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State : Court Rules Against Union County

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By Michael Lowrey
Carolina Journal



RALEIGH — In 2006, Union County adopted an adequate public facilities ordinance (APFO) to help pay for school construction. In a Dec. 8 ruling, the state's second highest court ruled that the county lacked the legal authority from the General Assembly to impose such an ordinance, which it described as amounting to an impact fee for school construction.

Frustrated by its inability to obtain approval from the General Assembly for a school impact fee, Union County in 2006 imposed a moratorium on approving new subdivision plans to allow time to draft an adequate public facilities ordinance. Under the ordinance, proposed new subdivisions are evaluated to determine their impact on the schools that would serve the development. Before a development can be approved, the schools that would serve it must be deemed to have adequate capacity.

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If schools are judged not to have enough capacity, the county can deny the application or impose conditions upon the development. Possible conditions include requiring developers build new schools, making a "voluntary mitigation payment" to the county, or delaying the development until sufficient school capacity otherwise becomes available.

A number of landowners and developers sued Union County over its adoption of the APFO. After a Superior Court judge ruled in favor of the county, they brought the matter before the N.C. Court of Appeals.

On appeal, Union County argued that its authority to impose an APFO comes from three separate sections of state law, those covering a county's police power, its zoning authority, and its power to regulate subdivisions.

The Court of Appeals did not agree, finding that none of those statutes allowed for imposition of an APFO.

The appeals court first addressed whether a county's police powers, which allow it to regulate or prohibit "acts ... or conditions detrimental to the health, safety, or welfare of its citizens," allow an APFO. The courts have at times upheld local government actions under this provision that restricts the use of land. Because the General Assembly has enacted separate statutes giving localities the authority to regulate zoning and subdivisions, however, the appeals court found that it should look to those laws.

The appeals court in turn drew a distinction between zoning ordinances and subdivision ordinances. Subdivision ordinances are concerned with the creation of new lots or separate parcels of land.

Under state law, however, zoning ordinances may only "regulate and restrict the height,

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number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes."

Counties may also use zoning to address the adequate provision of schools. When read together, these provisions do not allow counties to impose adequate public facility ordinances.

"Although defendant is entitled to use its zoning authority to facilitate the efficient and adequate provision of schools, it must achieve this goal using the tools authorized by the zoning statute," wrote Judge Barbara Jackson for the appeals court.

The county argued that it could impose an APFO under its authority to regulate the subdivision of land. N.C. Gen. Stat. § 153A-331(a), for example, states that such regulations "provide for the orderly growth and development of the county ... in a manner that will avoid congestion and overcrowding and will create conditions that substantially promote public health, safety, and the general welfare." Other sections call specifically for the "the construction of community service facilities in accordance with county plans" and reservation of school sites.

The Court of Appeals was again not persuaded, noting that Durham Land Owners Association v. County of Durham (2006) concluded that counties were primarily responsible for providing adequate school capacity.

"Defendant may not use the APFO to obtain indirectly the payment of what amounts to an impact fee given that defendant lacks the authority to impose school impact fees directly," Jackson wrote.

The case is Union Land Owners v. County of Union (09-35).

Michael Lowrey is an associate editor of Carolina Journal.



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