No. 62PA21 JUDICIAL DISTRICT 11-A

SUPREME COURT OF NORTH CAROLINA

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ANDERSON CREEK PARTNERS, L.P; ANDERSON CREEK INN, LL; ANDERSON CREEK DEVELOPERS, LLC; FAIRWAY POINT, LLC; STONE CROSS, LLC d/b/a STONE CROSS ESTATES, LLC; RALPH HUFF HOLDINGS, LLC; WOODSHIRE PARTNERS, LLC; CRESTRVIEW DEVELOPMENT, LLC; OAKMONT DEVELOPMENT PARTNERS, LLC; WELLCO CONTRACTORS, LLC; W.S. WELLONS CORPORARION; ROLLING SPRINGS WATER COMPANY, INC; and STAFFORD LAND COMPANY, INV. Plaintiffss-Appellants, v. COUNTY OF HARNETT, Defendant-Appellee.	)	From Harnett County No. COA19-533

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BRIEF *AMICUS CURIAE* OF NORTH CAROLINA WATER QUALITY ASSOCIATION AND THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF DEFENDANT-APPELLEE COUNTY OF HARNETT

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ISSUE ADDRESSED BY *AMICI*

The issue addressed by *amici* is whether generally applicable and uniform water and sewer system impact fees are subject to constitutional scrutiny as to an alleged "Taking" under the Fifth Amendment to the U.S. Constitution and the "unconstitutional conditions" doctrine adopted by the federal courts. [1]

INTRODUCTION

The North Carolina Water Quality Association (the Association) and the National Association of Clean Water Agencies (NACWA) represent on, respectively, a Statewide basis and the national basis, municipalities and other public entities that provide wastewater treatment and disposal services. Many members of the Association and NACWA also provide potable water services to their citizens. Those services in the typical case (as in the case of Defendant-Appellee Harnett County) (the County or Harnett), include both substantial infrastructure and operations and maintenance elements. Wastewater service infrastructure includes collector sewers within residential neighborhoods and commercial areas; larger sewers that combine wastewaters from multiple areas of collector sewers; pumping stations and force mains; wastewater treatment facilities; and often reuse or

[1] No person or entity, other than *amici*, their members and their counsel, either directly or indirectly, either wrote this Brief or contributed money for its preparation.

other specialized facilities. All of these facilities are typically sophisticated and expensive to construct, operate, and maintain, putting substantial financial obligations on their municipality owners and the public that they serve. *See infra* II. Such wastewater obligations arise from programs and legal requirements under multiple state and federal laws, including those at issue here: the federal Clean Water Act, 33 U.S.C. § 1251, *et seq*., North Carolina Gen. Stat. Ch. 143, and the regulations adopted thereunder requiring both extensive water-quality-based controls directly addressing aquatic life, human health and other values, and technology-based requirements addressing a standardized level of wastewater control technology required irrespective of specific water quality concerns.

One of the most effective growth management tools available to public utilities is the use of new customer impact fees, which facilitates growth paying for itself rather than existing customers paying for this cost burden in rates. Impact fees (or development fees and comparable terms) are monetary charges that are generally determined to allow a municipal water or wastewater system owner to assess from a developer a charge for existing or planned water and sewer infrastructure that will be required for and used by the new development. That charge recovers for the municipality funds that it has incurred or will incur for the infrastructure through appropriations funded by taxes or user charges. Absent that recovery, the municipality's

other customers would bear the developer's fair costs for the services to be provided for the influx of new residential customers. The payment of the impact fees (in this case a facially moderate $1000 for water and $1200 for wastewater service per residential connection) offsets costs that the developer would otherwise have to spend to provide (where these would be permitted), for example, a separate wastewater treatment and disposal system, permitted under the federal Clean Water Act and North Carolina programs; or onsite individual septic systems requiring larger (and therefore fewer) lots and a less modern and less valuable product for the developer's prospective purchasers.[2]

The Harnett County water and wastewater impact fees at issue in this case cover the costs of (1) potable water, purification and conveyance facilities; and (2) wastewater, collector and interceptor sewers, pumping stations, and treatment and other facilities. The fees were adopted by the County Board and are generally and uniformly applicable. The impact fees should not be subject to constitutional scrutiny as to an alleged "Taking" under the Fifth Amendment to the U.S. Constitution and the "unconstitutional conditions" doctrine adopted by the federal courts, and such review is wholly unnecessary to ensure fairness. Rather, in light of the other

[2] The NACWA 2020 Financial Survey (https://www.nacwa.org/docs/default-source/news-publications/index-1-2021-final.pdf?sfvrsn=8a56fa61_6): among 39 utility responses on impact fees, the average wastewater system fee is $2,965.58.

State law-based avenues of review, application of the federal unconstitutional conditions doctrine as a further avenue of review could badly disrupt and even potentially halt planning and implementation for future water and sewer system growth and development Statewide. This would contravene bedrock public policy in favor of maximizing public water and sewer system development (as opposed to decentralized, on-site systems that are less efficient at protecting human health and the environment), as well as locality land use planning.

