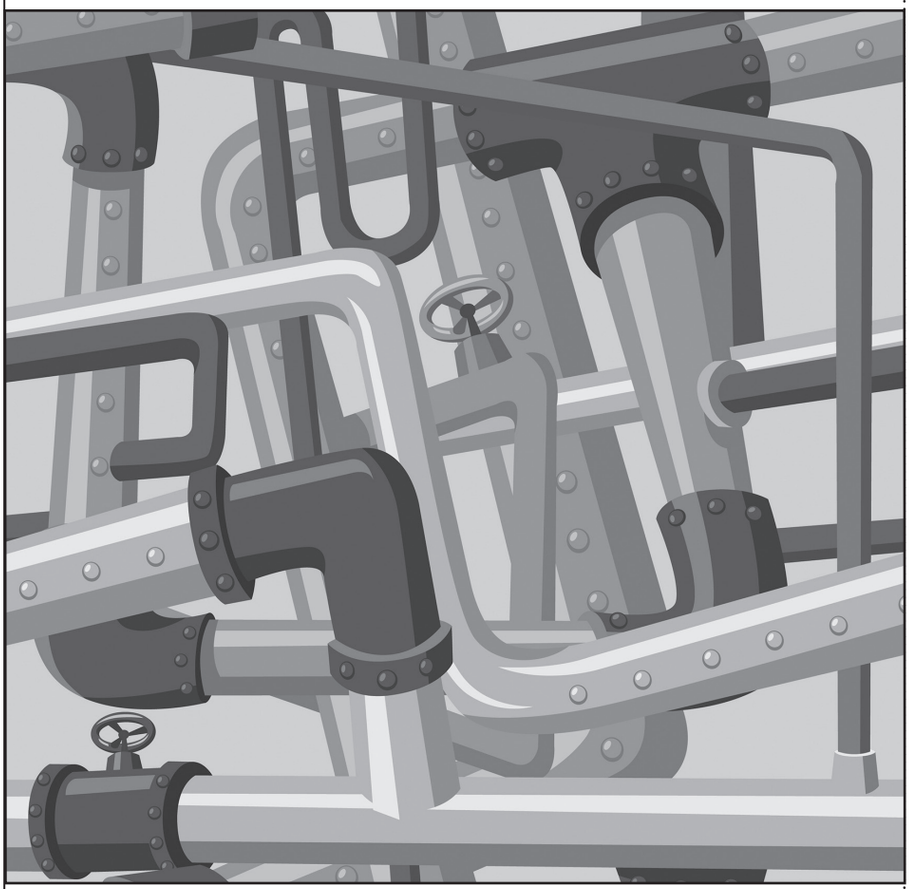
Common Problems (And Solutions) For Municipal Water Suppliers

by Jane Tsamardinos



Local governments provide a myriad of services to their residents, including municipal water. While there are a host of benefits to providing water to consumers both inside and outside municipal boundaries, municipal officials frequently encounter numerous pitfalls when administering a water system. Whether local governments are faced with a consumer refusing to pay a water bill, a damaged pipe in need of immediate repairs, or requests for refunds, municipalities are faced with unique challenges when engaged in the water business. As such, water and sewer systems are a frequent topic of discussion amongst our members. During the "The Nuts and Bolts of Municipal Water and Sewer Systems" presentation at NYCOM's 2013 Fall Training School, attendees raised a number of issues commonly encountered when managing their water works systems. This article will address three issues raised by Conference attendees as common problems for municipalities that provide water service to consumers both inside and outside the village.

Entering Private Properties to Investigate or Make Repairs

Water utility employees frequently need to enter a customer's home to examine or repair a water meter. This often happens when a meter is broken, incorrectly registering water use. However, users are occasionally unwilling to allow the water system employees to enter their homes or premises. In such situations, the meter remains unfixed, and the local officials have no idea what to charge the consumer. Local government officials have several options for address this situation. Absent the consent of the property owner or tenant or exigent circumstances, municipal officials may not enter onto private property. A municipality can be held liable for trespass, regardless if the municipality is mistaken in its belief that it has a right to enter.[1]

