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David M. Lawrence
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Dillon's Rule Is Dead; Long Live Dillon's Rule!

A. Fleming Bell, II

The North Carolina Supreme Court decided two cases in 1994 dealing with Dillon's Rule, a long-standing rule of statutory construction used in determining the powers of local governments in this state. Unfortunately, the cases, Homebuilders Association of Charlotte v. City of Charlotte, 336 N.C. 37, 442 S.E.2d 45 (1994) and Bowers v. City of High Point, ___ N.C. ___, 451 S.E.2d 284 (1994), seem to point in different directions, resulting in some confusion concerning how to determine the extent of the authority given to North Carolina's cities and counties by the state legislature. This bulletin examines both cases and discusses what the current law appears to be concerning the powers of local governments.

Dillon's Rule

Dillon's Rule is named for Judge John F. Dillon, author of an early treatise on municipal corporation law. It is a principle that has been followed since the mid-1870s by North Carolina's courts in determining whether a local government has authority to engage in a specific activity.[1] To understand Dillon's Rule, one has to first consider the legal status of local governments in this state.

Local governments in North Carolina are creatures of the state legislature. Under a broad grant of constitutional authority, the General Assembly may establish local governments whenever and however it sees fit. The state constitution states that "[t]he General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by [the] Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable."[2] Thus, if the General Assembly wants to create a county, city, or other local governmental unit, it is free to do so. If it wishes to abolish a local government, or to merge it with another, or to impose particular obligations on it, it has almost unlimited power to do as it chooses.[3] In sum, North Carolina is not a "home rule" state: its local governments exist by legislative benevolence, not by constitutional mandate.[4]

As creatures of the state legislature, local governments may act only if they have legislative authorization to do so. Determining exactly what the General Assembly has authorized local governments to do is not always easy, however. For example, what specifically is included in a legislative grant of power to cities and counties that enables them to pass ordinances relating to public health, safety, and welfare?

Answering such questions requires a rule of statutory interpretation. What that rule should be is the focus of the current dispute and is one of the issues which these two cases address.

Dillon's Rule was adopted as such a rule of statutory construction by the North Carolina Supreme Court over 100 years ago. It sets out the principles that the courts will use in

The author is an Institute of Government faculty member who specializes in local government law.

1. Smith v. City of New Bern, 70 N.C. 14, 16 American Reports 766 (1874), cited in *Homebuilders Ass'n of Charlotte,* 336 N.C. at 42, 442 S.E.2d at 49.

2. N.C. Const., art. VII, § 1.

3. The only limitations on this power are those imposed by higher law, such as the state constitution (*see, e.g.,* the restrictions on local legislation in N.C. Const., art. II, § 24), or federal statutes, or the federal Constitution (*see, e.g.,* the federal Voting Rights Act of 1965, as amended, 42 U. S. Code § 1971, § 1973 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution). These limitations will not concern us in this discussion.

4. In constitutional "home rule" states, the existence and/or powers of at least some of the state's units of local government are spelled out in the state constitution. To change such provisions, a constitutional amendment, rather than simply a legislative act, is required.

construing the powers that the creator, the legislature, has bestowed on its creatures, local governments. Under the rule, a local government has only certain powers: (1) those granted to it by the legislature in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential (that is, not simply convenient, but indispensable) to accomplishment of the unit's declared objects and purposes.[5]

Legislative Reaction to Dillon's Rule

Dillon's Rule was regularly applied in North Carolina until the 1970s, with sometimes unpredictable results. Many of the disputes in interpreting the rule centered around its "implied powers" provision. Not surprisingly, people differed in determining what powers could be implied from a specific grant. In general, it is fair to say that the courts were most willing to imply the power to act when the local governmental activity in question was routine and historically unremarkable. They were more likely to require specific enabling authority for new, unusual, or controversial activities.[6]

In 1971 and 1973 the General Assembly rewrote the main bodies of law pertaining to cities and counties respectively.[7] Both Chapter 153A and 160A of the North Carolina General Statutes [hereinafter G.S.] contain more generous standards than Dillon's Rule for interpreting legislative grants of power to local governments. In Section 4 of both chapters, we find similar language:

> It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power. [G.S. 153A-4]

