

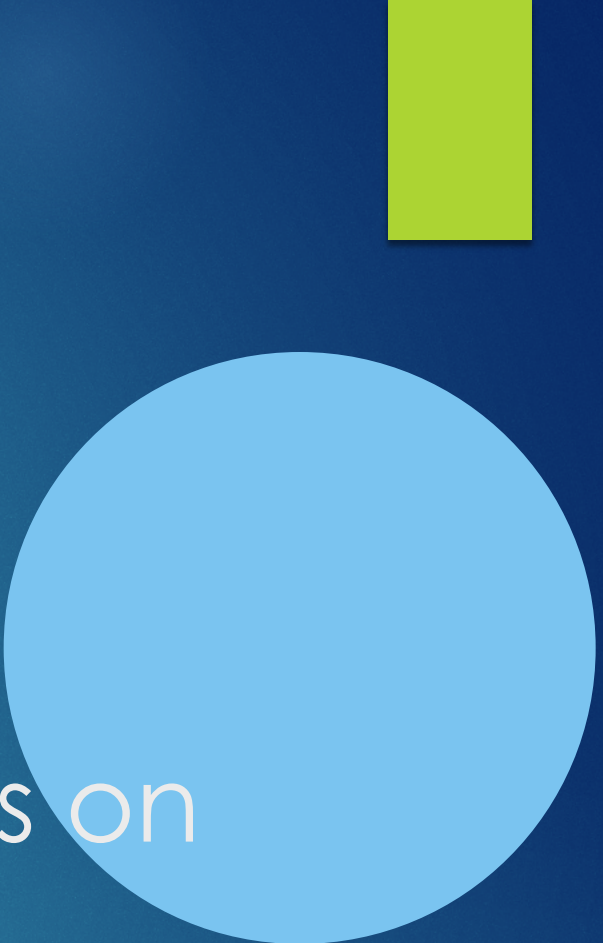
County Zoning and Local Land Use Regulations

TREVOR A. HUNTER

Overview

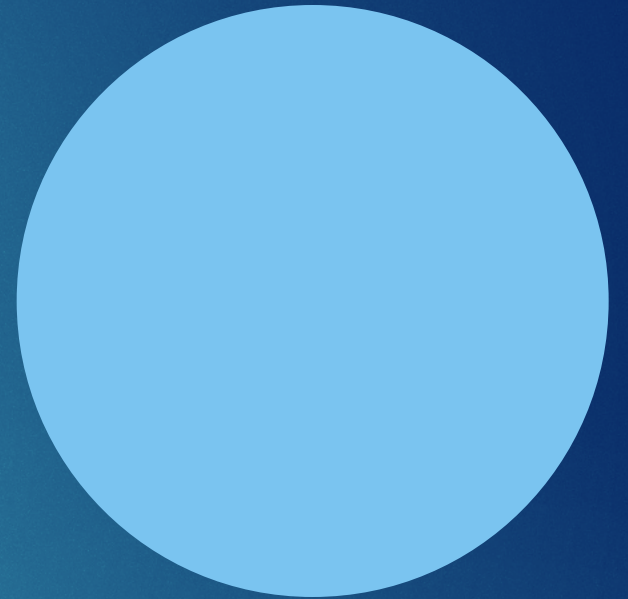
- ▶ (1) General authority granted to counties for zoning
- ▶ (2) Land use planning process and considerations
- ▶ (3) Enforcement of zoning violations
- ▶ (4) Appeals of adverse zoning decisions
- ▶ (5) Trends
- ▶ (6) Tips





CAUTION:
These are general comments on
general concepts

General Authority Granted to Counties for Zoning



General Grant of Authority

- ▶ N.D.C.C. § 11-33-01:

- ▶ For the **purpose of promoting health, safety, morals, public convenience, general prosperity, and public welfare**, the board of county commissioners of any county may regulate and restrict within the county, subject to section 11-33-20 and chapter 54-21.3, the location and the use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes. The board of county commissioners and a county zoning commission shall state the grounds upon which any request for a zoning amendment or variance is approved or disapproved, and written findings upon which the decision is based must be included within the records of the board or commission.

