

## Tax or fee: Court ruling may impact DWSD stormwater runoff billings

By Kirk Pinho

Is it a tax or a fee?

That's the crux of a recent **Michigan Court of Appeals** ruling regarding stormwater runoff charges that the **Detroit Water and Sewerage Department** is reviewing in light of some city businesses' concerns about a DWSD stormwater runoff charge that hadn't been billed for in years.

The charges, which in some cases were billed retroactively as far back as six years, upset affected commercial property owners this spring when about 1,200 learned the DWSD had mistakenly not assessed them.

Some business owners told *Crain's* in April that they expected to owe tens of thousands of dollars because of what the department has said was a billing oversight uncovered by an internal audit.

### Violation of Headlee?

Published Aug. 1, the appellate court's ruling determined the **Jackson City Council's** 2011 approval of a stormwater management charge on city property owners was unconstitutional because it violates 1978's Headlee Amendment. The amendment, in part, prohibits increasing existing taxes or imposing new ones without a vote of the electorate.

"A true fee confers a benefit upon the particular person on whom it is imposed, whereas a tax confers a benefit on the general public. ... In the present cases, we cannot readily identify any particularized benefit the charge confers on the property owners that is not also conferred upon the general public," the ruling states.

The Jackson charge benefits "not only the property owners subject to the management charge, but also everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street or roadway or across a city bridge, everyone who uses the Grand River for recreational purposes downriver from the city and everyone in the Grand River watershed."

The court also ruled that a 1998 **Michigan Supreme Court** decision, *Bolt v. Lansing*, requires that "a permissible utility service charge is one that "reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component."

The court ruled that there wasn't a close enough relationship between the amount of runoff on a land parcel and the management charge.

The ordinance that imposed the fee for the city's stormwater management system's operation and maintenance is also effectively mandatory, making it a tax instead of a fee, the court's ruling reads.

Before the Jackson council's approval of the charge, the city paid for a variety of services, including street sweeping, catch basin cleaning and yard waste collection with general tax revenues. The stormwater management charge was designed to replace that, according to court documents.

William Wolfson, chief operating and compliance officer and general counsel for the DWSD, said the department is reviewing the implications of the Jackson case.

"It's our intention to look at and apply whatever lessons we think are applicable from that case to our operations," he said. "That being said — and we also have not completed our review — but we do believe there may be some differences in our operation and the city of Jackson."

He declined to elaborate.

### **Opposition grows**

Ken Gold, an environmental law specialist and partner with Detroit-based **Honigman Miller Schwartz and Cohn LLP**, declined to say whether the businesses he is advising will challenge the fees the court, and whether the Jackson case will factor in any possible legal action.

"We've been contacted by more and more people who are extremely irate and upset" about the charges, he said. "There is a real groundswell of opposition and anger."

The department said in an Aug. 29 news release that "runoff charges have appeared on the bills of the majority of (commercial) customers since 1984."

The DWSD has also accepted responsibility for the error.

"It's our fault. We accept responsibility for not doing this the right way the first time," said DWSD spokesman Bill Johnson. "We understand this is a shot to some customers, so we are working with them instead of being confrontational with them."

The charges only affected Detroit businesses because the DWSD is not responsible for stormwater drainage services in suburban communities. They also did not affect residential consumers.

Some businesses have appealed the charges — \$600 per month for each acre of impervious surface, such as parking lots and roofs — but Johnson did not know exactly how many have done so or if any charges have been reduced or erased.

"The department will continue to evaluate each case individually and make the appropriate adjustments, if any, to the customer's bill," Wolfson said.

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