Adequate Public Facility Criteria: Linking Growth to School Capacity

By Richard Ducker

A number of school systems in North Carolina today are struggling to provide school facilities adequate to a system of quality education.[1] In some jurisdictions, local financial resources may be too meager to provide a system of high-quality public schools. In other areas, where financial resources are adequate, the electorate may be unwilling to support the construction of new school facilities or the expansion or renovation of existing ones. In still other school districts, rapid population growth and a rise in the number of school-age children are creating pressures on local governments to provide schools in time to accommodate this growth. In such a situation, political support for public schools may fade if voters come to associate overcrowded schools with an influx of newcomers into the community.

It seems elementary that population growth should lead to a larger tax base, increased tax revenues, and more opportunities for local governments to provide and pay for new public facilities. In areas of rapid growth, however, public revenues do not necessarily become available at a suitable pace or in the right form to cover growing public costs. Local governments and school districts find it difficult to plan for and commit public funds to capital projects before the need for them becomes obvious.

In most debates about school facilities, population growth—while not capable of exact prediction—is viewed as a given, a reason to expand school capacity. However, a few North Carolina communities are trying to accomplish the converse, hoping to link growth to school capacity. They are applying *adequate public facilities* (APF) criteria to their local government planning programs and land development ordinances.

The Concept

The key feature, and perhaps prime virtue, of an APF program is that it is designed to prevent a community's growth from outpacing the local government's ability to provide necessary public facilities to serve that growth. It also can be used to channel growth into geographic areas (and school attendance zones) that are more capable of handling new development. The primary APF criterion requires developers seeking project approval to show that currently available public facilities have adequate capacity to accommodate the project—or will have such capacity when the project is ready for occupancy. Thus certain restrictions on development, pending completion of new or expanded school facilities, may be permissible in the short run even though they would not be in the long run.[2] Because it requires that facilities be provided concurrently with development, the APF criterion is sometimes known as the *concurrency criterion*.[3]

To see how APF standards may be linked to public school facilities, we first need to understand the functioning of conventional planning and land development control systems

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1. The obligation of North Carolina state government to support public schools is being shaped by the decision of the North Carolina Supreme Court in Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997), which unanimously concluded that the North Carolina Constitution "guarantees [to] every child of this state an opportunity to receive a sound basic education in our public schools" and a "general and uniform system of" schools in which "equal opportunities shall be provided for all students" (*see School Law Bulletin* 28 (Fall 1997): 35–36 and 29 (Summer 1998): 9–18). The case was remanded to Wake County Superior Court to determine whether the *Leandro* rights of the state's children have been violated. That court's opinion and judgment of April 4, 2002, in Hoke County Board of Education v. State of North Carolina (Super. Ct., Wake Co., No. 95-CVS 1158), suggests that inadequate public school facilities are not the major problem: "It's not the building—It's what takes place inside that really matters. . . . The critical component of whether or not the children are being provided with an equal opportunity to receive a sound basic education does not lie in a shiny new school or an older school, but rather, the critical component is the quality of instruction and leadership provided by the principal and the teachers who purport to educate the children who attend." ("Memorandum of Decision, sect. 3: Hoke County and Beyond," March 21, 2001, p. 8). *See also School Law Bulletin* 33 (Spring 2002): 16.

2. As Justice Oliver Wendell Holmes once stated, "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." Block v. Hirsch, 256 U.S. 135, 157 (1921).

3. For purposes of this bulletin, the terms *adequate public facilities* and *concurrency* are used interchangeably.

(e.g., zoning and land subdivision regulations). The development standards in many land development control ordinances adopted by North Carolina cities and counties do not fully take into account a project's potential impact on public facilities, particularly public schools. Some zoning and subdivision regulations allow development projects to be approved with relatively little regard for their impact on public facilities.[4] Others take into account only facilities located within the confines of the development site or in its immediate vicinity. In any event, public facility requirements for a particular project are typically determined on an ad hoc basis.

In contrast, an adequate public facilities criterion serves as a growth-management technique by demanding that a community measure the impacts of a development project against community standards based on more comprehensive, systemwide analysis.

Relation to Land Development Approvals

Local governing boards already have wide-ranging power to take into account the adequacy of public facilities when deciding whether to rezone land.[5] However, most APF programs also make adequacy a criterion for various other project approval decisions. Thus the granting of special zoning permits, approval of subdivision plats, and approval of site plans may also depend on a concurrency finding.

Since the strain on school capacity is often associated with population growth, APF programs are almost always applied only to residential development; commercial and industrial projects generally are not required to meet these standards. Nor are all residential developments subject to APF review. Most North Carolina programs exempt minor (i.e., smaller) residential developments from concurrency requirements.[6] For example, the Currituck County program exempts residential developments of fewer than six units; and the Town of Cary exempts residential developments that either (1) do not involve subdivision plat or site-plan approval or (2) do not exceed one dwelling unit per two acres. The Cary Town Board may also waive applicable requirements for certain "affordable housing" projects so situated that applicable level-of-service standards will not be exceeded by more than 5 percent.[7]

North Carolina Programs

Adequate public facility programs are widely used in communities in states like Washington and Florida, where concurrency with respect to certain types of public facilities is mandated by state legislation; in states like New Hampshire and Maryland, where APF standards are expressly authorized by statute; and in a number of local government units throughout the country. Fewer than half a dozen North Carolina local governments have adopted APF programs, and no state legislation directly addresses either the concept of concurrency or the operation of an APF program with respect to public schools—or for that matter, other public facilities. Thus, APF programs tied to schools are no less common in North Carolina than those tied to roads, parks, utilities, or other public facilities. Nonetheless, by most measuring sticks, the public school APF programs in this state are pioneering programs.

