OFFICIAL OPINION NO. 86-04, Zoning ordinance for mining operation

March 3, 1986

Roger Tellinghuisen
State's Attorney
70-80 Sherman Street
Lawrence County Courthouse
Deadwood, S.D. 57732

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Dear Mr. Tellinghuisen:

You have asked for an official opinion from this Office regarding the following factual situation:

FACTS:

Lawrence County is considering adopting, as part of its County Zoning Ordinance, reclamation standards for mining operations within the County. As a part of such an ordinance, the County would like to require a surety or other form of security from the mining operation to ensure compliance with the reclamation standards. Currently, mining can only occur without a conditional use permit on land zoned industrial or with a conditional use permit on land zoned park, forest or agricultural. It is contemplated that such reclamation standards could be made a part of the conditions attached to the granting of a conditional use permit allowing such mining.

Regarding these facts, you have asked the following questions:

QUESTIONS:

1. Would an ordinance, supplementing a zoning ordinance and requiring certain reclamation standards to be met by a mining operation, violate the provisions of SDCL 45-6B?

2. Has the State of South Dakota, by adopting SDCL 45-6B, preempted local governments from passing regulations regarding reclamation?

3. Can a county adopt reclamation standards which may be more stringent and not in conflict with State regulations?

4. If the county has the authority to adopt reclamation standards for mining industries, can it require a surety or other security to ensure compliance with such standards or would such a requirement violate SDCL 45-6B-4?

5. If a county cannot require a surety or other form of security, what methods might be available to it to enforce compliance with reclamation standards without violating SDCL 45-6B-4?

Local governments have only those powers specifically or impliedly delegated to them by the State. SDCL Ch. 11-2 specifically authorizes county governments to conduct land use planning and to utilize zoning controls to implement that planning. The purpose behind the planning effort is delineated at

SDCL 11-2-12:

The comprehensive plan shall be for the purpose of protecting and guiding the physical, social, economic, and environmental development of the county; to protect the tax base; to encourage a distribution of population or mode of land utilization that will facilitate the economical and adequate provision of transportation, roads, water supply, drainage, sanitation, education, recreation, or other public requirements; to lessen governmental expenditure; and to conserve and develop natural resources. (Emphasis added.)

A county's comprehensive plan may be effectuated by the division of the county into zoning districts. SDCL 11-2-13 states:

Official controls may include the establishment of zoning districts within which the use of land for agriculture, forestry, recreation, residence, industry and commerce, soil conservation, water supply, sanitation and additional uses of land may be encouraged, regulated or prohibited and for such purposes the board may divide the county into districts of such number, shape and area as may be deemed best suited to carry out the comprehensive plan.

However, a county's zoning power may be exercised only in a fashion that is not arbitrary, capricious, confiscatory, discriminatory, or otherwise unreasonable. See, e.g., Yick Wo

v. Hopkins, 118 U.S. 356 (1886); Chokecherry Hills Estates, Inc. v. Deuel County, 294 N.W.2d 616 (S.D. 1980); State Theatre Co. v. Smith, 276 N.W.2d 259 (S.D. 1979); Crowley v. State, 268 N.W.2d 616 (S.D. 1978);State v. Reninger, 59 S.D. 336, 239 N.W. 849 (1931). Generally, it appears that so long as a zoning ordinance is reasonable, it will be upheld.

With specific regard to the application of a zoning ordinance to a mining operation, the confiscatory problem--the taking of private property--comes to the forefront. Unlike other disruptive land uses which can be relocated, mining can occur only where the minerals exist. 'Zoning that prevents mining has the effect of prohibiting any use at all of mineral property.' Midland Electric Coal Corp. v. Knox County, 1 III.2d 200, 115 N.E.2d 275, at 283 (1953).

Courts, in deciding cases in which a zoning ordinance is being attacked as a taking of mineral property, have become involved in balancing the gains to the local public from prohibiting the mining activity against the losses to the mining company and the general public from failing to allow the development and utilization of a valuable mineral resource. The results of such challenges have been inconsistent; one author has suggested that:

> . . . perhaps all that can be said is that the probability that zoning will be upheld increases the closer such tract is located to a municipality or concentrated residential development, the more disruptive the mining will be with respect to adjoining land uses, and the greater the alternative uses to which the land can be put. Conversely, the restriction is more likely to be struck down where the loss to the landowner is great, where society will noticeably suffer from not having the mineral extracted, where the mineral is extremely rare or the deposit unusually valuable, and where the mining will occur sufficiently distant from more fragile land uses so as to cause minimal disruption or disturbance.

