Coates' Canons Blog: Water and Sewer Availability Fees

By Kara Millonzi

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UPDATE October 5, 2015: The legislature enacted S.L. 2015-246, which, effective August 1, 2016, prohibits a city, county, sanitary district, and water and sewer authority from mandating connection to its water system (and prohibits a city from assessing an availability fee) under certain circumstances. Clickhere for more information about this law.

Roland Spring has lived in his house for over twenty years in the Town of Waterworks, NC. Over the past year, Roland has noticed town workers doing significant construction work in the town's easement at the front of his and his neighbor's properties. He has not paid much attention to the nature of the work, assuming it had something to do with the drainage problems his street frequently experiences. A few months after the construction finishes, Roland receives a notice in the mail from the town indicating that the town's water system has been extended to Roland's neighborhood and notifying Roland that, pursuant to some state statute and local ordinance, he now must connect his property to the town's water supply. (The cost to Roland to connect will be $400.) Roland is incensed. He recently had a new well drilled, at significant expense to him, and he has no desire to receive water from the town. Roland immediately calls town hall and expresses his outrage. He informs the town manager that he will not be connecting his property to the town's water lines.

A few months pass and nothing happens. Roland feels satisfaction at having "fought city hall" and won. Then one day he receives a bill in the mail from the town's water department for administrative charges totaling $22. Assuming it to be a clerical error, Roland ignores the bill. A month later, he receives another bill for $45.10 ($22 administrative charge for the current month + $22 administrative charge for the past month + 5 percent late fee penalty). He once again calls town hall to complain. This time the manager informs Roland that the assessment is an "availability fee" that he legally is obligated to pay even though his property is not connected to the town's water system. Roland is outraged. Could there actually be such a law?

The answer is yes. Local governments have authority to impose water and sewer availability fees under certain circumstances. The statutory authority differs for municipalities and counties, so they will be discussed separately below.

Municipal Authority to Impose Water and Sewer Availability Fees

G.S. 160A-317 authorizes a municipality to

> 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.

This authority only applies to developed *residential* or *commercial* properties *within* the municipality. It does not apply to undeveloped properties, industrial properties, or properties outside the municipal territory, even if those properties are within the unit's extraterritorial jurisdiction (ETJ). The statute does not define what constitutes a "reasonable distance" from the water or sewer line—this determination is left to the (rational) discretion of the unit's governing board. The statute also does not place any restrictions on the amount of the connection fee that may be assessed. This decision also lies within the discretion of the unit's governing board (subject to common law restrictions on ratemaking, which are discussed **here**.)

The statute further provides that

> [i]n 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.

Thus a municipal board, in its discretion, may offer an alternative to mandatory connection to its water or sewer system. If a property that is otherwise eligible for mandatory connection does not connect to the municipality's water or sewer system, the unit may impose an availability fee on the property owner. The availability fee may not exceed the periodic (monthly, bi-monthly, etc.) administrative or overhead charge that is assessed to actual water or sewer customers. (A water or sewer bill typically has two components—a fixed administrative or overhead charge and a variable charge based on actual usage. It is the fixed administrative or overhead charge that also may be assessed as an availability fee.)

Once a property is connected to a municipality's water or sewer line, the unit no longer is authorized to charge the property owner an availability fee. This is true even if there is no actual consumption at the property. Instead, the unit is allowed to assess the periodic administrative or overhead charge (even if there is no consumption). The property owner, however, is not legally liable to pay the charge unless he or she actually established the account for utility service with the unit.

(Note that, pursuant to **S.L. 2011-396 (HB 845)**, a municipality's authority to impose an availability fee on properties that are involuntarily annexed may be restricted. Click **here** for more information.)

County Authority to Impose Water and Sewer Availability Fees

A county has parallel authority to require developed residential or commercial property located within a reasonable distance of a water or sewer line that is owned, leased, or operated by or on behalf of the county to connect to the county water or sewer systems. **G.S. 153A-284**.

