



MICHAEL T. FACKLER
GENERAL COUNSEL
CITY OF JACKSONVILLE

OFFICE OF GENERAL COUNSEL

REGINA ROSS
Chief Legal Counsel

117 W. Duval Street, Suite 480 | Jacksonville, FL 32202
Direct: (904) 255-5059 | Fax: (904) 255-5120
ReginaR@coj.net | Rossrd@jea.com

MEMORANDUM

TO: Steve Diebenow, Driver, McAfee, Hawthorne & Diebenow, PLLC, on behalf of Mayo Clinic

FROM: Regina Ross, Chief Legal Counsel, JEA

RE: Water and Sewer Capacity Charges for the Mayo Clinic Campus

DATE: December 18, 2024

This memorandum addresses the outstanding water and sewer capacity charges owed to JEA for the water and sewer connections at the Mayo Clinic (“Mayo”) campus on San Pablo Road in Jacksonville and Mayo’s position that it is exempt from such charges pursuant to a 1986 agreement with the City of Jacksonville (the “City”), predecessor to JEA as owner and operator of the water and sewer systems within the City. JEA understands that Mayo’s position on the claimed exemption is based on the arguments detailed in an October 23, 2024 memorandum prepared on Mayo’s behalf by Driver, McAfee, Hawthorne & Diebenow, PLLC (the “Mayo Memo”). JEA is not aware of any other potential grounds for an exemption. Accordingly, this memorandum reviews and analyzes the history of water usage and sewer discharge at the Mayo campus, the 1986 agreement, and the interpretation of the agreement set forth in the Mayo Memo, before concluding that capacity charges are due for Mayo’s current level water and sewer usage and that additional charges will be due in order for its recent and planned construction on the campus to utilize the JEA water and sewer systems.

I. The Mayo Campus’s Water and Sewer Usage and Capacity Charges

A brief review of the Mayo campus and its water and sewer usage is useful to understand how capacity charges and a claimed exemption arose as issues. The Mayo campus is primarily served by a 10” master water meter that was installed in 1995,¹ before ownership and operation

¹ Mayo also has a 2” water meter at 4420 Mary Brigh Drive, for which it initially paid \$43,223.62 in capacity charges in 2020, though \$34,918.80 of that amount was later refunded after an adjustment was made for credits from prior payments in 1998.

of the water and sewer systems were transferred from the City to JEA in 1997. JEA's billing system indicates that Mayo had been credited capacity for 10,219 fixture-units in 1995, which, at 13.9 gallons per day (gpd) per fixture-unit, equated to 142,044 gpd of total consumption. Between 1995 and 2022, Mayo's average daily consumption grew by 250,550 gpd to 392,594 gpd, representing 276% of the initial capacity paid for in 1995.

To date, JEA has not identified any records indicating that the onsite improvements and increased consumption on the campus were approved by JEA as part of its standard submission and review process that would typically accompany development of this magnitude. Instead, the scope of improvements and extent of increased consumption came to JEA's attention in 2022 during a pre-construction meeting with a Mayo contractor regarding upcoming projects on the campus. Since 2022, average consumption has increased another 251,235 gpd, for a total average consumption of 643,830 gpd, or 453% of the initial capacity approved in 1995.

Mayo is now in, or has recently completed, construction on five major projects on the campus: a new central utility plant, an integrated oncology building, a vertical expansion of the main hospital, a laundry expansion, and a Hilton hotel. Though Mayo has not provided JEA with projected flows for each component, the projects are expected to result in a considerable increase in water and sewer consumption of at least 121,360 gpd.²

In accordance with Section 105(g) of the JEA Water and Sewer System Tariff Document, attached here as Exhibit 1, additional capacity charges are due if the use of a property served by JEA's water and/or sewer system changes such that the water usage and/or sewer discharge increases by more than 20% since the most recent capacity charge payment. Such additional charges are due regardless of whether capacity charges had been imposed or paid at the time of initial connection to the system. The additional charge is to be calculated according to the prevailing rates described in the tariff.

