Coates' Canons Blog: Local Police-Power Ordinances: Whatever Has Happened to Them?

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UPDATE September 2013: Clickhere for an analysis by my colleague Trey Allen of the general police power as interpreted by the 2013 North Carolina Court of Appeals case ofKing v. Town of Chapel Hill.

In North Carolina some of these ordinances may be in peril, at least to the extent they are intended to govern specific uses of land or types of land development. Sign and outdoor advertising control ordinances, telecommunication tower ordinances, polluting industry ordinances, mobile home park ordinances, steep-slope ordinances, adult business ordinances—all have been adopted by local governments, particularly counties, either to serve as a substitute for comparable regulations in a zoning ordinance or in some cases as a supplement to a zoning ordinance. It should come as no surprise that if a particular set of regulations looks and smells enough like a zoning ordinance it may end up being treated as one. But isn't the general police power (sometimes called the general ordinance-making power) granted to counties by G.S. 153A-121 and to cities by G.S. 160A-174 robust enough to support the regulation of particular land uses without prompting all of the procedural and substantive baggage of zoning? Maybe not. Recent litigation this past spring from Buncombe County is instructive.

The future of these police-power ordinances seemed bright when in 1989 the North Carolina Court of Appeals held that a Henderson County outdoor advertising ordinance was valid under the county's general police power (G.S. 153A-121) and did not need to be treated as a form of zoning. In 2002 the same court upheld a Transylvania County sign control ordinance as a valid exercise of the general ordinance-making power and the county was not required to follow the enactment procedures that applied to zoning. In 1998 the court followed suit by ruling that the failure of Onslow County to adopt a comprehensive zoning plan did not prevent it from regulating the location of adult and sexually oriented businesses pursuant to the general police power. A year later in another decision involving the same Onslow County ordinance, a panel of the court declared that a local government "may enact ordinances regulating land use in two fashions: one, pursuant to a comprehensive zoning plan and two, pursuant to their police powers." By 1999 the 4thCircuit of the U.S. Court of Appeals was continuing in stride by upholding a federal district court ruling that Ashe County's enactment of both a limited building moratorium and a polluting industries ordinance under the general grant of the police power rather than under the zoning statutes did not violate North Carolina law. Were not counties and, by implication, cities free and clear to use such ordinances flexibly and liberally without worrying about the burdensome notice and hearing requirements that apply to zoning?

The seeds of a different view date back to a 1991 case in which the Court of Appeals invalidated an Iredell County ordinance imposing a moratorium on certain kinds of development in anticipation of the adoption of the county's initial zoning ordinance. The court made no reference to the Henderson County case mentioned above and stated that "if an ordinance substantially affects land use, it must be enacted under the procedures which govern zoning and rezoning." However, it was not until 2004 that the legacy of the Iredell County case was revived in a case involving a Rutherford County ordinance establishing a 120-day moratorium on the issuance of building permits for heavy industry within a certain distance of schools. The moratorium action was apparently taken in anticipation of the adoption of a permanent ordinance of the same nature. The Court of Appeals invalidated the ordinance because the county had failed to comply with the notice and public hearing requirements that applied to the adoption of any ordinance related to planning and development under G.S 153A, article 18. Those requirements applied because the ordinance restricted the issuance of building permits. But the court also pointed out in passing that the effect of the ordinance was to divide the county into two areas—zones in which heavy industry was allowed and those in which it was not. The implication was clear—the moratorium ordinance that the county attempted to justify as a police-power ordinance also functioned as a zoning ordinance even though the county had no plans to adopt zoning after the moratorium expired.

This past spring (2009) the Court of Appeals invalidated Buncombe County's multi-family dwelling (MFD) ordinance. The MFD ordinance did not function as a moratorium, nor was its adoption preceded by a moratorium. What doomed the

county ordinance as much as anything was the fact that the ordinance divided the county into three separate regulatory regions that resembled zoning districts. One set of standards applied to multi-family properties located above 2,500 feet above sea level but not above 3,000 feet. Another set of standards applied to properties located above 3,000 feet. The ordinance was not applicable to property located below 2,500 feet above sea level. The court also found it noteworthy that the multi-family dwelling ordinance effectively limited the density of multi-family housing complexes and regulated the height of buildings, the area of land disturbance, off-street parking, and road construction. Obviously these features resemble the features that are often the subject of development standards in a zoning ordinance. In concluding that the Buncombe County ordinance really functioned as a zoning ordinance the court resuscitated the phrase from the 1991 Iredell County opinion that the test was whether a challenged ordinance "substantially affects land use."

Where do these recent cases leave us? As more and more counties expand the reach of zoning or adopt it for the first time, interest in using police-power ordinances has diminished. The moratorium legislation passed by the General Assembly in 2005 has provided clear guidance to local governments about the public hearing and notice requirements that may apply to ordinances of that sort. That, too, has lessened the need to determine whether such ordinances qualify as police-power ordinances or not. But it is entirely possible that this moratorium legislation as it affects land development ordinances will be repealed this year or next.

Unfortunately there is one other shoe that may drop on those local governments that wish to use their general ordinance-making power. In the cases above in which police-power ordinances were invalidated the courts have pointed to the fact that the local government failed to comply with the public hearing and newspaper notice requirements that apply to the adoption of all planning and development ordinances, including zoning (e.g., G.S. 153A-323). However, if the ordinance action is properly characterized as a zoning map amendment, then additional notice must be provided to affected property owners either by mail or by enhanced newspaper notice, and the property must be posted. If a simple local government police-power ordinance intended to apply to much of the unincorporated area of a county turns out to be a form of zoning, then complying with these additional tiers of notice requirements could be unexpectedly costly and burdensome.

Is the adoption or amendment of certain features of a free-standing city or county flood hazard protection ordinance subject to all of these zoning requirements mentioned above? The reasoning of the Buncombe and Rutherford County cases suggests that in certain circumstances the answer may be yes.

That implication means that cities and counties will need to be particularly careful when considering any ordinance that "substantially affects land use."

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