

Detroit City Council waived its attorney client privilege with respect to this memo 10/29/2015

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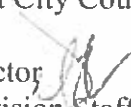
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TO: The Honorable Detroit City Council

FROM: David Whitaker, Director 
Legislative Policy Division Staff

DATE: October 21, 2015¹

RE: Legality of Water Affordability Plan (WAP)

**PRIVILEGED AND CONFIDENTIAL²
ATTORNEY CLIENT COMMUNICATION**

Council has had several discussions of a proposed Water Affordability Plan (WAP) based on ratepayer income, which would hold indigent retail customers harmless for any amount billed above a low threshold.³ In the course of these discussions, it has frequently been asserted that such a rate structure would be illegal in Michigan, as if the objections that have been made reflected an immutable characteristic in the law, rather than concerns that can simply be acknowledged and overcome.

¹ This is a substantively equivalent, revised version of a privileged report originally dated July 16, 2015. Direct references in the previous version to the City of Detroit Law Department's attached September 2006 privileged memorandum on this issue have been deleted, and that memo itself is attached to this version in anticipation of a closed session based on both documents.

² LPD has designated this report privileged because it communicates attorney opinion and information about legal rights and obligations, in a context that is potentially very controversial. Council Members will have the option after reading this report and deliberations to lift the privilege if including this analysis in the ongoing public discussion is deemed advisable.

³ 3% of household income has been suggested by the United Nations.

Summary

LPD respectfully states that the conclusion that such a Water Affordability Plan (WAP) would necessarily be illegal is not warranted under existing law. This report will survey legal authorities to explain and support this legal opinion.⁴ The contrary conclusion appears to be based on an argument that favors both bondholders⁵ and higher income ratepayers, who are much better positioned to pay a fair and equitable share of the costs of service for the regional water and sewer systems. LPD's basic analysis and conclusion can be summarized as follows:

1. DWSD and GLWA legally adjust water and sewer rates based on many factors that affect the costs of providing their services, such as:
 - a. so-called "bad debt" analysis – premised partly on a predetermined percentage of customers expected not to pay billed charges – currently 15%, (a presently unquantifiable number of whom simply cannot afford to pay current charges due to poverty)
 - b. loss of a wholesale customer like Flint;
 - c. over-estimation of water sales to major wholesale customers and retail customers, resulting in revenue shortfalls;
 - d. increased water conservation;
 - e. weather-related factors;
 - f. the need for increased revenue to meet rising costs of maintenance, energy, chemical, labor and other costs to run the system;
 - g. regulatory mandates;
 - h. debt and interest obligations; and
 - i. innumerable other factors that cumulatively affect the systems' revenue requirements.⁶

⁴ As with virtually anything, it is conceivable that a plan could be improperly designed or implemented so as to violate some legal restriction. Moreover, predicting a court's ruling in a specific case is inherently unreliable. But within these normal constraints, a straightforward legal analysis of Michigan law and the basic tenets of the WAP proposed and endorsed by Council in 2005, strongly supports the conclusion that it is legal to include affordability as one element of an equitable, reasonable and lawful water and sewer rate structure. It should be noted that the related policy question of whether or not to subject a Water Affordability Plan (WAP) to a popular vote, is beyond the scope of this analysis.

⁵ The desires of bondholders were emphasized in particular by officials in the administration and the Great Lakes Water Authority at the Budget, Finance and Audit Standing Committee discussion of this issue on July 8, 2015. The video of that meeting is archived at: <http://www.detroitmi.gov/Government/City-Council/Meeting-Video-Archives/ArticleID/375/Detroit-City-Council-Session-Budget>

⁶ See, e.g., slide 10 of the DWSD rate increase approval presentation to Council on June 30, 2015, stating that a "Modest rate increase is designed to address a revenue shortfall"; "That fact applies to both Detroit retail customers and the suburban wholesale customers." "Lower usage = revenue shortfalls..." "Individual community impacts (including Detroit retail) are related to their relative decline in sales, and to certain cost allocation changes." And "Approximately 3% of the Water increase reflects each community's share of making up the shortfall created by Flint's departure from the System." If such relative factors involving multiple communities and differential considerations, some of which apply locally and others regionally in myriad ways, and all of which are included in the rate "allocation" submitted to Council by DWSD on June 30, 2015, can be applied to the proposed Detroit retail rate increase without running

