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VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

RE: Clarence & Norma Hurteau by Findings of Fact,
John B. Kassel, Esq. Conclusions of Law
Miller, Eggleston & Rosenberg, and Order
Ltd. Application #6F0369-EB
P.O. Box 1489
Burlington, VT 05401-1489

I. SUMMARY OF PROCEEDINGS

On December 8, 1987, Clarence and Norma Hurteau filed an appeal with the Environmental Board from Land Use Permit #6F0369 issued by the District #6 Environmental Commission on November 10, 1987. The permit authorizes the Hurteaus to create an 84-lot residential subdivision in the Town of Georgia, Vermont.

At a prehearing conference on January 4, 1988, in St. Albans, parties to the appeal were determined to be the Hurteaus and the Town of Georgia School Board. With the agreement of the parties, the Board agreed to decide the issue of whether Act 250 confers authority to impose school impact fees prior to addressing the factual issues pursuant to Criterion 6. The parties completed briefing on the initial issue on February 8, 1988, and the Board heard oral argument on this issue in Mendon on February 24. On March 25, the Board issued a memorandum of decision affirming that Act 250 confers on the Board and district commissions authority to impose school impact fees.

On August 9, an administrative hearing panel of the Board convened a public hearing on this matter in Georgia, Chairman Leonard U. Wilson presiding. Parties appearing at the hearing included:

Town of Georgia School Board by Joseph Cahill, Esq.
Clarence & Norma Hurteau by Martin K. Miller, Esq. and
John Kassel, Esq.

After hearing testimony, the Board recessed the hearing subject to the filing of proposed findings of fact and conclusions of law, review of the record in this case, and preparation of a proposed decision by the panel.

On September 9, 1988, the Hurteaus submitted proposed findings of fact with a supporting memorandum of law. Along with arguing that the evidence in this case demonstrated the 'proposed project's compliance with Criterion 6, the Hurteaus' memorandum argued that the Board does not possess legal authority to impose impact fees. However, since that

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issue was addressed in the March 25 Board memorandum, it is not addressed here. Georgia also submitted a request for findings on September 9.

A proposed decision was sent to the parties on March 10, 1989, and the parties were provided an opportunity to file written objections, and to present oral argument before the full Board. On March 15, 1989, Georgia requested oral argument and on March 29 submitted a written response to the proposed decision. The Hurteaus filed a reply to Georgia's written submission on March 30. The Board convened a public hearing in Montpelier on April 15. On that date, following a review of the proposed decision and the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent that the parties' proposed findings of fact and conclusions of law are included below, they are granted; otherwise, said findings of fact and conclusions of law are hereby denied.

II. ISSUES IN THE APPEAL

The Hurteaus appealed Condition #13 of the permit, which imposes a school impact fee for each subdivision house pursuant to Criterion 6. The Hurteaus challenged the authority of the District Commission and the Environmental Board to impose school impact fees and the District Commission's determination that the proposed project would not impose an unreasonable burden on the ability of Georgia to provide educational services if school impact fees were assessed on the project.

Pursuant to Criterion 6, three issues are before the Board: (a) whether the proposed project will impose a burden on the ability of Georgia to provide educational services; (b) if so, whether this burden is "unreasonable"; and (c) if this burden is unreasonable, whether assessment of school impact fees is an appropriate remedy for this burden.

