

**Adequate Public Facilities Ordinances in North Carolina:  
A Legal Review**

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## ***Executive Summary***

Adequate Public Facilities Ordinances (APFOs or Concurrency Regulations) have emerged as a popular topic for discussion among planners and public officials in rapidly growing communities throughout North Carolina. Proponents of APFOs contend these regulations help control the timing of real estate development and ensure needed public infrastructure is in place before new projects are allowed to move forward. Despite the perceived benefits, such ordinances interfere with private property rights and can potentially be misused in an effort to stop growth or shift an unreasonable portion of infrastructure cost to the private sector. These concerns have led real estate developers and landowners to question the legal authority of local governments to implement concurrency regulations. APFOs have also been challenged as unconstitutional violations of Due Process, Equal Protection, and the Just Compensation Clause. The following legal review examines North Carolina statutory law and existing precedent to determine how the judiciary has addressed these challenges.

### ***Legal Authority to Implement an APFO Regulation***

In North Carolina, a local government's authority to regulate land use is derived from the General Assembly through enabling legislation. Although the State does not have legislation specifically authorizing APFOs, municipalities are provided with authority to create regulations necessary to facilitate the adequate provision of defined public services. Supporters believe such language provides implicit authority for the enactment of an APFO. Critics do not necessarily agree with this interpretation and have questioned whether zoning authority provides an appropriate legal foundation for the enactment of such regulations.

The method chosen by a local government to achieve concurrency may prove to be the critical factor determining the legality of the ordinance. Concurrency regulations provide local governments with a mechanism to control the timing of development without prohibiting all new construction. However, an APFO may operate as a de facto moratorium if a municipality is unable to implement an effective infrastructure development plan. Recently enacted legislation provides local governments in North Carolina with authority to implement temporary moratoria, but numerous procedural requirements restrain their use. A proposed moratorium must include a clear statement of the condition warranting its imposition, an expiration date, and a statement of actions to be taken by the municipality to correct the problem. Additionally, moratoria cannot be extended unless the municipality has taken reasonable steps to address the problems and new facts are presented to warrant the extension. An APFO may be subject to these heightened procedural requirements if the judiciary finds the regulation is overly restrictive and equivalent to a moratorium.

Some APFO structures attempt to avoid delays by allowing real estate developers to fund new infrastructure through voluntary exactions. These regulations become subject to legal challenges when “voluntary” exactions effectively force developers into paying fees in exchange for the right to develop. Enabling legislation must provide authority for mandatory exactions. North Carolina’s General Statutes allow the use of mandatory fees and land dedications to fund defined public services. The judiciary has broadly interpreted local authority to collect fees for services such as recreational areas, water, and sewerage. However, recent decisions suggest the judiciary will not broadly construe enabling legislation to create new regulatory powers not specifically provided for by the General Assembly. APFOs imposing exactions to fund services outside the scope of existing enabling legislation will likely be subject to judicial scrutiny.

### ***The Just Compensation Clause and Regulatory Takings***

The Federal and North Carolina Constitutions prohibit a government entity from taking property for public use without just compensation. APFOs can potentially result in a taking by prohibiting development or requiring exactions in exchange for the right to develop. While North Carolina has not yet addressed a regulatory takings claim involving an APFO, the judiciary has firmly established land use regulations can result in a taking if they are overly burdensome and deprive a landowner of all economically viable use of a property. The U.S. Supreme Court recently held temporary development moratoria do not result in a per se taking, but must be evaluated by considering the economic impact of the regulation, the impact on a landowner's investment-backed expectations, and the character of the governmental action. Federal and State Courts have generally upheld temporary moratoria for growth management purposes even when they cause delays in the development process. However, it remains unclear whether North Carolina courts will follow established extra-jurisdictional precedent when evaluating de facto moratoria caused by an APFO.

Regulatory takings claims can also arise when APFOs require exactions in exchange for the right to develop property. The U.S. Supreme Court has developed a two-part test to determine if an exaction violates the Just Compensation Clause. First, an "essential nexus" must exist between the exactions and the interest the government seeks to advance. Second, "rough proportionality" must exist between the required exaction and the impact of the proposed development. Unfortunately, North Carolina has not yet established a rule to determine if an exaction results in an unconstitutional taking and further judicial guidance is needed.

### ***Due Process and Equal Protection***

In addition to regulatory taking claims, APFOs face constitutional challenges as violations of Due Process and Equal Protection. In both cases, the North Carolina judiciary has generally upheld the validity of land use ordinances. Such regulations are subject to rational basis review and must be reasonably related to a permissible state objective. Local governments can often establish infrastructure provision as a legitimate state objective and concurrency as a reasonable method of achieving the goal.

### ***Conclusion***

The North Carolina judiciary has not yet determined if the State's General Statutes provide implicit authority for local governments to enact adequate public facilities ordinances. However, state statutory law and existing precedent provide some guidance in evaluating the legality of these regulations. Overly restrictive ordinances may be considered the equivalent of a moratorium and subjected to heightened procedural requirements. Additionally, the judiciary has expressed unwillingness to broadly interpret enabling legislation to allow new exactions not specifically provided by the General Assembly. APFOs including these types of provisions may be outside the scope of local authority. If the court determines local authority exists, U.S. Supreme Court precedent suggests APFOs including reasonable development moratoria will withstand regulatory taking challenges. However, exactions imposed by an APFO must promote a legitimate government interest and be proportionate to the infrastructure demands created by a new development in order to avoid Federal and State constitutional challenges. Considering these issues may help municipalities limit the probability of future legal challenges resulting from the implementation of an adequate public facilities ordinance.

## I. Introduction

Many growing communities in North Carolina are faced with the challenge of providing water, sewer, roads, and schools necessary to serve their expanding populations. To address the problem, Adequate Public Facilities Ordinances (APFOs or Concurrency Regulations)<sup>1</sup> have emerged as a planning technique designed to control the timing of development. Local governments adopt these ordinances with the intent of ensuring needed public services are made available as new projects are constructed. By creating parity between the demand for public facilities and the delivery of new infrastructure, APFOs hope to provide municipalities with an effective growth management tool.

Communities choosing to implement an APFO make a number of initial decisions.<sup>2</sup> The community must first determine which public services will be governed by the ordinance. A level of service standard (LOS) is then established for each public service included in the ordinance. The LOS determination creates an objective standard for evaluating the impact each unit of demand places on the municipality's infrastructure. The city then examines the demand placed on its infrastructure by existing development. Before new development can proceed, the developer must show the existing infrastructure can support the new demand at the level of service standard established by the ordinance. If capacity exists, the project receives an adequacy permit and the

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<sup>1</sup> Adequate public facilities ordinances are often referred to as APFOs or concurrency regulations. These terms will be used interchangeably throughout the study.

<sup>2</sup> White, S. Mark and Elisa L. Paster, 2003. Creating Effective Land Use Regulations Through Concurrency, 43 *Nat. Resources J.* 753, 763. Freilich, Robert H., 2003. Smart Growth in Western Metro Areas, 43 *Nat. Resources J.* 687, 696-1697.

development is allowed to move forward. When a particular development is denied an adequacy permit, it is placed on hold until infrastructure is available.

APFOs have grown in popularity in recent years, but they are not a new growth management strategy. Concurrency regulations were conceptually developed in the 1950's and implemented by a limited number of local governments throughout the 1960s and 1970s.<sup>3</sup> In 1985, the Florida state legislature helped bring APFOs to the forefront of growth management study by requiring concurrency throughout the state.<sup>4</sup> The proliferation of APFOs has generated considerable policy debate.<sup>5</sup>

Proponents contend concurrency regulations provide planning departments with an efficient tool to address rapid growth and help mitigate problems such as traffic congestion and crowded schools. Controlling the timing of development may be a more beneficial option than other types of growth management initiatives such as moratoria, which completely halt new construction. Appropriately structured APFOs can also put pressure on municipalities to plan for future growth and provide needed infrastructure.

