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THE RULEMAKING AUTHORITY OF NORTH CAROLINA LOCAL BOARDS OF HEALTH

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State law authorizes local boards of health in North Carolina to adopt rules necessary to protect the public's health. This statutory grant of authority is further defined by two relatively recent court decisions. This bulletin summarizes the statutory rulemaking authority of local boards of health as well as the judicially-imposed limitations placed on that authority.

Statutory Authority

State law requires counties to provide public health services. [1] Each county may provide these services in one of five ways.[2] The county may operate a county health department, participate in a district health department,[3] establish a consolidated

1. N.C. Gen. Stat. 130A-34(a) (hereinafter G.S.).

2. G.S. 130A-34(b) (stating four of the methods for providing public health services); 130A-45 (stating that the purpose of Chapter 130A, Part 1B is to "provide an alternative method for counties to provide public health services" through the creation of a public health authority).

3. A district health department is one that provides public health services to two or more counties. G.S. 130A-36.

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human services agency,[4] establish a public health authority,[5] or contract with the state for the provision of public health services.[6] Each county, agency, district or authority has a board of health that is the "policy-making, rule-making and adjudicatory body" for the department, agency or authority.[7]

These boards of health have "the responsibility to protect and promote the public health" and are specifically authorized by statute to "adopt rules necessary for that purpose."[8] There are three statutory limitations on this general rulemaking authority. First, if the Commission for Health Services or the Environmental Management Commission (EMC) adopts a rule, that state rule will prevail over any more lenient rule adopted by a board of health. However, a board of health may adopt a rule that is more stringent than a corresponding state rule when, in the board's opinion, a more stringent rule is necessary to protect the public health.[9] Second, a board of health is not authorized to adopt any rules relating to the grading, operating or permitting of food and lodging facilities.[10] Finally, a board of health may adopt rules governing wastewater collection, treatment and disposal systems that are not designed to discharge effluent to the land surface or surface waters. Such rules may be adopted, however, only when the state has reviewed the local rules and determined that the local rules are at least as stringent as the rules adopted by the EMC and are sufficient and necessary to safeguard the public health.[11]

In addition to the general rulemaking authority "to protect and promote the public health," boards of health are, in a few instances, specifically authorized or required to enact rules. For example, although state statutes and EMC regulations govern the construction of wells, local boards of health are specifically authorized to adopt by reference the EMC rules and then adopt more stringent rules "when necessary to protect the public health."[12] Also, local boards of health are required to adopt rules governing administrative penalties for violations of any local rules governing wastewater collection, treatment and disposal.[13]

Court Decisions

Two court decisions within the last decade have defined and narrowed the legal authority of local boards of health to adopt rules related to public health.

City of Roanoke Rapids v. Peedin

In *City of Roanoke Rapids v. Peedin*, the North Carolina court of appeals invalidated Halifax County's board of health rules relating to smoking in public places, restaurants, and places of employment.[14] The rules generally prohibited smoking in public places but provided for several exceptions. For example, restaurants with a seating capacity of thirty or more patrons were required to designate a nonsmoking area comprising a certain percentage of the dining area while bars and restaurants with a seating capacity of fewer than thirty patrons were permitted to choose whether to offer a nonsmoking area.[15] The court invalidated the rules as exceeding "the general limitations imposed upon rule making powers of boards of health."[16]

For the first time, the court identified a five-part test for determining when a board of health has acted within its rulemaking authority. The court stated that a board of health acts within its authority when it enacts a rule that

- is related to the promotion or protection of health;

4. A county with a population over 425,000 may elect to establish a consolidated human services agency and board to oversee public health, social services, mental health and other human services or have the board of county commissioners assume all of the statutory powers and functions of the board of health. G.S. 153A-77; 130A-43.

5. A public health authority is a legal entity that is created for the specific purpose of providing public health services in a defined geographical area. G.S. 130A-45 *et seq*. For a discussion of the powers of public health authorities, see A. Fleming Bell, II and Warren Jake Wicker, eds. *County Government in North Carolina, 4th ed*. 637-639 (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1998).

6. G.S. 130A-34.

7. G.S. 130A-35(a) (county boards of health); 130A-37(a) (district boards of health); 130A-45.1(a) (public health authority board).

