



To: Dave Grimaldi
From: Bob Wasserbach
Subject: Land Use Escrow Accounts
Date: January 23, 2013

Please review the information in this memorandum, particularly the section “County Auditor’s Recommendation.” Thank you and please let me know if you have any questions and/or comments.

Background

Monuments

Prior to the enactment of the UDC (Unified Development Code), County Code Article VI, Chapter 32 - Subdivision dealt with “Monuments and Markers.”

- Section 32-411 dealt with the placement of monuments in new subdivisions. This section dealt with the requirement for a developer to place monuments for boundary and street identification purposes.
- Section 32-412 stated “Where permanent monuments are to be placed in the boundary (perimeter) or the street right-of-way of a subdivision, the department of planning requires that, prior to the recordation of a plan, the subdivider must submit a certified check to the county at the rate of two hundred and fifty dollars (\$250.00) per monument to be placed. These moneys shall be forwarded to the county department of finance to be deposited in the department’s escrow account for monuments, and the exact amount will be returned to the payer upon the receipt by the department of certification that the monuments are installed in accordance with these regulations and at the locations shown on the record plan. Certification that the monuments are installed must be issued in writing by a registered land surveyor.”

The Land Use Department informed us how the escrow funds were handled prior to the enactment of the UDC¹:

- The required monuments appeared on the Record Plan. From this, Land Use would determine the number of monuments and then multiply the number of monuments times the \$250 fee. The result would be the amount Land Use would collect from the developer and put in an escrow liability account (“Escrowed Amounts, account number 2280).
- When the developer placed the monuments, the developer would contact the Land Use Department and ask for a release of the funds. The developer would hire a surveyor to physically locate the monuments and ensure they were placed in accordance with the Record Plan. The surveyor would provide a certification that the correct number of monuments had been placed and that they had been placed correctly.
- The Land Use Department would then release the funds to the developer.

¹ Current practice is that funds are no longer collected from the developer. Instead the developer is required to post a surety bond. This is part of the County’s LDIA (Land Development Improvement Agreement) with the developer.

- Land Use informed us that there was not a procedure for Land Use to contact the developer if the developer never contacted the Land Use Department. Therefore, if the developer never contacted the County about obtaining a release of the funds, then the funds would stay in the escrow account.

Improvements

Prior to the enactment of the UDC (Unified Development Code), County Code Article VII, Chapter 32 - Subdivision dealt with "Improvement Specifications."

- Section 32-446, "General Standards", stated "Physical improvements to the property being subdivided shall be provided, constructed, and installed as shown on the record plan, in accordance with this chapter ..."
- Section 32-447, "Specific Compliance", provided for various escrows to be submitted to the County by the developer to ensure performance of various facets of the developer's work. For example, Section 32-447(i) states "... a certificate of occupancy may be issued prior to the satisfactory completion of any required improvements, provided the owner and/or developer posts a bond or escrows funds adequate in amount to cover one hundred (100) percent of the estimated cost of completing incomplete work."

The Land Use Department informed us that they believe the procedures for releasing these escrow funds were similar to those involving monuments (i.e., verification that the work was completed before the funds were released). The general ledger liability account was also account number 2280, "Escrowed Amounts."

Recent Developments Regarding Escrow Accounts

The Land Use Department informed us that they requested guidance several times over the years on how to handle the escrow funds that remained in the account after a development was completed. However, they never received such guidance.

In September 2011, the Acting CFO sent two e-mails to the County Attorney (and Acting CAO) and the County's Deputy CAO requesting that:

- "... the Law Office please investigate whether the County can now have access to these funds and be able to deposit them in the County's General Fund. The current balance in this escrow account is \$1,258,800. I would recommend we keep a 10% reserve in case any old accounts need to be refunded.
- "... the Law Office please investigate whether the County can now have access to these funds and be able to deposit them in the County's General Fund. The current balance in this escrow account is \$544,478.80. I would recommend we keep a 10% reserve in case any old accounts need to be refunded."

