NEW YORK STATE | Department of Environmental Conservation

New York State Department of Environmental Conservation

Division of Water

Municipal Separate Storm Sewer System (MS4) Funding Document

DRAFT

June 2007

This document was written by Bob Feller of Bond, Schoeneck & King, PLLC.

MS4 Funding Document

Table of Contents

Executive Summary

This report reviews the provisions in existing state law that relate to the funding of the local share of the MS4 program. A supplement to this report will review Stormwater Utilities, Contractor Impact Fees, and Legislative recommendations.

The MS4 program has a mix of requirements that comprise the six minimum control measures. There are requirements for municipalities to construct and maintain compliant drainage facilities (Construction Site Stormwater Runoff Control for municipal facilities; Post-Construction Stormwater Management for facilities dedicated to the municipality; and Pollution Prevention/Good Housekeeping for Municipal Facilities). There are requirements for municipalities to exercise regulatory authority over entities within their jurisdictions (Stormwater Runoff Control for non-municipal facilities; Post-Construction Stormwater Management for non-municipal facilities; and Illicit Discharge Detection and Elimination). Finally, there are administrative and program development requirements (Public Outreach and Education on Stormwater Impacts and Public Involvement/Participation). In addition, as part of this last category, the municipality must pay for the costs of developing a complying program and reporting to DEC.

Capital and Operation and Maintenance Costs

There are numerous provisions of existing law that address the mechanisms to finance the construction and operation and maintenance of drainage facilities. It is clear that existing law focuses on the flood control aspect of drainage facilities. In order to avoid any ambiguity, it may be advisable to extend the concept of drainage facilities to encompass the water quality aspect of MS4-compliant facilities.

There are provisions in the Town, Village and General City Law that authorize the payment of these costs from general revenues (the principal source of which is real property taxes). Town and Village Law also permit the payment of these costs through charges on the benefited properties either entirely or in combination with general revenues. Where general revenues are used, out-of-district properties contribute as part of their real property tax assessments.

Both the County and Town Law contain provisions that authorize the establishment of administrative units within government known as “districts.” Town and county districts are financially self-sufficient. All of the local costs to construct, operate and maintain these facilities must come exclusively from the properties in the district.

Options for Charging Benefited Properties

The charges against benefited properties, whether as part of a district or merely within a

benefited area, are raised in one of three ways - special *ad valorum* levies, special assessments or user fees. Special *ad valorum* levies are raised in the same way as real property taxes, i.e. based on assessed value.

Special assessments are made on a benefit basis. Benefit has been interpreted to mean the amount by which the value of the property increases because of the improvement. The benefit does not need to be measured with precision and, in any given case, there may be a number of acceptable methodologies for measuring benefit. Clearly, the benefit approach could distribute the costs in a much different way than an *ad valorum* levy.

Finally, there is the option of user fees. When available, user fees can only be employed to fund the operation and maintenance portion of the costs. Here too, there are a number of approaches to design the user that could be employed. User fees would almost certainly distribute the costs in a much different way than an *ad valorum* assessment. Depending upon the way in which the user fee is designed, it could distribute the costs in a way that was similar to the benefit assessment or in a way that differs significantly.

The options available under existing law are not available in all circumstances. As a rule, New York law favors the use of the benefit assessment. Regardless of the situation, the benefit assessment is always legally available to use with benefited properties to distribute the capital, operation and maintenance costs for drainage improvements. On the other hand, the use of special *ad valorum* levies or user fees are available in only certain defined situations for benefited properties. The chart in Chapter IV summarizes these circumstances.

Regulatory Costs

Regulatory costs include those concerned with reviewing applications for land use approvals (e.g. subdivision, site plan review) that implicate the DEC's general permit for construction activities and any matters involving enforcement of that permit or against illegal discharges into a municipality's storm water system.

Municipalities are clearly authorized to perform the regulatory oversight functions required by the MS4 program.[1] While there are no specific provisions addressing the costs associated with this function, many municipalities have already adopted provisions in their zoning and subdivision laws that require an applicant to pay a filing fee and further authorize the land use board to direct the applicant to pay the costs of an outside expert to advise the board on the merits of the application. These mechanisms can be used to cover the costs of application review either entirely or as a supplement to monies in a municipality's general fund.

Municipalities also have authority to take enforcement action as required by the MS4 program.[2] There are no specific provisions providing mechanisms for financing these costs other than the use of general funds. Municipalities can raise funds from the assessment of violations of local

[1] Although municipalities have very broad land use authority, they may first need to amend their zoning, subdivision or other land use laws in order to implement the MS4 requirements.

[2] Again, municipalities may have to adopt or amend local laws dealing with illegal discharges before they can effectively exercise that authority.

laws. However, any such fines are deposited to the municipality's general fund and not a dedicated account. Although the proceeds of such fines would be available to the municipality, self-discipline would be needed if those funds were not to be used for non-MS4 purposes.

Municipalities may also consider the imposition of an inspection fee to offset some of the costs of detecting and eliminating illicit discharges. Such a fee would have to be imposed under the Municipal Home Rule Law and care would need to be taken to ensure that such a fee was within the authorization of that law.

Administrative and Program Development Costs

Presently, the only source for the payment of these costs is the general fund of the municipality. Under current law, properties within a district can be charged with the payments to cover the costs of construction and those of facility operation and maintenance. It would be difficult to characterize the costs that fall in the "administrative and program development" category in such a way to make them eligible as district expenses. As a result, even where districts have been formed, these costs will likely have to be conducted by the municipality (or conceivably some multi-municipal or regional entity).

Factors in Selecting the Best Approach

As discussed above, there are limitations on the source of local funding for certain of the MS4 costs. In the case of others, several local funding options may be legally viable. Where choices do exist, there are certain goals and principles that municipal decision makers should take into account.

1. Equity of charges.

In order to maintain public support for financing the MS4 program, it will be helpful if taxpayers perceive that they are receiving real value for additional costs imposed and that the distribution of the these costs is fair.

2. Reliability and adequacy of revenue stream.

Dedicated revenue streams are preferable to non-dedicated streams. Where revenue streams are not dedicated, they are always in competition with other municipal priorities and, as a result, the MS4 program may not be adequately funded.

3. Administrative simplicity and flexibility.

The easier and more flexible the administrative arrangements, the better. For instance, the creation of a large number of drainage districts may make administration difficult and the accounting for costs unwieldy.

4. Functions administered at the appropriate level of government.

Certain requirements, such as those for the maintenance of specific stormwater systems, may need to be assessed only against the benefited properties or made part of a district charge. Others, such as the public participation and education requirements, may more logically be handled at the municipal level or even be implemented at a multi-municipal or regional level.

Chapter 1 Financing the MS4 Program: An Introduction

Municipalities that are covered under the MS4 program are obligated to implement best management practices (BMPs) with respect to their management of stormwater in municipal systems. There are six minimum control measures that constitute the BMPs all MS4 communities must implement. This report examines the options that municipalities have to pay for the local share of the cost of implementing these BMPs under existing state law.

These measures can be placed in four broad categories: Capital costs; maintenance costs, regulatory oversight costs and programmatic costs.

