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Developers-Don't Let Your Water and Sewer Impact Fees Go Down the Drain

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Background

In general, North Carolina counties and municipalities use impact fees to offset the need for expanded infrastructure as a result of new development. Tap fees, on the other hand, are charges for connecting to existing public sewer or water.[1] North Carolina municipalities and counties may also assess fees against new subdivisions in lieu of certain road and infrastructure projects. Not all impact fees are controversial, but issues arise when the fees are unrelated to benefits actually conferred upon the development project.

Quality Built Homes v. Town of Carthage

The North Carolina Supreme Court has provided some guidance to developers paying impact fees for "future services" that, in fact, do not benefit the proposed development project. According to the North Carolina Supreme Court, most municipalities do not have the authority to require impact fees for "*future services*." Barring a North Carolina local act[2] to the contrary, municipalities may only "establish and revise . . . schedules of rents, rates, fees, charges, and penalties for the *use of* or the *services* [*currently being*] *furnished* by any public enterprise" (the "**Public Enterprise Statute**").[3] The Public Enterprise Statute, which is the enabling statute for municipal water and sewer districts, does not grant the authority to charge fees for services *to be furnished*.[4] This is unlike the enabling legislation for county and metropolitan water districts, which grants the authority to charge impact fees for "services furnished or *to be furnished* by any water system or sewer system of the authority."[5]

In its August 19th decision in Quality Built Homes Incorporated and Stafford Land Company v. Town of Carthage[6] ("Quality Built Homes"), the North Carolina Supreme Court held that the Town of Carthage exceeded the scope of its municipal authority by adopting two impact fee ordinances relating to future services. Under both ordinances, "final plat approval" for subdividing property was contingent upon the landowner paying water and sewer fees "based on water meter size according to the town's fee schedule." The offending portion of the code required the fee to be paid at the earliest of the "(a) Tap Fee; or (b) Development permit."[7] Effectively, this made the impact fee a prerequisite for final subdivision plat approval by the town of Carthage.

In ruling against Carthage, the N.C. Supreme Court noted that the town refused to issue building permits to developers unless the impact fee was paid. The fee was charged in addition to the standard tap fee and normal charges for water and sewer customers.[8] After Quality Built Homes, it is clear that if a municipality charges for prospective services, it is operating outside the bounds of its statutory authority.

Similarly, a county does not have authority to charge for services to be furnished, unless it makes a commitment or concrete plans to provide such services. For example, in Point South Properties, LLC v. Cape Fear Public Utility Authority, the North Carolina Court of Appeals held that the "generalized goal of extending water and sewer service to unspecified parts of New Hanover County at an unspecified time

in the indefinite future" was not "sufficient to authorize imposition of impact fees for services 'to be furnished.' "[9] The N.C. Court of Appeals noted that despite authority to charge for future services, a county must produce evidence of at least "*a commitment* to extending water and sewer service to the subject properties, regardless of the timeline."[10]

Municipalities with Legislative Authority to Charge for Future Services

The N.C. General Assembly has passed several local acts allowing municipalities to charge impact fees for services to be furnished. One such act affects the town of Rolesville. In part, the act states that local ordinances "may provide that an applicant for a building permit shall submit the impact fee along with the permit application and that building permits shall not be issued until the impact fee has been paid."[11] The fee is calculated based on the projected cost of improvements over no more than a twenty year period needed to serve the Town and extraterritorial planning area.[12] In effect, this local act grants Rolesville the authority to charge fees for future municipal water and sewer services.

Other towns have successfully lobbied for similar acts. These include Pittsboro and Chapel Hill. However, no such local act has been passed by the North Carolina General Assembly since the late 1980's. According to the North Carolina Home Builders Association (NCHBA), the General Assembly has been resistant to most proposals to increase municipal or county impact fees.[13] However, the additional guidance from Quality Built Homes may lead to changes at the municipal level.

How will Municipalities Respond?

The Quality Built Homes ruling may catch the attention of municipalities. It is conceivable that the enabling legislation itself could be amended to give municipalities the same authority as counties and metropolitan water districts to charge for future services. However, such an amendment would require a strong lobby considering the opposition of the NCHBA.

It is unlikely that individual municipalities will be successful in lobbying the General Assembly for change on a case-by-case basis. Although the N.C. Supreme Court stated in Quality Built Homes that municipalities "routinely seek and obtain enabling legislation from the General Assembly to assess impact fees," the evidence is to the contrary. Local acts to this effect are rare. In fact, the Court in Quality Built Homes cites only to the Rolesville, Pittsboro, and Chapel Hill local acts as examples, and all of these acts were passed nearly thirty years prior. Considering the history of local acts related to impact fees, a dramatic shift expanding municipal power is unlikely to occur in the near future.

Developers should be Proactive to Avoid Fees

Time is money in the development world; therefore, this article does not suggest that developers withhold payment for impact fees at the expense of obtaining a building permit or certificate of occupancy. Instead, if developers or their counsel believe impact fees are being assessed without the proper authority, it is possible to submit the fee under protest to the county or municipality requiring the assessment. If protest is made properly and in a timely fashion, there are some additional legal remedies available.

For example, developers may have a state law claim under the Public Enterprise Statute if a municipality acts beyond the scope of its powers granted by the legislation. Like other statutes that do not set a statute of limitations, the developer has ten years to file a claim. [14] An additional, but more complicated claim, would be a § 1983 Due Process claim. This claim must be filed within the three year statute of limitations.[15]

In conclusion, legislative change is not likely, but possible. Future articles will track changes, if any, to this area of law. In the meantime, developers and their counsel should closely examine municipal and county impact fees in light of the Quality Built Homes ruling.

This article is for educational purposes only and is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.

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[1] 27 Urb. Law. 541 (1995).
[2] A "local act" is a law passed by the General Assembly, but affecting only a small number of municipalities or counties. Local acts affecting less than fifteen (15) counties do not require the signature of the governor.
[3] N.C.G.S § 160A-314(a) (the "Public Enterprise Statute").
[4] Generally, enabling statutes create a 'ceiling' of authority for a governmental body. See N.C.G.S § 160A-314(a) (enabling municipalities to enact water and sewer ordinances and fee schedules related to services actually rendered).
[5] See, e.g., N.C.G.S. 162A-49 (2015) (applying to metropolitan water districts).
[6] Quality Built Homes Inc. v. Town of Carthage, No. 315PA15, 2016 WL 4410716 (N.C. Aug. 19, 2016).
[7] Carthage, N.C., Code §§ 51.076(C)(2) , 51.096(C).
[8] Id. at 1.
[9] Point South Properties, LLC v. Cape Fear Public Utility Authority, 778 S.E.2d 284, 292 (2015).
[10] Id. at 290.
[11] Senate Bill 1576 S.L. 1987-996, §6.
[12] Id. at §2(1)
[13] "Why not impact fees?" North Carolina Home Builders Association, http://www.nchba.org/wp/legislative-news/why-not-impact-fees/ (accessed September 19, 2016).
[14] Point South Props., LLC at 289. See N.C. Gen. Stat. § 1-56 (establishing a 'catchall' ten-year statute of limitation for claims that do not otherwise provide a statutory limit on claims).
[15] See Tommy Davis Const., Inc. v. Cape Fear Public Utility Authority, 807 F.3d 62 (holding for developer on facts similar to Quality Built Homes).