Invoking Police Power to Enter Property

Can a local government rely on its police powers to enter someone's property? While courts have recognized that a municipality may utilize its police powers to address situations injurious to public health and welfare, it may not use police powers to "assuage a municipal annoyance."[2] In other words, a municipality can rely on its police powers to address urgent situations that require immediate action. The court in *Hahn v. City of Rensselaer* held that the City was not liable for entering a customer's home to inspect a water problem in the basement that was a potential public health and safety hazard.[3] The City had acted in accordance with various sections of its building code vesting the City with discretion to take such action as is necessary to protect the public, including inspection of property deemed to be hazardous to the public.[4] The court held that the City exercised reasonable judgment in light of the circumstances and was immune from liability for trespass.[5] While the City's actions were upheld in that decision, in light of the potential for liability for trespass, in addition to bad publicity, local governments should have a legitimate, exigent need to enter the property without permission. It is highly unlikely that a municipality could invoke its police powers to enter a premises without permission to investigate a water meter or connection without evidence of an emergency situation that requires immediate attention by the local government.[6] In other words, entering private property should be a last resort and in response to an emergency or imminent threat to the public. In all other instances, local governments should seek a court order before entering private property without consent.

Charging A Flat Rate to Encourage Meter Repairs

Without an emergency impacting public health and welfare, a local government can alleviate this situation by relying on its authority to establish a system for calculating water rents. A municipality could create a "rate class" encompassing individuals with broken meters that deny access to their homes, requiring payment of a flat rate for use of municipal water.[7] A system of user fees may be established with varying rates to be charged to different classes of users so long as the municipality abides by constitutional equal protection guarantees and there is a rational basis for a distinction amongst users.[8] Moreover, when "usage is incapable of calculation with exactitude, discrepancy in charges between various properties ... may be tolerated so long as a rational basis exists with respect to the rents assessed."[9] Thus, if a city or village is unable to calculate the actual use, it could charge a flat rate so long as there is a rational basis for that rate. Villages establish the system for setting water rates, including all penalties and late charges, by local law pursuant to Village Law §11-1116. Villages may reserve the right, within the text of the local law, to amend rates from time to time by resolution. Cities should look at their charter for guidance on how to adopt and amend water rates.

Charging a flat rate to users who will not allow water system employees to repair their water meters could encourage these property owners to allow entrance for such repair, especially if the flat rate far exceeds the property owners' actual water use. Even in an opposite scenario, where the flat rate is lower than the actual use of water, charging a flat rate guarantees that the municipality receives at least some revenue from those consumers. In addition, a local government could develop an estimate of a property owner's use of water based on previous meter readings or water bills. Municipalities should explicitly state in its rules, policies, or local laws the method it will use to arrive at such an estimate. It is advisable for a municipality to make several attempts, in writing, to gain access to the home and remedy the situation with the property owner prior to charging a flat rate or estimated water bill.

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Refunds

Cities or villages may be approached by water consumers requesting refunds alleging billing errors, improper charges, a breach of contract on the part of the municipality, or simply because they can not pay their bill. Local governments are not authorized to forgive delinquent water charges, as this would constitute a gift of public funds in violation of Article 8, Section 1 of the New York State Constitution. However, where a municipality operates a water works system and sells water to consumers, it acts in a quasi-private, as opposed to governmental capacity, governed by the same rules that apply to a private entity. Consequently, a municipality could be held liable for breach of contract in certain instances.[10] For instance, if a municipality fails to supply water that is not pure and wholesome as governed by Department of Health regulations,[11] it has breached an implied warranty of fitness and its customers would have a valid claim for breach of contract. In that instance, an aggrieved customer would be entitled to a refund after submitting a valid claim to the municipality.[12]

In addition, if a city or village inadvertently charges a property owner not connected to the system, he or she would be entitled to a refund if the payments were made by mistake and as the result of the property owner's lack of care.[13] Refunds may also be given in cases of extreme hardship and where the customer was not responsible for excess consumption of water.[14] For instance, if a property owner consumes a large amount of water due to a subterranean leak in a water pipe located below the property, a municipality could properly refund that property owner for the excess amount of water used as a result of the leak.[15] Refunds may also be given in the event that the municipality uses an incorrect assessed valuation in computing water rents[16] or improperly applies new, higher water rates retroactively to its customers.[17] In other words, refunds are permissible where the customer is not responsible for the excess or improper charge, or where the municipality was negligent.

