
Coates' Canons Blog: Administering Development Regulations and Accounting for Permitting Fees

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Article: <https://canons.sog.unc.edu/administering-development-regulations-and-accounting-for-permitting-fees/>

This entry was posted on September 04, 2018 and is filed under Accounting, Reporting, Auditing, Administration & Enforcement, Community & Economic Development, Development Fees, Development Finance, Development Finance, Fees, Charges, Penalties, Finance & Tax, General Local Government (Miscellaneous), Land Use & Code Enforcement

A 2015 North Carolina law requires that fees collected by the local “inspections department” must stay with that department. A 2018 law requires local finance officers to report to the Local Government Commission the revenues and expenditures “from building inspections.” The basic statutory language of each rule is straightforward, but in practice the meaning and scope is less clear. The lack of clarity around permitting fees arises from the complicated authority for local governments to administer development regulations. This area of law has overlapping terminology, convoluted statutory structure, and varied local government organization and practices. This blog attempts to shed some light on the topic, but questions remain.

Authority for Administering Development Regulations

The broad term “development regulation” encompasses many different categories: zoning and land subdivision, the North Carolina Building Code, local housing codes and unsafe building ordinances, historic preservation, rules for telecommunications towers, land disturbance permitting, and more. In the North Carolina General Statutes, these regulatory activities are authorized under Article 18 of Chapter 153A for counties and Article 19 of Chapter 160A for municipalities. Additionally, some regulations are integrally related to land development even if they also can stand alone. These include regulations for driveway permits, stormwater management, wetland protections, and others.

The administration of these development regulations includes processing permit applications, ensuring construction standards through inspections, and maintaining compliance through enforcement actions. State law provides authority—some general, some specific, and some implied—for local governments to handle those administrative duties.

The principal authorities for administering development regulations are outlined under the statutory Part titled “Building Inspection” (Gen. Stat. Ch. 153A, Art. 18, Part 4 and Ch. 160A, Art. 19, Part 5). The core of this statutory Part is permitting for the State Building Code, but the grant of authority is much broader. As outlined at G.S. 153A-352 and 160A-412, the local inspections department is authorized to enforce State *and local laws* relating to:

- The construction of buildings and other structures;
- The installation of such facilities as plumbing systems, electrical systems, heating systems, refrigeration systems, and air-conditioning systems;
- The maintenance of buildings and other structures in a safe, sanitary, and healthful condition;
- Other matters that may be specified by the [governing board].

These statutes are where cities and counties get authority for processing the variety of development permit applications; making inspections for the building code, zoning ordinance, and housing code compliance; issuing orders to correct violations; bringing judicial action for enforcement; and other administrative duties related to land development regulations. Local governments are explicitly authorized to “enact reasonable and appropriate provisions governing the enforcement of the laws and ordinances and regulations” (G.S. 153A-352 and 160A-412). The permits authorized under G.S. 153A-357 and 160A-417 are those “required by the State Building Code *and any other State or local law or local ordinance or regulation* applicable to the work.” And, state law provides that the inspection department may include inspectors with the titles “housing inspector, zoning inspector, . . . or any other title that is generally descriptive of the duties assigned” (G.S. 153A-351 and 160A-411).

In addition to the general authority for administering development regulations, there are some specific authorizations for

certain development regulations. For example, local governments have specific authority for subdivision permitting (G.S. 153A-332 and 160A-373), periodic inspections for hazardous and unsafe conditions (G.S. 153A-364 and 160A-424), and zoning and subdivision enforcement (G.S. 153A-324 & -123 and 160A-365 & -175).

Beyond these explicit authorizations, local government authority for administering development regulations may be fairly implied from the general regulatory powers. As outlined in the General Statutes, “grants of power [to local governments] shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect” (G.S. 160A-4; similar language for counties at G.S. 153A-4; see also, *Homebuilders Ass’n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 442 S.E.2d 45 (1994)). In other words, if state law grants cities the power to regulate land development and the authority is ambiguous or silent about administration, North Carolina courts may construe the authority broadly to include the power to administer the regulatory scheme through things like permitting, inspections, and enforcement. Those implied powers are not boundless, however (see, *Lanvale Properties, LLC v. Cty. of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012)). As discussed more below, each of the cases cited addressed the authority for charging fees, but the legal reasoning and the statutory rule for broad construction may be extended to other administrative tasks.

