Coates' Canons Blog: King v. Town of Chapel Hill: The Supreme Court Issues a Major Decision on the Police Power of Local Governments (Part 2)

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In my last blog post I listed and discussed seven points that local governments should take away from *King v. Town of Chapel Hill*, perhaps the North Carolina Supreme Court's most significant decision yet on the general police power of local governments. Part 1 of my analysis focused primarily on the portions of *King* that uphold the broad exercise of regulatory powers by cities and counties. As I noted, however, *King* also has much to say, both directly and indirectly, about constitutional and statutory limitations on the police power. This blog post picks up where my last one left off and offers five additional takeaways from *King.*

8. To be constitutionally valid, local regulation of trades and businesses must be reasonably related to a substantial government purpose.

Although the supreme court determined that the general police power of local governments must be interpreted broadly, *King* reminds cities and counties that there are constitutional constraints on their authority to regulate businesses. Business regulations, the court remarked, implicate the "fundamental right" to earn a livelihood protected by Article I, Section 1 of our state constitution. For this reason, such regulations "must be rationally related to a substantial government purpose" if they are to survive challenges under Article I, Section 1. (As interpreted by the supreme court, the "law of the land clause" in Article I, Section 19 also protects the right to earn a living, and the same standard of review applies when business regulations are challenged under that provision.)

The court's use of the terms "fundamental right" and "substantial government purpose" could prompt lower court judges, attorneys, and others familiar with how courts evaluate constitutional claims to wonder whether *King* mandates something more demanding than the rational basis test for local business regulations.

The rational basis test is the standard of review that courts use to evaluate claims that a government action violates the constitutional rights of individuals to equal protection or substantive due process, except when the alleged violation involves the impingement of a "fundamental right" or the disparate treatment of individuals based on a "suspect classification." (Fundamental rights recognized by the courts include the right to marry, the right to vote, the right to interstate travel, the right to free speech, and the right to religious liberty. Race, alienage, national origin, and gender have all been deemed suspect classifications.) A government action passes the rational basis test so long as it is reasonably related to a legitimate government objective. The rational basis test is extremely deferential to governments, and consequently, they tend to prevail when it is applied.

In cases involving the abridgment of fundamental rights or use of suspect classifications, the courts usually subject government actions to more rigorous standards of review. Depending on the precise nature of the alleged violation, the government will usually have to show either that a contested action was substantially related to an important government interest ("intermediate scrutiny") or that the action was necessary to further a compelling government interest ("strict scrutiny"). Government actions are less likely to be upheld when intermediate scrutiny or strict scrutiny is applied.

While the terms "fundamental right" and "substantial government purpose" show up in *King*, I think that the standard for determining whether local business regulations run afoul of Article I, Section 1 is closer, in practice at least, to the rational basis test than to intermediate or strict scrutiny. Here is why:

- In cases applying the rational basis test to government actions, the courts have held that the health, safety, or welfare of the public constitutes a legitimate government interest. *E.g.*, *Huntington Props., LLC, v. Currituck County* , 153 N.C. App. 218, 230 (2002). Similarly, *King* and precedents cited therein seem to acknowledge that the public's health, safety, or welfare qualifies as a substantial government purpose when business regulations are challenged under Article I, Section 1. *E.g.*, *State v. Ballance*, 229 N.C. 764, 769 (1949).
- In *King* the supreme court upheld or invalidated the individual provisions of Chapel Hill's towing ordinance based on their reasonableness, which is consistent with the rational basis test. The court upheld the ordinance's signage provisions as a "**rational attempt** at addressing some of the inherent issues affecting citizen health, safety, or welfare that arise when one's car is involuntarily towed." (Emphasis added.) Likewise, it upheld the ordinance's requirement that towing companies accept credit cards as "bear[ing] a **rational relation** to a broad interpretation of citizen safety or welfare by enabling owners to quickly and easily regain access to their vehicles." (Emphasis added.) On the other hand, the court rejected the ordinance's caps on towing and storage fees upon finding that there was "no **rational relationship** between regulating fees and protecting health, safety, or welfare." (Emphasis added.)
- The North Carolina Court of Appeals has noted the similarities between the "substantial government purpose" test for Article I, Section 1 claims and the rational basis test. *Sanders v. State Pers. Comm'n*, 197 N.C. App. 314, 326 (2009).

