STATE OF MICHIGAN
IN THE COURT OF APPEALS

PLATT CONVENIENCE, INC.,
individually and as
representative of a class of
similarly-situated persons and entities,

Plaintiff,

v.

CITY OF ANN ARBOR,
a municipal corporation,

Defendant.

Case No. _____

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**BRIEF IN SUPPORT OF PLAINTIFFS'
ORIGINAL CLASS ACTION COMPLAINT
TO ENFORCE THE HEADLEE AMENDMENT
PURSUANT TO CONST 1963, ART 9, § 32**

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STATEMENT OF JURISDICTION

This is an original action pursuant to MCR 7.206(E). There are no prior opinions or proceedings to identify. This Court is vested with original jurisdiction concurrent with the Circuit Courts to hear original actions challenging the validity of a tax pursuant to Article 9, Section 32 of the Michigan Constitution of 1963. The authority is codified by MCL 600.308a.

The choice to bring an action in the Circuit Court or in the Court of Appeals is left to the discretion of the person initiating the proceeding. MCL 600.308a(1).

This action is timely commenced within one year of the imposition of the tax on Plaintiff. MCL 600.308a (3); *see also Taxpayers Allied for Constitutional Taxation v. Wayne County*, 450 Mich. 119; 537 NW2d 596 (1995).

STATEMENT OF QUESTION PRESENTED

1. Is the Stormwater Charge imposed and collected by the City of Ann Arbor, which has been assessed against Plaintiff and the putative class, a disguised tax in violation of the Headlee Amendment?

Plaintiff answers: Yes.

Defendant will likely answer: No.

The Court should Answer: Yes.

NATURE OF THE CASE

I. INTRODUCTION

"When virtually every person in a community is a 'user' of a public improvement, a municipal government's tactic of augmenting its budget by purporting to charge a 'fee' for the 'service' rendered should be seen for what it is; a subterfuge to evade constitutional limitations on its power to raise taxes." *Bolt v. City of Lansing*, 459 Mich. 152, 166, 587 N.W.2d 264 (1998) (Exhibit 1).

In this putative class action, Plaintiff challenges the City of Ann Arbor's (the "City") stormwater sewer system rates (the "Stormwater Rates") and the resulting charges (the "Stormwater Charges") imposed on virtually all property owners in the City. The City assesses Stormwater Charges for the purpose of operating, maintaining, and improving its Stormwater Sewer System—and to pay for certain general fund purposes, described herein, unrelated to stormwater management. The City persists in the exaction of the Stormwater Charge even though "the nature of a stormwater management system, which benefits the public without providing any individualized, measurable benefit to individual property owners, does not lend itself to a system of funding based on user fees." *Dekalb County v. U.S.*, 108 Fed. Cl. 681 (U.S. Court of Claims 2013) (Exhibit 2 hereto).

The Charges here are not "user fees" but rather constitute taxes imposed by the City in violation of Section 31 of the Headlee Amendment to the Michigan Constitution, which provides:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. [Const 1963, art 9, § 31.]

In *Bolt,* the Supreme Court identified "three primary criteria to be considered when distinguishing between a fee and a tax" (459 Mich. at p. 161):

A. "[A] user fee must serve a regulatory purpose rather than a revenue-raising purpose";

B. "[U]ser fees must be proportionate to the necessary costs of the service"; and

C. Payment of the fee is voluntary. [459 Mich. at pp. 161-62.]

The City's Charges have a revenue-raising purpose which significantly outweighs any regulatory purpose of the Charges. The Charges here lack a significant element of regulation because, among other things:

A. The City fails to require either the City or property owners to identify, monitor and treat contaminated storm and surface water runoff and allows untreated storm water to be discharges into the Huron River – *i.e.*, there is no "end-of-pipe" treatment of the stormwater;

B. The method of charging does not consider the presence of pollutants on each parcel that contaminate such runoff and contribute to the need for treatment before discharge into navigable waters;

C. The method of charging does not distinguish between those responsible for greater and lesser levels of runoff; and

D. The method of charging does not take into account the location and grade of the properties that are subject to the Charges.

Further the Charges are not proportionate to the necessary costs of the service for at least seven reasons:

A. The City's stormwater management activities confer a general public benefit and therefore the Charges are disproportionate to any specific benefits received by the payors of the Charges;

B. The City assesses Stormwater Charges based solely upon the area of impervious surface present on each assessed property, and therefore fails to recognize that even "pervious" surfaces contribute stormwater to the system. As a result, a property with two acres of total area and ¼ acre of impervious surfaces, for example, pays the same stormwater charges as a property with ½ acre of total area and the same ¼ acre of impervious surfaces;

C. The City's arbitrary "tiered" billing methodology results in wildly varying charges for properties that have very similar areas of impervious surfaces and at the same time results in the exact same charges to properties that have wildly-varying areas of impervious surfaces;

D. The City does not impose Stormwater Charges on public streets and roads, including streets and roads maintained by the City, that contribute significant volumes of

stormwater runoff to the system. The City also exempts "undeveloped" property from the Stormwater Charges. The cost of managing the stormwater that enters the City's sewer system from those areas therefore is borne (or subsidized) by the persons and entities who pay the Stormwater Charges;

E. The City diverts the Stormwater Charge revenues to purposes wholly or partially-unrelated to the stormwater system; and

F. Even after diverting Stormwater Charge revenues, the City has consistently generated a profit from its imposition of the Stormwater Charges.[1]

Finally, the Charges are not voluntary because, at the very least they are "effectively compulsory" in that "the property owner has no choice whether to use the service and is unable to control the extent to which the service is used." *Bolt,* 459 Mich. at 167-168.

This is not untrodden ground. Indeed, the illegality of stormwater management charges that are not approved by local voters – like the City's Charges here -- has now been clearly established. Indeed, **every extant Michigan court decision addressing property-based stormwater management charges has ruled that such charges are unlawful "taxes" and not permissible "user fees."** *See* discussion, *infra*, of *Bolt*, *County of Jackson v. City of Jackson*, 302 Mich. App. 90, 836 N.W.2d 903 (2013) (Exhibit 3 hereto), *Gottesman v. City of Harper Woods*, COA Case No. 344568, 2019 Mich. App. LEXIS 7657 (Exhibit 4 hereto),[2] and *Patrick v. City of St. Clair Shores*, Case No. 2017-

[1] The facts described in these Subparts E and F also further justify a finding that the Charges are motivated by a revenue-raising purpose.

[2] On September 29, 2021, the Michigan Supreme Court vacated the Court of Appeals Opinion in the *Gottesman* case. *See* Exhibit 29 hereto. Significantly, however, the Supreme Court did **not** disturb the Court of Appeals' finding that the stormwater charges there were taxes. Instead, the Supreme Court remanded the case to the Court of Appeals so that it could address two distinct issues that are wholly irrelevant to this case – namely, (1) whether a provision of the Drain Code (MCL 280.459(4)) constituted pre-Headlee authorization for the charges and (2), if not, whether plaintiff's alternative non-Headlee claims were subject to the same one year statute of limitations as the Headlee Amendment claims. The Drain Code has no application to the Ann Arbor Stormwater Charges and Plaintiff here has not asserted any alternative claim. Indeed, the Headlee Amendment claim is the only claim that Plaintiff can pursue as an original action in this Court.

003018-CZ (Macomb County Circuit Court) (Exhibit 5 hereto).[3]

Plaintiff, individually and on behalf of a class of similarly situated persons and entities, seeks, among other remedies, a refund of all Stormwater Charges received by the City in the year prior to the filing of this lawsuit and any Stormwater Charges collected during the pendency of this action. Based upon the amount of revenue generated by the Stormwater Charges in the fiscal year ending June 30, 2020—$12,485,490—Plaintiff and the Class are entitled to millions of dollars as a refund of the unlawful Stormwater Charges. *See* Exhibit 8 hereto at p. 4-14. Indeed, under Michigan law, the City must be required to refund the Stormwater Charges (and any additional funds collected during the pendency of this action) to its citizenry. *See, e.g.*, *Bolt v. City of Lansing,* 238 Mich. App. 37, 49; 604 N.W.2d 745 (1999) ("*Bolt II*") (**"any tax collected on or after December 28, 1998, that is adjudicated to be a wrongful tax under Headlee will have to be refunded, provided, of course, that persons seeking relief have acted within the statutory period of limitation."**). (Emphasis added).

II. STATEMENT OF FACTS

A. The City's Stormwater Sewer System.

The City maintains a storm sewer system (the "Stormwater Sewer System") that is separate from its sanitary sewer system, and which is used to collect stormwater that falls on the City's land area and to convey that stormwater to nearby waterways. *See* Stormwater Utility Regulations (Exhibit 9 hereto).

[3] In *Binns v. City of Detroit*, a Court of Appeals panel found that the City of Detroit's land-based Drainage Charges were lawful user fees and not taxes. *See* Exhibit 6 hereto. However, on December 11, 2020, the Michigan Supreme Court vacated the Court of Appeals' Opinion and remanded the case so that further factual development could occur. *See* Exhibit 7 hereto. In a concurrence, Justice Zahra openly questioned how the Detroit charges could ever pass constitutional muster as "user fees." *Id.*

Stormwater begins as rain or snowmelt that falls on or washes over both "pervious" (grass, woodlands, gardens and other undeveloped lands) and "impervious" surfaces (roofs, driveways, parking lots, streets and other hard surfaces). *See* City of Ann Arbor "Stormwater FAQs" (Exhibit 10 hereto at p. 1. Stormwater runoff is created from excess water that cannot be absorbed by pervious surfaces or from water flowing off impervious areas. Rather than being absorbed into the ground, the stormwater runoff enters the City's stormwater drainage system, a network of catch basins, yard inlets and pipes that keep water from flooding roads and property. Water is diverted through the network to the City's creeks, lakes, and eventually the Huron River. *Id.*

The City assesses Stormwater Charges for the purpose of operating, maintaining and improving the Stormwater Sewer System as well as to pay for certain purposes, described herein, unrelated to stormwater management.