> It is the policy of the General Assembly that the cities of this State should have adequate authority to exercise the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State. [G.S. 160A-4]

These statutes state a rule of construction that appears to be quite different from Dillon's Rule. They provide that chapters 153A and 160A and local acts pertaining to counties and cities are to be broadly construed. Further, they require that grants of powers to cities and counties be construed to include other powers that are "reasonably expedient" to exercise those grants. This language is probably more expansive than the Dillon's Rule requirement that additional powers must be "necessarily or fairly implied" from the express grant of power. This interpretation seems especially likely if the statutes are construed in light of their stated purpose of providing adequate authority for cities and counties to exercise the powers conferred on them.[8]

Despite the existence of G.S. 153A-4 and 160A-4, North Carolina's appellate courts continued to refer to Dillon's Rule at least occasionally during the ensuing twenty years.[9] At the same time, the supreme court in other cases recognized the statutory mandate for broad construction.[10] The court was not squarely presented with the apparent inconsistency between Dillon's Rule and the statutory rule until the first of the two cases discussed below came before it in 1994.

Homebuilders Association of Charlotte, Inc. v. City of Charlotte[11]

Facts of the Case and Lower Court Holdings

On August 22, 1988, the city of Charlotte passed a resolution implementing a policy of charging user fees for a number of city regulatory services and for rental of publicly owned facilities. The fee schedule was based on a study of

5. *See, e.g.*, Smith v. City of New Bern, 70 N.C. 14, 16 American Reports 766 (1874); Vaughn v. Commissioners of Forsyth County, 118 N.C. 636, 640–42, 24 S.E. 425, 4 (1896); and Moody v. Transylvania County, 271 N.C. 384, 386, 156 S.E.2d 716 (1967), *quoted in* Bowers v. City of High Point, ____ N.C. ____, 451 S.E.2d 284 (1994), discussed below.

6. *See, e.g., Smith, supra* note 5; State v. Gulledge, 208 N.C. 204, 179 S.E. 883 (1935); and Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

7. 1971 N.C. Sess. Laws ch. 698; 1973 N.C. Sess. Laws ch. 822.

8. It is somewhat unclear whether this "reasonably expedient" rule for implying powers applies only to grants of power to cities and counties under chapters 153A and 160A and local acts, or whether it also includes grants of power under other statutes. We will return to this question later in the article.

9. *See, e.g.*, Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 554, 276 S.E.2d 443, 445 (1981), *appeal after remand*, 61 N.C. App. 682, 301 S.E.2d 530, *disc. rev. denied*, 308 N.C. 675, 304 S.E.2d 757 (1983); Greene v. City of Winston-Salem, 287 N.C. 66, 72, 213 S.E.2d 231, 235 (1975).

10. *See, e.g.*, River Birch Assoc. v. City of Raleigh, 326 N.C. 100, 107–9, 388 S.E.2d 538, 542–43 (1990).

11. 336 N.C. 37, 442 S.E.2d 45 (1994).

the cost of certain regulatory services. It was codified in the city code as Section 2-4. The user fee that was assessed varied depending on the type of regulatory service provided.

The Homebuilders Association of Charlotte filed a complaint on May 22, 1990, seeking a declaratory judgment that Section 2-4 of the city code was invalid and unenforceable. It also sought to enjoin the city from collecting the listed fees until and unless the General Assembly expressly granted that power to the city. Both parties moved for summary judgment, and the superior court judge entered a declaratory judgment order in favor of the city on July 18, 1991. The association appealed to the court of appeals.

The court of appeals reversed the trial court's order and remanded the cause for entry of declaratory judgment in favor of the association. The appellate court held that the city had not been granted the power to impose the user fees established under Section 2-4. While it noted the rule of broad construction found in G.S. 160A-4, it disagreed with the city's argument that the power to charge fees could be implied from various regulatory powers granted to cities in the statutes.[12] The court cited two supreme court cases that were decided after G.S. 160A-4 was adopted as authority for the proposition that "[s]tatutory delegations of power to municipalities are to be strictly construed, resolving any ambiguity against the municipal corporation's authority to exercise the power in question."[13] The court did not explain, however, how this rule squared with the statutory requirement of broadly construing municipal powers granted by Chapter 160A.

