



ILLINOIS STATE BAR ASSOCIATION

# LOCAL GOVERNMENT LAW

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## Local governments may not always impose its regulations and fees on other local governments

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Depending on your point of view, the Illinois appellate court for the Second District recently either struck a blow to the regulatory power of local governmental units or it clarified the power of state agencies in *County of Lake ex. Rel. Lake County Stormwater Management Com'n v. Fox Waterway Agency*, 326 Ill.App.3d 100, 759 N.E.2d 970, 259 Ill.Dec. 909 (2nd Dist. 2001). According to the Second District, when a state agency has been granted authority over a matter of government, a less particular grant of authority to an equal or lesser unit of government may not be exerted to require compliance with its mandates.<sup>1</sup> Moreover, the court found a state agency, being an arm of the state, occupies a superior position in the hierarchy of government in relation to local governmental bodies.<sup>2</sup> Accordingly, when confronted with local ordinances contrary to the purpose of a state agency, the agency is not required to abide by these regulations.<sup>3</sup>

The defendant in *County of Lake*, the Fox Waterway Agency (Agency), was a body corporate and politic created by the Fox Waterway Act.<sup>4</sup> The Act granted the Agency the power to implement reasonable programs and adopt necessary and reasonable rules and ordinances to improve and maintain the Fox River Waterway.<sup>5</sup> The Act also granted the Agency the power to develop programs and build projects to minimize pollution in its watershed from entering the Waterway and to acquire dredging equipment necessary to accomplish the purposes of the Act.<sup>6</sup>

Grass Island, located in Grass Lake, is part of the Fox River Waterway.<sup>7</sup> Over the years, a substantial portion of Grass Island had suc-

cumbed to erosion.<sup>8</sup> The Stormwater Commission, pursuant to its authority to improve the Waterway granted under the Fox Waterway Act, sought to re-build the island (the Geotube Project), creating a refuge for plants and wildlife.<sup>9</sup> The Geotube Project consisted of filling large fabric tubes with dredge spoil taken from the lake bottom.<sup>10</sup> By placing the tubes atop one another and in the shape of a square, an enclosure was created into which additional dredge was placed.<sup>11</sup> When enough material was added to the enclosure, native vegetation was planted.<sup>12</sup> The Agency refused to apply for a permit from the Stormwater Commission prior to beginning the project.<sup>13</sup>

The Stormwater Commission was a body created under the Counties Code, charged with developing a Stormwater Management plan for Lake County.<sup>14</sup> Under the Counties Code, the Stormwater Commission had the power to "prescribe by ordinance reasonable rules and regulations for floodplain management,"<sup>15</sup> and "regulate and restrict the location of buildings, structures, and land for trade, industry, or other uses."<sup>16</sup>

Pursuant to an agreement with the Illinois Department of Natural Resources (IDNR), the Stormwater Commission was granted the authority to require and issue permits for construction in the designated "100-year" floodway.<sup>17</sup> In light of this authority and the Agency's failure to obtain a permit, the Stormwater Commission issued a stop work order and brought an action against the Agency seeking a declaration that the Agency must obtain a permit.<sup>18</sup>

On appeal, the Second District held the

Agency exempt from the Stormwater Commission's permit application requirement.<sup>19</sup> The court framed the issue as whether the Stormwater Commission may exert authority to require a statutorily created entity that possesses the statutory authority to engage in precisely the activities for which the Stormwater Commission seeks to require a permit.<sup>20</sup> The court held that the status the Agency enjoyed as an agency created by the state Legislature with the specific purpose and authority to engage in activities like the Geotube Project exempted it from the Stormwater Commission's permit requirements.<sup>21</sup>

In making their decision, the court focused on the scope of authority given to both the Agency and the Stormwater Commission. While both the Stormwater Commission and Agency enjoyed authority to regulate certain activities affecting stormwater management, the court found the Agency, through the Fox Waterway Act, had been given far more particular authority.<sup>22</sup> Specifically, the court found the Geotube Project, an undisputed improvement to Grass Lake, expressly within the power granted to the Agency to "acquire... dredging equipment" and "construct... facilities" to improve the waterway.<sup>23</sup> The court found that "where a legislative enactment grants primary jurisdiction over a particular matter to a body of government, a less particular grant of authority to an equal or lesser unit of government may not be exerted to require compliance with its mandates."<sup>24</sup>

Further, while the appellate court encouraged cooperation between units of

local government, it found that where, as here, two unequal legislative bodies have inconsistent enactments, the enactment of the more powerful will preempt that of the lesser.<sup>25</sup> The Second District contrasted both the Agency's and Stormwater Commission's grant of authority, noting that the Agency's authority is drawn from a "legislative purpose establishing a bi-county water improvement agency with certain powers and responsibilities,"<sup>26</sup> while the Stormwater Commission is empowered by "a county's ordinance authority derived from the powers conferred upon it in the Counties Code, and the permit authority delegated to the Commission by the IDNR."<sup>27</sup> Ultimately, the court found the Agency, a statutorily created agency, more powerful than the Stormwater Commission, a body created by a county board resolution.<sup>28</sup>

While the court principally based its ruling on the specific grant of authority given the Agency and the power the Agency enjoyed as an arm of the state over the Stormwater Commission, it relied for further support from case law. In all, the court mentioned the Agency's specific grant of authority;<sup>29</sup> The power a statutorily created entity enjoys over one created by a county board

resolution;<sup>30</sup> The more recent enactment of the Fox Waterway Act;<sup>31</sup> And that regulation of the Agency's activities by the Stormwater Commission would be inconsistent with the purpose for which the Agency was created.<sup>32</sup>

The court's reasoning indicates: (1) That a state agency with particular authority over a matter is not required to abide by the mandates of an equal or lesser body of government with a less-particular authority over the same matter; and (2) In the absence of contrary statutory language, a state agency will be exempt from restrictions of local governmental bodies. This ruling may have broad and far-reaching implications for units of local government and the limits of their regulatory authority. Municipal attorneys should be well-versed in this decision when advising local governmental units on the feasibility and enforcement of regulations and ordinances against other governmental bodies. ■

1. *County of Lake ex. Rel. Lake County Stormwater Management Com'n v. Fox Waterway Agency*, 326 Ill.App3d 100, 110 (2nd Dist. 2001)

2. Id. at 108

3. Id.

4. 615 ILCS 90/1.1

5. 615 ILCS 90/7.1

6. 615 ILCS 90/7.1 and 7.5

7. 326 Ill.App.3d 101

8. Id.

9. Id.

10. Id.

11. Id.

12. Id.

13. Id. at 103

14. 55 ILCS 5/5-1062(b)

15. 55 ILCS 5/5-1062(f)

16. 55 ILCS 5/5-12001

17. 326 Ill. App.3d 105

18. Id. at 102

19. Id. at 110

20. Id. at 105

21. Id. at 110

22. Id. at 106

23. Id.

24. Id. at 107

25. Id. at 108

26. Id. at 109

27. Id.

28. Id. at 107

29. Id.

30. Id. at 108

31. Id. at 109-110

32. The court compared the situation of the parties in this case to those in *Metropolitan Sanitary District of Greater Chicago v. City of Des Plaines*, 63 Ill.2d 256, 347 N.E.2d 719 (1976), where the court found a fundamental difficulty permitting a regional district to be regulated be a part of that region.

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