

HOME RULE AND PREEMPTION ISSUES REGARDING COUNTY ORDINANCES THAT REGULATE CONFINED FEEDING OPERATIONS

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Confined Feeding Operations and Concentrated Animal Feeding Operations (collectively “CFOs”) in Indiana are regulated under state law. Some Indiana counties have responded to the lack of effective regulation of CFOs by the state by strengthening their own ordinances. Some county planners, however, are under the misconception that such ordinances—specifically with respect to land application of manure—are preempted by state agency regulations. This brief memo, provides legal analysis demonstrating that counties are free to regulate CFOs including land application of manure on areas associated with the CFO as long as those ordinances do not conflict with IDEM regulation of CFOs.

Local Authority and Indiana’s Home Rule Statute

The Indiana legislature has explicitly granted local governments powers to regulate conduct within their jurisdictions. For example:

- A local government unit may exercise planning and zoning powers to improve the health, safety, comfort, convenience, and welfare of their citizens and to plan for the future development of their communities.¹
- “When it adopts a zoning ordinance, [a local government unit] shall act for the purposes of: (1) securing adequate light, air, convenience of access, and safety from fire, flood, and other danger; (2) lessening or avoiding congestion in public ways; (3) promoting the public health, safety, comfort, morals, convenience, and general welfare; and (4) otherwise accomplishing the purposes of this chapter.”²
- A local government body “may do the following in the zoning ordinance: (1) Establish one or more districts . . . (2) In each district, regulate how real property is developed, maintained, and used. This regulation may include: (A) requirements for the area of front, rear, and side yards, courts, other open spaces, and total lot area; (B) requirements for site conditions, signs, and nonstructural improvements, such as parking lots, ponds, fills, landscaping, and utilities; (C) provisions for the treatment of uses, structures, or conditions that are in existence when the zoning ordinance takes effect; (D) restrictions on development in areas prone to flooding; (E) requirements to protect the historic and architectural heritage of the community; (F) requirements for structures, such as location, height, area, bulk, and floor space; (G) restrictions on the kind and intensity of uses; (H) performance standards for the emission of noises, gases, heat, vibration, or particulate matter into the air or ground or across lot lines; (I) standards for population density and traffic circulation; and (J) any other provisions that are necessary to implement the purposes of the zoning ordinance.”³
- A unit may “regulate conduct, or use or possession of property that might endanger the public health, safety, or welfare.”⁴

¹ See IND. CODE §§ 36-7-4-100 to -1513 (Indiana planning and zoning law).

² IND. CODE § 36-7-4-601(c).

³ IND. CODE § 36-7-4-601(d).

⁴ IND. CODE § 36-8-2-4.

- A unit may “regulate the introduction of any substance or odor into the air, or any generation of sound.”⁵
- A unit may “regulate the introduction of any substance into a watercourse or onto its banks.”⁶
- A unit may “plan for and regulate the use, improvement, and maintenance of real property and the location, condition, and maintenance of structures and other improvements.”⁷
- A unit may “regulate excavation, mining, drilling, and other movement or removal of earth below ground level.”⁸

In addition to the above explicit statutory grants of power, Indiana’s Home Rule Act (“Act”) enacted in 1980, grants county governments “all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute.”⁹ The Act abrogated the traditional rule that local governmental powers were limited to those expressly granted by state statute.¹⁰ Thus, the omission of a power from the Indiana statutes does not imply that counties lack that power.¹¹ The Act further directs that “[a]ny doubt as to the existence of a power of a [local government unit] shall be resolved in favor of its existence.”¹² These broad grants of power to local governments were intended to further Indiana’s policy of “granting [counties, municipalities, and townships] all the powers that they need for the effective operation of government as to local affairs.”¹³

Counties’ broad Home Rule authority to regulate the use of land, does have certain limits. Specifically, the Home Rule Act at Ind. Code § 36-1-3-8(a)(7) provides that a local government unit does not have “the power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.” This provision has been interpreted by Indiana Courts to mean that a state statute (and its associated agency regulations) can preempt local regulations either by: (1) express language; or (2) by implication. Such “implied preemption” is further categorized as either field preemption or conflict preemption. Field preemption occurs where the scheme of state regulation is sufficiently pervasive and comprehensive to make a reasonable inference that the state legislature left no room for supplementary local regulation. Conflict preemption on the other hand occurs where compliance with both state and local regulation would be impossible, or where local regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the state legislature. *See e.g., Lex, Inc. v. Board of Trustees of Town of Paragon*, 808 N.E.2d 104 (Ind. Ct. App. 2004); *Yater v. Hancock County Planning Commission*, 614 N.E.2d 568 (Ind. Ct. App. 1993); *Kentuckiana Medical Center LLC v. Clark County, Ind.*, 2006 U.S. Dist. LEXIS 3298 (S.D. Ind. January 18, 2006); and *Sisters of St. Francis Health Services, Inc. v. Morgan County, Ind.*, 397 F. Supp. 2d 1032 (S.D. Ind. 2005). Put another way, a local CFO ordinance is not preempted by state law, even if it regulates in the same subject areas as the state, so long as the local standards do not completely overlap or conflict with the state law, or fall within an express preemption provision in the state law.

