Coates' Canons Blog: Local Government Impact Fee Authority for Public Enterprises Revisited

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In a previous **post,** I questioned the authority of local governments to impose impact fees on new development for water and sewer services. The North Carolina Court of Appeals recently issued an unpublished opinion holding that the Town of Carthage has authority under the **public enterprise statutes** to impose such impact fees. The case is a win for Carthage. Because the opinion is unpublished, however, it has no precedential value in other jurisdictions. Furthermore, the court's analysis of the issue provides little prospective guidance to other units about the legality of current or proposed public enterprise impact fees. The court does not appear to follow the framework established by the North Carolina Supreme Court for statutory interpretation. And the court also does not squarely address seeming contradictory case law precedent. That said, the case might serve as a roadmap for other local governments faced with a similar challenge to their impact fee authority.

This post summarizes the case and the court's analysis. It also raises additional considerations for units considering imposing (or continuing to impose) impact fees on new development.

***Town of Carthage* Facts**

The Town of Carthage imposed impact fees on new development that ranged "from $1,000 for each water connection and $1,000 for each sewer connection where the meter size is ¾ inches to $30,000 for water and $30,000 for sewer where the meter size is 6 inches." The impact fees were assessed in addition to water and sewer connection (tap) fees. The fees were collected either upon final plat approval for a new subdivision or upon application for a building permit, whichever occurred first. Plaintiffs, two developers, sued the town claiming, among other things, that the town had no statutory authority to assess the impact fees. The plaintiffs also alleged that the town was using the impact fees to offset the expense of maintaining its entire water system, as opposed to offsetting only the costs imposed by the new development. The trial court judge granted summary judgment in favor of the town. The plaintiffs appealed.

Court of Appeals' Holding

On appeal, the plaintiffs claimed that the town acted ultra vires in collecting the water and sewer impact fees because (1) the town did not have specific statutory authority to assess the impact fees, and (2) the town's ordinance specified that impact fee revenue would be used for expansion of the water and sewer infrastructure, but the town used the revenue to maintain its current systems.

Specific Statutory Authority

The plaintiffs argued that the public enterprise fee statute (**G.S. 160A-314**) did not authorize the town to collect water and sewer fees for services to be provided in the future. The statute provides that "[a] city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services *furnished by* any public enterprise." **G.S. 160A-314** (emphasis added). Plaintiffs compared this statutory grant of authority for municipalities with that in **G.S. 162A-9(a),** which is applicable to water and sewer authorities. The latter statute provides that "[a]n authority may establish and revise a schedule of rates, fees, and other charges for the use of and for the services *furnished or to be furnished* by any water system or sewer system or parts thereof owned or operated by the authority." **G.S. 162-9(a)** (emphasis added). Plaintiffs argued that in assessing impact fees on new development, and requiring the payment when the plats were approved or before the building permits were issued, the town was charging a fee for services *to be furnished*. And, in contrast to the fee statute for water and sewer authorities, the fee statute for municipalities does not authorize such a charge. Plaintiffs pointed out that there was no guarantee that the property would actually be developed

at the time that the town assessed the impact fees. Thus, it was not certain at that point that the property would be connected to, and receive any services from, the town's water and sewer systems.

Plaintiffs cited to *Town of Spring Hope v. Bissette*, 305 N.C. 248 (1982), in which the North Carolina Supreme Court had addressed a similar argument (reconciling the provisions in the two fee statutes), albeit in a different context. *Bissette* did not involve an impact fee. The challenge in that case was to the town's practice of periodically increasing its water and sewer rates to finance the construction, operation, and maintenance of an upgraded water treatment plant. The new plant was required to maintain the town's permit to discharge treated water. The fee at issue was assessed on all current customers of the water and sewer system. An owner of a launderette refused to pay the increased fee, claiming that the town exceeded its authority in charging for "services to be furnished" as opposed to "services furnished" by the public enterprise. The *Bissette* court disagreed, holding instead that the fee was assessed for a service that the customer currently received. According to the court, the upgrade "was not intended to, nor did it result in, providing a new or higher level of service to the sewer system's customers." *Id.* at 251-252. When the new plant went into operation, "the customers received nothing they had not received before," thus, the rate "did not reflect any service yet to be furnished." *Id.* To the contrary, it "represented the cost of a necessary improvement to the already existing sewer system without which the Town could not continue to provide sewer service." *Id.* The town was free to set the fee amount above the level necessary to cover current operating costs. It could also factor in the costs of upgrading the water treatment plant. Thus, the *Bissette* court was addressing the authority to include future capital costs in calculating the fee charged to current customers for current services. It was not opining on the authority to charge impact fees on new development not currently being served by the utility. In fact, the *Bissette* court specifically stated that "a municipality may not charge for services 'to be furnished'. . . ."

