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Hon. Catherine Metsker
Chairman, McLean County Board
115 E. Washington St., Room 401
Bloomington, IL 61701

McLean County Zoning Board of Appeals
115 E. Washington St., Room M102
Bloomington, IL 61701

Dear Chairman Metsker and Members of the Zoning Board of Appeals:

The State's Attorney's Office has received a request for a legal opinion regarding the County's authority to regulate Class VI injection wells used for the sequestration of carbon dioxide (CO_2). The request follows a proposed text amendment to the McLean County Zoning Ordinance, submitted for preliminary consideration to the Zoning Board of Appeals by the County Board's Land Use and Development Committee. For the reasons explained below, it is my opinion that the County Board, through the Zoning Board of Appeals, has certain zoning powers to regulate and restrict the location and use of Class VI injection wells, but lacks the authority to enact a whole-sale prohibition of such wells.

BACKGROUND

Geological sequestration is the process of injecting carbon dioxide captured from an emission source into deep subsurface rock formations for long-term storage. 73 FR 43492-01 (2008). The process is intended to mitigate the environmental effects of greenhouse gas emissions. The first step in the process is the capture of CO_2 from a fossil-fueled power plant or other emission source. The captured CO_2 is compressed into a supercritical fluid and transported, typically through an underground pipeline system, to a geological sequestration site. At the sequestration site, CO_2 is injected into deep subsurface rock formations using Class VI injection wells. *Id.*

Several issues have arisen during the County's consideration of its regulatory approach to CO_2 injection wells: protection of the Mahomet aquifer, risk to public safety, and nuisance to surrounding properties. Geological sequestration of carbon dioxide is a relatively recent technological development, and as such, there is a dearth of legal authority addressing a county's authority to enact regulations on this specific issue. Therefore, my opinion relies on an analysis of existing statutes, regulations, and court opinions addressing counties' regulatory powers in Illinois.

ANALYSIS

I. Protection of Groundwater Resources is Regulated by State and Federal Authorities in Illinois.

As a non-home rule unit of local government, McLean County has only those powers granted under Article VII, Section 7 of the Illinois Constitution and those granted by law. Non-home rule units of local government, "have no inherent powers." *Ross v. City of Geneva,* 71 Ill.2d 27, 31 (1978). "They may exercise only those powers that the state legislature confers upon them, either expressly or impliedly, by statute." *Hawthorne v. Village of Olympia Fields,* 204 Ill.2d 243, 255 (2003) (citing *American Telephone & Telegraph Co. v. Village of Arlington Heights,* 156 Ill.2d 399, 460; *Pesticide Public Policy Foundation v. Village of Wauconda,* 117 Ill.2d 107, 111-12 (1987)).

A. Illinois Groundwater Protection Act, 415 ILCS 55/1 et seq.

States are generally responsible for protecting groundwater from pollution. *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund,* 140 S. Ct. 1462, 1472 (2020) (J. Breyer, "Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States ..."). Illinois exercised that regulatory authority through the Illinois Groundwater Protection Act. The Act established the Interagency

Coordinating Committee on Groundwater[1], the Groundwater Advisory Council[2], and the Mahomet Aquifer Council[3]—the latter being dedicated specifically to the protection of the groundwater source for which it was named. While each of these advisory groups are tasked with providing recommendations for the protection of Illinois groundwater resources, only the Illinois Environmental Protection Agency ("IEPA") is empowered to propose, "regulations establishing comprehensive water quality standards which are specifically for the protection of groundwater." 415 ILCS 55/5-8 (*West*, 2022). Those regulations are promulgated under Title 35 of the Illinois Administrative Code, Subtitle C, Chapter 1.

