**IN THE STATE OF MICHIGAN**

**COURT OF APPEALS**

**NICOLA BINNS, JAYNE CARVER, SUSAN MCDONALD, GOAT YARD LLC.,** individually and on behalf of other similarly situated, and **END OF THE ROAD MINISTRIES, INC.**, a Michigan nonprofit corporation, individually and on behalf of other similarly situated,

Plaintiffs

v.

**CITY OF DETROIT**, a Municipal Corporation, by itself and through its **WATER AND SEWAGE DEPARTMENT,** its Agent, the **DETROIT BOARD OF WATER COMMISSIONERS**, and **GREAT LAKES WATER AUTHORITY**.

Defendants.

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**BRIEF IN SUPPORT OF PLAINTIFF'S HEADLEE AMENDMENT COMPLAINT**

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**I. IS DEFENDANTS' "DRAINAGE CHARGE" A TAX IN VIOLATION OF THE MICHIGAN CONSTITUTION'S HEADLEE AMENDMENT, WHERE THE DRAINAGE CHARGE IS A BILLING SCHEME IMPLEMENTED BY DEFENDANTS, TO GENERATE REVENUE BY CHARGING ARBITRARY RATES THAT ARE COMPLETELY UNRELATED TO ANY SPECIFIC BENEFIT OR USE CONFERRED UPON THE PLAINTIFF LANDOWNER?**

Plaintiffs answer "yes."

## STATEMENT OF FACTS

### The Drainage Charge

Defendants approved and implemented a Drainage Charge for at least 20,000 parcels of land that had not previously been charges for any services by the Defendants. (DWSD Letter, August 1, 2016, Exhibit 1). Included in those 20,000 parcels, Defendants began to bill a Drainage Charge on the parcels owned by Plaintiffs herein. (Exhibit 5). Only parcels that have "less than .02 acres of impervious area are exempt from the Drainage Charge." Exhibit 2, p. 2). Defendants utilize information from the City of Detroit's assessor's office, including "impervious area data from aerial photography," to "determine the drainage charge for each parcel." *Id* at p. 3. Defendants set the rate of $750.00 per impervious acre per month as the drainage charge from July 1, 2016 through June 30 2017. *Id* at p. 5. There is no information contained in Defendants publications or materials that explains what data or measurements this $750 rate is based upon. (Exhibits 2, 6).

### Drainage Charge Credits

Under Defendants' Drainage Charge billing scheme, landowners can apply for certain "green credits" to offset the Drainage Charge they are incurring monthly. The credits come in two forms – volume flow credit and peak flow credit. (Exhibit 10, pp 3-4). Regardless of the work done by a property owner to obtain a credit on this charge, they will only be able to obtain an 80% reduction of their bill. *See Id* at pp 5, 10, 11. For example, if a landowner has two storm water practices in place on his/her land, one storm water management practice may entitle the landowner to a Peak Flow Credit, while a second or subsequent storm water practice may qualify a landowner for a second credit. *Id* at 11-13. Defendants Drain Charge Credit system will not allow a property

owner to alleviate itself 100% of the requirements of the Drainage Fee since this 80% reduction maximum is in place. Consequently, there is 20% of this Drainage Fee that is always collectible by Defendants so long as Plaintiffs' land meets the requirements of containing an impervious surface of any kind. *See Id* at p. 14.

**Drainage Charge Bill Adjustments**

There is a second remedy that a landowner, such as Plaintiffs, may take to attempt to lower their drainage charge. A landowner can request a "Bill Adjustment." Again, the landowner is given the burden and the responsibility of taking affirmative action steps to obtain any relief from the Bill Adjustment procedures. See *A Guide to the Drainage Charge Bill Adjustment*, attached as Exhibit 11). This process allows a landowner to attempt to seek a modification to its Drainage Charge bill based upon the fact that the bill is inaccurate. For example, Plaintiffs' properties, which are largely impervious, could be subject to modification through a Bill Adjustment Application. However, "[i]mpervious area adjustments of 435 square feet or less will not be made to a parcel because the calculations used in determining impervious surface areas already provide for an allowance of this amount of area." *Id* at p. 4. As a result, any property owner with less than 435 square feet[1] of impervious surface cannot obtain a bill adjustment to offset the actual permeable nature of their property. *Id*.

