STATE OF MICHIGAN

COURT OF APPEALS

NICOLA BINNS, JAYNE CARVER, SUSAN MCDONALD, GOAT YARD, LLC, and END OF THE ROAD MINISTRIES, LLC,

Plaintiffs,

v

CITY OF DETROIT, CITY OF DETROIT WATER AND SEWERAGE DEPARTMENT, DETROIT BOARD OF WATER COMMISSIONERS, and GREAT LAKES WATER AUTHORITY,

Defendants.

UNPUBLISHED
November 14, 2024
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No. 337609
Original Action
(Headlee Amendment)

DETROIT ALLIANCE AGAINST THE RAIN TAX, DETROIT IRON & METAL COMPANY, AMERICAN IRON & METAL COMPANY, MCNICHOLS SCRAP IRON & METAL COMPANY, MONIER KHALIL LIVING TRUST, and BAGLEY PROPERTIES, LLC,

Plaintiffs,

v

CITY OF DETROIT, DETROIT WATER AND SEWERAGE DEPARTMENT, and DETROIT BOARD OF WATER COMMISSIONERS,

Defendants.

No. 339176
Original Action
(Headlee Amendment)

ON REMAND

Before: RIORDAN, P.J., and BOONSTRA and REDFORD, JJ.

PER CURIAM.

In Docket No. 337609, plaintiffs, Nicola Binns, Jayne Carver, Susan McDonald, Goat Yard, LLC, and End of the Road Ministries, LLC (referred to collectively as the Binns plaintiffs), filed this original action under Const 1963, art 9, §§ 25-34, popularly known as the Headlee Amendment.[1] In Docket No. 339176, plaintiffs, Detroit Alliance Against the Rain Tax (DAART), Detroit Iron & Metal Company, American Iron & Metal Company, McNichols Scrap Iron & Metal Company, the Monier Khalil Living Trust, and Bagley Properties, LLC (referred to collectively as the DAART plaintiffs), likewise filed an original action under the Headlee Amendment. We will use the general term "plaintiffs" when referring collectively to both the Binns plaintiffs and the DAART plaintiffs. This Court consolidated these original actions. *Detroit Alliance Against the Rain Tax v Detroit*, unpublished order of the Court of Appeals, entered October 24, 2017 (Docket No. 339176). This Court later vacated the order consolidating the actions, *Detroit Alliance Against the Rain Tax v Detroit*, unpublished order of the Court of Appeals, entered September 5, 2023 (Docket No. 339176), but, as will be explained, the cases have continued to be considered together.

On November 6, 2018, this Court issued a single opinion for the two cases denying relief to plaintiffs in accordance with MCR 7.206(E)(3)(b), which provides that, in a Headlee Amendment case, this Court may deny relief without oral argument. *Binns v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued November 6, 2018 (Docket Nos. 337609 and 339176) (*Binns I*), vacated & remanded sub nom *Binns v Detroit*, 506 Mich 996 (2020), and vacated & remanded sub nom *Detroit Alliance Against the Rain Tax v Detroit*, 506 Mich 996 (2020), amended in part on recon & recon den in part 507 Mich 871 (2021). On December 11, 2020, our Supreme Court vacated this Court's judgment in the Binns case and remanded the case to this Court with instructions to "refer the case to a judicial circuit for proceedings under MCR 7.206(E)(3)(d)." *Binns v Detroit*, 506 Mich 996, 996 (2020) (*Binns II*).[2] On the same date, our Supreme Court vacated this Court's judgment in the DAART case and remanded the case to this

[1] This Court has original jurisdiction in Headlee Amendment cases. See Const 1963, art 9, § 32.

[2] MCR 7.206(E)(3)(d) provides, with respect to Headlee Amendment cases:

> [I]f the panel of the court determines that the issues framed in the parties' pleadings and supplemental briefs present factual questions for resolution, the panel must refer the suit to a judicial circuit for the purposes of holding pretrial proceedings, conducting a hearing to receive evidence and arguments of law, and issuing a written report for the panel setting forth proposed findings of fact, and conclusions of law. The proceedings before the circuit court must proceed as expeditiously as due consideration of the circuit court's docket, facts and issues of law requires. Following the receipt of the report from the circuit court, the panel must notify counsel for the parties of the schedule for filing briefs in response to the circuit court's report and of the date for oral argument, which must be on an expedited basis.

Court with instructions to hold the case in abeyance for the Binns case and, once the Binns case was decided, to reconsider the DAART case in light of this Court's decision in the Binns case. *Detroit Alliance Against the Rain Tax v Detroit*, 506 Mich 996, 996 (2020) (*DAART I*), amended in part on recon & recon den in part 507 Mich 871 (2021). On February 12, 2021, our Supreme Court, on partial reconsideration of its December 11, 2020 order in the DAART case, modified that order to provide that the DAART plaintiffs "may participate in the proceedings below undertaken pursuant to MCR 7.206(E)(3)(d)." *Detroit Alliance Against the Rain Tax v Detroit*, 507 Mich 871, 871-872 (2021) (*DAART II*).

On March 2, 2021, this Court referred the Binns case to then-Chief Judge Timothy M. Kenny of the Wayne Circuit Court for the purpose of selecting a judge of that court to serve as the special master. *Binns v Detroit*, unpublished order of the Court of Appeals, entered March 2, 2021 (Docket No. 337609). Chief Judge Kenny appointed Wayne Circuit Court Judge Patricia Perez Fresard to serve as special master. On March 2, 2021, this Court entered an order holding the DAART case in abeyance pending the decision in the Binns case. *Detroit Alliance Against the Rain Tax v Detroit*, unpublished order of the Court of Appeals, entered March 2, 2021 (Docket No. 339176). By stipulation of the parties in both cases, and in accordance with our Supreme Court's February 12, 2021 order, the special master allowed the DAART plaintiffs to participate in the proceedings before her.

On August 8, 2023, the special master issued a 53-page report setting forth proposed findings of fact and conclusions of law.[3] The special master concluded that plaintiffs were not entitled to relief because the Detroit drainage charge is a valid user fee rather than an unauthorized tax that is subject to the Headlee Amendment. On September 12, 2023, this Court entered orders allowing the DAART plaintiffs to participate in the proceedings and providing a timeframe for the filing of objections to the special master's report. *Binns v Detroit*, unpublished order of the Court of Appeals, entered September 12, 2023 (Docket No. 337609); *Detroit Alliance Against the Rain Tax v Detroit*, unpublished order of the Court of Appeals, entered September 12, 2023 (Docket No. 339176).

Both sets of plaintiffs have filed respective objections and supporting briefs arguing that the Detroit drainage charge is an unauthorized tax in violation of the Headlee Amendment. Defendants, the city of Detroit and its agencies, the Detroit Water and Sewerage Department (DWSD) and the Detroit Board of Water Commissioners (BWC) (collectively referred to as defendants[4]), have filed responsive briefs arguing that the special master correctly concluded that the drainage charge is a valid user fee.

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[3] The Court thanks and acknowledges the diligent efforts as well as detailed and comprehensive report of the Special Master, the Honorable Patricia Perez Fresard, Chief Judge of the Third Judicial Circuit.

[4] Defendant Great Lakes Water Authority has been dismissed by stipulation of the parties. *Binns v Detroit*, unpublished order of the Court of Appeals, entered April 8, 2021 (Docket No. 337609).

We agree with the special master and defendants that the drainage charge is a valid user fee. We therefore deny plaintiffs' requests for relief.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs own property in Detroit or, in the case of DAART, represent such property owners, and assert that a drainage charge assessed by defendants is a tax that has not been approved by voters as required by the Headlee Amendment. *Binns I*, unpub op at 2-3. In contrast, defendants argue that the drainage charge is a valid user fee that is not subject to the Headlee Amendment. *Id*. at 3.

In *Binns I*, this Court summarized the pertinent facts as derived by the parties largely from documents published by defendants. *Id*.[5]

> As with many older cities, Detroit has a combined sewer system, meaning that storm water runoff flows into the same pipes as unsanitary wastewater, i.e., sewage. Every year, billions of gallons of storm water flow into Detroit's combined sewer system from impervious surfaces, i.e., hard surfaces that limit the ability of storm water to soak into the ground. Impervious surfaces include roofs, driveways, parking lots, and compacted gravel and soil. This storm water is contaminated with dirt and debris. The combined sewage is treated at Detroit's wastewater treatment plant (WTP) and combined sewer overflow (CSO) facilities before being released back into the environment. Federal and state regulations have required the DWSD to invest more than $1 billion in CSO control facilities in order to prevent untreated CSOs from spilling into Michigan waterways. The DWSD has instituted drainage charges that pay for capital, operations, and maintenance costs for the WTP, CSO control facilities, and combined sewer system components. [*Id*.]

As of January 2016, wholesale suburban customers are now served by the Great Lakes Water Authority (GLWA) rather than the DWSD. *Id*.

> [T]he GLWA operates, controls, and improves the regional water and sewage assets owned by the city of Detroit—which were previously operated by the DWSD—under lease agreements for an initial term of 40 years, and the city of Detroit continues to manage and operate its own local water and sewer infrastructure. . . . [T]he city of Detroit and its agencies continue to manage the supply of water, drainage, and sewage services to retail customers of the city of Detroit. [*Id*.]

Pursuant to an order entered in federal litigation, the city of Detroit's BWC must establish retail rates for water, drainage, and sewage services in order to satisfy revenue requirements established

[5] Although our Supreme Court vacated this Court's opinion in *Binns I* and remanded for factual findings by a special master, the key facts derived from documents remain undisputed and are thus summarized only to provide a basic overview and to facilitate the discussion of the history of these cases in the period before the issuance of our Supreme Court's orders. The special master's findings will be summarized later.

by the GLWA in addition to the expenses of operating the city's local water and sewer infrastructure. *Id*. at 3-4. Drainage charges are deemed critical to ensure compliance with federal regulatory requirements related to the treatment and disposal of CSOs. *Id*. at 4.

Although DWSD customers had been paying some form of a drainage charge since 1975, the DWSD updated or revised its method of calculating the drainage charge in 2016. *Id*.

> On the basis of flyover views and aerial photography conducted in 2015 to determine impervious areas, as well as city assessor data, the DWSD identified 22,000 parcels that had not previously been charged for drainage, including parcels that did not have a water account and thus were not in the DWSD billing system. The DWSD determined that these parcels, except those owned by faith-based institutions, would be charged $750 per impervious acre beginning in October 2016. All customers would be charged on the basis of impervious surface area by 2018. In particular, the new impervious surface rate would apply to industrial properties beginning in January 2017, commercial properties in April 2017, tax-exempt properties (other than faith-based) in June 2017, residential properties in October 2017, and faith-based properties in January 2018. Transition credits would apply for two fiscal years. The DWSD adopted its phased-in approach to the updated drainage charge in order to afford customers time to prepare for the new rate and to avoid overwhelming the DWSD billing system. The DWSD has asserted that it possesses various options if a customer refuses to pay the drainage charge, including termination of water service for the property, the imposition of a lien on the property, a legal action to recover unpaid fees, and the suspension or revocation of a license to do business in the city of Detroit.
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> No drainage charge will be imposed for parcels containing fewer than .02 impervious acres because that is the margin of error from flyover views. Further, if a property owner verifies that storm water runoff flows directly into the Detroit River or the Rouge River and that the parcel is disconnected from the DWSD system, there is no charge. The DWSD provides procedures whereby customers may dispute the measurement of the impervious acreage for a parcel or may seek an adjustment in billing on the basis of a modification to the impervious surface area or the direct discharge of surface waters to one of the above-mentioned rivers. The DWSD provided the following explanation in a publication: "By simply reducing the impervious cover on a property, customers reduce the amount of storm water leaving their property and thus reduce their drainage charge. Examples of impervious cover reduction include removal of asphalt or concrete parking spaces and replacing the impervious cover." The DWSD also permits drainage credits of up to 80% for customers who use green infrastructure systems or practices that reduce the amount of storm water flowing from the property into the DWSD's combined sewer system. "Green infrastructure examples include disconnecting downspouts, rain gardens, bioretention practices, installing permeable pavement, green roof designs, detention and subsurface detention and other practices that manage storm water volume." [*Id*. at 4-5.]