2. Therefore, under the same legal rules that apply to all those factors, a reasonable and equitable adjustment to the rate structures in order to meet the systems' revenue requirements for service to all customers, including those living on low incomes, would not violate any applicable legal requirement.
3. In particular, the oft-claimed violation of the *Bolt* doctrine and the Headlee Amendment (discussed in detail below) rests on unfounded assumptions about the nature of the ratemaking process for the water and sewer systems, an analysis that inappropriately translates every adjustment of rates into a zero-sum contest where one customer (e.g., an indigent person) is assumed to automatically benefit at the direct and unreasonable cost of another (e.g., a middle class customer). This assumption does not reflect the actual practice of ratemaking and adjustment by DWSD (to the extent it has been publicly explained), nor the nature of the public water and sewer systems' services, infrastructure or budgetary needs, where the basic requirement is that the rates be equitable and reasonable (but by no means equal) for all ratepayers.

Survey of Selected Case Law

A sufficient legal analysis of this issue requires consideration of multiple constitutional, charter, statutory and common law provisions (that is, judge-made rules in cases in litigation), as set forth to some extent below. But the starting point for understanding the objection frequently voiced in the City of Detroit to the proposed WAP, most recently by the Director of DWSD in correspondence with LPD dated July 15, 2015, is invariably the 1998 decision of the Michigan Supreme Court in the case of *Bolt v City of Lansing*, 459 Mich 152 (1998).

In *Bolt*, Lansing imposed a storm water service charge for the creation of an enterprise fund "to help defray the cost of the administration, operation, maintenance, and construction of the stormwater system" In essence, the city developed a plan to make major improvements to their sewer system to benefit about one-fourth of the community, and imposed the storm water charge on all properties in the city, including some among the three-quarters of the ratepayers who would not directly benefit from the improvement at issue, and who had already paid for similar improvements affecting their own properties. The Michigan Supreme Court ultimately held on those facts that the storm water service charge was a "tax" under the Headlee Amendment, Const 1963, art 9, § 31, and therefore unconstitutional since it was imposed without having been submitted to a popular vote as required by Headlee.

In reaching its conclusion, the Court cited in particular the following "failing" of the Lansing storm water service charge:

"Approximately seventy-five percent of the property owners in the city are already served by a separated storm and sanitary sewer system. In fact, many of them have paid for such separation

afool of the principles established by the case of *Bolt v City of Lansing* or other legal requirements discussed herein, then query how a reasonable and equitable water affordability plan providing for such adjustments and allocation "to address a revenue shortfall" nominally estimated as required by indigent customers' inability to pay the full rates could be declared *ipso facto* illegal, when the affordable rate structure and implementation system hasn't even been designed in detail yet?

through special assessments. Under the ordinance, these property owners are charged the same amount for storm water service as the twenty-five percent of the property owners who will enjoy the full benefits of the new construction. Moreover, the charge applies to all property owners, rather than only to those who actually benefit.” 459 Mich, at 165

Those are not the material facts regarding the proposed WAP. In seeking to support the conclusion that a properly designed WAP would be illegal under *Bolt*, a logical and legal error arises from the assumption that a suggested flat “meter charge” imposed on all customers, as one way suggested in 2005 to fund a WAP, is necessarily the only way to make up for the shortfall in revenue resulting from holding retail customers harmless for an amount billed above a low threshold of 2 or 3% of household income.

