

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Environmental Driven Solutions,)	
LLC,)	North Dakota Supreme Court
Plaintiff & Appellee,)	No. 20160100
v.)	
)	Dunn County
Dunn County, a North Dakota)	No. 13-2013-CV-100
Municipality,)	
Defendant & Appellant,)	
v.)	
)	
North Dakota Industrial Commission,)	
Intervenor and Appellee.)	

**BRIEF OF AMICUS CURIAE
IN SUPPORT OF DUNN COUNTY**

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[¶ 2] INTEREST OF AMICUS CURIAE

[¶ 3] The North Dakota Association of Counties (NDACo) has an interest in this appeal as an amicus curiae. NDACo is a statutorily authorized organization made up of voluntary membership which includes all of North Dakota's 53 counties as members. All 53 counties have enacted some form of planning and zoning control as specifically authorized by NDCC § 11-33. These zoning controls have been enacted through various ordinances designed to protect the health and safety of everyone within their boundaries.

[¶ 4] Although not every county faces the same type of regulation dispute faced by Dunn County in this particular case, any decision providing broad authority to the North Dakota Industrial Commission (NDIC) or a similarly situated State Agency would have the potential to swallow the specific authority of a county's power to regulate property. The purpose of providing local zoning control is to allow local decision makers to balance the property rights of competing interests while maintaining land use predictability. Erosion of this authority would not only contradict the plain language of the county zoning authority but would undermine future zoning collaborations.

[¶ 5] FACTS

[¶ 6] NDACo adopts Dunn County's recitation of the facts as found in Appellant's Brief.

[¶ 7] **ARGUMENT**

[¶ 8] **I. Dunn County’s regulation over Environmental Driven Solutions is within the power granted by the North Dakota State Legislature and the NDIC has not been empowered to supersede such zoning.**

[¶ 9] A county has the authority and powers granted to it by law. N.D. Const. art. VII, § 2. By enacting NDCC § 11-33-01 the legislature has expressly provided counties the right to “regulate and restrict” within their boundaries the location and the use of buildings or structures. The only limiting language expressed in the chapter is counties are still subjected to State building codes and cannot prohibit or preclude certain farm operations. NDCC § 11-33-01 & 11-33-02.1. (usurping township zoning was another limitation but has since been repealed and replaced by NDCC 54-40.5-04).

[¶ 10] Local zoning authority also has a long history of judicial acceptance. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding it is not the province of the courts to take issue with reasonably adopted municipal zoning ordinances) See also Detlaff v. Board of County Commissioners of Ward County, 136 N.W.2d 835 (1965) (upholding zoning regulations for a building permit). Legislative and judicial pronouncements make it clear that counties have long enjoyed broad authority to regulate zoning within their bounds. Counties zoning power therefore remains in effect unless and until the legislature would restrict its authority which it has not done.

[¶ 11] **A. Chapter 38-08, N.D.C.C., does not include a provision giving the NDIC exclusive or sole jurisdiction or authority over oil and gas waste treating plants.**

[¶ 12] It is true the NDIC has been legislatively provided control over certain

aspects of gas and oil resources. See NDCC § 38-08-04. However, chapter 38-08, does not include a provision giving the NDIC exclusive or sole jurisdiction or authority over oil and gas waste treating plants. Section N.D.C.C. § 38-08-04 states in part that the NDIC “has continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of this chapter.” The grant of “continuing jurisdiction” to the NDIC under Section 38-08-04 does not mean exclusive jurisdiction. Under the rules of statutory construction, words in a statute are to be given their plain ordinary meaning. See N.D.C.C. § 1-02-02; Gadeco v. Industrial Commission, 2013 ND 72, ¶ 10, 830 N.W.2d 535. The plain and ordinary meaning of “continuing” refers to something that endures and which is not terminated by a single act or fact. See Black’s Law Dictionary, p. 169 (5th ed. 1983). In addition, Black’s Law Dictionary defines “continuing jurisdiction” as jurisdiction that, once acquired, “continues . . . for purposes of amending and modifying its orders therein.” *Id.* Therefore, when the State Legislature used the word “continuing jurisdiction” it merely meant that NDIC’s jurisdiction would continue beyond the issuance of its permits or orders. That does not mean that the NDIC’s jurisdiction is exclusive.

