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ADEQUATE PUBLIC FACILITIES ORDINANCES: A COMPARISON OF THEIR USE IN GEORGIA AND NORTH CAROLINA

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I. INTRODUCTION: ADEQUATE PUBLIC FACILITIES ORDINANCES ARE A USEFUL TOOL FOR SPRAWL PREVENTION

Adequate Public Facilities Ordinances (APFOs) are land use regulations that condition new development on the existence and availability of necessary public facilities and services such as roads, sewers, and water.[1] Although a municipality's comprehensive plan often suggests that adequate public facilities should be a condition of development approval, the plan often lacks the mechanism for meeting such conditions.[2] APFOs are designed to fill that gap. APFOs "reverse the normal pattern of land development whereby local infrastructure is provided in response to private development decisions and population growth" because they force

[1] For a survey of APFO definitions by experts in the field, see Robert H. Freilich et al., *Adequate Public Facilities Ordinances*, 2 SE11 ALI-ABA 581, 583 (1999); S. Mark White & Elisa L. Paster, *Creating Effective Land Use Regulation through Concurrency*, 43 NAT. RESOURCES J. 753, 754 (2003); S. MARK WHITE, Report No. 465, ADEQUATE PUBLIC FACILITIES ORDINANCES AND TRANSPORTATION MANAGEMENT 5 (Am. Planning Ass'n 1996).
[2] White & Paster, *supra* note 1, at 755.

developers to react to local governments' capital improvements planning.[3] These ordinances regulate the timing of new development and require demonstration that certain objective standards are in place before new development begins.[4] The objective standards, referred to as "Level of Service" (LOS) standards, are developed for each facility the APFO regulates.[5] "'Level of service' means an indicator of the extent or degree of service provided by, or proposed to be provided by a facility. Level of service [indicates] the capacity per unit of demand for each public facility."[6]

> The primary objectives of an APFO are:
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> (1) To link the provision of key public facilities and services with the type, amount, location, density, rate, and timing of new development.
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> (2) To properly manage new growth and development so that it does not outpace the ability of service providers to accommodate the development at established LOS standards.
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> (3) To coordinate public facility and service capacity with the demands created by new development.
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> (4) To discourage sprawl and leapfrog development patterns and to promote more infill development and redevelopment.
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> (5) To encourage types of development patterns that use infrastructure more efficiently, such as New Urbanist or transit-oriented development.
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> (6) To require that the provision of public facilities and services to new development does not cause a reduction in the levels of service provided to existing residents.
>
> (7) To offer an approach for providing necessary infrastructure for new residents.[7]

Once enacted, APFOs either require development approval to be withheld until LOS standards are met or, in some cases, allow developers to "commit to furnish" the facilities necessary to meet LOS standards before

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[3] Freilich, *supra* note 1, at 583.

[4] Because the purpose of the APFO is to ensure that new growth occurs at the same rate public facilities are made available to support that growth, APFOs are often called "concurrency regulations." *See* White & Paster, *supra* note 1, at 754.

[5] *Id.* at 758.

[6] *Id.*

[7] *Id.* at 756-57.

development is approved.[8] Thus, the LOS standard is perhaps the most important component in the APFO.[9] The LOS standard is objective and "should be tied to units or increments of demand."[10] It governs "timing of growth and development" and the "level of public/private investment needed in order to achieve and maintain that standard."[11] It takes into account current and projected uses of a facility and gives a community the capacity to allocate the use of a given facility to approved development within a designated area.[12] The LOS standard varies in applicability to different areas and may be designed to promote other comprehensive plan objectives, such as infill development.[13]

Once the LOS standard is set, a county or city then sets the *timing* for the service.[14] To do so, the local government determines when a particular service must be obtained in order for development to proceed.[15] The period allowed between development and required concurrency is known as "lag time."[16] The "amount of 'lag time' a community will tolerate between the construction and occupancy of development and the availability of the public facilities needed to serve the development [is a] critical policy issue."[17] The lag time can vary by service. For example, the APFO for the city of Concord, North Carolina provides no lag time for water concurrency, stating that "[o]nly existing capital improvements may be considered for issuance of approval for a final site plan or final subdivision plat."[18] The same APFO, however, provides a three year lag time for roads, stating that "[p]rogrammed capital improvements within the first three (3) years of the Capital Improvements Program and guaranteed by currently available

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[8] Freilich, *supra* note 1, at 583. The time period between development and concurrency is referred to as "lag time," White & Paster, *supra* note 1, at 759, and it is probable that developers are especially interested in "lag time" as an increase in it may correlate with a lower monetary commitment by the developer because there is more time for municipality and county governments to implement capital improvements.

[9] White & Paster, *supra* note 1, at 758 ("The cornerstone of an APFO is the adoption of an LOS standard." *Id.*).

[10] *Id.*

[11] *Id.*

[12] *Id.* at 759.

[13] *Id.* at 761.

[14] *Id.* at 759.

[15] White & Paster, *supra* note 1, at 759.

[16] *Id.*

[17] *Id.*

[18] CONCORD, N.C., UNIFIED DEV. ORDINANCE art. 14 tbl.14-2 (2003).

revenue sources may be considered for subdivision plat or site plan approval."[19]

With APFOs in place, implementation is the last step in the process; in order to implement an APFO a local government must have sufficient legislative authority, and must consider the constitutional issues of takings, equal protection, and due process.[20] This article begins by discussing the varying legislative provisions that grant local governments authority to enact APFOs, using North Carolina and Georgia statutory and case law to illustrate.[21] The article follows with a general discussion of the federal constitutionality of APFOS and, again, uses North Carolina and Georgia to illustrate specific state-level constitutional issues.[22] Next, the article synthesizes the analysis of constitutional and legislative authority issues that confront local governments in an effort to provide advice to those governments seeking to successfully implement APFOs as a growth-management tool.[23]

II. AUTHORITY OF LOCAL GOVERNMENT TO PASS ADEQUATE PUBLIC FACILITIES ORDINANCES

Since local governments are "creatures" of state government, and thus have only the powers delegated to them by the state legislature,[24] one of the primary issues that must be addressed is the authority of local governments to pass APFOs. Authority to pass APFOs is clearest in states with some type of direct or indirect enabling legislation.[25] However, there are only a few states with such legislation.[26] Neither Georgia nor North Carolina is among those states, yet several local governments in North Carolina have passed APFOs.[27] As of this writing, there is no record of any local government in

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[19] *Id.*
[20] White & Paster, *supra* note 1, at 762.
[21] *See infra* Part II.
[22] *See infra* Part III.
[23] *See infra* Part IV-V.
[24] CHESTER JAMES ANTIEAU, 1-13 ANTIEAU ON LOCAL GOVERNMENT LAW § 13.02, (2d ed., M. Bender 1997) (2006).
[25] WHITE, *supra* note 1, at 9.
[26] White & Paster, *supra* note 1, at 762. "Only Maryland has specific APFO enabling legislation, though Florida, Vermont, and Washington mandate concurrency at the state level by prohibiting new development where the impact would have adverse effects on specified facilities or a reduction in adopted levels of service. New Hampshire's legislation allows development-timing ordinances subject to preparation of a master plan and CIP." *Id.* (citations omitted).
[27] These include the Town of Davidson, Cabarrus County, Town of Harrisburg, Town of Mount Pleasant, and Stanly County. *See infra* Part B.4.

Georgia passing an APFO, however, at least two jurisdictions in Georgia are considering doing so.[28] Thus, one of the purposes of this article is to explore the authority under which these and other similarly situated local governments might operate.

According to APFO expert and consultant S. Mark White, "[b]ecause explicit enabling legislation for APFOs is rare, authority is often implied under more traditional zoning or subdivision enabling legislation."[29] Also, since APFOs can control when development occurs, authority can be construed from the power of local governments to enact development moratoria.[30] Finally, White also suggests that authority for APFOs that regulate transportation infrastructure may be found generally in the police power to regulate traffic and access to roads.[31]

A. The Ramapo *Case*

There is very little case law specifically on the issue of APFOs. The 1972 *Golden v. Planning Board of Ramapo* case from New York held that although "phased development controls were not specifically authorized by any state statute, they were implied by the inherent power in local governments to restrict land use."[32] This is the most widely known case on the issue of APFOs.[33]

In 1964, due to population pressures that resulted in problems providing municipal facilities and services, the town of Ramapo developed a master plan, which "was followed by the adoption of a comprehensive zoning

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[28] In Pickens County, staff hopes to bring a draft ordinance to the public hearing stage by fall 2008. Interview with Norman Pope, Planning Dir., Pickens County, Ga. (Oct. 11, 2007). Additionally, Forsyth County is only in the exploratory phase of drafting an APFO. E-mail from Vanessa Bernstein, Long Range Planner, Forsyth County, to Jamie Baker Roskie (Mar. 5, 2007 10:06:50 EST) (on file with author).

[29] WHITE, *supra* note 1, at 10.

[30] *See* White & Paster, *supra* note 1, at 775. Commentators generally focus on whether APFOs might be "de facto" moratoria and therefore whether they would survive challenge under a takings theory or because a particular state does not allow the use of moratoria by local governments. *See, e.g.*, Dustin C. Read & Steven H. Ott, *Adequate Public Facilities Ordinances in North Carolina: A Legal Review* (Jan. 2006) (unpublished working paper, on file with the Center For Real Estate at UNC Charlotte), *available at* http://www.naiop.org/foundation/apfonclegal.pdf (last visited May 25, 2007). However, this argument also cuts the other way – if local governments indeed have authority to use moratoria, this supports the use of APFOs as well, as is explained in this article. *See infra* Part II.C.3., II.B.3.

[31] WHITE, *supra* note 1, at 10.

[32] Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291, 295 (N.Y. 1972).

[33] Freilich, *supra* note 1, at 584.

ordinance."[34] Ramapo then adopted a capital program providing for locations and sequences of capital improvements in the town over the next twelve years.[35] Under this scheme, in order to develop any residential use, developers were required to obtain a special permit from the town.[36] The standards for the permit required availability of adequate sewer and drainage facilities, parks and recreation facilities, school, roads, and firehouses.[37] If the developer wished to "advance" subdivision approval, he or she could provide the improvements him or herself.[38]

As stated above, the court noted there was no specific statutory authorization for the "sequential" and "timing" controls adopted by *Ramapo*.[39] However, the court found that under the delegation from the state to local governments to zone, and the fact that "legitimate zoning purposes [included] 'adequate provision of transportation, water, sewerage, schools, parks and other public requirements'" the Ramapo ordinance was authorized.[40]

The court also discussed whether or not the ordinance was, in effect, a blanket prohibition on subdivisions.[41] However, the court stated that the infrastructure requirements were not an "absolute prohibition."[42] The court found it important that when plat approval was denied for want of the necessary infrastructure, the developer was "free to provide those improvements at his own expense."[43] The court also read zoning and subdivision law together as authorizing the Ramapo ordinance, writing that

> zoning historically has assumed the development of individual plats and has proven characteristically ineffective in treating with the problems attending subdivision and development of larger parcels, involving as it invariably does, the provision of adequate public services and facilities. To this end, subdivision control purports to guide community development . . . while at the same time

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[34] *Ramapo*, 285 N.E.2d at 295.
[35] *Id.* A capital improvement is defined as "[a]n acquisition of real property, major construction projects, or acquisition of expensive equipment expected to last a long time." HARVEY S. MOSKOWITZ & CARL G. LINDBLOOM, THE LATEST ILLUSTRATED BOOK OF DEVELOPMENT DEFINITIONS 67 (Center for Urban Policy Research 2004).
[36] *Ramapo*, 285 N.E.2d at 295.
[37] *Id.*
[38] *Id.* at 295-96.
[39] *Id.* at 296.
[40] *Id.* at 297 (quoting N.Y. Town Law § 263 (2004)).
[41] *Ramapo*, 285 N.E.2d at 298.
[42] *Id.*
[43] *Id.* at 299 n.7.

> encouraging the provision of adequate facilities for the housing, distribution, comfort and convenience of local residents.[44]

The court also said that subdivision control "is designed to complement other land use restrictions, which, taken together, seek to implement a broader, comprehensive plan for community development."[45]

B. Authority for APFOs in North Carolina

Because one of the threshold issues in developing an APFO is whether the local government has the authority to do so, an analysis of such authority in Georgia and North Carolina will be important in understanding local governments' use of this tool within those states. The next few sections of this article will therefore analyze the delegation of police power, particularly the power to zone, as well as authority to enact development moratoria, and to control subdivisions. For reasons discussed below, it will also be necessary to analyze case law in Georgia on the specific authority of local governments to delay or deny re-zonings or development permits based on inadequate infrastructure to service the development.[46]

1. North Carolina Police Power and Zoning Power

Local governments in North Carolina are granted their general police power by statute.[47] Cities and counties may, through the use of ordinances, "define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the [city or county]; and may define and abate nuisances."[48] Also, the statutory provisions require that grants of county and city authority must be "broadly construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect."[49]

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[44] *Id.* at 298.
[45] *Id.* (citations omitted).
[46] *See infra* part II.C.4.
[47] N.C. GEN. STAT. § 153A-121 (2006) (granting police powers to counties); *id.* at § 160A-174 (granting police powers to cities and towns). Within North Carolina's statutes, cities and towns are granted authority through Section 106A, *id.* at § 160A, whereas counties are granted power in Section 153A, *id.* at § 153A. Much of the language granting various powers to the different local governments is the same, and, as result, throughout this article citations are provided to the different sections granting the same power to cities and towns, and counties.
[48] *Id.* at §§ 153A-121, 160A-174.
[49] *Id.* at §§ 153A-4, 160A-4.

