

THE USE OF ZONING CONDITIONS AND  
IMPACT FEES

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**TABLE OF CONTENTS**

	Page
I. Introduction .....	1
II. Contract and Conditional Zoning .....	1
III. Problems Created By Imprecise Conditions .....	5
IV. Background and History of Impact Fees .....	6
V. Impact Fees and Their Uses .....	7
VI. Adoption of an Impact Fee Ordinance .....	8
VII. Specific Uses of Impact Fees .....	11
VIII. Specific Elements of an Impact Fee Ordinance .....	13
IX. The Cherokee County Lawsuit .....	17
X. Conclusion .....	22

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### **I. INTRODUCTION**

With the recent success of Cherokee County in defending its impact fee ordinance, impact fees are under consideration by numerous jurisdictions. The widespread adoption of impact fee ordinances will raise concerns with insuring that all development exactions are properly adopted. This is and has been an on-going concern, since the Development Impact Fee Act has been in effect for ten years, and because it prohibits development exactions that are system improvements unless an impact fee ordinance has been adopted. Yet violations of this law occur frequently, and are neither noticed or challenged. The scope and legality of a proper zoning condition appears to be somewhat of a mystery to many local governments, leading to the enactment of improper zoning conditions on a frequent basis. This paper will discuss the nature of and law regarding conditional zoning, contrasting proper zoning conditions with improper contract zoning. In addition, problems with imprecise zoning conditions will be discussed, as will the law regarding impact fees.

### **II. CONTRACT AND CONDITIONAL ZONING**

#### **A. Contract Zoning and Conditional Zoning Defined**

Contract zoning is a concept rarely found in Georgia law. Contract zoning generally refers to conditions that are imposed so as to motivate the zoning board to grant the zoning for the sake of gaining the benefit of the proposed conditions, rather

than as an exercise of legitimate legislative discretion. In other words, “buying” the zoning with agreed upon conditions, or even a payment. Conditional zoning, in contrast, is rezoning subject to conditions which are not applicable to other land similarly situated. Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977). In this case, the property owner offered at the rezoning meeting to resurface a road leading to the property, which was something that several neighbors at the hearing were complaining about. That was included as a condition, and the property was rezoned. The court found that the condition benefited the neighbors and was not contract zoning. The court cited to a Washington state case, State v. City of Spokane, 70 Wash.2d 207, 422 P.2d 790 (1967) for the proposition that a \$75,000 payment for street construction made necessary for the rezoning change was conditional rather than contract zoning.

Authorized conditions are imposed to ameliorate the impact of the rezoning on the neighbors. Contract zoning is invalid, while conditional zoning is valid. The difference between contract and conditional zoning turns on whether the conditions were imposed to “buy” the zoning, or whether the conditions were imposed pursuant to the police power for the protection or benefit of neighbors to ameliorate the effects of the zoning change. Contract zoning has not actually been found to have occurred in any reported Georgia decision, and so there is not really clear guidance as what would constitute contract zoning. Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977)(declares conditional zoning valid and contract zoning invalid). Ervin Co. v. Brown, 228 Ga. 14, 183 S.E.2d 743 (1971)(declares conditional zoning valid; upholds conditional zoning where the conditions were incorporated into a statement in the minutes that the zoning was “pursuant to the stipulations of [property owner’s attorney]”).

B. Imposition of Conditions

Conditions are imposed by the local governing body. Conditions typically include written stipulations submitted by the applicant, or conditions suggested by the planning commission or staff, or conditions suggested by the members of the local governing body. Frequently a developer will submit a letter with proposed conditions. To enact that as conditional zoning, the minutes should reflect explicitly that those conditions are being imposed, and the letter should be read into the minutes or attached to the minutes. Brian Realty Corp. v. DeKalb County, 229 Ga.App. 185, 493 S.E.2d 595 (1997). In this case, conditions were imposed by a document attached to the board of commissioners' official minutes. In Ervin Co. v. Brown, 228 Ga. 14, 183 S.E.2d 743 (1971), the minutes stated that the property was rezoned "pursuant which stipulations presented by Mr. Carnes." The Court found that the property was conditionally rezoned, and found that the conditions constituted all of the stipulations made upon the rezoning hearing and entered in the official and public minutes of the board of commissioners.

