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Water and Sewer Charges in New York City

By Francisco Augspach

In New York City, water supply and sewer use is a public service provided by the City through the Department of Environmental Protection ("DEP"). Water and sewer charges often disrupt real estate sales because they become a lien on the premises when billed, and because of the risk that past periods will be re-billed, leaving the purchaser with a debt that it had no part in incurring. This article explains the rules concerning water and sewer charges in New York City, warns of circumstances that pose unexpected risks, and offers solutions for the real estate practitioner.

I. Billing Systems and Re-bills

Water charges are what the City charges for supplying water: at the time of this writing at $1.81 per one hundred cubic feet ("HCF"). Sewer rent charges are what the City charges for the discharge of serviced waters into its sewers. Sewer rent charges are measured indirectly by the amount of water supplied to the property. At the time of this writing, sewer charges are generally 159% of the basic water charge. For example, if a tax lot is supplied 100 HCF, then the water charges would run at $181, and the sewer charges at $287.79, for a total of $469.79. The cost of water itself is measured either by actual consumption, using a meter, or by imposing a yearly flat fee, or both. While billing is done by DEP, collection is relegated to the Department of Finance, which can use the same means it has available to collect real estate taxes, including tax liens.[1]

A. Metering

Under metering, water and sewer charges are paid at the end of each quarter based on consumption. DEP claims to have the required personnel to read every meter in the City every three months. However, meter-readers are sometimes unable to complete their routes on time,[2] and meters sometimes break or fail. Even if the meter is read, DEP prevents mistakes in readings by ignoring unusually high and unusually low ones. The result is that many bills that appear on the records are "ESTIMATE"—i.e., based on past periods—as opposed to "ACTUAL" readings.[3]

If you are closing at the end of the term but before billing, there is no open amount to request from the seller. The first reaction to this common occurrence is to find the last billed amount and base an adjustment on it, on the assumption that the next charges will be somewhat similar. If the last bill reads ESTIMATE, then that means that the DEP has done the same thing as you to calculate it. That means that the meter has gone unread for over three months.

1. Re-bills on Metering

DEP reserves the right to adjust ESTIMATE charges once an ACTUAL reading is entered. Relying on the last estimated bill means that the meter has not been read in over three months. If the seller has been living in the property and there has been no substantial change in the occupancy, it might be safe to rely on the estimate. But what if you are closing in July and there is a swimming pool? The pool might have been cleaned and refilled in the interim. What if a basement apartment was created or the occupancy has been otherwise increased? The single most recurrent case is that of the undetected leak: Say you are closing in April and the last actual reading is from November. In cold winters water pipes have a tendency to freeze and burst and to create leaks, which can be difficult to detect. If the meter is not read, such leaks accrue charges over months until DEP visits the premises and the current owner receives a hefty bill for past periods.

While most re-billing occurs on estimated readings, actual readings are also subject to re-billing. The paramount example is meter tampering. If the meter does not measure consumption properly, DEP will recoup unbilled charges once a more thorough inspection is carried out. Other examples of re-billing on actual readings are meter malfunction and connection issues, such as having a leak between the point of entry and the meter, or having a second, unaccounted-for point of entry.[4]

Under the current rules (effective as of July 1, 2006), DEP may adjust charges up to four years after service was provided.[5] As to residential properties, this is questionable because Public Services Law § 118(2) prohibits back billings over twenty-four months after service was provided to residential properties. Culpable conduct, such as violation of the certificate of occupancy, meter tampering or preventing readings, voids both back billing limits.[6]

2. Metering: Is It Worth It?

Given the difficulty metering causes at real estate purchases, because of the likelihood of re-billing, there is a widespread desire in the real estate industry for the City to move back to billing by frontage; i.e., yearly flat rate billing. In light of the fact, it is meaningful to acknowledge that the universal metering program has borne fruit. For the twelve-month period ending on June 30, 2006 water consumption in New York City was at its lowest since 1951, when the City had 300,000 fewer inhabitants. With its daily consumption per capita at 136 gallons, New York consumes less water than Boston (177 gallons) or Denver (170 gallons), but not as little as Seattle (124 gallons) or San Francisco (97 gallons).[7] Linking cost with supply has produced the desired result of rationing consumption.

B. Frontage

"Frontage" billing means billing according to square footage, use and

occupancy, and fixture count. While commercial properties have been billed by meter since 1873, it took forty years of legislative debate and a severe drought to introduce metering on residential properties in 1986. Despite the City's best attempts at switching every account to metering, including the threat of surcharges (see below) and reimbursement of meter installation expenses,[8] many properties continue to be billed on frontage. Charges on frontage are straightforward: they are assessed yearly on July 1 based on the current rate schedule, and become due on July 31. The rate schedule is regularly revised and updated by the Water Board.[9] Frontage is also important because it is DEP's default billing system in the event meters are defective or absent.

