

Virginia Local Government Law

Attorney General: Emergency state regulations preempt local AOSS ordinances

By: Andrew McRoberts. This was posted Wednesday, November 18th, 2009

On November 9, 2009, Virginia Attorney General Bill Mims issued an official opinion stating that the State Board of Health's adoption of emergency regulations would trigger preemption of local government regulations of alternative onsite sewage systems (AOSS) found in some local government ordinances. The official opinion of the Attorney General can be found here.

The preemption language adopted in a 2009 amendment to <u>Virginia Code 15.2-2157</u> as subsections (C) and (D), states as follows:

C. When sewers or sewerage disposal facilities are not available, a locality shall not prohibit the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.

D. A locality shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164.

Enactment clause # 2, contained in the final legislation, 2009 Acts of Assembly ch. 846 (SB 1276), stated as follows:

That the provisions contained in subsections C and D of § 15.2-2157 of the Code of Virginia shall become effective 30 days following final promulgation by the Board of Health of regulations governing the operation and maintenance of alternative onsite sewage systems pursuant to Chapters 892 and 924 of the Acts of Assembly of 2007.

Reading those two portions of the enacted bill together, Attorney General Mims opined that any regulations, even emergency regulations, meet the test in Enactment Clause # 2 of a "final promulgation ... of regulations."

This comes as a surprise to many, especially local governments whose citizens have been concerned with the public safety of these systems, which require more maintenance and are therefore more susceptible to failure than traditional septic systems. Many had expected the local ordinances to remain effective until the adoption

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of final regulations, not emergency regulations. Emergency regulations may or may not be a "final promulgation." The Attorney General says they are. Others aren't so sure. What do you think?
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