EXACTIONS: A THIN LINE BETWEEN SMART GROWTH AND EXTORTION

April 7, 2014

Craig D. Justus

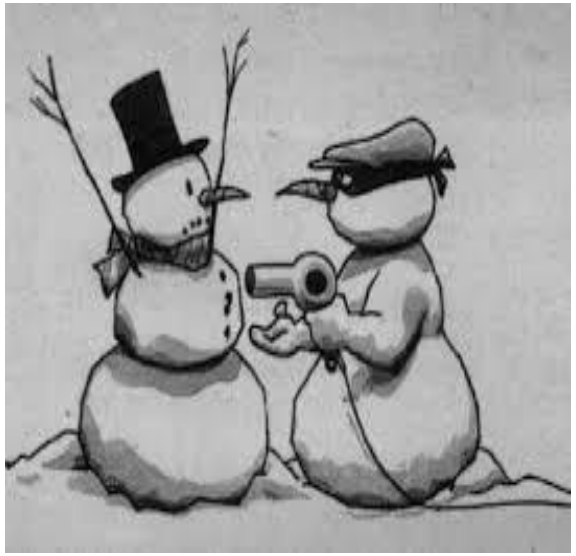
The Van Winkle Law Firm

What is “smart growth?”

At the heart of the American dream is the simple hope that each of us can choose to live in a neighborhood that is beautiful, safe, affordable and easy to get around. Smart growth does just that. Smart growth creates neighborhoods with schools and shops nearby and low-cost ways to get around for all our citizens. Smart growth creates jobs that pay well and reinforces the foundations of our economy. Americans want to make their neighborhoods great, and smart growth strategies help make that dream a reality.

See www.smartgrowthamerica.org/what-is-smart-growth

Extortion



In common law, extortion is committed by a public officer. When a public officer takes money or other valuables from an individual that is not due to the officer, such act will not amount to robbery. However, this will come under extortion. The valuables or money should be extracted by using force or threat. To constitute the offense of extortion, the public officer should use a threat under the guise of exercising public duties. When an officer falsely claims authority to take that which the officer is not lawfully entitled to , such act is known as acting under color of office[i]. When a public officer makes a person do a service or demands payment in a private capacity, it will not amount to extortion because it is not performed under the color of office[ii].

See http://www.extortion.uslegal.com

What is an Exaction?

- Typically, the term “Exaction” means:
  - A condition of development permission that requires a public facility or improvement to be provided at the developer’s expense.

Government vs. Citizen

Most Exactions fall into one of four categories:

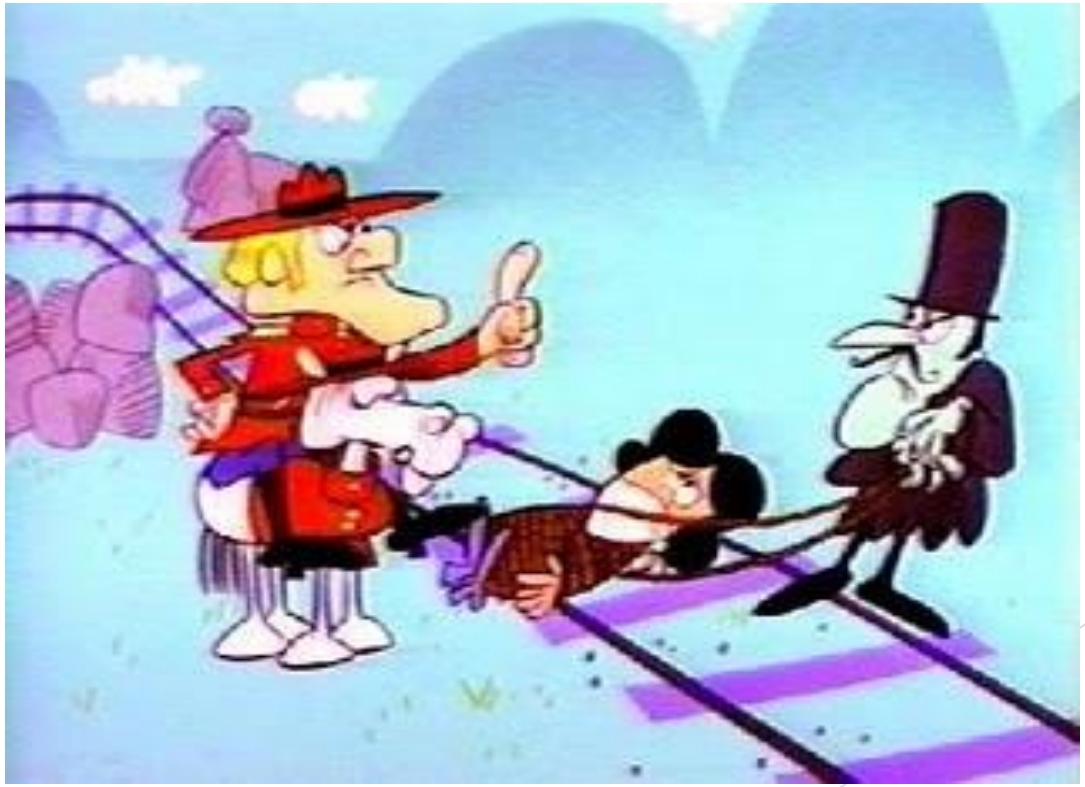
- (1) Requirements that land be dedicated for street rights-of-way, parks, or utility easements and the like;
- (2) Requirements that improvements be constructed or installed on land so dedicated;
- (3) Requirements that fees be paid in lieu of compliance with dedication or improvement provisions; and
- (4) Requirements that developers pay "impact" or "facility" fees reflecting their prorated shares of the cost of providing new roads, utility systems, parks, and similar facilities serving the entire area.