The DWSD's drainage revenue requirement exceeded $151 million for fiscal year 2017. *Id*. at 5. This included more than $125 million for operation and implementation costs and drainage credits. *Id*. "The DWSD's expense for debt service is $59.8 million; this expense is comprised essentially of a GLWA-held mortgage payment for facilities that are in place to address wet weather flows." *Id*. Uncollectible bills constitute bad debt that the DWSD's remaining customers are required to cover. *Id*. "[T]he DWSD invested more than $1 billion in CSO control facilities" to comply with federal regulatory requirements. *Id*. This cost was financed mostly through bonds that were being repaid with funds generated from the drainage charge. *Id*.

> The DWSD does not charge the city of Detroit itself a drainage fee for storm water flowing from city streets into the combined sewer system. The DWSD explains: "City streets, which are lower than parcels, are part of the conveyance infrastructure for facilitating the flow of storm water from Detroit properties into the catch basins, then into the combined sewer system, and then finally terminating at the [WTP]." However, "[c]ity owned parcels will not be characterized as conveyance. This term only applies to city streets, i.e., areas common to all that serve as storm water conveyance."
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> Effective in April 2017, and applied retroactively to October 2016, the DWSD has revised its drainage charge policy to provide transition credits for properties that were not previously billed for drainage services or that were previously billed on the basis of meter size and are now converted to the drainage rate based on impervious area. Under this revised policy, full implementation of the uniform impervious area based drainage charge is to be phased in over five years. Further, residential parcels received an automatic credit of 25% to reflect the flow characteristics of such parcels. The DWSD also indicated that it would provide a property owner with up to 50% of the cost, with a maximum payment of $50,000, for eligible green storm water infrastructure measures installed and maintained by the property owner. [*Id*. at 5-6]

In March 2017, the Binns plaintiffs filed their action alleging that the drainage charge was a disguised tax that was not authorized by voters as required by the Headlee Amendment. *Id*. at 6. The Binns plaintiffs requested declaratory, injunctive, and monetary relief. *Id*. They sought to represent a class of all property owners who had been charged the drainage fee. *Id*. In their answer, defendants raised numerous affirmative defenses, including that the drainage charge was a valid user fee. *Id*.

In July 2017, the DAART plaintiffs filed their action similarly asserting that the drainage charge was a tax that lacked voter approval as required by the Headlee Amendment. *Id*. at 8. The DAART plaintiffs asked for class certification as well as declaratory and monetary relief. *Id*. Defendants again answered raising the same affirmative defenses that they raised in the Binns case. *Id*. As noted, this Court consolidated the two cases. *Id*., citing *Detroit Alliance Against the Rain Tax v Detroit*, unpublished order of the Court of Appeals, entered October 24, 2017 (Docket No. 339176).

On November 6, 2018, we issued an opinion denying plaintiffs' requests for relief. *Binns I*, unpub op at 2, 22.[6] We determined referral to a judicial circuit for discovery or fact-finding was unnecessary because the parties had filed supplemental briefs with extensive documentary evidence, plaintiffs had not asserted any need for referral to a judicial circuit, and the DAART plaintiffs stated that the case could be decided without referral to a judicial circuit. *Id*. at 9.

We agreed with defendants that the drainage charge was a valid user fee that was not subject to the Headlee Amendment, *id*. at 9, and applied the three-factor test from *Bolt v Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998), for distinguishing between a user fee and a tax, *Binns I*, unpub op at 10. Under that test, "(1) a user fee serves a regulatory purpose rather than a revenue-raising purpose; (2) a user fee is proportionate to the necessary costs of the service; and (3) a user fee is voluntary in that property owners are able to refuse or limit their use of the service." *Id*., citing *Bolt*, 459 Mich at 161-162.

Regarding the first factor, we concluded that the drainage charge served a regulatory purpose rather than a revenue-raising purpose. *Binns I*, unpub op at 14. A service was rendered because storm water was removed and treated. *Id*. "[T]he DWSD provides full treatment to the combined sewage comprised of storm water and unsanitary waste water, as required by federal regulations and orders," thus indicating a significant regulatory component. *Id*. at 14-15. An adequate correspondence existed "between the charges imposed and the benefits conferred." *Id*. at 16. The charge was "used to fund capital, operations, and maintenance costs for facilities treating all of the storm water entering Detroit's combined sewage system." *Id*. There was no "evidence of a revenue-generating purpose that outweighs the regulatory purpose of the drainage charge." *Id*. The fact that the drainage charge was used in part to service debt incurred to finance federally required capital improvements did not overcome the presumption that the charge was reasonable. *Id*. at 17. "The city of Detroit's drainage charge is not used to fund future expenses for large-scale capital improvements; it is instead used to amortize present debt costs incurred to pay for capital improvements in conformance with accepted accounting principles." *Id*. at 18.

As for the second *Bolt* factor, this Court determined that the drainage charge was reasonably proportionate to the necessary costs of the service. *Id*. The charge was "calculated on the basis of aerial photography as well as city assessor data to determine the amount of impervious area on each parcel." *Id*. No charge was imposed for storm water runoff that flowed directly into the Detroit River or the Rouge River. *Id*. at 19. Customers could dispute the measurement of impervious acreage or seek a billing adjustment on the basis of a modification to the impervious surface area. *Id*. The use of green infrastructure systems could reduce the charge by up to 80%. *Id*. Defendants produced studies and manuals indicating that impervious area may be used to measure or estimate the volume of storm water runoff. *Id*. The use of a temporary gradual phase-in period to mitigate rate shock did not render the charge disproportionate. *Id*. at 19-20. Nor was there disproportionality on the basis of the DWSD's failure to charge the city of Detroit a drainage fee for storm water flowing from city streets. *Id*. at 20. Plaintiffs produced no evidence disputing defendants' explanation that city streets are part of the storm water conveyance infrastructure. *Id*.

[6] The cases were decided without oral argument, pursuant to MCR 7.206(E)(3)(b). *Binns I*, unpub op at 9.

With respect to the third *Bolt* factor, we found that the drainage charge was effectively compulsory, rather than voluntary. *Id*. "Property owners who have .02 or more impervious acres and whose storm water does not discharge directly into a river have essentially no control over whether to use the drainage service and pay the drainage charge." *Id*. The green infrastructure credit system permitted a credit only of up to 80% of the drainage charge. *Id*. The compulsory nature of the charge was further demonstrated by the DWSD's authority to terminate water service and impose a lien on the property if the customer fails to pay the charge. *Id*. at 21.

Overall, this Court ruled that the application of the *Bolt* factors led to the conclusion that the drainage charge was a valid user fee rather than a tax. *Id*. Although the third factor weighed in favor of a finding that the charge was a tax, the first and second factors indicated that the charge was a user fee. *Id*. "Because the application of the first two *Bolt* criteria clearly demonstrates that the drainage charge is a proper user fee rather than a tax, the effectively compulsory nature of the drainage charge does not render the drainage charge a tax for the purpose of the Headlee Amendment." *Id*. Hence, the drainage charge was not subject to the Headlee Amendment. *Id*.

Therefore, we denied plaintiffs' requests for relief. *Id*. at 22. Plaintiffs' motions for class certification were denied because plaintiffs lacked a cause of action. *Id*. at 22 n 23.

Both sets of plaintiffs applied for leave to appeal in our Supreme Court. On January 24, 2020, our Supreme Court entered an order in the DAART case directing the Clerk to schedule oral argument on the application. *Detroit Alliance Against the Rain Tax v Detroit*, 505 Mich 962 (2020). On the same date, our Supreme Court entered an order in the Binns case holding that case in abeyance for the DAART case. *Binns v Detroit*, 937 NW2d 121 (Mich, 2020). On October 7, 2020, our Supreme Court heard oral argument in the DAART case.

On December 11, 2020, our Supreme Court entered an order in the Binns case vacating this Court's judgment in that case and remanding the case to this Court with instructions to "refer the case to a judicial circuit for proceedings under MCR 7.206(E)(3)(d)." *Binns II*, 506 Mich at 996. Our Supreme Court did not retain jurisdiction. *Id*. On the same date, our Supreme Court entered an order in the DAART case vacating this Court's judgment in that case and remanding the case to this Court with instructions to hold the case in abeyance for the Binns case and, once the Binns case was decided, to reconsider the DAART case in light of this Court's decision in the Binns case. *DAART I*, 506 Mich at 996. Our Supreme Court did not retain jurisdiction. *Id*.

Justice Zahra wrote a statement concurring in the December 11, 2020 order in the Binns case. *Binns II*, 506 Mich at 997 (ZAHRA, J., concurring). Justice Zahra "observe[d] that the fact-finding process under MCR 7.206(E)(3)(d) that will take place in this case and which will subsequently be applied in *DAART* is critical to reaching a sound result under [*Bolt*]." *Id*. He opined that the second *Bolt* factor, involving proportionality, was particularly important here in light of the following assertion made in an amicus-curiae brief filed by Kickham Hanley, PLLC:

> The City of Detroit (the City) inexplicably does not collect Drainage Charges from the City's largest landowner, the Detroit Land Bank Authority ("DLBA"), a component unit of the City that owns and controls approximately 25% of the parcel-based acres in the City, a land area the size of the City of Royal Oak. As a result, the lost revenues attributable to the City's failure to collect from the DLBA must

be made up through higher Drainage Charge rates imposed on other landowners. [*Id*. (quotation marks, brackets, and citation omitted).]

Justice Zahra continued:

> Given the foregoing, it is at best unclear to me how the City's drainage charge is best classified as a user fee rather than as a tax where: (1) "user fees must be proportionate to the necessary costs of the service," *Bolt*, 459 Mich at 161-162; (2) a subunit of the City is exempted from paying the drainage charge that other impervious-acreage landowners must pay, see Kickham Hanley amicus brief at 3; and (3) that results in the imposition of "higher Drainage Charge rates" on other, non-DLBA landowners, see *id*.—all of which applies to plaintiffs in these cases. [*Id*.]

