

MEMORANDUM

TO: W. Calvin Horton, Town Manager
FROM: Ralph D. Karpinos, Town Attorney PDK
SUBJECT: Proposed Town Regulation of Gas Powered Leaf Blowers
DATE: November 10, 2004

On September 27, 2004, the Town Council received a petition from Council Member Cam Hill proposing that the Town "ban the use of gasoline powered leaf blowers within the city limits of Chapel Hill." The purpose of this memorandum is to respond to your request that I comment on a number of legal issues raised by the petition. Specifically, you have asked me to respond to the following questions:

- I. Does the Town of Chapel Hill have the authority to enact a prohibition on the operation of gasoline powered leaf blowers within the Chapel Hill Town limits?
- II. What other Town regulation of the use of leaf blowers, short of an outright prohibition on their use, might be possible? Does the Town have the authority to enact these other regulations?
- III. What current Town regulations or state statutes regulate the use of leaf blowers?
- IV. What would be the procedure under state law for the Town to enforce a local ordinance regulating or prohibiting the use of leaf blowers?

SUMMARY

I recommend that the Council hold a public hearing and receive evidence if the Council wishes to consider enactment of additional regulations on the operation of gasoline powered leaf blowers. The Town could elect to cease its own use of such equipment. Enactment of a complete prohibition on the use of gas powered leaf blowers would not likely be found by our Courts to be within the scope of the Town's legal authority.

DISCUSSION

I. Does the Town of Chapel Hill have the authority to enact a prohibition on the operation of gasoline powered leaf blowers within the Chapel Hill Town limits?

A. Legal Standards.

Municipalities in North Carolina are created by and receive their authority from the North Carolina Legislature. Article VII, Section 1 of the North Carolina Constitution provides, in its first paragraph:

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

Unlike some other states, North Carolina cities do not have so-called “home rule” authority, i.e., the authority to enact any regulations not inconsistent with constitutional standards, but generally may only exercise such powers as are conferred upon them by the General Assembly.

One of the general powers granted by the Legislature is the authority to enact ordinances to “define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens.” N.C.G.S. Sec. 160A-174(a) This is commonly referred to as the “general police power” and is found in Article 8 of Chapter 160A of the General Statutes. Other sections in Article 8 specify particular subjects of a municipality’s police power; e.g., regulation of “places of amusement” (160A-181), regulation of firearms (160A-189), regulation of emission of pollutants (160A-185), and regulation of noise (160A-184).

A municipality’s general police power in North Carolina is subject to state law limitations articulated in provisions of codified law and interpretations of that law by the North Carolina Appellate Courts and is subject to State Constitutional limitations, in Article VII, Section 1, cited above, and elsewhere in the State Constitution and as developed in decisions of our Appellate Courts.

B. Statutory limits.

North Carolina General Statute 160A-174(b), part of the Statute granting the general ordinance making power for North Carolina municipalities, contains a statement of some of the fundamental statutory limitations on a municipality’s police power:

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(b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:

(1) The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;

(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;

(3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;

(4) The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law;

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;

(6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or federal law.

In addition, some of the specific police power statutes expressly acknowledge such limitations. For example, G.S. 160A-185 authorizes regulation of emissions and effluents and provides that "any such ordinance shall be consistent with and supplementary to State and federal laws and regulations." The Town's authority to examine applicants for occupation licenses under 160A-194 must be "consistent with the general law of the State."

C. *Case based standards.*

1. Law of the land.

Our Courts have interpreted provisions of the North Carolina Constitution as also establishing limitations on a municipality's police power. A primary standard used by our Courts to evaluate the constitutionality of a local ordinance is Article I, Section 19 of the Constitution, the "law of the land" standard:

Article I, Section 1 of the North Carolina Constitution provides that "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness" are among those rights of the people that are inalienable. Section 19 of the same Article provides that "[n]o person shall be ... deprived of his ... liberty, or property, but by the law of the land." The "law of the land," like "due process of law," serves to limit the state's police power to actions which have a real or substantial relation to the public health, morals, order, safety or general welfare.

Poor Richard's, Inc. v. Stone, 366 S.E.2d 697, 699 (N.C.S.C., 1988).

With respect to the limits of the police power, our Court acknowledges that there is no hard and fast rule:

What constitutes an unreasonable interference with or burden upon private property in the exercise of police power is a matter for which there is no fixed formula or all-embracing test, but it is a matter resting in human judgment, ordinarily to be determined on principles of natural justice in the light of all the relevant facts, circumstances, and conditions in each particular case.

