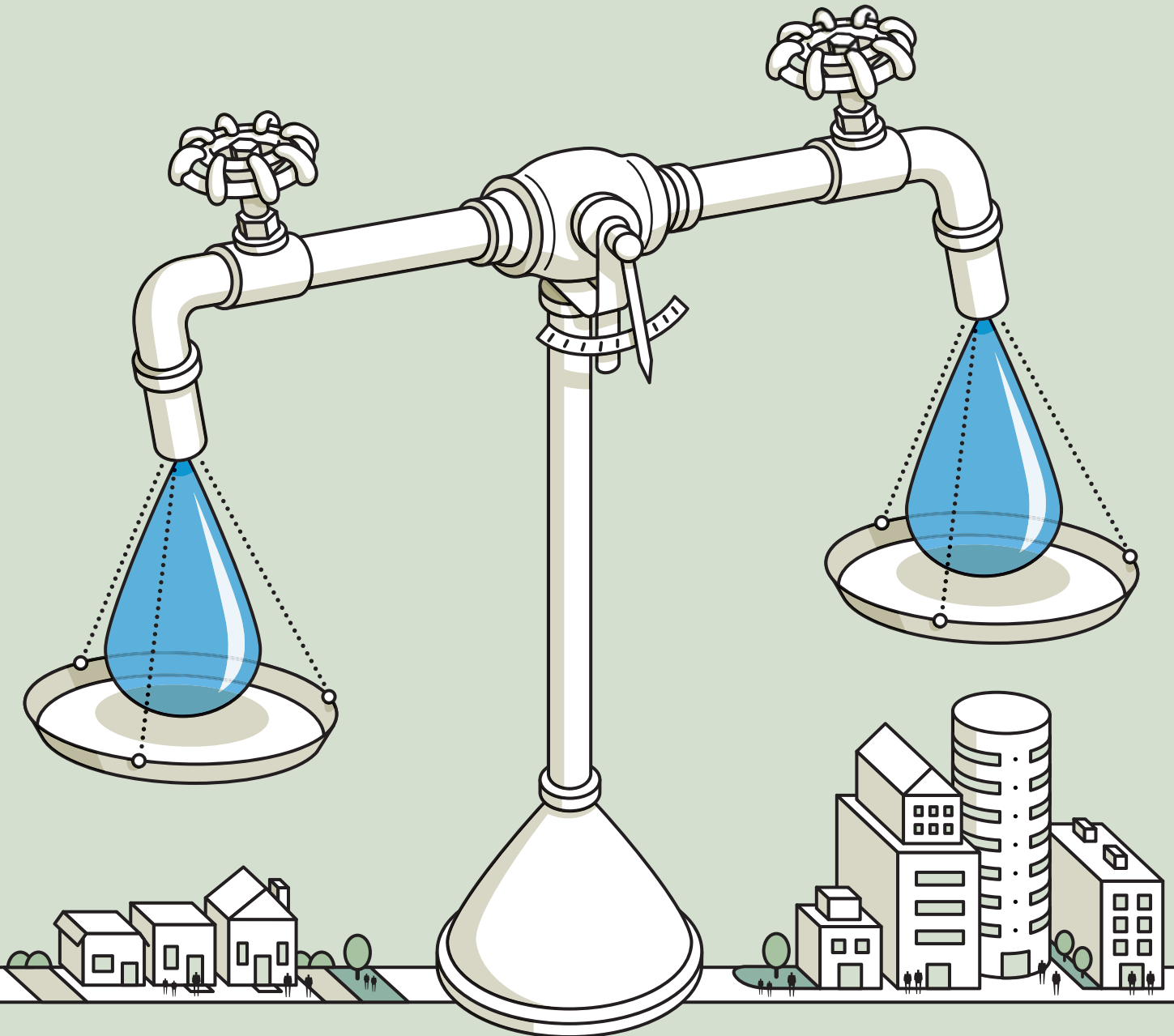


Legal Pathways to Income-Based Drinking Water Rates in Michigan

PREPARED FOR THE C.S. MOTT FOUNDATION BY
GREAT LAKES ENVIRONMENTAL LAW CENTER & NATIONAL WILDLIFE FEDERATION



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1. Introduction

Many in the water justice community have expressed dismay that water system staff and municipal officials believe that water rates based on household income are unlawful.¹ They have heard people reject the concept by saying that it would violate the Michigan Constitution's Headlee Amendment or that it would run afoul of the way ratemaking is supposed to work.

Other documents have laid out the excellent economic, moral, and public health arguments in favor of affordable income-based drinking water rates ("income rates"). The objective of this report is purely to evaluate the legal validity of income rates in Michigan. The short answer is, yes, as a general matter, income rates would not violate ratemaking standards or the Michigan Constitution's Headlee Amendment.

First, municipalities in Michigan routinely employ lower rates or discounts for certain classes of people such as the elderly and those facing economic hardship. Second, income-based rates meet the standards for water rate-making in Michigan. Where the water system employs them to try to more effectively meet its revenue needs, there is no material obstacle in terms of how water systems create rates and individual bills. Third, the Headlee Amendment to the Michigan Constitution does not apply to drinking water rates, and therefore poses no obstacle to income-based rates. Even if it did apply, the factors weigh heavily in favor of treating income-based rates as fees, not taxes, which means they could be developed legislatively or administratively without needing voter approval.

This report does not evaluate the merits of any particular approach to revenue need calculation or to rate design. Instead, it assumes that a rate design approach that accounts for income is desirable, and it evaluates whether certain Michigan laws are obstacles to such an approach.

The report is not limited to the Great Lakes Water Authority service territory. However, where useful, we used examples from the service territory to illustrate the analysis.

2. A basic introduction to water utility ratemaking

Utilities provide public goods and services like water and electricity. In exchange for allowing utilities to have a monopoly to provide services to people in a certain territory, they agree to have their pricing heavily regulated.

To provide goods and services, utilities need revenue. They need revenue for their capital and operating costs. To be sustainable, they also need to recover a modest profit.

There are basically four steps a utility must take to go from its revenue need to an individual water bill. First, the utility must calculate its total revenue need. Second, the utility must break down that revenue need into categories. Third, the utility identifies its various customer classes based on how each class consumes water materially differently than the others. Usually, the classes are industrial, commercial, and residential. Fourth, a utility must develop a water rate, which allows a utility to calculate individual water bills by accounting for the different customer classes and the different categories of costs and charges.

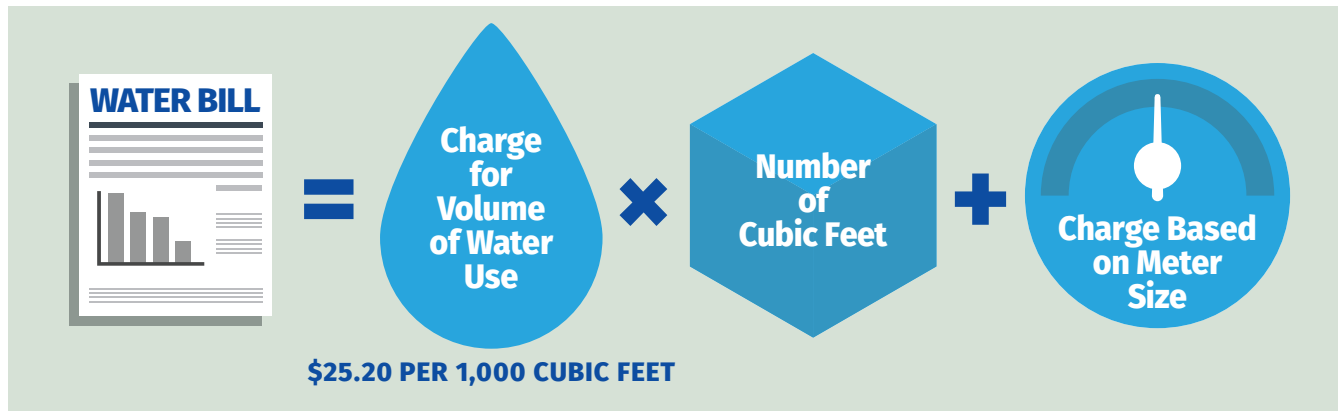
In Michigan and most everywhere else in the country, utilities develop rates that are closely tied to their annual revenue need, which in turn is closely tied to their cost of service. Utilities bill customers to recover their capital and operating costs and to earn a modest profit in order to be sustainable. Customer classes pay a share of the utility's revenue need that is roughly attributable to the share of operating and capital costs that they impose on the system. If as a class, it is more expensive for utilities to serve industrial users than agricultural users, then as a class, industrial users will pay a higher proportion of the system cost than agricultural users. Within each customer class, there is also an expectation that each individual customer will pay a share of the utility's revenue need that is roughly attributable to the share of operating and capital costs that they impose on the system, though as we point out below, there is room for distinguishing between groups of customers within a class.

There are different methods to develop a water rate. One common method, and by all counts the prevailing one in Michigan, is the base extra capacity method.² The base extra capacity method considers six components of a rate: base costs; maximum day extra capacity costs; peak hour extra capacity costs; customer costs; distance costs; and elevation costs.

There are also multiple water rate designs. They include uniform rates, increasing and decreasing block rates that vary based on volume used, seasonal rates, and affordability rates such as those that account for household income.

The Detroit rate can illustrate much of the above. First, for FY2019, the Detroit Water and Sewerage Department claimed that its revenue requirement would be approximately \$127 million (for water, but not sewage). Second, Detroit recognizes two customer classes: industrial and residential. Third, Detroit's residential water rate design is fairly basic. There is a fixed component and a variable component that corresponds to the volume used. With regard to the residential class, after calculating the cost of service and allocating the total cost to different ratepayer classes, the formula that renders an individual household's bill is as follows:

FORMULA THAT RENDERS AN INDIVIDUAL HOUSEHOLD'S BILL



Therefore, if in a given month a household uses 2,000 cubic feet of water and has a 1" meter, that household is billed \$69.01, which is calculated by taking the volume figure of \$25.20, multiplying it by 2 (for the volume of water used measured in 1,000 cubic feet units), and adding \$18.61 (meter charge). The bill would be \$69.01 no matter the monthly income of the household.

