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OPINION NO. 80-022

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Question: Does W.S. 18-5-201 (1977) of the planning and zoning statutes authorize boards of county commissioners to require and issue permits for mining operations?

Answer: Yes. However, W.S. 18-5-201 limits the planning and zoning powers of counties in such a way as to exclude them from acting to prohibit mining in an unincorporated area of the county. Counties may require mines to submit applications for zoning permits, and they may require conformance with zoning resolutions of those portions of the proposed mine which are not exempt as "reasonably necessary to the extraction or production of the mineral resources." Finally, counties may not use their planning and zoning authority to regulate environmental concerns.

DISCUSSION

I.

We have been presented with the question of whether counties have authority to require permits for mining operations. Specifically, we have been asked whether counties may use permits to regulate the environmental effects of mining.

Counties are subdivisions of the state for governmental and other purposes. Created by the legislature, they have only the powers that have been conferred upon them. Schoeller v. Board of County Commissioners, 568 P.2d 869, 876 (Wyo. 1977); Town of Torrington v. Environmental Quality Council, 557 P.2d 1143 (Wyo. 1976); see also, Board of County Commissioners of Laramie v. Board of County Commissioners of Albany, 92 U.S. 307 (1876), affirming 1 Wyo. 137 (1873). Counties in Wyoming have few constitutional powers. Article 12 of the Wyoming Constitution provides for the establishment of counties but does not contain any grant of authority to them. Article 13 gives all "municipal corporations" various powers, but Section 1 of that article, the "home rule" provision, applies only to "cities and towns." Thus, if Wyoming counties have authority to issue mining permits, it must be statutorily derived. See, Schoeller, supra, at 875-876.

Counties are given zoning and planning authority by W.S. 18-5-102 and W.S. 18-5-201. While the relation between the two is not entirely clear, the Wyoming Supreme Court has stated that they "deal with separate subjects and provide authority to accomplish different objectives..." Carter v. Board of County Commissioners of City of Laramie, 518 P.2d 142, 144 (Wyo. 1974). The basic difference between the two is that the zoning authority granted by Section 102 extends only to "sanitary facilities", as defined in W.S. 18-5-105, while Section 201 grants general zoning and planning power. See, Carter v. Board of County Commissioners, supra, and 1969-1972 Op. Att'y Gen. 251 (Opinion No. 7, May 25, 1972).

Given this difference, if a county has authority to issue mining permits, it must come from Section 201. That section states in part:

> To promote the public health, safety, morals, and general welfare of the county, each board of county commissioners may regulate and restrict the location and use of buildings and structures, and the use, condition of use, or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use, and other

> purposes in the unincorporated area of the county.

The grant of power is then limited by the next sentence of the section:

> However, nothing in W.S. 18-5-201 through W.S. 18-5-207 shall be construed to contravene any zoning authority of any incorporated city or town and _no zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands subject thereto_. (emphasis added).

It is thus necessary to discuss, first, the nature of the initial grant of power and decide whether, under it, counties could issue permits for mines. If the answer is affirmative, it will be necessary to determine the effect of the restriction on the grant of power.

II.

Our understanding of the initial grant of power is aided by the opinion of the Wyoming Supreme Court in _Snake River Venture v. Board of County Commissioners_, 616 P.2d 744 (Wyo. 1980). Construing Section 201's predecessor, W.S. 18-239.1 (1957, 1975 Cum. Supp.), the court found that it provided "a broad grant of authority" to counties. In particular, the court read the initial grant of power to be a delegation of "whatever police power is necessary to promulgate a subdivision, zoning, or planning ordinance." _Id._, at 752. While the statute construed by the court is not identical to Section 201, we do not see any substantive difference between the two and, so, must accept the court's statements as equally applicable to the current statute.

