

**INTRODUCED BY:** P. Brooks Banta  
**DATE INTRODUCED:** June 13, 2006  
**LEVY COURT PUBLIC HEARING DATE:** March 27, 2007  
**LEVY COURT PUBLIC HEARING TIME:** 7:15 P.M.  
**ADOPTION DATE:** March 27, 2007  
**EFFECTIVE DATE:** June 13, 2006

**ORDINANCE 07-09 (Schools)**

An Ordinance to amend Kent County Code, Vol. II, Chapter 187, Subdivision and Land Development effective June 10, 2003, as amended, by revising Article XVII, Supplementary Regulations to add a new §187-90.2 Adequate Public Facilities.

**NOW, THEREFORE, THE LEVY COURT OF KENT COUNTY, DELAWARE, HEREBY ORDAINS:**

**Section 1.** That the Kent County Code, Vol. II, Chapter 187, Subdivision and Land Development, Article XVII, Supplementary Regulations §187-90.2 Adequate Public Facilities, is hereby amended by striking the existing definition of the term “Adequate Public Facilities” as it appears in Subsection B thereof and by substituting in lieu thereof the following:

**Adequate Public Facilities** – Facilities and services relating to roads, schools, emergency medical services, and water supply and distribution systems meeting minimum acceptable Level of Service standards established by Kent County Levy Court.

**Section 2.** That the Kent County Code, Vol. II, Chapter 187, Subdivision and Land Development, Article XVII, Supplementary Regulations §187-90.2 Adequate Public Facilities, is hereby amended by striking the existing definition of the term “Adequate Public Facilities” as it appears in subsection B thereof and by substituting in lieu thereof the following

**Level of Service** – The performance standard adopted by Kent County Levy Court for the provision of roads, schools, emergency medical services and water supply and distribution. The adopted minimum acceptable Level of Service shall provide a basis for the establishment or expansion of a public facility or service, which is subject to this ordinance.

**Section 3.** Amend That the Kent County Code, Vol. II, Chapter 187, Subdivision and Land Development, Article XVII, Supplementary Regulations §187-90.2 Adequate Public Facilities, by adding a new subsection to the definition of the term “Capacity” as it appears therein to read as follows:

- C. For schools, student capacity ratings shall be determined in accordance with the most recent September 30 unit count and school capacity ratings established by and in accordance with the Delaware Department of Education.

**Section 4.** Amend That the Kent County Code, Vol. II, Chapter 187, Subdivision and Land Development, Article XVII, Supplementary Regulations §187-90.2 Adequate Public Facilities, is hereby amended by striking the existing definition of the term “State Rated Capacity” as it appears in Subsection B thereof and by substituting in lieu thereof the following definition:

**State Rated Capacity** - the rated student capacity of each school as determined by the Delaware Department of Education. Portable classrooms shall not be used in computing the school capacity for the purposes of this Ordinance.

**Section 5.** Amend That the Kent County Code, Vol. II, Chapter 187, Subdivision and Land Development, Article XVII, Supplementary Regulations §187-90.2 Adequate Public Facilities, by adding thereto a new subsection to §187-90.2 F to read as follows:

**4. Schools**

a. Before any proposed residential development project, other than a minor subdivision application, is accepted for consideration of approval by the Levy Court or Regional Planning Commission, a determination of compliance with the School Level of Service Standard of this Ordinance shall be rendered by the Department of Planning Services. The determination of compliance shall be based upon a finding that adequate capacity exists, or will exist, to accommodate increased demand for educational services in the school district within which the proposed residential development is located. Such determination shall indicate that:

- (1) Available capacity exists to accommodate the demand for educational services with the addition of the proposed residential development; or
- (2) Planned capacity improvements are scheduled for completion within two (2) years of the date of Final Plat or Site Plan approval exclusive of any capacity enhancements created pursuant to previously approved developer-funded mitigation program; or

- (3) The developer has executed an agreement to pay mitigation to the school district to compensate for the impact of the proposed subdivision based upon the mitigation formula as per the Delaware Department of Education Regulations. Per household unit mitigation contribution amounts shall be paid directly to the subject school district by the developer and in accordance with the Department of Education Regulations. Kent County shall not issue a certificate of occupancy for a housing unit governed by a mitigation agreement unless the School District has issued a letter verifying receipt of mitigation funds for that housing unit.

b. Level of Service Standards.

School district enrollment data as evidenced by the most recent September 30 unit count and student capacity ratings prepared by the Delaware Department of Education shall be utilized to determine the degree of compliance with the school Level of Service standards set forth below. The Levy Court and/or Regional Planning Commission shall determine the adequacy of school capacity according to the following criteria:

- (1) Elementary School Level of Service Standard. The Level of Service for elementary schools is considered adequate if the school district has available capacity to accommodate the existing student enrollment plus projected additional student enrollment from new development without exceeding of the State Rated Capacity for elementary schools in the school district.
- (2) Middle and High School Level of Service Standard. The Level of Service for Middle schools and high schools is adequate if the school district has available capacity to accommodate existing student enrollment plus projected additional student enrollment from new development without exceeding the State Rated Capacity established for middle and high schools in the school district.
- (3) Available capacity for individual schools shall be determined in accordance with Section c. Measuring for Available Capacity, below.