The City's Stormwater Utility Ordinance expressly recognizes that stormwater management provides a general public benefit. Indeed, Chapter 33, Section 2.202 of the Ordinance (Exhibit 30 hereto) provides in pertinent part as follows:

> The City Council finds all of the following: …
>
> (3) Stormwater contributes to the diminution of water quality, **adversely impacting the public health, safety and welfare, and endangering natural resources**.
>
> (4) Control of the quantity and quality of stormwater from developed and undeveloped property is essential to protect and improve the quality of surface waters and groundwaters, **thereby protecting natural resources and public health, safety and welfare.**
>
> (5) The Federal Clean Water Act and rules and regulations promulgated thereunder place increased mandates on the city to develop, implement, conduct and make available to its citizens and property owners stormwater management services which address water quality, velocity, and volume impacts of stormwater.

(6) Water quality is improved by stormwater management measures that control the quantity or quality, or both, of stormwater discharging directly or indirectly to receiving waters, that reduce the velocity of stormwater, or that divert stormwater from sanitary sewer systems.

(7) The city**, having a responsibility to protect the public health, safety, and welfare**, has a major role in ensuring appropriate water quality related to stormwater flow.

(8) **Improper management of stormwater runoff causes erosion of lands, threatens businesses and residences and other facilities with water damage from flooding, adversely impact public health, safety, and welfare, and creates environmental damage to rivers, streams and other bodies of water in Michigan, including the Great Lakes**.

(9) **The public health, safety, and welfare is adversely affected by poor ambient water quality and flooding that results from inadequate management of both the quality and quantity of stormwater.** … [emphasis added].

Plaintiff has been assessed, and has paid, Stormwater Charges within one year of the filing of this action. Copies of Plaintiff's billing and payment records are attached hereto as Exhibit 11.

B. The Nature And Basis For The Stormwater Charges.

After the Headlee Amendment was enacted in 1978, the City formed a "stormwater utility" and began imposing Stormwater Charges. The City maintains that it formed the stormwater utility in 1980. *See* Exhibit 10 hereto at p. 1. However, the City ordinance creating the stormwater utility was first enacted in 1993. *See* Exhibit 30 hereto. In order to impose the Stormwater Charges, the City claims to have conducted a computer analysis of infrared aerial photographs in order to distinguish hard, impervious surfaces (which generally do not absorb rainfall or snowmelt) from "pervious" areas that can more readily absorb rainfall or snowmelt, such as lawns and gardens. The City claims to have measured the areas of impervious surfaces present on each property in the City. *See* "Stormwater Rates and Credits" (Exhibit 12 hereto) at p. 1.

1. The Stormwater Charge Rates.

For single-family and two-family residential properties, the City has created four "tiers" of charges allegedly based upon the measured impervious surfaces of each such property. The rates that were in effect through June 30, 2021 were as follows:

- "Tier 1" consists of properties with up to 2,187 square feet of impervious surfaces, all of which are assessed a quarterly charge of $31.55.
- "Tier 2" consists of properties with 2,188 to 4,175 square feet of impervious surfaces, all of which are assessed a quarterly charge of $55.22.
- "Tier 3" consists of properties with 4,176 to 7,110 square feet of impervious surfaces, all of which are assessed a quarterly charge of $94.
- "Tier 4" consists of properties with over 7,110 square feet of impervious surfaces, all of which are assessed a quarterly charge of $165.66. [Exhibit 12 hereto at p. 1]. *See also* Exhibit 31 hereto (ordinance implementing new rates effective July 1, 2021).

Commercial and other properties are purportedly billed directly on the impervious areas at a rate of $851.44 per impervious acre per quarter. All properties incur an additional $4.15 "customer service charge" per quarter. *Id.* at pp. 1-2.

2. The City's Method Of Imposing The Stormwater Charges.

The Stormwater Charges are based solely upon the impervious land area of each single-family and multi-family parcel, regardless of the actual total land area of that particular parcel. *See* Exhibit 10 hereto at p. 4. *See also* Exhibit 30 hereto, Ordinance Ch. 33, Sec. 2:208(1) (providing that "the principal stormwater generating characteristic of each property is its representative impervious area, **which shall be used as the basis for the stormwater discharge rate**") (emphasis added).

By lumping properties into large impervious acreage-based categories, parcels that have roughly half the impervious surfaces of other parcels end up paying the same amount of Stormwater Charges as other parcels. For example, a parcel with 2,188 square feet of impervious surfaces pays

the same quarterly Stormwater Charge as a parcel with 4,175 square feet of impervious surfaces. *See* Exhibit 12 at p. 1.

Not only do parcels with wildly varying areas of impervious surfaces pay the same Stormwater Charges, but parcels that have virtually the same areas of impervious surfaces can pay wildly varying Stormwater Rates. For example, a parcel with 7,110 square feet of impervious surfaces incurs a Stormwater Charge of $94.65 per quarter but a parcel with 7,111 square feet of impervious surfaces incurs a Stormwater Charge of $165.66 per quarter. *Id.*

The City admits that pervious surfaces also contribute stormwater runoff to the City's sewer system. *See* Stormwater FAQs (Exhibit 10 hereto) at p. 1 ("Stormwater begins as rain or snowmelt that falls on or washes over both pervious … and impervious surfaces"). However, the Stormwater Charges are based solely upon the area of impervious surfaces present on each property and therefore do not take into consideration the fact that pervious surfaces also contribute stormwater runoff to the City's sewer system.

The City also admits that stormwater runoff is polluted:

> Stormwater can cause quality and quantity problems. Stormwater runoff picks up anything in its path and delivers it to our water resources. Pollutants including oil, yard waste, fertilizers, litter and sediment can create stormwater of poor quality which can harm our waters. The initial inch of stormwater runoff tends to carry the most pollution as it washes fertilizers, automotive fluids, animal waste, deicers and dirt into the street and down the gutter. … [Exhibit 10 at p. 1]

Nonetheless, because the Stormwater Charges are based solely upon the area of impervious surface of each charged parcel, the Stormwater Charges do not take into consideration the presence of pollutants on each parcel that contaminate to such runoff and contribute to the need for treatment before discharge into navigable waters. For the same reasons, the Stormwater Ordinance does not

require either the City or any property owner to identify, monitor, and treat contaminated stormwater runoff.

Moreover, there is no "end of pipe" treatment for the stormwater runoff. The runoff ultimately enters the Huron River untreated. *See* Exhibit 10 hereto at p. 1 ("Unlike wastewater, which is treated before it is released back into the environment, stormwater goes directly into a community's ponds, streams and lakes. Because stormwater comes in large amounts at unpredictable times, treating it as wastewater would be extremely expensive").

The City's public streets and roads are **not** subject to the Stormwater Charges. *See* Stormwater Utility Rate Study, Final Report May 3, 2018 (Exhibit 13 hereto) at p. 25 (recognizing that City and railroad right-of-ways receive a "full 100% credit" against the Stormwater Charges that would otherwise be allocated to those right of ways). Indeed, contrary to the requirements of the City's own ordinance, the full Stormwater Charges are only assessed against "developed" property in the City. *See* Exhibit 10 hereto at p. 7. "Undeveloped properties (vacant lots)" do not incur any Stormwater Charges based upon impervious surface areas but instead pay only a nominal "customer service fee." *Id.* Over 2700 properties in the City are designated as "undeveloped." *See* Exhibit 13 hereto at p. 29 (identifying 22,184 "impervious area accounts" and 2797 "administration accounts"). The City exempts undeveloped property from all but the "customer service fee" even though the City's stormwater utility ordinance expressly recognizes that "[c]ontrol of the quantity and quality of stormwater from **developed and undeveloped property** is essential to protect and improve the quality of surface waters and groundwaters, …" City Ordinance, Chapter 33, Sec. 2:202(4) (emphasis added) (Exhibit 30 hereto).

3. The Stormwater Charges Generate A Profit For The City, Even After The City Diverts Significant Revenues To Unrelated Purposes.

The Stormwater Charges generate revenues far in excess of the City's actual expenses relating to stormwater management. Moreover, the Stormwater Charges also finance governmental activities wholly or partially unrelated to stormwater management.

Since at least 2014, the City has set its Stormwater Rates at a level far in excess of the rates that were necessary to finance the actual costs of operating, maintaining and improving its Stormwater Sewer System. Indeed, between June 30, 2014 and June 30, 2020, the City increased its cash and investments in the Stormwater Fund from an already excessive **$7.2 million to over $17.7 million** through imposition and collection of the Stormwater Charges. *Compare* Exhibit 14 hereto (FY 2014 CAFR at p. 43 *with* Exhibit 8 hereto (FY 2020 CAFR at p. 4-11). By the end of fiscal year 2020, the City's cash and investment reserves represented approximately **250%** of the annual operating expenses of the Stormwater Fund. *See* Exhibit 8 at p. 4-11 and 4-14 ($17,794,184 in cash and investments vs. $6,897,382 in annual operating expenses.

This excessive accumulation of cash was not serendipitous but was undertaken pursuant to a plan to dramatically increase the cash in the Stormwater Fund through 2020 after paying all of the expenses of the Stormwater Fund, including capital improvements and debt service.

The City accumulated an additional $10 million in its Stormwater Fund between June 30, 2014 and June 2020. Indeed, the Stormwater Charges actually generated a much higher return than the $10 Million reflected in the City's financial statements because the City diverted monies from the Stormwater Fund for other impermissible uses. Thus, the Stormwater Charges are even more excessive and egregious because the City has included in its stormwater rates amounts designed to generate millions of dollars of revenue that the City has transferred to other City funds or otherwise

used to finance general governmental obligations wholly or partially unrelated to its stormwater system.

For example, the Stormwater Charges finance the vast majority of the expenses of the City's Forestry Department, a separate department tasked with managing all aspects of the City's "urban forest." See Exhibit 15 hereto at p. 34. The amounts included in the Stormwater Rates to finance the City's Forestry Department approximate $1 million per year. *Id.* The activities of the Forestry Department, however, confer benefits on the entire community, and not just on persons who pay Stormwater Charges. Indeed, prior to July 1, 2012, those expenses were the responsibility of the City's General Fund. *See* Exhibit 15 hereto at p. 32.

