water and sewer extension policies as a technique for guiding development

Michael Nugent, who concentrated in land use and environmental planning at UNC, received his Master of Regional Planning in May. He is currently employed by the Brunswick County Planning Department, Southport, North Carolina. This article is excerpted from a paper winning first place in the Awards Competition for Outstanding Student Papers and Projects, sponsored by the Student Planning/Network during March, 1975.

by Michael Nugent

It would be difficult, no doubt, to find any relatively informed observer of urban affairs who would not decry the many undesirable aspects of urban sprawl. Planner and decision-maker alike are too well aware of the substantial costs associated with "leap frog" development on the urban fringe.[1] Cities have grown and continue to grow in this extremely inefficient manner while possessing a potentially potent tool for regulating the location and timing of this development—the provision of municipal water and sewer services.

In the past, it has not been the practice to formulate water and sewer extension policies to **guide** development; there has been little choice but to **follow.** As Kenney points out in **Urban Water Policy As An Input In Urban Growth Policy**[2], " . . . typically, the provision of these facilities and services is provided in response to a **need,** with no attention to the shaping **effect** on the location and pattern of urban land use." This "catch up" game is not entirely the fault of past water and sewer extension policies. It is just as much evidence of the absence or impotence of traditional land use controls and their administrators to regulate land development on the urban fringe.

In order to effectively regulate development, any action instrument must be designed and implemented with its legal implications as a major consideration. Because the employment of utility extension policies to guide development has been limited in the past, litigation challenging these policies is likewise lacking. Nevertheless, with increased attention being directed to the use of this device for guiding development, legal challenges will inevitably follow, and it would be helpful to anticipate some of the issues. This paper attempts to expose and examine important dimensions of water and sewer extension for guiding development and the legal issues associated with these policies that can, if not considered, bring about legal defeat.

To simplify the discussion, we will assume that the municipality is the sole provider of water and sewer service within its boundaries. In reality this is often not the situation, with utilities being provided by various combinations of municipalities, counties, special districts, or private companies. Several issues

discussed will be present no matter what form the service provision takes; however, the statutory authority and case law interpretation will often vary among the different utility providers.

As water and sewer service extensions often occur simultaneously and have similar legislative provisions, they will be treated singularly throughout this paper. Unique issues may arise with respect to extending one without the other; however, it is beyond our scope to examine the plethora of hypothetical legal questions which could appear.

In order to employ a water and sewer service extension policy to effectively guide development, the critical dimensions of these utilities must be identified. Critical dimensions are those elements of water and sewer service that make it valuable for guiding and timing development. The dimensions are: (1) the physical existence or absence of the facilities, (2) rates charged for service provision, (3) fees charged for initial connection of the service, and (4) special assessments which may be levied against developers and/or property owners for the initial provision of service infrastructure into an area. Of these elements, the physical existence of the service will receive the major emphasis, as practical experiences have concentrated primarily on this dimension.

physical existence

If water and sewer service is to have an impact on the development of a particular parcel of property, its existence must be a prerequisite for that development to occur or at least be a highly desirable precondition. Alternatives to a municipally-supplied utility must be limited. In locations where soil conditions, ground water, density of development, and/or other physical features prohibit on-site water acquisition and/or waste water disposal, the significance of the availability of municipal utilities is enhanced.

One currently-used approach is the use of standards determined and adopted by local health departments to restrict the use of septic tanks and possibly wells in areas exhibiting particular physical features. Conformance with these regulations may be required for the issuance of building permits, the approval of subdivision plats, and possibly the granting of special or conditional use permits.

The availability of water and sewer service has two basic dimensions in guiding urban development—spatial and temporal. Spatial refers to the geographic location of water and sewer service availability and indicates which areas are "open" for development. The temporal element simply adds an additional dimension, indicating when these areas will receive service extension.