[¶ 13] When the State Legislature intends for the State, its entities or agencies, or a another entity to have exclusive jurisdiction or authority over an activity, the State Legislature expressly and specifically states that intent in the statutory language by use of the words “exclusive” and/or “sole” jurisdiction or authority. See e.g., N.D.C.C. § 11-35-02 (“Until the organization of either a regional planning and zoning commission . . . any city which shall determine to use zoning regulations shall have **exclusive jurisdiction** and power to zone over all land over which it has authority to control

subdivisions and platting of land[.]”); N.D.C.C. § 14-14.1-13(1) (“Except as otherwise provided in section 14-14.1-15, a court of this state which has made a child custody determination consistent with section 14-14.1-12 or 14-14.1-14 has **exclusive, continuing jurisdiction** over the determination” until a specific event happens); N.D.C.C. § 24-05-17 (“The boards of county commissioners in their respective counties have the **sole authority** and responsibility to acquire land for, construct, maintain, and operate the county road system as designated and selected by them.”); N.D.C.C. § 32-37-06 (“The district court of this state shall have **exclusive jurisdiction** to hear and determine all petitions made under this chapter [establishing date and place of birth].”) N.D.C.C. § 40-09-14 (“The board of city commissioners shall have the **sole authority** to pass and adopt rules and regulations concerning the organization, management, and operation of all the departments of the city[.]”); N.D.C.C. § 40-49-12(1) (“The board [of park commissioners] has the **sole and exclusive authority** to maintain, govern, and improve the land, and to provide for the erection of structures thereon.”); N.D.C.C. § 43-34-08 (“The board of examiners for nursing home] administrators shall have **sole and exclusive authority** to determine the qualifications, competence, and fitness of any person to serve as an administrator of a nursing home under the provisions of this chapter[.]”); N.D.C.C. § 48-10-03 (“Except as otherwise provided by this section, the commission has **exclusive authority** to accept or reject gifts of any type or class of property for exterior placement on the capitol grounds[.]”); N.D.C.C. § 50-01-02 (“The county social service board of each county has **exclusive jurisdiction** and control of the administration of county general assistance within the county, except as otherwise provided in this title.”); N.D.C.C. § 54-52.6-04 (“The board [of public employees

retirement system] has the **exclusive authority** and responsibility to employ or contract with personnel and for services[.]”).

[¶ 14] There is no express wording in Chapter 38-08, N.D.C.C., giving the NDIC exclusive or sole jurisdiction or authority over the regulation of, including location of, oil and gas waste treatment facilities. In fact, according to another chapter in the North Dakota Century Code, Chapter 23-29, entitled “Solid Waste Management and Land Protection,” the NDIC will share jurisdiction over commercial oilfield special waste recycling facility with the North Dakota Department of Health (NDDH). See N.D.C.C. § 23-29-04.2(2). This statutory provision manifests the State Legislature’s intent that the NDIC does not have exclusive jurisdiction over the treatment of oilfield waste.

[¶ 15] More significantly is the fact that the State Legislature expressly and specifically gave political subdivisions, such as Dunn County, the authority to regulate the management of solid wastes under Chapter 23-29:

Any political subdivision of the state may enact and enforce a solid waste management ordinance if such ordinance is equal to or more stringent than this chapter and the rules adopted pursuant to this chapter.

See N.D.C.C. § 23-29-05. According to Chapter 23-29, “solid waste” means:

[A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities.

See N.D.C.C. § 23-29-03(14). In addition, a special type of solid waste referred to as “special waste” specifically includes “waste from crude oil and natural gas exploration and production[.]” See N.D.C.C. § 23-29-03(16) (“Special waste” means solid waste that is not a hazardous waste regulated under chapter 23-20.3 and includes waste generated

from energy conversion facilities; waste from crude oil and natural gas exploration and production; waste from mineral and ore mining, beneficiation, and extraction; and waste generated by surface coal mining operations. The term does not include municipal waste or industrial waste.”)

[¶ 16] Although the Dunn County ordinance at issue in this case is a zoning ordinance and not necessarily an ordinance adopted pursuant to Chapter 23-29, Section 23-29-05 is still important because it reveals the State Legislature’s recognition that that in order to effectively manage waste products, multiple entities need to collaborate to bring their own expertise to bear on the issue. While the NDIC and the NDDH both have authority in the management of solid waste, including the treating of oilfield waste, this authority does not translate into exclusive jurisdiction over this area nor that local governments have no concurrent or joint jurisdiction. The principle this Court has repeatedly recognized is when possible the court will look to “harmonize statutes to avoid conflicts between them.” Shaw v. Burleigh County, 286 N.W.2d 792, 796 (N.D. 1979) (upholding a county’s denial of a special use permit stating the act was of a “coordinate branch of the government in a field in which it has paramount authority”).

