

Which Four Letters have the N.C. Supreme Court Up in Arms? APFOs in *Lanvale v. County of Cabarrus*

Kristen Kenley

Introduction

In order to experience urban sprawl, a person merely needs to drive throughout the Triangle region in central North Carolina. One town or city melds into the other, and it can be challenging to know which locality you are in at any given point. In the decade between the 2000 and 2010 censuses, the Triangle area added 400,000 new residents.¹ While cities like Cary, Durham, and Raleigh experienced the most growth, it was the boom in the populations of the smaller towns that really showed the effects of the recent urban sprawl.² Once-small towns have had their individual identities replaced by conglomerations of subdivisions, shopping centers, and chain restaurants.³ Though sprawl may be most visible in the Triangle region, it is affecting other areas in North Carolina as well. Counties surrounding Charlotte, including Cabarrus County, have been largely transformed from rural farmland to booming suburbs.⁴

While population growth tends to mean economic growth as well, the effects of sprawl are not solely positive.⁵ In addition to land degradation, traffic congestion, and air and water pollution, many local municipalities are struggling to provide adequate

¹ Richard Stradling & Stephanie Soucheray, *Census numbers show Triangle is 1.6 million strong*, NEWSOBSERVER.COM (March 3, 2011), available at <http://www.newsobserver.com/2011/03/03/1025817/triangle-is-16-million-strong.html>.

² *Id.*

³ *Id.*

⁴ CABARRUS COUNTY, CENTRAL AREA PLAN 4 (Aug. 18, 2008), available at http://www.cabarruscounty.us/government/departments/commerce/long-range-planning/Documents/commerce_central_area_adopted_land_use_plan.pdf.

⁵ David Owens, *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, 673 (2000) [hereinafter *Local Government Authority*] (discussing the negative effects of urban sprawl).

facilities at rates that are necessitated by the growth.⁶ The increasing population requires more housing, water and sewage facilities, roads, police and fire protection. Additionally, local governments have been unable to accommodate the influx in number of children into existing school capacities.⁷ In reaction to the rapid growth and the pressure to provide adequate facilities in response, Cabarrus County in North Carolina began enacting Adequate Public Facilities Ordinances (APFOs), and essentially, impact fees on subdivision developers who sought to develop in certain counties.⁸

This paper provides an introduction to the general nature of APFOs and impact fees. Next, it will examine why the North Carolina Supreme Court denied local governments in North Carolina the power to use APFOs as a growth management strategy and revenue generator in *Lanvale Properties v. Cabarrus County*.⁹ Finally, this paper presents some options for county governments to raise funds for school construction in the aftermath of the *Lanvale* decision.

I. APFOs and Impact Fees

APFOs and impact fees were crucial concepts in *Lanvale*.¹⁰ While they may appear to be used interchangeably when examining ways in which local governments financially and environmentally support development, they are distinct mechanisms that serve different purposes (even though one may encompass the other in practice).¹¹

An APFO is an ordinance that conditions the approval of a proposed new

⁶ *Id.*

⁷ *Id.*

⁸ *Lanvale Properties, LLC v. County of Cabarrus*, 731 S.E.2d 800, 803, 2012 N.C. LEXIS 644 (N.C. 2012), available at <http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQQTEwLTEucGRm>.

⁹ *Id.* at 818.

¹⁰ *Id.* at 803.

¹¹ Steven Ott & Dustin Reed, *The Effect of Growth Management Strategies: Adequate Public Facilities Ordinances and Impact Fees, A Review of Existing Research* 5-6, 12 (Jan. 2000) (unpublished working paper, UNC Charlotte), available at <https://realestate.uncc.edu/sites/realestate.uncc.edu/files/media/APFOLegalReviewJan24-06.pdf>.

