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EMERGING MUNICIPAL PROGRAMS TO RAISE REVENUE: STORMWATER FEES

by Marc E. Gold and Michael A. Carter –Manko, Gold, Katcher & Fox, LLP

Municipal entities are coming under ever-increasing pressure to control stormwater discharges in order to meet more restrictive environmental requirements. To meet this challenge, a new strategy has emerged for covering the rising costs of compliance that is built around municipal stormwater service fees.

Traditionally, local governmental entities imposed charges for both sanitary sewer and stormwater management services based on the metered water usage at each customer's property within their jurisdiction. This approach resulted in higher total fees for larger water users such as apartment complexes and large office buildings, even though those facilities are typically on properties with a smaller footprint that do not generate large quantities of stormwater. Conversely, shopping malls, car dealerships and stadiums, which would tend to use less water, typically have a larger footprint and generate greater volumes of stormwater. It is this disparity that has led many municipalities, including many larger cities like Minneapolis and Philadelphia, to revamp their water and sewer fee programs to focus more on the size of the property and the area of the property's impervious surface. According to one study, over five hundred local jurisdictions had adopted some variant of this form of stormwater fee as of 2006. If your company has been positively or negatively impacted by these changes, it is important to stay informed of the stormwater fee changes and be aware of pending litigation that could further impact your organization.

These new stormwater fee programs suffer from inequities of their own. While many of the programs include a variety of credits to take into account specific stormwater management features of the property and whether the property owner is subject to independent stormwater management obligations under federal or state law, the programs have been challenged on the grounds that they constitute an unlawful tax. In most instances, the entity enforcing the stormwater user fee program is not empowered under state law to enact a tax, which has spawned some interesting litigation.

Most courts that have considered the issue focused on three primary factors to determine whether a stormwater charge is actually a tax:

(1) Whether there is a reasonable relationship between the charge and either a service provided to, or a burden caused by, the regulated property;
(2) Whether the funds raised by the charge are segregated from general municipal revenues; and

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STORMWATER FEES (cont'd)

(3) Whether the property owner/occupier subject to the charge can fairly be said to have voluntarily incurred the charge.

In general, the trend favors upholding stormwater charges as valid user fees. (See Tukwila Sch. Dist. v. Tukwila, 167 P.3d 1167 (Wash. Ct. App. 2007), and McLeod v. Columbia City, 599 S.E.2d 152 (Ga. 2004)).

Notwithstanding this general trend, some state courts have invalidated stormwater fees as unauthorized taxes. For example, in Bolt v. Lansing, 587 N.W.2d 264 (Mich. 1998), a city adopted a stormwater fee, primarily to fund the separation of the city's combined sewers. The fee was imposed on all parcels, even though seventy-five percent of the city was already served by separate storm and sanitary sewers. Non-residential parcels were assessed a fee based on their impervious and pervious area, and credits were available to parcels that were not connected to the sanitary and/or storm sewer systems. The Michigan Supreme Court held that this fee structure was an invalid tax based on three principal findings: (1) a major portion of the funds collected from the fee were to be used for capital expenditures that benefited the public generally, i.e., separation of the combined sewers and resulting water quality improvement; (2) the fee did not correspond to the benefits conferred on regulated parcels because most were already served by separate storm sewers; and (3) the fee lacked a significant element of regulation because it focused only on the amount of rainfall shed from each parcel. Finally, the Court also held that the fee was not voluntarily incurred because the only manner in which a property owner could avoid payment would be to forgo development of its property.

A second line of attack on stormwater fees focuses on whether—regardless of how the fee is characterized—the municipality is authorized by state law to impose the fee. For example, the North Carolina Supreme Court held that, where a state statute authorized municipalities to charge fees to construct, maintain and operate storm drain systems, that statutory authorization did not extend to a municipality's imposition of stormwater fees used to comply with an EPA-mandated pollution prevention and control program. Smith Chapel Baptist Church v. Durham, 517 S.E. 2d 874 (1999).

In conclusion, if your company should be faced with stormwater fees, general counsel may have several paths to challenge either the rate structure as a whole or as applied to a specific parcel. In determining whether a challenge is appropriate, the first step is to review the state-specific enabling legislation relied upon by a municipality to determine whether, in fact, the fee is authorized. Second, you should also review prior challenges to stormwater fees in other jurisdictions, or challenges to related types of utility fees within the jurisdiction, to identify any legal weaknesses present in a municipality's fee structure. Additionally, with further investigation, you may find that most municipalities provide credits to reduce fees for entities that adopt specified measures designed to reduce runoff, and most municipalities also provide for administrative appeals of decisions regarding stormwater fees and credits, thus reducing your overall expense and exposure.