Chapter 7

The Preemption of Local Land Use Laws by State and Federal Laws: Total Preemption, Partial Preemption, and Laws That Are Not Preemptive

7-100 Introduction

At the federal level, preemption derives from the constitutional principle that the federal law is the supreme law of the land and trumps the laws of a state or locality that are inconsistent with a federal law. *United States Constitution, Article VI.* At the state level, a state law preempts the laws of a locality that are inconsistent with the state law. *Virginia Code § 1-13:17*; *West Lewinsville Heights Citizens Association v. Board of Supervisors of Fairfax County*, 270 Va. 259, 618 S.E.2d 311 (2005) (by-laws adopted by a board of supervisors must be consistent with the ordinances of the locality and the general laws of the Commonwealth). Ordinances are inconsistent with state law when they cannot coexist with a statute. *West Lewinsville Heights, supra.*

Federal preemption may occur in one of three ways: (1) the federal law expressly preempts state or local laws; (2) the federal law impliedly preempts a state or local law by occupying an entire field of regulation, so that no room is left for state regulation; or (3) state law is preempted to the extent it actually conflicts with federal law because compliance with both state and federal law is impossible, or when a state law stands as an impediment to a federal purpose. *Rum Creek Coal Sales, Inc. v. Caperton*, 971 F.2d 1148 (4th Cir. 1992). Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted. *Cipolione v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S. Ct. 2608 (1992), quoted in *Washington Gas Light Company v. Prince George's County Council*, 711 F.3d 412 (4th Cir. 2013) discussed in section 7-1800.

Preemption analysis under Virginia law is slightly different. When the state enacts laws in the exercise of its police power, a locality may, if it acts within its delegated powers, legislate on the same subject unless the General Assembly has expressly preempted the field. *Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 409 S.E.2d 446 (1991); *King v. County of Arlington*, 195 Va. 1084, 81 S.E.2d 587 (1954). Thus, in determining whether a local law has been preempted by state law, Virginia courts consider whether: (1) the statute and ordinance address the same subject matter; (2) the potentially competing provisions can be harmonized; and (3) there is an express preemption clause. *See, e.g., Klingbeil Management Group Co. v. Vito*, 233 Va. 445, 357 S.E.2d 200 (1987). The fact that an ordinance enlarges on a statute's provisions does not create a conflict with the statute unless the statute limits the requirements for all cases to its own terms. *West Lewinsville Heights, supra.*

In determining whether certain structures or uses are exempt from local zoning ordinances, "there must be a 'manifest intention on the part of the legislature' to do so." *BASF Corporation v. State Corporation Commission*, 289 Va. 375, 403, 770 S.E.2d 458, 473 (2015), quoting *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 422-423, 281 S.E.2d 836, 840-841 (1981).

Every local land use regulation must be analyzed to be certain that it is not preempted by state or federal law. Following is a list of some common subjects in which either state or federal law may have pre-empted local regulation in whole or in part.

7-200 Air pollution

Generally, the local regulation of air pollution is preempted. Virginia Code § 10.1-1321 provides that local ordinances adopted prior to July 1, 1972 continue in force provided that if there is a conflict between the ordinance and a state regulation, the state regulation governs unless the local ordinance is more strict.

If a locality wants to adopt or amend an air pollution ordinance after June 30, 1972, it must first obtain approval from the State Air Pollution Control Board. Other than open burning, a local regulation may not pertain to any emission source that is required to register with the Air Pollution Control Board or to obtain a permit under Virginia Code § 10.1-1300 *et seq.* and the applicable state regulations.

7-300 Alcoholic beverages

Virginia Code § 4.1-128 prohibits a locality, except in limited circumstances inapplicable to land use matters, from adopting an ordinance or regulation that "regulates or prohibits the manufacture, bottling, possession, sale, wholesale distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in the Commonwealth." Thus, the Attorney General opined that a town ordinance banning the sale of alcohol in dance halls was prohibited by Virginia Code § 4.1-128. *1981-82 Va. Op. Atty. Gen. 14*.

However, a condition in a special use permit stating "[n]o alcoholic beverages shall be permitted" is not preempted by the Alcoholic Beverages Control Act, because it is a "valid zoning ordinance . . . regulat[ing] the location of an establishment selling . . . alcoholic beverages," as permitted by the Act. *County of Chesterfield v. Windy Hill, Ltd.*, 263 Va. 197, 205, 559 S.E.2d 627, 631 (2002). Likewise, an ordinance requiring a special use permit for adult uses (such as sellers of alcohol and adult movie theaters) within 1000 feet of one another does not violate Virginia Code § 4.1-128. *City of Norfolk v. Tiny House*, 222 Va. 414, 281 S.E.2d 836 (1981).

7-400 Amateur radio communications

In 1985, the Federal Communications Commission issued a declaratory ruling pertaining to amateur radio preemption. This rule is known as "PRB-1." The ruling announced a policy of limited, rather than complete, federal preemption of local zoning laws affecting amateur radio communications, and required that:

> [L]ocal regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.

PRB-1 does not allow an amateur radio operator to build an antenna at any height he wants. *Williams v. City of Columbia*, 906 F.2d 994 (4th Cir. 1990). Absent a full federal preemption in this area, localities have the power to restrict antennas to heights below that desired by radio licensees, provided that they strive to strike a balance between the federal interest in amateur radio communications and local zoning concerns. *Williams, supra*. However, in 1998, the General Assembly stripped away much of the local zoning authority remaining on this issue when it enacted Virginia Code § 15.2-2293.1, which prohibits localities from restricting the height of amateur radio antennas to less than 200 feet (if the locality's population density is 120 persons or less per square mile, 1990 United States Census) or 75 feet (if the locality's population density is more than 120 persons per square mile, 1990 United States Census).

