Local Land Use Regulation of Extractive Industries: Evolving Judicial and Regulatory Approaches*

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I.
INTRODUCTION

Several concurrent trends in land use regulation, population growth and the mineral extraction industry have coalesced so that litigation regarding the industry has increased substantially in the past several years. While most early cases relating to the imposition of the land use regulatory powers on mining operations focused on sand and gravel extraction, today's cases go well beyond the sand and gravel pit. Counties, long the weak sister of sub-state governmental units, are now being given the full panoply of police powers. Population trends show an increase in rururban development, bringing people into contact with existing mineral development. The ensuing conflicts are resolved at both the political and judicial levels.

This paper will explore how these conflicts have been traditionally resolved and how they are being resolved in today's environment. Part I discusses the basic land use regulatory system, including early attempts at regulating mineral extractors. Part II analyzes how mineral operators have fared under the traditional zoning game—looking first at the rezoning process, then at the discretionary permit procedure, and finally at the specialized problems raised by the non-conforming use status given many

* This article is a revised version of a paper presented at the Mineral Development and Land Use Special Institute in May 1995, sponsored by the Rocky Mountain Mineral Law Foundation. The author is appreciative of the Foundation's consent to have the article revised and published in the UCLA Journal of Environmental Law and Policy.

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existing mineral operations. Doctrines especially created for the mineral development, including the diminishing asset doctrine, are also discussed in Part II. Part III discusses the unique problems caused by local regulation of oil and gas development. Part IV analyzes the general problem of multi-layered regulation of mining operations. Mining operators must often receive development permission from both the state and a sub-state unit. Issues relating to preemption of sub-state powers by state statutory or regulatory authority are analyzed. Part V reviews several recent cases reflecting innovative legislative and judicial responses to resolving the conflicts between mineral users and their neighbors. Finally, Part VI reaches several conclusions about where the future lies in the local regulation of the mineral extraction industry.

A. *The Basic Terminology*

Although land use regulation traces back to the onset of the colonies in the early eighteenth century, the modern land use regulatory system finds its roots in the New York City zoning ordinance of 1916. Two factors led to the nearly universal use of zoning and other land use regulatory measures within two decades of New York's experiment. First, in 1926, the Supreme Court upheld the validity of a comprehensive zoning law in *Village of Euclid v. Ambler Realty Co.*[1] Second, many states adopted the Standard Zoning Enabling Act (SZEA) and Standard Planning Enabling Act (SPEA) after they were drafted by the U.S. Department of Commerce under Herbert Hoover's direction.

The SZEA and SPEA envision that three different local governmental entities will be involved in land use matters.[2] The leg-

1. 272 U.S. 365, 390 (1926). The Supreme Court had dealt with a host of single purpose or specialized land use ordinances over the prior 50 years, including a major decision dealing with a mineral processing facility. Hadachek v. Sebastian, 239 U.S. 394 (1915). *See also* Pierce Oil Corp. v. Hope, 248 U.S. 498, 499 (1919) (upholding ordinance restricting oil storage facilities within 300 feet of a dwelling house); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (ordinance regulating type of structures where laundries could operate found violative of the 14th Amendment).

2. The American Land Institute developed a Model Land Development Code in 1976 which allocates decision-making power somewhat differently than under the SZEA. AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE (1976). To date, only Florida has adopted the Model Code after making several substantial changes. FLA. STAT. ANN. §§ 163.3161-163.3243 (West 1990 & Supp. 1995). In addition, a number of states, including Hawaii, Oregon and Vermont, have instituted statewide land use planning mechanisms which impact the local land use decision-

islative body is the only entity which can enact or amend a land use ordinance. In addition, modern land use practice reserves for the legislative body the power to review decisions of the board of adjustment or board of zoning appeals. Thus, legislative bodies are the final decision-makers on whether or not a variance or a discretionary permit should be issued.[3]

The SZEA and SPEA designated the Planning Commission as the appropriate administrative body to assist the local legislative body in preparing the comprehensive plan and the zoning ordinance. Additionally, the Commission typically reviews and approves subdivision plats. In most cities, the Commission is composed of local residents. However, in larger cities, a planning department, staffed with planning professionals, provides direct, technical support to the Commission.

To fill out the trimuverate of land use planning bodies, the SZEA and SPEA authorized the creation of boards of adjustment. This board, like the Planning Commission, is often composed of local residents. Under the SZEA, these boards have final administrative power to grant or deny discretionary permits and deal with appeals of decisions made by governmental employees. In addition, this board has the power to grant a variance when the literal enforcement of the ordinance would result in unnecessary hardship. In the early days of zoning, local legislative bodies did not review board decisions. However, as noted, this position is changing. As with Planning Commissions in larger cities, boards are now provided with technical support from professional planners.

The basic structure of zoning relates to the governmental regulation of the use of the land and the bulk and height of structures.[4] Traditional zoning was known as "Euclidean" zoning after the *Euclid* case. It is also often called "cumulative" zoning because the zoning districts often allow the uses specifically described for that district as well as all uses allowed in less intensive

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making process. *See generally*, State and Regional Comprehensive Planning: Implementing New Models for Growth Management (Peter A. Buchsbaum & Larry J. Smith eds. 1993).

3. Throughout this paper, I will use the term "discretionary permit" to describe what zoning ordinances may call conditional use permits, special exceptions, special exception permits, special uses, or special use permits.

4. The SZEA provided that: "The local legislative body may divide the municipality into districts of such number, shape and area as may be . . . best . . . and within such districts it may regulate and restrict the erection, construction, alteration, repair, or use of buildings, structures, or land."

use zones. Thus, in a multi-family residential district, single family residences would be allowed. The more modern view is for zoning districts to be exclusively limited to the uses specified for that district. Each district specifies the use, bulk and height restrictions that would apply within its boundaries. Normally two categories of uses are listed: those permitted as "of right" and those which require additional approval through some form of discretionary permit. A New Jersey court provided an accurate definition of a discretionary permit when it stated:

> [C]ertain uses, considered by the local legislative body to be essential or desirable for the welfare of the community . . ., are entirely appropriate and not essentially incompatible with the basic uses in any zone . . ., but not at every or any location . . . or without conditions being imposed by reason of special problems the use . . . presents from a zoning standpoint.[5]

This form of discretionary permit is distinguished from a variance. A variance authorizes a use or structure which violates the performance or use standards for that zoning district. A number of jurisdictions do not allow use variances, because that in effect is a de facto rezoning of the ordinance which can only be accomplished by the local legislative body, not the board of adjustment. Variances typically require a finding that the owner would face unnecessary hardship. Discretionary permits, on the other hand, are authorized by the ordinance and normally contain factors or findings that must be considered by the board before it can approve an application for such a permit.

Judicial review of local land use decisions characteristically falls into several categories. Most courts followed *Euclid*'s lead by taking a very deferential scope of judicial review of any challenge to a zoning ordinance, be it the original zoning ordinance or a later change or amendment. Even if the justification for the zoning ordinance is "fairly debatable" the courts will not substitute their judgment for that of the legislative body.[6] Because of this presumption of validity, the party attacking the local decision shoulders a heavy burden of proof.

Decisions of the board of adjustment which are not reviewed by the legislative body are directly reviewed by the courts, typi-

5. Tullo v. Millburn Township, 149 A.2d 620, 624-25 (N.J. Super. 1959).

6. Most states follow this hands-off approach, although a number are known for either their pro-regulatory bent, such as California, or their pro-landowner bent, such as Illinois and Virginia.

cally under a substantial evidence test, with review limited to the record generated during the administrative hearing.[7]

In the 1970's, there was a slight change in the judicial attitude towards reviewing the vastly increased number of individualized zoning decisions that were being made by legislative bodies. Starting with *Fasano v. Board of County Commissioners*,[8] a number of courts stopped asking the question of what body made the decision in order to determine the scope of judicial review, and instead asked whether the decision was legislative or quasi-adjudicatory in nature. In *Fasano*, the Oregon Supreme Court determined that a legislative rezoning of an individual tract was quasi-adjudicatory and required the legislature to make findings of fact so that the substantial evidence test could be employed. A majority of jurisdictions, however, still apply the traditional approach as reflected in *Euclid* which gives substantial deference to any decision made by a legislative body.[9]

Courts, of course, review zoning ordinances for compliance with constitutional and statutory mandates. These include the Fifth Amendment's prohibition against the taking of property without just compensation and the Fourteenth Amendment's due process and equal protection guarantees. In addition, for a variety of reasons, challengers to land use decisions can assert that the ordinance or administrative action is *ultra vires*.[10] A major

7. *See infra* text accompanying notes 70-73 for a more complete discussion of the substantial evidence test.

8. 507 P.2d 23, 26 (Or. 1973). Fasano is no longer good law in Oregon. Neuberger v. City of Portland, 607 P.2d 722, 725 (Or. 1980). If an adjudicatory decision is being rendered the parties have procedural due process rights to a hearing. In the event the hearing is more legislative in character than adjudicatory, the rezoning decision will be overturned. Resource Development Corp. v. Campbell County Fiscal Court, 543 S.W.2d 225 (Ky. 1976).

9. For cases applying the *Fasano* analysis *see* New Castle County Council v. BC Dev. Assocs., 567 A.2d 1271 (Del. 1989); Board of County Comm'rs v. Snyder, 627 So.2d 469 (Fla. 1993); Golden v. City of Overland Park, 584 P.2d 130 (Kan. 1978); City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Woodland Hills Conservation Ass'n v. City of Jackson, 443 So.2d 1173 (Miss. 1983). For cases rejecting the *Fasano* analysis *see* Wait v. City of Scottsdale, 618 P.2d 601 (Ariz. 1980); Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565 (Cal. 1980); Hall Paving Co. v. Hall County, 226 S.E.2d 728 (Ga. 1976); State v. City of Rochester, 268 N.W.2d 885 (Minn. 1978); Quinlan v. City of Dover, 614 A.2d 1057 (N.H. 1992); Bell v. City of Elkhorn, 364 N.W.2d 144 (Wis. 1985).

10. A good example of an ultra vires attack on an administrative action is Hazard v. Superior Court, 310 P.2d 830 (Ariz. 1957). An Arizona statute exempted mining activities from the application of the County Planning and Zoning Act. A sand and gravel operator had sought and received conditional use permits from the County. Neighbors intervened and challenged the issuance of the permits. The court dismissed the action on lack of jurisdiction grounds since the permits were illegally

issue directly affecting mineral development is whether state statutes or administrative regulations preempt local regulations.[11] Additionally, non-home rule units get their power to zone from enabling acts which may or may not authorize a particular type of regulation. Finally, a local land use decision must be made by the sub-state unit following the procedural requirements mandated by either state statutes or local ordinances. Failure to comply with notice requirements, not allowing an appropriate public hearing, or similar matters can all lead to judicial invalidation of a zoning ordinance or land use decision.

There is a rich tapestry of land use jurisprudence that affects the mineral operator. While there are common threads in that jurisprudence throughout the United States, land use law not only varies from state to state, but from city to city or county to county. Increasingly, states have granted substantial flexibility in the design and implementation of land use regulatory systems to their sub-state units. Likewise, there is substantial diversity in the approaches taken to the appropriate scope of judicial review of land use decisions between the states. The above summary is merely intended to provide a basic background to how mineral operations have been regulated by sub-state units.

B. *The Early Cases*

Two California cases reflect the schizophrenic approach taken in dealing with ordinances which attempted to limit quarrying activities in a newly developing urban area. These ordinances also antedated the modern comprehensive zoning ordinances so common today and were therefore geared solely at the mining or extractive industry. Specialized ordinances such as those are still used today, but have been mostly replaced with the more comprehensive zoning and land use regulatory program that followed the *Euclid* decision and the rapid enactment of the Standard Zoning Enabling Act by the states after it was developed by the United States Department of Commerce in 1926.

The earliest of these two cases, *Ex parte Kelso*,[12] was a challenge to a San Francisco ordinance directly prohibiting the oper-

issued as the state statute removed from the County its power to issue discretionary permits for mining operations. *See also* River Springs Ltd. Liab. Co. v. Board of County Comm'rs, 859 P.2d 1329 (Wyo. 1995) (state statute did not preempt county power to regulate sand and gravel operations).

11. *See* text accompanying *infra* notes 169-202.

12. 82 P. 241 (Cal. 1905).

ation of a rock or stone quarry within a large portion of the city.[13] In a rather straightforward and short opinion, the court determined that the ordinance "deprive[s] the owners of real property within such limits of a valuable right incident to their ownership, viz., the right to extract therefrom such rock and stone as they may find it to their advantage to dispose of."[14] While admitting that all property interests are held subject to the valid exercise of the police power, the court deemed this regulation a taking of private property without due process of law.[15] It did so not using modern day regulatory takings analysis, but using substantive due process analysis. The court used a less onerous alternatives type approach suggesting that regulation of quarrying could be validly accomplished if the regulation was more narrowly drawn to deal with the impact of quarrying on neighbor's rights. But the total prohibition went too far. In response to the public safety claim made by the City because of the blasting involved in quarrying, the court again resorted to a less onerous alternatives approach by recognizing the City's right to regulate blasting, but not its right to protect the public safety through a total ban on quarrying activities.[16] Lawful uses may not be prohibited unless they become nuisances. The blanket prohibition was overbroad and invalid. Because this was not a modern regulatory taking case, the court did not discuss the diminution in value of the owner's land and whether or not it could be used for other purposes. To date, *Kelso* had not been overruled by the California Supreme Court.[17]

13. *Kelso* and the later case, *Hadachek v. Sebastian*, *infra* note 18, are anachronisms since they were both habeas corpus actions reviewing criminal convictions for violation of the respective ordinances. The author knows of no recent case in which a zoning ordinance was challenged in a habeas corpus action.

14. 82 P. at 241.

15. *Id.* at 241. At this time in our constitutional jurisprudence, there was no regulatory takings jurisprudence. *See, e.g.*, Reinman v. City of Little Rock, 237 U.S. 171 (1915); Mugler v. Kansas, 123 U.S. 623 (1887). Not until Justice Holmes wrote Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), were regulatory takings prohibited as violative of the Fifth Amendment.

16. The court stated: "We can see no valid objection to the work of removing from one's own land valuable deposits of rock or stone that may not be entirely met by regulations as to the manner in which the work shall be done; and this being so, we are satisfied that an absolute prohibition of such removal, under all circumstances, cannot be upheld." 82 P. at 242.

17. For other cases where the courts emphasized that a total prohibition against quarrying or other mining activities would be unconstitutional on substantive due process or takings grounds, see People v. Hawley, 279 P. 136 (Cal. 1929) (public nuisance); Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275 (Ill. 1953); Bartsch v. Ragonetti, 207 N.Y.S. 142 (N.Y. Sup. 1924), *aff'd*, 210 N.Y.S. 825

Fewer than 10 years after *Kelso*, the California Supreme Court and the Supreme Court of the United States reached what can only be described as a contrary or opposite ruling in the landmark case, *Hadachek v. Sebastian*.[18] The facts were very similar. Los Angeles enacted an ordinance prohibiting the operation of a brickyard or brick kiln in specified areas of the city. Many years prior to the ordinance, Hadachek had purchased the land in question because it contained valuable deposits of clay. He operated a brick kiln on the premises which was rendered an unlawful use on the date the ordinance became effective. The total area of the City was 107.62 square miles, 3 square miles of which lay in the no-kiln zone. At the time the ordinance was adopted, the district was sparsely populated. Numerous other brick kilns in the City were not covered by this ordinance. The California Supreme Court treated the case as a classic substantive due process attack on the wisdom of the ordinance.[19] Finding that the police power clearly encompassed the right to protect the public from the noxious effects of brick kilns and opting for a deferential scope of judicial review of such police power actions, the California Supreme Court had no difficulty upholding the validity of the ordinance. It brushed aside *Kelso* on the basis that the burning of brick cannot be regulated to prevent the harm of noxious "externalities." It is clear that the California Supreme Court in *Hadachek* did not explore as deeply the legislative alternatives to total prohibition as it had in *Kelso*. The court stated:

> Whether or not this trade, however strictly the manner of its conduct may be regulated, can be pursued at all in a residential district without causing undue annoyance to persons living in the district, is certainly a question upon which reasonable minds may differ. If this be so, the propriety of entirely prohibiting the occupation

(N.Y.A.D. 1925); Cordts v. Hutton Co., 262 N.Y.S. 539 (Sup. Ct. 1932), *aff'd* 269 N.Y.S. 936, *aff'd* 195 N.E. 124 (1934); East Fairfield Coal Co. v. Booth, 143 N.E.2d 309 (Ohio 1957).

18. *Ex parte* Hadachek, 132 P. 584 (Cal. 1913), *aff'd*, Hadachek v. Sebsatian, 239 U.S. 394 (1915). *Hadachek* was not the first case upholding a governmental prohibition against mining. Justice Holmes, while sitting as a member of the Massachusetts Supreme Judicial Court, approved of a municipal ordinance which prohibited blasting without city approval. Commonwealth v. Parks, 30 N.E. 174 (Mass. 1892). *See also* Pacific States Supply Co. v. City and County of San Francisco, 171 F. 727 (N.D. Cal. 1909) where the court rejected the *Kelso* analysis.

19. 132 P. at 586 relying on *Mugler v. Kansas*, *supra* note 15 and two earlier California Supreme Court decisions allowing a city to prohibit lawful uses within certain districts. *Ex parte* Montgomery, 125 P. 1070 (Cal. 1912) (lumber yard); *Ex parte* Quong Wo, 118 P. 714 (Cal. 1911) (public laundry).