The court also relied on another doctrine of statutory interpretation: that the expression of one thing excludes another. It noted two instances in which the legislature had acted specifically when it wished to authorize funding sources for local governments. First, the legislature expressly authorized levying property taxes by cities for regulation of development without providing a similar grant to impose user fees. In addition, the General Assembly acted by specific statute to allow the imposition of user fees by another type of local governmental unit, county sewer districts.

Both parties petitioned for discretionary review, which the supreme court allowed on June 3, 1993.

Supreme Court Ruling

In a 5-2 decision, the North Carolina Supreme Court held (1) that the city had the power to impose the fees, and (2) that the fees it imposed were reasonable. In reaching the first holding (the one of interest here), the court specifically addressed what the proper rule should be in construing legislative grants of powers to municipalities, in light of G.S. 160A-4.

The court pointed out the "well-settled" law that municipalities have only those powers conferred on them by the legislature, and it reviewed briefly the history of Dillon's Rule in North Carolina.[14] It also noted that all of the services for which user fees were charged were related to some express authority of the city to regulate the use of land,[15] and that "[t]he generally accepted rule today seems to be that the municipal power to regulate an activity implies the power to impose a fee in an amount sufficient to cover the cost of regulation."[16]

In the next part of its opinion, the court examined G.S. 160A-4 and its interplay with Dillon's Rule. According to the court, Section 4 "makes it clear that the provisions of chapter 160A and of city charters *shall* be broadly construed and that grants of power *shall* be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect" (emphasis in original). This language, said the court, was a "legislative mandate that [it was] to construe in a broad fashion the provisions and grants of power contained in Chapter 160A."[17] Dillon's Rule, in contrast, "suggests a narrow construction."[18]

Rather than applying Dillon's Rule, the court looked to the rule of construction stated in G.S. 160A-4 and held "that the establishment of the user fee schedule codified in Section 2-4 of the Code of the City was reasonably necessary or expedient to the execution of the City's power to regulate the activities for which the services are provided."[19]

The supreme court also rebutted two other arguments raised by the court of appeals in holding that the city had not been granted the power to impose the fees. It noted that the fact that the General Assembly had provided property taxation as a means to meet the cost of development did not, by itself, show that the city could not choose user fees as a "reasonable alternative." And the fact that charging user fees is specifically authorized for services furnished by county water and sewer districts did not mean that user fees could not be charged for other services.[20]

12. Homebuilders Ass'n of Charlotte v. City of Charlotte, 109 N.C. App. 327, 332–34, 427 S.E.2d 160, 163 (1993).

13. *Id.* at 333, 427 S.E.2d 160 at 163. The two cases cited by the court of appeals are *Porsh, supra* note 9, and *In re* Incorporation of Indian Hills, 280 N.C. 659, 662, 186 S.E.2d 909, 910 (1972).

14. *Homebuilders Ass'n of Charlotte*, 336 N.C. at 41–42, 442 S.E.2d at 49.

15. *Id.* at 43, 442 S.E.2d at 49.

16. *Id.* at 42, 442 S.E.2d at 49 (citations omitted).

17. *Id.* at 43–44, 442 S.E.2d at 49–50 (citations omitted).

18. *Id.* at 44, 442 S.E.2d at 50.

19. *Id.* at 45, 442 S.E.2d at 50.

20. Homebuilders Ass'n of Charlotte v. City of Charlotte, 336 N.C. 37, 45, 442 S.E.2d 45, 51 (1994).

Finally, the court held that the fees imposed were not unreasonable, since they did not exceed the actual cost of the city's regulatory program supported by the fees.

The Dissenting Opinion

In dissent, Justice (now Chief Justice) Mitchell, joined by Justice Webb, took issue with the majority's conclusion that the city had authority to impose the fees in question. He argued that they were not truly "user fees," since the city's regulatory activities benefited (were "used" by) all citizens of the city equally, and that the legislature had "expressly provided that cities may pay for the 'regulation of development' within their boundaries *by levying general property taxes on all citizens*" (emphasis in original; citations omitted). In his opinion, "the intent of the legislature in passing statutes such as [the enabling statute for levying property taxes] and others was to require that cities levy general taxes to pay for such services." Otherwise, it would have expressly authorized the fees in question.[21]

Implications of the Decision

Homebuilders is the first case in which the North Carolina Supreme Court expressly discussed and distinguished Dillon's Rule in applying the rule of construction found in G.S. 160A-4 to construe the powers granted to cities by the General Assembly. (The court did not reach the question of whether Charlotte's fees would have been upheld if Dillon's Rule was applied.)