7-500 Americans with Disabilities Act

Title II of the Americans with Disabilities Act ("ADA") provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. *Public entities* include counties, cities and towns. *42 U.S.C. § 12131(A)*. Zoning qualifies as a public *program* or *service* and the enforcement of a zoning ordinance constitutes an *activity* of a locality within the meaning of Title II. *A Helping Hand v. Baltimore County*, 515 F.3d 356 (4th Cir. 2008); *see also START, Inc. v. Baltimore County*, 295 F. Supp. 2d 569 (D. Md. 2003) (the administration of zoning laws is a "service, program, or activity" within the meaning of the ADA).

A locality is required to reasonably accommodate disabled persons by modifying its zoning policies, practices and procedures and may not intentionally discriminate against the disabled person. *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001). 28 C.F.R. § 35.130(b)(7) states:

> A public entity shall make *reasonable modifications* in policies, practices, or procedures when the modifications are *necessary* to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

The ADA is further discussed in chapter 32.

7-600 Biosolids (land application of sewage sludge)

The local regulation of biosolids is a topic of concern in those localities having agricultural districts. "Biosolids" means "a sewage sludge that has received an established treatment and is managed in a manner to meet the required pathogen control and vector attraction reduction, and contains concentrations of regulated pollutants below the ceiling limits established in 40 CFR Part 503 and 9VAC25-31-540, such that it meets the standards established for use of biosolids for land application, marketing, or distribution . . . ." *9VAC25-31-10*.

Since at least the 1990's, some localities have attempted to regulate in this field.

7-610 *Blanton v. Amelia County* concluded that local regulation of the land application of biosolids was preempted by State law

When considering former Virginia Code § 32.1-164.5, which expressly authorized the land application of biosolids under a permit issued by the State Board of Health, the Virginia Supreme Court held that a zoning regulation banning the land application of biosolids was preempted by the state law and the regulations promulgated by the State Board of Health. *Blanton v. Amelia County*, 261 Va. 55, 540 S.E.2d 869 (2001). In reaching this decision, the Court relied on its often-stated rule that "a local government may not 'forbid what the legislature has expressly licensed, authorized, or required.'" *See also O'Brien v. Appomattox County*, 213 F. Supp. 2d 627, 635 (W.D. Va. 2002) ("*O'Brien I*") ("it appears that counties have no authority to regulate biosolids beyond their powers to conduct testing and monitoring"), *affirmed* at 2003 U.S. App. LEXIS 14760 (4th Cir. 2003) (unpublished).

7-620 The regulatory changes since *Blanton*

Since the Virginia Supreme Court decided *Blanton v. Amelia County*, 261 Va. 55, 540 S.E.2d 869 (2001), Virginia Code § 32.1-164.5 has been repealed and Virginia Code § 62.1-44.19:3 has been substantially amended to require the State Water Control Board, with assistance from the State Department of Health and the Department of Conservation and Recreation, to promulgate regulations regarding the permitting, treatment, land application and analysis of biosolids.

One of the most significant regulatory changes since *Blanton* is the grant of certain powers to localities in the areas of testing, monitoring and storage. In particular, localities may provide for the testing and monitoring of the land application of biosolids using their own inspectors "to ensure compliance with applicable laws and regulations." *Virginia Code § 62.1-44.19:3(I)*. If the locality tests and monitors the land application of biosolids, it also has the authority to abate a violation. *Virginia Code § 62.1-44.19:3.2*. Virginia Code § 62.1-44.19:3(I) requires that a locality's testing and monitoring program be established by ordinance. A locality adopting such a program is entitled to some reimbursement out of the required state permit fee.

With respect to the storage of biosolids, localities may, as part of their zoning ordinances, regulate the storage of biosolids and require a special use permit to begin the storage of biosolids, even in agricultural zoning districts. *Virginia Code § 62.1-44.19:3(R)*. However, the storage of biosolids for 45 days or less on a farm for land application on that farm is exempt from local zoning regulation. *Virginia Code § 62.1-44.19:3(R)*. At least in Albemarle County, the sewage sludge industry has avoided any local regulation by not storing biosolids for any period of time that might trigger a local zoning regulation. Instead, the industry practice is to bring the biosolids to the site and apply it immediately.

As for whether a locality has any implied powers to regulate the application of biosolids, the answer is likely "no." When the General Assembly expressly bestows certain powers in a statute, it intends to exclude those powers which have been omitted. *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992). Thus, the Attorney General and the courts have rejected various attempts by localities to regulate the land application of biosolids under its police and zoning powers.

In *2002 Va. Op. Atty. Gen. LEXIS 25*, the Attorney General opined that Sussex County could not require a conditional use permit for the land application or the storage of biosolids, concluding that "it is apparent that the state occupies the field of sewage sludge disposal, treatment and management."

In *O'Brien v. Appomattox County*, 293 F. Supp. 2d 660 (W.D. Va. 2003) ("*O'Brien II*"), the court rejected the county's argument that it could regulate the land application of biosolids under its police and zoning powers because Virginia Code § 62.1-44.19:3 was intended to grant localities *additional* authority to adopt ordinances.

In *Recyc Systems, Inc. v. Spotsylvania County*, 64 Va. Cir. 68 (2004), the circuit court considered a challenge to the county's zoning regulations that allowed the land application of sewage sludge in an "agricultural and forestal district," prohibited the activity in certain overlay districts, and required a special use permit for the activity in other agricultural zoning districts. Because the agricultural and forestal district was not an existing district, any landowner would have to apply to create such a district. The overlay districts in which land application was prohibited comprised large parts of the county's agricultural zoning districts. The circuit court found the county's zoning regulations to be invalid, concluding that the state had occupied the field except for those specific matters in which localities were expressly enabled. *Recyc Systems*, 64 Va. Cir. at 72.