General Grant of Authority

- ▶ “A local governing body cannot validly enact a zoning ordinance that contravenes federal or state law.” Mountrail Co. v. Hoffman, 2000 ND 49, ¶7, 607 N.W.2d 901, 903.
- ▶ Therefore, doctrine of preemption applies
 - ▶ Rule: that which is allowed by the general laws of the state cannot be prohibited by a local ordinance, without an express grant on the part of the state
 - ▶ Local municipal ordinances are inferior in status and subordinate to the laws of the state
 - ▶ Local laws can touch on areas addressed by state law and courts have a duty to try and reconcile each and give effect to both to the extent possible. Quam v. City of Fargo, 77 N.D. 333, 340 (1950).

General Grant of Authority

- ▶ Zoning ordinance provisions apply to projects and uses **after** adoption of the ordinance or amendment
- ▶ Example: McKenzie County did not adopt a zoning ordinance until March 2013
- ▶ How deal with nonconforming uses?
 - ▶ Rule: permitted but subject to regulation
 - ▶ “The board of county commissioners, may, by resolutions, as herein provided, prescribe such reasonable regulations, not contrary to law, as it deems desirable or necessary to regulate and control nonconforming uses and occupancies.” N.D.C.C. § 11-33-14.
- ▶ Circumstances which destroy “lawful nonconforming use status:
 - ▶ (1) Expansion or enlargement of physical footprint
 - ▶ (2) Change in use
 - ▶ (3) 50% destruction

General Grant of Authority

- ▶ Circumstances which destroy “lawful nonconforming use status:
 - ▶ (1) Expansion or enlargement of physical footprint
 - ▶ (2) Change in use
 - ▶ (3) 50% destruction
- ▶ Result?
 - ▶ Bring use in conformance with zoning ordinance



Enforcement of Zoning Ordinances

Enforcement of Zoning Ordinances

▶ Civil Action

- ▶ Counties can prevent unlawful construction of a structure which does not have its required land use permits in place. N.D.C.C. § 11-33-17.
 - ▶ Also grants enforcement rights to “any affected citizen or property owner”

▶ Criminal Action

- ▶ Violations of a zoning ordinance are considered public nuisances and are considered a class B misdemeanor. N.D.C.C. § 11-33-21.
- ▶ Generally each day the violation persists is considered a separate punishable offense



Land Use Planning Process and Considerations

- (1) INITIAL CONSIDERATIONS
- (2) COMMON LAND USE PLANNING PERMITS AND REQUESTS
- (3) APPLICATION AND HEARING PROCESS

Initial Considerations

- ▶ Where is the proposed project located?
 - ▶ City?
 - ▶ Township?
 - ▶ County?



Initial Considerations

- ▶ Who has jurisdiction over the proposed project?
 - ▶ City?
 - ▶ Township?
 - ▶ County?
 - ▶ State?
 - ▶ Federal?



Initial Considerations

- ▶ Which portions of the zoning ordinance apply to the proposed project?
 - ▶ Current zoning classification of land
 - ▶ Is proposed use allowed, conditional, or prohibited?
 - ▶ May need to examine both:
 - ▶ (1) As land is currently zoned; and/or
 - ▶ (2) As land will be zoned after the zoning is changed

Common Land Use Planning Permits and Requests

- ▶ Zone Changes (Hard Zoning)
- ▶ Conditional Use Permits
- ▶ Variances
- ▶ Comprehensive Plan Amendments
- ▶ Subdivisions



Zone Changes (Hard Zoning)

- ▶ Agricultural, residential, commercial, industrial
- ▶ Identify current zone classification
- ▶ Determine uses within current zone classification
- ▶ If use is not permitted or conditional within current zone classification, then need a zone change
- ▶ Usually an up or down vote
- ▶ Consider: spot zoning

Conditional Use Permits

- ▶ Required when the proposed use is a conditional use within the applicable zoning classification
- ▶ A conditional use is a permitted use within the zone, but because of the possibility that the permitted use could be incompatible in some respects with other uses in the zone, a special permit is required
- ▶ CUPs are “ministerial, administrative or discretionary procedures of governments relating to land use.” Arnegard v. Arnegard Township, 2018 ND 80, ¶ 19, 908 N.W.2d 737, 747.
- ▶ Rights granted by a CUP
 - ▶ A CUP is not a contract
 - ▶ A CUP does not create a greater right in property owners than they would have possessed had they desired to conform the use allowed in the zone

Conditional Use Permits

- ▶ Example of conditional use on industrial zoned land:
 - ▶ “Oil storage and loading facilities, gas holding, processing and distribution facilities”
- ▶ Initial interpretation issues
- ▶ Terms are undefined
- ▶ How to address
- ▶ The rub to a CUP is in the conditions!

