A Report Evaluating Whether Local Laws Requiring Buffers & Canopy Would Be Preempted By State Law

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1. Introduction

Vegetative buffers can function to mitigate the harmful effects of air pollution in part by creating a physical barrier between air emissions and human communities. Buffers also play numerous other functions related to stormwater management, shade provision, and viewshed improvement. To the extent a buffer can be construed to function in part as an air pollution control device, there is a question of whether Michigan's air quality laws would preempt local efforts to require such vegetative buffers.[1] This report evaluates whether state air pollution law would preempt a local government's ability to require buffers as a land use and zoning tool.

2. The legal concept of preemption of local law

The legal concept of "preemption" exists in the context of hierarchical levels of government. The idea is that a lower level of government should not be allowed to materially interfere with a higher level of government's lawmaking. Preemption, then, can apply where county or city law interferes with state law.

2.1 Local lawmaking

Michigan is a home rule state when it comes to local lawmaking. Based on the Michigan Constitution, home rule cities are empowered to adopt charters laying out their plan of government and to exercise any power not expressly denied them in order to meet their specific, local needs. At the same time, local governments must still abide by any restrictions placed on them by state law since, notwithstanding home rule, local governments themselves are still inventions of state law.

[1] This report does not constitute legal advice nor is it intended to form or facilitate any attorney-client relationship.

The traditional and still valid basis for local regulation is to protect the public health, safety, and welfare. In Michigan, that is the case whether it is a large city like Detroit or a smaller village or township.

The Home Rule City Act[2] requires home rule charter cities like Detroit to provide for the public health, safety, and welfare.[3] Detroit's charter and city code call for this. For example, the purpose of the code's chapter on Buildings, Safety Engineering and Environmental Department ("BSEED") is to "conserve and protect the natural resources of the City of Detroit in the interests of the health, safety and welfare of the people […]."[4]

2.2 General background of Michigan preemption law

In Michigan, preemption is largely a matter of statutory language and legislative intent. Municipalities are "preempted" or precluded from enacting an ordinance if: 1) the ordinance directly conflicts with state law, *or* 2) the state's legal scheme of regulation occupies the entire field of regulation of the relevant activity.[5]

To determine whether a state has occupied the field of regulation, courts evaluate: 1) the express meaning of state law; 2) the implied meaning of state law (as derived from sources such as legislative history; 3) how pervasive the state's regulation is of an activity; 4) how important it is for statewide uniformity of regulation.

2.3 Examples of preemption in the environmental context

Michigan's state environmental legislation is codified almost entirely in the Natural Resources and Environmental Protection Act or NREPA.[6] NREPA

[2] Codified at MCL 117.1-117.38.

[3] MCL 117.3.

[4] § 6-501 (emphasis added).

[5] People v. Llewellyn, 401 Mich 314, 257 NW2d 902 (1977).

[6] Codified at MCL 324.1701-324.1706.

contains various parts, each of them dealing with a distinct environmental matter.

Some of Michigan's environmental laws are designed to provide Michigan the ability to implement federal environmental law, leaving the federal Environmental Protection Agency with oversight authority. For example, Michigan's water quality legal scheme, which is found mostly in Parts 31 and 303 of NREPA, is intended to allow Michigan to issue discharge and wetland permits in a way that comports with the federal Clean Water Act. Part 55 contains Michigan's primary air quality legal scheme and is designed to allow Michigan to implement the federal Clean Air Act.

In the environmental context, Michigan's courts have addressed preemption numerous times. In City of Brighton v. Twp. of Hamburg, Brighton wanted to expand its wastewater treatment plant in Hamburg. The state had already issued a discharge permit to Brighton pursuant to Part 31 of the Natural Resources Environmental Protection Act.[7] That permit contained limits on the concentration of pollutants that Brighton could discharge. Hamburg through an ordinance attempted to require stricter limits on nutrient pollutant concentrations. In this case, there was no express preemption. Rather, the court of appeals found that the state had occupied the field through the comprehensiveness of its water quality regulatory scheme and because of the need for statewide uniformity. For that reason, the court held that the state law preempted that local ordinance.