Zoning power in North Carolina is also granted to cities and counties by statute.[50] Interestingly, under this grant there is a specific delegation to regulate infrastructure and public facility requirements.[51] "Zoning regulations . . . may address, among other things . . . the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements."[52] Critics of APFOs in North Carolina do not believe that this and the general zoning authority provide adequate foundation for the passage of APFOs.[53] However, other experts on the subject believe that the grant of local authority to regulate the adequate provision of these facilities may be sufficient authority to implement APFOs.[54]

2. North Carolina Law on Local Control of Subdivisions

North Carolina local governments also have clear statutory authority to control the subdivision of land.[55] Aspects of subdivision control that support the passage of APFOs include a provision of North Carolina law on the purpose of subdivision control ordinances, which states

> [a] subdivision control ordinance may provide for the orderly growth and development of the county; for the coordination of transportation networks and utilities within proposed subdivisions with existing or planned streets and highways and with other public facilities; for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision . . . and for the distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create

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[50] *Id.* at §§ 153A-340 to -348, 160A-381 to -392.
[51] *Id.*
[52] *Id.* at §§ 153A-341, 160A-383.
[53] Read & Ott, *supra* note 30 (criticizing APFOs as generally as an unlawful exercise of local government poweres potentially creating a de facto moratoria, requiring unlawful exactions, causing regulatory takings, and potentially violating due process and equal protection).
[54] *See* WHITE, *supra* note 1, at 9; David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 701 (Fall 2000). However, in the same article, Owens acknowledges the lack of total clarity, writing "a wide variety of emerging growth management tools are not explicitly mentioned in the state statutes. Can a local government adopt . . . an adequate public facilities ordinance, traditional neighborhood design standards, affordable housing mandates, transferable development rights schemes, or impact fees?" *Id.* at 679. As the answers to these questions remain murky, the purpose of his article is to help provide some guidance.
[55] N.C. GEN. STAT. §§ 153A-330 to -335, 160A-371 to -376.

> conditions that substantially promote public health, safety, and the general welfare.[56]

The subdivision control statutes also allow for local ordinances that permit developers to provide the county with funds to acquire recreational land to serve developments, or to provide funds for the development of roads ("in lieu of required street construction").[57] The ordinance may also "provide for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with county [or city] plans, policies, and standards," and "may provide for the reservation of school sites in accordance with comprehensive land use plans . . . ."[58] These provisions suggest that the North Carolina legislature considers the provision of adequate public facilities as part of orderly growth to be integral to the regulation of subdivisions, and therefore supports the passage of APFOs.

3. North Carolina Law on Development Moratoria

As mentioned above, since APFOs often regulate the timing of development, the authority of local governments to impose development moratoria may support the establishment of APF requirements.[59] Opponents of APFOs may claim that the infrastructure requirements are de facto moratoria "if a municipality is unable to implement an effective infrastructure development plan."[60] However, there is no question in North Carolina as to the authority for enacting temporary development moratoria – they are explicitly provided for in the zoning statute.[61] Since local governments can enact temporary *halts* to development, it follows logically that they can enact an ordinance that *delays* development. This lends support to local government authorities enacting APFOs, as long as the APFOs allow for the provision of adequate services within a reasonable amount of time and cause only a temporary delay of development.

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[56] *Id.* at §§ 153A-331(a), 160A-372(a).
[57] *Id.* at §§ 153A-331(c), 160A-372(c).
[58] *Id.*
[59] A development moratorium usually involves a short-term halt to development while a local government drafts new regulations to address a pressing development problem. *See* DANIEL R. MANDELKER, LAND USE LAW § 6.06 (4th ed. 1997). Mandelker also notes that some communities also impose moratoria to address issues of inadequate public facilities. *Id.* at §§ 6.06, 6.10.
[60] Read & Ott, *supra* note 30, at 3.
[61] N.C. GEN. STAT. §§ 153A-340(h), 168A-381(e).

4. Local Governments in North Carolina with APFOs

As mentioned above, several local governments in North Carolina have passed APFOs.[62] At least three counties (Cabarrus, Stanly, and Union), four municipalities within Carabbus county (Concord, Kannapolis, Mount Pleasant, and Harrisburg), as well as the Town of Davidson have passed APFOs of some form.[63] Cabarrus County and the four associated municipalities, along with Concord and Davidson Counties and the Town of Davidson, based their APFOs on a template developed by S. Mark White.[64] Stanly County's ordinance appears to also be based on the same template.[65] Currituck County, the Town of Cary, Orange County, the Town of Chapel Hill, and the Town of Carrboro are also reported to have passed APFOs related specifically to school capacity.[66] Interestingly, the Cary Town Council repealed their school capacity APFO in September 2004.[67] Reasons cited include the failure to stop any new development, create any new school seats, or provide additional money for increasing school capacity.[68] A more in-depth study of this ordinance and its repeal might be appropriate for jurisdictions considering APFOs related to schools, but further discussion is not warranted here.

The North Carolina Home Builders Association is challenging the Union County ordinance.[69] The ordinance, which bases its facilities

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[62] *See* North Carolina Ass'n of County Commissioners, *Counties look to APFOs to manage growing pains*, http://www.ncacc.org/apfos_1106.html (last visited May 25, 2007).

[63] CABARRUS COUNTY, N.C., SUBDIVISION ORDINANCE ch. 4, § 17 (2006); STANLY COUNTY, N.C., ADEQUATE PUBLIC FACILITIES ORDINANCE art. 4 (2004); UNION COUNTY, N.C., ADEQUATE PUBLIC FACILITIES ORDINANCE §§ 360-373 (2006); CITY OF CONCORD, N.C., UNIFIED DEVELOPMENT ORDINANCE art. 14 (2003); CITY OF KANNAPOLIS, N.C., UNIFIED DEVELOPMENT ORDINANCE art. 14 (undated); TOWN OF MOUNT PLEASANT, N.C., UNIFIED DEVELOPMENT ORDINANCE art. 14 (undated); TOWN OF HARRISBURG, N.C., UNIFIED DEVELOPMENT ORDINANCE art. 14 (undated); TOWN OF DAVIDSON, N.C., PLANNING ORDINANCE § 18.0-18.8 (2003).

[64] Telephone Interview with S. Mark White, Attorney, White & Smith, LLC Planning and Law Group (Mar. 8, 2007).

[65] *See* STANLY COUNTY, N.C., ADEQUATE PUBLIC FACILITIES ORDINANCE art. 4.

[66] Richard Drucker, *Adequate Public Facility Criteria: Linking Growth to School Capacity* n.4 (2003), *available at* http://www.co.chatham.nc.us/dept/planning/planning_dept/misc/APFO/Documents/nciog_article_1.pdf (last visited May 25, 2007).

[67] Town of Cary, N.C., Agenda & Minutes, September 9, 2004, (noting approval to repeal school APFO), *available at* http://www.townofcary.org/agenda/aa090904.htm (last visited May 25, 2007).

[68] Town of Cary, N.C., Schools Adequate Public Facilities Ordinance, Sept. 2004, http://www.townofcary.org/depts/dsdept/schoolapf2.htm (last visited May 25, 2007).

[69] Union County Chamber of Commerce, *Business News 2006* (Dec. 1, 2006), *available at* www.unioncountycoc.com/2006.html (last visited May 25, 2007).The law suit is currently in

requirements around public schools, uses a voluntary mitigation provision that allows developers to "overcome a failure to meet" a LOS standard.[70] Mitigation may be made through voluntary payments, donation of land, or school construction.[71] In the Union County suit, developers have challenged this voluntary payment as an impact fee, a regulatory tool that is not generally authorized for use by local governments in North Carolina.[72] However, this argument misconceives the nature of an impact fee, which is a required payment for the construction of capital improvements as part of a permitting process.[73] The voluntary mitigation fees in an APFO are a way for developers to avoid a permitting *delay*, which differs conceptually from a required payment to receive the permit *at all.*

It should also be noted that local governments in Georgia *do* have authority to enact impact fees for certain purposes through the Development Impact Fee Act (DIFA), as long as they follow certain statutorily-required procedures.[74] Thus, even if voluntary mitigation payments were somehow understood as impact fees, local governments in Georgia could still use them as a tool, provided they followed the DIFA procedures.[75] It appears the same would also be true of local governments in North Carolina that have local authority to charge impact fees.

The Union County lawsuit also challenges APFOs on several other grounds, including lack of local authority to use an APFO as a growth

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the discovery phase. Email from S. Mark White, Attorney, White & Smith, LLC Planning & Law Group (Oct. 11, 2007) (on file with author).

[70] UNION COUNTY, N.C., ADEQUATE PUBLIC FACILITIES ORDINANCE § 367(a) (2006).

[71] *Id.* at § 367(b).

[72] Telephone Interview with Marshall S. "Mark" White (Mar. 27, 2007). *See generally* Durham Land Owners Ass'n v. County of Durham, 630 S.E.2d 200 (N.C. Ct. App. 2006) (requiring a county to have statutory authority, through local legislation, before passing a school impact fee and, further, that this authority cannot be read from other statutory grants of power including the power to zone and to charge fees for services rendered by the county).

[73] *See* MANDELKER, *supra* note 59, at § 9.11 ("The impact fee . . . is usually levied as a condition to the issuance of building permits to pay for off-site facilities such as water and sewage treatment facilities." *Id.*).

[74] *See* GA. CODE ANN. §§ 36-71-1 to -13 (2006) (describing the procedures to be followed).

[75] *Id.* However, in Georgia, impact fees cannot be charged for schools as the statutorily allowed impact fee purposes are: "(A) [w]ater supply production, treatment and distribution facilities; (B) [w]aste-water collection, treatment, and disposal facilities; (C) [r]oads, streets, and bridges, including rights of way, traffic signals, landscaping, and any local components of state or federal highways; (D) [s]torm-water collection, retention, detention, treatment, and disposal facilities, flood control facilities, and bank and shore protection and enhancement improvements; (E) [p]arks, open space, and recreation areas and related facilities; (F) [p]ublic safety facilities, including police, fire, emergency medical and rescue facilities; and (G) [l]ibraries and related facilities." *Id.* at § 36-71-2(16).

management tool, violation of due process, and vagueness grounds.[76] The outcome of these lawsuits may have an impact on the passage of APFOs in North Carolina in the future so interested observers will want to stay tuned.

C. Authority for APFOs in Georgia

1. Georgia Police Power and Zoning Power

Local governments in Georgia are granted general police power and zoning powers by a mix of statutory and constitutional provisions.[77] Counties in Georgia receive police power from a "home rule" provision in the Georgia Constitution.[78] This provision allows counties "to adopt clearly reasonable ordinances, resolutions, or regulations relating to [their] property, affairs, and local government for which no provision has been made by general law and which is not inconsistent with this Constitution or any local law applicable thereto."[79] The Georgia Constitution provides for the "home rule" for cities in a slightly different way – through a grant of authority to the Georgia Legislature to provide for "self-government of municipalities."[80] The Legislature exercised this authority through the Municipal Home Rule Act.[81] This Act gives cities the same authority as counties (using the same wording as the county constitutional provision) to adopt "clearly reasonable ordinances."[82] Cities and counties are also granted "supplementary powers" in another constitutional provision, allowing them

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[76] *See* Julia Oliver, *Union County Responds to Lawsuit*, CHARLOTTE OBSERVER, Mar. 4, 2007, *available at* www.rebic.com/library/Union/030407%20CO%20Union%20County.pdf (last visited May 25, 2007). *See also* Read & Ott, *supra* note 30, at 2 (discussing possibility of an APFO challenge as a due process violation). It is interesting to note that similar arguments were raised on appeal in a challenge to an APFO in Currituck County in the late 1990s. *See* Tate Terrace Realty Investors, Inc. v. Currituck County, 48 S.E.2d 845 (N.C. Ct. App. 1997). The Currituck Planning Board's denial of special use permit on the basis that it would exceed the county's ability to provide adequate facilities was not arbitrary or capricious, nor was it unsupported by substantial evidence, however, these issues were not raised before the Board or the trial court, and so the Court ruled they could not first be raised at the appellate level. *Id.* at 852.

[77] There is a convoluted history of constitutional amendments and case law that resulted in this mix of grants and types of power, though this history is outside the scope of this article. *See generally* Frank S. Alexander, *Inherent Tensions Between Home Rule and Regional Planning*, 35 WAKE FOREST L. REV 539 (2000) (providing a review of the history behind the grants of power to local governments in Georgia).

[78] GA. CONST. art. IX, § 2.

