Coates' Canons Blog: Is North Carolina a Dillon's Rule State?

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North Carolina is often described as a "Dillon's Rule" state. What does that mean? Is it the opposite of home rule? Does it mean our courts apply Dillon's Rule in interpreting the scope of local government authority? Or does it simply reflect the fact that local governments in North Carolina have no inherent authority and derive all of their authority from the state?

The answer is "none of the above." North Carolina cases no longer apply Dillon's Rule and we're not a home rule state. Recent cases analyzing the scope of local government authority apply the "plain meaning" rule of statutory interpretation, which allows application of the legislative "broad construction" rule only in cases where the enabling legislation is ambiguous. The most recent North Carolina Supreme Court case addressing this subject, however, gives me pause. For while the court cites with approval the line of cases rejecting Dillon's Rule, it applies a rule that appears to be as strict, or perhaps even more strict, than Dillon's Rule.

Confused? You're not alone. This blog post summarizes the evolving case law in attempt to answer the question: What rule or standard should North Carolina courts use in determining whether a particular action by a local government is authorized under state law?

Home Rule vs. Dillon's Rule?

If this were a sporting event, it would be like comparing the 49ers vs. the Yankees. These two "rules" are usually described as if they are opposites, or alternatives within a common framework. In fact they are distinct legal concepts, which relate to each other only in the sense that they affect the scope of local authority: Dillon's rule, through court interpretation; home rule through state legislative delegation.

Dillon's rule is a legal standard sometimes used by courts when reviewing the legality of specific local government actions. The "rule" refers to a standard for judicial interpretation – a guide for judges suggesting that municipal powers should be narrowly construed. It was developed by John Forest Dillon, a judge and scholar who wrote a famous treatise in 1872 about local government law. The rule says:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation–not simply convenient, but indispensable."

Home rule describes the scope of authority that some states delegate to local governments. In our country's system of government, each state creates local governments, which derive all of their authority from the state. The form of the delegation of authority varies from state to state. In a home rule state, cities are granted broad powers over matters of local concern. So the "rule" in home rule isn't a rule of interpretation. It refers to the power the local government has to make its own rules.

North Carolina is not a home rule state. Here, authority is not granted through a broad delegation, but through numerous subject-specific general statutes and local acts. (In my article Do North Carolina Local Governments Need Home Rule? I compare North Carolina's structure to the structure in home rule states.) The granting of home rule authority in a particular state eliminates the need for individual subject-by-subject statutory authority. The local unit has general authority over matters of local concern. (For an insight to some of the challenges of determining what constitute matters of local as opposed statewide concerns, see my earlier blog post "Postcards from Home Rule States".)

Dillon's rule becomes a short hand for non-home-rule states like North Carolina because the lack of broad home rule delegation requires courts to analyze the scope of individual enabling statutes, often using the narrow Dillon's rule standard of review. But courts in home rule states sometimes apply Dillon's rule, and some non-home rule states don't apply Dillon's rule. So the notion that you're either a home rule state or a Dillon's rule state is simply wrong.

The Rule in North Carolina

More to the point, North Carolina is neither a Dillon's rule state nor a home rule state. Instead of a broad delegation of authority, North Carolina local governments operate under authority granted by individual statutes, including specific statutes directing courts to interpret the grants of authority broadly (G.S. 160A-4; 153A-4). Notwithstanding that legislative directive, our courts have, I think it's fair to say, meandered among various standards in the course of our state's history, struggling to adopt a consistent standard for analyzing the scope of local authority.

School of Government faculty members have written about this in several contexts. In addition to my article on home rule, David Owens provides a detailed history of this issue in *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform and the Current State of Affairs in North Carolina,* 35 Wake Forest Law Review 671 (2000). The title of an earlier article by Fleming Bell captures the challenge of keeping up with the changing judicial approach; *Dillon's Rule is Dead: Long Live Dillon's Rule!* Local Government Law Bulletin no. 66 (1995).

