

Graywater

Subscribe To Michigan Green Law

Email Address *

SUBSCRIBE!

Search Posts



Categories

▸ Webinars & Podcasts

▸ Jaffe Updates

▸ News

▸ Electronic Payments Law



▸ Michigan Green Law



▸ Data Privacy Law



▸ Immigration Law



Download PDF

JANUARY 17, 2017 | JAFFE LAW

Infrastructure funding in the age of austerity – just don't call it a "tax"



As demands for municipal services increase, costs go up and tax revenues flatten or fall, what is a municipality to do? Most Michigan politicians have decided that even to suggest more taxes is the kiss of death. Everyone agrees Michigan's roads need work. The gas tax went up on January 1 and even that increase was widely viewed as an inadequate to fully improve our sub-par roads. Recently, [a Michigan State study](#) indicated that nationally, roughly 12% of households cannot afford the cost of water services and, if water rates rise to cover repair and upgrade expenses due to the aging of our systems and other factors, that unaffordability factor may go up to almost 36% in the next five years.

The Governor's 2016 Infrastructure Commission, appointed in the wake of the Flint Water Crisis, reported that we need a modern infrastructure system to compete globally, to have economic prosperity, and to have healthy citizens and a healthy environment. However, the Commission did not answer the all-important question of how to fund all of this work. The Commission reports that Michigan lags behind every other state in the region in capital funding for infrastructure and that Michigan needs to spend \$4 billion more every year than it currently does just to align with an average state and the State's needs. This would be a 7% increase in spending. The Commission did not address how Michigan should fund this shortfall.

The business group, [Business Leaders for Michigan issued a report](#) earlier this month. That Report reached the same conclusion and proposed that the State ramp up its spending and opened a door to creative and novel financing approaches including user fees which the Report indicated may be used to fund costs of "services, enhancements to increase the quality of life, and ... administrative and regulatory processes." This report discusses such fundraising approaches as fees per mile traveled (vs gasoline taxes); public-private partnerships; fees based on property value increase; fees which take into account all lifetime system costs; selling or leasing systems to raise funds for new infrastructure improvements; toll roads and other more "outside the box" approaches.

We have seen this before but not on a statewide approach such as when municipal governments try to fund environmental initiatives, such as stormwater management (required by federal law). The cities of Lansing, Jackson, and Detroit all adopted stormwater "fees" based on the paved acreage of various properties within their jurisdiction. Clearly, to the municipalities, this seems like a good idea – otherwise, why would they keep doing it? Reportedly, nine Michigan communities have created [stormwater utilities](#) to impose such charges (Adrian, Ann Arbor, Berkley, Chelsea, Harper Woods, Jackson, Marquette, New Baltimore, and St Clair Shores).

The Michigan Supreme Court established a three-part test to distinguish between a fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose;" (2) "user fees must be proportionate to the necessary costs of the service;" and (3) "user fees must be voluntary." [Bolt v Lansing](#), 459 Mich 152, 161—162 (1998)

Unfortunately for the municipalities, the Michigan Courts keep striking these fees down as illegal, hidden taxes. In the case of [Jackson County v City of Jackson](#), the plaintiffs challenged a stormwater management charge imposed by the Jackson City Council. The Court of Appeals ruled

that the charge was a tax imposed in violation of [§31 of the Headlee Amendment](#) to the Michigan Constitution. The court held that the charge: (1) did not serve a regulatory purpose because it shifted funding of certain activities from the general fund to the charge; (2) was disproportionate to the benefits conferred upon the payor as there were no payor-specific benefits; and (3) was not voluntary because there was no way to avoid the charge by doing, or not doing, something.

The Court of Appeals cited *Bolt v Lansing*, which invalidated a similar stormwater charge on similar bases. Ultimately, both courts held these “charges” to tax subject to, and failing to meet, Headlee Amendment requirements.

Last year, the Michigan Legislature saw the introduction of a bill that would authorize such “fees,” regarding water and sewer, ostensibly to make them harder to defeat in Court under the *Bolt* test. The need is real and I am a big believer in top quality infrastructure which needs to be paid for. My question is, with the 1978 Headlee Amendment that puts the size and cost of government in the hands of the taxpayers, and with a backdrop of fees rising beyond what some citizens can afford – can and should our Legislature try to pass this off by various “fees” without getting the voters’ approval as well as other “creative” solutions, some of which may cost the taxpayers less in the short run but more in the long run? I’m all for the efficiencies in purchasing and scheduling that Governor Snyder has been pushing for but, as we watch more and more systems fail (like the recent Fraser sinkhole), it is clear that we cannot continue to push this off – if the citizens see that, they *should* be willing to pay for it. If these expenses get passed on in the form of fees which are not voted on and the citizenry gets hit with larger fees that they were not told about, who think that will play well at the voting booth?

SHARE THIS 