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North Carolina Impact Fee Litigation Update

2022 NCACC Summer Attorneys Conference

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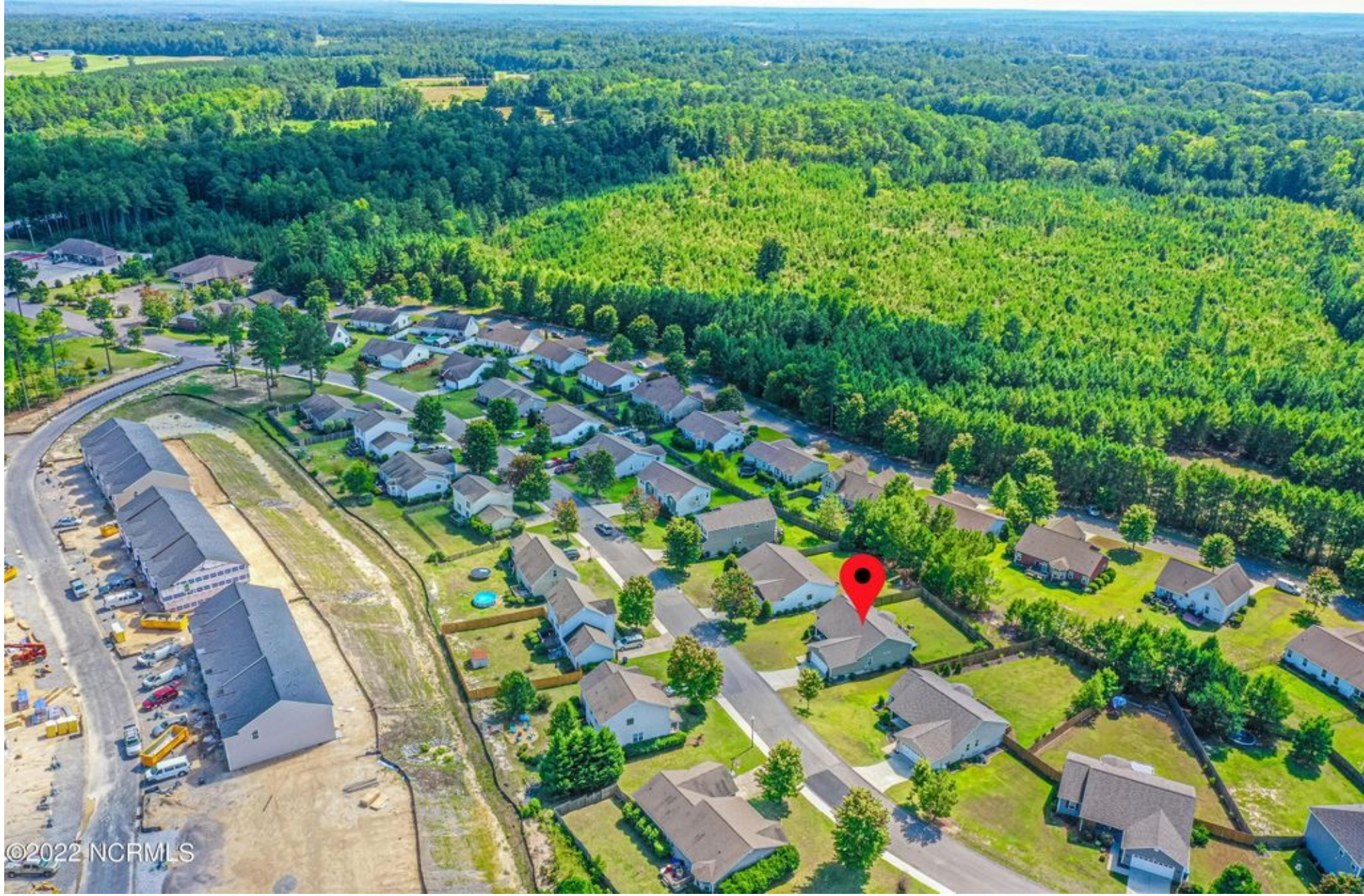
How did we get here?



A fee by any other name…

- Impact fees
- Capital reserve fees
- Capacity development fees
- Availability fees
- Facility fees
- System development fees

- Impact fees are one-time charges paid by developers as part of the development approval process.
- The fee is intended to help pay for the impacts of new development on public infrastructure such as roadways, sewer, water, police, fire, and schools.
- The primary purpose is to recover costs and not to generate revenue.

