

# Blue Ridge Environmental Defense League

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## LOCAL ORDINANCES

### What North Carolina Counties Can Do to Protect Residents from Polluting Industries

North Carolina law grants authority to all counties the power to adopt ordinances under NC General Statute § 153A-121. This is also referred to as the counties' *police power*. Recent legislation approved by the NC General Assembly alters but does not end this power.<sup>1</sup>

#### General Ordinance-making Power Granted Under NCGS § 153A-121

For decades state law has authorized all counties to adopt ordinances which "define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances."<sup>2</sup> Further, this ordinance power "does not impair the authority of local boards of health to adopt rules and regulations to protect and promote public health." Ultimately, the grant of authority to approve ordinances is general in nature; that is, it is not limited to only those specific actions listed in the law. Examples of ordinances adopted by counties include those which govern polluting industries, signs and billboards, telecommunication towers, mobile home parks and adult businesses.

#### Courts Have Upheld County Ordinances Restricting Polluting Industry

In the 1990s a series of legal challenges to county ordinances settled the question of whether county ordinances controlling pollution sources were regulating land use—that is, zoning—or protecting public health and safety. In 2002 the U.S. Court of Appeals 4<sup>th</sup> Circuit upheld the building moratorium and polluting industries ordinance enacted by Ashe County, holding that it did not violate state law.<sup>3</sup> The Court affirmed the county's use of its police power to prohibit asphalt plants within 1000 feet of residential and commercial areas and 1320 feet from schools or medical facilities. The ordinance also required county operating permits to be obtained and fees to be paid. This and other similar county ordinances did not ban polluting industries; they enacted protections for public health and safety.

#### County Ordinance Power Survives 2014 Legislation

On June 4, 2014 the Governor signed Ratified Bill S786, so-called, "The Energy Modernization Act" which includes the following section: "Local ordinances prohibiting oil and gas exploration, development, and production activities invalid; petition to preempt local ordinance."<sup>4</sup> Despite the title, the new law preserves the authority of counties to enact local ordinances. The overall purpose of S786 is to promote oil and gas exploration and extraction, known as hydraulic fracturing, or fracking, and in doing so limit county power to enact local ordinances. The law bars local governments from enacting anything which would ban oil and gas well siting and fracking operations. However, counties may still enact ordinances which do not prohibit fracking outright. S786 states:

"...any local ordinance that prohibits or has the effect of prohibiting oil and gas exploration, development, and production activities that the Mining and Energy Commission has preempted

<sup>1</sup> Session Law 2014-4 (S786): Ratified May 29, 2014 and signed into law June 4, 2014.

<sup>2</sup> NCGS § 153A-121(a), (1963, c. 1060, ss. 1, 1 1/2; 1965, cc. 388, 567, 1083, 1158; 1967, c. 495, s. 2; 1969, c. 36, s. 1; 1971, c. 702, ss. 1-3; 1973, c. 507, s. 5; c. 822, s. 1.)

<sup>3</sup> 281 F.3d 430, *TRI-COUNTY PAVING, INCORPORATED, Plaintiff-Appellant, v. ASHE COUNTY; Ashe County Board of Commissioners, Defendants-Appellees*. No. 01-1931, United States Court of Appeals, Fourth Circuit, Decided 2/22/02

<sup>4</sup> S786, SECTION 14 amends Article 27 of Chapter 113 of the General Statutes by adding § 113-415.1

pursuant this section, shall be invalid to the extent necessary to effectuate the purposes of this Article. (emphasis added)

The purpose of the Article is establishing a statewide system for oil and gas production.<sup>5</sup> Any county may still enact an ordinance for the protection of public health and safety as long as it does not prohibit fracking. In fact, S786 provides that county ordinances are valid unless proven otherwise. It states:

A local zoning or land-use ordinance is presumed to be valid and enforceable to the extent the zoning or land-use ordinance imposes requirements, restrictions, or conditions that are generally applicable to development, including, but not limited to, setback, buffer, and stormwater requirements, unless the Mining and Energy Commission makes a finding of fact to the contrary.<sup>6</sup>