Subject to the prevailing rates for water and plant capacity charges currently in effect as of the date of this memo, approximately \$7.6 million in additional capacity charges are due for the excess consumption on the Mayo campus through 2022,³ and approximately another \$7.6 million for the additional consumption since 2022. Based on the rough estimate of consumption associated with the five major projects set forth above, at least \$3.7 million in additional capacity charges would be due, bringing the total capacity charges due to an estimated \$18.9 million.

² This estimate is based on standard assumptions and the limited information presently available to JEA. Actual flows for the projects and the associated capacity charges are likely to be higher.

³ In an effort to compromise and resolve the dispute regarding unpaid capacity fees, in 2022, JEA staff offered to assess the capacity charges for the 250,550 gpd in increased consumption since 1995 at the rates in effect from 1993 to 2004, which would total \$834,331.50. That offer did not include the additional 251,235 gpd added since 2022 or the flows attributable to the five recent projects on the Mayo campus, neither of which would even arguably fall under the 1993-2004 rate schedule. In any event, Mayo did not accept or counter the offer.

II. The East Water Transmission Main and East Pressure Manifold System Cost Recovery Agreement Between the City and Mayo

The Mayo Memo contends that none of the above capacity charges are due, based on a document entitled “East Water Transmission Main and East Pressure Manifold System Cost Recovery Agreement” (the “Agreement”), a copy of which Mayo provided to JEA and is attached as Exhibit 2 to this memo.⁴ While the Agreement’s date of execution is unclear, the exhibits attached to the Agreement suggest that it was prepared in 1986.

The recitals to the Agreement provide the following context and purpose: the City was constructing a project called the “East Water Transmission Main and East Pressure Manifold System,” Mayo and three other developers⁵ had agreed to pay certain amounts for their pro rata share of the construction, and the parties wished to memorialize in the Agreement their “participat[ion] in cost recovery for the potable water phase and sewer phase of the project.”⁶

The Agreement itself and contemporaneous correspondence indicate that the City, not Mayo, was to construct the project.⁷ (Ex. 2, § 5 (“The water and sewer work *to be performed by the City* to construct the system” (emphasis added); see Mar. 13, 1986 Scott Kelly letter, attached as Exhibit 4.) Mayo would pay the City its pro rata share of the construction costs on a monthly basis upon receipt from the City of an estimate of costs incurred. (Ex. 3, § 5.) Then, for a period of ten years or until paid back in full, the City would reimburse Mayo from a portion of the “cost recovery fees” collected from users who connected to the City’s system within the specified recovery area served by the improvements. Mayo would be exempted from payment of the cost recovery fees.⁸ (*Id.* §§ 1, 2.) While the Agreement includes no specific term or duration, Section 6 states that “[t]he Agreement shall remain in full force and effect *until the Developer and the City have met all the obligations required of them by this Agreement* and shall not be terminated or discontinued without the written consent of both parties.” (*Id.* § 6 (emphasis added). To date, neither JEA nor Mayo has identified any records demonstrating consent to terminate or discontinue the Agreement. Furthermore, neither JEA nor Mayo has identified records demonstrating that Mayo did (or did not) make the required monthly payments for its share of the costs or that the City (or, later, JEA) did (or did not) pay Mayo its portion of the cost recovery fees collected. The Agreement provides that all disagreements between the parties as to the construction or operation of the Agreement are to be resolved by arbitration. (*Id.* § 11.)

⁴ Neither party has yet located the map referenced as part of Exhibit A to the Agreement.

⁵ JEA has located an unsigned agreement with one of the other developers, which is largely identical to the Agreement with Mayo at issue here and is attached as Exhibit 3 to this memo.

⁶ Given the rather limited purpose expressly stated in the Agreement, JEA does not agree with Mayo’s characterization of the Agreement as a “development agreement” establishing the entire relationship between the parties and “fully accounting” for Mayo’s connectivity to the system, rather than simply addressing the parties’ cost-share relationship for a specific City project.

⁷ The Mayo Memo suggests that Mayo constructed the improvements described in the Agreement (*See* Mayo Memo 2, 5), but does not provide support for the suggestion.

