

**LETTER OPINION  
2003-L-48**

November 4, 2003

Mr. Terence Devine  
Nelson County State's Attorney  
PO Box 428  
Lakota, ND 58344-0428

Dear Mr. Devine:

Thank you for requesting my opinion on two questions involving hunting on private land. Your first question is whether Nelson County "has authority under section 11-33-01 of the North Dakota Century Code to close all agriculture land in Nelson County to hunting unless the owner posts the same 'Open to Public Hunting'."

The language of the proposed zoning ordinance, as provided to this Office, states:

All lands in Nelson County, North Dakota, within the Agricultural District shall be closed to all public hunting, of every kind and nature, unless the owner or tenant thereof shall post the land as "Open to Public Hunting" and no one may hunt without specific written permission of the farmer/owner. The signs must be readable from the outside of the land, placed conspicuously on not more than every one half mile (880 yards) apart on unfenced areas and at the gates on fenced areas.

Section 11-33-01, N.D.C.C., allows a board of county commissioners to use its zoning powers to "regulate and restrict within the county . . . the location and use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes." N.D.C.C. § 11-33-01. Violation of a zoning ordinance is a class B misdemeanor. N.D.C.C. § 11-33-21. Thus, the legislature granted counties the general authority to enact and enforce zoning ordinances affecting land use within the county, except where inconsistent with statutory or constitutional limitations placed on counties. See N.D. Const. art. VII, § 3; County of Stutsman v. State Historical Soc'y, 371 N.W.2d 329 (N.D. 1985) ("counties are creatures of the constitution and may speak and act only in the manner and on the matters prescribed by the Legislature in statutes enacted pursuant to constitutional authority"); Mountrail County v. Hoffman, 607 N.W.2d 901, 903 (N.D. 2000) (a local governing body may not enact a zoning ordinance that contravenes

federal or state law). The question is therefore whether Nelson County can use its general zoning authority to close land to hunting unless the owner posts a sign indicating the land is open to hunting.

Chapter 20.1-01, N.D.C.C., contains the general provisions for hunting within the state of North Dakota. Sections 20.1-01-17 through 20.1-01-20, N.D.C.C., provide specific guidelines for hunting on private land. "Only the owner or tenant of any land may post it by placing signs alongside the public highway or the land giving notice that no hunting is permitted on the land." N.D.C.C. § 20.1-01-17. A person who illegally hunts or pursues game on legally posted land is subject to prosecution for a class B misdemeanor for a first offense and a class A misdemeanor for a subsequent offense within a two-year period. N.D.C.C. § 20.1-01-18. Accordingly, state law provides that only a landowner or a landowner's tenant can close private land to hunting, and only the action of posting the land creates the potential for criminal charges to be brought against persons who ignore the posted signs. Nelson County's zoning proposal would therefore appear to be the exact reverse of N.D.C.C. §§ 20.1-01-17 through 20.1-01-20.

"Although counties have general authority to enact zoning ordinances, a local governing body cannot validly enact a zoning ordinance that contravenes federal or state law." Mountrail County v. Hoffman, 607 N.W.2d 901, 903 (N.D. 2000) (citations omitted).

Municipal authorities, under a general grant of power, cannot adopt ordinances which infringe the spirit of a state law or are repugnant to the general policy of the state. The preemption doctrine is based upon the proposition that a [political subdivision], as an agent of the state, cannot act contrary to the state. In general, preemption may be either expressed or implied. Implied preemption occurs when a statute does not expressly state that its regulation is exclusive, but when nevertheless, an intent to preempt local regulatory authority is implied from the whole scope and purpose of the statutory scheme.

N.D.A.G. 94-F-15 (internal quotations and citations omitted). The comprehensiveness of state regulation of a particular subject is an indication of the intent to preempt local regulatory authority. N.D.A.G. 90-23.

The Legislative Assembly has enacted seventeen different chapters in N.D.C.C. title 20.1 regulating a myriad of outdoor recreational activities affecting wildlife, including hunting. The comprehensiveness of the State's regulation of hunting, including hunting on private property, indicates an intent to preempt local regulatory authority. The legislative statement that "only the owner or tenant of any land" may prohibit hunting on that land, N.D.C.C. § 20.1-01-17, is a further indication of the Legislative Assembly's intent to preempt county regulation of this subject. Accord N.D.A.G. Letter to Thompson (Jan. 15, 1968) (only a landowner may close land to aerial hunting; counties do not have the

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authority to close private land). Accordingly, it is my opinion that Nelson County's proposed zoning ordinance would be preempted by N.D.C.C. §§ 20.1-01-17 through 20.1-01-20.

An even stronger argument can be made that Nelson County's proposed zoning regulation would be a violation of N.D.C.C. §12.1-01-05. That section states in part that "[n]o offense defined in this title or elsewhere by law shall be superseded by any city or county ordinance." N.D.C.C. § 12.1-01-05. "The legislature's intent to have uniformity in criminal law throughout the state is clearly expressed in section 12.1-01-05, N.D.C.C. . . ." City of Bismarck v. Hoopman, 421 N.W.2d 466, 468 (N.D. 1988). A political subdivision's ordinance "must not attempt to prohibit any conduct other than that prohibited by the state statute." City of Dickinson v. Gresz, 450 N.W.2d 216, 220 (N.D. 1989).

Nelson County proposes to do just that. Instead of providing a mechanism for prosecuting hunters who trespass on private land that has been posted as closed to hunting, Nelson County proposes to enact a zoning ordinance that would subject hunters to criminal prosecution for hunting on land that has not been posted as open to hunting. Nelson County's proposal would destroy the uniformity of the posting laws in North Dakota and prohibits conduct "other than that prohibited by the state statute." See id. Accordingly, it is my opinion that N.D.C.C. §12.1-01-05 prohibits Nelson County from enacting a zoning ordinance that conflicts with North Dakota's posting laws, N.D.C.C. §§ 20.1-01-17 through 20.1-01-20.

Your second question regards the constitutionality of N.D.C.C. §§ 20.1-01-17 through 20.1-01-20. As you are aware, the constitutionality of N.D.C.C. §§ 20.1-01-17 through 20.1-01-20 is currently at issue in unrelated litigation. This office will not issue an opinion on a topic on which this Office is currently engaged in litigation. Accordingly, I respectfully decline to address your constitutional question.

Sincerely,

Wayne Stenehjem  
Attorney General

sam/vkk