development on the capacity of the government to provide adequate services for the development.¹² If a county decides there is insufficient infrastructure capacity to satisfy the needs of the new development, it will postpone approval of the development until sufficient capacity does exist.¹³ An impact fee is a charge placed on a developer in order to finance the cost of new or improved infrastructure that will be required to support the new development.¹⁴ For example, as will be evident when examining *Lanvale*, an impact fee may be placed on developers to finance construction of new public schools that would be necessary due to the increase in number of students in the school district accompanying the new residential development.¹⁵ Essentially, an APFO works to control the timing of development, while an impact fee seeks to fund the additional facilities required for the development.¹⁶ Together, they operate to ensure that adequate public facilities exist, or at least the funding to provide adequate public facilities exists, before the development goes forward.¹⁷ In certain cases, as in *Lanvale*, an APFO may stipulate an impact fee as one of the criterion that may be satisfied to grant approval of development plans.¹⁸

II. *Lanvale Properties v. County of Cabarrus*

In August 2012, the North Carolina Supreme Court ended the debate about whether or not local county governments possess the authority to enact APFOs as a

¹² Justin Shoemaker, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 DUKE L.J. 891, 897–99 (1999).

¹³ Ott & Reed, *supra* note 11, at 6.

¹⁴ South Carolina Policy Council, *Assessment of Impact Fees as Means of Financing Government Infrastructure*, KA. UNIV. COLLEGE OF ARCHITECTURE, PLANNING, AND DESIGN (1997), <http://www.arch.ksu.edu/jwkplan/planimp/impact%20fees.htm>.

¹⁵ *Lanvale Properties, LLC v. County of Cabarrus* 731 S.E.2d 800, 803, 2012 N.C. LEXIS 644 (N.C. 2012), available at <http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQQTEwLTEucGRm>

¹⁶ Ott & Reed, *supra* note 11, at 5–6.

¹⁷ *Id.*

¹⁸ *Lanvale*, 731 S.E.2d at 804, 2012 N.C. LEXIS 644.

means of managing growth in their counties.¹⁹ In *Lanvale Properties v. Cabarrus County*, the court held that Cabarrus County did not have statutory authority to enact an APFO on residential land developers in order to fund the construction of public schools.²⁰

The factual circumstances surrounding *Lanvale* arose when Lanvale Properties planned to construct a residential development in the city of Locust.²¹ The Cabarrus County Board of Commissioners (Board) informed Lanvale Properties that the conditions set out in the APFO would have to be met in order to gain approval.²² In April 2008, Lanvale Properties filed a declaratory judgment suit against the County challenging the APFO's validity on various statutory and constitutional grounds.²³ The trial court ruled that the County did not have the authority to enact the APFO; the Court of Appeals upheld the ruling.²⁴

Cabarrus County enacted its first APFO in 1998,²⁵ the current version of which was passed in 2007 as a part of the County's zoning ordinance.²⁶ In the nine years spanning 1998 to 2007, the County adopted several versions of the APFO that increased the amount of the fee that developers had to pay, citing N.C. law²⁷ to justify enforcement of the APFO.²⁸

¹⁹ *Id.* at 818.

²⁰ *Id.*

²¹ *Id.* at 805.

²² *Id.*

²³ *Id.*

²⁴ *Lanvale Properties, LLC v. County of Cabarrus*, 731 S.E.2d 800, 803, 2012 N.C. LEXIS 644 (N.C. 2012), available at <http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQQTEwLTEucGRm>.

²⁵ *Id.* at 803.

²⁶ *Id.* at 804.

²⁷ *Id.* at 810; see Act of June 30, 2004, ch. 39, sec. 5, 2004. Sess. Laws 47 (“[T]he County of Cabarrus or any municipality therein may enforce, within its jurisdiction, any provision of the school adequacy review performed under the Cabarrus County Subdivision Regulations, including approval of a method to address any inadequacy that may be identified as part of that review.”). The County used this statute to interpret ‘enforce’ as ‘adopt’ when justifying imparting APFOs on developers. *Lanvale*, 731 S.E.2d at 804. County officials wrongly believed they had authority to adopt APFOs, so they used the language from Session Law to enforce the preexisting APFOs. *Id.*

²⁸ *Id.* at 804.