1. Surcharges

In 1999 DEP sent letters to all its unmetered customers threatening to impose surcharges on any property that lacked a meter by July 1, 2000, unless the customer made a request to DEP to install one before that date.[10] Surcharges equal all amounts paid on frontage since July 1, 2000. For example, if an account was assessed and paid $500 dollars per year, DEP may impose surcharges of $500 per year since July 1, 2000. At the time of this writing, that is seven years' surcharges for a total of $3,500.[11] If a meter is installed before surcharges are posted, the risk disappears.[12] Once the owner complies, DEP will not look for past incompliance, but imposed surcharges will not be forgiven. Customers that made a timely request to have meters installed have been imposed surcharges, but the Appellate Division, Second Department, held that the imposition is capricious and arbitrary if the customer complied with the requirement of request by June 30, 2000.[13] However, preventing DEP from installing a meter by missing the appointment may expose the customer to surcharges.[14] The constitutionality of surcharges, as a possibly excessive fine, has been upheld by the Appellate Division.[15]

2. Re-bills on Frontage

There is a widespread misconception that frontage charges are not subject to re-bills. While re-bills on frontage are not as frequent as those on metering, they do happen. Frontage charges are based on use and fixture count. If the number of faucets, sinks, or showers changes, or if a pool is added, or the use of the property is altered, then frontage charges can be re-assessed retroactively. To illustrate, every illegal apartment, pool, fountain, commercial use, or bathroom carries the risk that frontage charges may be re-billed as of the date of the alteration. Moreover, the back billing limit of four years would not apply to any of those instances because violation of the certificate of occupancy constitutes culpable conduct, and culpable conduct voids back billing limits.[16]

C. Flat-Rate Plans

DEP currently runs three flat-rate plans. All three plans offer fixed annual charges to qualifying multi-family buildings. For this purpose, "multi-family" means six or more dwelling units.[17] All three plans require: (1) that customers be in compliance with their certificates of occupancy and (2) that all commercial units, if any, be metered separately.

1. The Pre-Transition Plan

Once metering on residential properties was introduced in 1986, the City faced substantial reluctance from landlords to switch to metered billing. In order to ease the passage, the City introduced the Pre-Transition Plan for those properties that had meters installed before July 1, 1992. Under this plan, combined water and sewer rent charges are paid at a fixed rate per dwelling unit. At the time of this writing, the combined charge per unit is $569.65. As its name implies, it is only temporary: it is due to expire on June 30, 2009.[18]

2. The Transition Plan

For properties installing meters on or after July 1, 1992, DEP introduced the Transition Plan. Under this plan, charges are calculated the same way as under frontage. This plan is due to expire on June 30, 2009.[19] New constructions and properties that were once on metering are ineligible.

3. The Multi-Family Conservation Plan

When DEP insisted that all buildings be metered by 2000 with the threat of surcharges, there was a general concern that residential landlords would face higher expenses, but that rent control and rent stabilization laws would prevent them from shifting the cost over to their tenants. There was a general fear that metering would mean higher charges and that landlords would be forced into bankruptcy or financial hardship. As a response, DEP introduced the Multi-Family Conservation Plan.[20]

Similar to the Pre-Transition Plan, charges are calculated per dwelling unit. The combined water and sewer rent charges currently are $583.35 per unit. In order to join, the customer must prove abatement of leaks and installation of high-efficiency washers and low consumption water-fixtures, among other conditions.[21] While this plan has no expiration date set, it might not be here to stay. Applications received after December 31, 2008 will not be considered.

4. Re-bills on Flat-Rate Plans

Properties under flat-rate plans are also subject to re-billing. As stated above, there are conditions that must be satisfied in order to qualify for the plans. In order to remain in good standing, those conditions must be complied with at all times. If a property is found to be in violation of its certificate of occupancy, or if commercial units are not metered separately,[22] or, in the case of the Multi-Family Conservation Plan, non-qualifying water-fixtures are installed, then the customer will no longer be in good standing, and charges will be adjusted retroactively.

The fact that a building may be under a flat-rate plan does not mean that it does not have a meter for

its residential units. In fact, having a working meter is a requirement under all three plans. As long as the customer is in good standing, the meter will not be read, and the customer will pay the flat rate. The meter becomes what is called a "monitor meter." If the customer ceases to be in good standing, the monitor meter will be read and actual consumption will be billed retroactively, as of the date of the violation. Henceforth, the customer will continue on metering until its status under the plan is restored. Once again, violation of the certificate of occupancy constitutes culpable conduct, which voids the four-year back billing limit. To illustrate, a purchaser of a six family building that has had a seventh illegal unit for the last five years is taking two risks: (1) that she may have to pay water and sewer charges for the unaccounted unit for the last five years and (2) that she will receive a property with a meter that has not been read in at least five years. (2) means that she would have to pay for the difference between the actual consumption and what was paid to DEP in the last five years. The slightest undetected leak could result in a costly bill after five years (see I.A.1., Re-bills on Metering, above).