On January 4, 2021, the DAART plaintiffs filed in our Supreme Court a motion for reconsideration of the December 11, 2020 orders. The DAART plaintiffs argued that it was erroneous and unjust to exclude them from participation in the MCR 7.206(E)(3)(d) proceedings. The DAART plaintiffs further argued that the facts were essentially undisputed and that the case could be decided on the basis of those undisputed facts. Even if further fact-finding was required, our Supreme Court's orders would confound the parties, the circuit court, and this Court because our Supreme Court's orders provided no guidance regarding any points on which additional fact-finding and legal conclusions were required.

On January 11, 2021, defendants filed in our Supreme Court an answer to the DAART plaintiffs' motion for reconsideration. Defendants argued that our Supreme Court palpably erred when it vacated this Court's November 6, 2018 opinion in *Binns I* and remanded for further fact-finding in the Binns case. Defendants urged our Supreme Court to vacate its December 11, 2020 orders and issue a decision on the basis of the existing record and briefs. This Court did not err by failing to refer the cases to a judicial circuit for findings of fact. The material facts were uncontroverted. The DAART plaintiffs had indicated that they did not need discovery or additional information. Defendants argued that this Court properly concluded that the existing record provided sufficient information to decide the legal question whether the drainage charge violated the Headlee Amendment and that there were no questions of fact that required resolution by a judicial circuit. Further, defendants contended this Court has the authority and discretion to draw inferences of fact when deciding any questions of law. Defendants further argued that the amicus-curiae brief cited by Justice Zahra incorrectly characterized the DLBA as a subunit of the city of Detroit. In truth, defendants said, the DLBA is a separate legal entity. Defendants asserted that Justice Zahra relied on unsubstantiated assertions by a nonparty.

On February 12, 2021, our Supreme Court entered an order in the DAART case granting in part the DAART plaintiffs' motion for reconsideration. *DAART II*, 507 Mich at 871. Our Supreme Court modified its December 11, 2020 order in the DAART case "to provide that the [DAART plaintiffs] may participate in the proceedings below undertaken pursuant to MCR 7.206(E)(3)(d)." *Id*. at 871-872. The motion for reconsideration was denied in all other respects. *Id*. at 872. Our Supreme Court did not retain jurisdiction. *Id*.

Justice Clement wrote a statement concurring in the February 12, 2021 order. *Id*. at 872-873 (CLEMENT, J., concurring). Justice Clement stated that she was "concerned about the confusion expressed by the [DAART plaintiffs] in this motion about what is to be achieved on remand," and she thus wrote separately to explain what she believed needed to be done on remand. *Id*. at 872. Justice Clement stated that the mere fact that Detroit had a combined sewer system, unlike the city of Lansing's separated sewer system considered in *Bolt*, was not, by itself, "sufficient to uphold the constitutionality of this financing scheme." *Id*. Justice Clement explained that our Supreme Court needed a better factual understanding of the case. *Id*. "The critical problem," she wrote, "is that we have no way of assessing how *proportional* the money being assessed is to the benefit that is being conferred." *Id*. (emphasis in original).

> How would a court go about determining that? It seems to me that a court would, at minimum, need reasonable estimates on issues such as: (1) what is the overall cost of the sewer system, (2) what portion of that overall cost is reasonably ascribed to the storm-sewer service vis-à-vis the sanitary-sewer service, (3) how is the cost of the storm-sewer service being apportioned among property owners in the city, and (4) are the city's assumptions about the amount of water that runs off of permeable vs. impermeable ground reasonable? It goes without saying that these inquiries cannot be calculated with absolute mathematical precision, but at least some effort at an estimate should be made. As a trivial example I can think of, we might calculate approximately how many gallons of storm-sewer water the system processes vis-à-vis the number of gallons of sanitary-sewer water, and use this as a way of apportioning the overall cost of the system between its storm and sanitary components. Of course, it may be reasonable to refine this further—perhaps sanitary-sewer water is, on average, more expensive to treat, thus affecting the ratio. In any event, it seems to me the only way we can assess whether property owners are being charged no more than the fair value of the service provided to each owner's parcel is to have a reasonable estimate of the total cost of the storm-sewer system. [*Id*.]
>
> Justice Clement noted questions concerning the Detroit storm-sewer system. *Id*.
>
> It is, for example, fair to wonder how, if many property owners are not being assessed anything, the overall system can remain financially viable unless those owners who are paying are being charged more than the value of the service being provided to them to make up for foregone revenue from parcels not being charged. It is also fair to question whether the cost of clearing water from city streets is a benefit that can be involuntarily paid for via a "fee" rather than a "tax." But by the same token, I am not aware of a rule in our Headlee jurisprudence saying that municipalities may not provide services at *less* than their cost to property owners (including, perhaps, to the municipality itself as a landowner); rather, I understand our law as allowing municipalities to charge *no more than* the reasonable cost of the service conferred. It appears to me that on this record, we simply cannot determine whether property owners are being overcharged. [*Id*. at 872-873.]

Justice Clement thus concluded that further fact-finding was necessary. *Id*. at 873.

As stated *supra*, on March 2, 2021, we referred the Binns case to the chief judge of the Wayne Circuit Court for the purpose of selecting a judge of that court to serve as the special master. *Binns v Detroit*, unpublished order of the Court of Appeals, entered March 2, 2021 (Docket No. 337609).

The special master then issued her findings.[7] The special master determined, in her opinion, that the facts supported a finding that the drainage charge was a lawful user fee under the *Bolt* factors.

She found the drainage charge was regulatory, rather than revenue-generating. She said the evidence showed that impervious area "is the best proxy for measuring the stormwater burden a parcel places on the [combined sewer system (CSS)], and therefore the corresponding benefit it derives from the system." The evidence further indicated "that the drainage charge was calculated only to recover the cost of a regulatory activity (the mandatory management of stormwater commingled with sewage, per the [federal Clean Water Act (CWA), 33 USC 1251 *et seq*.,] and [National Pollutant Discharge Elimination System (NPDES)] permit)." The drainage charge based on impervious area was used to recover "CSS costs associated with wet weather flow, which generates stormwater runoff that drives the size of the CSO facilities and CSO control costs . . . ." She found that "[t]he [c]ity used standard ratemaking practices to design a charge that defrays CSS costs associated with wet weather flow for the mandatory management, treatment, and disposal of stormwater commingled with sewage." Plaintiffs produced no "evidence that the revenue requirements, i.e., the costs required to operate the system, were inflated or included inappropriate elements." Capital improvements were paid for primarily through the DWSD's improvement and extension (I&E) fund, which was funded by the GLWA's $50 million annual lease payment.

The special master determined the drainage charge was proportionate. It "reflect[ed] the actual cost of use, metered with relative precision in accordance with available technology, and property owners are paying their proportionate share of those costs." She found that "[b]oth the [c]ity's CSS and estimated drainage collections relative to overall CSS and estimated drainage costs are reasonable." During "the relevant period the [c]ity's cash/rate collections for its CSS operations have always been less than its annual revenue requirement to operate the system." The city produced undisputed evidence that for each fiscal year since the implementation of the 2016 drainage charge, the "DWSD's estimated cash collections through its drainage charges have been less than what it billed its customers and not enough to cover the estimated annual revenue requirement for drainage . . . ." The special master said there is no evidence that property owners were overcharged, adding that a rational relationship existed between the fee amount and a parcel's contribution to the use of the CSS because impervious area "is the most important factor influencing the cost of stormwater management services." She said plaintiffs failed "to provide meaningful support for the proposition that groundwater infiltration resulting from pervious surfaces substantially contributes to CSOs." Further, defendants produced evidence that the use of impervious area was "a reasonable proxy for measuring a parcel's contribution to runoff, and

[7] The special master's findings were supported by citations of record evidence. We will summarize or quote the pertinent evidence later in this opinion when analyzing the parties' arguments.

there is no meaningful precision gained by relying on pervious area to allocate costs." She said a charge based on impervious area "is a widely used best practice."

Moreover, the special master determined, the drainage fee amount was reasonably related to the cost of using the CSS. The special master found reasonable the city's apportionment of 100% of CSO costs to drainage and 33% of CSS operational costs to drainage. The use of a phase-in period to mitigate rate shock did not render the drainage charge disproportionate; the shortfalls resulting from the use of transition credits were covered by a loan from the GLWA, which was repaid with nonrate revenue. Bad debt expense is a universally recognized component of a utility's operation and maintenance expenses. She said the DLBA did not receive special treatment, it was billed for drainage fees, and the bad debt expense associated with DLBA parcels was excluded from the drainage charge formula and calculations. City "roads are part of the stormwater conveyance system and provide in-kind services to [the] DWSD." It is thus reasonable not to impose a drainage charge for city roads. The drainage rates and impervious area allocable to roads owned by the Michigan Department of Transportation (MDOT) and Wayne County are governed by consent orders and settlement agreements negotiated in litigation.

The special master opined that the drainage charge was voluntary because property owners could limit their use of the drainage system because credits were available for drainage into a river, the use of green infrastructure, and residential parcels. Accordingly, the special master concluded that the drainage charge was a valid user fee under the *Bolt* factors. The special master thus declined to consider certain alternative arguments that defendants had asserted for denying relief to plaintiffs.[8]

II. STANDARD OF REVIEW

Whether the drainage charge constitutes a tax or a user fee is a question of law that this Court reviews de novo. *Bolt*, 459 Mich at 158. Plaintiffs have the burden of establishing the unconstitutionality of the drainage charge. *Jackson Co v City of Jackson*, 302 Mich App 90, 98; 836 NW2d 903 (2013). As directed by our Supreme Court, this Court referred the Binns case to a special master in accordance with MCR 7.206(E)(3)(d), and the DAART plaintiffs were allowed to participate in the proceedings before the special master. *DAART II*, 507 Mich at 871-872; *Binns II*, 506 Mich at 996; *Binns v Detroit*, unpublished order of the Court of Appeals, entered March 2, 2021 (Docket No. 337609). The special master has now issued her report setting forth her proposed findings of fact and conclusions of law. Because these cases are original Headlee

[8] After the issuance of the special master's report, we granted the Binns plaintiffs' motion for additional time to file objections to the report and granted the DAART plaintiffs' motion for leave to participate in the proceedings in this Court in the Binns case. *Binns v Detroit*, unpublished order of the Court of Appeals, entered September 12, 2023 (Docket No. 337609); *Detroit Alliance Against the Rain Tax v Detroit*, unpublished order of the Court of Appeals, entered September 12, 2023 (Docket No. 339176). The Binns plaintiffs and the DAART plaintiffs then filed their respective objections to the special master's report, along with supporting briefs. We later allowed the Binns plaintiffs to amend their objections and supporting brief. *Binns v Detroit*, unpublished order of the Court of Appeals, entered October 26, 2023 (Docket No. 337609). Defendants filed a concurrence in the special master's report and filed responses opposing plaintiffs' objections.

Amendment actions, this Court sits as the trial court, *Adair v Michigan (On Fourth Remand)*, 301 Mich App 547, 559; 836 NW2d 742 (2013), and we may, if we choose, adopt the findings of the special master, *id*. at 562.

III. DISCUSSION

We agree with the special master and defendants that the drainage charge is a valid user fee rather than a disguised tax and is thus not subject to the Headlee Amendment. We adopt the special master's findings and conclusions except with respect to the special master's analysis of the third *Bolt* factor.