City of Winston-Salem v. Southern Ry. Co., 105 S.E.2d 37 (N.C.S.C.,1958)

Whether the State's exercise of its police power "is a violation of the Law of the Land Clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it."

Furthermore, "[w]hen the most that can be said against [an ordinance] is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare."

Armstrong v. North Carolina State Bd. of Dental Examiners, 499 S.E.2d 462, 468 (N.C.App.,1998) (citations omitted).

2. Pre-emption.

Another important limitation on a municipality's police power, included in G.S. 160A-174 and other statutes, and further explained by our Courts, is the principle of "pre-emption". A municipality does not have the power to regulate or prohibit an activity, under the umbrella of the general police power, if the subject matter is already subject to a regulation by state and/or federal authority that indicates an intent to establish a complete regulatory scheme. N.C.G.S. Sec. 160A-174(b)(5):

b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;

Sometimes the preemption of local regulation is clearly expressed, as is the case with respect to local ordinances regarding alcoholic beverages: N.C.G.S. Sec. 18B-100 states:

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§ 18B-100. Purpose of Chapter (Chapter 18B)

This Chapter is intended to **establish a uniform system of control** over the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina, and to provide procedures to insure the proper administration of the ABC laws under a uniform system throughout the State. This Chapter shall be liberally construed to the end that the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages shall be prohibited except as authorized in this Chapter.

Except as provided in this Chapter, local ordinances establishing different rules on the manufacture, sale, purchase, transportation, possession, consumption, or other use of alcoholic beverages, or requiring additional permits or fees, are prohibited. (*emphasis added*)

Sometimes the preemption of local regulation is acknowledged as a limiting standard, as is the case with respect to local ordinances regulating emissions:

§ 160A-185. Emission of pollutants or contaminants

A city may by ordinance regulate, restrict, or prohibit the emission or disposal of substances or effluents that tend to pollute or contaminate land, water, or air, rendering or tending to render it injurious to human health or welfare, to animal or plant life or to property, or interfering or tending to interfere with the enjoyment of life or property. A city may by ordinance regulate the illegal disposal of solid waste, including littering on public and private property, provide for enforcement by civil penalties as well as other remedies, and provide that such regulations may be enforced by city employees specially appointed as environmental enforcement officers. **Any such ordinance shall be consistent with and supplementary to State and federal laws and regulations.** (*emphasis added*)

However, this preemption need not be expressly stated in the law. The General Assembly is not required to provide an express statement of intent to provide statewide regulation to the exclusion of local regulation, for preemption to be applicable. Craig v. County of Chatham, 565 S.E.2d 172 (2002), interpreting G.S. 160A-174(b)(5).

Thus, whether a particular regulation might be determined by our Courts as being preempted is in some cases a judgment call to be made based on a consideration of the proposed regulation, legal principles and relevant pre-existing state and federal laws and regulations.

D. Evaluation of Proposal

At the outset, it should be noted that I have not been able to find any direct case law in this jurisdiction that clearly addresses a municipality’s authority to prohibit the use of a gas powered leaf blower, or any closely analogous set of circumstances that has been considered by our Courts. Thus, my opinion and recommendations are primarily based on general North Carolina legal principles and State statutes.¹

There appear to be three concerns regarding the operation of gas powered leaf blowers that could constitute grounds for prohibiting their use:

1. emissions (exhaust fumes) from the equipment itself;
2. noise; and,
3. dirt and dust stirred up and spread into the air by their use.

The petition referred for evaluation identifies these three issues as decreasing air quality, noise pollution and airborne dust and debris. Each of these concerns as justification for a prohibition on the operation of a gas powered is considered below in regard to the Town’s police power authority.

1. Emissions.

Standards for emissions from small engine devices like leaf blowers are established by the U.S. Environmental Protection Agency. Information on these federal regulations has been distributed to the Council. Any attempt to enact a prohibition on the use of gas powered leaf blowers based on emissions, in my opinion, would be found by our Courts as having been preempted by these federal standards. In general, the prohibition by the Town of use of gasoline powered equipment and vehicles on the grounds of the emissions generated would likely to be found by our Courts to be preempted by federal and/or state regulation.