- (4) Final approval will not be granted for developments in the review process until the affected schools obtain adequate status, or the developer has executed an agreement to pay mitigation to the school district as described in Section F.1.a.(3).

c. Measuring For Available Capacity

- (1) Adequacy of every elementary, middle and high school serving the proposed development shall be initially measured at the time of pre-application consultation and preliminary plan review, and shall be finally measured and determined as of the date of final plan submission based upon data as published by the Delaware Department of Education.
- (2) For determination of available capacity, the Department of Planning Services shall analyze the most current enrollment data and student capacity ratings for the school district prepared by the Delaware Department of Education for adequacy. Projected additional student enrollment that would result from proposed development in conjunction with projected background enrollment growth shall be determined and included in this analysis.
- (3) Projected additional student enrollment shall be calculated by the Department of Planning Services by utilizing the most recent decennial census data for average school aged children per household, and by age cohort.
- (4) Background enrollment growth shall reflect projected enrollment increases associated with all additional approved, but not recorded major subdivision plans, and recorded but not built major subdivision plans in the school district.

d. Adequacy of School Capacity- Level of Service.

- (1) The projected Level of Service for the school district resulting from a proposed residential development shall be determined by the Department of Planning Services. The projected Level of Service shall be expressed as the percentage of state rated capacity that will be needed to sustain the total demand for educational services within the school district with the proposed residential development.

- (2) If it is determined that a residential development proposal would result in non-compliance with the Level of Service standards set forth in subsection 2.b., approval shall only be granted by the Levy Court or Regional Planning Commission when:
  - (a) The developer has executed an agreement to pay mitigation to the school district within which the proposed subdivision is located to compensate for the impact of the proposed subdivision based upon the mitigation formula as per the Delaware Department of Education Regulations; or,
  - (b) The developer reduces the residential density to reduce the impact on the school capacity to achieve compliance with the Level of Service standards of this Ordinance; or,
  - (c) The Levy Court or Regional Planning Commission stipulates a project phasing schedule that limits the construction of the project to a maximum annual build-out rate that achieves compliance with Level of Service standards.
- (3) Subdivision plans, conditional use site plans, or site plans that will not achieve compliance with the provisions of section d.(2) above shall not be approved by the Levy Court or Regional Planning Commission.

e. Limitations on Residential Building Permit Approvals

- (1) The Levy Court shall have the authority to limit the number of building permits for new residential units in school districts that do not have adequate student capacity as determined in Section F.1.d.(1).
- (2) The Levy Court may limit the number of residential building lots that may be approved for development on an annual basis in school districts for which all available school capacity has been utilized.

**Section 6. Vested Rights and Exemption from provisions of the Adequate Public Facilities Ordinance, Section 187-90.2. et. seq.**

- (a) Within 30 calendar days following the pre-application meeting set forth in Section 187-17, or 60 days after the adoption of this Ordinance whichever occurs last, an applicant may request exemption from any or all provisions of this Chapter based on good faith reliance on the state of law that existed prior to the enactment of this ordinance to his or her substantial detriment. Any request for exemption shall be in writing and submitted to the Planning Office.
- (b) Upon receipt of timely request, Kent County Levy Court shall provide a hearing to consider the request for exemption. At the hearing the applicant shall be permitted to appear and to show cause why an exemption should be granted. However, land cost alone does not qualify as an expenditure that would confer vested rights because the land is ordinarily usable under the new restrictions to the same extent as it was under the restrictions in place at the time of the pre-application meeting.
- (c) Kent County Levy Court shall apply a substantial reliance test to determine whether an applicant's development rights are vested due to good faith reliance on the subdivision ordinance under which he or she proceeded. Kent County Levy Court may approve or deny in whole or in part an application for exemption by weighing such factors as the nature, extent and degree of public interest to be served by the Adequate Public Facilities Ordinance amendment against the nature, extent and degree of the applicant's reliance on the state of the subdivision ordinance under which he or she proceeded. The nature and extent of applicant's reliance on the Subdivision Ordinance prior to the Introduction of the Adequate Public Facilities Ordinance may be established by various considerations, including but not limited to:
  - 1. Whether the applicant's reliance on the state of the ordinance was reasonable;
  - 2. Whether the applicant made extensive efforts to comply with the subdivision ordinance under which he or she proceeded.
  - 3. Whether the applicant expended substantial sums to comply with the ordinance under which he or she proceeded; and
  - 4. Whether the applicant's good faith reliance on the ordinance under which he or she proceeded was to his or her substantial detriment.

- (d) The provisions of this Section shall automatically terminate eighteen (18) months from the date of enactment.

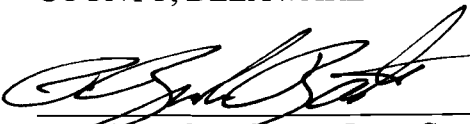
**Section 7. Severability.**

The provisions of this Ordinance are severable and if any of its provisions or any sentence, clause, or paragraph or the application thereof to any person or circumstance shall be held unconstitutional or violative of the Laws of the State of Delaware by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions which can be given effect without the invalid provision or application.

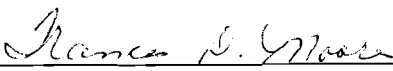
**Section 8. Effective Date.**

This Ordinance shall be effective upon enactment retroactive to the date of introduction.

ADOPTED BY THE LEVY COURT OF KENT  
COUNTY, DELAWARE

  
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President, Kent County Levy Court

This 27<sup>th</sup> day of March, 2007

ATTEST:   
Clerk of the Peace, *Deputy*

**SYNOPSIS:**

This ordinance establishes an Adequate Public Facilities Regulation limited to Level of Service standards for schools associated with new residential and non-residential development within Kent County.