Understanding Section 201 to grant broad planning and zoning authority, we next inquire into the reach of that authority. The statute occurs within Article 2, "Planning and Zoning Commission", of Chapter Five, "Planning and Zoning." From its location in the statutory scheme and from the titles to the original act, 1959 Wyo. Sess. Laws, Chap. 85, and the amending act, 1967 Wyo. Sess. Laws, Chap. 202, we conclude that Section 201, along with its companion provisions, was intended to grant counties power akin to the traditional planning and zoning authority to control the type of use made of land and buildings, the location and construction of buildings, and the location of streets, parks, utilities, and other incidents of

land usage. Such authority allows control of the physical development of property and the use to which it is put. Planning and zoning powers are normally given to a municipality in order to allow it to secure orderly development. See, 1 McQuillan, Municipal Corporations, Sections 1.72 - 1.73 (1971) and 1 Anderson, American Law of Zoning, Sections 1.03 and 1.13 (2nd Ed. 1976).

The difference between planning and zoning powers lies not in the kinds of controls which may be imposed, but in their timing and specificity. Planning powers allow the establishment of general policies and plans which anticipate future growth and development; whereas, zoning powers permit these policies and plans to be embodied in detailed resolutions which are then applied to specific proposed uses of land. See, 101 A C.J.S., Zoning and Planning, Sections 4-5 (1979) and 82 Am.Jur.2d, Zoning and Planning, Section 2 (1976).

Under Section 201, the general planning and zoning authority granted boards of county commissioners is limited in that it does not authorize control of all activities carried out on land within the county. Jurisdiction extends only to unincorporated areas of a county. In addition, the use or occupancy to be controlled must be "for residence, recreation, agriculture, industry, commerce, public use, and other purposes" similar to those enumerated. Cf. Town of Pine Bluffs v. State Board of Equalization, 333 P.2d 700, 779 (Wyo. 1958).

Thus, following the Wyoming Supreme Court's opinion in Snake River Venture, supra, we conclude that Section 201 grants boards of county commissioners broad authority to control the physical development of unincorporated areas of the county when such development is undertaken for one of the purposes listed in the statute. In addition, because we see no reason to doubt that a commercial mine is an industry under the statute, we further conclude that, absent the restriction, counties would have authority to require and issue zoning permits for mines.

In Snake River Venture, the court did not have occasion to discuss the restriction portion of Section 201. Since the restriction clearly pertains to mines, we must determine its effect on county planning and zoning authority. Determining the meaning of the restriction requires an interpretation of the statute. Statutory construction is accomplished by determining the legislative intent as found in the language of the statute itself. Oroz v. Hayes, 598 P.2d 432 (Wyo. 1979). "In construing a statute, its words must be given their plain and ordinary meaning." Jahn v. Burns, 593 P.2d 828, 830 (Wyo. 1979).

Applying these rules, we are of the opinion that the language "no zoning resolution or plan shall prevent" indicates

legislative intent to limit the planning and zoning authority of counties. The term "prevent" ordinarily means to prohibit, preclude, or stop, or, in other words, to keep something from happening or existing. Webster's Third New International Dictionary, 1798 (1961). Absent the restriction, counties could grant or deny zoning permits for mines in accordance with their zoning resolutions. That counties may not use their planning or zoning powers to "prevent any use or occupancy reasonably necessary to the extraction or production" of minerals must mean that counties cannot deny permits for such use or occupancy of land. The effect of the restriction, then, is to define an area which is exempt from county control.

County planning and zoning authority over the physical development accompanying mining would, absent the restriction, include authority to approve the location of the mine, the location and use of office buildings and equipment storage sheds, the placement of roads, the addition of railroad spurs and loading facilities, and potentially the construction of a wide variety of other facilities. Since we have determined that the restriction excludes at least some, and possibly all, of these matters from county control, the next step is to more precisely define the terms of the exemption.

While the terms "use" and "occupancy" appear in the statute to be alternatives, when applied to mining in the context of zoning and planning, it is not clear that they have distinct meanings. The "use of land" for mining and the "occupancy of land" for mining both refer to the presence of a mine on a tract of land. In addition, one or both terms may also refer to the presence of buildings, storage sheds, or other structures or facilities associated with mining. Compare 43A Words and Phrases "Use" at 297 and 314 (1969) with 29 Words and Phrases "Occupancy" at 223 and 229 (1972). Under the statute, counties may not prevent such use when "reasonably necessary to the extraction or production" of minerals. Because the "extraction or production" of minerals requires, at a minimum, "use or occupancy" of the surface of land, access would seem to be not only reasonably necessary, but absolutely necessary. We conclude, therefore, that at a minimum the restriction limits powers of counties by denying them the authority to forbid mining on any land within the county.