7-700 Building construction; manner and materials

The Virginia Supreme Court has stated that "when the General Assembly intends to preempt a field, it knows how to express its intention." *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15, 23, 380 S.E.2d 879, 884 (1989). A good example of an express preemption is found in Virginia Code § 36-98, which provides in part that the Uniform Statewide Building Code "shall supersede the building codes and regulations of [localities]." However, regulations in a locality's zoning ordinance or other land use controls that do not affect the manner of construction or the materials to be used in the erection, alteration or repair of a building or structure are not preempted. *Virginia Code § 36-97 (definition of building regulations).*

Virginia Code § 36-98 also provides that the building code will supersede local regulations applicable to single family residential construction that: (1) regulates dwelling foundations or crawl spaces; (2) requires using specific building materials or finishes in construction; or (3) requires minimum surface area or numbers of windows. However, Virginia Code § 36-98 expressly provides that the building code does not preempt proffers, special use permit conditions, variance conditions, standards, conditions and criteria established for clusters of single family dwellings, or land use requirements in airport or highway overlay districts, or historic districts created under Virginia Code § 15.2-2306.

7-800 Chesapeake Bay Preservation Act

This section addresses two limited areas of the Chesapeake Bay Preservation Act.

A city's zoning regulations that included lands in its resource protection areas on the basis of federal law were void where state law required that localities use the criteria developed by the Chesapeake Bay Local Assistance Board to determine the extent of the Chesapeake Bay Preservation Area within its jurisdiction. *Marble Technologies v. City of Hampton*, 279 Va. 409, 690 S.E.2d 84 (2010). The decision in *Marble Technologies* was based on the Dillon Rule, not directly on the issue of preemption.

Regulations for delineating resource protection areas under the Chesapeake Bay Preservation Act allow a locality to determine whether streams are perennial either by referring to the United States Geological Survey map or through the use of consistently-applied scientific criteria of perennial flow. *9 VAC 25-830-80(D).* A locality does not

have the authority to classify a stream as perennial in any other way, even under its zoning powers. *Pony Farm Associates, LLP v. City of Richmond*, 62 Va. Cir. 386, 390 (2003) ("[T]he General Assembly has set out the procedures applicable to determining whether a stream is or is not perennial and how [a Resource Protection Area] can be designated. If those procedures mean anything, they cannot be altered or amended by a municipality.").

7-900 Condominiums

Neither a zoning ordinance nor any other land use ordinance may prohibit condominiums by reason of the form of ownership. *Virginia Code § 55-79.43(A)*. In addition, condominiums must be treated the same under zoning, subdivision, site plan and other land use ordinances as would physically identical projects or developments under a different form of ownership. *Virginia Code § 55-79.43(A) and (B)*.

7-1000 Fair Housing Act

Although the federal government has stated that the Fair Housing Act ("FHA") does not preempt local zoning laws, the Act nonetheless can preempt the way a locality's zoning regulations are administered.

Under the FHA, it is unlawful to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of a person residing in or intending to reside in that dwelling. *42 U.S.C. § 3604(f)(1)(B)*. *Discrimination* under the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." *42 U.S.C. § 3604(f)(3)(B)*. A *handicap* under the FHA is the same as a *disability* under the Americans with Disabilities Act. *Dadian v. Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001). *See Virginia Code § 51.5-45, which pertains to the rights of persons with disabilities to housing accommodations.*

The FHA is further discussed in chapter 32.

7-1100 Federal uses and buildings

Under the common law, federal uses and buildings are exempt from local zoning requirements. *United States v. City of Chester*, 144 F.2d 415 (3rd Cir. 1944); *see Arizona v. California*, 283 U.S. 423, 451, 51 S. Ct. 522, 525 (1931) ("The United States may perform its functions without conforming to the police regulations of a State"). As the *Chester* court succinctly stated: "A state statute, a local enactment or regulation or a city ordinance, even if based on the valid police powers of a state, must yield in case of direct conflict with the exercise by the government of the United States of any power it possesses under the Constitution. [citations omitted]" *Chester*, 144 F.2d at 420.

40 U.S.C. § 3312 codifies the limited obligation of federal building projects to comply with local building codes and zoning laws. The requirements of 40 U.S.C. § 3312 do not apply to a building for which the administrator of General Services or the head of the federal agency authorized to construct or alter the building decides that the application of the statute to the building would adversely affect national security. *40 U.S.C. § 3312(a)(2)*. In that case, the statute's obligation on the administrator to consider and consult with the state and local laws as explained below does not apply.