> within such districts is one for the legislative determination. The courts will not substitute their judgment upon this issue for that of the legislative body.[20]

Had the *Kelso* decision not looked at less onerous alternatives and had it deferred to the legislative choice to prohibit rather than regulate, I really can't imagine that the "externalities" of an operating quarry would be less noisome than the "externalities" of an operating brick kiln. The California Supreme Court did not deal with the issue that the brick kiln's operation had preceded the enactment of the ordinance.[21]

When the case reached the Supreme Court of the United States, the issue of the diminution in value of the owner's business and land arose for the first time. The Court reiterated the owner's allegations that as a situs for a brick kiln and clay mine the site was worth approximately $800,000, but as a residential district, was worth not more than $60,000. Notwithstanding this fact, the Supreme Court focused on traditional substantive due process analysis. Specifically, the Court addressed whether a limited prohibition against brick kiln operators fell within the City's authority to regulate to protect the public health, safety, morals or general welfare. The police power goes beyond regulating nuisances per se.[22] Even lawful businesses may be outlawed to prevent the serious incommodation of the neighbors of the brick kiln. Hadachek sought to distinguish *Reinman v. City of Little Rock*,[23] a case which had upheld a prohibition against an existing livery stable against a similar substantive due process challenge. He argued that the livery business was movable and thus the prohibition did not destroy the business, while his brick kiln business depended on locating the kilns at the clay excavation site. He based this argument, in part, on language from *Kelso* which emphasized that mineral extraction activities have to take place where the minerals are located. The Supreme Court, however, did not treat the prohibition against brick kilns as the functional equivalent of a prohibition against mineral extraction. Hadachek was still free to mine all the clay he wanted. The economic realities of the brick-making business which made it impossible to

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20. 132 P. at 586.

21. For a general discussion of the modern doctrine relating to non-conforming uses, *see* Section III *infra*.

22. Earlier that year, the Supreme Court found that the prohibition of a lawful commercial use from an area which antedated the ordinance was a valid exercise of the police power. Reinman v. City of Little Rock, 237 U.S. 171 (1915).

23. *Id.*

compete if your kilns were not at the mine site could not defeat the public interest in protecting the public health, safety, morals or general welfare. The Court specifically eschewed answering the question whether a total prohibition of clay mining in areas containing clay deposits might be unconstitutional. But what is clear is that the Court will not substitute its judgment for that of the local legislative body when it comes to police power regulation. The ordinance may be over or under-inclusive, partial in coverage and still be constitutional. The presumption of validity that attaches to such local legislation would appear to be difficult to overcome even where the ordinance is industry-specific, rather than comprehensive in scope.

One of the first major state court decisions dealing with the impact of a comprehensive urban-oriented zoning ordinance prohibiting mining uses in residential zones was *West Brothers Brick Co., Inc. v. City of Alexandria.*[24] The facts were rather straightforward. West Brothers owned an 18-acre tract located near the center of the city and bounded on one side by a railroad right-of-way. West Brothers had purchased the lot in 1927 for $47,000, intending to use it as a source of clay for its brick-making operations. In 1931, the City adopted a comprehensive zoning ordinance following extensive public hearings. The ordinance placed the bulk of the 18-acre track in a residential district where mining operations were prohibited.

After reviewing in depth the expert testimony regarding the value of the clay deposits and the externalities that would be caused by allowing mining, the court emphasized the nuisance-like conditions that would attend both the mining and post-mining phases of the development. The key to the court's decision upholding the constitutionality of the zoning ordinance as applied to the 18-acre parcel was its very deferential scope of judicial review. Applying the fairly debatable test of *Euclid* and giving a reasonably expansive view of the scope of the police power, the court concluded:

> We have an expert city planner with twenty years' experience; we have the judgment of the Zoning Commission; we have the judgment of the mayor and city council. . . . It would be extraordinary, indeed, if their conclusions upon questions of fact were so utterly wrong as not to be debatable.[25]

24. 192 S.E. 881 (Va. 1937), *appeal dismissed*, 302 U.S. 658, *reh'g denied*, 302 U.S. 781 (1938).

25. 192 S.E.2d at 886.

These early cases reflect a basic divergence in views regarding how land use regulations affect mineral operations. *Kelso* and similar cases emphasize the locational peculiarities of regulating mining. The minerals are not movable and if you prohibit a mining use, the minerals will not be developed at all. On the other hand, *Hadacheck* and similar cases do not treat mining operations any differently than other commercial ventures when it comes to land use regulation. This divergence continues in various forms to the present as the courts have struggled to deal with land use regulations affecting mineral development.

C. *The Focused Ordinance - Mining as a NIMBY*

In today's parlance, mining, quarrying and related processing activities in many communities would be treated as a "NIMBY" (Not In My Back Yard). Mineral extraction activities have been NIMBY's for many years as reflected by the number of cases showing local government efforts to terminate such uses through ordinances specifically targeted to mining activities. After zoning became widespread in urban areas after the 1920's, one might have thought that the mining-specific ordinances, such as those enacted in *Kelso* and *Hadacheck*, would have become extinct. However, a number of more recent cases suggest that local governments still attempt to regulate or prohibit mining activities through mining-specific ordinances.

One of the few instances where a mining-specific ordinance was found unconstitutional was *Merced Dredging Co. v. Merced County*.[26] The County required any surface mining operator, including those who used dredgers, drag lines or other soil moving equipment, to get a permit before they could surface mine. The ordinance also required the land to be reclaimed. The County's stated purpose was to avoid water pollution and other environmental damage. Although the court stated that it afforded the County's purpose a presumption of validity, the court analyzed the ordinance and its purpose with a heavy hand. The court concluded that there was a basic inconsistency between the purpose of preventing water pollution and the reclamation requirement which it determined would aggravate, not solve the water pollution problem. The court also treated the reclamation requirement as a de facto prohibition against strip mining which, the court concluded, citing *Kelso*, would be unconstitutional. Thus,

26. 67 F.Supp. 598 (S.D.Cal. 1946).

the court granted the extraordinary remedy of an injunction against the enforcement of the County ordinance.

A thirty year attempt by the Township of Hempstead to regulate sand and gravel operations led to the Supreme Court's only major land use decision between 1928 and 1974.[27] The mining operator had continually mined gravel from a pit on a 38-acre tract since 1927. In 1945, the Town adopted an ordinance establishing several performance standards for gravel pits, including fencing and yards around the edge and limits on the slope of the excavation. In 1958, the Town enacted a second ordinance which prohibited any excavation below the water table and required owners of water-filled pits to fill them in. Due to the continuous excavation, by 1958, the pit had become a 20-acre lake with an average depth of 25 feet. In addition, the Township had undergone substantial residential development so that 1800 persons resided within two-thirds of a mile from the pit and four schools, with over 4500 students, were located in the immediate vicinity. The Town filed an action seeking to enjoin further excavations and enforce the reclamation provisions of the ordinance.

The miner's basic defense was that the ordinance was unconstitutional on either substantive due process or takings grounds. The New York courts emphasized the public safety concerns of the Town regarding the unfenced lake. In a terse Supreme Court decision, Justice Clark relied in large part on the *Hadacheck* rationale that there is no constitutional right to continue an admittedly beneficial use when the local legislative power properly exercises its police power.[28] The Court further concluded that depriving the owner of the most beneficial use of his land is also not per se unconstitutional.[29] Importantly the Supreme Court rejected applying a separate test to mining operations. In reviewing the safety objectives of the ordinance, both in terms of the deepening prohibition and the prohibition against expanding the lake by further excavations, the Court applied a fairly deferential

27. Town of Hempstead v. Goldblatt, 189 N.Y.S.2d 577 (Sup. Ct. 1959), *aff'd mem.*, 196 N.Y.S.2d 573 (App. Div. 1959), *aff'd*, 172 N.E.2d 562 (N.Y. 1961), *aff'd*, 369 U.S. 590 (1962). Justices Frankfurter and White did not participate in the Supreme Court decision.

28. 369 U.S. at 592.

29. The court cites a number of pre-Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), decisions which regularly upheld regulations which substantially diminished the value of the regulated property interest, including Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Reinman v. City of Little Rock, 237 U.S. 171 (1915); Mugler v. Kansas, 123 U.S. 623 (1887). 369 U.S. at 592-93.

scope of judicial review. If the ordinance was reasonable under any set of facts it will be upheld.

The Supreme Court summarily addressed the taking claim by merely referring to the large loss imposed on the brick kiln operation in *Hadacheck*. The Court also found no evidence in the record to show how much of a loss would be suffered by the mining operator, even though future excavation of sand and gravel were prohibited. The Court concluded: "How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question."[30] Thus, the Court avoided the obvious conclusion that not only would the regulation diminish the value of the land to zero, but the regulation would impose substantial reclamation costs on the owner. Nonetheless, *Goldblatt* stands for the proposition that prohibitions against pre-existing mining operations do not necessarily violate either the due process or takings clause.

The *Goldblatt* decision, while unanimous, was not entirely expected. Only a few years before it was decided, the Ohio Supreme Court in *East Fairfield Coal Co. v. Booth*[31] invalidated an ordinance prohibiting strip mining on substantive due process grounds. Relying in part on *Kelso* and a heightened sense of review, the court looked more at the wisdom of the regulation (substantive due process) rather than the takings issue. The owner had placed the takings issue before the court by alleging that the parcel was worth at least $1,000,000 if strip mining was allowed, while its residual value was pegged at $17,000. Nonetheless, the court in classic due process language found that the prohibition of a legitimate business from the community was unconstitutional.

Single-use zoning may run afoul of zoning enabling legislation which requires that land use regulations be adopted in accordance with a comprehensive plan. A recent Louisiana decision,

30. 369 U.S. at 594. *See also* Bureau of Mines of Maryland v. George's Creek Coal & Land Co., 321 A.2d 748 (Md. 1974) (upholding prohibition of strip mining in order to preserve the environment).

31. 143 N.E.2d 309 (Ohio 1957). Two Illinois cases from the same era also invalidated strip mining specific ordinances which prohibited such activities. Midland Elec. Coal Corp. v. County of Knox, 115 N.E.2d 275 (Ill. 1953); Northern Ill. Coal Corp. v. Medill, 72 N.E.2d 844 (Ill. 1947). *See also* Village of Terrace Park v. Errett, 12 F.2d 240 (6th Cir. 1926), *cert. denied*, 273 U.S. 710 (1926).

Trail Mining, Inc. v. Village of Sun,[32] invalidated a village ordinance prohibiting gravel mining as being *ultra vires* because it was not a comprehensive ordinance and was not part of a comprehensive plan to regulate land use within the village.

Although widely used in earlier times, the single purpose ordinance designed solely to regulate mining operations is the rare exception, not the rule, when it comes to land use regulation. As reflected by the divergent views of *Goldblatt* and *East Fairfield Coal*, the earlier disagreements continued regarding the validity of such ordinances—especially as they completely prohibited mining operations. In addition, as states began imposing mandatory comprehensive planning requirements on sub-state units, single-industry land use ordinances were replaced by comprehensive planning and zoning provisions that included mining operations under their aegis.

II.

MINERAL EXTRACTION AND THE ZONING GAME - THE MOVABLE EARTH MEETS THE IMMOVABLE NEIGHBORS

A. *Basic Zoning and Rezoning Decisions*

Perhaps the most forceful statement upholding the ability of a local governmental entity to zone out mining uses, even where there is an admitted substantial location of a valuable mineral, comes from the California Supreme Court in *Consolidated Rock Products Co. v. City of Los Angeles*.[33] Consolidated was the lessee of a 348 acre tract, known as the Tujunga Wash. It was the second largest alluvial cone of rock in Los Angeles County. The area was zoned for agricultural and residential uses, both of which did not allow mining operations. The trial court found that the 348 acres had great value if used for mining but "no appreciable economic value" for any other purpose.[34] The surrounding area was not densely populated although a nearby area had a number of sanitoria to treat those with respiratory problems. Applying the fairly debatable test, the trial court upheld the validity of the ordinance. The lessees appealed, claiming that the ordinance violated their substantive due process rights, their

32. 619 So. 2d 118 (La. Ct. App. 1993).
33. 370 P.2d 342 (Cal. 1962) *appeal dismissed*, 371 U.S. 37 (1962).
34. 370 P.2d at 344.

equal protection rights and constituted a taking of property without just compensation.

The lessees claimed that zoning which prohibits mining operations where valuable minerals are concerned is different from the typical zoning situation where the land is left with economically feasible alternatives. They relied in large part on *Kelso* and several other California cases treating land use regulation of minerals as requiring special rules.[35] While admitting that these cases seemed to set up a special set of rules relating to land use regulation of mineral activities, the court concluded that no special rules should apply. It stated:

> Too many cases have been decided upholding the constitutionality of comprehensive zoning ordinances prohibiting the removal of natural products from lands in certain zones for us now to accept at full value the suggestion that there is such an inherent difference in natural products of the property that in a case where reasonable minds may differ as to the necessity of such prohibition the same power to prohibit the extraction of natural products does not inhere in the legislative body as it has to prohibit uses of other sorts.[36]

The court refused to second-guess the elected officials who adopted the ordinance and applied the very deferential fairly debatable scope of judicial review.[37]

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35. Besides Ex Parte Kelso, 82 P.2d 241 (Cal. 1905), the other California cases were People v. Hawley, 279 P. 136 (Cal. 1929); Ex Parte Throop, 145 P. 1029 (Cal. 1915); Morton v. Superior Court, 269 P.2d 81 (Cal. Ct. App. 1954); Wheeler v. Gregg, 203 P.2d 37 (Cal. Ct. App. 1949). Also cited was Pennslyvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

36. 370 P.2d at 351. The following cases also have rejected a special test for mineral extraction regulation: Marblehead Land Co. v. City of L.A., 47 F.2d 528 (9th Cir. 1931), *cert. denied*, 284 U.S. 634 (1931) (oil and gas drilling limited) and *In re* Angelus, 150 P.2d 908 (Cal. 1944) (sand and gravel); County Comm'rs v. Merryman, 159 A.2d 854 (Md. 1960) (sand and gravel); Town of Seekonk v. John J. McHale & Sons, Inc., 90 N.E.2d 325 (Mass. 1950); Town of Burlington v. Dunn, 61 N.E.2d 243 (Mass.), *cert. den.*, 326 U.S. 739 (1945) (topsoil); Raimondo v. Bd. of Appeals, 118 N.E.2d 67 (Mass. 1954) (sand and gravel); Township of Bloomfield v. Beardslee, 84 N.W.2d 537 (Mich. 1957) (gravel); Fred v. Mayor and City Council of Old Tappan, 92 A.2d 473 (N.J. 1952) (topsoil); People v. Gerus, 69 N.Y.S.2d 283 (N.Y. Co. Ct. 1942) (sand and gravel); Moore v. Memphis Stone & Gravel, 339 S.W.2d 29 (Tenn. 1959) (gravel); West Brothers Brick Co. v. City of Alexandria, 192 S.E. 881 (Va. 1937), *appeal dismissed*, 302 U.S. 658 (1937), *reh'g denied* 302 U.S. 781 (1938).

37. Other zoning cases approving prohibitions against mining, especially in residential districts, also applied the fairly debatable test and refused to question the reasonableness of the zoning regulation. *See, e.g.*, Southern Rock Products Co. v. Self, 187 So.2d 244 (Ala. 1966); Farmington River Co. v. Town Planning & Zoning Comm'n, 197 A.2d 653 (Conn. 1963); Town of Lexington v. Simeone, 134 N.E.2d 123 (Mass. 1956); People v. Calvar Corp., 69 N.Y.S.2d 272 (N.Y. Co. Ct. 1940), *aff'd*, 36

In response to the takings issue claim, the court paid short shrift to the lessee's argument that there was a taking of property. While admitting that the loss to the plaintiff was great and substantial, and mindful of the *Pennsylvania Coal v. Mahon* aphorism that a regulation that goes too far is a taking, the court focused its analysis almost exclusively on the public's police power rights. Relying on *Hadachek*, a pre-*Mahon* case countenancing a substantial loss in property value after the regulation, the court basically ignored the takings claim, notwithstanding probative evidence that the land was of little value other than as a sand and gravel pit.

Finally the plaintiff made an equal protection claim based on the fact that a competitor, Livingston Rock, was allowed to extract sand and gravel from a 125 acre parcel contiguous to his. The Supreme Court deferred to the findings of fact of the trial court who had made an extensive on-site inspection of the premises and had concluded that there were substantial differences in terrain and degree of development between the two parcels. Because all zoning draws lines that may benefit one owner over another, merely alleging that a competitor might prosper is not sufficient under the equal protection clause.[38]

Notwithstanding the difficulty of making an equal protection claim, the Wisconsin Supreme Court in *Town of Caledonia v. Racine Limestone Co., Inc.*,[39] found discriminatory an ordinance that gave mining operators freedom to mine in industrial zones, but required them to get discretionary permits in agricultural zones. Without citation and over a stinging dissent by Justice Currie, the court basically second-guesses the line drawing done by the legislative body in having separate industrial and agricultural zones with different "of right" and discretionary permit

N.E.2d 644 (N.Y. 1941); Spencer-Sturla Co. v. City of Memphis, 290 S.W. 608 (Tenn. 1927). Davidson County v. Rogers, 198 S.W.2d 812 (Tenn. 1947) is a good example of the traditional hands-off approach which does not treat mining uses as requiring special protection. For a view that the fairly debatable test is not as deferential when it comes to interpreting zoning ordinances as they apply to nonconforming uses, *see* Gibbons & Reed Co. v. North Salt Lake City, 431 P.2d 559, 562 (Utah 1967).

38. 370 P.2d at 352. A similar argument was made in *Ex Parte* Hadacheck, 132 P. 584 (Cal. 191 3) where other brick kiln owners were allowed to extract the clay at the kiln site giving them an unbeatable competitive advantage over the plaintiff.

39. 63 N.W.2d 697 (Wis. 1954).

uses.[40] *Racine Limestone* is probably an anomaly which has not been widely followed or cited.