Villages and cities are not obligated to provide refunds until a formal claim for a refund is presented to the village board or city council.[18] However, there is no requirement that a consumer file an official Notice of Claim or initiate formal legal action to request a refund. Rather, the consumer must furnish a written request describing the basis for the refund. These claims should be fully investigated prior to providing a refund or agreement to a settlement. Because these claims result from a contract between the consumer and the municipality, they are governed by a six-year statute of limitation.[19]

There are two cases that discuss when the cause of action accrues for water refunds, with seemingly inconsistent holdings. In *Subin v. City of New York*,[20] the trial court held that

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the cause of action accrues at the time payment is made, while New York's 2nd Department, Appellate Division held in City of *White Plains v. City of New York*[21] that the cause of action accrues at the time the governing body audits and rejects a claim from the consumer. While the claim in *Subin* was relatively small and not contested by either party, the claim in *City of White Plains* was large and the amount was in dispute. Therefore, depending on the circumstances surrounding a particular claim, a court could apply the accrual standard in either *Subin* or *City of White Plains.* The exact timing of the statute of limitations accrual will determine whether or not a claim is time-barred. There is no authority for a governing body to waive the statute of limitations for a particular consumer.[22] Local governments should consult with their municipal attorneys to determine the appropriate time of accrual.

Terminating Water Service

It is well settled that a city or village may terminate water service to any consumer for failure to pay water rents. Section 11-1116 of the Village Law specifically provides for enforcement of collection of water rents via termination of service upon adoption of rules, regulations, or local laws that explicitly authorize termination. Cities may also adopt local laws or charter provisions that allow termination of water for failure to pay. However, there are two important factors to consider prior to terminating water service. First, a municipality may not terminate a utility service without due process.[23] The courts have recognized that when a property interest in a utility such as water service is created, the consumer must be notified prior to termination and be afforded an opportunity to voice concerns, discuss billing errors, or provide evidence of any hardships that may have impacted his or her ability to pay.[24] In *Pilchen v. City of Auburn*, a tenant successfully sued the City for due process and equal protection violations because the City failed to provide the tenant with an opportunity to be heard and refused to allow the water bill to be placed in the tenant's name to avoid termination in the future.[25] Even though the landlord/property owner in *Pilchen* was ultimately responsible for making the water payments, the tenant, as an occupant of the property and user of the water, was deemed to have a property interest subject to due process protections. In light of the holding in *Pilchen*, local officials need to notify both the property owner and tenants prior to shutting off water. The Office of the State Comptroller has similarly opined that a municipality should not terminate water service without notice and an opportunity to pay any arrears.[26] Thus, municipalities should ensure that they have adopted rules, regulations, or local laws that afford consumers with reasonable notice prior to termination, as well as an opportunity to address any concerns, contest charges, or set up payment plans with the municipality.

Local governments must also consider the public health implications of shutting off water to a property that is currently occupied.... With no source of potable water, the property could be deemed "unfit for human occupancy" and condemned by the local code enforcement officer, leaving occupants homeless until water is restored.

Local governments must also consider the public health implications of shutting off water to a property that is currently occupied. Local and county health department officials frequently have serious concerns when water is shut off. As such, it is advisable for cities or villages terminating water in an inhabited property to consult with the local department of health prior to shut-off. Policies regarding termination of water and public health concerns vary from county to county and some county departments of health may have more stringent policies regarding termination of water for inhabited properties or properties subject to additional state regulations, such as motels or mobile homes. In addition, the New York State Property Maintenance Code states that "when a structure or equipment is found to be unsafe, or when a structure is found unfit for human occupancy, or is found unlawful, such structure shall be condemned pursuant to the provisions of this code."[27] With no source of potable water, the property could be deemed "unfit for human occupancy" and condemned by the local code enforcement officer, leaving occupants homeless until water is restored. While there is no duty to find housing for individuals, some municipalities have created relocation programs for displaced tenants, charging the cost of relocation back to the landlord.[28] In addition, a municipality may wish to utilize the Red Cross or assistance from county agencies to find temporary homes for individuals displaced due to termination of water. In light of these concerns, terminating water in inhabited properties should be assessed on a case by case basis and considered a last resort as a means of enforcement.