The relevant provision of the Headlee Amendment, Const 1963, art 9, § 31, states as follows:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. . . .

"An application of § 31 is triggered by the levying of a tax." *Jackson Co*, 302 Mich App at 98, citing *Bolt*, 459 Mich at 158-159. The levying of a new tax without voter approval violates § 31. *Jackson Co*, 302 Mich App at 99, citing *Bolt*, 459 Mich at 158. However, a charge that constitutes a user fee is not subject to the Headlee Amendment. *Jackson Co*, 302 Mich App at 99, citing *Bolt*, 459 Mich at 159.

"There is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich at 160. "In general, 'a fee is 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. A tax, on the other hand, is designed to raise revenue.' " *Shaw v Dearborn*, 329 Mich App 640, 653; 944 NW2d 153 (2019), quoting *Bolt*, 459 Mich at 161.

> Under *Bolt*, courts apply three key criteria when distinguishing between a user 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) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or service." [*Shaw*, 329 Mich App at 653, quoting *Bolt*, 459 Mich at 161-162.]

"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 is not a fee." *Shaw*, 329 Mich App at 653 (quotation marks and citation omitted). The first two factors are closely related and may be analyzed together. *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999).

"[U]nder the Headlee Amendment, it is not this Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding

a municipal improvement or service." *Shaw*, 329 Mich App at 668. Rather, this Court's role "is to determine whether a particular charge imposed by a municipal government is a true user fee or a disguised tax." *Id*.

"[W]hile a utility fee must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged, mathematic precision is not required." *Trahey v Inskter*, 311 Mich App 582, 597; 876 NW2d 582 (2015), citing *Jackson Co*, 302 Mich App at 109. A municipal utility's rates are presumed reasonable, *Trahey*, 311 Mich App at 594, citing *Novi v Detroit*, 433 Mich 414, 428; 446 NW2d 118 (1989), and the burden is on the plaintiff to present evidence overcoming the presumption, *Trahey*, 311 Mich App at 594, citing *Novi*, 433 Mich at 432-433, and *Jackson Co*, 302 Mich App at 109; see also *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665-666; 697 NW2d 180 (2005) ("This Court presumes the amount of the fee to be reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence[.]") (quotation marks, ellipsis, and citations omitted). "Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable." *Trahey*, 311 Mich App at 595. "Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making." *Novi*, 433 Mich at 430.

A. REGULATORY PURPOSE

We agree with most of the special master's findings and conclusions in applying the *Bolt* factors. Regarding the first *Bolt* factor, a charge is regulatory if it is designed to defray the cost of a regulatory activity. *Bolt*, 459 Mich at 163-164. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham*, 236 Mich App at 151. In general, a municipality has police power to engage in regulatory activities concerning "the public health, morals, or welfare" and to impose related fees. *Merrelli v St Clair Shores*, 355 Mich 575, 582-583; 96 NW2d 144 (1959). "The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised." *Drain Comm'r of Oakland Co v Royal Oak*, 306 Mich 124, 141; 10 NW2d 435 (1943) (quotation marks and citation omitted); see also *Shaw*, 329 Mich App at 666 ("Under the first *Bolt* factor, it is beyond dispute that the city's water and sewer rates comprise a valid user fee because the rates serve the regulatory purpose of providing water and sewer service to the city's residents.").

The special master correctly concluded that the drainage charge serves a regulatory purpose rather than a revenue-raising purpose. The special master properly found "that the drainage charge was calculated only to recover the cost of a regulatory activity (the mandatory management of stormwater commingled with sewage, per the CWA and NPDES permit)."

In challenging the special master's conclusion, the Binns plaintiffs argue that the drainage charge is a revenue-raising program. The Binns plaintiffs assert that the DWSD's chief administrative officer (CAO) and general counsel, Deborah Pospiech, "testified that the Drainage Charge was designed and intended to raise approximately $20 million more revenue yearly by this new charge." The DAART plaintiffs similarly assert that the drainage charge "was designed,

intended, and imposed to raise approximately $20 million of additional revenue in its first year." Plaintiffs' arguments are unavailing.

In the portion of Pospiech's deposition cited by the Binns plaintiffs, Pospiech testified that drainage charge billings for fiscal year 2016 amounted to approximately $121 million. Pospiech testified later in her deposition that drainage charge billings for fiscal year 2017 came to $140,702,000. This testimony does not support the Binns plaintiffs' assertion that Pospiech testified that the drainage charge as revised in 2016 was designed and intended to raise an additional $20 million in revenue. At a later point in her deposition, Pospiech was asked whether the increased amount billed for fiscal year 2017 reflected an effort to increase revenue, and she responded: "No, no. . . . The costs are the costs. . . . You're not increasing revenue how ever you use that term. Your billings have to match to cover the costs." The special master correctly noted this testimony and stated that "[p]laintiffs have not introduced evidence that the revenue requirement includes a component of profit beyond the system costs."

Financial documents introduced as exhibits at Pospiech's deposition reflect that the costs to operate the system increased by $40 million for fiscal year 2017, that net billings increased by only $6 million, and that billings and collections fell short. The special master correctly found that defendants had provided undisputed evidence that, for each fiscal year since the implementation of the current version of the drainage charge in 2016, the "DWSD's estimated cash collections through its drainage charges have been less than what it billed its customers and not enough to cover the estimated annual revenue requirement for drainage . . . ."

The Binns plaintiffs assert that, "because the funds collected by [d]efendants are admittedly going toward public infrastructure improvements, their 'drainage charge' constitutes a tax." But the special master found:

> Capital improvements to the [c]ity's CSS, which are major construction projects, including significant repairs and projects that include excavating the sewer system, are paid for through [the] DWSD's I&E fund, which is funded by [the] GLWA's $50 million annual lease payment. (Drainage rate revenue is generally not used to pay for capital improvements or post-bifurcation debt.)

The special master noted that "[c]apital improvements are also financed by proceeds from GLWA and/or DWSD revenue bonds issued after bifurcation." She wrote, "[t]he drainage charge recovers a small percentage of revenue-financed CSS capital improvements, which consist of unanticipated repair projects."[9] The special master's findings are correct. Pospiech testified that the GLWA's

[9] The special master noted that the GLWA allocates pre-bifurcation debt service costs to the city. Defendants acknowledge that the city uses drainage charge funds to pay for the GLWA-allocated pre-bifurcation debt service costs. Defendants state that the city is required under the Revenue Bond Act of 1933 (RBA), MCL 141.101 *et seq*., to assess a user fee to pay for the pre-bifurcation debt service costs. Defendants cite MCL 141.121(1), which states:

$50 million annual lease payment was used to pay for post-bifurcation capital improvements, i.e., major construction projects. The drainage charge was not used to pay for these major planned construction projects, as opposed to unanticipated repair projects. The Binns plaintiffs' assertion that the drainage charge is admittedly used to pay for infrastructure improvements is thus not a fair characterization of the record and does not establish that the charge has a revenue-raising purpose.

The Binns plaintiffs argue that defendants did not perform a cost-of-service study or justify their ratemaking methodology. Plaintiffs have the burden of establishing the unconstitutionality of the drainage charge. *Jackson Co*, 302 Mich App at 98. It is plaintiffs' burden to present "a comprehensive rate study" or "similar evidence demonstrating that the disputed rates excessively compensated the [city] for the related utility services." *Youmans v Bloomfield Charter Twp*, 336 Mich App 161, 220; 969 NW2d 570 (2021). Plaintiffs have not provided a comprehensive rate study or similar evidence to satisfy their burden. We find the special master rendered proper findings regarding defendants' determination and allocation of costs. The special master noted that, although the final version of the rate model was lost because of accidental water damage to a computer, defendants had produced other evidence, including rate model spreadsheets, demonstrating how the costs were modeled and allocated.

The Binns plaintiffs suggest that there is a difference between revenue requirements and costs. They assert that the drainage charge "was based solely on revenue requirements, not solely the cost of services provided. Essentially, the [c]ity determined the amount of *revenue* needed and then fixed the rate accordingly." But in the context of utility ratemaking, the term "revenue requirement" is used to refer to the amount of revenue needed to cover costs. See *Youmans*, 336 Mich App at 172-173 (noting an expert rate consultant's testimony that "the 'first step' in utility ratemaking 'is to determine the revenue requirement,' i.e., the revenue that the utility will need to cover its expenses"). The special master correctly understood this concept's meaning by noting that "the term 'revenue requirement,' as used in ratemaking, means the money required on an annual basis to cover the costs of operating the system. A basic tenet of ratemaking is that a revenue requirement reflects the revenue needed to meet system costs."

> (1) Rates for services furnished by a public improvement shall be fixed before the issuance of the bonds. The rates shall be sufficient to provide for all the following:
>
> (a) The payment of the expenses of administration and operation and the expenses for the maintenance of the public improvement as may be necessary to preserve the public improvement in good repair and working order.
>
> (b) The payment of the interest on and the principal of bonds payable from the public improvements when the bonds become due and payable.
>
> (c) The creation of any reserve for the bonds as required in the ordinance.
>
> (d) Other expenditures and funds for the public improvement as the ordinance may require.

Consistent with this principle, Pospiech testified that "[t]he revenue requirement has to equal the cost of operating the system." When questioned about whether higher billings for fiscal year 2017 reflected an effort to increase revenue, Pospiech responded: "No, no. . . . The costs are the costs. . . . You're not increasing revenue how ever you use that term. Your billings have to match to cover the costs." Marcus Hudson, the DWSD's former chief financial officer (CFO) who designed the drainage charge, provided similar testimony. Hudson explained that "[w]e run a linear program which tells us what the rates need to be to balance that to zero," i.e., to cover costs but generate no profit. Eric Rothstein, an expert rate consultant whom defendants retained to oversee the implementation of the drainage charge, likewise testified that the charge was designed to meet revenue requirements and not to generate more money than was necessary to meet system costs. DWSD director Gary Brown similarly testified to the effect that the drainage charge did not increase revenue beyond that which was required to meet system costs. Further, the special master correctly found that plaintiffs had "not introduced evidence that the revenue requirement includes a component of profit beyond the system costs." Nor, the special master accurately noted, had "plaintiffs produced evidence that the revenue requirements, i.e., the costs required to operate the system, were inflated or included inappropriate elements."

In sum, the evidence supports the special master's conclusion that the drainage charge serves a regulatory purpose rather than a revenue-raising purpose. The first *Bolt* factor thus weighs in favor of the charge being a valid user fee rather than a disguised tax.

B. PROPORTIONALITY

Turning to the second *Bolt* factor, we agree with the special master that the drainage charge is proportionate to the necessary costs of the service. In addressing this factor, plaintiffs present multiple arguments. First, the Binns plaintiffs challenge the city's allocation of 33% of CSS operational costs to drainage. But the special master correctly noted that "GLWA figures and statistical modeling were used to determine an allocation of 33% of CSS operational costs to drainage, and current and historical flow data support that allocation as reasonable and proportionate." The special master quoted the following testimony of Hudson:

> *Q*. How did you arrive at 33 percent?
>
> *A*. So what we did was we calculated the total amount of flow. There's three components. There's DWII, Dry Weather Inflow and Infiltration. There's WWII, which is Wet Weather Inflow and Infiltration. Those two numbers we got from [t]he Foster Group, who was the same consultant that GLWA uses. The third component is the sanitary flow component which had to be estimated. We used a statistical model, an exponential smoothing model, to forecast the . . . sanitary flow. The 33 percent represents the wet weather inflow as a percentage of the—of the total fl[ow].