3. Water rates based on household income

For the purposes of this report, an income-based drinking water rate or income rate is a rate that applies to a set of residential households whose monthly income is at or below a certain percentage of the federal poverty rate. These rate designs are sometimes called percent of income payment programs. For these programs, the income rate yields individual household water bills that are affordable because the rate ties the amount charged for water to the household income.

Philadelphia's Income Based Water Rate Assistance Program is an example of an income rate. According to Philadelphia's program, the water department caps household bills at two percent of monthly income for residents earning less than 50 percent of the federal poverty level; 2.5% for those earning between 51 and 100 percent of the federal poverty level; and three percent for those earning between 101 and 150 percent of the federal poverty level.³ Based on the 2019 federal poverty guidelines, a family of four that earns \$1,610 per month (75% of the monthly guideline figure) would pay \$40 per month for water, which is calculated as the monthly income multiplied by 2.5%.

Another way to achieve an income rate is to apply a discount based on level of income. Therefore, the water rate calculations remain the same, but the bill amount generated by them is reduced by the discount.

We can use a Detroit family of four that earns \$1,610 per month as an example. Based on the way Philadelphia does it, if that family of four would normally pay \$69.01 per month for water based on the fixed and variable

DETROIT WATER RATES	
Effective as of July 1, 2019	
Water Volume Rate (per Mcf*)	\$25.20
Monthly Meter Charge by Meter Size	
5/8"	\$7.45
3/4"	\$11.17
1"	\$18.61
1.5"	\$37.23
2"	\$59.56
3"	\$119.14
4"	\$186.15
6"	\$372.28
8"	\$595.65
10"	\$856.26
12"	\$1,154.08
14"	\$1,600.82
16"	\$2,122.03
18"	\$2,516.65
20"	\$3,075.08
24"	\$4,467.43
30"	\$6,701.14
36"	\$8,934.83
48"	\$13,402.29
60"	\$17,869.71
Monthly Private Fireline Charge by Fireline Size	
4" or smaller	\$89.43
6"	\$186.31
8"	\$268.29
10"	\$432.25
12"	\$640.92

DETROIT SEWERAGE RATES	
Effective as of July 1, 2019	
Sewage Disposal Rate (per Mcf*)	\$55.94
Sewerage Service Charge (per bill)	\$6.41
Monthly Drainage Charge Per Impervious Acreage	\$602.00
Monthly Industrial Waste Control Meter Charge by Meter Size**	
5/8"	\$3.38
3/4"	\$5.07
1"	\$8.45
1.5"	\$18.59
2"	\$27.04
3"	\$49.01
4"	\$67.60
6"	\$101.40
8"	\$169.00
10"	\$236.60
12"	\$270.40
14"	\$338.00
16"	\$405.60
18"	\$473.20
20"	\$540.80
24"	\$608.40
30"	\$676.00
36"	\$743.60
48"	\$811.20

*Mcf (Million Cubic Feet) = 1000 Cubic Feet

**IWC Charges are collected on behalf of Great Lakes Water Authority and are not part of DWSD's Revenue Requirement

volume charge, their income rate would be \$40, which is calculated as the monthly income multiplied by 2.5%. Based on the discount method, if a 50% discount instead applied to a family of four that earns less than \$2,000 a month, then that same family of four that would normally pay \$69.01 would instead pay \$34.50.

The income rate stands in contrast to other alternative rates the calculations, for which expressly include the municipality's cost of service. Put crudely, the alternative rates take the utility's cost of service, allocate the total cost of service to different customer classes (commercial, industrial, residential, etc.), and based on all that provide a formula with which to calculate individual bills. It should be noted, however, that although the rate formulas are different, the goal of both income rates and these alternative rates is to allow the utility to recover its cost of service-based revenue need. In that sense, the income rate still accounts for the utility's cost of service-based revenue need even if that is not apparent from the water bill calculation formula.

4. Municipalities in Michigan have historically and routinely designed discounts or special rates for certain eligible homeowners.

Municipalities in Michigan routinely apply discounts or special rates to subclasses of residential ratepayers in a variety of areas, including sewer, water, waste disposal, and fire cost recovery. The most common bases for these rates are: whether one lives inside the service territory or outside of it; senior citizen status; and economic hardship. It is also common for the senior citizen and hardship exemptions to be combined, such as a fee waiver for senior citizens below the poverty line. While hardship deferrals⁴ are more common than waivers or exemptions, waivers and exemptions provide a clearer comparison to water rates.

The most common differentiated fee structures in Michigan are in sewer and water services, where different rates are established for customers within a set jurisdiction, such as a municipality's boundaries, and customers who are outside of those set boundaries.⁵ Nonresident fees typically ranged between 150% and 200% of resident fees. Courts have consistently held that these fee differentials are valid.⁶

Several municipalities provide senior discounts for water services, although a few of those municipalities limit these discounts to seniors below the poverty line. One example comes from the Stockbridge Code of Ordinances, Section 1.3.3.ii, which provides that "[a]ll customers age 65 or older are entitled to a ten percent discount on water usage only on their primary residence."⁷ On their municipal websites, the towns of

Portage and Three Rivers also declare a senior citizen discount on water rates; the discount is 10% in Portage and 15% in Three Rivers.⁸ Additionally, Norton Shores provides "a separate senior citizen water consumption charge discount" of 25% for customers who 1) are 62 or older, 2) live in a home they own which receives the water, and 3) have a household income of less than \$23,431.⁹ And Harrison has established special rates, which includes a "Senior Citizens discount, 25% per quarter if verified application filed showing household income less than \$6,000 per year."¹⁰

Such discounts are also common in the provision of sewer services. Similar to their provision of water services, Harrison provides that "[e]ligible senior citizens [are] to receive a twenty-five percent (25%) discount."¹¹ Mundy Township provides a 10% senior citizen discount for persons over 62 who live in Homestead Exempt residences; this discount applies to both the Ready to Serve Fee and the Flat Fee.¹² And Norton Shores provides a 25% "senior citizen sewer charge discount" for seniors who live in a home they own which receives the sewer service and have a household income of less than \$13,000.¹³

Another service which commonly has differentiated fee structures is waste disposal. The Springfield Code of Ordinances provides that "[a]ll elderly and handicapped persons shall receive a discount for residential curbside unlimited or backyard unlimited service."¹⁴ Similarly, Williamston provides that "[a]ll elderly and handicapped persons shall receive a discount for residential refuse service."¹⁵ The City of Detroit itself provides a 50% discount to seniors who own their home and have an annual income below \$40,000.¹⁶

Bloomfield Charter Township provides a full waiver of collection fees to individuals within 200% of the poverty limit and a 50% waiver for individuals within 200% to 300% of the poverty limit, if those individuals live in a house valued at less than \$200,000, and each member of the household has less than \$10,000 in checking and savings accounts.¹⁷ Bloomfield Hills provides a full waiver to a property owner with less than \$10,000 gross annual household income and a 50% waiver for property owners with a household income between \$10,000 and \$16,875.00.¹⁸ Several other municipalities provide similar fee waivers based on financial hardship¹⁹. In addition to a senior discount, the City of Detroit also provides a hardship exemption for waste disposal fees.²⁰

Another area with fee differentials in the provision of services is fire cost recovery. Groveland Township exempts responses to fires within township boundaries from cost recovery, as well as exempting assistance rendered to persons and their personal property, if those persons are residents of the township.²¹

Additionally, Rose Township exempts services provided to individuals within the boundaries of the North Oakland County Fire Authority (NOCFA), if those individuals are permanent residents of the area served by NOCFA and can demonstrate financial hardship²².

Thus, there are a variety of municipalities that have established different fees for different classes of residential households in a variety of service areas. Such ordinances are not uncommon, and do not appear to be a target of court challenges as of yet. Michigan courts tend to take a greatly deferential approach to municipalities in matters of ratemaking.²³ As long as “the enactment’s classifications [are] based on natural distinguishing characteristics and...bear a reasonable relationship to the object of the legislation,” and “all persons of the same class [are] included and affected alike [without] immunities or privileges extended to an *arbitrary or unreasonable class* while [being] denied to others of like kind,” such rate differentials should be able to withstand a court challenge.²⁴

The lesson to be learned is, with so many municipalities applying discounts and special rates, and with so many of those discounts and special rates being justified by hardship, there is nothing new or strange about applying an income rate to a set of household customers.

5. There is strong support for the argument that income rates would comply with Michigan ratemaking standards.

It is likely that Michigan ratemaking standards would allow for an income rate. The reasonableness standard in Michigan is broad and accommodating. When applying it, courts are highly deferential to rate-setting authorities. Finally, it is permissible to treat some residential customers differently than others so long as the differential treatment is reasonable.

5.1. Though there is no one law that governs drinking water ratemaking in Michigan, there are broadly applicable standards.

Generally, there is uneven legislative guidance for water utility rate setting in Michigan. What exists is scattered:

- At the broadest level, the Michigan Constitution authorizes municipalities to acquire, own, and operate their own water and wastewater facilities.²⁵ This grant of authority does not speak to how municipalities should finance that work (emphasis added).²⁶
- An old but still applicable law from 1869 states that when municipalities create entities to construct waterworks and deliver water (as opposed to having

the municipality itself do it), the municipality must protect inhabitants from exposure to undue or excessive water rates.²⁷ However, Michigan courts have not spoken to the question of water rates that might be undue or excessive.

- The General Law Village Act, which provides various kinds of authority to villages, states that villages are to establish just and equitable water rates.²⁸ There is no definition in the law of “just and equitable”.
- Fourth Class Cities are authorized to establish water rates that are “appropriate to different classes of buildings in the city” while accounting for numerous factors.²⁹
- There is also a complicated statute that governs rates when water providers sell water outside of their territorial limits.³⁰ This law receives special attention below.

No matter which statute is being interpreted, there are applicable standards that Michigan courts apply to drinking water ratemaking.