[79] *Id.*

[80] *Id.*

[81] GA. CODE ANN. §§ 36-35-1 to -8 (2006).

[82] *Id.* at § 36-35-3.

to exercise powers and provide services in a multitude of categories, including: street and road construction and maintenance; parks and recreation areas; storm water and sewage collection and disposal; provision of water, public transportation, and several other categories.[83] Finally, counties and cities are granted planning and zoning power through yet another constitutional provision, which reads: "[t]he governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power."[84]

The General Assembly has exercised the power to enact procedural requirements related to zoning in the Zoning Procedures Law (ZPL)[85] and the so-called "Steinberg Act,"[86] which applies to counties with a population over 625,000 and municipalities over 100,000.[87] Interestingly, the Steinberg Act, which specifies criteria by which local governments are expected to review zoning applications, requires local governments to consider "[w]hether the zoning proposal will result in a use which will or could cause an excessive or burdensome use of existing streets, transportation facilities, utilities, or schools."[88]

Experts understand the Georgia constitutional grant of zoning power to be "virtually unlimited" in the sense that the General Assembly may only regulate procedural, not substantive, aspects of zoning.[89] However, the term "zoning" is not defined or explained in the Georgia Constitution, and the only statutory definition available is in the ZPL, which defines zoning as

> the power of local governments to provide within their respective territorial boundaries for the zoning or districting of property for various uses and the prohibition of other or different uses within such zones or districts and for the regulation of development and the improvement of real estate within such zones or districts in

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[83] GA. CONST. art. IX, § 2.
[84] *Id.*
[85] GA. CODE ANN. §§ 36-66-1 to -6.
[86] *Id. See generally* Northridge Comm. Ass'n, Inc. v. Fulton County, 363 S.E.2d 251 (Ga. 1988).
[87] GA. CODE ANN. §§ 36-67-1 to -6.
[88] *Id.* at § 36-67-3(4).
[89] *See, e.g.*, JEFF RADER ET AL., GEORGIA PLANNING ASS'N LEGIS. COMM., WHITE PAPER ON PLANNING AND ZONING LEGISLATION 4 (2002) (on file with author) [hereinafter *WHITE PAPER*].

accordance with the uses of property for which such zones or districts were established.[90]

2. Georgia Law on Local Control of Subdivisions

There is currently no specific delegation of powers to local governments in Georgia to control the subdivision of land; however, this was not always the case. In 1957 a planning enabling act delegated various powers to local governments, including the ability to adopt subdivision regulations.[91] This legislation was later wiped from the books and replaced with the system of constitutional and statutory "home rule" grants described above.[92]

Despite this history, it is still understood that local governments may adopt subdivision regulations.[93] Other Georgia statutes even allude to this power. For example, the Georgia statute on the establishment of code enforcement boards defines "county or municipal codes and ordinances" as "zoning ordinances and resolutions, ordinances and resolutions enacting subdivision regulations . . . ."[94] Also, regulations of the Georgia Department of Transportation require local planning commissions to submit copies of proposed subdivision plats to the Department in certain cases for recommendations of approval or denial.[95] This suggests the widespread acceptance in Georgia of local power over subdivisions. Finally, Georgia case law, discussed below, also reflects this acceptance.

3. Georgia Law on Development Moratoria

There is no specific constitutional or statutory grant of power to local governments in Georgia that allows them to enact development moratoria. Rather, courts and commentators agree that local governments may adopt

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[90] GA. CODE ANN. § 36-66-3(3).
[91] *WHITE PAPER*, *supra* note 89, at 3.
[92] *Id.*
[93] GA. CONST. art. IX, § 2 (granting the local governing authority of each city and county the power to adopt subdivision and land development ordinances, rules, and regulations).
[94] GA. CODE ANN. § 36-74-21(2) (applying to enforcement boards created on or before January 1, 2003); *id.* at § 36-74-41(2) (applying to enforcement boards created after January 1, 2003).
[95] *Id.* at § 32-6-151 ("A planning commission shall submit two copies of the proposed subdivision plat to the department if such proposed subdivision includes or abuts on any part of the state highway system or where the proposed subdivision requires access to the state highway system. The department, within 30 days of receipt of the plat, shall recommend approval and note its recommendation on the copy to be returned to the planning commission or recommend rejection." *Id.*).

moratoria under their general police power.[96] Generally speaking, there must be a reasonable necessity for the moratorium,[97] and there must be criteria for the issuance of a permit in order to avoid due process problems.[98] Therefore, if Georgia governments are to pass APFOs that will stand the "temporary moratoria" test due to the ability to delay development, local governments must demonstrate a reasonable necessity for the APFO. This should not be difficult, given a showing that levels of service will fall below acceptable standards without sufficient infrastructure.[99] Further, the APFO must have specific criteria for issuance of the permit upon a finding of adequate levels of service. Again, because APFOs are clearly based on specifically articulated service levels,[100] this should be an easy threshold for local governments to cross.

4. Georgia Cases Upholding Denial of Development Based on Inadequate Infrastructure

Finally, since Georgia law does not contain specific authorization for APFOs, it is important to consider case law as part of the analytical picture. There are two important cases in Georgia that address the issue of whether a local government may deny a rezoning request based on inadequate infrastructure to serve the proposed development.

The first case is *Crymes Enterprises, Inc. v. Maloof.*[101] In this case, the DeKalb County zoning ordinance had several requirements for a landfill permit, including that "[t]ruck traffic routes and entrances to [the] facility must be reviewed and approved by the director of public works."[102] The county denied Crymes' permit application because the County Development Director (also the Associate Director of Public Works) felt "that traffic routes and entrances to the proposed facility were inadequate."[103] This decision, in turn,

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[96] Peter R. Olson, *Vested Rights, Grandfathering, and Moratoria* (2004), *available at* http://www.jnlaw.com/articles/VestedRights.shtml (last visited May 25, 2007). *See, e.g.*, DeKalb County v. Townsend Assocs., 252 S.E.2d 498 (Ga. 1979); Davidson Mineral Props., Inc. v. Monroe County, 357 S.E.2d 95 (Ga. 1987).
[97] *See DeKalb County*, 252 S.E.2d at 500.
[98] *See Davidson Mineral*, 357 S.E.2d at 96.
[99] *See* White & Paster, *supra* note 1, at 754-56.
[100] *Id.*
[101] Crymes Enters., Inc v. Maloof, 389 S.E.2d 229 (Ga. 1990).
[102] *Id.* at 230 (citation omitted).
[103] *Id.*

> was based on the opinion of the Director of Roads and Drainage . . . who reached his conclusion after examining the adequacy of intersections, road widths and pavement conditions, and determining that without minimum improvement, the "existing roadway [would] rapidly deteriorate and require substantial expenditure of public funds to maintain the roadway in its present inadequate state."[104]

Essentially Crymes argued that the Director of Roads and Drainage had created a "condition not specified in the ordinance," which was outside the Director's authority to do.[105] However, the court disagreed, writing "an examination of the general road conditions is a necessary and proper consideration in determining the adequacy of truck traffic routes and entrances. Crymes has not demonstrated that the . . . decision was not based on objective criteria as required by the ordinance."[106] This demonstrates that the Georgia Supreme Court recognizes that a local government might be well within its powers to disallow (or, conversely, allow) development based on inadequate (or adequate) infrastructure. Thus the ability of a local government to *delay* development through APFOs is also supported by this case.

The second case is *Screven County Planning Commission v. Southern States Plantation.*[107] In this case the Planning Commission denied sketch plan approval for the development of a subdivision.[108] Under the plan, some lot owners would access the subdivision through two existing, unpaved county roads.[109] The subdivision regulations provided that "the Planning Commission 'shall not approve a subdivision in a location where the existing roads providing primary access are inadequate to serve the additional traffic generated by the development.'"[110] "Although the Planning Commission discussed [this section] and expressed concern that the existing, unpaved roads were inadequate to serve the additional traffic generated by the subdivision, the Planning Commission made no finding based on [this section]."[111] Rather, the Commission stated that it interpreted another section of the regulation to require paving of those roads.[112] Finding

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] Screven County Planning Comm'n v. S. States Plantation, 614 S.E.2d 85 (2005).
[108] *Id.* at 86.
[109] *Id.*
[110] *Id.* (citing Screven County, Ga., Land Development Regulations § 6.8).
[111] *Screven County*, 614 S.E.2d at 86.
[112] *Id.* at 86-87 (citing Screven County, Ga., Land Development Regulations § 6.1).

an ambiguity in the regulation, the Court found in favor of the developer, saying that the regulation did *not* requiring such paving.[113] However, the Court also found that the developer was not entitled to approval of the sketch plan because the Commission had not exercised its discretion to actually "determine whether the 'existing roads providing primary access' are adequate 'to serve the additional traffic generated by the development.'"[114] Thus, the Court felt that the local government had the authority to consider adequate roads as part of its discretion in approving subdivision sketch plans.[115] The ability to deny a zoning or subdivision application on such a basis provides additional support to the authority of local governments to apply APF requirements to delay development until appropriate facilities are available.

D. Comparison and Analysis of North Carolina and Georgia law

In order to understand why local governments in North Carolina have been more willing to pass APFOs than local governments in Georgia, a side-by-side comparison of the various aspects of state law discussed above may be helpful.

1. Comparison of Police and Zoning Powers

In North Carolina, police and zoning powers are statutorily granted.[116] Also, the statute requires broad construction to include "additional and supplementary powers" to carry the police and zoning powers into effect.[117] Perhaps most importantly, in the North Carolina grant of zoning power, there is specific delegation to regulate "efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public facilities requirements."[118]

In Georgia, police and zoning powers are granted primarily through the constitution[119] (although Municipal Home Rule is granted by statute[120]). Local governments in Georgia have general authority "to adopt clearly

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[113] *Screven County*, 614 S.E.2d at 87.
[114] *Id.* at 87 (citing Screven County, Ga., Land Development Regulations § 6.8).
[115] *Screven County*, 614 S.E.2d at 87.
[116] N.C. GEN. STAT. §§ 153A-341, 160A-383 (2006). *See also* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (discussing the scope of local police powers to regulate development).
[117] N.C. GEN. STAT. §§ 153A-341, 160A-383. *See generally* Read & Ott, *supra* note 30, at 16.
[118] N.C. GEN. STAT. §§ 153A-341, 160A-383. *See also* Read & Ott, *supra* note 30, at 9.
[119] GA. CONST. art. IX, § 2. *See generally* Alexander, *supra* note 77, at 544-48 (providing a review of the history behind granting of power to local governments in Georgia).
[120] GA. CODE ANN. §§ 36-35-1 to -8 (2006). *See* Alexander, *supra* note 77, at 546.

reasonable ordinances . . . relating to [their] property, affairs, and local government . . . ."[121] Local governments have the authority to "adopt plans and . . . exercise the power of zoning."[122]

One noticeable difference between the grants of zoning power in North Carolina and Georgia is that the North Carolina statute is much more specific and detailed in its description of the zoning powers of local governments.[123] Georgia's, on the other hand, is remarkably brief and general.[124] One group of Georgia planners has noted that "[o]ne might think that such a broad grant of constitutional zoning, planning and home rule authority would give local governments a free reign when it comes to adopting zoning ordinances and other land use techniques."[125] However, they also note that

> the constitutional power to zone is far reaching, yet it provides no substantive guidance to the local exercise of zoning powers and land subdivision regulations. This lack of statutory guidance may have had a chilling effect in certain cases, as city and county attorneys tend to take cautious positions when they cannot point to a statutory basis for adopting a particular variation of land use regulation or growth management device.[126]

This may be one reason that local governments in Georgia have been less willing to adopt APFOs than local governments in North Carolina. On the other hand, the same group of planners has also noted that a plausible argument could be made "that Georgia does not need an enabling state statute to lawfully prepare and adopt local growth management techniques, or that any such enabling statute would be superfluous if construed under the meaning of 'planning and zoning.'"[127]

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[121] GA. CONST. art. IX, § 2, para. I.
[122] *Id.* at art. IX, § II, para. IV.
[123] *Compare* N.C. GEN. STAT. §§ 153A-341, 160A-383 (granting zoning power for "the following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; and to facilitate the efficient and adequate provision of transportation, water sewerage, schools, parks, and other public requirements" to cities and towns, and counties), *with* GA. CONST. art. IX, § 2, para. 1 (granting authority to local governments to "adopt plans and . . . exercise the power of zoning." *Id.*), *and* GA. CODE ANN. § 36-35-3 (granting authority to municipalities to govern its "property, affairs, and local government . . . ." *Id.*).
[124] GA. CONST. art. IX, § 2.
[125] *WHITE PAPER*, *supra* note 89, at 4.
[126] *Id.*
[127] *Id.* at 7.