Quality Built Homes, et al. v. Town of Carthage I
369 N.C. 15 (2016)

- A landowner seeking to subdivide property and receiving "final plat approval," was required to pay water and sewer impact fees based on water meter size.
- Impact fees were assessed in addition to the water and sewer tap fees, and the monthly service charges to water and sewer customers.
- If a property owner did not pay the impact fees, the Town refused to issue building permits.

Quality Built Homes, et al. v. Town of Carthage I

- The general utility fee statutes for both counties and municipalities provided:
  - The local unit "may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties *for the use of* or *the services furnished by* [the local unit's water or sewer system.]" N.C.G.S. 160A-314 (municipalities); N.C.G.S. 153A-277 (counties).

Quality Built Homes, et al. v. Town of Carthage I

- Lawful Fees
  - User fees: the amount calculated to cover current operating and capital costs, as well as future capital costs necessary to continue to serve the properties.
  - Connection/tap fees: assessed when a property connects to the water or sewer system and calculated to cover the direct and indirect costs of making that connection (including, but not limited to, the costs of installing the meter and setting up the customer account).

Quality Built Homes, et al. v. Town of Carthage I

- Unlawful Fees
  - "*for the use of*" and "*the services furnished by*"
  - The fee statutes only allow a local unit "to charge for the contemporaneous use of its water and sewer services—not to collect fees for future discretionary spending."
  - Unlike the fee statutes applicable to county water and sewer districts (and a few other local government entities that provided water and sewer services), the county and municipal fee statutes did not allow a unit to "charge for prospective services."

Kidd Construction Group v. Greenville Utilities Commission

271 N.C. App. 392, 845 S.E.2d 797 (2020)

- A charter granted the Greenville Utilities Commission authority to charge fees for “services rendered.”
- The commission required builders to pay a capacity fee to obtain development approval.
- The fee was designed to “recover a proportional share of the cost of capital facilities constructed to provide service capacity for new development or new customers connecting to the water/sewer system.”
- The phrase “services rendered” is synonymous with “services furnished.”

Daedalus, LLC v. City of Charlotte

--- N.C. App. ---, 872 S.E.2d 105 (2022)

- A new customer applied for service. A capacity analysis was completed. Following the analysis, the City reserved sewer system capacity for a specified period of time. The City, at that moment, committed itself to providing capacity to the applicant.
- The fees are "identical" to fees held to be *ultra vires*:
  - charged to pay for the capacity costs associated with serving new growth;
  - the fees were paid at the time of the application for a new service; and
  - the service connection fees consisted of two components, a tapping fee and a capacity fee.
- "Defendant cannot identify any contemporaneous use of the water and sewer system property owners receive for the payment of the fees."

Anderson Creek Partners, L.P. v. County of Harnett

--- S.E.2d ---, 2022 WL 3570917, 2022-NCSC-93 (Aug. 19, 2022)

- The fees are "intended to provide the County with a contribution toward the cost of expanding its water and sewer infrastructure to account for the additional customers that will be added as a result of the developer's development."
- Key holding: "Capacity use" fees are "monetary exactions" subject to constitutional scrutiny under *Koontz* and must, therefore, satisfy the "essential nexus" and "rough proportionality" test in order to avoid being treated as takings of plaintiffs' property.
- Dissenting opinion: "Even if this decision has few immediate practical consequences, it also signals an increased hostility towards government that hearkens back to a bygone era."
  - "At a minimum, governments will need to expend more resources justifying the imposition of reasonable fees used to defray the costs of providing public services."

Anderson Creek Partners, L.P. v. County of Harnett

--- S.E.2d ---, 2022-NCSC-93 (Aug. 19, 2022)

- Harnett County's capacity use fees were subject to scrutiny under the "essential nexus" and "rough proportionality" tests articulated in *Nollan* and *Dolan*.
- "[T]his Court expressed concern in [*Lanvale Properties* and *Quality Built Homes II*] that local governments might use impact fee ordinances to force landowners to choose between paying a monetary exaction or forgoing development of their land entirely."
- "[T]he County's decision to condition its support for the issuance of the required water and sewer permits upon the payment of the challenged 'capacity use' fees is inherently coercive in the constitutional sense."
- Windfall considerations: "on remand, the County shall be permitted to present evidence concerning the extent to which, if at all, plaintiffs factored the cost of the challenged 'capacity use' fees into the prices at which they have sold lots to ultimate purchasers."