Variance

- ▶ Defined: one-time exception to an express provision of a zoning ordinance
 - ▶ License to violate the provisions of the zoning ordinance as it applies to a particular property
- ▶ Granted for:
 - ▶ (1) use (disfavored and rare); or
 - ▶ (2) relaxation of development standards (e.g. setbacks, lot size, etc.)
- ▶ Local governing body has total discretion
- ▶ Rule: a variance is proper only where the property is somehow different from other property, particularly adjacent property
- ▶ Requirements:
 - ▶ (1) no adverse effect on public;
 - ▶ (2) no adverse effect on neighbors; and
 - ▶ (3) the property has characteristics making it eligible for a variance

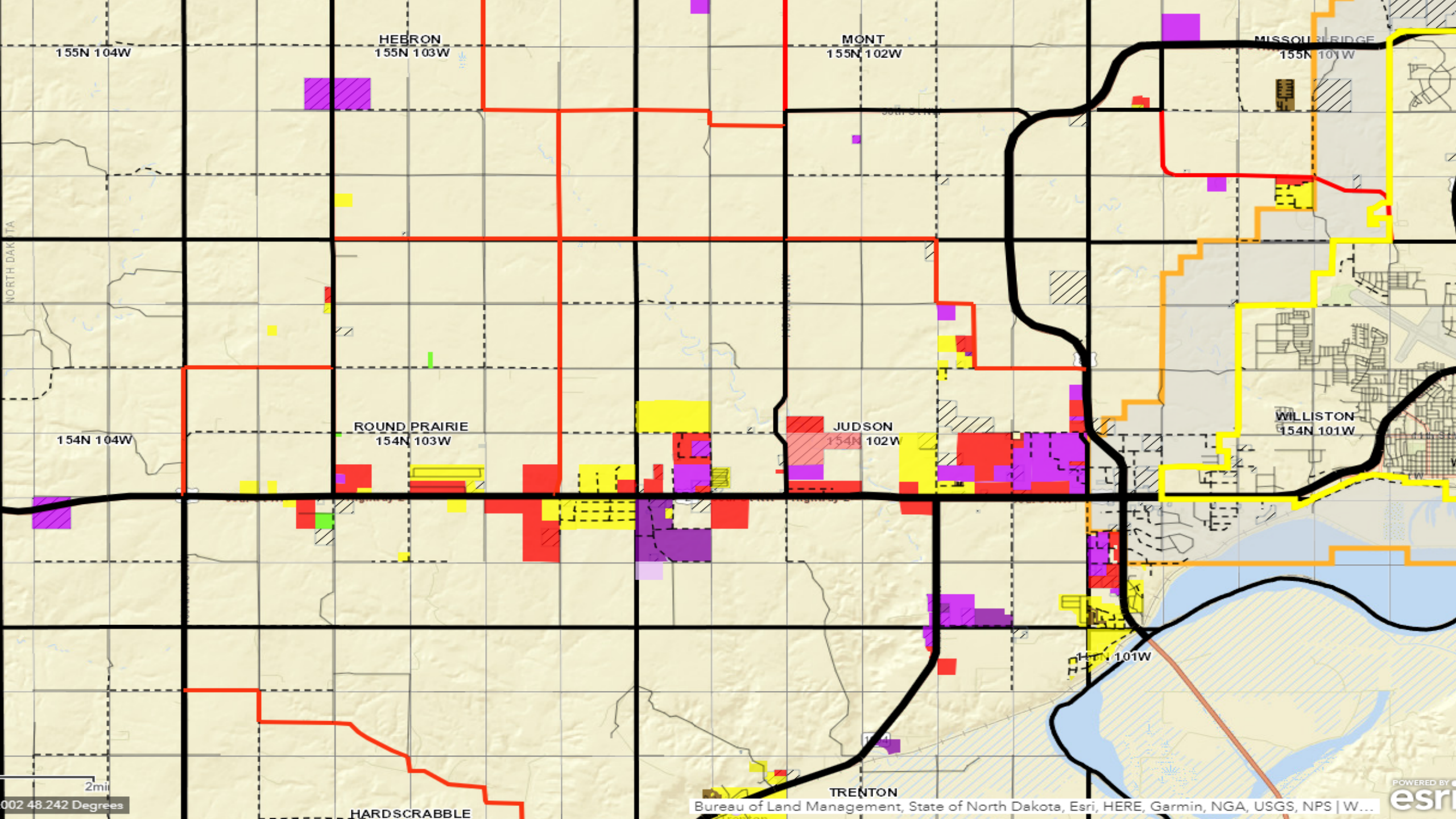
Comprehensive Plan



- ▶ Purpose: articulate the goals which the community hopes to attain through its land use activities and regulation, and serve as a guide for coordinated development of the community
- ▶ Zoning ordinances are required to be “made in accordance with a comprehensive plan.” N.D.C.C. § 11-33-03.
- ▶ Comprehensive plan amendment as part of zoning request

Authority for Variances and Amendments to the Comprehensive Plan

- ▶ “The board of county commissioners is authorized to adjust the application or enforcement of any provision of a resolution hereunder in any specific case when a literal enforcement of such provision would result in great practical difficulties, unnecessary hardship, or injustice, so as to avoid such consequences, provided such action shall not be contrary to the public interest or the general purposes hereof.” N.D.C.C. § 11-33-11.




Subdivisions

- ▶ Subdivision of the land
- ▶ Many variations: re-subdivision, replat, short plat, lot line adjustment, lot split, etc.
- ▶ Consider the applicable development standards
 - ▶ E.g. lot size, public rights-of-way and access, green scape, utilities, other improvements
- ▶ Will almost always need a survey and an attorney's title opinion

Application and Hearing Process



- ▶ Varies by city, township, and county but is generally similar
 - ▶ Initial meeting with the planning department
 - ▶ Prepare corresponding application and assemble necessary materials
 - ▶ Planning department notifies adjacent landowners, publishes the request in the paper, and may send the application on to the township
- 

Application and Hearing Process



- ▶ First public hearing before the planning and zoning commission
 - ▶ Decision is usually a recommendation
 - ▶ Weight of recommendation depends on the county
