

Smokestacks and Neighborhoods — Can Local Governments Participate in the Regulation and Permitting of New Air Emission Sources?

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In this age of increasing awareness of air quality, and greenhouse gas emissions in particular, the ability of government at all levels to participate in the reduction of air pollution is critical. A local government's role in regulating new air pollution that may affect its constituency can be important. Politics do not always drive practice. Ask someone with experience in permitting new air emission sources in Virginia and you will likely be told that the Virginia Department of Environmental Quality (DEQ) is the permitting agency. You may also be told that local governments cannot regulate emission sources. While this may be true in practice, it may not be in substance.

A proposed industrial facility of a kind known to release air pollutants can put a local government in a quandary. The government must consider new jobs and tax revenue on one hand and concerns about public health on the other. The public often opposes industrial development that could affect residential property and the environment, and localities fear increased traffic, noise, and decreasing property values. In some cases, the concern may be less about land use and more about air pollution.

Laws and regulations do not clearly prohibit local governments from imposing regulation on air emissions from new sources. They may do the opposite — at least for certain zoning regulations — even though the General Assembly adopted

Code of Virginia § 10.1-1321 to prohibit a local government from adopting an ordinance to regulate an emission source. The life of the law happens in the crevices.

Local Zoning Ordinances

The purposes of zoning and planning law are well-established in Virginia. The General Assembly delegated to localities the authority to establish zoning districts and regulate the use of all land and buildings to promote the health, safety, and welfare of the public.¹ This broad grant of power includes the power to allow by permit or to prohibit specific uses of buildings and land, so long as the exercise of that power is not arbitrary, capricious, or otherwise preempted or unconstitutional.²

Local governments adopt zoning ordinances to regulate the uses of land and buildings with a system of development standards and permit requirements. Permits allow local officials to apply the requirements of zoning ordinances to development of particular parcels. Many zoning decisions are made by administrators based on standards adopted by a locality. These decisions include approvals of building permits and certificates of occupancy. Some zoning decisions — including rezonings and special use permits — are reserved for the local governing body to approve or deny based on legislative standards. The approval of a rezoning or special use permit allows a local governing body to use proffers or conditions to mitigate the impacts of a proposed development, based on an evaluation of local needs and concerns.

The form and function of rezonings and special use permits differ in important ways. While both rezonings and special use permits are legislative, local governments have more latitude with special use permits. For rezonings, a locality depends on the applicant to submit proffers to limit the impact of the proposed development.³ A

local governing body may deny a proposed rezoning based on land use principles, but it is prohibited from requiring the applicant to limit the proposed development by proffering conditions, and it cannot unilaterally impose proffers. Local governing bodies can, on the other hand, impose conditions to the approval of a special use permit to address specific impacts that a proposed development may produce.⁴ Such conditions act as property-specific zoning regulations that must be satisfied to develop the project approved by a special use permit. A rezoning is approved with adoption of an ordinance that amends the zoning ordinance. Special use permits are approved by a resolution or a recorded vote by a local government.⁵

A locality has wide discretion to craft a zoning ordinance to include a review of proposed development with a special use permit. Once zoning districts have been established, a locality can then determine which land uses in a district should be prohibited, permitted by right, or subject to the approval of a special use permit. Special use permits can be required for land uses that may affect surrounding property and the community.⁶ By requiring special use permits, localities determine that the land use is presumed to be inappropriate in the zoning district, but can be made compatible by controlling uses through conditions. Conditions can be prescriptive or proscriptive. A condition can prohibit a land user from operating at night to reduce noise, or it can require road improvements to mitigate traffic. Such conditions allow the locality to address local issues with enforceable regulations. Traffic and noise are accepted as local issues that warrant local regulations. Air pollution has local and global impacts.

Obstacles to Local Regulation

What appear to be obstacles provide opportunity for local regulation through crevices in governing statutes and regulations. An air permit application cannot be deemed complete until the DEQ receives written notification that the location and operation of a new emission source complies with ordinances adopted under the authority of Chapter 22 of Title 15-2 of the *Code*. Chapter 22 authorizes a locality to adopt a zoning ordinance and a subdivision ordinance. Once an applicant obtains a state permit, DEQ regulations state that the permit does not relieve the permittee from complying with zoning ordinances and regulations.⁷ *Code* § 10.1-1321 prohibits only local ordinances that regulate emission sources, not other forms of local regulation. Together these offer local governments an opportunity to effectively regulate air emissions from a new emission source through zoning.

