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High Court Sides With County on Impact Fees

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In a decision with statewide implications, the Washington State Supreme Court ruled Thursday that Kitsap County can avoid paying back millions of dollars it collected from home builders to fund road and park projects.

The tight 5-4 ruling concluded that builders or home-buyers must challenge the government's right to impose "impact fees" within 21 days of the issuance of a building permit. They cannot wait for the normal three-year statute of limitations, as the plaintiffs did in this case, *James v. Kitsap County*.

"I am thrilled with the decision," said Kitsap County Commissioner Chris Endresen. "I was concerned because it was taking so long, and the interest mounts up."

The court first heard arguments from the attorneys in January 2004.

"It is a pretty big win for local government," said Silverdale attorney Bill Broughton, who filed the class-action lawsuit, "but it is a real setback for local citizens trying to keep their government in check."

At stake was about \$4 million, including interest, that Kitsap County had been ordered to pay back to about 2,000 builders and residents for fees collected in the mid-1990s when Kitsap County did not have a valid comprehensive plan.

State law requires counties to have a valid plan in place to collect impact fees for new schools, roads and parks. Kitsap County's plan was ruled invalid in 1994 by the Central Puget Sound Growth Management Hearings Board. It took four years for the county commissioners to approve an acceptable plan, after which time they began collecting back fees for development during the interim.

The question before the Supreme Court was whether the fees could be collected for building permits issued while the county had no valid plan. The court concluded that impact fees fall under the Land Use Procedures Act, which contains a 21-day appeal period. Reversing a Superior Court ruling, the majority of the court found that impact fees are more like fees for building permits than general fees and taxes. The court referred to an earlier ruling in which it declared that building permits are land-use decisions, thus subject to the 21-day appeal period.

If the longer three-year statute of limitations applied, Justice Charles Johnson wrote, "local

jurisdictions would be less able to plan and fund construction of necessary public facilities ... (or) would alternately be faced with delaying necessary capacity improvements until the three-year statute of limitations for challenging impact fees had run."

In a strongly worded dissent, Justice Richard Sanders said the 21-day time limit was designed to apply to land-use petitions, not impact fees.

"If the majority thinks it is good 'public policy' to allow local governments to keep millions of dollars of ill-gotten gains every time a private citizen fails to file suit within 21 days of the event, then the argument should be made to the Legislature, not this court," Sanders wrote. "Return the money! Certainly the Legislature has not spoken to the contrary."

Impact fees were established by the Legislature to force new home buyers to pay for a portion of the new schools, roads and parks needed as a result of growth.

Attorney Peter Buck, who represented Kitsap County before the Supreme Court, said the only workable alternative to collecting impact fees retroactively would be a countywide moratorium on building construction.

"You can't wiggle out of agreements to pay your fair share of the cost," he said. "On behalf of the taxpayers of Kitsap County, I'm grateful that the justices understood the importance of these issues. There are many, many situations like ours throughout the state."

In Snohomish County, home builders are seeking \$60 million in a federal lawsuit over impact fees. The federal courts had placed the case on hold while awaiting the outcome of the Kitsap case, which is similar.

"We intend to notify the court, and we think it should be controlling in our case and lead to our victory," said Brent Lloyd, a deputy prosecutor in Snohomish County.

"I believe this case will provide clear guidance to all jurisdictions about how to structure their local impact fee process and how to challenge the fees," Lloyd said. "You can't just pay the fees and wait for local government to build schools, roads and parks and then file a lawsuit later. There is no injustice here. They (builders) are just paying their impact fees like everyone."

But Broughton, who represented the 2,000 Kitsap plaintiffs, said the ruling will give local governments a greater ability to break the law. A class-action lawsuit cannot be filed within 21 days, he said, and no single person will find legal action worth the cost.

"When you can't rely on the courts to step in to correct illegal actions by a local jurisdiction, what remedy do we have?" he asked.

Commissioner Endresen said the county has saved nearly \$4 million in a fund that can now be used to build roads and parks, as was initially planned for the money.

School districts in Kitsap County were not a party to the Supreme Court case, because they had

settled out of court for about half of what the plaintiffs were seeking.

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