
Coates' Canons Blog: *King v. Town of Chapel Hill*: The Supreme Court Issues a Major Decision on the Police Power of Local Governments (Part 1)

By Trey Allen

Article: <https://canons.sog.unc.edu/king-v-town-of-chapel-hill-the-supreme-court-issues-a-major-decision-on-the-police-power-of-local-governments-part-1/>

This entry was posted on June 26, 2014 and is filed under Constitutional Issues, Enforcement, General Local Government (Miscellaneous), Ordinances & Police Powers, Police Power Regulations, Statutory Authority & Construction

In *King v. Town of Chapel Hill*, the North Carolina Supreme Court issued what could be its most significant decision yet on the general police power of local governments. Somewhat predictably, media coverage tended to focus on the portion of the court's opinion striking down Chapel Hill's ban on mobile phone use by drivers 18 years of age or older. The mobile phone ruling may be the least important aspect of a complex opinion that, taken as a whole, represents a substantial victory for cities and counties.

I have explained the police power's basic features and summarized the facts and procedural history of *King* in a previous blog post, so my comments here on those topics will be brief. The general police power of cities comes from G.S. 160A-174, which authorizes them to adopt ordinances that "define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of [their] citizens." The primary issue in *King* was whether this general police power allowed Chapel Hill to adopt ordinances regulating the involuntary towing of automobiles from private lots and the use of mobile phones by adult drivers.

The towing ordinance prohibited the removal of an automobile from a private lot without the vehicle owner's permission unless certain public notice requirements were met. Signs had to be posted on the lot at designated intervals warning that it was a tow-away zone. The ordinance specified the content and minimum dimensions of the signs and the size of their lettering. It capped the towing and storage fees that towing companies could charge the owners of involuntarily towed vehicles at amounts to be set annually by the town council. Towing companies had to accept payment by cash, debit card, and at least two major credit cards at no extra cost to the owners of towed vehicles. The mobile phone ordinance prohibited individuals 18 years or older from using mobile phones while driving in Chapel Hill. A violation of the 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 mobile phone ordinance; there had to be another lawful reason for the stop.

In a unanimous opinion, the North Carolina Supreme Court upheld the signage requirements as a legitimate exercise of the town's police power under G.S. 160A-174. It further ruled that the town could require towing companies to accept multiple forms of payment. The court struck down the specific limitations on towing and storage fees, however, as well as the ban on passing credit card fees on to the owners of involuntarily towed vehicles. The court likewise invalidated the mobile phone ordinance, holding that statewide restrictions on the use of mobile phones by certain categories of drivers establish that the General Assembly has preempted local regulation on this subject.

There are many points that local governments should take away from *King*. Seven points that I think are worthy of attention are discussed below. Additional points will be addressed in a subsequent blog post.

1. The provisions of G.S. 160A-174 must be interpreted broadly.

Prior to the enactment of G.S. 160A-4, North Carolina judges applied the longstanding principle known as Dillon's Rule to narrowly interpret statutes granting authority to cities. Through the enactment of G.S. 160A-4 the legislature directed the judiciary to "broadly construe[]" the statutes in Chapter 160A – the basic laws pertaining to cities – and to interpret any grants of power therein "to include any additional and supplemental powers . . . reasonably necessary or expedient to carry them into execution and effect." (See my previous blog post on *King* for more information about the Dillon's Rule era in North Carolina.)

The wording of the broad construction mandate in G.S. 160A-4 might appear to leave no doubt that it applies to G.S. 160A-

174, which is part of Chapter 160A. Nonetheless, it was not clear before *King* that the supreme court would broadly interpret G.S. 160A-174. The court previously adopted a rule of construction that G.S. 160A-4 applies only when a statute in Chapter 160A is ambiguous. Both the supreme court and the court of appeals invoked this rule in cases involving statutes other than G.S. 160A-174. In each such case, the court reasoned that the provision at issue was not ambiguous, and thus, recourse to G.S. 160A-4 was unnecessary.

What convinced the supreme court to apply G.S. 160A-4 to G.S. 160A-174 in *King*? According to the court, the police power conferred on cities by G.S. 160A-174 “is by its very nature ambiguous, and its reach cannot be fully defined in clear and definite terms.” The court determined that it had to apply G.S. 160A-4’s broad construction mandate to the provisions of G.S. 160A-174 because interpretation of the police power is unavoidable.

2. By implication, the provisions of G.S. 153A-121 must be interpreted broadly.

G.S. 153A-121 endows counties with the same general police power over their unincorporated areas that cities enjoy within their borders. G.S. 153A-4 sets forth a rule of construction for the county statutes in Chapter 153A nearly identical to the broad construction mandate in G.S. 160A-4. The supreme court’s reasoning in *King* necessarily implies that G.S. 153A-121 must be interpreted broadly pursuant to G.S. 153A-4.

