Coates' Canons Blog: If We Can't Collect a Fee, Can We Just Say No? Use of Impact Fees and Adequate Public Facility Regulatory Requirements

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UPDATE September 2013: The North Carolina supreme court subsequently ruled that counties do not have statutory authority to impose school impact fees. That 2012 case is discussedhere.

The population of Partition County has grown dramatically over the past several decades. The county has struggled to keep up with provision of public facilities to serve this growth. While the rate of growth has slowed in the past few years, the schools are still substantially overcrowded in the northern half of the county, where most of the growth has occurred.

The schools there have modular temporary classrooms on site and most of these are projected to remain at least another five or six years. The county is in the midst of an expensive ten-year school construction program largely funded by a bond program. The county board has concluded it is not feasible to raise taxes or issue more bonds for school construction in the next few years. Other public facilities, including roads, water, sewer, and emergency services, have also been stretched uncomfortably thin in this part of the county.

A local developer wants to be ready to resume work as the economy recovers. He has submitted a plan to the county for a large new mixed use development in the northern part of the county. In addition to a commercial center and health care facility, he is seeking approval for 1,200 new housing units. County officials are delighted to see early signs of economic recovery, but that is tempered by a very real concern about their ability to provide and pay for additional public facilities that will be needed to serve this new development. Staff analysis indicates the additional school children that would reside in this project cannot be accommodated in the existing school buildings. In fact, when other developments already approved are considered in relation to the existing and budgeted school capacity, staff has concluded it will be at least six years before there will be adequate school capacity to accommodate this development. Does the county have the option of denying or delaying regulatory approval of this project based on inadequate school capacity?

It is important in assessing the county's options to carefully distinguish adequate public facility regulatory requirements from impact fees generally and from school impact fees particularly. The county has more flexibility with its regulations than it does with its impact fee options.

Adequate public facility ordinances (APFOs) tie development approval to the availability of essential public facilities. Development is not permitted at a particular site unless and until a defined level of public services is available. A fully developed APFO involves adoption of a long-term capital improvement program and then sequencing development approvals as the required facilities become available. While this type of ordinance is common in many high population growth states, a simpler approach is more common in North Carolina. This alternative requires an analysis of facility availability and development impacts, with development approvals allowed only where adequate public facilities are available and denied where the project would lead to a degradation of facilities. A 2005 **School of Government survey**

reported 29 percent of North Carolina municipalities and 22 percent of the counties responding use some adequate public facility requirements as part of their development regulations.

G.S. 153A-341 and 160A-383 grant cities and counties the authority to regulate development "to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements." This provides authority to implement regulatory adequate public facility requirements. An example of the use of this authority for regulation was approved by the court in *Tonter Investments, Inc., v. Pasquotank County*, ___ N.C. App. ___, 681 S.E.2d 536, *review denied*, 363 N.C. 663, 687 S.E.2d 296 (2009). The plaintiffs contested a zoning ordinance requirement that prohibited residences in an agricultural zoning district unless the lot had a minimum specified frontage on a state road and was within 1,000 feet of a public water supply. The court held such a restriction "passed with the goal of ensuring that all new structures in Pasquotank County will have adequate access to drinking water, as well as roads that can handle traffic and emergency vehicles" clearly fit within the permissible goals of a zoning regulation. In *Tate Terrace Realty Investors v. Currituck County*, 127 N.C. App. 212, 488 S.E.2d 845 (1997), the court upheld Currituck County's denial of a residential development because county schools were inadequate.

The authority to regulate on the basis of adequacy of public facilities is not, however, the same as authority to impose fees to address inadequacies in facility capacity. Some local governments use impact fees to address projected deficiencies in public facility availability. Impact fees are assessments upon the owners or developers of land made by local governments to recoup some or all of the capital costs of public facilities needed serve new development. In many parts of the country impact fees, rather than general tax revenues, are used to finance the new roads, utilities, fire stations, parks, schools, and other public facilities that must be provided to service new development. About half of the states authorize broad use of impact fees. Local governments in North Carolina have authority to impose fees for a variety of "public enterprise" functions, such as the provision of water and sewer services. The zoning and subdivision statutes also allow regulations to require land dedication, construction, or payment of fees to address specific public facility needs generated by the development, such as internal roads, utilities, parks, and community service facilities. But in the absence of specific authority to impose such exactions, the courts will not imply such authority.