- *Building code*: Each building constructed or altered by the General Services Administration or any other federal agency must be constructed or altered, to the maximum extent feasible as determined by the administrator or the head of the federal agency, in compliance with one of the nationally recognized model building codes and with other applicable nationally recognized codes, including electrical codes, fire and life safety codes, and plumbing codes, as the administrator decides is appropriate. *40 U.S.C. § 3312(b)*. The administrator or the head of the federal agency must use the latest edition of the nationally recognized codes. *40 U.S.C. § 3312(b)*

- *Zoning ordinance*: 40 U.S.C. § 3312 amends the common law of complete preemption to a limited extent. For federal buildings, the federal General Services Administration and every other federal agency must *consider* a locality's zoning laws and any other state or local laws relating to landscaping, open space, minimum distance of

a building from the property line, maximum height of a building, historic preservation, and aesthetic qualities before it constructs or alters a building. *40 U.S.C. § 3312(a).*

The head of the General Services Administration or the federal agency is required to consult with appropriate state and local officials in preparing the plans for the building; submit those plans to the state and local officials for their review, if requested; and allow the building to be inspected during construction or alteration if the locality provides a copy of the inspection schedule before the work is begun and reasonable notice of the intention to conduct the inspection is provided prior to each inspection. *40 U.S.C. § 3312(d*). Federal regulations expand on these obligations. 41 C.F.R. § 102-76.10(c) requires in part that federal agencies, upon approval of the General Services Administration, be bound by several basic design and construction policies, including the obligation to follow "nationally recognized model building codes and other applicable nationally recognized codes that govern Federal construction to the maximum extent feasible and consider local building requirements." 41 C.F.R. § 102-76.20(c) requires that, in providing site planning and design services, federal agencies must "[c]onsider requirements (other than procedural requirements) of local zoning laws and laws relating to setbacks, height, historic preservation, and aesthetic qualities of a building."

State or local officials may make recommendations to the head of the General Services Administration or the federal agency concerning measures necessary to meet the requirements of the locality's zoning ordinance or the other classes of laws listed above, and measures to take into account local conditions. *40 U.S.C. § 3312(e).* The head of the General Services Administration or the federal agency is required to give due consideration to the recommendations of the local building and zoning officials. *40 U.S.C. § 3312(e).*

A locality has no recourse if the General Services Administration or the federal agency fails to comply with the requirements of 40 U.S.C. § 3312. *40 U.S.C. § 3312(f).*

7-1200 Fire and explosion prevention

Localities are authorized to regulate in the areas of fire prevention and minimizing the risk of explosion above and beyond the Fire Prevention Code. Virginia Code § 27-97 provides in part:

> Local governments are hereby empowered to adopt fire prevention regulations that are more restrictive or more extensive in scope than the Fire Prevention Code provided such regulations do not affect the manner of construction, or materials to be used in the erection, alteration, repair, or use of a building or structure, including the voluntary installation of smoke alarms and regulation and inspections thereof in commercial buildings where such smoke alarms are not required under the provisions of the Code.

The term *fire prevention regulation* is defined in Virginia Code 27-95 to mean:

> [A]ny law, rule, resolution, regulation, ordinance or code, general or special, or compilation thereof to safeguard life and property from the hazards of fire or explosion arising from the improper maintenance of life safety and fire prevention and protection materials, devices, systems and structures, and the unsafe storage, handling and use of substances, materials and devices, including explosives and blasting agents, wherever located, heretofore or hereafter enacted or adopted by the Commonwealth or any county or municipality, including departments, boards, bureaus, commissions or other agencies.

Localities must be certain that its standards are more restrictive than, rather than alternatives to, the Fire Prevention Code. As to whether fire prevention is a permissible zoning purpose, the answer is found in Virginia Code § 15.2-2283, which provides in part that zoning ordinances be designed "to give reasonable consideration to each of the following purposes, where applicable: (i) to provide for adequate light, air, convenience of access, and *safety from fire*."

7-1300 Game and inland fisheries; licensing requirements

The powers of the Virginia Department of Game and Inland Fisheries and the zoning powers of a locality do not overlap and, therefore, a locality's zoning authority is not preempted by the licensing requirements of the Department of Game and Inland Fisheries. *Tullidge v. Zoning Appeals Board of Augusta County*, 29 Va. Cir. 385 (1992).

7-1400 High voltage transmission lines

Any public utility is required to obtain a certificate of public convenience and necessity from the State Corporation Commission before it constructs, enlarges, or acquires, any facilities for use in public utility service, with limited exceptions. *Virginia Code § 56-265.2(A)(1).*

Before a public utility constructs a transmission line of 138 kilovolts or more, Virginia Code § 56-265.2(A)(2) requires the utility to either: (1) obtain a certificate of public convenience and necessity from the State Corporation Commission; or (2) obtain approval from the locality pursuant to Virginia Code § 15.2-2232 (that the proposed transmission line, if not already shown on the comprehensive plan, is in substantial accord with the comprehensive plan) and approval pursuant to any applicable zoning regulations. Effective July 1, 2017, Virginia Code § 56-265.2(A)(2) is amended to provide that if the public utility obtains a certificate of public convenience approving construction of a 138 kilovolt transmission line *and any associated facilities*, it is "deemed to satisfy the requirements of [Virginia Code] § 15.2-2232 and all local zoning ordinances with respect to the transmission line and its associated facilities." The term *associated facilities* includes any station, substation, transition station, and switchyard facilities to be constructed outside of any county operating under the county executive form of government that is located in Planning District 8 (*i.e.*, Prince William County) in association with a 138 kilovolt transmission line. The amendment is significant because it appears to legislatively overturn the Virginia Supreme Court's decision in *BASF Corporation and James City County v. State Corporation Commission*, 289 Va. 375, 770 S.E.2d 458 (2015) (applying Virginia Code § 56-46.1(F)), in which the Court held switching stations are not "transmission lines" and, therefore, were subject to local zoning regulations . The Court explained that "the plain language of Code § 56-46.1(F) does not reflect a manifest intent on the part of the General Assembly to exempt switching stations from local zoning ordinances."