There are usually two policies of local government which affect these dimensions of water and sewer service extension—the establishment of an urban services area for which the municipality is responsible and the capital improvements program. The urban services area indicates the geographic area in which utilities are projected to serve within a given long-range time frame. With respect to legal considerations, the urban services area is not as significant an issue as is the capital improvements program. The capital improvements program has important legal significance since it acts as a policy "guarantee", in coordination with other development controls, indicating when a particular parcel will be "open" for development. In order for a water and sewer extension policy to be effective, the capital improvements program must be backed by the commitment of the governing authority and have the confidence of the development community.

user charges and connection fees

Rates may apply to actual payment for service, or to the fees charged for initial connection to the city system. Rates do not seem to possess the potential of physical availability in encouraging or discouraging development.[3] This relative weakness is due in part to the necessity of the service (inelastic demand) and the fact that generally the ultimate purchasers of property (in residential use), not the development decision-maker, pay this service charge.

Differential rate schedules do exist and are presently used rather extensively. Some vary with the quantity of water used and waste water discharged. Another approach is to apply rate schedules to users within the corporate

limits of a municipality different from those applied to users outside of these boundaries.

special assessments

Special assessments or benefit assessments may be levied against properties to which municipal services are initially being introduced. These assessments are used by the municipality in financing service extensions and may be employed to cover the costs of streets, water and sewer lines, or other service provisions. The actual charge levied may be determined by a rate applied to the foot frontage or acreage of the property being serviced. These costs are generally borne by the developer and are either passed on to the property purchaser or are reimbursed by the municipality as others are connected to the line.

The critical dimensions of water and sewer service extension presented above are not set forth as the only elements for consideration in the adoption of an extension policy. An evaluation of these and other critical dimensions is desirable before a water and sewer extension policy to guide development is adopted and implemented.

legal considerations

The legal issues fall into three categories—constitutional, statutory, and case law. Constitutional issues are examined in reference to both the United States Constitution and the North Carolina State Constitution. Statutory provisions, which authorize and to some extent limit the prerogative of a municipality to employ a water and sewer extension policy, will be presented in the context of the North Carolina General Statutes. It is beyond our scope to exhaustively examine all case law relating to water and sewer extensions. However, several frequently-occurring issues selected for treatment here are: (1) the discretionary decision to extend, (2) justification for extension refusal, (3) pricing, (4) water and sewer extension moratoria, (5) annexation and (6) special assessment. These issues are not all-inclusive but were selected to provide a brief exposure to those legal questions which might arise.

the discretionary decision to extend service

No real controversy arises over the authority which a municipality possesses to operate and expand a water and sewer system. However, three initial questions should be answered in each specific situation: (1) who has the authority to make extension decision, (2) what are the legislative limitations on this authority, and (3) what is the nature of the decision (i.e., legislative as opposed to administrative).

As has been the practice throughout this paper, the following discussion will focus entirely on the municipality's role in operating these utilities and adopting and implementing an extension policy. In the event that water and sewer service is provided by a multiplicity of agencies or by an authority other than the municipality, a coordinated approach still might be employed in a water and sewer extension policy. If complex institutional arrangements exist, it would be essential to examine the various enabling statutes which apply to each as an initial step in developing a coordinated, guidance-oriented utility policy.

In North Carolina, the municipality is authorized by the State Legislature to provide water and sewer service within and often outside of its corporate limits. The decision to extend service will generally be legislative in nature and is at the discretion of the local governing authority.[4] The courts are strongly inclined to uphold the discretionary nature of this decision as long as the municipality has not abused it or based a decision on ureasonable conditions.[5]

The North Carolina General Statutes authorizing the municipality to operate water and sewer systems are quite general, and limitations to the extension of service must necessarily be determined by the courts. The Statutory provision quoted below illustrates the ambiguity of these limitations as stated in the enabling legislation.

> A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, and operate many or all of the public enterprises defined in this Article . . . A city shall have full authority to protect and regulate any public enterprise system belonging to it by

> adequate and reasonable rules and regulations. (N.C.G.S. Sec. 160A-312)

As is in fact the case, the courts have been relied upon to interpret what is a reasonable exercise of municipal discretionary authority in the provision and extension of water and sewer services.

The same section of the North Carolina General Statutes (Sec. 106A-312), which authorizes a city to provide services within its corporate limits, also authorizes service outside of these boundaries.

> . . . A city may extend and operate any public enterprise outside its corporate limits within reasonable limitations, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.

