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### **Water Affordability in Detroit: a Legal Analysis**

Detroit, Michigan, the largest city in a state surrounded by the largest surface of fresh water in the world, is home to a water crisis of epic proportions. Tens of thousands of Detroit residents lack access to water in their homes, because they cannot afford to pay their water bills.<sup>1</sup> This paper examines the legal aspects of this crisis, from access to shut-offs, and prospective solutions for Detroit. As the paper demonstrates, a solution must ultimately come from the political process, not the courts, though any solution must successfully navigate the law.

#### **The Legal Right to Water and Protection Against Shut-Offs**

From international to local, the law provides no right to water access for those who cannot afford it. International law formally acknowledges a human right to water, but it provides no mechanism to enforce that right.<sup>2</sup> A July 2010 UN General Assembly resolution recognizes “the right to safe and clean drinking water and sanitation that is essential for the full enjoyment of life and all [other] human rights[.]”<sup>3</sup> Similarly, the Universal Declaration of Human Rights (UDHR) provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services[.]”<sup>4</sup> This can be broadly interpreted to include a right to water.<sup>5</sup>

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<sup>1</sup> In 2007, Detroit’s Metro Times reported as many as 45,000 Detroit residents receive water shut off notices per year. Curt Guyette, *Water Fight*, The Metro Times, May 23, 2007, available at <http://www2.metrotimes.com/editorial/story.asp?id=10532> (Last accessed December 8, 2011).

<sup>2</sup> See Rose Francis, Laurel Firestone, *Implementing the Human Right to Water in California's Central Valley: Building A Democratic Voice Through Community Engagement in Water Policy Decision Making*, 47 Willamette L. Rev. 495, 504 (2011).

<sup>3</sup> G.A. Res. 64/292 (July 28, 2010).

<sup>4</sup> G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), Art. 25 (Dec. 10, 1948).

<sup>5</sup> George S. McGraw, *Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence*, 8 Loy. U. Chi. Int'l L. Rev. 127, 145-46 (2011).

The rights set forth in the UDHR are enshrined by two covenants: the International Covenant on Economic, Social and Cultural Rights (ICESR) and the International Covenant on Civil and Political Rights (ICCPR). The ICESR establishes a right to water, at least according to the committee that monitors the covenant.<sup>6</sup> However, the ICESR is not binding upon the U.S., because the U.S. Senate has not ratified it.<sup>7</sup> The ICCPR, which has been properly signed and ratified by the U.S., also provides a right to water access, at least to some extent.<sup>8</sup> However, the ICCPR is a non-self-executing treaty, only enforceable to the extent that a signatory nation brings its domestic laws into compliance with the covenant.<sup>9</sup> Because the U.S. has not brought its laws into such compliance, the ICCPR is not enforceable under U.S. law.<sup>10</sup>

Nationally, federal law does not guarantee a right to water access for its citizens. A conception of legally protected water rights goes far beyond any accepted constitutional rights doctrine.<sup>11</sup> As the U.S. Supreme Court has held, the “Constitution does not provide judicial remedies for every socio-economic ill.”<sup>12</sup> This view is reflected in such actions as the U.S. abstention from voting on the 2010 UN General Assembly resolution which recognized water as a human right.<sup>13</sup>

Individual states, however, have the ability to protect against water shut-offs, though most states do not exercise it.<sup>14</sup> Massachusetts, for instance, offers strong legal protections,

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<sup>6</sup> International Covenant on Economic, Social, and Cultural Rights, General Comment 15.

<sup>7</sup> Thorsten Kiefer & Catherine Brölmann, *Beyond State Sovereignty: The Human Right to Water*, 5 Non-St. Actors & Int'l L. 183, 190 (2005).

<sup>8</sup> *Id.* at 183.

<sup>9</sup> *Buell v. Mitchell*, 274 F.3d 337, 371-72 (6th Cir. 2001).

<sup>10</sup> *See Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002); *Buell*, 274 F.3d at 371-72.

<sup>11</sup> *See McGraw*, *supra* note 5, at 190.

<sup>12</sup> *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

<sup>13</sup> *See McGraw*, *supra* note 5, at 190.