Franklin Road Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989)(quoting *Ducker, "Taking" Found for Beach Access Dedication Requirement*, 30 Local Gov't Law Bulletin, 2, Institute of Government (1987)).

North Carolina Examples of Exactions

- Dedicate property for future roads/Construct improvements to adjoining public roadways: *Franklin Road; Batch v. Town of Chapel Hill*; *Buckland v. Town of Haw River*;
- Dedicate property for recreation/park: *Messer v. The Town of Chapel Hill*;
- School Impact Fee cases: *Lanvale Properties, LLC v. County of Cabarrus; Union Land Owners Association v. The County of Union; Durham Land Owners Ass'n v. County of Durham*.
  - Wait, there's more……

- Improve off-site public infrastructure: *High Rock Lake Partners, LLC v. NCDOT* (As a condition of driveway permit, widen RR crossing on SR 1135 ¼ mile from subdivision entrance and obtain RRs' approval) See G.S. 136-18(29), G.S. 136-18(5) and G.S. 136-93.



- G.S. 136-18(29) - The Department of Transportation may establish policies and adopt rules about the size, location, direction of traffic flow, and the construction of driveway connections into any street or highway which is a part of the State Highway System. The Department of Transportation may require the construction and public dedication of acceleration and deceleration lanes, and traffic storage lanes and medians by others for the driveway connections into any United States route, or North Carolina route, and on any secondary road route with an average daily traffic volume of 4,000 vehicles per day or more.
- G.S. 136-18(5) - To make rules, regulations and ordinances for the use of, and to police traffic on, the State highways, and to prevent their abuse by individuals, corporations and public corporations.....
- G.S. 136-93 - No opening or other interference whatsoever shall be made in any State road or highway…..except in accordance with a written permit from the Department of Transportation or its duly authorized officers, who shall exercise complete and permanent control over such roads and highways.

High Rock Lake Partners, LLC Timeline

- In August 2005, High Rock Lake Partners, LLC (HRLP) purchased for the sum of $5,200,000.00 approximately 186 acres on High Rock Lake in Davidson County with the plans to develop a residential subdivision.
- In order for HRLP to purchase the property, Dolven loaned $3,600,000.00 towards the purchase and became a secured creditor.
- September-December 2005, HRLP seeks County subdivision approval which railroads and DOT opposed.
- In October 2005, HRLP developer filed with DOT for driveway permit to connect to SR 1135.
- In December 2005, the DOT denied the driveway permit.
- In January 2006, HRLP timely appealed the denial in accordance with DOT policies.
- In March 2006, DOT granted the driveway permit with certain conditions. Those conditions being that HRLP had to physically widen a railroad crossing on SR 1135 located approximately one quarter mile from the proposed driveway connection point, and prior to doing so, to obtain all necessary approvals and right of way from two railroad companies.

- In March 2006, HRLP appealed the driveway permit with certain conditions to the DOT Driveway Permit Appeals Committee.
- In June 2006, the Committee upheld the driveway permit with certain conditions.
- In May 2008, because of the inability to develop, HRLP lost the property to Dolven in foreclosure.
- Between the years of 2006 and 2012, HRLP and Dolven went through two Trial Courts hearings, two Court of Appeals hearings and one North Carolina Supreme Court hearing to finally confirm that the Driveway Permit Statute is a narrow grant of power under which DOT may regulate only certain aspects of driveway connections and require applicants to complete only certain improvements. The conditions placed on HRLP's driveway permit are not authorized under the plain language of that Statute. Held that DOT exceeded its statutory authority.
- Dolven was finally granted a driveway permit in February 2014.
- There are currently two cases pending for monetary damages claims.