II. Remedies

A. Title Meter Reading and Flat-Rate Account Reconciliation

The importance of ordering a title meter reading or a flat-rate account reconciliation prior to closing cannot be stressed enough. In fact, practitioners who regularly do so do not need to fear the many risks in water and sewer charges. DEP offers protection to "innocent purchasers" if a title meter reading (also called "property transfer reading") or flat-rate account reconciliation is ordered 30 days prior to closing. If duly ordered, the purchaser will not be liable for re-bills.[23] As the name implies, title meter readings apply to metered accounts, and flat-rate account reconciliations to accounts on frontage and flat-rate plans.[24]

It is important to note that a "title reading" or "property transfer reading" is different from "actual," "final" and "special" readings. Title readings put DEP on notice that the property will be transferred, and that it will have one last chance to post charges for past periods. It is different from a regular "actual" reading because DEP carries out a thorough inspection, rather than simply reading the meter. For example, if after the purchase DEP discovers that the meter had been tampered with by the seller, the purchaser would be liable for past periods even if there was a actual reading at the time of closing, but not if a title reading was duly ordered. A "special" reading is an actual reading done at the customer's request. It does not put DEP on notice that the property will be transferred and, therefore, it does not afford the protection of a title reading. Lastly, a special meter reading is more expensive than a title reading. The former costs $75 for the first meter plus $25 per additional one, while the latter is only $25 regardless of the number of meters. The generous price on the more thorough title reading is explained as a subsidy to encourage sellers to order readings prior to closing.[25] Flat-rate account reconciliations cost $25 and put DEP on notice of transfer as well. A "final" reading occurs only when a meter has been removed, which does not necessarily mean that the property will be transferred.

That title meter readings and account reconciliations must be ordered 30 days prior to closing presents a timing issue for closing attorneys. Most closings are scheduled with at most two weeks' notice. It is difficult to foresee scheduling beyond that. The fact is that DEP asks for 30 days, but does not generally need all 30 days. In the case of properties with only one meter, or fewer than six residential units, three business days is a reasonable time for a title reading or flat-rate account reconciliation to be done and posted. A purchaser will qualify as an "innocent purchaser," if the closing takes place between the posting of the charges and the expiration of the 30 days since the order. The problem arises when the premises has multiple meters or when it is used in violation of its certificate of occupancy. Those readings will take longer and could leave a short window of opportunity to close with the protection. On the other hand, those are also the cases that carry a higher risk of re-billing and that would be better addressed prior to closing.

B. Title Insurance and Re-bills

Title insurance protects the purchaser from "Any defect in or lien or encumbrance on the title" as of the date of policy.[26] Water and sewers charges constitute a "lien or encumbrance." Hence, anything attaching as of the date of policy is insured against. However, charges attach only when they are posted. Liens posted subsequently to the date of policy are not insured. Water charges that may result from DEP's re-bill of prior periods only attach as of the date of the re-bill. If said date is subsequent to the policy, the policy does not insure against them.[27]

The reader might argue this result by drawing an analogy with other typical issues, such as forgeries. Forgeries in the chain of title are insured against. Forgeries happen prior to the date of policy and cause the insured and insurer's good faith reliance. The claim asserted by the injured party would appear of record only after the date of policy. Likewise, water consumption happens prior to closing, does not appear of record, and DEP asserts its claim after the closing. Why would the policy protect from forgeries but not from taxes based on the prior owner's periods?

The difference lies in the effective date of encumbrance. Both are based on happenings prior to the date of policy. The property rights of a prior owner whose signature was forged vested prior to the date of policy, presumably when she purchased or inherited the premises. Water charg-

es, on the other hand, only become liens as of the day they are posted. Hence, as of the date of policy the injured prior owner would have vested rights while the DEP would have no claim.[28]

Title policies insuring properties in New York City commonly include an exception in schedule B ("Matters excepted from coverage") excepting all charges from the date of the last actual reading or that may be re-billed on an actual reading. Attorneys representing purchasers oftentimes believe that this exception is what causes the re-bills to be excepted from coverage and thus sometimes fiercely insist that it be removed from schedule B. The truth is that the exception is merely a re-statement of what is the result of the application of the terms of the policy. It is only expressly stated as a warning to the insured. Suppressing it changes nothing.

Asking for affirmative insurance against re-bills fails to resolve the issue for the insured, too. First, underwriting guidelines prohibit it, because it is against the nature of title insurance to insure against future contingencies. Asking for and providing such coverage betrays a misunderstanding of title insurance and may not be relied upon by attorneys experienced in transactions involving title insurance. Second, even if the agent issuing the policy is willing to provide affirmative insurance, it is unclear whether it could be done effectively. As seen in the previous paragraph, removing the exception from schedule B does not help. Adding affirmative language would most likely fail as well, because it would be inconsistent with the terms of the policy and the nature of title insurance. While an agent may add language increasing or reducing specific coverage to tailor it for a transaction, it might not be binding upon the underwriter for an agent to insure against risks clearly outside the scope of title insurance. In other words, a title insurer cannot insure against re-bills any more than it can insure against termite damage, future condemnation, flood or fire.

C. Adjustments, Escrow Holdbacks and Credits on Metered Accounts

If no title reading was ordered, adjustments on metered accounts should be made with the last actual reading in mind, not only the amount shown, but also how long ago the meter was read. An actual reading within the last three months is the best possible scenario. It is considered prudent for an attorney to rely on that last actual reading when no intervening circumstances are known. If the last actual reading is over three months old it becomes a question of risk management: one should look into the occupancy and use, and the specific circumstances known about the premises. For example, a survey may disclose the existence of a fountain or a pool, an appraisal may indicate leaks and mold, and the client may have personal knowledge of the condition of the property or of common problems in the neighborhood. The longer the period between actual readings, the greater the exposure to a re-bill. While most meters are read regularly, situations occur where a meter has gone unread for years. These situations call for special attention.