Standing alone, this case might be seen as having important implications for cities, counties, and any other local governmental units that may be provided with a broad statutory rule for construing legislative grants of power. City and county officials might fairly have concluded from the *Homebuilders* decision that they were free to imply a wide range of authority from the powers expressly granted to them by the General Assembly. They could have surmised, in short, that they no longer needed to be concerned with the restrictive interpretations of legislative grants under Dillon's Rule.

Officials who drew such conclusions would soon find, however, that (with apologies to Samuel Clemens) the rumors of the death of Dillon's Rule had been greatly exaggerated.

21. *Id.* at 48, 442 S.E.2d at 52.

Bowers v. City of High Point[22]

On December 30, 1994, the North Carolina Supreme Court handed down its decision in *Bowers v. City of High Point.*[23] This second Dillon's Rule case concerned a local government's payment of benefits to law enforcement officers under a special separation allowance enacted by the legislature,[24] and whether it could pay employees an amount greater than that to which they were entitled under the statute. Read more broadly, the case deals with the ability of local governments generally to treat statutory provisions on pay and benefits as a "floor" above which additional benefits may be given. As discussed below, the court held that the city of High Point had no legal authority to pay its former employees an amount greater than that established by the legislature.

Facts of the Case

The facts in *Bowers* were undisputed. The plaintiffs were twelve High Point police officers who were eligible to retire from city service in 1986. The officers met with Randall Spencer, an assistant city manager, to discuss what their retirement benefits would be under the special separation allowance that had been enacted by the North Carolina General Assembly earlier that year. Spencer explained that under the statute, the officers would receive a special payment in addition to their regular retirement benefit, calculated as a percentage of their "base salary" multiplied by years of service, until they reached age 62.

Spencer stated that the base salary on which the separation allowance benefit would be calculated included not only the employees' regular pay rate, but also included longevity

22. Some of the material in this section is from Stephen Allred, "*Bowers v. City of High Point*: The North Carolina Supreme Court Examines Authority of Local Governments to Provide Employee Benefits," *Public Personnel Law Bulletin* No. 3 (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1995).

23. ___ N.C. ___, 451 S.E.2d 284 (1994).

24. G.S. 143-166.41. The act provides that law enforcement officers, as defined in the act, are entitled to a separation allowance retirement benefit if they are between the ages of 55 and 62, as long as they do not re-enter local government law enforcement during that period. The benefit is calculated by multiplying the employee's base rate of compensation by .85% for each year of creditable service. For example, an employee who retires at age 55 with 25 years of service and a base rate of $35,000 per year would receive an allowance of ($35,000 x .85%) $297.50 times 25, for a total annual payment of $7,437.50. The separation allowance is in addition to the employee's regular retirement benefit under G.S. 128, the Local Government Employees' Retirement System.

pay, overtime pay, and the cash equivalent of accrued vacation leave. The officers, acting in reliance on that representation, accepted early retirement after January 1, 1987, and began collecting their separation allowance.

In 1990 the High Point personnel director informed the city manager that the amount the city had been paying the retired officers was too much, and that under the General Statutes the separation allowance should have been calculated using only the employee's regular pay rate as the base. In other words, it was an error to include the officers' longevity pay, overtime, and accrued vacation leave in the payment calculation. The city wrote to the officers and informed them that the amount they had been receiving was incorrect and that their benefits would be reduced, effective immediately.

The officers brought suit in superior court, claiming they were entitled to continue to receive the separation allowance as originally calculated. The plaintiffs alleged breach of contract, unconstitutional impairment of contract, and an unconstitutional taking. The city did not dispute that a contract existed, but answered that the scope of the contract was beyond that which the city was legally authorized to execute.