Despite the perceived benefits, some real estate developers and landowners are less receptive to APFOs. The timing of development is traditionally a private market function, in which developers analyze supply and demand factors in a market and choose the appropriate time to undertake a project. APFO regulations shift the development timing decision to the public sector, limiting new development to the availability of public facilities. The manner in which an APFO is applied can also create inequitable

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<sup>3</sup> Pelham, Thomas G., 1992. Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth, 19 *Fla. St. U.L. Rev.* 974, 986. Pelham's article discusses the influential role land use planner Henry Fagin and attorney Robert Freilich have played in developing the concept of concurrency regulation during this period of time.

<sup>4</sup> Pelham at 1002.

<sup>5</sup> Numerous organizations including the American Planning Association, Real Estate and Building Industry Coalition, National Association of Realtors and the North Carolina Homebuilders Association have addressed the costs and benefits associated with APFOs.

results. For example, concurrency regulations can potentially be used to prohibit growth and exclude low income households from a market. They can also disproportionately shift the burden of infrastructure improvement and development to the private sector.

These concerns have caused developers and landowners to challenge APFOs on a number of legal grounds. A local government's authority to implement a concurrency regulation is often questioned. Additionally, APFOs have been challenged as unconstitutional violations of Due Process, Equal Protection, and the Just Compensation Clause. The legal debate over concurrency regulation has intensified as a growing number of communities implement the technique in their growth management policy. In light of these concerns, the following legal review examines North Carolina statutory law and existing precedent to determine the judicial response to many of the legal challenges facing adequate public facilities ordinances.

## **II. Legal Authority to Implement an APFO Regulation**

In North Carolina, local governments derive their authority to regulate land use from enabling legislation passed by the General Assembly.<sup>6</sup> No existing legislation specifically conveys authority to mandate concurrency between development timing and public service provision.<sup>7</sup> However, enabling legislation does provide cities and counties

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<sup>6</sup> N.C. Const. art. VII, § 1(2005). *Moody v. Transylvania County*, 271 N.C. 284 (1967). "A municipality has only such powers as the legislature confers upon it." *Craig v. County of Chatham*, 356 N.C. 40, 44, 565 S.E. 2d 172, 175 (2002). "Counties are creatures of the General Assembly and have no inherent legislative powers. They are instrumentalities of the state government and possess only those powers the General Assembly confers upon them."

<sup>7</sup> White and Paster at 763. Enabling legislation expressly providing authority to implement an APFO is rare. White and Paster's work identifies Maryland as the only state with specific APFO enabling legislation. They also note that some states derive land use authority directly from the state constitution. A limited number of states require concurrency at the state level by prohibiting development that would have a negative effect on defined public services.

with authority to implement general land use regulations through zoning ordinances.<sup>8</sup> North Carolina General Statutes provide municipalities with authority to create regulations necessary to “facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.”<sup>9</sup> Proponents of APFOs may rely on such language to provide implicit support for the enactment of an adequate public facilities ordinance. The New York Court of Appeals relied on similar implicit authority in the landmark case of *Golden v. Planning Board of the Town of Ramapo*, where the court held a concurrency regulation was within the scope of New York’s zoning enabling legislation.<sup>10</sup> Critics do not necessarily agree with this interpretation and have questioned whether zoning authority provides an appropriate legal foundation for the enactment of such regulations.

The North Carolina judiciary has not yet determined if implicit authority exists for the enactment of a concurrency regulation. The method chosen by a local government to achieve concurrency may prove to be the critical factor determining the legality of an ordinance. APFOs can temporarily prohibit development to ensure infrastructure is in place to serve a new project. They may also interfere with private property rights by requiring a developer to contribute land or funds to finance public services. These interferences with private property rights have led landowners and real estate developers

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<sup>8</sup> N.C. Gen. Stat. 160A-383 and 153A-341(2005). See Owens, David W., Local Government Authority to Implement Smart Growth Programs: Dillon’s Rule, Legislative Reform, and the Current State of Affairs in North Carolina, 35 *Wake Forest L. Rev.* 671, 793 (2000). Enabling legislation provided cities with zoning authority in 1923 and counties with authority in 1959. Enabling legislation is defined in N.C. Gen. Stat. 160A-381 to 160A-392.

<sup>9</sup> N.C. Gen. Stat. 160A-383 and 153A-341(2005). These zoning enabling statutes specifically include the term “adequate” when outlining local authority to implement land use regulations. However, the term “adequate” is not included in the subdivision regulation enabling legislation, which authorizes the use of development fees to fund public services such as roads and parks.

<sup>10</sup> *Golden v. Planning Board of the Town of Ramapo*, 285 N.E. 2d 291, 304 (1972). Ramapo’s concurrency regulation encompassed a wide variety of public services, including: public sanitary sewers; drainage facilities; improved public parks or recreation facilities and public schools; state, county or town roads; and firehouses.

to challenge the implementation of such ordinances. North Carolina statutory law and case law have developed to determine when growth management regulations are within the scope of local authority.

### ***APFOs Creating a De facto Moratorium***

Adequate public facilities ordinances ideally provide local governments with a mechanism to control the timing of development without prohibiting all new construction. However, an APFO may operate as a de facto moratorium if a municipality is unable to implement an effective infrastructure development plan. Moratoria freeze new development until a municipality can evaluate the impact of existing land uses on public facilities and derive a plan to accommodate future growth.<sup>11</sup>

Until 2005, the North Carolina General Statutes did not expressly provide local governments with authority to implement a development moratorium. Legislation providing authority to protect the general welfare and to regulate land use were often read together to imply local authority to implement a moratorium for a reasonable period of time.<sup>12</sup> Reliance on implied authority left uncertainty regarding the appropriate procedural steps required to protect landowners from overly burdensome regulation. Not all jurisdictions accept implied authority to enact a moratorium. Pennsylvania rejected the use of zoning enabling legislation as a legal basis to enact a temporary moratorium in *Naylor v. Township of Hellam*.<sup>13</sup> Even though Pennsylvania recognized broad construction of zoning enabling legislation, the state Supreme Court stated “the power to

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<sup>11</sup> Michaux, Roy Jr. and Samuel Reaves (2002). “Growth Moratoria Don’t Hurt Owners: Supreme Court”, *Charlotte Business Journal*, May 13.

<sup>12</sup> Owens at 793 (2000).

<sup>13</sup> *Naylor v. Township of Hellam*, 773 A. 2d 770, 776 (2001).

*suspend* land development has historically been viewed in this Commonwealth as a power distinct from and not incidental to any power to *regulate* land development.”

The North Carolina General Assembly addressed these concerns by amending the general statutes. Senate Bill 814 eliminated reliance on implied authority by providing local governments with express authority to implement temporary development moratoria.<sup>14</sup> However, the amendment restrains local regulatory powers through a number of procedural requirements included in the legislation. Moratorium ordinances must expressly include: a clear statement of the condition warranting a moratorium, how a moratorium will address the problem, an expiration date, justification of the duration, and a statement of actions to be taken by the municipality to correct the problem while the moratoria is in place.<sup>15</sup> Absent an imminent threat to public health and safety, the governing board must provide public notice and hold a public hearing.<sup>16</sup> Moratoria cannot be extended unless the municipality has taken reasonable steps to address the problems warranting its imposition and new facts are presented to warrant the extension.<sup>17</sup> Additionally, projects in which the developer has already made substantial expenditures or received development approvals are not subject to the statute.<sup>18</sup> If the legality of a temporary moratorium is challenged under the new legislation, Senate Bill

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<sup>14</sup> N.C. Gen. Stat. 160A-381(e) as enacted in § 5(a) of Senate Bill 814 establishes the authority for cities and N.C. Gen. Stat. 153A-340(h) as enacted in § 5(b) of Senate Bill 814 establishes the authority for counties. The moratoria provisions became effective September 1, 2005, while the rest of the amendment takes effect on January 1, 2006.