Other Exactions

- *MCC Outdoor, LLC v. The Town of Wake Forest* (as condition of shopping center development approval, landowner must not renew lease with billboard tenant); *Godfrey v. Zoning Bd. Of Adj.* (Legally establishing nonconforming use is a vested right entitled to constitutional protection).

Argument: Eliminating nonconforming uses serves the public's interest. (See *Koontz* below: giving up constitutionally protected rights in return for receiving government benefit is constitutionally flawed).

G.S. 136-131.1 (Local governments shall not use regulatory powers to cause removal of DOT-permitted signs)

G.S. 160A-381, 382/153A-340, 341 (Zoning); G.S. 160A-174/153A-121(a) (general police powers)

- Affordable Housing Allowances as a condition of development approval (*G.S.* 42-14.1 - No county or city as defined by G.S. 160A-1 may enact, maintain, or enforce any ordinance or resolution which regulates the amount of rent to be charged for privately owned, single-family or multiple unit residential or commercial rental property.)

Conclusion: Added to the above definition of exactions must be efforts to condition Development Approval on private property owner fixing perceived defects in existing public infrastructure and/or forfeiting statutorily or constitutionally protected rights.

The Debate

For “public health, safety and general welfare” reasons, new development cannot take place unless the “public infrastructure” is adequate to serve it (i.e. adjoining road network, water, sewer, police, fire, schools, etc.)

New Development should pay or be responsible for its share of public infrastructure needed to serve it.

If public infrastructure is not adequate to serve the development, then the development should be denied. *In re Application of Goforth Properties, Inc. v. The Town of Chapel Hill* (apartment complex denied due to adverse effect on traffic congestion and safety); *Ghidorzi Construction, Inc. v. Town of Chapel Hill* (“the Town Council is not bound to approve a proposed development because the present traffic problems may be solved at some point in the future”); *Tate Terrace v. Currituck County* (601 lot subdivision denied because of finding that proposed development exceeded the county’s ability to provide adequate public school facilities).

Paying impact fees or having the developer fix the perceived problems with “public infrastructure” are alternatives to saying “no” to development.

Zoning is based on minimizing the externalities created by new growth.

“Private infrastructure” is what occurs within the control of property owner on-site to serve the intended residents or consumers (i.e. internal roads, internal utilities, etc.)

TURN THE COIN OVER…….

- No growth is an isolationist dream, but a State's nightmare. ("If it is too difficult to develop in one county, then developers will flock to another county or even go to another State.")
- New development already pays for public infrastructure in terms of taxes from new properties (e.g. subdivision effect); sales taxes from goods consumed during construction (both development and house building), etc.
- Why should new development be blamed for deficiencies that already exist in the "public infrastructure" or where the "public infrastructure" is almost maxed out?

(Noah's Ark Effect: Everyone and everything is on board, we are good, now pull up the plank and let the rest struggle).

- *See Woodhouse v. Bd of Commissioners of the Town of Nags Head* (32 unit development could not be denied because development "potentially outstrips community fire-fighting facilities" because concern would exist regardless of the type of use or development of the property).

Citing NJ opinion, our Supreme Court stated:

…If this thesis be true as it applies here, it would be equally true in its application to any structure which might be erected on the site, the logical result then being the lands would remain in an unimproved condition and the owners thereof would be deprived of the right to put the premises to the uses authorized by the ordinance itself.

- *Blue Ridge Co., LLC v. The Town of Pineville* (subdivision plat could not be denied because of overcapacity issues at school that already existed)
- Denial of development based on existing deficiencies in public infrastructure would be “de facto moratorium” in violation of G.S. 160A-381(e)/153A-340(h)
- UNINTENDED (BUT KNOWN) CONSEQUENCES OF PASSING THE BUCK TO NEW DEVELOPMENT
  - Impact fees are treated as an alternative to an increase in local property taxes. The Cyclical Tax Implications: Impact fees are passed along to the consumer, increasing the price to buy a house and therein increasing property values which invariably increase property values in other areas which ultimately increases taxes everywhere in the long run.
  - Increased cost of housing minimizes affordability.
  - No development = stagnation.

Two Primary Legal Issues

#1, IS THERE STATUTORY AUTHORITY FOR THE EXACTION?