2. Comparison of Powers Over Subdivisions

As discussed above, another area of law that supports authority to enact APFOs is the power to regulate subdivisions.[128] This is another area where authority seems much clearer in North Carolina than in Georgia; North Carolina cities are authorized by statute to pass subdivision control ordinances to

> provide for orderly growth and development of the city; for the coordination of transportation networks and utilities . . . ; for the dedication or reservation of recreation areas. . .; and for the distribution of population and traffic in a manner that will avoid congestion and overcrowding and will create conditions that substantially promote public health, safety, and the general welfare.[129]

This power, particularly when read together with the zoning power, is highly suggestive that local governments are free to regulate regarding provision of adequate public facilities. Certainly the expert who is assisting these local governments agrees that these grants provide sufficient support for the passage of APFOs.[130]

On the other hand, the lack of a statutory grant of power over subdivisions in Georgia is less than helpful to local governments when it comes to passage of APFOs. However, since there is a general understanding in Georgia that local governments may pass subdivision regulations,[131] this is not a complete hurdle to regulation of adequate public facilities.

3. Comparison of Law on Development Moratoria

As mentioned above, authority to enact APFOs can also be supported by authority to enact development moratoria, since regulating timing of development under an APFO is analogous to the enactment of a short-term moratorium on development.[132] This is yet another area where North Carolina local governments have clear statutory authority[133] while local governments in Georgia do not. However, as discussed above, the case law

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[128] *Id.* at 3; *see also* WHITE, *supra* note 1, at 5.
[129] N.C. GEN. STAT. §§ 153A-331(a), 160A-372(a) (2006).
[130] Telephone Interview with S. "Mark" White, *supra* note 64.
[131] GA. CONST. art. IX, § 2. The local governing authority of each city and county has power to adopt subdivision and land development ordinances, rules, and regulations. *Id.*
[132] *See* White & Paster, *supra* note 1, at 759.
[133] N.C. GEN. STAT. §§ 153A-331(a), 160A-372(a).

in Georgia supports such authority.[134] Therefore, local governments in Georgia are encouraged to consider timing of development to be within their authority, particularly if they meet the due process and "reasonable necessity" requirements for temporary moratoria.[135]

Finally, since the Georgia courts have, in at least two cases, upheld the denial of a development permit based on inadequate infrastructure,[136] it seems clear that the Georgia courts recognize that local governments may regulate aspects of infrastructure provision. Therefore, despite the lack of the clear types of statutory guidance provided in North Carolina, there is a good argument to be made that local governments in Georgia may regulate through the use of APFOs or similar requirements.

III. CONSTITUTIONAL ANALYSIS OF ADEQUATE PUBLIC FACILITIES ORDINANCES

A. Introduction

Assuming that authority exists for local governments to enact APFOs, there still are potential federal and state constitutional challenges to APFOs including takings, due process, equal protection, and right to travel challenges.[137] What follows is an analysis of these challenges under North Carolina law, where APFOs have been enacted,[138] and under Georgia law, where (thus far), no APFOs are in effect.[139] First, however, is an analysis of the United States Constitution, which provides an umbrella of rights due all citizens, as well as an analysis of the seminal United States Supreme Court decisions on zoning, land use regulations, and constitutional rights.

B. United States Constitution

1. Takings & Due Process

The Fifth Amendment of the United States Constitution provides that no person can be deprived of private property without due process of law and that no private property can be taken for public use without just

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[134] *See, e.g.*, *DeKalb County*, 252 S.E.2d 498. *See also supra* Part II.C.4.
[135] *DeKalb County*, 252 S.E.2d 498.
[136] *See Crymes*, 389 S.E.2d 229; *Screven County*, 614 S.E.2d 85.
[137] Read & Ott, *supra* note 30, at 21-33.
[138] *See infra* Part III.C.
[139] *See infra* Part III.D.

compensation.[140] However, since the U.S. Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*,[141] "[t]he authority of state and local governments to engage in land use planning has been sustained against constitutional challenge."[142] In *Euclid*, the Court adopted a deferential standard of review to local government zoning decisions, ruling "before the ordinance can be declared unconstitutional, [it must be shown] that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[143] It is unlikely that APFOs would fail to meet this standard. For example, in *Village of Belle Terre v. Boraas* the Supreme Court upheld the use of zoning provisions to preserve such things as "family values, youth values, and the blessings of quiet seclusion and clean air" because the provisions promote the general welfare of the public.[144] APFOs arguably better promote the general welfare of the public than ordinary zoning provisions because APFOs are designed to ensure that public services "such as roads, water, sewer, drainage, schools, and parks" are available concurrent with development.[145] The APFO's purpose is to prevent a demand that exceeds the capacity of existing infrastructure and/or places an inordinate burden on a community to meet the need.[146] Thus, it is likely that APFOs meet *Euclid*'s legitimate state interest requirement and will not be found arbitrary or unreasonable.

A regulation that serves a legitimate state interest and therefore does not violate due process rights, however, can still amount to an unconstitutional taking without just compensation.[147] Government takings can be "physical," for example, where the government seizes property to build a road, or can be "economic," for example, where the government "strips a property of all economic use."[148] APFOs, to amount to a taking, would likely do so under

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[140] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." *Id.*).

[141] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[142] Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (citing *Euclid*, 272 U.S. 365).

[143] *Euclid*, 272 U.S. at 395. *See generally* Read & Ott, *supra* note 30, at 30-31.

[144] Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). *See generally* Read & Ott, *supra* note 30, at 31.

[145] White & Paster, *supra* note 1, at 754.

[146] *See id.* at 754-756 (noting the problems associated with development that proceeds absent concurrency requirements and outpaces infrastructure).

[147] *See* Read & Ott, *supra* note 30, at 4-5.

[148] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (discussing the differences between the two general categories of takings). *See also* White & Paster, *supra* note 1, at 765.

economic takings analysis because APFOs do not involve a physical invasion by the government of private land.[149]

Under the standard set in *Lucas v. South Carolina Coastal Council*, a regulation that serves a legitimate state interest, yet deprives an owner of all economically beneficial use, can result in a per se taking requiring just compensation.[150] It is unlikely, however, that APFOs can be successfully challenged under the *Lucas* standard. At most, APFOs result in a temporary delay in development. Additionally, some APFOs allow the developer to construct the necessary facilities to overcome the delay and provide financial assistance for the construction.[151] Finally, APFOs do not halt the current use of a property.[152] Therefore, it is doubtful an APFO could ever amount to the total deprivation of use necessary under the *Lucas* per se taking standard.

The potential delay in development caused by the APFO also might be analyzed as a temporary moratorium, or a temporary taking.[153] Under the U.S. Supreme Court's analysis in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[154] however, a challenge to an APFO under this theory is likely to be unsuccessful. In *Tahoe-Sierra* the Court held that a 32-month moratorium on building was not a regulatory taking because the owners had not been deprived of "*all* economically beneficial uses of . . . land."[155] The Court refused to view a temporary moratorium as a per se taking because a temporary moratorium, by its terms, is temporary.[156] In other words, when a moratorium is lifted, the economic value returns, so in no way is an owner deprived of "all" economic use.[157] Finding the categorical rule from *Lucas* inapplicable, the Court found that the proper

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[149] White & Paster, *supra* note 1, at 765.

[150] *See Lucas*, 505 U.S. at 1004 ("Regulations that deny the property owner all 'economically viable use of his land' constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. Although the Court has never set forth the justification for this categorical rule, the practical-and economic-equivalence of physically appropriating and eliminating all beneficial use of land counsels its preservation." *Id.* (citations omitted).).

[151] *See* Adam Strachan, Note, *Concurrency Laws: Water as a Land-Use Regulation*, 21 J. LAND RESOURCES & ENVTL. L. 435, 446-47 (2001).

[152] *See generally* Read & Ott, *supra* note 30, at 7.

[153] *See generally id.* at 10-12; White & Paster, *supra* note 1, at 775.

[154] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

[155] *See id.* at 329-31 (quoting the economic taking standard from *Lucas*, 505 U.S. at 1019).

[156] *Tahoe-Sierra*, 535 U.S. at 331-336.

[157] *Id.* at 332.

analysis for temporary moratoria was the *Penn Central* balancing test, described below.[158]

It is important to note the challenge in *Tahoe-Sierra* was a *facial* challenge.[159] The Court did suggest that if the petitioners challenged the temporary moratorium as it was *applied* "to their individual parcels . . . some of them might have prevailed under a *Penn Central* analysis."[160] In other words, the Court did not say that a temporary moratorium would never affect a taking.[161] It may be that a court applying the *Penn Central* test to a challenge to an *application* of an APFO, as opposed to a facial challenge to an APFO, would find a regulatory taking if the APFO "significantly interfere[d] with private property rights" and did not "substantial [sic] advance a legitimate state interest,"[162] as explained below. However, APFOs that allow developer mitigation may not be viewed as imposing moratoria, but instead may be viewed as imposing conditional affirmative duties, similar to land use regulations that require builders to include flood prevention measures in new construction.[163] As a first step in takings analysis, these factors will be taken into account in the *Penn Central* test analysis.

The *Penn Central* test applies to regulatory takings and involves a balancing of "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action."[164] The U.S. Supreme Court has applied some deference to

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[158] *Id.* at 330 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)). *See also* Strachan, *supra* note 151, at 446-47 (noting that concurrency ordinances that allow developers to construct the needed facilities and provides governmental assistance for doing so is even less likely to deprive a developer of all economically beneficial use of his or her land).

[159] *Tahoe-Sierra*, 535 U.S. at 333-334.

[160] *Id.*

[161] *Id.* at 337.

[162] *See* Read & Ott, *supra* note 30, at 25 (noting that the economic impact of the land use regulation, the land-owner's investment back expectations, and the character of the governmental action should be considered by court in accordance with *Penn Central* balancing test).

[163] The conditions imposed, therefore, would be analyzed as exactions, not as moratoria. *See generally* Dolan v. City of Tigard, 512 U.S. 374 (1994) (requiring a "rough proportionality" to exist between the condition imposed and the impact of proposed development); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (requiring an "essential nexus" to exist between a condition imposed on development and the purpose of the state interest); Read & Ott, *supra* note 30, at 4, 26-28 (discussing constitutional issues of exactions and other imposed conditions); *infra* Part III.B.2.

[164] *Penn Cent.*, 438 U.S. at 124.

regulatory interference, as opposed to physical invasions, because a regulation does not necessarily deprive an owner of the use of the land to the extent a physical invasion does.[165] But developers may claim that the APFO significantly interferes with their investment-backed expectations because they had an interest in developing the property and an APFO applied to them prevents their pursuit of that interest. This, the argument goes, coincides with an economic impact on the developer because of the loss of potential development income. However, the *Penn Central* Court noted that they "upheld land-use regulations that destroyed or adversely affected recognized real property interests," citing zoning laws as a classic example, because the public's "'health, safety, morals, and general welfare' would be promoted."[166] This has held true even when the zoning law affected an *existing* use of real property, as opposed to an *expected* use.[167] The cementing factor in those cases was whether the restriction was "reasonably necessary to the effectuation of a substantial public purpose."[168] APFOs are arguably reasonably necessary to the effectuation of concurrency because development delays are likely the only way to ensure that growth does not outpace the ability of service providers to accommodate new development and that there is no reduction in levels of service provided to existing residents, and all without overburdening the tax base.[169]

However, "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"[170] The issue is whether a delay in development amounts to the level of interference required to affect a taking. The temporary nature of the APFO concurrency delay makes this doubtful because courts will not look to the period of time during which development is not allowed, but instead will look to the fact that development options are available at some point in time. This is known as the "parcel as a whole"

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[165] *See id.*; Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413.).

[166] *Penn Cent.*, 438 U.S. at 125 (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928); *Euclid*, 272 U.S. at 365).

[167] *Penn Cent.*, 438 U.S. at 125-126 (citing Miller v. Schoene, 276 U.S. 272 (1928) (finding no compensable taking after ornamental trees cut down to protect state interest in apple trees); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding law prohibiting plaintiff from continuing brickyard operation)).

[168] *Penn Cent.*, 438 U.S. at 127 (citing *Nectow*, 277 U.S. at 188).

[169] *See generally* Freilich, *supra* note 1, at 583-584; White & Paster, *supra* note 1, at 753-762; Read & Ott, *supra* note 30, at 6-7.