5.2. The standards that apply to drinking water ratemaking leave ample room for income rates.

Given the limited direction in rate setting, courts have been reluctant to impose their own barriers on legislatures and their rate-setting powers. The courts have said that rate-making, as a general matter, is a legislative function better left to the government body authorized to set such rates.³¹ The Michigan Supreme Court has stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates.³² Moreover, the Court has said that it appears to be the Legislature’s intention to prevent the court from strictly scrutinizing rate-making.³³

In Michigan, reasonableness is the common law standard that applies to determine whether a rate is appropriate or constitutional.³⁴ Rates are assumed to be reasonable in the absence “of a showing to the contrary or a showing of fraud or bad faith or that [the rate] is capricious, arbitrary or unreasonable.”³⁵ Reasonableness “is not subject to mathematical computation with scientific exactitude but depends upon a comprehensive examination of all factors involved, having in mind the objective sought to be attained in its use.”³⁶ Ratemaking is considered a question of fact³⁷ and the challenger of a rate bears the burden of showing the rate is unreasonable.³⁸

In *Mapleview Estates*, challengers opposed a “tap-in” fee that charged for connecting a new home to the city’s central water supply.³⁹ The court held the tap-in fee was reasonable because it fell within the statutory authority

of the Revenue Bond Act⁴⁰ and because the “tap-in” fee was lower than the actual cost of connecting to the system.⁴¹

Likewise, in *Seltzer*, the court held that a \$150 privilege charge paid as a fee for capital improvements and equipment—in addition to a \$125 “tap-in” fee—was reasonable as issued under the “rate” authority of the Revenue Bond Act.⁴² The Court said that what is reasonable changes given the circumstances and facts of the case, and here the challenger did not provide evidence to show the charge was unreasonable.⁴³

In *City of Novi*, the Michigan Supreme Court said the Court of Appeals improperly banished the standard of reasonableness by simply allowing the challenger to show the water rate did not reflect the actual cost of service, as required for some water providers.⁴⁴ In doing so, the Supreme Court said the Court of Appeals violated the common-law bases for deference in utility-rate cases, and that requiring a strict actual cost of service rate would improperly nullify the reasonableness inquiry.

When faced with facts that show cities have considered outstanding debt in setting their water rates, the Court has remained reluctant to second guess the legislature’s decision. In *Trahey*, a resident challenged the City of Inkster’s water and sewer rates, claiming they violated the Inkster Charter⁴⁵ which requires just and reasonable rates.⁴⁶ The court held the portion of the City’s water rate which accounted for debt was part of the cost of service of water, as timely payment of the water and sewer department’s debt was necessary for its continued operation and thus constituted part of the actual cost of providing the service.⁴⁷ The court noted that absent evidence of impropriety presented by the challenger, the court would not independently scrutinize municipal ratemaking methods.⁴⁸ *Trahey* shows that in setting the cost of service, cities are allowed to consider outstanding debts and other costs of providing the service in setting the rate. Thus, applied to an income rate for water utilities, a rate making body should be allowed to consider outstanding debts and the likelihood of default in setting their rates. This suggests that a properly calibrated income rate could still be considered as based on the cost of service within the common law.

The current case law indicates that courts pay a high level of deference to rate makers under the reasonableness standard when setting water utility prices. Courts seem reluctant to interfere with what they consider to be an inherently legislative function. The legislative and local nature of rate setting could explain the relatively few numbers of cases challenging water utility rates—any issues or concerns could more easily

be worked out and negotiated at a local level, not within the court.

5.3. A note about extraterritorial sales of water and “actual cost of service”

Act 34 of 1917 mainly governs water furnished outside a water provider’s territorial limits.⁴⁹ The most relevant section of the law is codified at MCL 123.141.

MCL 123.141 provides a statutory constraint on water utility providers in addition to the common law’s reasonableness standard in certain situations. Specifically, MCL 123.141 states a “municipal corporation. . . authorized by law to sell water outside of its territorial limits [shall charge customers] a rate which is based on the actual cost of service.”⁵⁰ Just below, the report evaluates the portion of the law that is about cost of service ratemaking. In the appendix, there is a longer analysis of whether and how the law applies.

In its entirety, the text of MCL 123.141 states:

(1) A municipal corporation, referred to in this act as a corporation, authorized by law to sell water outside of its territorial limits, may contract for the sale of water with a city, village, township, or authority authorized to provide a water supply for its inhabitants.

(2) The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of ratemaking. This subsection shall not remove any minimum or maximum limits imposed contractually between the city and its wholesale customers during the remaining life of the contract. This subsection shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state. This subsection shall take effect with the first change in wholesale or retail rate by the city or its contractual customers following the effective date of this subsection. Any city that has not adjusted rates in conformity with this subsection by April 1, 1982 shall include in the next ensuing rate period an adjustment to increase or decrease rates to wholesale or retail customers, so that each class of customer pays rates which will yield the same estimated amount of revenue as if the rate adjustment had been retroactive to April 1, 1982. A city that is subject to section 5e of Act No. 279 of the Public Acts of 1909, being section 117.5e of the Michigan Compiled Laws, shall begin proceedings to determine rate changes pursuant to section 5e(b) of Act No. 279 of the Public Acts of 1909, being section 117.5e of the Michigan Compiled Laws.

(3) The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service.

(4) This act shall not apply to a jointly operated water system or authority that supplies raw untreated water to 2 or more municipalities.⁵¹

Subsection (1) authorizes a municipal corporation to sell water to a city, village, township, or authority outside of the municipal corporation's territorial limits. Subsection (2) mandates that the price charged by the municipal corporation to its customers—the customers being the village, township, or authority from part (1)—must be at a rate based on the actual cost of service.

The plain text of the statute does not mandate that the rate must be exactly the actual cost of service, rather only that the rate must be based off of such cost. Indeed, in *Novi*, when the City of Novi challenged the City of Detroit and the rate at which Detroit charged for its water, the Court noted:

[T]he Legislature's use of the phrase "based on the actual cost of service as determined under the utility basis of rate-making" cannot be construed to mean "exactly equal to the actual cost of service," in light of the difficulties inherent in the rate-making process and the statutory and practical limitations on the scope of judicial review.⁵²

There remains a question as to what extent the rate needs to be based off the actual cost of service. If the court is willing to allow rate-setters to deviate from the actual cost of service, then how much does the rate actually need to reflect the cost at all? It would seem unlikely that the court would ignore the law entirely. However, it's not clear how closely the court is willing to look at whether or not the rate resembles the actual cost of service, or at what point the Court will say the rate charged and the rate mandated by statute are no longer in accord.⁵³

The court has also said that MCL 123.141 does not alter the general common law standard of reasonableness applied by courts when reviewing utility rates.⁵⁴ Indeed, the Court has shown a high level of deference to legislatures when examining whether rates are reasonable. In *Plymouth* when municipalities challenged Detroit's water rates, the Court indicated that rate setting was a legislative function, and that deciding those rates was better left to the bodies authorized to set rates.⁵⁵ In *Novi* the Court once again was reluctant to make the determination of whether or not a rate was reasonable as a question of law and left the decision to the jury.⁵⁶

Further, the Court noted that legislatures are given a presumption of reasonableness when setting their rates, and that the burden of proof was on the rate challenger to show the rate does not reasonably reflect the actual cost of service.⁵⁷

The Court has recognized that while there is no one formula that constitutes the "utility basis of ratemaking" under part (2) of MCL 123.141, the two most broadly used methods are the "demand-commodity" method and "base-extra capacity" method.⁵⁸ In *Plymouth*, the Court noted:

Each method attempts to allocate to the different customers a share of the operating and capital costs of the system fairly reflecting the kind of use the customer makes of the system. Each method involves a two-stage process, first attempting to allocate costs into two categories of service-cost functions, and then allocating those costs between customers according to their respective responsibility for each of the functional costs.⁵⁹

In general, the utility basis seeks to "compensate the proprietary interest in a public utility with a reasonable rate of return from nonowner, nonresident customers, commensurate with the value of the facilities required to provide service to these customers."⁶⁰ The two utility basis methods are considered fair and equitable because both approaches end up distributing revenue requirements proportionally to each class based on a class's contribution to the system's cost components.⁶¹

Given the current case law, it appears the base-extra capacity is most commonly employed by local rate-makers.⁶² Generally, the base-extra capacity method is an average-and-excess method in which costs are separated into cost component categories. In *City of Novi*, the City of Detroit hired a utility-management consultant who utilized the base-extra capacity method to determine rates. There, they considered six basic cost categories: base costs, maximum day extra capacity costs, peak hour extra capacity costs, customer costs, distance costs, and elevation costs.

However, as mentioned above, there are several different utility-basis ratemaking methods, and the burden is on the plaintiff to show that the method used does not comply with the utility basis of ratemaking.⁶³

5.4. Contractual Agreements Between Great Lakes Water Authority and Detroit Water and Sewerage Department

Michigan Public Act 233 of 1955 allows two or more municipalities to incorporate an authority for the purpose of acquiring, owning, improving, enlarging, extending, and operating a sewage disposal system or a

water supply system.⁶⁴ The GLWA was formed pursuant to a Memorandum of Understanding executed by the Mayor of Detroit, the County Executives of Macomb, Oakland, and Wayne counties, and the Governor of Michigan.

There are two relevant agreements between the City and GLWA that govern DWSD ratemaking: the Regional Water Supply System Lease, and the Water and Sewer Agreement. These two agreements govern ratemaking by and between GLWA and the City, and by and between the City and its residents.

Regarding ratemaking by and between the City and its residents, the Regional Water Supply System Lease states that GLWA “shall have the exclusive right to establish rates for water service to customers of the Water System, including Retail Water Customers.” However, pursuant to the Water and Sewer Agreement, GLWA has delegated its exclusive right to establish rates for DWSD’s water service customers to DWSD. The Water and Sewer Agreement also specifies that any water service rates established by DWSD must be: reasonably projected to meet the revenue requirement established by GLWA for retail customers; the costs of the water system; and reasonable in relation to the costs incurred by GLWA for the supply of water. Additionally, the Water and Sewer Agreement also provides that the City must take “commercially reasonable actions to minimize the cost of services to be provided,” but that “[t]he City shall not provide free service to any customer.” In short, DWSD has authority to set rates for water service for its residents. While the Water and Sewer Agreement establishes some ratemaking requirements, those requirements only pertain to how much the City must collect through its rates, but not the specific rate structure to be used to meet the revenue requirement.

Regarding ratemaking by and between GLWA and DWSD, the Water and Sewer Agreement establishes that the City shall pay GLWA rates established by GLWA. These rates are set pursuant to a specific methodology established by GLWA.