Special use permits allow local governments to explore these crevices and overcome the obstacles to local regulation. A zoning ordinance could require a special use permit for the types of industrial land uses that typically require a major source permit from the DEQ.⁸ Before the DEQ would accept an air permit application, the applicant would need to obtain a special use permit from the local governing body. During the processing of the special use permit by local administrative personnel, the types and amounts of pollutants could be identified and studies conducted to evaluate the effects of such pollutants on the community. This information should then be provided to the governing body for legislative consideration.⁹ The special use permit could be approved with conditions that would limit the types and amounts of emitted pollutants, define the methods used to achieve those limits, and require continuous emissions monitoring as determined to be necessary by the local governing body. At this point, the local government could endorse the written notification required for the DEQ to process an air permit application. That endorsement would have to be qualified to reflect the conditional approval of the special use permit. Only the construction and operation of the emission source as approved by the special use permit should be considered consistent with the zoning ordinance.

If a local government undertakes such a course, it would encounter obstacles. First, it is unclear whether the DEQ would process and review an air permit application based on the limitations of the special use permit, or whether it would approve an air permit independent of such

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approval and leave the applicant with the burden to sort out the details later with the local government. Since the permit regulations do not reference zoning regulations as a criterion, the DEQ would likely process and approve the air permit independent of whatever limitations on air pollutant emissions a local government placed on a special use permit that affects air pollutant emissions.¹⁰ Second, a locality will likely hear that *Code* § 10.1-1321 prohibits it from adopting an ordinance—including a special use permit—to regulate an emission source. Third, no matter what the form of legislation, the potential for preemption looms. These

obstacles, while substantial, may not prevail if a locality chooses to enforce the special use permit.

In the event of litigation, a court would encounter some new ideas and some familiar legal concepts. Reconciling a locality's zoning authority and the statutes and regulations that govern air pollutant permitting would require a court to construe the reach of *Code* § 10.1-1321 and consider the Supreme Court of Virginia's preemption cases. A court would likely not consider the deference issue unless the DEQ were made a party before an approval of an air permit.¹¹ Preemption doctrine has a fairly well-established analytical framework, but there are no reported cases on this subject matter. A carefully crafted zoning ordinance and special use permits stand the best chance for overcoming each obstacle.

While the language of *Code* § 10.1-1321 is unambiguous, zoning regulations appear to fall outside its scope. This follows from the limited wording of the statute and the nuances of zoning regulations. The language limits the effect of the statute to ordinances. Special use permits are not required to be, and generally are not, approved as ordinances or amendments to ordinances. Typically, a local governing body approves a special use permit by resolution or recorded vote. So long as a special use permit is not required solely for the emission of air pollutants, the zoning ordinance itself should not fall under the prohibition of this statute.¹² The scope of this statute appears to be limited to ordinances that attempt to supercede the regulatory efforts of the DEQ.¹³ Such a reading of the statute is consistent with the emphasis placed on zoning compliance in *Code* § 10.1-1321.1 and DEQ regulations.¹⁴

The preemption cases may be a more complex obstacle than *Code of Virginia* § 10.1-1321. Zoning regulations have been the sources of several lines of preemption cases and present difficult scenarios for preemption analysis. State regulations usually focus directly on a regulated activity while the zoning regulations focus on the location of activity. When zoning regulations directly or indirectly prohibit activity anywhere that state law or regulation permits such activity, a court will likely invalidate the zoning regulations. Zoning regulations that stay closer to home and primarily regulate the location of an emission source and its compatibility with the community by limiting and controlling pollutant emissions should survive a preemption analysis.

Cases involving zoning regulations of alcohol sales and land application of biosolids provide a helpful contrast between zoning regulations that survive preemption and those that likely will not. Both involve local zoning control of activities permitted by state law and regulation. Local regulation with a form and function similar to traditional land use regulation survived. Local regulation that effectively banned an activity in the locality did not.