⁸ Otherwise, the City would (at least partially) be reimbursing Mayo with money *from* Mayo.

Section 9 of the Agreement, set forth in full below, states that Mayo, while exempt from cost recovery fees, is not exempt from ordinary fees and charges for water and sewer services:

9. *The Developer shall not be required to pay any other charges except those set out herein to secure water and sewer services to the property now owned by the Developer as shown on Exhibit A except that Developer shall be required to pay the following:*

- (a) Water meter tap charges or set fees and sewer tap charges;
- (b) The water pollution control charge in effect at the time the same is due, as uniformly applied throughout the City's water and sewer system;
- (c) Normal promulgated monthly rates for usage;
- (d) Other charges that are uniformly applied throughout the City's water and sewer system.

(*Id.* § 9 (emphasis added).) The Mayo Memo concludes that the language italicized above provides Mayo with an exemption from capacity charges and that such charges do not fit within any of the ordinary fees and charges that are due under subsections (a) through (d).⁹ The remainder of this memorandum, therefore, will address Mayo's conclusion and explain JEA's position that capacity charges are in fact due in this instance.

III. Water Pollution Control Charges Under Section 9 of the Agreement

The intervening thirty-eight years since the Agreement's preparation and execution have left Mayo and JEA with few direct interpretive aids other than its plain language. To date, neither party has provided the other any drafts, contemporaneous correspondence regarding the Agreement,¹⁰ or other parol evidence that would shed light on the meaning of Section 9, in particular. The most helpful information has been legislation from before and at the time of the Agreement relating to the fees and charges listed in Section 9, particularly the "water pollution control charge" that, under subsection (d), Mayo is required to pay.

Research has revealed that the "water pollution control charge" referred to in Section 9(b) of the Agreement was a precursor to, and component of, the current capacity charges now in

⁹ The Mayo Memo states that Mayo's claim of exemption from capacity charges is not based on the express exemption from cost recovery fees provided in the Sections 1 and 2 of the Agreement, so this memo will not address it further either. (Mayo Memo, pg. 3.)

¹⁰ Exhibit 3 to this memo, a March 13, 1986 letter from Scott Kelly, then-Engineering Manager with the City's Department of Public Works, to David Imesch with Mayo, contains some of the same terms as the Agreement regarding procedures for payment of Mayo's share of construction costs and payment of its share of cost recovery fees, including Mayo's exemption from cost recovery fees for the water component of the project. The letter does not mention an exemption from any other City fees or charge or reference Section 9 or the Agreement at all.

effect. The JEA Board made that precise factual finding in 2001 as part of an Eighth Supplemental Resolution issuing a new series of water and sewer review bonds and updating the terms of its master bond resolution, attached hereto as Exhibit 5. The primary purpose of the resolution was to specifically include capacity charges within the sources of revenue pledged under the bond. In identifying what constituted capacity charges, the Board amended the master bond resolution to add the following definition:

Capacity Charges shall mean water and sewer capacity charges under Ordinance 93-138-148, enacted by the City Council of the City on April 13, 1993, *a portion of which were formerly known as water pollution control charges imposed by Ordinance 71-747-334, enacted by the City Council of the City on August 24, 1971.*”

(Ex. 5 at § 3.01 (italics added).) The Board also “found and determined that the Capacity Charges constituted ‘impact fees’ within the meaning of applicable Florida law and, accordingly, that such Capacity Charges may, under such applicable Florida law, be used and applied only for the purposes of paying Costs of expansion of the System or related debt service” (*Id.* § 2.01.) The revenues from such capacity charges were therefore to be segregated in separate accounts or subaccounts and used and applied only for such purposes, with the capacity charges for water further limited to use only for expansion of the water system and capacity charges for sewer limited to expansion of the sewer system. (*Id.* § 2.02.)