Pospiech similarly testified: "Where did that 33 percent come from? That came from the GLWA flow reports for the WWII percentage." Pospiech explained that the DWSD "forecasted that [sanitary sewage volume] was going down, but storms were increasing. So [the DWSD] bumped it up to the 33 percent." Consistent with this testimony, the special master found that the "DWSD forecasted that sanitary sewage volume was going down, but storms were increasing, and therefore

adjusted the GLWA data to reflect projected [c]ity demand." The special master noted that the 2021 GLWA Flow Report indicated that wet weather flow "met or exceeded 33%" for each fiscal year from 2017 to 2021.

The Binns plaintiffs question how Hudson could have relied on a February 12, 2017 memorandum of the consultant Foster Group in developing the rate model because this memorandum was dated five months after the effective date of the current version of the drainage charge. But Hudson did not testify that he relied on that specific memorandum in developing the rate model, only that he relied on flow data obtained from the Foster Group. The special master correctly recognized that "Hudson never testified that his data was based on the 2017 memo. The evidence indicates that [t]he Foster Group prepared multiple documents for DWSD and also communicated with DWSD through correspondence outside of official memoranda . . . ."

The Binns plaintiffs suggest that a November 22, 2013 memorandum of the Foster Group shows that only 21% of CSS costs should have been allocated to drainage. But that memorandum states, "For the 2013-14 rates, the flow modeling and flow balancing efforts indicated that 28% of the flow from the Detroit class was related to storm flows." The special master discussed the 28% figure shown in the November 22, 2013 memorandum:

> [T]hat [28%] figure mirrors the wet weather flows in the GLWA flow reports for FY 2013-2016 cited by Hudson and Pospiech in their deposition testimony. The 28% takes into account [wet weather flows] processed by the [GLWA's Water Resource Recovery Facility (WRRF), formerly known as the city's WTP], but does not take into account [wet weather flows] processed by the [retention basins and other CSO facilities], which are also part of the CSS.

Again, as the special master observed, the allocation of 33% of CSS operational costs to drainage was the result of a projected increase in wet weather flows based on GLWA figures and statistical modeling. Historical and current flow data support the reasonableness and proportionality of that allocation.[10]

The Binns plaintiffs assert that "[e]very witness testified that this stormwater flow was not metered or measured by the [c]ity." The Binns plaintiffs fail to cite testimony in the record to support this assertion. In any event, the record establishes that gauged metering of stormwater runoff is not feasible.

Palencia Mobley, the former deputy director of the DWSD, testified: "With it being a combined sewer system you cannot individually measure flow. All the flow comes into the same pipe, you cannot separate them." Samuel Smalley, the chief operating officer (COO) of the DWSD, testified that "[w]e do have some rain gauges that will collect the amount of precipitation

[10] The Binns plaintiffs also extract a 20.7% figure from the Foster Group's February 12, 2017 memorandum. But as defendants note, this figure does not represent wet weather flow attributable to Detroit. Rather, it pertains to the portion of the flow in the Detroit region associated with leaks from the GLWA transmission main. Moreover, it appears this figure pertains to influent volumes at the WRRF and did not include wet weather flow to other CSS facilities.

during events." However, Smalley further testified that "the cost and complexity of measuring stormwater exclusively would be astronomical and have a significant negative impact on rates." Smalley explained that

> the flow is not as clean as potable water, so those contaminants or pollutants can make the metering equipment prematurely age. . . . [W]ith gravity flow you have to meter where the flow is, which is usually in confined spaces. The size of the meters would have to match the hydraulic grade line and flow characteristics of the pipes or tunnels that the flow is in.

Defendants' water resources engineering and utility rate expert, John Aldrich, similarly explained:

> Stormwater typically exits a property at multiple locations, sometimes via a pipe (which may or may not also contain sewage) but often by flowing across the ground to the public right-of-way. Conventional flow meters are not available to monitor flow across the ground, and the intermittent nature of stormwater would exceed the technical limitations of the sophisticated, multi-probe sensors required to obtain an effective measurement. Installing such meters at multiple locations discharging from each property would be extremely expensive, dramatically increasing the overall drainage fee imposed on customers in exchange for barely any increased precision in estimating the fee.

Consistent with this evidence, the special master correctly found that individual metering of stormwater runoff would be cost-prohibitive, if not impossible, and would increase the drainage fee. The special master determined that impervious area is a well-accepted proxy and the best available method for measuring actual surface water runoff from a parcel.

The Binns plaintiffs further argue that "[s]tormwater is generally less contaminated than septic waste and is correspondingly less expensive to treat." The Binns plaintiffs thus view it as inappropriate "to ascribe a dollar-for-dollar percentage split based solely upon volume allocations." But this argument ignores the reality that the city does not separately treat stormwater and sanitary sewage. Rather, the city treats combined sewage comprised of a mixture of stormwater and sanitary sewage. Mobley testified on this point:

> *Q*. Is there any difference in the way that stormwater is treated or runoff is treated and the way sewage is treated by DWSD?
>
> *A*. There is no difference because it is a combined sewer system. It all flows into the sewer system together so once it's mixed, it's mixed. It has to go through the same levels of treatment as sanitary sewage because it's combined.
>
> * * *
>
> *Q*. . . . So would you agree with me that stormwater or runoff has less pollutants than the sewage?
>
> *A*. I would not agree with you that stormwater could have less pollutants than sewage because we have a combined sewer system so it's mixed.

Consistent with this testimony, the special master found that, "[b]ecause the [c]ity's CSS contains commingled sanitary waste and stormwater, both components must undergo the same treatment before discharge."

"Mathematic precision is not required when reviewing the reasonable proportionality of a utility fee." *Shaw*, 329 Mich App at 667. Relative precision in accordance with available technology is sufficient. *Id*. Plaintiffs have provided no basis to overcome the presumed reasonableness of the city's allocation of CSS costs between stormwater and sanitary sewage. See generally, *id*. (holding that the plaintiff had failed to present evidence establishing that metered water usage was an insufficiently precise way to measure the actual costs of using the defendant-city's water and sewer systems or to show that the water and sewer charges were disproportionate).

In challenging the proportionality of the city's allocation of CSS costs for recovery through the drainage charge, the DAART plaintiffs assert that Hudson was unable to explain how the drainage charge was calculated, in light of water damage to his computer. The Binns plaintiffs similarly state that Hudson could not recall the basis for the rate at the time of his deposition. But Hudson testified in detail concerning the rate design and how costs were allocated. As noted, there is documentary evidence to support the city's cost allocation process. Plaintiffs have not provided a comprehensive rate study or similar evidence to satisfy their burden of demonstrating that the drainage charge is disproportionate. *Youmans*, 336 Mich App at 220.

The Binns plaintiffs assert that Hudson testified that the rate structure was disproportionate. But the Binns plaintiffs are grasping certain language out of the full context of Hudson's testimony. In his deposition, Hudson testified as follows during questioning by the Binns plaintiffs' counsel:

> *Q*. Would you agree that appropriately managing storm water is a benefit that's conferred to the general public?
>
> *A*. Yeah, I would agree.
>
> *Q*. Do you understand that—I'm sorry.
>
> *A*. But let's be clear, right.
>
> *Q*. Okay.
>
> *A*. What I would also suggest to you, right, is that the—it's not just sort of the general public, right, it is the households that exist within whatever municipality we're talking about, as well as sort of the businesses that exist. All benefit from, you know, the management of storm water, but most certainly they don't benefit, from my perspective at least, proportionately.
>
> *Q*. What did you say on that last part?
>
> *A*. They all don't necessarily benefit proportionately.
>
> *Q*. And what do you mean by that?

> *A*. What I mean, you know, very specifically is that—what's the word that I'm looking for here, is that one could get more benefit from Detroit's management of storm water if you have, for example, a super large lot, right, which can create, you know, X amount of revenue for you, right. Do you benefit more from the management of storm water than a person with a smaller lot? Financially speaking, absolutely you do.

A full and fair reading of Hudson's testimony reflects that he was not testifying that the drainage charge was disproportionate to the necessary costs of the service, which is the type of proportionality evaluated under the second *Bolt* factor. See *Shaw*, 329 Mich App at 653 (noting that the second *Bolt* factor involves whether a charge is "proportionate to the necessary costs of the service") (quotation marks and citation omitted). Rather, Hudson was expressing the notion that there is an individualized benefit for each parcel and that the size of a landowner's parcel, and the associated amount of revenue that can be generated from the parcel, may affect the extent to which the landowner benefits from the drainage services. Hudson's testimony does not establish that the drainage charge is disproportionate in the sense contemplated under the second *Bolt* factor.

Next, plaintiffs challenge the reasonableness or proportionality of the drainage charge on the ground that the city does not impose the charge with respect to city roads. That is, plaintiffs contend that the exemption of city roads from the drainage charge improperly shifts costs onto those who pay the drainage charge. However, as the special master correctly explained, "[t]he [c]ity's roads are part of the stormwater conveyance system and provide in-kind services to [the] DWSD[.]" In other words, "the roads specifically provide a benefit with respect to stormwater drainage." The special master found that "[i]t is extremely common for a municipality's roads department not to be charged a monetary fee for drainage services because the roads provide in-kind services." She determined that "[t]he benefit of the service performed by the [c]ity's roads in collecting and transporting stormwater generally offsets the benefit conferred by the CSS in processing runoff generated by the roads."

The evidence supports the special master's findings. Ronald Brundidge is the director of the Detroit Department of Public Works (DPW), which maintains the city's roads. Brundidge testified that, when the DPW makes changes to city roads that affect the CSS infrastructure, the DPW relocates the existing CSS infrastructure at a cost of approximately $1 million per mile. The DWSD is not charged for these costs. Rather, the DPW absorbs the costs. Detroit Mayor Michael Duggan testified that the DPW "spends millions in the design and maintenance of roads to move the water." He explained that the DPW "spends millions, not just handling the conveyance of the water from the street, but handling the water from the adjoining properties. Things like curb maintenance. Things like moving sewer lines when roads are changed." The DPW "builds and maintains its roads with the conveyance of storm water very much in mind and spends millions of road money to facilitate that."

Mayor Duggan emphasized that the DPW "is absolutely spending millions to facilitate the conveyance of storm water to the DWSD system." Brundidge testified that "the roads are designed in a manner that water is conveyed from the center of the road to the curb and then ultimately to the drains." Brundidge further explained:

> So when we design our roads they're designed in a manner that the highest point in the road is at the center of the road that we call the crown. It routes or slopes the water back to the curb. All of our roads are designed when they're approved we provide for curbing for any new projects. We want to ensure that we have at least four inches of curbing, and those, again, with the purpose of after the water is moved from the center of the road to the curb it's then sloped down to the drainage system.

