

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-23

Date issued: October 5, 1990

Requested by: Layton Freborg, North Dakota Senate

- QUESTION PRESENTED -

Whether a county may issue an oil drilling permit, and if so, whether the permit may be conditioned to require the permittee to enter a road maintenance agreement.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a county may not issue an oil drilling permit.

- ANALYSIS -

Chapter 11-33 gives broad zoning authority to counties. See, e.g., N. D. C. C. " 11-33-01, 11-33-02, 11-33-18. The Legislature, however, has given specific regulatory authority over oil and gas activities to the Industrial Commission. N. D. C. C. ' 38-08-04(1)(c) provides the Commission has authority to require the following:

The drilling, casing, operation, and plugging of wells in such a manner as to prevent the escape of oil or gas out of one stratum into another, the intrusion of water into oil or gas strata, the pollution of freshwater supplied by oil, gas, or saltwater, and to prevent blowouts, cavings, seepages, and fires.

Moreover, N. D. C. C. ' 38-08-04(2)(a) gives the Commission the authority to regulate "[t]he drilling, producing, and plugging of wells, the restoration of drilling and production sites, and all other operations for the production of oil or gas." Furthermore, N. D. C. C. ' 38-08-05 provides:

It is unlawful to commence operations for the drilling of a well for oil or gas without first obtaining a permit from the industrial commission under such rules as may be prescribed by the commission and paying to the commission a fee for each such well in an amount to be prescribed by the commission.

Thus, while counties may have general authority to zone, the Commission has specific authority to regulate oil and gas wells, as well as to require a permit and charge a fee for the permit. The question thus becomes whether the county may use its general zoning authority to regulate activity which is

specifically regulated at the state level.

A number of courts have addressed this question. In Osborne v. Board of County Comm'rs, 764 P.2d 397 (Colo. Ct. App. 1988), cert. denied, 778 P.2d 1370 (Colo. 1989), the Colorado Court of Appeals addressed the extent to which the Colorado Oil and Gas Conservation Act limited a county's authority to regulate the operation of oil and gas wells. Id. at 398. In Osborne, the county had adopted a zoning resolution allowing for the issuance of an oil and gas permit. Id. The plaintiffs had an oil and gas lease and sought a permit to drill on its leased acreage. Id. The county denied the plaintiffs' request for a permit based on the plaintiffs' refusal to meet reclamation, bonding, and fire protection conditions that were required by the county. Id. at 399. Subsequently, the plaintiffs sought review of the court's action and declaratory relief. Id.

On appeal, the court addressed whether the county's attempt to impose conditions on the permit was an impermissible infringement on the Colorado Oil and Gas Conservation Commission's (Commission) authority. Id. The court reviewed the general zoning authority of the county and the extensive authority given to the Commission over oil and gas matters. The court noted that when the Legislature delegates a general power to a local government, the local government's power may nevertheless be restricted by a legislative grant of power over a specific subject to another entity Id. at 400-01. In addition, the court stated that where a "comprehensive statute is intended to be the exclusive means of regulation," no specific conflict between state and local law is necessary for the state law to preempt local regulations. Id. at 401. The court reasoned that the mere enactment of legislation can show that the legislature meant to preempt an area. Id. The court stated that in this case, the comprehensiveness of the Oil and Gas Conservation Act and the commission's regulations indicated the legislature meant to make the commission the sole authority regulating the Act. Id. at 401-02; see also Envirogas, Inc. v. Town of Kiantone, 447 N.Y.S.2d 221, 222 (N.Y. Sup. Ct. 1982), aff'd, 454 N.Y.S.2d 694 (N.Y. App. Div. 1982) (State Oil and gas laws preempted municipal ordinance). But see Unger v. State, 629 S.W.2d 811, 812-13 (Tex. Ct. App. 1982) (enactment of state oil and gas laws did not repeal a municipality's prior legislative authority to regulate the drilling and production of oil and gas). Gant v. Oklahoma City, 6 P.2d 1065, 1067-68 (Okla. 1931), reh'g denied, 15 P.2d 833 (Okla. 1932), appeal dismissed, 284 U.S. 594 (1932) (authority of city to regulate drilling of wells was not deprived because of state regulation of oil and gas); Blancett v. Montgomery, 398 S.W.2d 877, 881 (Ky. Ct. App. 1966) (authority given to the Kentucky director of oil and gas did not preempt municipalities authority to regulate oil and gas production under their police powers).

The Osborne court explained a number of legal principles that are relevant to the question presented. When the Legislature delegates a general power to a local government, its power to act may nevertheless be restricted by a legislative grant of power over a specific subject to another governmental body. Osborne, 764 P.2d at 401. Additionally, where a comprehensive statute

is intended to be the exclusive means of regulation, no specific conflict between state and local law is necessary for the state law to preempt local regulations. Id. The mere fact that a state regulates an area of business however does not necessarily preempt all local legislation regarding that area. When state law expressly supersedes all local ordinances, the local government is precluded from legislating on the same subject unless there is clear authority to the contrary. Envirogas, 447 N. Y. S. 2d at 222.

As previously explained the North Dakota Industrial Commission has broad authority over oil and gas. N. D. C. C. ' 38-08-04(2)(a) gives the Commission the authority to regulate "[t]he drilling, producing, and plugging of wells, the restoration of drilling and production sites, and all other operations for the production of oil or gas." In addition, N. D. C. C. ' 38-08-04 gives the Commission jurisdiction and authority "over all persons and property, public and private", necessary to enforce the provision of the North Dakota Oil and Gas Conservation Act. Also, the Commission has the authority to require a permit and to charge a fee for that permit. N. D. C. C. ' 38-08-05. Furthermore, it should be noted that the Industrial Commission has adopted many rules relating to oil and gas. See N. D. Admin. Code ch. 43-02-03.

Because of the comprehensiveness of state regulation of oil and gas, I conclude that the North Dakota Legislature intended to preempt local regulation in this area. This conclusion is consistent with an earlier letter issued from this office, which provided in part: "[A] board of county commissioners has no authority to regulate the development, production, or utilization of natural resources of oil and gas in the state of North Dakota." Letter from Nicholas J. Spaeth, Attorney General, to Jay V. Brovold, Billings County State's Attorney (Feb. 7, 1985).

Because it is my opinion that counties may not require oil drilling permits it is my further opinion that the county may not require a company to enter into a road maintenance agreement prior to granting a permit. However, even if counties could require oil and gas permits, counties could not require a company to enter a road maintenance agreement prior to granting a permit. As previously stated, N. D. C. C. ch. 11-33 sets forth the zoning authority of counties. N. D. C. C. ' 11-33-02 provides in part: "The provisions of this chapter shall not be construed to include any power relating to the establishment, repair and maintenance of highways or roads." N. D. C. C. ' 11-33-02. Thus, a county may not impose a condition requiring road maintenance agreements upon oil and gas producers.

- EFFECT -

This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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Nicholas J. Spaeth
Attorney General

Assisted by: Patrick K. Stevens
Assistant Attorney General

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