Challenge of Categorizing Administration Tasks

Thinking about the administrative duties in practice, they might be categorized broadly into phases related to construction timing: pre-construction, at construction, and post-construction (or ongoing compliance).

Pre-Construction. Before the builder applies for any building permits, the owner or developer may need several pre-construction development permits. A rezoning, a special use permit, and a subdivision plat are each examples of approvals that come in advance of building construction.

At Construction. At the time of construction, the contractor must get the appropriate building permits for the various trades of the building code (building, electrical, plumbing, etc.) as well as the inspections and re-inspections associated with those building code permits. There may also be construction permits beyond the building code such as site plan approval, a land disturbance permit, or a driveway permit.

Post-Construction. After construction, the local government must monitor ongoing compliance of existing development, including zoning compliance, unsafe buildings enforcement, stormwater maintenance, and more. These duties are not typically tied to a particular permit, but rather are enforcement of generally applicable rules.

While these conceptual categories are distinct, the practical application of permitting and inspections do not always fit neatly into categories. Suppose a special use permit includes a specific condition for landscaped buffers. That would be permitted in pre-construction, confirmed through inspections during building construction, and monitored over time for ongoing compliance. Or, what about environmental health permits for well and septic for a new residential subdivision? That also may fit into each category: general approval at the time of preliminary plat approval, permitting and inspection at the time of construction compliance, and ongoing monitoring for public health and safety.

These topics of development regulation are further complicated by the fact that local governments handle these responsibilities differently. The local departments that handle inspection duties have many different names (Permitting, Planning, Inspections, Code Enforcement, Development Services, and others). While a small town may have a single staff person to administer all development regulations and more, in many cities and counties the broad duties that fall under the statutory Part on “Building Inspections” are spread across multiple departments with technical staff. Moreover, duties may be split across jurisdictions where the municipality handles zoning permits but the county handles building permits.

With that framework for administering development regulations in mind, let’s consider the authority for charging fees and the new requirements for accounting.

Permitting Fees Related to Development Regulations

Development regulations are related to many different types of fees. This blog is focused on what I will call *permitting fees*—the charges to an applicant to cover the administrative costs of processing a permit and/or inspection.

Other categories of fees are conceptually different and separately authorized. *Impact fees*, for example, are charges to new development to offset some of the broader public infrastructure and service impacts of the development. *Service fees* are charges to a user related to a specific public service for that user (such as a utility hook-up fee). *Fees-in-lieu* are fees paid by a developer in the place of some other obligation for the development (fees in lieu of road construction, for example). The authorizations and limits on those other types of fees are discussed in other blogs such as David Owens' "School Impact Fees and Development Regulations: Another Round," Kara Millonzi's "System Development Fees are the New Impact Fees," and my own blogs, "Exactions and Subdivision Approval" and "The Koontz Decision and Implications for Development Exactions." These other fee categories are separate topics subject to separate authority. This blog only addresses permitting fees.

Permitting fees are allowed as reasonably necessary to the execution of development regulations (*Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 442 S.E.2d 45 (1994)). That case of the North Carolina Supreme Court recognized the implied authority to charge fees for processing permits, including rezoning applications, subdivision plat review, driveway permits, grading permits, and others. The court made clear, though, that such fees still must be reasonably related to the cost of administering the permit or inspection. In contrast to the implied authority for permitting fees, North Carolina courts have refused to interpret general regulatory powers as authorizing broad school impact fees (see, *Lanvale Properties, LLC v. Cty. of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012)).

Additionally, North Carolina law includes explicit authority for cities and counties to "fix reasonable fees for issuance of permits, inspections, and other services of the inspection department" (G.S. 153A-353 and 160A-414). As outlined above, because of the structure and language of the statutes, the "permits, inspections, and other services of the inspection department" is a broad category that may include zoning, housing code, and other permitting, in addition to building code permits.

