

Stormwater Questions for Town Counsel

January 4, 2019

General Questions about Stormwater Fees

1. In Massachusetts under MGL c. 83, § 16 can we charge a stormwater fee where there is no direct discharge to the municipal separate storm sewer system? The City of Northampton charges every property(<https://ecode360.com/28439854>) and we propose to also charge a fee for every property in Westford.

While the statute is subject to interpretation, in our opinion, a fair reading would suggest that a fee may be imposed on anyone who contributes stormwater to a town-owned stormwater facility. Therefore, the Town, through the Board of Selectmen, may impose such a stormwater fee upon all properties contributing stormwater to the Town's stormwater utility pursuant to G.L. c. 83, §16, which provides that "the ... selectmen ... may from time to time establish just and equitable annual charges for the use of common sewers and main drains and related stormwater facilities, which shall be paid by every person who enters his particular sewer therein." In our opinion, a fair fee imposed under G.L. c. 83, §16 would be a fee which is proportionate to the amount of impacts caused to the Town's stormwater facilities as calculated by impervious surface area on specific properties.

2. Does K&P work with any other towns who have billed SW across all properties and who do not have town sewer?

KP Law has worked with numerous municipal clients regarding the enactment of stormwater bylaws and regulations, compliance with the MS4 permitting requirements, related municipal finance issues, and mechanisms available to charge fees for stormwater. This includes working with municipalities that do not operate a sewer system.

3. Please advise as to the Warrant Article and bylaw language most appropriate for Westford. We have attached several recent examples. A draft Warrant Article is due to the Board of Selectmen ASAP.

Our understanding is that the Board of Selectmen has not yet decided whether to fund stormwater costs through general taxation or through user fees. Should the Board decide to fund these activities in whole or in part through fees, it is our recommendation that the Town consider the adoption of a stormwater utility enterprise fund. Below is a suggested warrant article for that purpose:

“To see if the Town will vote to adopt General Laws Chapter 44, Section 53F½, and to create a Stormwater Utility Enterprise Fund for the fiscal year commencing on July 1, 2020; or act in relation thereto.”

As you will see, we are recommending that the enterprise fund not begin until Fiscal Year 2021 in order to give the Board of Selectmen and its finance team sufficient time to recommend an enterprise fund budget to Town Meeting. Under this approach, stormwater activities would be funded in Fiscal Year 2020 from the General Fund.

4. DOR said that a fee cannot be charged across all properties because a fee implies consent for services. A tax would be applied to all properties and would be involuntary, so they believe this is a tax. Please provide your opinion regarding fees vs. tax so Westford’s proposed stormwater fee is legal.

The Massachusetts Supreme Judicial Court has created a test, which clarifies the difference between a legal municipally imposed fee and an illegal tax. A fee is: (1) charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society, (2) is paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge, and (3) the charge is collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. Emerson College v. Boston, 391 Mass. 415, 424-25 (1984). This is the so-called “Emerson Test”.

The first prong of the Emerson Test requires the fee to be charged in exchange for a particular government service which benefits the party paying the fee in a manner not shared by other members of society. Id. To determine whether the first prong of the Emerson Test is satisfied, one must determine whether the services are “sufficiently particularized” to justify distributing their costs among new customers only, as opposed to all customers. Bertone v. Department of Public Utilities, 411 Mass. 536, 549 (1992). Where a fee is imposed which will benefit the general public welfare, not only the individual payees, such fee is invalid. Emerson, 391 Mass. at 426 (where fire protection charge was deemed an illegal tax because of its benefits to the general public); Berry v. Danvers, 34 Mass. App. Ct. 507, 512 (1993) (where the town’s sewer system was inadequate and charge imposed would repair the existing system, benefiting all users, not just new customers).

The Massachusetts Supreme Judicial Court upheld a proposed sewer connection charge in the Bertone case, where it found that “the benefit of new or expanded service (including both the service itself and the new construction which make it possible) [was] conferred only on those who connect to the system after August 1, 1985.” Bertone, 411 Mass. at 549 (upholding a fee that is “... an amount that reasonably relates to the incremental cost of the additional facilities

needed to provide [the new connectors] with service ... [and] for only those improvements to the system ... necessitated by the new customers, and ... will benefit them alone, and the remaining improvements are paid for by rate increases imposed on all customers.”) To determine a particularized benefit, the “inquiry does not involve an exact measuring or quantifying of the comparative economic benefits of the limited group and the general public ... [but] whether the limited group is receiving a benefit that is, in fact, sufficiently specific and special to its members.” Denver St. LLC v. Town of Saugus, 462 Mass. 651, 660 (2012) (upholding Town’s infiltration and inflow charge for connection to the sewer system, where the payee, developers, gained immediate access to the sewer system for their new connections.) In my opinion, the Town’s stormwater facilities are a particular governmental service that is provided for the benefit of each individual property owner who generates stormwater runoff. Having a fee that is proportionate to the amount of impervious surface contained on each assessed parcel will ensure that each property owner only pays a fair price for the amount of stormwater generated on the property, in my opinion. For example, a parcel of land that contains no impervious area would presumably not be subject to the stormwater fee.