Virginia Code § 56-46.1 requires that the State Corporation Commission conduct an analysis of the environmental impacts of electric utility facilities to be approved for construction. For electrical transmission lines of 138 kilovolts or more, Virginia Code § 56-46.1(B) requires a public notice and hearing procedure for the Commission to evaluate the adverse impacts on scenic assets, historic districts, and the environment, and to determine, among other things, whether the proposed corridor or line minimizes the impacts thereto. Virginia Code § 56-46.1(F) provides that approval of a transmission line by the State Corporation Commission "shall be deemed to satisfy the requirements of [Virginia Code] § 15.2-2232 and local zoning ordinances with respect to such transmission line." (italics added) This express preemption "not only evinces the General Assembly's view that such construction should be governed by statewide uniform regulations but also takes into account the practicality that such lines often traverse several counties." *Board of Supervisors of Fairfax County v. Virginia Elec. and Power Co.*, 222 Va. 870, 874, 284 S.E.2d 615, 617 (1981); *see BASF Corporation and James City County, supra.*

Transmission lines of 150 kilovolts or more are required to cooperate with localities in their preparation of their comprehensive plan. *Virginia Code § 15.2-2202(E)* (note the discrepancy in kilovolts between Virginia Code §§ 15.2-2202(E) (150 kv) and Virginia Code § 56-46.1 (138 kv)). Virginia Code § 15.2-2202(E) requires that every utility responsible for the construction, operation and maintenance of such lines must furnish reasonable information requested by a locality's planning commission within the utility's certificated service area where the lines may affect the locality's comprehensive plan.

7-1500 Hospitals – certificates of public need

The state health commissioner's issuance of a certificate of public need under Virginia Code § 32.1-102.3 to authorize the construction of a hospital does not preempt a locality's comprehensive plan policies and zoning regulations. *See Northern Virginia Community Hospital, LLC v. Loudoun County Board of Supervisors*, 70 Va. Cir. 283 (2006) (sustaining the county's demurrer on this issue).

In *Northern Virginia*, the circuit court noted that the primary purposes of comprehensive planning and zoning are to determine the proper uses of land, to assure compatibility and orderly growth, to plan for adequate facilities, and to achieve the orderly use of land through zoning regulations. Although some of these factors are also considered by the health commissioner when considering a certificate of public need for a hospital, he "is not concerned with the impact that such a facility will have on the overall development of the community" and his primary function is "to determine a need for those facilities within a designated area to be served." Citing *City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 281 S.E.2d 836 (1981), the *Northern Virginia* court stated:

> There is evident nothing in the provisions of law governing the issuance of Certificates of Public Need that would suggest that the General Assembly '[intended] to usurp the police power of local governments or to prevent them from achieving the orderly use of land through zoning ordinances.'

Northern Virginia, 70 Va. Cir. at 286. The court concluded by observing that the Loudoun County board of supervisors "did not seek to undermine the Commissioner's statutory authority to evaluate health needs or limit his authority to authorize the construction of health care facilities based upon findings of need." *Northern Virginia*, 70 Va. Cir. at 287.

7-1600 Landfills and other solid waste disposal

The Waste Management Act (Virginia Code § 10.1-1400 *et seq*.) does not preempt a locality from prohibiting landfills as a land use under its zoning power. *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15, 380 S.E.2d 879 (1989). The Virginia Supreme Court also has held that the Act did not preempt a county ordinance that required all persons operating facilities for the disposal of solid waste to obtain a permit from the county. *Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 174, 409 S.E.2d 446, 448 (1991) (the "power to prohibit includes the power to regulate"). The ordinance in *Ticonderoga Farms* imposed substantial fees, bond requirements, operational regulations, and construction standards upon the operators of solid waste facilities.

The trial court in *Virginia Electric & Power Co. v. City of Chesapeake*, 2017 Va. Cir. LEXIS 7 (2017) held that the savings provision in Virginia Code § 15.2-929(C) did not preempt the city from regulating the closure of the utility's landfill and a bottom ash pond because the utility site would no longer produce new ash, but both the landfill and the bottom ash pond would indefinitely store existing ash.

7-1700 Lottery ticket sales

The State Lottery Law (Virginia Code § 58.1-4000 *et seq*.) does not preempt a locality from prohibiting the sale of lottery tickets on the premises of a retail store as a special use permit condition. *1995 Va. Op. Atty. Gen. 85*. The Attorney General concluded that the most relevant provisions of the State Lottery Law related "to the licensing of agents, and not to the uses of land" and that the law did not evidence "a legislative intent to remove from local governments the authority to impose reasonable restrictions on the sale of lottery tickets at specific sites if the purpose of the restriction is to further a legitimate land use goal." The Attorney General stated that he did not view "the prohibition of the sale of lottery tickets in a particular location under a locality's special use permit authority as unreasonably infringing on the ability of the State Lottery to conduct its business, as might a general ordinance prohibiting the sale of lottery tickets within an entire commercial district."

7-1800 Mining (including gas and oil extraction) and natural gas pipelines

With respect to mining, Virginia Code § 15.2-2280 provides in part that a locality "may, by ordinance . . . regulate, restrict, permit, prohibit, and determine" . . . [t]he excavation or mining of soil or other natural resources."

The Attorney General has opined, in an opinion limited to the unconventional method of gas and oil drilling known as "fracking," that the Virginia Gas and Oil Act *(Virginia Code § 45.1-361.1 et seq.)* does not preempt a locality's zoning authority, and that localities have the authority to prohibit fracking. *2015 WL 2265418*. Key to the Attorney General's conclusion was the savings clause in Virginia Code § 45.1-361.5, which states that the Act does

not "limit or supersede the jurisdiction and requirements of . . . local land-use ordinances." In the absence of a total prohibition, however, other types of local control over fracking that do not relate to zoning, such as license or fee requirements, are entirely preempted by the Act. *2015 WL 2265418*. Virginia Code § 45.1-361.5 provides in part that no locality "shall impose any condition, or require any other local license, permit, fee or bond to perform any gas, oil, or geophysical operations which varies from or is in addition to the requirements of this chapter." In the absence of a total prohibition, whether a locality may control aspects of fracking such as the timing of drilling operations, traffic, or noise, under its zoning regulations will have to be evaluated in the context of the Act.

