

A summary of recent Michigan court cases relevant to the Bolt Decision.

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On December 11, 2020, the Michigan Supreme Court issued an order that may impact the current lawsuit against the City of Ann Arbor. The Supreme Court order was short, just one paragraph, but it vacated a Court of Appeals decision that had given some hope to municipalities whose utility charges were being challenged. The Court of Appeals had ruled in the combined case of *Binns v Detroit* and *DAART (Detroit Alliance Against the Rain Tax) v Detroit* that the City of Detroit's drainage charge was a fee rather than a tax under the analysis of the Michigan Supreme Court in *Bolt v City of Lansing*, 459 Mich 152 (1998).

In *Bolt* the Court described the difference between a municipal fee which can be assessed without voter approval and a tax which requires voter approval. The distinction between fee and tax is required by the Headlee Amendment to the State Constitution that prohibits collecting new taxes without approval of the voters. "Generally, a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, conversely, is designed to raise revenue." *Bolt*, at 161 The three primary criteria of a fee are: (1) a fee serves a regulatory purpose, (2) a fee is proportionate to the necessary costs of that service, and (3) a fee is voluntary.

In *Bolt*, the Court found that a utility charge imposed on property owners to finance infrastructure changes needed to separate stormwater and wastewater sewers was a tax that was not legally imposed because it had not approved by the voters. The Court noted "[i]n instituting the storm water service charge, the city of Lansing has sought to fund fifty percent of the \$176 million dollar cost of implementing the CSO control program over the next thirty years. A major portion of this cost (approximately sixty-three percent) constitutes capital expenditures. This constitutes an investment in infrastructure as opposed to a fee designed to simply defray the costs of a regulatory activity." *Bolt*, at 163.

In the subsequent case of *Jackson Co v City of Jackson*, 302 Mich App 90 (2013), the Michigan Court of Appeals found that a storm water charge assessed by the City of Jackson was not a fee but instead was a tax. Applying the *Bolt* factors, the Court in *Jackson* stated that the storm water charge served dual purposes. A regulatory purpose was furthered by financing the protection of local waterways from solid pollutants carried in storm water discharged from properties, and a general revenue-raising purpose was served by shifting the funding of preexisting government activities from declining general and street fund revenues to a storm water charge. The Court also found that the charge was not proportionate to the necessary costs of service nor was the fee voluntary.

Some believed that the *Binns* and *DAART* cases provided the Supreme Court a chance to address the impact of the *Bolt* decision with the hope that the Supreme Court might modify its approach to the fee versus tax analysis. The order vacating the Court of Appeals opinion made clear that the Supreme Court maintains its original approach. Of greater significance to the Ann

Arbor utility litigation is the statement of Justice Zahra. In his concurring opinion, he wrote:

“Of particular importance to this case is the second factor, the proportionality analysis, especially in light of the following statement of fact from amicus Kickham Hanley PLLC’s late-filed brief in DAART:

‘The City [of Detroit (the City)] inexplicably does not collect Drainage Charges from the City’s largest landowner, the Detroit Land Bank Authority (“DLBA”), a component unit of the City that owns and controls approximately 25% of the parcel-based acres in the City, a land area the size of the City of Royal Oak. As a result, the lost revenues attributable to the City’s failure to collect from the DLBA must be made up through higher Drainage Charge rates imposed on other landowners[.]’

“Given the foregoing, it is at best unclear to me how the City’s drainage charge is best classified as a user fee rather than as a tax...”

Justice Zahra cited an argument asserted in an amicus brief. That brief was submitted to the Court by the law firm representing the Plaintiff in the Ann Arbor utility case - Kickham Hanley PLLC. Clearly, Plaintiff Hahn’s lawyers know this area of law. The City has hired a capable law firm and has committed (so far) \$205,000 to defend the suit. If the City loses the suit, it will end up paying not just its own lawyers but also the Plaintiff’s lawyers. The longer the litigation goes on, the more expensive it will be in the end. Perhaps it would be more constructive to engage in serious settlement discussion, sooner rather than later. Equally obvious is that the Court are not going to modify the Bolt analysis.