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BERRY • SIMS PLC

Development and Utilities

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Development and Utilities

- Developer-Utility Agreements
- Cost Allocation
 - Off-site distribution, storage, pumping, & collection
 - Tap fees, facility fees, system development charges

Developer/Utility Agreement

- On-Site or Off-Site
 - Developer Installed Infrastructure
 - Utility Installed Infrastructure

- Availability of Service
 - Fees
 - Information required and provided

Developer/Utility Agreement

- Entering the Development Agreement
 - When
 - Before plan review
 - Before construction
 - Integration clause
 - Who
 - Developer / Owner
 - Verify the existence and viability of entity who executes the agreement
 - Non-assignment provision

Developer Installed Infrastructure

- Plan & Specification Review
 - Fees
 - Format, copies
 - Comments/Revisions/Approval
 - Timing
 - Non-waiver
 - TDEC Review & Approval
 - Responsible party

Developer Installed Infrastructure

- Utility Specifications
 - Incorporated into agreement
- Plat Certification
 - Prior to construction
 - Fire suppression note

Developer Installed Infrastructure

- “Performance” Bond or Letter of Credit
 - Prior to certifying plat
 - Parties
 - Principal/Creditor same as Agreement
 - In favor of the utility
 - Verification from the surety/bank
 - Form bond vs. customized bond
 - Control of completion
 - Term/Renewal provisions
 - Incremental reduction

Developer Installed Infrastructure

- Easements
 - Responsible Party
 - Documentation
- Developer's Contractor/Subcontractors
 - Right of approval/refusal
 - Receipt of utility specifications
 - Communication issues

Developer Installed Infrastructure

- Inspections
 - Access
 - Time
 - Schedule/Notification
 - Prior to covering/backfilling
 - Non-conforming construction
 - Enforcement / Stop Work
- Changes
 - Approval by the utility
 - Consistent with other documents

Developer Installed Infrastructure

- Testing and Re-Testing
 - Water
 - Pressure
 - Disinfection and Flushing
 - Bacteria Sampling
 - Sewer
 - Gravity settling of lines and manholes
 - Pressure, seals and coatings
 - Cleaning and TV Inspection
 - Responsible Party - Developer

Developer Installed Infrastructure

- Acceptance and Conveyance
 - Free of liens and encumbrances
 - Non-waiver
 - Formal documentation
 - Conveyance
 - Cost Certification
- As-Built Drawings
 - Format

Developer Installed Infrastructure

- Warranty
 - Defects
 - Period – 1 year typical
 - Inconsistent with plans or specifications
 - Different period? (statute of limitations)
 - Immediate right to remedy
 - At the cost of the Developer
 - Duration of the Bond or Letter of Credit
 - Through the warranty period

Developer Installed Infrastructure

- Indemnity
 - Claims or enforcement arising from:
 - Defects
 - Nonconformance
 - Delays
 - Control of defense
 - Attorneys' fees

Development Impacts

- Capital Contributions
- Development Fees
- New customers / rate payers
- Operation maintenance
- Treatment capacity
- Water availability

\$?

Legal Standard

- Tenn. Code Ann. § 7-82-403(a)
 - Reasonable rates, fees, tolls, or charges for the services, facilities and commodities of the system
 - System shall be self-supporting
 - The rates, fees, tolls or charges shall:
 1. Provide for all expenses of operation and maintenance of the system or systems, including reserves for the expenses; and
 2. Pay when due all bonds and interest on the bonds, including reserves

Legal Standard

- Tenn. Code Ann. § 7-82-702(19)
UMRB may review and conduct a hearing concerning the justness and reasonableness of a utility district's:
 1. Requirement that a developer build utility systems to be dedicated to the utility district
 - Onsite
 - Off-site
 2. Fees or charges against the developer

Off-Site Infrastructure

Pipes, pumps, storage, etc. serve only one new development

- Developer constructs and dedicates
and/or
- Developer pays in advance or reimburses utility for all costs
 - Design costs
 - Construction cost
 - Easement / land acquisition costs

Off-Site Infrastructure

Pipes, pumps, storage, etc. serve more than one contemporaneous development

- One developer constructs, dedicates and seeks direct reimbursement from other developer(s)
- One developer constructs, dedicates and seeks indirect reimbursement through utility (fees?)
- Developers proportionately pay in advance or reimburse utility for all costs
 - Design costs
 - Construction cost
 - Easement / land acquisition costs

Off-Site Infrastructure

Upgrade of existing pipes, pumps, storage, etc. to serve development and existing users

- Developer constructs and dedicates all
- Developer constructs, dedicates and is reimbursed for incremental cost increase
- Utility constructs and developer reimburses utility for all or a portion of costs
 - Design costs
 - Construction cost
 - Easement / land acquisition costs

Off-Site Infrastructure

Pipes, pumps, storage, etc. to serve the development and future users

- Developer constructs and dedicates all
- Developer constructs, dedicates and is reimbursed for incremental cost increase
 - Present or future
- Utility constructs and developer reimburses utility for all or a portion of costs
 - Design costs
 - Construction cost
 - Easement / land acquisition costs

Off-Site Infrastructure

- Current and Future Users
 - How far in the future can a utility charge for direct costs of infrastructure?
 - Upgrade costs / depreciation
 - Fees

Development Fees

- Availability fee
- Capacity fee
- Capital cost recovery fee
- Connection charge
- Construction fee
- Facility fee
- Dedicated capacity charge
- Impact fee
- System Development Charge
- Tap fee

Utility Revenues

- Water sales
 - rates
 - wholesale
 - Services
 - Meters
 - Fees & Charge
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- Grants
 - Fees & Charges
 - Capital Contributions

Utility Expenses

- O & M
 - Debt Service
 - Reserves
-
- Capital Improvements

How do you establish fees?

- Pick an amount that developers will pay
- Already established – raise it when revenues are low
- Equity method
- Incremental cost method

Equity-type Fees

- Appropriate for systems have adequate facilities for current and future customers
- Existing customers have “equity” in portions of the system for which there is no off-setting debt
- System valuation needed
- Buy-in based on average equity per equivalent unit

Incremental Cost Fees

- Appropriate for systems that require construction of new facilities to serve new customers
- Projected growth, growth rates, capacity needed, and cost of improvements
- Include financing interest and excess capacity in existing system
- Charge calculated on a cost per unit of capacity and can be reflected in charges based on meter size

Development Fees

- New customers pay for the facilities needed to serve them
- Existing customers do not subsidize future customers
- Just & Reasonable
- Be careful if these are being used to cover O & M, debt servicing or reserves
- Do not want to impede development

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The materials contained herein have been abridged from the statutes, regulations, court opinions and other sources and should not be construed or relied upon for legal advice. You are urged to consult legal counsel concerning particular situations and specific legal questions.