

MEMORANDUM

TO: The Carrboro Town Council

FROM: Nick Herman

SUBJECT: The Legality of Banning Gas-powered Leaf Blowers, and
General Options and Considerations for Regulating Such
Leaf Blowers and Other Landscaping Equipment

DATE: May 19 2023

I. SUMMARY

The Council has expressed interest in regulating gas-powered leaf blowers, particularly with two-stroke engines. Members of the public have expressed concern about the noise and pollution caused by this type of landscape-maintenance machinery. Some localities in other States (or at least one State itself, California) have sought to ban, at least partially, gas-powered leaf blowers, but the legality of such a ban by the Town must be considered under North Carolina law and not under the law of so-called “home rule” jurisdictions that have broader local regulatory authority than exists in our State. No North Carolina case, or analogous case, has addressed this issue.

This Memorandum concludes that, notwithstanding the salient policy considerations for banning gas-powered leaf blowers, a ban is not likely to be upheld by our courts. Nevertheless, the Town does have the power to enact reasonable time, manner, and place restrictions upon the use of such leaf blowers and other landscaping equipment.

II. GOVERNING LEGAL PRINCIPLES

A. The General Police Power

The Town’s ordinance-making power is limited to that conferred upon municipalities by the General Assembly pursuant to Article VII, Section 1 of the N.C. Constitution. Under G.S. 160A-174(a), the

Legislature has given the Town the general power to “define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens.” Under G.S. 160A-4, this power is to be broadly construed, so long as it is not exercised contrary to State or federal law or to the public policy of the State. Notably, the Legislature has specifically empowered municipalities to regulate noise (see G.S. 160A-184) and the emission of pollutants (see G.S. 160A-185).

B. Limitations on the General Police Power

The general police power, even as it is to be broadly construed, is constrained by other constitutional and statutory limitations. Under the “law of the land” clause of the N.C. Constitution, Article I, Section 1, the exercise of the police power is limited to “actions which have a *real or substantial relation* to the public health, morals, order, safety or general welfare.” This means that a regulation cannot impose an unreasonable interference with or burden upon private activity in relation to the public good. This limitation of reasonableness “is a matter resting in human judgment, ordinarily to be determined in 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. 1958).

Also, the constitutional guarantee of “equal protection” prescribes that police power regulations should apply equally to persons “similarly situated” unless there is a reasonable basis to make a regulatory distinction between persons similarly situated.

In addition to these constitutional limitations, under G.S. 160A-174(b) (2) and (5), the General Assembly has expressly said that an ordinance cannot be inconsistent with State or federal law, as where an “ordinance makes unlawful an act...or condition which is expressly made lawful by State or federal law,” or where an “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.” The latter limitation codifies the doctrine of “pre-emption,” which prescribes that an ordinance cannot regulate a matter that is expressly or impliedly intended to be regulated

by State or federal law to the exclusion of local regulation. *See Craig v. County of Chatham*, 565 S.E.2d 172 (N.C. 2002).

III. THE LEGALITY OF BANNING GAS-POWERED LEAF BLOWERS UNDER THE FOREGOING LEGAL PRINCIPLES.

As noted previously, G.S. 160A-184 specifically authorizes municipalities to “regulate, restrict, or prohibit the production or emission of noises...that tend to annoy, disturb, or frighten its citizens.” Under G.S. 160A-185, municipalities also have the power to “regulate, restrict, or prohibit the emission...of substances or effluents that tend to pollute or contaminate land...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,” provided, however, that “*any such ordinance shall be consistent with and supplementary to State and federal laws and regulations.*” Notwithstanding these grants of regulatory authority, they are still subject to the constitutional limitations on the police power discussed above.

Banning gas-powered leaf blowers based on noise is unlikely to be upheld under the foregoing legal principles when other commonly used gas-powered landscaping equipment, such as mowers, saws, and weed eaters, may generate a similar level of noise. This raises not only a potential “equal protection” problem, but also the contention that such a ban would be “unreasonable.”

Banning gas-powered leaf blowers based on air pollution is unlikely to be upheld on “pre-emption” grounds. The air emissions of landscape machinery, like gas-powered leaf blowers and other two-stroke engine machinery, are regulated by the EPA under the Clean Air Act. See 40 CFR Part 1054. As mentioned above, a municipal ordinance regulating emissions under G.S. 160A-185 cannot be inconsistent with federal regulations. Thus, a ban of such leaf blowers would arguably make unlawful an activity made lawful by federal law and be pre-empted by federal law. Moreover, such a ban is likely to lack a reasonable basis or pose equal protection problems, considering the air pollution occasioned by gas-powered mowers, chain saws, and string trimmers.