Trial Court Decisions

- Plantation Building of Wilmington v. Town of Leland, Brunswick County 18-CVS-1722 – March 12, 2020 - summary judgment for plaintiffs in a class action for refunds of Leland's water and sewer "impact fees" and "capacity fees" granted by Judge Bell **(paid at building permit)**
- M/I Homes of Charlotte, LLC v. City of Belmont, Gaston County 19-CVS-1080 and *Shea Builders v. City of Belmont*, 18-CVS-4101 – March 23, 2020 - summary judgment for plaintiffs for refund of Belmont's water and sewer "impact fees" granted by Judge Ervin. Attorneys' fees also awarded pursuant to N.C.G.S. § 6-21.7. **(paid at building permit)**
- Daedalus, LLC v. City of Charlotte, Mecklenburg County 18-CVS-21073 – October 2, 2020 - summary judgment for plaintiffs in a class case for refunds of the Charlotte's water and sewer "capacity fees" granted by Judge Archie **(paid at application for service)**
- True Homes, LLC and D.R. Horton, Inc. v. City of Greensboro, Guilford County No. 19-CVS-3879 – summary judgment entered for plaintiffs granted by Judge Doughton in class action for recovery of water and sewer "capacity use fees" charged by Greensboro **(paid at application for service)**

Settlements

- Approximately 28 cities and counties across North Carolina have settled claims for refunds of water and sewer impact/capacity fees
- Most have involved fees charged at the building permit stage or later.
- In recent years, many municipalities and counties have settled for 100% of fees paid or more.

Settlements (2019-2020)

City of Asheville	$1,850,000.00 (Class Action Settlement Fund)* *$616,666.00 in Attorney's Fees and Expense Reimbursements to be paid from the total Settlement Fund
City of Belmont	$1,656,339.00 (Class Action Settlement Fund) 100% of Fees paid
Pamlico County	$35,000.00 35% of Fees paid
Pamlico County	$450,000.00 ~39% of Fees paid
Pamlico County	$150,000.00 ~66% of Fees paid
Town of Apex	$15,300,000.00 (Class Action Settlement Fund)* ~43% of estimated Fees paid *$5,113,401.00 in Attorney's Fees and Expense Reimbursements to be paid from the total Settlement Fund
Town of Holly Springs	$7,950,000.00 (Class Action Settlement Fund)

The *Zander* Class Action Lawsuit

- Named Plaintiffs Elizabeth Zander and Evan Galloway
- Purchased a parcel of land in Chapel Hill to construct a home
- Paid impact fee of $11,423.00 before a certificate of occupancy would be issued
- Zander and Galloway brought the action alleging that the County's impact fees violated the U.S. and North Carolina Constitutions
- Plaintiffs originally asserted 13 causes of action on behalf of putative classes to include all individuals who paid school impact fees between 2009 and 2016

Elizabeth Zander, et al. v. Orange County, et al.

- Impact fees for capital improvements to public schools were authorized by S.L. 1987-460, the enabling legislation.
- Orange County's school impact fees were only invalid if they failed to comply with the requirements of the enabling legislation.
- Plaintiffs could not meet their burden of proof to establish that the County's school impact fees were invalid or "illegal."

Orange County's Enabling Legislation
1987 N.C. Sess. Law 460

TITLE VI. ORANGE COUNTY IMPACT FEES.

Sec. 17. G.S. 153A-331 is amended by identifying the existing provisions as subsection (a) and by adding new subsections to read:

"(b) Impact Fees Authorized.

(1) Orange County may provide by ordinance for a system of impact fees to be paid by developers to help defray the costs to the County of constructing certain capital improvements, the need for which is created in substantial part by the new development that takes place within the County.

(2) For purposes of this subsection, the term capital improvements includes the acquisition of land for open space and greenways, capital improvements to public streets, schools, bridges, sidewalks, bikeways, on and off street surface water drainage ditches, pipes, culverts, other drainage facilities, water and sewer facilities and public recreation facilities.

(3) An ordinance adopted under this subsection may be made applicable to all development that occurs within the County.

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