3. Regulation of involuntary towing falls within the scope of the police power.

The supreme court held that a broadly construed G.S. 160A-174 allows cities to regulate involuntary towing from private lots. The court observed a basic tension between the right of business owners to reserve their parking lots for their customers and the right of vehicle owners to make use of their automobiles. It opined that involuntary towing implicates the health, safety, and welfare of the public in that towing “can leave unknowing drivers without means of transportation and can lead to altercations between vehicle owners and towing personnel.” According to the court, “[i]n an urban setting, the general power to regulate towing ameliorates these dangers” and enables cities to balance the property rights of business owners against those of automobile owners.

Does the court’s use of the phrase “[i]n an urban setting” mean that counties may not rely on their general police power to regulate involuntary towing in more rural environments? I doubt it. As in cities, the involuntary towing of automobiles from private lots in unincorporated areas can leave drivers without means of transport and trigger verbal or physical confrontations. The supreme court did not say that problems with involuntary towing have to be pervasive, or even documented, for a local government to act.

4. The police power covers a host of other activities and circumstances.

Although G.S. 160A-174 does not mention towing, the supreme court held that involuntary towing is subject to the police power because it could identify plausible ways in which the practice might threaten the health, safety, or welfare of the public. Significantly, the court did not require the town to show that the threats posed by involuntary towing had actually materialized. Nothing in the record before the court, for instance, demonstrated that altercations between automobile owners and tow truck operators had become a common occurrence in Chapel Hill.

Many other cases similarly indicate that a plausible connection between a matter and the general health, safety, or welfare is enough to bring the matter within the scope of a local government’s police power. For example, in *State v. Maynard*, 195 N.C. App. 757 (2009), the court of appeals held that a city’s stated concerns about odor and noise problems permitted it to regulate the number of dogs that could be kept per lot. The city did not have to prove that dogs were actually responsible for widespread odor and noise problems.

Any number of other activities or circumstances could pose plausible risks to the well-being of a local government’s citizens. The *King* case and other precedents show that a local government may exercise its police power over such activities or circumstances without waiting for a crisis to erupt.

Here I should note that the General Assembly has enacted statutes expressly extending the police power of cities and counties to certain matters, such as flea markets and noises that disturb, annoy, or frighten their citizens. In so doing, the legislature has been careful to preserve the broad reach of the police power by inserting provisions in both Chapter 160A and Chapter 153A declaring that the enumeration of specific matters subject to the police power is not exclusive.

On the other hand, while the reach of the police power is undoubtedly broad, federal or state laws sometimes expressly or impliedly remove subjects from local control. The General Assembly, for example, recently enacted statutes that bar cities and counties from adopting ordinances which prohibit the sale of soft drinks above a particular size. (My next blog post will say more about state and federal preemption of local measures as part of its discussion of the supreme court's invalidation of Chapel Hill's mobile phone ordinance.)

5. When a problem falls within the scope of the police power, local governments may impose requirements reasonably calculated to address the problem.

Finding that an ordinance concerns a subject within the scope of the police power is not the same thing as concluding that the particular requirements imposed by the ordinance constitute a valid use of the police power. This distinction is evident in *King*, where the court first ruled that involuntary towing is a proper subject for local regulation and then evaluated the lawfulness of the specific towing ordinance provisions in controversy.

As noted above, the court held that G.S. 160A-174 allowed Chapel Hill to ban involuntary towing unless detailed signage requirements were satisfied and to specify the forms of payment that towing companies had to accept. The court characterized the signage requirements as the town's "rational attempt" to notify drivers of lot owners' towing policies and prevent conflicts between citizens and tow truck operators. It further reasoned that "[r]equiring towing companies to accept credit and debit cards bears a rational relationship to a broad interpretation of citizen safety or welfare by enabling vehicle owners to quickly and easily regain access to their vehicles."

Simply put, the court upheld the signage and form-of-payment provisions because they were reasonably connected to the town's interest in avoiding or mitigating the problems that can arise from involuntary towing. The court's approval of these provisions establishes that the police power of cities and counties encompasses the authority to impose obligations, even extensive ones, on private businesses or individuals, so long as the obligations are reasonably calculated to address a problem that falls within the scope of the police power. A city or county does not have to produce evidence that a measure will have or has had the intended effect for it to be lawful.

There are important limitations to the reasonableness standard applied in *King*. Some of the provisions in Chapter 160A and Chapter 153A condition the exercise of the police power over specific matters. For instance, while a county has the authority to remove, abate, or remedy "everything that is dangerous or prejudicial to the public safety," G.S. 153A-140 forbids it from employing this power unless it provides the owner adequate notice, the right to a hearing, and the right to appeal to the appropriate court.