8. G.S. 130A-39(a) (local boards of health); 130A-39(a) (district boards of health); 130A-45.3(a)(1) (public health authority).

9. G.S. 130A-39(b).

10. *Id*.

11. *Id*.; G.S. 130A-335(c).

12. G.S. 87-96(c). *See also* G.S. 87-83 *et seq*.(Well Construction Act); 15A NCAC 02C .0101 *et seq*. (EMC regulations governing well construction).

13. G.S. 130A-22(h).

14. 124 N.C.App. 578, 478 S.E.2d 528 (1996).

15. *Id*. at 583, 478 S.E.2d at 531.

16. *Id*. at 587, 478 S.E.2d at 533.

- is reasonable in light of the health risk addressed;
- does not violate any law or constitutional provision;
- is not discriminatory; and
- does not make distinctions based upon policy concerns traditionally reserved for legislative bodies.[17]

The court explained that this five-part test was "based upon previous holdings in related areas, as well as the holdings of courts in other jurisdictions."[18]

The court did not provide any additional guidance regarding the interpretation and application of the first four parts of this test, instead choosing to invalidate the board of health rules based on the fifth part of the test. The court reasoned that in order to achieve the rules' stated purpose of minimizing the public's exposure to environmental tobacco smoke, the board was required to establish across the board requirements that "treat similarly situated patrons and employees of all restaurants equally."[19] The court noted that the distinctions drawn by the board in the rules, such as the distinction between large and small restaurants, "involve the balancing of factors other than health."[20] The court concluded that, absent express statutory authority, a board of health may consider nothing but health when adopting rules; it may not consider issues such as economic hardship or difficulty of enforcement.[21] The court emphasized that only legislative bodies, such as the General Assembly or a board of county commissioners, are authorized to make such policy-based distinctions.[22]

Craig v. County of Chatham

In *Craig v. County of Chatham*, the North Carolina supreme court invalidated board of health rules regulating swine farms.[23] The rules adopted by the board of health required swine farms to comply with certain specifications regarding permitting, setbacks, buffers, and other related issues.

The court of appeals determined that because the state had enacted the "Swine Farms Siting Act"[24] and "Animal Waste Management Systems" laws[25] which, like the local rules, imposed comprehensive requirements on swine farms relative to permitting, setbacks, buffers, and other related issues, local regulation of swine farms (with the exception of zoning regulation in limited circumstances) was not allowed.[26] The court held that the board of health rules were preempted by state law because the state has already provided "'a complete and integrated regulatory scheme' of swine farm regulations."[27]

In affirming the appellate court's preemption decision, the supreme court examined state statutes and regulations governing the siting of swine farms and animal waste management as well as the expressed purpose, intent, breadth, and scope of the statutes. The court articulated three justifications for concluding that the local rules were preempted. First, from the statement of purpose accompanying the Swine Farm Siting Act, the court concluded that the General Assembly intended to strike a balance between protecting the rights of landowners and supporting the swine farm industry because it is "important to the economic stability of the state."[28] The court stated that regulation by both the state and the county was contrary to this intent because

17. *Id*.

18. *Peedin*, 124 N.C. App at 587, 478 S.E.2d at533. The court cited several cases as support for its five-part test. *State v. Curtis*, 230 N.C. 169, 171, 52 S.E.2d 364, 365 (1949) (cited as support for the conclusion that boards of health do not have authority to make distinctions based on policy concerns traditionally reserved for legislative bodies); *Clark's Charlotte, Inc. v. Hunter*, 261 N.C.222, 229, 134 S.E.2d 364, 369 (1964) (cited as support for the conclusions that rules must be reasonable and must not be discriminatory); *Cookie's Diner, Inc. v. Columbus Board of Health*, 65 Ohio Misc.2d 65, 74, 640 N.E.2d 1231, 1236 (1994) (cited as support for the conclusions that rules must be reasonable, must not be discriminatory, must not violate of any law or constitutional provision, and must not make distinctions based on policy concerns traditionally reserved for legislative bodies); *Weber v. Butler Cty. Bd. of Health*, 148 Ohio St. 389, 396, 74 N.E.2d 331, 336 (1947) (same); *Boreali v. Axelrod*, 523 N.Y.S.2d 464, 468, 517 N.E.2d 1350, 1353 (cited as support for the conclusion that boards of health do not have authority to make distinctions based on policy concerns traditionally reserved for legislative bodies).