Practitioners usually feel safe depositing funds in escrow and waiting for the next actual reading. This conservative approach has two problems: (1) an actual reading may take too long to appear (unless it is ordered), and (2) since the actual reading will post-date the closing, the seller may disagree on which charges are her responsibility, leading to a renewed discussion. Finally, since these issues arise on closed files they are usually not treated as diligently as open files. All this results in an open water account accruing new charges, penalties and interest at 9%, and eventually 15%, annual yield[29] and in an increasingly frustrated client involved in an issue that may know no end.

A much healthier but not generally explored approach is to collect a straight credit from the seller. Instead of requesting a certain amount to be held in escrow, the seller might agree on giving a smaller amount as an unconditional credit. Of course one suffers the risk of having taken too small a credit, but holding escrow is no more certain if the seller will argue the charges, and the advantages of a clean credit may overcome this. First, neither attorney is expected to work unpaid hours to negotiate an escrow release. Second, no late charges accrue while negotiating the issue. Third, if the client is reasonable and agrees on the credit at closing, the relationship with the client is spared.

One last remedy to be considered is eminently practical: if there is no time to wait for a meter reading, why not have the parties read the meter? Reading a meter is no mystery; it can be read much like an odometer. One need only know the consumption at the last actual reading and the current charge per HCF. For example, if the last actual reading on March 3 shows 00045100 cubic feet and the meter on September 3 shows 00100000, then we can easily conclude that 54900 cubic feet, or 549 HCF units, were consumed in the last 180 days. If the current charge per HCF is $1.81, then the water charges amount to $993.69. As for the sewer rent charges, they are 159% of the water charge, or $1,579.97, amounting to a total combined charge of $2,573.66. If the purchasers can take a picture of the meter on the final walkthrough, their attorney would be able to calculate the charges. Information regarding the previous actual reading and current charge per HCF can be easily obtained from the tax records. For more information on how to read a meter visit http://www.ci.nyc.ny.us/html/dep/pdf/readmeter.pdf.

D. Adjustments, Escrow Holdbacks and Credits on Frontage and Flat-Rate Plans

Because they pay yearly fixed charges, adjustments on frontage and flat-rate plans are straightforward. On the other hand, if the property is being used or occupied in violation of its certificate of occupancy, then it is ripe for a re-bill. A purchaser's at-

torney who knows that the property is illegally used and occupied should bear in mind the fact that hefty re-bills may follow. Moreover, if the property is on frontage, surcharges may be imposed as well. As for surcharges, as we have seen, the liability would be an amount equal to the sum of all monies billed on the account since July 1, 2000, even if the account is up to date (see I.B.1., Surcharges, above). As for the re-bill itself, it varies. If the property is on frontage, it would be calculated according to the actual use as of the date of the illegal alteration. If the property is on a flat-rate plan, then the meter would be read, so it would depend on actual consumption. In the case of frontage, one could read the rate schedule or look for another property to use as a proxy to determine the potential liability. In the case of flat-rate plans, it would be best to resort to solutions as if on metering, as above, such as having the parties read the meter if there is not enough time to obtain a reading.

III. Special Circumstances

A. Meter Cannot Be Placed

Occasionally, the physical circumstances of a building make it impossible for a meter to be installed. This is especially true in areas of high population density where yard space is lacking. A meter must be protected from the elements, so an indoor location is preferable. If there is no physical space, meters can be placed outdoors, but then some sort of protection (a meter pit) must be built around it. This requires extra space, which might also make it impossible to place it outdoors. In short, it might be impossible to place the meter without extensive re-plumbing. DEP recognizes this impossibility will maintain the account on frontage without imposing surcharges in that case. Staff at DEP has informally advised the author that technical advancements make it possible to install meters where they couldn't go before, and that property owners are to install meters when it becomes feasible, or they may suffer surcharges. If a flat-rate account reconciliation is duly ordered, upon examining the premises DEP will be able to determine whether a meter can be placed under current technology.

B. Allowances

As we have seen, the sewer rent charge is 159% of the water charge. Yet, the nature of some businesses makes it very likely that not every drop of water provided to the property will be discharged into the sewers. For example, if the property is an ice factory, then most of the water supplied will be sold in ice cubes and not discharged by the factory. Hence, ice factories receive an 85% allowance on sewer charges. As a practical example, if 100 HCF of water are supplied, the water charge would be $1,810, and the regular sewer rent $2,877.90. With the 85% allowance, the sewer rent comes down to $431.69. Other examples of businesses with high allowances are florists (50%), bakeries (40%), cemeteries (50%), dry cleaning (50%), and water used for building construction or sanitary purposes (90%).