In addition to *Consolidated Rock*, another 1950's decision reaffirmed the power of a local governmental entity to totally prohibit mining activities under a typical zoning enabling statute. In *Valley View Village, Inc. v. Proffett*,[41] a sparsely settled rural community had adopted a zoning ordinance which zoned the entire community for single family residential use. Only 1000 persons resided in the community consisting of some 18 square miles of area. An owner of a 44-acre parcel leased it for quarrying purposes and received a two year permit in which to extract sand and gravel.[42] After the local government entity denied renewal of a permit, the owner challenged the zoning ordinance as being *ultra vires* because the enabling act allegedly did not authorize single-use zoning for an entire community. The Sixth Circuit, however, viewed the broad grant of power to local governments as entailing the power to have only a single-use zone for the entire area. The court noted that preservation of the residential character of a community is a valid and reasonable police power objective. The court did reserve for later litigation whether the ordinance as applied to the 44-acre tract was arbitrary and unreasonable.

A major exception to the approval of most zoning ordinances which restricted, if not prohibited, the use of land for mining operations was the Michigan Supreme Court decision in *Silva v. Township of Ada*.[43] The owners purchased 31 acres adjacent to their existing quarry intending to expand it. The 31 acres was in a residentially zoned district which prohibited mining operations. The Township refused to rezone the 31 acre tract to allow the expansion of the quarry. While reaffirming the general rules regarding judicial review of zoning or rezoning decisions, the court

40. 63 N.W.2d at 702-03 (Currie, J., dissenting). *See also* Meyers v. City of Minneapolis, 189 N.W. 709 (Minn. 1922) (permit requirement for quarrying valid); Davidson County v. Rogers, 198 S.W.2d 812 (Tenn. 1947) (rezoning prohibiting quarrying valid).

41. 221 F.2d 412 (6th Cir. 1955).

42. The opinion does not suggest the source of the Village's authority to grant a permit which was in clear violation of the zoning ordinance. The actions were apparently made by the zoning enforcement officer and the zoning board of appeals, so it could not have been a change in the zoning ordinance. *Id.* at 414.

43. 298 N.W.2d 838 (Mich. 1980), *rev'd*, 330 N.W.2d 663 (Mich. 1982), *on remand* 333 N.W.2d 584 (Mich. 1983). *See also* France Stone Co., Inc. v. Charter Township of Monroe, 802 F.Supp. 90 (E.D. Mich. 1992) (failure to rezone to allow mining violated substantive due process rights of the owner).

stated: "zoning which prevents the extraction of natural resources involves different considerations than zoning regulations in general. . ."[44] The court went on to apply the "very serious consequences" test which invalidates prohibitory ordinances unless the government can sustain the burden of proving that the particular mining activity will have very serious consequence on the surrounding land. Rejecting the *Hadachek* view as well that regulating processing is not the same as regulating extracting, the court in essence gave the mining industry a preferred status vis-a-vis all other uses.[45] Few states, if any, have gone so far in their protection of mining uses from local zoning ordinances.

A modern approach to dealing with zoning and rezoning decisions that prohibit mining activities on lands where valuable minerals are located is illustrated in *Pompa Construction Corp. v. City of Saratoga Springs*.[46] A 68-acre parcel of land was located between two existing stone quarries. Prior to 1971, quarrying was permitted as of right on the 68 acres. That year the City amended its Comprehensive Development Plan and zoning ordinance designating the 68-acre tract in a conservancy district. Permitted uses, which still required site plan review, included single family residential and farming, the remaining being largely nonremunerative in nature. Uses allowed after the issuance of a discretionary permit included cemeteries, private recreation facilities, cultural facilities and drive-in theaters. The purchase of most of the parcel for approximately $150,000 by the owners took place after the 1971 change was in effect. The owners brought a rezoning petition to the planning commission which recommended its adoption. The City Council chose to deny the rezoning request.

In reviewing the validity of the existing zoning, the court looked to see if the restrictions were consistent with the City's concerns as expressed in its comprehensive plan. The preservation of open space and discouraging premature development are clearly substantial public purposes which can be achieved through a zoning ordinance. If the owners were allowed to operate their quarry, the land would be forever committed to industrial uses, even where the City desired otherwise. The City did

44. 330 N.W.2d at 666 (citing North Muskegon v. Miller, 227 N.W. 743 (Mich. 1929)).

45. 330 N.W.2d at 666-67.

46. 706 F.2d 418 (2d Cir. 1983).

not violate the owners' substantive due process rights through the application of its conservancy district regulations.

The owners also brought a takings issue claim asserting that it would suffer a substantial loss if it was not allowed to quarry stone. The court noted that the raw land value was somewhere between the owners' estimate of $34,000 and other estimates ranging to $68,000. That did not take into account potential uses for agricultural or residential development. While the loss would be substantial, in the range of 50-66%, two factors militated against finding that a taking had occurred. The first was the fact that the purchase took place after the zoning ordinance prohibiting quarrying was in effect. The second was that the Supreme Court had found similar, if not greater losses acceptable in *Euclid* and *Hadachek.*

One issue that might arise in a zoning ordinance is whether it covers sub-surface mining activities. In *Certain-Teed Products Corp. v. Paris Township*,[47] the owner of some deep-rock gypsum sought a declaratory judgment that the township zoning ordinance did not apply to his proposed shaft mining project. The zoning ordinance did not mention deep-rock mining as a use allowed as of right or by discretionary permit anywhere within the Township. The court concluded that from that absence could be inferred a total prohibition against such a use. The court went on to conclude that unless the Township could prove that there would be surface disturbing activities, a total prohibition against deep-rock mining would violate the takings clause under the *Penn Coal* rationale. The court concluded:

> It is probable that there are mining operations as remote in practical effect from surface uses sought to be regulated in a local zoning ordinance as is the flight of a satellite somewhere out in space. To the extent that plaintiff can effectively mine its gypsum without any interference of any kind with normal surface uses and living, we hold that any zoning prohibition would plainly be unconstitutional as not founded upon any public need.[48]

This conclusion that regulation of underground mining is beyond the scope of the police power, insofar as zoning regulation is concerned, is startling in that the federal and state governments have regulated underground mining for many years. Nonetheless, the court's view is that zoning is merely concerned with surface use. The court's decision is also remarkable because it found that the

47. 88 N.W.2d 705 (Mich. 1958).
48. 88 N.W.2d at 461-62.

Township's conclusion that there would be some surface impacts was wrong and had been effectively rebutted by plaintiff's experts who claimed that no subsidence would be caused by the mining operations.

Pennsylvania has a somewhat unique approach to zoning ordinances which exclude lawful uses.[49] While normally being very deferential in reviewing local zoning decisions, the court will view the ordinance with "particular circumspection" if the owner can show a total prohibition of a lawful use. The reasonableness that is presumed in line-drawing contests does not exist where a lawful use has been excluded, even if opportunities exist for locating that use in neighboring communities. In *Exton Quarries, Inc. v. Zoning Board of Adjustment*,[50] a zoning ordinance did not provide for quarrying activities in any zone. Exton had purchased a large tract with the intent of operating a quarry. The Township turned down the miner's request to operate the quarry. The Township interpreted its ordinances as prohibiting quarries. The Township was sparsely populated with a total population of 5000 residing in an area of approximately 14 square miles. The court's rationale was:

> [T]he constitutionality of total prohibitions of legitimate businesses cannot be premised on the fundamental reasonableness of allocating to each typeof activity a particular location in the community. We believe this is true despite the possible existence outside the municipality of sites on which the prohibited activity may be conducted . . . For these reasons, we believe that a zoning ordinance which totally excludes a particular business from an entire municipality must bear a more substantial relationshipto the public health, safety, morals and general welfare than an ordinance which merely confines that business to a certain area in the municipality.[51]

The court went on to suggest that special rules may need to be applied to mining activities because of the situs criteria emphasized in *Kelso* and ignored in *Consolidated Rock*.[52]

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49. Most of the early cases dealing with "exclusionary zoning" dealt with large lot residential zones which prevented low or moderate income housing from being located within the Township. *See, e.g.*, Nat'l Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965).

50. 228 A.2d 169 (Pa. 1967). *See also* Township of Paradise v. Mt. Airy Lodge, Inc., 449 A.2d 849 (Pa. Commw. Ct. 1982) (ban on shale excavation invalid).

51. 228 A.2d at 179.

52. The court referred to *Certain-Teed*, *supra* note 47, in support of special rules regarding mining operations.

Moore v. Memphis Stone & Gravel Co.,[53] addressed the issue of whether a use and occupancy permit gave the miner a vested right to continue mining after the area had been zoned into an agricultural zone where surface mining was prohibited.[54] States vary in what types of actions or permits are necessary to give the owner a vested right to continue operations under the rules in force at the time the action is taken or permit issued. Some states, such as California, have a late vested rights rule requiring the developer to get the last permit necessary in order to freeze the regulations.[55] Other states adopt an earlier vesting rule which focuses on the date the first permit is issued or even when the first permit application is filed.[56] Other states require both a permit and substantial expenditures made in reliance on that permit in order to attain a vested right.[57] Tennessee appears to follow this middle of the road approach to vested rights. A building or use permit, by itself is not sufficient to create a vested right. A permit authorizing the erection or alteration of a structure accompanied by actions in reliance on that permit by the owner create a vested right. Here, the permit on its face did not grant any right to use the premises in a manner prohibited by the zoning ordinance. Thus, the use permit did not give rise to a vested right and the zoning ordinance change which prohibited mining would be enforced.

A problem that is common to both zoning district and nonconforming use provisions is the definition of an accessory use.[58]

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53. 339 S.W.2d 29 (Tenn. Ct. App. 1959).

54. Analogous problems also arise where local governments impose a moratorium on permit issuances or zoning change requests while an owner either has filed or is thinking about filing his application. Where the local government is authorized to impose the moratorium, it is usually free to change the rules regarding issuance of the permit at the end of the moratorium period. Nello L. Teer Co. v. Orange County, 810 F.Supp. 679 (M.D.N.C. 1992), *aff'd in part and rev'd in part*, 993 F.2d 1538 (4th Cir. 1993).

55. Avco Community Dev., Inc. v. South Coast Regional Comm'n, 553 P.2d 546 (Cal. 1974), *appeal dismissed*, 429 U.S. 1083 (1977); Aragon & McCoy v. Albuquerque Nat'l Bank, 659 P.2d 306 (N.M. 1983).

56. *See e.g.*, WMM Properties, Inc. v. Cobb County, 339 S.E.2d 252 (Ga. 1986); Gibson v. City of Oberlin, 167 N.E.2d 651 (Ohio 1960).

57. *See, e.g.*, Saur v. County Comm'rs, 525 P.2d 1175 (Colo. Ct. App. 1974) (not selected for official publication) (limestone quarry use could not be changed from as of right to discretionary permit); American Nat'l Bank & Trust Co. v. City of Chicago, 311 N.E.2d 325 (Ill. 1974).

58. See text accompanying notes 117-128 *infra* for a discussion of the problem as it relates to NCU's. *See also* Missoula County v. American Asphalt, Inc., 701 P.d 990 (Mont. 1985) (on-site gravel processing involving washing, crushing, screening and barching fell within the statutory definition of "complete use, development and

With quarrying operations, the major issue relates to whether processing facilities using the quarried material are accessory uses. In *Medusa Aggregates Co. v. City of Columbia*,[59] Medusa operated a quarry in an agricultural zone. They sought a building permit to construct a concrete plant and an asphalt plant on the premises. The local zoning official determined that such uses were not authorized in an agricultural zone and were not accessory uses to the permitted use of quarrying. The test is whether the use is "incident" to the allowed use. That was interpreted as being dependent on or accompanying something else of greater or principal importance. The local decision should not be overturned even if the court would have applied the definition differently. The local opposition to the permit did not disturb the rationality of the decision finding processing facilities as conveniences, not accessory uses.

On occasion, local governments may be supportive of mining operations by having a zone where such activities are allowed as of right. For example, Adams County, Colorado had a mineral conservation district specifically designed to protect the sand and gravel resources by restricting the number of structures that could be built in areas known to have valuable mineral deposits. The district only allowed farming, single family residences, horse and dog racetracks, greenhouses and some other non-intensive uses. An owner of land located within that district claimed that the restrictions violated his substantive due process rights. The Colorado Supreme Court, however, applying the classic deferential fairly debatable test found the mineral conservation zone valid.[60]

In reviewing zoning and rezoning decisions which limit mining operations, most courts have not singled out such operations for

recovery of mineral resource" so as to preempt local regulation). *Accord* Wilson v. Pencader Corp., 199 A.2d 326 (Del. 1964).

59. 882 S.W.2d 223 (Mo. Ct. App. 1994).

60. Famularo v. Bd. of County Comm'rs, 505 P.2d 958 (Colo.'1973). Owners of land who want to have their zoning classification changed to allow mining operations likewise have difficulty overturning governmental decisions not to rezone because of deferential judicial review. *See, e.g.*, Madis v. Higginson, 434 P.2d 705 (Colo. 1967) (refusal to rezone to agricultural from residential fairly debatable and therefore valid). *See also* Warner Co. v. Zoning Hearing Bd., 612 A.2d 578 (Pa. Commw. Ct. 1992) (quarry operator challenged the validity of an ordinance which created a quarrying district because of the allegedly onerous conditions placed upon quarry operators; the court held that certain aspects of the ordinance were preempted by the Noncoal Surface Mining Conservation and Reclamation Act but otherwise upheld the constitutionality of the ordinance).

special treatment, notwithstanding the fact that mining operations must take place where the minerals are located. Exclusion of mining operations from residential areas is universally accepted while exclusion from entire communities may be found wanting under a state's general policy that total exclusion of lawful uses does not serve the general welfare. In almost all of the zoning and rezoning cases, the courts have consistently applied the very deferential "fairly debatable" scope of judicial review which obviously benefits the governmental body in defending how it draws zoning district lines.

B. *Giving Local Officials Discretion - Community Resistance and Frontier Justice*

1. Conditional Use Permits - Special Use Permits - Special Exceptions

The owner of any NIMBY is always troubled by the impact that community opposition may have on decision-makers who have the power to grant or deny a discretionary permit. Whether the permit is called a special exception, a conditional use permit or a special use permit, almost all modern zoning ordinances employ some mechanism designed to give the local government a final say over whether a particular use may be located within a district. In many instances, the zoning ordinance specifically empowers the permit issuer to impose additional conditions on the landowner.[61] These permits are oftentimes issued by the Board of Adjustment or Zoning Board of Appeals or Zoning Board of Adjustment, which are usually composed of citizens/laypersons. Some zoning ordinances may reserve the power to issue such discretionary permits to the local legislative body. In either event, an unpopular use, such as a mining operation, is likely to engender substantial public participation in the hearing or hearings held prior to the issuance of these discretionary permits. The scope of judicial review of these permits may be critical as a means of "reigning in" the opposition to the NIMBY and seeing that the provisions of the zoning ordinance are properly implemented.

61. Souza v. County of Hawaii, 694 F.Supp. 738 (D. Haw. 1988) (the holder of a discretionary permit brought a Section 1983 civil rights claim against the County after a County official sought to impose a condition on the operation of a sand and gravel pit which was not specifically included in the permit and the court found that the condition was illegally imposed, but that the county was at most negligent and therefore not liable under Section 1983).

A recent decision of the Wisconsin Supreme Court raises many of the issues likely to arise where the mining operator has to seek a discretionary permit in order to operate his mine. In *Edward Kraemer & Sons, Inc. v. Sauk County Board of Adjustment*,[62] the County zoning ordinance required mineral extractors to get a special exception permit to operate in an agricultural zone. Kraemer owned a 40-acre parcel upon which he planned to extract some minerals. The ordinance contained a purpose clause which stated that "the wise use of the county's resources" was a primary objective. The ordinance provided for special exceptions where the activities were consistent with the general purposes of the ordinance and met such other conditions as were stated in the ordinance. The ordinance stated in pertinent part:

> 1. . . . In order to grant a special exception permit, the board must find:(a) That mineral extraction and or processing is an appropriate land use at the site in question, based upon consideration of such factors as:(i) existence of mineral deposits; and(ii) proximity of the site to transportation facilities and to market areas; and(iii) ability of the operation, as described in the proposed operations plan, to avoid harm to the public health, safety and welfare and to the legitimate interests of nearby parties.[63]

The ordinance further authorized the Board to impose such conditions as are necessary to satisfy the standards contained in the ordinance. All of these provisions are standard for a discretionary permit scheme.

In January 1990, Kraemer sought his special exception permit. After a hearing, the Board granted the permit with several attached conditions. The Board had to hold a second hearing, however, because of a defect in the notice for the initial hearing. At the second hearing, the public opposed the proposed quarry because it threatened to destroy the scenic and historic qualities of Baraboo Bluff, a land formation containing large amounts of quartzite. At the hearing, Kraemer stated a willingness to grant a scenic easement to protect the east bluff, but did not propose a formal transfer. In March 1990, the Board unanimously denied the permit application, noting that the substantial desecration of a portion of the bluffs would not be wise use of the county's re-

62. 515 N.W.2d 256 (Wis. 1994).

63. 515 N.W.2d at 260. In addition, the ordinance contained some general conditions relating to the desirability of the proposed use from a public interest standpoint considering such factors as smoke, dust, noise, traffic and other noxious externalities. *Id.* at 259. *See also* Marriott v. City of Dallas, 644 S.W.2d 469 (Tex. 1983).

sources. The Board's denial was provisional in that Kraemer was given an opportunity to revise his operations plan in a manner which would implement his promise to protect the bluffs. Kraemer refused the invitation to revise his plan and instead sought judicial review of the Board's denial decision.

An initial question that arises when a court reviews a decision of an administrative body is whether the court's review is limited to the record made during the administrative hearings. Many jurisdictions, including Wisconsin, limit judicial review to the record, thereby not entitling the parties to try the issue de novo. The presumption of validity that attaches to local legislative action also attaches to administrative agency decisions.