The second prong of the Emerson Test requires the fee is paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge. A fee, if reasonably calculated to do nothing more than compensate a governmental agency for its services, are fees, not taxes, even though they must be paid in order for that right to be enjoyed. Southview Co-operative Housing Corp. v. Rent Control Board, 396 Mass. 395, 402 (1985). As proposed, every property owner will be charged the stormwater utility fee, proportionate to the amount of impervious surface present on the property. In my opinion, the fee is voluntary in nature because a property owner can choose to opt out of the stormwater utility services by installing pervious surface across the entire parcel, thereby not generating any stormwater runoff.

Lastly, the third prong of the Emerson test requires the charge is collected, not to raise revenues, but to compensate the governmental entity providing the services for its expenses. The revenue generated from the fee should be reasonably calculated to meet the expenses incurred by the town for the new service. Bertone, 411 Mass. at 549; Southview, 396 Mass. at 403. In determining reasonableness of fees, reasonable latitude must be given to the town department in fixing charges to cover its anticipated expenses in connection with the services to be rendered. Southview 396 Mass. at 402-403. Where the charges are not earmarked for the particular expenses of the service, but instead deposited into a town’s general fund and available for use of several existing government services, the charge will not be upheld by a reviewing court. Berry v. Danvers, 34 Mass. App. Ct. 507, 514 (1993); Emerson, 391 Mass. at 427. It is my opinion that accepting the provisions of G.L. c. 44, §53F½ at Town Meeting for the establishment of a Stormwater Utility Enterprise Fund for the purpose of

collecting stormwater utility fees for the management of the Town's stormwater facilities would be a lawful procedure to collect and administer the stormwater utility funds. Furthermore, imposing a fee proportionate to the amount of impervious surface on the property is a reasonable calculation of the fees, because a property owner only pays in proportion to the amount of stormwater generated on their property that enters into the Town's stormwater utility system.

Therefore, in order to comply with the Emerson Test and impose a legal stormwater utility fee, the Town, through the Board of Selectmen, should seek to impose such fee as proportionate to the amount of impervious surface present at the property and such funds collected shall be placed in an established Stormwater Utility Enterprise Fund for the purposes of managing the Town's Stormwater Program.

5. If a tax/fee/utility is collected for stormwater, how can the money be spent? Personnel? Trucks and equipment that may be used for stormwater activities, but have other uses like snow plowing that are not stormwater related? Per MGL c. 83, § 16, "The annual charge shall be calculated to supplement other available funds as may be necessary to plan, construct, operate and maintain stormwater facilities and to conduct stormwater programs."

If the Board of Selectmen decides to recommend, and Town Meeting agrees, to fund stormwater activity through the General Fund, or if the Board establishes a fee structure without an enterprise fund, all revenue generated from fees will go into the General Fund and would, therefore be available for appropriation for any purpose. If, on the other hand, an enterprise fund is established, all fees would be enterprise fund revenue and would only be available for operation and maintenance of the stormwater facilities within the Town. De minimus use of stormwater equipment for other purposes should not be an issue.

Enterprise Fund Billing and Collection

1. Can the town lien properties for non-payment?

Yes, the Town may lien properties for non-payment of the stormwater utility fee. This can be done through the imposition of a tax lien pursuant to G.L. c. 83, §16A-16F, which the Town must locally accept, by a vote of Town Meeting.

2. Can water shutoff be used as an enforcement mechanism prior to lien?

No, in my opinion, the appropriate enforcement mechanism for non-payment of a stormwater fee would be the imposition of a tax lien pursuant to G.L. c. 83, §16A-16F.

3. DOR is saying that we cannot add the original Storm Water Fee to a real estate tax bill, what do you think?

We would agree with DOR, unless the town obtains special legislation. It would seem most appropriate to add the stormwater fee to the water bill, assuming the Water Department is willing to undertake this responsibility. Pursuant to G.L. c. 83, §16C, however, if a tax lien imposed as a penalty for non-payment is not paid at the time of real property assessments, the tax lien may be added to the real estate tax.

4. Is it legal to add a Storm Water Fee to a town water bill?

Yes.

5. Is it legal to add accounts to the existing water billing system for the sole purpose of billing for stormwater?

In our opinion, this question presents more of a policy issue rather than a legal question. It is our further opinion that to the extent the Town decides to create an enterprise fund for stormwater fees, it would more efficient to include the stormwater fee as part of the water bill and directly transfer the funds generated into the enterprise fund.

6. If the Town can charge residents and businesses a fee to cover the costs of stormwater management, are there any restrictions on how that fee is calculated? Could it be based on the assessed value of the property, the size of the property, or the square footage of impervious surface on the property?

In our opinion, the stormwater fee must be just and equitable, and it must comply with the Emerson College Test, as set forth above. As previously stated, the fee should be proportionate to the amount of impervious surfaces on the property. If a property owner mitigates the stormwater impacts from their property, they should be afforded the opportunity to seek an abatement of the stormwater fee. We understand that the Town is currently working with an engineering consulting firm to develop a formula for potential fees.

7. Can the stormwater bill go to the water customer of record, whether that be owner or tenant?

While it may be most efficient for the stormwater bill to be mailed to the owner of record for the property, the G.L. c. 83 contemplates issuance of the bill to either the owner or tenant. G.L. c. 83, §16F provides for a mechanism to allow a landlord to recover from a tenant fees and interest paid by the landlord as a result of delinquent payments by the tenant.