<sup>15</sup> N.C. Gen. Stat. 160A-381(e) (1-4) (2005). Corresponding language provided for counties in N.C. Gen. Stat. 153A-340(h) (1-4) (2005).

<sup>16</sup> N.C. Gen. Stat. 160A-381(e), N.C. Gen. Stat. 153A-340(h). The statutes require a local government implementing a moratorium of 60 days or less to provide notice in a newspaper of general circulation and a public hearing. Moratoria over 60 days are subject to the expanded notice and hearing requirements outlined in N.C. Gen. Stat. 160A-364.

<sup>17</sup> N.C. Gen. Stat. 160A-381(e), N.C. Gen. Stat. 153A-340(h).

<sup>18</sup> The moratoria provision does not apply to projects in which the developer has already received a building permit, where a conditional use or special use permit application has been accepted, substantial good faith expenditures have already been made or the preliminary or final subdivision plat has already been accepted for city review.

814 places the burden of proof on the local government to demonstrate all procedural requirements were met.<sup>19</sup> These claims are also provided with expedited legal review.<sup>20</sup> Numerous procedural requirements may make the enactment of development moratoria more restrictive with enabling legislation in place.

The provisions of North Carolina's moratorium legislation could potentially restrict the enactment of APFOs. In *Toll Brothers Inc. vs. West Windsor Township*, the Superior Court of New Jersey held a timed-growth ordinance constituted a de facto moratorium.<sup>21</sup> Even though the city did not expressly define their growth control ordinance as a moratorium, the court determined that the delays created by the ordinance were equivalent.<sup>22</sup> The court invalidated the APFO for failure to meet the statutory requirements of the state's enabling legislation.<sup>23</sup> Although the North Carolina judiciary has not yet addressed the scope of the recently enacted moratoria legislation, the *Toll Brothers* decision suggests municipalities must be very conscious of regulatory delays created by adequate public facilities ordinances. Overly restrictive APFOs may be subject to heightened procedural requirements set forth in the newly enacted legislation. It may prove difficult for APFOs to meet these requirements because the ordinances are designed as ongoing regulatory programs, which evaluate the impact of a proposed project and determine if adequate public services are available. Extensive procedural requirements are not conducive to such individualized decision making.

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<sup>19</sup> N.C. Gen Stat. 160A-381(e), N.C. Gen Stat. 153A-340(h).

<sup>20</sup> The enabling legislation provides "actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in those actions shall be accorded priority by the trial and appellate courts."

<sup>21</sup> *Toll Brothers Inc. vs. West Windsor Township*, 712 A.2d 266, 270 (1998).

<sup>22</sup> *Id.* at 271.

<sup>23</sup> *Id.* at 271. New Jersey's enabling legislation allowed a moratorium only in the event of an emergency and expressly prohibited a moratorium to prepare development regulations.

### *APFOs Requiring Exactions*

Concurrency regulations can inhibit new construction when needed public services are not available. Some APFO structures attempt to avoid delays by allowing real estate developers to fund new infrastructure through voluntary exactions.<sup>24</sup> An exaction can be defined as “a condition of development permission that requires a public facility or improvement to be provided at the developer’s expense”.<sup>25</sup> Exactions come in various forms and may require a developer to dedicate land for public facilities, construct improvements on the land for public use, pay fees in lieu of dedicating land, or pay impact fees reflecting the cost of providing public services to the new development.<sup>26</sup> Private funding of infrastructure may be advantageous to a developer if it is economically beneficial to move forward with a project before a municipality can provide needed public service improvements. Unfortunately, communities may rely on “voluntary” exactions to fund new infrastructure, rather than effectively planning for future needs.

Proponents consider exactions an equitable method of shifting the cost of residential development to new homebuyers who generate demand for additional public services. The justification is based on a debatable assumption that residential development does not “pay for itself” in terms of increased tax revenues.<sup>27</sup> Alternatively, the real estate development community has ardently opposed exactions as an unreasonable attempt to shift the burden of infrastructure provision to the private sector.

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<sup>24</sup> APFOs adopted in Davidson, Harrisburg, Stanley County and other North Carolina communities include these “Advancement of Capacity” provisions.

<sup>25</sup> Ducker, Richard, (1987). “Taking” Found for Beach Access Dedication Requirement, 30 *Local Government Law Bulletin* 2, Institute of Government.

<sup>26</sup> Id.

<sup>27</sup> Walden, M. (1998) “Economic Impacts of Residential Construction,” Study prepared for the Homebuilders Association of Raleigh-Wake County, North Carolina State University. Renkow, M. (2001) “The Cost of Community Services in Wake County,” Report prepared for the Wake County and the Triangle J Council of Governments, North Carolina State University.

Financing of infrastructure through exactions may also result in excessive taxation of new residents, the unavailability of affordable housing, and limited economic development.<sup>28</sup> Regardless of the potential benefits and burdens, ordinances requiring exactions in exchange for the right to develop must be supported by enabling legislation.

Concurrency regulations become subject to legal challenges when “voluntary exactions” effectively force developers into paying fees in exchange for the right to develop. Local or general enabling legislation must provide authority for mandatory development fees. A summary of development fee legislation completed by the North Carolina Home Builders Association identifies 25 municipalities receiving local authority to impose impact fees between 1985 and 1991.<sup>29</sup> The legislation covers a variety of public services, including: streets, recreation areas, water and sewer, public schools and other capital needs.<sup>30</sup> However, over twenty bills have been introduced in the North Carolina General Assembly since 1991 seeking local authority to impose impact fees.<sup>31</sup> None of these bills have been enacted. Municipalities without local authority must seek general authority to impose fees from the state’s General Assembly.

North Carolina’s General Statutes provide local governments with express authority to use exactions to fund defined public services. The state’s Subdivision Regulations provide local authority to provide for orderly growth and development.<sup>32</sup>

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<sup>28</sup> Real Estate and Building Coalition, 2005. Issue Summaries: Adequate Public Facilities Ordinances, Transfer Taxes and Impact Fees.

<sup>29</sup> North Carolina Association of Home Builders, 2005. “Summary of Impact Fee Legislation in North Carolina”.

<sup>30</sup> Other public services included in local enabling legislation included libraries (SL 1989-502), sidewalks (1986-936), waste treatment facilities (SL 1989-469), bikeways (SL 1987-936), emergency medical service facilities (SL 1988-1021), and fire stations (SL 1985-536).

<sup>31</sup> “NCHBA’s Record of Impact Fee/Transfer Tax Legislation”, North Carolina Association of Homebuilders, 2005. In 1991, The City of Dunn, NC was the last city to receive local authority from the General Assembly to impose an impact fee.

<sup>32</sup> N.C. Gen. Stat. § 160A-372, § 153A-331(2005).

The statutes allow a municipality to condition development approval upon dedication of land or funds to pay for road development, recreation areas, parks, and open space serving the development.<sup>33</sup> Public Enterprise statutes allow collection of fees for use of specified public services, including: water supply and distribution systems, wastewater treatment, solid waste disposal, airports, off-street parking, public transit systems, and stormwater management.<sup>34</sup>

Concurrency regulations in North Carolina often address public services expressly covered in existing enabling legislation. However, some include public services outside the scope of the General Statutes. Harrisburg’s APFO includes public schools and fire protection facilities.<sup>35</sup> Davidson allows voluntary exactions to fund law enforcement services.<sup>36</sup> Cabarrus County broadly defines public services in their APFO using “including, but not limited to” language.<sup>37</sup> Stanley County’s ordinance defines public services as “capital improvements including schools”.<sup>38</sup> Such provisions may extend beyond local authority if they are implemented to require mandatory fees in exchange for the right to develop. The North Carolina judiciary is left to address the scope of legislative grants of authority and determine if such fees are appropriate.