In other words, a council or commission member should announce into the minutes what the conditions are, or the document stipulating the minutes should explicitly become a part of the record. Vague references to "conditions agreed to by the developer" can be problematic if there is no valid record of what the developer might have said. In other words, rezoning can be made conditional upon reasonable restraints as long as the conditions are set forth in the minutes or so long as an examiner of the ordinance will be alerted to the existence of such conditions. Otherwise, the public is entitled to rely on the four corners of the ordinance. Martin v. Hatfield, 251 Ga. 638, 308 S.E.2d 833 (1983). In this case, the attorney for the property owner had represented at the official zoning hearing, in response to a question, that there would be

no entrance or exit for the proposed apartment complex on a certain street. However, the site plan showed such an entrance, and the rezoning ordinance did not show or recite that it was conditional zoning. The city council later passed a resolution stating that it was their intent to condition the rezoning. The court found that a clear ordinance cannot be converted into conditional zoning by attempting to discern the collective state of mind of the council. The court held that the public is entitled to rely on the document. This principle would generally apply to all issues interpreting the minutes. Subsequent statements of the council's intent to make something conditional, or otherwise "clarify" their decision, have no effect.

Conditions are frequently suggested by the developer, as well as being suggested by planning staff or the commissioners themselves. This does not turn conditional zoning contract zoning.

#### C. Changing Zoning Conditions

Once conditional zoning is applied, the zoning conditions can be changed. A change in a zoning condition would be a change in zoning, and so would be subject to the Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq., requiring notice and a hearing, and other procedural requirements. Amending a zoning ordinance to change conditions is no different from amending a zoning ordinance to change the zoning classification, from a procedural point of view.

#### D. Challenging the Validity of Conditions

A valid condition would be a condition imposed pursuant to the police power to ameliorate the effects of the rezoning on the neighbors. Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977). The determination of the validity of the conditions varies depending on who challenges the conditions. Where the conditional zoning is otherwise

valid, the conditions imposed for the protection or benefit of neighbors cannot be attacked successfully by those neighbors. The owner of the rezoned land may be estopped from objecting to the conditions by having proposed or consented to them. Only the owner who has not proposed the conditions has any chance of really challenging them. He must show the conditions are invalid exercises of the police power. This would entail the same sort of challenge to the current zoning as any other challenge to the current zoning: the owner must show that the current zoning imposes a significant detriment and is insubstantially related to the public health, safety, welfare and morality. Warshaw v. City of Atlanta, 250 Ga. 535, 299 S.E.2d 552 (1983). In this case, the property owner contended certain conditions were takings, but the court held that they were properly imposed to address legitimate neighborhood concerns and that the property owner had failed to show by clear and convincing evidence that the council's actions were arbitrary or unreasonable. In relation to conditions, as to zoning in general, the courts find that the local governing body is the more appropriate body to shape and control the local environment according to the best interests of the locality and its citizens. Warshaw v. City of Atlanta, 250 Ga. 535, 299 S.E.2d 552 (1983); Westbrook v. Board of Adjustment, 245 Ga. 15, 17, 262 S.E. 785 (1980).

### **III. PROBLEMS CREATED BY IMPRECISE CONDITIONS**

In the case of Cherokee County et al., v. Martin, 253 Ga.App. 395, 559 S.E.2d 138 (2002), the Court of Appeals demonstrated the difficulties that can arise from an insufficiently precise zoning condition.

Cherokee County rezoned Martin's property to a PUD classification based on a site plan which showed that a portion of the property would be used as an "assisted

living” facility. But Cherokee County in the adopting ordinance approving the rezoning did not stipulate that the rezoning must comply with the site plan. Later Martin decided to build an apartment complex instead of an “assisted living” facility, but the county refused to issue a permit although both uses were permitted in the zoning district. Thereafter, Martin sued Cherokee County contending he had the right to build the apartment complex.

Finding in favor of Martin and his right to build the apartment complex, the court resolved that there was no language within the rezoning resolution adopted by the county which referenced conditions or required Martin to abide by the particular use specified in his site plan. The court reasoned that since a zoning ordinance restricts an owner’s right to freely use his property, it must be strictly construed in favor of the property owner and never construed beyond its explicit terms. Furthermore, a court may not infer that the zoning of property is conditioned to a particular use, but should require that any conditions be expressly made a part of the rezoning resolution. “Rezoning is conditional only if the conditions are set forth in the rezoning resolution itself or if an examiner of the resolution would be alerted to the existence of such conditions.” (at p. 397).