There is a question as to whether a Detroit ordinance passed by Detroit city council requiring water rates to be affordable would be valid given the contractual constraints on water rates. First, so long as the rates established by DSWD are sufficient to meet its costs and the revenue requirements established by GLWA, then such rates would be valid under the Agreement. Put another way, the Agreement regulates the amount of money DWSD must seek from its customers, not how it may seek it. Second, even if an ordinance requiring water rates to be affordable was found to be in violation of the Agreement, it is likely that the ordinance would still be valid.

In *United States Trust Co of New York v New Jersey*, the Court held the contract clause⁶⁵ did not prevent a

State from enacting legislation that affects the State’s existing obligations of a contract, so long as the legislation is based on “reasonable conditions and of a character appropriate to the public purpose justifying its adoption.”⁶⁶ However, complete deference to a legislative assessment of reasonableness and necessity is not appropriate when the State’s self-interest is at stake.⁶⁷ The Court went on to say a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.⁶⁸

In *Wayne County Bd. of Com’rs v. Wayne County Airport Authority*, the State transferred ownership of an airport from the county to a new airport authority which substantially impaired a county’s obligation to pay bondholders from airport revenues.⁶⁹ The Michigan Court of Appeals said if impairment of contractual obligations is minimal, then the legislation is not unconstitutional.⁷⁰ If the impairment is substantial, the court then asks is there a significant public purpose behind the regulation and are the means adopted to implement the legislation reasonably related to the public purpose.⁷¹ A critical factor in determining the extent of the impairment is whether the complaining industry has been regulated in the past.⁷² The Court held the improved operation of a State’s airports qualified as a legitimate public purpose, and because there was not a more moderate course of action to serve State’s interest in the proper management of the airport, that legislation was not unconstitutional.⁷³

Applied here, even if substantial impairment is found, water utility rates are highly regulated. Thus, the court might find the impairment on the contract permissible as water providers “[play] in a field subject to many regulations.”⁷⁴ It is unclear in *Wayne County* whether heavy regulation reduces the level of impairment or makes a substantially impaired contract permissible. In any case, it appears the more heavily regulated the industry the more a court will be willing to allow a contract to be impaired by legislation.

Detroit could argue they have a legitimate public purpose in maximizing the amount of water payments collected to the amount owed on those payments and in providing affordable water utilities to its residents—especially those who live near or below the Federal poverty level. However, it is unclear whether there would be a more moderate course of action to achieve those interests. Perhaps a court would find a local tax separate from the water rate would be less drastic as it would not impair the GLWA contract. Additionally, it is unclear how much deference a local ordinance would receive as compared to state legislation. Like *Trust Co*, Detroit’s self-interest would be at stake,⁷⁵ however a local municipality might receive more deference than

a State legislature as they are even more attuned to local concerns. On the other hand, because a municipality might have more at stake than a State in a costly contract, given their relative size and ability to handle and absorb costs, a court could give even less deference.

6. The Headlee Amendment does not limit a municipality's ability to adopt income rates.

When one raises the possibility of a water rate that accounts for household income, some opponents respond by arguing that the Headlee Amendment of the Michigan Constitution prohibits such a rate.⁷⁶ This report evaluates the validity of that objection. We conclude that the Headlee Amendment does not apply at all to income rates. Even if the Headlee Amendment applied, income rates would mostly likely be considered fees, not taxes, and therefore would not require voter approval.⁷⁷

6.1. Background of the Headlee Amendment and Section 31

The Headlee Amendment added sections 25-34 to Article IX of the Michigan Constitution.⁷⁸ The amendment was a response to a taxpayer revolt of sorts. In general, the Headlee Amendment attempted to limit the ability of state and local governments to tax their citizens.

With regard to the debate about user fees versus taxes, section 31 is of most relevance. It states in full (emphasis added):

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. If the definition of the base of an existing tax is broadened, the maximum authorized rate of taxation on the new base in each unit of Local Government shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the General Price Level from the previous year, the maximum authorized rate applied thereto in each unit of Local Government shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the General Price Level, as could have been collected at the existing authorized rate on the prior assessed value.

The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment.

Section 31 is simple: subject to express exceptions (taxes that generate revenue to service debt), units of local government ("municipalities") cannot impose a tax without first obtaining voter approval. The main question that arises is, how do we know whether a municipality has imposed a tax that is subject to Section 31's voter approval requirement?

A tax is one way to raise revenue for local government. Local governments can only impose a tax if the state authorizes them to impose such a tax. In Michigan, all municipalities can impose property taxes. A small handful of municipalities can impose income taxes.

Other ways that municipalities raise revenue include: leasing or selling government-owned property; transfers from federal or state government; grants; and various kinds of charges or fees.⁷⁹ Municipalities' attempt to charge fees (as well as special assessments) is what has caused Headlee Amendment litigation.

In terms of water, sewage, and stormwater rates, the main case to interpret Section 31 has been *Bolt v Lansing*⁸⁰, which is described at greater length below. *Bolt* created a three criteria test to apply to a municipal charge to determine whether it is really a fee or tax for purposes of Section 31. If it is a tax, then voter approval is necessary. If it is a fee, then there is no need for voter approval.

6.2. An income-based water rate scheme does not trigger Section 31 at all. Therefore, there is no Headlee Amendment or Bolt issue to address.

Section 31 applies only to situations where, without a vote, the unit of local government either (1) "lev[ies] a tax" not authorized by law, or (2) increases the rate of an existing tax authorized by law.⁸¹ When a municipality charges certain residents for water using an income rate, while continuing to charge the remaining residents based on an alternative rate, neither the income-based charge nor the other charge triggers section 31 at all because that municipality has neither levied an unauthorized tax nor increased an authorized tax. The text of the constitution is clear.⁸²

In other words, where residents have been paying a municipal charge for decades, there is no Section

31 issue if the municipality decides to rearrange the amount charged without charging anyone more than it did before. Nor should there be an issue if a municipality did charge certain homeowners more to account for any lost revenue attributable to the income rate.

6.2.1. When a municipality decides to employ an income rate for certain residential households, there is no “charge”. Nothing is levied. Therefore, Section 31 does not apply.

For Section 31 to apply, a municipality must levy something. It must charge residents for some good or service. The following hypothetical scenario will illustrate why adoption of an income rate does not create a levy or charge that triggers Section 31. It should be noted that this is an extremely simplified hypothetical intended simply to illustrate the points being made.

HYPOTHETICAL

A municipality has 10,000 households. For the last ten years, the annual revenue need for the municipal drinking water system has been approximately \$12 million. That includes not only the actual cost of debt service and operation & maintenance but also a modest profit margin that promotes sustainability and resilience. To recover its cost, the municipality has charged each household an average of \$100 per month (some pay more, some pay less depending on how much water they use). The municipality has usually recovered approximately \$9 million per year because 25% of households cannot afford to pay their water bill at all. The municipality decides to continue to charge an average of \$100 per month to the 75% of households who can afford to pay, which charge is based on traditional rate formulas. In order to recover more of its total revenue need, the municipality decides to adopt an income rate for the 25% of households who historically have been unable to pay. Application of that income rate will yield an average monthly bill of \$50 for qualifying households. Based on that change, the municipality forecasts that it will recover \$10.5 million instead of \$9 million.

When, based on the income rate, the municipality charges an income-rate eligible household less than what it used to pay, the municipality has not charged or levied anything. When based on the alternative rate the municipality charges a household ineligible for income rates no more than what it used to pay, again, the municipality has not charged or levied anything.⁸³

Also, where the municipality adopts the income rate primarily to recover more of its revenue need, and not to embark on a new capital or non-capital project, then

there is no new item or service to pay for through a charge or levy. The municipality is merely recovering more of its revenue need to pay for all the capital projects and services it has already routinely been paying for. The cases that interpret Section 31 turn on whether the municipality was charging residents either for the first time for some new item or service or more than they were charged before for a new or materially altered item or service.⁸⁴ No court has ever held that Section 31 is implicated when a municipality merely rearranges its rate allocation to recover more of its revenue need.

Finally, the practice of charging residents for drinking water by generating individual water bills from a water rate is long-lived, ongoing, and recognized universally as a fee. By adjusting the rate or the water bills in order to better meet the revenue need, the municipality does not suddenly levy a tax. If it did, any increase to rates or bills would be subject to Section 31 scrutiny.

In a variation on the hypothetical above, if the municipality needed to charge certain households more to make up for lost revenues attributable to application of the income rate, one might argue that the risk of the Headlee Amendment applying would increase. The argument would be that the increase in the charge is a tax levied without authorization. Still, the charge increase is not for a new program or infrastructure item, and the increase is a small part of an overall charge that already existed, was regarded as a fee, and which no one ever claimed was or could be a tax.

However, when there is an increase to a charge for some households that is attributable to lost revenues from application of the income rate, one can more easily argue – at least in the abstract – that something new is levied. For that reason, the Headlee analysis may be triggered, though as we explain below, it likely would not result in a finding that the increased charge is a tax.

6.2.2. Drinking water charges are not authorized taxes. Therefore, when a municipality decides to employ an income rate for certain residential households, even if monthly bills increase for other households, there is no increase to an authorized tax that triggers Section 31.

For Section 31 and *Bolt* to apply to an increase to a tax authorized by law, there has to be a tax authorized by law. For increases to taxes authorized by law, there is never a question about whether a charge is a fee or a tax. It must be a tax authorized by law to begin with so

that the only remaining question is whether there was truly an increase to that tax without voter approval.

Drinking water charges are not authorized taxes such as property tax or local income tax. There is no law that authorizes municipalities to levy special taxes for drinking water. Therefore, an alteration to a drinking water rate that makes residents pay more than what they used to pay would not be an increase to a tax authorized by law that triggers Section 31 scrutiny.

This is likely true even if the municipality increases bills for some to make up for the provision of income-based discounts or caps to others. Again, because drinking water charges are not already authorized taxes, an increase to the charge for some is still not an increase to a tax authorized by law.

6.3. Even if Section 31 is triggered, a water rate based on household income is a fee, not a tax, based on application of the Bolt test.

Income rates do not trigger a Section 31 analysis. Hypothetically, even if they did, income rates would be considered fees after application of the *Bolt* criteria.