Historically, the state of North Carolina followed Dillon’s Rule, requiring strict construction of enabling legislation and a narrow interpretation of governmental

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<sup>33</sup> § 160A-372 governs cities, § 153A-331 governs counties. Both provide local authority to collect funds or require land dedication for the above mentioned public services. Funds collected for road construction must be calculated based on the number of trips generated by the development.

<sup>34</sup> § 160A-314 (2005).

<sup>35</sup> Town of Harrisburg Unified Development Ordinance, Art. 14.1.2. An APFO enacted by a city including “schools” as a defined public service may face an additional structural problem. In North Carolina, the provision of schools is funded and controlled by counties, not cities. It is unclear if North Carolina cities can structure a growth management ordinance to include a public service for which they do not have financial responsibility. I

<sup>36</sup> The Town of Davidson Planning Ordinance, § 18.0 Adequate Public Facilities Ordinance of the Town of Davidson.

<sup>37</sup> Cabarrus County Subdivision Ordinance § 17.

<sup>38</sup> Stanley County Adequate Public Facilities Ordinance § 1.1.2.

authority.<sup>39</sup> The judiciary continued to recognize the doctrine throughout the early 20<sup>th</sup> century, but courts began to apply a more expansive interpretation of land use enabling legislation to address rapid urbanization occurring in many parts of the state.<sup>40</sup> In 1971, the North Carolina General Assembly departed from Dillon’s rule by requiring grants of municipal authority to be broadly “construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect.”<sup>41</sup> Despite legislative support for broad interpretation, the North Carolina judiciary has created uncertainty regarding the appropriate construction of land use enabling legislation.

In *Town of Spring Hope v. Bissette*, the North Carolina Supreme Court determined whether the state’s Public Enterprise statute provided local authority to increase water and sewer rates to fund the development of a new waste water treatment facility.<sup>42</sup> The plaintiff contended the increased fee could not be imposed until the facility was constructed because the Public Enterprise statute allowed fees for “services furnished” not “services to be furnished”. The court interpreted the statute to allow the city to impose the fee increase before the new plant began operations.<sup>43</sup>

Citing the *Town of Spring Hope* decision, the United States District Court for the Eastern District of North Carolina upheld the imposition of an impact fee to fund the

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<sup>39</sup> Owens at 682. Dillon’s Rule was established by Judge John F. Dillon in 1872 in the *Treatise on the Law of Municipal Corporations*. The rule maintains that municipal corporations have only those powers “expressly granted”, “incident to the powers expressly granted, or “indispensable” to the powers expressly granted by the legislature.

<sup>40</sup> Owens at 694. Owens’ work provides a thorough examination of statutory interpretation in North Carolina and the application of Dillon’s rule principles in land use cases throughout the state.

<sup>41</sup> N.C. Gen. Stat. § 160A (2005).

<sup>42</sup> *Town of Spring Hope v. Bissette*, 305 N.C. 248, 287 S.E. 2d 851 (1982).

<sup>43</sup> *Id.* at 252. The court reasoned, “The increase in the rate, far from being a charge for a new service not yet provided by the Town, represented the cost of a necessary improvement to the already existing sewer system without which the Town could not continue to provide sewer service.”

expansion of water and sewer facilities in *South Shell Investment v. Town of Wrightsville Beach*.<sup>44</sup> The Court found no distinction in the Public Enterprise statute between the imposition of a new fee and the revision of existing fee needed to finance public services.<sup>45</sup> The District Court held the Town of Wrightsville Beach had “authority to impose impact and tap fees under the Public Enterprise statute and that no specific enabling legislation is necessary.”<sup>46</sup>

In *River Birch Associates v. City of Raleigh*, the Supreme Court of North Carolina broadly interpreted enabling legislation providing cities with authority to regulate subdivision development.<sup>47</sup> The case involved an ordinance enacted by the City of Raleigh requiring fee simple conveyance of recreation land included in a subdivision plat approved by the city.<sup>48</sup> In light of “broad interpretation mandated by N.C.G.S. § 160A-4”, the court held the ordinance was “reasonably necessary or expedient to carry into effect the legislative intent to secure to the residents of the subdivision the benefits of the recreation areas.”<sup>49</sup>

The North Carolina Supreme Court once again applied a rule of broad statutory construction in *Homebuilders Association of Charlotte, Inc. v. The City of Charlotte*.<sup>50</sup> The court upheld a local ordinance imposing user fees for a variety of development

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<sup>44</sup> *South Shell Investment v. Town of Wrightsville Beach*, 703 F. Supp. 1192 (1988).

<sup>45</sup> *Id.* at 1207.

<sup>46</sup> *Id.* at 1207. The court also cited *Atlantic Construction Co. v. City of Raleigh*, 230 N.C. 365, 169 (1949), “In the absence of any constitutional or statutory restriction, the rates and fees that may be charged to such residents in connection with the use of its public utilities, are matters that may be determined by its governing body in its sound discretion.”

<sup>47</sup> *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E. 2d 538 (1990). N.C. Stat. 160A-372 states, “a subdivision control ordinance may provide...for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision.”

<sup>48</sup> *Id.* at 105.

<sup>49</sup> *Id.* at 110.

<sup>50</sup> *Homebuilders Association of Charlotte, Inc. v. The City of Charlotte*, 336 N.C. 37, 442 S.E. 2d 45 (1994).

inspections provided by the city, despite the absence of specific enabling legislation.<sup>51</sup> The court emphasized that N.C. Stat. § 160A-4 expressly called for broad construction of statutory authority. The court held municipal power to regulate an activity implies the power to impose a fee to cover the cost.<sup>52</sup>

The statutory construction applied in *Town of Spring Hope, South Shell Investment, River Birch Associates* and *Homebuilders Association of Charlotte* displays willingness by North Carolina courts to broadly interpret local grants of authority included in enabling legislation. However, subsequent decisions suggest the judiciary will not broadly construe enabling legislation to create new powers not specifically provided for by the General Assembly. In *Smith Chapel Baptist Church v. City of Durham I*, the North Carolina Supreme Court examined a fee imposed by the City of Durham to finance a new storm water management system.<sup>53</sup> Based on a narrow interpretation of the state's Public Enterprise statute, the court found the city did not have authority to implement the ordinance because the proposed fees financed ongoing regulatory efforts in addition to construction and operation costs.<sup>54</sup> However, the court upheld the ordinance after broadly interpreting enabling legislation providing local

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<sup>51</sup> *Id.* at 39-42. The ordinance required user fees for services such as site inspections, rezoning reviews, special use permits, final plat reviews and a number of other reviews and inspections.

<sup>52</sup> *Id.* at 44. A recent decision issued by the North Carolina Court of Appeals offers additional support for broad statutory construction. In *BellSouth telecoms., Inc. v. City of Laurinburg*, the court held stated that where there is ambiguity in a statutory grant of local authority, Dillon's Rule has been replaced with broad statutory construction as provided in N.C.G.S § 160A-4. *BellSouth telecoms., Inc. v. City of Laurinburg*, 606 S.E. 2d 721 (2005). The North Carolina Supreme Court denied certiorari in that case.

<sup>53</sup> *Smith Chapel Baptist Church v. City of Durham*, 348 N.C. 632, 502 S.E. 364 (1998).