Capital costs are those that involve the construction of stormwater control facilities. This will typically occur in the context of a municipality building or upgrading their stormwater system. It could occur as an adjunct to a municipal project (e.g. the construction of roads or new municipal buildings) or as a stand alone project to upgrade the components of the stormwater system. Many of the new systems will be installed as part of development projects at the expense of the project sponsor and hence, in those cases, there will be no local cost for construction.

Maintenance costs are those that involve the upkeep of any part of the municipal stormwater management system. This would include roads, streets, catch basins, curbs, gutters, ditches, man-made channels and storm drains.

Regulatory oversight costs are those which the municipality incurs to oversee the actions taken by third parties that provide input into the municipal stormwater system. They would include the review of applications for development projects and the costs incurred for the enforcement of local laws.

Programmatic costs are those needed to develop the components of the MS4 program and report to DEC and those that involve public education and participation.

The funding options for a municipality will differ depending upon the type of cost involved.

Chapter 2 Authorities for Financing the MS4 Program.

A. Specific Authorities

The specific authorities for financing components of the MS4 program are found largely in the enabling statutes for towns, villages, and cities (Town Law, Village Law, General City Law, Second Class and City Law respectively).[3] Cities and other municipalities with charters will need to examine any provisions that may be relevant as well.

Components of the program that involve drainage on municipally-owned highways or roads may have separate financing mechanisms under the Highway Law. The requirements relating to the issuance of debt to build stormwater facilities are contained principally in the Local Finance Law.[4]

Authorization for local government to handle components of the program using regional or inter-municipal approaches under the County Law and General Municipal Law will be discussed in this chapter as well as a mechanism available under the Environmental Conservation Law for drainage improvement districts.

Another point which will become apparent in the discussion below is that the traditional authorities regulating drainage are concerned with flood protection. The MS4 program is focused more on the water quality issues associated with the discharge of storm water than on the water quantity issues. Therefore, it may be advisable to affirm that the traditional authorities can be employed for addressing storm water issues that do not relate to flooding concerns.

1. Towns

The town is a basic unit of local government in New York State. Every area of the State outside of incorporated cities and Indian reservations is within a town. As a consequence, the demographics of towns vary widely from sparsely populated rural ones to those that are predominantly suburban or even urban in character. These same variations often occur within the confines of a single town. As a result, over the years, the State Legislature has provided the needed flexibility for towns to adapt the services they provide to the wide variety of conditions they encounter within their jurisdictions.

[3] The MS4 program obligations are not limited to village, towns and cities. They apply to all publicly-owned infrastructure in the designated communities (See GP-02-02). However, the obligations of many of the other jurisdictions are more limited as they have no regulatory authority over land use. Hence their obligations are focused on the propriety obligations of constructing, operating and maintaining their own drainage infrastructure, generally as a part of the larger drainage infrastructure for the community. This paper will not explore the mechanisms for doing so with two exceptions: a) Mechanisms that could be used to facilitate inter-municipal or regional approaches: and b) Mechanisms that would provide for funding other than general revenue.

[4] This aspect of funding is treated separately in Chapter V.

a. Town-Wide Approach

Section 64 of the Town Law enumerates the general powers of town boards. Paragraph 11-a provides authority for towns to construct public drainage facilities, including the acquisition of land for such purposes. It states,

> 11-a. Drainage facilities. Upon the adoption of a resolution, the town board of any town may, for the purpose of drainage and to protect the property within the town from floods, freshets, and high waters, construct drains, culverts, ditches, sluices, and other channels for the passage of water, and may deepen, straighten, alter, pipe, or otherwise improve any of the lakes, ponds, streams, ditches, drains, or water courses in any part or section of the town in order to prevent the same from overflowing, and provide that the same carry off such additional water as may be brought to the same by other public improvements in the towns; and for such purposes the town board of any town may acquire real property or an interest therein by purchase, dedication, gift, devise, or by condemnation in the manner provided by law for acquisition of real property for highway or town road purposes. If an expenditure for any of such purposes is to be paid by taxes levied for the fiscal year in which such expenditure is to be made, the adoption of a resolution therefore shall be subject to a permissive referendum.

Two points are worth noting. First, the capital facilities described are apparently for the purpose of protecting against flooding. The facilities that would be constructed for the MS4 program may differ significantly from than those that would be constructed if flooding were the only or principal concern. Therefore, it would be helpful to clarify through legislation that these authorities apply equally even if the objective involving the management of the storm water is water quality.

The second point is that, to the extent that general funds from the operating budget are to be used on the construction of these facilities, the authorizing resolution is subject to permissive referendum.[5]

Section 3 of section 63 of the Town Law provides the town board with the right to maintain all land and facilities owned by the town.

Monies that are expended on drainage facilities pursuant to Town Law §64-11(a) and Town Law §64(3) are part of funds used for general town administration. Charges to support these expenditures are included in the annual budget and are financed by real property taxes and other general revenues to the extent that they are not funded through state grants or other non-town revenue sources.

Funding for highway construction and maintenance is budgeted separately from other town charges. In the case of the MS4 program, some of the costs will involve the proper maintenance of municipally-owned roads and therefore would properly be funded through these mechanisms.

[5] Permissive referendum refers to a referendum on petition and is governed by Town Law Article 7.

The local share of everyday maintenance expense for drainage facilities are incorporated as expense items in the general town budget or the budget for town highways. Revenues to fund these costs will be raised principally through the town tax or highway tax levy. Significantly, the town highway tax cannot be levied against properties within an incorporated village.[6]

However, it is generally not feasible to fund major capital expenditures and large equipment purchase or maintenance items from a single year's tax levy. The local share of these costs are funded either through financing authorized under the Local Finance Law or through the use of reserve funds authorized under Article 2 of the General Municipal Law. Financing these costs will be discussed in Chapter V of this Report.

Presently, the General Municipal Law provides authority for establishing such a reserve fund in GML §6-c entitled: Capital reserve funds for counties, cities, villages, towns and sewer and water improvement districts. It is clear that such a fund could not be used for improvements that would benefit special improvement districts other than water or sewer districts.[7] Although the general tenor and intent of GML §6-c appears to be to authorize reserve funds for sewer and water improvements, its authorization for capital reserve funds does not explicitly exclude drainage improvements that are being handled as a general town charge.

A municipality and any county or town drainage district can deposit monies into a repair reserve account. Such monies can be used for the repairs of capital improvements or equipment which repairs are of a type not recurring annually or at shorter intervals.[8]

b. Special Improvement District Approach

The Town Law authorizes the establishment of special improvement districts including, among others, drainage districts. Special improvement districts are the means by which a town provides particular types of services to an area of the town that is not generally being provided to the town as a whole.[9] The public costs of building the improvement and maintaining it are supported by charges assessed against the real property located within the boundaries of the district, not as a general town charge.[10] Districts are not separate legal entities but rather are administered by the town board as a units of town government.[11] Any debt issued in support of the improvement benefiting a district is a debt of the town.[12]

After a drainage district is established, a town board,

---

[6] Highway Law §§284 and 277.
[7] GML §6-c(2). See also, OSC 88-73, 80-89 and 79-548.
[8] GML §6-d.
[9] See Local Government Handbook, Dep't of State Publication (2000) at pg. 68; Town Law Manual, Association of Towns Publication (2000) at pg. 147.
[10] Reference is made to "public" charges because in the case of most drainage improvements, most if not all of the capital cost will be borne by the property developer.
[11] Separate governing bodies for special improvement districts were abolished in the 1930s. Some of the older districts that were in existence at that time have continued to operate under a board of commissioners. These districts are government by Town Law Article 13.
[12] Town Law §§231 and 231-a; Local Finance Law §§10 and 11.

