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KLEIN, THORPE & JENKINS, LTD.  
Attorneys at Law

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## MUNICIPAL LAW GROUP

### Court Upholds Village Authority to Impose Stormwater Utility Fee to Address Stormwater Run Off

To address continuing serious stormwater runoff issues, the Village of Winnetka engineer coordinated a study of the Village stormwater problems. The study concluded that the amount of impervious area on a property is directly and proportionally related to runoff from the property and corresponding use of the storm water system. The Village then issued bonds for \$40 million to make capital improvements to their stormwater system and approved a stormwater utility fee on property owners to make bond payments and for the operation of the stormwater system. The fee was imposed on all impervious land area owned in the Village (i.e. an owner's proportionate share of responsibility for the stormwater runoff problem). The Illinois Appellate Court rejected a challenge to the fee by a resident property owner contending the fees were an unlawful property tax, finding the Village established a reasonable relationship between the stormwater runoff occurring in the Village and the impervious areas causing runoff, to support the utility fee.

*Green v. Village of Winnetka*, 2019 IL App (1st) 182153 (July 26, 2019)

For copy of the full appellate decision:

[Green v. Village of Winnetka](#)

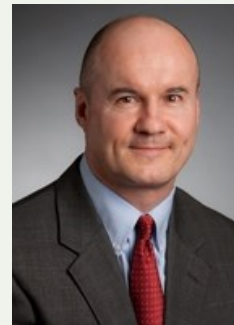
A more detailed summary of the decision is set forth herein.

Authored By:

Name: Scott Uhler

Email: [sfuhler@ktjlaw.com](mailto:sfuhler@ktjlaw.com)

Phone: 312-984-6421



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## Facts

The Village of Winnetka is within a large floodplain and has stormwater problems. It has a storm sewer system, including pumping stations, to try to alleviate flooding problems. To address flooding issues following significant rainfalls in 2008 and 2011, the Village examined possible improvements to its stormwater system. The Village adopted a new stormwater management plan and corresponding stormwater ordinance. The ordinance was based on an analysis by the engineering department finding that all real property in the Village contributes to runoff and either uses or benefits from the maintenance of the stormwater system.

The ordinance established the Village stormwater system as a municipal utility, to be funded through user fees to pay for the management, operation, maintenance, construction and rehabilitation of the Village's storm water system. The ordinance created a utility fee formula based on the amount of impervious surface area of each property in the Village and the cost of the system improvements and operation. One portion of the fee was to be used to make bond payments. The remainder of the fee was based on such other rates, fees and charges that the Village Council determines are necessary to recover all costs related to operating, maintaining and improving the stormwater system utility. The ordinance did exempt properties with less than 170 square feet of impervious surface from the stormwater fee or that were able to capture all stormwater runoff on their own property.

## Challenge Brought to Village Authority to Adopt a Stormwater Utility Fee

Following the adoption of the ordinance by the Village, a Village resident sued the Village contending the fee was an unconstitutional tax levied without voter approval and that the utility fee was not a valid user fee but a real property tax and that it must be levied on property value as required by the constitution and must be adopted following the statutorily prescribed procedure of Section 8-3-1 of the Illinois Municipal Code. 65 ILCS 5/8-3-1. The resident also argued that the fee was unlawful because it was imposed to pay the bonds the Village issued for capital improvements.

## Village Response to Legal Challenge

The Village defended its utility fee as a valid user fee (and not a tax) contending "(1) it compensates the Village for property owners' use of the stormwater system, including but not limited to the Tunnel [part of the planned capital improvements]; (2) the proceeds are segregated into a special fund for the stormwater system; and (3) the Fee is based on the cost of constructing, maintaining, and operating the stormwater system." *Green v. Village of Winnetka*, 2019 IL App (1st) 182153, 182160 The Village relied primarily on the prior decision of an Illinois Appellate Court in *Church of Peace v. City of Rock Island*, 357 Ill. App. 3d 471 (2005) which upheld a similar stormwater utility fee.

## Court Analysis

The Court noted that a tax is a charge having no relation to the service rendered, assessed to provide general revenue rather than compensation, while a fee is proportional to a benefit or service rendered. The Court found that the prior Illinois Appellate Court decision in *Church of Peace* governed this case and the engineering consultant's study for the Village established the required relationship between impervious surface and runoff. The Court concluded that the Village did not have to establish a perfect relationship between the subject and object of the fee, only a reasonable one. It found the reasonable relationship between impervious area and runoff based on the conclusion of the Village Engineer that the "amount of impervious area on a property is directly and proportionally related to an owner's use of the stormwater system ... because if impervious areas block water from being absorbed into the ground on a particular property, the storm water must either evaporate (which accounts for a negligible amount of stormwater during a storm) or run off the property into the Village's stormwater system." *Green v. Village of Winnetka*, 2019 IL App (1st) 182153 The Court concluded that the amount of a fee need not be the precise or actual value or cost of the services, property, or improvements provided to a particular user.

As for the legal challenge based on the assertion that bond payments for capital improvements to the system were a tax and not a user fee, the Court agreed with the multi-jurisdictional law from other state courts in *City of Lewiston* and *Tukwila School District No. 406* and concluded that the fact that stormwater fee revenue is spent on capital improvements to the stormwater system, and to pay bonds issued for such capital improvements, as well as the operation of the system, does not render a stormwater fee tax.

For any questions or comments you might have regarding this newsletter, please feel free to contact:

### Chicago Office

20 N. Wacker Drive, Ste. 1660  
Chicago, IL 60606

T: (312) 984-6400

F: (312) 984-6444

### Orland Park Office

15010 S. Ravinia Ave., Ste. 10  
Orland Park, IL 60462

T: (708) 349-3888

F: (708) 349-1506

### Streator Office

7 Northpoint Drive  
Streator, Illinois 61364

T: (815) 672-3116

F: (815) 672-0738

[www.ktjlaw.com](http://www.ktjlaw.com)

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