The first APF program for schools in North Carolina was adopted by Currituck County in 1994.[8] APF standards are incorporated into that county's unified development ordinance and apply to facilities for education, fire and rescue, law enforcement, and other county services. The primary APF criterion is triggered by an application for conditional-use or special-use permits, which are required for major single-family residential subdivisions and multifamily residential developments. (The Currituck County Zoning Board of Adjustment grants conditional-use permits, while the Board of Commissioners grants special-use permits.) Currituck's program was challenged in 1997 in *Tate Terrace Realty*

4. Adequate public facilities (concurrency) requirements affect both zoning ordinances and land development control ordinances because both types of ordinance require some form of residential development approval. However, a number of North Carolina local governments have adopted "unified development ordinances" that combine zoning and subdivision regulation in a single ordinance. Coincidentally, virtually all the local governments in North Carolina that have adopted an APF program for public schools or that are seriously considering such a program (i.e., Currituck County, Town of Cary, Cabarrus County, City of Concord, Orange County, Town of Chapel Hill, Town of Carrboro) have adopted a unified development ordinance and have incorporated or are planning to incorporate the requirements into such an ordinance.

5. *See, e.g.,* Builders Ass'n of Santa Clara & Santa Cruz Counties v. City of San Jose, 13 Cal. 3d 225, 118 Cal. Rptr. 158, 529 P.2d 582 (1974), *appeal dismissed*, 427 U.S. 901 (1976) (two-year moratorium upheld that would prohibit rezoning of land to residential use unless school district certified availability of school capacity).

6. Unless "exempt" developments actually have a minimal effect on school enrollment or represent forms of development that have been "grandfathered," they may undermine the legal integrity of a schools APF program. See the discussion of the analogous issue in the context of school impact fees in Richard D. Ducker, "Using Impact Fees for Public Schools," *School Law Bulletin* 26 (Spring 1994): 1, 9.

7. Currituck County Unified Development Ordinance § 1402, Appendix (Permitted Use Table) 30.000 (Subdivisions) (1993); Town of Cary Unified Development Ordinance § 5.16.4 (as amended July 22, 1999).

8. The Currituck County School System is the only school administrative unit in Currituck County. The county is one of the few counties in North Carolina without an incorporated municipality.

Investments, Inc. v. Currituck County.[9] In that case, the North Carolina Court of Appeals upheld the decision of the Currituck County Board of Commissioners in denying a special-use permit for a 601-lot residential subdivision; the commissioners determined that facilities were not adequate to serve the estimated 312 additional students the project was expected to bring into the public schools. The court ruled that the record included sufficient evidence to support the commissioners' decision.[10]

In 1999, Cary became the first municipality in North Carolina to adopt an APF program specifically for schools and the first to adopt a memorandum of understanding with a county board of education. Cary's ordinance provisions apply APF standards to all residential subdivisions and site plans, including those for multifamily residential developments. The schools APF program applies to developments located within Cary's entire planning jurisdiction (which includes territory both inside and outside the town's corporate limits). The Wake County Board of Commissioners is not a party to Cary's APF program. The commissioners declined the town's invitation to adopt a joint memorandum of understanding and have not formally agreed to program or fund Cary-area school facilities according to the timetable established by the county board of education and the town governing board.

Cabarrus County adopted APF standards in 1998 in its unified development ordinance, which applies the standards to a range of public facilities other than schools.[11] The Cabarrus provisions apply to both large single-family residential subdivisions and multifamily residential developments. More recently, the county joined with all the municipalities in the county to develop a land development ordinance the county and the cities can adopt. This revised development ordinance includes APF provisions that are more detailed than those in the 1998 ordinance. Ironically enough, the revised ordinance (including revised APF provisions) has been adopted by the cities of Concord and Kannapolis but not (yet) by Cabarrus County and the other two municipalities in the county (Mount Pleasant and Harrisburg). Concord and Kannapolis both adopted the APF provisions for schools in their local development ordinances in 2001 but have apparently not yet enforced them.

In addition, Orange County and the municipalities of Carrboro, Chapel Hill, and Hillsborough are in the process of reviewing and revising the documents needed to adopt a concurrency program.

Intergovernmental Arrangements

Perhaps the most distinctive feature of the public school APF programs in North Carolina is the great demand for cooperation they place on several different governmental units and agencies. First, a school district, working within the framework of a statewide educational system, designs, constructs, and operates the public schools serving a new development. In this regard, it plays the role of facility and service provider. Second, the county provides the funding for school construction and may play an instrumental role in developing a reliable capital improvement program for school construction. In this regard, a county plays the role of facility financier. Third, either a city or a county typically exercises land-use planning and growth-management jurisdiction over areas within a school district. In the role of land development regulator, the local government evaluates development proposals to ensure that they provide adequately for school needs. The service/facility provider, the financier, and the land development regulator must all cooperate to create an effective concurrency program for public schools.[12]

The most common mechanism used in North Carolina to ensure that these governmental entities perform their assigned tasks is a memorandum of understanding (MOU) adopted by service/facility provider, financier, and development regulator.[13] North Carolina jurisdictions with school APF (school concurrency) programs use a MOU to coordinate their actions. A successful APF depends on the voluntary cooperation of the parties; the unwillingness of one party to participate is generally enough to terminate a program. If one of the governmental entities breaches the agreement, little is to be gained by litigation. An additional complication is that some of the actions a local government has to take to advance the APF program—for example, the county's appropriation of

9. 127 N.C. App. 212, 488 S.E.2d 845 (1997*), cert. denied*, 347 N.C. 409, 496 S.E.2d 394 (1997).

10. Some of the evidence of school inadequacy presented at the commissioners' hearing was unsworn testimony by the planning director, who read aloud a letter from the county school superintendent about the long-term capital facility needs of the school system. The court ruled that the applicant had waived the right to insist upon sworn testimony and to cross-examine the witness.

11. Cabarrus County Code of Ordinances, sec. 66–81 (Jan. 20, 1998).

12. In William S. Hart Union High School Dist. v. Regional Planning Comm'n of County of Los Angeles, 226 Cal. App. 3d 1612, 277 Cal. Rptr. 645 (1991), *reh'g denied*, 227 Cal. App. 3d 846 (1991), the court held that a school district could challenge a county's decision to approve a particular development project on the grounds that the board did not do all it could do under California law to mitigate the adverse impact that the proposed project would have on the schools.