Accounting for Fees for "The Inspection Department" and "Building Inspections"

Two recent changes to state law affect the accounting for and reporting of permitting fees. In 2015 the General Assembly amended the statutes concerning permitting fees to specifically state: "All fees collected under the authority set forth in this section shall be used for support of the administration and activities of the inspection department and for no other purpose" (G.S. 153A-354 and 160A-414; S.L. 2015-145). The general notion of this law was straightforward and in line with prior caselaw. It codified the rule that permitting fees should be reasonably related to the cost of administering the permit, and those funds should actually pay for those administrative costs. The precise scope of this law, though, is not perfectly clear.

What are the fees that must be accounted for? The legislative intent and context of the Session Law 2015-145 emphasized building code enforcement. The title of the session law begins "An Act to Reform Building Code Enforcement to Promote Economic Growth . . ." and then listed the various changes the law made to building code administration. Moreover, the law was among the several laws monitored by the House Select Committee on Implementation of Building Code Regulatory Reform. Considering those factors, arguably this new accounting requirement relates only to building code permitting and inspections.

The plain language of the statutes, however, is broader than that. The statutes apply to "[a]ll fees collected under the authority set forth in this section," and concern "the administration and activities of the inspection department." That plainly includes fees for conventional building code permitting, but "this section" authorizes permitting fees for development regulations broadly. As discussed those duties and responsibilities are broader than mere building code enforcement and may be handled by multiple departments under different names. Arguably, a local government must account for all permitting fees collected for all activities authorized under Article 18 for counties and Article 19 for municipalities (planning, zoning, subdivision, historic preservation, housing code, and more).

Either way, it is prudent under this law for a local government to account for the fees and expenditures related to development regulation permitting. Under the caselaw and statutory requirement, permitting fees must be based on a reasonable estimate of the cost of administering the permit and/or inspections. Those costs may include staffing, printing, outside expert review (when required), vehicles and fuel, administrative and facility costs (office, technology, support staff), and other reasonable costs attributable to the permit or inspection. To be clear, a local government need not charge for all estimated costs; permitting and inspections costs commonly are supplemented by the local government's general fund.

While the law does not necessarily require a separate bank account for permitting activities, the local government should take steps to track those revenues and expenses. The local government budget should include a line item for such funds, and the financial accounting should separately track the revenues and expenses related to the duties of the inspections department. As discussed more below, under another new law some of those revenues and expenses must be tracked and reported by type.

In 2018, the General Assembly used the state budget bill, Session Law 2018-5 (Senate Bill 99), to add new requirements for reporting permitting fees and expenses. Under G.S. 159-33.1, each local government must report financial information to the Local Government Commission twice annually, on January 1 and July 1. Session Law 2018-5, section 21.1 added that "the finance officer of each city and county shall include in the statement *the total revenues received from building inspections, by type, and the total expenditures paid from all revenues received, by type.*" Under Session Law 2018-29 (House Bill 948), the reporting requirements become effective June 30, 2019.

In addition to the new statutory language, Section 21.1(b) of Session Law 2018-5 called upon the Local Government Commission to adjust online reporting forms to address the new requirements. The session law provided that "[t]he Local Government Commission shall incorporate in information technology projects to assist local governments in accounting and financial management one or more line items on which each city and county shall provide the total revenue received from building inspections and the total expenditures paid from the revenue received."

Moreover, Session Law 2018-29 added additional policy guidance. Section 4.(a) states:

"In addition to, and in conjunction with, Section 21.1 of Senate Bill 99, 2018 Regular Session, the Secretary of the Local Government Commission, upon consultation with the Department of Insurance, shall revise the reporting requirements for units of local government under G.S. 159-33.1 to include information sufficient to track whether the fees collected by local inspection departments under G.S. 153A-354 and G.S. 160A-414 are used in accordance with those statutes, if the general fund of the local government supplements the inspection department and if the local inspection department is supplementing the general fund of the local government."

The Local Government Commission posted guidance for local governments noting that the reporting requirement applies to fees charged under G.S. 153A-354 and 160A-414. Still, the question remains: What are the permitting fees to be reported? Is it the narrow category of permits under the North Carolina Building Code, or the broader category of activities authorized under the statutory Part on Building Inspections?