III. FINDINGS OF FACT

1. The Hurteaus propose to build an 84-lot single family home subdivision on approximately 167 acres of land in Georgia. The land is located in the south center of the town near Interstate 89, on Sandy Birch Road between Nottingham Drive and Town Highway #6. The proposed subdivision is known as "Laura's Woods."
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2. The Town of Georgia Planning Commission issued a permit for the proposed project on July 21, 1987. This permit provides for phased availability of housing units over ten years, allowing occupancy of eight units in the first year, twelve units in the second year, nine units in each of the next three years, eight units in each of the next four years, and five units in the last year.
 3. The District #6 Environmental Commission issued the Hurteaus Land Use Permit #6F0369 on September 30, 1987. This permit authorizes construction of the proposed project conditioned on payment to Georgia of a school impact fee of \$645.00 per housing unit.
 4. Georgia owns and operates a public educational facility for kindergarten through 8th grade (the K-8 facility). No other educational facilities are operated by Georgia. The K-8 facility consists of two buildings located on a parcel of land north of the area of town known as Georgia Center.
 5. The capacity of the K-8 facility is 575-600 students. Student enrollment at the K-8 facility for the 1988-1989 school year is 606 students. Consequently, the K-8 facility is operating beyond capacity during the 1988-1989 school year.
 6. Because of operation beyond capacity, certain adjustments have been necessary at the K-8 facility. Specifically, a lunch room in one of the buildings has been converted into two classrooms; the gymnasium has been used as a lunch room for a portion of each school day, reducing its availability for physical education use; and a temporary trailer is being used for some music classes.
 7. To meet state standards for approval of public schools, Georgia will be required to find classroom space at the K-8 facility for an art program and special reading and math programs. Because the K-8 facility is currently operating beyond capacity, the Board finds that the K-8 facility would not be able to provide the needed space unless it is expanded or the number of children using the facility decreases.
 8. The K-8 facility was operating well below capacity through 1985, during which 510 students were enrolled. However, in 1986 the student population jumped to just under capacity, with 588 students enrolled. The population increased to 598 students in 1987, and then
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to its current level of 606 students in 1988.

9. In the Arrowhead Development, located in Georgia near the proposed location of Laura's Woods, the average number of children per house in 1988 enrolled at the K-8 facility was .67. For Georgia as a whole, the average number of children per house enrolled at the K-8 facility in 1988 was .55. Over the last eight years, the average number of children per house enrolled at the K-8 facility for the town as a whole has been .58 per year.
 10. The Board finds that the number applicable to Laura's Woods of K-8 children generated per house is that of the town as a whole averaged over the last eight years. Although Georgia has argued that the Arrowhead Development number should be applied because Laura's Woods is comparable to that development, Georgia has not submitted sufficient evidence to prove that the two developments are comparable. Instead, Georgia has simply asserted that the developments are comparable because they involve "starter homes," without providing parameters for deciding what is a "starter home" or sufficient information on who lives in such homes. Given this lack of information, the Board finds that use of statistics for the Arrowhead Development is less reliable than use of statistics for the entire town. Also, use of statistics for 1988 is less reliable than use of statistics for the eight-year period ending 1988, since the eight-year period represents a longer-term trend.
 11. The Board finds it reasonable to project the number of K-8 children per home for Georgia as a whole onto Laura's Woods. The number for Georgia includes all homes in the town, from homes owned by younger families to homes owned by older families or non-parents. Georgia's rate therefore includes families whose children have grown and are no longer in grades K-8. Thus, projection of this number onto Laura's Woods allows for the movement of children from Laura's Woods through and out of the school system, and for a diversity of prospective buyers of homes in the subdivision similar to the diversity of homeowners already existing in the town.
 12. **Based on the number of K-8 children per house for Georgia of .58 per year, Laura's Woods will generate approximately the following numbers of children requiring K-8 education during the first ten years of the project:**
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<u>Year</u>	<u># Children, New Phase of Homes</u>	<u>Total</u>
Year 1	4.64	4.64
Year 2	6.96	11.6
Year 3	5.22	16.82
Year 4	5.22	22.04
Year 5	5.22	27.26
Year 6	4.64	31.9
Year 7	4.64	36.54
Year 8	4.64	41.18
Year 9	4.64	45.82
Year 10	2.9	48.72

Based on this table, Laura's Woods will generate 49 students requiring K-8 education during the project's first ten years. This represents an increase of 8% over the 1988-1989 K-8 enrollment of 606 students.