In its most recent form, the Cabarrus County APFO linked a subdivision development's approval with the available capacity of the County's school system.²⁹ If enough capacity to sustain the development existed, the Board would approve the subdivision without any stipulations or impact fees imparted on the developer.³⁰ However, if the Board determined that the school system did not have sufficient capacity to handle the influx of students, it would deny the application or impart an APFO on the developer.³¹ The APFO contained the following conditions:

(1) deferring approval for five years or until sufficient student capacity becomes available; (2) phasing construction of the development in increments that coincide with available capacity; (3) reducing density or intensity of the development; (4) entering into a consent agreement involving a monetary contribution, donation of land, or construction of a school; or (5) 'any other reasonable condition to ensure that all [public schools] will be adequate and available.'³²

Condition four describes what the County referred to as a voluntary mitigation payment.³³ However, the court rejected this characterization, and likened the payment instead to a mandatory school impact fee that it had struck down in previous cases.³⁴ The fees paid by the developers to satisfy condition four were used to fund construction of public schools in the area that would be impacted by population growth as a result of the development.³⁵ Since 2008, Cabarrus County imposed an \$8,617.00 fee on each single-

²⁹ *Id.* at 813.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (quoting Cabarrus County, N.C., Zoning Ordinance ch. 15, §§ 7, 8).

³³ For a definition of "voluntary mitigation payment" see Union County Planning Board Agenda, (May 2008), http://www.co.union.nc.us/Portals/0/Planning/Agenda_Min/2008/pb_minutes05-06-08.pdf (defining a voluntary mitigation payment as "a mitigation measure in which the Applicant agrees to contribute money to the County to defray the per-unit impacts of school facilities").

³⁴ *Lanvale Properties, LLC v. County of Cabarrus*, 731 S.E.2d 800, 814 (N.C. 2012) (citing *Durham Land Owners Ass'n v. Cnty. of Durham*, 177 N.C. App. 629, 638, 630 S.E.2d 200, 206 (N.C. App. 2006)).

³⁵ *Id.* at 805.

family unit that was constructed.³⁶ This amount increased the APFO fee for a single-family home by more than 1,600 percent between 2003 and 2008.³⁷

Prior to *Lanvale*, several North Carolina courts had ruled that county governments did not have the authority to enforce APFOs or impact fees.³⁸ In each of these cases, the courts ruled that the counties had misinterpreted the statutes under which they were enforcing impact fees because the counties were assuming more authority than the General Assembly actually delegated.³⁹ In order to use an APFO, a county must apply to the General Assembly for special permission.⁴⁰

While the General Assembly has granted North Carolina counties the power to enact zoning ordinances,⁴¹ the *Lanvale* court ruled that the APFOs did not fall within that zoning authority due to functional differences between zoning ordinances and APFOs.⁴² The purpose of zoning is to regulate the use of land within a given area by categorizing which type of land uses may be permitted in each area.⁴³ In contrast, Cabarrus County's APFO did not organize land for specific uses at all; rather, it functioned as a mechanism to generate revenue for the County that had nothing to do with defining land use categories.⁴⁴ While the APFO was comprised of other conditions aside from the impact fee, the court ruled that the impact fee condition of the APFO was much like the impact

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See* Amward Homes, Inc. v. Town of Cary, 206 N.C. App. 38, 53, 698 S.E.2d 404, 416 (N.C. App. 2012); Union Land Owners Ass'n v. Cnty. Of Union, 201 N.C. App. 374, 380-81, 689 S.E.2d 504, 507-08 (N.C. App. 2009); *see also* FC Summers Walk, LLC v. Town of Davidson, No. 3:09-CV-266-GCM, 2010 WL 4366287, at *3 (W.D.N.C. Oct 28, 2010).

³⁹ *Lanvale Properties, LLC v. County of Cabarrus*, 731 S.E.2d 800, 806 (N.C. 2012).

⁴⁰ *Id.* at 808.

⁴¹ *See* N.C. GEN. STAT. § 153A-340(a) (2011).

⁴² *Lanvale*, 731 S.E.2d at 808.

⁴³ *Id.* at 810.

⁴⁴ *Id.* at 813.

fee that the Court of Appeals had struck down previously in *Durham Land Owners Ass'n v. County of Durham*.⁴⁵

Ultimately, the *Lanvale* court ruled that local governments do not possess the authority to impart APFOs on developers. This decision was based on “substantial differences between the APFO’s initial version and its current iteration, the General Assembly’s reluctance to authorize the imposition of school impact fees, and the Court of Appeals’ decision in *Durham Land Owners*.”⁴⁶ The Court noted that the General Assembly is best positioned to address issues of population growth and its impact on public education.⁴⁷ However, it also acknowledged that the General Assembly has not provided an answer to this issue,⁴⁸ so it is unclear how the counties will be able to fund new infrastructure without the APFOs.