Allowances are troubling for the closing attorney because they can only be claimed as long as the property is used for the designated purpose. As soon as DEP learns that the business is no longer operational, it can revoke the allowance retroactively, as of the date operations ceased. For example, suppose you are buying a store that used to be a dry cleaning business, but that has been out of business for a year. Any sewer charges incurred in that year would have been reduced by the allowance. If after the purchase DEP becomes aware that dry cleaning stopped for a year, charges would be re-adjusted for the entire year. This risk, like all others, disappears if a title meter reading or flat-rate account reconciliation is obtained prior to closing.

C. Meter Shown on Record, but No Charges

There are a number of reasons why records may show that a building has a meter but to find no charges of record. First and foremost, it could be a new meter. If so, charges would appear only at the end of the first quarter. Another reason is that it could be a monitor meter, such as would have a property on a flat-rate plan, as explained above, in which case the account itself would show charges. Lastly, it could be a fire meter or a cooling tower meter, as explained below.

D. Fire Meters

Fire meters are used to measure water used by sprinklers and other fire protection systems.[30] This water is not subject to sewer rent charges. Ideally, water used for this purpose has a different point of entry from the rest of the water, thereby circumventing the master meter and keeping a clear account of what consumption is subject to sewer rent charges. In that case, the fire meter would be placed in the second point of entry and would be read normally for charges.

Unfortunately, physical circumstances sometimes prevent having two points of entry. In those cases, DEP places a "tee" after the master meter to divide water meant for fire purposes from the rest. The fire meter would then be placed on the branch meant for fire protection. All the water passing through the fire meter would have already passed through the master meter. In this case, the purpose of the fire meter is to calculate the amount of water that should be deducted from the master meter reading in order to calculate sewer rent charges. In other words, in this case the fire meter is used to calculate sewer rent deductions, not water charges.

The use of fire meter water for any other purpose is prohibited[31] because it would be an attempt to avoid sewer rent charges. An illegal connection tapping into the secondary point of entry is an instance where re-billing can occur despite the fact that the last reading was an actual reading.

One might think that fire meters accrue charges only in case of a fire, but in practice charges accrue over

time as a result of testing. Fire meters do not post readings regularly. They only appear when they are actually read, and readings can be ordered as well. Tax searches sometimes neglect to specify that a meter is a fire meter. This causes confusion because the tax search reveals a meter that has been in place for years, but that was never read.

E. Cooling Tower Meters

Cooling tower meters follow the principle behind allowances: not all water provided will be discharged into the sewers. They measure the amount of water that flows into cooling towers because that water will vaporize as a result of the cooling process. Since it will not be discharged into the City sewers, the meter measures the amount of water that will be entitled to an 85% allowance. Cooling tower meters are only read on demand and they only result in a credit on previously billed sewer charges.

F. Exemptions

Certain entities are exempt from water and sewer charges.[32] In order to benefit from the exemption, the entity must apply for it with DEP. Failure to apply results in forfeiture. Mixed-use properties may be entitled to exemption if the principal use is exempt.[33] For a list of all entities entitled to exemption visit http://www.ci.nyc.ny.us/html/dep/pdf/exemption.pdf. Since water and sewer charges are levied by the City and collected by the Department of Finance, it is common for practitioners to assume they are a tax, and hence that entities exempt from taxes are also exempt. This is not the case. Water and sewer charges are a public service by the City and not a tax. In fact, the federal government, the state government and their respective agencies do pay water and sewer charges.

G. New Buildings

New buildings to be over 75 ft. in height or to have six or more stories must have meters prior to commencement of construction.[34] While under construction, the site must have one meter per point of entry. Once the construction is finished, these meters are to be replaced by an entire premises meter.[35] Multiple accounts and meters are expected in major projects, and amounts due on the construction accounts are rolled into the entire premises account once the project is over. This can be dangerous because purchasers do not expect newly opened accounts to show any charges. Buildings under six stories are not required to have accounts during construction, but may apply for a permit to use fire hydrant water.[36] All new buildings and major renovations are required to install meters upon completion.[37]

H. New Developments

A new development is one of the areas of greatest concern. The unwary look at the water search, confirm that the meter was recently installed as the building was finished, and assume there cannot possibly be rebills. The problem with this approach is that it ignores charges against the base lot.

Suppose a developer buys a tract of land, tax lot 1, which dimensions are 100 feet by 200 feet. The developer subdivides lot 1 into ten lots of 20 ft. by 100 ft., numbered lots 1 through 10. All charges accrued prior to the subdivision attach to all new ten lots. Any unpaid amounts become a foreclosable lien. In theory, the City does not apportion tax lots until all taxes are paid. In practice, water charges that have not appeared of record, or that may subsequently appear on an actual reading, are not accounted for and continue to be a lien against the base lot after the subdivision. This should be a concern for every purchaser of lots 1 through 10, following the example. The owner of lot 1 should be particularly concerned because the Department of Finance records do not distinguish between "old lot 1" and "new lot 1." This means that the owner of lot 1 will receive all outstanding tax bills on the base lot, including the foreclosure notice. Needless to say, charges on a base lot of 100 ft. by 200 ft. can be daunting to the residential owner of a lot 20 ft. by 100 ft. The purchasers of lots 2 through 10 are not free of risk, because if the owner of new lot 1 pays outstanding taxes on the base lot, the other purchasers will probably be liable for contribution.[38] Purchasers of newly created tax lots should always request tax searches on the base lot.

