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LOCAL GOVERNMENT PARTICIPATION IN THE PERMITTING OF SANITARY LANDFILLS

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North Carolina statutes give cities and counties limited authority to participate in the process by which permits are issued for the construction and operation of sanitary landfills, an authority that is relatively new and that is untested in court. This bulletin analyzes the role given local governments and concludes that they have not been granted the unrestricted power to veto a permit application.

The regulatory framework

The authority of North Carolina local governments to participate in the permit application process, granted by N.C.G.S. §§ 130A-294(a)(4)a. and (b1), 153A-136(c), and 160A-325, must be understood within the state's framework for reviewing and approving permits for sanitary landfills. This state framework must meet the minimum requirements of subpart D of the federal Resource Conservation and Recovery Act,[1] which directs that each state have an approved solid waste management plan that meets certain statutory criteria, that open dumps of solid waste be prohibited, and that solid waste be disposed of only in permitted sanitary landfills or resource recovery facilities. The Environmental Protection Agency, pursuant to subpart D, has issued detailed regulations concerning where sanitary landfills for the disposal of municipal solid waste may be located and how they must be designed and operated.[2] The purpose of the federal regulations is to establish minimum national criteria to "ensure the protection of human health and the environment."[3]

The North Carolina permit requirements are derived from two broadly worded statutes: G.S. 130A-294(a)(4)a directs the Department of Environment, Health, and Natural

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1. 42 U.S.C. §§ 6941-6949a.
2. 40 C.F.R., part 258.
3. Id. § 258.1(a).

Resources (DEHNR) to develop a permit system for the establishment and operation of solid waste management facilities, and G.S. 130A-294(b) directs the Commission for Health Services to adopt rules to implement a comprehensive statewide solid waste management plan. The detailed rules regarding applications for permits to construct and operate landfills for the disposal of municipal solid waste are found in Title 15A North Carolina Administrative Code, subchapter 13B.[4] The permit procedure is in two parts: a permit applicant must first submit a site study and obtain a permit to construct[5] and then obtain a permit to operate the facility.[6] The rules prescribe the information that must be contained in a permit application and siting and design requirements for landfills.[7] As can be seen from this sketch of the federal and North Carolina regulatory framework, federal and state law contemplate that permits for sanitary landfills will be issued by a state agency pursuant to state rules that—at a minimum—conform to the federal requirements for landfills.

History of authority for local government participation

Until 1987, no statute authorized local governments to participate in the landfill permitting process. In that year, the General Assembly enacted chapter 597 (H. 261), which amended G.S. 130A-294(a)(4) to provide that no permit could be issued for a sanitary landfill until approval of the permit had been granted by the city or county in which the landfill was to be located. In 1993, the approval requirement was broadened by chapter 473 (S. 1003) to require local government approval of an application for the renewal of or substantial amendment to an existing permit. Because this statute contained no standards to guide local government review and approval, several lawyers, including this writer,[8] were of the opinion that the statute was very likely unconstitutional; it authorized a local government to deny permission for the operation of a legitimate business without basing that denial on a constitutionally recognized exercise of the police power, such as the protection of public health. To remedy this constitutional deficiency, the General Assembly, in 1994, enacted chapter 722 (H 1973), which established the franchise and land-use compliance requirements now in G.S. 130A-294(b1). These requirements do not apply to demolition landfills.[9]

In addition, in 1992, the General Assembly imposed requirements on local governments when a permit is sought for a new sanitary landfill that is to be located within one mile of an existing sanitary landfill.[10] These requirements are contained in G.S. 153A-136(c) and G.S. 160A-325.

Analysis and comment

Local government franchises

G.S. 130A-294(b1)(3) requires that before DEHNR's Waste Management Division approves a permit application for a new sanitary landfill, the renewal of a permit, or a substantial amendment to a permit, the applicant must have received a franchise from the local government with jurisdiction over the landfill. If the local government is a county, it must adopt a franchise ordinance pursuant to G.S. 153A-136. That statute authorizes a county to adopt an ordinance granting a franchise "to one or more persons for the exclusive right to commercially collect or dispose of solid wastes within all or a defined portion of the county and prohibit any other person from commercially collecting or disposing of solid wastes in that area." As used in the statute, "exclusive" appears to mean only that a county may provide that no person may collect or dispose of solid waste without a franchise, and not that only one franchise may be granted for the county or a portion of the county. The maximum term of a solid waste disposal franchise is 30 years.