> ….. may lay out, open, design, construct, maintain and alter drains, storm water sewers, pumping stations or necessary works appurtenant thereto, and improve water course for the benefit of any drainage district in such town.[13]

This is a very broad authorization and would appear to be provide enough authority to address most, if not all, of the tasks that would be required under the MS4 program. In fact, it is broader in scope than the authority contained in Town Law §64(11-a).

Under the Town Law, there are two approaches for establishing drainage districts. Under Article 12, the process is initiated by a petition of property owners within the proposed district.[14] The alternative approach is under Town Law 12-A which is initiated by resolution of the town board.[15] The procedures and relative advantages of each approach will be discussed in Chapter III of this Report.

Regardless of which approach is taken, the district cannot be established or extended into the boundaries of an incorporated city. The district can take in part or all of an incorporated village but only with the consent of the village board, which consent would be subject to a permissive referendum.[16]

c. Town Improvement Approach

Between the town-wide approach and the special district approach there is a third way – the town improvement approach which is analogous to the funding of "local improvements" for cities and villages. This approach is authorized for drainage improvements pursuant to Town Law Article 12-C and is as broad as that allowed for special districts.[17] A town drainage improvement is established by one of two alternative procedures similar to those for special improvement districts in Town Law Articles 12 and 12-A.

Unlike the special improvement district, some or all of the capital cost of the town improvements can be assessed against real property owners in the entire town, outside of the area in any village.[18] A town improvement area cannot be established in whole or in part in a village.[19]

Chapter III. of this Report will contrast the relative advantages of this approach with those that can be taken for special improvement districts under Town Law Articles 12 and 12-A as well as with county districts.

d. Town Highways

Highways are important parts of the public infrastructure affecting storm water drainage. There

[13] Town Law §198(2).
[14] Town Law §191.
[15] Town Law §209.
[16] Town Law §§190, 191 and 209.
[17] The authorization for this approach originally limited to towns classified as "suburban towns" pursuant to Town Law Article 3-A (Town Law §54). Town Law Article 12-C extended this approach to all towns.
[18] Town Law 209-q(8).
[19] Town Law §209-q(1)(c).

are two statutes that apply to town highways that that could be used as alternative methods for addressing the MS4 requirements in that specific context.

First, Town Law §200 provides a mechanism to improve particular town roads and highways, including components of the drainage.[20] It may also be used to acquire a private road and perform similar improvements.

Although this provision is within Town Law Article 12, using the process it provides does not result in the establishment of a special improvement district. In fact, it has both features of district and non-district approaches. The improvement may be initiated by petition of fronting or abutting landowners or by town board initiative. The capital cost of the improvement is a charge against the fronting and abutting owners but once the improvement is complete, it is maintained as a general town charge.

Another statute, Highway Law §218, provides specifically for the construction of storm water sewers in town highways. The financing of the capital cost and the maintenance expense for the improvement is similar to that provided for in Town Law §200 with only minor differences. However, this approach can only be utilized upon the filing of a valid petition by a majority of property owners fronting the street or highway.

2. Villages

a. Drainage Improvements Generally

Villages arose to provide services to clusters of residents within what were relatively rural towns. Therefore, the basic approach to funding improvements under the Village Law differs from that under the Town Law because services are being provided more uniformly to inhabitants.

The basic authority for villages to provide for stormwater management is found in Village Law §4-412 which enumerates the powers of the Board of Trustees. It provides that the Board,

> … [m]ay, for the purpose of arresting and preventing damage to property within the village resulting from floods or erosion, construct drains, culverts, dams, bulkheads, and dredge channels, and regulate water courses, ponds and watering placing within or without the village.[21]

As was the case with Town Law §64(11-a), this authorization could be read to limit the circumstances under which and the extent to which a village might undertake stormwater management responsibilities to those that concern flooding and erosion problems.

A village may undertake a stormwater project under its general authority as a municipal-wide project. Alternatively, such a project could be funded as a "local improvement" pursuant to

[20] The authorized improvements to highways include, "…the construction of sidewalks, curbs, gutters, culverts, and other necessary improvements …" (emphasis added).
[21] Village Law §4-412(3)(1).

Village Law §22-2200. Finally, as previously discussed, stormwater management projects can be provided within a village as part of a town special improvement district, assuming the necessary consents are obtained.

In the event the project is handled as a municipal-wide project, funding would be through general revenues, principally derived from real property taxes.

The village also has the option of funding a stormwater project as a local improvement pursuant to Village Law §22-2200. In that event, the village also has the option of charging the entire cost to the benefited properties or may fund it partly from charges to the benefited properties and partly from general village funds.[22]

Provisions relating to the charging of a special or local assessment against the benefited properties are found in Village Law §§22-2200 and 4-412(3)(1). However, these statutes only provide explicitly for the method of establishing charges for the capital cost of drainage improvements.

Although there is no explicit reference to the authority for the village board to maintain drainage facilities, a village that owns drainage facilities could rely upon Village Law §1-102 as a source of authority to maintain them.[23] However, it is not clear that any local share of the cost of such maintenance could be paid as other than a general village charge. This would be in contrast to town drainage districts and town drainage improvements where there is are explicit provisions that address operation and maintenance.

b. Village Highways and Roads.

Villages are responsible for constructing and maintaining village streets.[24] With one exception, there is no authority to treat these expenses as anything other than a general village expense.

There is an explicit provision related to a village undertaking an improvement to a state highway, or its equivalent, within a village.[25] That statute defines a "highway improvement" to mean the "…filling, excavating, grading, paving, draining and laying of curbs, gutters, sidewalks upon or otherwise improving a state highway." The village has the option of making the cost of the improvement a village charge, a charge against the benefited properties or a combination of the two.

3. Cities

The basic authority granted by the State to cities is contained in the city's charter. Additionally, there are explicit authorities that apply to all cities in the General City law.

[22] See discussion in OSC 87-92.
[23] At least one opinion of the State Comptroller has read the authorization in Village Law §4-412(3(1) broadly enough to encompass activities that would be considered maintenance. See, OSC 90-4.
[24] See, Village Law §§6-602 and 6-612.
[25] Village Law §6-630.

The General City Law contains several general authorizations relating to drainage.

General City Law §20(2) authorizes the acquisition of land "…for the construction, operation and maintenance of drainage channels and structures for the purpose of flood control …." This has been held to authorize the construction of storm sewers.[26]

General City Law §20(7) provides authority "to lay out, establish, construct, maintain, operate, alter and discontinue ….. drainage systems."

Though laid out in less detail in the General City Law, cities, like villages, have the option to develop a drainage improvement as a general municipal project or as a local improvement, i.e. one benefiting a specific portion of the city.