[170] *Penn Cent.*, 438 U.S. at 127 (citing *Pa. Coal Co.*, 260 U.S. 393).

theory, discussed in *Penn Central*.[171] In *Penn Central*, the owners of the famous Grand Central Terminal sought compensation because they were denied a permit to build a multistory office building above the Terminal, which had been designated a landmark under New York City's Landmarks Preservation Law.[172] This designation resulted in restrictions to the owners' options concerning use of the site.[173] The owners claimed a taking had occurred because they had been denied the ability to exploit a particular property interest – development of the airspace above the Terminal.[174] The Court, however, refused to segment the property interests, and instead focused on the property as a whole.[175] "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[176] Utilizing this concept, the Court in *Tahoe-Sierra* also refused to apply a "conceptual severance" to a temporary moratorium, noting that the "parcel as a whole" concept from *Penn Central* applied to *temporal* property rights as well.[177]

Accordingly, in its analysis of the owners' investment-backed expectations, the *Penn Central* Court noted that the owners of Grand Central Terminal had not been denied *all* use of their property. [178] Additionally, the Court held the owners had been granted transferable development rights in the air space.[179] The Court also noted that the law did not interfere with the owners' primary expectation of the property because they were able to continue their current use of the property and obtain a reasonable return on their investment.[180] The Court, therefore, in finding that an unconstitutional taking without just compensation had not occurred, was persuaded by the fact that the owners had not been denied all use of property, that the ordinance provided mitigation opportunities, and that the ordinance did not prevent current uses.[181] Similarly, a developer who is forced to delay development under an APFO cannot claim denial of all use of their property because the delay is temporary, not permanent. Further, developers may

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[171] *Penn Cent.*, 438 U.S. at 130-31.
[172] *Id.* at 119.
[173] *Id.* at 111-112, 115.
[174] *Id.* at 130.
[175] *Id.* at 130-31.
[176] *Id.* at 130.
[177] *Tahoe-Sierra*, 535 U.S. at 331 (citing *Penn Cent.* 438 U.S. at 130-31).
[178] *Penn Cent.*, 438 U.S. at 137.
[179] *Id.*
[180] *Id.* at 136.
[181] *Id.* at 136-37.

have options. They can potentially mitigate the delay by developing the necessary facilities themselves. Alternatively, developers can wait it out, potentially developing the property at a time when it may be even more valuable and desirable. Thus, it appears an APFO could survive challenge under the *Penn Central* balancing test as long as the delay is reasonable.

2. Exactions

A developer may argue that mitigation opportunities available in some APFOs are actually conditions placed on the developer that result in unconstitutional exactions because, although the APFO may define the conditions as voluntary, the conditions can also be seen as a "prerequisites" to development.[182] The U.S. Supreme Court applies a two-part analysis to claims of unconstitutional exactions. The first part of the test is the "essential nexus" test, which was first utilized by the Court in *Nollan v. California Coastal Commission*.[183] This test involves a determination of whether there is an essential nexus between the "'legitimate state interests'" and the conditions imposed by the regulation.[184] In *Nollan*, the plaintiffs sought a permit from the California Coastal Commission to demolish, and subsequently rebuild, their beachfront bungalow.[185] The Commission granted the permit on the condition that the plaintiffs provide an easement that would allow the public "to pass across a portion of their property."[186] The plaintiff claimed the condition amounted to an unconstitutional taking.[187] Noting that a land-use regulation does not affect a taking if it substantially promotes a legitimate state interest,[188] the Court determined that the question was whether the condition imposed bore an "essential nexus" to a legitimate governmental purpose.[189] The condition in *Nollan* purportedly was imposed to provide public access to the beach, to reduce congestion on the beach, and to remove public psychological barriers to the

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[182] *See* Richard Ducker, *Adequate Public Facility Criteria: Linking Growth to School Capacity*, N.C. SCHOOL OF GOV'T SCHOOL LAW BULL., Winter 2003, at 11 (discussing mitigation fees as exactions obtained as a prerequisite to approval of development plans from developers), *available at* http://ncinfo.iog.unc.edu/pubs/electronicversions/slb/slbwin03/article1.pdf (last visited May 25, 2007).
[183] *Nollan*, 483 U.S. at 837.
[184] *Id.*
[185] *Id.* at 828.
[186] *Id.* The Supreme Court analyzed the condition under a regulatory analysis, even though the regulation led to a physical occupation, because the condition was attached to a building permit. *Id.* at 836.
[187] *Id.*
[188] *Id.* at 834.
[189] *Nollan*, 483 U.S. at 837.

beach.[190] The Court, however, did not see how an easement allowing the public to walk across the beachfront portion of the plaintiffs' property served any of these purposes.[191] Finding that the Commission had not demonstrated a sufficient nexus between the easement and the state interest involved,[192] the Court ordered the Commission to compensate the plaintiffs.[193]

Note that the Court in *Nollan* did not say that the purpose to be served by the condition was not a legitimate state interest; it simply did not see how the condition imposed served that interest.[194] Therefore, it is likely that a carefully drafted APFO will meet the "essential nexus" test imposed by *Nollan* if the potential mitigation opportunities in the APFO specifically address the types of impact actually caused by the proposed development.[195]

Some might assert that the APFO should provide for mitigation that is "roughly proportional" to the impact caused by the development as required by the test from *Dolan v. City of Tigard*.[196] In *Dolan*, the city of Tigard had enacted a comprehensive development plan that included a plan for a pedestrian/bicycle pathway.[197] The purpose of the pathway was to "encourage alternatives to automobile transportation for short trips."[198] To facilitate the bike path, the plan required new developments to dedicate land for "pedestrian pathways where provided for in the pedestrian/bicycle pathway plan."[199] The plan also included a master drainage plan designed to mitigate the potential flooding risks associated with increased impervious surfaces.[200] The plaintiff applied for a city permit to redevelop the site of her plumbing and electric supply store.[201] The city granted the application subject to the conditions of the master plan, denying the plaintiff's requested variance from the conditions.[202] The plaintiff claimed the conditions were exactions that amounted to an unconstitutional taking.[203]

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[190] *Id.* at 838.
[191] *Id.* at 838-39.
[192] *Id.* at 838.
[193] *Id.* at 842.
[194] *See id.* at 840-41.
[195] *See* WHITE, *supra* note 1, at 12.
[196] *Dolan*, 512 U.S. 374.
[197] *Id.* at 377-78.
[198] *Id.* at 378.
[199] *Id.*
[200] *Id.*
[201] *Id.* at 379.
[202] *Dolan*, 512 U.S. at 379-81.
[203] *Id.* at 382.

The Court found that flood prevention and traffic reduction were "undoubtedly" legitimate public purposes and that the conditions imposed on the plaintiff had an "equally obvious" nexus to the conditions.[204] The Court went on to examine whether the exactions imposed on the plaintiff were "roughly proportional" to the likely impact of the plaintiff's proposal.[205] The Court did not require a precise mathematical calculation, but did require an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[206] Finding that the city did not demonstrate rough proportionality between the conditions imposed and the likely impacts, the Court held the exactions to be unconstitutional takings without just compensation.[207]

However, it is important to note that a court may not analyze the voluntary mitigation opportunities of an APFO under the "rough proportionality" test at all. The U.S. Supreme Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* stated, "we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions-land-use decisions conditioning approval of development on the *dedication of property to public use*."[208] Since an APFO requires a delay of development rather than a dedication of property the application of the *Dolan* test is not apposite under current federal constitutional jurisprudence.

3. Equal Protection & Right to Travel

The U.S. Constitution, through the Fourteenth Amendment,[209] "provides that states cannot deny the equal protection of the law to persons."[210] This clause requires the "law to treat individuals in the same manner under similar circumstances."[211] States, however, often impose legislative classifications to serve particular zoning and land-use regulation purposes.[212] Zoning ordinances, for example, classify land use for different purposes

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[204] *Id.* at 387.
[205] *Id.* at 391.
[206] *Id.*
[207] *Id.* at 394-396.
[208] *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702-03 (1999) (discussing the *Dolan* "rough proportionality" and *Nollan* "essential nexus" tests for conditions) (emphasis added).
[209] U.S. CONST. amend. XIV, § 1.
[210] White & Paster, *supra* note 1, at 772.
[211] Read & Ott, *supra* note 30, at 32-33 (citing U.S. CONST. art. XIV; N.C. CONST. art. I, § 19).
[212] *See* Read & Ott, *supra* note 30, at 14.

such as industrial, commercial, and residential.[213] Thus, challenges to zoning classifications may involve claims of denial of equal protection under the law because the classifications inherently result in different treatment of individuals based on how their property is zoned.[214] APFOs, too, inherently create classifications based on geographic boundaries, thus the APFOs might be challenged under this same theory.[215] One potential argument is that those people wanting to move to areas lacking infrastructure are disproportionately burdened with paying for new infrastructure.[216] It is unlikely, however, that an APFO challenge would succeed on these grounds. The U.S. Supreme Court in *Euclid* said that it would give deferential treatment to legislative classifications if the validity of the classification for zoning and regulation was "fairly debatable."[217] The Court further stated in *Village of Belle Terre v. Boraas* that it would uphold legislative classifications that bore a "'rational relationship to a (permissible) state objective.'"[218] As suggested by the Court in *Zobel v. Williams*, a higher standard may apply if the classification involves a suspect class.[219] Courts typically subject growth management classifications, however, to the rational basis review and communities have had little trouble overcoming equal protection challenges to land use regulations.[220] Thus, APFOs would likely survive challenge under the equal protection clause.

APFOs might also be challenged under the theory that the regulations prevent people from freely "traveling" from one state to another. The U.S. Supreme Court in *Shapiro v. Thompson* recognized the right of all citizens to be "free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or

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[213] *See, e.g.*, *Euclid*, 272 U.S. at 379-82 (discussing the division of a village into six classes, or zones, of use with development restrictions resulting from a zoning ordinance).
[214] *See, e.g.*, *id.* at 384; *Village of Belle Terre*, 416 U.S. at 7-8.
[215] White & Paster, *supra* note 1, at 772.
[216] *See id.* (analyzing potential equal protection clause challenges to APFOs).
[217] *Euclid*, 272 U.S. at 388.
[218] *Village of Belle Terre*, 416 U.S. 1, 6 (citing Reed v. Reed, 404 U.S. 71, 76 (1971)).
[219] Zobel v. Williams, 457 U.S. 55, 60 (1982) ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose. Some particularly invidious distinctions are subject to more rigorous scrutiny." *Id.* (footnote omitted).).
[220] Read & Ott, *supra* note 30, at 33 n.126 (noting that APFOs designed "to treat individuals differently based on race, religion, nationality, gender or other suspect classifications" will be subject to heightened levels of judicial scrutiny). Most courts have not found developers a suspect class. *See generally* White & Paster, *supra* note 1, at 772.

restrict this movement," a concept known as the right to travel.[221] The Court in *Saenz v. Roe* further explained

> [t]he right to travel embraces three different components: [1] the right to enter and leave another State; [2] the right to be treated as a welcome visitor while temporarily present in another State; and, [3] for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[222]

The U.S. Supreme Court typically utilizes an equal protection analysis in right to travel claims.[223] Under the *Saenz* Court's third type of claim,[224] in the context of APFOs, a developer could bring a complaint claiming that an APFO that delays development prevents new residents from moving to the state because of lack of housing.[225] The developer's argument would most likely fail because (1) new residents still have the option of buying or renting existing homes in the state; (2) these are not actually barriers to interstate travel because under most APFOs developers are free to construct the facilities that are needed to meet the concurrency requirement;[226] and (3) under the equal protection analysis the restrictions bear a rational relationship to a legitimate state purpose. Further, even if a court were to find that the APFO created an impermissible classification between state residents and non state residents, a community most likely would be able to demonstrate that the ordinance served a "compelling state interest"[227] and, thus, would survive the strict scrutiny analysis suggested by the *Zobel* Court.[228] Residents of a locality that enacts an APFO likely would not be

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[221] Shapiro v. Thompson, 394 U.S. 618, 629, 638 (1969) (holding that a one-year residency requirement for welfare-recipients violates right to travel. *See also Zobel*, 457 U.S. at 60 n.6 ("The right to travel and to move from one state to another has long been accepted, yet both the nature and the source of that right have remained obscure . . . . In reality, right to travel analysis refers to little more than a particular application of equal protection analysis." *Id.* (citations omitted).).

[222] Saenz v. Roe, 526 U.S. 489, 490 (1999).

[223] *See Zobel*, 457 U.S. at 60 n.6. The Court's standard for a right to travel analysis is actually difficult to determine, but arguably the Court applies an analysis similar to that found in equal protection challenges. *See id.* ("In reality, right to travel analysis refers to little more than a particular application of equal protection analysis." *Id.*). *See generally* Gregory B. Hartch, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457 (1995) (discussing lack of consensus as to source of and standard of review for right to travel cases).

[224] *Saenz*, 526 U.S. at 490.

[225] *See* Strachan, *supra* note 151, at 448 (discussing this type of challenge by a developer).

[226] *Id.*

[227] *Id.*

[228] *Id.* at 449.

able to bring violations of right to travel claims because their claims would only involve restrictions on *intrastate* travel. Restrictions on intrastate travel only amount to violations of the constitutional right to travel if non-residents are treated differently from residents.[229] The U.S. Supreme Court in *Bray v. Alexandria Women's Health Clinic* explained that a "purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them."[230]

In summary, APFOs are likely to survive constitutional challenges under federal law, but cities and counties also must ensure that enacted APFOs do not violate state constitutional limitations. State law may impose more restrictive constitutional limitations than federal law, and therefore should be analyzed separately from federal law. Following is an analysis of APFOs under North Carolina law, a state that has already enacted APFOs, and under Georgia law, a state that has not.

