STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE: PETITION FOR FORECLOSURE OF CERTAIN PARCELS OF PROPERTY DUE TO UNPAID TAXES, INTEREST AND FEES

Supreme Court No. 149506
Court of Appeals Case No. 309229
L.C. Docket No. 2011-2208-CH

MACOMB COUNTY,

Petitioner,

AND

CHARTER TOWNSHIP OF CHESTERFIELD,

Intervening Party-Appellant.

v.

FOX, LLC., D/B/A ROSIE O'GRADY'S,

Respondent-Appellee,

AMICI CURIAE BRIEF OF THE MICHIGAN TOWNSHIPS ASSOCIATION AND MICHIGAN MUNICIPAL LEAGUE SUPPORTING THE CHARTER TOWNSHIP OF CHESTERFIELD'S APPLICATION FOR LEAVE TO APPEAL IN THE SUPREME COURT

Dated: October 7, 2014

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STATEMENT OF QUESTION PRESENTED

WHETHER THE COURT OF APPEALS' OPINION THAT THE TOWNSHIP'S SEWER PRIVILEGE FEE CONSTITUTED A TAX IN VIOLATION OF THE HEADLEE AMENDMENT IS CLEARLY ERRONEOUS AND A MISAPPLICATION OF LAW.

The Michigan Court of Appeals answered:	"No"
Appellee Fox LLC answered:	"No"
Township answered:	"Yes"
Amici Curiae answers:	"Yes"

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici Curiae accept the Statement of Facts and Procedural History on pages 1 through 5 of the Charter Township of Chesterfield's Application for Leave to Appeal.

STATEMENT OF INTEREST OF AMICI CURIAE

The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. The MTA, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its Legal Defense Fund, the Michigan Townships Association has participated on an amicus curiae basis in a large number of state and federal cases presenting issues of statewide significance to Michigan townships.

The Michigan Municipal League (MML) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates its Legal Defense Fund through a board of directors. The purpose of this Legal Defense Fund is to represent the member local

governments in litigation of statewide significance. This brief amici curiae is authorized by the Legal Defense Fund's Board of Directors.[1]

Amici Curiae, Michigan Townships Association and Michigan Municipal League submit this Brief in support of the Charter Township of Chesterfield's Application for Leave to Appeal.[2] Pursuant to Michigan Court Rule 7.306, the MTA and MML each consist of "an association representing a political subdivision". The Amici Curiae brief in this matter is authorized by the MTA and MML to edify and assist this Honorable Court's consideration of this important case.

Amici Curiae strongly believe that the within appeal presents issues of major statewide significance to Michigan municipalities by jeopardizing municipal sewer systems throughout the state. The Court of Appeals Opinion struck down the Township's sewer tap-in fee (sewer privilege fee) as an unlawful "tax" in violation of the Headlee Amendment.[3] The Township sewer privilege fee is intended to charge the

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[1] The Board of Directors' membership includes: the President and Executive Director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys; Lori Grigg Bluhm, City Attorney, Troy; Clyde J. Robinson, City Attorney, Kalamazoo; Randall L. Brown, City Attorney, Portage; Catherine M. Mish, City Attorney, Grand Rapids; Eric D. Williams, City Attorney, Big Rapids; James O. Branson, III, City Attorney, Midland; James J. Murray, City Attorney, Boyne City and Petoskey; Robert J. Jamo, City Attorney, Menominee; John C. Schrier, City Attorney, Muskegon; Thomas R. Schultz, City Attorney, Farmington and Novi; and William C. Mathewson, General Counsel, Michigan Municipal League.

[2] Appeal is being sought with regard to the Michigan Court of Appeals unpublished Per Curiam Opinion dated May 27, 2014 (Docket No. 309229) (Court of Appeals Opinion).

[3] The Court of Appeals misused the test in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1998) to determine the Headlee Amendment violation. In *Bolt* this Honorable Court struck down the City of Lansing's stormwater service fee. The circumstance and type of the fee in *Bolt* was far different than the sewer use fee in the case at bar. As will be shown herein, the *Bolt* test which is used to analyze a claimed Headlee Amendment violation is inapplicable to review of the Township sewer use privilege fee.

sewer system user its "fair share of the major capital improvements of the wastewater system".[4] Common throughout the state is the practice of requiring users to pay their "fair share" of infrastructure costs for use of the sewer system based upon the burden placed upon the system by the user. An additional fair share amount is owed if the user later expands the burden on the system (i.e., expand the size of the restaurant thereby increasing their burden on the sewer system). This type of ordinance provision is used throughout the state and actually assures that current users do not end up paying for the whole infrastructure cost of the sewer system with future users to pay up their "fair share".