In attacking the Board's decision to deny the discretionary permit, Kraemer asserted that the decision was *ultra vires* because the Board took into consideration factors that it was not authorized to consider. The principal argument was that the Board could consider only the specifically listed factors in the ordinance and not such matters as community opposition and landmark preservation. The Wisconsin Supreme Court did not treat the Board's powers as being so narrowly prescribed for several reasons, the most important of which was the avoidance of harm to the public health, safety and welfare. This is a common feature in many zoning ordinances' discretionary permit provisions. It is intentionally included in what may be a laundry list of performance standards because the basic purpose of imposing a discretionary permit requirement is to give the decision-maker power to protect the area being affected by the proposed use. That standard clearly encompasses consideration of community feelings, community impact and landmark or historic preservation concerns. In addition, discretionary permits are to be issued in accordance with the purposes of the zoning ordinance which includes "the wise use of the county's resources." Protecting the scenic and historic bluffs clearly falls within that purpose.

The court further concluded that the adoption of generalized standards is an accepted and constitutional methodology in discretionary permit procedures. It is not an unconstitutional delegation of power from the legislative body to the administrative body. Requiring the board to provide for the wise use of county's resources or protecting the public health, safety, morals

or general welfare does not impermissibly delegate legislative authority.[64]

The owner was not left without any hope of getting a discretionary permit. The County had conditionally denied the permit pending the owner's implementation of a general promise to protect the bluffs. As part of its power to impose conditions on the discretionary permit, the County was free to approve a permit with such conditions as were mutually acceptable to it and the owner regarding the necessary steps to protect the scenic and landmark resource.

While general standards are sufficient, a total lack of standards to govern the administrative official or body in the issuance of a discretionary permit has been found invalid. Thus, in *Lyon Sand & Gravel Co. v. City of Oakland*,[65] the court invalidated an ordinance containing no standards for the issuance of a commercial mining permit that was required prior to any quarrying activities.[66]

In reviewing the approval or denial of discretionary permits, courts must have a record to review. This is especially true where the ordinance lists various findings that must be made before a discretionary permit may be issued.[67] Mere statements by the administrative agency that the permit was denied because of public opposition or public policy will not be sufficient.[68] As the Minnesota Supreme Court has stated, the agency must provide the court with more than a list of sources of information. While formal findings of fact are not required, but desired, the agency must do more than record in a conclusory fashion the reasons for denying the permit. Courts take to task agencies which have mandatory findings or factors they must consider pursuant

64. *See also* Smith v. City of Brookfield, 74 N.W.2d 770 (Wis. 1956) where the court upheld such a broad delegation as it applied to the issuance of discretionary permits for sand and gravel pits. Some cases, however, have overturned discretionary permit decisions where there were only the most general of standards. Andrews v. Bd. of Supervisors, 107 S.E.2d 445 (Va. 1959).

65. 190 N.W.2d 354 (Mich. Ct. App. 1971).

66. *See also* City of Warwick v. Del Bonis Sand & Gravel Co., 209 A.2d 227 (R.I. 1965).

67. An example of such an ordinance is given in Earthburners, Inc. v. County of Carlton, 513 N.W.2d 460, 462 (Minn. 1994). *See also* Rural Area Concerned Citizens, Inc. v. Fayette County Zoning Hearing Bd., 646 A.2d 717, 722-23 (Pa. Commw. Ct. 1994).

68. *Earthburners*, 513 N.W.2d 460, describes a typical NIMBY situation where a hearing was packed with citizens opposing the issuance of a discretionary permit to a business seeking to convert an old quarry site to a facility to burn soil in order to remove the contaminants.

to an ordinance or statute but where there is no effort to formalize the reasons for decision.[69]

Where a party challenges a decision of an administrative agency that has either approved or denied a discretionary permit, the typical scope of judicial review utilizes the substantial evidence test.[70] As stated recently by the Pennsylvania Commonwealth Court:

> In a zoning appeal, where the trial court has not taken additional evidence, appellate review is limited to a determination of whether the ZHB [Zoning Hearing Board] committed an abuse of discretion or an error of law, and a reviewing court may not disturb the findings of the ZHB if the record indicates that its findings are supported by substantial evidence.[citation omitted] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[71]

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69. *Earthburners*, 513 N.W.2d at 462-63. For an example of a clear articulation of findings and reasons for a permit denial see South Anchorage Concerned Coalition, Inc. v. Coffey, 862 P.2d 168 (Alaska 1993). *See also* Southern Rock Products Co. v. Bd. of Zoning Adjustment, 210 So.2d 419 (Ala. 1968); Barton Contracting Co. v. City of Afton, 268 N.W.2d 712 (Minn. 1978).

70. This contrasts with the more deferential scope of judicial review given legislative decisions such as zoning and rezoning ordinances. *See supra* text accompanying notes 9-10. *See also* Barnes v. Bd. of Supervisors, 533 So.2d 508 (Miss. 1989), where the Mississippi Supreme Court clearly distinguishes between the "fairly debatable" rule for reviewing legislative actions and the substantial evidence test for reviewing adjudicatory permit decisions. For other cases distinguishing legislative versus adjudicatory zoning decisions, see Arnel Dev. Co. v. City of Costa Mesa, 620 P.2d 565, 568 (Cal. 1980); Bauer v. City of Wheat Ridge, 513 P.2d 203 (Colo. 1973); Humble Oil & Refining Co. v. Board of Alderman, 202 S.E.2d 129 (N.C. 1974); Fasano v. Bd. of County Comm'rs, 507 P.2d 23 (Or. 1973), *overruled*, Norvell v. Portland Metro. Area Local Gov't. Boundary Comm'n, 604 P.2d 896 (Or. Ct. App. 1979). Another issue that may arise is the usually very short time period in which to appeal a zoning decision. *See, e.g.*, Nello L. Teer Co. v. Orange County, 810 F.Supp. 679 (M.D. N.C. 1992), *aff'd in part and rev'd in part*, 993 F.2d 1538 (4th Cir. 1993), *without op.*

71. Rural Area Concerned Citizens, Inc. v. Fayette County Zoning Hearing Bd., 646 A.2d 717 (Pa. Commw. Ct. 1994) (hereinafter "*RACC*"). This case involved a discretionary permit to operate a limestone quarry on lands located within an agricultural zone. *See also* Southern Rock Products Co. v. Bd. of Zoning Adjustment, 210 So.2d 419 (Ala. 1968) (substantial evidence supporting denial of rock quarry permit due to noise, vibration and dust externalities); South Anchorage Concerned Coalition, Inc. v. Coffey, 862 P.2d 168 (Alaska 1993) (substantial evidence supported Board's decision not to grant discretionary permit for sand and gravel extraction); Cherokee Crushed Stone, Inc. v. City of Miramar, 421 So.2d 684 (Fla. Dist. Ct. App. 1982) (substantial evidence test used to review denial of permit for quarry); Barnes v. Bd. of Supervisors, 553 So.2d 508 (Miss. 1989). For a case finding that a discretionary permit was arbitrarily withheld, see Certain-Teed Products Corp. v. Paris Township, 88 N.W.2d 705 (Mich. 1958). *See also* Wheeler v. Gregg, 90 203 P.2d 37 (Cal. 1949) (applying a very deferential scope of judicial review to the board decision to grant a discretionary permit for a quarry brought by several neighbors who opposed the use).

In a number of jurisdictions, the applicant has the initial burden of producing evidence at a discretionary permit hearing to show that the proposed use complies with the specific and general performance standards contained in the ordinance.[72] Likewise, once the applicant satisfies that burden of producing evidence, the burden shifts to the opponents or the government to show that the issuance of the permit will not serve the public interest. Mere speculation about adverse impacts will not be sufficient.[73]

In a reasonably rare case overturning a local decision not to reissue a discretionary permit, the federal district court in *Sternaman v. County of McHenry*,[74] found such a denial arbitrary and capricious. While noting that there is a presumption of validity and a heavy burden of proof on the plaintiff, the court was swayed by the Illinois approach of scrutinizing zoning decisions that prohibit the most beneficial use of land.[75] The key issue for the court was the fact that the plaintiff had a right to extract the sand and gravel. The discretionary permit covered only on-site processing facilities. Because Illinois treats these zoning decisions as legislative in nature, no findings of fact were required. But because the permit applicant had made a prima facie showing that the decision was arbitrary or capricious, the burden of producing evidence as to the reasonableness of the decision shifted to the government. Here, the court found no evidence

72. 646 A.2d at 721-22.

73. *Id.* at 722-23. *RAAC* also raises interesting procedural issues that are beyond the scope of this paper because they are very state or ordinance-specific. State statutes or local ordinances may provide for the designation of alternate members of an administrative board. Obviously the procedures for selecting and appointing alternates must be followed if the proceedings are going to be valid. *Id.* at 724-25. In RAAC the challengers also asserted that the decision to approve must be overturned because two members of the board were seen to be sleeping during the hearing. Borrowing from prior rulings relating to sleeping jurors, the court concluded that the "mere appearance of dozing may not be taken as a clear indication that an individual is asleep, and is missing relevant testimony." *Id.* at 725-26. (The author hopes other courts would not be so unrealistic and require that citizens serving on boards issuing discretionary permits must at a minimum be awake during the hearing.) Other procedural issues including what constitutes the minimum process due under the procedural arm of the due process clause are also dependent on whether the court characterizes the discretionary permit proceeding as legislative or adjudicatory. *See generally* Barton Contracting Co. v. City of Afton, 268 N.W.2d 712 (Minn. 1978) (discussing the parameters of these procedural due process rights).

74. 454 F. Supp. 240 (N.D. Ill. 1978).

75. La Salle Nat'l Bank v. County of Cook, 145 N.E.2d 65 (Ill. 1957) authorizes courts to engage in an extensive balancing of competing interests in determining whether a particular zoning ordinance or action is valid.

about the alleged externalities and then gave special weight to the fact that the parcel in question had a fairly unique type of sand deposit which greatly enhanced the value of the land.

A typical zoning ordinance which has a discretionary permit procedure undoubtedly includes therein a provision authorizing the local governmental unit to impose such conditions as are necessary to protect the public interest or the public health, safety, morals and general welfare. This power is freely exercised and designed to deal with the externalities caused by the uses which have to go through the discretionary permit procedure.[76] Illustrative of the types of conditions imposed upon mining operators are those found in *Barnes v. Board of Supervisors*.[77] In 1986, the County revised its zoning ordinance. A substantial portion of the county was rezoned from an agricultural district where mining was allowed as of right, to an agricultural/residential district, where mining was allowed only after applying for a discretionary permit. The owner of an existing quarry sought such a permit to relocate a processing facility and to extend the area where his quarrying activities could take place to an adjacent 80 acre parcel. Neighbors objected at the public hearing. The Board of Adjustment, however, approved the permit, but appended a list of 15 operating restrictions.[78] Among the conditions were setback requirements, a phased in expansion plan, limitation on hours of operation, creation of a grievance mechanism for damages caused by haul trucks, fencing and berm installation, and a drainage plan. Both parties appealed to the Board of Supervisors, which held a de novo hearing and amended one of the conditions, shortening the amount of setback required of the miner.

In reviewing the decision, the court was concerned, as was the Minnesota Supreme Court in *Earthburners*, regarding inadequate findings of fact. The government needed to show that it had considered the factors mandated by the ordinance. While no

76. A reasonably narrow interpretation of the power to impose conditions on discretionary permits was given by the Colorado Supreme Court in Western Paving Constr. Co. v. Bd. of Comm'rs, 506 P.2d 1230 (Colo. 1973). The court said: "We do not interpret the zoning resolution as permitting the Commissioners to impose conditions and safeguards as intending to serve as grounds for denial of lawful use." *Id.* at 1231. The major purpose of having a discretionary permit requirement is to have the power to deny a permit unless the special conditions are complied with in order to minimize the externalities caused by the use being subjected to the discretionary permit procedure. *But cf.*, C & M Sand & Gravel v. Bd. of County Comm'rs, 673 P.2d 1013 (Colo. Ct. App. 1988).

77. 553 So.2d 508 (Miss. 1989).

78. *See id.* at 512-13 for entire list.

formal findings were made in this case, the court in reviewing the record found ample support for the issuance of the permit in accordance with the terms of the ordinance. Here, the neighbors could not sustain their burden of proof that the issuance of the permit with the stated conditions was not supported by substantial evidence in the record.

Conditions can be imposed that limit the length of time that the quarrying activities may be conducted. They are similar to amortization periods for non-conforming uses which are widely accepted as not constituting a violation of the takings clause.[79] Thus, a discretionary permit which required the mining operation to cease after five years was upheld notwithstanding the operator's unchallenged assertion that he could not produce all of the sand and gravel located on his land in that period of time.[80]

Mining operations fit the traditional category of uses that require a discretionary permit. They tend to have more externalities than many uses, but are nonetheless a legitimate business which should be accommodated within any governmental unit. As with rezoning decisions, courts have not carved out any special rules relating to the issuance or denial of these discretionary permit merely because a mining operation is involved. Thus, review is under some variation of the substantial evidence test and the sub-state unit is normally free to impose conditions on the issuance of the permit.

2. Variances

Not many cases deal with mining operations and variances, perhaps because the NIMBY status of such operations make it unlikely that a variance would be granted. In *Bernstein v. Smutz*,[81] however, a mineral owner sought a variance from an ordinance limiting to one the number of oil wells that could be drilled within the City. The City had refused to consider the variance application even though the mineral owner complained that the one acre/well limitations prevented him from drilling an offset well to prevent drainage to an adjacent parcel. Because the

79. One of the leading amortization cases is City of Los Angeles v. Gage, 274 P.2d 34 (Cal. Ct. App. 1954) which upheld a five year period for a plumbing supply business. Municipalities have been especially aggressive in applying short amortization periods for adult entertainment facilities and billboards. *See* cases cited *infra* note 101.

80. Whittaker & Gooding Co. v. Scio Township, 332 N.W.2d 527 (Mich. Ct. App. 1983).

81. 188 P.2d 48 (Cal. Dist. Ct. App. 1947).

allegations raised takings issues, the variance mechanism should have been applied.

In *Dade County v. Florida Mining & Materials Corp.*,[82] the court appears to apply a deferential scope of review of the denial of a variance, but actually substitutes its judgment for that of the legislative body.[83] In *Florida Mining*, the quarry was located in an environmentally sensitive zone. An adjacent parcel, however, was being mined for aggregate with County permission. Although applying a combination of the fairly debatable and substantial evidence test, the court found insufficient evidence to support the denial, holding that the present zoning was arbitrary and confiscatory. The court deemed the denial of a beneficial use of property unconstitutional, although there was no evidence that the land's sole use would be mining.

The issue of whether a board of appeals had the power to issue a variance to allow sand and gravel extraction operations was found to be moot by the Colorado Supreme Court. There, the local governmental body amended the zoning ordinance and placed the area in question in a zone where extraction operations could be carried out if a conditional use permit was sought.[84] Since the validity of the permit issued under the prior ordinance no longer affected the validity of the mining operations, whether the board acted *ultra vires* in the issuance of the permit was no longer relevant.

A recurrent theme in the law relating to variances is what is sufficient to constitute unnecessary hardship, a near-universal statutory or ordinance requirement. What may be critical in many cases is whether the party seeking the variance knew, or should have known, about the nature of the restrictions when the land was purchased or other expenditures made.[85] Another important factor will be the perceived externalities of the proposed use and its impact on neighboring property values. In most in-

82. 364 So. 2d 31 (Fla. Dist. Ct. App. 1978) *cert. denied*, 372 So. 2d 467 (Fla. 1979).

83. The quarry operator was seeking an unusual use permit, a specialized type of discretionary permit, and a variance because quarrying was not an allowed use under the comprehensive plan. The court noted that only the discretionary permit need be attained because operations in violation of the plan were not enforceable. 364 So. 2d at 34.

84. Bd. of Adjustment v. Iwerks, 316 P.2d 573 (Colo. 1957).

85. Thompson, Weinman & Co. v. Bd. of Adjustment, 154 So. 2d 36 (Ala. 1963) (denying a variance to operate a marble quarry). A number of cases have dealt with the denial of a variance to drill an additional well within city limits. *See, e.g.*, Thompson v. Phillips Petroleum Co., 147 P.2d 451 (Okla. 1944); Van Meter v. H.F. Wilcox Oil & Gas Co., 41 P.2d 904 (Okla. 1935).

stances, courts will defer to the decision of the board of adjustment regardless of whether they grant or deny the variance request.[86]

III.

THE NON-CONFORMING USE - WHERE THE PAST MEETS THE PRESENT AND INTRODUCES THE FUTURE

A. *Some Basic Principles*

Attempts by local governments to restrict and stop NCU's takes many forms. One such method which is almost universally invalidated is to restrict the NCU to its present owner. This runs afoul of one of the basic tenets of zoning law: zoning regulates land use, not landowners. Thus, a purchaser of a mining operation which has become a NCU cannot have that NCU status changed merely because there has been a change in ownership.[87]

In many NCU cases, two important and conflicting policies influence a court's analysis of any particular factual situation. The first is that NCU's are to be restricted to the greatest extent possible because they are inconsistent with the zoning and land use regulatory programs.[88] The other important policy is the freedom to own and utilize property in a lawful manner.[89]

The protection of NCU's in zoning ordinances is not constitutionally compelled under all circumstances. While it is now widespread practice for zoning ordinances to "protect" NCU's from the application of the zoning ordinance, it is also possible to amortize or terminate NCU's if, on the individual facts, it would not constitute a taking of property. The California Supreme Court in *Livingston Rock & Gravel Co. v. County of Los Angeles*,[90] upheld the general validity of a zoning ordinance which created an amortization period of 20 years for all NCU's and further authorized the County to terminate other NCU's earlier should termination not violate the constitutional rights of the NCU

86. *Thompson, Weinman & Co.*, 154 So. 2d at 39 (refusing to overturn trial court's decision affirming the denial of a variance when trial court's findings were not "plainly and palpably erroneous").