It is further erroneously assumed that such a flat “meter charge” on all customers would be legally equivalent to the Lansing storm water service charge. And it is often further argued that there is an irresolvable contradiction between the “cost of service” that makes up DWSD’s budget requirement, on the one hand, and the WAP cost of providing discount water and sewer services to persons living on low income who need such a discount to live on the other hand, with the rate structure adjusted (in a legally indistinguishable manner from the way DWSD regularly adjusts the rate structure based on many other reasons and factors). None of these assumptions are consistent with the facts or the law.⁷ Therefore, as discussed more fully below, the *Bolt* doctrine is not controlling in the water affordability context.

It should also be noted that in multiple cases in recent years the Michigan Court of Appeals has significantly restricted the scope of the *Bolt* doctrine to the facts of that case, involving a disguised revenue-raising tax mislabeled as a fee, and disproportionately imposed on one group for a generalized public benefit. See, e.g., *Jackson County v City of Jackson*, 302 Mich App 90 (2013) (The court followed *Bolt*, where an ordinance imposed a storm water management charge on all property owners. The most significant motivation for the ordinance was to generate revenue, and there was no particularized benefit imposed on the charged property owners that was not also conferred upon the general public; a true “fee” confers a benefit upon the particular person on

⁷ Moreover, in connection with a parallel economic, not legal, objection to the WAP that should be noted in this regard, it should be recognized that the allocation of the cost burden for indigents’ inability to pay water and sewer rates to other ratepayers is inevitable and inherent, whether the policy response to such indigent customers’ inability to pay is mass water shut offs, a WAP or whatever. In every case, the system’s lost revenue from customers’ inability to pay is spread to the customer base. This is reflected in the 15% “bad debt” analysis referenced on page 2 above. A well-designed, successful Water Affordability Plan (WAP) should result in reduction of this portion of the rates designated as “bad debt”, to the extent that some of this revenue is received from customers in need of affordable rates in order to pay. In other words, there is a strong business case for the WAP. This fact alone refutes the *Bolt*/Headlee argument against the WAP. There is no basis under *Bolt* for concluding that the affordable rates paradigm of the WAP would be illegal, when DWSD routinely achieves the same cost-spreading of lost revenues due to, among other factors, indigent customers, through “certain cost allocation changes” on bases other than reducing rates that are not affordable for those living in poverty. The principal difference is whether the adjustment is made in part through affordable rates, or through losses sustained after shut offs or other collection measures at the end of the customer service process. No disguised “tax” for purposes of raising revenue in violation of *Bolt* or Headlee enters into the question.

whom it is imposed, whereas a “tax” confers a benefit on the general public.) Whatever policy objections regarding the Water Affordability Plan may be made, it is not designed to raise revenue from the targeted recipients; rather, it should, in effect, increase the overall revenue the system has historically received from those who cannot pay the full rates, and seeks to accept the revenue they can provide, by intentionally charging these customers an affordable rate.⁸ And it serves the legitimate regulatory purposes of making the services reasonably available to all, while making up for any lost revenue by adjusting rates accordingly, in the same general way as the rates have historically been adjusted for multiple reasons, to support the costs of providing these essential services to users.

In the cases of *Lapeer County Abstract & Title Co. v Lapeer County Register of Deeds*, 264 Mich App 167 (2004) and *A & E Parking v Detroit Metropolitan Wayne County Airport Authority*, 271 Mich App 641 (2006), the Court of Appeals noted that “the *Bolt* test is only designed to distinguish between user fees and taxes on real property and has no applicability in the present context.” The factual context in *Lapeer County* was a fee imposed by a county register of deeds for the provision of certain documents. The context in *A & E Parking* was commercial access fees (CAFs) imposed by the airport authority on hotels and parking and limousine companies providing shuttles services to the airport. The factual context here is a proposed Water Affordability rate structure based on income and ability to pay that would charge all customers a fee, discount the fee for those unable to pay the full fee due to lack of income, and include that equitable differential in the overall rate structure for the system as a whole. None of these contexts involve the problem of distinguishing between user fees and taxes on real property that was analyzed in *Bolt* and *Jackson County*. Although the WAP, like *Bolt*, does involve charges for services of a public water and sewer utility, it does not place a flat fee on any class of users, for the sole benefit of another class. Rather, it requires consideration of affordability in the context of ratemaking and achieving the systems’ revenue requirements in a manner that is legally indistinguishable from the way DWSD has historically adjusted rates based on experience and the systems’ revenue needs. Therefore, under the *Lapeer County* and *A & E Parking* cases, far from being an insurmountable legal barrier to the suggested Water Affordability Plan, *Bolt* would have “no applicability in the present context.”⁹

