Coates' Canons Blog: Court of Appeals Takes Expansive View of the Police Power

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UPDATE 3: In anopinion issued on 12 June 2014, the North Carolina Supreme Court reversed in part and affirmed in part the decision of the North Carolina Court of Appeals. I have blogged about the opinionhere andhere.

UPDATE 2: In anorder issued on 8 November 2013, the North Carolina Supreme Court granted the plaintiff's request for review of the ruling by the North Carolina Court of Appeals. Accordingly, the ultimate fate of the ordinances at issue in*King* will not be known until the supreme court issues a decision.

UPDATE: In an orderissued on 25 June 2013, the North Carolina Supreme Court granted the plaintiff's motion for a temporary stay. This action ensures that the ruling by the North Carolina Court of Appeals will not take effect before the supreme court has an opportunity to consider the plaintiff's request for further appellate review.

The decision of the North Carolina Court of Appeals in *George King, d/b/a George's Towing and Recovery, v. Town of Chapel Hill*, ____ N.C. App. ____ (2013), could breathe new life into the police power of local governments. The court upheld the legality of an ordinance aimed at curbing objectionable towing practices and rejected a challenge to an ordinance prohibiting cell phone use by drivers 18 years of age or older. This blog post analyzes *King* and what it means for the general ordinance making authority of local governments.

What is the "police power"?

The term "police power" often confuses people. It does not in most instances refer to law enforcement. Rather, in the local government context, the term stands for the broad authority the General Assembly has delegated to cities and counties in G.S. 160A-174 and G.S. 153A-121, respectively, to enact ordinances governing "acts, omissions, or conditions detrimental to the health, safety, or welfare of [their] citizens and the peace and dignity of [their jurisdictions]." (It also includes the authority to define and abate nuisances.) The police power underlies ordinances involving matters as diverse as loud noises, dangerous animals, door-to-door solicitations, overgrown vegetation, and business regulation.

The police power is subject to certain limitations, most of which are obvious. For example, a city or county may not infringe upon constitutionally protected liberties or authorize acts expressly prohibited by federal or state law. Some limitations are not so obvious, like the prohibition against ordinances regulating matters "for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation." G.S. 160A-174(b)(5). The courts sometimes disagree on whether a statute "clearly shows" a legislative intent to preempt local government action. *See, e.g., Craig v. County of Chatham*, 356 N.C. 40 (2002).

The judiciary's approach to local government authority

To put *King* in perspective, it is necessary to know something about how the North Carolina Supreme Court has approached prior challenges to the validity of ordinances.

Local governments are created by the General Assembly, and thus, they have only those powers delegated by law. In the 1870s the supreme court endorsed "Dillon's Rule," which basically holds that a local government's authority is limited to those powers expressly granted by statute or necessarily or fairly implied by such express powers. Thereafter the court frequently invalidated local government measures, especially those involving taxes or fees or the provision of services. *See generally* David W. Owens, *Local Gov't Auth. to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 Wake Forest L. Rev. 671 (2000).

In 1971 the General Assembly appeared to overrule Dillon's Rule, at least for cities, by enacting G.S. 160A-4. Section

160A-4 declares that the provisions of Chapter 160A – the basic laws pertaining to municipalities – "shall be broadly construed and grants of power shall be construed to include any additional and supplemental powers . . . reasonably necessary or expedient to carry them into execution and effect." In 1973, by enacting G.S. 153A-4, the legislature endorsed a nearly identical rule of construction for the primary statutes regarding counties.

Although G.S. 160A-4 and G.S. 153A-4, taken at face value, direct the judiciary to broadly interpret statutory grants of authority to cities and counties, the supreme court hasn't uniformly applied this broad construction mandate when examining the validity of ordinances. In *Homebuilders Association of Charlotte v. City of Charlotte*, 336 N.C. 37 (1994), the court held that Charlotte could charge reasonable fees for regulatory services, such as commercial driveway permit reviews, commercial inspections, and rezoning reviews, though no statute specifically authorized the fees in question. The court explained that G.S. 160A-4 required it "to construe in a broad fashion the . . . grants of power . . . in Chapter 160A."

Roughly five years later, however, without any reference to G.S. 160A-4, the court invalidated Durham's ordinance establishing a stormwater management program and the fee schedule used to fund the program. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999). While G.S. 160A-311 and G.S. 160A-314 allowed cities to operate fee-based stormwater "system[s]," the court held that Durham had exceeded statutory parameters by incorporating into its program components, such as oil recycling, not directly related to the physical management of stormwater.

Most recently, in *Lanvale Properties, LLC, v. County of Cabarrus*, 731 S.E.2d 800 (2012), the supreme court invalidated an ordinance adopted to reduce the strain of residential development on school capacity. The ordinance permitted the county to deny or conditionally approve a developer's application if a proposed development would exceed unused school capacity; developers frequently agreed to contribute funds for school expansion in amounts designated by the county in order to have their applications approved.

The court rejected the county's claim that the general zoning power authorized the ordinance, even though one of the purposes of the zoning statutes is to promote the "adequate and efficient provision of . . . schools." According to the court, the "plain language" of the zoning laws didn't expressly allow counties to address inadequate school capacity through the imposition of fees on developers. The court declined to apply G.S. 153A-4's broad construction mandate because it didn't regard the statutory provisions describing the zoning tools available to counties as ambiguous.

The *Smith Chapel* and *Lanvale* decisions have led some to ask whether the supreme court is predisposed to resolve any doubts about the validity of ordinances against local governments. If this is indeed the court's inclination, ordinances adopted pursuant to broadly written statutes like G.S. 160A-174 and G.S. 153A-121 could be especially vulnerable to legal challenges.