Any objection to a local ordinance must be presented by written petition to the NC Mining and Energy Commission, which must then hold public hearings.<sup>7</sup> And a reversal must meet specific conditions spelled out in the new law. The Commission may preempt a local ordinance only if it makes all four of the following findings:

1. That the ordinance would prohibit oil and gas production
2. That but for the ordinance all state and federal permits have been issued
3. That the public has had an opportunity to participate in the permitting process
4. That oil and gas activities will not pose an unreasonable health or environmental risk to the surrounding community

Even if an ordinance were to be preempted, the operator would still be required to comply with other applicable local ordinances.

### **A Model for Regulating Polluting Industries**

Prior to the enactment of its ordinance, Ashe County put in place a moratorium on pending development of the polluting industry, citing the "public health, safety, general welfare, and property values...from potential adverse health effects caused by these facilities; such as documented, potential harmful emissions, and any aesthetic or property value damage to adjacent communities." The ordinance states:<sup>8</sup>

Polluting industries, by their very nature produce objectionable levels of noise, odors, vibrations, fumes, lights, or smoke that may or may not have hazardous effects. These standards shall allow for the placement and growth of polluting industrial activities, while maintaining the health, safety and general welfare standards of established residential and commercial areas in Ashe County.

The Ashe County Polluting Industries Ordinance has withstood multiple court challenges. It still provides an effective model for other local governments to protect their residents.

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<sup>5</sup> Article 27 of Chapter 113 § 113-415

<sup>6</sup> § 113-415.1 (f)

<sup>7</sup> § 113-415.1 (d)

<sup>8</sup> Ashe County Polluting Industries Development Ordinance, Section 159.02 Purpose

# NC Senate Bill 786 / S.L. 2014-4

Ratified by the NC General Assembly May 29, 2014, Signed by Gov. McCrory June 4, 2014  
Section on local ordinances

§ 113-415.1. Local ordinances prohibiting oil and gas exploration, development, and production activities invalid; petition to preempt local ordinance.

(a) It is the intent of the General Assembly to maintain a uniform system for the management of oil and gas exploration, development, and production activities, and the use of horizontal drilling and hydraulic fracturing for that purpose, and to place limitations upon the exercise by all units of local government in North Carolina of the power to regulate the management of oil and gas exploration, development, and production activities by means of special, local, or private acts or resolutions, ordinances, property restrictions, zoning regulations, or otherwise. Notwithstanding any authority granted to counties, municipalities, or other local authorities to adopt local ordinances, including, but not limited to, those imposing taxes, fees, or charges or regulating health, environment, or land use, any local ordinance that prohibits or has the effect of prohibiting oil and gas exploration, development, and production activities that the Mining and Energy Commission has preempted pursuant this section, shall be invalid to the extent necessary to effectuate the purposes of this Article. To this end, all provisions of special, local, or private acts or resolutions are repealed that do the following:

(1) Prohibit the siting of wells for oil and gas exploration, development, and production within any county, city, or other political subdivision.

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(2) Prohibit the use of horizontal drilling or hydraulic fracturing for the purpose of oil or gas exploration or development within any (2) Prohibit the use of horizontal drilling or hydraulic fracturing for the purpose

of oil or gas exploration or development within any county, city, or other political subdivision.

(3) Place any restriction or condition not placed by this Article upon oil and gas exploration, development, and production activities and use of horizontal drilling or hydraulic fracturing for that purpose within any county, city, or other political subdivision.

(4) In any manner are in conflict or inconsistent with the provisions of this Article.

(b) No special, local, or private act or resolution enacted or taking effect hereafter may be construed to modify, amend, or repeal any portion of this Article, unless it expressly provides for such by specific references to the appropriate section of this Article. Further to this end, all provisions of local ordinances, including those regulating land use, adopted by counties, municipalities, or other local authorities that prohibit or have the effect of prohibiting oil and gas exploration, development, and production activities and use of horizontal drilling or hydraulic fracturing for that purpose within the jurisdiction of a local government are invalidated to the extent preempted by the Commission pursuant to this section.

