

OPINION
76-24

April 26, 1976 (OPINION)

Mr. Mervin A. Tuntland, Esq.

City Attorney

City of Underwood

Garrison, ND 58540

Dear Mr. Tuntland:

This is in response to your letter dated March 16, 1976, wherein our opinion was requested on several matters of law relating to proposed coal mining development near the city of Underwood. Your letter states the following facts and questions:

"I am writing you as the City Attorney for the City of Underwood, North Dakota.

There is a big vein of coal in the area immediately adjacent to Underwood, and it is expected that within the next few years coal will be mined in this area. I am therefore asking for opinions, if you can possibly give them to me, as to the rights which the City of Underwood may have in protecting itself from damages which may be done to the City through the coal mining. The questions are as follows:

1. The McLean County Zoning Ordinance gives the municipalities the rights to zone the area for one-half mile in all directions in the area immediately adjacent to the city limits. The first question is, how much power does the City have to keep the coal companies from mining coal within this area over which it has jurisdiction?
2. The City of Underwood is expanding and is annexing new territory. If the City will have power to regulate the coal mining within the half-mile area adjacent to the city limits, and if in the future additional area is annexed to the City of Underwood, would the half-mile area adjacent to the City of Underwood, as far as the regulation of the mining of coal is concerned, extend from the outer boundaries of the annexed area?
3. The City of Underwood is obtaining its water supplies from wells which for the most part obtain their water from the coal area below the ground. There is a high possibility that the mining of coal in the area near Underwood may affect this water supply. The question is, what rights and what remedies would the City of Underwood have against the coal mining companies if through the mining of the coal, the water supply of the City of Underwood would be diminished to the point where damage would be done to the City and its residents by this lack of a supply of water?

I have another question not entirely related to the coal mining matter. McLean County has a zoning ordinance in General Provisions on page 12 Section 2.2 - INTENT. "It is the intent of this County Ordinance that the area within 3 miles adjacent to municipalities shall be a zone of coordination for development between the Planning Commissions of the County and the municipalities. This Ordinance shall encourage the development of residential, commercial, and industrial districts within this zone." My question is if there is a difference in opinion regarding zoning between the municipality and the County of McLean, which of these political subdivisions would prevail?"

The authority of the City of Underwood to extend the application of its zoning regulations beyond its city limits has been established by the state legislature pursuant to Section 40-47-01.1 of the North Dakota Century Code. In the case of Underwood, with a population of less than 5,000, its zoning authority is extended to unincorporated territory located within one-half mile of its corporate limits. The McLean County zoning ordinance referred to in your letter has no authorizing affect on the extension of Underwood's zoning ordinance to within one-half mile of its limits. The city's authority exists only pursuant to Section 40-47-01.1.

The powers of the city to prohibit or regulate the mining of coal within one-half mile of its corporate limits are principally established pursuant to Chapter 40-47, City Zoning, and Chapter 40-48, Municipal Master Plans and Planning Commissions, of the North Dakota Century Code. Section 40-47-01 specifically authorizes cities to regulate, through the zoning process, the use of land for "trade, industry, residence or other purposes." If the city intends to regulate the mining of coal within one-half mile of its corporate limits, it must adopt regulations, pursuant to Chapter 40-47 which have general application within the incorporated limits of the city. Any ordinance adopted to regulate the use of land within the city relating to coal mining may be extended in its application pursuant to Section 40-47-01.1 to unincorporated territory within one-half mile of its corporate limits.

With respect to your inquiry concerning the annexation of territory to the city of Underwood and the application of the city's extended zoning authority under Section 40-47-01.1, it is considered that the city's extended zoning authority would include all unincorporated territory within one-half mile of the outer boundary of the newly annexed territory. Upon annexation, previously unincorporated territory becomes incorporated into the municipality and is indistinguishable from any territory within the corporate city limits for purposes of applying Section 40-47-01.1.

Reference is made in your letter to page 12, Section 2.2 of the McLean County ordinance which provides for "a zone of coordination for development between the planning commissions of the county and the municipalities" of territory "within three miles adjacent to municipalities."

Section 2.2 of McLean County ordinance appears in the general

provisions title of that ordinance. This section of itself can have no effect on the zoning actions of the city of Underwood as applied to the unincorporated territory within one-half mile of its corporate limits. The application of county zoning ordinances to property located within the zoning authority of a city is prohibited by Section 11-33-20 of the North Dakota Century Code.

"TOWNSHIP ZONING NOT AFFECTED - TOWNSHIP AND CITY MAY RELINQUISH POWERS. - The provisions of this chapter shall in no way prevent townships from making regulations as provided in sections 58-03-11 to 58-03-15, inclusive, but such townships may relinquish their power to enact zoning regulations to the county by resolution of the board of township supervisors. The provisions of this chapter shall not be construed to affect any property, real or personal, located within the zoning or subdivision authority of any city of this state, except that any such city by resolution of its governing body may relinquish to the county its authority to enact regulations under chapter 40-47 or subdivision regulations under chapter 40-48, in which case such property shall be subject to the provisions of this chapter." (Emphasis added.)

Unless a city relinquishes its zoning authority to the county pursuant to Section 11-33-20, county zoning ordinances can have no affect in territories subject to city zoning jurisdiction. Assuming that the city of Underwood has not relinquished its zoning authority to the county and has not joined the county to form a regional zoning commission pursuant to Section 11-35-01 of the North Dakota Century Code, there can be no application of the McLean County zoning ordinance within the territory over which the city has authority to apply its zoning ordinance.

There is no provision in the law which provides for a three-mile "zone of coordination" between a county and a city. The law does provides, as discussed above, for regional planning commissions and the relinquishing of city zoning authority by resolution.

Where the county and the city differ regarding zoning within the three mile area referred to in your letter, and in the absence of a regional zoning commission, or the city relinquishing its zoning authority by resolution, the city's zoning ordinance will apply within the one-half mile territory extending beyond its corporate limits. The county ordinance will not apply within that one-half mile area. That territory extending beyond the city's one-half mile authority area will be subject to the exclusive authority of the county ordinance in the absence of township zoning ordinances.

With regard to your inquiry concerning possible adverse affects of coal mining on city water supplies, reference is made to Chapter 38-14 of the North Dakota Century Code, Reclamation of Strip Mined Lands. Section 38-14-05.14 refers to the duties of a coal mine operator to "ensure the delivery to the surface owner of that quality and quantity of water available to such surface owner prior to mining." It is recommended that you contact the Reclamation Division of the Public Service Commission for information on the implementation of this requirement by the PSC and its application to the city of Underwood.

Also for your information, the State Engineer, the State Water Commission and the State Department of Health have duties and responsibilities regarding the protection of underground water resources. (See Section 61-01-06; Section 61-01-07; Section 61-02-29; Section 61-02-14.1,i; and Chapter 61-28 of the N.D.C.C.) In addition, Condition 8 of the United Power Association/Cooperative Power Association Conditional Water Appropriation Permit issued by the State Engineer for purposes of supplying its Coal Creek Station electric generating plant near Underwood requires proper planning for the protection of existing ground water supplies.

It is also recommended that you contact the State Engineer and the Water Supply and Pollution Control Division of the State Department of Health for information on the application of their statutory and regulatory requirements as they relate to the protection of Underwood's ground water supply.

Concerning possible direct action by the city to protect its water supplies, reference is made to the nuisance statutes found in Title 42 of the North Dakota Century Code and Chapter 32-40, Environmental Law Enforcement Act.

It is hoped that the foregoing will be of assistance.

Sincerely,

GERALD W. VANDEWALLE

Chief Deputy

Attorney General