Coates' Canons Blog: (Electronic) Notice of Subdivision Construction Development Fees Revisited

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Article: https://canons.sog.unc.edu/electronic-notice-of-subdivision-construction-development-fees-revisited/

This entry was posted on August 19, 2010 and is filed under Development Finance, Fees, Charges, Penalties, Finance & Tax, Land Use & Code Enforcement, Public Authority Finance, Public Enterprise / Utility Finance

In 2009, the General Assembly enacted new electronic notice and public comment requirements with respect to the imposition of, or increase in, certain fees and charges assessed by local governments, and (at least potentially) sanitary districts and water and sewer authorities. *See* **S.L. 2009-436 (S698)** (hereinafter "2009 Act"). I blogged about the new requirements last fall—see **here** and **here**. I divided my analysis of the legislation into two parts because I believed there were at least two conflicting interpretations with respect to the types of fees and charges (and, correspondingly, types of entities) to which the new requirements applied.

This year the General Assembly revised the legislation to alter the notice requirements. *See* **S.L. 2010-180 (H1766)** (hereinafter "2010 Act"). The General Assembly did not clarify, however, the types of fees and charges to which the requirements apply—leaving local governments to once again speculate as to the scope of the legislation.

Old Requirements

As summarized in my previous posts, the **2009 Act** directed any covered entity that has a web site that is maintained by its employees to provide notice on the web site of the imposition of, or increase in, certain fees or charges at least 7 days before the first meeting at which the fees or charges are on the governing board's agenda for consideration. The **2009 Act** also required a governing board of a covered entity to provide a period of public comment on the imposition of, or increase in, the fees or charges at issue during the first meeting at which the fees or charges were discussed. (Neither of the requirements applied if the imposition of, or increase in, the fees or charges were included in the proposed budget ordinance that the covered entity's budget officer submitted to the governing board during the annual budget process.)

But, to what types of fees and charges did the requirements apply? The **2009 Act** stated that the requirements applied to the assessment by counties, municipalities, sanitary districts, and water and sewer authorities of "fees or charges applicable solely to the construction of development subject to the provisions of" either **G.S. 153A, Art. 18, Part 2** (for counties), or **G.S. 160A, Art. 19, Part 2** (for municipalities), or both (for sanitary districts or water and sewer authorities). At the time of its enactment, I believed that this provision was subject to two different interpretations.

The first interpretation, supported by the plain language of the provision (particularly the use of the word "solely") and by the Act's legislative history, was that the new requirements applied only to fees and charges that are directly related to the subdivision regulations. Such fees and charges includes those assessed in conjunction with the review of subdivision plats, and those paid by developers in lieu of dedicating recreation areas and constructing road improvements. The problem with this interpretation is that sanitary districts and water and sewer authorities are not authorized to regulate subdivisions and impose these types of subdivision fees. Yet, the Act specified that the requirements also applied to those entities.

The second, slightly broader, reading of the **2009 Act**was that the notice and hearing requirements applied to any fees or charges that are assessed on the construction of development in subdivisions. Under this interpretation, the requirements applied to any fees and charges that are assessed on the construction of development in subdivisions—including plan review fees, fees and charges paid by developers in lieu of dedicating recreation areas and constructing road improvements, permit fees, inspection fees, water and sewer impact fees, (potentially) water and sewer tap or connection fees, and other regulatory fees assessed on the construction of subdivision development. This interpretation had the benefit of giving effect to all of the provisions in the **2009 Act**, but it required a strained reading of the plain language of the statutory provisions. Because of that, and because of the legislative history of the Act, I felt this was the weaker of the two interpretations.

New Requirements

That brings us to the **2010 Act**. Effective February 1, 2011, the **2010 Act** makes parallel amendments to the following statutory provisions—**G.S. 153A-102.1** (counties), **G.S. 160A-4.1** (municipalities), **G.S. 130A-64.1** (sanitary districts), and **G.S. 162A-9** (water and sewer authorities)—to alter the notice requirements summarized above.

Specifically, the **2010 Act** requires that covered entities provide notice to "interested parties" of the imposition of, or increase in, certain fees or charges "at least seven days prior to the first meeting where the imposition of or increase in the fees or charges is on the agenda for consideration." A covered entity must provide notice in at **least two of the following four methods**:

- Display the notice in a prominent location on a web site managed or maintained by the covered entity
- Display the notice in a prominent physical location, including, but not limited to, any government building, library, or courthouse
- E-mail the notice to a list of interested parties that is created by the covered entity for purposes of complying with the 2010 Act
- Fax the notice to a list of interested parties that is created by the covered entity for purposes of complying with the 2010 Act

If a municipality, sanitary district, or water and sewer authority does not maintain its own website, it may request that the county (or counties) in which it is located post the notice on the county's website for purposes of satisfying one of the notice requirements. The covered entity must submit the request to the county at least fifteen days prior to the date of the meeting and, if the county agrees to post the notice, it must do so within seven days of receiving the request.

(Note that the **2010 Act** does not alter the requirement that covered entities provide a period of public comment on the imposition of, or increase in, the fees or charges at issue during the first meeting at which the fees or charges are discussed. Nor does the **2010 Act** modify the exemption from the notice and public comment requirements if the imposition of, or increase in, the fees or charges are included in the proposed budget ordinance that the covered entity's budget officer submits to the governing board during the annual budget process.)

But, to what fees and charges does the **2010 Act** apply? Good question. The statutes at issue still state that the requirements apply to "the imposition of or increase in fees or charges applicable solely to the construction of development subject to the provisions of" either **G.S. 153A, Art. 18, Part 2** (counties), or **G.S. 160A, Art. 19, Part 2** (municipalities), or both. Again, a plain language interpretation of this provision implies that the only fees and charges that the requirements apply to are those that are directly related to the subdivision regulations. However, the requirements still purportedly apply to sanitary districts and water and sewer authorities, which suggest that the requirements must apply to at least some water and sewer fees.

Thus, local governments are faced with the same interpretative quandary as last year. However, there is one additional piece of information which may prove significant. And that is the fact that the General Assembly did not remove sanitary districts and water and sewer authorities from coverage under the **2010 Act**, even as it made changes to other parts of the **2009 Act**. This might indicate that the General Assembly intends that the types of fees and charges to which the requirements apply be construed broadly. *See generally* Burgess v. Your House of Raleigh*,* 326 N.C. 205 (1990) (stating that courts "may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve."). And, this may tip the

scales in favor of the second interpretation of the provision “the imposition of or increase in fees or charges applicable solely to the construction of development” that **I posited last fall**. Namely, that the word “solely” modifies “construction of development” and limits the fees and charges to those that are assessed during the construction phase of subdivision development, but does not limit coverage to fees and charges that only may be assessed on subdivision development.

In light of this new information, local governments may want to take a cautious approach and apply the new requirements when imposing or modifying any fees and charges that are assessed on the construction of development of subdivisions—including, but not necessarily limited to, plan review fees, fees and charges paid by developers in lieu of dedicating recreation areas and constructing road improvements, permit fees, inspection fees, water and sewer impact fees, (potentially) water and sewer tap or connection fees, and other regulatory fees assessed on the construction of subdivision development. As always, a unit should consult with its local counsel before implementing the new requirements.

Links

- www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S698v7.pdf
- www.ncleg.net/Sessions/2009/Bills/House/PDF/H1766v8.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_153A/Article_18.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_160A/Article_19.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-102.1.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-4.1.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_130A/GS_130A-64.1.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_162A/GS_162A-9.html