

## **Regulatory Fee or User Fee Charge?**

Georgia Attorney General Opinion 2009-6 (July 9, 2009)

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### **Background Information**

On July 9, 2009, Georgia Attorney General Thurbert Baker issued Official Opinion 2009-6 at the request of the State Georgia Department of Transportation (GDOT). The opinion was issued in response to an inquiry made by the GDOT regarding enforcement efforts undertaken by the Douglasville-Douglas County Water and Sewer Authority (the Authority) with regard to a GDOT project, and the Authority's Post-Construction Stormwater Management Ordinance which was based on the model ordinance authority of the Metropolitan North Georgia Water Planning District (the District).

In the opinion, the Attorney General takes the position that projects and public property of State of Georgia entities are not subject to local regulation, nor are they subject to local permit requirements absent express statutory language to the contrary. Local governments have long understood that the State of Georgia is not required by law to comply with local ordinances and regulations as administered via the police powers of a local government. Therefore, the regulation of stormwater runoff is not an issue that was in question. The issue in question relates to a local government's authority to provide stormwater management services to a parcel of land within its jurisdiction and the legal obligation of that parcel/customer to pay a fee for that service.

### **Regulatory Fee or Utility Charge?**

The Home Rule section of the Georgia Constitution (Ga. Const. of 1983, Art. IX, Sec II Par. III (a)(6)) grants local governments the power to provide the service of "storm water...collection and disposal systems" and to "prescribe, revise, and collect rates, fees, tolls or charges for the services, facilities, or commodities furnished or made available by such undertaking". As such, local governments in Georgia are authorized by the State of Georgia to provide stormwater services and to impose fees on the users of those systems and services. A local government's authority to provide such services and impose such fees was upheld and ratified by the Georgia Supreme Court in 2004 (see *McLeod, et al vs. Columbia County*, 278 Ga. 242, 599 S.E. 2d152 (2004)). The Supreme Court ruling went on further to state that a properly implemented stormwater utility user fee charge was in fact a legitimate fee for a particular service rendered and not a tax.

Following issuance of Opinion 2009-6, one State of Georgia entity (i.e. the Department of Agriculture) sent correspondence to at least three stormwater utilities (including Garden City, Georgia) regarding the Attorney General's opinion and the department's interpretation of the Attorney General's Opinion. The form letter dated July 21, 2009 stated that the Department of Agriculture and its facilities were not liable for payment of local stormwater runoff fees and that the department would discontinue payments immediately. This position was taken by the department even though the local stormwater utilities continued to provide stormwater runoff management and conveyance

services to these parcels of land, and they continue to incur a cost to provide these services and systems.

On September 4, 2009, Garden City, Georgia notified the Department of Agriculture staff and its tenants via letter correspondence that their public utility services (i.e. water, sewer and stormwater) were going to be suspended effective September 11, 2009 unless full payment was made on all outstanding public utility bill accounts owed to the City. The City took this action pursuant to the Garden City Combined Public Utility System Ordinance which was adopted in early 2009. On September 8, 2009, a representative from the Department of Agriculture contacted Garden City and indicated that the outstanding public utility bill account would be paid in full prior to September 11, 2009. It was the City's understanding that the Department of Agriculture consulted with the Georgia Attorney General's Office and based on those discussions decided to remit payment to the City as required.

### **Conclusion**

Review of the opinion indicates that the Attorney General simply states that local governments and authorities do not have the power to regulate post construction stormwater runoff activities of the State, its departments, agencies, and authorities. However, the opinion does not state that local governments and authorities do not have the power to charge the State and its agencies for stormwater management services furnished by such local governments and authorities. As described above, a stormwater user fee charge is imposed for the service delivered (just like charges imposed upon the State by a local government or authority for other municipal/public utility services such as water and sewer), and a stormwater utility user fee charge is NOT a regulatory fee which is intended to pay for the cost of regulation or enforcement. Nothing in Opinion 2009-6 states that a stormwater utility user fee charge should not be paid by the State or any of its agencies.

In summary, the opinion appears to be limited to the issue of whether the State, its departments, agencies and authorities, are subject to the exercise of police powers of local governments, not whether they are subject to payment of user fees related to the delivery of municipal/public utility services. Local government stormwater utilities should review their ordinances and consult with their legal counsel regarding the most appropriate manner in which to address correspondence from a State or Federal agency that seeks to discontinue payment of stormwater user fee charges, or user fee charges for any other municipal/public utility service.