Moreover, banning just leaf blowers and not other gasoline powered yard equipment that causes equivalent emissions, such as lawn mowers, string trimmers, and chain saws, would appear to be at least subject to challenge as being based on a distinction that lacks a reasonable basis and therefore possibly beyond the Town’s police power.

¹ Our research has located two reported cases from outside North Carolina where the legality of a local ordinance regulating power blowers has been addressed, both trial court decisions from New York. In People v. Edinger and Jacobs, 683 N.Y.S. 2d 820 (1998), the City Court of New York, Long Beach, found a Long Beach, N.Y., ordinance prohibiting the use of power blowers to be unconstitutional, noting that the City had failed to show that the ordinance was enacted to achieve any valid purpose. In People v. Trolio, 653 N.Y.S. 2d 486 (1996), the Justice Court of New York, Village of Scarsdale, upheld as constitutional a Scarsdale Village Ordinance that barred the use of gasoline-powered blowers from June through September each year. The Court said the ordinance was reasonably related to the Village’s exercise of police power.

2. Noise.

Reasonable regulation of equipment-generated noise has been recognized by the Courts and the General Assembly as a valid subject for the exercise of a municipality's police powers. In addition to the general statutory police power in G.S. 160A-174, N.C.G.S. 160A-184 provides that a municipality : "may by ordinance regulate, restrict, or prohibit the production or emission of noises . . . that tend to annoy, disturb, or frighten its citizens. . . ." However, establishing a complete prohibition on the operation of gasoline powered leaf blowers based on this statute, in my opinion, would be subject to being challenged as an unreasonable exercise of the Town's police power. It would be difficult to cite noise as a basis for prohibiting the operation of leaf blowers when there are decibel standards established for such equipment and when other equipment is allowed which is generating just as much noise, and in the case of lawnmowers, is possibly being operated for longer periods and longer seasonally than leaf blowers. (There would not be a pre-emption issue. The U.S. E.P.A. does not regulate noise pollution.)

3. Air pollution due to generation of dirt and dust:

Unlike other power yard equipment, a leaf blower has the specific task of actually moving solid, albeit light-weight objects, from one place to another. So, although it is true that a chain saw may shoot saw dust into the air and a lawn mower can, particularly if operated without a clippings bag and discharge guard, stir up material and dirt, their principle function is not to actually move the material through the air as is the case with a leaf blower.

In addition to moving leaves across grassed areas, leaf blowers can serve other functions such as clearing driveways or sidewalks. This activity can stir up, along with the leaves, dust, dirt and trash. Indeed, in order for the equipment to work as intended, materials must be lifted into the air. Thus, it might be possible to identify the operation of leaf blowers as being a valid category for regulation because they are designed for this purpose and this air pollution generated may be greater than that from other types of equipment. On the other hand, if this is to be argued as the legal basis for prohibiting the operation of such equipment, it would be appropriate to consider, along with gas powered leaf blowers, electric powered leaf blowers, and any other equipment that by use of forced air, functions to move similar material. It is still possible that such a rationale to defend a ban on powered leaf blowers might be found by our Courts to be preempted by federal regulation and in my judgment, it is also possible that a complete ban would be found by our Courts to be beyond the Town's police power under the principles cited in the case law above. If such equipment can be subject to reasonable regulation that would address this air pollution concern, as discussed below, consideration of an outright prohibition might not be warranted.

If the Town wished to consider further the possibility of banning powered leaf blowers on the basis of their generating air pollution by way of dirt and dust so as to

cause a public health or welfare issue, I would recommend that the Council invite the presentation of research and evidence to the Council and that there be an opportunity for the public to present testimony to determine if data exists that would support such a legislative finding. I would further recommend that the research include evaluation of the effects on air quality of the operation of similar equipment. One of the issues that should be considered, in my judgment, is whether this equipment contributes to an overall decrease in air quality or just a short term problem for persons in the immediate area. If it is the latter, then the opportunity to regulate their use, as discussed below, rather than prohibit all use, may be sufficient to address these concerns.

II. What other Town regulation of the use of leaf blowers, short of an outright prohibition on their use, might be possible? Does the Town have the authority to enact these other regulations?

There are a number of possible ways the Town could respond to this petition and regulate leaf blowers that would not subject the regulation to the legal concerns that I have just mentioned.