Lower Court Rulings

Each side moved for summary judgment. The Guilford County Superior Court granted summary judgment in favor of the police officers, and the city appealed. The court of appeals affirmed the judgment of the superior court,[25] ruling that the promise by the assistant city manager that the special separation allowance would be computed on a final twelve months' compensation, including longevity pay, accrued vacation pay, and overtime pay, was enforceable. The court ruled that Spencer, as a duly appointed officer of the city, had the legal authority to enter into a contract with the officers in which the amount of retirement benefits they would receive could be determined. Having made this contract, the city could not later void it. Relying on *Pritchard v. Elizabeth City*,[26] the court held that the contract became binding and enforceable through the doctrine of estoppel, even if there was a question of whether Spencer had the authority to enter into the contract.

Supreme Court Ruling

The North Carolina Supreme Court unanimously reversed the court of appeals, agreeing with the argument advanced by the city of High Point that it had acted outside the scope of its legal authority in executing the contract and that it was not estopped from now asserting that the agreement was *ultra vires* (that is, beyond the scope of the city's contracting authority).

The court began its analysis by noting, as it did in *Homebuilders*, that local governments can exercise only those powers that the legislature has conferred on them. Thus, a contract made by a local government beyond its power is unenforceable.

As in *Homebuilders*, the court recited both Dillon's Rule and the rule of broad construction found in G.S. 160A-4. But it then emphasized a different aspect of G.S. 160A-4, observing that "[t]his statute, while reflecting our legislature's desire that cities should have the authority to exercise the powers conferred upon them, nevertheless clearly reiterates the principle that municipalities have only that power which the legislature has given them."

The court then examined the language in G.S. 143-166.41, which provides that law enforcement officers will receive the special separation allowance in accordance with the formula multiplying their "base rate of compensation." After a lengthy discussion of cases from other jurisdictions in which similar terms were construed by those courts to mean only the regular rate of pay, and an examination of the plain meaning of the words as defined in *Black's Law Dictionary*, the North Carolina Supreme Court concluded that the term "base rate of compensation" did not include overtime pay, longevity pay, or pay for unused vacation. The court held that the city did not have the legal authority to pay its officers a separation allowance using these factors.

The court then held that the city could not be estopped from asserting its claim that the original agreement was *ultra vires*—one that the city, through its agent Spencer, had no legal authority to execute—once the city determined that it had acted improperly. Rather, stated the court, the rule is that a local government may assert that an agreement was one that it had no power to make, even though it has accepted the benefits of the agreement and the other parties have fully performed their part of the agreement. Because the city had no legal authority to enter into the agreement in the first place—since the North Carolina General Assembly had only authorized payment of an allowance as calculated on the "base rate of compensation"—the city was not barred from subsequently voiding the contract, even though the plaintiffs had relied on the representations made by city officials at the time of contracting that they would receive the higher amount.

25. 110 N.C. App. 862, 431 S.E.2d 219 (1993).

26. 81 N.C. App. 543, 344 S.E.2d 821, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 598 (1986). In *Pritchard*, the court held that the city was estopped from denying liability under an agreement with its firefighters concerning accumulation of vacation leave. The agreement was deemed one the city could legally execute under the authority of the General Statutes.

Implications of the Court's *Bowers* Decision

In *Bowers,* the supreme court cites both Dillon's Rule and G.S. 160A-4, but it does not analyze what powers might be implied from G.S. 143-166.41. It does not examine what might be included if that grant of power was broadly construed under the rule of G.S. 160A-4, nor even what powers might be necessarily or fairly implied in or incident to G.S. 143-166.41 under Dillon's Rule. And the *Homebuilders* case is not mentioned at all.

In short, the court seems to return to a very strict view of the powers of local governments—that they may only take actions for which there is clear statutory authority. This is the view, it will be recalled, of the court of appeals and of the supreme court dissent in *Homebuilders.* Such a perspective is perhaps even stricter than the "necessarily or fairly implied" requirement for implied powers found in Dillon's Rule.

This point of view is closely related to the rule, discussed earlier, that the statement of one thing excludes another. Thus, the fact that the General Assembly has authorized one particular separation allowance, defined in a particular way, means that local governments not only have no authority to provide a lesser amount, but also that they cannot go beyond what the law requires and provide more.