Mayor Duggan noted that "we pave probably a hundred miles of road a year. It's paid for by state gas tax dollars, but in addition to paving the road, we have a standard that every curb is rebuilt to four inches to make sure the water flow continues and that money comes out of the, for the most part, state gas taxes." Every decision the city makes regarding the design and location of sidewalks and curbs is based on maintaining the flow of stormwater into the DWSD system. Brundidge likewise testified that "a main objective when we are designing any of our projects, is to do it in a manner to ensure that the water makes it to the sewer system." He noted that, "with all of our projects, whether we're just doing a resurfacing project or whether we're designing a new road, whether we're changing the layouts, our position has always been that when we improve or design roads they're designed in a manner that the water makes its way from the roadway into the sewer system . . . ."

Brundidge further testified that

> there are examples when we made a decision to change the configuration of the road where it's resulted in millions of dollars being spent, which are absorbed by DPW because, again, we feel ultimately when we're designing and improving roads it's our responsibility to ensure that they're designed in a manner that the water makes its way to the sewer system . . . .

Brundidge cited as an example

> the Livernois streetscape project that DPW constructed a couple years ago. In that particular project we actually changed the location of the curb, and when we did that as part of the overall project we had to, of course, change the location of all of the corresponding catch basins to ensure connection into the sewer system.
>
> Once we make a decision to change—as part of a project to change the location of the curb it can add in excess of a million dollars per mile and just—and to the overall construction project, and a big portion of that is curb—the relocation of curb, removing the existing curb and then placing the new curb at the new location.

Brundidge noted that "we're not charging the [DWSD] for the cost associated with those changes, so we're incorporating those into our DPW design project cost." The DWSD "could theoretically be held responsible for costs associated" with the drainage system, but the DPW instead absorbs the costs and does not bill the DWSD. Mayor Duggan explained that, by ensuring that water is conveyed from city roads to the DWSD system, the DPW is saving the DWSD tens of millions of dollars in costs associated with moving the drainage system infrastructure.

Brundidge indicated that if the drainage charge was imposed for city roads, then the DPW would quantify the costs of the services provided by the DPW to the DWSD and determine whether to offset the drainage fees.

When asked why the DPW does not presently charge the DWSD for the services that the DPW provides, Brundidge testified that he did not wish to speculate and that the matter had not come up. But Brundidge noted that the DPW and the DWSD are "sister department[s]" and that

> we would try to avoid . . . a scenario where we're charging a sister department for one thing and they're charging us for the other thing and it all balances out and all we've done is just waste a bunch of taxpayer money and time just re-charging each other, you know, for costs that ultimately, you know, balance themselves out.

Defendants' water resources engineering and utility rate expert, Aldrich, testified that the DWSD did not bear the total costs of drainage and that the DPW bore some of the costs associated with drainage functions. This is because there is a "symbiotic relationship between roads and drainage systems," and the DPW provides in-kind services that are not paid for through the drainage charge. Rothstein, the expert rate consultant who was retained to oversee the implementation of the drainage charge, testified that it is common for city roads to be viewed as part of the stormwater conveyance system for ratemaking purposes.

The DWSD's CAO and general counsel, Pospiech, averred that the "DWSD retained Stantec, a rate consultant, to begin a new cost of service study in March 2021. Stantec finalized the new, post-bifurcation cost of service study for DWSD on September 19, 2022." The Stantec report stated, in relevant part:

> Public rights-of-way (ROW) serve as vital components of the DWSD drainage system. ROW include streets, curbs and inlets, and other parcels of land that allow for buried drainage infrastructure. Without these key assets DWSD would be required to develop alternative infrastructure to convey runoff and therefore the ROW are considered integral to the drainage conveyance network. It is important to take these benefits into account as part of the drainage rate calculations. Stantec used two approaches to evaluate the net benefits associated with the role of public ROW in the management of drainage within DWSD.

On the basis of these analyses, the Stantec report concluded that the benefit of using the ROW was higher than the cost, and the report thus did not recommend imposing the drainage charge on the ROW. As correctly summarized by the special master, the Stantec report indicates that the "DWSD gains no net benefit from charging the ROW for drainage."

Overall, the evidence supports the special master's conclusion that the city's roads are part of the stormwater conveyance system and provide an in-kind service to the DWSD. Plaintiffs have

not shown that the failure to apply the drainage charge to city roads renders the drainage-charge system unreasonable or disproportionate.[11]

Plaintiffs further argue that the drainage charge is disproportionate because MDOT and Wayne County are charged less for drainage from their respective state and county roads than other customers are charged for drainage from their parcel-based acreage. But as the special master correctly noted, it is undisputed "that MDOT and Wayne County charges are governed by consent orders and settlement agreements negotiated in litigation. . . . [T]hose agreements govern the rates and [impervious area] allocable to [state and county] roads." The special master's findings were supported by documentary evidence and deposition testimony. Plaintiffs fail to establish that the city possesses unilateral authority to alter the drainage rates for state and county roads. It is not unreasonable for the city to comply with its legal obligations.

Moreover, defendants explain that, in August 2022, the city and MDOT agreed that MDOT would be subject to the same uniform drainage charge that is imposed on other customers, qualified by a partial conveyance credit of approximately 40% because state roads assist in conveying stormwater. Defendants note that the same effective rate that now applies to MDOT is also being applied to Wayne County. Defendants have provided documentation to support these assertions.

Next, the Binns plaintiffs assert that the drainage-charge system fails to account for the potentially polluted contents of stormwater runoff. But the special master correctly found that defendants had "provided evidence that [impervious area] is directly related to pollution in runoff." The special master's finding was supported by the testimony of defense expert Aldrich. He explained that "the conclusion of [studies analyzing pollutants in stormwater] is that what drives the differences in pollutants is largely the impervious area; that the contribution of pollutants, the concentrations are roughly the same across different land use categories." Aldrich noted that the level of pollutants is driven by "the amount of runoff which is directly attributed to impervious area." Hence, "the fact that we're managing the volume of runoff based on impervious area also manages the pollutant discharges." Aldrich explained, "[W]hen you look at the statistical averages across different land use categories, you see that the concentration of those pollutants are [sic] roughly the same, so what causes different loading [of pollutants] is the amount of runoff, and what causes the amount of runoff is impervious area." The use of impervious area as a proxy for

[11] The DAART plaintiffs suggest that *Bolt* and *Jackson Co* require the conclusion that the exemption of city roads from the drainage charge automatically renders the charge disproportionate. But neither *Bolt* nor *Jackson Co* requires such a conclusion. Our Supreme Court in *Bolt* noted in one sentence of its analysis that the Lansing ordinance at issue "excludes street rights of way from the properties covered by the ordinance." *Bolt*, 459 Mich at 167. This language from *Bolt* was quoted in *Jackson Co*, 302 Mich App at 103-104. But there is no language in *Bolt* or *Jackson Co* to suggest that the failure to apply a drainage charge to city streets is dispositive of the proportionality analysis. There is no indication that the municipal defendants in those cases provided the type of extensive argument and supporting evidence that were provided in the present cases to support the exclusion of the city's roads from the drainage charge. Plaintiffs have failed to establish that the city's practice renders the drainage charge unreasonable or disproportionate.

runoff thus accounts for pollutants in stormwater. The Binns plaintiffs fail to rebut the presumed reasonableness of this methodology.

The DAART plaintiffs challenge the proportionality of using impervious area as a proxy for drainage customers' contributions of runoff to the CSS. The DAART plaintiffs argue that the drainage charge should apply to pervious surfaces "by using readily available stormwater runoff coefficient data applicable to various types of pervious surfaces." The DAART plaintiffs' argument is unconvincing.

The special master found that "[t]he amount of [impervious area] is the most important factor influencing the cost of stormwater management services." The special master noted that defendants had "produced extensive evidence that [impervious area] is the best and most proportionate available method for measuring how much stormwater a parcel contributes to the [c]ity's CSS" and that plaintiffs had "failed to establish that runoff from pervious acreage is a meaningful driver of CSS costs." The special master found that "[t]he evidence showed that impervious area or acreage (IA) is the best proxy for measuring the stormwater burden a parcel places on the CSS, and therefore the corresponding benefit it derives from the system."

The special master's findings are supported by the evidence. Aldrich testified:

> [T]h reason that impervious area is a proxy is because based upon my 42 years of experience of studying urban drainage systems and knowing urban hydrology, that when we're looking at the kinds of storms that cause combined sewer overflows, and that send flows to the wastewater treatment plant, which is what the bulk of these costs are for, that those are flows that are generated almost entirely, if not entirely, by impervious surface runoff. So impervious area is used as a proxy because it is the best measurement and most representative of the relationship between the amount of runoff that comes from a property and how you would allocate those costs.

As the special master noted, Aldrich cited and provided governmental publications and industry guidebooks in support of his opinion regarding the use of impervious area as a reasonable proxy for measuring a parcel's contribution to stormwater runoff. Rothstein likewise testified that impervious area is the best proxy available for estimating stormwater contributions coming from parcels.

The DAART plaintiffs fail to rebut the presumed reasonableness of the city's use of impervious area as a proxy for a parcel's contribution of stormwater runoff. The DAART plaintiffs advocate the use of "stormwater runoff coefficient data applicable to various types of pervious surfaces" and refer generally to deposition testimony and exhibits provided by their expert geologist, Michael Wilczynski. But the DAART plaintiffs fail to establish specifically how their preferred methodology would alter the drainage charge. They have not provided a comprehensive rate study or similar evidence demonstrating the disproportionality of the drainage charge. *Youmans*, 336 Mich App at 220. The special master thus correctly rejected the DAART plaintiffs' argument that the use of runoff coefficient data applicable to pervious surfaces was a more accurate way than the use of impervious area to assess a parcel's contribution of stormwater runoff. The

special master properly found that a drainage charge determined on the basis of impervious area "is a widely used best practice."

Again, in evaluating a claim "under the Headlee Amendment, it is not this Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding a municipal improvement or service." *Shaw*, 329 Mich App at 668. "Mathematic precision is not required when reviewing the reasonable proportionality of a utility fee." *Id*. at 667. Relative precision in accordance with available technology is sufficient. *Id*. Even if the city's ratemaking methodology is imperfect, and other possible ways of calculating the drainage charge exist, those facts alone would not establish that the charge is disproportionate.

Moreover, the special master made correct findings regarding the lack of feasibility of considering runoff discharges from pervious surfaces in calculating the drainage charge, as would occur under the DAART plaintiffs' proposed methodology. The special master found that

> [i]mplementing a drainage charge that factored in discharge from pervious surfaces would be impracticable in the [c]ity because of differences in types of soil and changes in elevation across the city, the impracticality of sampling the soil on each property, the limitations of the billing system, customers' difficulty understanding pervious area changes, and difficulties in tracing whether groundwater infiltration results from storm precipitation or other groundwater sources.

These findings were supported by record evidence, including Pospiech's deposition testimony and Aldrich's report and deposition testimony. Also, Aldrich explained that parcel-level data regarding pervious surfaces "doesn't exist and would be virtually impossible to collect, and . . . after all that effort, it would not, we believe, significantly alter what the charge is or the equity of how those costs are distributed."