A. *Town's use.*

Certainly the Town could choose to limit or cease its own use of gas powered leaf blowers. I understand there are operational and financial consequences of such a step. In a separate memorandum, representatives of the Town's Public Works Department discuss the consequences of the Town's not using this type of equipment. Further, the Town uses other power equipment to move leaves and debris by means of forced air, such as vacuum trucks.

B. *Use in or near Town right of way.*

The Town has general control of the public streets it owns and maintains. A reasonable regulation regarding operation of powered leaf blowers in or near the public right of way, to maintain the areas as being open and safe for public use, would appear to be within the Town's authority under 160A-296:

§ 160A-296. Establishment and control of streets; center and edge lines

(a) A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to:

(1) The duty to keep the public streets, sidewalks, alleys, and bridges in proper repair;

(2) The duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions;

(3) The power to open new streets and alleys, and to widen, extend, pave, clean, and otherwise improve existing streets, sidewalks, alleys, and bridges, and to acquire the necessary land therefor by dedication and acceptance, purchase, or eminent domain;

(4) The power to close any street or alley either permanently or temporarily;

(5) The power to regulate the use of the public streets, sidewalks, alleys, and bridges;

(6) The power to regulate, license, and prohibit digging in the streets, sidewalks, or alleys, or placing therein or thereon any pipes, poles, wires, fixtures, or appliances of any kind either on, above, or below the surface;

(7) The power to provide for lighting the streets, alleys, and bridges of the city; and

(8) The power to grant easements in street rights-of-way as permitted by G.S. 160A-273. (*emphasis added*)

Thus, the Town could consider regulating the use by private individuals of gasoline powered leaf blowers, along with other leaf blowers, on public right of way or on private property to move leaves or debris from private property to the public right of way and into or near public storm water drainage facilities. Some of the concerns regarding the use of leaf blowers may arise from persons traveling out in the open, on foot or bicycle for example, or in protected vehicles and coming upon clouds of dust and debris generated by these devices. In extreme circumstances, the material flying in the air could even contribute to an accident or injury to someone's eye or lungs, cause minor surface damage to a vehicle or even contribute to a vehicle mishap. Also, the use of leaf blowers to move leaves into gutters or other storm water drainage facilities could lead to ponding of water and other hazards, but perhaps no more so than the use of any other, powered or non-powered, equipment to move leaves to the same locations.

Again, before enacting such a regulation, I would recommend that a forum be considered to provide an opportunity for the presentation of some evidence that could establish a basis for this regulation. Even without additional regulation, specific instances of behavior that lead to an injury or accident might be the basis for establishing private civil liability or a violation of an existing standard of public behavior.

C. *Use on private property.*

In addition to the regulation of the use of equipment along public right of way, there are some additional reasonable regulations the Town could consider regarding the use of gas powered leaf blowers on private property that would probably be within the Town's legal authority. In terms of location, it would not appear to be reasonable to consider, for example, prohibiting their use within some distance of a property line between private properties. Just as grass may grow and need to be cut up to a property line, leaves fall all over private property and if the equipment is going to be used as intended, its use needs to be permitted all over one's lot. However, some further reasonable regulation regarding the time of day for the operation of a gas powered leaf

blower and other equipment might be possible beyond that already included under the Town's noise ordinances.

Other reasonable regulations, essentially the codification of standards of common courtesy, might also be considered. For example, the Town might establish standards related to the operation of leaf blowers while other persons are traveling by, say within 20 feet of the operator. A regulation that would prohibit them from being used in such manner as to create clouds of dust on the private property of others or near moving vehicles might also be considered. A standard regarding the power level of operation under particular circumstances is another example of possible regulation.

One distinction between leaf blowers and other equipment to consider is that while a person is not likely to mow their lawn or operate a chain saw every day, leaf blowers could be used on a daily basis, or perhaps even more often, if a person wished to maintain a cleared driveway or sidewalk during the fall leaf season, for example. Thus, while the community may be accustomed and generally acceptable of the weekly use of a lawn mower, there may be less tolerance for daily or perhaps even more frequent use of a gas powered leaf blower. Depending on the information developed through a hearing process, this might be considered justification for additional regulations regarding the time and frequency of use of such equipment. Operating a leaf blower so as to offend an immediate neighbor would more appropriately be dealt with as a private matter between the two parties rather than as a matter of Town Ordinance. For example, a property owner with a resting invalid or sleeping infant might ask his neighbor to not run a leaf blower, or lawn mower, during some particular part of the day, but it would be difficult to attempt to establish or enforce a Town regulation regarding such activity.