To the extent that the drainage system can be classified as a "local improvement," the General City Law provides authority to pay for the improvement through benefit assessments alone or in combination with general revenues.[27] The reader is directed to Chapter III for a more definitive discussion of local improvements.

Certain smaller cities are governed by the provisions of the Second Class Cities Law.[28] This law permits the apportionment of charges for the construction of a "public sewer not less than three feet in diameter" between general city expenses and a charge upon the benefited property.[29] Given the characteristics of storm sewers, this statute seems to be intended to apply only to sanitary sewer improvements although there is no definitive interpretation.

4. Inter-Municipal Authorities

a. Counties

The geographic limits of the MS4 requirements generally coincide with the political boundaries of cities, towns and villages. Nonetheless, to the extent that a county-owed facility is located in a location where the MS4 requirements apply, it would need to comply with those requirements. The most common example of this relates to county roads.

Unlike the municipal governments discussed above, counties do not have general authority to operate drainage systems. The only authority they do have arises in the context of county drainage districts.[30]

---

[26] In re Schenectady Sewer Assessment, 134 Misc 810, 236 NYS 455 (Supreme Ct., Schenectady Cty., 1929).

[27] General City Law §20(11). Although General City Law §20 talks about storm sewers, the authorizations in General City Law §§20(26) and (26-a) relating to sewer rents appears to be limited to charges for sanitary sewers.

[28] See, Second Class Cities Law §4.

[29] Second Class Cities Law §100.

[30] There are two other related districts that counties can establish who purposes are more focused specifically on flood control – hurricane, flood and shoreline protection districts (County Law Article 5-B; and small watershed protection districts (County Law Article 5-C).

i. Drainage Districts

Drainage districts may be set up for the purpose of managing drainage of stormwater and other waters, either surface or subsurface, within the county.[31] It may consist of two or more noncontiguous areas in which drainage systems are interrelated or interdependent.[32]

The process for a drainage district can be initiated by petition or by the county board of supervisors or the elected county legislative body.[33] The petition process may be initiated by a municipality or district or by 25 owners of taxable real property of record situated within the proposed district.[34] The district is administered as an administrative unit of county government.[35]

The charges for construction and the operation and maintenance of the improvements is a charge against the properties within the district.[36] The charges can be assessed against properties in the district either on an *ad valorum* (according to assessed value) or on a benefit basis.[37]

In addition, county districts may establish "zones of assessment."[38] Where a zone of assessment is established, an *ad valorum* assessment is broken up according to the capital and maintenance costs that are allocable to each zone.[39] This tool is valuable because county districts are often comprised of many individual systems that vary significantly in terms of capital and maintenance costs. This permits a more equitable distribution of the burden.

It should also be noted that when county or town drainage districts are consolidated with other districts or with extensions to the same district there is authority to preserve different rate structures in the newly consolidated district. See County Law §§274-a and 274-b and Town Law §§206 and 206-a.

2. Other County Districts

There are three other types of county districts that are created and administered in much the same way as the county drainage district – the hurricane protection, flood and shoreline erosion control districts, the small watershed protection districts and the soil and water conservation districts..[40] The purpose of these districts is similar to the drainage district but each has a different emphasis. For the purpose of the MS4 program, there is no advantage to consider anything other than the drainage district.

---

[31] County Law §250(4).
[32] County Law §250(6).
[33] County Law §§253(1) and 150-a(2).
[34] County Law §253(1)
[35] County Law §261; Tom Sawyer Motor Inns, Inc. v. Chemung County Sewer Dist. No. 1, 33 A.D.2d 720, 305 N.Y.S.2d 408 (3d Dept. 1969).
[36] County Law §270.
[37] County Law §§270 and 271.
[38] County Law §256.
[39] County Law §270.
[40] See, County Law Articles 5-B and 5-C and the Soil and Conservation Districts Law and County Law §223.

Chapter 3 of this Report will provide a comparison between the advantages of the county district approach and those provided under legislation for town special improvement districts or town improvements.

b. Municipal Cooperation under the GML

In addition to the authority that the units of local government have to act individually, the General Municipal Law provides authority for cooperative actions amongst them.

The principal authorization for joint municipal drainage projects is pursuant to GML Article 5-G. That statute permits municipalities to undertake joint services and/or a joint drainage project on a cooperative or contract basis, functions that they are individually authorized to undertake.[41]

In addition, Article 5-G also authorizes municipalities to adopt a mutual sharing plan in order to undertake or receive any joint service on behalf of or by a municipality which has adopted such a plan.[42] Thus a single municipality could provide drainage services on a contract basis to another municipality.

Article 5-G provides that the formula for allocating revenues and costs for these joint undertakings can be done on the basis of the ratio of full value assessments of real property, the amount of services rendered, benefits received or conferred or on any other equitable basis.[43] It is important to understand that this allocation is strictly between the participating municipalities. These municipalities, in turn, must then raise the necessary funds through the methods that are otherwise authorized.

General Municipal Law Article 5-F is a more specific authorization for municipalities to enter into contracts to acquire, construct, operate and maintain common drainage facilities.[44] Most, if not all, that could be accomplished under this statute can be done under the later-adopted Article 5-G. Here too, the relative share each municipality would have to pay would be governed by contract among them. The statute provides that each municipality would meet the cost of its obligation through tax revenues or borrowing pursuant to the local finance law.[45]

General Municipal Law Article 5-E is a companion of Article 5-F. It authorizes one municipality to construct drainage facilities in excess of its own needs to be used for another municipality.[46] The costs can be supported by contractual charges to the benefited municipality.

c. Drainage Improvement Districts under the ECL

The ECL contains authority for the establishment of drainage improvement districts for the

[41] GML §119-o.
[42] GML §119-o(3).
[43] GML §119o(2).
[44] As used in this statute, municipality means a town, village, city, town on behalf of a town drainage district or county on behalf of a county drainage district.
[45] GML §119-j.
[46] GML 119-c.

purpose of providing for the drainage of agricultural lands.[47] Because of the limited purpose of these districts, it is doubtful that such a district would be available in most, if not all, of the urban communities that are subject to the MS4 requirement. Nonetheless, the framework for establishing these districts and the manner of funding them could be instructive as a model.

Drainage improvement districts should generally include all portions of a natural drainage basin.[48] The districts would be independent legal entities with the authority of eminent domain, taxation and assessment.[49]

The proceeding for forming such a districts commences upon the filing of a petition of three or more landowners.[50] Ultimately, the determination to approve the district formation is in the hands of the DEC.[51]

The district is funded based on benefit assessments known as "drainage enhancements." These charges are defined to be the increase in value of a parcel that will occur as a result of improving it by the drainage works.[52]

B. General Authorities

Because New York is a "home rule" state, there are statutory provisions that give municipalities the authority to adopt local laws that go beyond or differ from the explicit authorizations discussed above.[53] The principal limitations on the use of this power is that it not be inconsistent with the state constitution or any law of general applicability or be in an area where the Legislature, either explicitly or implicitly, prohibited the use of such power.[54] This authority is particularly broad with respect to matters relating to property and affairs of local government.