More narrowly and recently, the *Bolt* analysis was applied by the Michigan Supreme Court to the Detroit waste disposal fee in *Wolf v City of Detroit*, 489 Mich 923 (2011), when remanding a challenge to that fee to the Court of Appeals. There the State Supreme Court reasoned that under *Bolt*, such a fee is permissible if it is proportionate to the necessary costs of the service, and serves a regulatory (not a revenue-raising) purpose. Ironically, **the solid waste disposal fee charged by**

⁸ The program could be designed to provide for automatic payment of the affordable rate out of a designated account, so that the system receives this revenue in a predictable manner.

⁹ Although LPD generally agrees with previous criticisms of the “meter charge” aspect of the 2005 Water Affordability proposal, as raising an unacceptably high potential for a successful challenge under *Bolt* and *Headlee*, it should be noted that if the *Lapeer County* and *A & E Parking* cases are followed, even such a meter charge on all ratepayers should not invalidate the WAP. In any case as noted above, such a meter charge is not the only way to fund a WAP, consistent with DWSD (and the GLWA’s) rate structure and adjustment process.

the City is to this day reduced by income,¹⁰ directly analogous to the proposed mechanism for implementing the WAP.

If the WAP is designed, similar to the waste disposal fee, to be proportionate to the cost of the services to all customers, and serves the legitimate regulatory purposes of making water and sewer services reasonably available to all customers while raising adequate revenue to pay the cost of the services, thereby supporting public health and welfare, it should survive legal challenge under *Bolt*. Such a reasonable, proportionate and regulatory-purposed fee structure, as opposed to the kind of excessive, general revenue-raising fee increase disapproved of in *Merrelli v City of St. Clair Shores*, 355 Mich 575 (1959), has long been permissible under Michigan law (before the novel *Bolt* analysis of fees vs. taxes under the Headlee Amendment was ever raised). Under the particular facts at issue, neither *Bolt*, *Jackson County*, nor *Merrelli* would be a serious legal obstacle to a well-designed and –implemented Water Affordability Plan; the first two because they are legally inapplicable to a fee for water and sewer services; the third because it is factually inapposite to a fee that is reasonably proportional to the cost of the services.

The requirement of equitable water rates is well within the scope of authority of the legislative bodies that set and adjust these rates, including City Council and, at this time the Board of Water Commissioners, as well as the Great Lakes Water Authority Board in the future. Moreover, such an equitable rate structure satisfies the procedural and substantive standards mandated by Michigan law. For example, Sec. 9-507 of the City Charter states that any agency of the City may, with the approval of the City Council, charge a service fee for any service provided by the agency, and City Council’s approval is also required to change any such service fee. DWSD’s proposed FY 2015-16 rate increase was submitted to City Council on June 30, 2015, pursuant to this Charter-mandated authority. Moreover, Section 7-1202 of the Charter requires that DWSD “shall periodically establish equitable rates” for its services.¹¹

¹⁰ <http://www.detroitmi.gov/How-Do-I/File/Senior-Citizen-Solid-Waste-Discount-Information> “The City of Detroit may provide a discount to homeowners who are at least 65 years old and have a household gross income below \$40,000.00. Effective July 1, 2009, the Solid Waste Fee is \$240.00. Qualifying Seniors will receive a discount of \$120.00.” One of the requirements for qualifying for the reduced solid waste fee is stated to be “**PROOF OF YOUR INCOME**”.