Hence, it is critical that local governments be specific in adopting zoning conditions. The zoning condition should be read into the minutes, or should be incorporated by reference to a specific written document kept in the minute book or the associated documents. Otherwise, the condition is subject to later challenge.

#### **IV. BACKGROUND AND HISTORY OF IMPACT FEES**

The General Assembly adopted the legislation known as the Georgia

Development Impact Fee Act in 1990. It is located at the Title 36, Local Government, Chapter 71 (O.C.G.A. § 36-71-1 et seq.).

While Development Impact Fees have been established in Georgia for over 10 years, only a few municipalities and counties within the State had chosen to adopt Impact Fees, prior to last year; and most ordinances only imposed fees on a few categories, not the entire spectrum of fees allowed. The increased interest in impact fees is a direct result of the successful fight by Cherokee County in defense of its Impact Fee Ordinance, up to the Court of Appeals. That decision, Cherokee County v. Greater Atlanta Homebuilders Assoc., Inc., 255 Ga.App. 764, 566 S.E.2d 470 (2002), will be discussed in detail below.

The purpose of the Impact Fee Act as enunciated by the General Assembly was to insure the development of an equitable program for planning and financing public facilities needed to serve new growth and development in order to promote and accommodate orderly growth and development. Its goal is to ensure that new growth and development is required to pay no more than its proportionate share of cost of public facilities needs to serve new growth and development and to prevent duplicate and ad hoc development exactions. It apparently was the intent of the General Assembly to find a process other than exactions required by local fees to make up for deficiencies in service that already exist, and prevents the use of impact fees to increase levels of service to existing areas. Impact fees can only proved the same level of service to new growth.

## **V. IMPACT FEES AND THEIR USES**

Development Impact Fees are payments of money imposed upon a development

as a condition of approval to pay for system improvements to serve new growth and development. The types of things that can be funded by impact fees are capital facilities (things with a life of over ten years). Ongoing operations and maintenance cannot be funded by impact fees.

The public facilities authorized by the Development Impact Fee Act are water supply production, treatment and distribution facilities; waste water collection, treatment and disposal facilities; roads, streets and bridges; storm water collection; parks, open space and recreation areas; public safety facilities, including police, fire, emergency medical rescue facilities; and libraries. Impact fees can only be assessed and collected for system improvement costs, which means the cost incurred to provide additional public facilities capacity needed to serve new growth and development.

Impact fees are intended to only pay for the burden on such infrastructure caused by new growth. They cannot be used to pay for a deficit in facilities that are currently existing. For example, if a county jail cannot meet the current needs, impact fees cannot be used to remedy that problem. It can be used to provide facilities anticipated to be needed based on the future growth. As can be seen, it is a tricky and complicated matter to collect and spend impact fees.

## **VI. ADOPTION OF AN IMPACT FEE ORDINANCE**

O.C.G.A. § 36-71-1 et seq. is a complex statute, with numerous requirements for an impact fee ordinance to be valid. It is not an easy or simple task to adopt impact fees, and it is an expensive process, requiring an expensive effort by professional consultants to adopt. However, it can also produce significant revenues. In the first year of Cherokee County's fees (a county of about 150,000 population), about \$2.8 million was

collected.

A. Initial Steps Toward Adoption

As with any legislation enacted by local government, the critical beginning point is the will of the local body to proceed with the course of action. Adopting Development Impact Fees is a long, arduous and expensive process that takes much study and planning.

The initial step in implementation of Development Impact Fees is the engaging of an expert in the field. In those larger counties that have an in-house capacity for such study and planning, this may not be necessary, but it is very rare that any staff individual is familiar enough with Development Impact Fees Act and the necessary planning process to implement impact fees. The local government will establish, as provided by the Act, a committee that will work hand and hand with the expert in order to establish an impact fee program.

The Act calls for the establishment of a Development Impact Fee Advisory Committee and requires that the Committee be composed of not less than five and no more than ten members with at least 40% of the membership including representatives from the development, building and real estate industry. O.C.G.A. § 36-71-5. An existing planning commission that meets the requirements can serve as the Advisory Committee.