C. North Carolina's Constitution

1. Due Process & Takings

Unlike the U.S. Constitution,[231] the North Carolina Constitution does not include an express prohibition on the taking of property without just compensation.[232] Instead it states, "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."[233] In *Long v. City of Charlotte*, however, the North Carolina Supreme Court recognized the right to just compensation for a government taking as fundamental under this constitutional provision.[234] Accordingly, land use regulations are often challenged in North Carolina as an invalid exercise of police power that deprives land owners of the right to reasonable use of their property, thus allegedly effecting takings of private property for public use

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[229] *Zobel*, 457 U.S. at 60 n.6.
[230] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993) (emphasis in original).
[231] U.S. CONST. amend. V.
[232] *See* Read & Ott, *supra* note 30, at 22.
[233] N.C. CONST. art. I, § 19.
[234] Long v. City of Charlotte, 293 S.E.2d 101 (N.C. 1982).

without just compensation.[235] Such challenges actually implicate both due process and takings claims.[236]

An exercise of the police power is presumed valid and the burden is on the property owner to overcome that presumption.[237] With respect to determining whether an application of a land use regulation results in an unconstitutional taking, North Carolina courts apply a two-part test.[238] The North Carolina Supreme Court describes this two-part test in *Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville*.[239] First, through an "ends-means" test, the courts determine whether the objective of the legislation is within the scope of the police power (the due process challenge), and second, whether the means chosen to achieve the objective are reasonable (the takings challenge).[240] The second part of this test – the "takings" analysis – has two prongs.[241] First, the court determines if the application of the regulation is "reasonably necessary to promote the accomplishment of a public good."[242] Second, the court determines if the "interference with the owner's right to use his property as he deems appropriate [is] reasonable in degree."[243] In other words, the court determines if the regulation is a reasonable way to meet the legitimate state need, and, if so, whether it is reasonable for the owner of the property to suffer the burden of the regulation without compensation.[244]

North Carolina courts have not yet addressed APFOs under a takings analysis, but in their paper, *Adequate Public Facilities Ordinances in North Carolina: A Legal Review*, Dustin Read and Steven Ott argue that APFOs essentially prohibit development, and therefore, potentially could result in a taking under North Carolina law.[245] Under the *Responsible Citizens* test described above, a challenge to an APFO on these grounds could succeed if the challenger could demonstrate that (1) concurrency is not a legitimate

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[235] *See, e.g.*, Finch v. City of Durham, 384 S.E.2d 8, 14 (N.C. 1989) (analyzing a land use regulation challenge under the constitutional provisions).
[236] *See* Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville, 302 S.E.2d 204, 208 n.2 (N.C. 1983) (noting that taking challenges are often "interwoven" with challenges to invalid exercise of police power).
[237] *See* A-S-P Assocs. v. City of Raleigh, 285 S.E.2d 444, 456 (N.C. 1979) (discussing the presumption of government validity with respect to an equal protection analysis).
[238] *See, e.g.*, *Finch*, 384 S.E.2d at 14 (applying the *Responsible Citizens* two-part test).
[239] *Responsible Citizens*, 302 S.E.2d at 208.
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] Read & Ott, *supra* note 30, at 21.

exercise of the state's police power, (2) the APFO is not a reasonable means to achieve concurrency, or (3) the APFO unreasonably burdens the property owner without just compensation.[246] Success under the *Responsible Citizens* test, however, appears unlikely.

In *Responsible Citizens*, the court held that the city's flood plain ordinance, which required new construction or substantial improvements made to properties in the flood plain to be built in a manner that minimized flood damage, was constitutionally sound.[247] Applying the "end-means test" outlined above, the court first found that the objectives of the legislation (such as controlling floods so as to prevent loss of life and property, minimize threats to health and safety, avoid disruption of commerce and governmental services, and avoid extraordinary public expenditures for flood protection and relief) were appropriately documented in the ordinance and were well within the scope of the police power.[248] The court next determined that the means chosen to meet the objectives were reasonable because the properties located in the flood zone actually caused much of the loss associated with periodic floods.[249] The ordinance's findings of fact stated that the homes in the flood plain cumulatively increased obstructions in flood plains, leading to increased flood heights and velocities.[250] This meant that the homes actually increased the intensity of the floods, and, therefore, the extent of the flood damage.[251] The findings of fact also stated that the homes and occupants were particularly vulnerable to flood loss because of inadequate flood protections.[252] This meant that resources expended for flood loss were substantially directed toward those particular homes.[253] Thus, the court found that it was reasonably necessary for the city to require new construction or substantial improvements on property within the flood plain be built so as to minimize the loss.[254] The court then turned

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[246] *See Responsible Citizens*, 302 S.E.2d at 208.
[247] *Id.* at 205-06.
[248] *Id.* at 208-09 (describing the harm to life, property, commerce, governmental services, tax base, and more that could result from flooding as justifying a government's exercise of its police power).
[249] *Id.* at 209.
[250] *Id.*
[251] *Id.*
[252] *Responsible Citizens*, 302 S.E.2d at 209.
[253] *Id.* (noting that "some of the flood damage is caused by properties within the flood hazard area").
[254] *Id.* Indeed, the court said the guidelines were the "only feasible" way to meet the objectives. *Id.*

to whether the interference with the plaintiffs' right to use their property was "reasonable in degree."[255]

Not having addressed this issue previously with regards to land use regulation, the court noted from prior case law that "*a zoning ordinance* would be deemed 'unreasonable and confiscatory,' as applied to a particular piece of property, if the owner of the affected property was deprived of all 'practical' use of the property and the property was rendered of no 'reasonable value.'"[256] Applying this standard to the ordinance at hand, the court determined that the flood zone ordinance did not affect in any way *current use* of the plaintiffs' property.[257] Thus, the ordinance did not deprive the owners of all practical use, and it did not prohibit new construction or substantial improvements; rather, it simply conditioned such activities, so it did not affect future use of the property.[258] The court found the diminished market value of the property and the cost of complying with the ordinance of no consequence and insufficient to render an ordinance invalid.[259] Accordingly, the court held the ordinance did not affect an uncompensated "taking" of the plaintiffs' property in violation of the North Carolina Constitution.[260]

As discussed in the sections above on the authority of local governments in North Carolina to exercise police and zoning power, an APFO would most likely meet the first part of the *Responsible Citizens* test and fall within the local government's valid exercise of police power.[261] The issue with APFOs, therefore, is more likely to be whether the *means* – delaying development until adequate facilities are available – are reasonable to meet the *legitimate objective*, under the two-pronged "takings analysis" comprising the second part of the *Responsible Citizens* test.[262] Under that test, "legislation may yet deprive individuals of due process of law if the

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[255] *Id.*

[256] *Id.* at 210 (emphasis in original) (citing Helms v. City of Charlotte, 122 S.E.2d 817, 825 (N.C. 1961)).

[257] *Responsible Citizens*, 302 S.E.2d at 210.

[258] *Id.* (referring to the requirements as "conditional affirmative duties" and insufficient to invalidate the ordinance).

[259] *Id.* at 210-11.

[260] *Id.* at 211.

[261] *See supra* Part II.B. Referring to this test as a "takings" test is really a misnomer. The first prong of this test is actually a substantive due process analysis, with the second prong reaching both the issues of whether substantive due process rights were violated and whether a government "taking" actually occurred.

[262] *See, e.g.*, *A-S-P Assocs.*, 258 S.E.2d 444 (noting that the object of legislation may well be within the police power, but that means chosen to meet objective must be reasonable to stay within confines of due process).

means chosen to implement the legislative objective are unreasonable" and if the interference with property rights is unreasonable in degree.[263]

APFOs likely will survive challenges under both prongs of the takings part of the ends-means test. The North Carolina courts will ask whether the APFO restrictions on growth are necessary to meet the public goal of concurrency and whether the interference with the owner's right to use his or her property as he or she wishes is reasonable in degree.[264] APFOs restrict development until a later time when adequate facilities and services are in place.[265] This would appear to be a reasonable means of meeting the objectives of concurrency because one of the ways to ensure development occurs concurrently with services is to slow development to maintain service levels. One could argue that service levels should be increased more quickly; however, that would defeat other purposes of concurrency, such as lightening the burden on the tax base and keeping growth in line with a community's comprehensive plan and plans for capital improvement projects.

The issue under the second prong of the takings test is whether the application of an APFO is a reasonable interference with a property owner's rights.[266] Under North Carolina law, applying the *Responsible Citizens* test, the question is whether an APFO denies a property owner of all practical uses of his or her property.[267] It is doubtful a property owner could demonstrate such a loss of use given that APFOs do not inhibit current uses of property, but rather – at most – implement development delays. Many APFOs also can provide for voluntary mitigation; thus, if the developer chooses to provide for or fund the necessary facilities, the APFOs do not affect a delay at all. Therefore, just as the court in *Responsible Citizens* found that plaintiffs were not denied of all practical use when they could continue current use of their property and could engage in construction if they met the requirements of the ordinance,[268] a court likely would find that APFO challenges have not been denied all practical use when the challenges can continue current use of their property, and can either develop their property if mitigation requirements are met or could "wait it out" and develop when the necessary facilities are in place according to the

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[263] *Id.* at 451 (citing *Euclid*, 272 U.S. 356; Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975)).
[264] *See Responsible Citizens*, 302 S.E.2d at 208.
[265] White & Paster, *supra* note 1, at 754.
[266] *See, e.g.*, *Responsible Citizens*, 302 S.E.2d at 208.
[267] *See id.* at 209-10.
[268] *Id.*

community's comprehensive plan. In other words, under the *Responsible Citizens* test, it is doubtful that when a landowner still has reasonable options for use he or she can show denial of all practical use. Potentially, however, voluntary mitigation requirements may be challenged as unconstitutional takings under an exaction theory, similar to federal case law.[269]

2. Exactions

The North Carolina Court of Appeals adopted a test for claims of unconstitutional exactions in *Batch v. Town of Chapel Hill*.[270] The court adopted a "rational-nexus" test, which "provides that a [developer] can be required 'to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision.'"[271] The *Batch* test has been applied in just one other North Carolina case, *Franklin Road Properties v. City of Raleigh*.[272] The court noted that

> "[t]o determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; *and* (5) whether the condition imposed is proportionally related to the impact of the development."[273]

Batch has since been overruled on other grounds,[274] so it is unclear whether North Carolina courts will continue to apply the *Batch* test. Given the similarity between the *Batch* test and the "rough proportionality" test in *Dolan* (decided five years after *Franklin Road Properties*)[275], however, the North Carolina courts may continue to use the "rational-nexus" test. Therefore, the analysis of the APFO as an unconstitutional exaction would

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[269] *See supra* Part III.B.2.
[270] Batch v. Town of Chapel Hill, 376 S.E.2d 22 (N.C. Ct. App. 1989), *rev'd on other grounds*, 387 S.E.2d 655 (N.C. 1990).
[271] *Id.* at 31 (citing Longridge Builders, Inc. v. Planning Bd. of Twp. of Princeton, 245 A.2d 336, 337 (N.J. 1968)).
[272] Franklin Rd. Props. v. City of Raleigh, 381 S.E.2d 487, 490-91 (N.C. Ct. App. 1989).
[273] *Id.* at 491 (quoting *Batch*, 376 S.E.2d at 34 (emphasis in original)).
[274] *See* Batch v. Town of Chapel Hill, 387 S.E.2d 655 (N.C. 1990).
[275] *See Dolan*, 512 U.S. at 391; *Batch*, 376 S.E.2d at 34; *Franklin Rd. Props.*, 381 S.E.2d 487.

follow the *Nollan/Dolan* analysis discussed above.[276] Thus, while the benefit of the exaction need not inure exclusively to development residents, a city or county in North Carolina should ensure that conditions to development could meet the *Batch* and *Nollan/Dolan* tests.

3. Equal Protection & Right to Travel

APFOs may lead to challenges under the North Carolina Constitution's equal protection clause[277] if different standards are imposed upon different properties that are similarly situated.[278] For example, a developer may claim that APFO burdens are imposed only on new residents as opposed to existing residents.[279] However, as noted in *A-S-P Associates v. City of Raleigh*,[280] discussed above, the state has the "power to classify persons or activities when there is a reasonable basis for such classification and for the consequent difference in treatment under the law."[281] As with any exercise of police power, North Carolina courts presume the classification is valid, placing the burden on the property owner to overcome the presumption.[282] "'The test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and the subject matter of the legislation.'"[283] Therefore, to defeat an equal protection challenge an APFO should clearly set out the purpose of the ordinance and an objective basis for the limitations and burdens imposed by that ordinance.[284] In doing so, the APFO will supply the required "reasonable use" basis for classifying development to be occupied by new residents differently from development occupied by current residents. As long as that reasonableness is "fairly debatable" the court will defer to the legislature.[285]

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[276] *See supra* Part II.B.2 (discussing the *Dolan*, 512 U.S. at 390, "rough proportionality" test and the *Nollan*, 483 U.S. at 837, "essential nexus" test).
[277] N.C. CONST. art. I, § 19.
[278] WHITE, *supra* note 1, at 13.
[279] *See* Strachan, *supra* note 151, at 449 (discussing the potential equal protection challenge to an APFO for similarly situated properties).
[280] *See A-S-P Assocs.*, 258 S.E.2d 444.
[281] *Responsible Citizens*, 302 S.E.2d at 212 (citing *A-S-P Assocs.*, 258 S.E.2d at 446; Guthrie v. Taylor, 185 S.E.2d 193, 201 (N.C. 1971)).
[282] *Id.*
[283] *A-S-P Assocs.*, 258 S.E.2d at 456 (quoting *Guthrie*, 185 S.E.2d at 201).
[284] *See, e.g.*, *Responsible Citizens*, 302 S.E.2d at 212-13 (determining a reasonable basis for the classification, and differential treatment, by examining the purpose and findings of fact in the flood plain ordinance).
[285] *See A-S-P Assocs.*, 258 S.E.2d at 456 (citing *Euclid*, 272 U.S. 365; Schloss v. Jamison, 136 S.E.2d 691 (N.C. 1964)).

