LAW 7494: URBAN FELLOWS

Adequate Public Facilities Ordinances:

An Effective Land Use Tool for Local Governments in Georgia

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"It is the nature of all land use and development regulations to circumscribe the course of growth within a particular town or district and to that extent such restrictions invariably impede the forces of natural growth."

-*Golden v. Planning Board of Ramapo*

Introduction

Communities throughout the nation, including many in Georgia, are currently struggling with the issue of unprecedented metropolitan growth and its effect on infrastructure capacity. Rapid development often creates demands that exceed the capacity of existing infrastructure, such as roads, sewers, water, drainage, schools and parks. Local governments have been tasked with answering the difficult and often politically contentious question of how to "correct" this imbalance and ensure that, moving forward, growth and land development occur at a pace commensurate with a locality's ability to support such development. In short, these communities must determine "how much growth should occur, how quickly it should proceed, how it should look and who should be responsible for the costs."[1]

In many areas of the country, local governments have attempted to answer these questions by regulating the timing and sequencing of infrastructure development through their police powers. These regulations are known as concurrency regulations or Adequate Public Facilities Ordinances (APFOs).[2] An APFO ties development approvals under zoning and subdivision ordinances to explicitly-defined public facility standards. They are designed to control the pace of development until adequate urban services are in place. APFOs have the potential to be one of most effective land use tools for pacing development and growth, especially in areas with strong growth and a robust housing market. But "potential" is the key

[1] S. Mark White & Elisa Paster, Creating Effective Land Use Regulations Through Concurrency, 43 Nat. Resources J. 753, 753 (2003).
[2] *Id.* at 753.

word. Unfortunately, APFOs have often failed to effectively control infrastructure capacity as developers have challenged APFOs on constitutional and public policy grounds, arguing that APFOs violate constitutional protections, discourage infill development and force developers to seek out development opportunities in other communities.[3] APFOs have been challenged in court as unconstitutional violations of the Due Process, Equal Protection and the Just Compensation clauses. This push back has caused many local governments to abandon their APFOs.[4]

In 1969, Ramapo, New York became one of the first municipalities to institute an APFO. Today, APFOs are common, with some states --Washington and Florida -- even *requiring* that the local governments adopt them. In Georgia, APFOs are untested. The State Legislature has not specifically granted to local governments the authority to enact APFOs through enabling legislation. However, as discussed in greater detail below, the power to enact an APFO can likely be implied through the zoning or home rule powers. Moreover, an APFO would likely survive constitutional scrutiny under Georgia law so long as the APFO sets forth clear standards for decision making and permit issuance, imposes reasonable (i.e. temporary) delays on development, and is applied in a reasonable and non-discriminatory manner. The most difficult challenge local governments will face will be opposition from developers and private property owners that see land use regulatory controls like APFOs as deterrents to growth and economic development.

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[3] These are common arguments against the use of land use control tools. *See e.g.* Nicholas Benson, A Tale of Two Cities: Examining The Success of Inclusionary Zoning Ordinances in Montgomery County, Maryland and Boulder, Colorado, 13 J. Gender, Race & Justice 753 (2010) (private developers argue inclusionary housing programs force them to relocate to other jurisdictions that do not have such programs).

[4] *See* Mae Israel, With ordinances dead or in limbo, planners ponder next steps, http://plancharlotte.org/story/nc-impact-fees-union-cabarrus-adequate-facilities.

Part I of this paper describes how APFOs are created, implemented and enforced in a local community. This section also describes the required levels of service that are included in APFOs to set the extent of services provided by, or proposed to be provided by, a facility based on and related to the operational characteristics of the facility. Part II looks at the *Golden v. Planning Board of Ramapo* case and the adequate facilities ordinance that was upheld by the New York Court of Appeals in that case. The ordinance is described in some detail as a proposed model ordinance for local governments in Georgia. Part III discusses the legal authority by which an APFO may be enacted. Traditionally, the authority to enact an APFO has been through (1) specific enabling legislation, (2) the zoning power, or (3) a locality's home rule powers. Though enabling legislation is the preferred means of delegation, since it can set forth prescribed minimum standards and procedures, enabling legislation is rare and thus the power to enact an APFO is generally found in the zoning power. Part IV explores the potential constitutional challenges to APFOs both under the U.S. Constitution and the Georgia Constitution. If properly drafted, an APFO should be able to survive constitutional scrutiny under both state and federal law.

I. Adequate Public Facilities Ordinances

An APFO is a land use regulatory tool that conditions new development on the existence and availability of necessary public facilities and services. Its purpose is to ensure that certain types of public facilities and services needed to serve new residents are constructed and made available contemporaneously with the impact of new development.[5] An APFO allows the government to delay new development projects by prohibiting the issuance of development permissions if existing government services, such as water, sewer, roads, schools, fire, police,

[5] Craig A. Robertson, Concurrency and Its Relation to Growth Management, 20 Nova Law Review 891, 892 (1996).

and the like, cannot support the development. As such, APFOs are designed to manage the *timing*, rather than the location or quality, of new development by phasing the provision of public facilities consistent with a locally adopted comprehensive plan.[6] If the necessary infrastructure is not in place, the requested development allowances will not issue and construction will not be permitted to commence. In extreme cases, an APFO may require the county or city to impose a temporary halt, or moratorium, on all building until public facilities are adequately updated and extended to support further growth.[7]

To ensure certain urban services will be available to new residential development, objective standards or criteria are set for specific public infrastructure.[8] In this way, APFOs are able to coordinate capital improvements planning with growth. As described by one commentator, APFO's "reverse the normal pattern of land development whereby local infrastructure is provided in response to private development decisions and populations growth."[9] In general, the primary objectives of an APFO include:

(1) To link the provision of key public facilities and services with the type, amount, location, density, rate and timing of new development;

(2) To properly manage new growth and development so that it does not outpace the ability of service providers to accommodate the development as established LOS standards;

(3) To coordinate public facility and service capacity with the demands created by new development;

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[6] Since APFOs regulate the timing of development they are typically classified as a type of concurrency regulation, which requires that public facilities must be provided at the same time, or concurrently, with the new development. Concurrency relies on basic regulatory controls already available to local governments: (1) the ability to withhold building permits; (2) the ability to budget for anticipated capital improvements. Jamie Baker Roskie & Janna Blasingame Custer, Adequate Public Facilities Ordinance: A Comparison of Their Use in Georgia and North Carolina, 15 Southeastern Envt'l L.J. 345, 347 (2007); *see also* S. Mark White & Elisa Paster, Creating Effective Land Use Regulations Through Concurrency, 43 Nat. Resources J. 753, 753-754 (2003).

[7] Adam Strachan, Concurrency Laws: Water as a Land Use Regulation, 21 J. Land Resources & Envt'l L. 435, 435 (2001).

[8] Roskie & Custer, supra note 6, at 346.

[9] *Id.* at 347.

(4) To discourage sprawl and leapfrog development patterns and to promote more infill development and redevelopment;

(5) To encourage types of development patterns that use infrastructure more efficiently, such as in New Urbanist or transit-oriented development;

(6) To require that the provisions of public facilities and services to new development does not cause a reduction in the levels of service provided to existing residents; and

(7) To offer an approach for providing necessary infrastructure for new residents.[10]

Implementation of an APFO is typically through the land use regulatory process (i.e. subdivision approval, rezonings, development plans and/or building permits) and a capital improvements program (CIP) for public facilities.[11] The capital improvements program is usually included in a jurisdiction's comprehensive plan.[12] The comprehensive plan often incorporates goals and policies regarding adequacy of public facilities and services and the land development regulations. Although requirements for public facilities are included in the plan, the plan typically lacks the necessary legal mechanisms to make the adequacy of public facilities a requisite to development permits being issued.[13] Moreover, though the goals of an APFO and the capital improvements element of a comprehensive plan may be similar, the plan alone does not further an APFO's objectives because the comprehensive plan contains neither (1) objective standards or criteria (levels of service) by which "adequacy" can be measured nor (2) measurements of facility capacity to determine whether capacity is "available" to serve a

[10] White & Paster, supra note 1, at 756-757; *see also* Roskie & Custer, supra note 6, at 347.
[11] White & Paster, supra note 1, at 756.
[12] In the broadest sense, a "comprehensive plan" sets forth the official policies and guiding principles of a jurisdiction for future growth and development. Generally, comprehensive plans are created looking five to ten years into the future. It outlines a framework for the development of an area, recognizing the physical, economic, social, and political factors of a community, and generally includes multiple components, such as capital improvement plans, land use plans, and population projections. If no comprehensive plan exists, the CIP may be found as a separate document or resolution, or part of a locality's land use plan.
[13] *See* Roskie & Custer, supra note 6, at 346.

proposed development.[14] Therefore, because the comprehensive plan lacks legal status in many jurisdictions, including most jurisdictions in Georgia, an APFO provides a means for "fill[ing] the gap" between the comprehensive plan and traditional land use regulations, such as zoning and subdivision.[15]

Typically, an APFO can be applied to school capacity, jails, transportation, utilities, parks and recreation, water and sewer capacity and perhaps even affordable housing depending on the enabling legislation or scope of the police power. In North Carolina, APFOs have been applied to school capacity, though one county repealed its school capacity APFO after it was challenged by a local homebuilders association.[16] In reality, most communities already tie some development approvals to infrastructure capacity on an ad hoc basis.[17] For instance, development approvals are denied in many communities based on "traffic congestion" or other transportation infrastructure shortfall.[18] Georgia courts have upheld the denial of development approvals because of inadequate road capacity.[19] However, the permit denial was not based on an APFO or other similar concurrency ordinance.

