

Water and Wastewater Finance: Legal Issues & Trends

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Common Legal Issues

- Availability fees
- Impact/Capacity/System fees
- Transfers
- Preaudit requirements



Availability Fees

- Charge on developed property that is not connected to unit's water/sewer line
 - Not applicable to “dry taps”
- Charge cannot exceed periodic administrative/overhead fee that unit assesses on properties that are connected

Availability Fees

Municipalities

- Can require developed properties to connect to water/sewer lines located within reasonable distance
- In lieu of requiring connection, can charge availability fee

Counties

- Can require developed properties to connect to water/sewer lines located within reasonable distance
- Can charge availability fee only on properties that qualify for issuance of building permit but have not yet been developed

Impact Fee

- Capacity fee, system fee, capital fee
 - Label does not matter



**Any charge to generate \$
for future capital costs**

Relevant Case Law

- *South Shell Investment v. Town of Wrightsville Beach*, 703 F.Supp. 1192 (1988) (Town “had the authority to impose impact and tap fees under the public enterprise statute and that *no specific enabling legislature [was] necessary.*”)
- *Town of Spring Hope v. Bissette*, 305 N.C. 248 (1982) (rates charged to current customers can reflect both current operating costs and future capital costs necessary to continue to provide the service)
- *Atlantic Construction Co. v. City of Raleigh*, 230 N.C. 365 (1949) (city had authority to charge reasonable connection fees and to otherwise “fix the terms upon which the service may be rendered and its facilities used.”)

Relevant Case Law

- Union Land Owners Ass'n v. County of Union, 201 N.C. App. 374 (2009), *disc. rev. den'd*, 364 N.C. 442 (2010) (no implied impact fee authority)
- Amward Homes, Inc. v. Town of Cary, 206 N.C. App. 38 (2010), *aff'd by an equally divided court*, 365 N.C. 305 (2011) (no implied impact fee authority)
- Lanvale Properties, LLC v. County of Cabarrus, 366 N.C. 142 (2012) (no implied impact fee authority)

Counties and Municipalities May....

- “[e]stablish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise.”

Water and Sewer Authorities May...

- set “rates, fees, and other charges for the use of and for the services furnished *or to be furnished* by any water system or sewer system or parts thereof owned or operated by the authority.”

Is there authority?

- Monthly charge to current water customers, \$12.50 fixed + \$15.00 per 1000 gallons
- \$400 tap fee to install meter and establish new account
- \$750 capacity fee assessed on new development
- \$1200 connect fee on all properties that connect

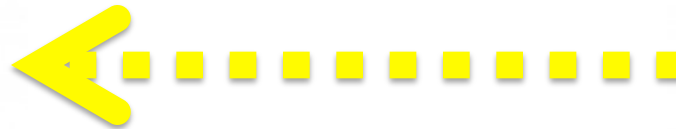
Why Care?

- G.S. 160-363; G.S. 153A-324
 - if unit found to have illegally exacted a fee for development approval that is not specifically authorized by law, city shall return fee plus 6% interest per annum
- G.S. 6-21.7
 - if court finds unit outside the scope of its legal authority, the court may award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court shall award attorneys' fees and costs.

Transfers



General Fund



Enterprise Fund

Transfers

- From General Fund to an Enterprise Fund
 - Authorized by G.S. 153A-276; G.S. 160A-313
- From Enterprise Fund to General Fund (or any other fund)
 - Authorized by G.S. 159-13(b)(14)
 - But, G.S. 159G-37

NCDENR SRF Certification

Applicant's Certification:

I certify that no funds received from water or wastewater utility operations have been transferred in the last fiscal year from the water and/or sewer enterprise fund to the general fund for the purpose of supplementing the (Local Government Unit) resources of the general fund in accordance with § 159G-37.(b) except as allowable and are listed below.

Preaudit



G.S. 159-8

“[A]ll moneys received and expended by a local government or public authority should be included in the budget ordinance [or project ordinance]. . . No local government or public authority may expend any moneys, regardless of their source, except in accordance with a budget ordinance or project ordinance....”

– Exceptions:

- Moneys accounted for intragovernmental service fund
- Moneys accounted for in a trust or agency fund

Obligating and Disbursing Public Funds

Preaudit Process (G.S. 159-28(a))

Triggered when:

- A unit enters into contract or agreement or places an order for goods or services that are accounted for in the budget ordinance or a project ordinance; **AND**
- the unit is obligated to **pay money** by the terms of the contract/agreement/order; **AND**
- (if the appropriation is accounted for in the budget ordinance) the unit anticipates paying at least some of the money in the fiscal year in which the contract/agreement/order entered into.

Disbursement Process (G.S. 159-28(b) &(d))

Triggered when:

- A unit pays invoice, bill, or other claim that is accounted for in the budget ordinance or a project ordinance

Preaudit Statute (G.S. 159-28(a))

- “No **obligation** may be incurred in a program, function, or activity under an ordinance or resolution unless the ordinance or resolution is an appropriation of an amount of money sufficient to cover the obligation and the ordinance or resolution requires the payment of money or by a purchase order for supplies and materials, **the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been preaudited to assure compliance with this subsection....**”



Preaudit applies to:

- Purchase orders (POs)
- Purchases below PO threshold
- Service contracts
- Phone / Internet orders
- Credit / Procurement / Fuel Card payments
- Employment agreements (even at-will)
- Interlocal agreements
- Etc.

Is a Preaudit Required?

- City and county enter into a five year bulk water sale agreement whereby county agrees to purchase water from the city. The county will pay based on city's rate schedule.
 - Must the city preaudit the contract?
 - Must the county preaudit the contract?

G.S. 159-28(a): What is Process?

Finance Officer (or deputy finance officer) must:

1. Check to see if there is an appropriation in budget ordinance or project ordinance for amount due this fiscal year
2. Check to see if sufficient funds remain in the appropriation to cover amount that will come due this fiscal year
3. **Memorialize contract/agreement/order in writing***
4. Affix signed preaudit certificate to “writing” that evidences contract/agreement/order

** New requirement as per 2012 & 2013 NC Court of Appeals decisions*

G.S. 159-28(a): Certificate



“This instrument has been preaudited in the manner required by the Local Government Budget and Fiscal Control Act.”

(Signature of finance officer or deputy finance officer)

- *Not required on any contracts approved by LGC.*

Penalties for not following Process

- Contract/agreement/order is VOID and cannot be enforced
- Any individual or officer who enters into contract/agreement / order or causes funds to be disbursed without following statutory processes may be held personally liable for amounts committed or disbursed