Additional regulation of leaf blowers based on their generation of dirt and dust should probably apply to electric powered equipment as well as gas powered equipment. As indicated by some of the information already submitted to the Council, some of the communities that have enacted strict regulations of leaf blowers find enforcement difficult. However, the establishment of such regulations can still effect an environmental improvement and public benefit from the resulting modification of the use of such equipment by at least some citizens.

IV. What current Town regulations or state statutes regulate the use of leaf blowers?

A. Noise Ordinances.

Three years ago, with the assistance of an independent consultant and after considerable public comment, the Town developed and enacted significant revisions to its noise regulations. Article III, Chapter 11 of the Code of Ordinances. These regulations establish daytime and nighttime standards for maximum decibel levels. Sound levels are to be measured from the property line. In addition, the ordinance contains a prohibition on "unreasonably loud noise, particularly during nighttime, which interferes seriously

with neighboring residents' reasonable use of their properties." Nuisance noise can include "power equipment including but not limited to . . . garden equipment." Thus, the use of gas powered leaf blowers is subject to the same noise standards as any other noise-generating device. It would not, in my judgment, be reasonable to consider setting a different noise standard for gas powered leaf blowers. Singling out gas powered leaf blowers for special noise regulation for an unrelated issue, such as a belief that such machines are of less utility than lawn mowers or generators used to power house washing equipment, because they are easily replaced by a rake, would not appear to me to be reasonable.

B. Yard Waste Regulations.

1. Chapter 8 of the Town Code includes regulations that affect how leaf blowers and other equipment are used to collect leaves on private property for Town pick-up. For example, section 8-34 of the Code prohibits placing yard waste in any "storm drain, manhole, ditch or median . . ."

2. Section 8-24.1(a) of the Town Code provides:

"During the annual fall and winter leaf collection season (October 15 through March 15), residents desiring leaf waste collection by the town **shall rake their leaves** to a place behind the existing curbline of the street, or where no such curbline exists, the leaves shall be placed off the street pavement and between the roadside ditch and the front property line." (emphasis added)

Reading this section in its entirety makes in clear that the highlighted language is not intended and would not be construed by the Courts as establishing a requirement as to how residents are required to actually move their leaves to appropriate location for Town collection, but rather where the material is to be placed.

3. Standards for collection of leaves and other yard waste during the remainder of the year are also provided by Town ordinance.

C. Nuisance Standards.

Use of a gasoline powered leaf blower in such a manner as to create a public or private nuisance could establish a basis for public civil or criminal liability, under state statute or, private liability under the common law. In addition, there are some statutes that might be a basis for a criminal citation related to the use of a leaf blower under unusual facts. The particular facts and circumstances would need to be considered in any case before we could consider whether there as a basis for initiating some type of legal proceeding.

V. What would be the procedure under state law for the Town to enforce a local ordinance regulating or prohibiting the use of leaf blowers?

The violation of a Town ordinance, with a few exceptions, is a misdemeanor under State Law. A person whom a law enforcement officer has probable cause to believe has committed a misdemeanor would most likely be issued a citation. Probable cause could be established by the officer's own observation of activity that is in violation of a Town ordinance or, in some cases by citizen complaint. For example, in the Town's current noise ordinance, probable cause that noise ordinance violation has occurred could be established by an officer taking a measurement of the noise. In the alternative, under Section 11-39.1, the receipt of complaints from two or more residents on different properties could lead to the issuance of a nuisance noise citation if the offending activity is not modified.

CONCLUSION

Additional regulation regarding the hours of operation and length of time for use of leaf blowers might be considered. The Town could choose to stop using them for its own purposes. The Town could consider regulations regarding use of leaf blowers by private persons on public easements and right of ways where the Town has property interests.

Emissions and noise as justification for a ban on gas powered leaf blowers would not likely withstand legal challenge. The singling out of leaf blowers for additional, stricter regulation than other equipment on the basis of their contribution to air pollution by dirt and dust might withstand legal challenge. Before considering this, I would recommend that the Council consider conducting further hearings and receiving evidence that might support such a step. While there is no direct authority on this subject, an outright prohibition on the operation of gas powered leaf blowers in Chapel Hill would not, in my judgment, likely be found by our Courts, to be within the scope of the Town's police power.