Another example involves wetland protection. For this, rather than a court deciding the issue, a member of the Michigan legislature requested a legal opinion from the state attorney general.[8] The question was whether a local government could impose a buffer or setback on the use of land adjoining a wetland in order to protect the wetland. Part 303 of NREPA spoke directly to what local governments could do. Based on the language of the statute,

[7] 260 Mich App 345, 677 NW2d 349 (2004).

[8] OAG, No. 6892, Regulation of wetlands and land adjoining by local units of government (March 5, 1996).

the attorney general concluded that the local government could not impose a buffer or setback for the principal purpose of protecting those wetlands that are regulated by NREPA. According to the attorney general, a municipality could best avoid preemption by imposing buffers or setbacks on land adjoining unregulated wetlands (such as those smaller than 5 acres) and for traditional zoning bases such as protection of the health, safety, and welfare of the public.

3. The current legal scheme in Michigan that regulates air pollution likely would not preempt a Detroit ordinance that requires vegetative buffers.

Part 55 of NREPA is the main air pollution control law in Michigan. Like the federal Clean Air Act, Part 55 regulates sources of air emissions mostly through permitting that sets limits on individual pollutants contained in those emissions.

Unlike other environmental laws in Michigan that either impose specific limits on local lawmaking authority or that are silent about it, Part 55 specifically authorizes local lawmaking that regulates air pollution so long as the local law is at least as stringent as state law. Section 5542 of the law states that:

> Nothing in this part or in any rule promulgated under this part invalidates any existing ordinance or regulation having requirements equal to or greater than the minimum applicable requirements of this part or prevents any political subdivision from adopting similar provisions if their requirements are equal to or greater than the minimum applicable requirements of this part.[9]

[9] MCL 324.5542.

On its face, Part 55 would seem to allow robust local regulation of air emissions.

In a 1998 opinion, the attorney general agreed. In response to questions by state legislators, the attorney general opined that with limited exception (such as noncharter counties), local governments could enact air pollution control ordinances so long as they were based in protection of the public health, safety, and welfare, and so long as they were otherwise lawful.[10] That opinion does not extend to solid waste incinerators because the solid waste provisions of NREPA, which in part require county-level solid waste plans, apply to preemption questions, and those provisions limit local lawmaking significantly more than Part 55 does.[11]

Other than the 1998 attorney general opinion, and excluding the one court opinion about the solid waste incinerators (which essentially holds that preemption for incinerators is a question of solid waste management law not air quality law), there does not appear to be any relevant legal opinion on how Part 55's preemption provision should be interpreted. Given the comparatively ordinance-friendly language of Section 5542, combined with the 1998 AG opinion, it is very likely the case that Michigan's current air pollution regulatory scheme would not preempt Detroit's enactment of ordinances that require vegetative buffers.

In working with the city on this issue, the following should be borne in mind:

- Any ordinance requiring buffers should be firmly grounded in the protection of the public health, safety, and welfare. The more emphasis placed on health impacts, the better.
- Any ordinance requiring buffers should, at least in the objectives and goals section, tout the many functions that vegetative buffers have, including viewshed improvement and odor abatement.

[10] OAG, No. 6992, Local government's authority to adopt air pollution control devices (August 13, 1998).

[11] Southeastern Oakland County Incinerator Authority v. Avon, 144 Mich App 39, 372 NW2d 678 (1985)

- The land use and zoning portions of Detroit's code would be the most appropriate to host buffer requirements since vegetation generally functions as a traditional municipal land use tool.[12]
- To the extent roadway buffers would be sited on land owned by the city, in practice the preemption question would not arise because the city could essentially be volunteering to take on the buffer obligation.
- The 4-part preemption test is only employed if there is a finding that the local law does not directly conflict with state law. Therefore, any ordinance passed would still need to steer clear of direct conflict. For example, notwithstanding the ordinance-friendly language in Part 55, a city that decides to operate an air emission control permitting program that operates exactly like and in parallel to the state's, might undergo greater direct conflict scrutiny than one that merely required buffers as part of its traditional siting and zoning considerations.

[12] As it happens, Detroit already has provisions that require vegetative buffers "to mitigate the adverse effects of wind and air turbulence, heat, noise, motor vehicle headlight glare and other artificial light intrusion" and other impacts. § 61-14-192(2).