A county's authority to impose an availability fee, however, appears to be far more limited than a municipality's. **G.S. 153A-284** provides that:

> [i]n 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 county has installed water or sewer lines or a combination thereof directly available to the property, the county may require payment of a periodic availability charge, not to exceed the minimum periodic service charge for properties that are connected.

This provision was added to **G.S. 153A-284** in 1995. **S.L. 1995-511**. It seems to limit a county's availability fee authority to those situations where the county's water or sewer lines are directly available to property that has been improved to the extent that it would qualify for the issuance of a residential or commercial building permit, but where no structures actually have been constructed. Once a building permit is issued, though, the county's only option is to force the property owner to connect to its water or sewer systems.

(Note that sanitary districts and certain water and sewer authorities have similar authority to counties with respect to mandating connections and imposing availability fees. *See* **G.S. 130A-55(16)(a); G.S. 162A-6(a)(14d)**. Metropolitan sewerage districts have authority to mandate connections but not to impose availability fees. **G.S. 162A-69(13b).**)

Adoption and Collection of Water and Sewer Availability Fees

A municipal or county board must adopt an ordinance imposing an availability fee. Generally, the board need not provide notice to affected property owners before adopting the ordinance, nor is it required to hold a public hearing on this issue. *See* **G.S. 160A-312**; **G.S. 160A-317; G.S. 153A-275; G.S. 153A-284.**; *see also* McNeill v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990). If an availability fee will be assessed on new subdivision development, a unit may have to comply with certain notice and public comment requirements, though (The requirements are discussed **here**).

Unlike typical water and sewer fees, an availability fee is not imposed under a contract between the unit and a voluntary customer. Instead the fee is imposed by local ordinance, under authority conferred by state law. Regardless of who occupies the property (or even if it is not occupied) the availability fee is the responsibility of the owner(s) of the property when the fee was imposed.

What happens if a property owner fails to pay the availability fee? A unit has a few collection remedies at its disposal. First, if the unit provides any other public enterprise services to the property owner, it can list the availability fee on the bill for the other services and order partial payments such that the availability fee is paid first if the bill is not paid in full. This allows the unit to disconnect one or more of the other public enterprise services to the property owner for nonpayment. *See* **G.S. 160A-314; G.S. 153A-277**. Second, if the amount owed exceeds $50, the unit may submit the debt to the State's debt set-off program. *See* **G.S. 105A, Art. 1.** Third, the unit may institute a civil suit against the property owner to collect the debt. Fourth, the unit may impose a fine or penalty for failure to pay the amount due on time. Finally, unless the governing board opts-out, failure to pay the availability fee constitutes a misdemeanor under state law. *See* **G.S. 160A-175 ; G.S. 153A-123**.

(Note that if a local government imposes a fine or penalty for non-payment of an availability fee, the clear proceeds of the penalty revenue must be distributed to the public schools unless the governing board opted out of criminal enforcement of the ordinance. Click **here** for more information on this requirement.)

New(er) Legislation Regarding Wells

The General Assembly enacted legislation last summer regarding local regulations of private wells. *See* **S.L. 2011-255 (SB 676).** The legislation prohibits a county that, through its local health department, implements a private drinking water well permitting, inspection, and testing program from unduly delaying or refusing to permit a well that may be constructed or repaired in compliance with state law and regulations. It also prohibits a local health department from denying a permit for a well on the basis of a local government policy that discourages or prohibits the drilling of new wells. The legislation, however, does not prohibit a local government from mandating connection to its water or sewer system, or imposing an availability fee, according to the statutory authorizations discussed above.

Links

- canons.sog.unc.edu/?p=8244
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-317.html
- ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/lfb33.pdf
- www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H845v7.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-284.html
- www.ncleg.net/Sessions/1995/Bills/Senate/PDF/S908v5.pdf
- 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-69.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-312.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-275.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-314.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-277.html
- www.ncleg.net/gascripts/Statutes/StatutesTOC.pl?Chapter=0105A
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-175.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-123.html
- www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S676v5.pdf