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New Inflow and Infiltration Reduction Payment Ruling

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A recent Massachusetts Superior Court case looked at whether requiring developers to make certain payments for the purpose of improving a municipal sewer system amounted to an impermissible tax, and not a permitted fee. The Court determined, in a case involving the Town of Saugus, that Inflow and Infiltration (I/I) reduction payments, which had to be made by parties in order to secure sewer connection permits and which were only imposed on new developments, were a tax and not a fee. The Court struck down the payment scheme since in Massachusetts, taxes can only be imposed in accordance with certain statutory requirements.

I/I reduction requirements are very common in the Commonwealth, and payments to reduce I/I are often required. "Inflow and Infiltration" refers to the situation common in older municipal sanitary sewer systems where storm water (inflow) and groundwater (infiltration) enter into the system through illegal connections and cracks and leaks in pipes. Often, the excess amounts in the sanitary sewer system overwhelm the system during storms, causing backups and causing the sanitary sewer system to overflow into nearby bodies of water. The Department of Environmental Protection (DEP) uses various mechanisms, including consent orders, to force cities and towns to upgrade their sewer systems to reduce the amount of inflow and infiltration, thereby avoiding discharges into bodies of water. In order to fund these upgrades, cities and towns often require developers to pay I/I reduction fees on large new connections, usually on a per gallon basis, based on the sanitary sewer flow to be introduced by the new development. In most cases, a development cannot be permitted without payment of these I/I fees.

In the case of Saugus, the sewer system had been neglected for many years, and the Town had not performed necessary upgrades. DEP forced the issue, and Saugus entered into a consent order with DEP which required Saugus to upgrade its system by reducing inflow and infiltration.

Saugus, in turn, imposed an obligation to make I/I reduction payments on new developments. This was in the form of a \$3 "per gallon" fee for any new flow which was multiplied by a factor of ten for the first developers who desired to connect. The Saugus plan allowed lower "per gallon" fees from later developers. Significantly, only new users of the municipal sewer system paid any I/I reduction fees. Existing users were not charged any I/I reduction fees.

The Court weighed various factors and concluded that the Saugus I/I fee scheme was an impermissible tax and not a fee. The Court noted that the Town had spent some of the fees it had received on upgrades that had little to do with reducing I/I, that it imposed uneven and unfair burdens on certain developers, and that existing users of the system paid no costs of removing I/I.

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While this case raises interesting points, it would be too simple to interpret its holding as a license to stop paying all I/I fees. The Court in this case characterized Saugus' attempt to resolve its I/I problem as unfair and unjust, and concluded that based on a weighing of the equities, the scheme Saugus adopted was impermissible. It is entirely possible that in other scenarios, where the payment scheme is more balanced and is not imposed solely on new users, a court might conclude that the payment of I/I reduction fees is not an impermissible tax.

In any event, if you are faced with having to make I/I reduction payments, the particulars of the city's or town's program should be reviewed to determine if there is a basis to challenge the payments.

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