



## Court Holds Local NIMBY Ordinance Preempted by State Law

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The "not in my back yard" (NIMBY) doctrine taking hold across the United States was recently dealt a setback in South Carolina. The United States District Court for the District of South Carolina, Florence Division, recently determined that a State law regulating mine permitting expressly preempts a County ordinance requiring a separate mine permit from the local government. The case is instructive because it shows that local governments may not accord themselves "veto power" over state programs they do not like simply by enacting a local ordinance.

### **BACKGROUND**

In the case of *Red Bluff Trade Center, LLC v. Horry County*, a mining company sought to operate a limestone mine on property in Horry County, South Carolina after first obtaining all necessary permits from the State Department of Health and Environmental Control ("DHEC"). While its mine permit application with DHEC was pending, the company filed an application to obtain a mine permit from the Horry County Council, as required under Horry County Code of Ordinances, chap. 13, art. VI (the "Ordinance"). The Ordinance requires public notice and a hearing, after which the request for a mining permit is approved or denied by resolution. *Id.* at § 13-62. The decision to approve or deny the application is purportedly based on (1) the adequacy of the transportation network, and (2) compatibility with the surrounding community. *Id.* at § 13-63. Despite having satisfied all necessary requirements, the Horry County Council voted to deny the application.

### **DECISION AND ANALYSIS**

While the Court recognized that powers of local governments in South Carolina are to be "liberally construed" and local governments have "wide latitude" to adopt local ordinances to protect their citizens, the Court found the local permit program was preempted by State law. The Court found the County's attempt to duplicate State mine permit program requirements was in direct conflict with the State permit program and therefore must fail.

The history of State regulation of mining in South Carolina was reviewed by the Court and found to be

relevant to its decision. In 1972, South Carolina joined the Interstate Mining Compact by enacting the South Carolina Mining Act, S.C. Code Ann. §§ 48-21-10, et. seq. (the "Mining Act"). The Compact recognizes "[t]he states are in a position and have the responsibility to assure that mining shall be conducted in accordance with sound conservation principles, and with due regard for local conditions." *Id.* at § 48-21-10(1)(a)(5).

The Mining Act states, in relevant part, that "no mining may be carried on in the State unless plans for the mining include reasonable provisions for the protection of the surrounding environment and for reclamation of the area of land affected by mining." S.C. Code Ann. § 48-20-20. The Court interpreted the Mining Act to give DHEC "ultimate authority over all mining, and the regulation and control of mining activity." The Court noted the Mining Act allows local governments to adopt regulations governing mining activities provided those regulations are consistent with the Act. It cited S.C. Code Ann. § 48-20-250, which says:

No provision of this chapter supersedes, affects, or prevents the enforcement of a zoning regulation or ordinance within the jurisdiction of an incorporated municipality or county or by an agency or department of this State, except when a provision of the regulation or ordinance is in direct conflict with this chapter.

(emphasis added)

Thus, the Court found the Ordinance could avoid preemption only if it was a "zoning" ordinance and not in "direct conflict" with the Mining Act. The Court determined that neither of these conditions had been satisfied. In support of its conclusion that the Ordinance was not zoning, the Court found (1) unlike traditional zoning ordinances, the Ordinance did not apply to particular districts but applied universally to all land; (2) the Ordinance did not permit or prohibit anything as of right, but merely created the potential for permitting or conditional permitting; (3) the Ordinance did not directly control the location of mines, but instead licensed mining based on the nature of the activity; (4) unlike traditional zoning ordinances that "endeavor to address and organize comprehensively all potential land uses" to separate "incompatible uses," the Ordinance applied only to mining; and (5) the Ordinance operated exclusively on a case-by-case basis.

The Court also found the Ordinance directly conflicted with State regulation. The decision notes the Mining Act states that "[n]o operating permit may be issued except in accordance with the procedures set forth in Section 48-20-70" and "[n]o operating permit may be modified except in accordance with the procedures set forth in Section 48-20-80 or 48-20-150." S.C. Code Ann. § 48-20-60. Relying on a South Carolina Supreme Court decision interpreting a similar statute regulating solid waste landfill permitting in the State, the Court concluded "[t]he intent of the legislature [is] the Mining Act expressly preempts the Horry County Mine Permit Ordinance" from requiring local permits for the same activity regulated by the State.

The Court did not take the opportunity to identify those specific components of the local permitting requirement that duplicate State permit provisions. For example, a DHEC permit must include provisions regarding traffic patterns, water quality, endangered species, and noise buffer zones. The Ordinance included all of those items. It would have been helpful if the Court explained how each provision was preempted by the Mining Act.

## **CONCLUSION AND APPLICATION**

The mining industry is under attack on all sides from environmental groups and local governments. A trend in recent years is for those same advocacy groups to petition local governments to adopt sweeping permitting programs, which may be as stringent as, or more stringent than, State regulations. The *Red Bluff* opinion strikes a blow against those efforts by ensuring duplicative permitting programs cannot stand.

While this case is unique to South Carolina law and mines in that State, it provides guidance to operations in other jurisdictions. The Court deferred to State regulation when given the chance and was not fazed by attempts to masquerade a permitting ordinance as a "zoning ordinance." The holding in this case thus has application in other states across the country.

***Red Bluff Trade Ctr., LLC v. Horry Cty.***, 2020 U.S. Dist. LEXIS 66146, No. 4:17-cv-03354-SAL (D.S.C. April 15, 2020).

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