A review of City Ordinance 71-747-334—which added a new Part 5 to Chapter 614 of the Ordinance Code and first established the “water pollution control charge”—confirms the Board’s 2001 finding that the charge is indeed equivalent to a component of the current capacity charges, as it had a similar purpose, similar restrictions on use, and largely similar language to that found in the current tariff document. The stated purpose of the ordinance (attached as Exhibit 6 hereto) was that “[t]his Part establishes procedures to facilitate the orderly expansion of the City’s sewerage system and *provides alternatives for funding of such expansion by those benefiting thereby*” (Ex. 7 at 1), which is also the purpose of impact fees such as the current capacity charges, *see* § 163.31801(2), Fla. Stat. (“The Legislature finds that impact fees are an important source of revenue for a local government to use in funding the infrastructure necessitated by new growth.”); *St. Johns Cnty. v. Ne. Fla. Builders Ass’n, Inc.* 583 So. 2d 635, 638 (Fla. 1991); *City of Zephyrhills v. Wood*, 831 So. 2d 223, 224 (Fla. 2d DCA 2002) (“Impact fees, which include connection fees, are the method by which a new user of a municipally-owned water or sewer system pays his or her fair share of the costs that the new use of the system involves.” (citations omitted)). As with the current capacity charges, the water pollution control charge under City Ordinance 71-747-334 was due upon a property first connecting and receiving service from the City’s sewer system after the effective date of the ordinance:

614.506 Water Pollution Control Charge.

(a) Imposed. Except as otherwise provided, every property owner whose property first receives sewer services from the City’s sewage system after

the effective date of this ordinance shall pay to the City, at the same time as connection charges are paid under Section 614.208, a water pollution control charge computed as follows

(Ex. 6 at 4.) Also similar to the current handling of capacity charges (Ex. 1, § 105(g)), additional water pollution control charges would be due in the event of a change in use classification for the property or an increase in the use of more than 20% of the use at the time of connection or the effective date of the ordinance, whichever was later (Ex. 6 at 4-5). And as with capacity charges under the current tariff (Ex. 1, § 105(h)), “[a]ll revenues derived from the water pollution control charges imposed by this section shall be placed in a separate capital improvement fund . . . and shall be used only for the construction or acquisition of additions, extensions, renewals and replacements to the sewage treatment plants and pumping stations of the City’s sewage system, as appropriated from time to time by the Council” (Ex. 6 at 5).

In 1993, the water pollution control charge was amended to add a charge for connection to the water system and renamed “water and sewer capacity charges.” (See Ordinance 93-138-148, § 38, attached as Exhibit 7 hereto.)¹¹ But as before, the revenues from water and sewer capacity charges remained restricted for use only for expansion of water plant capacity and sewer plant capacity, respectively, and were kept in separate capital improvement funds. (Ex. 7 at 54.) In 1997, as part of the transfer of the water and sewer system from the City to JEA, the provisions of the Water and Sewer Code, including those on water and sewer capacity charges, were transferred to JEA, as were the assets in the capital improvement funds, to be utilized for the same limited purposes. (See Ord. 97-229-E, §§ 14, 27, attached as Exhibit 11 hereto.)

As the Mayo Memo acknowledges, under Section 9(b) of the Agreement, Mayo is required to pay the water pollution charge “in effect at the time same is due,” which “includes the contemplation that it could apply to future amounts by the inclusion” of such language. (Mayo Memo, pg. 6.) Such “future applicability” built into the Agreement indicates that Mayo is therefore responsible for the current capacity charges, which are of the same nature and purpose as the water pollution control charge, even with different rates and a different label.¹²

¹¹ Between 1971 and 1993, the entire Ordinance Code had been amended and reorganized on a few occasions, with Chapter 614 being combined into Chapter 612 to create the “Water and Sewer Code” in 1972, and the Water and Sewer Code then being relocated to Chapter 750 when the Ordinance Code was reorganized and readopted in 1983. (See Ord. 72-1169-634, § 1, attached as Exhibit 8 hereto; Ord. 1985-1574-815, attached as Exhibit 9 hereto.) During that time, the water pollution control charge was also revised from, first, being based on equivalent residential connections in 1971, to being charged per fixture unit in 1972, and later charged per gallon of water consumption with a minimum charge in 1981. (See Ex. 6 at 4; Ex. 8 at 22; Ord. 81-924-393, § 4, attached as Exhibit 10 hereto.) “Water and Sewer Capacity Charges” were also assessed per gallon, with a minimum charge per connection, pursuant to Ordinance 93-138-148, (Ex. 7, §38) and are similarly assessed under the current tariff (Ex. 1, § 105(b)).