**DWSD's Permit Obligations**

In their letter to customers, Defendants cite the need for Combined Sewage Overflow plants (CSOs) and continued compliance with state and federal mandates are some of the reasons

[1] This is the approximate size of a two-car garage. *See A Guide to the Drainage Charge Credit Bill Adjustment*, Exhibit 15, p. 4.

that it is implementing the Drainage Charge. (Exhibit 1). However, the Permit Fact Sheet demonstrates that the State did not requiring the continued planning for construction of CSO facilities because it was concerned that the residents of Detroit did not have sufficient financial resources to fund such a costly capital improvement to Defendants' already failing infrastructure. (Exhibit 4)

**DWSD's Capital Improvement Plan**

For the Fiscal Years 2016 though 2020, the Defendants' Board of Water Commissioners approved a Capital Improvement Program ("CIP") for the Defendant DWSD. *See* CIP, approved March 11, 2015, attached as Exhibit 12. This CIP does not demonstrate that Defendants are spending any additional funds on stormwater treatment sufficient to justify the imposition of the onerous financial costs associated with the Drainage Charge. See p. 6. The Report outlines several capital improvements embarked upon by the Department. See Exhibit 16, passim. However, the Report does not specify any capital improvement costs that are directly associated with any stormwater treatment projects that are underway in Detroit as outlined in Defendants' Drainage Charge documentation and manuals. Specifically, the requirement for construction of CSOs is only listed once in the CIP as one of several components of a combined sewer system project. *See Id* at p. 34.

**Plaintiff Ms. Nicola Binns**

Ms. Binns resides at 518 Marlborough where she pays a drainage charge of $20.36 per month on her "City Residential" class account. This account is Ms. Binn's residential lot and is also billed for water at $2.35 per 1 CCF (approx. 748 gallons are in a CCF) of water for usage on her property. Ms. Binns then pays a monthly "sewage disposal" charge (on the 1 CCF of water

used) to be disposed of for $5.202 per 1 CCf. Exhibit 9 (Binns Invoices). In addition to the Sewerage Disposal fee and water usage fee, Ms. Binns pays an arbitrary $20.36 ($20.36 @ 1 month) for an unknown, unmonitored, uncalculated, and unexplained "drainage charge" for the lot upon which Ms. Binns lives with residential water account service.

Ms. Binns purchased two adjoining lots to her residential lot and is once again charged an arbitrary (and unmonitored, unexplainable, and baseless) amount of $45.00 per side lot for the "drainage charge" with absolutely zero reported usage on parcel reported in 13 months. Ms. Binns' side-lots are homes to rain gardens, vegetable gardens, and water catchment/distribution systems that she maintains in order to benefit from nature's runoff. However, under Defendants' Drainage Charge system, Ms. Binns is given another arbitrarily calculated "Green Credit" on her bill in the amount of $11.25 @ 1 month (unexplained) that drops her bill from $45.00/month down 33.3% to a final bill of $33.75/month/side lot. (Exhibit 9).

It is important to note just how arbitrary and unfounded this "fee" is by pointing out that Ms. Binns is charged a "drainage fee" of 45.00/month per lot to maintain property that is 100% permeable and absorbent, while being charged less money for drainage charges on the lot that measures usage (metered) and upon which her home was built. This demonstrates that the drainage charge is not a fee, for fees need to be based upon any measurable data, such as usage **and** the Drainage Charge as applied to Plaintiff Binns is completely arbitrary in cost when comparable to other lots/bills. *See Id*.

