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State Preemption of Local Hazardous and Low-level Radioactive Waste Ordinances

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During the past several years, a number of North Carolina counties and cities have enacted comprehensive ordinances dealing with the management of hazardous and low-level radioactive waste. These ordinances typically contain provisions that require (1) detailed applications by persons seeking to establish waste management facilities, (2) environmental impact assessments, (3) maps of the affected property and its relation to groundwater aquifers, (4) issuance of county or city permits for the facility, (5) inspection and testing of waste shipments intended to be treated or disposed of at the facility, (6) the monitoring of groundwater and air quality, (7) application fees, (8) various reports, and (9) postclosure protection of the site. This *Bulletin* discusses the extent to which these comprehensive ordinances are preempted by the state's statutes and regulatory programs for the management of hazardous and low-level radioactive waste.

North Carolina Preemption Principles

Under common law, municipal ordinances must be consistent with general state laws.[1] The North Carolina General Assembly codified and elaborated upon this principle in General Statute Chapter 160A, Section 174(b),[2] which provides that:

> A City ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with state or federal law when: . . .
>
> (2) The ordinance makes unlawful an act, omission, or condition which is expressly made lawful by state or federal law. . . .
>
> (5) The ordinance purports to regulate a field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation.

Although G.S. 160A-174(b) refers specifically to municipal ordinances, the North Carolina Supreme Court has used G.S. 160A-174(b) to analyze county ordinances. For instance, in *State v. Tenore*,[3] the court said that a county cannot pass an ordinance using a higher standard of conduct to regulate the identical type of conduct (in this case nude dancing) that the state has regulated. Thus the court indicated that the principles of the statute applied to counties as well. Furthermore, under G.S. 153A-11, counties must exercise their regulatory powers in

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conformity with the laws of the state. In *Cabarrus County v. City of Charlotte*,[4] the court of appeals found that a county landfill ordinance cannot require a city to charge rates based on residence rather than kind and degree of service as required by state statute. Thus it can be presumed that counties as well as municipalities cannot regulate a field for which a state statute provides a complete and integrated regulatory scheme.

G.S. 160A-174(b)(5) requires the courts to examine legislative intent to determine if a statute imposes a complete and integrated regulatory scheme. Although the North Carolina courts have not developed a single test to make this determination, they have found various factors to be controlling. These factors include (1) express declarations within the statute that it provides a uniform regulatory scheme; (2) whether there is a need for a uniform regulatory scheme; (3) the comprehensiveness of the statute, including whether it vests controlling authority in one regulatory agency; and (4) whether it allows for local participation in the regulatory scheme.[5]

A statute that expressly declares itself to be uniform demonstrates a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation. For instance, in *State v. Williams*[6] it was shown that G.S. 18A-1, which declared itself a "uniform system of control over the sale, purchase, transportation, manufacture, and possession of intoxicating liquors in North Carolina," preempted a municipal ordinance regulating the possession of beer.

Furthermore, a statute that expressly mentions but derogates local regulation may indicate an intent to establish a complete and integrated regulatory scheme. This was also the case in *State v. Williams*. G.S. 18A-35(a) indicated a uniform statutory scheme to the exclusion of local regulation by expressly permitting possession of malt beverages and unfortified wine by individuals eighteen years or older without restriction or local regulation. And in *In re Application of Melkonian*,[7] it was shown that G.S. 18B-100 indicated an intent to establish a uniform system of control over the sale of alcoholic beverages by prohibiting local ordinances that establish different rules or require additional permits or fees.

The courts also consider the need for a uniform statutory scheme in determining whether a statute provides for a complete and integrated regulatory scheme, as in *State v. Williams*. In this case the General Assembly needed to preempt the field of alcohol regulation to prevent confusion caused by some counties allowing possession of beer and other counties making it a criminal violation. In *Staley v. Winston-Salem*[8] and *In re Application of Melkonian*, it was shown that the legislature needed to preempt the field of alcohol regulation in order to provide a uniform system for determining the fitness of an applicant for a license to sell alcohol and the appropriateness of a sales outlet.

