Coates' Canons Blog: Exactions and Subdivision Approval

By Adam Lovelady

Article: https://canons.sog.unc.edu/exactions-and-subdivision-approval/

This entry was posted on February 01, 2013 and is filed under Land Use & Code Enforcement

Can a city require sidewalks for a development? Can a county charge fees from a developer for parks? In North Carolina, what exactions are allowed? The short answer: It depends upon the type of development approval and the underlying statutory authority. Following the recent decision of *Lanvale Properties, LLC v. County of Cabarrus*, there is renewed focus on the scope of authority for development regulation. As David Owens discussed here, among other findings, the North Carolina Supreme Court decision emphasized the distinction between zoning authority and subdivision authority.

This blog explores the authority for exactions related to subdivision approvals as set forth at G.S. 160A?372 and 153A-331 . Exactions are those infrastructure improvements, land dedications, or funds a local government may require a developer to provide as a condition of development approvals. A subdivision, in general, is the division of a tract of land into smaller parcels for the purpose of sale or development. Subdivision regulation is related to, but distinct from zoning and other development regulations. For more on qualifies as a subdivision take a look at Rich Ducker's posts on the specific definition of subdivision and statutory exemptions.

While this discussion is focused on authority granted by statute, constitutional limits apply as well. Any exaction must be rationally related and roughly proportional to the impacts created by the development. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Separate statutes authorize other exactions and fees for certain other development approvals. For example, conditions for special use permits and conditional use permits "may include requirements that street and utility rights?of?way be dedicated to the public and that provision be made of recreational space and facilities." G.S. 160A-381(c).

So what is authorized for subdivisions? The subdivision statutes authorize exactions for transportation network improvements, utilities, recreational lands, and school site reservations (each is discussed below). In addition to these topics, the statutes allow cities and counties to require "the construction of community service facilities in accordance with municipal [or county] plans, policies, and standards." The statutes do not define or limit the term "community service facilities." This term includes those transportation network, utilities, and recreational improvements. Arguably, the term may include additional facilities such as street lights, stormwater facilities and more.

Transportation Network

Regarding transportation, a subdivision ordinance may require: 1) construction of transportation network improvements within the subdivision; 2) that the transportation network within the subdivision coordinate with existing or planned streets, highways, and other facilities; 3) that rights of way or easements be dedicated for street purposes; or 4) that the developer remit funds in lieu of street construction. In the case of fees, any formula for such funds must be based on trips generated from the subdivision. An ordinance may require partial payment of funds and partial dedication of constructed streets.

For counties, any funds for street improvements must be transferred to a municipality for the development of roads pursuant to a mutual agreement between the county and municipality. Municipalities are authorized to receive such county funds and expend them outside of their corporate limits.

Cities may use funds to design, acquire and/or construct roads to serve the subdivision, and a city may work in conjunction with the Department of Transportation to undertake these activities. In cities, such funds in lieu of street construction "may be used for roads which serve more than one subdivision or development within the area." A subdivision ordinance may require *construction* of street improvements only inside the development, not abutting or

outside of the development. But, as noted in the statute for cities, funds in lieu of construction may be used for road improvements both within and outside the development. Buckland v. Town of Haw River, 141 N.C. App. 460, 541 S.E.2d 497 (2000). The county statute, by contrast, does not expressly authorize use of fees for off-site improvements.

The city and county statutes each refer to "the transportation networks" of the development. This is typically streets, but is not necessarily limited to that. Sidewalks, greenways, and bus stops may also be part of the transportation network of a development. Local legislation has authorized fees for transit and other categories of exactions for various local governments.

Utilities

A local ordinance may require: 1) construction of utilities within the development; 2) that the utilities of a subdivision coordinate with existing or planned utility facilities; and 3) that rights of way or easements be dedicated for utility purposes. In contrast to the transportation aspects, there is no specific authority for fees in lieu of utility construction. Cities and counties have separate authority to charge fees related to their public enterprise functions such as water, sewer, stormwater, and others. Cities and counties may also enter into reimbursement agreements with developers for the design and construction of infrastructure that is included in the local government's Capital Improvement Plan and serves the developer's property. G.S. 153A-451; 160A-499. Such infrastructure may include, among other things, water, sewer, stormwater, and streets.

Recreation

A subdivision ordinance may require a developer to provide recreation areas to serve the residents of the neighborhood. Significantly, the statues allow for the "dedication or reservation of recreation areas." Alternatively, the ordinance may require the developer to contribute funds for the local government to acquire recreational areas serving residents in the immediate area (not necessarily limited to the particular subdivision).

The city statute offers additional language on the matter of funds for recreation lands. For cities, such funds "shall be used only for the acquisition or development of recreation, park, or open space sites," and any formula for determining funds shall be based on property tax values of the development or subdivision. Cities may require a mix of funds and land dedication from developers.

Schools

Under the applicable statues, a local ordinance may require a developer to reserve land for a school site. The site is reserved, not dedicated. If the board of education desires to obtain the school site, it must purchase the site (or initiate condemnation proceedings) within 18 months of final approval of the subdivision. If there is no purchase after 18 months the land is freed from the reservation. Such land reservation must be preceded by agreement between the city or county and school board about location and size of the school, as evidenced in the comprehensive plan.

Related Issues

When exactions call for dedication of land, there may be situations when property interests are conveyed to third parties, not necessarily the city or county. Water and sewer easements may be granted to a water authority, recreational areas may be deeded to the applicable homeowners association, and, in a county subdivision, streets may dedicated to the Division of Highways pursuant to G.S. 136-102.6.

Cities and counties have power to determine where and how particular sites and improvements are provided. The North Carolina Court of Appeals has found sufficient statutory authority for a local government to select the location of a recreation area within a subdivision. Messer v. Town of Chapel Hill, 59 N.C. App. 692, 696, 297 S.E.2d 632, 635 (1982). Road and utility plans incorporated into a local comprehensive land use plan or other adopted plan or policy may affect the layout and design of a development plan. As the North Carolina Supreme Court has stated, a subdivision ordinance may "legitimately compel a developer to anticipate planned road development in some logical manner when designing a proposed subdivision." Batch v. Town of Chapel Hill, 326 N.C. 1, 13, 387 S.E.2d 655, 663 (1990). This analysis would apply to planned utility lines as well. Additionally, as noted above, the local government and board of education jointly determine the specific location and size of school sites to be reserved. Such sites must be included in the adopted

comprehensive land use plan.

Finally, in order to assure construction of the required improvements and compliance with applicable standards, the local government may require a performance guarantee sufficient to fund such construction. Local governments must allow a developer to choose from a range of guarantee instruments which may include surety bonds or letters of credit.

Conclusion

When it comes to subdivision approval, cities and counties have specific authority for certain exactions—transportation improvements, utilities, recreational land, and school site reservation. These exactions are specific to subdivision approvals (separate authority applies to zoning decisions). And the authority for exactions, as emphasized in recent case law, is limited to those specifically authorized by statute or local act.

Links

- appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQQTEwLTEucGRm
- canons.sog.unc.edu/?p=6882
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-372
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-331
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