Importantly, the General Assembly delegated authority to the IEPA to establish *comprehensive* regulations. The Illinois Supreme Court has concluded that, "[w]here the legislature enacts a *comprehensive* scheme of regulation, the legislature implies by the scheme that there is no room for additional regulation by local government units." *Pesticide Public Policy Foundation v. Village of Wauconda*, 117 Ill.2d 107, 115 (1987). For example, a non-home-rule municipality's ordinance regulating the use of certain pesticides was invalidated where State statutes:

> *present a broad and detailed scheme designed to regulate the field of pesticide use in all respects. Although the Pesticide Act, together with the Pest Control Act, has divided its expansive authority over pesticides among three entities, all of them are agencies of State government; notably absent from the acts is any provision delegating authority to, or allowing regulation by, units of local government. ... It is apparent from the act that the General Assembly has*

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[1] The Interagency Coordinating Committee on Groundwater is comprised of the following agencies: (1) The Illinois Environmental Protection Agency, who chairs the Committee;(2) The Illinois Department of Natural Resources; (3) The Illinois Department of Public Health; (4) The Office of Mines and Minerals within the Department of Natural Resources; (5) The Office of the State Fire Marshal; (6) The Division of Water Resources of the Department of Natural Resources; (7) The Illinois Department of Agriculture; (8) The Illinois Emergency Management Agency; (9) The Illinois Department of Nuclear Safety. 415 ILCS 55/4 (*West*, 2022).

[2] The Groundwater Advisory Council is composed of 9 public members appointed by the Governor, including 2 persons representing environmental interests, 2 persons representing industrial and commercial interests, one person representing agricultural interests, one person representing local government interests, one person representing a regional planning agency, one person representing public water supplies, and one person representing the water well driller industry. 415 ILCS 55/5 (*West*, 2022).

[3] 415 ILCS 55/5-5 (*West*, 2022)

intended that the State occupy exclusively the field of pesticide regulation.

Id., 116. Likewise, the Illinois Groundwater Protection Act's comprehensive regulatory scheme fails to delegate any authority for the protection of groundwater to local units of government. **Therefore, the County does not have authority to enact an ordinance for the protection of the Mahomet Aquifer.** Absent any authority to impose such regulation, an ordinance restricting sequestration wells for the protection of the aquifer would likely be invalidated if challenged.

B. Underground Sources of Drinking Water Regulation

While States are generally responsible for the protection of groundwater sources, underground injection wells are regulated under the authority of Part C of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. 300h et seq. The SDWA is designed to protect the quality of drinking water sources in the United States and prescribes that the Environmental Protection Agency ("EPA") issue regulations for State programs that contain "minimum requirements for effective programs to prevent underground injection which endangers drinking water sources." 42 U.S.C. 300h (b)(1).

In 2008, the EPA promulgated Federal requirements to allow for permitting the injection of carbon dioxide for the purpose of geological sequestration. The regulations are intended to decrease the risk of contamination to underground sources of drinking water, which can arise from improper siting, construction, operation, and monitoring of geologic sequestration projects. The EPA regulation created a new class of injection well, Class VI, specifically dedicated to geologic sequestration of CO_2. (Available at https://www.epa.gov/uic/final-class-vi-guidance-documents).

The SDWA allows individual states to create their own regulatory authority for geologic sequestration injection wells, which would replace the EPA's regulatory framework in those jurisdictions. At this time, only the states of Wyoming and North Dakota have implemented programs to regulate Class VI wells. **Therefore, the EPA is the only authority for the regulation of Class VI injection wells in Illinois, and McLean County would not have authority to impose a ban on or otherwise regulate the specifications of such injection wells.**

II. Counties May Enact a Zoning Ordinance to Require a Special Use Permit for, but Cannot Wholly Exclude, Class VI Injection Wells.

Although counties lack the authority to prohibit Class VI injection wells, the Zoning Division of the Counties Code ("Counties Code"), 55 ILCS 5/5-12001, delegates to counties the power to enact ordinances to "regulate and restrict the location and use of buildings, structures, and land," and "to establish building or setback lines," in unincorporated areas of a county. (*West*, 2022). Counties can use these powers, "for the purpose of promoting the public health, safety, morals, comfort and general welfare, and for the purpose of conserving the values of property throughout the county." *Id.* A zoning ordinance is a legislative judgment and is presumptively valid unless proven otherwise by clear and convincing evidence. *Northern Trust Bank/Lake Forest, N.A. v. County of Lake*, 311 Ill.App.3d, 332 (2000). In deciding whether a zoning ordinance is valid, courts will consider the following factors:

> *(1) existing uses and zoning of nearby property; (2) extent to which property values are diminished by particular zoning restrictions; (3) extent to which destruction of value of plaintiffs' property promotes the health, safety, morals, or general welfare of the public; (4) relative gain to public compared to hardship imposed upon individual property owner; (5) suitability of subject property for zoned purposes; (6) length of time the property has been vacant as zoned, considered in context of land development in vicinity; (7) community need for the proposed use; and (8) care with which community has undertaken to plan its land use development.*

Northern Trust Bank/Lake Forest, N.A. v. County of Lake, 311 Ill.App. 3d 332, 336 (2000).