Local governments in Georgia already have the power to require developers to pay a fee proportionate to their development's estimated impact on existing public facilities. In 1990, the Georgia Legislature enacted the Development Impact Fee Act[20] which delegated to local governments the power to adopt impact fee ordinances. As such, many local governments in Georgia have now enacted such ordinances requiring new developments to pay an "impact fee"

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[14] White & Paster, supra note 1, at 756.
[15] Roskie & Custer, supra note 6, at 347-348.
[16] Town of Cary, N.C., Agenda & Minutes, September 9, 2004 (approving the repeal of the APFO on school capacity), available at http://www.townofcary.org/agenda/aa090904.htm (last visited July 3, 2013).
[17] White & Paster, supra note 1, at 756.
[18] *Id.* at 756; *see Crymes Enterprises, Inc. v. Maloof*, 260 Ga. 26, 389 S.E.2d 229 (1990) (upheld the denial of a landfill permits because of inadequate truck routes and entrances).
[19] *Crymes Enterprises,* 260 Ga. 26, 389 S.E.2d 229 (1990).
[20] O.C.G.A. § 36-71-1 *et seq.*

proportionate to the proposed development's impact on existing public services.[21] The fees must be paid before building permits issue. At least one local government outside of Georgia has married APFOs and impact fees, requiring through its APFO that impact fees be paid before an adequacy permit will issue.[22] It should be noted, however, that APFOs and impact fees, though complimentary, are not synonymous land regulatory tools for infrastructure provision. Impact fee ordinances do not control the pace of development.

APFOs raise a number of questions that state and local governments must address before implementing a legally defensible and effective APFO. The first is how to achieve the consensus, coordination and containment necessary to create, apply and defend an APFO. Consensus may be the most difficult task facing local governments as developers, and those that represent them, ordinarily push back against any sort of regulation on private property rights or perceived deterrents to growth. A second issue a government will have to consider is how it will define "adequacy" for each facility or service. A community's applicable adequacy provisions may set quantitative provision levels of service for public facilities and services. To be legally defensible, predetermined levels of service for each public facility must be clearly identified and articulated in the ordinance or resolution adopting the standards. A lack of identifiable standards may lead to invalidation of the regulation or condition as violative of due process.[23] Moreover, a local government will need to clearly define the "adequate facilities" by setting standards and criteria to establish a consistent methodology for identifying the impacts of proposed development and develop levels of service in accordance with this methodology. This is a data-intensive process and requires a number of experts to design the standards and methodology.

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[21] *See* O.C.G.A. § 36-71-1 *et seq*. (enabling local governments to enact local impact fee ordinances).
[22] Adequate Public Facilities Ordinances in Maryland: A Report by the National Center for Smart Growth Research and Education, April 20, 2006, http://smartgrowth.umd.edu/assets/documents/research/ncsg_apfomaryland_2006.pdf (last visited July 21, 2013).
[23] 2 Edward Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 15:32 (2005).

Third, government will have to determine who will issue the adequacy permits. Will it be the same entity that issues building permits? This may make sense if the APFO requires issuance of an adequacy approval before or simultaneously with the issuance of a building permit. Fourth, the government must be able to develop the necessary commitment to the capital improvements elements of the comprehensive plan. This may be done by requiring consistency with a comprehensive plan. Unfortunately, however, a majority of jurisdictions in the United States do not mandate that zoning be done in accordance with a comprehensive plan. For instance, cities and counties in Georgia are not mandated by state law to zone in accordance with a comprehensive plan; however, many localities require by local ordinance or resolution that zoning be in accordance with a comprehensive plan.[24]

Fifth, a local government must be able to clearly define service districts within which there must be sufficient capacity to support additional development. This may be done by setting clear and predictable levels of service, or some other objective standard, by which growth can be measured, predicted and directed. Within these districts, local governments should set some sort of "lag time" that is appropriate or valid for how long development can be delayed. The "lag time" may vary depending on the service area's proximity to already-developed areas where adequate facilities currently exist. Finally, a local government must ensure its APFO is legally defensible in light of federal and state law. As in most land use regulatory cases, the legality of the regulation is often challenged as applied to a specific property and thus the facts and circumstances of the particular case are critical to the ultimate validity of the regulation. If facially challenged, so long as the APFO is reasonable, clear and has been properly adopted, it should survive a facial attack.

[24] *See e.g.* DeKalb County, Ga. Code, § 27-46 (requiring amendments to the comprehensive plan before a zoning amendment may be initiated).

Level of Service (LOS) Standards

In jurisdictions with APFOs, proposed residential developments must get an adequacy permit before they are allowed to develop. Issuance of the adequacy permit is based on whether a proposed development has met the predetermined level of service (LOS) standards. The term "level of service" has been defined as an "indicator of the extent or degree of service provided by, or proposed to be provided by a facility, based on and related to the operational characteristics of the facility. Level of service shall indicate the capacity per unit of demand for each public facility."[25] If an applicant has satisfied the LOS standards for all requisite facilities, he or she is typically entitled to the issuance of the adequacy permit. If an applicant has not satisfied LOS standards, the adequacy permit will be denied until adequate public facilities are in place, whether through the local government or developer advancement.[26] Developer advancement simply means that the developer has the option of paying for the facilities instead of waiting on the government to provide such facilities and services. When an adequacy permit is denied for residential development, it is placed in a queue until adequate facilities are extended or the developer chooses to advance, or fund, the facilities or infrastructure. If a local government denies a development permit due to the unavailability of resources, the government's capital improvement plan must show a good faith effort to make those resources, or infrastructure, available. Assuming all other requirements have been satisfied, once the public facilities are in place an adequacy permit should issue and development would be able to commence.

A community develops a level of service (LOS) standard for each public facility it deems necessary to have in place before residential construction commences. The community may vary

[25] White & Paster, supra note 1, at 758.
[26] Developer advancement is where the developer pays for the facilities and/or services required by ordinance.

the LOS standards applicable to each public facility by geographic area, over time, or by type of development project.[27] For example, the standards may be tiered over time to avoid the effect of an immediate, high level of service on growth and development in the jurisdiction.[28] One standard can take effect initially, and another can take effect later as development matures.

As a means of measuring performance, an LOS standard should take into consideration both the capacity of a public facility and the demand currently placed and potentially placed on the public facility from existing development, approved developments, and projected future growth.[29] To properly set LOS standards, local government must determine how much capacity is available and how much capacity will be used by a proposed development. The standards should be clear, reasonable and based on some data or information showing that the levels of service designated for an area are proportionate to the proposed development, and its impact, in the area. To determine this, local government could look at the zoning and subdivision laws in effect in a service area to determine the density of development that is allowed and thus the level of services that will be needed to support such density.

Once LOS standards have been established for the issuance of development approvals, a local government must determine *when* the LOS must be attained for development to proceed.[30] Once LOS standards have been adopted, difficulties might arise if existing public facilities are determined to be insufficient to accommodate the impacts of new development. When this happens, a community has four options:

(1) Building permits may be deferred pending availability of services (similar to a moratorium on development);

[27] White & Paster, supra note 1, at 761.
[28] *Id*. at 761.
[29] *Id.* at 759.
[30] *Id.* at 759.