A series of recent court decisions have established a strong rule that North Carolina cities and counties lack the statutory authority to impose school impact fees. In *Durham Land Owners Association v. County of Durham*, 177 N.C. App. 629, 630 S.E.2d 200, *review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006), the court held counties do not have implied authority to impose school impact fees. The court held provision of schools is a general governmental obligation rather that a service provided to an individual for which a fee can be charged. While permit application and review fees are appropriate under the statutory authorization of general ordinances and zoning ordinances, that authority does not reach to fees to fund basic governmental services. In *Union Land Owners Association v. County of Union*, ___ N.C. App. ___, 689 S.E.2d 504 (2009), *review denied*, ___ N.C. ___, ___ S.E.2d ___ (2010) (see **Rich Ducker's blog post** for more details on the case), the county ordinance provided several options if there was inadequate school capacity to accommodate a proposed development, including reducing the scale of the proposed development, phasing its construction to match school construction schedules, or having the developer provide funding (a "voluntary mitigation payment") or construction to address the school capacity deficiency. The court held the county lacked authority to adopt this ordinance under its general police power, zoning, or subdivision regulation authority. The court noted that consideration of development impacts on the efficient and adequate provision of public services (including schools) is expressly within the permissible objectives of a zoning ordinance. However, local governments may only employ the tools provided within the statute to address this objective. The court held that the tools enumerated within the statute (regulating the size of buildings, lot sizes, setbacks, density, land uses, etc.) was not sufficiently broad to include the voluntary mitigation payment tool. In an unpublished opinion the court of appeals reached the same result in a challenge of similar fees in Cabarrus County. In *Amward Homes, Inc. v. Town of Cary*, ___ N.C. App. ___, 698 S.E.2d 404 (2010), the town had adopted an "Adequate Public School Facilities Ordinance" (APSFO) that required a certificate of adequate school facilities or an exemption prior to approval of large residential developments. Although the ordinance did not include an explicit school impact fee mandate, the developers were informed by the mayor that the town council would not approve the development without payment of school impact fees (this requirement was later added to the ordinance). The court held the town had no authority to impose or accept school impact fees pursuant to the APSFO. Since the town had established a custom and practice of requiring these fees, the fact that this particular fee was imposed by a condition on an individual approval rather than directly by ordinance provision did not make it legal. Except for the Orange and Chatham Counties (both of which have special legislative authorization to use them), **school** impact fees cannot be a part of an adequate public facilities ordinance in North Carolina.

So a city or county can just say no if there are inadequate public facilities to support a proposed development. Whether there are or will be adequate school capacity, roads, utilities, and essential public service facilities is a lawful and legitimate consideration in rezoning decisions. It can be made a decision-making standard for special and conditional use permits, subdivision plat approvals, site plan reviews, and other development regulatory reviews. Assuming the local government has done appropriate planning and analysis to support the decision, it has the legal authority to deny or delay development approvals that would overburden public facilities. A local government cannot, however, use development regulations to mandate payment of impact fees to address inadequate public facilities unless the particular fee involved has been expressly authorized by the General Assembly. While there is latitude for good faith negotiations on public-private cost-sharing and contributions towards the provision of public facilities with development agreements and conditional zoning, any mandatory impact fee must have legislative authorization.

Links

- canons.sog.unc.edu/?p=6882
- www.sog.unc.edu/sites/www.sog.unc.edu/files/full_text_books/ss21.pdf
- www.youtube.com/watch?v=YeVm4JnHPg0&feature=related