North Carolina courts consider the comprehensiveness of the statute in determining whether the legislature intended to create a complete and integrated regulatory scheme. In considering comprehensiveness, the courts often find the amount of authority vested in the state regulatory agency to be relevant. In *Greene v. City of Winston-Salem*,[9] the court held that the General Assembly need not delegate to one agency all authority in order to provide for a complete and integrated regulatory scheme. Instead, it was sufficient that the General Assembly had delegated to the commissioner of insurance controlling authority with respect to the building code. As another example, in determining whether municipalities can regulate the sale of alcohol, the courts often emphasize that the General Assembly vested exclusive authority in the ABC Commission to determine the suitability of applicants for licenses to sell alcohol.[10]

Finally, the courts consider provisions for local participation within the statutory scheme. For example, G.S. 18B-901 gives the local governing body an opportunity to file a written objection to the issuance of an ABC permit. Furthermore, the ABC Commission, in determining the suitability of the location, may consider parking facilities, traffic conditions, and local zoning laws, as well as recommendations of the local governing body. Provisions for local concerns such as these may indicate legislative intent to create a complete and integrated regulatory scheme.[11] Because the General Assembly has decided which local regulations are appropriate and has allowed for them in the statute, other local regulations are preempted.

Application of the Preemption Principles

When the various common law tests used to determine whether a statute establishes a uniform

regulatory scheme are applied to the North Carolina hazardous and low-level radioactive waste statutes, it appears that the General Assembly intended to preempt the field. First, several sections expressly declare that the statutes comprise a complete and integrated regulatory scheme: G.S. 130A-296—"intent to prescribe a uniform system of hazardous waste management"; G.S. 130A-294(c)—"Rules concerning management of hazardous waste shall establish a complete and integrated regulatory scheme"; G.S. 143B-216.10—intent "to prescribe a uniform system for the management of hazardous waste and low-level radioactive waste." By using key words such as "uniform" and "complete and integrated regulatory scheme," the General Assembly appears to have intended to occupy the field of hazardous and low-level radioactive waste management.

Second, G.S. 143B-216.10, which invalidates local ordinances that prohibit hazardous and low-level radioactive waste facilities, may also indicate legislative intent to formulate a complete and integrated regulatory scheme. Although such a prohibition seems unnecessary if the field is preempted, the courts have pointed to such prohibitions as evidence of legislative intent to occupy the field.[12]

Third, the General Assembly has said that there is a need for a uniform state system of hazardous and low-level radioactive waste disposal, which also indicates legislative intent to preempt the field. North Carolina must establish a low-level radioactive waste facility to meet its responsibilities as host state under the Southeast Interstate Low-level Radioactive Waste Management Compact, according to G.S. 104G-3. Lengthy local permit procedures as well as a NIMBY (not in my backyard) attitude could delay the site selection and construction of these facilities beyond the deadlines set out in G.S. 104G-9 and G.S. 104G-4. Similar siting problems also confronted the General Assembly when it established hazardous waste facilities pursuant to the Hazardous Waste Management Act, although no deadlines are set out in the act. The General Assembly declared the "establishment of a comprehensive and integrated system of adequate treatment and disposal facilities [to be] essential."[13]

Fourth, both the North Carolina Low-level Radioactive Waste Management Act (G.S. 104G) and the Hazardous Waste Management Commission Act (G.S. 130B) are comprehensive statutes that vest controlling authority in state agencies. G.S. 104G-6 vests authority in the North Carolina Low-level Radioactive Waste Management Authority to site, design, construct, and operate low-level radioactive waste disposal facilities for wastes generated within the state pursuant to the Southeast Interstate Low-level Radioactive Waste Management Compact. Similarly, among other duties, the North Carolina Hazardous Waste Management Commission is authorized to site, design, finance, construct, and operate authorized hazardous waste facilities.[14] The commission is also responsible for formulating a permit system governing the establishment and operation of hazardous waste facilities.[15] The Governor's Waste Management Board, established by G.S. 143B-216.12, is given several reviewing responsibilities as well as responsibility to make policy recommendations, promote public education, and assist localities in collecting information on the suitability of a proposed site. The Environmental Review Commission is given responsibility for evaluating and reporting to the General Assembly concerning matters related to the current and projected need for hazardous waste facilities, the criteria set out by the Hazardous Waste Management Commission, and the reports of other state agencies having power with respect to hazardous waste management.[16] As stated earlier, all authority with respect to hazardous waste management need not be vested in one state agency in order for the General Assembly to establish a comprehensive regulatory scheme to the exclusion of local regulation. The broad powers vested in the various state agencies regulating hazardous waste disposal suggest that the General Assembly did intend such a comprehensive scheme.