¹¹ The designation of water rates as a “fee” rather than a “tax”, as well as the requirement that the governing legislative authority of the Detroit water system impose equitable rates, has been in place for well over a century, since at least 1869. *Jones v Detroit Water Commissioners*, 34 Mich 273 (1876): “By the original act of incorporation the water commissioners were empowered from time to time to “cause to be assessed the water rate to be paid by the owner or occupant of each house or other building having or using water, upon such basis as they shall deem equitable... The law of 1869 is the first attempt to enable the board to raise money by rates or assessments except from water consumers. 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. The price of water is left to be fixed by the board in their discretion, and the citizens may take it or not as the price does or does not suit them.” The *Bolt* court’s striking down the storm water service charge on the particular facts of that case did not convert all water rates into “taxes” in the face of that well-established distinction. See also *Preston v Board of Water Commissioners of Detroit*, 117 Mich 589 (1898) (Where the water rates paid to a city by consumers are reasonable in amount, they cannot complain of them as inequitable because the water commissioners’ duty was to assess the rates “on such basis as they

The City Charter also provides, in the preamble, for “an environment and government structure whereby sound public policy objectives and decisions reflect citizen participation and collective desires”. It further requires that “The City shall provide for the public peace, health and safety of persons and property within its jurisdictional limits.” In this context in particular, according to the preamble of the Charter, “the people have a right to expect city government to provide for its residents ... safe drinking water and a sanitary, environmentally sound city.” Similarly, the Michigan State Constitution, at Art. IV, Section 51, states that “The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern.” These authorities support a conclusion that affordable water rates are factually and legally part of the “cost of service” for DWSD, in charging equitable fees for water and sewerage services that cover the cost of providing the service. This has historically been the legal touchstone of DWSD ratemaking. MCL 117.4f(d)

Rather than the storm water service charge disapproved in *Bolt*, the proposed Water Affordability Plan (WAP) more closely resembles the installation and service fees approved by the Michigan Court of Appeals in its unpublished, but well-reasoned 2006 decision in the case of *City of Gaylord v Maple Manor Investments LLC*, Docket No. 266954. In that case, the city enacted ordinances that required homeowners to connect to city water system and charged fees for the connection and the ensuing water service. The plaintiff homeowners in that case unsuccessfully challenged these fees under *Bolt* and the Headlee Amendment. The court held that the ordinances which required homeowners to connect to city water system were rationally related to the legitimate public purpose of ensuring a clean and safe water supply. The ordinances were held to be a legitimate exercise of the city's police power. The same result obtains for the proposed WAP.

Regarding the *Bolt*/Headlee analysis, the *Gaylord* opinion states:

“...[I]f the charges are merely user fees, the charges are not subject to the requirements of the Headlee Amendment. ... In determining whether a charge is a user fee rather than a tax, three criteria are to be considered. First, a user fee must serve a regulatory purpose rather than a revenue-raising purpose. Second, the user fee must be proportionate to the costs of the service provided. The third criterion is whether the persons subject to the charge are able to refuse or limit their use of the commodity or service. Defendants have presented no evidence that the City raises revenue through operation of its municipal water system. Likewise, defendants have presented no evidence that charges are disproportionate to the costs of the services provided. Finally, although the ordinances mandate connection to and use of the City's water supply for all water used or consumed on the affected premises, defendants have ultimate control over the amount of water used and, therefore, have ultimate control over the amount of their water bill. Consequently, taking all these factors under consideration, we conclude that the charges are properly characterized as user fees rather than taxes.” (citations omitted)

Gaylord is highly persuasive authority for the conclusion that the proposed WAP is legal under existing Michigan law.

shall deem equitable... It is also true these regulations must be reasonable; but it is not true they must be uniform...” (emphasis added)

Similarly, in a published decision seven (7) years before *Gaylord, Graham v Kochville Township*, 236 Mich App 141 (1999), the Michigan Court of Appeals had approved a township ordinance requiring a similar connection fee to the community's water system. Applying the flexible *Bolt* criteria for distinguishing a "fee" from a "tax" that requires an election for approval under the Headlee Amendment, the *Graham* court reasoned that "the three criteria of a fee are as follows: (1) a fee must serve a regulatory purpose, (2) a fee must be proportionate to the necessary costs of the service, and (3) a fee is voluntary. We note that the Supreme Court cautioned that **these criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee.**" (emphasis added)