The City itself has touted the public benefits conferred by its "Urban Forest," which is maintained and preserved by the activities of the Forestry Department and financed through Forestry Charges. On the City's website, the City states:

> The urban and community forest is a defining and valuable characteristic of the city of Ann Arbor, which residents affectionately call "Tree Town," helping make it a desirable place to live, work and play. It is made up of the trees, shrubs and woody vegetation growing along city streets; in public parks; and on institutional and private property. **The urban community forest provides many environmental, economic and social benefits to the community**, including reducing stormwater runoff, **improving water and air quality, moderating summer temperatures, lowering utility costs, improving quality of life and beautifying the city**. [*See* Exhibit 16 hereto.]

The connection between the Forestry Charge included in the Stormwater Rates and the management of stormwater is extremely attenuated at best, and the City concedes that even though the Forestry Department is financed by the Stormwater Fund, the stormwater management benefits provided by the activities of the Forestry Department represent just a fraction of the total benefits purportedly conferred by those activities. Indeed, the City estimates that a "typical tree in Ann Arbor"

provides $149 in benefits every year, but less than 10% of the value of those purported benefits is attributable to enhanced stormwater management. *See* Exhibit 16 hereto (stating that each tree in the City provides $149 of "value" to the community, of which $14.10 is attributable to stormwater management).

In October 2020, the City's Council awarded a tree pruning contract valued at $674,000 to be financed by Forestry Charges included in the Stormwater Charge Rates. The City did so even though the Forestry Department's tree pruning program provides public benefits and does not specifically benefit payers of Stormwater Charges. In this regard, the City's website lists a number of "benefits" of tree pruning, all of which are unrelated to stormwater management:

> Trees pruned on a routine basis develop proper form and structure leading to a variety of benefits, including
>
> * Lower cost per tree trimmed compared to reactive pruning done in response to storm damage, sight clearance or immediate hazards
>
> * Healthier tree canopy as a result of removing dead, dying or diseased limbs, earlier identification and correction of insect/disease problems
>
> * Reduction in storm related tree damage
>
> * Better clearance and less obstructions in the public right-of-way as well as better sight lines for signs, signals and intersections
>
> * Lower future maintenance costs
>
> * Improvement of tree's structure to better withstand stresses from wind, ice and rain.
> [*See* Exhibit 17 hereto (City website page concerning "Routine Street Tree Pruning"]

At an October 19, 2020 meeting at which the Council approved the tree pruning contract, certain council members expressed that the City's practice of including the Forestry Charges in the Stormwater Charge Rates rendered those Charges unlawful taxes under the *Bolt v. Lansing* case. For example, Councilman Eaton stated:

> I want to remind council that this is an essential service, but its relationship to the stormwater fee is marginal at best. In the Bolt v. Lansing case, the City of Lansing tried to use its stormwater fees to finance the separation of its sewer system, stormwater and wastewater systems that had been mandated by a regulatory agency. So it was required to do that, and nonetheless, because the benefit being conferred was a benefit that was generalized throughout the community and wasn't particularized to the fee payer based on the amount they were paying, it was considered to be more appropriate for a tax than for a fee. Similarly, with this, if a tree is planted in my front yard, it doesn't benefit somebody in the second ward and there's nobody that person in the second ward can do to minimize their cost for the tree planting elsewhere in the city. **It's so general that it should be funded by a tax, not by a user fee.** The user fee should be for the cost of providing the actual service.
>
> **Another factor in this kind of case is when the service was previously funded from the general fund and then it shifted into this kind of fund. Historically, our forestry department was funded from the general fund, and it was just a number of years ago that it was shifted into our stormwater funding. And that is not going to help us in this litigation, I believe**. So I understand that the next council might want to take this risk, I'm just not willing to impose this risk on them on my way out the door. So if you want to vote in favor of this**, I understand, this is an essential service, it just not appropriately funded with this fee**. So I will be voting against it. If the plaintiff in the Hahn case prevails, we'll have to come up with the $674,000 somewhere anyways to repay it. So I just think you need to be more cautious with how you use fee revenue in this kind of general operational sense. [*See* Exhibit 18 (Transcript of meeting)]

Unfortunately, the City Council did not side with Councilman Eaton, voting 6-5 to approve the tree pruning contract, further confirming that the Stormwater Charge constitutes a tax on City landowners.

In addition, the Stormwater Fund has been transferring $85,000 per year to the City's General Fund, specifically for "parks." The transfers purportedly fund things like "Outdoor Educational Signage" and "Educational Programs – Parks and Recreations" and "Brochure Racks". *See* Exhibit 19 hereto. The City apparently justifies these transfers on the grounds that the funded activities relate in some way to stormwater management. However, even a cursory review of the described activities shows that they have nothing, or virtually nothing, to do with stormwater management.

The excessive cash reserves cannot be justified as being needed for planned or still-unplanned capital improvements to the storm sewer systems because, among other things, the City has not traditionally funded capital improvements by tapping its cash reserves. Instead, as reflected in its annual budgets and financial statements, the City has traditionally planned to fund, and actually funded, its capital improvements through a "pay as you go" approach – *i.e.*, including in its Rates on an annual basis the amount needed to fund current period capital improvements – or through the issuance of long-term debt, which has been used to finance major upgrades to the system, such as a recent upgrade to the wastewater treatment plant.

The City confirmed this policy in its FY 2020 Budget (Exhibit 20 hereto) (page 46), where the City stated:

> It will be a long-term goal that each utility or enterprise will ensure future capital financing needs are met by using a **combination of current operating revenues and revenue bond financing**. Therefore a goal is established that 15% of total project costs should come from operating funds of the utility or enterprise.

Remarkably, the City continues to accumulate excessive cash reserves in its Stormwater Fund even though its professional consultants have counseled against that practice.

In 2017, the City retained Stantec Consulting Service Inc. ("Stantec") to perform a comprehensive "Cost of Service" study of its Stormwater Fund. After conducting a detailed analysis of the cost structure associated with the City's Stormwater System, Stantec recognized that the City's cash and investments in its Stormwater Fund were far in excess of appropriate reserve amounts, thus confirming that the City's prior Stormwater Charges were unreasonable because they did not reflect the City's "cost of service." Stantec determined that, as of June 30, 2016, the Stormwater Fund, which had $10.1 million in cash and investments at the time (*see* Exhibit 21 hereto at p. 42), had at least $8 million more than it needed.

In a report issued in May 2018 (*see* Exhibit 13 hereto), Stantec recommended that the City "draw down" those excessive reserves over time by utilizing them to partially or completely finance ongoing and future stormwater capital improvement projects instead of completely funding those projects through Rates or other sources like long-term debt. *See* Exhibit 13 at p. 51 (showing fund balance being reduced from $9.3 million in FY 2017 to $1.5 million in FY 2021). Contrary to the recommendation, however, the City actually **increased** its Stormwater Fund cash and investments by over $7 million between July 1, 2016 and June 30, 2020. *Compare* Exhibit 21 at p. 42 *with* Exhibit 8 hereto at p. 4-11.

Through collection of the Stormwater Charges described above, the City has accumulated cash in the Stormwater Fund far beyond the amount necessary to ensure the continued provision of storm sewer service to its residents.

Payment of the Stormwater Charges was not voluntary. In this regard, the stormwater ordinance requires that unpaid Stormwater Charges be transferred to the tax rolls and further authorizes the "administrator" to "disconnect water service, sanitary sewer and stormwater sewer service to any property" whose owner fails to pay the Stormwater Charges. *See* Ordinance, Chapter 33, Section 2:221 (Exhibit 30 hereto).

Further, City Charter Section 15.5 provides:

SECTION 15.5.

(a) The Council shall provide by ordinance for the collection of rates and charges for public utility services furnished by the City. When any person fails or refuses to pay to the City any sums due on utility bills, the service upon which such delinquency exists may be discontinued and suit may be brought for the collection thereof.

(b) Except as otherwise provided by law, the City shall have as security for the collection of all charges for utility services furnished by it a lien upon the premises to which such utility services were supplied and, for such purposes, shall have all

the powers granted to cities by law. Such lien shall become effective immediately on the distribution or supplying of such utility services to such premises.

(c) Except as otherwise provided by law, all unpaid charges for utility services furnished to any such premises, which, on the thirty-first day of March of each year, have remained unpaid for a period of three months or more, shall be reported by the Controller to the Council at the first meeting thereof in the month of April. The Council thereupon shall order the publication in a newspaper of general circulation in the City of notice that all such unpaid utility charges not paid by the thirtieth day of April will be assessed upon the City's tax roll against the premises to which such utility services were supplied or furnished, and such charges shall then be spread upon the City's tax roll and shall be collected in the same manner as the city taxes.

(d) As further security for the payment of charges for utility services, the Council may require meter deposits of occupants of premises to which such services are supplied. [*See* Exhibit 22 hereto].

ARGUMENT

I. THE TAX VS. USER FEE DISTINCTION MADE UNDER THE HEADLEE AMENDMENT.

"Section 31 prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." *Durant v Michigan,* 456 Mich 175, 183; 566 NW2d 272 (1997). Thus, a tax imposed without voter approval "unquestionably violates" § 31. *Bolt,* 459 Mich at 158. However, a charge that is a user fee "is not affected by the Headlee Amendment." *Id.* at 159. "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, on the other hand, is designed to raise revenue." *Id.*at 161.

II. THE "BOLT FACTORS" ENUNCIATED BY THE SUPREME COURT.

In *Bolt*, the Court found that certain stormwater management charges imposed by the City of Lansing were unlawful taxes imposed in violation of Headlee.[4] In *Bolt,* the Court identified "three

[4] In *Bolt*, the city of Lansing sought to limit the polluting of local rivers that resulted when heavy storm water precipitation caused the city's combined storm water and sanitary sewer systems to

primary criteria to be considered when distinguishing between a fee and a tax" (459 Mich. at p. 161):

1. "[A] user fee must serve a regulatory purpose rather than a revenue-raising purpose";
2. "[U]ser fees must be proportionate to the necessary costs of the service"; and
3. Payment of the fee is voluntary. [459 Mich. at pp. 161-62]

With regard to the first two criteria, the *Bolt* Court concluded that the Lansing charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service. Rather, the Court concluded that the service charge served a revenue-raising purpose. *Id.* at 163-167. According to the Court, "'the "fee" [was] not structured to simply defray the costs of a "regulatory" activity, but rather to fund a public improvement designed to provide a long-term benefit to the city and all its citizens.'" *Id.* at 164 (quoting *Bolt v City of Lansing,* 221 Mich. App. 79, 91 (1997) (Markman, J., dissenting).[5] For this same reason, the Court concluded that the "'revenue to be derived from the charge is clearly in excess of the direct and indirect costs of actually using the storm water system over the next thirty years and, being thus disproportionate to the costs of the services provided and the benefits rendered, constitutes a tax.'" *Id.* at 164.

