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Memorandum

Date: 17 May 2024

To: Austin McFarlane, Interim Director
Lake County Public Works Department

From: Victor P. Filippini, Jr.

Re: Considerations & Principles: A Primer

Background

Since the County started its efforts to regionalize sanitary sewerage systems in the early 1970s with the dawning of the Federal Clean Water Act, 33 U.S.C. 1251 *et seq.*, and its implementing regulations (the “**CWA**”), the County has operated its sewerage systems through wholesale and retail agreements with municipalities within the County (the “**Sewer Agreements**”). The County’s Sewer Agreements have evolved over the decades, partly in response to changing development patterns and needs in the County, partly through policy changes, and partly in response to litigation in which the Sewer Agreements have been at issue.

Early on, Sewer Agreements provided municipalities with “spheres of influence” over geographic areas with respect to County sewer service. In the course of various lawsuits, the County’s employment of such spheres of influence was both upheld and refined, with the spheres of influence being treated as tools for the County to control and plan for the development of its utility systems, and **not** a means for municipalities to use the County to establish exclusive service areas.

As older Sewer Agreements that included spheres of influence expired or were otherwise renewed, the County re-focused the provisions of its Sewer Agreements to maintain greater control over the utilization of the County’s investment in sewers. This was consistent with the judicial findings that “[t]he general rule is that, in the absence of legislative directive,” a government provider of sewer services “is the sole judge of the desirability and allocation of sewer services.” *Unity Ventures v. County of Lake*, 631 F. Supp. 181, 197 (N.D. Ill. 1986), *aff’d*, 841 F. 2d 770 (7th Cir. 1988)(upholding County’s decision not to extend sewer service through specific facilities to development in Round Lake Park). The upshot of this efforts was to have Sewer Agreements based upon discrete geographic areas (typically municipal boundaries) instead of spheres of influence.¹

¹ Many of the Sewer Agreements also place flow and use limitations on the areas authorized for service, as such limitations protect the County’s sewerage systems from being unexpectedly overtaxed by changes in development.

These boundary-based Sewer Agreements required amendments whenever new territory was annexed by municipalities, which amendments were matters of legislative discretion for the County. See *Village of Itasca v. Village of Lisle*, 352 Ill. App. 3d 847, 859 (2d Dist. 2004).

Because there are no mandated criteria for exercising legislative discretion, the County often approached requests for amendments to Sewer Agreements on an *ad hoc* basis. Not only did this result in disgruntlement among the municipalities with which the County had Sewer Agreements, but it also concerned County Board members [and particularly those members on the Public Works & Transportation Committee (the “**PWT Committee**”)] who believed that there should be a decisional framework for evaluating requests for amendments to the Sewer Agreements.²

The Considerations & Principles

In the early 2000s, the PWT Committee charged the County staff and attorneys to craft a framework for processing requests for Sewer Agreements and amendments to Sewer Agreements. The product that the PWT Committee ultimately adopted was the “Considerations and Principles Relating to Intergovernmental Agreements for Sewer and Amendments to Existing Agreements” (the “**Considerations & Principles**”).³

The Considerations & Principles not only set forth the manner in which sewer-related decisions will be considered, it also identifies specific criteria for making sewer-related decisions (the “**Criteria**”), to-wit:

- Consistency with the Framework Plan
- Consistency with relevant municipal plans
- Available and committed capacity of system
- Impact on County roads and other services
- An applicant’s reasons for preferring one solution over another, and reasons for that preference
- Impact on other affected public bodies
- Fiscal and related benefits

² The desire for a decisional framework was a policy choice of the PWT Committee. There is nothing that requires the County to apply or adhere to any fixed standards unless the County chooses to do so. Nor does the County even have to explain what it considered or why it has entered into or declined to enter into a Sewer Agreement or an amendment thereto. The sole limitation on a legislative body making decisions on contracts for the provision or allocation of sewer services is not to act in an arbitrary, unreasonable, or capricious manner. *Unity Ventures*, 631 F. Supp. at 197. On this point, it is well-settled that “regulation of sewage treatment facilities pursuant ... to a comprehensive plan is clearly a legitimate purpose and concern.” *Id.* at 199.