(Western Land Use Regulation and Mined Land Reclamation Institute Paper 8, County Regulation of Mineral Development, p. 8-14, Rocky Mountain Mineral Law Foundation, 1979.)

In South Dakota, reasonable zoning ordinances have withstood a challenge of 'taking,' albeit not in reference to a mining project. In Chokecherry, supra. the South Dakota Supreme Court noted in dicta that '. . . the police power was properly exercised in preventing public harm by protecting the natural environment of shorelands.' (At 657,

referring to Just v. Marinette County, 56 Wisc.2d 7, 201 N.W.2d 761 (1972). The South Dakota Court has also enforced an ordinance whose purpose was '. . . to allow suitable areas of the county to be retained in agricultural uses and to prevent scattered nonfarm development,' thereby prohibiting the development of a residential subdivision. Save Centennial Valley Assn. v. Schultz, 284 N.W.2d 452 (S.D. 1979).

In summary, an absolute prohibition of a certain use of land in a zoning ordinance, as when the mining of a mineral property is prohibited, is difficult to defend against constitutional attack. However, SDCL Ch. 11-2 provides ample authority for a county to enact a planning and zoning ordinance which reasonably regulates mining activities within that county. One caveat to this conclusion, however, is that the reasonable regulation created by the zoning ordinance must not be preempted by federal or state law; it is this preemption problem that the remainder of this opinion will address.

The issue of preemption has recently been addressed by the United States Supreme Court. In Silkwood v. Kerr-McGee Corp., ---- U.S. ----, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), the Court identified two ways in which preemption could occur:

. . . If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. (Pacific Gas and Electric Co. v. State Energy Res. Cons. & Dvlp. Commission, 461 U.S. 190, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983)); Fidelity Fed. Svgs. & Loan Assn. v. de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or where the state law stands as an obstacle to the full purpose and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

104 S.Ct. at 621. These basic rules are applicable to a determination of when state or federal law preempts a county regulation or ordinance. The entire field of mining law and its effects on the law of property is first based on the General Mining Law of 1872 (30 U.S.C. 22 et. seq.) and on the various public lands laws (Homestead Acts, 43 U.S.C. 161, 162, 165, et al.). Underlying each of these Acts is the express congressional intent

that the nation's lands and minerals be developed and utilized. E.g., the Mining Law of 1872 declares that:

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase . . .

30 U.S.C. 22. The Mining Law does, however, leave room for the operation of non-conflicting state and local regulation of mining activity. 30 U.S.C. 22 further provides that the right to explore for minerals and to purchase lands of the United States is to be exercised:

. . . under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Further, 30 U.S.C. 26 qualifies the locator's right of possession and enjoyment of federal lands upon compliance with '. . . laws of the United States, and with the State, territorial, and local regulations not in conflict with the laws of the United States . . .'

In addition to the General Mining Law, the Mineral Lands Leasing Act (30 U.S.C. 181-263), which regulates the mining and development of federally- owned 'leasable' minerals, and the Mining and Mineral Policy Act of 1970 (30 U.S.C. 21a) may act to preempt local regulation of mining activity concerning federal minerals. The federal acts establishing national forest lands or otherwise creating an enclave of federally owned land may also result in a preemption of local or state regulations which are contrary to the use and development intended to those lands by their federal regulatory authorities. See, e.g., United States Constitution, Art. IV., Section 3, Cl. 2 (properties clause); 16 U.S.C. 478, 558. See also, the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-1782), which requires the Secretary of the United States Department of the Interior to develop and implement land use plans for the various public lands. This Act specifically gives the Secretary of the Interior the discretion to preempt state and local land use plans if they are inconsistent with the federal energy development scheme. 43 U.S.C. 1712(c)(9).

In general, when the preemption standards have been applied to local measures which attempt to prohibit--rather than reasonably regulate--the mining of federal minerals or the mineral development of federal land, the local regulation has been struck down.

In Idaho ex. rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976), the Idaho Supreme Court found that the Idaho mining statute, which required a state permit for a mining operation on federal land, was not preempted by federal law. That Court noted, however, that the reclamation requirements of the state permit '. . . would be unenforceable to the extent they rendered it impossible to mine the lode deposits.' 554 P.2d at 975. The Idaho Court expressly stated that it did not address the question of whether the state could deny a permit.