(2) The applicant may agree to reduce density or intensity of proposed development within parameters of available facilities;

(3) Create a phasing schedule; or

(4) The developer may agree to provide those public facilities needed (or payment to construct these facilities) to attain the adopted LOS.[31]

The option the community chooses to deal with insufficient public facilities is critical if the APFO is later challenged as a "taking" in court. If the government's action is classified as a "taking" of property by a court, the government will be constitutionally required to pay "just compensation" for the property taken. To illustrate, suppose a community with an APFO put a temporary hold on a proposed development request (by refusing to issue an adequacy permit to a developer) pending the availability of certain public services. The developer challenged the permit denial as a taking for which compensation must be paid because he could not put his property to economic use. If the court likened this temporary hold to a moratorium, as in Option #1 above, the court would likely employ a balancing test to weigh the interests of government against the investment-back expectations of the developer. However, if the government chose Option #4 instead, and gave the developer the option of providing the services or else no permit would issue (at least until the government can get the facilities in place), there is an argument that the "advancement of facilities" condition constitutes an exaction that would be analyzed under a different constitutional taking test that would most certainly alter the court's analysis of the case. These tests are discussed in greater detail in the "Constitutional Challenges to an APFO" section below.

[31] White & Paster, supra note 1, at 759-760.

II. *Golden v. Planning Board of Ramapo*

The seminal case upholding the validity of APFOs is *Golden v. Planning Board of Ramapo.*[32] In 1969, Ramapo, New York became one of the first municipalities to institute an APFO. The Town of Ramapo, a suburban town outside of New York City, used sequential infrastructure development to draft a comprehensive plan that linked growth planning to land use regulation.[33] The issue in *Ramapo* was whether development could be conditioned pending the provision by the municipality of specified services and facilities. The Court held that it could as the power to regulate the timing of development could be exercised through the Town's zoning power. Thus, the *Ramapo* case "established that development permission can be linked to the availability of infrastructure."[34] Some argue that the ingenuity of *Ramapo* was in using sequential infrastructure to draft a comprehensive plan that linked growth planning to land use regulation.[35] By using the comprehensive plan to guide subsequent land use regulations, the plan provided Ramapo with a legal basis for reasonably delayed development.[36] That is, by connecting infrastructure planning to land use regulation in an APFO, the Town was able to elevate its plan to a legal requirement despite the lack of statutory guidance.

Due to unprecedented growth in the Town of Ramapo, the Town enacted an ordinance that conditioned subdivision approval on the attainment of a special use or variance permit.[37] Before the ordinance was enacted, however, the Town developed a master plan for the community.[38] The master plan included an intense study of existing land uses, public facilities,

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[32] 285 N.E.2d 291 (N.Y. 1972).
[33] Edward Sullivan & Matthew J. Michel, Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation, 35 Urban Lawyer 75, 79 (2005).
[34] Julian C. Juergensmeyer & James C. Nicholas, Loving Growth Management in the Time of Recession 42 Urb. Lawyer 417, 422 (2011).
[35] Sullivan & Michel, supra note 31, at 79.
[36] *Id.* at 79.
[37] *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359 (N.Y. 1972).
[38] 30 N.Y.2d 359, 367-368 (N.Y. 1972).

transportation, industry and commerce.[39] Following the implementation of the master plan, the Town developed a comprehensive zoning ordinance and a local law approving comprehensive planning and a capital facilities program which provided for the location and sequence of additional capital improvements.[40] The capital improvements plan called for the Town to be developed in eighteen years.[41] Finally, Ramapo adopted several zoning amendments to eliminate premature subdivision and sprawl.[42] As described by the Court, the "amendments … [sought], by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land."[43]

The Town's plan was for residential development to proceed according to the phased provision of adequate municipal facilities and services. Any concomitant restraint on property use was to be temporary.[44] The proffered legislative intent of the plan was to preserve the area's suburban character and to direct future residential development to existing residential areas.[45] This was held to be a legitimate interest as it assured that each new home built would have at least a minimum of public services in categories regulated by the ordinance at a pace commensurate with increased public need.[46]

Furthermore, to ensure development was phased to meet municipal demands, Ramapo enacted an "adequate public facilities ordinance" that conditioned the issuance of a special use

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[39] *Golden,* 30 N.Y.2d at 367
[40] *Id.* at 367-368.
[41] *Id.* at 367.
[42] *Id*. at 368.
[43] *Id*. at 378.
[44] *Id.* at 368.
[45] *Id*. at 368, 393.
[46] This assurance of quality public facilities was within the Town's police power. In upholding Ramapo's ordinance, the Court noted that "[e]very restriction on the use of property entails hardships for some individual owners. Those difficulties are invariably the product of police regulation and the pecuniary profits of the individual must in the long run be subordinated to the needs of the community." *Id.* at 381. Additionally, the Court noted that where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in the population requires, there is a rational basis for phased growth and hence the challenged ordinance would not violate the Federal and State Constitutions. *Id.* at 383.

permit on the availability of five essential services: (1) sewers or substitutes; (2) drainage facilities; (3) parks, recreation and public schools; (4) roads; and (5) firehouses.[47] The city used a point system to determine whether a special use permit or variance would issue.[48] No permit or variance would issue until a developer accumulated fifteen points, calculated on a sliding scale of values.[49] Developers were allowed to "accelerate" or "advance" permit approval by providing the lacking facilities themselves (until he or she satisfied the requisite number of points), in a procedure called "advancement." In this way, developers were not wholly denied development permissions; they could provide the infrastructure or wait for the town to build the infrastructure.

Developers challenged the adequate public facilities ordinance on several grounds, including that the ordinance was exclusionary, facially unconstitutional, and an ultra vires means of controlling population growth.[50] Opponents argued that the municipality lacked the authority to enact such an adequate public facilities ordinance since there was no state enabling legislation specifically delegating this power to local governments. Specifically, it was argued that there was no specific authorization for the "timing controls" enacted by the Town.[51] In the absence of legislative authorization delegating the power to plan and zone to local government, exercise of such power would be held to be ultra vires[52] and void.[53] The Court in *Ramapo* conceded that the Town of Ramapo had "no explicit statutory basis beyond the 'statutory scheme as a whole' and the 'grant, by way of necessary implication, [of] the authority to direct the growth of population . .."[54] Despite the lack of enabling legislation delegating specific authority, the Court found that

[47] *Golden,* 30 N.Y.2d at 368.
[48] *Id.* at 368-369.
[49] *Id.* at 368.
[50] *Id*. at 384.
[51] *Id.* at 373.
[52] Ultra vires actions are those actions that go beyond the scope of delegated authority.
[53] *Id.* at 373-374.
[54] *Id*. at 371.

the delegation of the zoning and planning power to municipalities was broad enough to encompass phased development approvals under local government's expansive police powers.[55]

The Court also upheld the ordinance as a constitutional exercise of the Town's police power to regulate land use in its boundaries under both state and federal law. Specifically, the Court noted that "where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth' and hence, the challenged ordinance is not violative of the Federal and State Constitutions."[56]

The "Ramapo Plan": An Option for Georgia?

This paper suggests that local governments in Georgia should consider implementing an APFO similar to the ordinance enacted in the *Ramapo* case. By requiring that certain, necessary infrastructure is in place before development commences, local governments in the State would have an effective tool for protecting their citizens from the decreased quality and quantity of public services. Moreover, conditioning development approval on the availability of adequate public facilities and services would allow localities to stymie the deleterious effects of urban sprawl, overbuilding and diminished public services on the public health, safety and welfare.[57]

The Town of Ramapo used a "point system" to determine whether proposed developments satisfied the capital improvements element of the Town's comprehensive plan. The "point system" was based on Levels of Standards (LOS) that were set for five essential public facilities: (1) sewers or substitutes; (2) drainage facilities; (3) parks, recreation and public

[55] *Golden,* 30 N.Y.2d at 371.
[56] *Id.* at 383.
[57] Julian C. Juergensmeyer & James C. Nicholas, Loving Growth Management in the Time of Recession 42 Urb. Lawyer 417, 422 (2011).

schools; (4) roads; and (5) firehouses.[58] If the requisite amount of points was satisfied, a development permit was approved. If the requisite amount of points was not satisfied, no permit would issue. Additionally, the developer had the option to "commit to furnish" the facilities necessary to meet LOS standards before development was approved.[59] The point system enabled the reviewing agency to balance concurrency review with other public policies, which could include a "weighting system" on the availability of public facilities for public purposes of concurrency review.[60] Using the *Ramapo* approach, a "community could assign point scores for the availability of a specified amount of capacity for each public facility and/or for the achievement of other public policies such as the provision of affordable housing."[61]