<sup>14</sup> For instance, Kentucky's enabling statute, typical of most states, allows water shut-offs for delinquent residents. K.R.S. § 220.510(1).

outlawing water and other utility shut-offs every year between Nov. 15 and March 15.<sup>15</sup> Year-round protection exists for households that face financial hardship *and* are home to either (a) a seriously ill resident; (b) a child younger than one year, or if (c) all home resident adults are seniors, who live with a minor.<sup>16</sup> In other states, such as New York, the judiciary has crafted certain policy exceptions to prevent water shut-offs, when public necessity outweighs the need to shut off water service for nonpayment.<sup>17</sup> The court has allowed such exceptions to prevent shut-offs to public parks<sup>18</sup> and public schools.<sup>19</sup> The exception, however, has not been applied to typical residential customers, whose water can be shut off under New York statutory law.<sup>20</sup>

Michigan's laws on water shut-offs are unlike Massachusetts and similar to most states. Michigan law explicitly allows local units of government to discontinue water services to any resident delinquent in paying the water bill, regardless of poverty or other hardships.<sup>21</sup> In *Ripperger v. City of Grand Rapids*, the Michigan Supreme Court upheld this legal authority when Grand Rapids, in accordance with its local ordinance, shut off water services to delinquent customers.<sup>22</sup> The local government of Detroit, like Grand Rapids, grants its public water utility the power to discontinue service to customers who do not pay their bills.<sup>23</sup>

### **Current Water Assistance Programs in Detroit**

Detroit local government currently attempts to mitigate its residents' water bill woes through two programs: the Detroit Residential Water Assistance Program (DRWAP) and the Water Access Volunteer Effort (WAVE). DRWAP, which has existed since 2007, is jointly

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<sup>15</sup> 220 C.M.R. 25.03(1).

<sup>16</sup> 220 C.M.R. 25.03(1); M.G.L. 165 § 11B.

<sup>17</sup> *People ex rel. Johnson v. Barrows*, 140 A.D. 24, 124 N.Y.S. 270 (4th Dep't 1910), *aff'd*, 204 N.Y. 664 (1912); *Board of Education of City of Lockport v. Richmond*, 137 N.Y.S. 62 (Sup. 1912).

<sup>18</sup> *People ex rel. Johnson v. Barrows*, 140 A.D. 24, 124 N.Y.S. at 270.

<sup>19</sup> *Board of Education of City of Lockport v. Richmond*, 137 N.Y.S. at 64.

<sup>20</sup> N.Y. Village Law § 11-1116.

<sup>21</sup> M.C.L. §§ 141.121, 108.9, 123.166, 71.6.

<sup>22</sup> 338 Mich. 682, 687 (1954).

<sup>23</sup> Detroit, Michigan, Municipal Code 56-2-43.

operated by the Detroit Water and Sewerage Department (DWSD) and the Detroit Human Services Department (DHS).<sup>24</sup> To the extent its funding allows, DRWAP assists residents who (a) are at the point of water shut off, or pending shut off; (b) live in a single-family dwelling; and (c) are at or below 200 percent of the federal poverty level.<sup>25</sup> The program, however, caps assistance at \$175 annually per household.<sup>26</sup> As of Dec. 25, 2009, the program, expending most of its funds, was providing assistance to 2,047 households.<sup>27</sup> As of 2010, it is funded exclusively by voluntary donations, whereby Detroit ratepayers have the option to donate to the fund 50 cents from each of their water bills.<sup>28</sup> The WAVE Program, a similar effort, is a 501(c)3 nonprofit corporation established in 2003.<sup>29</sup> Prior to the creation of DRWAP, the WAVE program received the water bill donation funds; now it is funded exclusively by DWSD donations and other donations.<sup>30</sup>

DRWAP and WAVE, despite modest success, come nowhere near solving Detroit's crisis of water access. The programs also suffer from major administrative and existential problems on multiple levels, calling into question their immediate sustainability.<sup>31</sup>

## Solutions

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<sup>24</sup> Memorandum, City of Detroit, Nov. 18, 2010, p. 2, available at <http://tinyurl.com/csluy57> (Last accessed Dec. 20, 2011).