With respect to natural gas pipelines, in *Washington Gas Light Company v. Prince George's County Council*, 711 F.3d 412 (4th Cir. 2013), Washington Gas Light operated a natural gas substation and sought approval from the county to expand its substation to add liquid natural gas storage tanks to its site. The county denied the request because its new zoning ordinance designated the area in which the site was located for transit-oriented development and prohibited all industrial uses. In the meantime, the Maryland Public Service Commission staff determined that Washington Gas's proposal was consistent with the pertinent safety regulations.

The issue was whether the federal Natural Gas Pipeline Safety Act ("PSA") and the Natural Gas Act ("NGA") preempted local zoning regulations. The Fourth Circuit Court of Appeals concluded that neither the NGA nor the PSA pre-empted the county's zoning regulations because: (1) the PSA preempted state and local law in the field of safety and the county's zoning regulations were not safety regulations but were land use regulations designed to foster transit-oriented development around a metro station; and (2) although the NGA gave the Federal Energy Regulatory Commission ("FERC") jurisdiction over the siting of natural gas facilities and the transportation of natural gas in interstate commerce, the NGA only regulated the interstate natural gas industry, but not all natural gas companies whose operations cross state lines, such as Washington Gas, are considered interstate for purpose of the NGA if they transport natural gas to ultimate consumers.

7-1900 Onsite sewage systems

Virginia Code § 15.2-2157 provides that when sewers or sewerage disposal facilities are not available, "a locality shall not prohibit the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating." An "alternative onsite sewage system" is defined in Virginia Code § 32.1-163 to be a "treatment works that is not a conventional onsite sewage system and does not result in a point source discharge." Thus, as of July 1, 2009, a locality may no longer require onsite sewage systems that include septic tanks.

The Virginia Attorney General has opined that a locality can adopt standards and requirements for alternative onsite sewage systems that are in addition to or more stringent than those promulgated in regulations by the Virginia Board of Health, provided that the standards or regulations do not relate to maintenance issues. *2012 Va. Op. Atty. Gen. LEXIS 10, 2012 WL 5816306.*

7-2000 Private wells

The State Department of Health oversees permits for the construction of private wells. *Virginia Code § 32.1-176.1 et seq*. The State Board of Health is enabled to promulgate regulations pertaining to the location and construction of private wells. *Virginia Code § 32.1-176.4*.

In *Miller v. Commonwealth of Virginia*, 2005 Va. App. LEXIS 64, 2005 WL 350746 (2005) (unpublished), the Virginia Court of Appeals held that the King George County zoning regulations prohibiting more than two buildings from connecting to a single well without a special exception was not preempted by the state law. Specifically, the court found that although the state permit allowed Miller to have up to four connections to his well, that authorization did not supersede the county's zoning regulations requiring a permit if three or more connections were to be made. *Miller*, *supra*. The court distinguished the facts in this case to the locality's prohibition of biosolids at issue in *Blanton v. Amelia County*, 261 Va. 55, 540 S.E.2d 869 (2001), discussed in section 7-600.

7-2100 Railroads

Congress and the courts long have recognized a need to regulate railroad operations at the federal level. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998). A number of federal laws are controlling, but three commonly found to preempt state and local attempts to regulate railroad activities are the Interstate Commerce Commission Termination Act of 1995, the Federal Railroad Safety Act of 1970, and the Noise Control Act of 1972.

The federal laws applicable to railroads that affect a locality's authority are discussed in chapter 33.

7-2200 Radiation

The state's regulation of radiation under Virginia Code § 32.1-227 *et seq*. is limited to those radioactive materials and facilities, including nuclear reactors, that are not subject to exclusive licensing and regulation by the United States Regulatory Commission. *Virginia Code § 32.1-228*.

A locality's regulation of the by-product, source and special nuclear materials is not preempted by state law provided that the regulations are consistent with Virginia Code § 32.1-227 *et seq*. and the applicable State regulations. *Virginia Code § 32.1-237*.

7-2300 The Religious Land Use and Institutionalized Persons Act of 2000

The religious liberties protected by the First Amendment (*see section 6-500*) also must be considered in light of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). There are four key provisions in RLUIPA that apply to localities and their zoning regulations and decisions:

- *Substantial burden on religious exercise prohibited*: "No government shall impose or implement a *land use regulation* in a manner that imposes a *substantial burden* on the *religious exercise* of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a *compelling governmental interest*; and (B) is *the least restrictive means* of furthering that compelling governmental interest." *42 U.S.C. § 2000cc(a)(1)* (italics added).

- *Treatment on equal terms required*: "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution *on less than equal terms* with a nonreligious assembly or institution." *42 U.S.C. § 2000cc(b)(1)* (italics added).

- *Discrimination prohibited*: "No government shall impose or implement a land use regulation that *discriminates* against any assembly or institution on the basis of religion or religious denomination." *42 U.S.C. § 2000cc(b)(2)* (italics added).

- *Total exclusion and unreasonable limitations prohibited:* "No government shall impose or implement a land use regulation that – (A) *totally excludes* religious assemblies from a jurisdiction; or (B) *unreasonably limits* religious assemblies, institutions, or structures within a jurisdiction." *42 U.S.C. § 2000cc(b)(3)* (italics added).

RLUIPA is further discussed in chapter 34.

