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OPINION
of
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Opinion No. 94-01

BY: Denice Brown Kulseth
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TO: The Honorable Max Coll
New Mexico House of Representatives
State Capitol
Santa Fe, New Mexico 87503

QUESTION:

Are the various land use plans and ordinances adopted by several counties within the state, including Catron, Chaves, Eddy, Otero, Lincoln, Luna, and Sierra Counties, (hereafter "the Counties"),[1] lawful to the extent that they seek to restrict the public land regulatory authority of the United States and the State of New Mexico?

CONCLUSION:

No.[2] The ordinances reviewed have no legal effect because,

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[1]Specifically, we have reviewed the Catron County Comprehensive Land Plan and accompanying ordinances, the Chaves County Supplemental Land Use Plan and accompanying resolutions, the Eddy County Interim Land Use Policy Plan and accompanying ordinances and resolutions, the Lincoln County land use ordinances, the Luna County Interim Land Use Policy drafted as a set of ordinances, the Otero County Interim Land Use Plan and accompanying ordinances, and the Sierra County land use ordinances.

[2]This opinion focuses generally on the validity of the ordinances, rather than the land use plans, because it is the ordinances that will be enforced against state and federal governments. The land use plans, by themselves, have no legal effect. To the extent a land use plan is promulgated in the form

to the extent the ordinances affect federal lands, they are preempted by the Supremacy Clause of the United States Constitution; to the extent the ordinances affect state lands, they are nullified by the State's immunity from local zoning ordinances; and finally, to the extent the ordinances affect private lands, they are preempted by federal law, state law, or both.

FACTS:

The county plans and ordinances reviewed seek to restrict traditional federal and state regulatory authority over public lands, while correspondingly increasing county regulatory authority over those lands. Although the plans and ordinances at issue vary from county to county, they generally provide as follows:

1. Federal agencies must notify the county a specified number of days prior to issuing any land management decision, and federal agencies must provide the county with a report on the proposed decision's anticipated impact on the county;

2. Federal grazing permits shall be considered property rights, and federal agencies must notify and consult with grazing lessees or permittees a specified number of days before issuing decisions that affect lessees or permittees;

3. The federal government shall be limited in its ability to designate additional wilderness areas, park areas, and wild and scenic rivers within county boundaries;

4. All federal natural resource decisions shall be dictated by principles protecting private property rights and local custom and culture, as defined by the county;

5. All roads on federal lands throughout the county are declared "public roads;"

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of an ordinance, which is permitted under New Mexico law, see Board of County Comm'rs v. City of Las Vegas, 95 N.M. 387, 622 P.2d 695 (1980), the legality of that plan is analyzed in this opinion.

In order to make a determination about the validity of each ordinance, we would have to analyze the ordinances individually, a task which is beyond the scope of this opinion. The following general analysis, however, applies to all of the ordinances.

6. Planning for the recovery and management of threatened or endangered species may be done by the county, at its option, and federal agencies must coordinate their threatened or endangered species management activities with the county;

7. The county may prohibit the introduction of wild animals within the county, and the county may provide for the removal of wild animals from the county;

8. The amount of federal or state land within county boundaries shall not be increased; and

9. The federal Civil Rights Act is adopted as a county ordinance.

ANALYSIS

A. County Zoning Ordinances in General

Under New Mexico law, counties are designated zoning authorities for the purposes of promoting health, safety, morals, and the general welfare. See NMSA 1978, § 3-21-1. Further, counties have been given the authority to enact ordinances to enforce zoning, except where inconsistent with statutory or constitutional limitations placed on counties. See NMSA 1978, § 3-21-13.

Notwithstanding efforts by the Counties to distinguish their land use ordinances from traditional zoning ordinances,[3] the ordinances are, indeed, zoning ordinances because they seek to regulate the use of land. See Board of County Comm'rs of the County of San Miguel v. City of Las Vegas, 95 N.M. 387, 389, 622 P.2d 695, ___ (1980) ("Counties have statutory authority to enact both general police power ordinances and zoning ordinances. . . . '[Z]oning is defined as governmental regulation of the uses of land and buildings according to districts or zones.' The County's ordinance fits within this definition. The district or zone is merely made countywide, which is permissible." (quoting 8 E. McQuillen, Municipal Corporations, § 25.01, at 12 (3d ed. 1965)) (emphasis added)); Williams, 1 American Planning Law §§ 16.02-.03, at 435 (1988) ("Precisely what is zoning, and what is it not? The basic aspects of zoning are fairly clearly defined, and may be summarized as follows. Zoning exists to carry out three primary

[3]See, e.g., Catron County Comprehensive Land Plan, preface at ix.

functions: 1. To regulate the use of land . . . ." (emphasis added)).[4]

The legal principles underlying our analysis of the validity of these county zoning ordinances vary, depending on whether the land to be regulated is owned by the federal government, by the state, or by private land owners, and depending on whether federal or state law preempts the matter regulated.