This provision enhances the city's right to exercise its discretion in providing services outside the corporate boundaries because of fewer limitations and less concern for judicial reprisal. The courts of North Carolina have substantially upheld the exercise of this discretion.[6]

The real legal issues concerning water and sewer extension policies arise with the exercise of the municipality's discretionary authority to provide and extend these utilities. As one would expect, these issues originate primarily from decisions to refuse service provision or extension.

extension refusal justification

The primary statutory limitation affecting the municipal governing authority's deciding of whether or not to extend water and sewer services is the reasonableness of the decision. The courts determine if the discretion was exercised in a reasonable manner in specific cases. We can, however, draw certain criteria to constitute a reasonable use of this discretion, as well as the converse.

A basic dichotomy has been established as to what decision-making rationale is valid. Those decisions which have been based on a utilities-related reason have in most cases been upheld, as opposed to non-utilities related reasoning. Disproportionate economic cost of the proposed extension and physical remoteness of the area to be served have enjoyed the support of the courts.[7]

The existence of zoning and a plan which are complementary to the water and sewer extension policy also enhances the probability of a given decision surviving judicial challenge.[8] We cannot stress too much the importance of every implementation device being coordinated with every other one and with a particular growth policy (if it exists) and a plan. In order to effectively regulate the location and timing of development, each action instrument, including water and sewer extension policies, must necessarily complement the objectives of the plan.

Tradition, or what has been the municipality's policy for pricing providing water and sewer service, has played an important role in the courts' acceptance or rejection of an extension decision.[9] Arbitrary variation from traditional practice in the provision of municipal services has been challenged as a violation of equal protection.

Other constitutional issues which may arise from legal challenge of a water and sewer extension policy for guiding development could manifest themselves as accusations against the growth policy or plan rather than the actual implementation technique. However, the refusal to extend a municipality's water and sewer system may well violate specific constitutional rights.

In situations where municipally-supplied water and sewer services are required by the city for the development of a parcel of property, refusal to extend such services may be held by the courts to constitute a taking of development rights without just compensation. However, since the landmark Supreme Court decision in Euclid, the courts have issued varying if not seemingly contradictory opinions as to when the regulation of property constitutes a taking. Although numerous zoning cases have been decided in this country, there exists no consistent precedent on which to base the design of a proposed policy.

With the imposition of a water and sewer extension policy coordinated with a capital improvements program (and budget), the question of temporary taking may arise. If facilities are required for development approval, and the capital improvements program has scheduled service to a particular area for some time in the future, property owners in that area may well challenge an extension refusal as a taking of their development rights. However, in a guidance system approach, in which all action instruments are coordinated and directed at plan implementation, the entire growth policy would be subject to challenge.

A water sewer extension policy, in and of itself, would probably not be challenged as a violation of the right to travel. Again, allegation would likely focus on the growth policy or ordinance which actually interferes with the right of mobility between municipal boundaries. An extension policy may also be challenged as violating the constitutional right to due process when there is no recourse to development regulation. If coordinated with other land use controls, such as zoning, channels for recourse are provided through special use permits or zoning changes.

The constitutional right to equal protection of the laws appears more frequently than any other constitutional issue in water and sewer extension cases. The problem arises when a municipality, either implicitly or explicitly in the implementation of a utility extension policy, singles out and classifies a specific sect of the population and then affords this sect different rights and privileges from those enjoyed by others similarily situated. One immediately asks the question, how may an extension policy, which by its very nature discriminates to be effective, survive constitutional challenges? First, as indicated in Sec. 160A-312 of the North Carolina General Statutes cited earlier, the city has an explicitly stated liberty to discriminate in the provision of services to consumers outside its corporate limits. Secondly, the courts may permit a particular classification to stand if it is not found to be "based on some inherently suspect or invidious discrimination."[10]

service and connection fees

Legal issues also arise with water and sewer pricing. For example, the distinction between service provided to consumers within the corporate limits vis a vis non-residents assumes substantial importance in a discussion of pricing in both the case law and the statutory provision for service rate schedules. The concept of tradition again appears when considering the legality of pricing policy.

Although connection fees have a singular impact while the rate structure continues as long as service is provided, both will be discussed as one. This is an effort at simplicity, yet a valid one since the legal issues are essentially the same for both. The authority which a municipality possesses to set and charge rates for water and sewer service is granted through enabling legislation enacted by the State legislature. The specific municipal authority appears in Section 160A-314a of the North Carolina General Statutes and reads as follows: "Schedules of rents, rates, fees, charges, and penalities may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city."

