

Stormwater Utility Ordinance: U.S. District Court Addresses Whether Assessment Violates Railroad Revitalization and Regulatory Reform Act



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A United States District Court (Western District Virginia) in a December 26th Memorandum Opinion (“Opinion”) addressed a challenge to a stormwater utility ordinance assessment. See *Norfolk Southern Railway Company v. City of Roanoke, et al.*, 2017 WL 6599008.

The challenge was based on an argument that the assessment imposed by the ordinance discriminated against a rail carrier in violation of the Railroad Revitalization and Regulatory Reform Act of 1976 (“Act”).

The City of Roanoke, Virginia (“City”) enacted a stormwater utility ordinance (“Ordinance”) in 2013. The Ordinance established a utility to support the City’s stormwater management activities and a system of charges (i.e., assessments) to fund those activities. The utility manages the City’s MS4 (Municipal Separate Storm Sewer Systems) and administered the corresponding permit.

Virginia Code § 15.1-292.4 authorizes local governments to adopt stormwater control programs and impose charges on property owners to finance the cost of the programs. Charges imposed pursuant to the statute must be based on an analysis that demonstrates the rational relationship between the amount charged and the services provided.

Such localities are also required to provide for full or partial waivers of charges to any property owner who installs, operates, or maintains a stormwater management facility that reduces stormwater flow or pollutant levels and retains and treats stormwater on site in accordance with an approved stormwater management plan. Income derived from stormwater management charges is declared by the statute to be dedicated revenue and cannot exceed actual costs incurred by a locality operating under the provisions of the statute. Further, it can only be used to pay or recover costs for certain listed charges or costs.

The adoption of the Ordinance was based upon a finding that “an adequate, sustainable source of revenue for stormwater management activities is necessary to protect the general health, safety and welfare of the residents of the City.” A finding by the City Council declared that it would be in the “best interest of the public to base the assessment on a parcel’s impervious surface cover.”

Norfolk Southern Railway Company (“Norfolk Southern”) owns approximately 758 acres of property in the City. The railroad filed a lawsuit in the United States District Court (Western District Virginia) challenging the Ordinance’s assessment.

Norfolk Southern argued that the Ordinance is:

. . . another tax that discriminate[s] against a rail carrier, in violation of the Railroad Revitalization and Regulatory Reform Act of 1976 . . .

The Chesapeake Bay Foundation (“Chesapeake”) intervened as a Defendant.

Norfolk Southern, the City and Chesapeake all moved for summary judgment on the threshold issue of whether the assessment is a tax for purposes of the Act.

The Court concluded that the assessment is a fee rather than a tax. As a result, the Ordinance’s assessment was deemed not actionable under the Act. Both the City and Chesapeake were therefore deemed entitled to summary judgment.

The Court’s opinion provides a detailed discussion of the Act including its purpose and components. In particular, the Court notes that the Act was enacted in order to “restore the financial stability of the railway system in the United States.”

In order to achieve this goal, Congress is stated to have targeted states and local taxation schemes that discriminate against railroads. The Court considered whether the assessment was “another tax” within the meaning of Subsection (b)(4) of the Act. A key question was therefore whether the assessment was a tax or a fee.

The Court determined that the assessment was outside the scope of the Act. It noted:

. . . while the assessment bears some indicia of a tax, the court is convinced that those features do not render the Ordinance a tax provision. Instead, the court concludes, for the following reasons, that the Ordinance imposes a regulatory fee, rather than a tax, for purposes of the Act.

The reasons for the Court’s conclusion include:

- The record establishes that the Ordinance and the assessment were part of a comprehensive statutory and regulatory scheme designed to manage stormwater and its negative effects
- It was undisputed that all of the revenue generated by the assessment was used to fund the utility stormwater management facility operation and activities
- The structure of the assessment more closely resembles that of a fee as opposed to that of a tax
- The regulatory purposes served by the assessment structure “counsel in favor of characterizing the charge as a fee”
- The Ordinance encourages owners of improved parcels to implement stormwater management practices that further reduces runoff and pollutants
- There is sufficient correlation between the assessment and the stormwater management services provided by the utility

[A copy of the opinion can be downloaded here.](#)