ARGUMENT

I. Existing Federal Law Does Not Apply the Unconstitutional Conditions Doctrine Analysis to Generally Applicable and Uniform Impact Fees

The Plaintiffs-Appellants and *amici* Pacific Legal Foundation and N.C. Home Builders Association argue three principal U.S. Supreme Court cases in support of their respective positions on the unconstitutional conditions doctrine as it may be applied to this case. However, the cases they point to, *Nollan*, *Dolan*, and *Koontz,* all involved demands for real property from owners or developers; and all were examples of aggressive overreach. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Mgmt Dist*, 570 U.S. 595 (2013). Distinct from the case at bar, none addressed generally applicable and uniform fees.

The doctrine at issue in the present case is a "special application" of the principle of unconstitutional conditions, applicable when the government takes property when an owner applies for land use permits. *Koontz* at 605. In holding that the administrative agency actions in these cases constituted takings of real property without just compensation in violation of the taking clause of the Fifth Amendment, the Court emphasized that those actions were wholly unnecessary to achieve their stated community-wide goals. Only in the *Koontz* case did the Court have to address a money demand, and the money demand arose only after the property owner balked at what it argued was an excessive demand by a local water management district for a transfer of a fee ownership interest in a major part of the owner's real property and a subsequent alternative demand for money allowing the District to benefit other, unrelated property. *Id.* at 611 - 14.

Addressing the potentially blurred line between a taking of real property and a matter of fees or alternative payments, the Court observed that "it is beyond dispute that taxes and user fees are not takings," and that "teasing out the difference . . . is more difficult in theory than in practice." *Koontz* at 615 - 16. It was accordingly relatively easy for the *Koontz* Court to see the District's demand for money in lieu of a larger donation of real property that the owner was unwilling to provide to be a taking requiring an unconstitutional conditions analysis. It is similarly easy here for this Court

to observe that the opposite is true in the present case – the routine impact fees in question are the exact type of fees that the Supreme Court held are "beyond dispute . . . not takings."

Contrary to Appellants' assertions, therefore, *Koontz* makes clear that water and sewer impact fees which are generally applicable and uniform are not subject to application of the unconstitutional takings doctrine; and in fact, nothing in *Koontz* would suggest that any administratively adopted but generally applicable and uniform fees would be subject to the doctrine. Further, such analysis is wholly unnecessary, as the lower courts in this case have properly applied a "reasonableness" standard; and as to any future cases addressing locality impact fees the 2017 Public Water and Sewer System Development Fee Act, *infra at III*, now expressly requires that impact fees be tied to the actual capital cost impacts to water and sewer systems imposed by new development, thereby ensuring that fees will exhibit a rational relationship to the costs imposed. Adoption by the North Carolina Court of the federal doctrine would therefore be an unnecessary and costly exercise, the expense of which would be borne by the local communities served by public water and wastewater infrastructure.

II. Municipalities and Other Public Agencies Must be Able to Fairly Apportion the Costs of Wastewater Service

Water and wastewater infrastructure is expensive but critical to

human health, the environment, and the economy. Water and wastewater infrastructure projects have long-term planning horizons typically requiring that capacity be built ahead of the development that will use that capacity. New infrastructure may be paid for in accumulated public agency funds, but more typically is financed, in whole or in part, through long-term debt. In the case of existing infrastructure that has been fully or partly paid for, funds have come from local residents through either taxes or the capital portions of monthly utility bills. That accumulated capital or debt is repaid through impact fees, which allow developers that benefit from that capacity to eventually foot the bill for its establishment. In other words, impact fees require new development to cover its fair share of the cost. To do otherwise would mean requiring existing water and sewer customers to subsidize new development.

Because existing infrastructure has been paid for by current users and current citizens, new development is often subject to impact fees or some other capital recovery approach to ensure that developers benefiting from growth pay for the cost of the facilities necessary to accommodate it. Indeed, such impact fees are used by municipalities across the country to recover the costs of providing clean water and drinking water services to new development. Water and sewer system capacity is not addressed on a property-by-property or development-by-development basis, but instead

involves areawide capacity that must be planned for.

These financial issues are very significant for the Association's and NACWA's members. U.S. EPA's 2012 Clean Water Act "Needs Survey" (the most recent such EPA survey available) documents a nationwide need for $271 billion in new capital projects.[3] Of the nationwide total $52 billion represents public agency "secondary treatment" needs, the basic level of wastewater treatment required for all public agencies; $51 billion for new advanced wastewater treatment, addressing among other priorities reduction of wastewater nutrients and toxics, including emerging pollutant issues; and $45 billion in new conveyance systems, sewers and pumping stations. The State Water Infrastructure Authority projected (2017) water and wastewater infrastructure capital needs for North Carolina of between $17 and $26 billion.[4] These costs associated with providing water and sewer services for both existing and new development underscore the critical role impact fees play for *amici's* members.