¹² Line Extension Growth Capacity Charges, a relatively low amount compared to outstanding plant capacity charges, are not addressed in this memo.

The Mayo Memo briefly distinguishes water pollution control charges from the current capacity charges and does so based primarily on the federal district court opinion in *Ivy Steel & Wire Co. v. City of Jacksonville*, 401 F. Supp. 701 (M.D. Fla. 1975). (Mayo Memo, pg. 4 n.22.) *Ivy Steel & Wire Co.* actually supports the conclusion that they are equivalent charges.¹³ The court there was not directly presented with the question, but in holding that the water pollution charge in Ordinance 71-747-334 was constitutional, the court reiterated and upheld as rational the City’s purpose of instituting the charge so as to “impose the cost of the accelerated expansion, renewal and improvement of the sewer system onto those who were creating the immediate need for these increased expenditures, namely, those who were connecting to the system for the first time.” *Ivy Steel & Wire Co.*, 401 F. Supp. 701 at 705. The court’s recognition of the purpose of the water pollution control charge is significant here because that purpose matches the purpose of impact fees such as the current capacity charges, lending further support for the conclusion that they are equivalents.

The Mayo Memo also argues that, if water pollution control charges are the equivalent of capacity charges (as has been shown above), Mayo would still be exempted because it fits within an exception in the ordinance. (Mayo Memo, pg. 5.) A closer review shows, however, that the exception would not apply. Section 614.506(b)(2) of Ordinance 71-747-334 provides that a property owner would be excepted from water pollution control charges if the owner either (i) constructs “at his own expense . . . sewage treatment facilities adequate to serve such property” and turns it over to the City, or (ii) pays the City an amount sufficient to construct such facilities. (Ex. 6 at 4.) But as discussed in Section II, above, under the terms of the Agreement, the City, not Mayo, would construct the water transmission main and sewer pressure manifold system project and Mayo would be reimbursed for its share of the project costs. (Ex. 2, §§ 1-3.) Further, the project would not have addressed the Mayo campus’s sewage (or water) treatment facilities needs at all, as it related solely to water and sewer transmission.

IV. “[U]niformly applied throughout the City’s water and sewer system”

The primary focus of the Mayo Memo is whether the current capacity charges fit within a catchall provision of Section 9(d) of the Agreement that requires Mayo to pay “[o]ther charges that are uniformly applied throughout the City’s water and sewer system.” While the analysis above shows that capacity charges fit best within water pollution control charges, Section 9(b) contains the same wording, so an interpretation of the phrase is still necessary.

¹³ The note in *Ivy Steel & Wire Co.* referenced in the Mayo Memo—that a water pollution control charge is not a charge for the actual, physical connection to the system, like a tap or meter charge, but “merely a charge due at the time of connection and in addition to such connection charges”—is correct as far as it goes. *Id.* at 703. Ordinance 71-747-334 makes that distinction itself. (Ex. 6 at 4 (stating that water pollution control charges are due “at the same time as connection charges are paid under Section 614.208”.) But the relevance of the distinction here is unclear, since the Agreement requires Mayo to pay both tap and meter charges and water pollution control charges. (Ex. 2, § 9(a)-(b).)

Before looking to a dictionary definition to inform an understanding of “uniform” application, the language of the ordinance providing how the water pollution control charge was to actually be applied would, again, be the most instructive here. As noted earlier, since its establishment in 1971, different users and volumes of usage were treated differently for purposes of the water pollution control charge. At the time of the Agreement, the effective rate of the water pollution control charge differentiated between domestic waste and industrial waste and was based on consumption in gpd, with a minimum charge. (*See* Ex. 6 at 4; Ex. 8 at 22-23, Ex. 9, §§ 2-3; Ex. 10, §4.) In certain circumstances, the charge may be deferred and paid by installment, or, as discussed in Section III, above, a user might be excepted entirely from payment. (*See* Ex. 6 at 4.) But the charge was otherwise assessed across the City’s sewerage system upon initial connection. (*See id.* (“every property owner whose property first receives sewer services from the City’s sewerage system . . .”))