As illustrated, this section provides for two possible opportunities to differentiate in the rate schedules applied to consumers of the utilities. Classes of service generally apply to varying levels of water consumption and waste water discharge. The provision for higher rate schedules applicable to consumers outside the corporate limits may be employed to discourage development in these areas. However, it is unclear whether these schedules could discriminate among various unincorporated areas.

The case law examined with respect to pricing issues was concerned primarily with contests over rate differentials discriminating against non-corporate residents. Reasonableness again appears as the basic question asked by the courts in determining the validity of a particular pricing policy. The concept of tradition introduced earlier also enters the picture with respect to pricing policy. A change in pricing policy should be based on a utility-related reason, such as increased costs of service provision. Pricing modification imposed

arbitrarily, varying from traditional practice, may violate constitutionally protected rights and is likely to suffer legal defeat if challenged.

It would appear that water and sewer pricing does not possess the potential for affecting the location and timing of development as does the extension and availability of these services. Many legal issues arise that may be impossible to overcome, particularly if the adoption of a pricing policy does not accompany the initial provision of service but is imposed at variance to traditional practice.

water and sewer moratoria

Water and sewer moratoria have taken four basic forms as employed in this country: (1) moratoria on the extension of sanitary sewer trunk lines, (2) moratoria on new sanitary sewer connections, (3) moratoria on the extension of water mains and lines, and (4) moratoria in new water connections.[11] These devices are generally recognized as highly effective in the temporary control of development, since the services they provide are often absolutely necessary for development to occur. Most uses of water and sewer moratoria have been urgent responses to environmental problems brought about by development over-loading municipal service facilities. For this reason, they have apparently met with little judicial opposition. As Brower indicates in **Growth Management Through Development Timing,** "Moratoria generally have not been overturned by the courts when they have been directed to solve easily identifiable and quantifiable problems."[12]

Yet the extreme power which these devices possess could lead to their abuse in preventing undesired development. Court acceptance, as indicated, has been positive in the past, but it cannot be expected to continue if municipalities employ the technique for exclusionary and other constitutionally unacceptable reasons.

annexation

With respect to annexation, one would expect such decisions to be based on the existing plan (if any) and coodinated with the implementation instruments of the plan. However, this coordination does not always exist in plans, nor is it adhered to by decision-making authorities, and an annexation decision might very well force variation from an adopted water and sewer extension policy. This possible policy deviation results from statutorily-imposed obligations placed on the municipality. This obligation requires cities to provide newly-annexed areas with utility services comparable to those provided within the corporate boundaries at the time of annexation.

The North Carolina General Statutes contain explicit requirements for the procedures and the time frame in providing services to newly-annexed areas (N.C.G.S. Sec. 160A-35 & 47). Plans for extension of utilities are required prior to the public hearing on annexation, and if the annexation will require municipal extensions of infrastructure, the plans must provide for contracts to be let and construction begun within one year from the effective date of the annexation.

The "satellite" annexation of non-contiguous areas is likewise authorized by the North Carolina General Statutes. Section 160-453.26(3) requires that the annexing municipality be able to provide the same level of service to annexed areas that it provides within its corporate boundaries. No mention is made of the time frame for the required service provision.

special assessments

Special assessments have been proposed as a means of encouraging development in certain geographic areas since they increase the holding costs of unserviced properties with access to utilities. The value of this concept and its potential effectiveness will not be debated. However, substantial legal questions could arise if the rates which are applied to front footage or acreage are varied among geographic areas.

The North Carolina General Statutes (Sec. 160A-216) authorize a municipality to levy special assessments against properties within their boundaries for "Constructing, reconstructing, extending and otherwise building or improving . . . " both water and sewer lines. Section 160A-218 provides indices on which special assessments may be based. Both abutting frontage (foot rate) and acreage or area of land served are included. As well as these generally recognized criteria, the statutes allow for assessments based on value added to

