

***Bolt* Refresher**

Introduction

In December of 1998, the Michigan Supreme Court published its decision in *Bolt v. City of Lansing* (587 N.W.2d 264) in which the Court held that a storm water service charge was actually a disguised tax imposed in violation of the Headlee Amendment to the Michigan Constitution. The Headlee Amendment prohibits a unit of local government from levying any new tax without the approval of a majority of the qualified electors of the unit of local government voting thereon.

Storm Water Service Charge

The City of Lansing adopted an ordinance creating a storm water enterprise fund to finance the separation of a remaining portion of the city's combined sanitary and storm sewers. Under the ordinance, the fund would bear a portion of the costs of a combined sewer overflow control program (the "CSO Program"). The city implemented the CSO Program as part of its attempts to comply with the federal Clean Water Act and the National Pollutant Discharge Elimination System requirements thereunder. The city allocated fifty percent of the costs of the CSO Program over a period of 30 years to the storm water disposal system, which share of the CSO Program costs was to be paid from revenues of an annual storm water service charge. The fee was "imposed on each parcel of real property located in the city using a formula that attempt[ed] to roughly estimate each parcel's storm water runoff." *Bolt* at 267. The ordinance allowed the imposition of additional charges, property liens, and attorneys' fees to collect delinquent fees.

Is it a "Tax" or a "User Fee"?

The city billed Alexander Bolt \$59.83 for his 5,400-square foot property, and Bolt filed suit on the grounds that the ordinance violated the Michigan Constitution. The Court concluded that the fee imposed by the ordinance was a tax and not a valid user fee. The Court based its analysis on the general proposition that a fee is exchanged for a service rendered or a benefit conferred, with some reasonable relationship existing between the fee and the value of the service or benefit, while a tax is designed to raise revenue for the benefit of the public at-large (internal quotations and citations omitted). The Court then reiterated the three primary criteria on which to determine whether a particular charge is a true user fee or a tax. The three criteria are:

1. A user fee must serve a regulatory purpose rather than a revenue-raising purpose;
2. A user fee must be proportionate to the necessary costs of the service and correspond to any benefit conferred by the service; and
3. A user fee must be for a commodity or service voluntarily used.

The Court based its conclusion on several factors, including:

- a. **The fee was not proportionate to the necessary costs of service or benefit conferred.** The Court noted that the fee applied to all of the city's property owners even though 75 percent of the city's property owners were already served by a separated sewer system, many of whom previously paid for system separation through special assessments.
- b. **The ordinance and the fee served a revenue-raising purpose rather than a regulatory purpose.** First, the ordinance and the fee did not fully serve a regulatory purpose. They only addressed storm water runoff and not pollutant elimination, since storm water runoff would not be treated before being discharged into a river. Second, the fund replaced revenues previously provided by general fund revenues from property and income taxes. Third, most of the costs of the CSO Program to be paid by the fee and the fund were for capital improvements, the useful life of which would outlive the 30-year period in which the fee was to be charged and which would benefit the public at-large.

- c. **The fee was “effectively compulsory.”** Property owners had no choice whether to use the storm water disposal system and could not limit the use of the service without giving up rights of property ownership.
- d. **Collection of the fee could be secured by property lien.** The Court recognized that the ability to impose a property lien for unpaid fees would not transform a proper fee into a tax. However, where, as in the *Bolt* case, the fee was disproportionate to the necessary costs of the service and benefit conferred, the ability to lien property to collect the fee supported the conclusion that the fee was actually a disguised tax.
- e. **The fee was billed through the city assessor’s office and was sent with the December property tax statements.**

Key Points

- The *Bolt* decision does not prohibit usage-based utility charges. However, such charges must reflect the actual costs of use, metered with relative precision in accordance with available technology, and such charges may include some capital investment component.
- User fees should reflect the actual cost of use of a service provided, and such fees should be borne by those who stand to benefit from the service financed with such fees.
- User fees should be imposed in connection with a voluntary service, where those intended to use and benefit from such service have some control over whether to use the service.
- User fees should fully serve the regulatory purpose for which they are intended.
- Billing methods for such user fees should be consistent with the method used for other usage-based services.
- The *Bolt* decision gave rise to a number of cases with varied treatment of “user fees” and “taxes.” Caution and a careful analysis should be used when considering a new “user fee.”

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BOLT VS CITY OF LANSING

A Taxing Question for Michigan's Local Governments

By Mark Nettleton

In 1978, Michigan voters adopted the “Headlee Amendment” to the Michigan Constitution. The amendment revised existing provisions and added new ones including an express limitation on the ability of local governments to enact new taxes or increase existing taxes without a vote of the electors. Following the adoption of the Headlee Amendment, taxpayers began to challenge local government fees, such as sewer and water connection fees, on the basis that the fees were invalid and impermissible taxes.

In 1998, the Michigan Supreme Court decided the seminal case, *Bolt v City of Lansing*, to address the “fee” versus “tax” question. Since the *Bolt* decision, local governments have struggled to determine whether proposed or adopted fees would survive a “*Bolt* challenge” by a taxpayer, thus raising a taxing question for local governments.