Regarding the Township's power to build and charge fees to fund such a water system, the court said: "In our judgment, it is clear that **an ordinance regarding the water supply system of a township, including the fee requirements that will sustain the system, does bear a rational relationship to the public health, safety, and general welfare of the township. The availability of clean water is of paramount importance to the people of the township, affecting their health and safety, as well as the welfare of their property—as evidenced by the \$2,000 increase in value to the properties affected by the new water system. Thus, we conclude that the township ordinance act did empower defendant township to enact Ordinance 93-7-W to collect fees to pay for its water supply system.**" (emphasis added)

In the unpublished decision of *Tobin Group, LLP v Genesee County*, 2004 WL 2875634 (2004), the court of appeals upheld a county capital improvement fee, stating that the case was indistinguishable from *Graham*. The same reasoning and vital public purposes support the lawfulness of the City of Detroit's power to include a Water Affordability Plan (WAP), basing rates on ratepayers' income.

Similarly, in *Mapleview Estates v City of Brown City*, 258 Mich App 412 (2003), the court of appeals upheld a city's increased fees for connecting new homes to its central water supply and sewer systems. The court reasoned that such user fees were not taxes subject to the Headlee Amendment. Whatever revenue generated by the fees, like any adjustment necessitated by the WAP, was used for maintenance and operation of the water and sewer systems. The court said that "A fee is generally " '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.' " [quoting *Saginaw County v. John Sexton Corp. of Michigan*, 232 Mich App 202 (1998)] Similarly for the WAP, there is a reasonable relationship between the discount provided to indigent customers, and the adjustment to the rates charged to other ratepayers for the sole purpose of supporting the cost of the systems' services to all. Indeed, that reasonable relationship is the essence of the WAP policy. It is not primarily a revenue measure that disguises a tax as a fee.

An affordable rate structure for all ratepayers is much closer to the fees approved in the line of cases like *Mapleview Estates*, *Graham*, *Tobin Group* and *Gaylord*, than it is to the disguised taxes imposed for purposes of raising municipal revenue on one class for the benefit of others that were struck down for lack of support by a popular vote in the *Jackson County* and *Bolt* cases. Detroit's refusal to adopt a WAP to date has not been based on any applicable legal barrier arising out of the *Bolt* case, the Headlee Amendment or other allegedly insuperable legal restriction.

Discussion; Policy and Law

The adoption of an income-based affordable water rate structure has recently been given considerable new impetus by the enactment of Philadelphia's Income-based Water Rate Assistance Program (IWRAP) (copy attached). Although employing the terminology of "assistance" rather than "affordability", the operative provisions of that ordinance state that: "Monthly IWRAP bills shall be affordable for low-income households, based on the household's income and the schedule established pursuant to subsection (8), and shall be charged in lieu of the Department's service, usage, and stormwater charges." (page 3, ¶ 3a) (emphasis added)

It should be noted that in announcing the Philadelphia IWRAP, the Council Member sponsoring that legislation specifically referenced the recent water shut offs in Detroit: "Last year, experts from the United Nations stated in response to mass shut-offs in Detroit that "[i]t is contrary to human rights to disconnect water from people who simply do not have the means to pay their bills." The rate schedule required by the ordinance is scheduled for implementation as of October 1, 2015. (page 11, ¶ 8a)

As may be apparent from the late 19th century cases referenced on page 6, note 9, in the preceding section of this report, the issue of local government's authority to adjust water rates to reflect the needs of the system and its customers is neither new, nor unique to the City of Detroit. It has long been a staple of water utility rate regulation. For completeness of understanding in this connection, some of the clearest statements about the permissible scope of water affordability regulation are contained in the March 2014 report by the National Consumer Law Center (NCLC) entitled "Review and Recommendations for Implementing Water and Wastewater Affordability Plans in the United States".¹² Regarding the issue of legal permissibility of a Water Affordability Program addressed in this memorandum, the NCLC report specifically urges that states should relax the interpretation of any applicable statutes to allow for rate relief in disadvantaged communities:

