EXPLORING THE POTENTIAL APPLICATION OF "CREDITS" TOWARDS WATER OR SEWER CONNECTION FEES IN NEW JERSEY REDEVELOPMENT PROJECTS

By Robert S. Goldsmith and Irene Hsieh

Development in New Jersey often requires the payment of a water and/or sewer connection fee pursuant to the Sewerage Authorities Law, the Municipal County Utilities Authorities Law, or the County and Municipal Water Supply Act. But what about a redevelopment situation where the previous owner has already paid these fees and the new owner may not place an additional burden on the system? A review of New Jersey cases indicates that courts will uphold practical and equitable connection fees. Thus, redevelopers may be able to argue that they are entitled to "credits" towards existing connection fees.

General Standard in Assessing Connection Fees

There are three general statutory standards which come into play when calculating a reasonable connection fee: the fee must (1) be uniform within each class of users (unless otherwise statutorily provided); (2) not exceed the actual cost of the physical connection, if made by the authority; and (3) represent a "fair payment towards the cost of the system." Although some figures must be computed into the fee (i.e., debt service, number of service units, etc.), the standards are otherwise open to interpretation.

In the case <u>Airwick Industries, Inc. v. Carlstadt Sewerage Authority</u>, the New Jersey Supreme Court found that the key concepts in a reasonable connection fee were a "fair contribution" towards debt service and standards of "rough equality," which harmonize with the idea of connection fee "credits" for a redevelopment project. However, it is worth noting that courts rarely strike down a connection fee, and instead

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will give the authority another chance to re-calculate the fee.

Potential for a "Credits" Argument in New Jersey Case Law

Although no published New Jersey case has addressed the concept of "credits" in determining a connection fee, several cases indicate that the courts may support this idea. In <u>Nestle USA-Beverage Division, Inc. v. Manasquan River Regional Sewerage Authority</u>, a plaintiff who was adding a new product to its factory production and simply increasing the amount of flow to the sewerage authority was not obligated to pay another connection fee since it was not adding a new connection or modifying an existing connection.

Similarly, in <u>Animated Family Restaurants of East Brunswick v. East Brunswick Sewerage</u>, the court held that an actual connection to the sewerage system was a prerequisite to the imposition of a fee. Based on the court's rulings in these cases, redevelopers may be able to successfully argue that any proposed connection fees should reflect the fact that the redevelopment will not add a new physical connection. In <u>Animated Family Restaurants</u>, the court also observed that a mere change in the use of property is not enough to impose a new connection fee, an important concept for redevelopers to emphasize in negotiations.

In its 2013 decision in <u>612 Associates, L.L.C. v. North Bergen Municipal Utilities Authority</u>, the New Jersey Supreme Court held that any connection fee must "reflect the use of each system" and it should not be "duplicative." In the case, the plaintiff's property was connected to the North Hudson Sewerage Authority and its sewage flowed for approximately 300 feet in those pipelines before reaching the North Bergen Municipal Utilities Authority, where it was processed and treated. The Supreme Court held that both authorities could collect a connection fee, but the fee must be "tied to the capital costs of the relevant portion of each authority's system." The same norm, to avoid a duplicative result, compels a credit mechanism for prior hook-up and usage.

Conclusion

Since New Jersey courts follow standards of fairness and equality in evaluating connection fees, authorities may be persuaded to institute a "credit" mechanism for redevelopers.

Redevelopers should argue that when a predecessor in interest has already paid a connection fee, the redevelopment connection fees should be based on any immediate capital improvement costs required to provide utility services

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NEW GUIDANCE RULES

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off-site and the on-site area of concern and (4) demonstrate that there is no contribution or exacerbation from any on-site AOC. If investigations during the course of remediation lead to the discovery of contamination off-site that is not related to the contamination on-site, the guidance reaffirms current regulations and policy requiring "hotline" notification to NJDEP. The guidance leaves unscathed reporting requirements relating to immediate environmental concerns.

Significantly, parties evaluating contamination which may, even arguably, emanate from an off-site source cannot ignore the NJDEP's suggested practices. In the course of due diligence, undertaking preliminary assessments and securing "innocent purchaser" status will become even more important in the wake of NJDEP's new directives. Adherence to the new guidance could literally be the difference between inclusion, or exclusion of new contamination, and new costs and delays, in the process of obtaining final remediation approvals. Responsible parties should also consider "technical consultations" with NJDEP early to maximize opportunities to efficiently eliminate disputes between "on-site" and "off-site" liability.

If you have questions concerning the new guidance document you can contact Marc D. Policastro at mpolicastro@ghclaw.com, or via phone at 732-224-6507.

APPLICATION OF "CREDITS"

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to the redevelopment, as well as the additional burden placed on the utility by the redevelopment compared to the previous development. This will ensure that the construction and financing costs of a utility system's capital improvements are borne reasonably equally by all users, including redevelopers.

BUILDING INSURED?

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all insurance policies that insure real property include replacement cost riders. The replacement cost rider agrees to provide insurance proceeds to replace 'new for old' with materials of 'like kind and quality'. But the insurer's obligation to pay replacement cost dollars is contingent upon rebuilding the structure at the location described in the policy. Suppose you don't want to rebuild the building at that location. You would like to rebuild somewhere else. The insurance company says that's okay, but they no longer have the obligation to provide replacement cost funding. Rather, the replacement cost clause states the insurer only needs to offer 'actual cash value' which means the claim payment will take into account depreciation. For older structures, the depreciation factor could reduce the claim payout by as much as 50% of the amount insured.

Carefully consider the cost to rebuild real property. Insurance company statistics show almost 70% of all buildings in the U.S. are underinsured by 28%. Don't be one of them.

ENERGY SUBCODE UPDATE

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- The impact of the HERS compliance path (predicted to provide an additional savings of 15 to 20% compared to the prescriptive path) on the NJ ENERGY STAR Homes compliance path was not addressed in the proposal.

As you can see, this is not your father's energy code. The new code will require increased builder's attention to proper installation of insulation and HVAC distribution systems. Consultation with an experienced energy design engineer, or certified HERS Rater, in the early stages of design and purchasing will assure that compliance and better home performance are achieved.

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contribution claims, and reasoned that the Legislature's acquiescence to this understanding lends further support to the Court's decision.

In an uncommon turn of events, environmentalists also laud the decision because it eliminates any benefit that responsible parties could glean from refusing to conduct the remediation. Since responsible parties can no longer avoid liability by waiting for the statute of limitations to expire, such parties may want to take an active role in the remediation to ensure that costs are minimized. Environmentalists are encouraged that this will lead to more, and faster, remediations.

PROPERTY TAX ASSESSMENTS

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productive to resolution of assessment appeals. Currently, appraisals are not mandated within such a compressed time frame in property tax appeals. Also, a majority of cases are resolved without appraisals, yet this bill would require an appraisal for most matters in the Tax Court and also create an artificial and compressed deadline (90-days) for appraisal preparation, especially in light of the fact that most tax appeals are already filed within a compressed time period (by April 1 of each year). Thus, all required appraisals would be due during the same time frame, and negatively affecting the workload of appraisers by not affording them an opportunity to review all discovery obtained during the appeal to prepare a comprehensive report. Further, this measure would unnecessarily increase litigation costs to municipalities and taxpayers and possibly outweigh any tax savings, thereby having a chilling effect on the likelihood of future tax appeals as well as settlements.