[¶ 17] Because there is no provision in Chapter 38-08, N.D.C.C., giving the NDIC exclusive or sole jurisdiction or authority over gas and oil waste treating plants, and Chapter 23-29, N.D.C.C., expressly gives local governments jurisdiction over the management of solid wastes, including special waste such as waste from crude oil and natural gas exploration and production, the district court erred in concluding that the NDIC has exclusive jurisdiction over EDS’s proposed treating plant and that EDS did not need a Dunn County conditional use permit to construct or operate its treating plant at the

location approved by the NDIC.

[¶ 18] **B. Chapter 38-08, N.D.C.C., does not include a provision preempting local ordinances.**

[¶ 19] One of the instances where this Court has held that state law preempts a local ordinance regarding a particular activity is when the state regulations governing that activity expressly preempt or limit local regulation. See Ramsey County Farm Bureau v. Ramsey County, 2008 ND 175, 755 N.W.2d 920. In that case, this Court determined that state law preempted amendments to a Ramsey County zoning ordinance which sought to license, permit, and monitor the health and potential air and water pollution aspects of animal feeding operations. *Id.*, ¶ 17. This Court based its decision on the fact that state law explicitly limited a county's authority to regulate animal feeding operations, and the Ramsey County zoning amendments exceeded this authority. *Id.*, ¶ 20. In particular, this Court noted that N.D.C.C. § 23-25-11(9) expressly stated: "Neither a county nor a township may regulate or through any means impose restrictions or requirements on animal feeding operations or on other agricultural operations except as permitted under sections 11-33-02 and 58-03-11." *Id.*, ¶¶ 20, 25 (quoting N.D.C.C. § 25-25-11(9)). This Court noted further that Chapter 11-33 governing county zoning gave Ramsey County the authority to regulate the location and size of the operation and the type of animal only, and not the environmental consequences of the operation. *Id.*, ¶ 26 (citing N.D.C.C. §§ 11-33-02 and 11-33-02.1). Based on the express State statutes limiting Ramsey County's authority, this Court held that the county exceeded its authority in enacting the amendment and that the amendment was invalid. *Id.*, ¶ 27.

[¶ 20] Contrasting this case from Ramsey County, the statute at issue here,

Chapter 38-08, and in particular N.D.C.C. § 38-08-04, does not contain any of the limiting language used by the State Legislature in other statutory schemes that would restrict or prohibit a county's authority, under its zoning powers, to regulate the location of an oil or gas waste treating plant. See N.D.C.C. § 38-08-04 et seq. Compare N.D.C.C. § 18-13-10 (“[A] political subdivision may not enact or enforce any ordinance or regulation conflicting with any provision of this chapter [regulating cigarettes] or with any policy of this state expressed by this chapter.”); N.D.C.C. § 20.1-13-12(1) (“[O]rdinances or local laws chapter [regulating boating] are operative only so long as and to the extent that they continue to be identical to provisions of [Chapter 20.1-13], amendments thereto, or rules issued thereunder.”); N.D.C.C. § 23-12-10.2(2) (“A city or county ordinance, a city or county home rule charter, or an ordinance adopted under a home rule charter may not provide for less stringent provisions [regulating smoking in public places and places of employment] than those provided under sections 23-12-09 through 23-12-11.”). Additionally, unlike the Ramsey County case, there is no provision in Chapter 11-33, N.D.C.C., governing county zoning that prohibits or limits a county's authority to regulate through local zoning ordinances oil and gas waste treating plants. See N.D.C.C. §§ 11-33-01 et seq.

[¶ 21] Because neither Chapter 38-08 nor Chapter 11-33 contain any express provisions prohibiting or limiting a county's authority to regulate or restrict oil and gas waste treating plants, Dunn County's zoning ordinances and its zoning decision regarding EDS's proposed oil waste treating plant is not preempted by state law.