19. *Peedin*, 124 N.C. at 588, 478 S.E.2d at 534.

20. *Id*.

21. *Id*. at 589, 478 S.E.2d at 534.

22. *Id*. at 588-89, 478 S.E.2d at 534.

23. 356 N.C. 40, 565 S.E.2d 172.

24. G.S. 106-800 - 805.

25. G.S. 143-215.10A - 215.10M.

26. *Craig v. County of Chatham*, 143 N.C.App. 30, 40, 545 S.E.2d 455, 461. There is a specific statutory provision that permits counties to adopt zoning ordinances governing swine farms in limited circumstances. *Id*. (citing G.S. 153A-340(b)(3)).

27. *Id*. at 40, 545 S.E.2d at 462.

28. *Craig*, 356 N.C. at 47, 565 S.E.2d at 177.

it "would present an excessive burden on swine farmers and the pork production industry as a whole."[29]

Second, the court recognized that one purpose of the animal waste management law was to "promote a cooperative and coordinated approach to animal waste management among the agencies of the State…."[30] The court explained that dual regulation was contrary to this purpose because if "each county were allowed to enact its own waste management guidelines, there could be no statewide 'coordinated approach.'"[31]

The third justification for determining that the local rules were preempted was based on the breadth and scope of the state's regulation. The court concluded that the "statutes are so comprehensive in scope that the General Assembly must have intended that they comprise a 'complete and integrated regulatory scheme' on a statewide basis…."[32] Based on this review, the court concluded that the board of health rules were invalid because the state had in place a "complete and integrated regulatory scheme" for swine farms and intended to preempt, or override, any local regulation of swine farms.[33]

The court did recognize that dual regulation may exist in some situations because, in addition to their general rulemaking authority, local boards of health are authorized to adopt more stringent regulations than those of either the Commission for Health Services or the EMC when more stringent rules are "'required to protect the public health.'"[34] The court reviewed the applicable EMC regulations and concluded that the board of health rules were more stringent in some regards. The court, however, found that the rules were still preempted because the board of health simply included a statement asserting that more stringent rules were necessary to protect the public health and did not include "any rationale or basis for making the restrictions in Chatham County more rigorous than those applicable to and followed by the rest of the state."[35]

29. *Id*. at 48, 56 S.E.2d at 178.

30. *Id*.

31. *Id*.

32. *Craig*, 356 N.C. at 50, 565 S.E.2d at 179.

33. *Id*. at 52, 56 S.E.2d at 180-81. The remainder of the supreme court decision recognized one limited statutory exception to this preemption. The state law permits counties to adopt zoning ordinances governing swine farms in limited circumstances. *Id*. at 54, 56 S.E.2d at 181 (citing G.S. 153A-340(b)(3)).

34. *Id*. at 51, 56 S.E.2d at 179 (citing G.S. 130A-39).

35. *Id*. at 52, 56 S.E.2d at 180.

Summary

The statutory grant of general rulemaking authority to boards of health is rather broad: the boards are authorized to adopt rules necessary to protect and promote the public's health. They are also specifically authorized to adopt more stringent rules in areas regulated by the Commission for Health Services or the EMC if more stringent rules are necessary to protect the public health. Two recent court decisions, however, have limited local boards' authority in three basic ways.

First, a board of health is acting within its rulemaking authority only if the rule:

- is related to the promotion or protection of health;
- is reasonable in light of the health risk addressed;
- does not violate any law or constitutional provision;
- is not discriminatory; and
- does not make distinctions based upon policy concerns traditionally reserved for legislative bodies.

Because of the last requirement described above, a board of health may not adopt rules based on the consideration of factors other than health.

Second, the local board of health rules may be preempted if the state has already provided "a complete and integrated regulatory scheme" of regulation, such as in the field of swine farms.

Third, if the board of health adopts rules that are more stringent than rules adopted by the Commission for Health Services or the EMC, the board must expressly demonstrate that more stringent rules are necessary to protect the public's health.

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