Coates' Canons Blog: New Electronic Notice of Imposition or Increase in Fees Applicable to Construction of Development: Part I

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UPDATE August 2013: For more recent information on this topic, click **here**.

Effective September 1, 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. S.L. 2009-436 (SB 698). The requirements, detailed below, are fairly straightforward. Determining the fees and charges to which the requirements apply is a bit more complicated….

Basic Requirements

The following are the basic requirements imposed under the Act.

- If a covered entity has a web site that is maintained by its employees, it must 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 agenda for consideration. The local government or authority need not provide similar notice if the fees or charges are discussed or considered at subsequent meetings.
- The governing board of a covered entity must provide a period of public comment on the imposition of, or increase in, the fees or charges during the first meeting at which the fees or charges are discussed.
- Neither of the above two requirements applies 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, in accordance with G.S. 159-12.

Covered Entities

The new requirements purportedly apply to counties, municipalities, sanitary districts, and water and sewer authorities. As a practical matter, however, they may impact only counties and municipalities because of the limited types of fees and charges to which the requirements may apply.

Applicable Fees and Charges

So, to what types of fees and charges do the requirements apply? The Act states that the requirements apply 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). (Note that these statutory provisions authorize counties and municipalities to regulate subdivisions. I will refer to them collectively as "subdivision regulation statutes").

I believe that this provision is susceptible to two different interpretations. The first interpretation is that the new requirements apply only to fees and charges that are directly related to the subdivision regulations. The second, slightly broader, reading is that they apply to any fees or charges that are assessed on the construction of development in subdivisions. There are arguments for both interpretations, although neither is perfect—one interpretation requires ignoring a portion of the Act and the other interpretation requires a strained reading of the plain language. I detail the rationale for the first potential interpretation below. I will provide an analysis of the second potential interpretation in a future post.

As I stated above, one potential interpretation of the phrase at issue is that the new requirements apply only to fees and charges that are directly related to the subdivision regulations. Under this reading, the following fees and charges likely are subject to the new requirements:

- Fees and charges assessed in conjunction with the review of subdivision plats, and
- Fees and charges paid by developers in lieu of dedicating recreation areas and constructing road improvements.

I think this interpretation is supported by the plain language of the provisions—particularly the use of the word “solely.” This term implies that other fees and charges that may be assessed on the construction of development generally (not just on the construction of development in subdivisions), such as water and sewer impact fees, inspection fees, and other related regulatory fees likely are not be subject to the Act’s requirements.

One difficulty with this interpretation, though, is that only counties and municipalities are authorized to regulate subdivisions and impose the above-listed fees and charges. Where does that leave sanitary districts and water and sewer authorities, which also at least appear to be covered by the Act? Generally, if possible, an act of the General Assembly should be interpreted so as to give effect to all of its provisions. However, I believe that an exception to this rule might be appropriate in this case because the references to sanitary districts and water and sewer authorities may have been a drafting error.

An earlier version of SB 698 included water and sewer fees and charges, in addition to the fees or charges “levied in connection with” the subdivision regulation statutes, for counties and municipalities. For sanitary districts it covered fees and charges “for any service provided by the sanitary district,” including water and sewer fees and charges. And, for water and sewer authorities, it covered fees and 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.” The final version of the bill eliminates any references to fees and charges for water and sewer services, or other services provided by a sanitary district, and specifically states that its requirements apply “solely” to the fees and charges assessed on the construction of development subject to the provisions of the subdivision regulation statutes. Arguably, these changes effectively eliminated the Act’s applicability to any of the fees and charges that legally could be assessed by sanitary districts and water and sewer authorities—because none of their fees and charges apply only to subdivision development.

Check back next week for an alternative interpretation….

Links

- canons.sog.unc.edu/?p=3024
- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=S698
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_159/GS_159-12.html
- 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/Sessions/2009/Bills/Senate/PDF/S698v3.pdf