The fact of exceptions to the current capacity charge and that different users might be assessed a different rate and/or overall charge, therefore, cannot be a basis for finding the current capacity charges to be not “uniformly applied” and, so, not within the meaning of Section 9(b), since the application of the water pollution control charge at the time of the Agreement had those same features.¹⁴ To conclude otherwise would be to find that water pollution control charges were also not “uniformly applied throughout the City’s water and sewer system” and therefore render Section 9(b) meaningless surplusage from the moment it was written. *See Siedle v. Nat’l Ass’n of Securities Dealers, Inc.*, 248 F. Supp. 2d 1140, 1144 (M.D. Fla. 2002) (“The law compels that a contract should not be interpreted in a manner that would render a word, or term, extraneous.”). Instead, a better reading of the phrase “uniformly applied throughout the City’s water and sewer system” in both Sections 9(b) and (d) would be to contrast such a charge, including its rate structure and exceptions, against charges and fees like the cost recovery fees mentioned earlier in the Agreement, which only applied to specific areas within the system. Such a reading would be consistent with the application of the water pollution control charge at the time of the Agreement and the Agreement’s language, without reading Section 9(b) out of it.¹⁵

¹⁴ The court in *Ivy Steel & Wire Co.* recognized that “[n]o scheme of taxation . . . has yet been devised which is free of all discriminatory impact” and that the water pollution control charge was not unconstitutionally invalid for impacting, or benefiting, different groups in different ways. 401 F. Supp. 701, 705-06 (M.D. Fla. 1975).

¹⁵ Though Section 9(b) and (d) the Agreement are not ambiguous as to whether capacity charges are due here for the reasons described above, in the event a court were to find otherwise, it would not then be required to disregard an interpretation favorable to JEA, the apparent drafter of the agreement, as both parties were sophisticated and able to negotiate its terms. *ECB Atlanta Ctr. Ltd. v. Hilton Hotels Corp.*, 848 F.2d 146, 148 n.5 (11th Cir. 1988) (“This rule [of construction against the drafter] carries little force where, as here, both parties were represented by sophisticated counsel”); 11 *Williston on Contracts* § 32:12 (4th ed.) (“Application of the rule may be further limited by the degree of sophistication of the contracting parties or the degree to which the contract was negotiated.”)

V. Equitable Estoppel

The Mayo Memo contends that JEA should be equitably estopped from collecting capacity charges because, in Mayo's view, JEA has changed its position on the matter and Mayo had reasonably relied on the earlier position to its detriment. (Mayo Memo, pg. 8.) The standard for equitable estoppel is higher with respect to estopping a government entity such as JEA, however, in that "a party must establish all of the element of that doctrine, *and in addition*, rare, and exceptional circumstances" amounting to "unbearably egregious" conduct by the governmental entity "coupled with a supremely adverse effect on an innocent citizen." *Sutron Corp. v. Lake County Water Auth.*, 870 So. 2d 930, 933-34 (Fla. 4th DCA 2004) (emphasis added). For the reasons detailed below, the facts as currently understood by the parties do not support estoppel in this instance.

First, it is unclear what earlier misrepresentation by the City or by JEA that Mayo purportedly relied upon to its detriment, other than the interpretation of the Agreement expressed in the Mayo Memo. But as shown above, Section 9(b) of the Agreement does allow for the collection of capacity charges as the equivalent of water pollution control charges. Estoppel must be based on a party's reasonable reliance upon a misrepresentation of another party, not the first party's own misreading of a contract. *See In re Jet 1 Center, Inc.*, 335 B.R. 771 (Bankr. M.D. Fla. 2005) ("[T]he doctrine of estoppel cannot be used 'to defeat the express terms of a contract.'" (quoting *Cnty v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049, 1051 (Fla. 1997))).