Fifth, both G.S. 104G and G.S. 130B contain numerous provisions for local participation: G.S. 104G-3 and G.S. 130B-3 provide that reasonable concerns of local authorities should be considered in the siting of low-level radioactive and hazardous waste facilities; G.S. 104G-9 and G.S. 130B-11 state that, among other factors, the authority and the commission should consider local land uses in the siting of a facility; G.S. 104G-19 and G.S. 130B-19 provide that the board of commissioners of each county in which there is located a potential site may appoint a site designation review committee to advise the county on matters relating to the facility siting; G.S. 104G-20 and G.S. 130B-20 provide that

the board of commissioners of each county designated as a preferred site can appoint a preferred-site local advisory committee (among other responsibilities, the committee may review special-use zoning permits and develop recommendations concerning permit conditions); G.S. 104G-21 and G.S. 130B-21 provide that local governments may negotiate with the authority or the commission with respect to any issue except, among others, a decision regarding site selection; and G.S. 104E-6.2 and G.S. 130A-293 require that the Governor's Waste Management Board shall include two members appointed by the board of commissioners of the county in which the facility is to be located for determining whether to preempt local ordinances. These provisions for local participation indicate that the General Assembly intended to preempt any local regulations of hazardous or low-level radioactive waste disposal beyond what is specifically provided for in the statutes.

Effect of the Appeals Procedure on Local Ordinances

G.S. 104E-6.2 and G.S. 130A-293, however, also indicate that the General Assembly may have intended to permit some local regulation of hazardous and low-level radioactive waste facilities. Both sections set out appeal procedures available to a hazardous waste facility operator when a local ordinance prevents construction of a facility. If an appeal is made to the Governor's Waste Management Board, the board must make five findings in order to preempt the local ordinance:

1. The local ordinance would prohibit the establishment of the facility
2. There is a need for the facility
3. All required state and federal permits have been obtained
4. Local citizens had an opportunity to participate in the siting process
5. There are no unreasonable health or environmental risks and there has been compliance to the maximum feasible extent with local ordinances

What is the effect of this appeal procedure on state preemption principles? It appears likely that by enacting the appeal procedure the General Assembly intended to preempt comprehensive local regulatory ordinances but not local land-use ordinances, such as zoning, unless those ordinances prohibit a facility. An example of a zoning ordinance that would set off the appeal procedure in G.S. 104E-6.2 and G.S. 130A-293 is the Durham, North Carolina, Ordinance 24-11 (1985), which prohibits any storage of hazardous waste within a 1250-foot buffer zone of residential property lines. Should it develop that no suitable site for a hazardous waste storage facility is greater than 1250 feet from residential areas, the operator could appeal the ordinance to the Governor's Waste Management Board. An interpretation of the hazardous waste statutes that preempt comprehensive permit systems while preserving land-use regulations demonstrates the need for the appeal procedure and also takes into account the other sections of the hazardous and low-level radioactive waste statutes that mention local zoning permits.[17]

Both Pennsylvania and New Hampshire have interpreted their hazardous waste statutes as preempting any local permit requirements but allowing local zoning that does not prohibit a facility. In *Sunny Farms, Ltd. v. North Codorus Township*,[18] the Pennsylvania Supreme Court held that a township ordinance prohibiting hazardous waste facilities within 500 yards of the dwelling was valid as long as its standards were not stricter than the state's. Under Section 6018.105(h) of the Pennsylvania hazardous waste statute, a local law prohibiting a facility is superseded upon issuance of a certificate of public need. Because the section protects a facility from local prohibitions, the court felt justified in allowing local zoning. Similarly, in *Plymouth Township v. Montgomery County*,[19] the court held that the Solid Waste Management Act preempted the field as to regulation of transportation, processing, and disposal of municipal waste, but not as to lawful zoning concerning the location. This approach is similar to the one that was suggested earlier that the North Carolina courts might take, and the appeal procedure in G.S. 104E-5.2 and G.S. 130A-293, like the Pennsylvania certificate of public necessity, would protect facilities from local prohibition.