<sup>54</sup> *Id.* at 367. N.C. Gen. Stat. § 160A-311 and § 160A-314 authorize a local government to collect fees for the provision of a public enterprise, including a stormwater management system. The court reasoned that the statute provided local governments with authority to implement a fee to "finance only the structural and natural stormwater and drainage systems component part of the stormwater program" and could not be used to pay for monitoring, public outreach, or other portions of the program.

government with authority to address environmental preservation.<sup>55</sup> On discretionary review, the North Carolina Supreme Court reheard the case issuing a second opinion.<sup>56</sup> In *Smith Chapel Baptist Church v. City of Durham II*, the court found the City of Durham did not have authority to impose a fee to finance the entire storm water management system. The court held that the language of the Public Enterprise statute was clear and unambiguous, providing local governments with authority to impose fees equal to the cost of constructing and operating a storm water management system. It did not provide the city with authority to impose fees to finance “technical materials, inspections, monitoring, outreach, and other activities” described in the ordinance<sup>57</sup> The strict construction applied by the Supreme Court in *Smith Chapel Baptist Church II* questions whether the judiciary has fully departed from Dillon’s rule principles.

The North Carolina Court of Appeals decision in *Manning v. County of Halifax* invalidated an impact fee because it exceeded the scope of the Public Enterprise statute.<sup>58</sup> The case involved a fee imposed to finance the operation of a solid waste facility. While the imposition of a fee to process solid waste was within the scope of existing enabling legislation, the Court of Appeals held the County exceeded its statutory authority by collecting fees in excess of those needed to operate the facility.<sup>59</sup> The Court emphasized that clear and unambiguous statutory language should be interpreted according to its plain

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<sup>55</sup> *Id.* The court cited language from *Charlotte Homebuilders Association* calling for broad statutory construction.

<sup>56</sup> *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E. 2d 874 (1999). The court heard the case a second time pursuant to discretionary review under N.C. Gen. Stat. § 7A-31. See Owens at 697.

<sup>57</sup> *Id.* at 813.

<sup>58</sup> *Manning v. County of Halifax*, 166 N.C. App. 279, 603 S.E.2d 168 (2004). The impact fee was also challenged in *Elliott v. Halifax County*, 166 N.C. App. 279; 603 S.E.2d 168 (2004). In both cases the N.C. Supreme Court held discretionary review was improvidently allowed.

<sup>59</sup> *Id.* at 611. N.C. Gen. Stat. §153A-292 expressly requires that the revenues collected from a fee shall not exceed those necessary to provide the public enterprise.

meaning.<sup>60</sup> The fact that the fee revenue exceeded the cost of the public service was enough to find the fee unlawful, even though it would have been very difficult for the county to determine the exact cost of providing the public service in advance.

In a case of first impression, the Superior Court of Durham County addressed local authority to collect impact fees for school concurrency in *Durham Land Owners Association v. County of Durham*.<sup>61</sup> Durham County enacted the impact fee relying on general authority implicitly provided by a broad interpretation of the General Statutes.<sup>62</sup> Durham Land Owners Association rejected the County's authority to impose the fee and filed for summary judgment. Between 1991 and 2001, the County was involved in nine bills seeking local authority to impose a school impact fee ordinance. The Association claimed these failed attempts established a pattern of unwillingness by the legislature to grant general authority to impose school impact fees.<sup>63</sup> The Association also argued statutory provisions cited by the County did not mention impact fees or grant authority to impose assessments in exchange for the right to develop.<sup>64</sup> The Land Owners Association cited comprehensive legislation creating a comprehensive plan to finance public schools through ad valorem and other taxes, not through the use of impact fees.<sup>65</sup> Finally, the Association argued the impact fee was an unauthorized tax imposing a burden on a small group of people to fund facilities providing a benefit to the public as a

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<sup>60</sup> *Id.* at 612. The court cited strict statutory construction applied by the North Carolina Supreme Court in *Smith Chapel Baptist Church v. City of Durham II*.

<sup>61</sup> *Durham Land Owners Association v. County of Durham*, 03 CVS 05500 (2005).

<sup>62</sup> *Durham Land Owners Association v. County of Durham*, Plaintiffs-Appellees' Brief, North Carolina Court of Appeals No. 01 CVS 5500 (2005).

<sup>63</sup> Appellees' Brief also noted that the legislature had specifically granted local authority for school impact fees to Chatham County and Orange County, which would have been unnecessary if general authority existed.

<sup>64</sup> The Appellate Brief filed by Durham County cited N.C. Gen. Stat. §153A-102, 153-121 and 153-340, none of which specifically address impact fees.

<sup>65</sup> *Durham Land Owners Association v. County of Durham*, Defendant-Appellant's Brief, North Carolina Court of Appeals No. 03 CVS 5500 (2005).

whole. The Superior Court found the School Impact Fee Ordinance was unlawful and granted summary judgment in favor of the Land Owners Association. The court ordered a refund of fees collected under the regulation.<sup>66</sup>

Supporters of adequate public facilities ordinances believe these legal decisions reflect a growing acceptance of broad statutory construction and explicit authority to implement a wide range of growth management programs.<sup>67</sup> However, decisions in North Carolina's court system reflect hesitation on the part of the judiciary to extend local authority well beyond the powers specifically provided within enabling legislation. Specific enabling legislation may be required for APFOs imposing mandatory exactions.

### **III. The Just Compensation Clause and Regulatory Takings**

As discussed above, a court examining the legal validity of APFOs must first determine if North Carolina law and existing precedent provide authority for local governments to enact such ordinances. If the North Carolina judiciary determines authority exists, APFOs may still be subject to a number of challenges on federal and state constitutional grounds. Land use regulations can be challenged as unconstitutional "takings" in violation of both the Federal and North Carolina Constitutions. The Just Compensation Clause, found in the Fifth Amendment of the United States Constitution, prohibits the government from taking private property for public use without just

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<sup>66</sup> The case has been appealed to the North Carolina Court of Appeals, but has not yet been heard. The County has been allowed to continue collecting fees until the appeal is decided.

<sup>67</sup> Owens at 701. Owens concludes "the North Carolina courts have generally recognized, albeit belatedly and inconsistently at times, that Dillon's Rule no longer applies." "The substantial delegation of explicit authority to North Carolina local governments to undertake growth management measures gives cities and counties considerable authority to enact smart growth programs. The legislative expression of intent that these delegations be broadly interpreted adds latitude to the range of additional and supplemental powers that may be implied."

compensation.<sup>68</sup> The North Carolina Constitution does not expressly prohibit the taking of private property, but the State’s Supreme Court has inferred the fundamental right under the “Law of the Land” Clause.<sup>69</sup> Takings typically occur when a government entity directly appropriates property through eminent domain or physically occupies property. However, takings can also occur when a government regulation places an excessive burden upon a property owner without compensation. APFOs can potentially result in a taking by prohibiting development or requiring exactions in exchange for the right to develop. The following sections are designed to outline the evolution of regulatory taking law and discuss how the law has been applied to adequate public facilities ordinances and other growth management tools.<sup>70</sup>

### ***The Evolution of Regulatory Taking Law***

The Supreme Court’s landmark decision in *Pennsylvania Coal v. Mahon* established a right to just compensation when government land use regulations prove to be overly intrusive.<sup>71</sup> The Court stated “that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking” in violation of the 5<sup>th</sup>

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<sup>68</sup> U.S. Const. art. V. The Just Compensation Clause of the 5<sup>th</sup> Amendment prohibits the Federal Government from taking private property for public use without just compensation. The Clause is made applicable to the states through the 14<sup>th</sup> Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

<sup>69</sup> N.C. Const. art. I, § 19. “No person shall be taken, imprisoned, or disseized of his freehold, liberties, privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.” *Long v. City of Charlotte*, 306 N.C. 187 (1982), *Finch v. The City of Durham* 325 N.C. 352 (1989).