<sup>25</sup> Informational Flyer, Detroit Water and Sewerage Department, available at [http://www.dwsd.org/downloads\\_n/customer\\_service/customer\\_information/DRWAP\\_flyer.pdf](http://www.dwsd.org/downloads_n/customer_service/customer_information/DRWAP_flyer.pdf) (Last accessed Dec. 18, 2011).

<sup>26</sup> Lara Zielen, *The Plight of the Waterless in Detroit*, LSA Magazine, Sep. 28, 2011, available at <http://tinyurl.com/d4vcmqs> (Last accessed Dec. 8, 2011).

<sup>27</sup> Memorandum, *supra* note 24, at 3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1-2.

<sup>30</sup> *Id.* at 1-2.

<sup>31</sup> A 2010 Auditor General report found DRWAP operating without a governing document; the DWSD-DHS memorandum of understanding had expired without being renewed, nor was a new document executed. The report found widespread program mismanagement by both DWSD and DHS, including improper maintenance of escrow funds, incorrect assistance payment quantities, and improper funding. The report also found that WAVE was dissolved as a corporate entity in Oct. 2009, though it continues to function. Though WAVE has been funded in the past by annual \$100,000 DWSD payments, the Auditor General was unable to determine whether such funding was made in 2010. Memorandum, *supra* note 24.

As demonstrated, the legal system provides no independent solution to the water shut-offs that plague Detroit. A solution must come from the political process. Short of a grandiose sea change in the U.S. political establishment's views of its international treaty obligations, U.S. Constitutional rights, or legislative policy, state and local government are the most fertile arenas for change. Michigan could certainly pass a law, like that of Massachusetts, which protects against shut-offs. Michigan law already provides similar protections against heat shut-offs.<sup>32</sup> Finally, a local solution is possible. In fact, a highly detailed local proposal already exists called the Detroit Water Affordability Plan.

### **Water Affordability Plan**

The Detroit Water Affordability Plan (the Plan) is the product of a vibrant political struggle by the Michigan Welfare Rights Organization and other groups to bring water access to Detroit's underclass.<sup>33</sup> Developed by the Massachusetts consulting firm Fisher, Sheehan, & Colton,<sup>34</sup> the Plan was already approved by the Detroit City Council and the Mayor in 2006, though DWSD has since delayed its implementation.<sup>35</sup>

Strictly speaking, the Plan does not outlaw shut-offs, but rather subsidizes vulnerable residents to make their water bills affordable. This follows the principle that a household in serious economic hardship needs assistance even if it has not yet fallen behind in water bill payments, because funds used to pay the water bill come at the expense of other vital uses. Under the Plan, Detroit households that meet the following two requirements are eligible for

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<sup>32</sup> M.C.L. 400.1151, et seq.

<sup>33</sup> See Maureen Taylor, *A Birth Announcement: We Welcome the Water Affordability Plan!*, Michigan Citizen, Sep. 3, 2011, available at <http://michigancitizen.com/a-birth-announcement-we-welcome-the-water-affordability-plan-p3495-76.htm> (Last accessed Nov. 29, 2011).

<sup>34</sup> Roger Colton, *A Water Affordability Program for Detroit Water and Sewerage Department (DWSD)*, Fisher, Sheehan, & Colton, Jan. 2005, available at <http://www.fsconline.com/downloads/Papers/2005%2001%20Detroit%20Water.pdf> (Last accessed Dec. 18, 2011).