My comments so far about the "substantial government purpose" standard have focused on its application to laws that regulate how businesses operate. The supreme court has clearly indicated, though, that it sees a big difference between government measures that impose reasonable requirements on business operations and those that exclude individuals from particular occupations. Measures of the latter sort have prompted the court to apply the "substantial government purpose" standard more stringently. As the court explained long before *King*, "the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. When this field has been reached, the police power is severely curtailed." *State v. Harris*, 216 N.C. 746, 759 (1940). According to the court, "the ordinary lawful and innocuous occupations of life," that is, those not requiring advanced education or scientific skill, "must be open to all alike upon the same terms." *Ballance*, 229 N.C. at 770. This reasoning has led the court to strike down statutes that created state boards or commissions responsible for approving the qualifications of drycleaners, photographers, and tile contractors. *Roller v. Allen*, 245 N.C. 516, 525-26; *Ballance*, 229 N.C. at 770-73; *Harris*, 216 N.C. at 759-65.

9. The court's holding in*King* that the general police power statues (G.S. 160A-174 and 153A-121) must be broadly interpreted does not necessarily apply to other statutes delegating specific types of regulatory authority to local governments.

Taken together, G.S. 160A-174 and G.S. 153A-121 grant cities and counties their general authority to adopt ordinances for the health, safety, or welfare of the public. Other statutes found in Article 8 of Chapter 160A (cities) or Article 6 of Chapter 153A (counties) confer various specific aspects of the police power on local governments, granting them express power to regulate things such as noises that tend to annoy, disturb, or frighten their citizens. G.S. 160A-184; 153A-133. (Interestingly, one of the statutes in Article 8 expressly allows cities "to regulate and license occupations, businesses, trades, professions, and forms of amusement or entertainment," but it is not discussed in *King*. G.S. 160A-194. Counties have comparable authority under G.S. 153A-134.)

The *King* decision holds that G.S. 160A-174 and, by implication, G.S. 153A-121 must be broadly interpreted. It does not hold that all of the police power statutes have to be construed expansively. Under *Lanvale Properties, LLC, v. County of Cabarrus*, 366 N.C. 142 (2012), and related precedents, the statutes in Chapter 160A or 153A warrant expansive interpretations only if the court deems them to be ambiguous. If it finds that such a statute is not ambiguous, the court will construe the law strictly according to the "plain meaning" of its terms, making it less probable that an ordinance adopted in reliance on the statute will survive legal challenge. Thus, when advising a city or county on the lawfulness of a proposed ordinance, a local government attorney should consider whether a judge is likely to apply the "plain language" or the "broad construction" rule to the statute being cited as authority for the measure.

10. Local ordinances regulating matters covered by federal or state law may be preempted.

Local regulation of a matter is said to be "preempted" when federal or state laws remove the matter from local government control. The essential principles of preemption are set forth in subsection (b) of G.S. 160A-174. (The supreme court has

held that those principles apply to counties as well, even though they do not appear in G.S. 153A-121.)

Ordinances are usually deemed preempted in one of two circumstances. The first is when they concern an activity or condition that federal or state law expressly denies local governments the latitude to regulate. The second is when federal or state statutes regarding the subject matter of an ordinance are comprehensive enough to support a finding that Congress or the General Assembly intended to remove the matter from local control. Detailed statutes passed by the General Assembly to govern large-scale hog farming operations provide an example of this second kind of preemption. Although the laws do not explicitly prohibit local regulation, the supreme court held in one case that they implicitly preempted a county's attempt to regulate large hog farms. *Craig v. County of Chatham*, 356 N.C. 40, 45 (2002).