13. Georgia plans to construct additions to the K-8 facility to accommodate a projected increase in the K-8 population of 198 during the next ten years. Georgia plans to construct these additions because the increase in the K-8 population in recent years has been larger than anticipated, because of projected construction of several new subdivisions, including Laura's Woods, and because it must expand in order to meet state standards for approval of public schools.
14. The planned addition to the K-8 facility includes one additional classroom at each grade level for a total of 8,400 square feet, staff work areas totaling approximately 2,030 square feet, a multi-purpose room of approximately 2,400 square feet, and library space of 1,200 square feet. The addition's total size will therefore be 14,030 square feet. Construction costs of the addition will be \$75.00 per square foot. Accordingly, the total cost of the addition will be \$1,052,250. The State of Vermont currently provides 30% aid to pay for school construction costs. Assuming this rate remains approximately the same, Georgia will only have to pay for 70% of the construction cost, or approximately \$736,575.
15. Georgia plans to finance the construction of the K-8 addition through a ten-year bonded indebtedness. The **total amount of interest Georgia will pay on this indebtedness over ten years will be \$324,099.** Adding this to Georgia's construction costs, the total capital costs to Georgia of the addition will be \$1,060,674.

However, this amount must be reduced by further aid from the State of Vermont under the State aid to education plan. Currently Georgia is reimbursed by the State for 41% of education costs. Assuming that this funding level will remain approximately the same, the actual construction costs to Georgia of the addition will be 59% of \$1,060,674, or approximately \$625,798.

16. Students from Laura's Woods will use the addition in gradually increasing amounts because of the phased design of the facility. Specifically, the amounts and percentages of use by year will be:

<u>Year</u>	<u># Students</u>	<u>% Addition's Capacity</u>
Year 1	4.64	2
Year 2	11.6	6
Year 3	16.82	8
Year 4	22.04	11
Year 5	27.26	14
Year 6	31.9	16
Year 7	36.54	18
Year 8	41.18	21
Year 9	45.82	23
Year 10	48.72	25

Based on this table, Laura's Woods will contribute, over ten years, an average of 14.4% of the students for whom the new addition is planned to be built.

17. To determine the proportion of this cost attributable to Laura's Woods, the Board finds that the total cost of the addition to Georgia must be reduced by the percentage of the addition's square footage resulting from the need to meet state standards for public school approval. However, there is no evidence in the record on which to base a determination of the square footage needed to meet state standards. If such evidence were presented, the Board would reduce the total capital cost figure for the addition by an appropriate amount.
18. In the absence of a reduction for improvements to meet State standards, the percentage of the planned addition's cost potentially attributable to Laura's Woods should be calculated by multiplying the actual cost to Georgia by the percentage of students Laura's Woods will contribute to the planned addition. Calculated accordingly, the cost of the planned addition potentially attributable to Laura's Woods will be approximately \$90,114.
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19. Georgia assesses property taxes on homes in the town. Georgia would therefore assess property taxes on Laura's Woods. Assuming a value of homes in Laura's Woods of \$108,000, the property tax revenue to Georgia at the 1988 tax rate would be \$1,803.50 per home, which will be rounded to \$1,804 per home for purposes of easy calculation. Consequently, over the ten-year phase-in of the project, property tax revenues from Laura's Woods will be approximately:

<u>Year</u>	<u>No. Homes</u>	<u>Property Tax Revenue (\$)</u>
Year 1	8	14,432
Year 2	20	36,080
Year 3	29	52,316
Year 4	38	68,552
Year 5	47	84,788
Year 6	55	99,220
Year 7	63	113,652
Year 8	71	128,084
Year 9	79	142,516
Year 10	84	151,536

Based on this table, Laura's Woods will have generated a total of approximately \$891,176 in property tax revenue by the end of the ten year phase-in of the project. This period appears to be the same as the ten years during which Georgia will finance the planned addition. Further, the proposed project will continue to generate approximately \$151,136 per year in property taxes after Georgia has completed the planned addition's financing.