- ▶ Second public hearing before the county commissioners
 - ▶ Decision at this level is the ultimate decision on the request
 - ▶ Not every permit or zoning request goes all the way to this level (depends on the county)

Preemption of Local Ordinances

- ▶ Local laws can touch on areas addressed by state law and courts have a duty to try and reconcile each and give effect to both to the extent possible. Quam v. City of Fargo, 77 N.D. 333, 340 (1950).
- ▶ Preemption is not limited to only those local ordinances which expressly conflict with a state or federal statute.
 - ▶ An ordinance may be preempted if the legislative purpose in enacting the statute is “frustrated” by the ordinance
 - ▶ An ordinance may also be preempted if the state intended to preempt an entire field of legislation
 - ▶ “Field preemption” need not be expressly declared in the statute

Example of Concurrent Jurisdiction

- ▶ N.D.C.C. § 49-22.1-13(1):
 - ▶ “The issuance of a certificate of site compatibility or a route permit is, subject to subsections 2 and 3, the sole site or route approval required to be obtained by the utility.”
- ▶ However, N.D.C.C. § 49-22.1-13(2):
 - ▶ “A certificate of site compatibility for an energy conversion facility **does not supersede or preempt any local land use; zoning; or building rules, regulations, or ordinances**, and a site may not be designated which violates local land use; zoning; or building rules, regulations, or ordinances
 - ▶ **This statute was recently amended as will be discussed later

Example of Field Preemption: Treating Plants

- ▶ N.D.C.C. § 38-08-04(1)(b):
 - ▶ The North Dakota Industrial Commission has “continuing jurisdiction and authority to: “regulate...all other operations for the production of oil or gas...[d]isposal of saltwater and oilfield wastes...[t]he commission may consider, in addition to the other authority granted under this section, safety of the location and road access to saltwater disposal wells, treating plants, and all associated facilities.”
 - ▶ A “treating plant” exists to reclaim, treat, process, or recycle tank bottoms, waste oils, drilling mud, waste from drilling operations, produced water, and other wastes related to crude oil and natural gas exploration and production. N.D.A.C. § 43-02-03-01(52).
- ▶ County zoning ordinance: CUP required for “salt water storage tank & similar facilities” on property zoned “Rural Preservation”
- ▶ Creates potential for inconsistent outcomes