The Court of Appeals opinion threatens billions of dollars of user fees throughout the state that have been collected for the design, installation, and operation of municipal sewer systems and creates further uncertainty in financing future sewer systems. Municipal sewer systems are extremely expensive to construct and having any uncertainty, or moving goal posts, with regard to whether the user fees necessary to construct the system are in fact a tax in violation of the Headlee Amendment will have a deleterious effect.[5] The Court of Appeals Opinion failed to recognize that the Township's sewer user fees are exempt from Headlee consideration as the authority to levy such fees predated the Headlee Amendment.[6]

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[4] Township of Chesterfield Sewer Ordinance, Chapter 64, Article III, Section 64-214(a).

[5] How can you bond for a $100,000,000 sewer project if the user revenue based in part on the fair share of infrastructure costs which will be relied on to pay back the bonds is instead determined to be an unlawful tax and struck down?

[6] *American Axle and Manufacturing, Inc. v City of Hamtramck*, 461Mich 352, 604 NW2d 330. (2000). See Justice Corrigan's comments in *Duverney v Big Creek Mentor Utility Authority 469 Mich* 1042; 677 NW2d 836 (2004). The Headlee Amendment became effective December 1978.

Predating the Headlee Amendment, municipalities have long had authority under the Revenue Bond Act of 1933[7] to create sewer systems (including enlarging and extending the system) based upon revenue from user fees to support facilities, services and commodities of the system[8]. The Revenue Bond Act authorizes and mandates user fees. It does not, however, provide unchecked authority to charge rates as those amounts must be authorized and reasonable under the Revenue Bond Act.[9]

Additionally, predating the Headlee Amendment was the Public Health Code regarding water supply and sewer systems[10] which deemed "public sanitary sewer systems essential to the health, safety and welfare of the people of the state"[11] and allowing for involuntary, mandatory hook-up to available sewer systems.[12] Because these authorities and others to be discussed herein predate the Headlee Amendment, the *Bolt* test to determine a Headlee Amendment violation is inapplicable in these cases.

The importance of this case cannot be understated as jurisprudence in this state with regard to sewer fees is in need of this Honorable Court's attention. At present, the Court of Appeals Opinion erroneously throws the current system for sewer fees into chaos.

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[7] 1933 PA 94; MCL 141.101 et seq. Also used by Chesterfield Township see Sewer Ordinance Article III, Section 64-122(6).
[8] MCL 141.103(e) and MCL 141.121.
[9] See *Seltzer v Sterling Township*, 371 Mich 214; 123 NW2d 722 (1963) where sewer privilege fee was upheld. Once the reviewing court determines the fee is imposed upon a user it looks to only assure that the fee is for the facility or services. *Seltzer, supra*.
[10] 1978 PA 368 part 127; MCL 333.12701 et seq. Public Health Code regarding water supply and sewer systems.
[11] MCL 333.12752.
[12] MCL 333.12752.

It is important for this Honorable Court to weigh in on the issues presented in this case and clarify the impact of the *American Axle* decision with regard to sewer use fees. The legal significance of this case will be further apparent from the argument herein.

ARGUMENT

I. THE COURT OF APPEALS' OPINION THAT THE TOWNSHIP'S SEWER PRIVILEGE FEE CONSTITUTED A TAX IN VIOLATION OF THE HEADLEE AMENDMENT IS CLEARLY ERRONEOUS AND A MISAPPLICATION OF LAW.

A. Standard of Review

Questions of constitutional law are reviewed *de novo*.[13] Interpretation and application of a municipal ordinance is also reviewed *de novo*.[14]

B. Introduction

This case involves the question of whether a sewer privilege fee assessed against users of a local municipality's sewer system constitutes an unauthorized tax in violation of the Headlee Amendment.[15] The Headlee Amendment grew out of a tax revolt against new or increased rates of taxation. As it relates to the case at bar, the Headlee Amendment added Article 9 §31 to the Michigan Constitution of 1963 which provides in relevant part:

> "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. . . ." (Emphasis added)

In determining whether the Charter Township of Chesterfield's sewer privilege fee was actually a new tax instituted without a vote and thereby a violation of the Headlee Amendment, the Court of Appeals examined the fee pursuant to the three part test established in the 1998 landmark case of *Bolt*, *supra.* Chesterfield Township's Sewer

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[13] *Alba Township v Gratiot Co. Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013).
[14] *Soupal v Shady View, Inc.*, 469 Mich 458, 462; 672 NW2d 171 (2003).
[15] The Headlee Amendment was adopted by referendum effective December 23, 1978, and amended the Michigan Constitution of 1963 Article 9 Section 6 and added Sections 25 through 34.