The facts of *Bolt* are complex. Appendix A provides a detailed factual summary. Simply stated, Lansing needed to address its combined sewer overflow problem. To do so, it decided to separate its remaining combined sewers. The combined sewers to be separated were located in a particular area of Lansing. To pay for the separation, Lansing adopted a stormwater charge that it claimed was a user fee. All Lansing residents had to pay the charge even though only a portion of the residents lived in the area where combined sewers would be separated. A resident who was charged but who lived outside the separation area sued the city for imposing a tax without voter approval in violation of the Headlee Amendment. The case made its way to the Michigan Supreme Court which ruled in favor of the resident.

To determine whether a municipality had violated Section 31 by disguising a tax as a fee to avoid getting voter approval, the Michigan Supreme Court used prior case decisions about fees and taxes and formulated a three-criteria test to determine whether a municipal charge was a fee or a tax.⁸⁵

- A user fee serves a regulatory purpose rather than a revenue-raising purpose.
- A user fee is proportionate to the necessary costs of the service.
- A user fee is voluntary in that property owners are able to refuse or limit their use of the service.

6.3.1. Income rates do not primarily raise general fund revenue and are proportional. As such, charges that result from them are fees.

In *Bolt*, the first criterion used to distinguish a fee from a tax is that the charge at issue should primarily serve a regulatory purpose rather than a revenue-raising purpose.⁸⁶ The second criterion is that, to be a user fee, the charge must be proportionate to the cost of service. Courts often evaluate the two criteria together because they are linked. When a charge vastly over-delivers on cost of service recovery, it is seen both as being out of proportion with the good or service delivered and as being primarily for the purpose of raising revenue to be used by the municipality *for other things*.

First, according to *Bolt*, charges should not primarily compensate the municipality for capital expenditures when the resulting infrastructure will significantly outlast the cost recovery period. The *Bolt* court made this pronouncement in response to the fact that the Lansing stormwater charge would go to fund a significant percentage of the infrastructure required to implement the combined sewer overflow mitigation plan. In that sense, a key aspect of the *Bolt* decision that is distinguishable from most drinking water rate design scenarios is that *Bolt* was about raising capital for new infrastructure and services. To further explain, the Michigan Supreme Court in *Bolt* quoted from the court of appeals:

No effort has been made to allocate even that portion of the capital costs that will have a useful life in excess of thirty years to the general fund. This is an investment in infrastructure that will substantially outlast the current “mortgage” that the storm water charge requires property owners to amortize. At the end of thirty years, property owners will have fully paid for a tangible asset that will serve the city for many years thereafter. Accordingly, the “fee” is 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.

Therefore, a charge is vulnerable to being considered a tax if it will fund a significant amount of infrastructure that is designed to last longer than the cost recovery period for that infrastructure.

An income rate does not in and of itself primarily fund infrastructure. The primary purpose of an income rate is better cost of service recovery. In the municipalities that would employ income rates, that cost of service already exists and consists of a combination of debt service, operation, maintenance, salaries, and small to moderate

capital expenditures. Unlike the enterprise fund in *Bolt*, there is nothing about the design of an income rate that serves the purpose of significant capital investment for new or modified infrastructure.

Additionally, to the extent that the purpose of an income rate is better cost of service recovery, then income rates fulfil the regulatory purpose criterion so long as the drinking water system itself is investing in construction, operation, and maintenance that responds to regulatory requirements. The Safe Drinking Water Act requires water systems to deliver potable water. It does so primarily by limiting the concentration of contaminants in finished drinking water. Water systems must monitor their water for contaminants and treat the water to ensure that they meet the contaminant limits. When a water system takes out debt to construct infrastructure, pays staff to operate the waterworks, pays laboratories to analyze water samples, etc., the water system is engaged in activity that has a regulatory purpose. When that same water system charges residents in its jurisdiction to conduct those activities, those charges are to fund in large part a Safe Drinking Water Act-based regulatory purpose and not some other service like parking, emergency response, or policing. If an income rate improves cost recovery for a system that is responding to regulatory requirements, then it furthers the regulatory requirement. If an income rate causes the system to lose revenue, then it certainly cannot be accused of having more of a general fund revenue-raising purpose than a regulatory purpose.

Second, charges imposed should roughly correspond to the benefits conferred. The charge should apply to those who benefit from the item or service the charge is designed to pay for.⁸⁷ In *Bolt*, all of Lansing's residents were asked to pay a charge that would benefit only a quarter of the residents. In *Jackson County*, the defendant city described how the storm-water management services would improve the publicly accessible rivers, but failed to explain how each charged household's parcel would benefit.⁸⁸

Instead of asking everyone to pay to benefit a few, income rates benefit each charged household as well as the entire base of ratepayers. Income rates allow each household to contribute to cost of service recovery. When cost of service recovery is improved, everyone benefits because the water system is more fiscally stable. On the whole, fiscally stable water systems have less reason to significantly raise rates. Under an income rate scheme, the municipality charges in a way that allows all to contribute, and all benefit from the broader and larger contribution to the system's cost recovery.

Also, income rates, like alternative rates, are designed to provide drinking water to each household. There is

nothing about an income rate that takes away from that direct benefit to individual households.

One could argue that in a variation of the hypothetical above, if a municipality had to charge some households more to make up for lost revenues attributable to application of the income rate, there would be a lack of proportionality between the charge and the service provided. The argument would be that households to which the income rate does not apply now have to pay more to make up for lost revenues attributable to the income rate but get no additional or different water service.

However, in Michigan ratemaking cases, the courts have held that municipalities that develop charges do not have to treat everyone precisely the same. So long as the differentiation has a reasonable basis, it does not matter if it was not developed with "mathematical nicety" or that it results in "some inequality".⁸⁹ In other words, according to Michigan law, the fact that certain residential households will pay less than other households does not mean that those who pay less are not paying in proportion to their burden on the system or in proportion to the benefits they receive. Cost of service is one factor, but other factors to be considered include "the purpose for which the service or product is received, the quantity or amount received, the different character of the service furnished, the time of its use or any other matter which presents a substantial difference as a ground of distinction."⁹⁰ Proportionality, then, is not a strict equation where the inputs must exactly match the outputs. Michigan law allows for leeway.

Even if the increased charge to those who are not eligible for an income rate is considered a subsidy, subsidies are normal. As a practical matter, cross-subsidization occurs in every water system. Some households are physically closer to the water plant than others. However, the bills for the closer households are not necessarily less than those for the further away households. No one raises issues with this scenario even though, technically, we can consider the more proximate households to be subsidizing the more distant households by being billed according to the same water rate despite burdening the system less.⁹¹ Some neighborhoods may require more water main repair than others, but the utility does not bill the households in those neighborhoods more. Instead, those costs are spread throughout the rate base. No one complains that the households in neighborhoods that do not need as much repair are subsidizing the households in repair-heavy neighborhoods. Although Michigan law allows for reasonable differentiation within a customer class, water systems differentiate already in other contexts.

6.3.2. The third Bolt criterion is voluntariness. There is no compulsion to receive public drinking water; therefore, income rates yield charges that are fees.

The *Bolt* opinion states that “[o]ne of the distinguishing factors of a tax is that it is compulsory by law, ‘whereas payments of user fees are only compulsory for those who use the service, have the ability to choose how much of the service to use, and whether to use it at all.’” [citations omitted].⁹²

The *Bolt* court concluded that the stormwater charges were compulsory, not voluntary. It held that “[t]he property owner has no choice whether to use the service and is unable to control the extent to which the service is used.”⁹³ The court considered the argument that landowners could alter their land use by minimizing its impervious square feet. However, the court decided that this was “tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property.”⁹⁴

Some years later, the court in *Jackson County v City of Jackson* made similar conclusions about voluntariness.⁹⁵ In *Jackson County*, the City of Jackson shifted the way it paid for stormwater from general fund taxation to utility-based user fees. The City of Jackson’s new stormwater utility charged parcel owners based on the amount of impervious surface on the parcel, and provided partial credits either for removal of impervious surface or for certain stormwater management practices. For the court, the fact that no landowner could receive a 100% credit indicated that the charge was compulsory since there would always be some minimum amount to pay. Also, property owners would have to make stormwater management investments to earn the credits so that either way, they were compelled to pay something.

In *Lapeer County Abstract & Title Co v Lapeer County Register of Deeds*,⁹⁶ the court considered a Headlee Amendment challenge to a county deeds office’s imposition of a fee for copying documents. The court held that where a municipality charges for a good or service, the charge cannot be a tax largely because the transaction is voluntary.

The common understanding of a “tax” is that it involves an essentially mandatory assessment imposed by a governmental entity either on property owned by a party or on a transaction engaged in by a party. The voluntary sale and purchase of copies of records from a register of deeds office simply does not involve the imposition of a tax. Defendant is not acting as a governmental entity imposing a mandatory assessment on a transaction when it requires the payment of \$1 a page for providing copies of records to members of

the general public; rather, it is simply acting as the seller in the transaction.⁹⁷

Unlike stormwater management services like the ones in *Bolt* and *Jackson County*, drinking water rates are not compulsory. Neither income rates nor alternate rates require anyone to purchase water.⁹⁸ The *Bolt* court itself differentiated between stormwater management services and provision of drinking water by citing a Michigan Supreme Court case from 1876:

The water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water. No one can be compelled to take water unless he chooses, and the lien, although enforced in the same way as a lien for taxes, is really a lien for an indebtedness, like that enforced on mechanics’ contracts, or against ships and vessels.⁹⁹

Absent a law that compels a household to connect to a public water system, technically households are free to purchase or not purchase drinking water. If a household can disconnect from a drinking water system so as to not incur a bill, the voluntary criterion weighs in favor of a drinking water charge being voluntary. That a drinking water charge is derived from an income rate or some other rate does not matter.

Even if a charge is deemed to be involuntary, it can still be considered a fee and not a tax. The *Bolt* criteria must be considered in their totality. A charge need not fully satisfy all three to be considered a user fee.¹⁰⁰ Various cases interpreting Section 31 in the context of utility services have concluded that, even if one assumes without further investigation that the charge is involuntary, they can still conclude that the charge is a fee and not a tax because the first and second criteria weigh in favor of it being a fee.¹⁰¹

7. Conclusion

In Michigan, there are strong arguments in favor of water systems’ ability to employ income rates to try to more effectively meet their revenue need. Neither Michigan’s ratemaking standards nor the Headlee Amendment present a serious obstacle. Also, income rates for drinking water would be in line with what municipalities have already done with regard to other municipal services.