I. Condominiums

Condominium units pay their own real estate taxes, but not always their own water charges. Condominiums have one account for residential owners per building. If there is only one apartment building, then there is only one account. If, on the other hand, the condominium consists of a row of houses, then each house with its own heater and no more than three stories should have its own meter.[39] If each of these houses has only one dwelling unit, then each owner has her own water account and will be billed directly. In that case, water and sewer would not be paid through the common charges and should be taken care of at closing, as if purchasing a regular house. If the buildings are multiple residences, then there will be a common account shown against each common elements lot.

Water charges billed against the common elements lot (or lots) are divided among the unit owners through the common charges. As with all other charges affecting the common elements, water charges do not become a lien against the individual units until the managing board assesses the common charges.[40]

The same does not apply to charges on the base lot. As is the case with new developments, any outstanding charges on the base lot become a lien against anything standing on it. It is important to differentiate between the base lot and the common elements lot. The base lot is the lot that existed prior to the creation of the condominium; i.e., prior to the filing of the condominium declara-

tion. The builder's mortgage loan, for example, would be filed against the base lot, and just like the taxes, it covers the entire building, regardless of individual title to units. The common elements lot comes into existence with the creation of the condominium. Any charges filed against it do not attach to the individual units until they are assessed in the common charges.[41] Concern over charges against the base lot generally belong only to transactions involving new condominiums, because outstanding charges quickly become tax lien certificates, which are more conspicuously filed. Lastly, on any condominium unit purchase it is always prudent to check whether the condominium is up to date with its water payments or whether past periods are outstanding. If not, the purchaser should expect an assessment or an increase in the common charges in the near future.

J. Homeowners' Associations for Apportionment of Water Charges

As discussed above, DEP encourages homeowners without meters to obtain them. However, the City used to be reluctant to create separate accounts for each homeowner in new developments, particularly in Staten Island. Abstract searches in Richmond County regularly reveal Homeowners' Associations for the sole purpose of apportioning water charges from a base frontage account. Some of these associations continue to appear of record but have outlived their purpose because the individual owners now have individual accounts. This becomes troublesome because the title company finds it of record and expects to receive a letter at closing evidencing that the seller is up to date with the association's dues, but the seller has no knowledge of its existence. However, affidavits from the adjoining owners swearing to the fact that the association no longer exists or tax records showing that each owner now has her own account will serve as proof that the association has been voided and that therefore no letter from it will be required.

K. Multiple Accounts and Meters

Every commercial unit may keep its account and meter. In the case of a mixed-use building, there would also be a meter for all the residential units (which could be a monitor meter). There is no limit to the number of meters and accounts a property may have. However, all charges on every account become a lien on the entire tax lot, and not only the portion supplied by the respective meter.

L. Unusual Sewer Charges

Very few properties are not reached by the City's water supply, but obtain their water from wells. However, if they discharge into the sewers, they will be liable for sewer rent charges. DEP will estimate the water consumed applying the same schedule as for properties on frontage, and then calculate sewer rent charges normally.[42] The water itself would not be charged.

Con Edison supplies some properties with steam. After it is used, it condensates and it is discharged into the sewers. Con Edison reports to DEP the amount of steam supplied, and DEP bills sewer rent in relation to it.[43] This is the single most recurrent explanation of sewer charges that are well above 159% of the water charged.

M. No Charges, Irregular Charges, or Unexpected Credits Found

In the event tax records show extremely irregular charges, such as unexpected credits, extremely low charges, or no charges at all, the Appellate Division has held that the customer (or purchaser) carries the burden "to take reasonable steps to investigate the public record."[44] In addition, charges posted but mailed to the wrong address are not subject to the backbilling limitation when the customer takes notice, but late payment charges and interest may be forgiven.[45] Finally, properties which borders lie beyond 100 feet of the City's sewers are not required to be connected.[46]

N. If All Else Fails . . .

Complaints regarding water bills must be filed within four years, and the Rules of the City of New York provide for three levels of administrative review.[47] DEP encourages customers to pay the charges rather than waiting for a final decision, as late charges and interest continue to accrue. It is worth noting that DEP has discretion to forgive charges based on extraordinary leaks or disasters[48] and to offer payment plans.[49] The judicial test of review is whether the charges are arbitrary, capricious or lacking in a rational basis.[50] DEP is usually given deference in the interpretation of its own rules.

IV. Conclusion

This article has been an attempt to summarize and explain the rules concerning water and sewer charges and to warn of potential risks and provide remedies. While I may have succeeded in explaining the rules, I have certainly failed in the latter. The complexity of the rules is such, the cases so unforeseeable, and the liability involved so difficult to estimate, that neither can every risk be foreseen, nor can an appropriate remedy be provided for those risks that are known. But that only emphasizes the case for ordering title meter readings and account reconciliations prior to closing. Attorneys who make a habit of doing so need not worry about the many risks pointed out in this article. Attorneys for purchasers would be wise to include a clause in their contracts calling for a title meter reading or a flat-rate account reconciliation, as the case may be. Attorneys for sellers may recognize the benefits of obtaining a reading over depositing their clients' fund in escrow with the post-closing work that may involve.