While the Counties Code is expansive in its grant of zoning power to counties, courts have invalidated ordinances that attempt to regulate in a manner that conflicts with other statutes. "[W]here a particular local zoning ordinance … purportedly interfered with the legislative purpose of establishing a statewide environmental program, this court has held that the IEPA preempted the ordinance and rendered the ordinance unenforceable against a facility which had acquired a permit pursuant to the IEPA." *Lily Lake Road Defenders v. County of McHenry*, 156 Ill.2d 1, 12 (1993). For example, the Illinois Supreme Court struck down a county zoning ordinance imposing more rigorous requirements for the reclamation of strip-mined land than provided for

by State statute. *American Smelting & Refining Co. v. Knox County*, 60 Ill.2d 133 (1974). The Illinois Supreme Court concluded,

> *There is simply no demonstrable basis upon which concurrent State and county regulation of reclamation standards may be permitted. These matters are to be exclusively determined by the appropriate State agency after consideration is given to any county suggestions as provided by the pertinent provisions of the Reclamation Act.*

Id., 140.[4]

Likewise, units of local government cannot wholly exclude a category of lawful businesses from its jurisdiction through a zoning ordinance. "Under Illinois law, a zoning ordinance is impermissibly exclusionary if the affected activity is 'effectively prohibited anywhere within the municipal limits.'" *Hawthorne v. Village of Olympia Fields*, 328 Ill.App.3d 301, 309 (2002) (quoting *Oak Forest Mobile Home Park, Inc. v. City of Oak Forest*, 27 Ill.App.3d 303, 318 (1975). Courts have invalidated local zoning ordinances which effectively prohibited outdoor movie theaters, concrete mixing plants, trailer coach parks, shelter care homes, off-premises signs, and home childcare facilities. *People ex. rel. Trust Co. of Chicago v. Village of Skokie*, 408 Ill. 397 (1951); *Suburban Ready-Mix Corp. v. Village of Wheeling*, 25 Ill.2d 548 (1962); *High Meadows Park, Inc. v. City of Aurora*, 112 Ill.App.2d 220, 228 (1969); *Hazel Wilson Hotel Corp. v. City of Chicago*, 17 Ill.App.3d 415 (1974); *Dolson Outdoor Advertising Co. v. City of Macomb*, 46 Ill.App.3d 116, 121 (1977); *Hawthorne*, 310 (2002).

Although counties are not authorized to prohibit or regulate Class VI injection wells *per se*, a county may require a special use permit to ensure that such wells are sited in locations consistent with its zoning ordinance and impose setback requirements for the purpose of promoting public health and safety. A county's ordinance requiring a special use permit for a strip-mining operation was upheld, despite the absence of county authority to regulate strip mining operations. *Herren v. Zoning Bd. of Appeals of Kendall County*, 4 Ill.App.3d 342 (1972) (finding "a special use permit can be denied if such denial bears a substantial relation to the public health,

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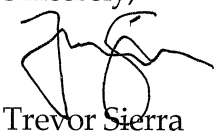
[4] The General Assembly has since amended Surface-Mine Land Conservation and Reclamation Act and the Illinois Environmental Protection Act to allow counties to impose reclamation regulations for strip-mining projects.

safety and welfare.")

CONCLUSION

For the foregoing reasons, it is my opinion that the County of McLean has the authority to require Class VI injection wells secure a special use permit for statutory zoning purposes but may not exclude such activities from its boundaries.

Sincerely,



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Cc: Cassy Taylor, *McLean County Administrator*; Phil Dick, *McLean County Director of Building and Zoning*; Erika Reynolds, *McLean County State's Attorney*; Representatives of the McLean County Board