³ The Considerations & Principles were updated in 2015. The discussion in this memorandum relates to the 2015 version of the Considerations & Principles (a copy of which is attached), but the underlying rationale for the Considerations & Principles relates to the legal and regulatory standards in place when the Considerations & Principles were originally approved and that continue in place today.

- Level of support/opposition to proposal
- Specific environmental concerns
- Alternative proposals put forth by an applicant or governmental entity

Although some have criticized the Criteria as reaching beyond sewer-related issues, the Criteria have their foundation in statutory and regulatory law governing sewers.

The Legal Precedent for the Considerations & Principles

The Considerations & Principles closely parallel the relevant statutory and regulatory standards that apply to “sewer-related issues.” Notwithstanding the view of some who believe that “sewer-related issues” are limited to pipe sizes and treatment capacity, under the CWA “sewer-related issues” cover a far broader swath of issues. The United States Environmental Protection Agency established conditions for preparing and certifying areawide water quality management plans (the “**AWQMP**”). 40 CFR 130.5(b)(4-5). These conditions included the development of procedures for amending AWQMPs and establishing a process to assess the environmental, social, fiscal, and economic impacts of plan implementation. See 40 CFR 35.917-1 through 40 CFR 35.917-9; see also 40 CFR 130.6(c)(6). In fact, although the CWA has emphasized the need for “cost-effectiveness” in sanitary sewerage systems, cost-effectiveness has been broadly defined to include both monetary and non-monetary factors, as well as primary and secondary effects of the development and implementation of a sewerage system. See 40 CFR Pt. 35.E, App. A, at 6.a. Those primary and secondary effects include not only environmental impacts, but also traffic, the “[p]ressure to rezone or otherwise facilitate unplanned development,” and “pressure to accelerate growth.” *Id.* at 8.f(2)(a-b).

In response to the AWQMP requirements in the CWA, the Illinois General Assembly established the Chicago Metropolitan Agency for Planning (“**CMAP**”) [and its predecessor agency, the Northeastern Illinois Planning Commission (“**NIPC**”)] as the agency in northeastern Illinois charged with assessing amendments to the AWQMP, including changes to the boundaries of sanitary sewer facility planning areas (“**FPA**”).⁴ 70 ILCS 1707/15(e). In turn, NIPC and CMAP had developed the “Criteria for Facility Amendments to the Areawide Water Quality Management Plan for Northeastern Illinois” (the “**FPA Amendment Criteria**”) for evaluating requests for FPA boundary changes.⁵ The FPA Amendment Criteria have included:

1. Any proposed facility amendment must be designed to meet State of Illinois water quality standards for the receiving waters and the appropriate

⁴ The Illinois Environmental Protection Agency (“**IEPA**”) has determined that it will no longer link sewer permits to approvals of FPA amendments. See IEPA, “In the Matter of: 2010 Annual Hearing on Bureau of Water Programs Responsiveness Summary,” at 5; see also [ff8eec3-0438-42ff-8028-460260bd9bac](https://www.illinois.gov/ff8eec3-0438-42ff-8028-460260bd9bac) (illinois.gov), at 3 n.2. Nevertheless, the regulatory bases for reviewing FPA changes are still extant and relevant to the Criteria.

⁵ Since the Considerations & Principles were first developed, the FPA Amendment Criteria have been modified from time-to-time, but the elements remain similar to what guided the PWT Committee when it originally approved the Considerations & Principles. The current CMAP FPA Amendment Criteria can be found at [ff8eec3-0438-42ff-8028-460260bd9bac](https://www.illinois.gov/ff8eec3-0438-42ff-8028-460260bd9bac) (illinois.gov).

discharge standards or must receive a variance from the Illinois Pollution Control Board.