The Committee is only advisory, and in fact no action is required from the Committee as a prerequisite for adoption of an impact fee ordinance. The provision is simply designed to try and insure community input. The Committee should ideally work hand and hand with the expert in order to insure that the program is implemented fairly and with at least a measure of support from the development community. The

expert and the Committee will produce the Capital Improvements Element. This element, referred to throughout this paper as the “CIE,” is the component of the comprehensive plan adopted pursuant to chapter 70 of the Coordinated and Comprehensive Planning Act of Georgia.

B. Capital Improvements Element

Impact fee ordinances are intimately tied to the Capital Improvements Element (CIE) of a local government’s comprehensive plan. The CIE is the document that provides all the information for the collection and distribution of the impact fees. The CIE determines the current levels of service, the current deficit, the future growth and the future capital improvements need. The preparation of the CIE is an expensive element of adopting impact fees, because of the amount of work required to properly draft the CIE. O.C.G.A. § 36-71-3 requires a local government adopt a CIE prior to adoption of a development impact fee ordinance, so the CIE is a necessary prerequisite.

The CIE projects the future needs in the local government relating to “system improvements.” The development impact fee statute contains numerous definitions, and CIE is a defined term. “System improvements” is also defined, and it is an important definition, because development impact fees can support system improvements but not project improvements.

The CIE thus becomes a comprehensive planning document that determines current need, sets levels of service and service areas, and projects future needs. As an example in Cherokee County, the CIE determines the level of service for the jail, fire department, sheriff’s department, parks, libraries and roads. In each category, the CIE determines the current level of service, projects future growth, and anticipates what facilities will be needed, their cost and their anticipated funding source. This requires a

comprehensive survey of the current system and careful consideration and planning for the future, based on anticipated growth. The CIE has a 20 year horizon, but it should be updated every year. It also calls for a five year short-term work program, detailing more immediate spending needs.

After preparation, the CIE is submitted to the Department of Community Affairs of the State of Georgia for approval. This also entails submission by the Department of Community Affairs to the local regional Development Commission for comment. Upon approval, the locality is then in a position to implement Development Impact Fees.

C. Ordinance and Adoption

The local government's impact fee ordinance itself must follow the guidelines as contained in the Development Impact Fee Act. The calculation and fees in the contents of the ordinance are found at O.C.G.A. § 36-71-4.

Upon the completion of the ordinance, two duly notice public hearings are required prior to the implementation of the ordinance. The second hearing is required to be held at least two weeks after the first hearing. Upon the implementation of the ordinance and the implementation of the necessary computer software, which will be discussed later, the local government is ready to proceed with the Development Impact Fee program.

**VII. SPECIFIC USES OF IMPACT FEES**

A. Authorized Expenditures: System Improvements versus Project Improvements

Impact fees may be spent on system improvements but not project improvements. Project improvements are improvements that provide service for a

specific project. O.C.G.A. § 36-71-2(14). The fact that they may provide incidental benefits to persons other than users of the particular project is not sufficient to make a project improvement into a system improvement.

System improvements are “capital improvements that are public facilities and are designed to provide service to the community at large.” O.C.G.A. § 36-71-2(18). In other words, impact fees cannot be spent on improvements that just benefit one particular project. They have to be spent on the system in general. Any improvement or facility included in a plan for public facilities approved by the governing body is considered a system improvement.

“Public facilities” are facilities related to water supply, roads, public safety, libraries, parks, storm-water drainage, and sewer. O.C.G.A. § 36-71-2(16). “Capital improvements” are improvements with a useful life of ten years or more that increase the service capacity of a public facility. O.C.G.A. § 36-71-2(1). As can be seen from this example, the statute is full of terms of art that are defined with reference to further defined terms. It is therefore essential to not assume that the words have an everyday meaning, and the definitions statute (O.C.G.A. § 36-71-2) should always be checked.

#### B. New Improvements Only

Development impact fees can only pay for the impact of new growth. They cannot be used to remedy problems already existing, such as lack of capacity. A development impact fee is defined as “a payment of money imposed upon development as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve new growth and development.” O.C.G.A. § 36-71-2(8). This requires a careful separation in the CIE of what is an existing deficit and what is a demand created by new growth.

## **VIII. SPECIFIC ELEMENTS OF AN IMPACT FEE ORDINANCE**

An impact fee ordinance must contain a variety of specific elements, as detailed by the Impact Fee Statute, which has detailed requirements.

