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## Coates' Canons Blog: Are Adequate-Public-Facility Ordinances Adequate?

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**UPDATE September 2013:** In December 2012 the North Carolina Supreme Court invalidated the adequate-public-facilities program for public schools in Cabarrus County in the case of *Lanvale Properties, LLC v. County of Cabarrus*, \_\_\_ N.C. \_\_\_, 731 S.E.2d 800 (2012). The county had allowed developers to avoid the consequences of inadequate school capacity by paying voluntary “mitigation fees” to the county to be used to defray the costs of constructing or expanding facilities so as to overcome the inadequacy. [Click here for an analysis of the Lanvale Properties case.](#)

With respect to many of the adequate-public-facility ordinances adopted by North Carolina counties affecting public schools the answer is apparently no. On December 8, 2009, the North Carolina Court of Appeals in *Union Land Owners Ass'n v. County of Union*, struck down Union County's high-profile public-school adequate-public-facility ordinance (APFO) on grounds that the ordinance was not based on appropriate state enabling authority. Similar ordinances have been or are currently enforced in the counties of Cabarrus, Lincoln, Stanly, Franklin, and Currituck, all rapidly growing counties on the fringe of metropolitan areas. Are local governments now prevented from taking the adequacy of public facilities into account in making future zoning and land subdivision decisions?

Planners have long advocated directing growth into areas that currently enjoy excess public facility capacity or that will be served by public facilities concurrently with the build-out and occupancy of the development (hence the term “concurrency”). Generally the idea with respect to public schools is that if a proposed development's impact will not overburden the capacity of schools serving the development, the project is approved. If the impact will overburden the system, the project is denied approval. What distinguished the Union County ordinance were regulations that allowed the county to approve a development subject to certain conditions intended to mitigate the impact of a project on school capacity. Possible conditions included: (1) deferring initiation of development for five years; (2) postponing development until school capacity became available; (3) scheduling the development to match the rate of school capacity growth; (4) redesigning the proposed development to reduce the impact on school capacity; (5) requesting minor plat approval so as to exempt the proposed project from the other ordinance requirements; (6) offsetting any excess impact on school capacity resulting from the proposed development by providing a voluntary mitigation fee (VMF) to the county to build or expand schools; and (7) constructing school facilities to offset the capacity deficiency. The approval condition that apparently attracted the most attention from the court was the “voluntary mitigation fee.”

The court was clearly influenced by the case of *Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 630 S.E.2d 200 (2006), which invalidated Durham County's public school impact fee for lack of statutory authorization. The court also noted the fact that Union County had sought but failed to obtain local legislation authorizing school impact fees in 1998, 2000, and 2006. The APFO may have seemed like a back-door attempt by the county to gain revenues from developers for schools despite the absence of express authority.

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The Court of Appeals examined the zoning and land subdivision control enabling statutes. G.S. 153A-341 allows counties to use zoning “to facilitate the efficient and adequate provision of . . . schools . . . and other public requirements.” G.S. 153A-331 allows county subdivision ordinances to “provide for the orderly growth and development of the county . . . in a manner that will avoid congestion and overcrowding and will create conditions that substantially promote public health safety, and the general welfare.” The broad reach of this language made clear that the problem in the eyes of the court was not necessarily the purpose of APFO regulations; instead the difficulty apparently was the means employed by Union County in achieving these purposes. The court found no zoning or land subdivision authority to “impose fees or similar devices upon developers of new construction.” If the use of the VMF was a key tool implementing the ordinance, perhaps the outcome of the Union County case should come as no surprise.

How would a “pure” APFO ordinance fare that would link development approval to public facility adequacy but without a “mitigation” fee option? Discretionary standards involving public facility adequacy are sometimes used by North Carolina local government in ordinary land subdivision plat approvals and decisions involving special-use and conditional-use permits; financial mitigation measures are not involved. Perhaps an APFO system more clearly established to manage the pace of growth rather than to assign public facility costs to developers would have much better chance at passing the legal test.

What should give local government attorneys and planners pause, however, is the Spartan nature of the analysis of the Court of Appeals. The opinion includes little mention of the many North Carolina cases interpreting our zoning and land subdivision control authority. No mention is made of the case law from other states in which similar APFO provisions were upheld, a matter analyzed in amicus briefs. No reference is made to the difficult planning circumstances in which Union County has found itself during the last decade. There is no apparent recognition that inability to slow down the pace of development in rapid-growth counties to coincide with the pace of school construction may result in counties using other defensible measures to slow or halt residential development. There is little express guidance about what it would take to fashion a legally defensible alternative regulatory system.

There is another shoe that may drop that is not evident from a reading of the opinion. In the Durham County impact–fee case of 2006 the Court of Appeals ordered the illegally collected fees to be refunded, but found no authority to enable developers to collect interest on the amounts due. In 2007 the General Assembly enacted G.S. 160A-363(e) and G.S. 153A-324(b), both of which provide that if a development fee or tax, or even a monetary “contribution,” is found to be unauthorized, then the local government must return the collected taxes, fees, or contributions along with six percent (6%) annual interest. It appears that the legislation was adopted in anticipation of this very kind of Union County litigation.

On August 13, 2009, before the Union County decision was announced, a Cabarrus County superior court judge invalidated certain APFO provisions in Cabarrus County’s unified development ordinance on similar grounds. Cabarrus, Stanly, Lincoln, Franklin, and Currituck counties need to review their options and are trying to determine whether their APFO regulations can be reworked to conform with existing authority. The story also continues in Union County. The Union County Board of Commissioners voted on December 14, 2009, to petition the North Carolina Supreme Court to accept the case for discretionary review.

## Links

- [appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQQTEwLTEucGRm](http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQQTEwLTEucGRm)
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