Finally, a ban on gas-powered leaf blowers raises important questions about regulatory “reasonableness” under the Town’s prevailing “racial equity” lens. To the extent commercial landscaping companies in the Town employ or are owned by minorities, those businesses could suffer a serious economic impact from the elimination of gas-powered leaf blowers. This is a relevant consideration not only in terms of a potential unreasonable interference with or burden upon landscaping businesses in general, but also upon minority landscaping businesses in particular.

IV. REGULATORY OPTIONS OTHER THAN A BAN ON GAS-POWERED LEAF BLOWERS AND FOR OTHER GAS-POWERED LANDSCAPING EQUIPMENT.

A. Regulation of Noise Under the Current Town Code

Section 5-12 of Article II of the current Town Code prohibits:

(4) The operation or use of any of the following tools, machinery, or equipment, when such operation or use takes place (i) outside of a fully enclosed structure; and (ii) within 300 feet of a residentially occupied structure that is not in the possession of the party responsible for the noise at issue; and (iii) after sunset on any day or before 7:00 a.m. on any day except Sunday and before 12:00 noon on Sunday. However, this prohibition shall not apply when work must take place on an emergency basis for health or safety reasons, or when work is undertaken within a public street right-of-way by (i) a utility pursuant to an encroachment agreement, (ii) the Town, or (iii) the North Carolina Department of Transportation.

- a. Earth moving or clearing power equipment.
- b. Chain saws, brush cutters, woodchippers, or similar equipment.
- c. Power saws.
- d. Power driven hammers or jackhammers.

B. Considerations for Potential Amendments to the Town Code to Regulate Gas-powered Leaf Blowers and Other Gas-powered Landscaping Equipment.

The following is a list of non-exclusive general considerations for amendments to the Town Code. The Council is encouraged, even as it is not required, to hold one or more public hearings and perhaps a work session when considering any amendments. The Council might consider extending non-ban regulations to other gas-powered landscaping equipment in addition to gas-powered leaf blowers because the impacts of both may be similar. However, the regulations can be different for different types of gas-powered landscaping equipment so long as there is a factually supported rational basis for making regulatory distinctions.

(1) A maximum decibel level could be established, measured off the property where the equipment is used at a prescribed number of feet from the location of use. (The City of Burlingame, California required, in a 2012 ordinance, that every leaf blower display a label that certifies that it operates at a noise level within the prescribed decibel limit, which presumptively establishes compliance with the ordinance, but the ordinance is silent about how this certification process was to be implemented).

(2) Permissible days of the week and hours could be established for the use of equipment in residential zoning districts and on non-residential properties that are contiguous to residentially zoned properties. These time limitations might vary between commercially-operated equipment and equipment used by residents.

(3) Equipment could be required to be operated with manufacturer emission and noise control features in proper working order.

(4) Under G.S. 160A-296, which empowers cities to have general authority and control over their streets, sidewalks, and public rights-of-way, a regulation could be established to prohibit the use of equipment in a way that causes debris to encroach upon or impair the use of public rights-of-way or public stormwater drainage facilities.

(5) If the factual record can clearly demonstrate that the use of gas-powered leaf blowers is only seasonable, a regulation might possibly establish more stringent limitations on the times such blowers could be used than the limitations placed on other gas-powered landscaping equipment that is commonly used year-round. The legality of such a regulation is, however, tenuous. It is mentioned here because, in *People v. Trollo*, 653 N.Y.S.2d 486 (1996), a local court of limited judicial precedent, the Justice Court of New York, Village of Scarsdale, upheld the Village's ordinance that prohibited the use of gas-powered blowers from June through September of each year on the ground that the objecting defendant failed to adequately show financial hardship upon landscapers, failed to show unreasonableness, and failed to show that alternatives to gas blowers were not viable. In essence, the defendant failed, from an evidentiary standpoint, to overcome the presumption of constitutionality ordinarily accorded to a local government's exercise of its police power. As previously mentioned, no North Carolina Court has addressed this type of regulation or decided a case that may be drawn upon as persuasive precedent on this issue. Thus, the *Trollo* decision will have little, if any, impact upon how a North Carolina appellate court would rule on the same issue.

(6) Regulations might provide for sensible exceptions, such as the use of equipment on golf courses or on public parks, or for equipment operated by the Town, among other examples.

(7) Enforcement of any new regulations could be governed by the civil penalties set forth in Section 5-21 of Chapter 5 of the Town Code.

As previously mentioned, the foregoing considerations are only intended to be illustrative and not exhaustive. The Town Staff may be able to provide the Council with other pertinent considerations.

In the end, the touchstone for the legality of regulating gas-powered leaf blowers and other similar landscaping equipment is "reasonableness"—where the regulations enacted do not, based on the totality of the facts and circumstances, unreasonably interfere with or burden private activity in relation to the public good to be accomplished

and do not apply unequally to persons similarly situated in the absence of a factually-supported reasonable basis for a difference in treatment. This “reasonableness” is best supported by a robust public record, through one or more public hearings and/or work sessions, that provides a credible factual rationale for the regulations enacted.