III. More Appropriate and More Tailored Remedies are Available for any Instances of Improper User Fees

For cases where an impact fee (or other investment mechanism) is arguably excessive or otherwise unfair, an aggrieved party always has

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[3] https://www.epa.gov/cwns/clean-watersheds-needs-survey-cwns-2012-report-and-data

[4] http://portal.ncdenr.org/c/document_library/get_file?uuid=df1eeeae-d14b-455d-9ad4-73b5d635f057&groupId=14655572

redress in the courts without resort to a strained application of federal constitutional protections. The lower courts in this case appropriately evaluated Appellants' claims about the Harnett impact fees under the "Reasonableness" standard established by the North Carolina courts. *Anderson Creek Partners, et al. v. County of Harnett*, COA19-533 (Dec. 31, 2020) at 35; see *also Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 46, 442 S.E. 2d 45, 51 (1994). While the U.S. Supreme Court has made clear that such fees are not subject to a Constitutional "takings" analysis, conceptually it is difficult to argue that "Reasonableness" would necessarily prove to be a less stringent standard than that applicable under the federal courts' special application of the unconstitutional conditions doctrine regardless. *See Koontz* at 612 (nexus and "rough proportionality").

Although this case predates the 2017 Act, the North Carolina Public Water and Sewer System Development Fee Act establishes a comprehensive authorization for and system of limitations on impact fees. N.C. Gen. Stat. §§ 162A-200, *et seq*. Impact fees must be based on a written analysis by a financial or other qualified professional for the purpose of a "charge or assessment for services imposed with respect to new development to fund costs of capital improvements necessitated by and attributable to such new development, to recoup costs of existing facilities which serve such new development, or a combination of those costs." *Id*. § 162A-201. Among other

substantive restrictions on the determination of fees, they must include a credit reflecting "a deduction of either the outstanding debt principal or the present value of projected water and sewer revenues received by the local government unit for the capital improvements necessitated by and attributable to such new development . . . " *Id.* § 162A-207(b). In other words, an impact fee may not include elements of cost that are anticipated to be recovered in the future through periodic service charges to be paid by the elements of the new development, thereby preventing double-charging by the public agency.

In light of these tailored State remedies, North Carolina public agencies should not be burdened with inappropriate federal unconstitutional conditions claims. Indeed, precedent requiring the unnecessary application of the unconstitutional conditions doctrine could undermine the important public-policy objective of providing and maintaining utility service to new developments not only in North Carolina but across the United States.

IV. The Unrelated Evils About Which *Amici* Pacific Legal and Home Builders Speculate Have Nothing to do With This Case

Amici Pacific Legal Foundation and North Carolina Home Builders Association assert, among other issues, that "this Court's resolution of the legislative exactions question will have a profound impact on affordable housing." Brief *Amicus Curiae* of Pacific Legal Foundation and North

Carolina Home Builders Association in Support of Plaintiffs at 14 – 19. There is no basis for this claim. Neither *amici* nor any Plaintiff offers any evidence of any use by public agencies of utility impact fees for any discriminatory or other negative purpose. They also incorrectly and misleadingly claim that impact fees are "exact[ed] against individual property owners as a way of financing public projects enjoyed by everyone in the community . . . "*Id*. at 15 -16. Although water and sewer infrastructure is enjoyed by everyone, public agencies' existing customers have already paid for their shares of the necessary capital investments. Ironically, it is actually the Home Builders that are trying to maximize their own profits by passing the costs their development will have on public infrastructure to local communities, including those that are disadvantaged.

Pacific Legal and Home Builders also conveniently ignore the existence of specific legal remedies on both the federal and State level against the fair housing concerns they express. The federal Fair Housing Act is a mature, tested and effective compilation of protections against unfair housing practices. 42 U.S.C. §§ 3601, *et seq*. The North Carolina State Fair Housing Act likewise provides comparable protections. N.C. Gen. Stat. §§ 41A-1, *et seq*. These legal protections provide effective limitations that would apply should impact fees produce an unacceptable disparate impact, 42 U.S.C § 3604, or be found to have been motivated by discriminatory considerations,

see N.C. Human Relations Council v. Weaver Realty Co., 79 N.C. App. 710 (1986), and they do so in a far more targeted and tailored manner than the broad constitutional doctrine advanced by *amici*.

CONCLUSION

The unconstitutional conditions doctrine should not be applied to generally applicable and uniform impact fees applied by municipalities and other public entities to newly developed property that will be served by existing municipal water and sewer infrastructure. Such an application would trivialize Fifth Amendment takings jurisprudence, harm public agencies' ability to provide vital health and environmental services to local communities, and inappropriately pass the cost of private development onto the public.

The North Carolina Courts have decided the underlying issues presented in this case by resort to application of State law, and there are no factors or interests at play in this case that should lead the North Carolina Supreme Court to pursue the unconditional conditions doctrine in a manner that goes beyond the current state of federal law as set out by the federal courts.

The substantive concerns raised by *amici* Pacific Legal Foundation and North Carolina Home Builders Association with respect to fair housing issues are likewise not implicated in this case and are in any event better

addressed and protected through other existing legal remedies. This court should not permit private developers to maximize their own profits by passing their costs onto local communities through a strained and wholly inappropriate reading of federal takings jurisprudence.

Respectfully submitted, this 29th day of November, 2021.

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CERTIFICATE OF SERVICE

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This 29th day of November, 2021.

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