Coates' Canons Blog: Legislature Limits Government Water Utilities' Authority to Mandate Connections

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The governing boards of several government-owned or operated water and sewer utilities currently have the authority to mandate connection of certain properties to their water systems. The authority extends to municipalities, counties, sanitary districts, and water and sewer authorities (hereinafter referred to as "government utilities").

Specifically, each local unit may require "the owner of developed property on which there are situated one or more residential dwelling units or commercial establishments" located within the territorial jurisdiction of the government utility and within a reasonable distance of the water line . . . owned, leased as lessee, or operated by, or on behalf of, the government utility "to connect the owner's premises with the water [ ] line and may fix charges for these connections." *See* **G.S. 160A-317** (municipalities); **G.S. 153A-284** (counties); **G.S. 130A-55(16)** (sanitary districts); **G.S. 162A-6(a)(14d)** (water and sewer authorities); *see also* **G.S. 162A-14(2)** (interlocal agreement between the political subdivision and a water and sewer authority). (A sanitary district and water and sewer authority may only exercise this authority if the water service is not being provided to the property by another government utility or by a private utility that is regulated by the North Carolina Utilities Commission.)

As of August 1, 2016, counties, municipalities, sanitary districts, and water and sewer authorities will be prohibited from mandating connection to their water systems under certain circumstances. This post summarizes the new law and provides a guide for government utilities as to when it applies and what it prohibits.

The new provisions are found in G.S. 87-97.2. They were enacted in conjunction with expanded drinking water well permitting requirements. **S.L. 2015-246**.

Drinking Water Well Permitting Requirements

Effective August 1, 2016, **section 3.5d of S.L. 2015-246** requires a local government to issue a permit to a property owner for a private drinking water well under the following circumstances:

1. If the property is undeveloped or unimproved, the local government must issue the permit even if the property could be served by a government utility.

2. If the property is developed or improved, the local government must issue the permit, only if the government utility has not yet installed water lines directly available to the property ***or*** if the government utility cannot provide water service to the property at the time the property owner desires service.

Prohibition on Mandated Connections

Again, effective August 1, 2016, once a drinking water well permit is issued for a particular property, a government utility may not mandate connection of that property to its water system, as long as the permitted well remains compliant and in use. A property owner who has been issued a drinking water well permit, may choose to connect to the public water system, but he/she may not be compelled to do so.

A government utility may continue to mandate connection of any developed or improved property located within its

jurisdiction, and within a reasonable distance of its water lines, if a drinking water well permit has not been issued for the property.

Furthermore, there are a few exceptions to the mandated connection prohibition, even if a drinking water well permit has been issued. A government utility may still mandate connection to its water system of a property for which a permit has been issued if one or more of the following apply:

(1) The private drinking water well serving the property has failed and cannot be repaired. The statute does not specify who determines whether or not the well can be repaired. It is up to the government utility to establish a process to verify the functionality of each private drinking well.

(2) The property is located in an area where the drinking water removed by the private drinking water well is contaminated or likely to become contaminated due to nearby contamination. This determination is made or confirmed by the local health department. *See* **G.S. 87-97**.

(3) The Local Government Commission (LGC) is *assisting* the government utility operating the public water system. The new law does not define the circumstances under which the LGC would be deemed to be *assisting* the government utility. Arguably, all local governments and public authorities are assisted to some extent by the LGC. The LGC monitors the fiscal health of each unit by reviewing its annual audit. To read *assisting* this broadly would cause the exception to swallow the rule, though. It is likely that the legislature intended the term *assisting* to mean something more.

It is possible that *assisting* for purposes of this statute means that the LGC has issued debt on behalf of the government utility. When a local government or public authority borrows money through general obligation bonds, revenue bonds, special obligation bonds, or project development bonds, it is the LGC that actually issues the bonds. Even this interpretation of *assisting* seems broader than what the legislature likely intended, though.

In an extreme case, the LGC has the authority to impound the books and records associated with a government utility, assume full control of all its affairs, or take any other actions deemed necessary by the Commission to deal with a government utility that is in financial trouble. *See* **G.S. 159-181(c).** This statute is triggered when

> for three consecutive fiscal years, the audited financial statements of the unit or public authority demonstrate that the unit or public authority meets any one of the following three criteria: (i) the enterprise system experienced negative working capital; (ii) the enterprise system experienced a quick ratio of less than 1.0; or (iii) the unit or public authority experienced a net loss of revenue from operations in the enterprise system using the modified accrual budgetary basis of accounting. Before the Commission assumes full control of an enterprise system as described in this subsection, it must find that the impact of items (i) through (iii) threatens the financial stability of the unit or public authority, and that the unit or public authority has failed to make corrective changes in its operation of the enterprise system after having received notice and warning from the Commission. The notice and warning may occur prior to the expiration of the three-year period.