Not all use or occupancy proposed as part of a mine is included under the terms of the exemption. Rather, it extends only to those portions which are "reasonably necessary for the extraction or production" of minerals. It is a standard rule of statutory interpretation that every word and phrase must be given effect. See, e.g. State ex rel. Albany County Weed and Pest District v. Board of County Commissioners of Albany County, 592 P.2d 1154, 1157 (Wyo. 1979). We understand the use of the words "extraction and production" to limit the scope of

the exemption. We believe they mean that only those matters having to do with the actual removal of the mineral fall within the exemption.

Similarly, we believe that the use of the words "reasonably necessary" indicates that not all matters relating to the extraction or production of minerals are included under the exemption. However, determining which portions of a plan are included is difficult. First, as with other legal standards of reasonableness, a final decision can be made only by examining the particular set of circumstances to which the standard applies. Second, the combination of words is unusual. Nevertheless, the meaning of the phrase can be at least generally understood. If the restriction said only "necessary", it would indicate legislative intent to exempt only those portions of the plan for which there were no alternatives and without which the removal of the mineral could not occur. The use of the term "reasonable" broadens this category. Those portions of the plan which are included because some facility of the kind is necessary to extract or produce the mineral and because the particular facility proposed is a practical way to meet the need are, we believe, those "reasonably necessary." Cf. Fisher v. Pilcher, 341 A.2d 713, 717 (Del. Super. 1975). For example, while a storage facility for equipment or supplies may be necessary to carry out mining on a day-to-day basis, no particular type of building may be necessary; however, several types of structures would be practical ways of meeting the need. As we understand the restriction, it operates to exempt any type to the extent that it meets the need.

We recognize that county authorities and mine operators may disagree about either the reasonableness or necessity of a facility. An objective and appropriate way to settle such differences without litigation would be, we believe, to consider the types of facilities normally constructed for mining. Those normally constructed because some facility of the kind is necessary are, at the least, those "reasonably necessary" and fall outside the scope of county zoning and planning authority. Conversely, buildings and structures which are only incidental to the operation of a mine come under county authority.

Having considered each of the terms that define the area exempted, we conclude that the restriction exempts from county control those aspects of a proposed plan which are reasonable means of meeting a need directly related to the activity of removing minerals without which mining cannot be carried out. We believe that such needs include at least access to the mineral, the use of equipment, storage facilities for equipment and supplies, and some type of office building or office trailer, equipment and supplies, and office facilities. At the same time, other portions of a mine plan such as roads for transportation, processing facilities, and other buildings

which may be useful t are not directly needed ɔ remove the mineral do fall outside the exemption.

Since some aspects of a proposed mine are within the jurisdictional authority of counties, we conclude that counties may require mines to submit applications for zoning permits prior to commencing operations. Applying our conclusion that the restriction establishes a standard which exempts other aspects, we further conclude that counties may deny permits only when aspects of the proposed operation which are not "reasonably necessary to the extraction or production" of minerals are in nonconformance with zoning resolutions. In other words, we understand the legislative intent of the provision to be that "reasonably necessary" aspects of mining operations are to be allowed to proceed free of county control, but that counties retain authority over all other physical development which accompanies mining. We reach this conclusion mindful of the fact that any denial of a zoning permit could be said to prevent mining contrary to the statute. We reject this view, however, because the conclusion that counties cannot deny permits would effectively covert the restriction into an exception for all aspects of a mining operation and render the crucial portions of the restriction meaningless.

We also note that the restriction does not operate to exclude mineral lands from the exercise of planning and zoning authority. The restriction is concerned only with the "extraction or production" of minerals and does not affect other uses to which the land might be put. As we understand the restriction, counties may continue to include mineral lands in their land use plans and zoning classifications. Such designations shall control against all uses except the "extraction or production" of minerals.