20. Georgia uses a portion of its property tax revenue to finance educational operating costs and bonded indebtedness relating to educational capital costs.
21. The Georgia school budget represented 85.7% of the entire town budget in 1987-1988. Approximately 3% of the Georgia school budget was used in 1987-1988 to finance capital cost-related bonded indebtedness.
22. The Town budget comes from property tax revenues. The Board finds it reasonable to assume that the percentage of property tax revenues going to education will stay at approximately 85.7%, and therefore that this percentage of the property taxes from Laura's Woods will be used by Georgia for educational purposes. Accordingly, Georgia will use for educational purposes

approximately \$764,046 of the property tax revenue from Laura's Woods by the end of the ten-year phase-in of the project. In addition, after the phase-in is complete, Georgia will continue to use for educational purposes approximately \$129,866 per year from the proposed project.

23. For purposes of this decision, the Board will assume that the portion of the school budget used for bonded indebtedness will remain at 3% over the ten-year phase-in of the project. Accordingly, by the end of the ten-year phase-in, Georgia will use to finance capital costs approximately 3% of the portion of property tax revenues from Laura's Woods going toward education, or \$22,921. Further, following the phase-in, Georgia will continue to use approximately \$3,896 per year in revenues from Laura's Woods to finance educational capital costs.
24. Subtracting the property tax revenues generated by Laura's Woods attributable to financing capital costs from the costs of the planned addition attributable to Laura's Woods, Laura's Woods will create a burden on Georgia's ability to provide educational services of \$67,192. However, this burden does not and should account for costs of the planned addition related to public school approval standards.
25. The burden on Georgia is reasonable. The total school budget for 1987-1988 was \$1,516,926; the burden resulting from Laura's Woods represents approximately 4% of this total. The Laura's Woods burden will not occur at once but will be phased-in over a ten-year period. Further, Laura's Woods will continue to generate revenue for Georgia to apply toward capital costs after the planned addition is completed. Finally, the actual increase in K-8 students generated by Laura's Woods will be only 8% at the end of the ten-year phase-in. While by itself such an increase might not be reasonable, it is reasonable in view of the phasing of the proposed project.

IV. CONCLUSIONS OF LAW

Act 250 prohibits issuance of a land use permit unless the Board or district commission makes a finding that a proposed project will not cause an unreasonable burden on the ability of a municipality to provide educational services. 10 V.S.A. § 6086(a) (6) (Criterion 6). Although

an applicant must provide sufficient evidence for the Board or district commission to make a positive finding, the burden of proof under this criterion rests with the opponent of the proposed project. 10 V.S.A. § 6088(b). Accordingly, if the Hurteaus provide sufficient evidence to allow the Board to make a positive finding, Georgia must prove: (a) that Laura's Woods will impose a burden on Georgia, (b) that this burden is unreasonable, and (c) that an impact fee is an appropriate remedy for this burden.

The Board believes that assessing the burden on Georgia can be done through the same calculation as would be made to assess the impact fee. In other words, the "burden" and the "impact" are the same, and can be expressed in a dollar amount.

Impact fee calculation is a complex matter. As court decisions nationwide indicate, the decision-maker must take into account numerous economic factors such as the cost of new facilities and the credit to be given for a project's revenue contributions other than through impact fees. In developing various factors to include, courts have emphasized that impact fee assessments must be reasonable and fair. See, e.g., Banberry Development Corp. v. South Jordan City, Utah, 631 P.2d 899, 901-902 (1981). Thus, for the Board to mandate an impact fee, it must have all the facts necessary to assess a fair fee.

The Board will therefore examine the burdens of proof in this case in light of the issues raised by Criterion 6 and the need to ensure that impact fees are fair.

A. Provision of Sufficient Evidence by the Hurteaus

The Board concludes that the Hurteaus have provided sufficient evidence on which to make a positive finding that Laura's Woods will not create an unreasonable burden on Georgia's ability to provide educational services. Although the Board does not agree with the Hurteaus concerning the conclusions to be drawn from some of the evidence they have provided, an examination of the record reveals that they have submitted information that the number of potential K-8 children from Laura's Woods will be 37.6 over ten years: the potential property tax revenues from the proposed project will be \$14,428 in 1988 for eight homes or \$1,803.50 per home; 85.7% of these revenues will be used for educational purposes; the fiscal impact on Georgia will represent only a small portion of the total school budget; and the proposed project will be phased in over ten years. In addition, the record shows that approximately three percent of the

1987-1988 school budget finances educational capital costs. Since the planned addition is to a facility which only is used by K-8 children, the Board is able to reach a positive conclusion on the basis of the information submitted by the Hurteaus that no unreasonable burden is created on Georgia's ability to provide educational services. Accordingly, the burden of proof shifts to Georgia with regard to the three issues cited above regarding the burden on Georgia, the reasonableness of this burden, and the appropriateness of fee assessment.