7-2400 Right to farm

The Right to Farm Act (*Virginia Code § 3.2-300 et seq.; see also Virginia Code § 15.2-2288*) is a limited, express preemption of a locality's zoning power which prohibits localities from requiring a special use permit for any production agriculture or silviculture activities in an agricultural zoning district. Although the Right to Farm Act does not specifically prohibit all local regulation of industrial farming, any restrictions must "bear a relationship to the health, safety and general welfare" of the locality's citizens. *Virginia Code § 3.2-301; see 2001 Va. Op. Atty. Gen. LEXIS 60, 2001 Va. Op. Atty. Gen. WL 866393* (insufficient facts to determine whether the Right to Farm Act

permits an airstrip on a farm used to conduct surveillance of crops, livestock and property and to pick up repair parts and supplies). The Act also limits the circumstances under which an agricultural operation is deemed a nuisance. *Virginia Code § 3.2-302*.

The Attorney General has opined that a locality does not have the authority to adopt an ordinance limiting the circumstances under which agricultural operations may be deemed to constitute a nuisance, trespass, or other interference with the reasonable use and enjoyment of land. *1998 Va. Op. Atty. Gen. 13*.

7-2500 Satellite dishes and other video antennas

47 C.F.R. § 25.104 preempts localities from regulating satellite antennas (referred to in the regulations as *satellite earth station antennas*) except under limited circumstances. 47 C.F.R. § 25.104 arose out of the Cable Communications Policy Act of 1984, which was passed in part to promote the growth of satellite programming and to facilitate individual reception of unencrypted satellite signals. *See 130 Cong. Rec. S14285 (1984) (statement of Sen. Packwood), reprinted in 1984 U.S.C.C.A.N. 4738, 4745, cited in Loshiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994) (overruled on other grounds).

47 C.F.R. § 25.104(a) provides in part:

> Any state or local zoning, land-use, building, or similar regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable, except that nonfederal regulation of radio frequency emissions is not preempted by this section.

A *reasonable* local regulation is one that: (1) has a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation itself; and (2) furthers the stated health, safety or aesthetic objective without unnecessarily burdening the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers. The trial court in *Neufeld v. City of Baltimore*, 863 F. Supp. 255 (D. Md. 1994) observed that most district courts have held that unless the local government explicitly states the reasons in regulating the installation of satellite antennas, the local regulations will be preempted.

47 C.F.R. § 25.104(b)(1) provides in part:

> Any state or local zoning, land-use, building, or similar regulation that affects the installation, maintenance, or use of a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by non-federal land-use regulation shall be presumed unreasonable and is therefore preempted subject to paragraph (b)(2) of this section.

See 47 C.F.R. § 25.104(b)(2) for the showing required to justify a local regulation to which 47 C.F.R. § 25.104(b)(1) applies.

47 C.F.R. § 25.104(f) provides that a satellite earth station antenna that is designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska is covered by 47 C.F.R. § 1.4000. That regulation has been in effect since October 1996, and it prohibits restrictions that impair the installation, maintenance or use of antennas used to receive video programming. The rule applies to video antennas including direct-to-home satellite dishes that are less than one meter (39.37 inches) in diameter (or of any size in Alaska), television antennas, and wireless cable antennas. The rule prohibits most restrictions, including zoning and building regulations, that: (1) unreasonably delay or prevent installation, maintenance or use; (2) unreasonably increase the cost of installation, maintenance or use; or (3) preclude reception of an acceptable quality signal. The rule does not prohibit legitimate safety restrictions or restrictions designed to preserve designated or eligible historic or prehistoric properties, provided the restriction is no more burdensome than necessary to accomplish the safety or preservation purpose.

The simplest example of a prohibited zoning regulation would be one that prohibits the protected satellite dishes because the regulation would prevent viewers from receiving signals. Procedural requirements, such as those requiring permits prior to installation are likely prohibited as well because this process can unreasonably delay installation, maintenance or use of the satellite dish. Likewise, a permit fee would be an unreasonable expense.

7-2600 Silvicultural activities

Virginia Code § 10.1-1126.1 places several limitations on the local regulation of silvicultural activity, including a requirement that a local ordinance may not prohibit or unreasonably limit such activity, and may not impose a permit or fee requirement to engage in such activity.

In *Dail v. York County*, 259 Va. 577, 528 S.E.2d 447 (2000), the Virginia Supreme Court held that the county's zoning regulations governing silvicultural activity were not preempted by Virginia Code § 10.1-1126.1. The court concluded that: (1) the provisions of the county's forestry ordinance prohibiting the clear cutting of trees and regulating the thinning of forests were neither a prohibition nor an unreasonable limitation on silvicultural activity; and (2) the provisions of the county's forestry ordinance requiring submission and approval of a forest management plan by the zoning administrator did not impose a permit requirement for silvicultural activities.

7-2700 State lands, uses and buildings

State-owned lands and buildings are exempt from local zoning regulations provided that they are used for public purposes and are not used or occupied by a nonpolitical entity or person. *Virginia Code § 15.2-2293*. State-owned lands and buildings are subject to zoning regulations in the following circumstances:

- *Public travelways*: Airspace that is superjacent or subjacent to any public highway, street, lane, alley or other way that is not required for the purpose of travel, or other public use, by the Commonwealth or other political jurisdiction owning it. *Virginia Code § 15.2-2293(B)*.

- *Other public land*: Airspace that is: (1) not associated with a public travelway; (2) superjacent to any land owned by the Commonwealth or other political jurisdiction; and (3) occupied by a nonpolitical entity or person. *Virginia Code § 15.2-2293(C)*.