<sup>35</sup> See Menelik Hardy, *Water Affordability Plan Implementation is Imminent*, Michigan Citizen, Jan. 21, 2007, available at <http://michigancitizen.com/water-affordability-plan-implementation-is-imminent-p4029-76.htm> (Last accessed Dec. 11, 2011).

assistance: (1) a household income at 175 percent or below the federal poverty level, and (2) a water usage level that exceeds an “affordable burden” cost.<sup>36</sup> This affordable burden falls between two and three percent of household income, depending on household income.<sup>37</sup> For households making 0-50 percent of the poverty rate, it is two percent; for households between 50 and 100 percent, it is 2.5 percent; for those between 100 and 175 percent, it is three percent.<sup>38</sup>

Households that qualify for assistance receive a fixed credit to reduce their water bill down to a proportion of household income deemed an affordable burden.<sup>39</sup> The fixed credit is based on a projection of the household’s annual income and water usage.<sup>40</sup> Once this calculation is made, the fixed credit does not change, even if the household reduces its water usage.<sup>41</sup> Therefore, households have a financial incentive to decrease their water usage, in order to devote a larger portion of income for other uses.

Customers already in arrearage from past unpaid bills, and who still meet the Plan’s eligibility requirements, also earn credits to extinguish the arrearage over a two-year period.<sup>42</sup> Furthermore, the Plan sets forth outreach efforts to encourage residents to conserve water, from information on identifying leaking water pipes, to water conservation kits mailed to residents.<sup>43</sup>

The Plan will cost an estimated \$13.5 million annually.<sup>44</sup> This includes startup and administrative costs, assistance payments, and projected savings, including bad debt offsets, because a substantial portion of the extinguished water bill arrearage would not have been paid

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<sup>36</sup> Colton, *supra* note 34, at 7.

<sup>37</sup> *Id.* at 14.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 7.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 9.

<sup>43</sup> *Id.* at 9-12.

<sup>44</sup> *Id.* at 13, 21-23. This 2005 projection is based on a study of Detroit’s socioeconomic situation and analysis of similar assistance programs implemented in Pennsylvania, New York, and Washington, D.C.

back in the first place.<sup>45</sup> Though these figures may have changed since this 2005 proposal, they provide a necessary starting point.

To pay for this program, the Plan calls for a fixed increase in water bill fees on a per-customer basis (as opposed to a volumetric basis). The proposal calculates that the following fixed monthly rate increases would essentially pay for the entire program: a \$1 increase for residential customers, a \$20 increase for commercial customers, a \$275 increase for industrial customers, and an \$80 increase for municipal, school and large-scale housing customers.<sup>46</sup>

### **Legality of the Plan**

Despite the Mayor and City Council's approval of the Plan, DWSD has resisted its implementation.<sup>47</sup> A detailed look at whether the City Council's approval is legally binding and enforceable is beyond the scope of this paper. However, it is likely not enforceable. Municipal actions that are legislative in nature, setting forth a new plan or policy, must be passed by ordinance to be enforceable.<sup>48</sup> In contrast, ministerial actions, which merely administer already existing laws, need only be accomplished by resolution.<sup>49</sup> Implementing the Plan is likely closer to being legislative in character. Thus, it is likely not binding unless passed by ordinance.<sup>50</sup>

However, even if the Plan was implemented, two principal challenges could call its legality into question:<sup>51</sup> (1) whether the Plan's extra charges to customers violates DWSD's duty

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<sup>45</sup> *Id.* at 17.

<sup>46</sup> *Id.* at 20.

<sup>47</sup> *See Hardy, supra* note 35.

<sup>48</sup> 1A Sutherland Statutory Construction § 30:3 (7th ed.); 56 Am. Jur. 2d Municipal Corporations, Etc. § 286.

<sup>49</sup> *Id.*

<sup>50</sup> § 7.1502 of the Detroit City Charter bestows upon the DWSD Board of Water Commissioners, not the City Council, the power to set water rates. To change this would likely take legislative action.

<sup>51</sup> DWSD has already articulated these challenges to some extent. *See Bankole Thompson, Affordable Water Plan Inches Forward*, Michigan Citizen, Feb. 26, 2006, available at <http://michigancitizen.com/affordable-water-plan-inches-forward-p2718-1.htm> (Last accessed Dec. 9, 2011).

to set water rates at a reasonable level that is not undue or excessive;<sup>52</sup> and (2) whether the Plan violates the Headlee Amendment to the Michigan Constitution, which prohibits local units of government from increasing taxes on its residents without voter approval.<sup>53</sup>

