Coates' Canons Blog: Snakes with Too Much for Dinner: Conforming to the Transportation Plan

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UPDATE September 2013: The North Carolina Department of Transportation has adopted rules and policies concerning the size, location, direction of traffic flow, and the construction of driveway connections into State Highway System roads. In exercising this authority underG.S. 136-18(29), NCDOT may require the construction and public dedication of acceleration lanes, deceleration lanes, traffic storage lanes, and medians as they connect with any United States route, North Carolina route, or any secondary road route with an average daily traffic volume of at least 4,000 vehicles per day. These requirements, however, must be adequately linked to the traffic generated by the development served by the driveway.

Session Law2013 – 245 (H 785) allows NCDOT to establish a statewide pilot program for sharing the costs of "oversized" transportation improvements in connection with driveway permits that should not legally be assigned to a single driveway permit applicant. The department is authorized to develop a formula for apportioning costs on a project-by-project basis among NCDOT and private property developers. A developer is not required to participate in the program in order to obtain any necessary driveway permit. This authority should enable NCDOT to "iron out" the irregular right-of-way and travel way widths on key state roads and highways.

"You know Pleasant Avenue, over on the west side of town. Our transportation plan shows it as a four-lane arterial street with a median. But most of it is just two lanes wide, except in front of the school and that stretch along the shopping plaza. That road tapers down to two lanes and then bulges back out to four. It's just like a snake that has had too much for dinner. And not all of that land along Pleasant is developed. We ought to get developers to improve roads like that along their frontage. I mean, that's what the transportation plan calls for."

If everyone agrees that the ultimate built-out for Pleasant Avenue is a four-lane road with a certain right-of-way, then doesn't it stand to reason that coordinated comprehensive planning and land development regulation should mean that developers of abutting land should fill in and patch up the gaps in the road system to help achieve the purposes of the plan? After all, are not regulations intended to ensure that development occurs in a manner that is consistent with comprehensive plans? A transportation plan or local street plan can surely indicate what street improvements are needed, but determining who should pay for the work and when and how it is to be done is another matter.

One problem is that the statutory authority allowing local governments to require developers to contribute to road improvements is very fragmented. There are several forms in which owners/developers can contribute—land, construction of improvements, and monetary payments ("developer exactions"). Statutory authority for one does not necessarily imply authority for another. Similarly, a local government's power to require one of these forms of contribution is triggered only if a particular regulatory tool is used. (The power to require road improvements as a condition of subdivision plat approval does not necessarily apply if a zoning special-use permit is involved.) Local government authority to require developers to furnish road right-of-way, to make road improvements, and to pay for the work done by public agencies is disjointed and incomplete. Consider the following:

(1) Subdivisions. If a development involves the subdivision of land, then a local government may require a developer to dedicate right-of-way for streets and either to construct road improvements or pay fees-in-lieu of making the improvements directly (G.S. 160A-372 and G.S. 153A-331). However, the usefulness of this authority is limited by a 2000 North Carolina Court of Appeals case, Buckland v. Town of Haw River, that holds that this authority does not allow a local government to require a subdivider to make improvements to a road on the perimeter of (as opposed to within) the subdivision.

(2) Site plans. If a development involves a use permitted by existing zoning, then neither a site plan approval procedure

nor the issuance of a routine zoning permit provide a legally sanctioned opportunity for local governments to impose right-of-way dedication requirements, road improvement requirements, or fees. Developer exaction requirements typically require express statutory authority, which in these instances is simply absent.

(3) Special-use or conditional-use permits. If a development involves the grant of a special-use or conditional-use permit, then "reasonable and appropriate conditions and safeguards" may be added, including "requirements that street . . . rights-of-way be dedicated to the public . . . " (G.S. 160A-381(c1) and G.S. 153A-340(c1)). Carefully tailored requirements that improvements be made to adjacent streets appear to be permissible (see discussion concerning conditional zoning below), but the validity of imposing fees to fund work done by public agencies is more uncertain.