In the *Town of Carthage* case, the court of appeals acknowledged the plaintiff's argument and laid out the facts and holding of *Bissette* in detail. The court even quoted the language from *Bissette* in which the supreme court stated that a municipality may not charge for services to be furnished. The court, however, did not directly analyze the plaintiffs' argument. It did not address the significant factual differences between *Bissette* and the case before it. Nor did it indicate how assessing impact fees constituted a charge for "services furnished" by the town's water and sewer system.

Instead the court determined that it was bound by a "legislative mandate" in **G.S. 160A-4** to broadly construe the grant of authority in **G.S. 160A-314**. And, read this way, the court held that **G.S. 160A-314**, along with other public enterprise statutes, provided sufficient authority to charge impact fees "that are necessary to ensure the continued quality of water and sewer services in the face of development."

The court noted that the North Carolina Supreme Court held in *Homebuilders Ass'n of Charlotte v. City of Charlotte*, 336 N.C. 37, 43-44 (1994) that

> [t]his statute makes it clear that the provisions of chapter 160A and of city charters shall be broadly construed and that grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect.

However, the supreme court has subsequently held that the broad construction statute is not implicated unless the statutory provision at issue is ambiguous. According to the supreme court,

> When the enabling legislation " 'is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.' But when a statute granting power to a municipality is ambiguous, the enabling legislation "shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect."

King v. Town of Chapel Hill, ___ N.C. ___, 758 S.E.2d 364, 369 (2014) (internal citations omitted); *see also* Lanvale Props., LLC v. Cnty. of Cabarrus, 336 N.C. 142 (2012).

In *Town of Carthage,* the court does not appear to have engaged in the analysis required by *King*, at least not explicitly. The court simply applied **G.S. 160A-4** in interpreting the statutory provision at issue. As I note **here**, there is at least an argument that the language in **G.S. 160A-314** is clear and unambiguous and, therefore, the broad construction statute does not apply.

Use of Impact Fee Revenue

The second argument raised by plaintiffs was that even if the town had authority to impose the impact fees, it did not have authority to use the proceeds to maintain its current water and sewer systems. It was required to use the impact fee revenue only to provide for expansions to the systems. The record indicated that the town had pooled impact fee proceeds with other revenues accruing to the enterprise systems and used the monies to fund repairs and replacements to the current water and sewer system infrastructure.

The court rejected plaintiffs' claim, holding that there was no authority prohibiting the use of the revenue generated from the impact fees for maintenance of the town's water and sewer systems. Again, though, the court did not articulate its analysis of the issue. In particular it did not address whether or not impact fees assessed on new development for water and sewer services are subject to "essential nexus" and "rough proportionality" conditions required by the Fifth Amendment of the U.S. Constitution. The U.S. Supreme Court decision in *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. ____ (2013), at least suggests that when a local unit imposes such fees it must ensure that there is an essential nexus and rough proportionality with the impacts of the new development. If that is true, then a unit might have to ensure that the impact fee is tied to actual costs imposed on the water and sewer system by the new development. And a unit may be constrained to using the impact fee revenue for infrastructure that directly serves or benefits the new development. (My colleague, Adam Lovelady, provides more information on *Koontz* and its potential applicability to impact fees **here**.)

Prospective Guidance for Local Government Officials

As I stated above, *Town of Carthage* is not legally binding authority except outside of the specific impact fees at issue in Carthage, but may provide a roadmap for other units that face similar challenges to their water and sewer impact fee authority. A unit might well argue that the grant of fee authority to municipalities in **G.S. 160A-314** (and in **G.S. 153A-277** for counties) is ambiguous. Because of that, a court is compelled to apply the broad construction statute (**G.S. 160A-4** for municipalities and **G.S. 153A-4** for counties) to hold that the imposition of the impact fees is necessary to ensure the continued operation of the water and/or sewer systems. A unit might also argue that the fee statutes should not be read in isolation and that the entire statutory scheme for public enterprises compels this result.

A unit, however, should be prepared to address the differences in the statutory language between the municipal and county fee statutes and the water and sewer authority fee statute. It also may have to address the potential applicability of *Koontz*.

Links

- canons.sog.unc.edu/?p=7798
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_160A/Article_16.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-314.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_162A/GS_162A-9.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-4.html
- canons.sog.unc.edu/?p=7191
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-277.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-4.html