- The power of any agency or board to exact public improvements or money from private property owners must come from clearly defined sources of legislative authority and such power, being in derogation of common law property rights, will be strictly construed. *High Rock Lake + Smith Chapel Baptist Church v. City of Durham + Lanvale* (authority to enact APFO must come from specific enabling legislation):
  - G.S. 160A-400.20(b) Development Agreements: Local government may not impose any tax or fee not authorized by otherwise applicable law.
  - G.S. 153A-324(b) If the county is found to have illegally exacted a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law, the county shall return the tax, fee, or monetary contribution plus interest of six percent (6%) per annum.

- G.S. 160A-372 Ordinance may require developer to provide funds for recreational land or areas; may require developer, in lieu of required street construction, to provide funds for construction of roads.
- Public enterprises: Finding authority in G.S. 160A-314 generally authorizing cities to establish rates and charges for services furnished by any public enterprise, Court determined that impact fees are authorized for future capital improvements. *South Shell Investment v. Town of Wrightsville Beach*, 703 F. Supp. 1192 (U.S. Dist. Ct., E.D. N.C.) (1988).

- *Lanvale*:
  - "The General Assembly has enacted the zoning and subdivision regulation statutes for the purposes of delineating the authority of county governments to regulate the development of real estate." (*citing Union County*). This statement seems to reject the use of general police power authority to "regulate the development of real estate."
  - Holding: general zoning or subdivision statutes did not provide authority to county to enact AFPO in question that mandates that developers pay an impact fee to obtain development approval without regard to a "zone".
  - "We believe the General Assembly is best suited to address the complex issues involving population growth and its impact on public education throughout the State. We note that the General Assembly has not addressed this precise issue to date."

- IT CAN BE A CONDITION OF DEVELOPMENT OR IT CAN BE A REASON FOR DENYING DEVELOPMENT

Justice Hudson's dissent:

"At no point does the majority explain how denying a development application in light of inadequate school capacity, delaying development until school capacity is adequate, or requiring the developer to modify the development application to address inadequate school capacity are not authorized by statute."

If a county can deny development application outright based on school capacity concerns, surely it can insist on reasonable delays of development to allow for new school construction as well."

Union Land Owners (Judge Jackson): County "may not use APFO to obtain indirectly the payment of what amounts to an impact fee given that defendant lacks the authority to impose school impact fees directly." "Constitution places the duty to fund public schools on the General Assembly and local governments and because the General Assembly has neither expressly or impliedly authorized defendant to shift that duty using subdivision ordinances that impose fees or use similar devices upon developers of new construction, we hold that defendant's adoption of an APFO that includes a VMP and similar measures was in excess of statutory authority."

National Land and Investment Company v. Easttown Township Bd. Of Adj. (Pennsylvania Supreme Court):

Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and cannot be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future –it may not be used as a means to deny the future…Zoning provisions may not be used,…to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.

Several states state that impact fees cannot be imposed to "cure deficiencies in a public facility serving existing development" (Utah, G.S. 11-36a-202; Montana, G.S. 7-6-1602(7)(c)).

Is there a material difference between a development project seeking approval where public infrastructure is already deficient and a development project that causes the cup to run over or facilities are already on the verge of overcapacity?

Should there be a minimum level of “public infrastructure” capacity funded by the taxpayer pool (See *High Rock*: SR 1135 served at the time of the driveway permit 32 trips per day; called a “farm lane”).

Is it clear and unambigious whether or not local governments can simply deny development where there is inadequate “public infrastructure”? If not clear, then 160A-4/153A-4’s mandate to construe grants of power broadly will undoubtedly come into play.

CONSTITUTIONAL CHALLENGES

#2, if #1 is "no", then exaction is illegal if imposed. If the answer to #1 is "yes", then **DOES IT WITHSTAND CONSTITUTIONAL SCRUTINY?** This is usually in the form of either a due process or takings challenge.

14th Amendment to U.S. Constitution (Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws): *Koontz v. St. Johns River Water Management Dt.; Dolan v. City of Tigard; Nollan v. California Coastal Commission*.

Article I, Sec. 19 of N.C. Constitution (No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land). *Batch v. Town of Chapel Hill* (decided ultimately on statutory authority grounds without constitutional inquiry). *Amward v. Town of Cary* (school impact fee case): Found due process violation due to lack of statutory authority although split decision of N.C. Supreme Court left case without precedential value).

No State appellate opinion exists that really establishes binding precedent identifying available remedies in case of illegal exactions.

US Supreme Court

Nollan/Dolan: A unit of government may not condition the approval of a land-use permit on the owner's relinguishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.

Koontz: *Nollan/Dolan* analysis extended to when government denies permit. It is also extended *Nollan/Dolan* to cover in lieu payments of money, rather than dedicating real property to public use.

"Land use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take."