The Court further concluded that the storm water service charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service on the basis of the following two "related failings" of the ordinance. The first failing the Court found was that the fee imposed did not

overflow. *Id.* at 154-155. The city decided to separate the remaining combined storm and sanitary sewer system, at a cost of $176 million. *Id.* at 155. As a means to fund the costs of the sewer system separation, the Lansing City Council adopted Ordinance 925, which provided that the costs would be financed through an annual storm water service charge which was imposed on each parcel of real property located in the city.

[5] Judge (later Justice) Markman's dissent in the 1997 *Bolt* Court of Appeals' decision is noted repeatedly in this Brief because the Supreme Court ultimately adopted it in substantial part in the majority opinion in *Bolt*.

correspond to the benefits conferred because a majority of the property owners in the city who were required to pay the charge were already served by a separated storm and sanitary sewer system that many of them had already paid for through special assessments. *See* discussion in *Bolt*, 459 Mich at 165-167. The Court noted that "a true 'fee' . . . is not designed to confer benefits to the general public, but rather to benefit the particular person on whom it is imposed." *Id.* (citations omitted). The Court then concluded that "the lack of correspondence between the charges and the benefits conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public." *Id.*

The "second failing" was the ordinance's lack of a significant element of regulation because: (a) the ordinance only regulated the amount of rainfall shed from a parcel of property as surface runoff, and did not consider the presence of pollutants on each parcel that contaminate such runoff contribute to the need for treatment before discharge into navigable water; (b) it failed to distinguish between those responsible for greater and lesser levels of runoff and excluded street rights of way from the properties covered by the ordinance; and (c) the stormwater was not treated before it was discharged into the waterway. [*Bolt,* 459 Mich at 165-167.]

Next, the Court found that the charge lacked any element of voluntariness, which the Court found to be further evidence that the charge was a tax and not a user fee. The Court opined:

> The charge in the present case is effectively compulsory. The property owner has no choice whether to use the service and is unable to control the extent to which the service is used. [*Bolt,* 459 Mich at 167-168 (footnote omitted).][6]

[6] In reaching its decision, the *Bolt* court specifically rejected the assertion that charges for storm or sanitary sewers are "always user fees." 459 Mich. At 162. Instead, the Court held that sewerage can properly be viewed "as a utility service for which usage-based charges are permissible, and not as a disguised tax," **only** where "**the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology,**

III. THIS COURT CONFIRMS THE BOLT PRINCIPLES IN INVALIDATING THE CITY OF JACKSON'S AND THE CITY OF HARPER WOODS' STORMWATER CHARGES.

The principles of *Bolt* were more recently applied by the Michigan Court of Appeals to strike down another municipality's attempt to impose stormwater-related charges without complying with the voter approval requirements of Headlee. In *County of Jackson v. City of Jackson*, 302 Mich. App. 90, 836 N.W.2d 903 (2013) (Exhibit 3 hereto), the Court held that a city ordinance establishing a storm water utility and imposing a stormwater charge on all property owners within the City established an unconstitutional tax.

In *County of Jackson*, the City of Jackson maintains and operates separate storm water and wastewater management systems. Historically, the city funded the operation and maintenance of its storm water management system with money from the city's general and street funds. In 2011, however, the Jackson City Council created a "storm water utility" and imposed a storm water management charge on all property owners within the city to generate revenue to pay for the costs associated with operating and maintaining the City's separate storm drain system. Plaintiffs alleged that the city, by shifting the method of funding certain preexisting government activities from tax revenues to a utility charge, ran afoul of § 31 of the Headlee Amendment.

Applying the *Bolt* factors, the Court held that the charges there were motivated by a revenue-raising purpose, were not proportional to use, and were not voluntarily paid by the city's landowners. Accordingly, the Court invalidated the Jackson charges. 302 Mich. App. at 112.

After *County of Jackson*, another panel of the Michigan Court of Appeals upheld the Wayne County Circuit Court's determination that the City of Harper Woods had violated the Headlee

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including some capital investment component." *Id* at p. 164-64 (emphasis added).

Amendment when it imposed similarly imprecise stormwater management charges. *See Gottesman v. City of Harper Woods*, No. 344568, 2019 Mich. App. LEXIS 7657, at *18-19 (Dec. 3, 2019) (Exhibit 4 hereto) ("The ordinance does not consider the individual characteristics of the property, such as pollutants, the type or extent of improvements thereon, or how said improvements affect the amount of runoff flowing from the property. Indeed, all residential properties that are not exempt from the Charge pay either one-third, one-half, or a full billing unit based strictly on the square footage of the property, regardless of how much of the property is actually impervious or pervious. . . . Although mathematical precision is not required . . . defendant's inflexible approximation approach is a far cry from the more particularized method involving individual measurements of impervious areas this Court found acceptable . . .") (citations omitted).

Similarly, in an October 18, 2018 Opinion and Order, Judge Jennifer Faunce of the Macomb County Circuit Court found that the City of St. Clair Shores' Stormwater Charges were taxes imposed by that city in violation of the Headlee Amendment. *See* Exhibit 5 hereto. In reaching its decision, the Court observed:

> Based on the above, the Court finds that the City has failed to provide any evidence that differentiates this case from *Jackson*. First, both *Jackson* and *Bolt* specifically rejected the City's argument that the Stormwater Charge is justified because the storm drain system is necessary in order to regulate and prevent flooding of public and private property and to ensure compliance with federal and state laws. The *Jackson* Court held that: "these concerns … benefit not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street or roadway across the city bridge…" *Jackson*, 302 Mich. App. at 108-109; Bolt, 459 Mich. At 166. The *Jackson* Court went on to hold that "[t]his lack of correspondence between the management charge and a particularized benefit conferred to the parcels support our conclusion that the management charge is a tax. Id.
>
> Further, the Court finds that the Stormwater Charge is not proportionate to the cost of the service and is mandatory. The Court is convinced that the property owners paying the Stormwater Charge do not receive any particularized benefit that is not conferred on the general public. The Court is also convinced that the Stormwater

> Charge generates a profit for the city and is therefore revenue raising. Lastly, the AMP specifically recommends that the revenue from the Stormwater Charge be used for a 5-10 year capital improvement plan. Thus, the Court finds that the Stormwater Charge is a tax, rather than a user fee. Therefore, since the Stormwater Charge was not approved by a majority of the qualified electors of the City, the Stormwater Charges is in violation of the Headlee Amendment. [Exhibit 4 hereto at pp. 10-11.]

As discussed below, the Stormwater Charges at issue here are legally indistinguishable from the stormwater charges that were struck down in *Bolt*, *County of Jackson, Gottesman,* and *Patrick*.

IV. THE STORMWATER CHARGES ARE MOTIVATED BY A REVENUE-RAISING PURPOSE.

In *Jackson*, the Court's finding that the charges were motivated primarily by a revenue-raising purpose was based upon the fact that the charges were instituted in order to relieve other City funds – which were supported by tax dollars – of the obligation to finance expenditures relating to the City's storm drainage system. This shifting of financial responsibility allowed the other City funds to devote monies that otherwise would be spent on stormwater management to other City activities. There, the Court observed:

> In the present cases, the documents provided this Court reveal that the management charge serves a dual purpose. The charge furthers a regulatory purpose by financing a portion of the means by which the city protects local waterways, including the Grand River, from solid pollutants carried in storm and surface water runoff discharged from properties within the city, as required by state and federal regulations. **The charge also serves a general revenue-raising purpose by shifting the funding of certain preexisting government activities from the city's declining general and street fund revenues to a charge-based method of revenue generation. This latter method of revenue generation raises revenue for general public purposes by augmenting the city's general and street funds in an amount equal to the revenue previously used to fund the activities once provided by the city's Engineering and Public Work Departments and now bundled together and assigned to the storm water utility**. Because the ordinance and the management charge serve competing purposes, the question becomes which purpose outweighs the other. *Id.* at 165-167, 169. **We conclude that the minimal regulatory purpose served by the ordinance and the related management charge is convincingly outweighed by the revenue-raising purpose of the ordinance.** [302 Mich. App. at 105-106 (emphasis added).]

The Court's finding that the charges there were motivated by a revenue-raising purpose was further supported by documentary admissions by the City and its consultants, which the Court summarized as follows:

> Further, the documents generated by and on behalf of the city and provided this Court clearly show that the desire to protect the city's general and street funds from the costs of operating and maintaining the existing storm water management system constituted the most significant motivation for adopting the ordinance and management fee. As previously noted, before the adoption of the ordinance, the city paid the costs of operating and maintaining the storm water system, including the costs of street and catch basin cleaning and leaf pickup and mulching, with revenue from the city's general and street funds. **In the documents supplied this Court, the city readily admits that the costs associated with maintaining the storm water system resulted in money from these funds being directed away from "other critical programs" and that budgetary pressures, including declining general fund revenue, necessitated the tapping of new sources of funding for the maintenance of the storm water system.** Similarly, the storm water utility feasibility study commissioned by the city reflects that the primary purposes of the study were to devise a method of calculating a storm water management charge of sufficient amount to fund the preexisting services the city desired to delegate to the utility and to convince the city council that the imposition of the recommended management charge would not violate *Bolt* and the Headlee Amendment. **The fact that the impetus for creating the storm water utility and for imposing the charge was the need to generate new revenue to alleviate the budgetary pressures associated with the city's declining general fund and street fund revenues, and the fact that the city's activities were previously paid for by these other funds are factors that support a conclusion that the management charge has an overriding revenue-generating purpose that outweighs the minimal regulatory purpose of the charge and, therefore, that the charge is a tax, not a utility user fee.** [302 Mich. App. at 106-107 (emphasis added).]