In *Chesterfield County v. Windy Hill LTD*, the court upheld a special use permit for a sports complex that prohibited the sale of alcohol at the sports complex. To address the concern of alcohol sales in the special use permit process, Windy Hill agreed to, and the board of supervisors adopted, the prohibi-

tion as a stipulation to the special use permit. Several years later, Windy Hill changed its mind and obtained a permit from the Alcoholic Beverage Control Board to sell beer on the premises. The county sought an injunction after the ABC Board refused to enforce the stipulation at the state permitting stage.¹⁵ The court determined that the special use permit and stipulation constituted a land use regulation of a particular parcel, not a general regulation of the business or consumption of alcohol.

In contrast to the site-specific nature of the regulation in *Windy Hill*, Appomattox County adopted ordinances that would have effectively prohibited the use of biosolids on any land in the county. When local landowners obtained state permits from the Virginia Department of Health to apply biosolids to their farmland, litigation ensued. The federal district court in *O'Brien v. Appomattox County* determined that the ordinances generally prohibited what the state permit allowed and were therefore void.

The regulation by a special use permit of a use that produces air pollutants could survive the analytic framework of these two lines of cases. A special use permit that controls air pollutant emission would not be a general ordinance that would prohibit anywhere in the jurisdiction what an air permit might allow. Rather, it would share the characteristics of the parcel-specific prohibition of alcohol sales upheld in *Windy Hill*.

An effective special use permit should be supported by a legislative record to demonstrate that the control of emissions will further local land use concerns such as compatibility between industrial and residential, or maintaining a land use less intense than industrial. A locality should not seek to regulate the emission of air pollutants when local land use concerns cannot be established in a legislative record — particularly concerns about land use compatibility.

Conclusion

Localities seeking industrial development should cautiously approach regulating air emissions through a special use permit. Balancing constituent concerns and the need for industrial investment can be difficult. Special use permits offer a bridge to reconcile the two. By allowing citizens and industry to participate in the process, local governments can accommodate both for the greater good. ■

Endnotes:

- Code of Virginia* §15.2-2283 outlines the general purposes of local zoning.
- Ticonderoga Farms Inc. v. Loudoun County, et al.*, 242 Va. 170 (1991).
- Proffers can be accepted by local governing bodies only as a voluntary offer by the rezoning applicant. See *Code of Virginia* §§ 15.2-2296, 15.2-2297, and 15.2-2298.
- Code* §15.2-86.A.3 provides that special use permits can be approved under suitable regulations and safeguards.

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- 5 Unless a charter or local zoning ordinance requires otherwise, the *Code* does not require that a special use permit be approved as an ordinance.
- 6 A locality should take care that the requirement for a special use permit is uniform throughout a zoning district. *See Code* § 15.2-2282.
- 7 *See* 9VAC5-80-930, 9VAC-80-1230, 9VAC5-80-1520, and 9VAC5-80-1665. Stating the approval of a permit does not relieve the permittee from complying with existing zoning ordinances and regulations.
- 8 As briefly discussed in note 6, localities must craft zoning ordinances carefully. Industrial land uses should be identified for special use permit requirements based on land use considerations that include air pollution but also other potential impacts to land use compatibility. Air pollution should be only one of several reasons to require a special use permit.
- 9 A complete legislative record is essential to show that the locality is primarily concerned with the land use regulation of an individual development.
- 10 This would likely be similar to the Alcohol Beverage Board's actions in *Chesterfield County v. Windy Hill LTD*, where the ABC Board determined that the zoning regulations were not something it could consider in its permitting process, and that the applicant and local government should seek judicial relief.
- 11 It is unlikely that a local government could initiate a declaratory judgment proceeding until the DEQ issued a permit contrary to the terms of the special use permit. Therefore, the deference that the DEQ owes to a limited written notification is likely left entirely to DEQ's discretion.
- 12 While it is not entirely clear that the term "ordinance" in this statute includes a zoning ordinance, given that the state law mandates an emission source must comply with zoning, a locality should not invite more risk than necessary. It should craft the zoning ordinance using recognizable land use principles.
- 13 The term "ordinance" could refer to police power ordinances that conflict with DEQ regulatory actions rather than to land use regulations adopted before the DEQ approves a permit.
- 14 *See* note 8.
- 15 *See* note 11.