It has also been suggested to us that the "reasonably necessary" language of the restriction allows counties to consider and control the environmental consequences which may accompany mining since adverse consequences could render the proposed plan unreasonable. We must reject this view because, as has been discussed, the term "reasonably necessary" pertains to only "extraction or production" and operates to limit the exemption created by the restriction rather than establish a standard for issuance of permits. Under Section 201, counties do have authority to adopt zoning resolutions which promote the health of their citizens. We see no reason why such zoning regulations would not apply to those portions of a proposed mine which are not excluded by the restriction. However, zoning powers extend only to the control of the physical development of land. Absent explicit authorization to the contrary, it is no more reasonable to assume that counties have been given authority to regulate the operation of mines than it is to suppose that they have been given authority to regulate

the operations of businesses, ranches, and other users of land and buildings within the county.

Finally, it should be noted that the conclusions we have drawn apply only to Section 201 and do not affect the powers given counties under other statutes. The restriction contained in Section 201 is, by its own terms, limited to W.S. 18-5-201 through W.S. 18-5-207 and does not apply to either county authority over sanitary facilities under W.S. 18-5-101 through W.S. 18-5-107 or subdivisions under W.S. 18-5-301 through W.S. 18-5-315.

III.

Although the question asked has been answered, there are additional grounds for concluding that county authority does not extend to all aspects of a proposed mine and that counties may not regulate the operation of mines. To the extent that such regulation is aimed at controlling the effect of mining on the air, water, and land at and surrounding the mine site, we believe that county action has been preempted by the Wyoming Environmental Quality Act. (WEQA), W.S. 35-11-101, et. seq., as amended.

Preemption concerns two basic issues: first, the supremacy of one regulatory authority over another and, second, the superior authority's occupation of the regulated area. Op. Att'y. Gen. No. 80-009 (May 29, 1980). As noted earlier, counties are subdivisions of the state and have only the powers that have been granted them. The state is clearly the superior authority and counties cannot act contrary to state authority. The New Jersey Supreme Court in Overlook Terrace Management v. Rent Control Board, 71 N.J. 451, 366 A.2d 321 (1976) has set forth five questions to determine the applicability of state preemption:

> 1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the legislature has permitted or does the ordinance permit what the legislature has forbidden?)
>
> 2. Was the state law intended, expressly or impliedly, to be exclusive in the field?
>
> 3. Does the subject matter reflect a need for uniformity?...

> 4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
>
> 5. Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the legislature?

Overlook Terrace Management v. Rent Control Board, supra, at 326 (all citations omitted). Cf. Galvan v. Superior Court, 70 Cal.2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969). In applying these questions to the WEQA, we see three basic reasons to conclude that county authority in this field has been preempted.

First, we believe that the express purpose of the Act "to retain for the state the control over its air, land, and water", W.S. 35-11-102, is a declaration of legislative intent to invest environmental regulation authority in the Wyoming Department of Environmental Quality. See, Town of Torrington v. Environmental Quality Council, supra, at 1148. Similarly, the declared policy of the act "to plan the development, use, reclamation, preservation, and enhancement of the air, land, and water" of the state necessitates preemption because the ability to plan would be severely hampered if counties could negate or alter state decisions. Mining in Wyoming does not usually occur in singular or isolated locations. Rather, large areas of the state covering many counties are underlain by deposits of coal, uranium, and other minerals and an ever increasing number of mines have opened or are planning to open in these areas. While any one mine has the potential of affecting the air and water quality in its vicinity, neither air nor water pollution is necessarily confined to the boundaries of a county. Even more important, we believe, is the potential cumulative effect of many mines operating in the state. Such state-wide effects are beyond the ability of a county to plan for or control. Similarly, uniform land reclamation plans are required in order to assure that these areas can be used for agriculture or other beneficial use once mining is completed.