"Flexibility is key and should be incorporated into policies to achieve water and wastewater affordability. Some states have relaxed their interpretations of existing statutes to allow for rate relief in disadvantaged communities under certain circumstances. Flexibility to deviate from the strict application of district specific pricing or single-tariff pricing should be an option when reasonably necessary, based on all relevant factors. ...[S]tatutes that were enacted to create "reasonable" rates are often so narrowly interpreted that they serve to prevent the very regulatory mechanisms which might be the most effective in achieving affordability. When considering options to provide needed relief to low-income customers, numerous water utilities and public agencies struggle with interpreting laws that forbid unduly discriminatory utility rates. Throughout the United States, regulatory bodies and water agencies have repeatedly viewed any program that might subsidize one ratepayer class at the expense of another as potentially violating the anti-discriminatory rate provisions found in their respective state statutes. And while some jurisdictions have more broadly interpreted anti-discriminatory statutes, which facilitates the development of ratepayer assistance programs, the fact remains that absent specific legislative authorization, some affordability programs might be precariously positioned to

¹² This report was discussed in LPD's report to Council dated August 25, 2014. It is available on line at: <http://www.nclc.org/images/pdf/pr-reports/report-water-affordability.pdf>

pass judicial scrutiny. ... With a widening income gap in most parts of the United States, the need for greater flexibility to implement water affordability programs becomes more significant. Some states have relaxed their interpretations of existing statutes to allow for rate relief in disadvantaged communities under certain circumstances.” (emphasis in original) Clearly, the potential legal challenge to a WAP posed by *Bolt* and the Headlee Amendment is not unique to Michigan at all. Nor is it insurmountable given the actual intention and will of the officials responsible for the ratemaking decisions to do so.

A final observation is required for the sake of completeness: Historically, MCL 123.141(2) has required that “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.” When the infrastructure and rates of the regional water and sewer systems were under the control of the City and its water and sewerage department, it was historically anticipated that a Water Affordability Plan intended to discount rates to indigent retail ratepayers in the City would be legally challenged under this statute by wholesale customer communities in the suburbs. This objection, not the parallel analysis under *Bolt* and Headlee, seems to be more securely grounded in the facts of the case and governing law. Although MCL 123.141 was intended to prevent the owner of the system from charging its customers excessive rates, the argument that a Water Affordability Plan would have that effect on non-indigent ratepayers in other communities could not be distinguished from the facts, even if the affordability analysis could be incorporated into the required actual cost of service and utility basis of ratemaking framework. In short, MCL 123.141 seemed on its face to provide a much more robust, even if ultimately not necessarily dispositive Michigan legal basis for challenging the WAP than *Bolt* or the Headlee Amendment.

It should be noted that, with the advent of the Great Lakes Water Authority (GLWA), MCL 123.141 no longer imposes that restriction. Subsection (4) states “This act shall not apply to a jointly operated water system or authority that supplies raw untreated water to 2 or more municipalities.” With the elimination of the principal statutory limitation on the governing board’s discretion to adjust water rates under Michigan law, the prospects for a well-designed WAP to survive anticipated legal challenges could well be enhanced by the imminent “standing up” of the GLWA.

Conclusion

DWSD and its predecessors have functioned for about a century and a half as a public utility, providing necessities of modern life on a monopoly basis to millions of residents of the metropolitan Detroit area. The law is clear that by virtue of this unique and crucial status the rates it charges for its services must be reasonable and equitable. There is no legal prohibition against discounting these rates for people who are so unfortunate as not to be able to pay them in full, nor against charging those who can afford to pay the rates enough to support the costs of operating the DWSD (and now GLWA) systems. On the contrary, a consistent and principled application of all the constitutional, statutory and common law principles applicable to this complex factual, legal and policy matrix arguably requires such an affordability component, to adequately achieve the core public health and revenue requirements of these systems.