### **A. Calculation of Fees**

Impact fees cannot exceed a proportionate share of the cost of system improvements. O.C.G.A. § 36-71-4. They must be calculated “based on actual system improvement costs or reasonable estimates of such costs.” O.C.G.A. § 36-71-4-(q). They are imposed based on service areas, which are designated in the CIE. The question raised in the Greater Atlanta Home Builders’ suit as to what is a sufficient number of service areas. The trial court raised concerns about equal protection if some parts of the county are farther from the service than others. This is one of the areas requiring careful consideration in the CIE. Cherokee County chose to implement services based on a county-wide service area. The Homebuilders challenged that and asserted that the County should be split into smaller areas, with money staying in its own area. The County resists this because its goal is to provide equal service to the entire county. In Cherokee County’s case, the bulk of the population and growth is in the south half of the County, around Woodstock and Canton. If the County were split in half, the south would generate much more funds, and consequently have better services. The smaller population of the north would lead to longer response times. Ultimately, the Court of Appeals approved Cherokee County’s choice.

An impact fee ordinance must allow two options to the developer: paying his actually proportionate cost, or a set cost per unit of development. This of course creates an administration headache. The ordinance must authorize credits to be given for

system improvements that are made as a condition of zoning or for other reasons. O.C.G.A. § 36-71-7. The ordinance must also authorize refunds for funds not spent within not spent within six years of the collection date. O.C.G.A. § 36-71-9.

B. Refunds: O.C.G.A. § 36-71-9

Refunds must be authorized in the ordinance. A developer is entitled to a refund if funds are not encumbered within six years, or if capacity is available and service is denied. If a refund comes due, the local government must provide notice to the developer. Then the developer must send a request for a refund within one year. The government has sixty days to decide if the refund is warranted, and if not granted, the developer can sue. This imposes a burden on keeping track of what developer paid what fees, and into which category of improvements. Refunds are encumbered by a first-in, first-out (FIFO) basis. Actual interest earned must also be refunded. This is a good incentive to insure funds are encumbered.

C. Credits: O.C.G.A. § 36-71-7

The ordinance must provide for credits for system improvements required or accepted by a government. Credit is not given for project improvements. If the developer agrees to build a system improvement, such as a road, and the cost exceeds what the development impact fee on that development should be, then the developer is entitled to a refund. Credits are also issued when a building project is abandoned but some system improvements have been built.

D. Investment of Fees

The Code provides that the impact fees collected must be kept in an interest bearing account. O.C.G.A. § 36-71-8. Furthermore, records must be kept to show the category for which the fees are collected and the service area for which fees are collected,

as well as who paid the fee. As mentioned, in Cherokee County an impact fee is assessed that contains a public safety element, a parks element, a roads element, an administration element, etc. These fees are quite specifically broken down based on the type of use involved and its impact on a certain type of infrastructure. For example, a movie theater imposes a greater burden on roads than a cemetery, and so is charged a correspondingly higher fee for that system improvement. Hence, voluminous and detailed records must be kept to insure compliance with the refund provision. If a road project is begun within six years but no parks built, then the park money may become unencumbered and need to be refunded, whereas the road money would not need to be refunded.

E. Previously Incurred Costs

An interesting provision of the Code is that a government may provide for the imposition of impact fees for system improvement costs previously incurred by a government to the extent that new growth or development will be served by the previously constructed system improvements. O.C.G.A. § 36-71-4(k). In other words, if a county already has a road widening underway, and some portion of that project can be shown to support new growth rather than existing traffic, an impact fee can be collected to pay that cost. This raises the question of where the money should go. Essentially, the impact fee would seemingly be used to repay the general fund of the government, or whatever fund had been used. However, this appears to conflict with the provision that requires impact fees only to be used to pay for system improvements that create additional service to serve new growth – they would be, but only indirectly.

F. Appeal

The ordinance must provide for an appeal to the governing body or some body of

the amount of an impact fee. Arbitration can be authorized. Cherokee County has provided for an appeal board, with the ultimate appeal from that board going to the Board of Commissioners.

G. Exemption Debate

The Development Impact Fee Act was designed to replace and prohibit all other exactions imposed on developers, other than project improvements. A few specific exactions are still allowed, under O.C.G.A. § 36-71-13. Local governments are not prohibited from requiring project improvements. This in essence authorizes the continued imposition of zoning conditions, which should be project related anyway.

Additionally, local governments and developers may make private agreements to install system improvements, including interproject transfers of credits. This, however, should be kept in the context of avoiding “contract zoning.”

