Coates' Canons Blog: School Impact Fees and Development Regulations: Another Round

By David Owens

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In areas experiencing urban growth and development, two questions often arise for local governments. Do we have the capacity to provide necessary public facilities to serve this development? If not, how are we going to pay for the needed additional facilities?

A range of public services are needed for development — water, sewer, streets, schools, parks, fire, police, emergency medical service, waste collection and so forth. Sometimes growth occurs where the public facilities to provide those services are in place to accommodate new development. But it is not unusual for new development to be proposed where existing public facilities are already stretched to capacity or beyond. In North Carolina this issue is particularly acute in high growth areas such as the small towns and counties surrounding our major urban areas. In these areas high rates of residential growth, combined with modest existing public facilities, quickly lead to significant economic, political, social, and legal controversies regarding the rate of growth and how to finance demands for new public facilities.
These controversies led to the most recent North Carolina Supreme Court pronouncement on land use law – **Lanvale Properties, LLC v. County of Cabarrus**, ___ N.C. ___, 731 S.E.2d 800 (2012). The court invalidated the approach the county had taken to provide new school capacity. The case has important lessons for cities and counties wrestling with issues of growth and public facility capacity. The key issue in this case dealt with financing the costs of adding school capacity, but the same issue must be addressed for the full range of public facilities needed to serve new development.

Providing Capacity for School Needs

One of the key flash points in addressing the impacts and costs of new residential development in North Carolina is school capacity. Construction of substantial numbers of new homes brings substantial numbers of new school children to a community. In North Carolina, the state government pays most of the operational expenses for schools (such as teacher salaries) and county governments are responsible for providing and equipping school buildings. While parents are understandably upset with overcrowded schools, construction of additional schools is an expensive proposition. Wake County, for example, is currently discussing a series of possible $400 to $600 million bonds for school construction. And this is after having a $970 million bond issued for school construction in 2006, a $450 million school bond in 2003, and a $500 million school bond in 2000. When a school system is adding thousands of new students per year, the fiscal impacts for county government is substantial Wake County had estimated in 2006 that the cost of land, building construction, and equipment for a new elementary school can be over $25 million, $46 million for a middle school, and $79 million for a high school.

While concerned about school overcrowding, many citizens are also very concerned about tax rates. This presents a

difficult balancing act for local government officials – how do we encourage new growth, avoid overcrowded schools, and keep our property tax rates from rising?

In an effort to provide for school construction funds without raising property taxes, several counties turned to use of a school impact fee. The unit of government calculates school capacity, the additional capacity required to support new development, and the costs of adding that capacity, and then allocates that cost to new development on a pro rata basis. For example, this calculation may show that each new home in a particular area of the county generates a need for new school capacity that would cost $2,000 per home. An impact fee would charge $2,000 per home rather than increasing property taxes to cover the costs of needed school construction.

Authority for School Impact Fee

North Carolina statutes do not specifically authorize school impact fees. The court of appeals in several cases had held that existing local government authority does not include the authority to impose a school impact fee. In Durham Land Owners Ass'n 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 county asserted that the statutory grant of authority to fix fees for "performing services or duties required by law" gave the county authority to impose a school impact fee on new residential construction. The court held that provision of schools, while mandated by the state, is a general governmental obligation rather that a service provided to an individual for which a fee can be charged. In Union Land Owners Ass'n v. County of Union, 201 N.C. App. 374, 689 S.E.2d 504 (2009), the court held that even where a legitimate regulatory objective is being met, the means used to advance that objective cannot be implied to extend beyond the powers granted. That case involved an adequate public facilities provision that gave developers the option of paying a voluntary mitigation fee if there was inadequate school capacity. The court held that while school capacity is a legitimate legislative concern, the tools enumerated within the zoning and subdivision statutes do not include authority to assess what is essentially a school impact fee. These cases are discussed in earlier blogs on this site **here** and **here**. The court of appeals made similar rulings in a third case involving school impact fees, but on appeal that case was affirmed by an evenly divided court, so it does not have precedential value. Amward Homes, Inc. v. Town of Cary, 206 N.C. App. 38, 698 S.E.2d 404 (2010), *aff'd per curiam by evenly divided court*, 365 N.C. 305, 716 S.E.2d 849 (2011).

The North Carolina Supreme Court in Lanvale Properties affirmed the line of reasoning from these earlier cases. The court held the county had no authority under zoning to impose these fees even if they were included within a unified development ordinance, and even if the fees were only one of several options offered to developers to address school capacity inadequacy.

