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## Developers, boards battle over impact fees

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*FREEDOM RALEIGH BUREAU*

DURHAM — Can county commissioners in North Carolina impose impact fees on developers without authorization from the General Assembly?

A panel of judges from the N.C. Court of Appeals grilled attorneys on the issue Tuesday as they heard an appeal from the Durham County commissioners, who adopted an impact-fee ordinance without legislative authorization.

"You've got a tough mountain to climb," Judge Eric Levinson told Durham County attorney Chuck Kitchen.

Kitchen said that a general state statute gives commissioners the authority to set such fees.

"What it recognizes is that the commissioners have the right to set any of the fees for any services that are permitted by statute or required by statute," Kitchen said.

He added that taxpayers in the county have "reached a breaking point" and cannot afford them any more.

Impact fees are charges that a governmental body, such as a board of county commissioners, charges developers for anticipated costs of a new development. For example, some cities have gotten authority from the General Assembly to charge impact fees to build new parks or make street improvements.

Durham County's ordinance assesses fees as a means of helping build new schools necessitated by rapid population growth.

Local governments and land developers across the state are watching the case closely. If the court rules in favor of the Durham commissioners, it would open the door for other county boards across North Carolina to charge similar fees without getting legislative approval.

If the developers who are suing the commissioners prevail, special legislative authorization would be required before a board of commissioners could impose such fees. Local governments have found it difficult to get such approval from lawmakers in recent years.

"What services or actions were the county employees doing to generate the impact fee?" Judge Doug McCullough asked.

"It's a service or duty which is required or permitted," Kitchen responded. "The county does have a duty under both the (N.C.) Constitution and general statutes to provide the money for the building of school buildings.

"If we read this statute this broadly, then county commissioners and probably the municipalities ...we would be saying that the General Assembly is enabling counties to do anything and everything they want to do to raise dollars," Levinson said.

Kitchen said there is no similar state statute for municipalities. He said the N.C. Supreme Court has ruled that the children are entitled to an adequate education.

"Part of that I maintain is school buildings," he said.

Attorney Henry Porter, representing the developers, argued that counties are creatures of the General Assembly and have no inherent powers.

He said that counties wanted to turn to impact fees as a means of financing schools as a matter of "political expediency" because they can be done "fairly painlessly."

"It is clear that the General Assembly controls what local governments have the authority to do," Porter said.

He added that it's important to look at some other counties, specifically Chatham and Orange, which do have specific authority from the General Assembly to levy impact fees.

"Specific legislative authority is needed for the fee," he said.

Porter also said that commissioners had other means of paying for school construction. In addition to property taxes, they have some sales taxes available and can issue bonds to spread out payment over a longer timeframe.

Tuesday's session was held at the N.C. Central University School of Law in Durham, which allowed law students to observe the proceedings.

The panel of three judges made no decision on the case Tuesday. Ordinarily, the Court of Appeals rules on cases within a few months of hearing the oral arguments.

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