The final exemption is to allow local governments that provide water and sewer service to collect “a proportionate share of the capital cost of water or sewer facilities by way of hook-up or connection fees as a condition of water or sewer service to new or existing users.” There is some litigation going on about this matter in the City of Hoschton, in a suit brought by the same Greater Atlanta Homebuilders’ Association. Hoschton, a tiny city in Jackson County, has not imposed impact fees, but does charge a large “connection fee” of upwards of \$2,500 per residence, designed to recapture capital costs of water and sewer expansion. The Homebuilders have challenged this as an impact fee, and the case is pending on summary judgment in Jackson Superior Court. Numerous small jurisdictions still charge this type of fee, and if the court strikes it down, and is ultimately upheld, it will cause significant difficulty for small jurisdictions.

## **IX. THE CHEROKEE COUNTY LAWSUIT**

Cherokee County has a lengthy battle regarding its Impact Fee Ordinance, and the history of that suit is instructive regarding potential challenges to other communities' ordinances.

### **A. Initial Litigation Issues**

Cherokee County adopted its Capital Improvements Element on April 25, 2000, and adopted its Impact Fee Ordinance on that date with an effective date of May 1, 2000. On April 27, 2000, The Greater Atlanta Home Builders Association had been watching the County's progress towards a comprehensive ordinance, and was prepared with its lawsuit. In fact, the Homebuilders' association filed suit on April 27, 2000, three days before the Ordinance was adopted. Suit was filed in Cherokee County Superior Court (No. 00-CV-0768), and the author's firm was engaged to defend the County.

The Homebuilders focused their challenge on the Cherokee County Ordinance, and asserted that the ordinance was not in compliance (that is, had not properly followed) the requirements of the Development Impact Fee Act, O.C.G.A. § 36-71-1 et seq. Additionally, the Homebuilders asserted that the impact fees imposed were unconstitutional, and violated due process and equal protection. The Homebuilders did not challenge the constitutionality of impact fee statute or impact fees themselves, which has been done in many other states. Hence, it was not necessary to involve the Attorney General to defend the state statute. Cherokee County hired the author's firm to handle the defense

### **B. Claims of the Suit**

The Homebuilders challenged all aspects of the Cherokee Ordinance and the Capital Improvement Element upon which it is based. They challenged the designation of

countywide service areas, they challenged the mechanism that the CIE used to calculate “levels of service” and they challenged the fee structure. They also challenged the credit and refund mechanisms.

The Homebuilders immediately sought a preliminary injunction to enjoin the County from enforcing the statute and collecting any impact fees. The case was assigned to Superior Court Judge Frank Mills, and he conducted a hearing on May 4, 2000. The County raised the defenses of ripeness and standing, pointing out that the Homebuilders was only an association, and could not show that it had paid any impact fees. Also, the County argued that had any member paid any fee, it had an appeal process that must be exhausted prior to suit being filed. The trial court refused to grant the preliminary injunction. The Homebuilders soon added an individual member builder who had paid a fee as a Homebuilders.

The initial hectic pace of the lawsuit slowed down as the Homebuilders began conducting discovery and settlement was explored. The County offered to revise the ordinance to take some of the Homebuilders’ concerns into account, but no agreement was reached. Settlement talks collapsed near the end of 2000, and depositions began in earnest in early 2001. The Homebuilders deposed representatives of each major area of impact fees: fire protection; sheriff’s department and public service; libraries; roads; and parks.

### C. Summary Judgment Motion

In early March 2001, the Homebuilders filed an extensive Motion for Summary Judgment. In it, the Homebuilders made due process and equal protection challenges to the Cherokee Ordinance. Once again, no challenge to the constitutionality of the state statute was made. Instead, a detailed challenge was launched regarding the provisions and

operation of the Cherokee Ordinance. Specifically, the Homebuilders objected that the calculations of level of service, which were based on measures such as square footage per population, were not based on the same measures of service that the agencies themselves used. For example, the fire department uses response time, not square footage.

The Homebuilders also asserted that countywide areas of service were improper, and that narrower areas of service should be chosen. The Homebuilders also argued extensively that the funding provisions of the state statute were not being followed, and that the Cherokee Ordinance did not provide enough credit for future tax revenue from new growth. However, Cherokee's future capital improvements budget is anticipated to come from SPLOST funds and not from general revenue.