Lastly, there is the potential claim that APFOs violate the constitutional right to travel. North Carolina does recognize "right to travel" claims, applying the same standard recognized by the U.S. Supreme Court in *Zobel*,[286] but no North Carolina cases have addressed the right to travel issue in the context of zoning regulations. Following the U.S. Supreme Court's application of equal protection analysis to right to travel claims, however, it is unlikely this theory would prevail against a North Carolina APFO.

D. Georgia's Constitution

North Carolina and Georgia courts use similar tests for constitutional challenges, with some subtle differences. As in North Carolina, APFOs in Georgia are likely to withstand constitutional challenges. The Georgia Constitution expressly prohibits the government taking of private property without just compensation.[287] The Georgia Constitution also states that "[n]o person shall be deprived of life, liberty, or property except by due process of law."[288] Similar to challenges in North Carolina, potential constitutional challenges in Georgia include claims that APFOs violate due process, effect unconstitutional takings without just compensation, violate equal protection provisions, and violate the right to travel.

1. Due Process & Takings

Due process claims can be procedural or substantive.[289] An oft-presented procedural due process challenge to a zoning ordinance is that the ordinance does not provide sufficiently objective standards to "apprise an applicant of common intelligence of the standards which he should anticipate the governing body will consider."[290] Georgia ordinances lacking in such standards are inapplicable in the permitting process, meaning that a zoning board will not be able to rely on the ordinance in a zoning

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[286] *See, e.g.*, Town of Beech Mountain v. County of Watauga, 370 S.E.2d 453, 454 (N.C. Ct. App. 1988) (citing *Zobel*, 457 U.S. at 60 n.6), *aff'd*, 378 S.E.2d 780 (N.C. 1989).

[287] GA. CONST. art. I, § 3, para. I.

[288] *Id.* at art. I, § 1, para. I.

[289] *See generally* Barrett v. Hamby, 219 S.E.2d 399, 403-04 (Ga. 1975) (Gunter, J., concurring) (discussing substantive and procedural due process challenges to zoning ordinances).

[290] Levendis v. Cobb County, 250 S.E.2d 460, 462 (Ga. 1978) (challenging a liquor license permit denial). *See also* Dinsmore Dev. Co., Inc. v. Cherokee County, 398 S.E.2d 539, 539 (Ga. 1991) (challenging a special use permit denial); Hixon v. Walker County, 468 S.E.2d 744 (Ga. 1996) (challenging a building permit application).

decision.[291] Georgia courts, therefore, will require APFOs to be written with precise, objective, and measurable standards.

Substantive due process and takings claims are more complicated.[292] Like North Carolina courts, Georgia courts presume zoning regulations are valid;[293] in Georgia, with regard to takings claims, the presumption can only be overcome if property owners first demonstrate they have suffered an unconstitutional deprivation.[294] Also, like North Carolina courts, Georgia courts actually conflate the issues of takings and substantive due process, utilizing a balancing approach[295] similar to that utilized by North Carolina courts. Georgia courts require a demonstration that the zoning regulation bears a "substantial relation to the public health, safety, morality or general welfare."[296] This "substantial relation" test involves an analysis of the harm to the property owner compared to the public welfare interest served by the regulation.[297]

In *Barrett v. Hamby*, for example, the landowner claimed that the county's act of applying single family zoning to his property, rather than commercial zoning, constituted an unconstitutional taking because of the substantial harm he suffered with no countervailing public interest.[298] The court agreed noting that the landowner had demonstrated substantial economic harm as a result of the zoning and that the record was devoid of any "countervailing benefit to the public . . . ."[299] Therefore, the presumed validity of the ordinance was overcome, shifting the burden to the county to justify the zoning.[300] The county claimed "that the county already ha[d] enough commercially zoned property."[301] Finding that interest "too vague"

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[291] *See Dinsmore*, 398 S.E.2d at 540 (holding that applicants for a zoning permit were entitled to approval because the zoning ordinance purpose statement contained only a statement of general goals and purposes and provided no criteria to govern the zoning board's decision).
[292] *See generally Barrett*, 219 S.E.2d at 403-04 (Gunter, J., concurring) (discussing differences between substantive and procedural due process in a zoning challenge).
[293] *See id.* at 402.
[294] *See* Gradous v. Bd. of Comm'rs of Richmond County, 349 S.E.2d 707, 709 (Ga. 1986) (describing the analysis of takings claims in the zoning context).
[295] *See Barrett*, 219 S.E.2d at 401-02 (discussing a court's approach to analyzing zoning and unconstitutional takings issues).
[296] *Id.*; *see supra* Part III.C.2.
[297] *Barrett*, 219 S.E.2d at 401-02.
[298] *Id.* at 400-01.
[299] *Id.* at 402.
[300] *Id.*
[301] *Id.*

to outweigh the significant detriment to the property owner, the court affirmed the voiding of the ordinance.[302]

Today, Georgia courts typically use the six factors applied by the Georgia Supreme Court in *Guhl v. Holcomb Bridge Road Corp.* to analyze whether the validity presumption has been overcome, which are

> (1) existing uses and zoning of nearby property;
>
> (2) the extent to which property values are diminished by the particular zoning restrictions;
>
> (3) the extent to which the destruction of property values of the [property owners] promotes the health, safety, morals or general welfare of the public;
>
> (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner;
>
> (5) the suitability of the subject property for the zoned purposes; and
>
> (6) the length of time the property has been vacant as zoned considered in the context of the land development in the area in the vicinity of the property.[303]

Under these factors, challenges to an APFO must demonstrate that they have suffered a significant detriment from the application of the APFO. Property owners likely would attempt to do this by demonstrating that a delay in development caused an economic loss. As discussed above, the temporary delay is probably not enough in North Carolina to meet the standard of "depriv[ing] . . . all 'practical' use,"[304] but Georgia courts impose a lower standard of what constitutes harm.[305] For a landowner to demonstrate a significant detriment under the *Guhl* factors, it is "not necessary that the

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[302] *Id.*

[303] Guhl v. Holcomb Bridge Rd. Corp., 232 S.E.2d 830, 831-32 (Ga. 1977) (quoting Lasalle Nat'l Bank v. County of Cook, 208 N.E.2d 430, 436 (Ill. App. Ct. 1965) (discussing the six "general lines of inquiry" regarded as relevant in a zoning ordinance analysis)). In *Guhl*, the landowners appealed after they were denied a rezoning application from single family residential to commercial. *Guhl*, 232 S.E.2d at 831-32. After an analysis of the six factors outlined above, the court held the single family residential classification void because the plaintiffs' property was not reasonably and economically suited for single family residences and the county failed to demonstrate objectively that a rezoning would increase traffic more than any other development on the property, *id.*, which reemphasizes the importance of objective support for zoning decisions.

[304] *Responsible Citizens*, 302 S.E.2d at 210 (citing *Helms*, 122 S.E.2d at 825).

[305] *See Guhl*, 232 S.E.2d 830 (finding that the zoning of property as residential and not zoned as professional and residential was unconstitutional).

property be totally useless . . . ."[306] This does not mean, however, that an economic loss will always overcome the validity presumption in Georgia. Although Georgia courts do not require total deprivation of property for a taking to have occurred, the courts normally do require something beyond diminution in value to overcome the validity presumption.[307]

In *Gradous v. Board of Commissioners of Richmond County*, the court described the landowner's burden as one of "constitutional reasonableness," and not one of "economic reasonableness."[308] In *Gradous*, the plaintiff challenged a denial of her rezoning application from single family residential to a mix of professional and residential.[309] The landowner demonstrated that her property would be more valuable if rezoned, but the court found the detriment to the public by way of increased congestion and decrease in surrounding homeowners' property values outweighed detriment to the landowner.[310]

Thus, under Georgia's significant detriment analysis, a developer who challenges an APFO based on loss of economic value of land will face a tough battle. As the court cited in *DeKalb County v. Dobson*, "'the evidence that the subject property would be more valuable if rezoned . . . borders on being irrelevant.'"[311] The court in *Gradous* did note that the landowner did not demonstrate a *decrease* in property value based on failure to rezone, so potentially such a demonstration would weigh more heavily in a landowner's favor in such a challenge.[312] But, more importantly, even when faced with a permanent loss of potential value, the court in *Gradous* was not persuaded that such a loss constituted a significant detriment when weighed against the public benefit,[313] and it is unlikely that a temporary loss in economic value would garner more weight then a permanent one. Thus, considering that a temporary economic loss is probably the most significant harm a property owner could demonstrate from the application of an APFO, as long as the APFO is substantially related to the public health, safety,

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[306] *Barrett*, 219 S.E.2d at 402.
[307] *Gradous*, 349 S.E.2d at 710 (upholding a decision that a taking did not occur where rezoning would have increased the value of the land in question).
[308] *Id.* (citing Guhl v. M.E.M. Corp., 249 S.E.2d 42, 43 (Ga. 1978)).
[309] *Gradous*, 349 S.E.2d at 707.
[310] *Id.* at 707-10.
[311] DeKalb County v. Dobson, 482 S.E.2d 239, 242 (Ga. 1997) (quoting DeKalb County v. Chamblee Dunwoody Hotel P'ship, 281 S.E.2d 525, 528 (Ga. 1981)). *See also* Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994) ("[Z]oning power does not exceed police power simply because it . . . diminishes the value of property." *Id.* at 202.).
[312] *Gradous*, 349 S.E.2d at 710.
[313] *Id.*

morality, and welfare, it is likely a Georgia court will find that the APFO does not affect a taking.[314]

If the property owner does manage to prove significant detriment, the court will then balance that detriment against the public welfare interest served by the regulation.[315] As a Georgia court has recognized the

> "concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[316]

Thus, the purposes of APFOs, such as ensuring that the public not be faced with exorbitant costs and that adequate facilities are in place before new development is commenced, should easily meet the threshold requirement of substantially relating to public health, safety, morality, and welfare.[317] Further, as required by the court applying the *Guhl* factors in *Parking Association of Georgia, Inc. v. City of Atlanta*, "[t]he means adopted [through an APFO must] have a real and substantial relation to the goals to be attained."[318]

A substantial relation can be demonstrated by an APFO that is consistent with a city or county's "long-range planning goals," as Georgia courts are fairly deferential to decisions that are consistent with comprehensive development plans.[319] For example, in *City of Atlanta v. TAP Associates*, the court upheld the city's denial of TAP's rezoning application, persuaded in part by the fact that the "zoning decision is consistent with the policies and long-range planning goals for the area as adopted in the

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[314] *Id.* at 710 (stating because plaintiff had not demonstrated a sufficient deprivation, there was no reason to consider another basis upon which to uphold the ordinance).
[315] *Barrett*, 219 S.E.2d 399.
[316] H & H Operations, Inc. v. Peachtree City, 283 S.E.2d 867, 869 (Ga. 1981) (quoting Berman v. Parker, 348 U.S. 26, 33 (1954)); *see also Parking Ass'n of Ga.*, 450 S.E.2d at 202-03 (applying the *Guhl* six factors to balance landowner detriment with the public welfare interest).
[317] *See Guhl*, 232 S.E.2d at 832 (discussing the six relevant factors for testing the validity of the zoning ordinance).
[318] *Id.* (discussing a challenged ordinance, noting that "[a]n ordinance is not unreasonable even if designed only to improve aesthetics," and upholding the ordinance).
[319] City of Atlanta v. TAP Assocs., 544 S.E.2d 433, 436 (Ga. 2001) (upholding a zoning decision in part because it was consistent with the city's comprehensive plan, which had been adopted after extensive study as to the best plan for managing growth and development of the area).

comprehensive development plans . . . ."[320] The court noted that the policies were "adopted after extensive study and often contentious debate among the interested parties . . . about the best plan for managing the growth and development of the area."[321] Accordingly, a city or county need not show that its way of protecting the public is the *only* way, but rather that its method protects the public in a *substantial* way.[322] *TAP Associates*, therefore, demonstrates that a city or county could support its APFO against challenges when it (1) engages in comprehensive planning that objectively demonstrates long range planning goals, and (2) drafts its APFOs in an objective manner that adequately addresses how the APFO meets the goals outlined in the comprehensive plan.