13. In some states (e.g., Florida), adoption of a legally binding interlocal agreement by the school district, the county, and all of the municipalities in the county is a necessary element of a mandated local comprehensive plan and to the implementation of a public school concurrency program. FLA. STAT. ANN. §§ 163.3177(6)(h)(2) (West 2002) and 163.3180(13)(f) and (g) (West 2000).

school construction funds to a school district or a city's adoption of amendments to its zoning or land subdivision ordinance—are legislative in nature, not administrative. In the absence of authorizing legislation, North Carolina local governments are not permitted to contract away legislative authority or to bind themselves to exercise that authority in a particular way through an interlocal agreement.[14]

Nonetheless, a memorandum of understanding can help local entities collaborate in educational planning and decision making with respect to population and capacity projections, public school siting, and a variety of other issues. For example, the MOU being considered by one of the school districts in Orange County, by Orange County, and by three municipalities in Orange County calls for development of a capital facilities program that will "utilize a projected growth rate for student enrollment agreed upon by the parties, which growth rate may differ from one school level to another (i.e., number of students per level per year)."[15] Among other subjects, the Orange County MOU provides for four actions: (1) joint development of a realistic capital facilities program for the construction of schools to ensure that enrollments at any school level (i.e., elementary, middle, or high school) do not exceed certain percentages of building capacity; (2) development of school building capacity figures by the school boards and the board of county commissioners; (3) the county's "best efforts" to provide the necessary funding to carry out the capital facilities program; and (4) the school district's "best efforts" to construct schools in accordance with the county Capital Improvements Program (CIP). The MOU also states that it represents "a good faith statement of the intent of the parties to cooperate" and is "not intended to and does not create legally binding obligations on any of the parties to act in accordance with its provisions."

Program Elements

The Capital Improvement Program and Comprehensive Plan

In North Carolina, local boards of education are directed by law to provide classroom facilities adequate to meet state requirements for classroom size and teacher allocation.[16] Moreover, local boards must submit their long-range plans for meeting school facility needs to the State Board of Education every five years. Ideally, these school facility capital plans are also integrated into and coordinated with a county capital improvements program adopted by the board of county commissioners and the relevant board of education.[17]

Although North Carolina law does not compel a county to adopt a capital improvements program to ensure the financial feasibility of plans for remedying school capacity deficiencies under an APF program, a realistic CIP is almost certainly an essential element of such a program. The significance of a financially feasible CIP adopted by the "financier" of the concurrency program was established in the landmark case of *Golden v. Planning Bd. of the Town of Ramapo*.[18] In upholding the town's APF ordinance, the New York Court of Appeals based its affirmation on an eighteen-year-old capital facilities program designed to provide "the capital improvements projected for maximum development" set forth in the town's comprehensive plan.[19] Because of this tie between land development regulation and the scheduling and construction of public facilities construction, the town's attempt "to phase residential development to the Town's ability to provide" infrastructure withstood a constitutional challenge.[20]

In a similar vein, Florida law requires that adoption of a school concurrency program be accompanied by public school level-of-service standards adopted as part of the capital improvements element in the local comprehensive plan. That plan, in turn, shall contain "a financially feasible public school capital facilities program, established in conjunction with the school board, that demonstrates that the adopted level of service standards will be achieved and maintained."[21]

An APF program must also be accompanied by good faith efforts to resolve existing deficiencies.[22] The courts have consistently upheld growth controls imposed pursuant to a balanced and even-handed comprehensive plan designed to

14. *See* Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 262 S.E. 2d 705 (1980); Bessemer Improvement Co. v. Greensboro, 247 N.C. 549, 101 S.E. 2d 336 (1958).

15. "Draft School Adequate Public Facilities Memorandum of Understanding," http://www.co.orange.nc.us/planning/apfomou.htm. Last visited May 29, 2003.

16. N.C. GEN. STAT. § 115C-521(a) (hereinafter G.S.).

17. Political disputes between boards of education and boards of county commissioners concerning the financing of schools are not uncommon. The statutes establish a procedure for resolving disputes when a school board is dissatisfied with the county appropriation, including the division between current expenses and capital outlays. G.S. 115C-431.

18. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

19. The program included a capital budget providing for the improvements specified in the master plan within the next six years, and, as a supplement to the capital budget, a capital program providing for the location and sequence of additional capital improvements for the twelve years following the life of the capital budget. *Id*. at 294–95.

20. *Id.* at 294–96.

21. FLA. STAT. ANN. §. 163.3180(13)(d)(1)(West 2000).

22. *See, e.g.*, Q.C. Construction Co., Inc. v. Gall, 649 F. Supp. 1331, 1337–39 (D.R.I. 1986) (invalidating a moratorium pending the resolution of sewer system inadequacies, noting that the expansion of the sewer system had occurred in a "piecemeal fashion rather than according to a comprehensive plan" and citing a number of other cases that had approved development restrictions or moratoria imposed pursuant to a comprehensive plan to remedy deficiencies and that would not impose a permanent ban on development).

resolve infrastructure deficiencies. Even where a plan is not in place—or does not address public facility deficiencies—courts have found governmental units to be acting in good faith if planning studies are underway and the analysis generally demonstrates that development restrictions do not serve to disguise ulterior motives for blocking growth.

Program Application and Impact Areas

Two questions of geography are of substantial importance in developing an APF program for schools. The first is "Within what geographic area will the whole program apply?" The second is "Within what geographic area will the adequacy of schools be evaluated when a development application is submitted?"

The most logical, and perhaps most legally defensible, approach to school facilities concurrency is to require that concurrency apply on a districtwide basis; this approach will ensure that standards are applied to all facilities within the control of a particular local board of education. Indeed, Florida lawmakers concur. That state's law encourages local governmental units to establish school concurrency programs on a districtwide basis. The Cary program, however, was established in a way that considers the adequacy of school capacities in only part of the Wake County School System—the area within the town's planning jurisdiction, which extends to some areas beyond the town. As a practical matter, therefore, only portions of certain school attendance zones are included in the program. In contrast, the programs in Currituck and Cabarrus counties are designed to apply districtwide, as is the program under consideration in Orange County.

The second determination is the impact area within which to measure adequacy. A countywide or districtwide impact area means that a development application will be denied if enrollment at any one of the three school levels (elementary, middle, and high) exceeds the standard applied throughout the school district. As a result, a developer may be denied development permission if enrollment in the elementary schools, taken as a whole, exceeds the capacity standard for all such schools in the system, even when the development would be located a block away from an elementary school with considerable excess capacity. However, a districtwide impact area does have two major advantages. First, it may be more legally defensible in light of the school board's obligation to provide "a general and uniform system" of public schools.[23] Second, such a system gives school officials a freer hand to draw school attendance boundaries without possible adverse effects on land development.

