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Builders respond to appeal over fees

By Ray Gronberg, The Herald-Sun
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DURHAM -- Because public schools in North Carolina are essentially state institutions, county governments must adhere to a state-dictated system for funding school construction that bars them from using per-home impact fees, local builders say.

The General Assembly has clearly said it wants bonds and taxes -- and above all, the property tax -- to be the sole source of local revenue for school construction, lawyers for the builders said in a brief filed with the state Court of Appeals.

The brief answered Durham County's attempt to convince appeals judges to overturn a lower-court ruling that killed Durham's 2003 passage of an impact-fee ordinance.

Filed last week by Apex lawyer Hank Fordham, the brief noted that the General Assembly has allowed only two counties, Orange and Chatham, to experiment with such fees.

The mere fact that those counties secured a go-ahead from the General Assembly shows that the assembly's permission is required for others to follow suit, Fordham argued, noting that legislators have since turned down at least nine attempts by Durham to get its name added to the list.

"Political expedience and [a] consultant's statement that this is a 'free revenue source since there is no obvious increase in cost to current voters' are not substitutes for legislative authority," he added, quoting the consultant Durham hired in 2001 to conduct its fee study.

The key passage of Fordham's 126-page brief, however, sought to counter Durham's contention that the General Assembly has already granted the county all the authority it needs.

The county's argument turns on the notion of implied powers and relies heavily on a provision of state law that instructs judges to give counties a lot of leeway in the use of their authority.

Fordham countered by denying that the law's grant of leeway doesn't even apply to school funding, given that the state constitution makes the General Assembly responsible for providing free public

schools.

The assembly has delegated major decisions to the state Board of Education and to local school boards, but it's also established an elaborate system of funding that mixes federal, state and local subsidies, he said.

Legislators have thus "provided a specific and comprehensive statutory plan for the operation and funding of the public school system," and local governments have no business freelancing outside of it, Fordham argued.

The lawyer's argument appeared tailored to invoke two recent state Supreme Court precedents that overturned local government actions.

One of the cases involved Chatham County and invalidated a county law regulating hog farms. A unanimous Supreme Court held in 2002 that the General Assembly can pre-empt local action merely by passing laws "so complete in covering the field" that it would be counterproductive to allow local governments to strike off in their own direction.

The other case involved the city of Durham. Fordham represented a group of churches that challenged the city's attempts to use stormwater fees for pollution control, and in 1999 helped convince a divided Supreme Court to strike down the city's rules.

The 4-3 decision held that the city ignored the plain language of a statute that only allowed it to levy fees to control flooding.

The dissenters in that case -- former justices Henry Frye and Burley Mitchell, and current Justice Sarah Parker -- said the city was entitled to a broad reading of the statute that allowed it to levy stormwater fees.

But the majority -- current justices I. Beverly Lake Jr., Mark Martin and George Wainright, and former Justice Robert Orr -- disagreed.

The justices split on party lines. The court's four Republicans were in the majority, and the Democrats all dissented.

"I think the case turned on how broadly government should be granted these powers," Orr said in an interview Wednesday. "The majority viewed it in a fairly conservative manner, saying that the specific statute limits what they can do, and the three justices in the dissent viewed it as a broader grant of authority to government."

The Court of Appeals has since said it thinks the city of Durham case stands for the proposition that when a statute is clear, judges must enforce it as written, and when it's ambiguous, they can give local

governments more leeway. County Attorney Chuck Kitchen's brief, filed in July, leaned heavily on the case announcing that interpretation.

The appeals court has yet to schedule oral arguments in the impact-fee case, and hasn't announced which three of its 15 members will hear them. Nine of its judges are Democrats and six are Republicans.

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