[¶ 22] **C. The State Legislature did not intend for State law to wholly and entirely occupy the field of the regulation of oil and gas waste treating plants.**

[¶ 23] In relying on the law governing federal preemption of state law, the district court concluded that the State Legislature intended that the NDIC “occupy the field” of oil and gas waste treating plants. As this court has previously stated “courts are reluctant to infer pre-emption” and the party claiming such a pre-emption has the burden of proving the State intended to pre-empt the local ordinance. Liberty Nat'l Bank, 427 N.W.2d 307, 309 (N.D. 1988). Additionally, the US Supreme Court has also adopted the principal of not inferring preemption in the context of Federal law usurping state and local regulation of “of matter related to health and safety”. Hillsborough County Florida v. Automated Med. Lab., Inc., 471 U.S. 707, 715 (1985). (upholding a county’s regulation of plasma donors) The district court’s conclusion in this case is erroneous.

[¶ 24] In applying the law on federal preemption of state law, it is not sufficient that federal law merely “occupy the field”; rather, this Court has held that for federal preemption to apply, there must be an intent by Congress to “occupy the entire field” or “wholly occupy the field” covered by the federal statute in question. See State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, ¶¶ 25, 28, 30, 712 N.W.2d 828. Such an intent may be inferred when the federal regulatory scheme “is so pervasive as to create an inference that” no room is left for states to supplement it, or when the federal interest in the field is so dominant that it will be assumed to preclude enforcement of other laws on the same subject. Id., ¶ 25. However, this Court has further stated that “[w]here the field to be preempted encompasses areas that have been traditionally occupied by the states through their police power, congressional intent to displace state law must be “clear and manifest.” Id.

[¶ 25] In this case, the field to be preempted is the use of land, in particular, the location of an oil waste treatment plant. Land use and the location of structures on land in the county is an area traditionally occupied by county boards of commissioners through their zoning authority. See N.D.C.C. § 11-33-01 This Court has previously recognized that a county’s zoning authority stems from its police power. See Minch v. City of Fargo, 332 N.W.2d 71. 74 (N.D. 1983) (“This court has counted zoning as a manifestation of the police power.”) Because this case involves what is traditionally the exercise of a county’s police power to regulate land use, the State Legislature’s intent to displace local zoning ordinances must be clear and manifest. Chapter 38-08, N.D.C.C., carries no implication that the State Legislature intended to preempt local law. That Chapter contains no preemption provision. As stated previously, if the State Legislature intended to preempt additional local laws, that intent could easily have been expressed as part of Chapter 38-08.

[¶ 26] This is not a case where Dunn County’s zoning ordinances and decisions would make it impossible for EDS to comply with both State and local requirements, or where local law stands “as an obstacle to the accomplishment and execution of the full purposes and objectives” of the State Legislature. See FreeEats.com, 2006 ND 84, ¶ 31, 712 N.W.2d 828 (citation and internal marks omitted). Dunn County only seeks to regulate the location of EDS’s proposed facility. It does not seek to override state laws governing the operation of that facility. In addition, Dunn County’s purposes in enacting zoning ordinances regulating the location of oil waste treatment facilities, i.e., to promote the “health, safety, morals, public convenience, general prosperity, and public welfare” of

its citizens actually furthers the State Legislature's intent in enacting Chapter 38-08 --
the greatest possible good to the general public:

It is hereby declared to be in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital natural resources.

See N.D.C.C. § 38-08-01. (Underline added).

[§ 27] Because there is not a clear and manifest intent by the State Legislature to preempt local regulations in the location of oil waste treatment plants, the Dunn County zoning ordinances are not preempted by state law and therefore the county still has zoning authority.

[¶ 28] **CONCLUSION**

[¶ 29] Since counties have been provided the authority to zone and the legislature has not explicitly or implicitly revoked that authority and since any authority the NDIC has is to be used in conjunction with the county authority, this Court should reverse the District Court's order and uphold Dunn County's zoning authority.

Respectfully submitted this 26th day of July, 2016.

Aaron G. Birst, NDID #05820

[¶ 30] STATEMENT OF AUTHORSHIP AND CONTRIBUTIONS

[¶ 31] No party's counsel authored this brief in whole or in part. Neither a party nor a party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

[¶ 32] CERTIFICATE OF SERVICE

A copy of this document was e-filed with the North Dakota Supreme Court on the 26th of July 2016, and served electronically upon:

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