In contrast, less-than-districtwide impact areas may be more effective at preventing individual schools from becoming overcrowded. It is also consistent with the planning idea that development should be steered into areas better equipped to handle growth. One procedure for introducing more flexibility into this approach allows development approval when the adopted level-of-service standard cannot be met in a particular impact area but the unused capacity is available in one or more contiguous impact areas.[24] The idea of less-than-districtwide impact areas can also be politically popular. Indeed, in 2002 the Cary ordinance reduced the applicable impact area to the attendance area of each individual school.[25]

Projecting the Impact of Development Projects on School Enrollment

An important element in an APF program is the forecasting of how new residential projects will affect school enrollments. Local boards of education and local governments generally rely on historical data to develop student-generation rates to apply to future projects. Some jurisdictions develop more than one rate in order to take into account the number of bedrooms and whether dwelling units are single family or multifamily. Others, however, apply the same student-generation rates to both manufactured homes and site-built houses. Most use different rates for each school level (i.e., elementary, middle, or high).[26]

Determining the Capacity of School Facilities

Level-of-Service Standards

Adequate public facility requirements and concurrency regulations are based on determinations of the capacity of school facilities. A key concept in capacity determinations is

23. N.C. CONST. art. IX, sec. 2(1). *See Leandro*, 346 N.C. at 336; *see also* St. John's County v. Northeast Florida Builders Ass'n, Inc., 583 So.2d (Fla. 1991) (ruling that no school impact fees could be collected under a county ordinance until substantially all of the county's population was subject to it).

24. Florida law mandates such a requirement if school capacity is available within a district; school adequacy is thus tested on a less-than-districtwide basis. FLA. STAT. ANN. § 163.3180(13)(c)(3) (West 2000).

25. Town of Cary Unified Development Ordinance § 5.16.4 (May 22, 1999) (amended 2002).

26. The Concord ordinance provides for the following student-generation rates/dwelling unit: (1) elementary schools: 0.30; (2) middle or junior high schools: 0.167; and (3) high school: 0.167, for a total student-generation rate of 0.634/dwelling unit. However, these student-generation rates vary among communities. According to an Orange County study, the student-generation rate for *existing* single-family houses in the Chapel Hill–Carrboro District was 0.57, but the comparable rate for single-family houses in developments *currently being built* was 0.98. "Development Ordinance Text Amendment-Adequate Public Schools: Attachment 3, Questions/Issues Raised at the February 19, 2001, Public Hearing," Memorandum to Mayor and Town Council of the Town of Chapel Hill from W. Calvin Horton, Town Manager, April 23, 2001, p. 19.

level of service (LOS).[27] Level-of-service standards are generally thought of as technical standards, but they inevitably reflect concerns about cost and economic feasibility as well. The level-of-service concept in the context of schools is typically based on minimum standards for school construction and maximum class size, as established statewide. In developing concurrency regulations for public schools, local governments generally base their capacity calculations on standards promulgated by the North Carolina State Board of Education and the North Carolina Department of Public Instruction.[28] APF programs often exclude temporary classrooms such as modular structures from their calculations of existing classroom capacity and typically use separate standards for elementary schools, middle schools, and high schools. Reasonable, quantifiable standards for capacity and adequacy are particularly important, because level-of-service standards apply to existing schools as well as to future construction.[29] If a local government denies development permission on the basis of a level-of-service standard, it is expected to refer to that standard in funding the renovation and expansion of existing schools as well as the design and construction of new schools.

Existing and Committed Capacity

Existing school capacity is a key computation and is, of course, based on the level-of-service standards rather than on actual enrollment figures. A related concept, *committed capacity*, is also used in some concurrency programs. For purposes of calculating school adequacy, it is customary to subtract from existing capacity two figures: (1) the capacity necessary to serve the children who already live in the school district and are expected to "age up" through the school system; and (2) the capacity to serve the children expected to live in dwellings for which development project approvals have been granted but that have not yet been built or occupied. Sometimes this component of capacity is referred to as *reserved capacity*.[30]

Consider, for example, three elementary schools in Moyock and Crawford Townships in Currituck County that have a combined capacity of 1,288 students.[31] The 2000–2001 enrollment for all three was estimated at 905 students. Projected enrollments attributable to existing development would add an additional 54 students by 2002–2003. Thus school capacity for 383 additional elementary school students was expected to be available in 2002–2003. However, by 2002–2003, development activity already approved (or exempted from the county's concurrency requirements) was expected to add an additional 130 students to the elementary schools in these townships, reducing the capacity available for students from any new development to 153.[32]

Planned (Programmed) Capacity

A central aspect of a concurrency program is the notion that determinations of adequacy must take into account school facilities that will be built in the future as well as those that are currently available. Virtually all APF programs credit school facilities for which funds have been legally committed. Most also count future facilities included in capital improvement programs for which sources of funds have been identified. Some jurisdictions, however, refuse to consider schools planned for the distant future. For example, Currituck County considers only planned school facilities expected to be available within the two years following approval of a sketch plan for a proposed development.[33] The City of Concord uses a more complex formula. In certain instances, its ordinance allows school districts to credit the capacity of planned school projects for which funding commitments have been made and that will be available within the five years following the date on which school capacity is calculated—but only if such projects are included in the district's ten-year school facilities plan.[34]

27. In Florida, APF regulations must be consistent with service levels established in the capital improvements element of the local comprehensive plan. FLA. STAT. § 163.3180(13)(b)(2) (West 2000) and the public school facilities element of the plan. FLA STAT. ANN. § 163.3177(12)(a) (West Supp. 2002).

28. *See* North Carolina Public Schools Facilities Guidelines, Public Schools of North Carolina, State Board of Education, N.C. Department of Public Instruction (March 2000); North Carolina Public Schools Facilities Guidelines, "Class Sizes and Teacher Allotments" (January 1997).