There is a good argument that this financial reporting requirement is limited to permitting fees and expenditures related to building code permits. First, the plain language of G.S. 159-33.1 ("received from building inspections") can be contrasted with the broader fee authority under G.S. 153A-354 and 160A-414 that refers to "fees for issuance of permits, inspections, and other services of the inspection department." Second, the language of G.S. 159-33.1 for the new financial reporting states that revenues and expenditures shall be reported "by type." That reasonably may be interpreted to refer to the different trades of the North Carolina Building Code (building, plumbing, electrical, and others). The guidance added by Session Law 2018-29 calls upon the Local Government Commission to consult with the Department of Insurance, and it is the Department of Insurance that oversees the North Carolina Building Code and certification of building code inspectors. The Department of Insurance is not involved in local zoning permits or housing code enforcement. All of that supports a narrow interpretation that the new reporting requirement applies only to revenues and expenditures from building inspections under the North Carolina Building Code.

Furthermore, this interpretation aligns with the context of legislative history. Session Law 2018-29, which gives guidance for the Local Government Commission, is focused on building code regulatory reform and arose from the House Select Committee on Implementation of Building Code Regulatory Reform Legislation.

Under this narrower interpretation, the “types” to be reported might include permitting and inspections for the following: building code, electrical code, mechanical code, plumbing code, fire code, energy code, and fuel gas code.

There is, however, also an interpretation of the statute that the financial reporting applies to a broader category of activities. As discussed above, the statutory Part on Building Inspections authorizes building code inspections as well as zoning inspections, housing inspections, and other matters. So, what is included in “building inspections” under G.S. 159-33.1? Are housing code inspections included? How about a zoning permit provided by the municipality when the county is handling the building permits? What about site plan and stormwater permitting necessary for the construction of a commercial building? When G.S. 159-33.1 refers to revenues received from building inspections, it could be using this broader notion, and the requirement to report “by type” may refer to inspection types such as zoning, subdivision, minimum housing, and building code.

While the guidance added by Session Law 2018-29 refers to consultation with the Department of Insurance, the phrasing is not limited merely to building code permit fees. The session law refers broadly to the “fees collected by the local inspection departments under G.S. 153A?354 and G.S. 160A?414,” and the express purpose is to determine if the inspection department is supplementing the general fund or vice versa. That might argue for a broader interpretation of the financial reporting requirement.

Under this broader interpretation, the “types” to be reported might include planning and zoning, land subdivision, building code (a general category including all of the trade types listed above), housing code, unsafe buildings enforcement, and others.

Without additional legislative guidance or litigation, the exact scope of this requirement is not clear. That said, there is a good argument under the statutory language and legislative context that the reporting requirement is intended to apply only to the narrow category of building code permitting fees.

Summary

North Carolina local governments are authorized—generally, specifically, and by implication—to administer development regulations, and that administration stretches from pre-construction approvals, to construction permitting and inspections, to ongoing enforcement after construction is complete. Part of the administrative authority is the power to charge fees for permitting and inspections activities. New laws establish limits on the use of permitting fees as well as requirements to report revenues from and expenditures of permitting fees. The exact meaning and scope of those requirements are not clear because of overlapping terminology, convoluted statutory structure, and varied local departmental organization and practices.

Additional legislation or court interpretation will be needed to truly clarify the precise scope of these new requirements. It is prudent, however, for local governments to base permitting fees for all development regulations on reasonable estimates of the costs of administering the permit and/or inspection, and to account for the revenues and expenditures related to those fees. With regard to the reporting requirement, one can argue that it applies broadly to all development regulation permitting fees, but the statutory language and legislative context allow a fair interpretation that the reporting is limited to building code permitting fees. Additional guidance could shed light on the scope of these requirements.

Links

- www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_153A/Article_18.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_160A/Article_19.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-4.pdf



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- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_153A/GS_153A-4.pdf
 - www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_153A/GS_153A-354.pdf
 - www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-414.pdf
 - www.ncleg.net/Sessions/2015/Bills/House/PDF/H255v8.pdf
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 - www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_159/GS_159-33.1.pdf
 - www.ncleg.net/Sessions/2017/Bills/House/PDF/H948v6.pdf
 - www.nctreasurer.com/slg/lgcblog/Pages/New-Accounting-Requirement-for-Building-Inspection-Fee-Revenue-and-Expenditures-of-That-Revenue-Revised-July-5,-2018.aspx