Ordinance, Chapter 64 entitled "Utilities", Article III, Section 64-122(6) sets up the Township' sewer system under the Revenue Bond Act of 1933 providing that:

> "Act No. 94 of the Public Acts of Michigan of 1933 (MCL 141.101 et seq.), as amended, authorizes public corporations to purchase, acquire, contract, improve, extend, repair and maintain sewage disposal system and water supply systems, and to provide for the imposition and collection of charges, fees, rentals, or rates for services, facilities and commodities furnished for such improvements, and to issue bonds in anticipation of such revenues."

Article III, Sewer and Water Rates, Section 64-214(a) further provides that:

> "The sewer privilege fee shall be considered payment of the applicant's fair share of the major capital improvements of the wastewater system such as trunk sewers and master sewage meters."

Subsection (b) of the ordinance goes on to describe the formula for determining the fair share of the sewer privilege fee. In the case at bar, the building in question was a restaurant that when originally constructed paid a sewer privilege fee of approximately $40,000 for 64,000 sq. ft. The formula based the amount of the fee on the square footage of the restaurant. The present owner of the building wanted to expand the size of the restaurant by nearly double, leading to an additional sewer privilege fee in the amount of $30,000. The additional fee is based upon the additional fair share based upon the applicant's increased burden on the sewer system due to the expansion. Although the restaurant already paid a sewer privilege fee, its large expansion increased its burden on the sewer system and required payment of an additional fair share of the major capital improvements.[16]

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[16] To find that the additional sewer privilege fee on the expansion is inappropriate could inappropriately allow sewer users to initially undersize the building, pay their sewer privilege fee and then later expand substantially. This would cause an unfair burden on other users for the sewer system infrastructure.

The fundamental problem with the Court of Appeals Opinion's analysis is that it should not have even reached the point of a *Bolt* analysis. The Court of Appeals failed to make the threshold determination of whether the Headlee Amendment restriction was even applicable, as the Township's sewer privilege fee was authorized by law prior to Headlee Amendment and, therefore, did not represent a new tax. This consideration is necessitated by the precise language used in the Headlee Amendment and this Honorable Court's decision in *American Axle,* which held that if a municipality's authority to authorize a tax existed before the effective date of Headlee, no Headlee violation can arise.[17] The inapplicability of a Headlee violation claim regarding a mandatory sewer connection fee was latter addressed in Michigan Supreme Court Justice Corrigan's comments in *Duverney.*[18] As will be discussed in more detail, the law very clearly allowed for local municipalities to levy upon users of their sewer system a sewer privilege fee prior to the effective date of the Headlee Amendment. Pre-existing authority for such sewer user fees is provided for in the Revenue Bond Act of 1933, the Public Health Code and the County Public Improvement Act of 1939. These fees do not represent a new tax. In the instance case, any Headlee Amendment *Bolt* analysis should have ended at that point. The reasonableness of the sewer privilege fee should have been reviewed as provided in *Seltzer.*

This error is extremely serious and the impact of allowing the erroneous Court of Appeals Opinion to stand with regard to its Headlee Amendment analysis will undoubtedly have very dire consequences with regard to present sewer systems and future development. This decision flies in the face of the pre-Headlee legislative

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[17] *American Axle, supra*, 357-358. This was further discussed in *Duverney, supra.*
[18] *Duverney, supra*, 1042.

determination regarding the importance for public health, safety and welfare that sewer systems be created and where available, the properties must make use of the public sewer system.[19] Voluntariness is not an issue. As previously indicated, this Court of Appeals Opinion regarding sewer systems jeopardizes billions of dollars in user fees collected throughout the state and the ability to create new sewer systems lawfully funded by user fees. If there is a moving goalpost and uncertainty as to whether the sewer user fee is an unlawful tax in one case while an appropriate fee in another, then this creates an unworkable situation for financing extremely large investment in sewer infrastructure and development. Such uncertainty is unnecessary as proper legal analysis shows that the ability to collect sewer privilege user fees predates the Headlee Amendment and is exempt from its restrictive edict, as such fees are not new to the law after December 23, 1978. If it was a lawful sewer fee pre-Headlee, then it continues to be a lawful fee today.