TABLE 1

LEGAL ISSUES INVOLVED IN WATER AND SEWER EXTENSION

WATER & SEWER ACTIONS	CONSTITUTIONAL	STATUTORY	CASE
Discretionary decision to extend service		N.C.G.S. 160A-312	48 A.L.R. 2d 1222 Greenwood v. Provine (143 Miss. 42)
Extension refusal justification	Equal protection, Due process, Taking, Right to travel	N.C.G.S. 160A-312	Robinson v. Boulder Reid . . . v. Parsippany . . . (89 A.2d 667)
Public Utility Limitations		N.C.G.S. 62-3 (23) d	Reid . . . v. Parsippany . . . . . . Englewood v. . . . Denver (229 P. 2d 667)
Moratoria on Extension	Taking (temporary)		
Pricing of Service and Connections	Equal Protection	N.C.G.S. 160A-314 130-144	Fulghum v. Selma (238 N.C. 100)
Municipal Annexation		N.C.G.S. 160A-35 160A-47	
Special Assessments	Equal Protection	N.C.G.. . 160A-218	

the land served, the number of lots served, or any combination of two or more of these.

Perhaps these statutory authorizations, if carefully applied, could be developed into a legally acceptable and effective policy with assessment rates either encouraging or discouraging development at a particular time.

conclusions

The potential effectiveness of the provision and extension of water and sewer facilities as a means of guiding the location and timing of development is hardly debatable. In many situations, these services are necessary for development to occur, and the decision to provide or expand facilities is the responsibility of local government. Yet the history of water and sewer provision exposes either a "follow development" syndrome or examples of extension policies which have been struck down by the courts in legal challenges. Judicial defeat may be all that is necessary to destroy government initiative in growth management of plan implementation, thus emphasizing the importance of considering legal validity in the design and implementation of policy.

Throughout this paper, particular considerations have stood out as essential in the establishment of water and sewer extension policies. First and foremost is the necessity of a utility-related reason for extension refusal. The implications of this requirement are many. One may be the necessity of employing an extension policy only in areas which have previously not enjoyed municipal services. Others may include applications only in areas outside a municipality's corporate boundaries, or areas in which facility capacities are presently being approached or exceeded. These implications would require a thorough examination in the policy development stages.

As has been pointed out, coordination of all policies, plans, and implementation devices is absolutely essential. Each element must complement every other element and reflect the municipality's overall goals and objectives with respect to physical development. Piecemeal adoption of water and sewer policy without an examination of its relationship to other implementation techniques may amount to condemnation before the first extension decision can be implemented. The challenge to planners is to take the initiative by developing water and sewer extension policies that will endure over time and be effective in guiding future land development.

Finally, one last concept must be provided for and afforded considerable emphasis. This is the responsibility of a municipality to maintain a commitment to whatever approach it chooses in directing development. If communities

expect to have effective input into the land development process, they must stick by their end of the "bargain" and maintain a commitment over time to policies and plans and earn the recognized credibility of the development community. With respect to water and sewer extension policies, this requires a commitment to capital improvements programs, guaranteeing the proposed facilities at the times projected.

Demand for water and sewer services will continue to exist, and in all likelihood, efforts will continue to be made in the direction of growth management and development regulation. The tool of water and sewer extension policy is a means by which both objectives may be met in an effective manner.

Footnotes

[1]Real Estate Research Corporation, **The Costs of Sprawl** (Washington: U.S. Government Printing Office), p. 3.

[2]Kenneth B. Kenney, **Urban Water Policy As An Input in Urban Growth Policy** (Knoxville: Water Resources Research Center), p. 1.

[3]Utility pricing and its effects on urban development is currently the topic for research of a National Science Foundation funded project. This project is presently being undertaken as a cooperative venture at the University of Virginia and Virginia Polytechnic Institute. Perhaps the results of this endeavor will expose further critical dimensions of water and sewer service which may be imployed in a development guidance context.

[4]"Right to Compel a Municipality to Extend its Water System" 48 A.L.R. 2d 12222.

[5]**Ibid.,** p. 1225.

[6]**Fulghum v. Selma** 238 N.C. 100.

[7]48 A.L.R. 2d 1224.

[8]**Josephs v. Town Board** 198 N.Y. S. 2d 695.

[9]**City of Texarkana v. Wiggins et al.** 246 S.W. 2d 622.

[10]**Lawrence B. Robinson et. al. v. The City of Boulder,** Dist. Ct., Boulder County, Colorado, May 20, 1974, p. 24.

[11]Brower et. al., **Growth Management Through Development Timing,** (Raleigh: Ofice of State Planning), p. 106.

[12]**Ibid.,** p. 116.