<sup>70</sup> The evolution of regulatory taking law and the landmark cases guiding the development have been outlined by numerous authors examining APFOs and other growth management techniques. The research of White and Paster, 43 *Nat. Resources J.* 753 (2003), Oshiro, 41 *Hous. L. Rev.* 167 (2004), Amand and Merriman, 43 *Nat. Resources J.* 703 (2003), and Pelham, 19 *Fla. St. U.L. Rev.* 974 (1992) develop the relationship between Supreme Court precedent and growth management.

<sup>71</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922). The case stemmed from the passage of the Kohler Act by the State of Pennsylvania, prohibiting the mining of coal beneath specified structures. Pennsylvania Coal filed suit, claiming the statute resulted in a taking without just compensation in violation of the 5<sup>th</sup> and 14<sup>th</sup> Amendment.

and 14<sup>th</sup> Amendments.<sup>72</sup> Rather than creating a categorical rule, the Court called for an ad hoc decision making process based on a factual inquiry. The Supreme Court provided further guidance in *Penn Central Transportation Co. v. City of New York* by implementing a three factor balancing test to evaluate regulatory taking claims.<sup>73</sup> The factors included: the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with the owner's investment backed expectations, and the character of the governmental action.<sup>74</sup> By recognizing the existence of a regulatory taking claim, land use regulations became subject to constitutional challenges under the 5<sup>th</sup> and 14<sup>th</sup> Amendments.

Following *Pennsylvania Coal* and *Penn Central*, the Supreme Court addressed the legality of a temporary land use restriction in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.<sup>75</sup> While the court did not determine if the County ordinance resulted in a taking, it found the Fifth Amendment requires just compensation when an ordinance deprives a landowner of "all use of a property."<sup>76</sup> Additionally, it held a temporary taking created by an interim ordinance may require the government to provide compensation. The Court acknowledged the decision would "undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies...when enacting land-use regulations."<sup>77</sup> The decision is critical for legal challenges involving an APFO because the limitations imposed by such ordinances are

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<sup>72</sup> *Id.*

<sup>73</sup> *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Landmark Preservation Commission denied approval of a development to be constructed over Grand Central Station. The Supreme Court affirmed the New York Court of Appeals decision, holding no compensable taking had occurred. In reaching the decision, the court implemented a three factor balancing test for evaluating regulatory taking claims.

<sup>74</sup> *Id.*

<sup>75</sup> *First Lutheran Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)

<sup>76</sup> *Id.* at 313.

<sup>77</sup> *Id.* at 321.

temporary in nature. Judicial recognition of a “temporary taking” claim placed APFOs within the scope of the Just Compensation Clause.<sup>78</sup>

After the *First English* decision, the Supreme Court continued to address regulatory takings in *Lucas v. South Carolina Coastal Council*.<sup>79</sup> Instead of relying on ad hoc factual inquiry, the Court created a per se rule requiring just compensation whenever a regulation permanently deprives land of all economically beneficial use.<sup>80</sup> The Supreme Court was asked to apply the per se taking rule to a growth management program in the subsequent case of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.<sup>81</sup>

The *Tahoe-Sierra* case involved two development moratoria implemented by the Tahoe Regional Planning Agency to provide adequate time to evaluate the region and design a growth management strategy.<sup>82</sup> Relying on the Supreme Court’s decisions in *First English* and *Lucas*, area landowners filed suit arguing “for a categorical rule that whenever the government imposes a deprivation of all economically viable use of property, no matter how brief, it affects a taking.”<sup>83</sup> The Supreme Court rejected the

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<sup>78</sup> Supreme Court precedent has been used by North Carolina courts to evaluate regulatory takings claims involving the “Law of the Land” Clause of the North Carolina Constitution. See *Responsible Citizens v. The City of Asheville* 308 N.C. 255 (1983), *Finch v. The City of Durham* 325 N.C. 352 (1989).

<sup>79</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003. The case involved two waterfront lots purchased by a real estate developer for the construction of two residential units. The South Carolina Coastal Council created the Beachfront Management Act, which permanently prohibited development of the lots. The Supreme Court relied on a number of previous decisions, including *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), in concluding “categorical treatment [is appropriate] where regulation denies all economically beneficial or productive use of land.” The court also noted that a regulation may not result in a regulatory taking if the State’s property and nuisance laws create an inherent limitation on the property’s use.

<sup>80</sup> *Id.* at 1016. The Court held a per se taking rule is appropriate when government regulation “compels a property owner to suffer a physical invasion of his property” or when the “regulation denies all economically beneficial or productive use of land”.

<sup>81</sup> *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). During the 32 month moratoria nearly all residential development in the area was stopped.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

Plaintiffs' argument, acknowledging the remaining value in the land after the moratorium was lifted. The Court held future evaluations of regulatory takings should continue to be conducted through fact specific inquiry applied in the *Penn Central* decision.<sup>84</sup>

The *Tahoe-Sierra* decision recognized the importance of effective growth management and refused to establish a per se rule encouraging communities to “rush through the planning process” in order to avoid “compensating property owners during a moratorium.”<sup>85</sup> However, the Court also emphasized land use regulations are not exempt from takings challenges simply because they are temporary in nature.<sup>86</sup> Courts should continue to consider the economic impact of a land use regulation, the impact on a landowner's investment-backed expectations, and the character of the governmental action. Additionally, land use regulation must substantially advance a legitimate state interest.<sup>87</sup> Adequate public facilities ordinances<sup>87</sup> and other growth management strategies that significantly interfere with private property rights may still be considered regulatory takings.

North Carolina precedent firmly establishes a land use regulation does not constitute a taking if it is reasonably related to a legitimate state objective and does not render the property valueless.<sup>88</sup> Unfortunately, the state court system has not yet addressed a regulatory takings claim involving an APFO or temporary development

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<sup>84</sup> *Id.* at 554.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 337. The Court stated, “ In rejecting petitioners' per se rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other.”

<sup>87</sup> *Id.* at 337. Supreme Court cites *Agins v. Tiburon decision*, 447 U.S. 255, 260 (1980).

<sup>88</sup> *Responsible Citizens in Opposition to the Flood Plain Ordinance, et al. v. The City of Asheville*, 308 N.C. 255, 265, 302 S.E. 2d 204 (1983); See also *Finch v. City of Durham*, 325 N.C. 352, 384 S.E. 2d 8, (Rezoning does not constitute a regulatory taking if the rezoned property “has a practical use and a reasonable value”), *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 218 (1979) (“The mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid”), *Helms v. City of Charlotte*, 255 N.C. 647 (1961).

moratorium. The “reasonableness” of growth management regulations are often determined by the period of time allowed before necessary infrastructure is provided.<sup>89</sup> Extended periods of time have been found reasonable to plan and construct needed infrastructure in other jurisdictions. The Supreme Court’s *Tahoe-Sierra* decision upheld a 32 month moratorium on residential construction without compensation while infrastructure was planned.<sup>90</sup> *Tahoe-Sierra* mirrored previous state and federal court decisions, which found 18 and 24 month moratoria did not result in compensable takings.<sup>91</sup> Since the *Tahoe-Sierra* decision, Federal Courts have upheld temporary development moratorium for growth management purposes, even when they cause “extensive delays for particular developers.”<sup>92</sup> The North Carolina judiciary has not yet addressed a regulatory taking claim involving a development moratoria and *Tahoe-Sierra* may provide guidance.