For instances where it is impossible to order a timely title reading, one should keep in mind: (1) that frontage and flat-rate plans can result in re-bills, (2) that violations of the certificate of occupancy have an incidence on water charges, (3) that the backbilling limit of four years is

voided by culpable conduct, (4) that base lot charges follow newly created lots, and (5) that title insurance does not protect the purchaser, regardless of what the title agent may say.

Endnotes

1. N.Y.C. Admin. Code §§ 20-317.
2. To illustrate, DEP has known instances where meter-readers developed a relationship with their regular customers and entered into illegal agreements by which the readers would grossly underestimate readings. In order to avoid this risk of corruption, meter-readers are regularly assigned new routes, which means that readers may occasionally get lost and be unable to finish them. *See* David M. Halbfinger, *20 Arrested in Scheme to Cut Water Bills,* N.Y. TIMES, Oct. 22, 1998.
3. "ESTIMATE" and "ACTUAL" are the classifications as used in the records of the Department of Finance.
4. *See* III.D., Fire Meters, below.
5. 15 RCNY Ch. 42, App. A, Part V, Sec. 6.
6. *Id.*
7. Sam Roberts, *More Masses Huddling, but They Use Less Water,* N.Y. TIMES, Oct. 3, 2006.
8. DEP used to run a very generous reimbursement program for homeowners installing meters for the first time. Although the program still exists today, qualification is discretionary. New constructions are not qualified. 15 RCNY Ch. 42, App. B. More information *available at* http://www.nyc.gov/html/dep/pdf/reimbmet.pdf (last visited September 24, 2007).
9. N.Y.C. Admin. Code §§ 24-514 (b).
10. Extensive litigation has ensued from customers' timely requests to have meters installed and DEP's imposition of surcharges regardless. In the typical scenario, the customer made the request to DEP in June 2000, and when DEP imposed charges, the customer installed its own meter and sued to vacate the surcharges. It was the Water Board's position that (a) installing a meter by June 30, 2000 or (b) making a request to DEP by that date were "two mutually-exclusive options," and that the customer's initiative to install its own meter after surcharges had been imposed had voided the immunity afforded by the timely request. The courts decided against the Water Board, finding its interpretation of the rule arbitrary and capricious. *President Park Inc. v. City of New York*, 2005 NY Slip Op. 51571 (U) (Kings County Oct. 3, 2005); *2222 Mgt. Corp. v. Dept. of Envtl. Protection*, 2004 NY Slip Op. 51647 (U) (Kings County Dec. 15, 2004); *Botanical Realty v. City of New York*, 2005 NY Slip Op. 50500 (Mar. 31, 2005). One case decided by the Supreme Court in New York County upheld the Water Board's interpretation of mutually exclusive options. Application of *512-514 Realty, LLC v. The City of New Yor*k, New York County Index No. 111243/04 (Conf. *President Park, Id.* at 3.)
11. 15 RCNY § 20-05(a)(1); 15 RCNY Ch. 42, App. A, Part II, Sec. 3.
12. N.Y.C. Admin. Code §§ 24-335.
13. *770 Owners Corp. v. City of New York*, 20 A.D.3d 572, 799 N.Y.S.2d 263, 2005 NY Slip Op. 06121(2d Dep't July 25, 2005). As opposed to the customers in the cases referred to in note 10, this plaintiff did not undertake to place a meter, but simply waited after making its timely request to DEP.
14. *2222 Mgt. Corp. v. Dep't of Envtl. Protection, id*.
15. *77 Realty, LLC v. New York City Water Board,* 16 A.D.3d 247 (1st Dep't 2005), 792 N.Y.S.2d 36 (1st Dep't March 22, 2005).
16. 15 RCNY Ch. 42, App. A, Part V, Sec. 6.
17. Residential properties with fewer than six dwelling units may qualify for an initial cap on meter charges. Said cap is equal to 150% of the last annual frontage charge and applies only for the first metering year. 15 RCNY Ch. 42, App. A, Part VI, Sec. 5. All residential properties, regardless of the number of units, may qualify for a cap on all meter charges of $1,083.83 per year for the first dwelling unit and $722.28 per year per additional dwelling unit. 15 RCNY Ch. 42, App. A, Part VI, Sec. 4.
18. 15 RCNY Ch. 42, App. A, Part VI, Sec. 7.
19. 15 RCNY Ch. 42, App. A, Part VI, Sec. 6.
20. Eric Lipton, *In Policy Switch, City Eases Stance on Water Meters,* N.Y. TIMES, Dec. 15, 2000.
21. 15 RCNY Ch. 42, App. A, Part VI, Sec. 9. More information is *available at* http://www.ci.nyc.ny.us/html/dep/pdf/mfappfrm.pdf (last visited September 24, 2007).
22. Consumption for commercial purposes must be separate from consumption for residential purposes under the plans. However, it is not required that every commercial unit have its own meter; it is enough if they share one.
23. 15 RCNY Ch. 42, App. A, Part V, Sec. 3.
24. Obtaining a flat-rate reconciliation on a frontage account prior to closing does not dispel the risk that surcharges may be subsequently imposed. But see III.A., Meter Cannot Be Placed, below.
25. In fact, the author was told by staff at DEP that the Water Board had even suggested no charge on title meter readings. It was only at the request of search companies that the $25 charge was imposed at all. This way they have a receipt to document the request.
26. *See* 2006 ALTA Owner's Policy, 1, Item 2. The same language appeared on the 1992 ALTA Owner's Policy.
27. To illustrate, consider the case of the seller who has fraudulently benefited from a real estate tax exemption, and thus paid too little in real estate taxes. When the Department of Finance discovers the fraud it will post and collect a special assessment from the current homeowner. This assessment, as it would be subsequent to the date of policy, would not be covered against, regardless of the fact that it is based on periods prior to the date of policy.
28. It is important to remember, nevertheless, that water and sewer charges, like taxes, always have priority over private liens, such as mortgages, regardless of filing dates. *See* N.Y.C. Admin. Code §§ 24-317 (b); N.Y.C. Admin. Code §§ 24-317 (e).
29. DEP imposes 9% interest, but should it become a tax lien, it becomes 15%. N.Y.C. Admin. Code § 11-332. Due dates on re-bills may be extended up to six months by application. 15 RCNY, Ch. 42, App. A, Part VI, Sec. 3 (b). The City reserves the right to shut off water service if charges are not paid within two years of the due date for commercial and multi-family properties. For residential properties with less than six dwelling units, the term is three years. N.Y.C. Admin. Code §§ 11-314; 15 RCNY Ch. 42, App. A, Part VIII, Sec. 2; App. C, Sec. 3; and Public Authorities Law § 1045-h(8); § 1045-j(5). Termination and restoration charges would be borne by the owner. 15 RCNY § 20-04 (d)(4).
30. 15 RCNY § 20-10.
31. 15 RCNY § 20-05(a)(5)(iii).
32. 15 RCNY Ch. 42, App. A, Part V, Sec. 7; Chapters 893 & 894 of the Laws of 1980.
33. The Appellate Division affirmed judgment and order of the Supreme Court to overturn DEP refusal to grant an exemption where the taxpayer was a church, but the property also served as residence for the church administrator and teacher. *Bethlite Community Church, Great Tomorrows Elementary School v. Department of Envtl. Protection of City of N.Y.*, 2006 NY Slip Op. 01709 (1st Dep't Mar. 9, 2006).
34. 15 RCNY § 20-05(a)(3)(i).
35. 15 RCNY § 20-05(a)(3)(ii).
36. 15 RCNY § 20-05(a)(4) ; § 20-08(b); 15 RCNY Ch. 42, App. A, Part IV, Sec. 4.1.
37. N.Y.C. Admin. Code §§ 24-334 and I.B.1., Surcharges, above.
38. The problem of the base lot also concerns real estate taxes. However, since these are easily quantifiable and