29. Failure to establish adequate student-generation, capacity, and impact-area standards may invalidate an APF ordinance. *See* Rosenburg v. Maryland–National Capital Park and Planning Comm'n, 269 Md. 520, 307 A.2d 704 (1973).

30. Alternatively, committed or reserved capacity may be incorporated into the methodology for determining school adequacy by simply increasing projected *enrollments* to reflect estimates of school-age children attributable to residential development in the construction pipeline that will be occupied by the relevant date. Whether this component is treated as increased enrollment or committed capacity, the results should be the same.

31. "Cumulative Total of (Currituck County) School Population Projections (3/7/01)," handout sheet presented by Jack Simoneau, Currituck County Planning Director at program session "Adequate Public Facilities Ordinances" at North Carolina Planning Conference, Charlotte, May 18, 2001.

32. This example involved no planned additions to elementary school capacity from new construction.

33. Currituck County Unified Development Ordinance, sec. 2015(2) (September 18, 1995).

34. City of Concord Unified Development Ordinance, sec. 14.3.6.2 (October 11, 2001). If currently available capacity is inadequate, the "planned capacity" reflected in the facilities plan for the following two years must be taken into account. However, if currently available capacity and planned capacity, taken together, are inadequate, then "future available capacity" is recalculated to consider the next five years of planned capacity. In this latter case, the development application may be approved only if the funding for the planned school projects has been approved or acceptable project-phasing conditions are set forth in the development proposal.

Certification and Allocation of Adequacy

In principle, development approval may be denied or made conditional whenever a district's projected school enrollment exceeds 100 percent of the existing, committed, and planned capacity. However, some North Carolina programs do not in fact restrict or delay development until enrollment exceeds capacity by a certain percentage. For example, the Cary program, which was initiated in 1999, has applied the principle only when the average enrollment-to-capacity level for all eligible elementary schools exceeds 148 percent, when the level for eligible middle schools exceeds 132 percent, or when the level for eligible high schools exceeds 141 percent.[35] In 2002, however, the percentages for all three school categories were lowered to 130 percent.

Many APF programs for schools place the responsibility for making capacity calculations and adequacy determinations on the school district. For example, the MOU proposed for the school boards and local governments in Orange County would authorize the school district to issue a certificate of adequacy if the expected future uncommitted capacity exceeds the demand generated by the proposed residential development. In most cases, developers must obtain such a certificate before submitting the development project for approval. Some programs also require that they obtain development approval within a specified period after the certificate of adequacy is issued (e.g., six months).[36] An alternative approach requires developers to first obtain a special-use or conditional-use zoning permit that only becomes effective when they obtain a certificate of adequacy. In such a case, the certificate expires if the zoning permit expires.[37]

All North Carolina's public schools APF ordinances allow excess public facility capacity to be allocated on a first-come, first-served basis. Thus developers "reserve" the fraction of available capacity that corresponds to that required by the development project proposed and approved. Moreover, no quotas or program-based restrictions limit the capacity for which a certificate may be obtained. This feature of the ordinances, however, can result in an erratic pace of local development as developers queue up to take advantage of excess capacity before it disappears. APF programs seem to encourage a certain amount of jockeying for position in the development-allocation queue. Developers may accelerate or delay their plans in response to public facility capacity changes. Excess capacity encourages developers to move as fast as possible to apply and qualify for an allocation of excess capacity. Once the excess capacity is gone (even temporarily), a local government must decide whether to continue to accept development applications and assign priorities to them. If it does so, it may encourage developers to present their proposals sooner than they would otherwise. If, on the other hand, local government places a moratorium on applications, it can expect a flood of applications when capacity is expanded. In either circumstance, the pace of development and the rate at which development applications are received can be erratic.

"Advancing" Capacity

In North Carolina, a system of locally provided public schools provides general societal benefit, while state and local government taxpayers shoulder most of the funding for those schools. Indeed, the location of a school (particularly an elementary school) within a residential development has long been seen as a positive selling point for the developer. It is generally understood that if school construction lags behind demand, the public is responsible for closing the gap. Indeed, APF programs are based on the premise that the public must act in good faith to cure any inadequacies in capacity. However, the question arises whether, if ever, and, if so, how developers should be allowed or expected to voluntarily contribute to the public schools in order to speed up the planning and building of schools.

North Carolina local governments that adopt APF requirements for schools generally do not require developers to reserve land for school sites for future purchase, to dedicate land free and clear for such sites, or to pay fees in lieu of doing so.[38]

However, it is no longer unusual for developers of large-scale residential developments to offer to donate land for a school site or to offer other services or supplies for use in

35. Town of Cary Unified Development Ordinance, sec. 5.16.4 (July 22, 1999).

36. *See, e.g., id.* at sec. 5.16.2(a); and sec. 5.16.5.

37. The APF ordinance proposed for Orange County originally called for the certificate of adequacy to be issued first. However, several local governments were concerned that developers might try to "reserve" capacity for development in excess of what might be approved as part of the zoning process. The draft ordinance under consideration by Orange County, Carrboro, Chapel Hill, and Hillsborough calls for development approval to precede application for a certificate of adequacy.

38. Local governments are empowered to require that land be reserved for school sites during the land subdivision and development approval process. The North Carolina land subdivision control enabling statutes (G.S. § 160A-372 and G.S. § 153A-331) authorize both cities and counties, in cooperation with local boards of education, to require subdividers to reserve land for later purchase as a school site. The reserved land may not be subdivided or developed for a period of eighteen months, beginning on the date the final subdivision plat is approved. If the local government does not purchase the land within that period, the reservation is lifted. However, although land-reservation provisions for school sites are sometimes included in local government development ordinances, they are rarely, if ever, used.