The court in *Bowers* is essentially treating the specific statutory provision on separation allowances as a "ceiling" beyond which a local government may not go, as well as a "floor" for payments. In this way, the *Bowers* decision calls into question the ability of local governments to determine the scope of their benefits packages.

Several things are puzzling about the *Bowers* case. First, no mention is made of other possible sources of statutory authority for separation allowances to be provided by cities. Perhaps because it was not mentioned in the plaintiff's brief,[27] the court neither refers to nor discusses G.S. 160A-163, which authorizes city councils to provide for enrolling city employees in actuarially sound retirement systems or plans, to make payments into such systems or plans on behalf of their employees, and to supplement from local funds the benefits provided by certain retirement plans named in the statute. G.S. 160A-163 also allows a city council to create and administer an actuarially sound fund "for the relief of members of the police and fire departments who have been retired for age, or for disability or injury incurred in the line of duty."[28] The court also fails to mention G.S. 160A-162, which authorizes the city council to "fix or approve the schedule of pay, expense allowances, and other compensation of all city employees" and to "provide . . . fringe benefits for city employees." If these statutes are read in conjunction with the rule of broad interpretation in G.S. 160A-4, they seem clearly to provide municipalities with sufficient power to offer a separation allowance beyond that required by G.S. 143-166.41 if they choose to do so.[29]

A second puzzling aspect of the case is the court's willingness to apply Dillon's Rule again so soon after it had seemed to abandon Dillon's requirements in favor of the rule of construction in G.S. 160A-4. The court notes that the plaintiffs "have not argued that [the authority to enter a contract for a separation allowance] *is necessarily or fairly implied in an express power or that such power is essential and indispensable to [the City's] declared objects*" (emphasis added). This language is from Dillon's Rule, not G.S. 160A-4.[30]

Perhaps the easiest answer to this second puzzle is that the statute cited by the parties, G.S. 143-166.41, is not part of G.S. Chapter 160A, and that the rule of broad construction in G.S.160A-4 applies only to powers granted to cities under that chapter or under their charters. The statutory language can easily support such an interpretation. But if this is the case, why did the court not say so explicitly? And why did it quote G.S. 160A-4 in its discussion of rules of interpretation in the *Bowers* opinion?

Probably the most baffling thing about the *Bowers* case is that *Homebuilders,* decided only eight months earlier, is not mentioned by the court, even for the purpose of distinguishing that decision. Readers must draw their own conclusions, as best they can, about how the two cases fit together.

Read narrowly, *Bowers* stands for two simple and unremarkable propositions concerning the implied powers of cities. First, cities are not explicitly given authority by G.S. 143-166.41 to offer a greater-than-mandated separation allowance. Second, the court will not go out of its way to find

27. *Bowers,* ___ N.C. at ____, 451 S.E.2d at 291 ". . . plaintiffs have not pointed to a statute authorizing defendant to enter a contract for a separation allowance. . . ."

28. G.S. 160A-163(a), (b), and (c).

29. *Cf.* Leete v. County of Warren, 114 N.C. App. 755, 757, 443 S.E.2d 98, 99 (1994), *Notice of Appeal retained,* 336 N.C. 781, 447 S.E.2d 425 (1994) ["The legislature has vested county boards of commissioners with broad discretion to direct fiscal policy of the county, G.S. § 153A-101, and with specific authority to fix compensation for all county officers, G.S. § 153A-92. Courts may not interfere with the exercise of discretionary powers of local boards for the public welfare unless the action taken is so unreasonable that it amounts to an oppressive and manifest abuse of discretion. Jones v. Hospital, 1 N.C. App. 33, 34–35, 159 S.E.2d 252, 253 (1968)"].

30. *Bowers,* ___ N.C. at ____, 451 S.E.2d at 291. This language also seems to create a rather specific pleading requirement for a party asserting the existence of a local government power that is not expressly set out in a statute.

express or implied statutory authority for a greater allowance if the plaintiffs themselves are unwilling to make the necessary case.[31]

Read more broadly, *Bowers* seems to say that a strict interpretation of Dillon's Rule is alive and well in North Carolina, at least with respect to local government powers not mentioned in G.S. chapters 153A and 160A. And it may even be that the rule of broad construction found in G.S. 153A-4 and 160A-4 must still be taken with a "grain of salt" when one is seeking to imply powers under those two chapters.