Second, assuming for the sake of argument that either the City or JEA had made a specific misrepresentation that Mayo was exempt from capacity charges (formerly known as water pollution control charges) and that Mayo was reasonable to rely upon that representation rather than the language of the Agreement, for JEA to be estopped from collecting such charges now, Mayo would still need to show that it took action in reliance on that purported misrepresentation and was substantially injured as a result. 22 Fla. Jur. 2d *Estoppel and Waiver* § 64. No information has been provided that Mayo's substantial investment in its San Pablo Road campus was due to its reliance on a purported exemption from capacity charges and that it would not have done so otherwise.

Third, the doctrine of equitable estoppel, rooted in the principles of fair play and essential justice, requires balancing the equities of the parties. *Organized Fishermen of Florida v. Hodel*, 775 F.2d 1544, 1549 (11th Cir. 1985); *Williams v. Guyton*, 167 So. 2d 7, 9 (Fla. 3d DCA 1964). It is not at all certain that a court would find the balance of equities to weigh in Mayo's favor under the facts as presently known. As described in Section II, above, the Agreement required Mayo to initially pay a pro rata contribution of a total of \$511,214.68 towards a project to extend of water and sewer lines to the area of its campus and then be paid back in full by the City from cost recovery fees collected from other new development within the area served by the line extensions. Logically, Sections 1 and 2 of the Agreement exempt Mayo from paying those cost recovery fees to avoid essentially reimbursing itself, but a finding that Mayo then should also be

exempt from capacity charges totaling at least \$18.9 million in exchange for no net outlay would bestow a windfall on Mayo.¹⁶ Equity is unlikely to support such an outcome.

VI. Course of Dealing

Finally, the information the parties have located thus far does not establish the clear course of dealing that the Mayo Memo suggests would support its understanding of the Mayo being exempt from capacity charges. It is certainly true that Mayo has not regularly paid capacity charges, which is the basis for this dispute. But Mayo's nonpayment of capacity charges does not equate to affirmative acceptance by JEA of Mayo's purported exemption. As noted in Section II, above, the Mayo campus is primarily served by a 10" water meter, and developments on the campus were not necessarily submitted to JEA for review. Moreover, JEA's billing records indicate that Mayo was credited in 1995 for capacity charges equivalent to 10,219 fixture-units (or 142,044 gpd) and that, in 2020, Mayo paid capacity charges on the 2" water meter at 4420 Mary Brigh Drive, which, while not the main connection for the campus, is within the area described by the Agreement. To the extent a course of dealing on the payment (or nonpayment) of water pollution control charge or capacity charges had been established between Mayo and JEA, the limited information suggests that Mayo has paid some capacity charges.

VII. Conclusion

When considered in the context of the fees and charges that were assessed at the time of its execution, the Agreement is best understood to exempt Mayo from paying special fees and charges for water and/or sewer service, like cost recovery fees, but not the type of ordinary fees and charges normally assessed throughout the system, like capacity charges. Further, a broad exemption from such fees and charges would not be consistent with the stated purpose of the Agreement or the (relatively) limited consideration exchanged in support thereof.

As the Mayo Memo rightly points out, Mayo and JEA have been partners over the nearly-forty years since the Agreement was executed and as Jacksonville and Northeast Florida have grown exponentially. That course of dealing certainly suggests that the parties can reach a resolution of this matter that recognizes their investments in delivering services to the area, maintaining a healthy business relationship, and providing for the public's best interest.

¹⁶ Such a severely one-sided exchange, if it were truly the intent of the Agreement, might be considered *ultra vires* as benefiting a private party without a valid public purpose. *City of Daytona Beach v. King*, 181 So. 1, 5-6 (Fla. 1938) (holding as *ultra vires* and invalid a contract to expend public funds for the operation of a private golf course); see *P.C.B. P'ship v. City of Largo*, 549 So. 2d 738, 742 (Fla. 2d DCA 1989) (“[T]he municipality will not be estopped to assert the invalidity of a contract which it had no power to execute.”)