III. Next Steps for Local Governments

In *Lanvale*, the court presented county governments with three options to generate revenue for funding public education: (1) property taxes; (2) special assessments against property; and (3) local government sales and use taxes.⁴⁹ However, for political and policy reasons, counties prefer methods where they do not have to dramatically raise taxes or cut spending.⁵⁰ In addition, conflicting theories exist as to who should bear the burden of new development—only those who benefit from it directly or the entire community that may experience auxiliary benefits (through new restaurants, shopping

⁴⁵ *Durham Land Owners Ass'n v. Cnty. of Durham*, 177 N.C. App. 629, 638, 630 S.E.2d 200, 206 (N.C. App. 2006).

⁴⁶ *Durham Land Owners*, 177 N.C. App. at 639.

⁴⁷ *Lanvale*, 731 S.E.2d at 814.

⁴⁸ *Id.*

⁴⁹ *Id.* at 814.

⁵⁰ *Property Taxation and Impact Fees*, COALITION FOR PROPERTY RIGHTS (Oct. 3, 2012), <http://proprights.com/library/taxes-and-fees>.

centers, etc.).⁵¹ Therefore, if a county is going to generate revenue without APFOs and impact fees and without raising taxes, it will have to search for more creative solutions for funding the construction of public schools in high-growth areas.

Perhaps one option for counties struggling to finance the extra facilities required due to high growth is to enact a balanced growth policy that would encourage commercial development proportional to and coinciding with residential development.⁵² When business development occurs in an area, it often spurs additional development; this compounding effect provides jobs and economic and tax benefits for the community as a whole, and a greater tax base for funding infrastructure projects.⁵³

North Carolina counties could also look to other states that have experienced similar issues for guidance. For example, the Maryland General Assembly established a task force for studying public school facilities.⁵⁴ The task force summarized and identified the positive and negative consequences of dozens of financing methods for public school construction.⁵⁵ However, Maryland may have an easier time generating revenue for school construction than North Carolina.⁵⁶ Maryland has the fourth highest impact fee usage in the country (behind Florida, California, and Washington) even though its legislature requires special individualized approval for the fees.⁵⁷ In contrast,

⁵¹ Ott & Reed, *supra* note 11, at 13.

⁵² Ralph Stephenson, *Why Balanced Growth is Important*, PRINCE WILLIAM CITIZENS FOR BALANCED GROWTH (Dec. 2007), <http://pwcgbg.org/WhyBalancedGrowthIsImportant.html>.

⁵³ *Id.*

⁵⁴ *Task Force to Study Public School Facilities*, MARYLAND STATE ARCHIVES (Aug. 11, 2011), <http://www.msa.md.gov/msa/mdmanual/26excom/defunct/html/32school.html>.

⁵⁵ DAVID LEVER, MARYLAND PUBLIC SCHOOL CONSTRUCTION PROGRAM, OVERVIEW OF ALTERNATIVE FUNDING 2–11 (2003), *available at* http://mlis.state.md.us/other/education/public_school_facilities_2003/Alternative%20Financing%20and%20Funding%20Report.pdf.

⁵⁶ *Lanvale Properties, LLC v. County of Cabarrus*, 731 S.E.2d 800, 806 (2012), *available at* <http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi80MzhQTEwLTEucGRm>. (comparing how North Carolina has only granted special authority to two counties to use APFOs).

⁵⁷ CLANCY MULLEN, DUNCAN ASSOCIATES., *STATE FEE ENABLING ACTS 2*, (2012), *available at* http://www.impactfees.com/publications%20pdf/state_enabling_acts.pdf.