Superjacent airspace includes any use or structure on top of or above the ground (*e.g.*, an antenna affixed to a pole). Note that Virginia Code § 15.2-2293 insulates only state owned lands and buildings from compliance with a locality's zoning regulations and only if neither of the exceptions in Virginia Code § 15.2-2293(B) or (C) apply. Privately owned but state occupied lands and buildings are not insulated from local zoning regulations under Virginia Code § 15.2-2293.

The State Department of Environmental Quality is required to distribute a copy of the environmental impact report (EIR) prepared for every major state project (as defined in Virginia Code § 10.1-1188; generally, if the estimated project cost is $500,000 or more) to the chief administrative officer of every locality in which the project is proposed to be located. *Virginia Code § 15.2-2202(A)*. The purpose of distributing the EIR is to enable the locality to evaluate the proposed project for environmental impacts, consistency with the locality's comprehensive plan, local zoning and subdivision ordinances, and other applicable laws and to provide the locality an opportunity to comment. *Virginia Code § 15.2-2202(A)*. The Department of Environmental Quality is required to consider the locality's responses "in substantially the same manner as the Department solicits and receives comments from state agencies." *Virginia Code § 15.2-2202(A)*.

In *Jennings v. Board of Supervisors of Northumberland County*, 281 Va. 511, 708 S.E.2d 841 (2011), the issue was whether the county's zoning regulations extended to regulate the construction of additional mooring slips and piers that would lie seaward of the mean low-water mark in the state's tidal navigable waters. It was undisputed that the bottomland at issue was the property of the state under Virginia Code § 28.2-1200 and that the Virginia Marine Resources Commission (VMRC) had regulatory authority over the bottomland. The Virginia Supreme Court concluded that Jennings' proposed mooring slips and piers fell within the jurisdiction of the county and its zoning

powers. First, the Court relied on Virginia Code § 15.2-3105, which provides in part that the boundaries of localities "bordering on the Chesapeake Bay, including its tidal tributaries . . . shall embrace all wharves, piers, docks and other structures . . . erected along the water front of such locality, and extending into the Chesapeake Bay, and its tidal tributaries." *Jennings*, 281 Va. at 518, 708 S.E.2d at 845. Second, the Court held that VMRC's jurisdiction was not exclusive because the regulatory authority granted to it by the General Assembly contemplated that authority of these structures would be concurrent. *Jennings* provides a reminder that local regulation is not necessarily preempted because the Commonwealth has regulatory authority over the same area. State and local regulation may, and often do, co-exist.

Jennings was preceded by 1985-86 Va. Op. Atty. Gen. 108, in which the Attorney General discussed in a footnote the question of whether private wharves, piers and docks were subject to local zoning regulations where the subaqueous beds of bays, rivers, creeks and shores are the property of the Commonwealth. Recognizing that private landowners had riparian rights, the Attorney General concluded that "the State's use of State-owned bottom is not subject to local regulation, but the exercise of a riparian landowner's property rights which encroach on State-owned bottom is validly subject to local regulation."

In *Board of Supervisors of Fairfax County v. Washington, D.C. SMSA*, 258 Va. 558, 566, 522 S.E.2d 876, 880 (1999), the issue was whether privately owned personal wireless service facilities proposed to be located within a state-owned right of way were subject to county review for substantial accord with the county's comprehensive plan under Virginia Code § 15.2-2232. The telecommunications companies and the Commonwealth contended that while VDOT's rights-of-way may be "within" the county's jurisdiction because the lands were its boundaries, the rights-of-way were not "under" its jurisdiction because the rights-of-way were the property of the state and, thus, the county's comprehensive plan did not apply regardless of the use made of them. The Virginia Supreme Court rejected this argument. In holding that the proposed wireless facilities were subject to county review under Virginia Code § 15.2-2232, the Court explained:

> In short, while VDOT would benefit from the ability to place its equipment on the towers, VDOT does not own the towers or have a primary right of use of the land subject to the leases during their terms. The telecommunications companies are in the same position with respect to the towers in question as they would be for any other such towers constructed on land leased or acquired for such purposes. The mere fact that the towers are conveniently, or even necessarily, located on state-owned rights-of-way is irrelevant to the question whether they fall within the regulatory authority of the planning commission granted under Code § 15.2-2232(A).

In reaching this conclusion, the Court declined to address the county's alternative contention that it had the authority to regulate the wireless facilities under Virginia Code § 15.2-2293.

7-2800 Telecommunications Act of 1996 and related laws; wireless telecommunications

In the Telecommunication Act of 1996, Congress "struck a balance between the national interest in facilitating the growth of telecommunications and the local interest in making zoning decisions" over the siting of towers and other facilities that provide wireless services. *360 Communications v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000). While expressly preserving local zoning authority (*47 U.S.C. § 332(c)(7)(A)*), the Act requires that decisions denying wireless facilities be in writing and supported by substantial evidence (*47 U.S.C. § 332(c)(7)(B)(iii)).* The Act also prohibits localities from adopting regulations that prohibit or have the effect of prohibiting wireless services, or unreasonably discriminate against functionally equivalent providers. *47 U.S.C. § 332(c)(7)(B)(i).* The only complete preemption contained in 47 U.S.C. § 332(c)(7)(B) is found in subparagraph (iv), which preempts localities from regulating the placement, construction, and modification of wireless facilities on the basis of the environmental effects of radio frequency emissions if those facilities comply with the Federal Communications Commission's regulations concerning emissions.

The Telecommunications Act of 1996 and related laws are further discussed in chapter 35.

7-2900 Water

Virginia Code 15.2-2283 expressly provides that water protection is an express purpose of zoning by providing that a zoning ordinance may "include reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and ground water as defined in § 62.1-255."