One possible answer to the question of the two rules' present status may lie in the order in which they are presented in the opinion (Dillon's Rule, then G.S. 160A-4). Perhaps the court is introducing a two-tiered method for analyzing the powers given to local governments by the legislature. Under such an approach, courts would first use the principles of statutory interpretation found in Dillon's Rule to determine whether a local government has the power to act at all; for example, whether a local government is authorized to regulate development or to pay pension benefits. If the authority to act is expressly given or can be necessarily or fairly implied, the broader rule of construction found in G.S. 160A-4 would then be used to determine what types of actions, such as imposing user fees, are allowed. (And this second level of analysis might be limited to cases where the power to act is found in chapters 153A or 160A or in a local act.)[32]

Unfortunately, however, this proposed distinction between the powers that the legislature has granted to local governments and the actions that it has authorized them to take in furtherance of those grants of power ultimately collapses. For if a particular type of action is allowed under the broad construction rule of G.S. 153A-4 and G.S. 160A-4, that action must also by definition be included in what the local government has been explicitly or implicitly granted the power to do under Dillon's Rule.

Another possible answer involves the differing positions taken by the local governments involved in the *Homebuilders* and *Bowers* cases. The city of Charlotte argued for a broad interpretation of legislative grants of authority, in order to carry out certain programs in a particular way. The city of High Point, on the other hand, argued for a narrow interpretation of its statutory powers. But should interpretations of grants of power depend on whether or not the local government wants to have or exercise a particular grant?[33]

The ultimate question still awaits an answer. What did the legislature intend in each of its grants of power to local governments, and what rule of statutory construction are we to apply in determining that intent? It remains unclear to what extent North Carolina is still a Dillon's Rule state, and how much statutory authority is required for a local government to act. Prudent local government officials should probably continue to carefully choose what powers they imply from express statutory grants—even under chapters 153A and 160A—until the courts either provide additional guidance or the legislature explicitly decides the fate of Dillon's Rule.

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31. Recall the court's statement, mentioned earlier in note 27 and text accompanying note 30, that the plaintiffs neither pointed to a statute authorizing a city to contract for a greater separation allowance, nor argued that there was implied authority for a city to contract for such an allowance. *Bowers*, ____N.C. at ____, 451 S.E.2d at 291.

32. Another recent case is consistent with this interpretation. In County of Lancaster v. Mecklenburg County, 334 N.C. 496, 434 S.E.2d 604 (1993), the supreme court held that the general authorization in G.S. 153A-321 for counties to set up a "planning agency" of "not less than three members" did not allow them to make the zoning administrator a "planning agency." "[W]hile N.C.G.S. § 153A-321 gives local government considerable latitude, that latitude does not extend far enough to allow the designation of the zoning administrator individually to constitute a 'planning agency' for the purpose of making special and conditional use permit decisions. *While N.C.G.S. §§ 153A-4 and 160A-4 mandate that grants of authority to local governments be broadly interpreted, zoning authority cannot be exercised in a manner contrary to the express provisions of the zoning enabling authority.*" *Id.* at 509, 434 S.E.2d at 613 (emphasis added; footnote omitted).

Consider also a related point involving those cases where the General Assembly has described in great detail what a local government can do in a given situation—for example, the amount of separation allowance that it can offer. In such instances, the court might not look at all to G.S. 160A-4 for permission to imply additional powers. The court may reason that the legislature has spelled out exactly what the local government is to do, and that it wants to give precise effect to that legislative mandate

Courts may be especially likely to look only to what the legislature has actually said in cases where the statute not only gives local governments *the power* to do something, but *commands* that they do it. They may think that it makes less sense to look for implied grants of power in the case of an explicit legislature directive, such as that involving separation allowances (*Bowers*), than in the case of a general, less specific grant of permission to regulate land development (*Homebuilders*).

33. I am indebted to participants in the 1995 County Attorneys' Winter Conference, held on February 17–18, 1995, at the Institute of Government, for suggesting this interpretation.

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