2. The population and employment for which the proposed amendment is designed must fall within the 20-year forecasts most recently adopted by the Commission for the facility planning area. The Commission may agree to adjustments within the regional forecast total.
3. The applicant must demonstrate that the unit of local government granting zoning to the project has formally accepted financial responsibility for the wastewater system in the event of system malfunction or failure. Such acceptance must be in the form of a resolution from the unit of government responsible for zoning.
4. The proposed amendment should not reduce the effectiveness of the water quality improvement strategy contained in the original plan, either for point source or nonpoint source control.
5. The proposed amendment should not adversely affect the cost effectiveness of the Areawide Water Quality Management Plan for meeting water quality standards in the facility planning area as a whole.
6. The proposed amendment should have the endorsement of the designated management agency for wastewater treatment and substantial support by the municipalities within the affected facility planning area.
7. The proposed amendment should not adversely affect adjoining units of government.
8. The proposed amendment should be consistent with other county and regional plans or state policies.
9. Consideration will be given to evidence of municipal or county zoning approval and commencement of development activity prior to Areawide Water Quality Management Plan adoption in January, 1979.

As set forth in the following table, there is substantial consistency between the Criteria in the Considerations & Principles and the FPA Amendment Criteria:

CONSIDERATION & PRINCIPLES CRITERIA	FPA AMENDMENT CRITERIA
Consistency with the Framework Plan	FPA Amendment Criteria Nos. 2, 6, 8
Consistency with relevant municipal plans	FPA Amendment Criteria Nos. 6, 8
Available and committed capacity of system	FPA Amendment Criteria Nos. 1, 4, 5, 6
Impact on County roads and other services	FPA Amendment Criteria Nos. 5, 7, 8

Impact on other affected public bodies	FPA Amendment Criteria Nos. 6, 7
Fiscal and related benefits	FPA Amendment Criteria Nos. 3, 5, 6
Level of support/opposition to proposal	FPA Amendment Criteria No. 6
Specific environmental concerns	FPA Amendment Criteria Nos. 1, 4, 8

In short, although the Considerations & Principles take into account a wide range of issues, those issues are well-recognized with respect to the rational allocation of limited public sanitary sewer resources. Moreover, because the County has a wide range of functional and planning responsibilities for services within its region that may be affected by the extension of sanitary sewer services, taking a full view of the issues associated with the allocation of sewer resources is both rational and good public policy.

The Considerations and Principles in Practice

Since the PWT Committee created the Considerations & Principles, County staff has applied them to evaluate requests for Sewer Agreements and amendments. The PWT Committee, in turn, has considered such staff evaluations in the context of the Considerations & Principles before making recommendations to the full County Board. Such evaluations have typically been at the “site” level, insofar as site-specific proposals have been the driver for nearly all agreement amendments since the inception of the Considerations & Principles policy. The Considerations & Principles also allow for a more generalized review for Sewer Agreement amendments that envision development of a particular scale or type in a specific area, often predating any specific site development proposals.

The application of the Considerations & Principles in this manner has enabled the County to plan more specifically for improvements to the overall County systems and to help establish priorities among competing projects. Moreover, evaluations made pursuant to the Considerations & Principles help anticipate externalities that may result from particular development proposals, whether those externalities affect the County sewerage system, the Lake County roadway network, or other vital services and facilities in the County such as schools.

Conclusion

Although the County’s development and use of the Considerations & Principles was in no way legally mandated, the Criteria incorporated into the Considerations & Principles are well grounded in applicable law. Moreover, the Considerations & Principles have established a framework for the PWT Committee to evaluate and make recommendations on new Sewer Agreements and amendments to existing Sewer Agreements in a consistent and reasoned manner that takes into account an array of issues that may be presented by developments to be supported by public sewer.

Importantly, even though the County has utilized the Considerations & Principles for approximately 20 years, the County remains fully authorized to exercise its legislative discretion

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in making decisions on new Sewer Agreements and amendments based on a generalized determination of the County's best interests – even if the Considerations & Principles might suggest a different outcome.

Please feel free to contact me with any questions on this matter.

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