An alternative to the *Ramapo* system is the tiered approach of control.[62] Under a tiered approach, communities are zoned according to urban, urban expansion, rural, and environmentally sensitive, and development is thereby targeted according to capital facility planning and land suitability.[63] Regardless of which APFO alternative is chosen, if any, local governments should be sure to clearly state the public need that ties the rate of growth to infrastructure capacity needs to be established.[64] This will help an APFO survive due process review. Moreover, studies should be prepared which address the following issues: (1) A causal relationship between new growth and the need for additional facilities or capacity to support that growth; (2) the relationship of adequate public infrastructure to basic health, safety and welfare;

[58] *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 368 (N.Y. 1972).
[59] Roskie & Custer, supra note 6, 347-348.
[60] White & Paster, supra note 1, at 760-761.
[61] *Id.* at 760-761.
[62] 1 James Kushner, Subdivision Law and Growth Management §2:19 (2d. ed. 2013).
[63] *Id*. at § 2:19.
[64] *Id.*

and (3) the steps being taken by the municipality to ensure that those needs are accommodated, usually through the capital improvements plan/element of comprehensive plan.[65]

III. A Legal Basis for Enacting an APFO

A local government must have sufficient legal authority to enact an APFO.[66] Local governments are creatures of the state government, and thus only have the powers delegated to them by the state legislature. The power to enact an APFO has been established in one of three ways: (1) explicit enabling legislation; (2) implicit the zoning power; or (3) implicit in the home rule power. If it is determined that no authority exists upon which to enact an APFO, the APFOs could be held to be ultra vires acts of governmental entities. The term "ultra vires" describes actions that are outside the scope of delegated authority. Thus, a critical issue with APFOs in Georgia is whether a local government seeking to enact an APFO has the authority to enact such legislation.

Enabling Legislation

The safest alternative to legally adopting and implementing an APFO is to have explicit enabling legislation in place delegating to local governments the power to enact APFOs. Generally, enabling legislation is a state statute that establishes local authority to exercise a certain power and then describes the conditions by which the power may be exercised.[67] Currently, only Maryland has specific APFO enabling legislation.[68] While enabling legislation is not necessary for the implementation of an adequate public facilities ordinance, state enabling

[65] 1 James Kushner, Subdivision Law and Growth Management §2:19 (2d. ed. 2013).
[66] Roskie & Custer, supra note 6, at 349.
[67] White & Paster, supra note 1, at 762.
[68] *Id.* at 762.

legislation will help stave off ultra vires challenges to subsequently adopted APFOs. Moreover, since enabling legislation sets forth minimum criteria which must be complied with by local governments exercising the delegated power, enabling legislation would provide guidance to local officials and uniformity between APFOs in different jurisdictions within the state.

Explicit enabling legislation is not necessary to enact an APFO. In the *Ramapo* case, New York had no specific enabling legislation to enact an APFO. The Court in that case found that the zoning power granted to local governments was enough to encompass the power to enact a public facilities ordinance. Currently, Georgia has not specifically delegated to local governments the power to enact local APFOs. However, Georgia has not explicitly delegated to local governments the power to control the subdivision of land; nevertheless, it is understood that local governments may adopt subdivision ordinances. Moreover, there is no specific constitutional or statutory grant of power to local governments in Georgia to enact development moratoria; nevertheless, courts have found that local governments have the power to adopt reasonable development moratoria.[69] Each of these is authorized as an exercise of the police power. The police power is the inherent power of the state to legislate for the protection of the public health, safety, morals and welfare.

Thus, it is reasonable to suggest that the power to enact an APFO is implicit in Georgia's delegation of the zoning power to local governments, which is likewise exercised as part of government's general police powers. This is discussed below.

[69] *See City of Roswell v. Outdoor Systems, Inc*., 274 Ga. 130, 549 S.E.2d 90 (2001); *Davidson Mineral Properties, Inc. v. Monroe County*, 257 Ga. 215, 357 S.E.2d 95 (1987).

Enacting an APFO under the Zoning Power or Home Rule Power

Explicit enabling legislation is rare. As such, the authority to deny development approval based on inadequate facilities is often found under subdivision and zoning legislation or home rule powers. "With the power to zone land, state and local governments have historically exercised control over when and where development can take place."[70] In Georgia, after a series of piecemeal delegations of the zoning power to local governments based population size, the Georgia Legislature explicitly granted to all cities and counties the zoning and planning power through the State Constitution in 1983. The 1983 Constitution provides that:

> "The 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 powers."[71]

Georgia courts have interpreted the term "governing authority" to mean "such city or county board as [has] the authority to exercise general and not limited power."[72]

The terms "zoning" and "planning" are not defined in the Constitution, though "zoning" is statutorily-defined in the Zoning Procedures Law.[73] These powers are thought to be very broad.[74] "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."[75] Thus, with the exception of general procedures that may be mandated,

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[70] Strachan, supra note 7, at 435.
[71] Ga. Const. of 1983, Art. IX, § 2, para. IV.
[72] *Button v. Gwinnett Landfill, Inc. v. Gwinnett County*, 256 Ga. 818, 353 S.E.2d 328 (1987) *quoting Humthlett v. Reeves*, 212 Ga. 8, 13, 90 S.E.2d 14 (1955).
[73] The term "zoning" means "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 accordance with the uses of property for which such zones or districts were established." O.C.G.A. § 36-66-3(3).
[74] Roskie & Custer, supra note 6, at 358.
[75] *Id.* at 358.

zoning is entirely within the purview of local governments. Considering the term "zoning" is not defined in the Constitution, and is exercised through local government's ever-expansive police power, it is reasonable to assume that this grant of the zoning and planning power also granted to local governments the power to enact and enforce APFOs.

If the authority to enact an APFO cannot be implied through the zoning power, it may be implied through the home rule power.[76] The "home rule" doctrine states that local governments lack inherent powers to govern but may exercise powers independent of the state through home rule powers granted by state constitution or statute. Home rule systems are characterized "as authorizing local governments to legislatively frame and adopt their own organizational structures."[77] If a state constitution directly vests power in a local government, commentators generally categorize the system as one of "constitutional home rule."[78] If, on the other hand, the constitution empowers the state legislature to effect the authorization, the system falls into the "legislative home rule" category.[79]

Georgia has been characterized as both a "constitutional home rule" state and a "statutory home rule" state. The Home Rule provision of the Georgia Constitution governs county home rule power. The Constitution delegates to counties the power to adopt ordinances, resolutions, or regulations relating to its property, affairs and local government for which no provision has otherwise made by general law.[80] In 1965, the Georgia Legislature enacted the Municipal Home Rule Act, which conferred specific home rule powers to municipalities in the State.[81] Georgia's Municipal Home Rule Act provides that "[t]he governing authority of each municipal

[76] Roskie & Custer, supra note 6, at 358.
[77] R. Perry Sentell, Jr., The Georgia Home Rule System, 50 Mercer L. Rev. 99, 103 (1998).
[78] *Id*. at 103.
[79] *Id*.
[80] Ga. Const. of 1983, Art. IX, § II, para. I.
[81] O.C.G.A. § 36-35-3.

corporation shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which are not inconsistent with the Constitution or any charter provision applicable thereto."[82]

It seems plausible that the power to enact an APFO could be implied through the home rule power since it empowers local governments to adopt ordinances and resolutions regarding property within its jurisdiction. APFOs directly relate to property as they condition the development of property on adequate urban services being available and adequate for the expected level of development.

IV. Constitutional Challenges to APFOs

Since APFOs restrict private property use and growth potential to some degree, these ordinances are often challenged on constitutional grounds. The most frequent challenge to an APFO is that it constitutes a taking of private property for which just compensation is due under the U.S. and state Constitutions.[83] This is because development approvals are not granted until adequate public facilities are in place, stalling development and hindering the economically viable use of property. Thus, economic takings challenges are common. Moreover, APFOs have been challenged under the Due Process[84] and Equal Protection[85] clauses of the Fourteenth Amendment and state constitutional equivalents, and as a violation of the constitutional right to travel.[86] If an APFO is clearly drafted and sets reasonable, temporary restrictions on development, it will most likely survive constitutional attacks under federal law. However,

[82] O.C.G.A. § 36-35-3(a).
[83] U.S. Const., amend V; Ga. Const. of 1983, Art. I, § III, para. I.
[84] U.S. Const., amend. XIV.
[85] U.S. Const., amend. XIV.
[86] *See Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518 (1999) (the right to travel).

because states may provide broader private property protections to their citizens than federal law, a local government must be sure that its APFO will likewise survive constitutional scrutiny under state law. For instance, the Georgia Constitution provides broader protections to private property owners in the takings context than its federal counterpart.[87] Moreover, Georgia courts have historically been very protective of private property rights and have been quick to invalidate arbitrary or confiscatory land use regulations. So, while an APFO will likely survive federal constitutional scrutiny, surviving constitutional scrutiny under state law may be a more onerous burden.