The special master correctly noted that "there is no persuasive evidence that pervious acreage contributes to stormwater runoff." Indeed, "having more pervious area reduces the amount of stormwater a parcel contributes to the CSS because pervious surfaces absorb and/or hold stormwater, which prevents it from entering the CSS and thereby benefits the CSS." Most stormwater that falls onto pervious surfaces during small to moderate storm events is absorbed and does not enter the CSS, and pervious surfaces thus mitigate CSOs.

The special master's findings are supported by the record evidence. Aldrich testified that, during the small to moderate storm events that drive CSS costs, most water falling on pervious surfaces is absorbed by soil or used by plants and never enters the CSS. Any water that "flows off the surface is filtered through the grass and the vegetation, and it's significantly slowed down, so it doesn't contribute to the peak flows that come from that, and any amount that infiltrates through the soil is also being cleansed and slowed down." "So, if anything, pervious area is not a contributor, it's actually part of an effective stormwater system to help control [stormwater] flow . . . ." Pervious area "actually is probably a benefit more so than a contributor to runoff." Impervious areas drive stormwater flow, and very little flow comes from pervious areas. Therefore, Aldrich explained, "an impervious area measurement is a perfectly fine and equitable way to distribute those costs without taking into account any of the pervious contribution because

it's so small." Mobley likewise testified that any runoff from pervious surfaces "is usually limited, small and minute, generally speaking."

The DAART plaintiffs argue that the failure to apply the drainage charge to pervious areas renders the charge disproportionate because pervious areas become saturated during heavy storms and thus contribute stormwater runoff. But the special master correctly found that "CSOs are generated almost entirely by impervious surface runoff from small to moderate rain events." "Small to moderate storm events generate virtually no pervious runoff . . . ." "Because almost all precipitation volume during a typical year occurs during storms generating less than 1 inch of rainfall, most of the cost to operate a CSS is related to the capture and treatment of small storms during a typical year of precipitation." "Stormwater runoff from [impervious areas] during small to moderate storm events drives the pollution volume that must be treated by the [c]ity's sewer system and therefore drives the size of the CSO facilities and CSO control costs."

These findings are supported by the evidence. In his report, Aldrich explained that "[e]stablished empirical and statistical modeling methods" showed "that most of the stormwater generated during a typical year results from small, frequent storm events." And as explained earlier, Aldrich testified that, during the small to moderate storm events that drive CSS costs, most water falling on pervious surfaces is absorbed by soil or used by plants and never enters the CSS. CSS costs are driven by small to moderate storm events, not the extreme storm events that could cause pervious surfaces to become saturated with stormwater. Because CSO facilities are not sized for extreme storm events, stormwater runoff from extreme storm events generally bypasses CSO facilities and is discharged through legally permitted outfalls, consistent with Environmental Protection Agency (EPA) policies. In his report, Aldrich explained:

> Statistical evaluation reveals that almost all precipitation volume during a typical year occurs during storms generating less than 1-inch of rainfall. Only rarely do extreme events occur that generate larger precipitation volumes. Thus, these larger events represent a small fraction of the average annual precipitation. Most of the cost to operate a combined sewer system is related to the capture and treatment of small storms during a typical year of precipitation. As such, an equitable drainage fee should be proportionate to small storm runoff.

Aldrich's report concluded that "evaluation of small storm runoff demonstrates a direct relationship between runoff volume and the area of impervious surfaces. Thus, stormwater volume is more consistently proportionate to impervious area than to pervious area." The DAART plaintiffs' argument regarding the saturation of pervious surfaces is thus unconvincing.

The DAART plaintiffs further argue that, even during dry weather, groundwater infiltrates the CSS and that the drainage charge fails to account for the cost of treating this groundwater. But the special master correctly noted that the city accounts for groundwater infiltration:

> Groundwater infiltration is either categorized as dry weather inflow and infiltration (DWII) or included in the overall calculation of wet weather flow (WWF) (which includes wet flow and associated sanitary and DWII). (DWII-related costs are allocated to CSS customers as part of the sewer charge while WWF-related costs are allocated to the drainage charge.)

The special master explained that "evidence submitted by [d]efendant[s] indicated that wet weather and dry weather infiltration costs are allocated as part of [the DWSD's] rate structure, and those costs are based on GLWA flow measurements." DWII costs are allocated through the sewer rate rather than the drainage rate because those costs are not tied to wet weather events or CSOs. As the special master correctly found on the basis of Aldrich's testimony, "CSO facilities do not function during dry weather and are not needed to manage dry weather flow."

The special master correctly found that plaintiffs' expert geologist, Wilczynski, "was unable to provide meaningful support for the position that groundwater infiltration resulting from pervious surfaces [due to storm events] substantially contributes to CSOs." The special master noted that Wilczynski "acknowledged during his deposition that such infiltration has never been quantified . . . in any studies he was aware of." The special master's findings accurately reflected Wilczynski's testimony. The DAART plaintiffs fail to establish that groundwater infiltration of the CSS resulting from stormwater on pervious surfaces substantially contributes to CSO costs.

Next, plaintiffs argue that the drainage charge is disproportionate because the city used a temporary phase-in period that resulted in different rates being paid by various classes of customers. In rejecting plaintiffs' argument on this point, the special master correctly explained:

> Contrary to [p]laintiffs' assertion, the phase-in did not raise the rate for some customers while lowering it for others. Rather, the [c]ity assessed a uniform rate during the phase-in and temporarily lowered the charge (using transition credits) for customers who were experiencing "rate shock." During the initial phase-in period, DWSD had a shortfall in its sewer fund for 2017 and 2018. The shortfalls were covered with a loan from GLWA, which was repaid using non-rate revenue. As such, DWSD, not ratepayers, paid for the phase-in and covered the cost of transition credits while customers became acclimated to the uniform drainage charge.

The special master further noted that

> nothing prohibits a municipality from providing a service at less than its cost to property owners. For the period of the phase-in, some categories of customers paid less for the cost of drainage service than other categories, but there is no evidence that any category of drainage customers has been paying more than the reasonable cost of the service conferred.

The special master's findings were supported by the record evidence. Pospiech testified that, when the 2016 version of the drainage charge initially went into effect, new-to-the-world customers, i.e., customers who had never previously paid a drainage charge, "were only paying at a rate of about 37 percent." This low collection rate was considered to be caused by rate shock; the city thus used transition credits to phase in the drainage charge over a period of time. Pospiech testified that the shortfalls experienced in 2017 and 2018 were covered by the DWSD through a loan from the GLWA, which was paid back with funds from the GLWA lease payment. She testified that the use of transition credits helped to improve the collection rate, which had stabilized by 2022 at just under 90%.

Brown likewise testified that the city adopted a phase-in period with transition credits to alleviate rate shock. Mobley testified that "rate shock occurs when a customer is experiencing a rate increase that is much higher than the customer's previous rate." New-to-the-world customers experience an even bigger rate shock because they had never previously been billed. Rate shock can lead to customers not paying their bills, which causes future bad debt expense that is added to the revenue requirement. Rothstein testified that rate shock causes "increased uncollectibility [sic], adverse public reactions, [and] customer service problems . . . ." The city thus adopted a phase-in period in order to effectuate a smooth and reasonably acceptable adjustment of rates.

The special master therefore correctly concluded that the phase-in period served the purpose of improving and stabilizing the city's collection levels while customers became acclimated to the new version of the drainage charge. This helped to decrease the likelihood of bad debt expense, which can lead to future increased rates. The city itself absorbed the cost of the phase-in, which was paid for through revenue other than the drainage charge. There is no evidence that any category of customers paid more than the reasonable cost of the services provided.

The Binns plaintiffs argue that the city's drainage charge is too high relative to charges imposed in other communities. However, they fail to provide adequate substantiation of this assertion. Citing an EPA document dated April 2009 regarding the rates charged in certain communities, the Binns plaintiffs assert that the average drainage cost for a single-family home is $44 a year and that the high end of the cost spectrum is $120 a year. According to the Binns plaintiffs, Detroit residents pay approximately $396 a year for drainage, which comes to approximately $33 a month. But the EPA report upon which the Binns plaintiffs rely regarding the rates paid by other communities is not a recent or exhaustive study; it is more than 15 years old and focused on communities in the New England area. Also, the Binns plaintiffs cite a DWSD question-and-answer document stating that the city's drainage charge is among the highest in the country, but the Binns plaintiffs fail to rebut the following explanation provided in that document for the drainage charge being high:

> Detroit's drainage charge is among the highest in the country largely due to strict environmental regulations, the massive amounts of storm water that enter the combined sewer system, and the decrease in population over the past several decades. Many suburban or newer communities have separate storm water systems and may charge for drainage through other sources, such as property taxes. The cost of treating sewerage and drainage is typically higher than that of water which comes from a natural source. Like most utilities, DWSD is obligated by law to incur these costs to comply with environmental regulations.

Consistent with the DWSD's explanation, the EPA noted in a 1995 guidance document provided by defendants that the control of CSOs in communities having a CSS is "extremely complex" and that "the financial considerations for communities with CSOs can be significant." As an example, defendants have provided documentation indicating that the city of Seattle, Washington, has a CSS and that, in 2023, residential customers in Seattle were required to pay in a range between $216.23 and $844.75 a year for drainage services.

Next, plaintiffs argue that the drainage charge is disproportionate because the city does not collect a charge from the DLBA, which, according to plaintiffs, owns approximately 25% of the

city's parcel-based acreage. The Binns plaintiffs refer to Justice Zahra's concurring statement in *Binns II*, in which he quoted from an amicus-curiae brief stating that the city " 'inexplicably does not collect Drainage Charges from the City's largest landowner, the Detroit Land Bank Authority ('DLBA'), a component unit of the City that owns and controls approximately 25% of the parcel-based acres in the City . . . .' " *Binns II*, 506 Mich at 997 (ZAHRA, J., concurring) (quotation marks and citation omitted). But both the amicus-curiae brief cited by Justice Zahra and his concurring statement were written before the special master's fact-finding process ordered by our Supreme Court took place.[12] The record that has now been developed does not support plaintiffs' argument that the drainage charge is rendered disproportionate by reason of the DLBA's failure to pay its drainage bills.

The special master correctly found that "[t]he evidence indicates that DLBA is billed for drainage fees like any other owner of parcels with [billable impervious area]." This finding was supported by the testimony of the DWSD's current CFO, Istakur Rahman, the DWSD's former CFO, Hudson, and Mayor Duggan. The special master noted that the DLBA has historically refused to pay its drainage bills. The special master explained that the "DLBA files quiet title actions prior to selling or auctioning DLBA parcels, which, in accordance with MCL 124.759(11),[13] result in court orders that discharge any past-due drainage charges." Mayor Duggan's testimony supported the special master's finding, i.e., that the DLBA routinely filed quiet-title actions that resulted in court orders that discharged any past-due drainage bills, making the DLBA uncollectible.

