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County launches impact fee appeal

By Ray Gronberg, The Herald-Sun
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DURHAM -- With a little help from its friends, Durham County has begun its attempt to convince the state Court of Appeals to reverse a lower-court ruling and allow it to levy school impact fees.

County Attorney Chuck Kitchen filed a 114-page brief on Thursday that rehashed many of the arguments he made in January before Superior Court Judge Orlando Hudson, who ruled that the county lacks the authority to charge developers a per-home fee to raise money for school construction.

Meanwhile, lawyers from two coastal counties and the N.C. School Boards Association filed friend-of-the-court briefs supporting Kitchen's argument that Durham in fact has the authority under state law to levy the fees.

At least two of those briefs -- the third was unavailable for inspection Thursday because Court of Appeals clerks had sent it to a printer for copying -- noted that counties throughout the state face a serious backlog of school construction needs and don't have the money to deal with it.

If North Carolina's 100 counties can't craft their own strategies for raising school-construction money, they might have to raise property taxes to the point of choking off economic growth or else risk lawsuits accusing them of neglecting their duties to provide for K-12 education, the school board association argued.

"If the [county] commissioners are denied the authority to use impact fees to help meet that obligation, the commissioners run the risk of not being able to adequately fund school facilities -- and thus run the risk of losing control to the courts of one of the largest components of the county's budget," the association's brief said.

The ruling Durham County wants overturned could force it to repay at least \$2.2 million it has collected from developers since the county's impact fees went into effect at the start of 2004. Hudson's ruling also directed the county to pay interest -- at an annual rate of 8 percent -- to any developer who's due a refund.

The Court of Appeals has allowed the county to continue collecting the fees while the appeal unfolds. The case stems from a class-action lawsuit filed late in 2003 by the Durham Land Owners Association, an unincorporated group of developers, and 13 area builders.

Hank Fordham, the developers' lawyer, couldn't be reached Thursday for comment. He has argued that in levying the fee, Durham County lacked the sort of specific authorization from the N.C. General Assembly that the courts have ordinarily required.

In a January hearing before Hudson, Fordham noted that county officials had asked the General Assembly at least nine times for the power to levy impact fees and had been turned down each time. By imposing the fees anyway, "they decided to test the waters," he said.

Kitchen, however, argued in his Court of Appeals brief that state law already gives counties all the power they need. He noted that one statute specifically allows them to charge fees necessary for "performing services or duties permitted or required by law," and another instructs judges to read such grants of power in a way that gives counties the latitude they need to do their job.

The county attorney also said precedent suggests the court should presume the County Commissioners' decision on the fees was proper and put the burden for proving otherwise on Fordham and his clients.

As a fallback argument, Kitchen said another statute gives counties broad power to "abate ... conditions detrimental to the health, safety or welfare of [their] citizens," a concept judges sometimes have understood to cover the imposition of fees. He conceded, however, that if the appeals court goes along with that idea, the fees would be valid inside the city of Durham only if the city allowed county officials to enforce them there.

The two counties that filed friend-of-the-court briefs on Wednesday and Thursday, Currituck County and Camden County, are both on the North Carolina coast. The Currituck brief was the one unavailable because clerks had sent it to the printers.

The Camden brief, authored by Camden County Attorney Herbert Mullen, stressed the dilemma officials in that community are facing because it almost completely lacks a property tax base.

Camden County, which is near the Virginia border, has only one four-lane road. It has no commercial shopping centers, no dentists and no manufacturing plants, Mullen said. The entire county has only about 50 small businesses.

"We have a Piggly Wiggly, but don't even have a Food Lion in the county," Mullen said in an interview Thursday afternoon.

Camden officials nonetheless are facing spillover growth from the Elizabeth City and Virginia Beach areas. The county's three schools -- one each at the elementary, middle and high school levels -- are at or

near capacity, and to finance new construction, the county had to get a 40-year loan from the federal government.

To pay the interest on that loan, Camden commissioners recently had to raise property taxes by 20 percent. In percentage terms, it was the highest single county tax increase passed for fiscal 2005-06.

"We don't have the money to provide the infrastructure to the people," Mullen said. "We severely need the impact fee."

Mullen's brief essentially backed Kitchen's basic legal arguments, adding that in a case like Camden's where the property tax base is so small, state law would essentially require the courts to allow county officials to levy fees to address their legal responsibilities to provide for the schools.

The only counties now levying school impact fees are Orange, Chatham, Durham, Granville and Stanly. "Local acts" approved by the General Assembly specifically authorize the Orange and Chatham fees.

The next move in Durham County's appeal is up to Fordham, who has 30 days to file a response to Kitchen's brief.

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