Example of Field Preemption: Treating Plants

- ▶ Reconciliation? Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, 890 N.W.2d 841.
- ▶ County zoning ordinance as to treating plant is preempted (field preemption)
- ▶ Reasoning of decision:
 - ▶ (1) NDIC has express statutory authority to regulate “all other operations for the production of oil or gas”
 - ▶ (2) A treating plant qualifies as an “other operations[]” for the production of oil and gas
 - ▶ (3) Given the comprehensiveness of the state laws and regulations, the North Dakota legislature intended the NDIC to “occupy the field” of oil and gas waste treatment plants
 - ▶ (4) Therefore, the NDIC has exclusive jurisdiction of the issue of the location of oil and gas waste treating plants
 - ▶ (5) Therefore, counties do not have the authority to “veto” the NDIC’s siting of an oil and gas waste treatment plant



Appealing an Adverse Zoning Decision



- (1) Grounds for an Appeal
- (2) Standing
- (3) Burden of Proof and Standard of Review
- (4) Timing and Procedure

Grounds for an Appeal

- ▶ N.D.C.C. § 11-33-10: Appealing adoption of zoning resolution or amendment
 - ▶ Petition the Board after the first publication of the resolution or amendment
 - ▶ Hearing held by Board 7-30 days after petition
 - ▶ Petitioner notified of decision
 - ▶ Board affirms or rescind resolution or amendment at next regular meeting
- ▶ N.D.C.C. § 11-33-12: Appealing a decision based on zoning ordinance
 - ▶ “**Any person**, or persons, jointly or severally, **aggrieved** by a decision of the board of county commissioners under this chapter, **may appeal to the district court** in the manner provided in section 28-34-01.”

Standing

- ▶ Rule: must be “**aggrieved**”
 - ▶ The person seeking to appeal must show a “personal, individual interest in the decision, and any grievance which he might have suffered simply because he is an elector and taxpayer is not sufficient to give him the right to appeal.” Huber v. Miller, 101 N.W.2d 136, 140 (N.D. 1960).
 - ▶ One is “factually aggrieved” if the decision enlarges or diminishes that person’s interest. Washburn Pub. Sch. Dist. V. State Bd. of Pub. Sch. Educ., 338 N.W.2d 664, 666-68 (N.D. 1983).
 - ▶ Person must be “injuriously affected by the decision.” Huber, 101 N.W.2d at 136.

Burden of Proof and Standard of Review

- ▶ Standard of review on appeal: **arbitrary, capricious, or unreasonable**
- ▶ The local governing body's decision must be affirmed unless the local body acted "arbitrarily, capriciously, or unreasonably, or there is not substantial evidence supporting the decision." Graber v. Logan Co. Water Resource Bd., 199 ND 168, ¶ 7, 598 N.W.2d 846, 848.
- ▶ A decision is not arbitrary, capricious, or unreasonable if the exercise of discretion is the product of a **rational mental process** by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation." Tibert v. City of Minto, 2006 ND 189, 8, 720 N.W.2d 921, 924.

Burden of Proof and Standard of Review

- ▶ Limitations and Considerations:
- ▶ (1) Court will not substitute its judgment for that of the enacting body.
- ▶ (2) Court gives deference to the judgment and interpretation of the governing body.
- ▶ (3) Only evidence presented to the county can be considered and such evidence “must be reviewed in light of the commission's decision to determine whether that decision was arbitrary, capricious, or unreasonable.” Pulkrabek v. Morton Co., 389 N.W.2d 609, 613 (N.D. 1986).
 - ▶ In other words, an appellant's burden is not to show that the greater weight of the evidence entitled it to the relief requested.
 - ▶ An appellant's burden is to show that the county acted arbitrarily, capriciously, or unreasonably.