The special master further found that, "[s]ince 2016, DLBA has filed quiet title actions on 8,319 parcels, resulting in the discharge of approximately $7,494,415.63 in drainage fees as of June 6, 2022." This finding was supported by Pospiech's deposition testimony and a spreadsheet that was provided as an exhibit at her deposition. In accordance with Pospiech's testimony, the special master noted that the

> discharged amount includes drainage fees for an indeterminate number of years, including prior to 2016 [when the current version of the drainage charge went into effect], as evidenced by write-off amounts applicable to parcels with less than .02

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[12] Defendants argue that Justice Zahra's statement about the DLBA "was improperly based on unfounded assertions made in an amicus brief that was not rooted in any discovery or part of the record in this matter." Defendants cite *Giblin v Detroit Trust Co*, 270 Mich 293, 295-296; 258 NW 635 (1935), for the proposition that an appellate court should not consider an allegation contained in an amicus-curiae brief when the alleged fact does not appear in the record. However, Justice Zahra merely noted questions to be considered in the proceedings on remand and did not suggest a definitive resolution of the case on the basis of allegations in the amicus-curiae brief.

[13] MCL 124.759(11)(c), which is part of the Land Bank Fast Track Act, MCL 124.751 *et seq*., provides that a judgment granting a land bank authority's petition to quiet title shall specify that "[t]hat all liens against the property, including any lien for unpaid taxes or special assessments, except future installments of special assessments and liens recorded by this state or the authority under the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106, are extinguished."

> [impervious acres]. Approximately 1,600 parcels included in the aforementioned spreadsheet had less acreage than would be billable under the 2016 drainage charge.

Also, in accordance with Pospiech's testimony, the special master correctly found that the "estimated bad debt expense associated with parcels owned by the DLBA was excluded from the drainage charge formula and calculations." Accordingly, the special master properly recognized that "[w]hen the DLBA quiets title to property and drainage charges are discharged pursuant to state law, the resulting bad debt (like all bad debt resulting from failure to pay drainage bills) has the effect of shifting costs."

Plaintiffs have not identified any evidence to support their contentions that the DLBA owns 25% of the parcel-based property in the city. The special master noted that neither party had provided the special master "with information regarding the amount of billable impervious acreage (BIA) held by the DLBA." In this Court, defendants have provided part of a July 2023 DLBA report for the fourth quarter of the 2023 fiscal year. This report indicates that the DLBA owned 71,927 parcels. According to an affidavit of the DWSD's billing manager, Mihai Facaeanu, there are approximately 381,000 discrete parcels in the DWSD's billing system. From this, defendants reason that, as of July 2023, the DLBA owned 19% of the city's parcels. The DLBA's July 2023 report further indicates that 63,053 of the DLBA-owned parcels, which constitutes 88% of the 71,927 DLBA-owned parcels, are vacant land. Defendants assert this means that 88% of the DLBA-owned parcels consist of pervious area that absorbs and manages stormwater. Facaeanu's affidavit indicates that the DLBA sends monthly drainage bills for 253,500 parcels. From all this data, defendants conclude that, "[o]f the 253,500 parcels that receive monthly drainage bills based on [impervious area], an estimated 8,874 parcels (a mere 3.5% of billed parcels) were owned by DLBA." Defendants' interpretation of the data appears reasonable. But even if defendants' argument is laden with certain assumptions, such as the perviousness of vacant parcels, and they are disregarded, plaintiffs have not established that the DLBA owns 25% or any significant portion of the impervious area in the city.

The Binns plaintiffs assert that the city and the DLBA share a "common identity." But the special master correctly found that the "DLBA is an independent authority created pursuant to the Land Bank Fast Track Act, MCL 124.751 *et seq.*, via an intergovernmental agreement between the Michigan Land Bank Fast Track Authority [(MLBFTA)] and the City." This finding is supported by the DLBA's articles of incorporation, which provide that the DLBA is a public corporate entity with its own Board of Directors, and by the testimony of Mayor Duggan, who explained that the DLBA "is a separate board, it's not a city entity. It's a separate corporation with a separate board . . . ." See MCL 124.773(5) ("A qualified city may enter into an intergovernmental agreement with the [MLBFTA] providing for the exercise of the powers, duties, functions, and responsibilities of an authority under this act and for the creation of a local authority to exercise those functions."). Plaintiffs offer no basis to find that the city can control the DLBA's decision whether to pay its drainage bills. We agree with the special master's conclusion that, "[g]iven that the City bills the DLBA for drainage, the DLBA's decision not to pay those bills cannot change the character of the drainage charge as a proportionate fee charged to cover the City's costs of treating and disposing of stormwater entering the CSS."

Next, plaintiffs argue that the inclusion of bad debt expense in the drainage charge formula renders the drainage charge disproportionate by shifting costs to those who pay the charge.[14] However, the special master correctly found that "[b]ad debt expense is the cost associated with uncollectible accounts and is a universally recognized component of a utility's operation and maintenance expenses." This finding was supported by the evidence. Defendants' rate consultant, Rothstein, testified that "[b]ad debt expense is one of the operating expenses included in utility revenue" and is "an established recognized component of revenue." The DWSD's former CFO, Hudson, testified that bad debt expense "represents an uncollectable bill. And so if I can't collect it, that's cash I can't receive, that's cash that I can't put toward a cost, and so that necessarily increases the amount that I have to . . . bill . . . to cover the cost of the system." Hudson explained that "any company, any utility will have some amount of bad debt, . . . and that's just a cost of doing business."

The Binns plaintiffs assert that the "adoption of a 47% bad debt expense means DWSD effectively billed property owners double the amount of the actual attributable cost of drainage service to their parcels simply because it expected to only collect on roughly half those bills it issued." However, by referring to "a 47% bad debt expense" and asserting that "roughly half" of drainage bills were uncollectible, the Binns plaintiffs mischaracterize or misunderstand the key data, as they did before the special master. The special master explained:

> DWSD calculated bad debt expense by using estimated bad debt expense for various customer classes and historical accounts receivable data to project total bad debt across the CSS at roughly 8-10% of total CSS billings. Based on that same data, the City allocated 47% of this CSS bad debt expense for recovery through the drainage charge. The City allocates 47% of the uncollectible total CSS billings (both sewer and drainage) to drainage and the remaining 53% to sewer because those are the amounts estimated to be attributable to drainage and sewage customers, respectively, who do not pay their bills. Contrary to Plaintiffs' claims, however, only 8-10% of total CSS billings are deemed uncollectible.

The special master properly relied on record evidence, including Hudson's testimony, the rate model diagrams, and the rate model spreadsheets, in support of the findings related to this analysis. For the reasons stated by the special master, the Binns plaintiffs' suggestion that 47% or "roughly half" of drainage bills were uncollectible is incorrect. The Binns plaintiffs continue to misunderstand or mischaracterize the data. They do not address the special master's explanation or identify any pertinent evidence such as financial data to contest the DWSD's collection rate or allocation of bad debt expense.

[14] Plaintiffs' arguments on this point appear to address bad debt generally, not merely bad debt associated with DLBA-owned parcels. As noted earlier, the special master correctly found that the "estimated bad debt expense associated with parcels owned by the DLBA was excluded from the drainage charge formula and calculations."

In sum, the evidence supports the special master's conclusion that the drainage charge is proportionate to the necessary costs of the service provided. The second *Bolt* factor thus weighs in favor of the charge being a valid user fee rather than a disguised tax.

C. VOLUNTARINESS

With respect to the third *Bolt* factor, plaintiffs argue that the drainage charge is not voluntary. We agree. In *Binns I*, this Court analyzed the third *Bolt* factor as follows:

> Turning to the third factor, the drainage charge in the instant cases is effectively compulsory rather than voluntary. Property owners who have .02 or more impervious acres and whose storm water does not discharge directly into a river have essentially no control over whether to use the drainage service and pay the drainage charge. Although a green infrastructure credit system is available, it permits a credit only of up to 80% of the drainage charge. See *Jackson Co*, 302 Mich App at 111 (noting that the city of Jackson's credit system did not guarantee property owners would receive a 100% credit and finding the city's charge effectively compulsory). Moreover, property owners must either pay the drainage charge or pay at least some of the costs for making the green infrastructure improvements required to obtain a credit, thus making it impossible for property owners to escape the financial demands of the drainage charge. See *id*. at 111-112 (noting that property owners could not escape the financial demands of the city of Jackson ordinance because the property owners must either pay the charges assessed or pay for improvements to their respective properties). Although property owners are free to reduce the impervious areas on their properties, this is not "a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property." *Bolt*, 459 Mich at 168. It is also notable that if a customer refuses to pay the drainage charge, the DWSD may terminate water service for the property, impose a lien on the property, commence a legal action to recover unpaid fees, and suspend or revoke a license to do business in the city of Detroit, which further indicates the effectively compulsory nature of the drainage charge. See *Jackson Co*, 302 Mich App at 112 (stating that the compulsory nature of the charge was demonstrated in part by the fact that delinquent payments could result in the discontinuation of water service, the imposition of a lien, and the filing of a civil action to collect past-due charges). [*Binns I*, unpub op at 20-21.]

The analysis of the third *Bolt* factor in *Binns I* is adopted. Although this Court's opinion in *Binns I* has been vacated on other grounds, the analysis of the third *Bolt* factor in *Binns I* is persuasive.

The special master stated that "[t]he fact that property owners can substantially offset the drainage charge through [green infrastructure] indicates that the charge is voluntary under *Bolt*." As the special master acknowledged, however, "the maximum credit available for [green infrastructure] is 80%." In *Jackson Co*, 302 Mich App at 111, this Court noted that the city of Jackson's ordinance allowed property owners to receive credits "for actions taken to reduce runoff

from their respective properties" but did "not guarantee all property owners will receive a 100 percent credit." Moreover, the city of Jackson's credit system

> effectively mandates that property owners pay the charge assessed or spend their own funds on improvements to their respective properties, as specified by the ordinance and the city, in order to receive the benefit of any credits. In other words, property owners have no means by which to escape the financial demands of the ordinance. [*Id*. at 111-112.]

Those were among the circumstances demonstrating an absence of voluntariness in *Jackson Co*. *Id*. The same reasoning applies here. Property owners cannot escape the financial demands of the Detroit drainage-charge system unless their properties drain directly into a river. Although property owners could theoretically avoid the charge by eliminating or declining to create impervious areas on their properties, this would not be "a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property." *Bolt*, 459 Mich at 168.

IV. CONCLUSION

Overall, plaintiffs have failed to carry their burden of demonstrating that the drainage charge is a disguised tax rather than a permissible user fee. The first and second *Bolt* factors favor that the drainage charge is a proper user fee. Although analysis of the third *Bolt* factor indicates that the drainage charge is effectively compulsory, "the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Youmans*, 336 Mich App at 233 (quotation marks and citation omitted). The drainage charge is therefore a permissible user fee that is not subject to the Headlee Amendment.

In light of our conclusion that the drainage charge is a valid user fee under the *Bolt* factors, it is unnecessary to reach defendants' alternative arguments for denying relief to plaintiffs.

For the foregoing reasons, we deny plaintiffs' requests for relief.[15]

/s/ Michael J. Riordan
/s/ Mark T. Boonstra
/s/ James Robert Redford

[15] In *Binns I*, we stated that, "In light of our decision to deny plaintiffs' requests for relief, plaintiffs' respective motions for class certification are denied because plaintiffs lack a cause of action." *Binns I*, unpub op at 22 n 23, citing *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999) (holding that "[a] plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class[]" and that it was thus proper to deny the motion for class certification). Because we again deny relief to plaintiffs, we again deny plaintiffs' respective motions for class certification.