CITY ATTORNEY'S OFFICE

City Of Raleigh
NORTH CAROLINA

To: Senator Andrew Brock
Representative Chuck McGrady

From: Thomas A. McCormick, City Attorney
Dan McLawhorn, Associate City Attorney

Date: February 5, 2014

Re: Comments on Local Environmental Ordinance Powers

The Raleigh City Council approved submission of a comment to your subcommittee recommending that the powers of local governments to enact environmental ordinances remain unchanged from the law as it applied before Session Law 2013-413 became law. From the earliest days of statehood, the legislature and our Supreme Court have recognized the need for local regulation of the public health and nuisance issues that are key components of what are now identified as environmental laws. By 1917, the Legislature adopted a comprehensive statewide statute authorizing adoption of ordinances that fit within the term "environmental laws" as used in SL 2013-413. Laws 1917, c. 136, subc. 7, § 4.

Since those early laws were adopted, an important new set of reasons has arisen for local environmental ordinance powers. Federal and State environmental laws and permit programs require local governments to adopt implementing ordinances. The programs are implemented in a variety of formats, including Federal regulations mandating ordinance adoptions to achieve end results without specific standards (stormwater and pretreatment of industrial wastewater), model programs setting goals and end results without adopted rules (water supply watershed protection and sedimentation control programs), and delegated programs with broad general requirements that don't necessarily fit the landscape of each adopting local government (sewer line and water supply extensions, pretreatment, riparian buffer protections, and reclaimed water distribution).

Raleigh has used the powers conferred by the Legislature in N.C. Gen. Stat. §§ 160A-174, -185, -193, -311, - 459, and its Charter to adopt environmental ordinances tailored to its needs and the best interest of its citizens. Vesting this authority in local governments, instead of a top down mandate approach, clearly allows for the tailoring essential to the most effective and efficient environmental programs. From the earliest laws, State and Federal laws have always controlled when a conflict arises with the adopted local ordinances. This system has proven to be a good means for State control of the overarching issues and should be preserved.

The alternative of barring local governments from adopting environmental ordinances, except when the local ordinances mirror state rules, will require the adoption of many more State rules. Numerous State and Federal programs rely on guidance documents, model ordinances, or similar means to set the standards for local ordinances required to be adopted to implement environmental programs. In the past two years, the Legislature has made numerous changes in the Administrative Procedure Act to curtail state agency rule adoption. That policy position conflicts with the alternative of severely limiting the power of local governments to adopt environmental ordinances.

In 1787, the Legislature conferred on the town of Fayetteville broad public health and nuisance ordinance powers, including the capacity to regulate how hogs could be kept in the town. See *Shaw v Kennedy,* 4 N.C. 591 (1819) citing Chapter 39, Laws of 1787. More than 200 years ago, Chief Justice John Louis Taylor provided the same explanation as compels Raleigh to request the law of over 200 years continue to apply:

> "Whether an act amounts to a nuisance must depend upon the place in which it is done, and its tendency to produce those inconveniences which are specified in the definition of the offense. Thus an act may amount to a nuisance in a town which would not be so elsewhere."
> *Ibid,* 4 N.C. at 595.

In the 1787 statute, the same fundamental limitation applied as now --i.e. "all by-laws must be consistent with the Constitution and the laws of the State." That same concept was applied in later cases before it was incorporated into a General Statute in 1917. See e.g. *Plymouth v Pettijohn,* 15 N.C. 591 (1834); *Hellen v Noe,* 25 N.C. 493 (1843).

Raleigh also requests consideration of a second important set of reasons to maintain the long-standing policy of local control on environmental issues. Local governments are able to design program which are most cost effective for their citizens. For example, Raleigh requires permits for sedimentation and erosion control on smaller lots than the State requires. That policy choice is driven by the strong State directives to reduce nutrient loading from stormwater into the Neuse Estuary via the Neuse River. Nutrients bind to sediment particles making the sediment a source of nutrient loading. The stronger sedimentation control program is a critical component of Raleigh's program which has achieved the target goal of a 30% reduction in its overall nutrient loading of the Estuary. Absent the control, the burden for removing the sediment/nutrients would shift to a bigger network of City built stormwater catch basins and similar expensive measures. Instead, the City invested in a stronger ordinance and an effective enforcement staff. Similar choices were made by the City to protect its drinking water resources in Falls Lake and the Swift Creek lake system.

The League of Municipalities has provided the ERC with a comprehensive explanation of the many subject areas where local environmental ordinances are required. Raleigh relies on that information and will not extend this memorandum by repeating it. If the subcommittee members or other ERC members have questions, please direct them to Dan McLawhorn.

Thank you for your consideration of this important issue and its potential impact on the ability to best tailor environmental regulatory systems to meet the individual needs of the very different areas of the State through their local elected governing bodies.