### ***Regulatory Takings Resulting from Excessive Exactions***

The U.S. Supreme Court’s decisions in *Pennsylvania Coal*, *First English* and *Tahoe Sierra* all address circumstances in which a government regulation limited a private landowner’s use of property. Regulatory takings claims also arise from situations in which the government requires exactions from a developer in exchange for the right to develop property. Many APFO regulations allow developers to voluntarily provide infrastructure at their own expense to speed up the development process. Developers are

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<sup>89</sup> White and Paster at 563

<sup>90</sup> *Tahoe-Sierra* at 310.

<sup>91</sup> The Minnesota Court of Appeals held a 24 month development moratorium did not result in a taking. *Woodbury Place Partners v. Woodbury*, 492 N.W. 2d 258 (Minn. App. 1993) The District Court for the Northern District of California also upheld a development moratorium of 18 months. *Zilber v. Moraga*, 692 F. Supp. 1195 (1988).

<sup>92</sup> *Currier Builders v. Town of York*, 208 F. Supp. 2d 71, 72 (2002)

often willing to pay for some infrastructure improvements as a reasonable way to advance their project. However, government entities can go too far and require exactions that do not bear a reasonable relationship to the impact created by the project.

The Just Compensation Clause is designed “to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole”.<sup>93</sup> Therefore, requiring excessive exactions from a private developer can result in a compensable taking. In order to address the appropriateness of governmental exactions, the Supreme Court issued two key decisions in 1987 and 1994. The Court’s holdings in *Nollan v. California Coastal Commission*<sup>94</sup> and *Dolan v. City of Tigard*<sup>95</sup> created a two-part test to analyze governmental exactions and the Just Compensation Clause.

In *Nollan v. California Coastal Commission*, the Supreme Court acknowledged a “land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner all economically viable use of his land.”<sup>96</sup> However, the Court required an “essential nexus” between the land use regulation and the legitimate interest the government seeks to advance.<sup>97</sup> The “essential nexus” test became the first prong when determining whether land use regulations result in a compensable taking. The second prong of the analysis evolved through the Supreme Court’s decision

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<sup>93</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960)

<sup>94</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) The Nollans applied for a building permit to construct a new home on their beachfront lot. The Coastal Commission conditioned the issuance of a building permit upon the granting of a public easement across the Nollans’ property. The city claimed the easement was necessary because increased residential construction limited visibility of the ocean and encouraged private use of the shorefront. In order to offset these effects, the Commission required the Nollans to grant an easement across their property, designed to encourage public use of the beach. The Nollans claimed the condition violated the Takings Clause of the Fifth Amendment.

<sup>95</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994)

<sup>96</sup> *Id.* at 835. *Agins v. Tiburon*, 447 U.S. 255, 260 (1978).

<sup>97</sup> *Id.* at 837.

in *Dolan v. City of Tigard*.<sup>98</sup> After establishing an “essential nexus” between the land dedication and the legitimate public interest, the Court stated “rough proportionality” must also exist between the required dedication and the impact of the proposed development.<sup>99</sup>

The North Carolina Court of Appeals first determined when an exaction would result in an unconstitutional regulatory taking in *Batch v. Town of Chapel Hill*.<sup>100</sup> The case involved a real estate developer who was refused development approval by the city because she would not dedicate a portion of her property for construction of a public road. Following the test implemented by the U.S. Supreme Court in *Nollan*, the Court of Appeals developed a five-part test to evaluate the constitutionality of an exaction: 1) identify the condition imposed, 2) identify the regulation which caused the condition to be imposed, 3) determine whether the regulation substantially advances a legitimate state interest. If so, then determine 4) whether the condition imposed advances that interest and 5) whether the condition imposed is proportionately related to the impact of the development.<sup>101</sup> Although the *Batch* decision was reached before the U.S. Supreme Court decided *Dolan v. City of Tigard*, the North Carolina Court of Appeals also required

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<sup>98</sup> *Dolan at 380*. Dolan requested a building permit to expand her plumbing and electrical supply store and add a paved parking lot. The application was granted, subject to conditions requiring Dolan to dedicate a portion of her property located within the 100-year floodplain for a public greenway and another portion for use as a “pedestrian / bicycle pathway”. Dolan claimed the dedications resulted in a compensable taking under the 5<sup>th</sup> Amendment.

<sup>99</sup> *Id.* at 392. Under the facts of the *Dolan* case, the Court held rough proportionality did not exist because the city failed to show that flood control could not be accomplished by a private greenway or that the pedestrian/bicycle path would reduce traffic congestion created by a larger retail center. Due to the lack of rough proportionality between the exaction and the impact of the development, the Court held the land dedications violated the 5<sup>th</sup> and 14<sup>th</sup> Amendments. The Court explained the use of the term “rough proportionality” as an attempt to prevent confusion with the minimal level of scrutiny required under rational basis review, implemented in Equal Protection analysis. Additionally, the Court wanted to suggest a more deferential standard than the “specific and uniquely attributable” test adopted by the Illinois Supreme Court and other jurisdictions.

<sup>100</sup> *Batch v. Town of Chapel Hill* 92 N.C. App. 601 (1988).

<sup>101</sup> *Id.* at 621-622.

proportionality between the exaction and the impact of the development.<sup>102</sup> The Court of Appeals held the exaction resulted in an unconstitutional regulatory taking because the land dedication was not proportionately related to the impact of the development.<sup>103</sup>

On Appeal, the North Carolina Supreme Court reversed the Court of Appeals' holding on technical grounds and did not address the constitutional claims raised by the developer.<sup>104</sup> It remains unclear if the rule established by the Court of Appeals is still valid to determine the constitutionality of exactions required from a developer. The U.S. Supreme Court's subsequent holding in *Dolan* suggests the North Carolina Court of Appeals appropriately analyzed the takings claim in *Batch v. City of Chapel Hill*. In recent years other jurisdictions have also applied the heightened level of judicial scrutiny established in *Nollan* and *Dolan* to evaluate impact fees used for growth management purposes.<sup>105</sup> Further judicial guidance is necessary to firmly establish a rule for evaluating exactions in North Carolina.

#### **IV. Due Process and Equal Protection**

In addition to regulatory takings claims, APFO regulations have been challenged as violations of Due Process and Equal Protection. The Due Process Clause, included in

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<sup>102</sup> The Supreme Court decided *Dolan v. City of Tigard* five years after the *Batch* decision, requiring "rough proportionality" between an exaction and the impact of a development.

<sup>103</sup> *Id.* at 623. The North Carolina Court of Appeals also utilized the test established in *Batch* to decide a similar case, *Franklin Road Properties v. City of Raleigh* 94 N.C. App. 731(1989).

<sup>104</sup> *Batch v. Town of Chapel Hill* 326 N.C. 1 (1989). The Court concluded that Chapel Hill rightfully denied the grant of a subdivision permit because the application failed to consider future road plans. For discussion of the judicial history see Arias, Elizabeth K., Note: *Batch v. Town of Chapel Hill*. Takings Law and Exactions: Where Should North Carolina Stand? 21 *Campbell L. Rev.* 49 (1998).

<sup>105</sup> *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994). The California Supreme Court found a \$280,000 impact fee was subject to heightened judicial scrutiny established in *Dolan*. *National Association of Home Builders of the United States v. Chesterfield County*, 907 F. Supp. 166 (1995). U.S. District Court for the Eastern District of Virginia applied *Dolan* and upheld a voluntary fee program in exchange for favorable action on rezoning.

the 5<sup>th</sup> Amendment of the Federal Constitution, states no person shall be “deprived of life, liberty, or property, without due process of law”.<sup>106</sup> The Equal Protection Clause of the 14<sup>th</sup> Amendment requires all States “to provide any person within its jurisdiction the equal protection of the laws.”<sup>107</sup> APFOs and other growth management techniques are clearly capable of depriving a citizen of property rights by preventing development or requiring exactions in exchange for the right to develop. The implementation of an APFO can also treat two groups of people differently because the regulations only apply to citizens within a specific geographical area.<sup>108</sup> Due to these constitutional restraints, an examination of Due Process and Equal Protection law is necessary to determine the appropriate use of growth management regulations.

