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## Coates' Canons Blog: Preempted? Let Me Count The Ways.

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One of the basic principles of local government law in North Carolina is that cities and counties have only those powers delegated to them by the General Assembly. Another is that any action taken by a local government must be consistent with state and federal law. Within broad constitutional parameters, the legislature may expand or contract the powers of local governments as it deems appropriate. When the General Assembly enacts a law that expressly or by implication restricts or eliminates the power of local governments to deal with particular subjects, the law is said to preempt any local government action that would conflict with its provisions.

During its last regular session, the General Assembly enacted a number of laws that deprive local governments of the authority to do certain things. With apologies to Elizabeth Barrett Browning for its title, this blog post highlights seven ways in which new laws preempt local government action.

**1. Moratorium on adoption of environmental ordinances.** Prior to the enactment of Session Law 2013-413, cities and counties were free to adopt ordinances aimed at reducing environmental risks to their local communities, provided those ordinances weren't contrary to or displaced by state or federal environmental laws or regulations. The general police power conferred on cities and counties by G.S. 160A-174 and G.S. 153A-121, respectively, permits them to address circumstances detrimental to the health, safety, or welfare of their citizens, and dangerous environmental conditions certainly seem to fall within this category. (A discussion of the scope of local governments' police power is available here .) Furthermore, cities have express authority under G.S. 160A-185 to adopt ordinances governing the emission or disposal of hazardous substances, effluents, or solid wastes and to appoint city employees as environmental officers to enforce such ordinances. Counties likewise have specific statutory power to regulate the handling and disposal of solid wastes, and other laws allow cities and counties to control the sale, possession, and use of explosive, corrosive, inflammable, or radioactive substances. G.S. 153A-136; G.S. 160A-183; G.S. 153A-128. Finally, a number of statutes authorize local governments to adopt environmental standards more stringent than those imposed by the state in certain instances, as in the case of water conservation measures designed to respond to drought. G.S. 143-355.2.

Section 10.2 of Session Law 2013-413 temporarily bans cities or counties from adopting any ordinance which regulates "a field that is also regulated by a State or federal statute enforced by an environmental agency or . . . regulated by a rule adopted by an environmental agency." As defined by section 10.2, the term "environmental agency" encompasses nine government entities, including for instance the Department of Environment and Natural Resources and the Wildlife Resources Commission. The disposal of motor oil is an example of a field covered by section 10.2.

Three points about the moratorium imposed by section 10.2 deserve special attention:

- A city or county may adopt an ordinance that would otherwise violate the moratorium if its governing board unanimously approves the ordinance;
- The moratorium will expire on 1 October 2014, by which time the Environmental Review Commission is expected to make recommendations to the General Assembly regarding the extent to which local governments should be allowed to enact ordinances regulating fields also regulated by environmental agencies; and
- The moratorium has no effect on environmental ordinances adopted before 23 August 2013, the date on which section 10.2 became law. Cities and counties may continue to enforce those ordinances during the moratorium.

(Thanks to Richard Whisnant for his thoughts on the impact of section 10.2 of Session Law 2013-413.)

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**2. Prohibition of concealed weapons on local government recreational facilities.** The general rule under G.S. 14-415.23 is that cities or counties may not restrict the lawful carrying of concealed handguns within their borders. The statute expressly allows local governments to prohibit the carrying of concealed handguns on municipal or county recreational facilities, however, even by individuals with concealed handgun permits.

In its previous form, G.S. 14-415.23 defined “recreational facilities” to mean playgrounds, athletic fields, swimming pools, and athletic facilities, but the statutory text didn’t elaborate on what was intended by those terms. This led to confusion about, for example, whether the power of local governments to restrict the lawful carrying of concealed handguns at municipal or county swimming pools extended to locker rooms open to patrons of those pools. Section 6 of Session Law 2013-369 clarifies but arguably also narrows the definition of “recreational facilities” in G.S. 14-415.23 to apply only the following:

- Athletic fields and “appurtenant facilities” such as restrooms, though only during organized athletic events when the fields or facilities have been scheduled for use with the responsible municipal or county offices;
- Swimming pools and “appurtenant facilities” used for dressing, storing personal items, or other uses related to swimming pools; and
- Facilities such as gymnasiums used for athletic events.

Moreover, the definition of “recreational facilities” in G.S. 14-415.23 now expressly excludes greenways, designated or customary biking or walking paths, and open areas or fields where athletic events may occur (unless the areas satisfy the criteria for “athletic fields” described above). Public playgrounds no longer appear in the definition for recreational facilities, which presumably means that cities and counties may not adopt ordinances preventing individuals with concealed handgun permits from carrying concealed handguns in those locations. (Thanks to Jeff Welty for his thoughts on the impact of section 6 of Session Law 2013-369.)