Because the issue of preemption arises in many contexts, the applicability of a particular case to environmental regulation is not always clear. Even within the area of environmental regulation, cases frequently turn on specific provisions of state acts or home rule provisions which protect the powers of municipalities. Cases which hold against preemption generally do so on the basis of express language which either states that counties are not prohibited from enacting more restrictive regulations, (Nelson v. Department of Natural Resources, 88 Wis. 2d 1, 276 N.W.2d 302 (Wis. App. 1979)), or

indicates legi ative intent to grant re latory authority as in Indiana Waste Systems v. Board of Commissioners, 389 N.E.2d 52 (Ct. App. 2nd Dist. 1979). In that case, the court found that a provision of the Indiana Environmental Management Act, mandating the administrative board to "encourage and assist local units of government in developing programs and facilities" for air and water pollution control, as well as other matters, indicated that counties retained authority since otherwise they could not be assisted by the state board. The WEQA does not have a similar provision.

Second, if both state and county permits were required before a mine operator could commence operations, instances could arise in which counties denied permits to mines which had already met state requirements. While more restrictive county requirements are not always viewed as constituting a "conflict", it is a basic principle that local regulation may not exclude what the state has permitted. Jamens v. Township of Avon, 71 Mich. App. 70, 246 N.W.2d 410 (1976). In Town of Colchester v. Reduction Associates, Inc., 34 Conn. Supp. 177, 382 A.2d 1333 (1977), the court found that the enactment of a state-wide waste management program had given the state exclusive jurisdiction and that the licensing of a waste disposal facility by the state preempted a county zoning regulation which disallowed it. The court based its decision in part on the reasoning of Lauricella v. Planning & Zoning Board of Appeals, 32 Conn. Supp. 104, 342 A.2d 374 (1974), which had held that a town's zoning regulations for wetlands, copied from state legislation, were preempted insofar as they applied to tidal wetlands which were in the exclusive jurisdiction of the state. We note that the Supreme Court of Georgia has ruled to the contrary, finding that the Georgia Surface Mining Act did preempt counties from enacting different or more restrictive requirements than those provided by state laws and regulations. Georgia Marble Company v. Walker, 236 Ga. 545, 224 S.E.2d 394 (1976). The decision, however, concerns only the need for a mine to obtain a county mining permit and implicitly recognizes preemption to the extent that the state has entered the area by law or regulation.

Third, we believe that the state regulatory scheme is so pervasive and comprehensive that it occupies the field of environmental regulation and precludes counties from entering the area.

The Environmental Quality Council has been given broad authority to enact regulations. W.S. 35-11-112(a)(i). The administrators of the Air, Water, and Land Divisions are charged with proposing regulations. W.S. 35-11-202, W.S. 35-11-302, and W.S. 35-11-402. These regulations are developed in conjunction with an advisory board and recommended to the Council by the administrator through the director. The advi-

sory boards are in addition, charged with :veloping "comprehensive plans and programs for the prevention, control, and abatement of air, water, and land pollution" and recommending "rules, regulations, and standards to implement and carry out the provisions and purposes" of the act. W.S. 35-11-114(a)(b). The Land Quality Division in particular is given power to regulate all mining operations in the state, W.S. 35-11-401(a)(b), and no mine may operate without a permit. W.S. 35-11-405(a). Furthermore, the permit requirements under the Act contain numerous requirements designed to assure control of adverse environmental effects. W.S. 35-11-406(b). See generally, Southern Ocean Landfill v. Mayor and Council of the Township of Ocean, 64 N.J. 190, 314 A.2d 65 (1974); Rollins Environmental Services v. Iberville Parish Police Jury, 371 So.2d 1127 (La. 1979); Greater Greensburg Sewage Authority v. Hempfield Township, 5 Pa. Cmwlth. 495, 291 A.2d 318 (1972); and the combination of Illinois cases of O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972); and Carlson v. Village of Worth, 62 Ill. 2d 406, 343 N.E.2d 493 (1975), which have now been held to be limited to non-home rule units in County of Cook v. John Sexton Contractors Company, 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

CONCLUSION

We are of the opinion that the restriction contained in Section 201 limits the planning and zoning powers of counties in such a way as to exclude them from acting to prohibit mining in an unincorporated area of the county. We are also of the opinion that counties may require mines to submit applications for zoning permits and that they may require conformance with zoning resolutions of those portions of the proposed mine that are not exempt as "reasonably necessary." It is our further opinion that the Wyoming Environmental Quality Act has preempted the area of environmental regulation of mining in the State of Wyoming.