During the development permitting process, some local governments impose *developer exactions*—formal conditions to approval that require developers to contribute land for a public facility at the developer's own expense. However, North Carolina land subdivision control and zoning

connection with a school.[39] If the purpose of such a contribution is to enhance the capacity of the public school system in order to obtain a certificate of adequacy, the action is sometimes referred to as an *advancement of capacity*. The City of Concord ordinance provides for such offers and establishes five requirements for their acceptance. These requirements include:

1. inclusion of the facility in the capital improvement program of the applicable service provider;
2. an estimate of the total cost needed to construct the improvement and a description of the cost "participation";
3. a schedule for commencement and completion of the improvement, with specific target dates;
4. a finding that the improvement is consistent with the area plan and, if applicable, the city's comprehensive plan; and
5. reimbursement of the pro-rated cost of the excess capacity, at the option of the city council, if the contribution will result in capacity exceeding the demand generated by the proposed development.[40]

A somewhat different approach has been used by Cabarrus County in reviewing development proposals under its current ordinance. There, the Board of Commissioners is authorized to make a finding that capacity is adequate if the developer offers an appropriate contribution to school facility expansion. These measures generally take the form of a monetary donation for each lot in the subdivision, but donations of land and traffic improvements have also been accepted. The county has accepted some nineteen *donations to adequacy* thus far; thirteen of them have been monetary, based on a contribution of $500 per subdivision lot.[41]

Enabling Authority

In certain states, like Maryland, legislation authorizes APF programs or concurrent management generally but does not expressly mention public school facilities.[42] In Washington, public schools are among the types of public facilities that are subject to state concurrency requirements expressly listed in state planning goals.[43] In other states, like Florida, the authority for such programs is implied by statutory requirements for, or limitations on, such programs.[44] In California, state legislation limits the power of local governments to deny approval for development projects on the basis of inadequate school capacity but authorizes local governments to require certain mitigation measures (e.g., mitigation fees, land dedications) as a condition of development approval.[45] In yet other states, APF programs or concurrent programs have been adopted under enabling authority for general zoning, land subdivision control, or general development regulation.

North Carolina's local government zoning enabling statutes, G.S. 160A-383 (cities) and G.S. 153A-341 (counties), specifically mention that a purpose of zoning is to "facilitate the adequate provision" of public facilities.[46] This and other

enabling statutes do not expressly authorize cities and counties to require developers to dedicate land for a public school site, to make improvements to an existing school site, or to pay a fee in lieu of making an "in-kind" contribution. As a practical matter, developer exactions with respect to schools are rarely used.

One exception to local governments' unwillingness to impose developer exactions is the system of public school facility impact fees charged by Orange and Chatham counties. These fees apply to most new residential subdivisions and land development projects. The funds received for each project are segregated and earmarked in a way that ensures they will be used to fund schools for the children who will reside in the developments. Under the proposed Orange County APF ordinance, a developer would be charged an impact fee only if the development is allowed to proceed under the terms of the APF provisions. Of course, the development may proceed under those terms only if currently available and planned school capacity is adequate to meet the projected enrollment increases that would be caused by the development. In this instance, *planned school capacity* may include schools to be constructed or expanded that will be funded in part by impact fees. Thus school impact fees paid by an Orange County developer may be used to cure potential capacity deficiencies to which the developer's project may eventually contribute.

39. *See* Richard Stradling, "Strings often attached to cash, land donated for schools," *News and Observer* (Raleigh), July 9, 2001, 1-A. The reporter lists eight instances in the Triangle area of North Carolina in which a developer has donated land or money for a school site when initiating a development project. *See also* T. Keung Hui, "Developer, Cary near school deal," *ibid.*, March 9, 2002), 1-B. The article describes an agreement between a developer, the Town of Cary, and the Wake County Board of Education under which the town will spend $500,000 to buy a site for a county elementary school, the developer will donate $5.5 million to construct the school on the site, the town will allow the developer to more than double the number of homes planned for the residential subdivision, and the school system will set aside at least half of the seats in the new school for students living in the developer's subdivision.

40. City of Concord Unified Development Ordinance, sec. 14.2.9.1 (October 11, 2001).

41. "Donation to Adequacy; Capital Reserve 450-00-00-6-7220-6518," Cabarrus County Planning Division Work Sheet (January, 2002). The ordinance provides no formula or methodology for figuring an appropriate "donation" to avoid a suggestion that the contribution is compulsory. The factor of $500 per lot was reflected in the first such contribution made by a developer under the APF provisions of the ordinance, and many of the developers that have sought to make an "adequate" contribution have relied on the same method of determining their offered donation.

42. *See* MD. CODE ANN., art. 66B, § 10.01 (Michie Supp. 2002).

43. WASH. REV. CODE § 36.70A.020(12)(2003). The goals are provided to guide local plans and regulations to ensure that public facilities and services are "adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below established minimum standards."

44. *See* FLA. STAT. ANN. § 163.3180(13) (West Supp. 1998). For a historical summary and comprehensive assessment of school concurrency programs under Florida law, *see* David L. Powell, "Back to Basics on School Concurrency," *Florida State University Law Review* 26 (Winter, 1999): 451–86.

45. CAL GOV'T CODE § 65996 (West Supp. 2003).

46. Recent case law (e.g., Homebuilders Assoc. of Charlotte v. City of Charlotte, 336 N.C. 37, 43–44 [1994]) suggests that the grants of power found

similar statutory language in the New York zoning enabling legislation was found sufficient to authorize the well-known staged development program adopted by the Town of Ramapo, New York, which was upheld in *Golden v. Ramapo*.[47] The question of whether adequate enabling authority is available may inevitably be limited to considerations of how the authority is exercised. In any event, any determination of whether such regulations are authorized under state law is likely to depend on (1) the methodology and analysis upon which the ordinance is based, (2) the types of development permission that are subject to the APF criteria, and (3) how the comprehensive plan and capital improvement program are linked to the ordinance.

Takings Challenges

The Fifth Amendment to the U.S. Constitution provides that private property "shall not be taken for public use without just compensation." The primary purpose of this clause is to "bar government from forcing some people to bear alone burdens that, in all fairness and justice, should be borne by the public as a whole." The Takings Clause was originally applied only to physical appropriations of property, but courts have long recognized that regulations and other restrictions on property will be treated as "takings" if they go too far. One "categorical rule" enunciated by the U.S. Supreme Court is that a taking occurs whenever a regulation denies the owner all economically beneficial or productive use of land. In most other instances, whether a regulatory program constitutes a taking depends on a balance of several factors first set forth in *Penn Central Transp. Co. v. New York City:*[48] (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the governmental regulation.