**3. Abortion coverage for local government employees.** Sections 2.(b) and 2.(c) of Session Law 2013-366 collectively forbid cities and counties to extend abortion coverage to their employees greater than the coverage provided by the State Health Plan for Teachers and State Employees. By law the state health plan may not cover abortions except when (1) the life of the mother would be endangered were she to carry the unborn child to term or (2) the pregnancy is the result of rape or incest. G.S. 135-48.50; G.S. 143C-6-5.5. The plan must cover complications arising from an abortion, regardless of whether the abortion itself was covered.

**4. Living wage requirements for private contractors.** A city or county may enter into contracts with private entities to carry out any public purpose the law allows it to undertake. G.S. 160A-20.1; G.S. 153A-449. Sections 5.(c) and 5.(d) of Session Law 2013-413, however, prohibit cities and counties from requiring a private contractor, as a condition for bidding on a contract, to abide by any restriction they couldn’t impose on all employers within their boundaries. The law offers two examples of bidding conditions that are unlawful because cities and counties may not mandate them for all such employers: a minimum wage and a requirement that employers provide paid sick leave to their employees. The law appears to be aimed at “living wage” ordinances, such as this one adopted by the Durham City Council, which set minimum hourly rates private contractors must pay their employees if they wish to do business with particular local governments. (The City of Durham’s living wage rate for 2013 is \$11.91 per hour, an amount significantly in excess of the current federal minimum wage of \$7.25 per hour.) Interestingly, nothing in Session Law 2013-413 stops a local school board from adopting a living wage policy for its private contractors.

**5. Restrictions on soft drink sizes.** The recent efforts of Mayor Michael Bloomberg to limit the size of soft drinks sold in New York City apparently led to worries that local governments in North Carolina would attempt to follow his lead. Session Law 2013-309 responds to such worries by preempting local ordinances that prohibit the sale of soft drinks above a particular size, though the law expressly doesn’t invalidate ordinances regulating the sanitation or other operational aspects of soda dispensers. (Click here for the definition of “soft drink” relevant to Session Law 2013-309.)

**6. Procurement and operation of unmanned aircraft.** Section 7.16(e) of the Appropriations Act of 2013 generally bans local governments and their officers from procuring or operating unmanned aircraft systems or disclosing personal information acquired through the operation of such systems. In its current form, the ban lasts until 1 July 2015.

**7. Enforcement of tree ordinances on airport land.** Session Law 2013-366 forbids a city or county from enforcing an

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ordinance regulating trees on land owned or operated by a public airport authority.

As the legislation summarized herein demonstrates, the General Assembly in its last regular session acted to preempt local government authority in matters great and small. If your local government has been affected by any of those limitations, please share your experiences in the comments section.

## Links

- [en.wikipedia.org/wiki/Sonnets\\_from\\_the\\_Portuguese](http://en.wikipedia.org/wiki/Sonnets_from_the_Portuguese)
- [www.ncleg.net/Sessions/2013/Bills/House/PDF/H74v5.pdf](http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H74v5.pdf)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-174.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-174.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_153A/GS\\_153A-121.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-121.html)
- [canons.sog.unc.edu/?p=7169](http://canons.sog.unc.edu/?p=7169)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-185.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-185.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_153A/GS\\_153A-136.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-136.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-183.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-183.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_153A/GS\\_153A-128.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-128.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-355.2.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-355.2.html)
- [www.sog.unc.edu/about/faculty-and-staff/richard-b-whisnant](http://www.sog.unc.edu/about/faculty-and-staff/richard-b-whisnant)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_14/GS\\_14-415.23.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-415.23.html)
- [www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2013-369.html](http://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2013-369.html)
- [www.sog.unc.edu/about/faculty-and-staff/jeffrey-b-welty](http://www.sog.unc.edu/about/faculty-and-staff/jeffrey-b-welty)
- [www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2013-366.html](http://www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2013-366.html)
- [statehealthplan.state.nc.us/](http://statehealthplan.state.nc.us/)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=135-48.50](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=135-48.50)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143c-6-5.5](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143c-6-5.5)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-20.1.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-20.1.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_153A/GS\\_153A-449.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-449.html)
- [durhamnc.gov/ich/as/fin/Documents/Purchasing/ordinance%2011333.pdf](http://durhamnc.gov/ich/as/fin/Documents/Purchasing/ordinance%2011333.pdf)
- [www.ncleg.net/Sessions/2013/Bills/House/PDF/H683v6.pdf](http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H683v6.pdf)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=105-164.3](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=105-164.3)
- [www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S402v7.pdf](http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S402v7.pdf)
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