This authority allows municipalities to tailor requirements to local needs. Of particular relevance to financing the MS4 program are the following authorities from Municipal Home Rule Law §10.

> Levying, administration and collection of local taxes authorized by the legislature and assessments for local improvements. (1)(ii)(a)(8) and (a)(9).[55]
>
> Fixing, levying, collection and administration of rentals, charges, rates, fees, and penalties with respect to local property and programs. (1)(ii)(a)(9-a).

[47] ECL Article 15 title 19.
[48] ECL §15-1905(3).
[49] ECL §15-1905(2).
[50] ECL §15-1911.
[51] ECL §15-1915.
[52] ECL §15-1919.
[53] The source of authority for these powers in Article IX of the State Constitution and the Statute of Local Government. The enumeration of these general authorities is in the Municipal Home Rule Law.
[54] MHRL §10(1)(i) and (ii).
[55] OSC 85-24 holds these provisions refer only to the act of levying charges that have already been ascertained and does not provide independent authority to establish assessments on anything other than a benefit basis.

Authorization for benefit assessments for local improvements. (1)(ii)(c)(3), (d)(2), (e2).[56]

Supersession of village law provisions on matters relating to the village's property, affairs or government. (1)(ii)(e)(3).[57]

Provision for enforcement of local laws by civil penalty or fine. (4)(b).

1. Using the MHRL to Adopt Alternative Approaches for Funding Drainage Improvements.

In general, municipalities have had limited success in using the authority in the MHRL to establish alternative schemes for financing any aspect of public works projects. There have been two principal objections to doing so.

In several cases, even where the law is silent, courts have found that the financing scheme in other statutes was intended by the Legislature to be exclusive. As such, they have held that the Legislature implicitly, restricted the use of the MHRL.[58]

The courts have also held that some of the alternative financing schemes have amounted to a tax. According to the state constitution, a tax needs explicit state legislative authorization and hence these schemes failed due to inconsistency with the state constitution which requires state legislative authorization.[59]

While the Village and General City Laws all have provisions relating to the funding of local improvements through benefit assessments, even if these provisions are unclear about funding the operation and maintenance of these facilities through benefit assessments, the MHRL provides adequate alternative authority for villages and cities doing so.[60]

There are certain principles that have emerged that define the limits of the MHRL provisions that shed light on the degree to which that law can be used to establish alternative approaches to funding the installation, operation and maintenance of stormwater infrastructure.

a. Where there is a comprehensive scheme of general applicability for funding, the MHRL

[56] This authorization extends only to cities, towns and villages. The authorization for towns requires consistency with the provisions in Town Law articles 12, 12-A and 12-C.

[57] However, Village Law §5-532 explicitly provides that no local law can be adopted changing, amending or superseding the provisions of Village Law Article 5 which governs village finances. A similar provision exists for the supersession of Town Law provisions but it does not apply to Articles 8 (Town Finances), 12, 12-A or 12-C.

[58] See, Albany Area Bldrs. Assn. v. Town of Guilderland, 141 A.D.2d 293, aff'd 74 N.Y.2d 372 (1989); Coconato v. Town of Esopus, 152 A.D.2d 39 (3d Dep't, 1989).

[59] Albany Area Bldrs. Assn, v. Town of Guilderland; Coconato v. Town of Esopus; Philips v. Town of Clifton Park Water Authority, 286 A.D.2d 834, 730 N.Y.S.2d 565 (3d Dep't, 2001)

[60] MHRL §10(1)(ii)(c)(3) and (e2).

cannot be used to change that scheme.[61] Where no particular funding mechanism is prescribed, then MHRL §10(1)(ii)(a)(9-a) could be used.[62]

As a result of this principle, user fees could not be used to fund town drainage district because of the comprehensive scheme in Town Law Articles 12 and 12-A.[63] However, user fees can be used to fund a municipal-wide function that would otherwise be paid from taxes.[64]

There is no known opinion concerning whether the "scheme" established in Village Law §22-2200 to finance local improvements would be considered comprehensive. Although there is no known opinion regarding the provisions related to local improvments in General City Law §20(11), given its minimal content, it is less likely that it would be found to constitute a comprehensive scheme, making it more likely that a city could adopt a user fee under MHRL authority.

b. To the extent that MHRL §10(1)(ii)(a)(9-a) is used as the basis to establish a user fee, the fee cannot be a disguised tax. It must have two characteristics: (1) only those who use the service can be charged; and (2) the charge/fee must bear a rational relationship to the use or benefit.[65]

A user fee can be used to recover the costs of providing a service but cannot be used to generate funds beyond those costs to offset other governmental costs.[66] The municipality can set varying rates based on varying benefits so long as there is a rational basis for doing so.[67]

c. If a user fee is established pursuant to MHRL §10(1)(ii)(a)(9-a), enforcement of delinquent charges cannot be enforced in the same manner as delinquent tax enforcement.[68] The municipality retains contractual remedies (suit for monetary damages, cut off services) or there is authority to adopt a local law under the same provision to allow a filing of a lien against the benefited property.[69]

The user fee can be charged on whatever schedule desired by the municipality or even included as a separate item on tax bills.[70]

2. Using the MHRL for Funding Other Aspects of the MS4 Program

In addition to paying for the cost of installing or operating and maintaining drainage

---

[61] OSC 91-61 citing Coconato v. Town of Esopus.
[62] OSC 94-17.
[63] OSC 90-61 and MHRL §10(1)(ii)(d)(3) which precludes a town from superseding provisions of the Town Law relating to special or improvement districts.
[64] OSC 92-18.
[65] OSC 94-17; OSC 92-18; Elmwood – Utica House, Inc. v. Buffalo Sewer Authority, 65 N.Y.2d 489, 492 N.Y.S.2d 931 (1985); Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y.2d 52, 412 N.Y.S. 2d 821 (1978).
[66] OSC 92-18; cf., C.I.D. Landfill, Inc. v New York State Department of Environmental Conservation, 167 A.D.2d 827, 561 N.Y.S.2d 936 (4th Dep't. 1990).
[67] OSC 92-18; Elmwood-Utica House.
[68] OSC 2004-7
[69] OSC 2005-1; OSC 94-17; OSC 92-18
[70] OSC 88-2.

systems where the cost of operating those systems is comparable.

c. Enforcement against Delinquent Charges

Each of the varying types of charges and assessments supporting the drainage improvement has an enforcement mechanism in the event of delinquent payments. A full discussion of these mechanisms was provided in Chapter 2.B.1.

d. Administrative Simplicity

The municipality should consider the need to segregate the funding of separate drainage projects with the benefits from combining the areas served by several projects into a single district in order to simplify administration.

In addition, municipalities should also consider the benefits of operating drainage improvements through a county district for similar reasons. County districts may also be useful in addressing issues that arise from the flow of stormwaters from one local jurisdiction into another.

Finally, municipalities should take into account the complexities in establishing and administering separate assessment rolls that would be required for any special benefit assessment.

D. Chart Comparing Town and County Districts and Town Improvements

The chart below compares various issues related to the town drainage district, town drainage improvement and the county drainage improvement. Inclusion of villages within town or county districts is discussed in the chart. Although there is authority to do local improvement in jurisdictions other than towns (in particular villages and cities), the law provides little detail with respect to the items being compared.