### **Reasonable Rates that are Not Undue or Excessive**

DWSD, like all Michigan water rate-setting administrative bodies, must not set undue, excessive,<sup>54</sup> or unreasonable<sup>55</sup> rates. Michigan law does not elaborate on the meaning of “undue” or “excessive.”<sup>56</sup> The reasonableness requirement, a wholly judicial creation, has been explicated to some extent. A rate that yields a profit for the administrative body to put toward improvements to the water plant is still reasonable.<sup>57</sup> Furthermore, a party challenging the reasonableness of a rate has the burden to show the rate is unreasonable.<sup>58</sup>

In one form or another, states generally follow a standard similar to Michigan’s “undue, excessive, and unreasonable” standard for water and other utility rates.<sup>59</sup> In evaluating a utility subsidy program under this standard, the courts must determine whether the subsidy to a particular class of ratepayers (be it the poor, elderly, or another disadvantaged class), unduly discriminates against other classes of ratepayers, who must bear increased utility costs to pay for the subsidy.<sup>60</sup>

Jurisdictions are split on whether subsidized utility plans pass this standard. Some take a narrow interpretation, holding any subsidy plans discriminatory. Under this interpretation,

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<sup>52</sup> M.C.L. 486.315; 25 Mich. Civ. Jur. Water § 149; *Preston v. Board of Water Com'rs of Detroit*, 117 Mich. 589, 596 (1898).

<sup>53</sup> Mich. Const. 1963, Art. IX, § 31.

<sup>54</sup> M.C.L. 486.315.

<sup>55</sup> *Preston*, 117 Mich. at 596.

<sup>56</sup> *See* 25 Mich. Civ. Jur. Water § 151.

<sup>57</sup> *Preston*, 117 Mich. at 596.

<sup>58</sup> *City of Novi v. City of Detroit*, 433 Mich. 414 (1989) (Notably, however, this case deals with the reasonableness of rates for water sold between municipal entities under M.C.L. 123.141(2), which is not at issue here.).

<sup>59</sup> *See* Margot Saunders et al., *Water Affordability Programs*, American Water Works Association Research Foundation, at 144, available at <http://tinyurl.com/6u6v6bu> (Last accessed Dec. 19, 2011). Other states use such language as “unreasonable” or “unjust” price discrimination.

<sup>60</sup> *Id.* at 144-52.

subsidizing certain classes at the expense of others amounts to a policy decision, which belongs in the legislative realm, not the judicial or regulatory.<sup>61</sup> In the absence of an explicit statutory directive to consider these policy goals, rate setting bodies do not hold this authority.<sup>62</sup>

Other jurisdictions take a more relaxed view, using a balancing test to determine whether a subsidy plan unduly, excessively, or unreasonably discriminates between classes. Factors in this balancing test typically include: (a) the costs associated with the plan; (b) the level of utility use by subsidized residents relative to other classes; (c) whether the plan targets a narrow class of people so that only customers in sufficient need are subsidized; and (d) the economic and social well-being of the subsidized residents.<sup>63</sup> This balancing test allows for a measure of equity toward the “deserving class” otherwise unable to afford essential services.<sup>64</sup> In balancing these factors, detailed, evidence-based projections are essential.<sup>65</sup>

Due to lack of applicable Michigan caselaw, it is an open question whether Michigan courts would take a narrow or a relaxed view on this issue. Michigan’s reasonableness water rate requirement, used by courts independently of any statutory directive, indicates the potential for a more relaxed and broad construction. Another relevant, though nonbinding, starting point is the Michigan Public Service Commission (MPSC) decision *In Re Consumers Power Co.*<sup>66</sup> In this

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; *Mountain States Legal Foundation v Public Utilities Com.*, 197 Colo. 56, 60 (1979); *Rhode Island Consumers’ Council v Smith*, 111 R.I. 271, 301-302, later app. 113 R.I. 232 (1973) (a telephone rate case); *Telluride Power Co. v Public Utilities Com.* 8 F. Supp. 341, 344 (1934, DC Utah) (an electricity rate case); *Mountain States Legal Foundation v New Mexico State Corp. Com.* 101 N.M. 657, 659 (1984).