C. THE TOWNSHIP SEWER PRIVILEGE FEE DOES NOT VIOLATE THE HEADLEE AMENDMENT AS THE MUNICIPAL AUTHORITY TO LEVY SUCH FEE PREDATED THE HEADLEE AMENDMENT.

In the case of *American Axle*, this Honorable Court shed further light on the threshold question of what can be considered a violation of the Headlee Amendment. This decision in *American Axle* was decided subsequent to the *Bolt* decision in 1998 and directly impacts consideration of whether the sewer privilege fee can even be considered a violation of the Headlee Amendment. In *American Axle* this Honorable Court stated that:

> "One of the sections added by Headlee, art 9, §31, adds the requirement of voter approval of new taxes. However, it exempts taxes authorized by

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[19] See Public Health Code, MCL 333.12752.

> law at the time the section was ratified: '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 the 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.'"[20]
>
> The Court went on to state that:
>
> "We have not previously had occasion to deal with this subject. However, we agree with the decisions of several panels of the Court of Appeals that the Headlee exemption of taxes authorized by law when the section was ratified permits the levying of previously authorized taxes even where they were not being levied at the time Headlee was ratified and even though the circumstances making the tax or rate applicable did not exist before that date."[21]

In *American Axle*, the Court was considering whether pre-existing authority for municipalities to levy a tax to satisfy a judgment without a vote of the electors pursuant to MCL 600.6093 was exempt from application of the Headlee Amendment. Because it was pre-existing authority, it was exempt from Headlee.

Michigan Supreme Court Justice Corrigan in *Duverney v Big Creek Mentor Utility Authority*, 469 Mich 1042, 677 NW2d 836 (2004) addressed this issue further with regard to the impact of the *American Axle* case on a claim that a sewer system connection fee may violate *Bolt*. In *Duverney*, this Honorable Court was addressing proper pleading for an alleged violation of the Headlee Amendment with regard to a sewer connection fee. Following oral argument on the application for leave to appeal from an order of the Court of Appeals, in lieu of granting leave to appeal, this Honorable Court vacated the Court of Appeals order and remanded the case back to the Court of Appeals for further proceedings allowing the plaintiff 28 days to amend the complaint to

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[20] *American Axle, supra*, 356.
[21] *American Axle, supra* 357.

more specifically allege a Headlee violation. Of particular note to this case, Justice Corrigan concurred and stated as follows:

> "I concur with this Court's decision to vacate and remand this case. Nonetheless, I believe that any effort to amend plaintiffs' complaint to allege a violation of the Headlee Amendment, Const. 1963, art. 9, §§ 25-34, will prove futile.
>
> The defendant municipality constructed a sewer system and required that plaintiffs connect to it. Plaintiffs sued, alleging that the connection charges amounted to a tax that was not put to a public vote and thus violated the Headlee Amendment. To survive a motion for summary disposition, a plaintiff who alleges a Headlee Amendment violation must plead sufficient facts to support a conclusion that the disputed fee meets every prong of the test announced in *Bolt v City of Lansing*, 459 Mich 152, 587 NW2d 264 (1998): (1) the charge is for a revenue-raising purpose; (2) the charge bears no reasonable relationship to the benefit conferred; and, (3) the charge is involuntary. Because the plaintiffs' initial complaint did not attempt to satisfy *Bolt's* first two criteria, the Court of Appeals dismissed the complaint, after reviewing defendant's answer.
>
> Plaintiffs' attempt to amend the complaint will prove futile under *American Axle Mfg., Inc. v Hamtramck,* 461 Mich 352, 604 NW2d 330 (2000). In *American Axle*, this Court held that if a municipality's authority to authorize a tax existed before the effective date of the Headlee Amendment, no Headlee violation can arise. *Id.* at 357-358, 604 NW2d 330.
>
> MCL 333.12752 declares that public sewer systems are in the public interest. It provides further:
>
> The connection to available public sanitary sewer systems at the earliest, reasonable date is a matter for the protection of the public health, safety, and welfare and necessary in the public interest which is declared as a matter of legislative determination.
>
> MCL 333.12754 authorizes a governmental unit to require that any structure in which sewage originates within the unit's borders be connected to a sewer system if one is available.
>
> The Headlee Amendment was adopted by referendum and effective on December 23, 2978. MCL 333.12754 took effect on September 20, 1978. Thus, defendant's authority to compel plaintiffs' conversion to a sewer system from their existing septic systems already existed when the Headlee Amendment became effective.
>
> MCL 333.12753 and 333.12754 lay out the procedures that local governments must follow in requiring mandatory sanitary sewer hookups.