The Acting CFO states that he cannot find a response to this e-mail, but that he may have received verbal approval to transfer these monies to the General Fund.

In October 2011, the Law Department requested the Land Use Department to provide detailed information on the monument escrows. The Land Use Department sent an Excel Workbook to Law showing details on the activity in this account. The Land Use Department informed us that they never heard anything back from the Law Department. Our inquiry of the Law Department on January 14, 2013 revealed that the Law Department did not provide Land Use with a legal opinion at that time.

In December 2011, as a result of the June 30, 2011 audit of the County's financial statements, the external auditors placed a Best Practice recommendation in their "Communication of Audit Results and Report to those Charged with Governance." This Best Practice comment stated "Perform a review of stale deposits that may be escheat property."

In February 2012, a Finance Department representative informed the NCCFAC (New Castle County Financial Advisory Council) that there were abandoned escrow deposits that would be transferred to the General Fund in the next fiscal year. From reviewing the minutes from that meeting, this individual apparently said that the external auditors had advised Finance to do so. In July 2012, the County made accounting entries to:

- Debit the general ledger liability account “Escrowed Amounts” (account number 2280) and Credit “Revenues” (account number 4110) for 90% of the escrow funds in the liability account, or \$1,132,920.
- Debit the general ledger liability account “Escrowed Amounts” (account number 2280) and Credit “Revenues” (account number 4110) for 90% of the escrow funds in the liability account, or \$484,080.

Thus, a total of \$1,617,000 was taken into Revenue.

We spoke to the external auditors who informed us that they did not advise Finance to transfer these particular funds to the General Fund, but only to review the funds in the “Escrowed Amounts” general ledger account and determine if any funds should be escheated to the State. (See Best Practice comment above.) Apparently, the Finance Department representative, when addressing NCCFAC, misinterpreted what the external auditors had said.

Issues Presented

1. Is the County subject to the Delaware escheat laws?² If so, does the County have an obligation to escheat any of these funds to the State of Delaware?
2. If the County is not obligated to escheat these funds to the State, do these funds legally belong to New Castle County? Does the County have any affirmative duty to provide notice to the parties who provided the escrow funds?

Our understanding is that Judy Hildick is researching these issues and will be providing a legal opinion. The answers to these issues will guide the accounting treatment of the funds.

County Auditor’s Recommendation

We believe that the accounting entries, transferring these funds from the liability account to the revenue account, should be reversed and that any future accounting entries regarding these funds should be postponed until the Law Department provides an opinion on the issues presented above.

Once the Law Department issues its legal opinion, we’d be glad to discuss the accounting implications of this decision.

County Auditor – Other Thoughts

From our discussion with the Land Use Department, there did not appear to be any procedure, pre-UDC, for the County to reach out to the developer if the developer never asked the County for a release of the escrow funds. There probably should have been a procedure to provide a notice to the developer that the County still held the funds and to inquire on whether the developer would be asking for a release.

It is our understanding that, in the current Code, developer are still required to provide a deposit to guarantee the performance of various items (including monuments), and that the developer has three options: (1) a letter of credit from a financial institution, (2) a performance bond, or (3) a cash escrow deposit. The Land Use Department informed us that, in Fiscal Year 2012, \$273,530 was received from developers in performance escrow deposits in cash. Please let us know if you wish us to analyze the controls over these funds.

² On December 18, 2001, an attorney in the County’s Law Department issued an e-mail to the Treasury area of the Finance Department stating, in regard to the Delaware escheat laws, “I would say that we are exempt. 12 Del. C. s 1199(a) requires holders of abandoned property to file annual reports with the State Escheator, and it is the filing of those reports that leads to the eventual payment or delivery of the abandoned property (s1201). Pursuant to s1199 C), however, ‘The requirements of this section for filing an annual report shall not apply to municipal corporations or counties and the fiscal officers thereof.’ Since we don’t have to file reports, I don’t think the rest of the process kicks in.” As noted above, the Law Department is re-evaluating this issue.

Cc: Mike Coupe
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