<sup>63</sup> See, e.g. *Saunders*, *supra* note 59, at 144-52; *Hoechst Corp. v Department of Public Utilities* 379 Mass. 408, 412-13 (1980); *Town Taxi, Inc. v Police Comr. of Boston*, 377 Mass. 576, 582 (1979).

<sup>64</sup> *Town Taxi, Inc.*, 377 Mass. at 582 (1979).

<sup>65</sup> See *Saunders*, *supra* note 59, at 148; *Mountain States Legal Foundation v. Utah Pub. Services Comm’n*; 636 P.2d 1047, 1052 (Utah 1981).

<sup>66</sup> *Re Consumers Power Co.*, 25 P.U.R.4th 167 (July 31, 1978).

administrative case, the MPSC allowed for reduced electricity rates for senior citizens, because seniors used less electricity than other classes of ratepayers.<sup>67</sup>

If Michigan courts take a narrow view of the undue, excessive, unreasonableness standard, the Plan would not pass judicial scrutiny. However, it could likely survive if the court applies a relaxed standard. The first consideration is cost. Again, projected costs are based on 2005 projections, and a more current analysis would have to be completed. But, under the 2005 projections, the plan would cost \$13.5 million annually.<sup>68</sup> This is about two percent of the \$685,954,940 the City of Detroit recommended water revenue for the 2011-12 year.<sup>69</sup> For comparison, Los Angeles' water affordability program totaled \$16 million annually, according to a 1998 report.<sup>70</sup> The annual costs per customer to pay for the Plan range from \$12 for residential customers to \$3,300 for industrial customers.<sup>71</sup>

Also relevant is the level of water used by subsidized residents relative to other classes. While this paper does not look into differences in water usage levels for Detroit citizens based on socioeconomic status, there is no immediate reason to believe poor residents use more water than other residents. If anything, their limited funds may cause them to use less water. Furthermore, water conservation is a central component of the Plan, both through direct advocacy efforts and through the incentives created by the fixed payment structure.

Whether the Plan targets a narrow class of people, so that only customers in sufficient need are subsidized, is a complicated issue for Detroit. The Plan is typical for water and utility

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<sup>67</sup> *Id.* at 231. Note: this case was decided before passage of the 1984 Michigan Low Income Heating Assistance and Shut-Off Protection Act.

<sup>68</sup> Colton, *supra* note 34, at 13, 21-23

<sup>69</sup> City of Detroit 2011-12 Executive Summary, April 12, 2011, available at <http://tinyurl.com/7ffc94q> (Last accessed Dec. 18, 2011).

<sup>70</sup> Saunders, *supra* note 59, at 22.

<sup>71</sup> Colton, *supra* note 34, at 20.

affordability plans in that eligibility requirements are keyed to federal poverty guidelines.<sup>72</sup> The Plan's 175 percent of federal poverty eligibility level is higher than many plans,<sup>73</sup> though some cities, such as Los Angeles, share this higher eligibility level.<sup>74</sup> However, Detroit is unique from many other cities in its high proportion of poverty. The Plan's 2005 proposal calculated that 43 percent of Detroit residents would be eligible for the Plan.<sup>75</sup> Courts have certainly considered the economic well-being of residents in asserting the validity of assistance plans, and a sufficient case can be made that all of these households do in fact need assistance. But in terms of sufficient narrowness, a court might be compelled to consider a plan that could subsidize nearly half of the city's residents to be overly broad. A narrower plan, more likely to pass legal scrutiny, might lower the 175 percent of poverty eligibility requirement, or provide assistance only to residents who actually miss water bill payments.

### **The Headlee Amendment**

A second legal concern is whether the Plan would violate the Headlee Amendment's prohibition against local units of government increasing taxes on its residents beyond that already authorized by law, without voter approval.<sup>76</sup> Whether this prohibition applies depends on whether the charge is a tax or merely a fee; a tax is prohibited, while a fee is allowed.<sup>77</sup> While no bright-line test exists to differentiate between the two, the court considers three criteria: (1) whether the charge serves a regulatory purpose or a revenue-raising purpose; (2) whether the charge is proportionate to the necessary service cost; and (3) whether the charge is voluntary.<sup>78</sup>

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<sup>72</sup> Saunders, *supra* note 59, at 157.