As in *Jackson*, "the documents generated by and behalf of the City" here confirm the City's desire to protect the City's general fund from the costs of operating and maintaining the existing stormwater management system. The City did not even create its stormwater utility until 1980 and therefore, the stormwater management costs now being covered by the Stormwater Charges obviously were paid by other funds of the City. Worse, the Stormwater Charges are not merely designed to relieve the City's General Fund of the obligation to finance stormwater management activities, but to

offset general fund activities that include, but are not limited to, tree pruning, forestry, and parks obligations described above.

Given the City's admissions, this Court should conclude that the Charges are motivated by a revenue-raising purpose that far outweighs any countervailing regulatory purpose. Thus, as in *Jackson*, the first *Bolt* factor is clearly satisfied.

V. THE STORMWATER CHARGES LACK A "SIGNIFICANT ELEMENT OF REGULATION."

In *Jackson*, the Court found that the city's stormwater charges did not contain a significant element of regulation for the following reasons:

> Ordinance 2011.02 suffers from the same lack of a significant element of regulation as the Lansing ordinance did. Although the ordinance confers the power of regulation on the utility's administrator, the ordinance contains few provisions of regulation and no provisions that truly regulate the discharge of storm and surface water runoff, with the exception of the provision that allows for credits against the management charge for the use of city-approved storm water best management practices. Moreover, as was the case in *Bolt*, the ordinance fails to require either the city or the property owner to identify, monitor, and treat contaminated storm and surface water runoff and allows untreated storm water to be discharged into the Grand River. *Bolt,* 459 Mich. At 164-167. In these regards, the city's ordinance suffers from the same regulatory weaknesses as did the Lansing ordinance struck down as unconstitutional in *Bolt*. [302 Mich. App. at 106.]

In order to have a legitimate regulatory purpose, stormwater charges must be based on more than just a rough estimate of the volume of stormwater attributable to any particular property. As the *Bolt* court stated:

> The ordinance only regulates the amount of rainfall shed from a parcel of property as surface runoff; it does not consider the presence of pollutants on each parcel that contaminate such runoff and contribute to the need for treatment before discharge into navigable waters. Additionally, the ordinance fails to distinguish between those responsible for greater and lesser levels of runoff and excludes street rights of way from the properties covered by the ordinance. Moreover, there is no end-of-pipe treatment for the storm water runoff. Rather, the storm water is discharged into the river untreated. [459 Mich. at 167.]

As in *Bolt* and *Jackson*, the purpose of the Stormwater Charges is to pay for operation and maintenance of the City's stormwater drain system. The Stormwater Charges are thus used by the City to pay for stormwater management. As in *Bolt*, however, the Charges do not take into consideration "the presence of pollutants on each parcel that contaminate to such runoff and contribute to the need for treatment before discharge into navigable waters." Additionally, as in *Bolt,* the Charges "fail to distinguish between those responsible for greater or lesser levels of runoff and exclude[] street rights of way from the properties" which incur the Charges. *Id.* Finally, there is no end of pipe treatment for the stormwater runoff.

In his Court of Appeals dissent in Bolt, Judge Markman observed:

> **There is no significant element of regulation here**. If there were, the storm water charge would be based, not merely on the amount of rainfall shed from a parcel of property as surface runoff; but additionally on the presence of pollutants on that parcel that contaminate such runoff and contribute to the need for treatment before discharge into navigable waters. Further, the regulatory nature of the charge would be enhanced if consideration had been given to the location and grade of properties or if greater justification had been provided for the arguable but overly facile assumption that properties contribute to runoff as a direct function of their size. [221 Mich. App. at 99-100 (emphasis added).]

VI. THE CHARGES ARE NOT PROPORTIONAL TO ANY ACTUAL USE OF THE STORM DRAINAGE SYSTEM BY ANY LAND OWNER.

A. The Charges Are Not Proportional Because The Charges Do Not Confer Any Particularized Benefit On The Persons Paying The Charges.

The Michigan courts have repeatedly recognized that a charge is not "proportionate" unless the payors of the fee receive a "particularized benefit" and those benefits do not extend to persons who do not pay the fee. *See Graham v. Township of Kochville*, 236 Mich. App. 141, 151, 599 N.W.2d 793 (1999) (holding that a true user fee "confers benefits **only** upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee.") (emphasis added)

(citing *Bolt,* 459 Mich. at 164-165). Said another way, a true fee is "**paid only by those who use the service in question**." *A&E Parking v. Detroit Metropolitan Wayne County Airport Authority*, 271 Mich. App. 641, 644, 723 N.W.2d 223 (2006) (emphasis added). Moreover, the *Bolt* Court quoted the Headlee Blue Ribbon Commission's definition of "user fee" as follows: "**A "fee for service' or 'user fee' is a payment made for the voluntary receipt of a measured service, in which the revenue from the fees are [sic] used only for the service provided.**" *Bolt*, 459 Mich. at 168 n.16 (emphasis added).

Storm water systems help prevent erosion, collect contaminated water for cleansing, keep roadways from flooding, and prevent the formation of standing pools of stagnant water. The benefits resulting from this management are shared by nearly every member of the public. The City's own Ordinance recognizes that "[s]tormwater contributes to the diminution of water quality, **adversely impacting the public health, safety and welfare, and endangering natural resources**." Ordinance Chapter 33, Sec. 2:202(3).

The Michigan courts, including this Court, also have held that governmental charges lack the required proportionality when those charges finance a governmental activity that provides a benefit to the general public. For example, in *Bolt*, the Court further concluded that the storm water service charge neither served a regulatory purpose nor was proportionate to the necessary costs of the service on the basis of the following two "related failings" of the ordinance:

> First, the charges imposed do not correspond to the benefits conferred. Approximately seventy-five percent of the property owners in the city are already served by a separated storm and sanitary sewer system. In fact, many of them have paid for such separation through special assessments. Under the ordinance, these property owners are charged the same amount for storm water service as the twenty-five percent of the property owners who will enjoy the full benefits of the new construction. Moreover, the charge applies to all property owners, rather than only to those who actually benefit. **A true "fee," however, is not designed to confer**

> **benefits to the general public, but rather to benefit the particular person on whom it is imposed**. *Bray [v Dep't of State,* 418 Mich. 149, 162; 341 N.W.2d 92 (1983); *Nat'l Cable Television Ass'n v United States & Federal Communications Comm*, 415 U.S. 336, 340-342; 94 S Ct 1146; 39 L Ed 2d 370 (1974)]. …
>
> **In this case, the lack of correspondence between the charges and the benefits conferred demonstrates that the city has failed to differentiate any particularized benefits to property owners from the general benefits conferred on the public**.
>
> This conclusion is buttressed by the fact that the acknowledged goal of the ordinance is to address environmental concerns regarding water quality. **Improved water quality in the Grand and Red Cedar Rivers and the avoidance of federal penalties for discharge violations are goals that benefit everyone in the City, not only property owners**. [459 Mich. at 166 (emphasis added)][7]

Similarly, in In *County of Jackson v. City of Jackson*, 302 Mich. App. 90, 836 N.W.2d 903 (2013), the Court held that a city ordinance establishing a storm water utility and imposing a stormwater management charge on all property owners within the City established an unconstitutional tax. In reaching this conclusion, the Court relied heavily on the fact that the charges at issue there did not correspond to any particularized benefit conferred upon the payers of the charges:

> Likewise, the lack of a correspondence between the charge imposed and any particularized benefit conferred by the charge supports a conclusion that the charge is a tax and not a utility user fee. A true fee confers a benefit upon the particular person

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[7] Justice Markman previously noted the general public benefits conferred by stormwater management facilities in his Court of Appeals dissent in *Bolt* that ultimately was adopted in substantial part by the Supreme Court majority:

> What properly characterizes most public safety functions, such as core police and fire services, as being beyond the purview of governmental activity that might be subject to a user fee is that the benefits derived from these functions benefit the entire community generally. … The preservation of public safety is a quintessential function that government provides to the community as a whole.
>
> **Environmental public works projects fit the same mold. These are governmental undertakings of community-wide application and benefit and are properly funded from general revenues**. [221 Mich. App. at 99 (emphasis added)].

> on whom it is imposed, whereas a tax confers a benefit on the general public. *Id. at 165*. …
>
> **We do not doubt that a well-maintained storm water management system provides such benefits. Nevertheless, these concerns addressed by the city's ordinance, like the environmental concerns addressed by Lansing's ordinance in *Bolt*, benefit not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street or roadway or across a city bridge, everyone who uses the Grand River for recreational purposes downriver from the city, and everyone in the Grand River watershed. This lack of a correspondence between the management charge and a particularized benefit conferred to the parcels supports our conclusion that the management charge is a tax**. *Bolt, 459 Mich at 166*. [302 Mich. App. at pp. 108-109 (emphasis added)].

More recently, in *People v. Cameron*, 319 Mich. App. 215, 900 N.W.2d 658 (Mich. App. 2017), the Court held that certain court costs imposed by a state statute upon criminal defendants constituted taxes. In reaching that result, the *Cameron* court reiterated that charges which finance activities that benefit the general public fail to satisfy the proportionality factor:

> **Defendant further argues that the costs are "not proportionate to the 'service,' because the courts confer benefit[s] to the public (justice, fairness, order) not the particular person on whom the costs are imposed." This argument has merit**. …
>
> We find the reasoning in [State v Medeiros, 89 Hawaii 361, 370; 973 P2d 736 (1999)] persuasive and conclude that, **although the court costs at issue comport with the requirements of MCL 769.1k(1)(b)(iii) and Konopka, they nevertheless are not proportionate to the service provided because any service rendered by the trial court's role in the prosecution of defendant benefits primarily the public, not defendant**. [319 Mich. App. at 226-27 (emphasis added)]

This case is not distinguishable from *Bolt* or *Jackson* because the Stormwater Charges here provide a public benefit and the persons and entities who are subjected to the Stormwater Charges simply are not "users" of the stormwater management system.