If the local government with jurisdiction is a municipality, it is required to adopt a franchise ordinance pursuant to G.S. 160A-319. That statute

[4]. Although the definition of a "sanitary landfill," as that term is used in G.S. 130A-294(a)4a., includes landfills other than those used for the disposal of municipal solid waste [see the definition of "sanitary landfill" in G.S. 130A-290(a)(31)] all references in this bulletin to the North Carolina rules are to those that apply to sanitary landfills for the disposal of municipal solid waste. These are the sanitary landfills of greatest concern to local governments.

[5]. 15A N.C.A.C. 13B.1603.

[6]. Id. § .1617.

[7]. Id. §§ .1617, .1622., 1624.

[8]. See William A. Campbell, Solid-Waste Management: Local Government Exclusionary Policies, 55 Popular Government, Spring 1990, p. 44.

[9]. N.C. Gen. Stat. § 130A-294(a)(4)a.

[10]. Chapter 1013 (S. 1159), 1991 Session Laws, 1992 Regular Session.

provides that a municipality may grant a franchise for any utility operation "upon reasonable terms." The maximum term of a municipal solid waste disposal franchise is also 30 years.

Whether granted by a city or a county, a landfill franchise must contain the following information: (1) a description of the population to be served, including a description of the geographic area; (2) a description of the volume and characteristics of the waste stream; and (3) a projection of the landfill's useful life,[11] information already required of the applicant by the state rules.[12]

It is unclear whether a city or county that intends to apply for a permit to construct a landfill in its own jurisdiction must grant itself a franchise. G.S. 153A-136 speaks of a franchise for the commercial disposal of waste, and "commercial" in this context may mean by a private firm for a fee. On the other hand, it may mean simply disposal for a fee, which would include a county that charges a tipping fee. G.S. 160A-319 contains no language limiting it to commercial disposal. Since the purpose of the franchise requirement is to provide the local government and DEHNR with three items of information, and a local government applicant will already have the information and DEHNR will obtain it in the permit application, there appears to be no reason for a local government to adopt a franchise ordinance granting itself a franchise. DEHNR may, however, interpret the statute as requiring such a franchise, since the statute contains no express exception for local government applicants. It is clear that if one local government intends to apply for a permit to construct a landfill within the boundaries of another local government, it must obtain a franchise from the city or county where the landfill is to be located.

It further appears to be the intent of the statute that when a permit applicant is ready to submit its application to DEHNR and furnishes the local government with the three items of information that must be included in the franchise, the local government may not deny the franchise or impose conditions in the franchise that would prohibit the landfill. G.S. 153A-136(b) requires any county solid waste franchise ordinance to be consistent with the state rules. G.S. 160A-319 does not contain a similar requirement for municipal franchise ordinances, but consistency with the state rules would be required of a municipal ordinance under preemption principles.[13] There may be some leeway, within the bounds of this consistency requirement, for a local government to impose conditions or restrictions in its franchise ordinance that deal with matters not covered in the the rules, but because the rules are so detailed, this leeway is narrow indeed. And because the evaluation of environmental and health considerations and the decision whether to grant a permit are matters committed by the rules to DEHNR, not to local governments, there is no legal room for a local government simply to deny a franchise or impose conditions in its franchise that would effectively result in the denial of a permit.

Compliance with land-use regulations

The second requirement, imposed by G.S. 130A-294(b1)(4), directs the applicant to furnish DEHNR with a determination from the local government having jurisdiction that the landfill is consistent with any "franchise, zoning, subdivision, or land-use planning ordinance" applicable to the landfill. To serve as a basis for a determination of consistency, any land-use regulation must have been in effect not less than 90 days before the date the request for determination is delivered to the clerk of the local government. If a local government makes a determination that the landfill would be inconsistent with any applicable land-use ordinance, it must accompany that determination with a copy of the offended ordinance and the specific reasons for the inconsistency. In the event of a determination of inconsistency, DEHNR must attach as a condition of any permit issued that the landfill not be constructed or operated until it is in compliance with the ordinance cited in the determination of inconsistency.

The types of ordinances listed in the statute for which a determination of consistency is required are "franchise, zoning, subdivision, or land-use planning." Each type merits separate examination.

The requirement of consistency with a franchise ordinance adds nothing to the franchise requirement in G.S. 130A-294(b1)(3), discussed above, and it is unnecessary duplication to require a determination of consistency with that same franchise ordinance under G.S. 130A-294(b1)(4), but it is nevertheless required.

Compliance with local zoning ordinances was already required by the state permit rules.[14] The requirement of a determination of consistency with a local zoning ordinance probably applies only to private applicants for a permit and not to local government applicants. City and county zoning ordinances, by virtue of the limitations imposed by G.S. 160A-392 and G.S. 153A-347, are applicable only to "buildings"

11. N.C. Gen. Stat. § 130A-294(b1)(3).

12. 15A N.C.A.C. 13B.1619(e).