The New Hampshire courts have applied a similar interpretation to that state's hazardous waste statute.[20] In *Stablex v. Town of Hooksett*,[21] the New Hampshire Supreme Court held that the Revised Statutes Annotated Chapters 147A-D preempted

local regulations that frustrate state regulation of hazardous waste but not local land-use regulations such as landscaping and building specifications. In *Applied Chemical Technology, Inc. v. Town of Merimak*,[22] the court held that a town's authority to deny a site plan application for a hazardous waste facility was preempted, but that nonexclusionary aspects of the site plan approval remained unaffected. The court also held that the *Stablex* interpretation of state preemption was not overly broad because Chapter 147C contains numerous opportunities for local participation in the siting process. As discussed earlier, a similar interpretation of the North Carolina hazardous and low-level radioactive waste statutes is plausible because the North Carolina statutes also contain numerous provisions for local participation.

Conclusion

The North Carolina hazardous and low-level radioactive waste statutes probably preempt any comprehensive local ordinances but allow local land-use ordinances such as zoning. This interpretation of state preemption is based on the various common law tests that indicate that the statutes comprise a complete and integrated regulatory scheme. There are several express declarations within the statutes that they comprise a complete and integrated regulatory scheme. Furthermore, the statutes invalidate any local regulation that prohibits the siting of a facility. The General Assembly has declared that the need for facilities can only be satisfied through a uniform regulatory scheme. Finally, the hazardous and low-level radioactive waste statutes are sufficiently comprehensive to regulate the field of hazardous and low-level radioactive waste disposal to the exclusion of local regulation. This interpretation of state preemption is also substantiated by the appeal procedure in G.S. 104E-6.2 and G.S. 130A-293. Although interpretation of North Carolina statutes in light of other state hazardous waste statutes must be viewed cautiously as all statutes differ in some respects, the North Carolina courts would probably follow the Pennsylvania and New Hampshire lead in preempting local permit procedures, while allowing for other land-use regulation.

Notes

1. Washington v. Hammond, 76 N.C. 33, 36 (1877).
2. Hereinafter the General Statutes will be cited as G.S.
3. 280 N.C. 238, 185 S.E.2d 644 (1972).
4. 71 N.C. App. 192, 321 S.E.2d 476 (1984).
5. *See* Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975) (state building code preempts municipal ordinance requiring sprinkler system); State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973) (state ABC permit scheme preempts municipal ordinance regulating the possession of beer in public).
6. 283 N.C. 550, 196 S.E.2d 756 (1973).
7. 85 N.C. App. 351, 355 S.E.2d 503 (1987).
8. 258 N.C. 244, 128 S.E.2d 604 (1962).
9. 287 N.C. 66, 213 S.E.2d 231 (1975).
10. *See* Staley v. Winston-Salem, 258 N.C. 244, 128 S.E.2d 604 (1962); *In re* Application of Melkonian, 85 N.C. App. 351, 355 S.E.2d 503 (1987).
11. *In re* Application of Melkonian, 85 N.C. App. 351, 355 S.E.2d 503 (1987).
12. State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973).
13. G.S. 130B-3.
14. G.S. 130B-7.
15. G.S. 130A-294(c).
16. 1989 N.C. Sess. Laws ch. 168, sec. 46(a).
17. *See* G.S. 104G-20 (preferred-site local advisory committee may consider special-use zoning permits).
18. 81 Pa. Commw. 371, 474 A.2d 56 (1985).
19. 109 Pa. Commw. 200, 531 A.2d 49 (1987).
20. N.H. Rev. Stat. Ann. § 147A-D (Supp. 1983).
21. 122 N.H. 1091, 456 A.2d 94 (1982).
22. 126 N.H. 45, 490 A.2d 1348 (1985).

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