Coates' Canons Blog: Water and Sewer District's Impact Fee Powers

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UPDATED September 2017: As of October 1, 2017, the state legislature has further defined (and limited) the impact fee powers of a County Water and Sewer District. Click here for more info on the new law.

An impact fee is a charge imposed on new or proposed development, the revenue generated from which is used to fund capital projects necessitated (or at least prompted) by the development. A local government typically assesses an impact fee as part of its development approval process. Paying the fee is often a condition of receiving a building permit or certificate of occupancy.

North Carolina counties and municipalities have specific statutory authority to require subdivision developers to pay fees in lieu for certain road and recreational land infrastructure projects that benefit the new development. *See* **G.S. 160A-372** (municipalities); **G.S. 153A-331** (counties). There is no specific authority to charge impact fees under general law, though, at least to fund general government infrastructure or services. (A handful of units have local act authority to assess impact fees for certain purposes.) And North Carolina courts have repeatedly refused to hold that impact fee authority is implied from a unit's regulatory powers. *See, e.g.*, Lanvale Properties, LLC v. County of Cabarrus, 366 N.C. 142 (2012); Union Land Owners Ass'n v. County of Union, 201 N.C. App. 374 (2009), *disc. rev. den'd*, 364 N.C. 442 (2010); 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). As I discuss **here** and **here**, it is an open question whether or not municipalities have authority to assess impact fees for water and sewer purposes, pursuant to their public enterprise powers.

In addition to counties and municipalities, there are a number of limited-purpose local government entities that are authorized to provide certain public enterprise services. Limited-purpose governments (referred to as **public authorities** in the Local Government Budget and Fiscal Control Act) often are established to serve regional populations that cut across municipal or county boundaries. One type of limited-purpose government that is authorized to provide water and sewer services is a **county water and sewer district**. A county board of commissioners may create a county water and sewer district to provide services to all or a portion of the properties in the county. (Municipal territory may not be included unless consented to by a municipality's governing board.) Once formed, a water and sewer district is an independent legal entity from the county government. The members of the county board of commissioners serve as the water and sewer district's governing board, though. The district's powers and duties are enumerated in **Article 6 of Chapter 162A of the North Carolina General Statutes.**

The statutory language authorizing a water and sewer district to assess rates and charges for its utility services is broader than that for a county or municipality. And there is a much stronger argument that a water and sewer district (and, by analogy, a water and sewer authority (G.S. 162A-9); metropolitan water district (G.S. 162A-49); metropolitan sewerage district (G.S. 162A-72); metropolitan water and sewerage district (G.S. 162A-85.13)) authority to impose impact fees than there is for a municipality or county. However, as a recent court of appeals cases out of New Hanover County illustrate, that does not mean that any of these entity's impact fee authority is unlimited.

Water and Sewer District Fee Authority

A water and sewer district is authorized to "establish, revise and collect rates, fees or other charges and penalties [collectively "fees"] for the use of or the services furnished *or to be furnished* by any sanitary sewer system, water system or sanitary sewer and water system of the district . . . ." **G.S. 162A-88** (emphasis added).

In *McNeill v. Harnett County*, 327 N.C. 552 (1990), the North Carolina Supreme Court held that this authority (particularly

the italicized provision) "is *not* limited to the financing of maintenance and improvements of *existing* customers." *Id.* at 570. In that case, a water and sewer district had assessed what amounted to pre-connection charges on properties that would eventually be connected to a yet-to-be-built sewer system. Although *McNeill* did not involve impact fees *per se*, it provides precedent for a water and sewer district to assess charges on a property owner before his/her property is connected to the district's water or sewer system, at least if it is clear that the connections are going to be made.

But how far does this authority extend? ***Point South Properties, LLC v. Cape Fear Public Utility Authority*, COA15-374, ___ N.C. App. ____, (Oct. 20, 2015)**, and its companion case, ***CB Windswept, LLC. v. Cape Fear Public Utility Authority*, COA15-371, __ N.C. App. __ (Oct. 20, 2015),** give some guidance about the contours of a water and sewer district's authority to assess fees and charges for services "to be furnished."

Facts of*Point South Properties*

In 1987, New Hanover County and the New Hanover County Water and Sewer District adopted an impact fee policy whereby the payment of a water and sewer impact fee (also referred to as a facility fee) was required as a condition to receive a building permit. The rationale for assessing the impact fee was that the district needed the revenue to expand its wastewater infrastructure, with the ultimate goal of serving the whole county. The county collected the fee on behalf of the district. Between 2003 and 2006, the plaintiffs, two residential developers, each paid over $200,000 in impact fees in order to secure development permits from the county. Once constructed, the properties built by the two developers received water and sewer services from a private utility company. Although the county had identified the area in which the properties were located as a possible future service area, neither the county, nor the district, took any specific steps to extend service to these properties.

In 2012 and 2013, the two developers (plaintiffs) filed separate suits against the county and the Cape Fear Public Utility Authority (CFPUA) (successor entity of the water and sewer district), claiming, among other things, that the county and district lacked statutory authority to impose the impact fees. At the time of the litigation, almost ten years after the developers paid the impact fees, the properties continued to be served by the private utility company. The trial court granted summary judgment for the plaintiffs in both cases, finding that the district lacked statutory authority to impose the fees.