<sup>73</sup> *Id.* at 19, 23. Seattle water assistance eligibility requirements are set at 125 percent of the federal poverty level. Philadelphia is at 150 percent.

<sup>74</sup> *Id.* at 21.

<sup>75</sup> Colton, *supra* note 34, at 13.

<sup>76</sup> Mich. Const. 1963, Art. IX, § 31.

<sup>77</sup> 23 Mich. Civ. Jur. Taxes § 3.

<sup>78</sup> *Mapleview Estates, Inc. v. City of Brown City*, 258 Mich. App. 412 (2003); *Bolt v. City of Lansing*, 459 Mich. 152 (1998).

The more a charge is regulatory, service cost-proportionate, and voluntary in nature, the more likely it will be considered a fee. In accordance with the Michigan Constitution, the Headlee Amendment must be construed liberally in favor of local government entities.<sup>79</sup>

Even under a favorable interpretation, the charges imposed by the Plan would likely be closer to a tax than a fee. To be regulatory in nature, a charge must specifically benefit the person who pays it, though it can also have the dual purpose of benefiting the public.<sup>80</sup> In this case, the Plan would administer a monthly charge on all customers in order to benefit *only* those residents eligible for the Plan. In this sense, its explicit purpose is to raise revenue.

As for proportionality to the service rendered, a charge has a presumption of reasonableness, unless it is facially wholly out of proportion to the expense involved.<sup>81</sup> In this case, the extra charge would be separate from the normal water rates and explicitly intended solely for funding of the Plan. This separateness means that it is not proportionate at all to the customer's water service, because it is not related to the service in the first place.

A more unorthodox analysis would view the charges not as separate, but in context of the entire water bill. This analysis would hold the Plan to be a valid regulatory action. Detroit, as a home rule city, has police power to promote its residents' health, safety and general welfare.<sup>82</sup> Furthermore, the extra charges would be relatively small in proportion to the rest of the water bill, and thus not wholly out of proportion to the general water service rendered. The more typical Headlee Amendment analysis, however, views charges in their separateness.

As for whether the charge is voluntary, every Detroit resident who uses DWSD water must pay the charge. Customers cannot opt out of it. Furthermore, because water is a necessity

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<sup>79</sup> Mich. Const. 1963, Art. VII, § 34; *In re Harrand*, 254 Mich. 584 (1931); *People v. Johnson*, 12 Mich. App. 139 (1968).

<sup>80</sup> *USA Cash # 1, Inc. v. City of Saginaw*, 285 Mich. App. 262 (2009); Mich. Const. Art. 9, § 31.

<sup>81</sup> *Kircher v. City of Ypsilanti*, 269 Mich. App. 224 (2005).

<sup>82</sup> *Belle Isle Grill Corp. v. City of Detroit*, 256 Mich.App. 463, 480-81 (2003).

and a government-monopolized utility, Detroit customers have no realistic voluntary choice but to use DWSD water. All of these factors point to the charge being a tax rather than a fee.

For these reasons, the Headlee Amendment poses a substantial challenge to the Plan. This challenge could be sidestepped if the Plan's funding came simply from increased volumetric water rates, rather than a separate charge affixed to each customer's water bill. Providing water services is a valid regulatory purpose, already allowed by law. Though the increase in rates would only benefit those eligible for the Plan, the water rate itself would primarily serve the purpose of paying for the service rendered to all customers. A secondary purpose of funding the Plan would likely be more acceptable to courts.<sup>83</sup> Funding for the Plan would thus not be separated from the service rendered. This alternative means of funding would much more likely be considered a fee, and thus not prohibited by the Headlee Amendment.

In conclusion, the law independently provides very limited support for water access in Detroit, and the solution must ultimately come from the political process, not the legal system. Ultimately, solutions are possible, but any solution must successfully navigate substantial legal challenges.

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<sup>83</sup> See *USA Cash # 1, Inc.*, 285 Mich. App. 262.