There would be even more certainty if there were a state law expressly authorizing income rates for drinking water. However, given the laws as they exist, and for the reasons provided, income rates for drinking water are most likely lawful.

Appendix A: Factual summary of the Bolt case taken from David G. Pettinari Michigan's Latest Tax Limitation Battle: A Tale of Environmental Regulation, Capital Infrastructure, and the "Will of the People", 77 U. Det. Mercy L. Rev. 83, 123-128 (1999)

The amount of pollutants discharged into Lansing's Grand River Basin is regulated by the Environmental Protection Agency (EPA) and the Michigan Department of Environmental Quality (MDEQ), formerly known as the Michigan Department of Natural Resources (MDNR). Both agencies regulate the discharge according to the Federal Water Pollution Control Act of 1972 (WPC) as amended, and the Clean Water Act of 1987 (CWA). In addition, the MDEQ controls individual compliance with federal pollutant discharge regulations through the issuance of and compliance with a National Pollutant Discharge Elimination (NPDES) Permit. The city of Lansing was issued its original NPDES permit from the MDNR on June 30, 1977. One requirement of the NPDES permit was that the city submit a plan for implementing a Combined Sewer Overflow (CSO) Control program within one year.

The city-funded transportation, collection, and treatment of sewage associated with its NPDES Permit with a Sewage Enterprise Fund. Revenue for the fund was collected from user fees placed on all water consumption in the city. The fees were collected by the Lansing Board of Water and Light via citizens' water bills. The fund obtained additional revenue by charging industrial and commercial customers for effluent sampling.

In September of 1978, the city was cited by the MDNR for failure to submit the plan for its CSO program. The city finally submitted a plan in mid-1979. In August, 1979, the city was cited by the MDNR for numerous NPDES permit violations. Among these violations was the excess discharge of raw sewage resulting in a failure to control combined sewage and stormwater overflows. In conjunction with these violations, the MDNR informed the city that it was considering prohibiting any new residential or commercial sewer connections within the city limits.

In response to both the citations and the impending ban on sewer connections, the Lansing City Council began the hearing process on the CSO program. Following a public hearing, a CSO program was adopted in April, 1980. The program called for facilities improvements in two phases. Among the facilities improvements recommended in Phase One were the construction and rehabilitation of several pump stations and interceptors, rehabilitation of the sewer system, and improvements to the Wastewater Treatment Plant. Phase Two called for a series of long-term improvements.

The city completed Phase One of the program between 1983 and 1989. The improvements were financed through

federal and state grants. During Phase One, a bifurcated sewer system was installed to service some of Lansing's residents. Following the completion of Phase One, the city of Lansing was found to be in compliance with its NPDES permit. However, in 1987, the MDNR submitted a public notice to the city's NPDES permit requiring the city to implement Phase Two by December 31, 1991 or again be in violation. The city chose to contest the 1987 notice. In 1989, the city successfully negotiated with the MDNR to reduce the scope of Phase Two.

A public hearing was scheduled on the CSO Project Plan. At the hearing, a consultant hired by the city presented three plans for completion of the CSO Project. The Lansing City Council chose to pursue Alternative Plan One, which called for the separation of the city's remaining combined sanitary and storm sewers. At the time, no additional federal or state grants were available to fund the improvements. In December of 1991, the city council adopted resolution No. 745, which distributed the cost of the CSO Program between the city's Sewage Enterprise Fund and, on an interim basis, the city's General Fund. Resolution No. 745 mandated that fifty percent of the operational cost of the CSO Program be funded through the Sewage Enterprise Fund. In May of 1993, the MEDQ issued an NPDES permit requiring implementation of Phase Two of the CSO project according to a specified construction schedule.

In 1994, the city formed an Ad Hoc Committee to establish the means of funding the completion of the CSO program. In October, 1995, the Lansing City Council, after receiving the Ad Hoc Committee's recommendations, enacted Ordinance No. 925, which established the Stormwater Enterprise Fund. The ordinance provided that, all property owners using the city's stormwater system pay a user fee toward the fund. The user fee would be used to support the cost of the stormwater utility. The fee was to be based upon a formula that estimates the runoff attributed to each of the city's parcels of land. The fee for residential parcels of land of two acres or less was based on a flat rate. The fee for residential parcels greater than two acres and for commercial and industrial parcels, was obtained by multiplying the parcel's undeveloped area by a runoff factor of 0.15 and its developed area by 0.95. Thus, according Resolution No. 745 and Ordinance No. 925, the operational cost of the CSO Control Project was to be funded by the Sewage Enterprise Fund, which consisted primarily of revenue obtained from a fee levied on water usage and the Stormwater Enterprise Fund, which was to consist of revenue obtained through an assessment on

landowner's property based on an engineering formula designed to calculate stormwater runoff.

Ordinance No. 925 allowed property owners to appeal their assessment and reduce or eliminate the stormwater service charge levied on their property. Through the appeal process, property owners could have the charge reduced by creating their own stormwater retention system, or eliminated (with the exception of a small availability charge) by proving that their property was sufficiently concave to naturally contain anticipated amounts of precipitation.

The city began to assess the stormwater service charge in December, 1995. Alexander Bolt was charged \$59.83 for the stormwater service associated with his property. In March, 1996, Bolt filed a complaint with the Michigan Court of Appeals, claiming that, because the stormwater service charge was not enacted subject to a vote of the city's electors, it was an unconstitutional local tax per Article 9, Section 31 of the Headlee Amendment. Amicus curiae briefs were filed by the Michigan Municipal League and the Lansing Regional Chamber of Commerce in support of the ordinance and by numerous parties in support of the plaintiff.

Appendix B: Application of MCL 123.141 (extraterritorial sales of water) to Great Lakes Water Authority and Detroit Water and Sewerage Department

There are questions about whether and how MCL 123.141 applies at all. Specifically, given that in southeastern Michigan there is a regional entity called the Great Lakes Water Authority that delivers water wholesale to customer municipalities, it is not clear whether MCL 123-141 or some other ratemaking law applies.

In its entirety, the text of MCL 123.141 states:

- (1) A municipal corporation, referred to in this act as a corporation, authorized by law to sell water outside of its territorial limits, may contract for the sale of water with a city, village, township, or authority authorized to provide a water supply for its inhabitants.
- (2) The price charged by the city to its customers shall be at a rate which is based on the actual cost of service as determined under the utility basis of ratemaking. This subsection shall not remove any minimum or maximum limits imposed contractually between the city and its wholesale customers during the remaining life of the contract. This subsection shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state. This subsection shall take effect with the first change in wholesale or retail rate by the city or its contractual customers following the effective date of this subsection. Any city that has not adjusted rates in conformity with this subsection by April 1, 1982 shall include in the next ensuing rate period an adjustment to increase or decrease rates to wholesale or retail customers, so that each class of customer pays rates which will yield the same estimated amount of revenue as if the rate adjustment had been retroactive to April 1, 1982. A city that is subject to section 5e of Act No. 279 of the Public Acts of 1909, being section 117.5e

of the Michigan Compiled Laws, shall begin proceedings to determine rate changes pursuant to section 5e(b) of Act No. 279 of the Public Acts of 1909, being section 117.5e of the Michigan Compiled Laws.

- (3) The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed the actual cost of providing the service.
- (4) This act shall not apply to a jointly operated water system or authority that supplies raw untreated water to 2 or more municipalities.

Exemptions

Based on the plain text of the statute, one could argue under part (4) that the Great Lakes Water Authority ("GLWA") and the Detroit Water and Sewerage Department ("DWSD") would be exempt from the requirements of parts (2) and (3). Here, part (4) would be read as exempting a jointly operated water system—like the Detroit water system under DWSD and GLWA¹⁰²—or suppliers of untreated water to two or more municipalities. However, it is unclear whether the relationship between DWSD and GLWA would be considered "jointly operated" as envisioned by the statute. In June 2015, DWSD entered into several agreements with GLWA which ultimately resulted in DWSD leasing their water service authority and infrastructure to GLWA, while DWSD acts a limited agent for GLWA within the City of Detroit for rate setting and billing, collection and enforcement of payments.¹⁰³ Given that GLWA has ultimate authority over the water infrastructure in Detroit and surrounding communities and even has final say on the few duties of DWSD, which are only within Detroit, it's unclear if this relationship would be considered a joint operation.

One might also argue that without a comma the statute is best read as exempting a jointly operated water system, or jointly operated water authority, where both system or authority must supply raw untreated water to two or more municipalities. Thus, it is unclear whether the “or” in part (4) separates the two types of providers which are exempt—a jointly operated water system, and an authority supplying raw untreated water—or whether the provision is read as dictating both the system or authority must supply untreated raw water to two or more municipalities. If the statute is understood as the second reading, Detroit would not be exempt as GLWA and DWSD operates to provide treated drinking water to residents of Detroit and other municipalities.¹⁰⁴

Part (2) states that the provision “shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state.” Based on this language, one might argue the requirement for actual cost of service in the preceding sentence applies to a number of water systems regardless of whether they purchase water from an outside system. They would argue that the actual cost of service requirement applies to a water provider in Detroit as they serve more than 1% of the population. However, in that case, Detroit would be providing water directly to inhabitants, not “customers” as understood by part (2). In part (2), “customers” seems to mean cities, villages, townships or authorities who go on to provide water to individual residents. This is supported by the fact that part (2) follows part (1), which authorizes the sale of water from a municipality to a city, village, township or authority. The parallel construction suggests that those municipal entities are the customers part (2) is referring to. Further, part (3) specifically mentions the retail sale of water to individual inhabitants by the customers of part (2). This suggests part (3) is concerned with the sale of water to individuals, and part (2) deals with the sale of water to municipalities. Thus, the exemption in part (2) would not affect a large-scale service provider selling directly to individuals within its township because part (2) deals with the sale of water to municipalities and authorities, thus the provision would not apply regardless of the number of residents within the territory.

For example, part (2) would apply when a large municipal corporation, serving more than 1% of the population, sourced its own water and sold that water outside of its territorial boundaries. Part (2) would not apply when that same municipal corporation when it sold water to residents within its territorial boundaries, as residents within territorial boundaries are likely not the “customers” as envisioned in part (2), even if those residents comprise more than 1% of the population. If that same municipal corporation was smaller and serviced less than 1% of the population, part (2) would

not apply to any sales within its boundaries for the same reason above. Additionally, part (2) would not apply to sales to customers outside the municipality’s territorial boundaries as the part (2) exemption would apply.