The term *assisting* could refer only to situations when the LGC takes action under this statute, or when it compels a government utility to make its debt service payments, pursuant to **G.S. 159-36**. That seems too restrictive of an interpretation, though. If the legislature intended this result, it could simply have stated that the exception applies only when the LGC takes action under **G.S. 159-181** or **G.S. 159-36**. By instead using the word *assisting* it appears that that the legislature intended for the exception to apply to a broader set of circumstances.

In fact, viewing the exception in the context of the whole statute, it is likely that the legislature intended it to apply when a government utility is in financial trouble, or on the verge of financial trouble, such that prohibiting the utility from mandating connections might affect the utility's continued viability. Thus, I think the most likely interpretation of *assisting* is that the LGC has issued at least one warning letter within the past year to the government utility indicating some concern about the utility's financial condition, stability, or viability.

(4) The government utility operating the public water system is in the process of expanding or repairing the public water system and is actively making progress to having the water lines installed directly available to provide water service to the property within 24 months of the date the property owner applies for the private drinking water well permit. This exception allows the unit to compel the property owner to connect his/her property to the public water system when it is available.

The exception expires on July 1, 2017, though. After that date, a government utility will be prohibited from mandating connection to its water system once it has issued a private drinking well permit, even if the system is available for connection within the 24-month period (unless, of course, another exception applies).

Availability Fees

Current Authority

Under current law, a government utility has authority to charge an availability fee to certain property owners whose properties are not connected to the unit's water or sewer system. The availability fee may not exceed the minimum periodic charge that is assessed on properties that are connected. The circumstances in which a government utility may charge an availability fee vary by government entity.

The municipal statute current reads as follows:

> A city may require an owner of developed property on which there are situated one or more residential dwelling units or commercial establishments located within the city limits and within a reasonable distance of any water line or sewer collection line owned, leased as lessee, or operated by the city or on behalf of the city to connect the owner's premises with the water or sewer line or both, and may fix charges for the connections. *In lieu of requiring connection under this subsection and in order to avoid hardship, the city may require payment of a periodic availability charge, not to exceed the minimum periodic service charge for properties that are connected.*

G.S. 160A-317(a).

The county, sanitary district, and water and sewer authority statutes all currently read as follows:

> A [utility] may require the owner of developed property on which there are situated one or more residential dwelling units or commercial establishments located so as to be served by a water line or sewer collection line owned, leased as lessee, or operated by the [utility] or on behalf of the [utility] to connect the owner's premises with the water or sewer line and may fix charges for these connections. *In the case of improved property that would qualify for the issuance of a building permit for the construction of one or more residential dwelling units or commercial establishments and where the [utility] has installed water or sewer lines or a combination thereof directly available to the property, the [utility] may require payment of a periodic availability charge, not to exceed the minimum periodic service charge for properties that are connected.*

G.S. 153A-284; *see also* **G.S. 130A-55(16)a; G.S. 162A-6(a)(14d).**

Authority as of August 1, 2016

What changes, if any, does the new law make to the availability fee provisions? The answer, again, varies by type of entity.

The new law did not modify the availability fee language in the municipal statute. However, the municipal statute ties the authority to charge an availability fee directly to the authority to mandate connections. It states that "in lieu of" requiring connection, the unit may choose to instead impose an availability fee. That very likely means that if a municipality does not have authority to mandate that a property connect to its water system pursuant to G.S. 87-97.2, it also does not have authority to impose an availability fee on that property owner.

The county, sanitary district, and water and sewer authority statutes do not directly tie the imposition of an availability fee to the authority to mandate connections. (And, in fact, the new law actually creates a new subsection in the county statute, separating the authority to mandate connections from the authority to impose an availability fee.) It thus appears that a county, water and sewer authority, and sanitary district will continue to have the authority to impose availability fees on properties who qualify for the issuance of a development permit, but are not yet developed or improved, even if the unit has issued the property owner a private drinking water well permit. (Click **here** for a more detailed explanation of this availability fee authority.)

Links

- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-317.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-284.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_130A/GS_130A-55.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_162A/GS_162A-6.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_162A/GS_162A-14.html
- www.ncleg.net/Sessions/2015/Bills/House/PDF/H44v5.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_87/GS_87-97.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_159/GS_159-181.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_159/GS_159-36.html
- canons.sog.unc.edu/?p=6305