prospective—i.e., paid at the beginning of the period—the uncertainty is greatly reduced. Nevertheless, diligence requires that the base lot be searched as well for outstanding taxes.

39. NYC Admin. Code § 20-05(l).

40. RPL Art. 9-B (Condominium Law) Sec. 339-l.1.

41. By way of example of the non-liability of the unit owners as to common elements, consider *Pekelnaya v. Allyn*. The Supreme Court declared condominium unit owners to be jointly and severally liable for damages caused to pedestrians by a fence falling off the rooftop, which was part of the common elements, but the Appellate Division reversed on the law. *Pekelnaya v. Allyn,* 2005 NY Slip Op. 07860 (1st Dep't Oct. 25, 2005).

42. 15 RCNY Ch 42, App. A, Part III, Sec. 3.

43. 15 RCNY Ch. 42, App. A, Part III, Sec. 1 (B.1); 15 RCNY Ch. 42, App. A, Part III, Sec. 7.

44. *333 E. 89 Realty LLC v. New York City Water Board*, 272 A.D.2d 549, 708 N.Y.S.2d 155 (2d Dep't May 22, 2000).

45. 15 RCNY Ch. 42, App. A, Part V, Sec. 6; *Perry Thompson Third Co. v. City of New York,* 279 A.D. 108 (1st Dep't 2000), 718 N.Y.S.2d 306, decided December 19, 2000.

46. *Jansen Court Homeowners v. City of New York*, 17 A.D.3d 588, 795 N.Y.S.2d 594 (2d Dep't Apr. 18, 2005), and N.Y.C. Admin. Code §§ 27-901(e)(2)(b).

47. 15 RCNY Ch. 42, App. A, Part IX, Sec. 2; Public Authorities Law § 1045-g.

48. 15 RCNY Ch. 42, App. A, Part VI, Sec. 8.

49. 15 RCNY Ch. 42, App. A, Part VIII, Sec. 4.

50. *Mid-City v. New York City,* 290 A.D.2d 301 (1st Dep't 2002); *Westmoreland Apt. v. New York City Water Board*, 294 A.D.2d 108 (1st Dep't 2002); *Hermany Farms v. Chapin,* 287 A.D.2d 565 (2d Dep't 2001), 731 N.Y.S.2d 663.

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