87. *See, e.g.*, Faircloth v. Lyles, 592 So. 2d 941 (Miss. 1991) (applying rule to sand and gravel operation). *See also* ROBERT ANDERSON, 1 AMERICAN LAW OF ZONING § 6.40 (3d ed. 1986).

88. *See generally* Arundel Corp. v. Bd. of Zoning Appeals, 257 A.2d 142, 145-46 (Md. 1969).

89. *See, e.g., Ex parte* Kelso, 82 P. 241 (Cal. 1905).

90. 272 P.2d 4 (Cal. 1954).

owner. An owner of a sand and gravel excavation and processing operation had the land rezoned making such activities nonconforming. Within a year of the rezoning, a hearing was held seeking to terminate the NCU immediately. Instead of appealing the Planning Commission's decision to terminate the NCU the owner sought an injunction against the County from interfering with his business. The court concluded that the ordinance was not per se unconstitutional through its procedures to terminate NCU's. The owner had an adequate remedy at law to challenge the Planning Commission's decision as an as applied taking. Thus, injunctive or declaratory relief was unavailable. The police power could not be restricted so as to leave NCU's alone unless the owner could prove an unconstitutional application of the ordinance.[91]

B. *The Establishment of a NCU*

Before a land use can attain the status of a NCU, the use must be "established" prior to the enactment of the zoning ordinance which prohibits such use. Factual issues can arise in all situations regarding the establishment of NCU's. However, due to the nature of mining or quarrying activities, courts face difficult issues because the use may not have been continuous prior to the enactment of the ordinance.[92]

In *Pederson v. County of Ormsby*[93], the Nevada Supreme Court was faced with such an issue. The landowner claimed that when the zoning ordinance was adopted in 1961, he was already quarrying sand and gravel from the parcel. The parties had agreed that between 1961 and 1968 the owner had extracted sand and gravel notwithstanding the prohibition against such activities by the 1961 zoning ordinance. Faced with conflicting evidence presented by the parties, the trial court found that the use had not been established. Regarding the issue of establishment of use as a question of fact, the Nevada Supreme Court treated the trial court's factual determinations with extreme deference. The

91. This holding is consistent with the view that NCU's may be terminated after a reasonable amortization period. *See infra* note 102 and accompanying text.

92. It is clear, however, that merely intending to extract sand and gravel rather than the actual extraction of sand and gravel is required. In *Arundel Corp.*, the court found that when the 1948 zoning ordinance was enacted, quarrying operations were prohibited and that no quarrying actually took place until 1953 even though the lands were purchased prior to 1948 with the intention that sand and gravel be extracted. 257 A.2d at 145.

93. 478 P.2d 152 (Nev. 1970).

court found existing evidence of the owner's intent to operate a commercial quarry on the site insufficient to establish a use. Actual use of the land, which in this context means physical removal of the sand and gravel, must take place prior to the enactment of the zoning ordinance in order for the use to be considered nonconforming.[94]

In contrast, the Oregon Supreme Court in *Polk County v. Martin*,[95] upheld a trial court's finding that a NCU for quarrying was established even though there were no sales from the parcel for 14 of the 31 years prior to the zone change making quarrying a NCU. The nature of the quarrying business was a sufficient explanation as to the lack of continuous sales.[96] Quoting an earlier opinion, the court stated:

> [Q]uarry operations are by their nature sporadic, and a discontinuance or abandonment cannot be inferred from the mere fact blasting and crushing cease. . . or from fluctuation in the volume of extractions or sales. . .[97]

Furthermore, under the statutory language, the key issue was not continuous pre-ordinance use, but the existence of a lawful use at the time the ordinance became effective. The lack of major capital improvements was also irrelevant to the existence of a lawful use. An owner's choice to lease his quarry to others, rather than invest in the equipment needed to produce the stone, should not affect his NCU status.

If an ordinance specifically grandfathers pre-existing commercial mineral extraction operations if they were valid NCU's or holders of a discretionary permit at the time the ordinance was enacted, the NCU owner must still prove that the NCU was established. The Alaska Supreme Court in *Spendlove v.*

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94. The court also found that the quarrying activities that had taken place were on a 1 acre parcel which the owner had sold to another. Without discussing the extension issue, the court simply concluded that those activities would not govern the establishment of a use on the 4 acre parcel still owned by the miner. 478 P.2d at 153.

95. 636 P.2d 952 (Or. 1981). *See also* County of DuPage v. Gary-Wheaton Bank, 192 N.E.2d 311 (Ill. App. Ct. 1963) where the court gave preferential treatment to mineral extraction activities so as to find a NCU established where the mining operator had engaged in one day's work prior to the enactment of the zoning ordinance. Other cases have given prior work similar preferential treatment. *See* Fredal v. Forster, 156 N.W.2d 606 (Mich. Ct. App. 1967).

96. The court was applying an Oregon statute allowing the "lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance," to be continued. 636 P.2d at 956 (*citing* OR. REV. STAT. § 215.130(5) (1979)).

97. 636 P.2d at 957 (*citing* Lane County v. Bessett, 612 P.2d 297, 301 (Or. Ct. App. 1980)).

Anchorage Municipal Zoning Board of Examiners and Appeals,[98] adopted the "substantial use" test to determine whether, in fact, the owner had established such a NCU and was entitled to continue such operations. There was substantial evidence in the record supporting the Board's finding that the use was sporadic and insubstantial, and therefore not eligible for continued protection under the ordinance.

Because mining operations may not be as continuous as other commercial enterprises, the factual issue of whether such an operation has been established as a NCU is often hard to resolve. Several courts, however, have eased the burden on mining operators by adopting a "substantial use" test which takes into consideration the often sporadic nature of the extractive industry. Even if sporadic, actual mining operations must have taken place sometime prior to the adoption of the land use ordinance which otherwise prohibits such activities.

C. *The Ability to Expand or Change Non-Conforming Uses*

1. The Traditional Approach

One of the hallmarks of the regulation of NCU's is that the use may not be changed or expanded. Typically, by the terms of the ordinance, but sometimes by statute,[99] NCU's are prohibited from either expanding or changing their NCU, except to change from a non-conforming use to a conforming use.[100] Special factors, however, apply to the typical mining or extractive NCU which create unique problems not usually present in the typical NCU case.

It is also important in dealing with NCU's to look carefully at the language of the zoning ordinance. Older ordinances may only regulate NCU's which are discontinued. Other zoning ordinances may contain general prohibitions against changes in use or expansion of uses. Other NCU provisions ordinarily prohibit owners of NCU's from rebuilding or reconstructing a non-conforming structure should it be destroyed, totally or partially, by a natural or man-made catastrophe. Newer ordinances, on the other hand, may be quite specific in terms of providing perform-

98. 695 P.2d 1074 (Alaska), *appeal dismissed*, 474 U.S. 895 (1985).

99. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-462.02 (1990); MASS. ANN. LAWS ch. 40A, § 6,9 (Law. Co-op. 1983).

100. *See, e.g.*, Baxter v. City of Preston, 768 P.2d 1340, 1342 (Idaho 1989). Nonconforming use litigation is often digested in the American Law Reports; *see* 61 A.L.R.4th 902 (1988); 61 A.L.R.4th 724 (1988); 56 A.L.R.4th 769 (1987).

ance standards regarding expansions and alterations. Likewise, they may have amortization periods after which the use must cease.[101]

Several early cases using traditional NCU terminology tried to deal with the typical NCU problem that a mining use almost always is expanding the area that is being mined. For example, in *Borough of Cheswick v. Bechman*,[102] the Borough's zoning ordinance prohibited the removal of sand and loam from property owned by Bechman and leased to Bognar for that purpose. Loam and sand removal antedated the zoning ordinance by two years. At the time the ordinance was enacted, the trench was some four to six feet in depth and covered about three fourths of the 14 acres contained in the original tract. In determining that the trench could be deepened and expanded beyond the existing 14 acres, the court looked at two factors to determine if the preexisting use was "discontinued." These were the construction or adaptability of the building for the purpose being used and employment of the land within that purpose. The business being carried on when the ordinance was adopted was loam and sand removal. It did not have to utilize the entire tract in order to have it covered by the NCU provisions. Therefore, the removal business was being continued and could not be prohibited.[103]

But a number of courts from several different jurisdictions have applied the traditional strict application of NCU rules to deny the mineral extractor from expanding the mining to areas that had not already been mined at the time the use became nonconforming.[104] Typical of the language used is the following dis-

101. One area which local governments have been especially vigilant in applying amortization periods to terminate NCU's is the area of sexually-oriented businesses or adult entertainment facilities. *See, e.g.*, SDJ, Inc. v. City of Houston, 837 F.2d 1268 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989) (6-month period upheld); Castner v. City of Oakland, 180 Cal. Rptr. 682 (1982) (1-year period upheld); County of Cook v. Renaissance Arcade & Bookstore, 522 N.E.2d 73 (Ill. 1988).

102. 42 A.2d 60 (Pa. 1945).

103. *See also* Lamb v. McKee, 160 A. 563 (N.J. 1932) where the New Jersey Supreme Court found that an owner of a sand and gravel operation could expand his mining from the 1 acre actually being mined at the time the zoning ordinance was adopted to the entire 10 acre parcel which he had continuously owned. For a similar approach see DeFelice v. Zoning Bd. of Appeals, 32 A.2d 635 (Conn. 1943).

104. *See, e.g.*, Town of Billerica v. Quinn, 71 N.E.2d 235 (Mass. 1947); Town of Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243, *cert. denied*, Leithauser v. Hartford Fire Ins. Co., 326 U.S. 739 (1945); Struyk v. Samuel Braen's Sons, 85 A.2d 279 (N.J. Super. Ct. App. Div. 1951), *aff'd*, 88 A.2d 201 (N.J. 1952); People v. Gerus, 19 Misc. 2d 389, 69 N.Y.S.2d 283 (1942); People *ex rel.* Ventres v. Walsh, 121 Misc. 494, 201 N.Y.S. 226 (1923); Davis v. Miller, 126 N.E.2d 49 (Ohio 1955).

cussion by the Massachusetts Supreme Judicial Court, which upheld an injunction against the further taking of topsoil from lands not being stripped at the time the ordinance prohibiting that activity was enacted:

> It does not necessarily follow . . . that an existing use for the operation of a stone quarry, . . . can never be continued by increasing the area of excavation after the passage of a zoning ordinance . . . . It is conceivable that a larger area than that previously excavated may have been devoted to the use by actual occupation of the land in a manner physically appropriating it to the use, as for example by means of structures, use for storage or ways, preparation of the ground, or even perhaps by fencing off the portion to be used, if the fencing had particular relation to the use . . . . The mere intention to strip the remainder of the land did not amount to an existing use of it.[105]

Under traditional NCU doctrine, NCU's may not be expanded, enlarged or changed. Courts which adopt the traditional terminology tend to find that mining operations cannot be extended beyond the area actually being mined at the time the regulatory ordinance becomes effective. No special rules are applied even though the mining NCU is different than the typical NCU occupying a building. This approach clearly limits mining operations and effectively terminates the NCU within a relatively short period of time.

2. The Diminishing Asset Doctrine

Because of the unique characteristics of the hardrock mineral extraction business a number of courts have applied the diminishing assets doctrine to judge whether or not an extractive business which is an NCU can expand the physical area that is being mined. The rationale for this rule is best explained by the Illinois Supreme Court which concluded:

> In a quarrying business the land itself is a material or resource. It constitutes a diminishing asset and is consumed in the very process of use. Under such facts the ordinary concept of use, as applied in determining the existence of a nonconforming use, must yield to the realities of the business in question and the nature of its opera-

105. *Town of Billerica*, 71 N.E.2d at 236 (citations omitted). In People v. Gerus, 69 N.Y.S.2d 283 (1942), the court stated: "I cannot accede to the argument that a person owning, for example, one hundred acres of land, who is engaged in excavating sand therefrom as a business at the time of the enactment of the zoning ordinance placing his property in a residential zone, may, nevertheless, continue to extend that operation to the entire one hundred acres." 69 N.Y.S.2d at 288.

> tions. We think that in cases of a dminishing asset the enterprise is 'using' all that land which contains the particular asset and which constitutes an integral part of the operation, notwithstanding the fact that a particular portion may not yet be under actual excavation. It is in the very nature of such business that reserve areas be maintained which are left vacant or devoted to incidental uses until they are needed. Obviously it cannot operate over an entire tract at once.[106]

One of the earliest cases applying the diminished asset doctrine, although not naming it as such, was *McCaslin v. City of Monterey Park*.[107] *McCaslin* is typical of the hostile treatment that the mineral extraction industry faces from local governments. The operator owned about 70 acres of land that had been used since 1944 for the mining of decomposed granite. The tract was on the edge of the city and when established was surrounded by vacant land. By 1950, a residential area had developed on the west boundary of the parcel, but the remaining adjacent uses were such as not to be affected by the granite removal business.[108] In 1938, the City adopted a comprehensive zoning ordinance which classified the McCaslin parcel as residential/ agricultural. In 1944, a lessee of McCaslin received a variance in order to extract granite. In 1945, the zoning ordinance was comprehensively revised, but the McCaslin parcel remained in the residential/agricultural district which did not allow granite extraction. In 1947, as part of a deal to get the local electrical utility to build some facilities within the City, the zoning ordinance was amended so that most of the McCaslin parcel was zoned in an industrial district. Shortly thereafter, the zoning ordinance was amended to specifically limit the operation of quarries to daylight hours only and not on Sundays at all.

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106. County of Du Page v. Elmhurst-Chicago Stone Co., 165 N.E.2d 310, 313 (Ill. 1960). For other cases embracing the diminished assets doctrine see Stephen & Sons v. Municipality of Anchorage Zoning Bd. of Examiners & Appeals, 685 P.2d 98 (Alaska 1984), discussed at text accompanying *infra* notes 112-114; McCaslin v. City of Monterey Park, 329 P.2d 522 (Cal. Ct. App. 1958) discussed at text accompanying *infra* notes 107-111; Hawkins v. Talbot, 80 N.W.2d 863 (Minn. 1957); Moore v. Bridgewater Township, 173 A.2d 430 (N.J. Super. Ct. App. Div. 1961); Syracuse Aggregate Corp. v. Weise, 414 N.E.2d 651 (N.Y. 1980); State *ex rel.* Union Limestone v. Bumgarner, 168 N.E.2d 901 (Ohio Ct. App. 1959); Gibbons & Reed Co. v. North Salt Lake City, 431 P.2d 559 (Utah 1967).

107. 329 P.2d 522 (Cal. Ct. App. 1958).

108. These uses included an electrical substation, garbage dump, gravel pit and cemetery. 329 P.2d at 523.

In 1950, the City again comprehensively revised its zoning ordinance and totally eliminated the industrial category, replacing it with a light manufacturing district. There were several provisions of the ordinance which directly affected the McCaslin granite operation. Non-conforming buildings were limited to their useful life, but in no event, longer than 20 years from the date of their original construction. Non-conforming uses could not continue for more than 2 additional years. No NCU could be "expanded or extended" on the same property. Finally, all activities involving the production and development of natural resources had to receive a special use permit in order to continue.

In 1954, McCaslin applied for a special use permit which was denied. Notwithstanding the denial and the 4 year period in which no permit was sought, McCaslin did receive a business license from the City for the operation of his granite extraction business. In 1956, the City adopted an ordinance specifically aimed at the extractive industry which prohibited the expansion or extension of any NCU, limited the issuance of special use permits to the manufacturing districts only and labeled any mining operation in any other zone a public nuisance. This caused McCaslin's operations to be deemed a public nuisance if extraction continued 60 days after enactment of the ordinance.

Insofar as the 1950 and 1956 ordinances were concerned, the extraction of granite was a valid NCU. Under California law, the owner of a NCU has a right to continue that use unless it would constitute a public nuisance.[109] The imposition of the special use permit requirement in the 1950 ordinance could not apply to the extraction of granite since the mine had been in continuous operation since 1944.

On the area to be mined issue, the court emphasized that the "very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land as a whole, without limitation or restriction to the immediate area excavated at the time the ordinance was passed."[110] The owner was entitled to extract granite from the entire 70-acre parcel even though at the time of the enactment of the ordinance making the use nonconforming only a small portion of the parcel had actually been excavated. This would not normally be the case with a typical NCU or non-conforming building which would not be allowed to

109. *See, e.g.*, Livingston Rock & Gravel Co. v. County of Los Angeles, 272 P.2d 4 (Cal. 1954).

110. 329 P.2d at 527.

expand in area or by additional building space even if the use remained the same.[111]

The California Supreme Court revisited the issue of the application and scope of the diminishing assets doctrine in *Hansen Brothers Enterprises v. Board of Supervisors*.[112] The mining operations in question antedated the adoption of the County ordinance in 1954 which forbids continuation of a NCU if it ceases operation for a period in excess of 180 days.[113] The evidence showed that while there was continuous activity for over fifty years, there were periods of inactivity that exceeded ten days following the 1954 enactment of the County's zoning ordinance which made the mining operation a NCU.[114] The mining operators owned a series of parcels adding up to some sixty-seven acres. The tract straddles a river, from which sand and gravel had been extracted in some quantities and a nearby hillside where there had been some extraction, but none for many years. The mining operators were seeking to quarry rock from the hillside, but were denied a state permit because the mining plan was in violation of the County ordinance.[115] It was also clear that the intensity of the extractive activities would be substantially increased under the proposed mining plan.[116]

While there were four opinions, none of which garnered a majority of the justices, it is clear that a majority believe that the diminishing assets doctrine should apply to mining operations which are NCU's.[117] In defining the diminishing assets doctrine, the key factor for the court is:

> whether the nature of the initial nonconforming use, in the light of the character and adaptability to such use of the entire parcel, manifestly implies that the entire property was appropriated to such use prior to the adoption of the restrictive zoning ordinance.[118]

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111. *See generally* Anderson, *supra* note 87, at § 6.51.