	TOWN DRAINAGE DISTRICT	**TOWN DRAINAGE IMPROVEMENT**[114]	**COUNTY DRAINAGE DISTRICT**
1. Formation	See discussion above	See discussion above	See discussion above
2. Eligible Costs to be Paid by District	Lay out, open, design, construct, maintain and alter drains, storm water sewers, pumping stations or necessary works appurtenant thereto, and improve and water course; contract for supplying storm sewage facilities; contract for the purchase of any trunk sewer, storm sewer system, pumping station, rights of way and other interests in land; provide for the operation and maintenance of any such facilities; regulate private drains and storm sewers and prescribe the method of connections.[115]	Same as for Town District.[116]	All contracts and costs of land and other interests in real property; the costs of erection of necessary facilities and appurtenances for operation or administration of the improvement; the costs of necessary original equipment for operation or administration of the improvement; printing, publishing and interests on loans; legal and engineering services; and all other expenses incurred or occasioned by reason of the establishment of the district and the furnishing of the drainage improvement. Can also include the costs of establishing the district and well as cost of services of county attorney, county engineer or other salaried county employee.[117]
3. Geographic Area Encompassed by the District	Any part of a town outside of a village. Can include part of a village if the village consents. Need not be contiguous.[118]	Any part of a town outside of a village. Cannot include area within a village	Must include multiple municipalities. Part of any town, village or city within the county so long as the district is contiguous or, if non-contiguous, the drainage system in the non-contiguous areas

[114] The town drainage improvement is analogous to the local improvements that are available for cities and villages. The town drainage improvement has a comprehensive scheme set forth in Town Law Article 12-C while, by contrast, there is a less extensive scheme laid out in Village Law Article 22 and only a single reference to local improvements for cities in General City Law § . There is also authority in the Municipal Home Rule Law _____ to establish local improvements that can be used in combination with the sections of the Village Law and General City Law cited above.

[115] Town Law §198(2)

[116] Town Law §209-q(1)(a).

[117] County Law §267.

[118] Town of Colonie v. A.C. Allyn Company, 246 A.D. 354, 286 N.Y.S. 828, (3rd Dept. 1936).

	TOWN DRAINAGE DISTRICT	TOWN DRAINAGE IMPROVEMENT[114]	COUNTY DRAINAGE DISTRICT
			are interrelated and interdependent.
4. Capital Cost of Improvement	Charged as a special assessment on a benefit basis against all properties within the district.	May be charged as a special assessment against (a) the area of the town outside of any village; (b) the benefited property; or (c) both. Any portion assessed against all areas outside of the town are on an assessed value basis. Any portion assessed against the benefited property may be either on a benefit or assessed value basis.	May be charged as a special benefit assessment or as a special ad valorum levy . In addition, zones of assessments may be established within the district and the relative costs of the improvements within the zone allocated to such improvements. In such a case, the basis for the special assessment in any given zone would relate back to the costs allocated to that zone, not the overall costs of the improvements.
5. Maintenance Costs for the Improvement.	Assessed in the same manner as capital charges.	May be charged in the same manner as capital charges or may be assessed on a user fee basis.	Assessed in the same manner as capital charges. Where zones of assessment are established, the basis for maintenance charges is the allocable portion of the maintenance for a particular zone.
6. Capacity in Excess of What is Required for the Properties in the District.	Authorized to construct excess capacity. Costs are a general town (not a district) charge until the service is provided to a subsequently established district or extension within the town.[119]	No provision.	Authorized to construct excess capacity. Costs are a general county (not a district) charge until the service is provided to a subsequently established district or extension within the county.
7. Increase or Improvement of Facilities in Existing District.	Town Board must hold a hearing but determination not subject to permissive referendum or comptroller approval.[120]	No provision.	Legislative body of the county must hold hearing but determination not subject to permissive referendum but still financing would subject to comptroller approval unless under the threshold set.[121]

[119] Town Law §192-a. It does not appear that a town can use the facility elsewhere in the town unless and until that area is part of a drainage district or an extension of such a district.

[120] Town Law §202-b. Paragraph 5 of that statute provides that Comptroller approval is required for towns wholly or partly in the Adirondack Park whose state-owned land is at least 30% of the town's total assessed value.

[121] County Law §268.

	TOWN DRAINAGE DISTRICT	TOWN DRAINAGE IMPROVEMENT[114]	COUNTY DRAINAGE DISTRICT
8. Extensions of the District.	Extensions established in the same way as original district. Costs are levied in extension as they are in the original district. For purposes of assessing costs, the extension may be handled independently or may be incorporated into the existing district .[122]	No provision.	Extensions established in the same way as original district. Costs are levied in extension as they are in the original district. For purposes of assessing costs, the extension may be handled independently or may be incorporated into the existing district.[123]
9. Consolidation of Two or More Districts.	One or more districts may be merged. Districts may be for same or different purposes. Merger proceeding determines the basis for assessments in the new district (if different in existing districts).[124]	No provision.	One or more districts may be merged. Districts may be for same or different purposes. Merger proceeding determines the basis for assessments in the new district (if different in existing districts).[125]
10. Reduction in the Size of the District.	Cannot be done if an improvement has been constructed without special state legislation.	No provision.	Cannot be done if an improvement has been constructed without special state legislation.
11. Dissolution of the District.	Drainage district may be dissolved and converted to a town drainage improvement. All charges would assessed in the same manner as a drainage improvement.[126]	Not applicable since there is no entity or administrative unit to dissolve.	Cannot be done if an improvement has been constructed without special state legislation.
12. Administration of the District.	District is treated as administrative unit of the town.	Improvement is administered directly by the town board just as any other part of town government.	District is treated as administrative unit of the county.[127]
13. Other Features	Separate proceeding allowed for construction of lateral drains.	Town may lease town improvement to another	County district may not acquire existing municipal facilities except by consent of the municipal owner.

[122] Town Law §206-a.
[123] County Law §§274 and 274-b.
[124] Town Law §206.
[125] County Law §274-a.
[126] Town Law §209-r.
[127] Shields v Dinga, 222 AD2d 816, 634 NYS2d 790 (3d Dep't. 1995); Tom Sawyer Motor Inns, Inc v Chemung County Sewer Dist No. 1, 33 AD2d 720, 305 NYS 2d 408 (3d Dep't. 1969); OpAttGen (Inf) 92-3.

	TOWN DRAINAGE DISTRICT	TOWN DRAINAGE IMPROVEMENT[114]	COUNTY DRAINAGE DISTRICT
		municipality.	

Chapter 4 Special Assessments and User Fee.

A. General Concepts.

There are three approaches used in New York for raising funds from benefited areas (as contrasted with municipality-wide charges) to defray the capital costs and operation and maintenance expenses relative to a public improvement. These approaches are: special *ad valorum* levies, special assessments and user fees. Each has distinct characteristics that will be discussed and contrasted below.

