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STORMWATER MANAGEMENT FEES AND LOCAL GOVERNMENT POWERS: THE NORTH CAROLINA SUPREME COURT RECONSIDERS *SMITH CHAPEL BAPTIST CHURCH V. CITY OF DURHAM*

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This bulletin discusses the North Carolina Supreme Court's recent decision in *Smith Chapel Baptist Church v. City of Durham*,[1] which superseded the court's earlier opinion in the case[2] and held the city's stormwater fees to be invalid because they were used to finance programs not authorized by the enabling statutes. It also discusses how the case adds to the uncertainty in the law regarding the powers of local governments.

History of the litigation

Durham's stormwater management program

The federal Water Quality Act of 1987 requires cities with a population of 100,000 or more to obtain a National Pollutant Discharge Elimination System (NPDES) permit to discharge stormwater from their municipal storm sewer systems into the nation's waters. In North Carolina, the NPDES permit program is administered by the Department of Environment and Natural Resources. In response to the permit requirements, the City of Durham, by ordinance, adopted a comprehensive stormwater quality management program on June 6, 1994. The program was financed by a utility fee charged to property owners based on the quantity of impervious surface area on the property. As defined by the ordinance, impervious surfaces included roofs, driveways, patios, parking areas, and other surfaces that impeded or prevented "the natural infiltration of water into the soil. . . ." The fee schedule was

[1] No. 250PA97 (August 20, 1999).

[2] Reported at 348 N.C. 632, 502 S.E.2d 364 (1998).

$2.17 per month for residential units with less than 2,000 square feet of impervious surface area, $3.15 per month for residential units with 2,000 square feet or more, and $3.25 per month for each 2,400 square feet of impervious surface area for other properties.

The city's comprehensive program included, in addition to the construction and operation of stormwater drainage systems, educational programs to encourage the prevention of stormwater pollution, a used oil recycling program, storm event water sampling, and the development of stormwater management programs for commercial, industrial, and residential areas and construction sites.[3]

The statutes relied on by the city for establishing its stormwater management program as a utility and for charging fees based on the amount of impermeable surfaces were G.S. 160A-311and G.S. 160A-314. G.S. 160A-311(10) includes in the definition of public enterprises that may be operated by municipalities "[s]tructural and natural stormwater and drainage systems of all types." G.S. 160A-314 authorizes municipalities to charge rates and fees for public enterprise services, and in describing the fees for stormwater utility services subsection(a1) provides that the fees "may vary according to whether the property served is residential, commercial, or industrial property, the property's use, the size of the property, the area of impervious surfaces on the property, the quantity and quality of the runoff from the property, the characteristics of the watershed into which the stormwater from the property drains, and other factors that affect the stormwater drainage system. Rates, fees, and charges imposed under this subsection may not exceed the city's cost of providing a stormwater and drainage system."

Challenge to the ordinance

On December 20, 1994, the plaintiffs, several Durham churches, filed an action in superior court for a declaratory judgment that the city's stormwater management ordinance was invalid. Among their challenges were that the fees charged were not commensurate with the services provided and that the ordinance exceeded the city's statutory authority under G.S. 160A-311 and 160A-314. The superior court held that the city had exceeded its statutory authority by imposing fees for programs beyond the cost of the stormwater drainage system— the physical infrastructure—and declared the ordinance invalid.

[3] This description of the city's program is taken from the court's August 20, 1999, opinion.

The city moved for a new trial or to amend the judgment. The court allowed the introduction of new evidence but did not change its original judgment that the ordinance was invalid. The city then filed a petition, pursuant to G.S. 7A-31, to have the supreme court review the case prior to a determination by the court of appeals, and the supreme court granted the city's petition for discretionary review.

Smith Chapel Baptist Church I

In its first opinion in the case, filed July 30, 1998,[4] the supreme court reversed the superior court and held the city's stormwater management ordinance valid. The court conceded that the superior court was correct in finding that the city's ordinance went beyond the authority granted by G.S. 160A-311 and 160A-314. Those statutes, by their terms, authorize fees only to finance structural and natural stormwater and drainage systems, not the city's entire comprehensive program. The statutes further provide that the fees may not exceed the costs of operating the stormwater drainage system. But for the supreme court that was not the entire story. The court found another source of the city's authority to impose the fees in Article XIV, section 5, of the North Carolina Constitution.[5] That provision makes it the policy of the state to conserve and protect its land and waters and says that it is a proper function of the state and its political subdivisions to limit pollution. The court stated that this gives cities authority to regulate water quality, including stormwater quality. Then, relying on *Homebuilders Ass'n of Charlotte v. City of Charlotte*,[6] the court held that it was reasonably necessary for the city to charge the fees to carry out its stormwater management program, as authorized by the constitution and required by the Water Quality Act.

[4] 348 N.C. 632, 502 S.E.2d 364.

[5] This is the conservation of natural resources provision, adopted in 1972.

[6] 336 N.C. 37, 442 S.E.2d 45 (1994). In this case the court upheld the city's authority to charge user fees for a number of regulatory services. Although no statutory provision authorized the charging of such fees, all of the regulatory services for which the fees were charged were expressly authorized by statute. Since the regulatory services were authorized by statute, the court found that G.S. 160A-4, which provides that the powers given cities are to be broadly construed and include supplementary powers reasonably necessary to execute stated powers, operated to permit the city to adopt measures reasonably necessary to implement those regulations. *Id.* 336 N.C. at 43-44, 442 S.E.2d at 50.