The court relied on the second type of preemption to invalidate the mobile phone ordinance at issue in *King*. The court identified three factors as the basis for its conclusion that the legislature meant to deny local governments the power to regulate drivers' mobile phone usage:

- Chapter 20 of the General Statutes comprises over 1,100 pages of statutes that address practically every aspect of travel on the highways. While some of the statutes grant municipalities limited power over roadways, none of them invest local governments with authority to regulate mobile phone use by drivers.
- The General Assembly has enacted at least three statewide laws that restrict drivers' mobile phone usage. *See* G.S. 20-137.3(b); 20-137.4(b); 20-137.4A(a). Collectively, the three statutes ban individuals of all ages from texting while driving and prohibit school bus drivers and individuals under age 18 from using mobile phones while driving on public streets or highways.
- The title of one of the statutes restricting mobile phone usage is "Unlawful use of a mobile phone." G.S. 20-137.4. In the court's view, the wording of this title "tends to indicate an expansive intent to regulate, thus precluding municipalities from doing so."

By relying on multiple factors, the court indirectly highlighted an important point about preemption: activities or conditions are not immune to local regulation simply because they are covered by federal or state law. Indeed, the final sentence in G.S. 160A-174(b) affirms the general authority of local governments to impose standards higher than those set forth in federal or state law. It is therefore possible that the outcome in *King* would have been different had the General Assembly adopted just one or two of the three statutes restricting mobile phone usage, or had it located the statutes somewhere other than Chapter 20. (The court put less emphasis on the title of G.S. 20-137.4 than on the other factors, so it is unlikely that a different title would have led to a ruling in the town's favor on the question of preemption.)

11. State law preempts efforts by cities or counties to regulate the use of mobile phones by automobile drivers.

See discussion of point 10 above.

12. G.S. 20-219.2 does not authorize local governments to regulate involuntary towing.

In *King* Chapel Hill identified G.S. 20-219.2 as an alternative statutory basis for its towing ordinance. The statute is not a statewide law; its subsection (c) lists the particular cities and counties to which it applies. (Orange County, home of Chapel Hill, is one of the counties named.) Among other things, G.S. 20-219.2 prohibits the parking of automobiles in a private lot without permission and allows the non-consensual towing of illegally parked vehicles, provided signs designating the lot as private and listing the towing and storage company's current name and telephone number are prominently posted at each of the lot's entrances. An individual who parks an automobile in violation of G.S. 20-219.2 is guilty of an infraction and subject to a fine of not less than $150. The statute places certain restrictions on towing companies but also grants them limited liability protection for damages arising from the nonconsensual removal of automobiles.

The supreme court in *King* concluded that G.S. 20-219.2 was not relevant to its analysis of the towing ordinance. In support of this conclusion, the court noted that G.S. 20-219.2 omits language common to enabling statutes, such as a statement expressly authorizing cities and counties to adopt ordinances consistent with its provisions. According to the court, G.S. 20-219.2 was enacted to allow the prosecution of individuals who trespass in private parking lots and to regulate the removal of unauthorized vehicles from such lots, not to confer authority over involuntary towing on local governments.

Conclusion

The North Carolina Supreme Court's expansive interpretation of the general police power in *King* makes the decision a net plus for local governments, though cities and counties should still pay careful attention to the constitutional and statutory limitations on that power. Of course, as with many decisions by our state's highest court, the full impact of *King* will not be apparent until its influence is felt in future cases. No doubt there is much more to come.

Links

- canons.sog.unc.edu/?p=7742
- appellate.nccourts.org/opinions/?c=1&pdf=31737
- www.ncga.state.nc.us/legislation/constitution/ncconstitution.html
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-174
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-121
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_160A/Article_8.html
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