(c) When oil and gas exploration, development, and production activities would be prevented from construction or operation by a county, municipal, or other local ordinance, the operator of the proposed activities may petition the Mining and Energy Commission to review the matter. After receipt of a petition, the Commission shall hold a hearing in accordance with the procedures in subsection (d) of this section and shall determine whether or to what extent to preempt the local ordinance to allow for the proposed oil and gas exploration, development, and production activities.

(d) When a petition described in subsection (c) of this section has been filed with the Mining and Energy Commission, the Commission shall hold a public hearing to consider the petition. The public hearing shall be held in the affected locality within 60 days after receipt of the petition by the Commission. The Commission shall give notice of the public hearing by both of the following means:

(1) Publication in a newspaper or newspapers having general circulation in the

county or counties where the activities are to be conducted, once a week for three consecutive weeks, the first notice appearing at least 30 days prior to the scheduled date of the hearing.

(2) First-class mail to persons who have requested notice. The Commission shall maintain a mailing list of persons who request notice in advance of the hearing pursuant to this section. Notice by mail shall be complete upon deposit of a copy of the notice in a postage-paid wrapper addressed to the person to be notified at the address that appears on the mailing list maintained by the Commission, in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(e) Any interested person may appear before the Mining and Energy Commission at the hearing to offer testimony. In addition to testimony before the Commission, any interested person may submit written evidence to the Commission for the Commission's consideration. At least 20 days shall be allowed for receipt of written comment following the hearing.

(f) A local zoning or land-use ordinance is presumed to be valid and enforceable to the extent the zoning or land-use ordinance imposes requirements, restrictions, or conditions that are generally applicable to development, including, but not limited to, setback, buffer, and stormwater requirements, unless the Mining and Energy Commission makes a finding of fact to the contrary. The Commission shall determine whether or to what extent to preempt local ordinances so as to allow for the establishment and operation of the facility no later than 60 days after conclusion of the hearing. The Commission shall preempt a local ordinance only if the Commission makes all of the following findings:

(1) That there is a local ordinance that would prohibit or have the effect of prohibiting oil and gas exploration, development, and production activities, or use of horizontal drilling or hydraulic fracturing for that purpose.

(2) That all legally required State and federal permits or approvals have been issued by the appropriate State and federal agencies or that all State and federal permit requirements have been satisfied and that the permits or approvals have been denied or withheld only because of the local ordinance.

(3) That local citizens and elected officials have had adequate opportunity to participate in the permitting process.

(4) That the oil and gas exploration, development, and production activities, and use of horizontal drilling or hydraulic fracturing for that purpose, will not pose an unreasonable health or environmental risk to the surrounding locality and that the operator has taken or consented to take reasonable measures to avoid or manage foreseeable risks and to comply to the maximum feasible extent with applicable local ordinances.

(g) If the Mining and Energy Commission does not make all of the findings under subsection (f) of this section, the Commission shall not preempt the challenged local ordinance. The Commission's decision shall be in writing and shall identify the evidence submitted to the Commission plus any additional evidence used in arriving at the decision.

(h) The decision of the Mining and Energy Commission shall be final unless a party to the action files a written appeal under Article 4 of Chapter 150B of the General Statutes, as modified by this section, within 30 days of the date of the decision. The record on appeal shall consist of all materials and information submitted to or considered by the Commission, the Commission's written decision, a complete transcript of the hearing, all written material presented to the Commission regarding the location of the oil and gas exploration, development, and production activities, the specific findings required by subsection (f) of this section, and any minority positions on the specific findings required by subsection (f) of this section. The scope of judicial review shall be as set forth in G.S. 150B-51, except as this subsection provides regarding the record on appeal.

(i) If the court reverses or modifies the decision of the Mining and Energy Commission, the judge shall set out in writing, which writing shall become part of the record, the reasons for the reversal or modification.

(j) In computing any period of time prescribed or allowed by this procedure, the provisions of Rule 6(a) of the Rules of Civil Procedure, G.S. 1A-1, shall apply.