The court relied on G.S. 160A-314 to uphold the city's basis for calculating the fees to be charged. That statute does not require that the amount of the fee be related to services provided, and it permits the fee to be based on the amount of impervious surface area on the property. The city's method of calculating the fee was clearly authorized by statute. The court also brushed aside arguments that the fees violated the due process and equal protection provisions of the United States and North Carolina constitutions.

The decision was 5-2, with Justices Lake and Orr dissenting.

Smith Chapel Baptist Church II

The plaintiffs petitioned for a rehearing in the supreme court, which the court allowed on September 30, 1998, and in its second opinion in the case the court found the ordinance to be invalid.[7] The court again agreed with the superior court's judgment that G.S. 160A-311 and 160A-314 authorize cities to charge stormwater management fees to finance only structural and natural stormwater and drainage systems—the infrastructure—and not the sort of comprehensive management program adopted by Durham. But this time the court refused to look beyond the plain language of the statutes to find other authority that supported the city's ordinance.

The court agreed with *Smith Chapel Baptist Church* I that the city had properly based the amount of its fees on the quantity of impervious surface area, and that the amount of the fees did not have to be commensurate with services provided to a property. The court further held that the fee structure did not discriminate against the plaintiffs.

Finally, the court upheld the remedy ordered by the superior court, which was a refund of the fees paid by the plaintiffs, with interest. The court noted that the plaintiffs had paid the fees under protest and that a refund with interest was justified by analogy to a common law action for unjust enrichment: because of the invalidity of the ordinance, the city was in wrongful possession of the fees paid.

The decision was 4-3, with Justice Frye writing a dissenting opinion.[8] Justice Frye did not rely on Article XIV, section 5, of the North Carolina Constitution as authority for the city's adoption of a comprehensive stormwater management ordinance. Instead, he based his conclusion that the ordinance is valid on the following three points. First, to comply with the conditions of its NPDES permit, the city had to adopt a comprehensive stormwater management program, a program that went beyond infrastructure. Second, the disputed amount of the fees charged were to finance activities that were ancillary to and in support of the physical infrastructure. Third, pursuant to *Homebuilders Ass'n of Charlotte v. City of Charlotte*[9] and G.S. 160A-4, G.S. 160A-311 and 160A-314 should have been broadly construed to authorize the fees imposed by the city's ordinance. In Justice Frye's words, "Any ambiguity in the meaning of the term 'stormwater and drainage *system*' must be resolved in favor of enabling municipalities to execute the duties imposed upon them by federal law concerning the discharge of stormwater. The City cannot operate a stormwater and drainage system without complying with federal regulations."

The decision's consequences

The court's decision in *Smith Chapel Baptist Church* II has two sets of consequences: one for the City of Durham and stormwater management programs generally; and a second for how the courts will construe the statutory powers granted to local governments. For Durham and the other cities with stormwater management programs the decision is costly. Not only must they refund the fees, with interest, collected pursuant to the invalid ordinances, they must also pay for those parts of the programs not related to physical stormwater and drainage systems from the general fund. There are, however, two encouraging notes in the decision: basing the fees on the amount of impervious surface area was held to be valid; and no constitutional infirmities were found in either the statutes authorizing stormwater management fees or in the ordinance itself. Cities may therefore continue to charge all property owners stormwater fees based on a property's impervious surface area so long as the fees are used to finance only the infrastructure for stormwater and drainage systems. If the fees are ever to be used to finance other aspects of a comprehensive program, amendments will be required to G.S. 160A-311(10) and 160A-314(a1) to substitute "programs," or some similar term, for "systems."

The second consequence is more far-reaching. The majority opinion is grounded on the court's adherence to the plain meaning rule of construction. It found the language "structural and natural stormwater and drainage systems" plainly to include only physical infra-

[7] No. 250PA97 (August 20, 1999).

[8] Chief Justice Mitchell and Justice Parker joined the dissent.

[9] 336 N.C. 37, 442 S.E.2d 45 (1994).

structure, and that was the end of the matter. The opinion nowhere cites or discusses G.S. 160A-4 or *Homebuilders Ass'n of Charlotte v. City of Charlotte*.[10] The majority opinion's reliance in *Smith Chapel Baptist Church* I on the broad language of Article XIV, section 5, of the North Carolina Constitution as authority for a city to adopt a comprehensive stormwater management program might be viewed as a bit of a stretch even by the most ardent environmentalist. But Justice Frye's dissent in *Smith Chapel Baptist Church* II is closely reasoned and stays entirely within the confines of G.S. Chapter 160A. The majority opinion's disinclination to deal with *Homebuilders Ass'n of Charlotte* once again[11] raises the issue of the status of Dillon's Rule in North Carolina and whether it remains the controlling principle of statutory construction where municipal authority is concerned. The court might have distinguished *Homebuilders* by stating that it is inapplicable to statutes authorizing fees and charges and that such statutes will be strictly limited to the purposes stated, but it stopped too soon when it ended its analysis with the plain meaning rule of construction. The plain meaning rule and *Homebuilders* are not necessarily incompatible. Obviously, if a statute by its express terms grants municipalities the power in controversy, *Homebuilders* is inapplicable; it is only when a statute is silent on whether a power is granted that the case becomes relevant. By not addressing *Homebuilders*, an obviously relevant precedent relied on both in the earlier opinion in the case and by the dissent, or G.S. 160A-4, the controlling statutory rule of construction, the court added to the uncertainty in the legal community about the current status of that case and Dillon's Rule in North Carolina.

[10] *Id.*

[11] For a thorough discussion of the court's ambivalence about the case, see A Fleming Bell, II, *Dillon's Rule is Dead; Long Live Dillon's Rule!*, **Local Government Law Bulletin** No. 66, (Institute of Government, March, 1995).

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