Taking Challenges to an APFO under Federal Law

Regulations on land use will be invalidated or declared to be a compensable taking if the regulation is found to violate either the Fourteenth Amendment[88] or the Fifth Amendment of the U.S. Constitution.[89] The Fifth Amendment prohibits the government from taking private property for public use without just compensation. Specifically, the Fifth Amendment provides ". . . nor shall private property be taken for public use, without just compensation."[90] The U.S. Supreme Court and state courts recognize that police power restrictions on land use, such as zoning regulations, are generally valid, but in certain instances may go "too far" in destroying or impairing interests in property to become an unconstitutional "taking" of property.[91] To survive

[87] Ga. Const. of 1983, Art. I, § III, para. I ("private property shall not be taken *or damaged* for public purposes without just and adequate compensation being first paid) (emphasis added).
[88] The Due Process Clause of the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV.
[89] 1 Edward Ziegler, Jr., Rathkopf's The Law of Zoning and Planning, § 6:2 (2005).
[90] The Fifth Amendment has been applied to the states through its incorporation into the Fourteenth Amendment. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581 (1897) (though cited as the decision holding that the Fifth Amendment could be applied to States through its incorporation in the 14th Amendment, nowhere in this opinion does the Court mention the Fifth Amendment).
[91] Ziegler, supra note 86, at 6:3(5).

a takings challenge, an APFO must leave the landowner with a reasonable use of the property for a reasonable amount of time.[92]

Takings jurisprudence has traditionally been one of the most confusing and litigated areas of law. The confusion may be due in large part to our structure of government, where the federal government shows great deference to the states in regulating and defining "property."[93] Moreover, the U.S. Constitution does not provide any guidance on what actually constitutes a "taking" of property under the Fifth Amendment and thus it has been left up to the Court to determine the scope of "takings" law.[94] The U.S. Supreme Court has admitted that its takings jurisprudence "involves few fixed rules,"[95] and that each case must be determined on an "ad hoc, factual basis" by the facts and circumstances presented in the particular instance.[96] In *Penn Central Transp. Co. v. City of New York*, Justice Brennan characterized the U.S. Supreme Court's takings jurisprudence as confused and difficult to reconcile, stating that while the Court has accepted that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. . . [the] Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by

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[92] White & Paster, supra note 1, at 767.
[93] *See* Julian C. Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law, § 10.2 (2d. ed. 2007).
[94] In the 2002 U.S. Supreme Court case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, Justice Stevens noted the difficulty in determining whether land has been "taken" under the Fifth Amendment: "In determining whether government action affecting property is an unconstitutional deprivation of ownership rights under the Just Compensation Clause, a court must interpret the word "taken." When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322(17), 122 S.Ct. 1465 (2002).
[95] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct 2646 (1978).
[96] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct 2886 (1992); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct 2646 (1978); *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412, 43 S.Ct. 158 (1922).

public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[97]

To determine when property has been "taken" and compensation is constitutionally due, the U.S. Supreme Court has crafted several "takings tests,"[98] two of which are especially relevant in the context of APFOs. Regulatory takings claims are generally analyzed under one of four categories at the federal level:[99] (1) a denial of all economically viable use;[100] (2) a permanent, physical occupation of property;[101] (3) a balancing of interests;[102] and (4) a land use exaction.[103] In discussing these taking tests, Justice Kennedy in *Lingle v. Chevron* stated that "[a]lthough [the U.S. Supreme Court's] regulatory takings jurisprudence cannot be characterized as unified . . . each of these [taking] tests focuses directly upon the severity of the burden that the government imposes upon private property rights."[104] Each of these takings tests is described below, with considerable emphasis placed on the *Penn Central* balancing of interests test and the land use exactions test since courts have typically used these two tests to analyze the constitutionality of an APFO.

The first federal taking test is the "no economically viable use" test, which applies where a land use regulation deprives an owner *all* economically viable and beneficial use of his or her property. In this situation, if a regulation destroys all value in property, an owner has a taking claim so long as the property had economic value in the property before regulations were

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[97] *Penn Cent. Transp. Co.,* 438 U.S. 104, 123, 98 S.Ct 2646 (1978).
[98] *See Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 529, 125 S.Ct. 2074 (2005).
[99] *See* Ziegler, supra note 86, at § 6:51.
[100] *See e.g. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992).
[101] *See e.g. Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 105 S.Ct. 3164 (1982).
[102] *See e.g. Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978).
[103] *See e.g. Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).
[104] *Lingle*, 544 U.S. 528, 539, 125 S.Ct. 2074 (2005).

enacted.[105] This categorical rule was first articulated by the U.S. Supreme Court in the seminal case of *Lucas v. South Carolina Coastal Council,*[106] where a piece of state legislation prohibited all development on a piece of beachfront property depriving the owner of all economically viable use of his property. The legislation "wholly eliminated the value" of the owner's fee simple title and this constituted a taking.[107] In the context of APFOs, the argument that an APFO deprives an owner of all economically viable use would be difficult considering the property would still have some economic value even if it could not be immediately developed. The hold on development is temporary, and does not divest the landowner of any permanent private property rights.

The second type of taking test evolved from the case of *Loretto v. Teleprompter Manhattan CATV Corp*.,[108] where the U.S. Supreme Court held that a government regulation that results in the permanent physical occupation or invasion of private property requires that just compensation be paid under the U.S. Constitution.[109] To pursue a takings claim because of a permanent, physical occupation of property, a claimant must prove that the government regulation resulted in a physical invasion of the owner's property and interfered with the land owner's fundamental property rights, such as the right to exclude others from his or her property. Generally, an APFO does not grant governmental authorities or other entities permission to permanently occupy the property for which an adequacy permit has been submitted. Moreover, the APFO does not authorize the government or any other entity to exclude or alienate the property owner from his or her property; it simply restricts the owner from developing on his or

[105] Ziegler, supra note 86, at § 6:23.
[106] 505 U.S. 1003, 112 S.Ct. 2886 (1992).
[107] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330, 122 S.Ct. 1465 (2002) citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886 (1992).
[108] 458 U.S. 419, 105 S.Ct. 3164 (1982).
[109] *Loretto,* 458 U.S. 419, 105 S.Ct. 3164 (1982).

her property until adequate services and facilities are provided. Thus, the per se taking test from *Loretto* would likely be inapplicable in the APFO context.

The *Penn Central* "balancing of interest" test typically applies to cases where government regulation has diminished value in property, but has not taken all economically viable use.[110] Under the *Penn Central* test, the court applies "a complex of factors including the regulation's [1] economic effect on the landowner, [2] the extent to which the regulation interferes with reasonable investment-backed expectations, and [3] the character of the government action."[111] On this last factor, the character of the government action, the U.S. Supreme Court in *Penn Central* noted that a taking "may more readily be found" when the government physically invades property as opposed to when "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[112] The "character of the government action" is therefore analyzed by the degree to which the action resembles an actual physical appropriation or condemnation of property.

The *Penn Central* balancing of interests test is especially important in the context of APFOs since APFOs place a temporary hold on development (development approval) while public facilities are being sited. Thus, it could be argued that some economically viable use has been impaired by an APFO's temporary hold on development, even if it is not *all* economically viable use. If enacted jurisdiction-wide on development, the "character" of the government's hold on development would look less like a physical appropriation of property, which usually targets one or a few specific parcels of property, and more like a comprehensive scheme for the

[110] *See Penn Cent. Transp. Co.*, 438 U.S. 104, 123, 98 S.Ct. 2646 (1978); *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331, 122 S.Ct. 1465 (2002) (in reviewing the circuit court's decision, the U.S. Supreme Court found that the "starting point for the [lower] court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.").
[111] *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001) *citing Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct 2646 (1978).
[112] *Penn Central Transportation Co. v.*, 438 U.S. 104, 124, 98 S.Ct 2646 (1978).

ordered provision of services and responsible growth management. This would seem to weigh heavily in favor of the regulation being upheld. Moreover, though the land would be temporarily burdened by the APFO if adequate public facilities were not available, the economic effect on the landowner would be relatively minor so long as the public facilities were provided in a reasonable time.