A regulation may be an unconstitutional taking *on its face* or it may a taking *as applied* to a particular property. To be ruled a taking on its face, a regulation must be so restrictive that no application of its requirements will avoid a taking. A regulation that is not a taking on its face may, nevertheless, be a taking as applied. A regulatory program may not be a taking as applied to most of the property it covers but may be a taking as applied to other, specific properties.

Disguised Moratorium/Unreasonable Delay

One possible challenge to an APF program is an allegation that the program results in an unconstitutional taking because it effectively establishes an unreasonable moratorium on development. Moratoria are used widely among land-use planners to protect the status quo while formulating a permanent development strategy. Under the terms of an APF or concurrency program, a property owner may be prevented from developing a parcel of land until public projects to remedy certain deficiencies are funded and constructed. In *Ramapo*, for example, New York's highest court sustained the town's ordinance even though certain public facilities and improvements necessary to allow development in some areas to proceed were not scheduled for construction for eighteen years. The court held that the ordinance was not a taking on its face, in part because the plaintiffs presented no evidence that the ordinance would necessarily prevent property owners from developing land for an unduly long period of time.

Since *Ramapo*, few court decisions have comprehensively addressed the constitutional issues involved with concurrency programs. However, a recent U.S. Supreme Court decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* supports the view that a development moratorium may be used as a legitimate feature of a land-use and environmental-management program.[49] In *Tahoe-Sierra*, the high court was unwilling to conclude that a thirty-two-month moratorium on development in the Lake Tahoe Basin was a taking per se. The purpose of the moratorium was to allow the planning agency to develop a detailed comprehensive land-use plan for the area. The parties stipulated that several formally adopted moratoria *temporarily* deprived petitioners of *all* economically viable use of their land. Nonetheless, the Court majority observed that

in North Carolina General Statutes 153A and 160A, including that found in the zoning and land subdivision control enabling acts, should "be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect." *But see* Smith Chapel Baptist Church v. City of Durham, 350 N.C. 805, 517 S.E.2d 874 (1999) (fees charged pursuant to Durham program designed to satisfy the EPA's National Pollution Discharge Elimination System's permit requirements for pollution control of stormwater discharges exceeded city's enabling authority).

47. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). The program took the form of an amendment to the town's zoning ordinance whereby subdivision development would not be permitted until certain public facilities (i.e., roads, public schools, drainage improvements, parks, and water and sewer facilities) reached specified levels of service based on a point system, all according to scheduled facility completion dates included in the town's eighteen-year capital improvement program.

New York's zoning enabling legislation (like North Carolina's based on the Standard State Zoning Enabling Act) does not specifically authorize "sequential" or "timing" controls on development. It does, however, state that "[s]uch [zoning] regulations shall be made in accordance with a comprehensive plan and designed to . . . facilitate the adequate provision of transportation, water, sewerage, schools, parks and other requirements." N.Y. TOWN LAW § 263 (McKinney 1965). New York's highest court held that "phased growth is well within the ambit of existing enabling legislation." 285 N.E.2d at 300.

48. 438 U.S. 104, 123–24 (1978).

49. 535 U.S. 302 (2002).

> a permanent deprivation of the owners' use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value when the prohibition is lifted.[50]

The Court refused to adopt a categorical rule that any moratorium was a taking, instead ruling that a taking challenge to a moratorium must be evaluated in terms of the three-prong balancing test from *Penn Central*. Nonetheless, the Court cautioned—apparently referring to a circumstance in which a regulation was challenged as applied—that "[i]t may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism."[51]

No case cited in *Tahoe-Sierra* involved an APF or concurrency program. Whether a local government's interest in coordinating the timing and sequencing of land development with the provision of public facilities is comparable in weight to a local government's interest in preparing a long-range land-use plan is unclear. The way a court applies the three-prong balancing test to the features of an APF program will depend on the features of the program, especially the government's demonstrated need for a timing-and-phasing program for development. A carefully prepared comprehensive plan, CIP, and APF ordinance can be very helpful in defeating this type of challenge.[52]

An unusual example of how a prohibition on development because of inadequate school capacity can result in a taking comes from the 1996 Maryland case, *Steel v. Cape Corp*.[53] The Cape Corporation (a development company) owned land zoned OS (Open Space), a zoning-district designation that apparently permitted virtually no development of the property. Anne Arundel County somehow applied that designation to the property by mistake. Once the error was discovered, the developer petitioned to have the land rezoned to R5 (a low- to medium-density residential zoning classification) to allow the land to be subdivided for single-family residences. This type of residential use was apparently the only developed use of the land economically feasible and consistent with the area surrounding the site. However, the County Board of Education determined that if the property were rezoned and subdivided at the density permitted, the county school system would have inadequate capacity to handle the projected number of students for the next six years.[54] When the county refused to rezone the property for this reason, the property owner claimed a taking. The Maryland Court of Appeals held that the county's actions would result in the loss of all economically viable use for Cape's property for a period of the next six years and that the prospective moratorium was a taking as applied.[55]

A related but different claim that could be brought against an APF program is that even if the length of time a property owner must wait for a governmental agency to build a facility is reasonable, it is unrealistic to expect the public agency to provide the facility "on time." In *Ramapo*, the town was both the provider for most of the public facilities included in the program and the land development regulator. The developer argued that all the public facilities called for in the town's CIP were unlikely to be provided on schedule. The New York Court of Appeals replied:

> As the Town may not be held to its program, practices do vary from year to year, 'and fiscal needs cannot be frozen beyond review and recall' (citations omitted), the 'patient owner' who relied on the capital program for qualification then is said to face the prospect that the improvements will be delayed and the impediments established by the ordinance further extended by the Town's failure to adhere to its own schedule.
>
> The reasoning, as far as it goes, cannot be challenged. Yet, in passing on the validity of the ordinance on its face, we must assume not only the Town's good faith, but also its assiduous adherence to the program's scheduled implementation. We cannot, it is true, adjudicate in a vacuum and we would be remiss not to consider the substantial risk that the Town may eventually default in its obligations. . . . The threat of default is not so imminent or likely that it would warrant our prognosticating and striking these amendments as invalid on their face. When and if the danger should materialize, the aggrieved landowner can seek relief . . . declaring the ordinance unconstitutional as applied to this property.[56]

The inability of public agencies operating under a concurrency program to provide school facilities according to an adopted CIP raises two problems for the program's integrity. The first problem stems from the possibility that a postponed school project will extend the period of a de facto development moratorium, effectively creating a "set of rolling

50. *Id.* at 331.