2. Exactions

As discussed earlier, APFOs may allow developers to mitigate delays in construction by voluntarily contributing the necessary services to maintain or obtain concurrency. As in North Carolina, developers in Georgia may claim that these mitigation opportunities are exactions that affect an unconstitutional taking because

> [a] development exaction [in Georgia] is defined as 'a requirement attached to a development approval or other municipal or county action approving or authorizing a particular development project, including but not limited to a rezoning, which requirement compels the payment, dedication, or contribution of goods, services, land, or money as a condition of approval.'[323]

Arguably, the mitigation opportunities in an APFO do not meet the definition of an exaction because they are voluntary, but a developer may argue that the contributions amount to exactions if they are the only feasible way for the developer to receive a permit. Thus, although Georgia provides statutory authorization for impact fees under the Development Impact Fee Act,[324] developers may claim these contributions are exactions that result in unconstitutional takings.

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[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] City of Griffin v. McDaniel, 606 S.E.2d 607, 609 (Ga. Ct. App. 2004) (citing GA. CODE ANN. § 36-71-2(7) (2006)).
[324] GA. CODE ANN. § 36-71-1 to -13 (authorizing development impact fees by a municipality or county).

Georgia courts have not expressly articulated the standard applied to unconstitutional exactions claims, but in *Greater Atlanta Homebuilders Association v. DeKalb County* the court indicated that the *Dolan* test may be utilized only in "as-applied" challenges to land use regulations in Georgia.[325] Thus, a developer who is denied a permit as a result of the application of an APFO can expect a court to apply the *Dolan* "rough proportionality" standard to any challenge made to the permit decision. Therefore, under the *Dolan* test, as long as the voluntary conditions placed on the developer are roughly proportional to the impact of the development, and there are objective criteria for the conditions, the APFO as applied should survive the challenge under Georgia law.

3. Equal Protection & Right to Travel

Like the federal Constitution[326] and North Carolina's Constitution,[327] Georgia's constitution affords that all persons are to be treated alike under like circumstances and conditions.[328] Additionally, like federal courts and North Carolina courts, Georgia courts generally apply a rational basis test to equal protection challenges.[329] The issue in equal protection is whether similarly situated persons are treated more favorably than others. Further, even if similarly situated persons are not treated equally, the challenger must show that a zoning decision was not rationally related to a legitimate government interest.[330] For example, in *Dover v. City of Jackson*, the court refused to find a violation of equal protection laws when the challenger could not show that others similarly situated were treated differently.[331] More importantly, the court stated that even if the challenger had shown differential treatment, the city's interest in preserving the character of a residential neighborhood was a legitimate purpose of zoning and planning and, therefore, was not a violation of equal protection laws.[332] With such

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[325] *See* Greater Atlanta Homebuilders Ass'n v. DeKalb County, 588 S.E.2d 694, 697 (Ga. 2003) (describing plaintiff's reliance on the test from *Dolan* as "misplaced" because *Dolan*, 512 U.S. 374, involved an "as-applied challenge" as opposed to a "facial challenge").
[326] U.S. CONST. amend. XIV, § 1. *See supra* Part III.B.3.
[327] N.C. CONST. art. I, § 19. *See supra* Part III.C.3.
[328] GA. CONST. art. I, § 1.
[329] *See, e.g.*, Cherokee County v. Greater Atlanta Homebuilders Ass'n, 566 S.E.2d 470, 474 (Ga. Ct. App. 2002) ("[A] statutory classification . . . that neither proceeds along suspect lines nor infringes fundamental constitutional rights, 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (citations omitted).).
[330] *See, e.g.*, Dover v. City of Jackson, 541 S.E.2d 92, 95 (Ga. Ct. App. 2001).
[331] *Id.* at 96.
[332] *Id.*

deferential treatment of zoning decisions, it is likely that an APFO challenge would survive equal protection analysis. The important factor for the city or county to demonstrate would be the legitimate purpose of the APFO, and in so doing the local government would have to demonstrate a rational basis for delaying or denying a building permit.

Like North Carolina, there are no Georgia cases analyzing zoning and right to travel challenges. As in North Carolina, Georgia courts addressing right to travel challenges cite *Zobel*,[333] finding these challenges to be no more "than a particular application of equal protection analysis."[334] Thus the APFOs, if enacted in Georgia, will likely survive constitutional challenges and be upheld as a valid exercise of the police power. In other words, under Georgia law, properly drafted APFOs are likely to be found not to unreasonably burden a landowner, not to impose unconstitutional exactions, not to deny equal protection, and not to impinge on the right to travel.

IV. CRITICISMS OF APFOS AND ADVICE TO FORMULATE FAIR AND EFFECTIVE APFOS

As discussed above, because APFOs are arguably within the authority of local governments in both North Carolina and Georgia and APFOs are likely to pass constitutional muster in both states, it is appropriate to briefly consider whether and how APFOs work. According to S. Mark White and his co-author Elisa Paster,

> [c]oncurrency regulations are often criticized by Smart Growth advocates based on a perception that they encourage sprawling, low-density development patterns. Opponents claim that developers in jurisdictions with concurrency regulations seek locations in remote areas where facilities are relatively uncongested or seek to develop in other jurisdictions without concurrency requirements. Second, transportation-related concurrency requirements tend to focus on streets and other automobile-related infrastructure. This can encourage service providers to widen roads and expand roadway capacity in response to growth demands, thereby creating further automobile dependence and sprawling development patterns. Finally, to the extent that concurrency slows growth, it is often

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[333] *Zobel*, 457 U.S. 55.

[334] *See, e.g.*, Columbus-Muscogee County Consol. Gov't v. CM Tax Equalization, Inc., 579 S.E.2d 200, 205 (Ga. 2003) (citing *Zobel*, 457 U.S. at 60 n.6, in determining that right to travel analysis requires little more than equal protection analysis).

accused of driving up housing costs or reducing affordable housing options in a community.[335]

Also, Douglas Porter's book, *Managing Growth in America's Communities*, discusses early problems with Florida's concurrency requirements.[336] He suggests that "premises and assumptions underlying the standards must be continuously examined for their reasonableness and appropriateness to the specific circumstances."[337] He mentions the example of Montgomery County, Maryland because, in 1995, it decided to waive APFO requirements around Metro stations in order to encourage development in station areas as this helped it meet its planning goals to concentrate development around those stations (presumably to encourage transit use).[338]

Another interesting critique of APFO use in Maryland was done by the National Center for Smart Growth Research and Education at the University of Maryland for the Home Builders Association of Maryland.[339] This report, which is an extensive study of implementation issues with several Maryland counties' APFOs, highlights several issues with APFOs and gives advice on how local governments might draft and use them more effectively.[340] At the time of the report, Maryland developers were describing APFOs in some jurisdictions as "the biggest obstacles to their attempts to build compact developments in either existing communities or designated growth areas."[341] The report identified a number of issues, including: a lack of adequate funding to provide necessary infrastructure in the designated growth areas;[342] a lack of coordination between the planning department and the board of education regarding school APFOs;[343] APFOs becoming *the* dominant land use planning tool rather than being coordinated with other land use policies;[344] and inadequate data to help local officials balance

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[335] White & Paster, *supra* note 1, at 756.
[336] DOUGLAS R. PORTER, MANAGING GROWTH IN AMERICA'S COMMUNITIES 131 (Island Press 1997).
[337] *Id.*
[338] *Id.*
[339] NAT'L CTR. FOR SMART GROWTH RESEARCH & EDUC., ADEQUATE PUBLIC FACILITIES ORDINANCES IN MARYLAND: AN ANALYSIS OF THEIR IMPLEMENTATION AND EFFECTS ON RESIDENTIAL DEVELOPMENT IN THE BALTIMORE METROPOLITAN AREA (Jan. 12, 2005) *available at* http://www.smartgrowth.umd.edu/research/pdf/Cohen_APFOBaltimore_041906.pdf (last visited May 25, 2007).
[340] *Id.*
[341] *Id.* at v.
[342] *Id.* at x.
[343] *Id.* at xii.
[344] *Id.* at xv.

growth with infrastructure as well as sometimes deliberate manipulation of data to either delay development when capacity is arguably available, or allow development even when it would actually result in a violation of service standards.[345]

White and Paster also have advice for local governments in implementing APFOs.[346] For example, in order to achieve community planning goals, they recommend allocating capacity to projects that achieve "goals and objectives of the comprehensive plan or that should be granted preferential treatment for hardship or other reasons."[347] As an example they mention the APFO of Hillsborough, Florida, which

> contains predetermined thresholds for impacts caused by New Urbanist and other Smart Growth projects. These thresholds act as incentives to encourage development based on New Urbanism rather than conventional suburban development. The APFO assumes that since a traditional neighborhood development is walkable and provides for adequate transit, it will generate only a limited amount of automobile trips. Also, given an infill project, the APFO assumes that adequate facilities are already in place and . . . will not place an additional burden on the system. This concurrency waiver encourages urban infill and redevelopment while discouraging sprawl.[348]

A complete survey of the pros and cons of APFO requirements is beyond the scope of this article, but it is interesting to note some points of debate between proponents and critics of this tool. Considering the criticisms of APFOs also may be useful for a local government in formulating its own APFO requirements, and ensuring that those requirements fit in with other planning and zoning goals.

V. CONCLUSION

Communities often include in their comprehensive plans the goal of ensuring that public facilities such as roads, sewers, and water are in place concurrent with development. These same plans, however, often do not proscribe how such concurrency will be achieved. Adequate public facilities ordinances can fill that gap by providing the regulatory mechanism to meet public facility concurrency goals. APFOs condition new development on the

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[345] NAT'L CTR. FOR SMART GROWTH RESEARCH & EDUC., *supra* note 339, at xvii.
[346] *See generally* White & Paster, *supra* note 1.
[347] *Id.* at 760.
[348] *Id.* at 775-776.

existence and availability of necessary public facilities. Thus, by requiring minimum level of service standards to be in place prior to the approval of new development, APFOs reverse the normal pattern of development and force developers to be responsive to a community's capital improvements plans. This mechanism can be a useful tool in preventing sprawl as it encourages in-fill and redevelopment before initiating new development in areas lacking adequate facilities. Implementation of APFOs, however, may be subject to challenge if communities lack authority from the state to enact APFOs, or if application of the APFOs violates constitutional principles. This article examined these potential challenges to APFOs under federal law and under the state laws of North Carolina, where APFOs have been enacted, and Georgia, where, thus far, no APFOs have been enacted. It concludes that APFOs, carefully drafted and applied, should survive challenge in both states.

North Carolina communities can likely find express statutory authority to enact APFOs under the police powers, general zoning powers (which include the express power to enact temporary moratoria), and subdivision regulation powers that have been granted to local governments by the state. Although Georgia communities cannot point to express statutory power to enact moratoria or to regulate subdivisions, Georgia communities likely have power to enact APFOs. This authority in Georgia can be inferred from the general zoning power conferred on local governments through statutory and constitutional laws, from the general acceptance of local communities' ability to regulate subdivisions, as evidenced by court decisions, government regulations, and statutory language, and from the general acceptance that communities can enact moratoria under general police powers.

North Carolina and Georgia communities, by implementing APFOs, likely will not violate constitutional provisions concerning due process and private property rights so long as the APFOs are carefully drafted, based on measurable standards, and appropriately designed to serve a legitimate state purpose, i.e., designed to serve the public health, safety, morals, or general welfare. Regarding due process challenges North Carolina and Georgia courts, like federal courts, are fairly deferential to the legislature in determining what falls within the public health, safety, morals, and general welfare. The purpose of the APFO, concurrency of public facilities with development, is likely to meet this definition. Thus, so as long as a community can demonstrate that the APFO as applied is substantially related to that legitimate state purpose, the APFO should withstand due process challenges.

As to takings challenges, North Carolina courts and Georgia courts apply standards that, at a minimum, are as strict as those applied in federal courts. North Carolina courts will not find an unconstitutional taking so long as the means chosen (the APFO) are substantially related to the legitimate state purpose (concurrency) and so long as the landowner has not been denied all use of their land. Georgia courts balance the harm to the landowner with the public interest served, and, although they do not require a landowner be denied of all practical use as in North Carolina, they do require a demonstration beyond diminution in value. An APFO arguably would not cause significant harm to the landowner under the tests applied by the courts. An APFO would not deny a landowner of all use of her or his land; any denial of use that an APFO would cause is temporary. Finally, an APFO arguably bears a substantial relation to a legitimate state interest. Therefore it is likely an APFO would withstand unconstitutional taking challenges under all three jurisdictional analyses.

Similarly, it is unlikely claims of denial of equal protection or constitutional right to travel would prevail against the application of an APFO. Federal courts, Georgia courts and North Carolina courts have cases that do not involve suspect classes of people and all require that the regulation bear a rational relation to a legitimate state purpose, a standard the APFO should have no trouble meeting. Therefore, Georgia communities most likely can do what some North Carolina communities have already done and enact APFOs to assist in meeting their comprehensive plan goals. So long as the APFOs are carefully and objectively drafted and applied, the communities should have confidence that the APFOs will survive the challenges discussed in this article.

Communities should also carefully draft their APFOs in such a way that the regulations do not interfere with other local government policies for encouraging in-fill development and other Smart Growth policies. They should also ensure that APFOs are well coordinated with other land use policies, and that capital improvements are carefully planned so that infrastructure is indeed available in a timely manner. If all these factors are taken into consideration, APFOs will indeed be a useful tool for meeting community goals, including sprawl prevention.