Special *ad valorum* levies means "…a charge imposed upon benefited real property in the same manner and at the same time as taxes for municipal purposes to defray the cost, including operation and maintenance, of a special district improvement or service."[128] The apportionment of the charges is on the basis of assessed value. These charges cannot be imposed on behalf of a city or village.[129]

Special assessments are "..charges imposed upon benefited real property in proportion to the benefit received by such property to defray the cost, including operation and maintenance, of a special district improvement or service or of a special improvement or service."[130] Courts have repeatedly held that the benefit a property receives means the amount by which its value is increased by the improvement.[131] There may be no correlation between assessed value and benefit. Whether there is such a correlation and to what extent it exists, depends on the specifics of each situation. In some cases, the benefits may be similar or proportional to the assessed value. In other cases, properties with relatively higher assessments could receive little benefit from an improvement while those with a relatively lower assessment could greatly benefit. In short, the benefit approach is a fundamentally different one to apportioning cost than the apportionment according to assessed value. Special assessments are also assessed together with real property taxes.

There is no general definition in New York statutes for the term "user fee." Several statutes user the term "rents" or "rates" equivalently.[132] General Municipal Law Article 14-F provides authorization for all municipalities to adopt user fees in the form of sewer rents. It defines sewer rents as "A scale of annual charges …..for the use of a sewer system or any parts thereof."[133] User fees are usually billed on a schedule separate and distinct from real property taxes.

The following chart shows where each of the three methods is authorized currently under New York State law in the MS4 context.

---

[128] RPTL §102(14).
[129] RPTL §102(14).
[130] RPTL §102(15).
[131] Kermani v. Town Board of Guilderland, 47 AD2d 694, 364 NYS2d 251 (3d Dept. 1975), reversed on other grounds, 40 NY2d 854, 387 NYS2d 1001 (1976); In re West 231st St in City of New York, 160 A.D. 472, 145 N.Y.S. 537 (1st Dept. 1914), aff'd 212 N.Y. 590 (1914). 99 NY Jur Taxation and Assessment §868..
[132] GML Article 14-F is entitled "Sewer Rent Law"; Town Law §198(1)(i) refers to "sewer rents."; Town Law §198(3)(d) refers to "water rates"; County Law §266.
[133] GML §451(1).

Chart showing where each of the three methods of raising funds authorized by New York State is applied in MS4 context

	Special *Ad Valorum* Levy	Special Assessment	User Fee	General Revenue
Town Drainage District	---	x	---	---
Town Drainage Improvement	x[134]	x[135]	x[136]	x[137]
County Drainage District	x	x	----	----
City or Village Drainage Improvement	----	x[138]	x[139]	x

In each case where the use of other than general tax revenues are authorized, the statute defines those costs that are so funded. For example, in town drainage districts which are funded by benefit assessments, eligible costs include costs associated with the power to

> [L]ay out, open, design, construct, maintain and alter drains, storm water sewers, pumping stations or necessary works appurtenant thereto, and improve any water course for the benefit of any drainage district in such town; contract with any person or corporation, municipal or otherwise, for supplying the inhabitants of such drainage district with storm sewerage facilities; contract for the purchase from any person or corporation, municipal or otherwise, of any trunk sewer, sewer system, pumping station, rights of way and appurtenances, for any such purpose or purposes… Town Law §198(2).

Although the construction and maintenance of any facility built under this authorization can be funded through benefit assessments in the district, it is open to question whether the other costs (namely, regulatory costs such as enforcement against illegal discharges and program development costs such as public education) could be similarly funded.

Similar issues are raised in the context of every comparable authorization. In short, these statutes do not fully anticipate all the requirements of the MS4 program. Therefore, while the local share of regulatory and program development costs can be funded through general tax revenues, it is speculative whether any of the methodologies discussed in this chapter could be used for those purposes under current law.

B. Who is Subject to These Charges?

1. Special *Ad Valorum* Levies and Special Assessments

[134] Capital charges within the benefited area may be made on as an *ad valorum* levy.
[135] Capital charges within the benefited area may be made on as a special assessment.
[136] This relates only to operation and maintenance charges within the benefited area.
[137] This relates to all charges within the town outside of any villages.
[138] This relates to capital charges on the benefited properties.
[139] May be permissible under MHRL §10(1)(ii)(a)(9-a).

Real property taxes are based on the value of realty as defined in the real property tax law. All real property is subject to such taxes unless exempt. To the extent that the cost of the MS4 program is paid from real property tax revenues, exempt properties do not contribute and those that are not exempt contribute based on their assessed value.

Exemption from special *ad valorum* levies and special assessments is governed by Real Property Tax Law §490. That section exempts many of the same properties from these charges. However, all of these exemptions are made inapplicable where the levy is to pay for the capital cost of drainage improvements.

Thus properties that would be exempt from paying real property tax assessments are still liable for the cost of drainage improvements raised through the special *ad valorum* levy or special assessment. However, it is important to note that the exemptions from real property assessments that are made applicable to special *ad valorum* levies and special assessments would still apply where operation and maintenance charges are at issue.[140]

2. User Fees

User fees are not governed by the real property tax law. Instead, they are considered to be payment for the provision of services. User fees are not based on the value of the property served (existing or increased) but rather on the use of a facility.[141] Therefore, the real property tax law exemptions have no applicability.[142] All properties that are using a drainage system would be assessed.

In the case of water and sewer improvements, it has been held that vacant lands that are not connected to the system can not be charged a user fee.[143] Similarly, it has been held that properties that are connected can be charged even if they are not currently occupied and using the system.[144]

There are no cases that address this issue in the context of user fees for drainage improvements. However, it is unlikely that the same principles would apply. Unlike sewer and water facilities, the property would not be "connected to" a drainage improvement but rather "be using" the drainage system so long as storm water was being collected that would otherwise accumulate on the property. Thus, an educated guess would be that user charges against vacant properties would be sustained.

C.. What is the Basis for Setting these Charges?

1. Special *Ad Valorum* Levies

Special *ad valorum* levies are imposed on benefited property based on appraised value. The same assessments set by assessing units for real property tax purposes serve as the basis for a special *ad valorum* levy.

---

[140] See also, YMCA v. Rochester Pure Waters District, 37 NY2d 371, 372 NYS2d 633 (1975).

[141] Notwithstanding, some statutes permit delinquent user charges to be relevied into tax bills and enforced in the same manner as delinquent taxes.

[142] YMCA v. Rochester Pure Water District

[143] Rock Hill Sewerage Disposal Corp. v. Thompson, 27 A.D.2d 626 276 N.Y.S.2d 188 (3d Dep't. 1966)

[144] Kindead v. Town of Round Lake, 187 A.D.2d 905, 591 N.Y.S.2d 80 (3d Dep't. 1992).

2. Special Assessments

Special assessments are imposed on benefited property in proportion to the benefit received. Courts have repeatedly ruled that the measure a property has benefited is the increased value to the property caused by the improvement.[145] The issue then becomes how that property value increase is measured.