Additionally, the *Penn Central* test is relevant because a temporary hold on development can be likened to a moratorium on development. A moratorium is a temporary land use control technique adopted by ordinance that is intended to prevent development that may be inconsistent with a proposed land use or zoning plan for an area.[113] A moratorium acts as an "interim development control" to slow growth while well-reasoned land use plans can be crafted by planners.[114] Because the adoption of a moratorium freezes development, a property owner or land developer often loses significant economic value in land at least while the moratorium is in place. In the case of *Tahoe-Sierra Preservation Council*,[115] the U.S. Supreme Court concluded that moratoria should be analyzed under a balancing test like that in *Penn Central* to determine their constitutional validity.[116] In the Court's view, "the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."[117] The Court in *Tahoe Sierra* noted that moratoria are an essential tool of successful development, and that if the Court was to adopt a more rigorous taking test in cases where development is temporarily halted, any "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," would

[113] Ziegler, supra note 86, at § 13:1.
[114] *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. 302, 334-335, 122 S.Ct. 1465 (2002).
[115] 535 U.S. 302, 306, 122 S.Ct. 1465 (2002).
[116] *Tahoe-Sierra Preservation Council, Inc.,* 535 U.S. 302, 306, 122 S.Ct. 1465 (2002).
[117] *Id.* at 321.

constitute a taking and require significant changes to established governmental practices.[118] The Court felt that this type of rule would lead to hasty decision making on the part of planners and local government and foster "inefficient and ill-conceived growth."[119] Though an APFO is not a moratorium per se, the effects of an APFO on the value of property may be similar to the effects a moratorium on the same if adequate facilities are lacking. That is, where development is temporarily halted, the landowner will suffer some diminution in land value while the development hold is in place. So long as the development hold is temporary and reasonable, it should be constitutional under a *Penn Central* review. See above.

The final taking test evolved from two U.S. Supreme Court cases and applies in the special context of land use exactions. A typical land use "exaction" involves the government conditioning the issuance of a permit or land use approval on the a real property dedication, promise, or fee that "serves a public need and is related in some way to the expected external costs to the community of the owner's new use of her land."[120] Exactions "may be in the form of a dedication of land to the city, a monetary payment, and/or a restriction on the use of the developer's land."[121] They have become an important strategic component of a local government's comprehensive plan and a vital aid in meeting the needs of a burgeoning population and development area.[122] Land use exactions represent a unique category of partial takings that require judicial assessment of the fundamental fairness reflected in the allocation of

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[118] *Tahoe-Sierra Preservation Council, Inc.,* 535 U.S. 302, 334-335 (2002).
[119] *Id.* at 335 ("The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations . . . the financial constraints of compensating property owners during a moratorium may force officials to rush through the planning process or to abandon the practice altogether.").
[120] Mark Fenster, Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions, 58 Hastings L.J. 729, 734 (2007).
[121] Craig Habicht, Dolan v. City of Tigard: Taking A Closer Look At Regulatory Takings, 45 Cath. U. L. Rev., 221, 226(20) (1995).
[122] *Id.* at 226(20).

burdens.[123] An exaction may constitute a taking if the burden imposed on a private landowner, in light of the governmental action at issue, is one that in fairness should be borne by the public as a whole instead of the solitary landowner.[124]

Courts may characterize APFOs as exactions, though this characterization seems flawed. Depending on the specific requirements of the ordinance, the ordinance may require developers to help build roads, schools, water and sewer systems and other public improvements if these facilities are lacking and the proposed development is projected to increase demand on these facilities and services.[125] Moreover, if the ordinance makes the advancement of public services *voluntary* so that a developer only has to pay for these public services if he or she does not want to wait on the government to make the infrastructure improvements, the "exaction" characterization would seem inapplicable since development approval has not been conditioned on a dedication of money or real property. Rather, development approval is based on objective levels of services being satisfied. But, as noted by one commentator, a developer could 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 may also be seen as 'prerequisites' to development."[126]

If analyzed as an exaction, the condition imposed must satisfy the *Nollan* and *Dolan* "essential nexus" and "rough proportionality" two-prong test for land use exactions. This two-part inquiry is based on two different Supreme Court cases in which Nollan and Dolan were

[123] Ziegler, supra note 86, at § 6:51.
[124] Ziegler, supra note 86, at § 6:17.
[125] Habicht, supra note 118, at 226(20).
[126] The recent *Koontz v. St. John's River Water Management* case begs the question of whether local government should even offer conditions at all. Would it be best to just deny development approval until adequate public facilities are in place? The ordinance would therefore be judged under the *Penn Central* balancing of interests test, or the state equivalent balancing test for takings, and would likely be upheld. After the *Koontz* decision, it appears that the Supreme Court does not take kindly to burdensome, or purportedly burdensome, conditions placed on development approvals. *See Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013).

plaintiffs.[127] Prior to 2013, this two-part inquiry had only been applied to exactions involving the dedication of real property. However, in the 2013 case of *Koontz v. St. John's River Water Management District*,[128] the Court found that the *Nollan* and *Dolan* requirements for exactions (the two-part inquiry) apply to monetary conditions on development approval as well as real property dedication conditions.[129] In *Koontz*, the Court held that the "government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* when the government denies the permit and even when its demand is for money."[130]

In the case of *Nollan v. California Coastal Commission*,[131] the U.S. Supreme Court held that the government may not require a person to give up the right to receive just compensation when property is taken in exchange for a discretionary benefit conferred by the government when the benefit sought bears little or no relationship to the property for which the permit is sought.[132] To determine whether the benefit sought passes constitutional muster, an "essential nexus" must exist between the purpose for development condition and some need or problem created by the particular development.[133] In addition to the "essential nexus" test, the U.S. Supreme Court also requires that a development exaction be "roughly proportional" to the proposed development.[134] In *Dolan v. City of Tigard*,[135] the U.S. Supreme Court created the "rough proportionality" test to measure the degree of the development exaction relative to the development at issue. If the exaction requested by the government is not roughly proportional to

[127] *See Nollan v. California Coastal Commission*, 438 U.S. 825, 107 S.Ct 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).
[128] 133 S.Ct. 2586 (2013).
[129] Both *Nollan* and *Dolan* involved "developmental exactions," which have been described as "regulations which demand that a property owner dedicate some item of value to the city in return for the permission to build or develop a parcel of property."
[130] *Koontz*, 133 S.Ct. 2586, 2603 (2013).
[131] 438 U.S. 825, 107 S.Ct. 3141 (1987).
[132] *Nollan v. California Coastal Commission*, 438 U.S. 825, 107 S.Ct 3141 (1987); *see also Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S.Ct. 2309 (1994).
[133] Ziegler, supra note 86, at § 6:51.
[134] *See Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S.Ct. 2309 (1994).
[135] 512 U.S. 374, 114 S.Ct. 2309 (1994).

the development's expected impact, the exaction may be found to be a taking for which compensation is due. The Court in *Dolan* noted that although "no precise mathematical calculation is required" when measuring the degree of impact to the size of the exaction, the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[136]

If a court characterized the conditions imposed by APFOs as land use exactions, the ordinance would have to survive the "essential nexus-rough proportionality" review to survive constitutional muster. This means that the levels of service in the APFO must set standards that are proportionate to the anticipated impact of the new development on existing and anticipated facilities. This would satisfy the "rough proportionality" prong of the test. However, since an APFO requires a delay of development rather than a dedication of property or payment of money, the *Dolan* "rough proportionality" test appears inapposite. The "essential nexus" test may still apply, and if so, the APFO should satisfy this test so long as the proposed development is determined to have an impact on certain existing public facilities and create a need for new public facilities and services.

Georgia courts have likewise adopted the *Nollan* and *Dolan* "rational nexus-rough proportionality" test to determine the constitutionality of exactions.[137]

Due Process Challenges under Federal Law

The Fourteenth Amendment to the U.S. Constitution prohibits the government from depriving a person of life, liberty or property without due process of law.[138] Due process

[136] *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S.Ct. 2309 (1994).
[137] *See e.g. Parking Ass'n of Georgia v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994) ("Extractions for the public benefit are generally upheld if the two requirements are met: First, that the extraction is closely related to a particular problem generated by the owner's use of his land . . . and second, that the extraction represents the property owner's proportion of the particular problem.").

encompasses both substantive due process and procedural due process. Substantive due process of law requires that there be a substantial relationship between governmental regulation and the purpose of its enactment. Laws that are patently unreasonable or arbitrary and capricious can be challenged on substantive due process grounds. Procedural due process ensures that citizens receive notice and have an opportunity to be heard when governmental actions affect property rights.[139]

An APFO would meet this "arbitrary and capricious" standard if the ends selected were legitimate and the means to attain these ends rationally related. That is, the purpose of the APFO must be for the health, safety and welfare of the public (within the police power), and the regulations sought to attain it must actually advance the purpose of the regulation. To ensure procedural due process, the APFO must include clear standards to direct the decision making body in making its determination as to whether a development approval should be issued. These standards must also be enforced in a reasonable manner. As noted by one commentator, "[i]n addition to the need for enabling legislation and planning consistency, a concurrency ordinance must be enforced according to specific standards which prevent the legislative body from arbitrarily and capriciously enforcing the ordinance."[140] The criteria set forth in the APFO must be clear and reasonable such that a person of ordinary intelligence would be able to decipher if his or her project fell within the scope of the ordinance, and by what standards his or her application would be reviewed.