51. *Id.* at 341.

52. One authority has declared, "Takings challenges are almost always ineffective against timed and sequenced growth if based upon an integrated and comprehensive plan." Robert H. Freilich, *From Sprawl to Smart Growth: Successful Legal, Planning, and Environmental Systems* (Chicago: Section of State and Local Government Law, American Bar Association, 1999), 100, n. 205.

53. 111 Md. App. 1, 677 A.2d 634 (1996).

54. *Id.* at 640.

55. It is unclear from the decision what weight, if any, was given to the fact that the land had been so restricted during the period *prior* to the county's refusal to rezone it.

56. *Ramapo*, 285 N.E.2d at 298–99, n.7.

moratoria that, with the benefit of hindsight, might properly be characterized as the functional equivalent of a permanent taking."[57] Second, the failure to provide school facilities on time may raise doubts about the legitimacy of the APF program and the good faith of the governmental units involved. Evidence that agencies acted capriciously in establishing the regulations or that they failed to act diligently and in good faith could support a conclusion that the regulations constituted a taking.

Certain features may be added to an APF ordinance to make it more legally defensible with respect to both "facial" and "as applied" attacks. The first feature is particularly important if the ordinance applies only to residential development. If the owner of vacant, residentially zoned land is precluded from subdividing it for a long time because of a concurrency requirement, there may well be no alternative nonresidential use he or she can legally or practically make of the property. In such a case, the owner may be without any economically beneficial use of the property during the moratorium. To mitigate the impact of an APF-based moratorium, therefore, it may be wise to exempt from an ordinance not only the issuance of zoning/building permits for vacant single-family residential lots but also minor subdivisions below a certain threshold number of lots. These concessions will make it possible for local governments (and boards of education) to assert that not only is the development delay temporary but also that there is a residual, productive use of these parcels of land that is permitted during the period of delay. Thus an ordinance can allow some base level of development on all parcels, regardless of whether certain schools have excess capacity.

A second feature an ordinance can include to make it defensible from the claim of taking is some sort of administrative procedure authorizing the regulating government to mitigate or waive the development prohibition in cases of hardship and other special circumstances. These "safety-valve" provisions allow a local government to take into account the peculiar circumstances that develop when the ordinance is applied to a particular property. Only after exhausting all such administrative remedies would a property owner be certain of the specific ways the regulations apply to his or her own property.

Mitigation Fees or Advancing Capacity as a Developer Exaction

A second and wholly different type of taking claim derives from the fact that some APF ordinances provide a mechanism by which developers may avoid a moratorium. Under this provision, they may either pay a mitigation fee or "advance" the facilities that are deemed deficient by supplying them to the governmental entity (or paying for them) without reimbursement. A concurrency ordinance may provide that such contributions are not required under the ordinance; that, if made, they are voluntary and not compulsory; and that any measures for making contributions set forth in the ordinance are merely suggestions. Nonetheless—however described—these contributions can legitimately be viewed as prerequisites to development approval because without them development would not proceed. Such arrangements thus carry the potential risk of being characterized as developer exactions. In order to be valid, requirements that public facilities be provided at the developer's expense as a condition of development approval must meet the following constitutional test: the contribution must be roughly proportionate to the need for the public facility generated by the development for which they were contributed.[58] In some cases, these advancements to capacity or payment of mitigation fees are not tailored closely enough to the particular development's impact on the school system. A developer might be induced to pay a disproportionately high share of the cost of such facilities. If a court finds these fees or advancements to be disproportionate, it could conclude that they constitute a taking.

Conclusions

In North Carolina, it is uncommon for local governments to restrict land development and community growth to times when school capacity is or will soon be available to serve that growth. It is far more common for school-facility funding to be driven by school enrollment growth than for that growth to be determined by a county's capital improvement plan. However, as hard-pressed local governments and boards of education cast about for new sources of funding for school facilities and overcrowding of certain schools continues, local governments may see methods of linking the rate of community growth to the capacity of school facilities as increasingly attractive.

As APF (or concurrency) programs for schools are relatively new in this state, there has not yet been time to fully evaluate them. Their impact depends on whether a school concurrency program is based on the entire school district or on individual school attendance zones. If the adequacy of

57. *See Tahoe-Sierra* at 333.

58. Dolan v. City of Tigard, 512 U.S. 374 (1994). *See also* Beaver Meadows v. Board of County Commissioners, 709 P.2d 928 (Colo. 1985) (county could deny planned unit development approval on that basis of lack of adequate off-site road capacity but could not approve the project and then apportion the cost of building the facilities disproportionately to the developer).

schools' capacity is tested with respect to a particular school level (e.g., all the elementary schools in the district), school boards will be more immune to pressures from the development community to change school attendance boundaries. However, if adequacy is tested with respect to individual school attendance zones, an APF program can encourage new development in areas with excess school facility capacity.

To be successful, an APF program requires a close working relationship among local boards of education (the facility provider), units of county government (the financiers), and municipalities (along with counties, the land development regulators). Indeed, sharing data and other information, developing common and consistent student enrollment and facility capacity projections, and establishing both formal and informal means of communication between school districts and local government planners can provide benefits in all jurisdictions—not merely those that press on to develop APF programs.

School board members will be relieved to know that the legal risk that may arise from an APF program is much more likely to fall on the local governments that regulate land development than on school boards. Many of the legal issues surrounding the use of APF programs have not yet been resolved. In particular, local governments need to be mindful of the impact of development moratoria on individual property owners and should consider allowing them a certain base amount of development before development restrictions become effective. Similarly, local governments need to be cautious about encouraging developers to contribute to the public schools as a way to speed up the process of planning and building schools.

Adequate public facility programs for schools will become prevalent only to the extent that population growth and land development become significant local issues. At present, the backlog of capital needs in North Carolina school systems seems unlikely to decline dramatically any time soon. The struggle to ensure that school facilities are properly matched to the needs of school enrollment growth will continue. ■