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TO: City of Detroit Board of Water Commissioners

FROM: Debra N. Pospiech, Esq., Chief General Counsel

DATE: November 6, 2018

RE: **Michigan Court of Appeals Ruling in Class Action Cases Challenging the City of Detroit Drainage Fee**

We are pleased to report that the Michigan Court of Appeals ruled in favor of the City of Detroit in two major class action cases¹ challenging the constitutionality of the drainage charge and held the charge is **a permissible user fee that is not subject to the Headlee Amendment**. Further, the **phase-in of rates is lawful and permissible**.

First and foremost, we would like to express gratitude to the team at Miller Canfield who worked tirelessly to defend the drainage fee, especially attorneys Sonal Mithani and Caroline Giordano. Their legal acumen, writing skills and attention to detail are second to none. Members of our DWSD team devoted many hours of their time, as well, providing critical facts and information that strengthened our pleadings: Billing & Collections; Stormwater Management; Finance; Information Technology; consultants from TetraTech, OHM Advisors, and Eric Rothstein; as well as Director Gary Brown, Deputy Director/Chief Engineer Palencia Mobley and former Chief Financial Officer Marcus Hudson.

The 22 page opinion thoroughly analyzes the landmark decisions in *Bolt v. Lansing* and *Jackson Co v City of Jackson* and then, beginning on page 14, the Court thoughtfully applied those legal decisions to the facts surrounding Detroit's drainage charge. Simply stated, **the Court: (1) applied the *Bolt* criteria to the facts at issue and found that Detroit's drainage charge meets two of the three *Bolt* criteria** (all three factors do not need to be present) and **(2) distinguished the facts at issue in Detroit from the facts surrounding Lansing and Jackson's drainage charges.**²

Perhaps the most significant portion of the ruling:

"...Detroit's method of assessing the drainage charge assures a higher degree of precision between the service provided and the benefits conferred than did the charges in *Bolt* and *Jackson Co.*" (p. 16)

¹ *Detroit Alliance Against the Rain Tax v City of Detroit*; *Nicola Binns v City of Detroit*; and amici curiae brief filed by a group of businesses in Greektown. Note: a legal challenge based on violation of the Headlee Amendment to the Michigan Constitution has original jurisdiction in the Court of Appeals.

² Lansing and Jackson's drainage charges were found to be an unconstitutional tax.

Key portions of the ruling applying *Bolt* criteria:

1. Drainage charge must serve a regulatory purpose rather than revenue-raising purpose.

- Key Facts/Ruling
 - The federally mandated treatment of combined sewage and stormwater runoff constitutes the provision of a service.
 - Federal and state regulations required DWSD to invest more than \$1 billion in combined sewer overflow (CSO) control facilities to prevent untreated CSOs from spilling into Michigan waterways.
 - City has been legally required since 1977 to render full secondary treatment to stormwater flows.
 - DWSD instituted drainage charge to pay debts for capital, operations and maintenance costs for facilities.
 - Detroit's charge not used to fund future improvements.
 - **No evidence** of a revenue-generating purpose.
- Distinguishing Factors - Lansing and Jackson:
 - **Had separated systems;**
 - Were allowed to release **untreated** stormwater into the environment;
 - Did not have a significant regulatory component like Detroit; and
 - Used general fund revenues to fund stormwater system.

2. Drainage charge must be reasonably proportionate to the necessary costs of service.

- Key Facts/Ruling
 - The amount of the charge is reasonably related to the costs of regulation.
 - Detroit provided studies and manuals supporting the conclusion that a parcel's impervious area may be used as a way to measure or estimate the volume of stormwater run off from a parcel.
 - Charge is calculated based on aerial photography and assessor data.
 - City has undertaken reasonable efforts to ensure that only parcels which discharge water into the CSO are subject to charge.
 - Customers may dispute measurement of impervious acreage and seek adjustments based on specific factors per parcel.
 - City was not collecting more than it needed to operate the system.
 - **Phase-in of charge for "new to world" customers is a permissible administrative mechanism to ensure a gradual and orderly transition to a uniform rate in order to avoid rate shock.**
- Distinguishing Factors - Lansing and Jackson:
 - Did not take individual measurements of each parcel.

3. Drainage charge must be voluntary.

- Key Facts/Ruling
 - Detroit's charge is "effectively compulsory rather than voluntary."
 - Despite credit opportunities, it is impossible for property owners to escape the financial demands of the drainage charge.
 - Property owners may reduce impervious areas but this requires them to relinquishing their right to build on their property.
 - If charge is not paid, DWSD may terminate water service, impose a lien, commence legal action, etc., which indicates a compulsory charge.

Next Steps.

Several other cases were filed in Wayne County Circuit Court challenging the drainage charge claiming a Headlee violation and other legal theories. Those cases have been stayed pending this Court of Appeals ruling. We anticipate the *DAART* and *Binns* plaintiffs will seek leave to appeal to the Michigan Supreme Court. We will continue to vigorously defend all pending cases and we will keep you updated.

I am happy to answer any questions.