The bottom line is this: When a local government considers adopting specific measures to combat a particular problem, it should satisfy itself both that the measures are reasonably related to the problem and that they comply with any relevant statutory requirements.

6. The supreme court disfavors fee provisions that directly threaten the capacity of businesses to make profits.

Unlike the signage and form-of-payment provisions, the towing ordinance's fee provisions did not pass muster with the supreme court. The court was unable to discern any rational relationship between them and the "health, safety, or welfare" of Chapel Hill's citizens. According to the *King* opinion, not even an expansive reading of G.S. 160A-174 could justify the fee caps on involuntary towing. Upholding the fee limits, the court argued, would expose other private enterprises "not only to price setting but also to officious and inappropriate regulation of other aspects of their businesses."

The court's conclusion that the fee caps bear no rational relationship to the public welfare is not entirely persuasive. It is easy to imagine scenarios in which outrageous towing fees lead to confrontations between citizens and tow truck operators. Additionally, such fees could make it difficult for owners to regain possession of their automobiles. Thus, the very same rationales that prompted the court to uphold the towing ordinance's signage and form-of-payment provisions

appear to support the fee provisions.

It seems to me that the court struck down the fee caps chiefly out of concern over the cumulative effect the towing ordinance might have on the financial viability of towing companies. The court remarked that it has a duty to prevent arbitrary government actions that interfere with the fundamental right of individuals to enjoy the fruits of their labor. See N.C. Const. art. I, § 1. By imposing regulatory burdens on the towing companies and capping their fees, the court explained, Chapel Hill had “inappropriately place[d] the burden of increased costs incident to the regulation solely on towing companies.” In other words, the fee cap unacceptably impaired the ability of towing companies to recover the additional costs they would incur by complying with other parts of the towing ordinance. This same logic prompted the court to strike down the towing ordinance’s ban on passing along credit card fees, which the court described as tantamount to a fee cap.

The court’s decision to invalidate the fee provisions can also be understood as a manifestation of its historic reluctance to uphold local government fees for which there is no express statutory authorization, displayed most recently in *Lanvale Properties, LLC, v. County of Cabarrus*, 366 N.C. 142 (2012). 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). The supreme court suggested in *King* that the towing ordinance’s fee provisions would have withstood judicial scrutiny if they had been expressly authorized by the General Assembly. According to the court, the relationship between the fee provisions and the public welfare was too “attenuated” for the fee provisions to survive without such authorization. The court pointed to the statute allowing cities to set taxi-cab rates as an example of the kind of statute it had in mind.

Several of my colleagues at the School of Government have long advised that the risk of judicial disapproval is real when local governments adopt fees without a clear mandate from the legislature. Although the towing ordinance did not impose fees in the traditional sense, it did impose direct costs on towing companies by reducing their capacity to make profits and requiring them to absorb the fees charged by credit card companies.

7. The *King* decision should make it easier for local governments to defend against lawsuits alleging that they have exceeded their statutory authority.

Obviously, the more broadly the police power is interpreted, the more authority it grants to local governments. The broad interpretation given to the police power in *King* should make it more likely that local governments will prevail over claims that they have acted in excess of their statutory authority.

A local government can benefit from a broadly construed police power even when it acts based on a statute other than G.S. 160A-174 or 153A-121 and its understating of that statute turns out to be incorrect. In *King* the town initially cited G.S. 20-219.2 as legal authority for the towing ordinance. As I will explain more fully in my next blog post, the supreme court held that G.S. 20-219.2 did not permit the town to regulate involuntary towing. The court nonetheless upheld most of towing ordinance’s provisions as a proper use of the town’s police power under G.S. 160A-174. In short, the police power can serve as either primary or secondary authority for many local government actions. (There is an important exception to this principle. The police power may not be cited as authority when the unambiguous text or degree of detail in another statute shows that the General Assembly intended that statute to govern local action on a matter.)

This post has focused primarily on the latitude that *King* seems to afford local governments in the exercise of their general police power. The opinion also has some important things to say about the constitutional and statutory limits of that power. Stay tuned for my next blog post, which will take up some of those points.

Links

- appellate.nccourts.org/opinions/?c=1&pdf=31737
- www.charlotteobserver.com/2014/06/12/4972121/nc-supreme-court-strikes-down.html#.U6HvkbHb7Qc
- canons.sog.unc.edu/?p=7169
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-174
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-4
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-121



-
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-4
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-177
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-124
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-140
 - www.ncga.state.nc.us/legislation/constitution/nconstitution.html
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-304
 - www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=20-219.2