B. County Zoning of Federal Lands

The Counties' ordinances, while impacting state and private lands, appear to have been drafted primarily to regulate federal lands. However, "where local laws impact directly on the federal government, its instrumentalities, or the use of its property, such laws are presumptively invalid under the supremacy clause of the federal Constitution. For example, federal facilities and operations generally are exempt from local zoning ordinances." See Ziegler, 3 Rathkopf's The Law of Zoning and Planning § 31.05, at 31-36 (4th ed. 1993); see also Anderson, 2 American Law of Zoning § 12.08, at 506 (3d ed. 1986) ("The land and the facilities of the Federal Government are not subject to the restrictions imposed by municipal zoning regulations. . . . The immunity of the Federal Government has been explained in terms of sovereign immunity from suit, but it is argued more persuasively that the United States is supreme when it operates within its powers, and that neither a state nor its political subdivisions may interfere with it." (footnote omitted)); Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1086 (9th Cir. 1979) ("Although state law may apply where it presents 'no significant threat to any identifiable federal policy or interest,' the states and their subdivisions have no right to

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[4]Counties and municipalities have the same statutory authority to enact ordinances, see NMSA 1978, § 4-37-1 ("All counties are granted the same powers that are granted municipalities except those powers that are inconsistent with statutory or constitutional limitations placed on counties."), and, more specifically, the same statutory authority to enact zoning ordinances, see NMSA 1978, § 3-21-1 ("[A] county or municipality is a zoning authority . . . ."), and NMSA 1978, § 3-21-13 ("Counties having authority to regulate . . . zoning . . . may enact ordinances to carry out that authority the same as a municipality, except where inconsistent with statutory or constitutional limitations placed on counties."). Accordingly, case law that addresses the authority of municipalities to zone land is persuasive for understanding the authority of counties to zone land.

apply local regulations impermissibly conflicting with achievement of a congressionally approved use of federal lands . . . ." (quoting Texas Oil & Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366, 371 (W.D. Okla. 1967))), aff'd mem., 445 U.S. 947 (1980); City & County of Denver v. Bergland, 517 F. Supp. 155, 203 (D. Colo. 1981) ("It is clear that where conflicts arise between federal regulations and state and local regulations regarding public land the latter are preempted.").

The legal reasoning behind federal authority over federal land is firmly established. Under the Supremacy Clause, the Counties' zoning ordinances are of no legal effect to the extent that they affect federal lands.

C. County Zoning of State Lands

In New Mexico, it is well settled that state-owned land is immune from local zoning ordinances unless the local zoning authority can point to express statutory authority for regulating state lands. See City of Santa Fe v. Armijo, 96 N.M. 663, 664, 634 P.2d 685, 686 (1981) ("A state governmental body is not subject to local zoning regulations or restrictions. A city has no inherent right to exercise control over state land. A city's power to zone state property must be delegated to the city by state statute. . . . Cities have only such power as statutes expressly confer without resort to implication. Thus, no power or authority may be claimed by a municipality by inference or implication from a statute. Municipalities have only those powers expressly delegated by state statute." (citations omitted)); see also Jersey City v. State Dep't of Envtl. Protection, 227 N.J. Super. 5, __, 545 A.2d 774, 779 (N.J. Super. Ct. App. Div. 1988) ("Generally, local zoning and planning regulations cannot affect the State's authority to carry out public functions for the benefit of all the people of the State, especially on the State's own land."); Lower Allen v. Commonwealth, 10 Pa. Commw. 272, 310 A.2d 90 (Pa. Commw. Ct. 1973); accord, El Dorado at Santa Fe, Inc. v. Board of County Comm'rs of Santa Fe County, 89 N.M. 313, 317, 551 P.2d 1360, 1364 (1976) ("A county is but a political subdivision of the State, and it possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers.").

A thorough review of the statutory provisions authorizing counties in New Mexico to pass zoning ordinances reveals that there is no express statutory authority for the Counties to regulate state lands. Accordingly, the state is immune from the Counties' zoning ordinances as they apply to state lands.