The Latest Chapter: Lanvale Properties, LLC v. Cabarrus County and the City of Locust

The North Carolina Supreme Court recently ruled that Cabarrus County lacked authority to adopt an adequate public facilities ordinance [APFO]. David Owens describes the main holding in his blog post here. In describing the standard of judicial review that applies to this type of question, the Court acknowledges: "This Court's general approach to construing the legislative authority of local governments has evolved over time." Slip op. at 16. The Court goes on to summarize the history (citing the Owens law review article), from broad construction in the mid-1800's to the use of Dillon's rule, later in that century, and the enactment in the 1970's of the legislative directive for broad construction. Slip op. at 16-18.

The broad-construction statutes provide:

It is the policy of the General Assembly that the counties and cities of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.

The Court notes that its initial application of the broad-construction statutes in the zoning cases "was inconsistent." Slip op. at 18. The court rejected the county's assertion, however, that the court should always apply the broad construction standard.

"The principal flaw in the County's argument is that section 153A-4 is a rule of statutory construction rather than a general directive to give our general zoning statutes the broadest construction possible… If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." Slip op. at 19.

The Court went on to conclude, as outlined in Owens' blog post, that the zoning statutes are not ambiguous, and that they do not explicitly or implicitly authorize the APFO. While the main concern in the decision seems to be that the ordinance had the effect of imposing an unauthorized fee on applicants, the court invalidated the entire ordinance, and the potential impact of the decision is quite broad. As noted in a recently filed petition for rehearing, the decision's narrow reading of powers that might be implicit in the zoning laws may call into question numerous regulations that are not explicitly outlined in the laws themselves, but are commonly recognized as being within the legislative intent for land use regulation by local governments.

The application of the "plain meaning" rule in this context starts to look a lot like Dillon's rule, which allows only those powers "granted in express words." Of course, even Dillon's rule includes those powers necessarily or fairly implied in or incident to the power expressly granted. The ruling in *Lanvale* seems to create a rule for North Carolina that is even

narrower than Dillon's rule. Indeed, there is something about the result that appears not to be fully consistent with the legislative directive to provide "adequate authority" and to construe explicit powers as including those "reasonably expedient" to the exercise of the powers granted.

The Plain Meaning of the Broad-Construction Statutes

Courts understandably must exercise restraint to avoid rewriting legislation and supplanting the role of the legislature. The threshold need for ambiguity in the statutory construction plain language rule gives permission, if you will, for the court to move beyond the words of a statute and consider alternative meanings. I suggest that there may be a difference between the question of whether a statute is "ambiguous" (defined as doubtful or uncertain; capable of being understood in two or more possible senses or ways) under the plain meaning standard, and the question of what powers should be construed to be included in and reasonably expedient to the explicit authority conferred by statute, under the broad-construction statutes. The broad-construction statutes recognize that the authority granted includes certain implied powers. In effect, the legislature has, in plain words, given the court permission, indeed arguably a mandate, to interpret the statutes broadly, and to include in that interpretation any powers that are reasonably expedient to the exercise of the power authorized in the statute. Perhaps it's not too much of a stretch to suggest that the whole purpose of the broad-construction statutes was to recognize that the many subject-specific enabling statutes could not reasonably be expected to (and perhaps were not intended to) include and delineate every permissible activity.

The Court interprets the statute, however, to apply only in the case of an ambiguity, despite the fact that there is no legislative intent reflecting such a limitation in the statute itself. As stated in the opinion, "section 153-4 applies only when our zoning statutes are ambiguous, or when its application is necessary to give effect to 'any powers that are reasonably expedient to [a county's] exercise of the power'" Slip op. at 19-20. While the adherence to the plain meaning of statutes is appropriate in the absence of any contrary legislative intent, the broad-construction statutes appear to be plain and explicit in their directive to construe enabling legislation to include implied powers, perhaps even if the language of an enabling statute is not "ambiguous" in the commonly understood meaning of that word.

Links

- en.wikipedia.org/wiki/John_Forrest_Dillon#Dillon.27s_Rule
- en.wikipedia.org/wiki/Home_Rule_in_the_United_States
- scholarship.law.unc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4236&context=nclr
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