On appeal, the county and CFPUA (defendants) disputed the trial court's conclusion that the district did not have specific authority to impose the impact fees pursuant to **G.S. 162A-88**. They also claimed that the plaintiffs' claims were barred by the statute of limitations.

Authority to Impose Impact Fees

The defendants primary claim on appeal was that the district imposed the impact fees for water and sewer services "to be furnished," as expressly authorized by G.S. 162A-88. They characterized the dispute as one about the timing of when services must be provided and noted that the statute set no specific timeframe. They also claimed that the plaintiffs were confusing impact fees with tap fees. According to the defendants, the latter type of fee, which the district did not assess the plaintiffs, is intended to capture actual charges of connecting a property to the water or sewer system. The impact/facility fee, on the other hand, was meant to fund future system expansions.

The court rejected the defendants' characterization of the dispute. The case did not, in the court's opinion, involve a disagreement about how quickly services had to be provided or how the fee revenue was spent. Instead, the case hinged on whether the district had statutory authority to assess an impact fee on a developer when the district had no concrete plan to serve the property being developed. The court held that the district did not have such authority and thus acted *ultra vires*.

The defendants maintained that they had a "generalized long range plan," dating back as far as the 1970s, to provide water and sewer services to the southern part of the county (where the properties at issue were located). The court noted, however, that although the defendants had developed specific timelines for extending service to other properties, no such steps had been taken with respect to the properties at issue. Nor did the defendant's capital improvement plan include any "specific commitment" to extend water and sewer service to the properties. The defendants did not even have "an aspirational target year" for providing the services. Furthermore, because a private utility company serviced the properties, the defendants would not legally be able to exercise eminent domain to condemn the private utility company's property for

their own use. And the record reflected that the defendants had never contacted the private utility company about purchasing its utility infrastructure. Thus the defendants failed to provide sufficient evidence that the county or district "ever decided or planned" for water and sewer service "to be furnished" to the properties at issue.

Statute of Limitations

The defendants also argued on appeal that the plaintiffs had waited too long to sue, such that their claims were barred by either the 3-year statute of limitations imposed by **G.S. 1-52(2)** for claims based on a "liability created by statute," or the 2-year statute of the limitations imposed by **G.S. 1-53(1)** for an "action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied." The court rejected both of these arguments.

The litigation did not involve a contract dispute. And, according to the court, it also did not involve a dispute over how quickly the defendants had to provide service to the properties at issue in order to impose an impact fees for services "to be furnished." The plaintiffs did not want the defendants to provide service at all. A private utility company had served the properties they developed from the outset. What was at issue in the suit was whether or not the defendants had authority to impose impact fees on these particular developers. Thus the court determined that the appropriate statute of limitations was ten years, pursuant to the "residual or 'catch all'" provision in **G.S. 1-56**.

Prospective Guidance for Local Government Entities

Point South Properties makes clear that a water and sewer district (and, by analogy, any other local government entity that provides water and sewer services) may not impose an impact fee on a proposed or newly-development property when the utility has no concrete plan to provide water and/or sewer services to the property.

The court declined to "state any criteria, guidelines, or standards" as to when the assessment of an impact fee would be appropriate. However, the fact that whether or not the district had a concrete plan to provide services was central to the court's holding in this case, strongly suggests that **G.S. 162A-88** allows for the assessment of impact fees for services "to be furnished," at least under some circumstances. Otherwise the court could simply have held that the district had no impact fee authority at all.

Another recent case (arising out of analogous facts) potentially provides additional guidance on the contours of a water and sewer district's fee authority. In 2011, another developer filed suit against the New Hanover County and CFPUA claiming that the county and district lacked statutory authority to compel it to pay impact fees as a condition of receiving development permits in 2005 and 2006. That case was removed to federal court, and the Fourth Circuit issued an opinion in December 2015, affirming the district courts' grant of summary judgment, and award of attorney fees and costs, to the plaintiff-developer. Tommy Davis Construction, Inc. v. Cape Fear Public Utility Authority, 807 F.3d 62 (4th Cir. 2015). In reaching its decision the Fourth Circuit relied heavily on the court of appeal's opinion in *Point South Properties*. Citing to *McNeill*, the Fourth Circuit went further, though, in fleshing out the meaning of the phrase "to be furnished" in **G.S. 162A-88**, stating that it "must be construed as the power to collect a user fee from those who are going to use the system's services." *Id.* at 68-69. As such, according to the court, the authority

> can be construed meaningfully only in the context of the developer's needs, such that the developer can expect that it will have water and sewer services within a reasonable time after it complete the construction of the houses.

Id. at 69. The Fourth Circuit's holding is not binding precedent in North Carolina's state courts. It does provide some indication of how a state court might analyze the issue of when services must be provided in order for a district to assess a fee for services "to be furnished." Note, however, that because the fee at issue in *McNeill* was essentially a tap or connection fee, neither that case, nor the *Tommy Davis Construction* case directly addresses whether or not a fee may be assessed on proposed or new development, before the property is connected to the water and/or sewer system, to fund future capital projects.

Links

- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-372.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-331.html
- canons.sog.unc.edu/?p=7798
- canons.sog.unc.edu/?p=8205
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_162A/Article_6.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_162A/GS_162A-88.html
- appellate.nccourts.org/opinions/?c=2&pdf=33307
- appellate.nccourts.org/opinions/?c=2&pdf=33308
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_1/GS_1-52.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_1/GS_1-53.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_1/GS_1-56.html