D. County Zoning of Private Lands

The Counties' zoning ordinances affect not only federal and state lands, but also private lands. Clearly, local governments may regulate the uses of private lands, but only if no state or federal law preempts the regulation of that use. See generally Anderson, 2 American Law of Zoning §§ 12.07, 12.08; Ziegler, 3 Rathkopf's The Law of Zoning and Planning §§ 31.02, 31.05.

1. Preemption by Federal Law

If local ordinances interfere with a federal statutory or constitutional purpose, the ordinances are preempted by federal law. See Anderson, 2 American Law of Zoning § 12.08, at 506 ("One federal court said: 'A state statute, a local enactment or regulation or a city ordinance, even if based on the valid police powers of a State, must yield in case of direct conflict with the exercise by the Government of the United States of any power it possesses under the Constitution.'" (quoting United States v. Chester, 144 F.2d 415 (3d Cir. 1944)); Ziegler, 3 Rathkopf's The Law of Zoning and Planning § 31.05, at 31-36 ("The supremacy clause also precludes the enforcement of local regulations if they conflict with the objectives of a federal statute or are preempted by federal regulation.").

In Evans v. Board of County Comm'rs of the County of Boulder, Colo., 752 F. Supp. 973 (D. Colo. 1990), the court held that a county zoning resolution limiting the height of radio antennas was preempted by Federal Communication Commission regulations. In so holding, the Evans court explained federal preemption:

> The Supremacy Clause of Article VI of the United States Constitution provides the federal government with the power to preempt state laws. Preemption occurs when (i) Congress, in enacting a federal statute, expresses a clear intent to preempt state law, (ii) an outright conflict exists between federal and state law, (iii) compliance with both federal and state law is in effect physically impossible, (iv) there is an implicit barrier within federal law to state regulation in this area, (v) federal legislation is so comprehensive as to occupy an entire field of regulation, (vi) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, or (vii) federal regulations

> promulgated within the scope of congressionally-delegated agency authority have any of the above effects.

See id. at 975 (citations and footnote omitted); see also Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982); accord Borough of Maywood v. United States, 679 F. Supp. 413, 419 (D.N.J. 1988).

Furthermore, federal preemption can occur even where states and local governments seek to regulate land within their jurisdiction:

> These principles [of federal preemption] are not inapplicable here simply because real property law is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."

See Fidelity Federal, 458 U.S. at 153 (quoting Free v. Bland, 369 U.S. 663, 666 (1962)).

2. Preemption by State Law

Likewise, if local zoning ordinances frustrate a state statutory or constitutional purpose, then those ordinances are preempted by state law. See Anderson, 2 American Law of Zoning § 12.07, at 504 ("A municipal zoning ordinance will not be applied to activity of the state or its agent if such application would thwart the public policy of the state as expressed in a statute." (footnote omitted)); Ziegler, 3 Rathkopf's The Law of Zoning and Planning § 31.02, at 31-8 (preemption occurs where local ordinance is logically inconsistent with state law or where local ordinance would infringe upon the spirit of state law or upon general policy of the state); accord Battaglini v. Town of Red River, 100 N.M. 287, 669 P.2d 1082 (1983) (where state law and local ordinance were in conflict, state law preempted local ordinance even though state law was passed after local ordinance was already in effect); see also County of Venango v. Borough of Sugarcreek, 596 A.2d 265 (Pa. Commw. Ct. 1991) (state statute authorizing county to purchase land and build jails preempts local borough zoning ordinance prohibiting jails on the land); Chester v. Dep't of Environmental Protection, 181 N.J. Super. 445, 437 A.2d 334 (1981) (state solid waste act regulating solid waste disposal in a comprehensive and uniform manner preempts local zoning ordinance regulating proposed access road to land fill); Northern New Hampshire Mental Health Housing,

Inc. v. Conway, 121 N.H. 811, 435 A.2d 136 (1981) (state statutory policy of placing developmentally impaired persons in various locations throughout the state preempts town ordinance prohibiting community living facility from being located in residential neighborhood).

In sum, to the extent that the Counties' zoning ordinances impact private lands in a manner inconsistent with federal or state law, those ordinances are preempted and have no legal effect.

E. Application of Legal Principles to County Ordinances

In light of the foregoing principles, it is clear that the ordinances described above have no legal effect. The County ordinances described in paragraphs one through five directly affect federal lands. These ordinances require the federal government to give the Counties advance notice of all land management decisions, consult with grazing lessees before issuing decisions that affect such lessees, limit the designation of additional wilderness areas and other public areas, consider private property rights as the paramount concern to be protected when issuing natural resource decisions, and declare all roads on federal lands to be "public." As discussed in section B, these ordinances are unlawful under the Supremacy Clause of the United States Constitution as an attempt by local governments to regulate the use of federal lands.