B. Burden/Impact on Georgia

The Board concludes that Georgia has not met its burden to prove that Laura's Woods would cause a burden on the ability of Georgia to provide educational services. In assessing the burden or impact on Georgia, central factors to consider are: (1) whether new facilities are necessary because of a proposed project; (2) if so, what the costs of these new facilities will be; and (3) whether credits should be given to the proposed project because of other revenues the proposed project will generate. In this regard, it is important for a party with the burden of proof to provide a formula for assessing these factors.

In testimony on its behalf, Georgia offered a formula for the Board to use in this matter, but this formula does not take into account all the actual debits and credits that must be considered to reach a fair result. The factors that should be accounted for are included below in the Board's discussion of the areas in which more information would be needed to find in Georgia's favor.

1. Need for Additional Facilities

To adequately determine whether new facilities are necessary because of the proposed project, the Board needs to know what current conditions are at the K-8 facility, the number of K-8 children that will be generated by Laura's Woods, whether improvements are needed to meet public school approval standards, and the aggregate number of K-8 children per year that existing homes in Georgia will produce in the future.

In this area, Georgia has provided some but not all of the evidence the Board considers relevant. For example, Georgia has not indicated the number of K-8 children expected to be generated by Georgia's existing population over the next ten years. Georgia also has not come forward with information as to whether portions of the planned

In addition are attributable to meeting public school approval standards. At oral argument on April 5, Georgia asserted that it only sought impact fees with regard to classroom space and that no increase in classroom space was needed to meet the approval standards. However, the record reveals that Georgia seeks impact fees for space relating to a library and a multi-purpose room as well as classrooms. Georgia also asserted at oral argument that the scope of the planned addition is in fact much greater than the proposal which formed the basis for the impact fee calculation and that this initial proposal excluded all improvements needed to meet the approval standards. The record contains no factual basis for these assertions.

2. Cost of Additional Facilities

With respect to the cost of any necessary additional facilities and services, the Board requires information concerning the construction costs of the planned addition to the K-8 facility, the percentage of the addition's excess capacity that will be used by K-8 students from Laura's Woods, the percentage of the construction costs for the planned addition that is attributable to meeting the State's public school approval standards, and whether the planned addition will include other improvements to raise the overall level of educational services being provided. Here again the Board has only some of the data needed for a decision. The record does not show what portion of the planned addition is needed to meet state standards, what the expected overall level of educational services will be, and whether Georgia is attempting to raise this level in planning the addition to the K-8 facility.

3. Credits Based on Other Sources of Revenue from Project

To assess the burden or impact fairly, the Board needs information concerning what credits should be given based on other sources of revenue from the project. In this regard, the Hurteaus have provided evidence showing property tax revenues which will mitigate the impact of the projected costs of the planned addition. Georgia has not submitted sufficient information to rebut this contention. In objecting to the proposed decision, Georgia did argue that property tax revenues go toward educational operation and not capital costs. But the record demonstrates that a portion of these revenues typically does cover capital costs relating to bonded indebtedness.

C. Reasonableness of Burden/Impact

The Board concludes that Georgia has not met its burden to show that any alleged educational burden is unreasonable. The Board believes that it must determine whether a burden is unreasonable in light of (1) the ability of the community as a whole to absorb the burden, (2) other burdens from developments which have been accepted or not accepted as reasonable by Georgia or other communities, and (3) other measures which might be taken, or factors which may exist, to mitigate the burden. In this regard, Georgia has discussed the Arrowhead Development but has not offered evidence on this development's fiscal burden on Georgia or whether this burden was reasonable. Further, Georgia has not shown what the cost per taxpayer will be if the planned K-8 addition's costs were spread to all town residents through the property tax. The Board does not believe that impact fees should only be assessed if a town cannot use the property tax to finance a project. The Board does believe that, to determine whether a burden is unreasonable, it is important to see what the burden might be on the individual taxpayer.