VALID USER FEE VERSUS AN INVALID TAX

Municipalities frequently charge numerous fees: application fees; permit fees; sewer and water connection fees; cable franchise fees; and commodity fees. In *Bolt*, the Michigan Supreme Court tried to clarify when such fees are valid.

The city of Lansing had, for many years, a combined sanitary sewer and storm water system. During heavy rain events, the combined sewer systems became overwhelmed and untreated or partially treated sanitary sewage flowed into the Grand and Cedar Rivers.¹ The city sought to remedy the overflow by separating the storm sewers from the sanitary sewers. At that time, the estimated cost to separate the two systems was \$176 million over 30 years.² To pay the project cost, the city imposed an annual stormwater service charge on each parcel of property located within the city. The revenue from the charge was expected to pay half of the capital cost of the separation project; the balance of the cost was to be paid from the city's general fund.

The charge was roughly based on estimated stormwater runoff from each parcel and factored in parcel size and the amount of the parcel covered by impervious surfaces: blacktop, sidewalks, patios, and buildings, for example. Residential parcels under two acres were charged a flat fee. The annual charge was included in the city's property tax bill and, if not paid when due, was considered delinquent and then collected as a delinquent tax.

Alexander Bolt, a property owner within the city of Lansing, challenged the annual stormwater fee alleging the fee was an impermissible tax imposed without a vote of the city's electors, in violation of *Headlee*. The Michigan Supreme Court agreed.

In invalidating the fee, the Court noted that a valid user fee is “exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.”³ In contrast, taxes are “exactions which are imposed primarily for public rather than private purposes.... Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will inure to the persons or group assessed.”⁴ The Court held that a valid fee must serve a “regulatory purpose,” but concluded that the city's fee was imposed to raise revenue, as evidenced by the city's intent to use the revenue to pay half of the cost of the project. The Court also determined that the

¹ *Bolt* at 155; ² *Id.*; ³ *Id.* at 161; ⁴ *Id.*; ⁵ See *Graham v Township of Kochville*, 236 Mich App 141 at 155 (1999); ⁶ See *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412 (2003); see also *Graham at v Township of Kochville*, 236 Mich App 141, 155-156; ⁷ See *Lapeer County Abstract & Title Co. v Lapeer County Register of Deeds*, 264 Mich App 167 (2004); ⁸ See *Wheeler v Charter Township of Shelby*, 265 Mich App 657 (2005); ⁹ See *Meadows Valley, LLC v Village of Reese*, Case No. 309549 (Mich Ct App, unpublished opinion, 06/11/2013); ¹⁰ See *Tobin Group LLP v Genesee County*, Case No. 248663 (Mich Ct App, unpublished opinion, 12/14/2004); ¹¹ See *In re Petition for Foreclosure of Certain Parcels of Property v Township of Chesterfield*, Case No. 309229 (Mich Ct App, unpublished opinion, 05/27/2014); see also *County of Jackson v City of Jackson*, 302 Mich App 90 (2013)

amount of the fee was not proportionate to the service provided to those paying the fee because the fee was imposed on properties that were already served by separated storm sewers. Without such a corresponding benefit, the fee is no different than a tax imposed on all property owners. Finally, the Court determined that the fee was not voluntary—Mr. Bolt could not avoid paying the fee.

According to the *Bolt* Court, in order for a fee to be valid and not an impermissible tax, the fee must:

- 1 **SERVE A REGULATORY PURPOSE AND NOT BE IMPOSED SOLELY FOR A REVENUE-RAISING PURPOSE;**
- 2 **BE REASONABLE AND PROPORTIONATE TO THE COST OF THE SERVICE PROVIDED; AND**
- 3 **BE VOLUNTARY—A USER MUST HAVE A WAY TO LIMIT THE AMOUNT OF THE SERVICE USED AND THE FEE INCURRED.**


The Court noted that the three criteria are not to be considered in isolation, and subsequent courts have held that the criteria should be considered “in their totality,” such that a “weakness in one area would not necessarily require a finding that the charge at issue is not a fee.”⁵

WITHSTANDING A *BOLT* CHALLENGE

Since Bolt, numerous challenges to fees have been filed and decided. Courts have upheld mandatory connection to, and connection fees for public sewer and water;⁶ utility debt service fees; fees for copying public microfilm records;⁷ waste hauler fees;⁸ sewer “ready to serve” charges;⁹ and sanitary sewer and public water capital improvement charges,¹⁰ to name a few. Key to upholding these fees are the facts underlying the fee structure. Fees that pay for, or approximate, the municipality’s cost to provide the service to only those customers that benefit from the service, serve both a regulatory purpose and are proportionate. Further, even where payment of the fee is mandatory, such as a sewer or water connection fee, if the customer can regulate its use of the commodity (by using less water, for example), the courts are more likely to determine that the fee is “voluntary” under the Bolt “test.”

Fees are typically invalidated when they are imposed for a revenue-raising purpose, or when the fee is disproportionate to the cost of the service provided.¹¹

CONCLUSION

When enacting new fees or adjusting existing fees, local governments must carefully analyze whether the fee complies with the three-part Bolt test to ensure the fees will not be invalidated. 

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