The County ordinances described in paragraphs six and seven affect federal lands, state lands, and private lands. These ordinances allow the Counties the option of formulating their own endangered species recovery plans and give the Counties the authority to both prohibit the introduction of wild animals within the Counties and to remove wild animals from the Counties. To the extent the ordinances affect federal lands, again they constitute an unlawful attempt to regulate federal lands, as discussed in section B. To the extent the ordinances affect state lands, the ordinances are null because there is no express statutory authority for the Counties to regulate state lands, as discussed in section C.

Finally, to the extent the ordinances affect private lands, they have been preempted by both federal and state law, as discussed in section D. For example, the federal Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq., (hereafter "ESA"), preempts those County ordinances that allow the Counties the option of formulating their own plans for the management of endangered species and that require federal agencies to "coordinate" their endangered species management efforts with the Counties' efforts. The ESA specifically renders void any state law or regulation, and

thereby any local law or regulation, that could have the effect of allowing what is prohibited by the ESA or prohibiting what is allowed by the ESA. See 16 U.S.C. § 1535(f). Because the ordinances allow the Counties to adopt management plans that could be inconsistent with the mandates of the ESA, the ordinances are expressly preempted by the ESA. The fact that the Counties could conceivably adopt management plans that are wholly consistent with the ESA is immaterial. See Fidelity Federal, 458 U.S. at 155.

Moreover, these same ordinances conflict with, and thus are preempted by, the state Wildlife Conservation Act, NMSA 1978, § 17-2-37 et seq., (hereafter "WCA"). The WCA states that it is the Game and Fish director, not the Counties, who "shall establish such programs, including programs for research and the acquisition of land or aquatic habitat, as authorized and deemed necessary by the [state Game C]ommission for the management of endangered species." See § 17-2-42. Furthermore, the Game and Fish director is permitted, but not required, to enter into agreements with political subdivisions of the state to carry out the "administration and management of any program established under [section 42 of the WCA] or utilized for management of endangered species." See id. Consequently, the ordinances cannot lawfully grant to the Counties the option of taking over the state's designated role in planning for the recovery and management of threatened or endangered species.

With respect to the ordinances that prohibit the introduction of wild animals within the Counties and that provide for the removal of wild animals from the Counties, the analysis is the same. The ordinances are unlawful to the extent that they affect federal lands, as discussed in section B. To the extent the ordinances affect state lands, they are null, as discussed in section C. Lastly, to the extent the ordinances affect private lands, they have been preempted by both federal and state law. If the wild animals to be introduced within the Counties or removed from the Counties are endangered species, then the federal ESA and the state WCA preempt these ordinances to the extent they affect private lands. If, on the other hand, the wild animals to be introduced or removed are not endangered species, then the State Game Commission has plenary, and thus preemptive, authority over the introduction or removal of virtually all such wild animals, even on private lands, as provided in NMSA 1978, chapter 14, articles 1 through 5, which chapters comprehensively govern the hunting, taking, capturing, killing, or possession of various game animals, birds, and fish.

The County ordinances described in paragraph eight affect private lands. These ordinances attempt to prohibit federal and state governments from acquiring privately owned lands within the

Counties by donation, purchase, or exchange. Such ordinances are in direct conflict with, and thus preempted by, numerous federal statutes, including those that allow the Secretaries of Interior and Agriculture to acquire lands for the conservation of fish, wildlife, and plants, see 16 U.S.C. § 1534, that allow any federal agency to exchange any property it owns with comparable historic property if the exchange will insure the preservation of the historic property, see 16 U.S.C. § 470h-3, and that allow the Secretary of the Interior to accept donations of lands for national parks and monuments, see 16 U.S.C. § 6. The ordinances are also preempted by several state statutes, including those that allow the state to acquire lands for park and recreational purposes, see NMSA 1978, § 16-2-11, that allow the State Game Commission to acquire land for fish hatcheries, game farms, game refuges, and other relevant purposes, see NMSA 1978, § 17-4-1, and that allow the New Mexico Cultural Properties Review Committee to acquire lands to ensure preservation of cultural property, see NMSA 1978, § 18-6-10, to name a few.

Unlike all of the other ordinances discussed herein, the ordinances described in paragraph nine do not necessarily affect lands at all; rather, they apply to persons acting under color of state law. These ordinances attempt to make state officials who enforce state public lands policies potentially liable under the federal Civil Rights Act. The adoption of such ordinances can neither expand nor contract the scope and reach of this federal act as it has been interpreted by the courts for many years and, thus, are of no consequence.

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