“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury. Nor does it make a difference . . . that the government might have been able to deny petitioner’s application outright without giving him the option of securing a permit by agreeing to spend money to improve public lands. . . . Even if respondent would have been entirely within its rights in denying the permit for some other reason, the greater authority does not imply a lesser power to condition permit approval on petitioner’s forfeiture of his constitutional rights.”

However, Fifth Amendment remedy of just compensation is not available where there has been no “taking”, in the case of a permit denial based on unconstitutionally extortionate demands. Court did not decide what remedies, including monetary damages, might be available. Remand to Florida Supreme Court.

GOVERNMENT WORKING TOGETHER WITH LAND OWNERS

In 2005, the General Assembly adopted several additions to land use statutes by authorizing local governments to enter into voluntary agreements with land owners allocating mutually reciprocal benefits and burdens between them, including reimbursement agreements for infrastructure (N.C. Gen. Stat. 160A-499/153A-451); public enterprise contracts (N.C. Gen. Stat. 160A-320(a)/153A-280) and development agreements (N.C. Gen. Stat. 160A-400.20 *et seq.*/153A-349.1 *et seq.*). Reimbursement agreements and public enterprise contracts allow counties to mutually agree with developers on cost sharing and reimbursements for public infrastructure incidental to development such as water, sewer and streets. "Schools" are not included. N.C. Gen. Stat. 160A-499/153A-451(a); N.C. Gen. Stat. 160A-311/153A-274 (defining public enterprises); N.C. Gen. Stat. 160A-320(a)/153A-280(a)(improvements "that are adjacent or ancillary to a private land development project").

Development agreements are limited to mutually reciprocal and binding agreements with developers of “large-scale projects” on 25 acres or more of land. N.C. Gen. Stat. 160A-400.20/153A-349.1; 160A-400.23/153A-349.4. This statute explicitly contemplates that a developer of a “large-scale” project may need to enter into a development agreement for such project in order to lock development rules in place and provide vesting for up to 20 years. N.C. Gen. Stat. 160A-400.23/153A-349.4; 160A-400.26/153A-349.7. In return for such vesting assurances, a developer may be willing to negotiate terms on sharing the costs of “public facilities”, which in this limited case includes “educational” facilities. N.C. Gen. Stat. 160A-400.21(12)/153A-349.2(12); N.C. Gen. Stat. 160A-400.25/153A-349.6. However, local governments are expressly prohibited from using the development agreement statute to “impose any tax or fee not authorized by otherwise applicable law.” N.C. Gen. Stat. 160A-400.20(b)/153A-349.1(b).

ISSUES TO BE ADDRESSED

- Statutory Authority for Exactions. Where should the General Assembly come down on the exactions issue? Without specifically addressing the issue via statute, *Lanvale* may not preclude using a proper zoning ordinance to "zone" out development via a conditional/special use permitting context if faced with inadequate public infrastructure and spawning litigation as to the public policies behind *Woodhouse/Blue Ridge* cases.

- Remedies. Should the General Assembly define a remedy for illegal or improper exactions?
  - *Koontz*.
  - *Corum v. University of North Carolina* (in the absence of an adequate state remedy, our common law will provide one; a trial judge will be allowed to craft the necessary relief)
  - *G.S. 136-111; 40A-51* Inverse Condemnation statutes address permanent taking of real property interests (some government servitude is imposed –fee or easement), where just condemnation is based on fair market value.
  - Not adequate to address improper permit denial or conditions where the property owner challenges the agency action to remove the regulatory burden (so there is no permanent "taking" of a real property interest) or where the property owner loses all of his real property interests due to regulatory action. The latter scenarios are more in the nature of "damages" as stated in *Koontz*.

- Judicial Process
  - Right now, there is a bifurcated process where the permit denial or conditions are challenged administratively and then judicially (APA: 150B-43; Zoning: 160A-393) but separate from damages claims; See *Batch v. Town of Chapel Hill*
  - This raises issues of judicial economy, monetary waste, statute of limitations (2 years or 3 years), ripeness (how many development plans must be presented?) and discovery. *See Messer v. Town of Chapel Hill; Amward Homes, Inc. v. Town of Cary*

- Attorney's Fees
  - G.S. 6-19.1 (Attorneys' fees against State agencies) "Substantial justification" lacks definition and may be rendered useless by government's assertion of "public purpose" for exaction.
  - G.S. 6-21.7 (Attorneys' fees against cities or counties) If acting outside "scope of its legal authority", the court may award reasonable attorney's fees. This is again ripe for "public purpose" rationales given by local governments.

Conclusion:

Since exactions raise a myriad of statewide public policy issues, the General Assembly should tackle the subject matter head on and settle the debate as the representatives of the public.