The stormwater management services at issue in this case do not provide a unique benefit to the City's property owners, but rather provide a benefit to the entire community. Therefore, payments

which finance those services are properly characterized as taxes. A number of other state and federal courts considering the nature of stormwater management charges have concluded that stormwater management and disposal benefits the public at large, and not any particular landowner. For example, in *Dekalb County v. U.S.*, 108 Fed. Cl. 681 (U.S. Court of Claims 2013) (Exhibit 2 hereto), the court observed:

> **The purposes of the stormwater ordinance, and of the stormwater system -- *i.e.*, flood prevention and the abatement of water pollution -- are benefits that are enjoyed by the general public. For that reason, the charge is more properly viewed as a tax than as a fee**. *See San Juan Cellular, 967 F.2d at 685* (noting that the revenue from a tax "is spent for the benefit of the entire community"). Those benefits are public; they are not individualized services provided to particular customers.
>
> The presence of a stormwater management system, and the imposition of charges to fund that system, create reciprocal benefits and burdens for nearly all owners of developed property within the unincorporated areas of DeKalb County. **While each property owner is burdened by payment of the charge, and enjoys no special benefit by virtue of the connection of its own property to that system, the property owner does derive a benefit from the fact that stormwater runoff from other properties is collected and diverted by the system. That benefit, however, is one that is shared with nearly every other member of the community. In short, flood control is a public benefit, and charges to pay for that benefit are typically viewed as taxes.** *See, e.g., United States v. City of Huntington, W.V., 999 F.2d 71, 73 (4th Cir. 1993)* (explaining that because flood control and fire prevention are both "core government services," assessments to pay for those services are taxes).
>
> **The abatement of water pollution is also an important benefit of the system, and it is likewise a public benefit that is shared with the rest of the community. The owners of developed property, who pay the stormwater management charges, receive no special benefit from clean rivers, streams, and lakes that is not also enjoyed by the general public**. *Cf. Mildenberger v. United States, 91 Fed. Cl. 217, 245-47 (2010)* (noting that water pollution is a harm that is experienced not only by riparian landowners, but by the public as a whole), *aff'd*, *643 F.3d 938 (Fed. Cir. 2011)*.
>
> The stormwater system is a local infrastructure improvement that provides benefits -- *i.e.*, drainage, flood protection, and water pollution abatement -- not only to the owners of developed property who pay stormwater utility charges, but also to the owners of undeveloped property, who do not pay the charge, and to other members of the general public who may not own any property in the county at all. The Supreme Court has noted that "[a]ssessments upon property for local improvements are involuntary

exactions, and in that respect stand on the same footing with ordinary taxes." *Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707, 4 S. Ct. 663, 28 L. Ed. 569 (1884).*

Similarly, in *Lewiston Independent School District v. City of Lewiston*, 151 Idaho 800, 264 P.3d 907 (2011) (Exhibit 23 hereto), the Idaho Supreme Court noted the public nature of the services at issue in finding that a stormwater charge was an unlawful tax:

> The Stormwater Utility provides no product and renders no service based on user consumption of a commodity. *See Brewster, 115 Idaho at 505, 768 P.2d at 768*. The City has no involvement with the flow or removal of stormwater on private property. **The essence of the charge imposed is for the privileges of having a pollutant free stormwater system and clean streets. This benefit is no different from the privilege shared by the general public, much like the public's use of city streets or police and firefighter services**. *See id. at 504-05, 768 P.2d at 767-68* (holding that "a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs).

The nature of this type of charge was succinctly summarized by the Court in *Oneida Tribe of Indians v. Village of Hobart*, 891 F. Supp. 2d 1058, 1067 (N.D. Ill. 2012) (Exhibit 24 hereto):

> **Storm water management and control, like highway construction, is a public service typically funded by government through tax revenue**.
>
> In reality, the Village's funding mechanism for its storm water management utility operates comparably to a school tax. Each property owner within a community is assessed a school property tax regardless of whether the property owners themselves have children attending public schools. The goal of school property tax is, of course, to benefit the community as a whole rather than individuals receiving a denominated service. **Like a school tax, Hobart's ordinance assesses each property within the community a charge, the revenues of which will be collected to support the operation of the storm water management utility that benefits the community as a whole. In short, Hobart's "charge" is a tax for all meaningful purposes here. And like property taxes used to pay for schools, the storm water management fees confer a benefit on the public generally, as opposed to only those who pay**. [emphasis added].

B. Given the City's Method Of Imposing The Charges, The Actual Use Of The Storm Water Sewer System By Each Parcel Is Not Accounted For With The Requisite Level of Precision Necessary To Support A Conclusion That The Charge Is Proportionate To The Costs Of The Services Provided.

Even if stormwater management could properly be viewed as bestowing a particularized benefit on the landowners who are subject to the Stormwater Charges, those charges still are not proportionate to the necessary costs of the alleged "service."

With regard to the proportionality requirement, the *Jackson* Court first analyzed the City's method of imposing the charges. The Court characterized the basis for the charges as follows:

> The EHA base unit used to compute the amount of a management charge is the square footage for the average single family residential parcel. One EHA base unit is 2,125 sq. ft. **The pervious and impervious areas of residential parcels with two acres or less of surface area are not measured individually. Instead, such parcels are assigned one EHA unit and charged a flat rate established by resolution of the city council, which is billed quarterly**. For all other parcels, the management charge is based on the actual measurements of the pervious and impervious areas of each individual parcel. The number of EHA units for these latter parcels is calculated by multiplying a parcel's impervious area in square feet by a runoff factor of 0.95 and the pervious area in square feet by a runoff factor of 0.15, adding these two areas and then dividing that total by 2,125 sq. ft. The number of EHA units is then multiplied by $2.70 to arrive at the monthly management charge. [302 Mich. App. at 96 (emphasis added).]

The Court held that, as imposed by Jackson, the Charges lacked the requisite "close proportional relationship between the amount of runoff attributable to a particular parcel and the management charge" and therefore failed to satisfy the proportionality requirement:

> A permissible utility service charge is one that "'reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component . . . ." *Bolt*, 459 Mich. At 164-165, quoting *Bolt,* 221 Mich App. at 92 (MARKMAN, J., dissenting). **In the present cases, the management charge is predicated on the assumption that properties contribute to runoff, and, hence, storm sewer use, as a direct function of the size of a parcel's impervious and pervious areas. Despite this assumption, residential parcels measuring two acres or less are charged a flat rate based on the average EHA of all single family parcels, and not on the individual measurements of each parcel's**

> **impervious and pervious areas**. Single family residential parcels account for 12,209 or 83 percent of the 14,743 parcels within the city. According to the city, it is cost-prohibitive to calculate the EHA units for each single family residential parcel on the basis of actual measurements of impervious and pervious areas of each parcel. In contrast, residential parcels measuring over two acres and commercial, industrial and institutional parcels of all sizes are assessed a management charge based on the individual measurements of each parcel's impervious and pervious areas. **This method of apportioning the management charges among all urban properties emphasizes administrative convenience and ease of measurement and, thereby, suggests an absence of a close proportional relationship between the amount of runoff attributable to a particular parcel and the management charge, as does the fact that the method of calculating the charge fails to consider property characteristics relevant to runoff generation, such as a parcel's location in reference to storm gutters and drains and soil grade**. [302 Mich. App. at 109-110 (emphasis added).]

Here, the Stormwater Charges similarly lack proportionality for numerous reasons, each of which is discussed below.

1. The Stormwater Charges Are Disproportionate Because They Do Not Take Into Account Runoff From Pervious Surfaces And Treat All Types Of Allegedly Impervious Surfaces The Same.

The Stormwater Charges are based **solely** upon the total area of the impervious surfaces present on each charged parcel, regardless of the size of the parcel. In addition to the other deficiencies in the City's rate methodology described above, the City's method of using **only** the area of impervious surfaces present on each parcel results in Drainage Charges that further lack proportionality for at least two reasons.

First, the City's methodology fails to take into account the fact that even **pervious** surfaces contribute to stormwater runoff.

This fact is confirmed by the State's own Drainage Manual, which sets forth "runoff coefficients" for various types of surfaces. *See* Exhibit 25 hereto. The Manual recognizes that stormwater runs off of "pastures," "forested areas," and even "undeveloped" land. *Id* at p. 3-10

(assigning runoff coefficients ranging from 0.1 to 0.4 to those surfaces).[8] While the runoff coefficients associated with these pervious surfaces are smaller than those assigned to more impervious surfaces like concrete and asphalt, they still contribute to the overall volume of runoff that enters a sewer system and thus must be managed. The City's methodology considers "grass, woodlands, gardens and other undeveloped lands" to be pervious and therefore does not measure those areas, which understates the amount of runoff potentially attributable to parcels with pervious areas. *See* Exhibit 10 hereto at p. 1.

In a publication titled "Funding Stormwater Programs" (Exhibit 26 hereto), the EPA recognized that, because pervious surfaces also contribute stormwater runoff, a methodology that takes into account only impervious areas can lead to an unfair distribution of stormwater management costs:

> Because the potential impact of stormwater runoff from the pervious area of a parcel is not reviewed, this method is sometimes considered to be less equitable than the Intensity of Development (ID) or Equivalent Hydraulic Area (EHA) methods because runoff-related expenses are recovered from a smaller area base. [Id. at p. 2].

By measuring only impervious area, the City fails to employ a methodology that takes into account all potential runoff from the properties charged. **Indeed, under the City's methodology, a one-acre parcel with one-half acre of impervious surface would pay as much as a four-acre parcel with the same one-half acre of impervious surface**. Given that even pervious surfaces contribute runoff to the system, such a methodology obviously cannot result in proportionate Drainage Charges.

[8] The coefficients express the percentage of rainfall that is estimated to run off a given surface. Thus, a relatively pervious surface with a runoff coefficient of 0.4 means that 40% of the volume of rainfall on that surface is estimated to run-off.

At the Supreme Court oral argument in the *Binns* case, Judge Zahra emphasized that pervious surfaces contribute runoff to a stormwater system and openly questioned whether the City of Detroit's method of charging there which, like the City's method here, only measured the area of impervious surfaces, could result in proportionate charges:

> JUSTICE ZAHRA: The test is proportionality, and I'm very concerned about a fee that's only put on people who are deemed to have impervious acreage, when I know from common sense that water runoff goes off of lawns, soil surfaces that are sometimes compacted and goes into the sewer system. [Exhibit 27 hereto at p. 19].