112. 48 Cal. Rptr. 2d 77, 907 P.2d 1324 (1996).

113. 907 P.2d at 1332.

114. *Id.* at 1331-2. The average annual yield of rock for the aggregate amounted to only 6200 cubic yards, of which only 1300 cubic yards came from the Nevada County portion of the parcel.

115. *Id.* at 1330-31.

116. *Id.* at 1356 (Kennard, J. dissenting).

117. Justices Werdegar and Lucas who concurred stated: "First and foremost, California recognizes the diminshing assets doctrine." *Id.* at 1351.

118. *Id.* at 1339 (citing 6 Richard Powell, The Law of Real Property 79C-178-179). The court also reviews *McCaslin*, *supra* note 107, as well as many of the cases discussed in this section. *See, e.g.*, Stephen & Sons v. Municipality of Anchorage, 685

While limiting the "expansion" of a NCU to land owned prior to the adoption of the local zoning ordinance, the court does allow multiple parcels to be treated as a single tract where mining operations were contemplated on each of the parcels.

The factual issue for the Supreme Court was the extent of the mining operation in 1954. Acting as a factfinder because there were some title disputes, the court concluded that only about 32 out of 60 acres alleged by the mining operators would fall under the diminshing assets doctrine, because they had not sustained their burden of proof to show that they owned the remaining acreage in 1954.[119] The next key factual issue that the Supreme Court resolved by reversing various administrative and lower court findings, was whether the riverbed and hillside operations were separate or integrated.[120] Here the plurality found that the operations were integrated and included mining, quarrying and processing with all of the attendant structures necessary to engage in those activities. This integration conclusion also supported the plurality's treatment of the discontinuation issue.

In addition to the favorable treament on the integration issue which tended to show fewer and shorter periods of non-activity, the court also suggested that the term "discontinued" was the functional equivalent of abandonment. Abandonment requires not only a cessation of use, but an intent to abandon which must be shown through some overt act or failure to act. Mere cessation of use is typically insufficient to prove abandonment.[121] Because it treated the mining operation as an integrated entity, the court did not ultimately have to apply the abandonment rationale since it found no cessation of use that exceeded the ordinance requirement.

P.2d 98 (Alaska 1984); County of DuPage v. Elmhurst-Chicago Stone Co., 165 N.E.2d 310 (Ill. 1960); Town of Wolfeboro v. Smith, 556 A.2d 755 (N.H. 1989); Moore v. Bridgewater Twp., 173 A.2d 430 (N.J. Super. Ct. App. Div. 1961); Syracuse Aggregate Corp. v. Weise, 414 N.E.2d 651 (N.Y. 1980).

119. *Id.* at 1344.

120. Both Justices Mosk and Kennard in their seperate dissenting opinions took the plurality to task for substituting their judgment for that of the other factfinding bodies regarding the alleged integration of these two parts of the mining operation. *Id.* at 1352. (Mosk, J. dissenting); *Id.* at 1357-58 (Kennard, J. dissenting).

121. For other cases applying the abandonment test to discontinuation of mining operations see Union Quarries, Inc. v. Board of County Commissioners, 47 P.2d 181 (Kan. 1970); Southern Equipment Co., v. Winstead, 342 S.E.2d 524 (N.C. Ct. App. 1986). See text accompanying *infra* notes 141 to 150 for a more complete discussion of the abandonment and continuation issue.

Having resolved the discontinuation issue in favor of the mining operator, the court had to turn to the separate issue of whether or not the proposed use would be an enlargement or intensification of the NCU which was also prohibited by the county ordinance.[122] Relying on mineral extraction cases from other jurisdictions,[123] the court opined that the NCU is entitled to a natural and reasonable expansion to meet increased demand. There was an unresolved factual issue relating to the exact extent of the mining operations that were proposed, which was complicated by the fact that the court had earlier limited NCU designation to a small part of the 60-acre parcel which had been the parcel described in the state permit application. Thus, the plurality remanded this issue for further treatment when the exact nature of the revised mining plan was submitted for approval.

The plurality opinion reinforces the acceptance of the diminishing assets doctrine in California. The application of the doctrine to the mining plan in question clearly takes a more pro-mining position than many other courts. The aggregation of mining operations approach taken by the court will make it more difficult for local governments to regulate mining NCU's under either a discontinuation or an expansion provision.

The recent Alaska Supreme Court decision in *Stephen & Sons, Inc. v. Municipality of Anchorage Zoning Board of Examiners and Appeals*,[124] reflects the factual complexities involved in applying the diminished assets doctrine. Even where a court embraces the doctrine, it must still resolve several issues so that the mineral extractor does not have an automatic right to expand his business.

In *Stephen & Sons*, the owner of two parcels, one 40 acres in size and the other 13 acres, used a small portion of the 13 acre tract to extract gravel. In April 1969, Anchorage enacted its first area-wide zoning ordinance, which placed the 53 acres into a "U" district where mineral extraction was a use only allowed by special exception or by its status as a NCU. At the time of the two parcels sale in 1974 to the plaintiffs, only 2-5 acres of the lands were used for gravel operations. The plaintiffs expanded the op-

122. 907 P.2d at 1349.

123. *Id.* at 1349 (citing *Union Quarries, Inc., supra* note 121); *Town of Wolfeboro, supra* note 118; Frank Casilio & Sons v. Zoning Hearing Board, 364 A.2d 969 (Pa. Commw. Ct. 1976).

124. 685 P.2d 98 (Alaska 1984).

erations to include the 40-acre parcel and intensified their extractive efforts. In 1977, Anchorage enacted an ordinance requiring nonconforming mineral extractors to apply for amortization permits and to submit development and restoration plans for their mines. The Borough denied approval because the plaintiffs' plan included use of the 40-acre parcel for further gravel extraction. The reason given for the denial was that the NCU only existed as to the 13-acre tract and that allowing mining on the 40-acre tract would be an unlawful extension or enlargement of the NCU.[125]

The court acknowledged that the mineral extraction business is different than others because of the continuing use and expansion of the land being mined. While admitting that the diminished assets doctrine should apply, the court felt that a miner's mere wish or hope that at some day the entire parcel would be mined was insufficient to allow an extension of the NCU. Because the doctrine is an exception to the no expansion policy of the ordinance, the Board was within its powers in limiting the miner to extracting gravel from the 13-acre parcel and not from the 40-acre parcel. There was no objective evidence indicating an intent to mine the entire 53 acres at the time the use became nonconforming.

In contrast with the Alaska Supreme Court, the Utah Supreme Court in *Gibbons & Reed Co. v. North Salt Lake City*,[126] used the diminishing asset doctrine to allow a mineral operator to expand his present operations, notwithstanding his NCU status. Four parcels were involved, denoted Parcels A, B, C and D. When originally zoned in 1957, Parcels A, B and C allowed mining operations as a matter of right. Parcel D was zoned residential and did not allow such activities. At that time, the plaintiffs owned only Parcel A. They acquired Parcels B and D in 1959. In 1961,

125. The zoning ordinance contained the following standard language:

> A. No such nonconforming use shall be enlarged or increased nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of the relevant regulations. B. No such nonconforming use shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of the relevant regulations.

685 P.2d at 101. In Hawkins v. Talbot, 80 N.W.2d 863 (Minn. 1957), the court concluded that even if there were no constitutional considerations an ordinance preventing the expansion or extension of a NCU could not be interpreted to deny the owner the right to mine the entire area of the gravel bed or mining lode, if the mining operation antedated the zoning ordinance. 80 N.W.2d at 865-66.

126. 431 P.2d 559 (Utah 1967).

Parcels B and C were rezoned to residential and the City sought to stop the owners from continuing to extract sand and gravel.

The trial court had found that Parcel D was being used for sand and gravel extraction in 1957. The City argued that Parcel D was never part of the pre-ordinance gravel extraction use and, in the alternative, that the use was abandoned. Parcel D was used to store sand and gravel excavated from other lands and contained various haul roads used by trucks taking sand and gravel from the quarry. This was sufficient to show pre-1957 use. Relying on the diminishing asset doctrine, the court found that, although sand and gravel were not being physically extracted from Parcel D, the expansion to Parcel D did not violate the zoning ordinance's prohibition. Parcel D's status as a NCU because of its use as a right of way and storage facility placed it within the boundaries of the area from which sand and gravel could be extracted without running afoul of the prohibition against expanding a NCU.[127]

Several states have developed the diminishing assets doctrine to deal with the peculiar circumstances of mining operations and traditional NCU doctrine. Under this approach, mining operators can expand or enlarge activities beyond the area being mined at the time the land use ordinance is adopted. Application of the diminishing assets doctrine does not automatically allow a mining operations to expand without question, but it undoubtedly allows substantially more areal expansion of the mining operation than would traditional NCU doctrine.

D. *Ancillary or Accessory Uses*

A subset of the issue relating to expanding or extending a NCU is the problem of ancillary or accessory uses. In the nonmining context, courts generally focus on: (1) whether the addi-

127. 431 P.2d at 564-65. *See also* Hawkins v. Talbot, 80 N.W.2d 863 (Minn. 1957) where the court stated: "in the case of a diminishing asset, to mean all of that part of the owner's land which contains the particular asset, and not merely that area in which operations were actually being conducted at the time of the adoption of the ordinance." 80 N.W.2d at 866. *Gibbons & Read*, 431 P.2d 559, also followed the basic rule that NCU restrictions apply to land use, not landowners, after the City urged that because the current owner had purchased Parcel D after the ordinance came into effect, the current owner should not be allowed to continue or expand the NCU. 431 P.2d at 564. *See also* McCaslin v. City of Monterey Park, 329 P.2d 522 (Cal. 1958); County of DuPage v. Elmhurst-Chicago Stone Co., 165 N.E.2d 310 (Ill. 1960); Faircloth v. Lyles, 592 So. 2d 941 (Miss. 1991).

tion or expansion is an integral part of the NCU;[128] (2) whether the addition reflects the nature and purpose of the use as it existed on the date the use became nonconforming;[129] (3) whether there is a difference in the quality or character of the use as well as the quantitative use;[130] and (4) whether the addition is part of the natural expansion or modernization of the nonconforming use.[131]

In the context of the typical mining or quarrying operation, the issue most often arises where there has been either a change in the machinery used to extract the mineral or a mineral processing facility, such as where an asphalt or concrete plant is being added to a quarrying site which is a NCU.

The cases appear to be fairly evenly divided on whether such an addition is allowable. Typical of cases allowing such an expansion is *State ex rel. Smilanich v. McCollum*,[132] in which a neighbor attacked the issuance of a conditional use permit authorizing construction of an asphalt plant on a parcel where a gravel pit was a NCU. The area had been zoned suburban residential and the neighbor's residence was only 600 feet from the proposed plant. While admitting that a NCU may not be enlarged, the zoning ordinance language limited the prohibition against changes to changes in buildings. Here, there were no permanent structures involved and the County had the power to issue a conditional use permit upon a finding that it would not be unduly detrimental to the public health or general welfare. The gravel pit had been a longstanding use of the lot in question which supported the County's finding of no substantial public injury.[133]

In cases finding that adding a processing facility amounts to an unlawful expansion or change of use, the emphasis is on the dif-

128. *See, e.g.,* Superintendent & Inspector of Bldgs. v. Villari, 213 N.E.2d 861 (Mass. 1966); Gauthier v. Larchmont, 291 N.Y.S.2d 584, *appeal denied*, 242 N.E.2d 494 (N.Y. 1968).

129. *See, e.g.,* Conn. Sand & Stone Corp. v. Zoning Bd. of Adjustment, 190 A.2d 594 (Conn. 1963); Town of Bridgewater v. Chuckran, 217 N.E.2d 726 (Mass. 1966).

130. *See, e.g.,* Vokes v. Avery W. Lovell, Inc. 468 N.E.2d 271 (Mass.) *review denied*, 470 N.E.2d 798 (Mass. 1984); Austin v. Zoning Hearing Bd., 496 A.2d 1367 (Pa. Commw. Ct. 1985).

131. *See, e.g.,* Prior Lake Aggregates, Inc. v. City of Savage, 349 N.W.2d 575 (Minn. App. 1984); Gustin v. Zoning Bd., 423 A.2d 1085 (Pa. Commw. Ct. 1985).

132. 384 P.2d 358 (Wash. 1963).

133. For other cases allowing such an expansion, see Silliman v. Falls City Stone Co., 305 S.W.2d 322 (Ky. 1957); Hawkins v. Talbot, 80 N.W.2d 863 (Minn. 1957); Moore v. Bridgewater Township, 173 A.2d 430 (N.J. Super. Ct. 1961); Appeal of H.R. Miller Co., 281 A.2d 364 (Pa. Commw. Ct. 1971).

ferences between mining and processing. For example, in *Prior Lake Aggregates, Inc. v. Savage*,[134] the court emphasized that the processing facility was not a modernization of excavating machinery, but a qualitatively different operation which was disallowed by the zoning ordinance. Improvements in extraction techniques could be employed, but a change from extraction to processing was beyond the scope of the NCU provisions of the zoning ordinance.[135]

As with other areas of land use law, NCU expansion issues may be quite fact and ordinance specific. For example, one Minnesota court found that an asphalt batching plant could not operate on a NCU parcel devoted to sand and gravel mining, while another court concluded that a rockcrushing operation could be maintained even though a new rockcrushing structure was built where prior rockcrushing had been done by vehicles.[136]

How a court characterizes a particular change in use or alteration will also color the eventual outcome. Where the miner or quarry operator installs new equipment the courts have split as to whether that is a sufficient change in use which would violate the restrictions. For example, in *Syracuse Aggregate Corp. v. Weise*,[137] the court not only applied the diminishing assets doctrine to find that the mining operation had not ceased, but also concluded that a change in equipment or machinery allowing the operator to increase the amount of rock mined did not violate the ordinance's prohibition against expanding or enlarging a NCU. In a Kansas decision, the court allowed a "mom and pop" quarrying operation to be expanded to a much larger operation when business opportunities presented themselves, even though the quarry was a NCU.[138] But there are likewise a number of decisions which disallowed changes in extractive techniques which greatly increased the "externalities" created by the NCU.

134. 349 N.W.2d 575 (Minn. Ct. App. 1984).

135. For other cases not allowing a processing facility to be built see Paramount Rock Co. v. County of San Diego, 4 Cal. Rptr. 317 (Cal. Ct. App. 1960); Conn. Sand & Stone Corp. v. Zoning Bd. of Appeals, 190 A.2d 594 (Conn. 1963); First Crestwood Corp. v. Building Inspector of Middleton, 326 N.E.2d 363 (Mass. App. Ct. 1975); Wharton Sand & Stone Co. v. Township of Montville, 120 A.2d 858 (N.J. Super. Ct. 1956); Appeal of Mignatti, 168 A.2d 567 (Pa. 1961)

136. *Compare Prior Lake Aggregates*, 349 N.W.2d 575 *with Hawkins*, 80 N.W.2d 863.

137. 424 N.Y.S.2d 556, *aff'd*, 414 N.E.2d 651 (N.Y. 1980).

138. Union Quarries, Inc. v. Bd. of County Comm'rs, 478 P.2d 181 (Kan. 1970). *See also* Town of Wayland v. Lee, 91 N.E.2d 835 (Mass. 1950); Borough of Cheswick v. Bechman, 42 A.2d 60 (Pa. 1945).

For example, in *De Felice v. Zoning Board of Appeals*,[139] the Connecticut Supreme Court did not allow a sand and gravel operator to change from a dry screening method of extraction to a wet sand classifier method since the new method would entail the construction of several large semi-permanent structures. The town's decision not to allow the use was neither arbitrary nor capricious given the ordinance's overall goal of preventing NCU expansion especially in light of the close proximity of the NCU to a residential area.[140]

In these cases, it may be critical whether the local government decision authorizes or denies the extension. As noted earlier, many states have a limited scope of judicial review of land use decisions. The party challenging the local decision, be it by an administrative body or the local legislative body, has a difficult burden of proof to overcome in these fact intensive situations.

E. *The Problem of Continuation and Abandonment*

Zoning ordinances often contain provisions relating to the requirement that the NCU be continuous otherwise it will be deemed to have been terminated and the right to maintain the NCU ended.[141] Ordinances differ widely so that it is important to look at the exact language contained therein. It is especially important to determine if the ordinance requires the owner of the NCU to abandon it before the right to maintain the NCU terminates. Abandonment usually requires some evidence of intent or mens rea, which is difficult to prove.

There are normally two competing public policies extant when the issues of continuation or abandonment are raised. The first policy favors termination of NCU's as being inconsistent with the overall comprehensive plan for regulating development within the community. The second policy favors the continuation of otherwise lawful, but non-conforming uses, based on a visceral

139. 32 A.2d 635 (Conn. 1943).

140. For other cases not allowing changes in extraction techniques, see County Council v. E.L. Gardner, Inc., 443 A.2d 114 (Md. 1982); Bither v. Baker Rock Crushing Co., 438 P.2d 988, *modified*, 440 P.2d 368 (1968); Frank Casilio & Sons v. Zoning Hearing Bd., 364 A.2d 969 (Pa. Commw. Ct. 1976).

141. In Rocky Mountain Materials & Asphalt, Inc. v. Bd. of County Comm'rs, 972 F.2d 309 (10th Cir. 1992), the court dismissed as not ripe the miner's claim that he had been denied procedural due process protection in the application of a new zoning ordinance to his NCU. The alleged lack of notice claim, however, could only be litigated after a final adverse decision had been rendered by the County.

notion that zoning ordinances are to be narrowly interpreted because they are in derogation of private property rights.