Applicability within territorial limits

If we assume Detroit would not be exempt under part (4), there is still uncertainty as to whether the statute limits how Detroit can charge Detroit water users. The provision at issue was passed within Act 34 of 1917: Water Furnished *Outside* of Territorial Limits. Likewise, the preamble states the Act was passed to provide authority for municipal corporations to “furnish water *outside* their territorial limits, to sell water to *other* municipal corporations [and]. . .to contract. . .[for] the sale of water in such *outside* territory.”¹⁰⁵ Thus, before even reaching the text of MCL 123.141, the Act indicates its general purpose is to provide laws for the sale of water *outside* a municipality’s territory. Additionally, within the provision itself, part (1) addresses sales of water *outside* territorial limits.¹⁰⁶

No court has spoken directly to the issue of whether MCL 123.141 applies to sales within a municipality’s territorial bounds, suggesting the text might be clear on its face in that it only applies to sales outside territorial limits. It could also mean the precise issue hasn’t arisen yet. The current case law under MCL 123.141 deals with the sale of water outside of territorial limits to the residents within another municipality,¹⁰⁷ to the other municipality itself,¹⁰⁸ or when a city supplies water to residents within its territorial limits, but the water was purchased from an outside source.¹⁰⁹

Like the last scenario, one could argue that Detroit water is supplied to residents after being purchased from GLWA, an authority outside its territorial boundaries. Although GLWA’s address is within Detroit, an argument could be made that GLWA does not really have territorial limits as it is not associated with a city specifically. Unlike DWSD, which was the Detroit water provider who sold water outside the limits of Detroit, GLWA was never intended to be solely a Detroit water provider, but instead provides water to various town and municipalities in and around Detroit who decide to contract with it. Thus, in a way, GLWA does not really have a “territory” in the traditional sense of having a physical or tangible boundary. On one hand, GLWA’s territory could be whoever they decide to contract with, thus any sale would be within GLWA territory and MCL 123.141 might never apply to them. On the other hand, GLWA territory could be thought as limited to their headquarters or water treatment stations, and every sale is outside of those territories.

Further, the court might not try to decide where GLWA's territory lies, but rather they might find that any municipality that contracts with GLWA is reaching outside its own territorial boundaries to contact for water. In this case, part (3) would limit how a GLWA customer sets its rates because a water provider purchasing its water from an outside territory is considered a customer's under part (2). Indeed, the Michigan Supreme Court in *Oneida* reaffirmed this interpretation in their concise order and reversal, stating that part (3) only applies to municipalities who are contractual customers in part (2) and not simply on a wholesale vs retail distinction.¹¹⁰ In *Oneida*, the wholesale vs retail distinction relied on whether or not municipalities sold to another municipality (wholesale) or directly to individual consumers (retail). The Court clarified that part (3) does not simply apply to retail water providers (e.g., a municipality selling water directly to residents in another municipality).¹¹¹ Rather, part (3) applies to a municipality that is a contractual customer of another municipal corporation, the relationship governed by part (2).¹¹² Thus, if DWSD is understood to be purchasing water from an outside authority—where GLWA would have its own territorial boundary separate from Detroit—Detroit would be considered a customer under part (2), and part (3) would operate to limit how Detroit could charge its residents for water.

Applicability to municipal corporations

There is a question as to whether GLWA is a “municipal corporation” under part (1) and whether MCL 123.141's rate setting requirements would apply to GLWA in their sales to surrounding cities, townships and authorities. MCL 123.141 does not define municipal corporation. Several other statutes in Michigan's code define municipal corporation, although they split as to whether a municipal corporation includes or doesn't include a utility authority, like GLWA. For example, MCL 280.281, a provision in The Drain Code of 1956, and MCL 123.1265, a provision in the Municipal Lighting and Authority Act, both define municipal corporation as including a local utility authority. However, MCL 456.181, a cemetery corporations statute, and MCL 691.1401, the Uniform Collaborative Law Act, both explicitly define municipal corporation as including county, city, township, or village. These two provisions are silent on whether or not agencies or utility authorities are included. Interestingly, MCL 691.1401 actually defines government agencies separately and does not include that they might be municipal corporations in that definition.

An argument could be made that the statutes that do define municipal corporation as including government agencies are statutes pertaining to public utilities, thus they are the most applicable to the situation here. Therefore, because MCL 123.141 is silent on whether or

not a utility authority would be included as a municipal corporation, other utility related statutes suggest it should be read that way.

Additionally, part (1) states that municipal corporations can contract for the sale of water with a city, village, township, or authority. Given that, at a general level, the statute speaks to entities contracting with other similarly situated entities for the sale of water, part (1) could be understood as drawing a parallel between municipal corporations and those who they can contract with—in other words, a like body contracting with a like body. Therefore, municipal corporations contracting with cities, villages, townships, or authorities could be read as including cities, villages, townships, or authorities within the umbrella municipal corporations.

Further, part (4) mentions certain water authorities providing water to municipalities as being exempt, which suggests some water authorities are not exempt. Applying the cannon against surplusage, one could argue that authority must have some operative meaning. If authorities are not municipal corporations and some authorities are not exempt under part (4), a reading of municipal corporations that didn't include authorities or agencies in part (4) would become meaningless. Thus, because the statute specifically mentions water authorities in part (4), a water authority or agency must be covered by the statute.

Endnotes

- 1 Keith A. Owens, Making water affordable for Detroiters: DWS&D's affordability plan, Michigan Chronicle (website), Feb. 10, 2016, available at <https://michiganchronicle.com/2016/02/10/making-water-affordable-for-detroitersdwsd-director-gary-browns-affordability-plan/>
- 2 City of Novi v City of Detroit, 433 Mich 414, 422 (1989).
- 3 See also this document authored by the University of Michigan Graham Sustainability Institute http://graham.umich.edu/media/pubs/Water-CS-Philadelphia-Tiered-Assistant-Program_0.pdf
- 4 See, e.g., Oxford Charter Township (Oakland Co.), Michigan Code of Ordinances Sec. 62-41; Saugatuck Township (Allegan Co.), Michigan Code of Ordinances Sec. 36-282.
- 5 See, e.g., Paw Paw, Michigan Code of Ordinances Sec. 38-81(b) *Nonresident users of sewer service*. Property outside the boundaries of the village, customers shall be charged 150 percent of the rate established in subsection (a) of this section and an appropriate commodity charge. See also Cadillac, Michigan Code of Ordinances Sec. 42-183 (h) *Charges, rates and fees for nonresidents*. The city has previously found...that the total direct and indirect costs of providing service to users outside the city jurisdiction...equals at least two times the rates and charges imposed on users located in the city.
- 6 See, e.g., City of Novi v City of Detroit, 433 Mich 414 (1989)
- 7 Stockbridge, Michigan Code of Ordinances Section 1 1.3.3.ii.
- 8 Portage: The City of Portage offers a ten percent (10%) discount on water services for persons 65 years of age or older. The discount is applicable only to the customer's primary residence and only to the water base quarterly charge and usage charge for city-provided water. Three Rivers: The City offers a 15% discount to senior citizens 65 or older. [This discount applies only to] the first 1,100 cubic feet of water used. If you exceed 1,100 cubic feet you revert back to the regular rates.
- 9 Norton Shores, Michigan Code of Ordinances Sec. 44-60 Discount for senior citizens. (b) Customers shall be billed in accordance with the senior citizen water consumption discount if they demonstrate...that: (1) The customer is 62 years old or older; (2) The customer lives in, and is the owner of, the premises which receive the water service; and (3) The customer has a household income at or below the amount established by the duly adopted resolution of the city council.
- 10 Harrison, Michigan Compilation-General and Zoning Sec. 25.208 C. Special rates
- 11 Harrison, Michigan Compilation-General and Zoning Sec. 25.414 Special Rates
- 12 http://www.mundytpw-mi.gov/departments/water_and_sewer/index.php
- 13 Norton Shores, Michigan Code of Ordinances Sec. 44-144(b) Customers shall be billed in accordance with the senior citizen sewer discount if they demonstrate...that: (1) The customer is 62 years old or older; (2) The customer lives in and is the owner of the premises which receive the sewer service; and (3) The customer has a household income, as defined by the state Income Tax Act, of less than \$13,000.00.
- 14 Springfield, Michigan Code of Ordinances Sec. 36-115
- 15 Williamston, Michigan Code of Ordinances Sec. 42-75
- 16 <https://detroitmi.gov/departments/office-chief-financial-officer/ocfo-divisions/office-treasury/senior-citizen-solid-waste-discount-information>
- 17 Bloomfield Charter Township (Oakland Co.), Michigan Code of Ordinances Sec. 30-35(e)(8) Property owners meeting the following criteria shall be eligible to receive a full or partial waiver of collection fees:
 - a. An individual that has an annual gross household income of less than or equal to the current year's Federal Poverty Threshold as defined and determined annually by the United States Office of Management and Budget multiplied by a rate of 200 percent and who timely files with the township assessor's office an application for waiver of municipal solid waste collection fees along with proof of annual gross household income from the previous year, shall receive a waiver of all of the municipal solid waste collection fees required by this section for the year for which the application for waiver of municipal solid waste collection fees was filed.

b. An individual that has an annual gross household income of the current year's Federal Poverty Threshold multiplied by a rate of 200 percent to establish the lower limit, and the same poverty threshold multiplied by a rate of 300 percent to establish the upper limit and who timely files with the township assessor's office an application for waiver of municipal solid waste collection fees along with proof of annual gross household income from the previous year, shall receive a waiver of one-half of all of the municipal solid waste collection fees required by this section for the year for which the application for waiver of municipal solid waste collection was filed.

c. The property applying for the waiver of the municipal solid waste collection fees shall have a true cash value (assessment x 2) which is less than \$200,000.00 dollars.

d. The property owner applying for the waiver of the municipal solid waste collection fees shall have a maximum amount in savings/checking of \$10,000.00 or less for each person residing in the homestead.