⁵ IND. CODE § 36-8-2-8

⁶ IND. CODE § 36-9-2-12.

⁷ IND. CODE § 36-7-2-2.

⁸ IND. CODE § 36-7-2-6.

⁹ IND. CODE §§ 36-1-3-4(B)(1) and (2).

¹⁰ IND. CODE § 36-1-3-4(A).

¹¹ IND. CODE § 36-1-3-4(C).

¹² IND. CODE § 36-1-3-3(B).

¹³ IND. CODE § 36-1-3-2.

In that regard, there are two state laws that could conceivably preempt local regulation of CFOs: (1) the Office of the State Chemist's (OISC's) regulation of "Fertilizer Material" and (2) the Indiana Department of Environmental Management's (IDEM's) regulation of CFOs. As discussed below, neither preempt local regulation of CFOs including land application of manure on sites associated with CFOs. The OISC Rule, however, may preempt local regulation of land application of manure to off-site crop land not associated with a CFO due to an express provision in the OISC law that could be construed to preclude such local regulation.

IDEM's CFO Rule Does Not Preempt Local CFO Ordinances

As an initial matter, there is no express preemption provision in Indiana's CFO law at Ind. Code § 13-18-10, *et. seq.* or the associated IDEM regulations at 327 IAC 19. Thus, express preemption is not an issue with respect to IDEM regulation of CFOs.

Turning to the possibility of implied preemption, it is important to note that in enacting Ind. Code § 13-18-10, the legislature granted limited authority to IDEM to regulate the construction, expansion, and operation of confined feeding operations" including "construction, expansion, and manure containment that are appropriate for a specific site and manure application and handling that are consistent with best management practices designed to reduce the potential for manure to be conveyed off a site by runoff or soil erosion, and that are appropriate for a specific site." Ind. Code § 13-18-10-4 (emphasis added). In turn, the purpose of the IDEM regulations is to: "(1) impose construction and operational requirements for CFOs in order to implement IC 13-18-10; and (2) protect human health and the environment from threats to water quality." 327 IAC 19-1-1 (emphasis added). The regulations apply to "all CFOs as defined in IC 13-11-2-40," and prohibit "construction of a CFO or expansion of a CFO that increases animal capacity or manure containment capacity, or both without obtaining the prior approval" from IDEM. 327 IAC 19-1-2. And with particular relevance to land application of manure, the IDEM Rule applies only to "[l]and application of manure, litter, or process wastewater to land that is: (1) owned by the permittee; (2) rented by the permittee; or (3) utilized by the permittee under an agreement for land use . . . done in accordance with the requirements of the [IDEM Rule]." 327 IAC 19-14-1.¹⁴

In other words, the focus of IDEM's limited authority is to ensure that water quality is protected by imposing site-specific requirements for construction, expansion and operation of CFOs including their associated and site specific manure containment and land application activities. The IDEM Rule is not aimed at regulating land application of manure on sites not

¹⁴ And notably, "manure" is defined in the IDEM rule to mean:

"(1) Liquid or solid animal excreta. (2) Waste liquid generated at a livestock or poultry production area, including the following: (A) Excess drinking water. (B) Cleanup water. (C) Contaminated livestock truck or trailer washwater. (D) Milking parlor washwater. (E) Milk house washwater. (F) Egg washwater. (G) Silage leachate. (3) Any precipitation or surface water that has come into contact with the following: (A) Liquid or solid animal excreta. (B) Used bedding. (C) Litter. (D) Liquid described in subdivision (4). (4) Any other materials generated at a livestock or poultry production area commingled with the materials listed in subdivisions (1) through (3)."

associated with a CFO. Furthermore, the IDEM Rule is not focused in any way on assuring appropriate siting of CFOs, protecting air quality, or property values from CFOs, or preventing nuisances from CFOs. Indeed, IDEM plainly states on its website that it does not regulate CFOs for protection of “property values, public road conditions and traffic, where CFOs and CAFOs can locate, disposal of dead animals, groundwater use, odors and vectors.” <http://www.in.gov/idem/cfo/2342.htm>.

Thus, any local ordinances – even if they address aspects of construction, expansion, operation, or land application activities at CFOs – would not be in conflict or overlap with IDEM regulations (and, therefore, not preempted) as long as the ordinances are aimed at protecting air quality, property values, preventing nuisances or otherwise enacted to serve public health, safety and welfare. Furthermore, because the setbacks and performance standards in the IDEM CFO Rule are aimed at preventing excess nutrients (phosphorus and nitrogen) in manure from reaching waterways, as opposed to the known pathogens contained in manure including *E.Coli*, See 327 IAC 19-2-2; 327 IAC 19-7-5; 327 IAC 19-14-3; 327 IAC 19-14-6, any local ordinances can impose specific requirements to address that wholly unregulated issue for protection of water quality as well.