**Plaintiff Jayne Carver**

Ms. Jayne Carver resides at 2476 Field Street in Detroit Michigan. Ms. Carver received a bill from the DWSD in the amount of $111.74 with a bill date of 2/17/17 and a due date of March 16, 2017, after which a late fee of 5% will be applied to the total and shut-off may result if bill

remains unpaid. (See Exhibit 13, Plaintiff Carver's Invoice). This means that if you refute, or refuse to pay, the charges to your side lot bill, the water to your home can and will be shut off. This leave customers, like Plaintiffs with no option than to pay the "charges" for risk of losing the basic human necessity of running water to their main lot for nonpayment on the side lots. *See* DWSD's Collection Rules and Procedure attached as Exhibit 14, p. 9.

**Plaintiff End of the Road International Ministries, Inc.**

End of the Road Ministries ("ETOR") owns a property with a home at 840 Marlborough. The adjoining side lot, 828 Marlborough was purchased to be used as a sustainable vegetable garden.

The garden side lots belonging to Ms. Binns and ETOR are almost entirely permeable, meaning the 99% of the ground soaks up the rainwater leaving the runoff left from the sidewalk plus a negligible amount of impervious ground that is left by no design of the owner, as they feverously attempt to mitigate all runoff water with their eco-progressive rain gardens and water catchment/disbursement systems. One hundred percent of the Landowner's green efforts meet the criteria to earn a "green credit" yet that credit that is far less of a comparable credit at the current 33% total reduction in "drainage charges", thus negating their mutually beneficial efforts to use gardens and catchments in the first place.

**Plaintiffs McDonald and the Goat Yard LLC**

The Goat Yard is located at 95 St. Jean. The property is used as a boatyard, owned and operated by Plaintiffs McDonald and the Goat Yard, LLC. This property is surrounded by open fields to the south and houses the skeletal remains of an old steel brick factory[2]. Plaintiff Sue

[2] Time has left the old brick factory without a roof leaving the rainwater to immediately absorb into the porous ground.

McDonald received a letter in the mail from DWSD on January 25th that informs "Goat Yard LLC" that a drainage fee has been calculated based on the amount of impervious land. This parcel is adjacent to a canal. Broken bits of sidewalk and concrete comprise the remains of the driveway. As this property is located along the shore of the Detroit River, runoff into the Detroit River is the more likely the scenario than run off into Defendants' combined sewer system. The DWSD bill reflects an amount due of $697.50 for the "drainage fee" associated with a parcel of land that does not collect, or produce, runoff that drains into the Defendants' sewer system.

## I. DEFENDANTS' "DRAINAGE CHARGE" IS A TAX IN VIOLATION OF THE MICHIGAN CONSTITUTION'S HEADLEE AMENDMENT.

***Standard of Review***

The issue whether the surcharge is a tax subject to the Headlee Amendment or a permissible user fee is a question of law that we review de novo. *Mapleview Estates, Inc v City of Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003).

***Analysis***

Because it's not a fee that regulates, monitors, meters, or controls usage, Defendants' Drainage Charge is an improperly imposed tax created to charge the electorate without their approval by vote. The Headlee Amendment, 1963 Const, art 9, § 31, provides, in relevant part:

> 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.

Our Michigan Supreme Court has already held that stormwater service charges can constitute a tax levied for purposes of the Headlee Amendment, when there is no reasonable relationship

between the value of the service/benefit and the fee. *See Bolt v City of Lansing*, 459 Mich 152, 158-159; 587 NW2d 264 (1998). In *Bolt*, the City argued that the charge was a user fee, not a tax, and did not implicate the Headlee Amendment. *Id* at 159. The Court disagreed, distinguishing the disputed drainage charge from a sewerage charge that was upheld in *Ripperger*. *Id*. *See also, Ripperger v City of Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954). The Plaintiff in the present case asserts that the DWSD's "Drainage Charge" is a tax and must be immediately declared unconstitutional, its enforcement halted immediately, and all funds collected returned to each Plaintiff/landowner.