(4) Special-use, conditional-use, or conditional district rezoning. If a development involves a conditional or conditional-use-district rezoning, then reasonable requirements that improvements to or right-of-way dedications for a perimeter road are more likely to be authorized. G.S. 160A-382 and G.S. 153A-342 provide that conditions or site-specific standards "shall be limited to those that address the conformance of the development and use of the site to (local) ordinances and an officially adopted comprehensive or other plan and those that address the impacts reasonably to be generated by the development or uses of the site." Although appropriately sized road improvement and land dedication standards on perimeter roads appear to qualify, although it is less clear that such requirements may include fees or monetary contributions paid in lieu of in-kind work.

(5) Driveway permit. If a development involves none of the situations described in (1), (2), (3), or (4) above, there may still be the possibility of using curb-cut regulations (driveway regulations) to achieve results. A city may apply a curb-cut ordinance only inside its corporate limits (160A-307), and counties lack authority to adopt and enforce such ordinances at all. Such an ordinance may regulate the size, location, direction of traffic flow, and manner of construction of driveway connections. More important, it may require the construction of (or reimbursement to the public for) medians, acceleration and deceleration lanes, and traffic storage lanes within the right-of-way. The need for the improvements must be attributable to driveway traffic, and the improvements must serve that traffic (the "rational nexus" test.) Driveway permits offer potential for securing road improvements if requirements are properly tailored to the development project being built.

Road-related requirements must not only be authorized by statute. They must also meet constitutional tests, particularly the Fifth Amendment, which declares that that "private property shall not be taken for public use except upon the payment of just compensation." In order for a development exaction requirement to meet this standard, North Carolina courts have adopted a "rational nexus" test. It requires that the exaction requirement substantially advance a legitimate state interest and be proportionally related to the impact of the development. Some of the statutes mentioned above and some local implementing ordinances incorporate this proportionality principle. But local governments may find it tempting to ignore it. If the street plan calls for an additional 15 feet of right-of-way and an additional traffic lane along the short frontage of a land parcel proposed for a church, a small office building, or a small garden center, the expected peak-hour traffic generated by these land uses may be insufficient to justify a requirement that the owner dedicate right-of-way and make road improvements.

Trying to use the land development review process to get roads built according to the transportation plan poses other difficulties. Even if right-of-way expansions and lane improvements can legally be arranged when land is developed, the process depends heavily on the pace and location of development. The bulges, gaps, tapers, and flares incorporated into key roads can simply be a result of bad timing.

Municipalities can, of course, enter into contracts with developers concerning public intersection and other road improvements that are associated with a private land development project. Such contracts, authorized in G.S. 160A-309, generally concern "oversized" road improvement projects—projects for improvements that serve traffic above and beyond that generated by the developer's project. Of course, these contracts must be entered into voluntarily. A local government may not require a developer to agree to one, even if the developer is promised timely reimbursement for the share of the cost that is not the developer's to bear. Indeed, municipalities may be hard pressed to come up with the funds to contribute to such "partnership" projects when the opportunity presents itself. If a road is under the jurisdiction of the state, arrangements can be even more complicated since the North Carolina Department of Transportation (NCDOT) must approve the design and construction of the project, even if NCDOT does not "participate" in the cost.

Well, what about Pleasant Avenue? Not all urban street and roads need to be expanded. In fact one idea current in transportation planning circles is the concept of multi-modal "complete streets." Meeting this standard may mean putting

certain streets on something known as a “road diet.” However, for streets like Pleasant Avenue that clearly need to be widened and improved to comply with a comprehensive thoroughfare plan, a local government can gain from developer contributions. To be successful, however, requires a clear concept of the needed changes, careful planning, an ability to work closely with private property owners, and a dose of good luck.

Links

- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=136-18
- www.ncga.state.nc.us/Sessions/2013/Bills/House/PDF/H785v6.pdf
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-372
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153A-331
- appellate.nccourts.org/opinions/?c=2&pdf=2000/99-1347-1.pdf
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160A-381
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