

[\[back\]](#)



## Court upholds impact fee decision

By GREGORY PHILLIPS, The Herald-Sun  
June 6, 2006 11:24 pm

DURHAM -- The state Court of Appeals has upheld a lower court decision barring Durham County from charging developers fees to help pay for school construction.

The ruling Tuesday ordered the county -- which plans to challenge the decision in the state Supreme Court -- to repay the more than \$7.5 million it has collected over the last 2½ years in so-called school impact fees.

While upholding the heart of Superior Court Judge Orlando Hudson's ruling, the appeals court decision did reverse a part saying the county also should pay the developers 8 percent interest on the fees it has collected. That sum currently would total more than \$605,000.

County Manager Mike Ruffin said he was disappointed but not surprised at the ruling.

"There are good arguments on both sides," Ruffin said. "What I hope our lawmakers in Raleigh are beginning to understand is that our property tax system can't carry the burden for financing public schools. We just can't do it."

Counties collect the fees from developers, ostensibly to offset the "impact" of school construction costs generated by residential growth.

Since Jan. 1, 2004, Durham County has been charging developers \$2,000 for each new house and \$1,155 per apartment, condominium or townhouse, payable when the developer is ready to sell.

The county can continue to collect the fees until the ruling takes effect June 26. County Attorney Chuck Kitchen said he plans to ask the N.C. Supreme Court to review the case and to issue a stay on the appeals court ruling until it does.

Kitchen said he anticipated a response from the court by June 26, a response which may or may not result in the county being allowed to continue collecting the fees pending a Supreme Court decision.

If the Supreme Court refuses to take the case, Kitchen said, it would be returned to Durham County Superior Court -- to decide the developers' motion for the county to pay their legal costs -- before the impact fees would be refunded.

The money the county has been collecting is being held in escrow pending a resolution to the court case.

If the Supreme Court does take the case, a resolution is by no means imminent.

"Sometimes those come down quickly, sometimes they take years," Kitchen said.

Orange and Chatham counties both got state approval to collect impact fees. But that sparked opposition from developer lobbyists that killed Durham's attempts to follow suit, Ruffin said.

In January 2004, Durham became the first county to start collecting the fees without state legislative approval.

A group of developers filed a class action lawsuit, claiming the county had no authority to collect the fees. Hudson ruled in their favor in January 2005. The county appealed and was allowed to keep collecting the fees pending the appeals court's decision.

Kitchen has argued that state law already gives counties the authority through a statute allowing them to collect fees for performing legally required services. The broad requirement for counties to fund education also gives them sufficient freedom to levy the fees, Kitchen contends.

Tuesday's ruling -- handed down by judges Rick Elmore, Doug McCullough and Eric Levinson -- agreed with Hudson that the fees are unlawful and void.

"While a laudable goal, the County must have statutory authority to pass the ordinance requiring the fee," the ruling stated.

But the judges also found "no statutory authority for the award of interest in this circumstance."

Former Durham Mayor Nick Tennyson, now executive vice president of the Homebuilders Association of Durham, Orange and Chatham Counties, welcomed the partial upholding of the earlier decision.

But he said the ruling on interest concerns him.

"If there is no award of interest, then there is no risk for public bodies to take all sorts of actions, because they can collect money and if later they're told it wasn't legal they could just give it back," Tennyson said. "But you do harm anytime you take money from people."

Hank Fordham, the developers' lawyer, agreed. He cited a 1999 case he tried in which the Supreme Court ordered Durham County to repay stormwater utility fees and interest to some churches it had collected the fees from for pollution control.

"We think there's a very sound basis for Durham County paying interest," Fordham said.

There was little surprise that the county will fight the appeals court ruling.

"They were clear about that when the lawsuit was filed, that they certainly expected it to be resolved by the highest court in the state," Tennyson said. "That was our expectation from the beginning."

URL for this article: <http://www.herald-sun.com/durham/4-741923.html>

**© Copyright 2006. All rights reserved. All material on heraldsun.com is copyrighted by The Durham Herald Company and may not be reproduced or redistributed in any medium except as provided in the site's Terms of Use.**

[\[back\]](#)