13. See N.C. Gen. Stat. § 160A-174(b).

14. 15A N.C.A.C. 13B.1618(c)(5)(B).

of local governments, and the North Carolina Court of Appeals, in a subsequently modified decision, has held that a public enterprise is not a building within the meaning of the zoning statutes and therefore not subject to another local government's zoning ordinance.[15] A sanitary landfill owned by a city or county is defined as a public enterprise.[16]

A local government may not use its zoning authority to prohibit the construction of any landfill in the jurisdiction, unless it can base the prohibition on a demonstrable need to protect the public health or welfare, and if it can make such a demonstration the permit very likely could not be granted under the state rules anyway. Two cases from other states have held that zoning that completely excluded landfills was not supported by health and safety concerns and was therefore unconstitutional,[17] and this is in accord with North Carolina zoning law.[18] A different question would arise if a local government zoning ordinance allowed for landfills in certain areas but not at the location where the applicant intended to construct the landfill and the location is otherwise suitable for a landfill. G.S. 130A-294(b1)(4) appears to require a finding of inconsistency with the zoning ordinance in such a situation.

Although compliance with applicable subdivision ordinances is required, it is not easy to conceive of a proposed landfill site that would meet the definition of a subdivision in G.S. 160A-376 or G.S. 153A-335 (division of land into two or more lots "for the purpose of sale or building development").

The other land-use planning ordinances with which a determination of consistency is required include a local sedimentation and erosion control ordinance adopted pursuant to G.S. 113A-60, a coastal area land-use plan adopted pursuant to G.S. 113A-110, a floodway protection ordinance adopted pursuant to G.S. 143-215.57, and a water supply watershed protection ordinance adopted pursuant to G.S. 143-214.5. Compliance with the sedimentation pollution control law,[19] the protection of floodways,[20] and the protection of water supply watersheds[21] was already required by the state rules, and it is highly unlikely that DEHNR would approve a permit application for a landfill site in violation of a coastal area land-use plan, especially in light of the protection given wetlands in the rules.[22]

Additional requirements when the site is near an existing landfill

If a permit application shows that the new landfill will be located within one mile of an existing sanitary landfill, G.S. 153A-136(c) and G.S. 160A-325 require that the local government "consider alternative sites and socioeconomic and demographic data" and hold a public hearing before "selecting or approving" the site. A public hearing on virtually all permit applications is also required by the state rules[23] and by G.S. 130A-294(b1)(2). Local governments are required only to "consider" socioeconomic and demographic data and alternative sites; they are not prohibited from selecting a site for a new landfill within one mile of an existing landfill. The authority to approve a site, within the meaning of these statutes, is "approval . . . under G.S. 130A-294(a)(4)."[24] As noted elsewhere in this bulletin, local governments do not have authority to approve permit applications, although they did have such authority (of doubtful constitutionality) at the time these statutes were enacted. Local government authority under G.S. 130A-294(a)(4) now consists only of the authority to franchise and require compliance with land-use regulations, as discussed in this bulletin.

Conclusion

This examination of the local government participation authority contained in G.S. 130A-294(b1)(3) and (4) and the special provisions of G.S. 153A-136(c) and 160A-325 leads to the conclusion that the statutes resemble the emperor's new clothes: they may make local governments—and landowners near existing landfills—feel better, but they add very

15. Davidson County v. City of High Point, 85 N.C.App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

16. N.C. Gen. Stat. §§ 160A-311(6) and 153A-274(3).

17. Ottowa County Farms, Inc. v. Township of Polkton, 131 Mich. App. 222, 345 N.W.2d 672 (1983); Crown Wrecking Co., Inc. v. Zoning Hearing Bd., 71 Pa. Commnw. 310, 454 A.2d 683 (1983).

18. See Berger v. Smith, 160 N.C. 205, 74 S.E. 1098 (1912). See also, Town of Conover v. Jolly, 277 N.C. 439, 177 S.E.2d 879 (1971), holding that a municipality had no authority to prohibit completely the use of mobile homes as residences.

19. 15A N.C.A.C. 13B.1624(b)(14).

20. Id. § .1622(2).

21. Id. § .1622(9).

22. Id. § .1622(3).

23. Id. § .1603(c)(5) and (6).

24. N.C. Gen. Stat. §§ 153A-136(c)(1) and 160A-325(a)(1).

little to the pre-existing legal powers of cities and counties and nothing to the protection of public health and the environment beyond what is required in the state rules.

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