There is no requirement that the measurement of the property value increase be precise.[146] If no method is provided by statute (which is the case for drainage districts and improvements), it is up to the discretion of local officials to establish the methodology.[147]

Many different approaches have been taken to derive benefit assessments. It is very difficult to successfully challenge a methodology as its selection is legislative in nature.[148] The basic requirements are that it not be arbitrary or unjust so as to amount to a confiscation of property.[149] Since none of the statutes relating to drainage improvements direct the use of a particular methodology, so long as the basis for assessment is the benefit derived from the improvement, any rational theory or principle that determines benefits may be used.[150]

There are a few principles which have emerged from challenges to these methodologies. The methodology must be applied equally and uniformly to similarly situated properties.[151] Distinctions can be made based upon whether properties are developed or undeveloped[152] or the type of use to which they are devoted.[153] Benefits should be assessed without regard to present use or future purpose.[154]

Though there are several opinions which address the question of whether properties in a drainage district or improvement area are benefited, there are no known opinions regarding specific methodologies for assessing benefits.[155] Outside the context of drainage improvements, there are opinions concerning the appropriateness of using certain methodologies for assessing benefits including front footage, block-by-block rates, zone rates, flat or uniform rates and the use of property values.[156] Other factors that could serve as the basis for apportioning benefit assessments for drainage improvements might include those that have been commonly used to establish user fees in jurisdictions that use so-called drainage utilities, namely 1) impervious area; (2) a combination of impervious area and gross area; (3) impervious area and the percentage of impervious area; and (4) gross property area and the intensity of development.

In fact, in one situation, a special assessment which coincided with pre-existing assessed value (i.e. the

---

[145] See Footnote 3.
[146] YMCA v. Rochester Pure Water District
[147] 99 NY Jur Taxation and Assessment §865.
[148] DWS v. County of Dutchess, 110 A.D.2d 837, 487 N.Y.S.2d 870 (2d Dep't. 1985).
[149] OSC 87-64.
[150] 99 NY Jur Taxation and Assessment §867.
[151] 99 NY Jur Taxation and Assessment §863.
[152] 99 NY Jur Taxation and Assessment §868.
[153] 99 NY Jur Taxation and Assessment §868.
[154] 99 NY Jur Taxation and Assessment §868.
[155] See e.g., Town of Onondaga v. County of Onondaga, 61 A.D.2d 1124, 402 N.Y.S.2d 883, (Ap Div 4th Dep't 1975).
[156] See 99 NY Jur Taxation and Assessment §§869-876.

assessed value prior to the installation of the improvement), essentially indistinguishable from a special *ad valorum* levy, has been upheld under the theory that it was rational to conclude that the properties were benefiting in proportion to their existing assessments.[157] Because users of drainage improvement do not actively operate the drainage, perhaps it is even possible to design a special assessment that would be comparable to a user fee charge. If one were to examine the bases that have been used to set user fees in those jurisdictions where permitted, it is possible that virtually identical approaches labeled as "benefit assessments" might be sustainable.

3. User Fees

There is no statute that authorizes user fees to support operation and maintenance costs for all types of capital improvements. The General Municipal Law Article 14-F authorizes the use of sewer rents for any municipality or municipal district that is operating a waste water system. It establishes specific bases upon which these charges can be based. They are:

> a. the consumption of water on the premises connected with and served by the sewer system or such part or parts thereof;
>
> b. the number and kind of plumbing fixtures on the premises connected with and served by the sewer system or such part or parts thereof;
>
> c. the number of persons served on the premises connected with and served by the sewer system or such part or parts thereof;
>
> d. the volume and character of the sewage, industrial waste and other wastes discharged into the sewer system or such part or parts thereof; or
>
> e. upon any other equitable basis determined by the local legislative body, including but not limited to any combination of the foregoing.[158]

Although these bases are specific to sewer rents, they are illustrative of the concepts that user fees, aka rents, are based upon. There are also no examples in New York prior to the MS4 program of the use of user fees to fund the operation of drainage improvements. In states where the user fee concept has been applied to drainage improvements, the most popular approaches have been based on impervious surface (total or as a percentage of the total land); gross area; and intensity of development.

There are specific authorizations under county,[159] town,[160] village[161] and general city law[162] to use water rates /rents for water supply systems but none of these authorizations sets forth the bases for establishing these charges with the specificity of General Municipal Law Article 14-F.

The only authorization for user fees for drainage improvements is found in Town Law §209-q(12-a).

---

[157] Pikas v. Town of Grand Island, 106 AD2d 887, 482 NYS2d 949 (AD 4th Dept. 1994).
[158] GML §451(1).
[159] County Law §266.
[160] Town Law §§198(3)(d) and 209-q(12-a).
[161] Village Law §11-1118
[162] General City Law §20

> restoration to their original condition of such improvements, not involving original construction, reconstruction, major repairs, alteration, extension or enlargement of such works, ten years. The terms "major repairs" and "minor repairs" as used in this subdivision shall apply only to improvements described in articles six and eight of the conservation law and shall be construed as defined in such article.
>
> 4. Sewer systems. The acquisition, construction or reconstruction of or addition to a sewer system (either sanitary or surface drainage or both), whether or not including purification or disposal plants or buildings, land or rights in land, or original furnishings, equipment, machinery or apparatus, forty years; the replacement of such equipment, machinery or apparatus, thirty years; the replacement of such furnishings, ten years. The sealing of sewer lines by injection under pressure of polymers or other similar materials, substances or chemicals into open pipe joints or other leakage points in a sewer system (either sanitary or surface drainage or both), including inspection and testing procedures incidental thereto, fifteen years.

In addition to the above-quoted provision, the LFL provides a separate financing period for any local improvement, the cost of which is paid in whole or in part from assessments on the benefited properties whenever the proceeds of the sale of the bonds and the aforementioned assessments are paid entirely into a special fund.[191] In such a case, the maximum financing period is set at twelve years.

As discussed in the chapter on districts, this provision might apply in those instances where the capital costs for drainage districts (town or county) or special improvements are financed in whole or in part by benefit assessments.

In those situations where the drainage improvement is merely ancillary to another project, the maximum financing period will depend upon the useful life of the principal use as set forth in LFL §11.00.

Full Faith and Credit of Municipality

As discussed in Chapter III, improvement districts (town or county) are not independent legal entities but rather administrative departments of the municipalities that created them. It follows that the financing of a drainage improvement under the LFL will rely upon the credit of the municipality regardless of whether the borrowing is on behalf of a drainage district, drainage improvement or undertaken as a general municipal improvement. Notwithstanding the fact that the municipality may anticipate (and indeed commit) to repay the indebtedness from the proceeds of special benefit assessments or user fees, the full credit of the municipality must be committed to contract

[191] LFL §11.00(34).

indebtedness for any drainage improvement.[192]

Municipal Purpose

Both the LFL and the State Constitution prohibit any municipality from giving or loaning municipal credit and contracting indebtedness for the purpose of such municipality.[193] This prohibition does not prohibit a municipality from financing the cost of excess drainage facilities[194] or drainage facilities that might be developed in common with other municipalities.[195]

Limitation on Amount of Indebtedness

The law also places limitations on the maximum amount of debt for which a municipality can contract.[196] Municipalities who do construct drainage facilities using their own credit may impact their ability to finance other municipal projects if the municipality's total indebtedness is at or near its statutory debt limit.

[192] LFL §100.00.
[193] LFL §101.00.
[194] LFL §101.00(a)(1)(c).
[195] LFL §§101.00(a)(2)(c) and 101(a)(3).
[196] LFL §§104.00 and 104.10.