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[138] U.S. Const., amend. XIV.
[139] *Sikes v. Pierce,* 212 Ga. 567, 94 S.E.2d 427 (1956); *Tripp v. Hutchings*, 214 Ga. 330, 104 S.E.2d 423 (1958).
[140] Strachan, supra note 7, at 454.

Equal Protection Challenges under Federal Law

APFOs create classifications based on geographic boundaries and thus may be challenged under the Equal Protection clause of the U.S. Constitution or similar clauses in state constitutions.[141] The Equal Protection Clause of the Fourteenth Amendment demands that no State shall "deny to any person within its jurisdiction the equal protection of the laws,"[142] which is "essentially a direction that all persons similarly situated should be treated alike."[143] Equal Protection claims in the land use context generally arise from legislative zoning classifications which treat similar lands differently, similar uses differently, or treat similar land uses differently based upon the identity of the property owner.[144] Courts have interpreted the Equal Protection Clause to require zoning classifications not to be arbitrary and capricious but rather be "reasonable" in light of the governmental purpose furthered by the regulation.[145]

One argument that APFOs violate equal protection is that people wanting to move to areas lacking infrastructure are disproportionately burdened with paying for new infrastructure.[146] This argument seems unlikely to invalidate an APFO under the deferential standard of review courts employ when reviewing land use classifications. Courts typically subject growth management classifications to the rational basis review, and communities have little trouble overcoming equal protection challenges to land use regulations.[147] So long as the APFO does not discriminate in its classifications, it should survive equal protection review.

[141] Roskie & Custer, supra note 6, at 373-374.
[142] U.S. Const. amend XIV.
[143] *City of Cleburne, Tx. v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985).
[144] Ziegler, supra note 86, at § 4:1.
[145] *Id.* at 4:1.
[146] Roskie & Custer, supra note 6, at 374.
[147] *Id.* at 374.

The Right to Travel

APFO ordinances have also been challenged as violating the "right to travel." Though the word "travel" is not found in the text of the Constitution, the U.S. Supreme Court has found that a "constitutional right to travel from one State to another" exists in the jurisprudence of the Court.[148] This right is deemed to occupy "a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."[149] The right to travel "protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[150] Thus, the right to travel, an unenumerated right in the U.S. Constitution, "gives U.S. citizens the right to travel among the states, not *within* a state."[151] Though it could be argued that an APFO limits housing options for individuals looking to move from one state to another, this does not seem to be a persuasive argument or fit with the Court's "right to travel" jurisprudence. As such, an APFO does not violate the "right to travel."

Constitutional Challenges to a Proposed APFO under Georgia Law

Potential constitutional challenges to an APFO under the Georgia Constitution include claims that the APFO effects a taking of property for which just compensation is due, and that such an ordinance violates due process and equal protection. An APFO would most likely survive constitutional challenges under Georgia law so long as the ordinance sets forth clear

[148] *Saenz v. Roe*, 526 U.S. 489, 498, 119 S.Ct. 1518 (1999) *citing United States v. Guest*, 383 U.S. 745, 747, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966).
[149] *United States v. Guest*, 383 U.S. 745, 757-758, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966) (Citizens are "free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict the movement …").
[150] *Saenz v. Roe*, 526 U.S. 489, 500, 119 S.Ct. 1518 (1999).
[151] *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322 (1969) *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974).

criteria and standards for the issuance of an adequate public facilities permit and imposed only temporary holds on development permissions.

Takings under Georgia Law

The Georgia Constitution provides that ". . . private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid."[152] In the landmark case of *Barrett v. Hamby*,[153] decided in 1975, the Georgia Supreme Court articulated the state takings test that remains in place today. In *Barrett*, the Court held that it would determine whether there has been a taking of property in violation of the State Constitution by weighing the detriment to a landowner from a land use regulation against the government's legitimate interest in the regulation, and then looking to whether the regulation bears a substantial relationship to the public health, safety and welfare of the community.[154] As the Court in *Barrett* explained, when "the individual's right to the unfettered use of his property confronts the police power under which the zoning is adopted, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality or welfare."[155] Thus, Georgia courts utilize a literal balancing test to determine whether a land use regulation takes property in violation of the State Constitution. If the land use regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, the regulation is confiscatory and void.[156] Conversely, if the government's interest in a regulation outweighed the private interests of a party, the regulation will be upheld.

[152] Ga. Const. of 1983, Art. I, § III, ¶ I.
[153] 235 Ga. 262, 219 S.E.2d 399 (1975).
[154] *Barrett v. Hamby,* 235 Ga. 262, 265, 219 S.E.2d 399 (1975).
[155] *Id.* at 265.
[156] *Id.* at 265.

Land use ordinances are presumed valid under Georgia law.[157] Thus, the burden is on those challenging the ordinance to prove by "clear and convincing" evidence that the regulation take property or are being applied in an arbitrary and capricious manner.[158]

The term "significant detriment" has not been specifically defined by Georgia courts, and appears to depend on the particular facts and circumstances of the case. However, in determining the "significant" detriment to landowners under the *Barrett* balancing test, Georgia courts have consistently held that it is not sufficient to show that a more profitable use could be made of the property.[159] In other words, the key question for the courts is whether the property as currently used has some reasonable economic use. An APFO would still leave property with some reasonable economic use as any delays in development would be temporary, and therefore not permanently deprive the owner of putting his or her property to valuable use. Moreover, if developer advancements were optional in the APFO, a developer may not be delayed in putting the property to economic use.

Additionally, courts have used a set of six factors to determine the reasonableness of zoning decisions, which may be especially relevant if the authority to enact an APFO is found to exist through the zoning power. In G*uhl v. Holcomb Bridge Road Corp.,*[160] the Georgia Supreme Court articulated six factors it would consider when determining whether a zoning action of a local government was constitutional. These six factors have subsequently been incorporated into many local zoning ordinances in Georgia. These factors include:

(1) existing uses and zoning of nearby property;

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[157] *Gradous v. Board of Comm'rs of Richmond Cty*., 256 Ga. 469, 349 S.E.2d 707 (1986).
[158] *Gradous,* 256 Ga. 469, 349 S.E.2d 707 (1986); *see also City of Roswell v. Fellowship Christian School, Inc.*, 281 Ga. 767, 642 S.E.2d 824 (2007).
[159] *DeKalb County v. Chamblee Dunwoody Hotel Partnership*, 248 Ga. 186, 189, 281 S.E.2d 525 (1981); *Avera v. City of Brunswick*, 242 Ga. 73, 75, 247 S.E.2d 868 (1978).
[160] 238 Ga. 322, 232 S.E.2d 830 (1977).

(2) the extent to which property values are diminished by the particular zoning restriction;

(3) the extent to which the destruction of property values of the plaintiffs 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 land development in the area in the vicinity of the property.[161]

The potential delay in development approval cause by APFO also might be analyzed as a temporary moratorium on development under Georgia law,[162] similar to federal law. If APFOs are characterized as a type of development moratoria meant to delay the ability to develop property, the regulations will likely be upheld so long as the ordinance is reasonable and temporary.[163] Though Georgia courts have not had many occasions to clearly define the law of development moratoria, it has upheld the use of moratoria so long as the moratoria are reasonable and withstand the "temporary moratoria" test. In the case of *Davidson Mineral Properties v. Monroe County*,[164] the Georgia Supreme Court struck down "moratorium resolution" that left all building permits issuances up to the discretion of the Board of Commissioners.[165] No criteria were provided by which a building permit would issue, and no time frame was provided for how long the moratorium would remain in place.[166] The Court noted that the "moratorium in place in the resolution in question is not a temporary measure to maintain the status quo by prohibiting development," though it was characterized as such by the

[161] *Guhl v. Holcomb Bridge Rd. Corp*., 238 Ga. 322, 323, 232 S.E.2d 820 (1977).
[162] Roskie & Custer, supra note 6, at 367.
[163] *See Davidson Mineral Properties, Inc. v. Monroe County*, 257 Ga. 215, 357 S.E.2d 95 (1987); *see also* Roskie & Janna Blasingame Custer, supra note 6, at 360.
[164] 257 Ga. 215, 357 S.E.2d 95 (1987).
[165] *Davidson Mineral Properties, Inc. v. Monroe County*, 257 Ga. 215, 357 S.E.2d 95 (1987).
[166] *Id.* at 216.

local government.[167] The Court found that the resolution merely "establishe[d] a system whereby commercial development can proceed only by permission of the Board of Commissioners."[168] Because no objective criteria were provided in the resolution or elsewhere for the issuance of a building permit, the Court struck down the moratorium as "too vague, indefinite and uncertain to be enforceable."[169]

Thus, the *Davidson Mineral Properties* case stands for two principles relevant in the APFO context. First, suspensions on development must be temporary *in fact*. Local governments need to make a good faith effort to quickly and efficiently make public facilities available when new development is proposed so that the lag time between application and issuance of the adequacy (or APFO) permit is not unreasonably prolonged. Second, an APFO must include specific and clear criteria for the issuance of development permits. If clear standards are lacking, the ordinance will be challenged as violating due process.