Burden of Proof and Standard of Review

- ▶ Why the foregoing limitations?
- ▶ The principle of separation of powers prevents the parties from relitigating the correctness and propriety of a commission's decision.
- ▶ Granting approvals or issuing permits pursuant to a zoning ordinance “is a legislative function subject only to appellate review to determine whether or not the county’s legislative body acted arbitrarily, capriciously, or unreasonably in reaching its decision.” Shaw v. Burleigh Co., 286 N.W.2d 792, 797 (N.D. 1979).

Burden of Proof and Standard of Review

- ▶ Overall lesson?
- ▶ Burden on appellant is high especially if the County makes a decision which it can root it “**promoting health, safety, morals, public convenience, general prosperity, and public welfare**” of the County or its residents

Timing and Procedure

- ▶ N.D.C.C. § 11-33-12: “...**may appeal to the district court** in the manner provided in section 28-34-01.”
- ▶ N.D.C.C. § 28-34-01:
 - ▶ File notice of appeal with clerk of court within 30 days after the decision
 - ▶ Appellant must post an undertaking in a reasonable sum and with sureties approved by the auditor
 - ▶ Purpose: ensure appellant prosecutes appeal without delay and that it “will pay all costs adjudged against [it] in the district court.” N.D.C.C. § 11-11-39.
 - ▶ Serve a copy of the notice of appeal on local governing body within 30 days after the decision
 - ▶ Appellee (local governing body) prepares and files the record on appeal

The Record on Appeal

- ▶ Certified by appellee to be the “entire proceedings before the local governing body”
 - ▶ Supplementing the record with additional evidence (N.D.C.C. § 28-34-01(3))
 - ▶ After obtaining leave from the district court, appellant must show either:
 - ▶ (1) additional evidence is material; and (2) reasonable grounds exist to justify/explain failure to cite such evidence at the hearing; or
 - ▶ (2) additional evidence is material to the issues involved; and (2) such evidence was rejected or excluded by the local governing body.
- ▶ Consideration of the record depends on whether the appellant objects to the local governing body’s findings or fact or conclusions of law

The Record on Appeal

- ▶ Object to findings of fact?
 - ▶ Evidence submitted at hearing before the local governing body shall be considered by the district court
 - ▶ Standard of review then applies to both findings of fact and conclusions of law
- ▶ Only object to conclusions of law?
 - ▶ Evidence submitted at hearing is not considered
 - ▶ Issue on appeal: based on undisputed findings of facts, did the local governing body act arbitrarily or capriciously in denying (for example) the subject CUP?

Tips When Considering the “Record”

- ▶ Local governing bodies must make findings of fact!
- ▶ Tip: build the record at and prior to the hearing before the local governing body!
 - ▶ District court only looks at evidence presented to the local governing body
 - ▶ Local governing body's findings of fact are based on record the applicant creates

Decision on Appeal by the District Court

- ▶ Potential outcomes for a decision on appeal by the district court (N.D.C.C. § 11-11-44):
 - ▶ (1) Enter final judgment on an appeal
 - ▶ (2) Issue order to the local governing body on how to proceed
 - ▶ (3) Require the local governing body to comply with its order by mandamus or with power of contempt
- ▶ In other words, the district court can:
 - ▶ (i) affirm;
 - ▶ (ii) reverse and remand with instructions; or
 - ▶ (iii) reverse without remand.

Decision on Appeal by the District Court

- ▶ Reversal without remand is very rare in North Dakota
- ▶ Gullickson v. Stark Cnty Bd. of County Com'rs, 474 N.W.2d 890, 895 (N.D. 1991)
 - ▶ Zoning ordinance prohibited mobile homes in a certain subdivision
 - ▶ County granted a variance to permit a mobile home in that subdivision "this one time only"
 - ▶ District court affirmed the variance
 - ▶ Supreme Court reversed without remand
 - ▶ "A spot variance that is in conflict with the relevant standard of the zoning ordinance is arbitrary, capricious, or unreasonable." Id. at 895.

Appeals to the Supreme Court

- ▶ District court's decision is appealable to the North Dakota Supreme Court
- ▶ Standard of review is the same
- ▶ The North Dakota Supreme Court “independently determine[s] the propriety of the Board's decision without according any special deference to the district court's review.” Shaw, 286 N.W.2d at 792.