The decision in Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), aff'd. without opinion, 445 U.S. 947 (1980), was somewhat different. Ventura County sought to require a mining company to obtain an exploration and drilling permit in accordance with its zoning ordinance before the company initiated mineral development activities under a federal oil and gas lease and federal drilling permit. The mineral activity was to take place on national forest land. The Ninth Circuit rejected the county's position, holding that:

(T)he federal government has authorized a specific use of federal lands and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress.

This decision was based on the congressional intent appearing in both the federal mining laws and in those acts establishing the national forest.

In Brubaker v. El Paso County, 652 P.2d 1950 (Co. 1982), a county refused to issue a special use permit for core drilling on mining claims located on public land within the county. Basing its decision on preemption, the Court held that the county's denial of the special use permit was an attempt to substitute its judgment for that of Congress concerning the appropriate use of federal land. The Court noted specifically that it was deciding the issue not addressed by the Idaho Court in Andrus v. Click, supra, and held that '(s)uch a veto power does not relate to a matter of peripheral concern to federal law, but strikes at the central purpose and objectives of the applicable federal law.' 652 P.2d at 1056. The Court, however, did note that some local regulation of mining activities was permissible:

It is established that state or local regulation supplementing the mining laws is permissible. See 30 U.S.C. 22, 26; Butte City Water Co. v. Baker, (196 U.S. 119, 25 S.Ct. 211, 49 L.Ed. 409 (1905), in which the Court upheld a Montana law prescribing certain location requirements for federal mining claims); State ex rel. Andrus v. Click, supra. State

and local laws that merely impose reasonable conditions upon the use of federal lands may be enforceable, particularly where they are directed to environmental protection concerns.

In addition to preemption caused by the federal mining and land laws, there are other federal acts which may impact local control over mining activities. If the mineral being mined is coal, the Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 et seq., applies. Although this Act allows a state to promulgate and enforce a state coal mining program that is in conformance with the federal requirements, South Dakota has not implemented such a program due to the economic infeasibility of the development of the State's coal resources at this time. Therefore, SMCRA preempts conflicting provisions of the State's current mining program; it will also preempt conflicting reclamation standards implemented in a county zoning ordinance. Under SMCRA, however, local land use policies are supposed to be taken into consideration when the mineral developer is formulating his reclamation strategy. See 30 U.S.C. 1258(a)(8); 30 U.S.C. 1265(c)(3).

In addition, there are several federal environmental laws which allow local governments to impose regulations in addition to those requirements mandated by federal statute or regulation. For example, the provisions of the Clean Air Act (42 U.S.C. 7401-7642) and the Federal Water Pollution Control Act (33 U.S.C. 1288) seem to allow for some local control and land use planning, so long as that planning does not conflict with federal requirements and purposes.

This discussion of preemption is not intended to be exhaustive, but rather to point to some of the pitfalls which must be avoided by a county intending to reasonably regulate mining activities by means of a zoning ordinance. Basically, any inquiry into preemption appears to depend not only upon whether the general purpose or intention of the local regulation is inconsistent with federal law, but also whether the local regulation has the effect of frustrating the purpose and intent of the federal law. These same rules apply to preemption of a county zoning ordinance by the state law.

IN RE QUESTION NO. 1:

SDCL Ch. 45-6B is the South Dakota Mined Land Reclamation Act. This chapter provides for the issuance of a life-of-the-mine permit for a mining operation conducted on certain specified affected land. SDCL 45-6B-5. One of the requirements for the issuance of such a

mining permit is the submission and approval of a reclamation plan. Reclamation, defined at SDCL 45-6B-3(12), is:

the employment during and after a mining operation of procedures reasonably designed to minimize as much as practicable the disruption from the mining operation and to provide for the rehabilitation of affected land through the rehabilitation of plant cover, soil stability, water resources, or other measures appropriate to the subsequent beneficial use of such mined and reclaimed lands.

This Act requires the operator of a proposed mining operation to choose the type of reclamation to which he will return affected land after the completion of his operation. The choices of reclamation activities appear at SDCL 45-6B-45, and include forest planting, rangeland restoration, agricultural use, or the development of the area for homesite, recreational, industrial, wildlife and other uses.

The basic reclamation requirements which are eventually required by the State mining permit are those proposed by the operator and approved by the South Dakota Board of Minerals and Environment. Note, however, that SDCL 45-6B-37 through 45-6B-45, inclusive, have some very general requirements with which the operator must comply (e.g., SDCL 45-6B-37: 'Grading shall be carried on as to create a final topography appropriate to the final land use selected in accordance with 45-6B-44.'). Within these general parameters, the operator is free to choose a reclamation plan and to establish the requirements thereof, subject only to the Board's approval. SDCL 45-6B-7.