The court ruled that the zoning enabling statutes do not expressly or by implication provide authority for a school impact fee. The court held the requirement in G.S. 153A-4 for broad construction of powers granted to counties is a rule of statutory construction that guides the courts when there is ambiguity about the scope of powers granted, not an independent grant of authority. Thus when a statutory grant of authority (or failure to grant a power) is clear and unambiguous, the "broad construction" rule is inapplicable. The court noted the need for express authorization is particularly important for taxes and fees. The court held the lack of statutory authority within the zoning enabling statute for a school impact fee was clear.

In addition the court found the local legislation that Cabarrus County had secured was also insufficient to grant authority for a school impact fee. That local bill allowed the county to enforce any provision of the school adequacy reviews in its subdivision ordinance countywide (including within cities in the county) "including approval of a method to address any inadequacy that may be identified as part of that review." S.L. 2004-39. The court noted that other counties (Orange and Chatham) had secured explicit authority for school impact fees, while that authority had been denied to others (particularly Union County). The court contrasted the wording of Cabarrus County's local act with the 1987 explicit grant to Orange and Chatham Counties to "provide by ordinance a system of impact fees to be paid by developers to help defray the costs to the county of constructing certain capital improvements." S.L. 2004-1987 N.C. Sess. Laws 609.

Implications for Land Use Decisions

For those local governments struggling with how to manage and pay for the costs of development, what lessons are included within the Lanvale Properties opinion? In addition to the basic conclusion that the general local government statute most certainly does not now authorize use of school impact fees, here are several points the court made.

First, a local government needs clear, unequivocal statutory authorization for any development exaction imposed. If developers are required to address the impacts of their development by donating land, constructing facilities, or contributing money to defray those costs, the authority to require that must be explicitly granted by the legislature. The need for public facilities such as schools is important and the issues raised by funding those improvements are complex. The court acknowledged that this puts local governments in a difficult position. But the court directed those seeking additional tools to finance public facility provision to the General Assembly for relief.

Second, if a local government wants to use an authorized exaction, care must be taken to use it only in the manner authorized. This point is particularly important when local governments adopt a unified development ordinance. These are single ordinances that consolidate several different types of local development regulations, such as zoning, subdivision, historic district regulation, sign codes, and the like. These unified development ordinances are expressly allowed in North Carolina. G.S. 160A-363(d) and 153A-322(d). While a common set of definitions, procedures, boards, and organizational arrangements can be used for the various portions of a unified development ordinance, that is not the case with exactions. Some of the exactions allowed in North Carolina are authorized only by the subdivision enabling statute, not the zoning enabling statute. For example, an exaction authorized only when there is a subdivision of land, such as a requirement for reservation of a school site for future government purchase, can only be triggered when there is actually a subdivision as defined by the statutes. The fact that a development may require site plan approval or a special use permit under the zoning portion of the unified development ordinance cannot trigger the school reservation requirement in the absence of a subdivision.

Third, where a tax or fee is involved, the fact that a regulatory ordinance characterizes payment as optional does not eliminate the need for specific statutory authorization of the fee. For a tax or fee option to be included in a development regulation ordinance, specific statutory authority is necessary. Inclusion of an unauthorized option within a regulation may well invalidate the entire regulation, as was the case in Lanvale Properties, if the court views the regulation as a "revenue generating mechanism."

Fourth, the lack of authority to impose an impact fee does not reduce the local government's authority to consider the adequacy of public facilities in its development regulations. The zoning statutes expressly allow regulation of land uses and structures to "facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements." G.S. 160A-383, 153A-341. Subdivision ordinances may provide for "orderly growth and development." G.S. 160A-373, 153A-331. So, for example, if an area has limited capacity to deal with increased demand for these public services, the local government can impose zoning regulations to limit development to levels that can be supported by existing facilities. The government can delay approval under its development regulations until those services are available. Denial of a rezoning or a special use permit can be based on inadequate school facilities to support a proposed new development, provided the zoning ordinance is appropriately structured. The effect of the case law is that in those circumstances the local government cannot impose an impact fee or other exaction on developers to address inadequate facilities unless that fee has been expressly authorized by statute.

An interesting question for another day is what options a developer and local government have after a project is denied regulatory approval due to inadequate public facilities. At that point both parties may want to enter negotiations about how to most efficiently and expeditiously remove the inadequacies. The form and appropriate and permissible parameters of that type of truly voluntary negotiation are yet to be precisely delineated in this state.

In sum, cities and counties have substantial regulatory authority to limit and manage development where there are inadequate public facilities. They likewise have several tools available to finance provision of those facilities. But only the means for financing public facilities that are expressly set out in the statutes may be used to address inadequacies in public facilities. The authority to regulate does not include the authority to add financing methods unless and until the legislature specifically says it does.

Links

- appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQQTEwLTEucGRm
- canons.sog.unc.edu/?attachment_id=6885
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