When considering whether a charge is a tax or a fee, our Supreme Court used three primary factors: (1) whether the charge served a regulatory purpose (2) if the charge was proportional to the costs of the service; and (3), whether it was voluntary. *See Bolt*, *supra*, at 161-162 (citing *Merrelli v. St. Clair Shores*, 355 Mich. 575, 583-584, 96 N.W.2d 144 (1959); citing *Bray v. Dep't of State*, 418 Mich. 149, 162, 341 N.W.2d 92 (1983). *See also, Ripperger*, *supra* at 686 (citing *Jones v. Detroit Water Comm'rs*, 34 Mich. 273, 275 (1876).

The primary distinguishing factor in *Ripperger* to uphold the charge as a fee instead of a tax was the fact that the property owners could limit their use of the commodity, which was water. *Bolt*, supra, at 162. The Court in *Bolt* opined that the storm water charges to the residents of Lansing were not usage based, because they did not correspond to the benefits to the customer. *Id* at 165. The City of Lansing could not differentiate a benefit to property owners from a general benefit to the public, because the purpose of the charge was to address environmental concerns. *Id* at 166.

Here, the DWSD is addressing the same type of environmental concern. Defendants Drainage Charge does not distinguish between a benefit to the property owners a benefit to the general public. The Court in *Bolt* also found no regulatory purpose for the charge, where the City of Lansing did not consider the presence of pollutants on each property, nor the runoff amount on each property; therefore, the charge could not be considered regulatory, because it was not based on the amount of the service each property required. *Bolt* at 166-167.

The *Bolt* Court reasoned that the third factor of voluntariness was also not met where "the charge lacks any element of volition," reasoning that the customer has no control how much of the service is used. *Id* at 167. ." The Court of Appeals later found that the voluntariness element was not met, even where residents could receive credits of up to 75 percent of the charges incurred by making improvements on property to promote drainage. *Jackson Co v City of Jackson*, 302 Mich App 90, 98; 836 NW2d 903 (2013). Those residents' water could be shut off for non-payment of the charge, and the offset of charge could never reach 100 percent of the total, thereby making it incumbent upon the landowner to either make improvements on the property or pay the charge. *Id* at 100-101, 111-112.

The *Bolt* Court was not convinced by the argument of building less on the property to decrease the amount of impermeable land. *Bolt* at 167-168. The permeable land would be greater, thereby controlling the fee imposed, but that measure of reducing costs is "tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property." *Id* at 168.

In *Jackson*, the city used a formula for computing the charge which estimated the amount of water runoff of each parcel. *Jackson* at 96. Here, the DWSD is not measuring the need for

drainage on each property to calculate the charge. It is merely considering the permeable and impermeable areas of land by satellite. This method does not measure a use that can be denied or accepted by the customer. Rather this charge an attempt by the DSWD to charge and collect revenue and is masquerading as a fee without correlation to usage all.

Here, Plaintiff's, and other Detroit residents', water could be shut off for non-payment of the charge, because it is part of the water bill. The payment of the "Drainage Charge" to DWSD it compulsory, because the charge cannot be separated from the bill. A resident's water could be shut off where he or she does not pay for a system of drainage that the user has no control over. The charge cannot be considered voluntary and must be declared a tax. Plaintiff asserts that the DWSD's "Drainage Charge" is a tax, because it is a revenue raising tactic that was not directly related to any service used.

## RELIEF REQUESTED

This Honorable Court must declare Defendant's Drainage unconstitutional and immediately halt all collections efforts by Defendants of this illegally imposed tax. WHEREFORE, Plaintiffs pray that this Court:

A. Issue a temporary restraining order (TRO), to stop all "drainage charge" collection from Plaintiffs and other similarly situated property owners and schedule an evidentiary hearing for a preliminary and permanent injunction;

B. Provide declaratory relief finding that Defendant's policies, procedures and actions relating to "drainage charge", violate § 31 of Michigan's Headlee Amendment;

C. Refund all moneys collected from Plaintiffs by Defendants, as well as other

members of the Class and other similarly situated landowners.

D. Award reasonable attorneys' fees and costs; and

E. Award any further relief as is just and equitable.

Dated: March 25, 2017

Respectfully submitted,
**REDETROIT EAST COMMUNITY LAW CENTER**

/s/ Lisa C. Walinske

BY:_____

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