A good example of the first policy liberally applying NCU provisions of a zoning ordinance in order to terminate NCU's is *Gabe v. City of Cudahy*,[142] in which a farm owner claimed that he had been using part of his farm since 1921 to supply local sand and gravel needs. The zoning ordinance was adopted in 1957 and prohibited such extractive activities. After looking at the evidence, most of which showed no extractive activities, the court found that the owners had not sustained their burden of proof showing a continuous use since 1957.[143]

As a general matter, courts will take into consideration the nature of the quarrying or mining business in determining whether there has been a cessation of activities sufficient to terminate the NCU, even where the ordinance or statute does not require a finding that the owner intended to abandon the NCU. Typically, where courts consider the sporadic nature of mining, the decisions tend not to find a discontinuation of the use even if there are no sales or excavation activities for the period specified in the ordinance. Several Oregon cases are illustrative of this approach to NCU's.[144] These cases reflect the general view that a lawful use should be allowed to continue following the general customs and practices of the industry so that if actual mining and/or sales activities were not ongoing due to the nature of the business, the NCU would not lose its status.

Some jurisdictions take statutory and ordinance language which eliminate NCU's after their use has been discontinued and add to the temporal element an intent to abandon requirement.[145] Adding the abandonment element makes the decision quasi-adjudicatory which may likewise give the trial court the right to review the decision de novo, rather than defer to the legislative findings of fact.[146]

142. 187 N.W.2d 874 (Wis. 1971).

143. 187 N.W.2d at 876. The court looked at aerial photographs, took evidence from neighbors and looked at the owner's tax returns for several years which showed no income from non-farming activities.

144. Polk County v. Martin, 636 P.2d 952 (Or. 1981); Bither v. Baker Rock Crushing Co., 438 P.2d 988, *modified*, 440 P.2d 368 (Or. 1968); Lane County v. Bessett, 612 P.2d 297, *review denied*, 290 Or. 1 (1980).

145. Union Quarries, Inc. v. Bd. of County Comm'rs, 478 P.2d 181 (Kan. 1970).

146. *Id.* at 186.

In *Ernst v. Johnson County,*[147] the difficult task of proving an intent to abandon by the NCU owner when combined with the second policy of narrowly interpreting zoning ordinances led the Iowa Supreme Court to find that a NCU was continued even though there was probative evidence of little, if any, extractive activities ongoing for several years. The County zoning ordinance provided that NCU's would not have to get a conditional use permit for mining operations if they were established prior to the ordinance's adoption. The ordinance further stated that ". . . if said use is voluntarily interrupted for a period of one (1) year after the effective date of adoption. . . .,then the re-establishment of said use shall conform to the provisions of this article."[148] Quarrying activity on the land in question was substantial in the mid-1960's, but little evidence of continued quarrying was presented. The owners did allege that they maintained the quarry lease and received all permits and licenses on an annual basis.

The court followed earlier Iowa precedent which "construe[s] zoning restrictions strictly in order to favor the free use of property . . . ."[149] Notwithstanding that policy, the owner has the burden of proof to show that the use was established at the time the ordinance was adopted and that the use continued thereafter. In looking at the quarrying business, the court admitted expert witness testimony, asserting that a county quarrying operation would often go lengthy periods without actual blasting, crushing or selling activities.

The key issue, however, was the ordinance language requiring a voluntary interruption of use, which the court interpreted as being the equivalent of an intentional interruption requirement. Thus, subjective intent becomes a relevant factor and the vicissitudes of the quarrying business does not necessarily shown an intent to abandon, notwithstanding lengthy periods of minimal activity.[150] Periods of inactivity due to circumstances beyond the control of the quarry owners is not a voluntary interruption of use. The maintenance of the lease as well as the annual licenses

147. 522 N.W.2d 599 (Iowa 1994).

148. *Id.* at 602.

149. *Id.* at 602, (citing Greenawalt v. Zoning Bd. of Adjustment, 345 N.W.2d 537 (Iowa 1984)).

150. *See also* South County Sand & Gravel Co. v. Town of Charlestown, 446 A.2d 1045 (R.I. 1982).

and permits evinced an intent to return to quarrying activities when business conditions allowed.

State or local policy regarding the discontinuation or abandonment of NCU's can be expressed through statutes, ordinances or judicial opinions. Where a state favors termination of NCU's because they are inconsistent with sound planning principles, mining and other NCU's will have a tougher time showing that a cessation of activities is not an abandonment. On the other hand, where a state favors the continuation of otherwise lawful NCU's, mining and other NCU's which may have periodic or seasonal activities will more likely be allowed to continue.

IV.

MUNICIPAL REGULATION OF OIL AND GAS OPERATIONS - SOME SPECIAL RULES

Oil and gas well drilling can be regulated by local governments under their police power.[151] However, because of the fugacious nature of oil and gas and the rule of capture, municipal regulation relating to drilling has had to deal with the problem of protecting the correlative rights of the parties owning the oil and gas.

In 1927-28 several Kansas municipalities became the first governmental entities of any kind to adopt a compulsory pooling regulatory scheme as a means of protecting correlative rights while preventing massive over-drilling.[152]

Drilling ordinances were normally independent of any zoning ordinance and were justified on public safety and general welfare grounds.[153] An early Ninth Circuit opinion found that excluding drilling from an attractive and growing residential area was a legitimate police power objective which looked to the future development of the area and the real safety concerns that

151. Keaton v. Oklahoma City, 102 P.2d 938 (Okla.), *cert. denied*, 311 U.S. 616 (1940).

152. Winfield, Kansas was apparently the first municipality to regulate drilling densities and require pooling of interests. Its neighbor, Oxford, had the privilege of being the community where the constitutionality of compulsory pooling was legally challenged and eventually upheld. Marrs v. City of Oxford, 24 F.2d 541 (D. Kan. 1928), *aff'd*, 32 F.2d 134 (8th Cir. 1929), *cert. denied*, 280 U.S. 573 (1929). *See generally*, BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION 3.02[1] (3d ed. 1989 & Supp. 1994).

153. *See, e.g.*, Adkins v. City of West Frankfort, 51 F. Supp. 532 (E.D. Ill. 1943); Friel v. County of Los Angeles, 342 P.2d 374 (Cal. 1959); Larson v. Bush, 83 P.2d 955 (Cal. 1938); Gant v. Oklahoma City, 15 P.2d 833 (Okla. 1932), *appeal dismissed*, 289 U.S. 98 (1933).

accompanied oil and gas drilling operations.[154] Most of the litigation regarding them involved the pooling and not the land use aspects of the ordinances.[155]

While the basic constitutionality of drilling ordinances was established, both California and Oklahoma courts invalidated individual applications of various drilling ordinances on substantive due process and other constitutional grounds.[156] Most drilling ordinances provide for a variance mechanism like the variance mechanism in a typical zoning ordinance.[157]

Courts have upheld prohibitions against oil and gas well drilling covering the entire municipality[158] or certain designated districts.[159] Restrictions against drilling within a specified distance from an existing residence or a residential zone have also been upheld.[160] Because of the public safety concern, a number of municipalities require oil and gas well operators to post a bond before they can receive a drilling permit.[161]

A recent series of cases arising in Kansas reawakened long dormant challenges to the constitutionality of municipal zoning or oil and gas drilling ordinances which restrict the mineral owner from exploring for or developing his mineral estate. In *Mid Gulf, Inc. v. Bishop*,[162] the plaintiff, a surface owner and subdivider and an oil and gas lessee, became embroiled with the City of Lansing over its plan to subdivide and to drill an oil and gas well. Mid Gulf sought a discretionary permit to drill an oil and gas well. At that time there was no drilling ordinance, although two oil and gas lessees had received, on an ad hoc basis, discretionary permits to drill one well each. Two days later, the City Council adopted a resolution creating a 90-day moratorium on the issuance of any discretionary permits for oil and gas well

154. Marblehead Land Co. v. City of Los Angeles, 36 F.2d 242 (S.D. Cal. 1929), *aff'd*, 47 F.2d 528 (9th Cir.), *cert. denied*, 284 U.S. 634 (1931).

155. *See* Marrs v. City of Oxford, 24 F.2d 541 (D. Kan. 1928); Amis v. Bryan Petroleum Corp., 90 P.2d 936 (Okla. 1939); Rainwater v. Mason, 283 S.W.2d 435 (Tex. Civ. App. 1955).

156. *See, e.g.*, Sindell v. Smutz, 222 P.2d 903 (Cal. Ct. App. 1950); Bernstein v. Smutz, 188 P.2d 48 (Cal. Ct. App. 1947); Clouser v. City of Norman, 393 P.2d 827 (Okla. 1964).

157. *See, e.g.*, Beveridge v. Westgate Oil Co., 44 P.2d 26 (Okla. 1935).

158. Blancett v. Montgomery, 398 S.W.2d 877 (Ky. Ct. App. 1966).

159. *Marblehead Land Co.*, 36 F.2d 242.

160. Cline v. Kirkbride, 22 Ohio C.C. 527 (1901), *aff'd*, 61 N.E. 1144 (Ohio 1901).

161. Envirogas, Inc. v. Town of Westfield, 442 N.Y.S.2d 290 (1981).

162. There are two opinions, one reported, the other unreported. Mid Gulf, Inc. v. Bishop, 1992 WL 223772 (D.Kan. 1992), 792 F.Supp. 1205 (D.Kan. 1992).

drilling. Several months later, after holding a series of public hearings, the city enacted a drilling ordinance which strictly proscribed the conditions that would have to be met before the discretionary permit would be issued.[163] The city initially denied the permit, but after Mid Gulf filed a state court action, the city decided to issue the permit with additional conditions that were unacceptable to Mid Gulf.[164] Mid Gulf argued that the conditions were unreasonable and would make drilling in the city economically unfeasible. In addition, by the time the conditional approval was granted, Mid Gulf had lost its lease.

The basic claim regarding the denial and conditional approval of the discretionary permit was that the conditions were so onerous as to render it a regulatory taking of plaintiff's leasehold interest. The action was one alleging inverse condemnation. After reviewing the somewhat confused state of Kansas inverse condemnation law, the court concluded that Kansas and federal regulatory takings law are the same. It then applied the two-pronged test of whether the regulation substantially advances legitimate state interests or if it denies an owner all economically viable uses of her land.[165]

The court in its initial decision responding to the city's motion for summary judgment concluded that regulating drilling activities clearly falls within the definition of a legitimate state interest. Relying in part on *Goldblatt*, the court determined that the parameters of reasonable regulation are quite broad.[166] Nonetheless, there is a point at which the regulation goes beyond that needed to protect the public health, safety, morals or general welfare and becomes oppressive and unconstitutional. The reasonableness of the conditions imposed raises substantial issues of fact which precludes the entry of a summary judgment. Allegations that the ordinance was intended to, and actually, prohibited

163. These mandatory conditions included: 1. obtaining a $ 100,000 surety bond; 2. obtaining a $ 2 million general liability insurance policy; 3. prohibiting maintaining any tank or tank battery within city limits, 4. limiting noise to certain levels, and 5. limiting activities on the drill site between 8:00 PM and 8:00 AM. 1992 WL 223772 at *2.

164. One of those conditions was the use of steel mud pits. *Id.* at *3.

165. The court cites Keystone Bituminous Coal Association v. De Benedictis, 480 U.S. 470 (1987) for this proposition but Agins v. City of Tiburon, 447 U.S. 25 (1980) is the real source for this two pronged approach. Mid Gulf, Inc. v. Bishop, 792 F.Supp. 1205, 1213 (D.Kan. 1992).

166. *Id.* at 1214.

all drilling activities would tend to show that it was oppressive and not reasonable.[167]

In the hearing on the merits of the takings claim, the court noted that the plaintiff had not sought a direct review of the validity of the drilling ordinance's provisions relating to conditional use permits. Borrowing from the state law doctrine that requires a party to exhaust his administrative remedies before seeking judicial relief, the court determined that the inverse condemnation action was not yet ripe for review in federal court. Mid Gulf cut short its administrative or judicial review to challenge the reasonableness of the ordinance as it deals with the mandatory conditions that must be complied with before a permit may be issued. The court concluded:

> In order for a plaintiff to recover on an inverse condemnation claim under Kansas law, its is necessary for a plaintiff to show that the governing body's action was final and unable to be altered. The plaintiff here abandoned its challenge to the reasonableness of the City's regulation under [state law]. Pursuing this procedure would have given a court an opportunity to review specific provisions of the C.U.P. for reasonableness and, if "too oppressive", to either invalidate those provisions or remand them to be changed, thus curing the harm to plaintiff and preventing a taking from occurring.[168]

Oil and gas operations have long been regulated by local zoning ordinances. Because of the fugacious nature of oil and gas, however, sub-state units must consider the impact of such ordinances on the mineral owner's right to capture the oil and gas. After surviving challenges based on regulatory takings claims in the 1930's, such ordinances may come under attack given recent Supreme Court decisions making it somewhat easier for a prop-

167. The district court raises some interesting questions on the second prong of the test, namely the denial of economically viable use. The court does not look at Mid Gulf's leasehold interest as the denominator in the takings equation. It suggests that the surface estate, owned by the lessee, has to be included, so that even though the lessee might be totally precluded from drilling, the residual value retained by the surface owner would obviate the claim that a total taking had occurred. *Id.* The author calls this problem the aggregate, disaggregate issue raised by Justice Scalia in footnote 7 in Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2894 (1992), and recently decided in favor of the disaggregate approach in two decisions, Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994); Fla. Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S.Ct. 898 (1995).

168. 1992 WL 223772 at *8.

erty owner to claim that a land use regulation is a regulatory takings.

V.

THE PREEMPTION PROBLEM - OVERLAPPING AND POTENTIALLY CONFLICTING STATE AND LOCAL REGULATION

The control of land use insofar as it impacts the extractive industry may arise from the exercise of power from both the state and the sub-state levels of government. While the states are the basic repository of the police power, all states delegate to one or more of their sub-state units the power to regulate land use through the exercise of zoning and other regulatory mechanisms.[169] An owner seeking to extract minerals may have to receive permits from both the state and sub-state regulatory bodies. In some situations, the mineral owner may seek to avoid or invalidate local decisions preventing or conditioning the extraction of minerals by claiming that the sub-state unit's actions are *ultra vires*, either because they are beyond the scope of powers delegated to the sub-state unit or because the exercise of the power by the sub-state unit conflicts with a power exercised by a state agency.[170]

In multi-governmental permitting scenarios, several important issues arise. An initial, and quite basic question is whether the sub-state unit has been authorized to regulate the mineral extraction operation. Many states have adopted some form of a zoning enabling act for municipalities.[171] In addition, many states provide for home rule authority which delegates general police powers to designated home rule units which may either be municipalities or counties.[172]

The second question which will be analyzed further herein, is the problem of overlapping, inconsistent or conflicting state and sub-state regulation where it is conceded that all of the governmental units have the authority to regulate. There is unfortu-

169. The various constitutional and statutory doctrines that affect the state/sub-state unit relationship is beyond the scope of this paper. *See generally* OSBORNE REYNOLDS, JR., LOCAL GOVERNMENT LAW, 76-77, 95-123, 160-61 (1982); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968).

170. REYNOLDS, *supra* note 169, at 104-110.

171. DON HAGMAN & JULIAN JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 51-52 (2nd ed. 1986).

172. *Id.* at 53-54. *See also* REYNOLDS, *supra* note 169, at 95-103.

nately no uniform treatment of dealing with the problem of overlapping state and sub-state regulatory powers.[173] Individual constitutional or legislative home rule provisions may be critical.[174] In most states, however, the state has the power to preempt local regulation of the extractive industries through express statutory language.[175] But it is the rare exception, rather than the general rule, that a state expressly preempts sub-state regulation of the extractive industry.[176] In some instances, even where

173. Authors of a leading state and local government law casebook state: "When are overlapping state and local laws to be given concurrent operation, as being mutually consistent, or require displacement of one by the other, as being mutually inconsistent, conflicting, or preemptive?. . . No general answer or rationale can be offered to the foregoing questions. They involve a series of independent issues, each of which is materially affected by the facts and legal setting in each case." WILLIAM P. VALENTE & DAVID MCCARTHY, JR., LOCAL GOVERNMENT LAW - CASES AND MATERIALS 159 (1992).

174. For example, a limited number of states provide that as to "municipal affairs" the home rule unit has exclusive power and the state is without power to act. CAL. CONST. art. XI, § 5(a); COLO. CONST. art. XX, § 6(a). The analysis in these "non-preemptible" home rule states in resolving conflicts may be quite different than in the more typical state which allows the state to preempt local regulation. IDAHO CONST. art. 12, § 2, TEX. CONST. art. XI, § 5. For an example of the differing judicial approaches to these problems in a "non-preemptible" versus a "preemptible" home rule state, *compare* City and County of Denver v. State, 788 P.2d 764 (Colo. 1990) (non-preemptible home rule) *with* Envirosafe Services of Idaho, Inc. v. County of Owyhee, 735 P.2d 998 (Idaho 1987) (preemptible).

175. For example, Wyoming in its county zoning enabling act states: "[n]o zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands subject hereto." WYO. STAT. ANN. 18-5-201 (1995). In River Springs Limited Liability Co. v. Bd. of Comm'rs, 899 P.2d 1329 (Wyo. 1995), the court found that sand, gravel, rock, and limestone were not minerals within the meaning of the preemption statute. Thus, counties were free to regulate their extraction if the regulation was not in conflict with regulation by the State Department of Environmental Quality. Likewise Ohio in its Oil and Gas Conservation Act provides: "No county, or township shall require any permit or license for the drilling, operation, production, plugging or abandonment of any oil and gas well. OHIO REV. CODE ANN. § 1509.39 (Baldwin 1995). *See also* OHIO REV.CODE ANN. § 519.211 (Baldwin 1995) which contains limitations on townships regarding their power to prohibit the use of land for oil and gas drilling operations.

176. *See* Perry Pearce, "The Spectrum of Choices: Formulation and Implementation of Regulatory Land Use Decisions Affecting Mineral Development," in MINERAL DEVELOPMENT AND LAND USE (1995) where the author discusses the dual regulatory framework in a number of states including New Mexico, North Dakota, Oklahoma, Texas and Utah.