In addition to shutting off water due to non-payment, termination may be necessary when the municipal water supply is at risk of depletion. Upon reasonable notice, termination of water is permissible when consumption from an outside user is threatening the municipal water supply.[29] When a municipality operates a water system, it may not deny a resident access to water when an adequate supply exists[30] and there

is no authority for a municipality to terminate water service to a resident that it feels is consuming too much water.[31] However, a municipality may deny permission to an outside user to connect to its water system where there is evidence that allowing the connection will endanger the water supply to residents.[32] Sale to outside users should always be limited to any excess water supply that remains after the needs of resident consumers have been adequately met.[33] However, if a city or village terminates water to an outside user for reasons other than lack of supply or failure to pay water rents, it may incur some liability to the customer.[34]

Conclusion

Municipalities that operate a water works system should be aware of these common pitfalls and have policies in place to adequately address them. Furthermore, providing notice to consumers of any policies regarding termination of service, the use of flat rates or estimated billing, and the issuance of refunds could potentially stop problems before they start. Taking a proactive approach can help alleviate stressful, and potentially litigious, situations and ensure that the local government provides this vital service more efficiently.

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Notes

1. *See* Volunteer Fire Association of Tappan Inc v. County of Rockland, 101 A.D.3d 853, 855 (2d Dep't 2012).
2. *See* Village of Lansing v. Pyramid Companies, 51 A.D.2d 414, 417 (3d Dep't 1976).
3. Hahn v. City of Rensselaer, 563 N.Y.S.2d 155, 157 (2d Dep't 1990).
4. Id.
5. Id.
6. *See* id.
7. N.Y. Gen. Mun. Law §94; *see* Town of Watertown v. State of New York Department of Environmental Conservation, 176 A.D.2d 1166, 1167-68 (1991).
8. N.Y. Const., Art 1, § 11; Elmwood-Utica House v. Buffalo Sewer, 65 N.Y.2d 489 (1985); Op. St. Compt No. 1980-91. Op. St. Compt No. 1979-307.
9. *See* Rezek v. Village of Richmondville, 24 A.D.3d 1169, 1170 (3d Dep't 2005) *citing* Matter of Frontier Ins. Co. v. Town Bd. of Town of Thompson, 285 A.D.2d 953, 956 (3d Dep't 2001).
10. *See* Canavan v. City of Mechanicville, 229 N.Y. 473 (1920).
11. 10 NYCRR Part 5.
12. Op. St Compt. No. 1979-880.
13. Op. St Compt. No. 1979-235.
14. Op. St Compt. No. 1980-543
15. Id.
16. Op. St Compt. No. 1987-39.
17. Op. St Compt. No. 1980-761.
18. Op. St Compt. No. 1979-235.
19. CPLR § 213(2); *See* Op. St. Compt. No. 1979-405. It is worth noting that the court in *Village of Scarsdale v. New York City Water Bd.* (33 A.D.3d 1011 (2d Dep't 2006) held that when a claim by a municipal water board for payment in arrears is predicated on a contract for the sale of goods, the four year statute of limitations set forth in the Uniform Commercial Code would apply.
20. 229 N.Y.S 628 (Municipal Court of New York, Borough of Manhattan 1928).
21. 63 A.D.2d 396, 403 (2d Dep't 1978).
22. Op. St Compt. No. 1979-405.
23. *See* Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978).
24. *See* Pilchen v. City of Auburn, 728 F.Supp.2d 192, 198 (N.D.N.Y. 2010).
25. Id. at 200-201, 202, 204.
26. Op. St. Compt. No. 1981-369.
27. New York State Property Maintenance Code § 107.1.
28. *See* N.Y.C. Charter § 26-301; Albany City Code § 255-49.
29. Op. Att'y. Gen No. 1999-31.
30. *See* Torsoe Brothers Construction Corp v. Board of Trustees of the Village of Monroe, 81 Misc 2d 702 (Sup Ct. 1975).
31. Op. St. Compt. No. 1980-178.
32. *See* Toan v. Village of Perry, 297 N.Y. 710 (1947).
33. Village Law § 11-1120; *see* Kennilworth Management Co. v. City of Ithaca, 63 Misc 2d 617 (Sup. Ct. 1970).
34. *See* Fraccola v. City of Utica Board of Water Supply, 70 A.D.2d 768 (4th Dep't 1979).

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