NCWQA Files Amicus Brief Seeking to Limit Cities' and Towns' Potential Liability for Invalidated Water and Sewer Impact Fees, December 2016

For years, many cities and towns have charged impact fees to developers to support the construction of necessary water and sewer infrastructure to serve new development. As previously reported, the NC Supreme Court ruled in *Quality Built Homes v. Town of Carthage* in August that the Public Enterprise Statute (N.C. Gen. Stat. § 160A-314) does not authorize cities and towns in the state to impose impact fees for services "to be furnished." The Court's ruling does not apply to localities that have obtained individual legislative authority to charge the fees, or to Water and Sewer Authorities under § 162A-9, Metropolitan Water and Sewer Districts under §§162A-49, -72, -85.13, and County Water and Sewer Districts under §162A-88.

The Supreme Court sent the case back to the Court of Appeals to determine whether the defendant in that case, the Town of Carthage, must refund the impact fees it collected and pay the attorneys' fees of the developers who brought the suit. The Court of Appeals' forthcoming decision on these questions will have major implications for the scope of cities' and towns' potential liability for past impact fees. We anticipate that similar challenges will be filed against other cities and towns that have charged impact fees, and the precedent set by the Court of Appeals in this case is likely to be applied to those future challenges as well.

The developers have argued that Carthage must refund all impact fees charged within the past ten years, in addition to interest and attorney's fees. To rebut the developers' overreaching claim to recover ten years of past fees, the NCWQA filed a proposed amicus brief with the Court of Appeals on November 16. The brief explains that forcing cities and towns to return ten years of impact fees, in addition to interest and attorney's fees, would be a crippling blow for the state's cash-strapped public water and sewer service providers. Instead, NCWQA relies on a well-established legal precedent to argue that the developers should not be allowed to recover the fees because they in fact benefited from the water and sewer infrastructure that was constructed with those funds. Furthermore, the brief argues that if the court nevertheless allows the developers to recover fees, the applicable statute of limitations should limit the recovery to fees charged within the past year or the past three years, depending on which statute of limitations applies.

On November 29, the Court of Appeals denied our motion to file the amicus brief. We believe this signals that the Court is very close to a decision and did not want to delay to give the Plaintiffs' time to respond to our brief.

We will continue to track the *Quality Built Homes* appeal, as well as any copycat cases that may be filed against other cities or towns. Going forward, we continue to believe that the best solution to this problem is to seek corrective legislation. There's no defensible reason why some water and sewer authorities and districts have the general authority to charge impact fees for future services, but cities and towns do not. The General Assembly should correct this disparity.