The*King* decision

On 2 May 2012, towing operator George King filed suit against the Town of Chapel Hill ("Town") over its ordinance regulating non-consensual towing from private parking lots ("Towing Ordinance"). The lawsuit also challenged the Town's ordinance banning the use of cell phones by anyone age 18 or older while driving ("Cell Phone Ordinance"). It asked the court to declare the ordinances invalid and prevent the Town from enforcing them.

The legislature had already placed some restrictions on non-consensual towing in G.S. 20-219.2. However, the statute applies only to certain counties and cities (the Town is one), and it expressly leaves local governments free to adopt their own regulations for the removal of automobiles from private lots "as authorized by general law."

At least in part, the Towing Ordinance was the Town's response to complaints from individuals whose vehicles were towed from private lots after they walked off the property to conduct business elsewhere. The ordinance prohibited non-residential property owners from enforcing a walk-off towing policy unless they prominently posted signs informing the public of their policy. It also directed towing firms to notify the police department before removing vehicles from private lots and capped towing charges and storage fees at amounts to be set annually by the Town's council. Additionally, the ordinance required towing firms to accept payment by credit or debit card, a measure designed to protect young people whose vehicles were sometimes towed late at night or early in the morning when cash was not readily available.

State law already banned the use of cell phones by drivers under the age of 18 and school bus drivers. The Cell Phone

Ordinance banned cell phone use within the Town's limits by drivers not subject to the statewide bans. A violation of the Cell Phone Ordinance could result in a $25 fine but no driver's license points. Moreover, a police officer could not stop a motorist solely for violating the Cell Phone Ordinance; there had to be another lawful reason for the stop.

The trial court declared that both ordinances were invalid. In particular, the court ruled that the Towing Ordinance was unlawful because (1) G.S. 20-219.2 provided the only statutory basis for the ordinance and (2) G.S. 20-219.2 violated the prohibition in Article II, Section 24 of the state constitution against local acts regulating trade. Regarding the Cell Phone Ordinance, the court concluded that the legislature had preempted such local measures by imposing statewide restrictions on drivers' cell phone usage. Lastly, the court determined that enforcing the ordinances would violate the plaintiff's rights and issued an injunction preventing their enforcement.

The North Carolina Court of Appeals reversed the trial court, holding in a unanimous opinion that the Towing Ordinance represented a lawful exercise of the Town's police power under G.S. 160A-174. Because it sustained the ordinance as a valid exercise of the Town's police power, the court of appeals didn't examine the constitutionality of G.S. 20-219.2.

In interpreting G.S. 160A-174, the court applied the broad construction mandate in G.S. 160A-4. It did so based on its view of how the supreme court's decisions in *Homebuilders*, *Smith Chapel*, and *Lanvale* should be reconciled. According to the court of appeals, those cases collectively hold that G.S. 160A-4 and its counterpart G.S. 153A-4 apply only when the statute cited to support an ordinance is ambiguous; if the meaning of the statute is clear, judges must apply the law as written. The court observed that, unlike the zoning statutes at issue in *Lanvale*, G.S. 160A-174 does not list "specific circumstances" in which the authority it confers may be employed. Instead, the statute authorizes cities "to regulate the broad categories of 'health,' 'safety,' and 'welfare' to the end of ensuring 'peace and dignity' and 'defin[ing] and abat[ing] nuisances.'" The court reasoned that, given the "far-reaching meanings" of the key terms in G.S. 160A-174, the statute is ambiguous and must therefore be interpreted pursuant to G.S. 160A-174.

The court of appeals didn't rule directly on the lawfulness of the Cell Phone Ordinance. It reversed the trial court's ruling because the plaintiff had failed to show the "irreparable harm" required to obtain an injunction. The court noted that the plaintiff hadn't actually been cited for violating the Cell Phone Ordinance and that he could be cited for future violations only if stopped for another valid reason. The court appeared to question whether the consequences for violating the ordinance – a $25 fine with no driver's license points – would sustain a finding of irreparable injury.

Takeaways from*King*

1. The court of appeals takes a generous view of the police power delegated to local governments by G.S. 160A-174 and G.S. 153A-121. The Towing Ordinance regulated everything from the amount a towing firm could charge to the wording property owners had to include on signs informing the public of their towing policies, but the court had little trouble concluding that the expansive language in G.S. 160A-174 authorized those measures.
2. If an ordinance is valid under G.S. 160A-174 or G.S. 153A-121, it doesn't matter whether an alternative statutory basis for the ordinance is lawful. Thus, having deemed the Towing Ordinance a proper exercise of the Town's police power, the court of appeals didn't review the plaintiff's constitutional objections to G.S. 20-219.2.
3. Cities and counties should avoid taking *King* too far. The *King* decision doesn't mean that, when addressing matters that fall within the broad categories of G.S. 160A-174 or G.S. 153A-12, local governments may ignore the requirements of more detailed statutes when it's clear that those requirements were intended to govern a particular situation. For example, though business regulation is part of a city's police power, a city generally may not adopt an ordinance limiting business activity on Sundays without first holding the public hearing described in G.S. 160A-191.
4. The authority of local governments to restrict cell phone use by drivers remains unsettled. The North Carolina Department of Justice has issued an advisory letter asserting that state law preempts local regulation in this area, but such letters do not bind the judiciary. This issue probably won't be resolved until a driver who has actually been cited for violating a cell phone ordinance challenges the citation in court.
5. It might turn out that *King* doesn't inaugurate a new era of deference to local governments in the exercise of their police power after all. The supreme court could take a more restrictive view of the police power than *King*.

Links

- appellate.nccourts.org/opinions/?c=1&pdf=31737
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