OFFICIAL OPINION NO. 06-04, Preemption of County Ordinance

May 1, 2006

Mr. Roger R. Gerlach
McCook County States Attorney
P.O. Box 544
Salem, SD 57058

OFFICIAL OPINION NO. 06-04

PREEMPTION OF COUNTY ORDINANCE

Dear Mr. Gerlach:

You have requested an opinion from this Office concerning the following factual situation:

FACTS:

McCook County is in the process of adopting a subdivision ordinance which states "It shall be unlawful for any person having control of any land within the jurisdiction of McCook County to subdivide or lay-out such land in lots, unless by plat. If not platted, the Register of Deeds is not to record the transfer." SDCL 43-21-1 allows a deed to be recorded if in footage legal description (not platted).

Based on these facts you have asked the following question.

QUESTION:

May the McCook County Commissioners enact a zoning ordinance that is more restrictive than state statute because it directs the Register of Deeds not to record a deed on a parcel that is not platted even though the description in the deed is valid according to state law?

IN RE QUESTION:

A county commission has only those powers expressly granted by the Legislature, together with those powers necessarily implied from the legislative grant in order to carry out those express powers. Heine Farms v. Yankton County, 2002 SD 88, ¶17, 649 NW2d 597, 601;

AGR 75-24. "Counties, like cities, lack inherent authority and derive their power from the Legislature." Pennington Co. v. State of South Dakota, 2002 SD 31, ¶10, 641 NW2d 127.

The proposed McCook County Ordinance purports to do two things. First it seeks to require a plat in order for someone to subdivide or lay-out land in lots within the jurisdiction of the county. Second, it directs the McCook County Register of Deeds not to record a transfer of such lands unless those lands have been platted.

SDCL 43-21-1 provides as follows:

When any owner of a government subdivision or a platted tract or lot which is within or without the corporate limits of any municipality shall divide the same into parcels for the purpose of transfer that cannot be described except by metes and bounds, he shall cause the parcels of land so divided to be platted into lots and have the lots numbered and a plat thereof recorded before any instrument of transfer of such divided parcels of land shall be recorded. If such plat cannot be made without an actual survey he shall have such lands surveyed and the plat thereof recorded. The provisions of this section do not apply to parcels subject to a contract with the United States secretary of agriculture pursuant to the United States Conservation Reserve Program, as established in Subtitle D of Title XII of the United States Food Security Act of 1985, as amended on January 25, 1988, and which parcel is being transferred to or from the South Dakota Building Authority.

This statute only requires platting when property is divided and cannot be described except by metes and bounds description. SDCL 43-21-4.1 authorizes the recordation of a conveyance containing a metes and bounds description if a previous conveyance with the same metes and bounds description has been recorded.

McCook County seeks to avoid the reach of this statute, and the legislative exemptions from platting, by adoption of a county ordinance which on its face would require platting in all instances. Nowhere in statute has the Legislature given authority to a county to determine what has to be platted, nor do I find such authority to be implied. The Legislature has specified what information needs to be in plats, has set forth the process to follow to record and plat, and has specified when a plat is required. Where the Legislature intended to involve counties in that process, it specifically provided for that involvement. See, e.g., SDCL 11-3-8. In my opinion the county commissioners lack the legal authority to adopt the ordinance you describe above.

Furthermore, in my opinion the proposed county ordinance is preempted by state law. The South Dakota Supreme Court has identified three ways in which state statutes may preempt local ordinances.

There are several ways in which a local ordinance may conflict with state law. In that event, state law preempts or abrogates the conflicting local law. First, an ordinance may prohibit an act which is forbidden by state law and, in that event, the ordinance is void to the extent it duplicates state law. Second, a conflict may exist between state law and an ordinance because one prohibits what the other allows. And, third, state law may occupy a particular field to the exclusion of all local regulation.

In re Yankton Co. Commission, 2003 SD 109, ¶15, 670 NW2d 34, quoting Rantapaa v. Black Hills Chairlift Co., 2001 SD 111, ¶23, 633 NW2d 196, 203. (Citations omitted).