### ***Substantive Due Process***

In 1926, the Supreme Court reached a landmark decision addressing the constitutionality of land use regulations in *Village of Euclid v. Ambler Realty Co.*<sup>109</sup> The Court addressed the necessity of considering individual circumstances when determining the validity of zoning ordinances, stating; “a regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities”.<sup>110</sup> Since the legitimacy of land use regulation hinges on the specific circumstances in each case, the Court adopted a standard of review largely deferential to decisions made by local governments. The Court held “before [a zoning] ordinance can

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<sup>106</sup> U.S. Const. art. V.

<sup>107</sup> U.S. Const. art. XIV. The protections provided by the Due Process Clause of the 5<sup>th</sup> Amendment are applied to the States through the 14<sup>th</sup> Amendment. Similarly, the protections citizens are provided from the States by the Equal Protection Clause in the 14<sup>th</sup> Amendment also apply to the Federal Government through the 5<sup>th</sup> Amendment Due Process Clause. < <http://www.law.cornell.edu> >

<sup>108</sup> White and Paster n. 1 at 773.

<sup>109</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>110</sup> *Id.* at 388.

be declared unconstitutional [under the 5<sup>th</sup> or 14<sup>th</sup> Amendments]”, it must be shown that “such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>111</sup> Subsequent judicial decisions have found a wide range of activities to be related to the “general welfare” and have generally deferred to local governments when reviewing the constitutionality of land use regulations.<sup>112</sup>

The 1972 decision in *Golden v. Planning Board of Town of Ramapo* recognized the elimination of urban sprawl, availability of public facilities, efficient land use, and prevention of urban blight as legitimate uses of zoning authority.<sup>113</sup> In 1974, the Supreme Court went further in *Village of Belle Terre v. Boraas*, finding the “concept of the public welfare is broad and inclusive” and zoning authority can appropriately be used to preserve family values, clean air, and quiet seclusion.<sup>114</sup> Additionally, the Supreme Court acknowledged that such determinations are legislative functions, rather than judicial, which should be upheld unless the regulations are arbitrary and bear no “rational relationship to a legitimate state objective”.<sup>115</sup> The North Carolina Supreme Court has applied a rational basis test in *A-S-P Associates v. City of Raleigh*, holding land use regulations do not violate Substantive Due Process if they are “reasonably necessary to accomplish a public good”.<sup>116</sup>

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<sup>111</sup> *Id.* at 395, 388

<sup>112</sup> *White and Paster* at 771. *Pelham* at 991.

<sup>113</sup> *Golden* at 297.

<sup>114</sup> *Village of Belle Terre v. Boraas*, 416 U.S. 1,10 (1974).

<sup>115</sup> *Id.* at 9. Also see *Schenck v. The City of Hudson*, 114 F.3d 590 (1997), where the Sixth Circuit found a growth control ordinance did not violate the Due Process Clause. The City of Hudson enacted the ordinance after conducting studies showing inadequate sewage, roads, and emergency services to serve the existing population. Relying on expansive judicial precedent, the Sixth Circuit recognized the provision of public facilities as a legitimate interest and found the city’s permit lottery system was a reasonable method to control growth.<sup>115</sup>

<sup>116</sup> *A-S-P Associates v. City of Raleigh*, 298 N.C. 207 (1979).

APFOs and other growth management ordinances may be subjected to heightened judicial scrutiny if they interfere with an individual's right to travel. The Supreme Court has recognized a fundamental right to travel and regulations interfering with the right cannot be enacted unless they are necessary to achieve a compelling government interest.<sup>117</sup> An APFO can potentially limit an individual's right to travel if it prevents the development of housing until new infrastructure is created.<sup>118</sup> These challenges generally fail for a number of reasons. First, many APFO regulations allow developers to voluntarily provide infrastructure and proceed with development.<sup>119</sup> Second, effectively implemented concurrency regulations do not completely prohibit new development and new construction is slowed only to the extent necessary to provide needed infrastructure. Third, even when an APFO completely restricts development, new residents can move into existing homes within the community and exercise their fundamental right to travel.<sup>120</sup> Finally, due to the importance of providing infrastructure concurrently with new development, APFO regulations may be considered a compelling government interest.<sup>121</sup>

### ***Equal Protection***

Both the Federal and North Carolina Constitutions include an Equal Protection clause, requiring the law to treat individuals in the same manner under similar

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<sup>117</sup> *Saenz v. Roe*, 526 U.S. 489 (1999). Government regulations limiting fundamental rights are subject to strict scrutiny, rather than the deferential standard applied to land use regulations and other economic interest.

<sup>118</sup> White and Paster at 772.

<sup>119</sup> *Id.*

<sup>120</sup> Strachan, Adam (2001). Concurrency Law: Water as a Land Use Regulation, *Journal of Land, Resources and Environmental Law* 435, 449.

<sup>121</sup> White and Paster at 773.

circumstances.<sup>122</sup> APFO regulation can be subject to Equal Protection challenges because the ordinances create classifications based on geographic boundaries, treating individuals in various locations differently.<sup>123</sup> Legislative classifications made for growth management purposes are typically considered economic or social classifications, subject to rational basis review.<sup>124</sup> A land use regulation does not violate the Federal or State Equal Protection clause if “the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation.”<sup>125</sup> Rational basis review is a relatively easy hurdle to overcome and land use regulations are rarely invalidated on Equal Protection grounds. North Carolina communities generally have little trouble establishing infrastructure provision as a legitimate state objective and concurrency as a reasonable method.<sup>126</sup>

## V. Conclusions

Adequate public facilities ordinances will remain a topic of public debate as communities continue to struggle with rapid population growth. The North Carolina judiciary has not yet determined if the State’s General Statutes provide implicit authority for local governments to enact APFOs. However, state statutory law and existing precedent provide some guidance in evaluating the legality of these regulations. Overly restrictive ordinances

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<sup>122</sup> U.S. Const. art. XIV, N.C. Const. art. 1, § 19. Cornell Legal Information Institute, < [http://www.law.cornell.edu/topics/equal\\_protection.html](http://www.law.cornell.edu/topics/equal_protection.html) >

<sup>123</sup> Paster and White at 773.

<sup>124</sup> Id.

<sup>125</sup> *Guthrie v. Taylor*, 279 N.C. 703 (1971), *A-S-P Associates v. City of Raleigh*, 298 N.C. 307 (1979), *Responsible Citizens v. The City of Asheville*, 308 N.C. 255 (1983), *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

<sup>126</sup> Strachan at 124. APFOs are more susceptible to Equal Protection challenges when they are designed to treat individuals differently based on race, religion, nationality, gender or other suspect classifications. Suspect classifications require heightened levels of judicial scrutiny, which are more difficult to overcome than rational basis review. However, APFO regulations are rarely subjected to heightened judicial scrutiny.

may be considered the equivalent of a moratorium and subjected to heighten procedural requirements. Additionally, the judiciary has expressed unwillingness to broadly interpret enabling legislation to allow new exactions not specifically provided by the General Assembly. APFOs including these types of provisions may be outside the scope of local authority. If the court determines local authority exists, U.S. Supreme Court precedent suggests APFOs including reasonable development moratoria will withstand regulatory taking challenges. However, exactions imposed by an APFO must promote a legitimate government interest and be proportionate to the infrastructure demands created by a new development in order to avoid Federal and State constitutional challenges. Municipalities should consider these legal issues when considering the implementation of an adequate public facilities ordinance.