State Chemists’ “Fertilizer” Rule May Preempt Local Regulation of Land Application Activities Not Associated With a CFO

While the IDEM CFO rule focuses on regulating “manure” generated from a CFO including land application of manure on acreage associated with a CFO, the OISC is directed to “adopt rules” for the “distribution of *manure based fertilizer*,” defined as “processed manure based *commercial fertilizer* with a manure content of at least seventy-five percent (75%).” Ind. Code § 15-16-2-1.5. (emphasis added). The term “commercial fertilizer” in turn means “mixed fertilizer or fertilizer materials [and] . . . does not include *nonprocessed manure*, marl, lime, wood ashes, or plaster.” Ind. Code §15-16-2-8. The term “distribution” is not specifically defined by the statute but a “distributor” is defined as “a person who offers for sale, sells, barter, or supplies commercial fertilizers.” Ind. Code § 15-16-2-10. In other words, as it pertains to CFOs, the State Chemist regulation comes into play only if manure generated from a CFO is processed in some way to meet the definition of “manure based fertilizer” and is then distributed to a third party for use as a fertilizer (as opposed to untreated, unprocessed manure that is applied to land owned or in control of the CFO owner).

But that’s not all. The State Chemist is also directed to “adopt rules” for establishing “certification and educational programs . . . relating to the application of *fertilizer material*, the transportation of *fertilizer material*, or both for . . . persons who apply *fertilizer material* for hire, transport *fertilizer material* for hire, or both from . . . confined feeding operations . . . [or] . . . operations outside Indiana that would be confined feeding operations . . . if they were located in Indiana.” Ind. Code § 15-16-2-44 (emphasis added). “Fertilizer material” is defined by the statute to mean “any substance containing nitrogen, phosphate, potash, or any recognized plant nutrient that is used for the plant nutrient content, has nutrient value in promoting plant growth [and] includes *unmanipulated* animal and vegetable manures.” Ind. Code § 15-16-2-11 (emphasis added). Arguably this definition would include untreated “manure” from CFOs. Nevertheless, the

focus of the OISC regulation remains on land application of CFO manure—to the extent it meets the definition of “fertilizer material”—on cropland not associated with a CFO.

And notably, the stated purpose of this aspect of the OISC Rule is to “(1) ensure fertilizer materials are distributed and used effectively and safely: (A) as *plant nutrients*; and (B) in a manner that protects water quality; and (2) *complement authorities* granted to the Indiana Department of Environmental Management.” 355 IAC 8-1-1 (emphasis added). Put another way, the State Chemist has authority to regulate the distribution and use of CAFO waste to the extent that it meets the definition of “manure based fertilizer” or “fertilizer material” on land not associated with a CFO for protection of water quality from excess nutrients. The OISC is not in any way involved in regulating fertilizer distribution and use for the protection of air quality, property values, pathogen contamination or public health, safety and welfare.

With this in mind, the OISC implementing statute does contain an express preemption provision that prohibits local governments from “regulat[ing] by ordinance the storage or use of *fertilizer material*” without first “petition[ing] the state chemist for a hearing to allow a waiver to adopt an ordinance because of special circumstances relating to the storage or use of *fertilizer material*.” Ind. Code § 15-16-2-50. Aside from the potentially conflicting definitions of what is actually being regulated by the State Chemist as it pertains to manure generated from CFOs—i.e., “manure based fertilizer” or “fertilizer material” -- determining what specific activities that local governments are prohibited from regulating under this provision is less than clear.

Specifically, the provision prohibits local governments from regulating the “storage or use of fertilizer material.” “Storage” is defined to mean “the storage of *bulk fertilizer* by a person who manufactures or distributes *bulk fertilizer*; or stores *bulk fertilizer* for personal use.” Ind. Code § 15-16-2-21 (emphasis added). “Bulk fertilizer” in turn is defined as “*a commercial fertilizer* distributed in nonpackaged form.” Ind. Code § 15-16-2-7 (emphasis added). And again, “commercial fertilizer” is expressly defined to not include *nonprocessed manure*. Ind. Code § 15-16-2-8. On the other hand, “use” is defined to mean “the application of *fertilizer material* on an agricultural crop growing area, handling of fertilizer materials; or transportation of fertilizer materials.” 355 IAC 7-2-19. As stated above, the definition of “fertilizer material” does include “unmanipulated animal manure.” Ind. Code § 15-16-2-11. Based on these conflicting and confusing provisions, there is minimal legal basis to conclude that the preemption provision of the OISC Rule even prohibits local governments from regulating land application of manure on crop land not associated with a CFO. More importantly, there is absolutely no legal basis for the proposition that the OISC Rule prohibits local governments from going beyond what IDEM requires for land application of manure generated by a CFO on land associated with the CFO.