> The record before us reflects that these procedures were followed. While I believe that further litigation of this case is a waste of time and money, I join the Court's order only because our liberal pleading rules seem to allow plaintiffs one more opportunity to try to satisfy the *Bolt* test."[22]

Similar to the situation in *Duverney*, the Township's sewer ordinance requires a mandatory tap-in fee for connection and use of the sewer system.[23] With regard to sewer system facilities and services, it is clear that the Public Health Code provisions predated Headlee.[24] The mandatory sewer hook-up defines an available public sanitary sewer system in MCL 333.12751 as meaning:

> ". . . a public sanitary sewer system located in a right-of-way, easement, highway, street, or public way which crosses, adjoins or abuts upon the property and passing not more than 200 feet at the nearest point from a structure in which the sanitary sewer originates."

The pre Headlee statutory authority also takes into consideration that a sewer user could request that the charges for connection to the sewer system be deferred due to hardship.[25] Further, these Health Code provisions regarding public sanitary sewer systems provide additional authority and are not a limitation on the power of a governmental unit to adopt, amend, and enforce ordinances relating to the connection of a structure in which sanitary sewage originates.[26]

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[22] *Duverney, supra,* 1042.

[23] The sewer privilege fee requires a user to pay their fair share of the major capital improvements of the sewer system to which their use will burden. It makes no difference that the additional fee in the case at bar was based upon an expansion of restaurant facilities by the sewer user. The formula employed by the Township bases the sewer privilege fee on the square footage of the restaurant, therefore, when the square footage was increased, it produced a greater burden on the system requiring the sewer user to pay a greater fair share. Certainly the ordinance cannot allow sewer users to circumvent their fair share by pulling a smaller square foot building permit and then later expanding the size and use without the requisite formula charge.

[24] The *Bolt* analysis regarding voluntariness would be inapplicable as pre-existing authority allows for mandatory sewer fees.

[25] MCL 333.12756. This ameliorates some of the harshness that could occur.

[26] MCL 333.12758(2).

The Revenue Bond Act has been relied upon by municipalities across the state since 1933 and serves as a basis for constructing, enlarging, and maintaining public sewer improvements.[27] The Revenue Bond Act far outdates the Headlee Amendment and in line with *American Axle* and Justice Corrigan's comments in *Duverney*, the Township's sewer privilege fee on sewer users is exempt from Headlee. The Revenue Bond Act authorizes municipalities to construct facilities, services and commodities as public improvements such as a sewer system. The Revenue Bond Act authorizes municipalities to construct facilities, services and commodities as public improvements such as a sewer system. The Revenue Bond Act allows for user fees or charges to be imposed "for the services, facilities and commodities furnished by any public improvement".[28] Public improvements under the Revenue Bond Act includes "plants, works, instrumentalities and properties used or useful in connection with 'the system'".[29] The Revenue Bond Act authorizes and mandates user fees in order to finance such improvements and further allows for the use of its authority even where bonds are not issued.[30] Prior courts have reviewed Revenue Bond Act sewer privilege fees in the past and upheld them.[31] This Court specifically in *Seltzer* found that a "privilege fee" or capital improvements charge clearly fell within the term "rates" as used in the Revenue Bond Act. Prior to the Headlee Amendment this Honorable Court clearly determined

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[27] The Revenue Bond Act is the basis for establishment of the sewer system and the rates for Chesterfield Township as indicated in the Sewer Ordinance Article III, Section 64-122(6)

[28] MCL 141.103(e).

[29] MCL 141.103(b).

[30] MCL 141.104; MCL 141.121.

[31] *Seltzer, supra; s*ee also *City of North Muskegon v Bolema Construction Co., Inc.*, 335 Mich 520; 56 NW2d 371 (1953), and *Atlas Valley Golf and Country Club, Inc. v Village of Goodrich*, 227 Mich App 14, 575 NW2d 56 (1997).

that a rate or charge imposed for a sewer system may include a capital improvements charge. This authority is exempt from application of the Headlee Amendment.[32] User fees imposed on non-users are an invalid tax.[33] It should further be noted that the Revenue Bond Act mandates the inclusion of amortization costs of capital investment as part of the rates set for the public improvement.[34]