Second, the City's methodology fails to take into account the fact that not all impervious surfaces are created alike -- *i.e.*, they do not all have the same runoff potential. Indeed, the City considers a variety of surfaces to be impervious, even though the degree of imperviousness, and the resulting runoff potential, can vary significantly from surface type to surface type.

For example, the City considers gravel surfaces to be **as** impervious as concrete or asphalt surfaces. *See* Exhibit 10 hereto at p. 4. But gravel is significantly more pervious than concrete or asphalt. Indeed, in its Drainage Manual, MDOT assigns concrete or asphalt pavement a "runoff coefficient" of 0.8-0.9, but assigns gravel roadways and shoulders a runoff coefficient of just 0.5-0.7. *See* Exhibit 25 hereto at p. 3-20. Yet, the City views all three of these surfaces as exactly the same in determining the area of impervious surfaces on parcels and the resulting Drainage Charges.

At the end of the day, the Drainage Charge methodology employed by the City simply cannot measure with any sort of precision the volume of stormwater runoff associated with any particular property.

2. The City's Billing Methodology Results In Disproportionate Charges.

Further, the City's arbitrary "tiered" billing methodology results in wildly varying charges for properties that have very similar areas of impervious surfaces and at the same time results in the exact same charges to properties that have wildly-varying areas of impervious surfaces.

By lumping properties into large impervious acreage-based categories, parcels that have roughly half the impervious surfaces of other parcels end up paying the same amount of Stormwater Charges as other parcels. For example, a parcel with 2,188 square feet of impervious surfaces pays the same quarterly Stormwater Charge as a parcel with 4,175 square feet of impervious surfaces. *See* Exhibit 12 at p. 1.

Not only do parcels with wildly varying areas of impervious surfaces pay the same Stormwater Charges, but parcels that have virtually the same areas of impervious surfaces can pay wildly varying Stormwater Rates. For example, a parcel with 7,110 square feet of impervious surfaces incurs a Stormwater Charge of $94.65 per quarter but a parcel with 7,111 square feet of impervious surfaces incurs a Stormwater Charge of $165.66 per quarter. *Id.*

Moreover, by merely considering impervious areas, the City's methodology results in the same Stormwater Charges to properties whose **total land areas** can be greatly dissimilar. For example, under the City's methodology a property with 2 acres of total land area and ¼ acre of impervious surfaces pays the same Stormwater Charge as a property with ½ acre of total land area and the same ¼ acre of impervious surfaces. This further demonstrates the disproportionality of the Stormwater Charges.

3. The Charges Also Are Not Proportionate Because The City Does Not Charge All "Users" Of The Stormwater System.

The Charges also lack proportionality because the City does not charge all properties that contribute stormwater to the City's sewer system. Indeed, not only does the City not charge itself for drainage from the City's own streets and roads, but the City exempts "undeveloped" properties from the Stormwater Charges. This necessarily results in higher Stormwater Charge rates being imposed on other landowners.

When the Supreme Court vacated this Court's ruling that the City of Detroit's Drainage Charges were proper user fees in *Binns*, Justice Zahra expressed concern that Detroit, like Ann Arbor here, was not charging all landowners who were allegedly being benefitted from the charges at issue:

> Given the foregoing, it is at best unclear to me who the City's drainage charge is best classified as a user fee rather than a tax where: (1) "user fees must be proportionate to the necessary costs of the service," *Bolt,* 459 Mich at 161-162; (2) a subunit of the City is exempted from paying the drainage charge that other impervious-acreage landowners must pay, see Kickham Hanley amicus brief at 3; and (3) that results in the imposition of "higher Drainage Charge rates" on other, non-DLBA landowners, see *id.* – all of which applies to plaintiffs in these cases. [See Exhibit 7 hereto at p. 2]

4. The Charges Far Exceed The City's Actual Stormwater Management Expenses.

Finally, the Charges also lack proportionality because the total amount of the charges are far in excess of the City's actual stormwater management expenses. In *Jackson*, the Court found that the fact that the charges generated revenues which exceeded related expenditures further supported the conclusion that the charges there failed to satisfy the proportionality requirement:

> **This lack of proportionality is further demonstrated by the fact that the charge generates sufficient revenue to allow the city to maintain a working capital reserve of 25 to 30 percent of the storm water utility's total expenses**. Although maintaining a capital reserve is a common practice amongst rate-based public utilities

> that provides a degree of fiscal stability to utilities, see 73B CJS, Public Utilities, § 64; 64 Am Jur 2d, Public Utilities, Sec. 107, those reserves are funded by true user fees closely calibrated to the actual use of the service or a price paid for a commodity. The management charge at issue in these cases in not such a fee. **For these reasons, the actual use of the storm water sewer system by each parcel is not accounted for with the requisite level of precision necessary to support a conclusion that the charge is proportionate to the costs of the services provided**. [302 Mich. App. at 111 (emphasis added).]

Here, the City's financial statements confirm that, during the fiscal year ending June 30, 2020, the City imposed Stormwater Charges that were almost twice the amount of the City's actual stormwater management expenses. *See* Exhibit 8 hereto (showing Stormwater Charges of $12,485,490 and operating expenses of only $6,770,918). Indeed, the City reaped a handsome profit in excess of $5,714,572 during just that fiscal year. *Id.*

By accumulating over $17 million in cash through its collection of the Stormwater Charges during that time period, the City maintains a clearly excessive working capital reserve of approximately 250% of the City's total annual stormwater operating expenses, far in excess of the 25-30% deemed inappropriate in the *Jackson* case.

VII. PAYMENT OF THE CHARGES IS NOT VOLUNTARY.

Finally, the Charges are not voluntary because, at the very least they are "effectively compulsory" in that "the property owner has no choice whether to use the service and is unable to control the extent to which the service is used." *Bolt,* 459 Mich. at 167-168 (footnote omitted).

In *Jackson*, the Court found that the Charges there were not voluntary, notwithstanding the existence of a credit provision like the one in the City's Ordinance here. There, the Court ruled:

> Finally, our conclusion that the city's management charge is a tax is bolstered by the fact that Ordinance 2011.02, like Lansing Ordinance 925, is effectively compulsory. Although Ordinance 2011.02 allows property owners to receive credits against the management charge for actions taken to reduce runoff from their respective properties, it does not guarantee all property owners will receive a 100 percent credit.

> Indeed, if the ordinance realistically allowed for all property owners to receive a 100 percent credit, the credit system would undermine the central purpose of the ordinance, which is to generate dedicated funding to maintain and operate the current storm water management system. The city would be left with a storm water sewer system to operate and maintain and no dedicated revenue source to fund street sweeping, catch-basin cleaning, and leaf pickup, among other activities necessary to the city's stewardship of the system. More importantly, however, this system of credits effectively mandates that property owners pay the charge assessed or spend their own funds on improvements to their respective properties, as specified by the ordinance and the city, in order to receive the benefit of any credits. **In other words, property owners have no means by which to escape the financial demands of the ordinance. Additionally, the ordinance authorizes the administrator of the storm water utility to discontinue water service to any property owner delinquent in the payment of the fee, as well as to engage in various civil remedies, including the imposition of a lien and the filing of a civil action, to collect payment of past-due charges. All of these circumstances demonstrate an absence of volition. This lack of volition lends further support for our conclusion that the management charge is a tax**. *Bolt*, 459 Mich. At 168. [302 Mich. App. at 111-112 (emphasis added).]

See also Gottesman at p. 10 ("the fact that the Storm Water Charge may be secured by placing a lien on property supports the conclusion that the Charge is a tax"). Exhibit 4, hereto.

Most recently, this Court in a published decision held that flat-rate sewer charges are compulsory for purposes of the *Bolt* framework. In *Youmans v. Bloomfield Township*, __ Mich. App. __, __ N.W.2d __ (2021) (Exhibit 28 hereto) the Court observed:

> On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the Bolt inquiry. If a charge is "effectively compulsory," it is not voluntary. *Bolt*, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the variable portion of the disputed rates by refusing to use any water. But the fixed portions of those rates constitute flat rate charges like those in *Bolt*, 459 Mich at 157 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is unavailing. *See id.* at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to

> relinquish their rights of ownership to their property by declining to build on the property."). In light of *Bolt*, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the third Bolt factor weighs in favor of plaintiff's position.

Similarly, here the City's property owners "have no means by which to escape the financial demands" of the Ordinance. This is particularly true given that the Charges constitute a lien on the charged properties which, if unpaid, are transferred to the tax rolls, and the stormwater ordinance further authorizes the "administrator" to "disconnect water service, sanitary sewer and stormwater sewer service to any property" whose owner fails to pay the Stormwater Charges. *See* Ordinance, Chapter 33, Section 2:221. *See* Exhibit 30 hereto. There is no element of volition here. At a minimum the Charges are "effectively compulsory" within the meaning of *Bolt*.[9]

VIII. THE STORMWATER CHARGES WERE NOT "AUTHORIZED BY LAW OR CHARTER" AT THE TIME THE HEADLEE AMENDMENT WAS RATIFIED IN 1978.

Given that the Stormwater Charges clearly constitute "taxes" imposed without voter approval, the only remaining question is whether the Charges were "authorized by law or charter" at the time the Headlee Amendment was ratified in 1978.

A. The Stormwater Charges Were Not Authorized By Any City Ordinance Prior To Headlee.

First, the City's ordinances cannot constitute pre-Headlee authorization because it is undisputed that the City first enacted its stormwater utility ordinance in 1993. *See* Exhibit 30 hereto. While the City claims it formed its stormwater utility in 1980, that date still post-dates the ratification

[9] Finally, the Stormwater Charges have additional characteristics which "buttress" the conclusion that they are taxes. The *Bolt* Court observed the presence of "additional factors" which further supported its finding that the Lansing stormwater charges were taxes, including the fact "that the storm water service charge may be secured by placing a lien on property." Similarly, here, payment of the Stormwater Charges, can be secured by placing a lien on Plaintiffs' property and any unpaid amounts get transferred to the tax rolls. This further supports a finding that these Charges are "taxes."

of the Headlee Amendment. Accordingly, the City cannot rely upon its ordinances to save the Stormwater Charges under Headlee.