Due Process under the Georgia Constitution

The Georgia Constitution that "[n]o person shall be deprived of life, liberty, or property except by due process of law."[170] Similar to federal due process, state due process affords citizens both substantive and procedural due process of law. A common procedural due process challenge to APFOs is that such ordinances fail to set forth clear and objective standards which a local governing authority will consider in its determination as to whether development permits may issue.[171] If an ordinance fails to include clear, objective standards for the issuance of an

[167] *Davidson Mineral Properties, Inc. v. Monroe County*, 257 Ga. 215, 216, 357 S.E.2d 95 (1987).
[168] *Id.*
[169] *Id.*
[170] Ga. Const. of 1983, Art. I, § 1, para. I.
[171] *See e.g. Davidson Mineral Properties, Inc. v. Monroe County*, 257 Ga. 215, 357 S.E.2d 95 (1987) (resolution set forth no objective criteria for the issuance of building permits and thus the Board's discretion as to whether to issue such permits was held to be arbitrary and capricious).

adequacy permit under the APFO, the ordinance will be invalidated.[172] Georgia courts require APFOS to include precise, objective and measurable standards.[173]

The substantive due process issue is more complicated.[174] Substantive due process requires there to be some rational relationship between the ends or goals sought to be achieved by the government and the means by which the government seeks to attain these ends. In short, the ends have to be legitimate and the means rationally related; arbitrary and capricious laws will be invalidated. Georgia courts have "conflate[d] the issues of takings and substantive due process, utilizing a balancing approach" that analyzes whether the government regulation at issue is substantially related to the health, safety, morals and welfare of the public.[175] This balancing approach was discussed above and first presented in *Barrett v. Hamby* to analyze takings claims under the Georgia Constitution. Under the balancing test, the government's interest is weighed against the "significant detriment" to the property owner. This balance measures the degree of the burden on the landowner (degree of confiscation), and is properly characterized as a takings analysis.[176] However, the *Barrett v. Hamby* balance also asks whether the government's interest in the regulation is substantially related to the health, safety, morals and welfare of the public.

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[172] *Davidson Mineral Properties*, 257 Ga. 215, 357 S.E.2d 95 (1987); *see also Lithonia Asphalt Co. v. Hall County Planning Comm'n*, 258 Ga. 8, 364 S.E.2d 860 (1988) (finding a zoning resolution void for vagueness as it contained insufficient objective standards and guidelines to meet the requirements of due process).

[173] Roskie & Janna Blasingame Custer, supra note 6, at 374.

[174] *Id.* at 374.

[175] *Id.*

[176] In *Lingle v. Chevron U.S.A.*, the U.S. Supreme Court differentiated between due process violations and takings claims, stating that due process is essentially a "substantially advances" inquiry that asks "whether a regulation of private property is *effective* in achieving some legitimate public purpose." 544 U.S. 528, 542, 125 S.Ct. 2074 (2005). Though related, this is not the correct questions in the Takings context as it "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights." *Id.* The Georgia Supreme Court has yet to unravel substantive due process from takings claims, which is why litigants typically challenge burdensome land use regulations on both fronts. *See e.g. Henry County v. Tim Jones Properties, Inc.,* 273 Ga. 190, 539 S.E.2d 167 (2000) (challenging Henry County's denial of a rezoning as both a violation of substantive due process and a taking for which just compensation is due).

This is essentially a substantive due process question as it employs an ends-means test[177] to determine the legitimacy and rationality of the regulation.

An APFO would satisfy this ends-means test so long as the goals of the ordinance were legitimate and the means to attain these goes were rationally related. That is, the purpose of the APFO must be for the health, safety and welfare of the public (within the police power), and the regulations set forth in the APFO must actually further these goals.

Equal Protection under Georgia Law

The Georgia Constitution, like its federal counterpart, requires that the State treat similarly situated individuals in a similar manner.[178] The constitutional guaranty of equal protection requires that all persons be treated alike under similar circumstances and conditions. If they are not treated alike, there must be a reasonable and rational basis which justifies different regulatory treatment for similarly situated landowners.[179] For there to be a denial of equal protection under the Georgia Constitution, the Georgia Supreme Court requires a plaintiff to show that an ordinance is either not being uniformly enforced by authorities or that a plaintiff has been arbitrarily singled out for prosecution.[180] In the case of *Dover v. City of Jackson*,[181] the court stated that even if a challenger was able to show differential treatment, a locality's interest in preserving residential character was a legitimate purpose of zoning and planning and therefore

[177] An ends-means test asks "in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose." *Lingle v. Chevron, U.S.A., Inc*., 544 U.S. 528, 542, 125 S.Ct. 2074 (2005).
[178] Ga. Const. of 1983, Art. I, § 1, ¶ II; *City of Atlanta v. Watson*, 267 Ga. 185, 475 S.E.2d 896 (1997).
[179] *See Rockdale County v. Burdette*, 278 Ga. 755, 604 S.E.2d 820 (2004).
[180] *See Matthews v. Fayette County*, 233 Ga. 220, 210 S.E.2d 758 (1974).
[181] 246 Ga. App. 524, 541 S.E.2d 92 (2000) *overruled on other grounds by Greater Atlanta Homebuilders Ass'n v. City of McDonough*, 2013 WL 3336655 (July 3, 2013).

would not violate equal protection law.[182] Georgia courts generally apply a rational basis test to review equal protection challenges.[183]

An APFO should be able to easily satisfy state equal protection law. The most important factor for a city or county to prove for equal protection purposes would be that the APFO is furthering a legitimate purpose of the APFO, and delayed development is a rational or reasonable means of attaining such legitimate purpose. Moreover, since legislative decisions are given substantial deference by courts, a challenger to an APFO on equal protection grounds would have an uphill battle.

Conclusion

Local governments in Georgia should consider enacting APFOs, especially those localities struggling with the issue of unprecedented metropolitan growth and its effect on infrastructure capacity. APFOs equip cities and counties with an effective tool for regulating the timing and sequencing of infrastructure development to ensure the pace of development does not exceed the locality's ability to provide adequate public facilities. While it is true that APFOs are untested in Georgia, such ordinances have been utilized elsewhere with some success, though more success seems likely if local governments are able to garner the necessary consensus from all stakeholders (government, development community, planners, etc.) before an APFO takes effect.

Ideally, the Georgia Legislature would draft enabling legislation explicitly delegating to local governments the power and authority to enact APFOs. However, even without a specific

[182] 246 Ga. App. 524, 541 S.E.2d 92 (2000) *overruled on other grounds by Greater Atlanta Homebuilders Ass'n v. City of McDonough*, 2013 WL 3336655 (July 3, 2013)*; see also* Roskie & Custer, supra note 6, at 389.
[183] *City of Roswell v. Fellowship Christian School, Inc.*, 281 Ga. 767, 642 S.E.2d 824 (2007) (when a suspect classification is not involved, "a local government may not treat similarly situated applicants differently unless there is a rational basis for that treatment.").

delegation of power, it seems very likely that the authority to enact an APFO could be implied through the zoning power, which each local governing authority in Georgia is constitutionally authorized to exercise. Finally, the question of constitutionality depends on how well the APFO is drafted and whether the delays it imposes on private property owners looking to develop land is temporary and reasonable. If the ordinance is properly drafted, and takes into consideration all possible avenues of attack, it would likely survive constitutional scrutiny under Georgia law and federal law.