The Homebuilders also challenged the fact that services were being provided to cities, but that citizens of cities were not paying impact fees. Homebuilders couched this as an equal protection argument, asserting that not all similarly situated citizens were being treated equally. The County responded in part that its assessment of fees takes into account the entire service area, even if some of those persons do not presently pay the impact fee. The County's goal was to avoid the citizens of the counties paying a disproportionate share.

#### D. Trial

The trial court heard summary judgment arguments on April 17 and decided that enough questions of fact existed to go right into the trial. The case was tried on the 17th and 18th, and the trial court issued its ruling on May 8, 2001. The trial court upheld the ordinance against the challenges based on areas of service and levels of service, and upheld three of the six areas on the funding challenge, but found that the funding for parks, libraries and roads violated equal protection. The court found that because citizens of

cities could use parks, libraries and roads without paying anything, that the equal protection rights of the county citizens were being violated. The court did not find this same violation for fire department, sheriff's services and public safety facilities because to the extent those services are provided to cities, the cities pay with fees or in-kind services.

The trial court ordered the County to refund all impact fees collected in the areas of parks, libraries and roads. Cherokee County has appealed this ruling, and the Homebuilders cross-appealed the portions of the ruling they lost. The appeal was filed in the Supreme Court, but that court viewed the constitutional issues as routine transferred the case to the Court of Appeals.

E. The Court of Appeals' Decision

At the Court of Appeals, the County took the position that any benefits flowing to citizens of cities are incidental benefits, and that invalidating impact fees on that basis would essentially invalidate any impact fee because all would have incidental beneficiaries. Furthermore, the Cherokee County Impact Fee Ordinance is rationally related to a legitimate government purpose, which is the proper equal protection standard of review. Pursuant to state statute, it imposes fees on new development to pay for infrastructure that will be required to support that new growth. That persons who do not pay the fee will incidentally benefit by being able to use County roads, parks and libraries does not make the impact fees unconstitutional. The fees benefit those who pay them, and everyone subject to the fees is paying a fair share, so no one who is similarly situated is being treated differently. Additionally, no one is paying more than their fair share, because County residents do not pick up the fees not paid by those in the cities.

The Court of Appeals agreed with the County's position, and found that since the County lacked authority to impose impact fees on the citizens of incorporated cities, the

County acted rationally and reasonably in imposing impact fees on other those developments over which it had power to impose fees. The Court found significant that the General Assembly gave counties the power to impose impact fees, but did not require any intergovernmental agreement be entered into between counties and cities (although such is permitted).

In upholding the trial court's finding regarding fees for the sheriff, public safety, and fire protection, the Court approved the County's method of determining the impact of all growth, and then determine fees based on all growth (even though city residents would not be paying a fee). This created a shortfall that will need to be covered by other funding mechanisms, but does not create a "disproportionate" share. The Court pointed out that had the County calculated impact fees to have the citizens of the unincorporated county pay for all growth in the County (including growth in the cities), that "could possible by argued as disproportionate."

Importantly, the Court also rejected the Homebuilders' arguments about funding sources. The Homebuilders argued that, since impact fees ordinance must be calculated taking into account anticipated revenues, and since prior growth was paid for by grants, sales tax, SPLOST and general budget revenues, those sources must be counted as ways to pay for new growth (and consequently impact fees get much smaller). Cherokee County took the position that, although all those sources were used in the past, they were not counted on in the future, and need not be credited against impact fees. If that methodology were not permissible, impact fees would never be justified, as they are never a "historical" source of funds.

Finally, the Court also reviewed and approved the "level of service" methodology used by Cherokee County, such as square feet of library and number of books per

housing unit, acres of park per 1,000 housing units, square feet of precinct space and fire station space per 1,000 persons, portion of fire truck per 1,000 persons, etc. The Court noted that, while this may not be how those departments measure their performance (they use workload, response time, etc.), impact fee calculations are related to facilities, not personnel, and the County's method was rational.

Hence, the County's impact fee ordinance was resoundingly approved, and provides a model for other communities to follow.

## **X. CONCLUSION**

Any jurisdiction that routinely imposes zoning conditions (which is essentially all jurisdictions) needs to have a sound understanding of the limitations of zoning conditions, especially given the scope of the impact fee law. Too many conditions are being imposed that are illegal, subject either to a challenge as contract zoning, or a challenge as a violation of the impact fee statute. The consent by the developer will be no defense to a challenge by a neighbor.