On the basis of the evidence presented, the Board must conclude that the burden represented by Laura's Woods is reasonable. The burden only represents approximately 4% of the total school budget. Due to the phase-in of the project, this burden will occur gradually rather than at one time. Once the phase-in is completed, Laura's Woods will continue to generate property tax revenues which will be applied to educational-related capital costs. Moreover, Laura's Woods will cause only a total net increase in the amount of K-8 students of 8%. Like the cost increase, the increase in the number of students will occur gradually over ten years. Accordingly, the Board determines that Georgia appears able to absorb the educational impact of Laura's Woods and no unreasonable burden is created.

D. Appropriateness of Impact Fee Assessment

The Board concludes that Georgia has not proven that an impact fee is appropriate. In evaluating whether an impact fee is appropriate, an important factor is the fairness of both the fee and the plan for its actual assessment. The fee funds must be spent within a reasonable time and only to remedy the impacts for which they are levied. Other comparable developments must be assessed impact fees or it must be shown that it is not unfair to single out a particular project. Further, measures must be taken to ensure that no unfairness results from failure to consider

appropriate time-price differentials that may arise if homeowners pay fees at different times due to the phased nature of the project.

Georgia has not offered a fair plan for assessing impact fees on Laura's Woods. It has not demonstrated that impact fees -are being assessed against other comparable developments in Georgia or that Laura Woods has a unique impact which makes it appropriate to single out that development for such fees. Further, assuming that fees are to be paid by home buyers at different times over the ten-year phase-in of the project, Georgia has not proffered a method for consideration of the time-price differential inherent in comparison of amounts paid at different times.

In Georgia's objections to the proposed decision, it argued that it did not have the burden to come forward with all the elements of an appropriate remedy such as impact fees. In support of its contention, it cited 10 V.S.A. § 6087(b), which states:

A permit may not be denied solely for the reasons set forth in subdivisions (5), (6) and (7) of section 6086(a) of this title. However, reasonable conditions and requirements allowable in section 6086(c) of this title may be attached to alleviate the burdens created.

This provision does not in fact address who bears the burden with respect to fashioning a remedy. Instead, it authorizes the Board and district commissions to impose remedies to alleviate burdens.

In a case in which the remedy sought is impact fees, the Board needs proper information on how to fairly assess the fees. Georgia, as the party affirmatively seeking such fees, must bear the burden of coming forward with adequate information for fair fee assessment.

E. Conclusion

The Board concludes that Georgia has not met its burden of proof with regard to whether Laura's Woods would create an unreasonable burden on Georgia's ability to provide educational services and on whether an impact fee would be an appropriate remedy for this burden. In contrast, the Hurteaus have provided enough evidence for the Board to make a positive finding in this regard. Accordingly, the Board

determines that Laura's Woods will not create an unreasonable burden on Georgia within the meaning of Criterion 6, and will revise Land Use Permit #6F0369 to delete Condition 13.

In concluding that Georgia has not met its burden of proof, the Board recognizes that it will be difficult and time-consuming for Georgia and other communities to provide the information necessary for fair assessment of impact fees. However, the Board is constrained by law to ensure that these fees are fairly assessed and must rely on parties seeking the Board to impose impact fees to provide the information necessary for such imposition.

V. ORDER

Land Use Permit Amendment #6F0369-EB is issued in accordance with the Findings of Fact and Conclusions of Law contained herein. Jurisdiction over this matter is returned to the District #6 Environmental Commission.

Dated at Montpelier, Vermont this 24th day of April, 1989.

ENVIRONMENTAL BOARD



Jan S. Eastman, Acting Chair
Lawrence H. Bruce, Jr.
Elizabeth Courtney
Arthur Gibb
Samuel Lloyd
W. Philip Wagner

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