The Court's analysis of state preemption of county ordinances is analogous to the issue federal preemption of state law. Accordingly the Court has looked to the United States Supreme Court's preemption analysis for guidance. In re Yankton Co. Commission, supra, 2003 SD 109, ¶16, 670 NW2d 34. Federal court analysis indicates that conflict preemption occurs when there is a conflict between federal and state law or when it is impossible to comply with both federal and state law. South Dakota Mining Ass'n, Inc. v. Lawrence Co., 977 F.Supp. 1396, 1401 (DSD 1997); aff'd 155 F3d 1005 (8th Cir. 1998).

"A conflict exists when the local enactment 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" . . . . Once state law is found to conflict with federal law, the state law is deemed to be "without effect."

Id. (Citations omitted). (See also, Big Stone Broadcasting, Inc. v. Lindbloom, 161 F.Supp.2d 1009 (DSD 2001).

Applying this analysis to the facts you present leads to the conclusion that the proposed ordinance being considered by McCook County would be preempted by state law. To the extent that the proposed ordinance duplicates the requirements of SDCL 43-21-1, the ordinance is void. In re Yankton Co. Commission, 2003 SD 109 ¶¶ 14, 15, 670 NW2d 34.

Second, the proposed ordinance would require platting in several instances where the Legislature has determined that platting and compliance with SDCL 43-21-1 is not required. The proposed ordinance directly conflicts with SDCL 43-21-4.1 which allows for

the recordation of metes and bounds descriptions in cases where such a description has been recorded before. The ordinance would also be in conflict with SDCL 43-21-5 which authorizes the recording of certain plats that do not comply with SDCL chapter 43-21. The ordinance would also be contrary to SDCL 43-30-16 (certain railroad property) and SDCL 43-30-17 (certain property acquired from the Secretary of the Army) both of which statutes provide exemptions from the platting requirements of SDCL chapter 43-21. Because the proposed ordinance seeks to prohibit what the state statute allows, the ordinance is preempted. See AGR 85-50; AGR 86-04.

Keep in mind that SDCL 43-21-1 prohibits the use of a metes and bounds description where a property owner is dividing land for purposes of transfer and the land transferred cannot be described except by metes and bounds. AGR 75-173. Although "metes and bounds" is not defined in statute, our office has in past opinions stated:

A 'metes and bounds' description is determined by courses and distances and must be marked by lines enclosing the entire tract. A 'course' as used in reference to boundary is a direction of a line with reference to a meridian. . . . The rectangular tract which you describe is bounded on two sides by lines established by the United States Government survey and by two lines parallel thereto. I do not think this constitutes a 'metes and bounds' description within the meaning of the statute under consideration.

Biennial Report of the Attorney General, 1947-48, page 63.

It is not clear whether it is only metes and bounds descriptions that are of concern to you. For example, a legal description that describes the East 1400 feet of the North 2400 feet of the N1/2 of the section, containing a stated number of acres more or less could be construed as a "footage legal description" as you refer to in your statement of facts. Such a description is not in my opinion a metes and bounds description. Therefore, SDCL 43-21-1 has no application to such property descriptions and platting is not required under SDCL 43-21-1.

Such property descriptions, however, notwithstanding the reference to "footage," constitute a "legal description" for purposes of determining compliance with SDCL 7-9-7(1). These deeds are entitled to be recorded. SDCL 43-28-1.

Thus the question becomes whether a county commission may by ordinance instruct a register of deeds not to record a document, which is otherwise recordable under statute, by

requiring the platting of property in circumstances where the Legislature has not seen fit to do so. In my opinion, the answer is no.

Nowhere in statute has the Legislature granted authority to county commissioners to determine what a register of deeds may record. Neither is such authority implied in order for the county to carry out expressly granted powers. Indeed, an examination of the various statutes that deal with recordation of documents affecting the title to or possession of real property, makes clear that the Legislature has made the subject of what may be recorded its sole province. In my opinion the answer to your question is No.

Very truly yours,

Larry Long
ATTORNEY GENERAL

LL/HHD/lde