Trends



Trends

- ▶ **(1) Counties are moving away from requiring CUPs for pipelines**
 - ▶ Williams County: no CUP required for “industrial, municipal and/or commercial pipelines” if such pipeline is “subject to State or Federal government regulation and oversight.”
 - ▶ Applicant submits evidence that pipeline meets the exemption, Williams County reviews and issues an exemption letter, and final PSC approval (for example) is then provided to Williams County.

Trends

- ▶ (2) Staff are becoming vested with more authority to make administrative approvals
 - ▶ Staff can renew time-conditioned CUPs
 - ▶ Staff approval of time-conditioned temporary use permits
 - ▶ Usually temporary events, lay flat for fracs, surface mining for public projects
 - ▶ Administrative variances

Trends

▶ (3) Building permit waivers for otherwise regulated facilities

- ▶ McKenzie County: certain oil and gas processing and storage facilities can apply for a building permit waiver instead of a building permit
- ▶ “It is recognized that certain facilities are designed and constructed according to standards outlined by multiple codes and jurisdictions including federal, state, and local governments and agencies. There are overlapping codes and jurisdictions regulating the safe construction and operation of these facilities. Each waiver is specific to the structure described therein and does not apply to replacements, expansions, changes in use, or major alterations to the structure.”

Trends

- ▶ (4) Reclamation and performance bonds
- ▶ (5) Roads
- ▶ (6) Clarification on state v. local authority and jurisdiction



Trends

- ▶ (i) NDIC authority and jurisdiction following Environmental Driven Solutions, LLC v. Dunn County, 2017 ND 45, 890 N.W.2d 841 (2017)
- ▶ (ii) Electric energy conversion facilities and electric transmission facilities
 - ▶ N.D.C.C. § 49-22-16(2):
 - ▶ “A permit for the construction of an electric transmission facility within a designated corridor supersedes and preempts a local land use, zoning, or building rule, regulation, or ordinance, upon a finding by the commission that the rule, regulation, or ordinance, as applied to the proposed route, is unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of location. Without such a finding by the commission, a route may not be designated which violates a local land use, zoning, or building rule, regulation, or ordinance.”

Trends

- ▶ (ii) Gas or liquid energy conversion facilities
- ▶ OLD STATUTE – N.D.C.C. § 49-22.1-13(2):
 - ▶ “A certificate of site compatibility for an energy conversion facility **does not supersede or preempt any local land use; zoning; or building rules, regulations, or ordinances**, and a site may not be designated which violates local land use; zoning; or building rules, regulations, or ordinances

Trends

- ▶ NEW STATUTE – N.D.C.C. § 49-22.1-13(2):
- ▶ Rule: permit for such facility “supersedes and preempts any local land use or zoning regulations.”
- ▶ However, before obtaining PSC approval, an applicant must:
- ▶ (1) Comply with road use agreement of the impacted political subdivision
 - ▶ Exception: PSC permit may still supersede and preempt if the requirements of a political subdivision are “unreasonably restrictive” in view of existing technology, cost, needs of consumers, or directly conflict with state or federal laws or rules
- ▶ (2) PSC will notify city, township (with retained zoning authority), and counties in which the proposed corridor is located, and will not hold a hearing sooner than 45 days from the date of the notice
- ▶ (3) Political subdivision sends local requirements to the PSC for consideration

Tips



Tips

- ▶ Be cognizant of the power to enforce violations by criminal action
 - ▶ Mountrail County
 - ▶ Western Petroleum, LLC v. Williams Co. Bd. of Co. Commissioners, 2016 ND 249, 888 N.W.2d 388
 - ▶ Man camps with no CUP
 - ▶ Violation of zoning ordinance is \$1,000 for each offense
 - ▶ 49 housing units with no CUP
 - ▶ County imposed fine of \$29,635,000
 - ▶ District court: affirmed
 - ▶ Supreme Court: reversed and remanded
 - ▶ One CUP can cover multiple housing units so the fine does not apply to each individual housing unit

Tips

- ▶ Think about project from the perspective of the neighboring farmer
- ▶ Asking for forgiveness instead of permission is a bad idea
- ▶ Much of the practice is about relationships
- ▶ Engage the local governing body even if it does not have regulatory authority
- ▶ Engage the public
- ▶ Lock periods when a CUP is denied
- ▶ Always think of the record

Questions?