In San Pedro Mining Corp. v. Board of County Commissioners, 909 P.2d 754 (N.M.Ct.App. 1995) the mining operator asserted that the recently enacted New Mexico Mining Act (N.M.S.A. 69-36-1 et seq.) expressly preempted county regulation of mining activities. Specifically, they claimed that a statutory provision providing that existing county regulations will apply until such time as the state agency charged with overseeing the Act adopted its own regulations, N.M.S.A. 69-36-4(B)

the state delegates to a state agency "exclusive jurisdiction" over oil and gas exploration and development activities, sub-state regulation of such activities is widespread and judicially accepted.[177]

One methodology used by the courts to decide preemption or conflict issues categorizes the purpose or objective of the state and sub-state regulation to determine in the first instance whether a conflict actually exists. Two early Oklahoma cases are illustrative of this approach.[178] Oklahoma City required oil and gas drillers to post a $200,000 bond before they could drill a well within the city. The Corporation Commission had been granted extensive and exclusive regulatory powers over oil and gas drilling operations.[179] Notwithstanding that grant of power to the state, the court concluded that there is a presumption against state preemption of local police powers. The court further emphasized the public health and safety concerns regarding drilling activities in urban areas, which was different from the state objectives of preventing waste, protecting correlative rights and

(1994 Supp.), expressly preempted the county regulation since the state agency had adopted regulations. The court applied the traditional view that express preemption is not to be implied from unclear language. Here the legislature could have clearly preempted further local regulation but it chose not to do so. 909 P.2d at 759.

177. OKLA. STAT. ANN. tit. 52, §§ 1-2 (West 1991) gives the Corporation Commission such powers, but Oklahoma sub-state units have been regulating oil and gas drilling activities in the state for 60 years. Gruger v. Phillips Petroleum Co., 135 P.2d 485 (Okla. 1943); Gant v. Oklahoma City, 6 P.2d 1065 (Okla. 1931), *appeal dismissed*, 284 U.S. 594 (1931), *on subsequent appeal*, 15 P.2d 833 (Okla. 1932), *aff'd*, 289 U.S. 98 (1933). A similar situation occurs in Texas. Klepak v. Humble Oil & Refining Co., 177 S.W.2d 215 (Tex.Civ.App. 1944).

178. *Gant*, 6 P.2d 1065; Indian Territory Illuminating Oil Co. v. Larkins, 31 P.2d 608 (Okla. 1934).

179. *Gant*, 6 P.2d 1065. A similar argument was rejected by a New York court in Envirogas, Inc. v. Town of Kiantone, 447 N.Y.S.2d 221 (Sup.Ct.), *aff'd*, 454 N.Y.S.2d 694 (1982), *appeal denied*, 444 N.E.2d 1013 (1982). The New York legislature had recently enacted a statute which expressly preempted local regulation of the extractive industries, except as those industries affected local roads. N.Y. ENVTL CONSERV. LAW § 23-0303(2) (McKinney 1995). A local government sought to impose bonding and permit fee requirements ostensibly to protect the integrity of the road system. The court rejected the proffered explanation and relied on the expansive preemption language as well as the fact that the recently enacted statute intended to overturn prior caselaw which had allowed concurrent regulation. 447 N.Y.S.2d at 222. *See* Envirogas, Inc. v. Town of Westfield, 442 N.Y.S.2d 290 (1981) (allowing local regulations to co-exist with state regulations under the earlier statutory scheme). Notwithstanding a similar statutory provision relating to hard rock mining, N.Y. ENVTL CONSERV. LAW § 23-2703(2) (McKinney 1995), a New York court has allowed local zoning to be applicable since the regulation did not directly affect the extracting operations, but merely structures that were ancillary to the strip mining. Town of Cortlandt v. Santucci, 620 N.Y.S.2d 205 (NY. Sup. Ct. 1994).

conserving oil and gas.[180] Thus, the municipal regulation could stand, notwithstanding concurrent state regulation of drilling operations.

Oklahoma City also enacted an ordinance which limited the proximity of wells to each other and established minimum drilling block size. One year after the approval of the bonding requirement in *Gant*, the Oklahoma Supreme Court found that the well location regulations conflicted with state rules and, therefore, were preempted.[181] Here, the court found that the objectives of both the state and local regulations were the same. A direct conflict existed between the conservation and waste prevention objectives of the two governmental entities and where such a conflict exists, the state power must prevail.

This categorization or labelling approach to conflict/preemption issues may sometimes degenerate into a semantic game.[182] Similar regulatory schemes may be imposed if the sub-state unit is sufficiently creative regarding the objectives of the regulatory scheme. Nonetheless, this approach is one that is used by courts to deal with concurrent regulatory schemes where the state legislature has not made the basic decision to preempt local legislation. It gives some latitude to sub-state units to regulate in the absence of express preemption.

A second approach used by courts to deal with implied preemption and conflict situations is the "occupation of the field" test.[183] Under this approach a state regulatory program that is so comprehensive that the legislature must have intended to preempt sub-state regulation will preempt any conflicting regulatory programs. Several difficult definitional problems arise in applying this test, including determining the scope and extent of the field being occupied and whether or not concurrent, but not necessarily conflicting, regulations were intended to be preempted.

Illustrative of the "occupation of the field" approach is the Colorado Court of Appeals decision in *Oborne v. County Commissioners of Douglas County*.[184] A county with power to regulate land use sought to impose various conditions before it issued

180. *See generally* BRUCE KRAMER & PAT MARTIN, The Law of Pooling and Unitization 4-26-4-28 (1989 & Supp. 1994).

181. *Indian Territory Illuminating*, 31 P.2d 608.

182. *See, e.g.*, Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (differentiates between environmental protection and land use powers).

183. REYNOLDS, *supra* note 169, at 120; CLAYTON GILLETTE, LOCAL GOVERNMENT LAW 366-68 (1994).

184. 764 P.2d 397 (Colo. Ct. App. 1988).

a conditional use permit to a party who had already received a drilling permit from the Colorado Oil and Gas Commission.[185] In resolving this conflict, the court inferred an intent to preempt all local regulation of the oil and gas industry by the comprehensive powers delegated to the Commission.[186] The court concluded:

> Here, the comprehensiveness of the provisions of the Act, and the Commission's regulations issued pursuant thereto, and the purposes sought to be accomplished by them, as well as the absence from the Act's terms of any reference to local zoning or other regulations,convince us that it was the intent of the General Assembly to vest in the Commission the sole authority to regulate those subjects addressed by the Act, and to bar any local regulation addressing those subjects.[187]

The occupation of the field approach, however, was rejected as the sole means of resolving state/sub-state unit conflicts where non-home rule units are involved, by the Colorado Supreme Court in *Board of County Commissioners of La Plata County v. Bowen/Edwards Associates*.[188]

In *Bowen/Edwards*, a non-home rule county sought to impose its zoning and land use ordinance upon an oil and gas operator who had received a permit from the Oil and Gas Conservation Commission. As with *Oborne*, there was no doubt that concurrent powers were vested with the County and the Commission.[189] Instead of solely relying on an occupation of the field theory, the court noted that there were three ways that a non-home rule substate unit's powers could be preempted by state regulation. The first is by express legislative declarations.[190] The second is by implied preemption through the application of the occupation of

185. The Commission has been granted broad powers to prevent waste and protect correlative rights. COLO. REV. STAT. § 34-60-105-106 (West 1990). The County's powers derived from a zoning enabling act. COLO. REV. STAT. § 30-28-101 (West 1990).

186. *Oborne,* 764 P.2d at 401. The court also relied on a canon of construction that where a general power is delegated to a sub-state unit and a specific power is delegated to a state unit, the specific power prevails in the case of a conflict. *Id.*

187. *Id.* at 401-02.

188. 830 P.2d 1045 (Colo. 1992).

189. The County had sought to avoid the conflict/preemption argument with its claim that the County and the Commission were engaging in regulatory schemes with different objectives; the county achieving land use and zoning objectives while the Commission was achieving oil and gas conservation objectives. 830 P.2d at 1056-57. *See also, supra* note 174.

190. 830 P.2d at 1056. *See supra* note 179 for several examples of express legislative preemption.

the field doctrine announced in *Oborne*.[191] The court, however, disagreed with the *Oborne* finding that the state had intended to occupy the entire field of oil and gas development and operations. Partially based on its view of potentially different state and County objectives, the court found no implied intent to preempt all sub-state regulation.[192] The third deals with the practical conflicts that can arise where there is dual or concurrent regulation. Where there are "operational conflicts," the state regulation will prevail.[193] The issue is whether the sub-state unit regulation "impedes or destroys" the state regulatory objectives.[194] Because the evidentiary record was not clear on the extent to which the County regulation would impede or destroy state conservation objectives, the court remanded for a trial on the merits.[195]

To contrast with this tri-partite analysis, the Colorado Supreme Court asks different questions to resolve preemption problems when a home-rule unit is involved. In *Voss v. Lundvall Brothers, Inc.*,[196] decided the same day as *Bowen/Edwards*, the court addressed whether the regulation of oil and gas operations and development was a matter of purely local concern, a matter of state/local concern or a matter of purely state concern before it got into the *Bowen/Edwards* analysis.[197] If the matter was one of purely local concern, local regulation would prevail; if the matter was one of state/local concern, the *Bowen/Edwards* test would apply; and if the matter was one of purely statewide concern, the state statute would prevail.

One of the critical factors in this type of categorization scheme is the need for statewide uniformity.[198] Here, the court could find no overriding interest in uniformity since oil and gas exploration and development would be different depending on the

191. 830 P.2d at 1057-58.

192. *Id.* at 1057.

193. *Id.*

194. *Id.* at 1059.

195. *Id.* at 1060. The county had not totally prohibited oil and gas drilling activities. Had they done so a true conflict would have existed and the local regulation would have been preempted. *See, e.g.*, Baker v. Snohomish County Dep't of Planning and Community Dev., 841 P.2d 1321 (Wash. 1992).

196. 830 P.2d 1061 (Colo. 1992).

197. Colorado, like California, has non-preemptible home rule. *See supra* note 178. Pre-emptible home rule provisions would not necessarily have to look at the state or local nature of the activity being regulated.

198. 830 P.2d at 1067. *See also* State *ex rel.* Heinig v. Milwaukee, 373 P.2d 680 (Or. 1962), *rev'd in part*, City of LaGrande v. Public Employees Retirement Bd., 576 P.2d 1204, *aff'd on reh'g*, 586 P.2d 765 (Or. 1978).

type of reservoir and its location.[199] A second factor is whether or not there are extraterritorial effects of the operations being regulated. Here, the court found some, but not substantial, extraterritorial effects. A third factor is whether the state or local government had traditionally regulated in the field.[200] Here, the court skirted the tough question of reconciling the longstanding state regulation of the oil and gas industry with the equally longstanding and traditional regulation of land use. It merely concluded that oil and gas regulation was traditionally a state function.[201] Nonetheless, the court concluded that oil and gas regulation was a matter of hybrid state/local concern, and thus the *Bowen/Edwards* analysis would be applied.[202]

Since many mining operations are subject to some form of state regulation, conflicts are likely to arise between state and local regulatory efforts. Whether or not a sub-state unit can regulate mining operations will depend on a variety of factors that will be particular to each state and each sub-state unit. In dealing with the preemption problem as applied to sub-state unit regulation of mining operations, courts have applied their traditional preemption doctrines. States have developed individualized, preemption-related tests and policies. Where the legislature has

199. 830 P.2d at 1067.

200. *Id.*

201. *Id.* at 1068.

202. The *Bowen/Edwards* analysis does not create great certainty in resolving concurrent state/sub-state unit regulation. Multiple factors, including the statutory language creating the concurrent powers must be scrutinized and then a balancing test applied. In many situations, courts apply the presumption against preemption to allow concurrent regulation as long as there is no direct conflict between state and sub-state regulatory schemes. *See, e.g.,* C&M Sand & Gravel v. Bd. of County Comm'rs, 673 P.2d 1013 (Colo. Ct. App. 1983); Blancett v. Montgomery, 398 S.W.2d 877 (Ky. Ct. App. 1966); Klepak v. Humble Oil & Refining Co., 177 S.W.2d 215 (Tex. Civ. App. 1944, writ ref'd w.o.m.). Illustrative of the difficulties of applying the *Bowen/Edwards* analysis is a series of letters and formal opinions of the North Dakota Attorney-General which initially suggest total state preemption of County regulation of oil and gas operational matters, but then suggest that in the absence of operational conflicts County regulation could occur. These letters are reproduced in Pearce, *supra* note 176 at 6-25 to 6-32. For a recent application of the "occupation of the field" approach to implied preemption see San Pedro Mining Corp. v. Board of County Commissioners 909 P.2d 754, 759 (N.M.Ct.App. 1995). In *San Pedro*, the court looked to the objectives of the state and county legislation, determined that was some overlap, but concluded that the state legislation ignored many traditional land use concerns such as traffic congestion, noise, compatibility of use and affect on neighborhood property values. *Id.* at 759. The court approved of the Colorado approach taken in C & M Gravel, *supra*, allowing concurrent regulation in the absence of a direct conflict between the regulatory schemes.

not acted clearly, courts will continue to apply general preemption principles to resolve multi-jurisdictional conflicts.

VI.

THE CREATIVE REGULATOR - INNOVATIVE WAYS TO DEAL WITH MINING OPERATIONS

Zoning and other traditional land use regulatory mechanisms are not the sole source of problems for mining operators. As the following cases indicate, local governments that must use the Brandeis aphorism have been creative experimenters in dealing with the perceived NIMBY status of mining operations.

In *Carl Ainsworth, Inc. v. Town of Morrison*,[203] a town with a population of 429 sought to prevent the continued use of its streets by heavy trucks, owned by the plaintiff. These trucks were hauling sand and gravel from a local quarry. The town enacted an ordinance which prohibited trucks of more than 10,000 pounds gross weight from operating on two named streets. This ordinance eliminated the most convenient way for the operator to move the sand and gravel, but did not cut him off from access to a number of state and county roads. Morrison was free to protect the welfare of its citizens from the "externalities" caused by having 1400 trucks per day weighing upwards of 80,000 pounds rumbling down residential streets. The token inconvenience caused the mining operator could not stand in light of the strong police power objectives of the Town.

An issue rarely discussed relates to how zoning ordinances are enforced and whether or not an owner can claim that the local government should be estopped from enforcing the ordinance due to the actions of a town official or employee. Both of those issues were analyzed in *Dornfried v. October Twenty-Four, Inc.*[204] The Town sought an injunction to prevent a miner from continuing to operate a quarry that was located in a residential zone. In an earlier action, the miner had not contested the fact that the quarry was an unlawful use.[205] After initially granting a temporary injunction, the trial court vacated the injunction because of errors in pleading and proof and because he determined that the city was estopped from enforcing the ordinance.

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203. 539 P.2d 1267 (Colo. 1975).

204. 646 A.2d 772 (Conn. 1994).

205. Tomasso Brothers, Inc. v. October Twenty-Four, Inc., 602 A.2d 1011 (Conn. 1992), *on remand*, 1992 WL 19299 (Conn. App.), *aff'd*, 646 A.2d 133 (Conn. 1994).

The Connecticut Supreme Court followed the modern view of notice pleading. The complaint contained sufficient allegations to notify the defendant that the injunction was being sought for his continued operation of a quarry in violation of the zoning ordinance. It was undisputed that defendant was operating a quarry and that such a use was not allowed in a residential zone.

The estoppel claim was based on a series of annual site grading plan approvals which had allowed the defendant to continue to operate his quarry in violation of the ordinance. The court noted that prevailing on an estoppel claim against a government is possible, but difficult. The private party must show that the governmental official did or said something intending to induce the other party to act on that belief and the other party must change its position in reliance on those facts. In cases where the government is acting in its governmental capacity, a further requirement is imposed, that of being subjected to a substantial loss. The defendant did not meet this heavy burden of proof and the trial court's conclusion was likewise not supported by any probative evidence.[206]

One way to avoid zoning regulation may be to stay in the unincorporated area of a county. Miners, as a general rule, would fight annexation of their tracts because of the likelihood that zoning ordinances will be applied that will restrict their operations. In several states, annexation statutes impose certain performance standards on the annexing city regarding the quality of the land to be annexed. Arkansas, for example, required that the annexing area be adaptable to "prospective municipal uses."[207] That standard was used to defeat an annexation of several large tracts of land which contained existing and abandoned bauxite pits, even where the city intended to zone the area for mining purposes.[208]

206. In Marriott v. City of Dallas, 644 S.W.2d 469 (Tex. 1983) the quarry operator sought to have a mistaken and unauthorized designation of land as lying within the agricultural zone inure to his benefit so that he could operate his quarry without having to seek a discretionary permit. The court rejected the operator's estoppel argument and applied the zoning law as written. A blueprint drafting error cannot change a legislative act.

207. ARK. CODE ANN. § 14-40-302 (Michie 1994).

208. Saunders v. City of Little Rock, 556 S.W.2d 874 (Ark. 1977), *overruled by* Chappel v. City of Russellville, 204 S.W.2d 166 (Ark. 1986).

VII.
CONCLUSION

Regulation of the extractive industries antedates the regulation of urban development through comprehensive zoning and planning. The trend towards not only suburban, but rur-urban, development will undoubtedly increase local political pressure to further regulate and restrict the extractive industries. In addition, counties are being empowered to engage in zoning and planning regulation. These two developments will undoubtedly lead to further confrontation between those who make their living extracting minerals and those who want a "quiet place to live." Traditional land use doctrines can be applied to the industry, but a number of courts have recognized the unique locational circumstances of the industry. Other courts treat the extractive industry as any other use, subject to the police power, constrained only by constitutional limitations. The recent spate of appellate court opinions indicates that the confrontation between the various interests involved has become a reality and is likely to continue into the future.