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Court of Appeals Upholds City of Detroit Storm Water Drainage Fee

11.8.2018

Yesterday, the Michigan Court of Appeals held that the Detroit Water and Sewerage Department (DWSD) storm water drainage charge is a permissible fee and not a tax subject to voter approval under the Headlee Amendment.[1]

Plaintiffs argued that DWSD's storm water drainage charges are a tax requiring voter approval under the Headlee Amendment [2], and approval was neither sought nor obtained. Thus, the fees are unconstitutional. The Headlee Amendment provides in relevant part that:

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...

The Court applied the factors that the Supreme Court established in *Bolt v. Lansing*[3] for determining whether a charge is a fee or a tax. The Court also distinguished Detroit's storm water charges from similar storm water charges found to be illegal taxes in *Bolt* and in *Jackson Co. v. City of Jackson*.[4] The Court held:

- Detroit's drainage charge serves a legitimate regulatory purpose rather than a revenue raising purpose. DWSD is required by state and federal laws to treat storm water in its combined storm water and sanitary sewer system prior to discharge. DWSD was required to invest in significant capital improvements and the drainage charge pays not only for those capital improvements but the operations and maintenance costs necessary to treat the combined storm water.

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- DWSD has always funded its drainage costs through fees and there was no other evidence of a revenue raising purpose outweighing the regulatory purpose of the drainage charge. Unlike the Lansing and Jackson which replaced drainage programs supported by general fund monies with drainage specific charges.
- Detroit's drainage charge is reasonably proportionate to the necessary cost of service. Detroit bases its charges on the amount of impervious surface on a specific parcel of property, which has been found to be reasonably related to the amount of water conveyed to the sewer system. The City does not charge a drainage fee for properties whose storm water flows directly into the Detroit or Rouge Rivers bypassing Detroit's sewer system.
- While Detroit's drainage charge is effectively compulsory rather than voluntary, in that the only way around payment is to not improve the property, a factor consistent with a tax as opposed to a fee, this factor must be considered along with the other factors and does not alone, render the charge a tax as opposed to a fee.

For more information on the Court's decision or DWSD's storm water drainage program affects your Detroit property, please feel free to contact the authors, or other member of Butzel Long's Real Estate Practice Group.

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[1] *Binns, Detroit Alliance Against the Rain Tax v City of Detroit*, No. 337609 (Mich App 2018).

[2] Mich. Const. art. 9, § 31.

[3] 459 Mich. 152 (1998)

[4] 302 Mich. App. 90, 98 (2013).