Most recently, since at least the beginning of March 2015 (reprising discussions from 2005), Detroit City Council has been formally requesting in writing from DWSD data regarding what studies, if any, DWSD has undertaken to evaluate the sustainability of a true water affordability rate structure based on customers' ability to pay, as opposed to an assistance model for already payment-troubled customers like the Detroit Residential Water Assistance Program (DRWAP), or the Water Residential Assistance Program (WRAP)¹³ currently under development for the Great Lakes Water Authority (GLWA). And in May 2015 Council passed a resolution opposing continued large scale water shut offs until such data has been collected and analyzed. DWSD had not formally answered Council's questions, until July 15, 2015, and those answers are far from complete or even reasonably responsive. It has become clear through ongoing discussions that there have been no such studies of the costs and rate requirements for implementing a sustainable water affordability plan. Moreover, it has been reaffirmed in multiple settings, including City Council Committee and working group meetings that (as had previously been made clear in the Water Residential Assistance Program (WRAP) working group of the GLWA), DWSD has no such data, nor any plans or intention to obtain it, nor any inclination to use it if they had it to establish a sustainable and equitable water affordability plan as part of the rate structure. The alleged legal objection based on *Bolt* and *Headlee* has been employed as a barrier to this policy.

The issue is not whether the WAP is a fee or a tax; nor even whether water and sanitation are a human right, "free" or a commodity. The real issue is finding a way to provide these crucial services to indigent, disabled, children, aged and other vulnerable persons, consistent with the revenue requirements of the regional water and sewer systems. This issue was recently summarized as follows by the GLWA water assistance working group's draft program design report:

"As a major economic actor in the region, GLWA has a social responsibility to examine and acknowledge the acute challenges faced by the region's economically disadvantaged, who are among its ultimate customer base (through its customer communities responsible for retail water and sewerage services delivery). Despite gaps and inconsistencies in reporting on retail water and sewer customer demographics and customer community collections activities (including shut-off practices), a number of metrics offer a troubling portrait of economic disadvantage:

- DWSD/GLWA serves approximately 2,050,000 households in 8 counties. Households that are at or below poverty and served by DWSD/GLWA are listed in rank order (highest to lowest): Wayne = 65% (Detroit = 39% of total); Oakland = 16%; Macomb = 14%; Washtenaw = 2%; Genesee = 2.2%; Lapeer = 0.5%; Monroe = 0.2%; St. Clair = 0.05%.
- As of June 18, 2015, 46% of the 300,861 Detroit Residential combined water and sewer accounts were at least 60 days past due. The total amount past due was \$103,061,240. The average past due amount was \$732.
- As of June 16, 2015, the following information was reported for active assistance programs:

¹³ LPD recognizes that for those customers in deepest poverty, the Water Affordability Program would not be an adequate for those who have no assets or income at all, even a 2 or 3% discount price would still be unaffordable, and there is still a need for an assistance program like the WRAP.

- Detroit Water Fund – 1,870 approved applicants and total fund liability of \$879,205.
- Detroit Residential Water Assistance Program (DRWAP) – 826 customers enrolled with \$799,982. Allocated.
- The Heat and Warmth Fund (THAW) – started on June 1, 2015 and has served 202 customers for a total of \$245,892.
- DWSD has 35,134 active payment plans with a combined balance of \$28,717,289.

The breadth and depth of poverty in GLWA’s service area, as indicated by these few statistics, present fundamental challenges for GLWA and its customer communities. These challenges extend well beyond the scope of the Water Residential Assistance Program (WRAP) and speak to the need to address water affordability.”

LPD respectfully states that the logistical, political, economic, and technical challenges of accomplishing this necessary objective, both in the City itself and across the region, are far greater than any potential legal objection, realistically viewed in light of a sincere commitment to water affordability, as discussed in connection with the above legal authorities.

If Council has any other questions or concerns regarding this subject, LPD will be happy to provide further research and analysis upon request.