- 18 Bloomfield Hills, Michigan Code of Ordinances Sec. 17.3-32
- 19 See, Novi, Michigan Code of Ordinances Sec. 16-75; Menominee, Michigan Code of Ordinances Sec. 18-28; Sylvan Lake, Michigan Code of Ordinances Sec. 54-90; Farmington Hills, Michigan Code of Ordinances Sec. 14-9.5; Farmington, Michigan Code of Ordinances Sec. 16-34.5.
- 20 Detroit, Michigan Code of Ordinances Sec. 22-2-54. Note that while this ordinance provides the city with authority to establish such an exemption, it does not lay out the exact criteria for doing so.
- 21 Groveland Township (Oakland Co.), Michigan Code of Ordinances Sec. 2-122.
- 22 Rose Township (Oakland Co.), Michigan Code of Ordinances Sec. 2-161(c) Cost recovery fee schedule exemptions. The following individuals, entities, properties and/or services may be exempt from the adopted fee schedule: (5) Rescue and emergency medical response services within the geographic boundaries of the NOCFA, wherein the individual is a permanent resident of the area served by NOCFA (as demonstrated by driver's license or voter registration information) and the recipient of the service can demonstrate a financial hardship.
- 23 See, e.g., City of Novi v City of Detroit.
- 24 Brittany Park Apartments v Harrison Charter Twp, 432 Mich 798, 804 (1989).
- 25 Mich Const Art VII Sec. 24.
- 26 Id.
- 27 Section 15 from Act 113 of 1869, codified at MCL 486.315
- 28 MCL 71.6.
- 29 MCL 106.6.
- 30 MCL 123.141.
- 31 Novi v Detroit, 433 Mich 414, 427 (1989).
- 32 Plymouth v Detroit, 423 Mich 106 (1985).
- 33 Novi, 433 Mich at 429.
- 34 Detroit v Highland Park, 326 Mich 78, 100 (1949).
- 35 Id.
- 36 Novi, 433 Mich at 427.
- 37 Plymouth v Detroit.
- 38 Detroit v Highland Park, 326 Mich at 101.
- 39 Mapleview Estates, Inc v City of Brown City, 258 Mich App 412, 413 (2003).
- 40 MCL 141.103(e).
- 41 Mapleview Estates, 258 Mich App at 576.
- 42 Seltzer v Sterling Twp., 371 Mich 214, 220 (1963).
- 43 Id.
- 44 See MCL 123.141.

45 §14.3 Inskter Charter.

46 Trahey, 311 Mich App at 582.

47 Id at 597.

48 Id at 598.

49 MCL 123.141 – 144.

50 MCL 123.141.

51 Act 34 of 1917; [http://www.legislature.mi.gov/\(S\(00441f45w3tzstut12m3ic55\)\)/documents/mcl/pdf/mcl-Act-34-of-1917.pdf](http://www.legislature.mi.gov/(S(00441f45w3tzstut12m3ic55))/documents/mcl/pdf/mcl-Act-34-of-1917.pdf).

52 Novi, 433 Mich at 431.

53 This same analysis should apply to local ordinances that appear to link charges to cost of service. See e.g. Detroit City Ordinance 18-15-30 (2017) (“No free service or use of the system, or service or use of the system at less than cost, shall be furnished by the system to any person, firm or corporation, public or private, or to any public agency or instrumentality, including the city and any other municipality.”) It is also true to say that revising these provisions might help because they focus too much on the cost of service to individual system users and not enough on more effectively recovering revenue from individual users to meet the system’s overall cost of service-based revenue need. While this report focuses on the law we have, not the law we should have, it is also true to say that policymakers in Michigan should consider a rate scheme that focuses on cost of service as a limiting principle but that also makes room for public health and socioeconomic considerations.

54 Trahey, 311 Mich App at 597.

55 Plymouth v Detroit, 423 Mich 106, 133-135 (1985).

56 Novi, 433 Mich at 431.

57 Id at 432.

58 Id at 421.

59 Plymouth, 423 Mich at 133-135.

60 Novi, 433 Mich at 420.

61 <https://www.awwa.org/Portals/0/files/publications/documents/M1Ed7LookInside.pdf>

62 Plymouth, Novi.

63 Novi, 433 Mich at 438.

64 MCL 124.282.

65 US Const art I, §10, cl 1.

66 United States Tr Co v New Jersey, 431 US 1, 22 (1977).

67 Id at 1519

68 Id at 1521

69 Wayne Cty Bd of Comm’rs v Wayne Cty Airport Auth, 253 Mich App 144, 150 (2002).

70 Id at 819.

71 Id

72 Id

73 Id

74 Id at 821.

75 United States Tr Co v New Jersey, 431 US at 24.

- 76 Michael Jackman, *Legal blogger: Affordability plan for Detroit water doesn't violate state law*, Metro Times (online) (Sep 3, 2015), available at <https://www.metrotimes.com/news-hits/archives/2015/09/03/legal-blogger-affordability-plan-for-detroit-water-doesnt-violate-state-law>; Marian Swain, *Would a water affordability program for Detroit be illegal?*, American Water Shut-Offs (website) (Mar. 2, 2018), available at <https://americanwatershutoffs.mit.edu/blog/would-water-affordability-program-detroit-be-illegal>; Joe Guillen, *Legal experts: Detroit can reduce water rates for the needy*, Detroit Free Press (online) (Jan. 15, 2016), available at <https://www.freep.com/story/news/2016/01/15/legal-experts-detroit-can-reduce-water-rates-needy/78852696/>.
- 77 Of course, if the Headlee Amendment were the only objection that water systems had, then the path to income-based rates is clear: seek voter approval. Objections to income rates that are focused on Headlee less reveal an intractable legal hurdle and more reveal the lack of political will to address the increasing unaffordability of water.
- 78 Cynthia B. Faulhaber, *"No New Taxes": Article 9, Section 31 of the Michigan Constitution Twenty Years After Adoption*, 46 Wayne L. Rev. 211 (2000); Kevin C. Kennedy, *The First Twenty Years of the Headlee Amendment*, 76 U. Det. Mercy L. Rev. 1031, 1031 (1999).
- 79 Vernor v Secretary of State, 146 NW at 341.
- 80 464 Mich 854 (2001).
- 81 See Jackson Co v City of Jackson, 302 Mich App at 98-99
- 82 County of Wayne v Hathcock, 471 Mich 445, 468-470 (2004)
- 83 Rates and bills tend to rise year on year due to inflation and other increased costs. The stated proposition would apply even if the alternative rate in one year yielded higher monthly bills than in the previous year so long as the increase is not materially attributable to the application of an income rate to the other residential cohort.
- 84 Bolt v Lansing (a new charge imposed on all residents for new stormwater infrastructure that would only benefit some of the residents); A & E Parking v Detroit Metropolitan Wayne County Airport Authority, 271 Mich App 641 (2006) (a new charge imposed on hotels, parking, and limousine companies for access to airport to provide shuttle services); Tobin Group, LLP v Genesee County, 2004 WL 2875634 (Mich App Dec 14, 2004) (not reported) (a new charge to connect new development to county water or sewer system to offset costs of expanding system capacity)
- 85 For an excellent detailed description of the Bolt decision and the principal parties' filings, see David G. Pettinari, *Michigan's Latest Tax Limitation Battle: A Tale of Environmental Regulation, Capital Infrastructure, and the "Will of the People"*, 77 U. Det. Mercy L. Rev. 83 (1999).
- 86 Bolt at 161.
- 87 Bolt at 165.
- 88 Jackson County, 302 Mich App at 102-104.
- 89 Land v City of Grandville, 2 Mich App 681, 690 (1966) (citing Naudzius v Lahr, 253 Mich 216, at 222-223 (1931) (overruled on other grounds)).
- 90 Land, 2 Mich App at 692, citing to Ford v Rio Grande Valley Gas Co, 141 Tex 525, 527 (1943).
- 91 UNC Environmental Finance Center, *Navigating Legal Pathways to Rate-Funded Customer Assistance Programs: A Guide for Water and Wastewater Utilities* (2017), at 18.
- 92 At page 167.
- 93 168.
- 94 168.
- 95 302 Mich App 90 (2013).
- 96 264 Mich App 167 (2004).
- 97 Id at 182.
- 98 See also Page v City of Wyandotte, 2018 WL 6331339 (Mich App Dec 4, 2018) (not reported); Bowers v City of Muskegon, 9 NW2d 889, 891 (Mich 1943) ("The ordinance involved in the case at bar does not impose a tax upon vehicles. It merely imposes a fee for the voluntary use of a particular space for a designated period.").
- 99 Bolt, 459 Mich 152 (quoting Jones v Detroit Water Comm'rs, 34 Mich 273, 275 (1876)). The quote goes on to say, "The price of water is left to be fixed by the board at their discretion, and the citizens may take it or not as the price does or does not suit them."

- 100 Wheeler v Shelby Charter Twp, 265 Mich App 657, 665 (2005).
- 101 Deerhurst Condominium Owners Association v City of Westland, 2019 WL 360725, *6 (Mich App Jan 29, 2019) (not reported) (“the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax”) (quoting Wheeler, 265 Mich App at 666); Bohn v City of Taylor, 2019 WL 360730, *6 (Jan 29, 2019) (also quoting Wheeler).
- 102 <https://www.glwater.org/wp-content/uploads/2018/06/GLWA-DWSD-Infographic-2016.png>.
- 103 GLWA and DWSD Regional Water Supply System Lease.
- 104 <https://www.glwater.org/about/what-is-glwa/>.
- 105 Act 34 of 1917, Preamble; [http://www.legislature.mi.gov/\(S\(owfpxgpdb1ufirfbnmuatwvb\)\)/mileg.aspx?page=getObject&objectName=mcl-Act-34-of-1917&highlight=local%20AND%20unit%20AND%20of%20AND%20government](http://www.legislature.mi.gov/(S(owfpxgpdb1ufirfbnmuatwvb))/mileg.aspx?page=getObject&objectName=mcl-Act-34-of-1917&highlight=local%20AND%20unit%20AND%20of%20AND%20government).
- 106 MCL 123.141.
- 107 Novi v Detroit, 433 Mich 414 (1989).
- 108 Oneida Charter Twp. v City of Grand Ledge, 485 Mich 859 (2009).
- 109 Trahey v City of Inkster, 311 Mich App 582 (2015).
- 110 Oneida.
- 111 Id.
- 112 Id.



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