North Carolina's General Assembly has only given two counties special approval to use impact fees.⁵⁸

Virginia has created a system similar to impact fees called cash proffers in which developers voluntarily offer capital improvements, land donations, or cash payments as a part of their rezoning application.⁵⁹ The developer's application will either be approved or denied depending, partly, on how well the cash proffer mitigates the development's impacts.⁶⁰ However, it is unclear how North Carolina's General Assembly would treat such a system. As *Lanvale* demonstrated, when Cabarrus County in North Carolina attempted to implement a voluntary fee, it ended up not being very voluntary in practice.⁶¹ Also, Virginia counties were granted statutory authority to use the system,⁶² and it is likely that the General Assembly would need to grant such authority in North Carolina.⁶³

Without increasing taxes to generate additional revenue or guidance from the General Assembly, the options for local governments seem minimal, if existent at all. If the counties find that they are unable to generate the revenue needed to construct adequate facilities for the growing population, they could ultimately decide that it is necessary to limit the growth by enacting growth management strategies (such as setting growth boundaries or amending zoning ordinances to limit residential development).⁶⁴

⁵⁸ *Lanvale*, 731 S.E.2d at 810.

⁵⁹ Mullen, *supra* note 57, at 2.

⁶⁰ *Id.* Virginia's cash proffer program has been criticized as being mandatory in practice and an example of legal extortion. See Mike Saewitz, *Chesapeake fights to maintain flow of money from developers*, THE VIRGINIAN-PILOT (Norfolk, Va.), Feb. 24, 2008, available at <http://hamptonroads.com/2008/02/chesapeake-fights-maintain-flow-money-developers>.

⁶¹ *Lanvale*, 731 S.E.2d at 814.

⁶² Email Interview with David Owens, Gladys H. Coates Professor of Public Law and Government at the University of North Carolina at Chapel Hill, in Chapel Hill, N.C. (Oct. 10, 2012) (referring to VA. CODE ANN. § 15.2-2298).

⁶³ *Id.*

⁶⁴ Kevin Foy, *Complexities of urban sustainability: using local land-use authority to achieve environmental goals*, 3 CHARLOTTE L. REV. 23, 57–62 (2011) (discussing growth management options in North Carolina).

IV. Conclusion

Prior to *Lanvale*, North Carolina counties had been imparting APFOs and impact fees on developers for about a decade.⁶⁵ Without this authority, it is unclear as to how the counties will raise the additional funding needed to construct new public schools to accommodate population growth. As the *Lanvale* court suggested, if the problem becomes critical enough, the General Assembly could decide to address the issue of population growth's impact on public education and offer a solution to the counties.⁶⁶ If the issue reaches a crisis point where the General Assembly does in fact intervene, it is likely that the topic of impact fees will resurface.

Of the twenty-eight states that have legislation allowing impact fees (for uses additional to water and sewage facilities),⁶⁷ only twelve allow impact fees for school construction.⁶⁸ If the General Assembly were to look at other states as examples, it would find that the majority of states with impact fees require the fee to be based on a capital improvement plan or a growth projection plan.⁶⁹ Such plans require local governments to plan for a fee schedule based on projected growth and set certain specifications for the calculation of the impact fees.⁷⁰ A mandated plan would seem to minimize the concern expressed in *Lanvale* about a county government's power to arbitrarily increase the fees whenever it deemed necessary.⁷¹

Whether the issue of impact fees is permanently quashed or not, the issues surrounding local governments interpreting their authority under the General Assembly's enabling statutes will continue to arise as population growth continues in North Carolina.

⁶⁵ *Lanvale*, 731 S.E.2d at 803.

⁶⁶ *Id.* at 814.

⁶⁷ Mullen, *supra* note 57, at 1.

⁶⁸ *Id.* at 804.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Lanvale*, 731 S.E.2d at 804.

Lanvale only told the counties they had been exercising too much authority; it did not tell them how much authority they had when considering school capacities in zoning decisions.⁷² Without further direction, counties will have to decide how, if at all, they can factor these capacity issues into their current zoning ordinances.⁷³ Perhaps the overarching legal matter embodied in the case is how the power of local governments functions separately, as well as a part of, the state as a whole.⁷⁴

⁷² Tom Terrell, *Zoning and school funding—do they mix?*, N.C. LEGAL LANDSCAPES (Dec. 2009), <http://nclegallandscapes.wordpress.com/2009/12/14/zoning-and-school-funding-do-they-mix/>.

⁷³ *Id.*

⁷⁴ *Id.*