B. The City's Charter Also Does Not Constitute Pre-Headlee Authorization For The Stormwater Charges.

The City may argue that Section 15.4 of its Charter, enacted in 1956, constitutes pre-Headlee authorization for the Charges. That Section provides in pertinent part as follows:

> The Council shall fix just and reasonable rates and such other charges as may be deemed advisable for supplying municipal utility services to the inhabitants of the City and others. Discrimination in rates within any classification of users shall not be permitted, nor shall free service be permitted. Increased rates shall be charged for service outside the corporate limits of the City. [*See* Exhibit 22, City Charter.]

The Court should find that Section 15.4 of the City Charter does not render the Charges "authorized by law or charter" as of 1978 for at least three independently-dispositive reasons, each of which is discussed below.

1. A General Charter Provision Authorizing A Municipality To Provide A Service And Charge For That Service Does Not Constitute Pre-Headlee Authority For The Charge Imposed.

First, a charge imposed pursuant to a general charter provision authorizing a municipality to impose a charge for a municipal service does not constitute a tax "authorized by law or charter" within the meaning of the Headlee Amendment. Since long before Headlee was ratified, the Michigan statutes establishing municipal powers have authorized municipalities to undertake a variety of governmental functions, including the operation of public utilities to supply water and provide sewage disposal services, and to impose fees and charges to cover the costs of such services. For example, the Home Rule City Act (first enacted in 1909) provides that City's may include provisions in their charters "[f]or the acquiring, establishment, operation, extension, and maintenance of sewage disposal systems, sewers, and plants, either within or outside the corporate limits of the city, as a utility, … and

including the fixing and collecting of charges exclusively for service covering the cost of the service….." MCL 117.4f(d) (emphasis added).

Consistent with the authority granted by these Michigan statutes, municipalities have enacted Charter provisions which empower those municipalities to provide water and sewer services and to impose charges for such services. The City is no exception, having enacted a charter provision in 1951 which purports to allow the City to impose "just and reasonable rates and other charges as may be deemed advisable for supplying municipal utility services to the inhabitants of the City and others." Charter, Section 15.4. **Significantly, however, Plaintiff is aware of no case which has held that charter provisions enacted pre-Headlee which generally authorize local governments to provide services and to charge for those services exempt the resulting charges from the Headlee Amendment. Indeed, if that were the case, it would all but eliminate the local tax limitations prescribed by the Headlee Amendment.**[10]

The principle that a general statutory or charter provision authorizing a charge for a municipal service does not constitute preexisting taxing authority is also made clear by the *Bolt* decision itself.

[10] A tax is "authorized by law or charter" for Headlee purposes only where the preexisting law or charter provision both authorizes the tax **and** prescribes the method of imposing that tax. This requirement is demonstrated by *American Axle & Manufacturing, Inc. v. City of Hamtramck*, 461 Mich. 352, 604 N.W.2d 330 (2000), the principal case relied upon by the City. There, a civil judgment was entered against the City of Hamtramck and it assessed the unpaid amount of the judgment on the property tax rolls pursuant to MCL 600.6093. The Court held that because MCL 600.6093 was enacted before Headlee, it constituted "preexisting authority for that taxation, and thus [was] exempt from the Headlee Amendment's election requirement." 461 Mich. at 354. In stark contrast to the City's general Charter Provision at issue here, however, MCL 600.6093 specifically dictated the means and method of imposing the tax at issue and the amount of the tax. Indeed, the statute required the assessing officer of the municipality to add "the total amount of the judgment" to the other city taxes and assess it in the same column with the general city tax. Because of this specificity, which is totally lacking in the City charter provision, MCL 600.6093 was properly found to be a "tax authorized by law or charter" prior to 1978.

The dissenting Justices in *Bolt* argued that the stormwater charges did not violate Headlee because the Revenue Bond Act (which was first enacted in 1933) empowered the City of Lansing to construct and operate a sewer system. The *Bolt* majority rejected this argument and held that, even though the **power** to **build** the system predated Headlee, the City was not allowed to **finance** its sewer system through unlawful taxes:

> In response to this conclusion, the dissent notes that the Revenue Bond Act permits the City to implement a sewer system. However, whether the City was authorized to implement a sewer system is not at issue in the present case. What is at issue is how that system is to be funded. **It stands to reason that even though the City may be authorized to implement the system, its method of funding the system may not violate the Headlee Amendment**. [459 Mich. at 169 (emphasis added)].

The *Bolt* majority further implicitly rejected the assertion that a general charter authorization to charge for municipal services renders that charge outside of the reach of the Headlee Amendment. In arguing that the stormwater charges there were not "taxes," the *Bolt* dissenters identified a number of laws and charter provisions which indisputably were in effect at the time Headlee was ratified in 1978. The dissenting opinion noted:

> The city of Lansing derives its authority to impose a legitimate special assessment or user fee for storm water detention, transportation, treatment, and disposal under the home rule city act. MCL 117.1a-117.38; MSA 5.2071(1)-5.2118. … The Lansing City Charter also allows the city to operate and maintain public utilities. **To implement and maintain the public utilities, the city of Lansing may charge "just and reasonable rates" and "such other charges as may be deemed advisable for supplying all other municipal services to the inhabitants of the City and others**." Lansing City Charter, § 8-303. [459 Mich. at 172-173 (emphasis added)]

As the dissent correctly noted, Lansing – like the City here – had charter provisions which authorized the City to charge for municipal services and which were in effect at the time Headlee was ratified in December 1978. Nonetheless, the *Bolt* majority ignored these charter provisions in invalidating the stormwater charges. Stated simply, if a general charter authorization to impose rates

for municipal services constituted a tax "authorized by law or charter", then *Bolt* could not have been decided as it was. In fact, numerous decisions after *Bolt* have addressed the propriety of sewer-related charges under the Headlee Amendment, but none of those cases has concluded that the charges at issue were immunized on the grounds that they were "authorized by law or charter" at the time Headlee was ratified in 1978.

2. The City's Charter Does Not Constitute Pre-Headlee Authority Because The Charter Requires The Stormwater Charges To Be "Fair and Reasonable" and the Facts Demonstrate That The Charges In Fact Are Not "Fair and Reasonable."

Even if charges for municipal services imposed pursuant to a general charter authorization could theoretically constitute taxes "authorized by law or charter" as that term is used by Headlee, the Stormwater Charges here, while clearly "taxes," were not "authorized by law or charter" at the time Headlee was ratified in 1978 because the City's 1956 Charter requires such Charges to be "fair and reasonable." For all of the reasons previously discussed above, this self-imposed limitation on the City's ability to impose the Stormwater Charges should be fatal to any reliance by the City on Section 15.4 of its Charter because the Stormwater Charges are not "fair and reasonable."

3. Even If The Charter Provision Purported To Authorize Unlimited Stormwater Charges, Such Charges Were Otherwise Prohibited By Law At The Time Headlee Was Ratified in 1978.

Further, in assessing whether the Charges at issue were "authorized by law or charter" at the time the Headlee Amendment was ratified in November 1978, the Court cannot rely upon Section 15.4 of the Charter in a vacuum. Instead, the Court must evaluate what other legal limitations were placed on the stormwater-related Charges that the City could impose as of November 1978. For the reasons discussed below the Stormwater Charges are prohibited by law even if they were somehow authorized by the Charter provision.

Even if the City's Charter purported to authorize the specific Stormwater Charges the City has imposed here, that Charter provision would be invalid because it conflicts with a controlling Michigan statute limiting municipal taxing power which predated the 1978 Headlee Amendment. Far from being "authorized by law or charter" as of 1978, the Stormwater Charges were and still are prohibited by MCL 141.91, which was enacted in 1964 and which prohibits the City from imposing **any** tax, other than an ad valorem property tax, unless the tax was being imposed by the city or village on January 1, 1964. In this regard, MCL 141.91 clearly and unequivocally provides:

> Sec. 1. Except as otherwise provided by law and **notwithstanding any provision of its charter**, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964. [emphasis added].

In the previous sections of this Brief, Plaintiff demonstrated that the Charges constitute taxes. Accordingly, the Stormwater Charge is subject to MCL 141.91.

As taxes, the Stormwater Charges clearly violates MCL 141.91. The Charge most assuredly is not an "ad valorem property tax" and was not "being imposed by the city … on January 1, 1964." Indeed, as discussed above, the City's concedes that its stormwater utility was formed, at the earliest, in 1980. Accordingly, the Stormwater Charge is a tax first imposed after the effective date of MCL 141.91 (1964) and therefore was not "authorized by law" at the time Headlee was ratified.

The City's charter provision manifestly cannot save the Stormwater Charge, because MCL 141.91 expressly provides that the prohibitions in that statute apply "notwithstanding any charter provision." Further, it is clear that the City's general Charter Provision authorizing certain charges does not trump applicable Michigan statutes, because it is a fundamental principle that municipal charter provisions which conflict with Michigan statutes are invalid. In this regard MCL 117.36 states:

"**No provision of any city charter shall conflict with or contravene the provisions of any general law of the state**."

The Michigan Supreme Court has held that MCL 117.36 means what it says, ruling that "every municipal charter is subject to the Constitution and general laws of this State." *American Axle & Manufacturing, Inc. v. City of Hamtramck,* 461 Mich. 352; 604 N.W.2d 330, 366 (2000)(quoting *Hazel Park v. Municipal Finance Comm*., 317 Mich. 582, 27 N.W.2d 106 (1945). The same is true of any ordinances and resolutions adopted by a municipality. *See* Mich. Const. Art. VII, Sec. 22 ("Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, **subject to the constitution and law**") (emphasis added). In sum, another reason that the Stormwater Charge was not "authorized by law or charter" at the time Headlee was ratified in 1978 is because it was prohibited by MCL 141.91, which was enacted in 1964.

CONCLUSION

For all of the foregoing reasons, Plaintiff requests that the Court find and declare that the Stormwater Charges are taxes that have been imposed in violation of the Headlee Amendment and order the City to refund all Stormwater Charges collected since the date one year prior to the filing of Plaintiff's Complaint through the date of the final judgment.

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