In addition to submitting a reclamation plan, an operator of a proposed mining operation is required to tender a surety to the State, ensuring that the reclamation activities are indeed undertaken by the operator at the completion of the mining operation. SDCL 45-6B-20 through 45-6B-26, inclusive.

SDCL Chapter 45-6B makes several references to the local regulation of mining activity. SDCL 45-6B-4 states:

No governmental office of any political subdivision of the state may issue or require a local permit or require any surety for mining operations. However, the board of minerals and environment may not grant a permit in violation of city, town or county zoning or subdivision regulations unless a prior declaration of intent to change or waive the prohibition is obtained by the applicant from the affected government subdivisions.

In addition, as part of the application for a mining permit, the operator is required to submit '(t)he source of the applicant's legal right to enter and initiate a mining operation on the affected land.' SDCL 45-6B-6(4). Arguably, this provision could require a showing of compliance with a county zoning ordinance. SDCL 45-6B-32(5) specifically allows the Board of Minerals and Environment to deny a permit application for the mining operation that would be in violation of any county zoning or subdivision regulations-- again, seeming to require a showing of compliance with the provisions of a county zoning ordinance.

Applying the tests of preemption discussed above, as well as the basic rule of statutory construction that statutes should be read together in such a fashion as to give effect to all provisions (Karlen v. Janklow, 339 N.W.2d 322 (S.D. 1983); State v. Hoxeng, 315 N.W.2d 308 (S.D. 1982); Matter of Sales Tax Refund, 298 N.W.2d 799 (S.D. 1980), it is the opinion of this Office that the State's mining statutes do not evidence an intent to occupy the entire mining field and do not preempt the ability of a county government to enact reclamation provisions in its zoning ordinance, so long as those provisions do not conflict with the few statutory reclamation requirements provided in the statutes. Not only is this power specifically provided to counties by SDCL Chapter 11-2, but also the provisions of SDCL Chapter 45-6B appear to allow for such local control of mining activity. See the provisions prohibiting the Board from issuing a State mining permit in violation of local zoning provisions (SDCL 45-6B-4 and 45-6B-32(5)) and the enactment of only general reclamation parameters (SDCL 45-6B-37 through 45-6B-45, inclusive) which allow a county to promulgate specific and reasonable reclamation requirements which would not conflict with State standards.

Therefore, it is my opinion that the county could delineate and impose reclamation standards on mining operations through its county zoning ordinance. However, it is crucial to remember that the reclamation requirements must be reasonable and, especially when federal lands or minerals are involved, must be structured to allow mining development and yet ensure the future productivity of the land. To do otherwise would be to invite a challenge to the ordinance based upon preemption or constitutionality.

IN RE QUESTION NO. 2:

See answer to Question No. 1.

IN RE QUESTION NO. 3:

It appears that the real issue is not whether the county's reclamation standards are more stringent than those imposed by the state or federal government, but rather, whether the county's standards conflict with or are an _obstacle to the purpose and objective of the state and/or federal law. So long as the county's reclamation standards do not conflict with state or federal requirements or do not prohibit mining development unreasonably (or at all, on some federal land or concerning some federal mineral), it is my opinion that the stringency of the county requirements is not particularly important.

IN RE QUESTION NO. 4:

The first sentence of SDCL 45-6B-4 states: 'No governmental office of any political subdivision of the state may issue or require a local permit or require any surety for mining operations.' This State statute thus specifically prohibits a county from requiring a surety for a mining operation. Therefore, it is my opinion that any county requirement that a mining operator obtain a permit for a mining operation or file a surety for a mining operation to ensure compliance with the reclamation requirements established by the county as part of its planning and zoning ordinance, would directly conflict with State law and therefore be preempted.

IN RE QUESTION NO. 5:

One remedy available to a county to enable it to enforce the _reclamation requirements of a zoning ordinance, would be an injunctive action to mandate the reclamation activities. In addition, the county would of course have a criminal enforcement action available to it for the violation of a county ordinance.

This problem should be viewed realistically: the land affected by the mining operation would not go unreclaimed in total--such would violate state and/or federal law. Rather, it would be the additional reclamation requirements imposed by the county that would not be performed. From this perspective, an injunctive action would appear to be the only remedy available to the county that would actually result in the completion of the county's reclamation requirements.

Respectfully submitted,

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