Other statutory authority to construct and charge for sewer systems long pre-dating the Headlee Amendment can be found in the County Public Improvement Act of 1939.[35] The County Public Improvement Act essentially allows for a county to establish, construction, administer, coordinate, and regulate sewer systems and other improvements for local units of government.[36] The county is authorized to fix rates, charges, or assessments for services rendered by the county that include the complete and actual cost of the improvements and financing thereof.[37] Additionally, the county can enter into an agreement with a local municipality not to exceed 40 years whereby the local municipality pays for the services provided by the improvement and facilities authorized.[38] The County Public Improvement Act goes on to allow

> "Any contracting unit of government may raise the amounts required to be paid under such agreements by collecting connection charges, and rates, charges, or assessments from the users and beneficiaries of the improvements, facilities, and services within that unit of government, or by

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[32] It should be noted that the Revenue Bond Act does not just give municipalities carte blanche to charge as they will for the sewer system but rather such charges have been rejected where the person or property receiving the charge was not actually receiving a service. Further, the fee must be reasonable. See *Seltzer, supra*.
[33] See *Jones vs Water Comm'rs of Detroit,* 34 Mich 273; (1876); and *Smith v Township of Norton*, 2 Mich App 17; 138 NW2d 522 (1965).
[34] MCL 141.121.
[35] 1939 PA 342; MCL 14.171 et seq.
[36] MCL 46.171.
[37] MCL 46.174.
[38] MCL 46.175.

levy upon the taxable property of any contracting unit of government having the power to tax in accordance with the same procedure as provided under the general tax laws of the state."[39]

Importantly, the County Public Improvement Act of 1939 provides that:

For the purposes of making payment of its pledge share of the cost of the improvements or facilities, any contracting unit of government may use any, or all, or any combination of the following methods of raising funds:

(a) the levy of a tax on taxable property by a unit of government having the power to tax, which tax may be imposed without limitation as to rate or amount and in addition to any taxes that the unit of government may be authorized to levy but not more than the rate or amount sufficient for those purposes;

(b) the levy of special assessments . . .

(c) the levy and collection or rates or charges to users and beneficiaries of the service furnished by the improvement.

* * * (Emphasis added)."[40]

The County Public Improvement Act of 1939 highlights additional pre Headlee Amendment authority exempting from Headlee consideration sewer user rates and charges for, among other things, capital improvement costs of the sewer system.

As demonstrated by the above pre-existing authorities authorizing a local municipality to levy sewer user fees for capital improvement (i.e., sewer privilege fee for fair share of major infrastructure), it is clear that the Court of Appeals Opinion in this matter is in error. As per *American Axle*, the pre-existing right of local municipalities to collect such rates and charges exempts them from Headlee application. In the case at bar, the sewer privilege fee was authorized by the Revenue Bond Act long prior to the Headlee Amendment. The proper test would be to determine if the sewer user fee was

[39] MCL 46.175.
[40] MCL 46.175(a)

reasonable under the Revenue Bond Act.[41] When such pre-existing authority is provided by law, further analysis under the *Bolt* test to determine whether the fee is really a tax in violation of the Headlee Amendment is erroneous.

CONCLUSION

For the reasons stated here, the Court of Appeals Opinion was erroneous and misapplied the law in determining that the Township's sewer privilege fee was actually a tax in violation of the Headlee Amendment.

WHEREFORE, Amici Curiae respectfully request that this Honorable Court peremptorily reverse the Court of Appeals Opinion or, in the alternative, grant leave to appeal to further consider this extremely important matter.

Dated: October 7, 2014 Respectfully submitted,

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[41] *Seltzer, supra.*

STATE OF MICHIGAN
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IN RE: PETITION FOR FORECLOSURE OF CERTAIN PARCELS OF PROPERTY DUE TO UNPAID TAXES, INTEREST AND FEES

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MACOMB COUNTY,

Petitioner,

PROOF OF SERVICE

AND

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Intervening Party-Appellant.

v.

FOX, LLC., D/B/A ROSIE O'GRADY'S,

Respondent-Appellee.

On this 10th day of October, 2014, the undersigned served by first class mail, postage fully prepaid, a copy of Amici Brief of Michigan Townships Association and Michigan Municipal League on the following counsel of record at the addresses as shown below:

Robert J. Seibert, Seibert and Dloski, 19500 Hall Road, Suite 101, Clinton Township, Michigan 48038;

Gary E. Gendernalik, 24001 Greater Mack, St. Clair Shores, MI 48080.

Susan E. Ritchie

Susan E. Ritchie

Subscribed to before me, a Notary Public, on this 10th day of October, 2014.

Constance Hicks

Notary Public, Constance Hicks
Van Buren County, MI
My Comm. Expires: 3/3/2015