

Water and Wastewater Finance:  
Legal Issues & Trends

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Common Legal Issues

- Impact Fees-System Development Fees
- Transfers
- Interlocal Agreements



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Local government utility may assess a *system development fee* (schedule) on “new development” within its territorial boundaries to fund certain capital costs attributable to that new development.



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## Upfront Charges for Water/Sewer

New Development Within Territorial Jurisdiction	Existing Development Within Territorial Jurisdiction	New or Existing Development Outside Territorial Jurisdiction
System Development Fee (GS 162A, Art. 8)	May charge fees for "services to be furnished"	May charge fees for "services to be furnished" May adopt different fee schedules than for "inside" properties
Regulatory Fees	Regulatory Fees	Regulatory Fees
Tap/Hookup Fees	Tap/Hookup Fees	Tap/Hookup Fees
Contractual Charges	Contractual Charges	Contractual Charges
Availability Fee (if applicable)	Availability Fee (if applicable)	

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## System Development Fee



- What government entities are affected?
- Who can be assessed (aka what is new development)?
- How is the fee calculated?
- When may the fee be imposed?
- What may be funded with the fee?
- What is the process for adopting the fee?
- What other fees are allowed?




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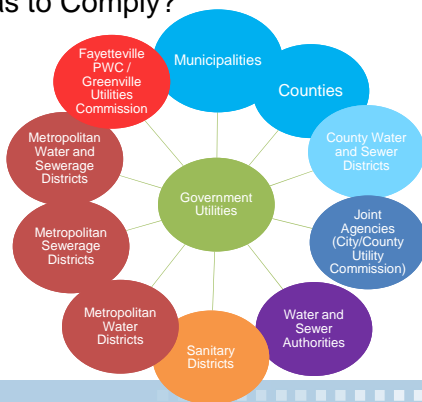
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## Who Has to Comply?




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## Who Can Be Assessed?

Change Made to Land/Structure(s)	Timing of Change Made to Land/Structure(s)
<ul style="list-style-type: none"> <li>• Subdivision of Land</li> <li>• Construction, or any change to existing structure, that causes increase in need for service</li> <li>• Any use or extension of use of land that increases need for service</li> </ul>	<ul style="list-style-type: none"> <li>• After fee resolution adopted by board; OR</li> <li>• After written analysis of fee calculation begins, as long as within one year prior to fee resolution adoption</li> </ul>

Only deals with Who may be assessed, not When fee is assessed




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## Can you assess SDF?

- April 2018: Land subdivided
  - May 2018: Contract for analysis
  - July 2018: Fee adopted
- (Note: The first three items are crossed out with a large red X)*
- Oct. 2017: Contract for analysis
  - Nov. 2017: Land Subdivided
  - July 2018: Fee Adopted




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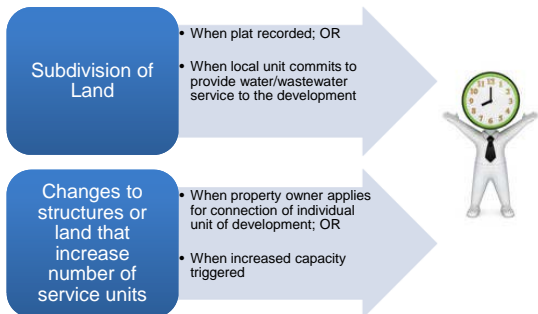
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## When Can Fee Be Assessed?




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## Process to Adopt Fee Schedule

- 1 • Professional Analysis
- 2 • Public Input
- 3 • Professional Analysis Reconsidered
- 4 • Public Hearing
- 5 • Adopt Resolution or Ordinance
- 6 • Notice of System Development Fee Schedule
- 7 • Periodic Updates



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## How to Calculate Fee Schedule



- Done by engineering or finance professional with sufficient training/experience
- Detailed Analysis (including statutory modifications to industry standards)
- Methodologies
  - Incremental/Marginal Cost
  - Buy-in
  - Combined
- Service Unit Rate
- Revenue or Valuation Credits
- Equivalency or Conversion Table (Fee Schedule)
- Planning Horizon of 10-20 years



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## Spending Proceeds



- Incremental / Marginal Cost or Combined Cost Methods
  - Costs of construction or expansion that were "necessitated by and attributable to" new development (construction; surveying/engineering; land acquisition; debt service; fee analysis costs)
  - If no capital improvements planned for 5 years, debt service on existing "capital improvements"
- Buy—in Method
  - Unrestricted proceeds in water or wastewater fund?



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## Administering Proceeds



- Capital Reserve Fund (CRF)
  - Alternative to Fund Balance
  - Adopt Ordinance or Resolution
  - Specify projects to be funded with proceeds
  - Must move \$ to budget or project ordinance before expending

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## What if your unit has charged/is charging an unlawful fee?



- ~~40-year statute of limitations (case law)~~
- Court may award attorneys fees and costs; must award if abuse of discretion (G.S. 6-21.7)
- If assessed on new development, 6% interest per year (G.S. 160A-363(e))

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## What if your unit has charged/is charging an unlawful fee?



- 3-year statute of limitations for “the recovery of an unlawful fee, charge, or exaction collected by a county, municipality, or other unit of local government for water or sewer service or water and sewer service.” (G.S. 1-52(15))
- Court may award attorneys fees and costs; must award if abuse of discretion (G.S. 6-21.7)
- If assessed on new development, 6% interest per year (G.S. 160A-363(e))

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## Oh, And....

- 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.




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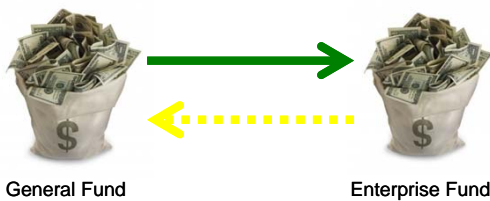
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## Transfers




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## 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



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## G.S. 159G-37(b)

(b) Certification. – The Division of Water Infrastructure shall require all local governments applying for loans or grants for water or wastewater purposes to certify that no funds received from water or wastewater utility operations have been transferred to the local government's general fund for the purpose of supplementing the resources of the general fund. The prohibition in this section shall not be interpreted to include payments made to the local government to reimburse the general fund for expenses paid from that fund that are reasonably allocable to the regular and ongoing operations of the utility, including, but not limited to, rent and shared facility costs, engineering and design work, plan review, and shared personnel costs.



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## 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.



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## Interlocal Agreements

- Contract with other government entity to perform jointly, or on behalf of, any activity that both units have authority to undertake
  - Billing/Collections
  - Operations
  - Expansions



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