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EXPLORING THE LATITUDE OF *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*: LOCAL CONTROL OF SURFACE MINING

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I. INTRODUCTION

[T]here are many arts and sciences of which a miner should not be ignorant . . . Lastly, there is the Law, especially that dealing with metals, that he may claim his own rights, that he may undertake the duty of giving others his opinion on legal matters, that he may not take another man's property and so make trouble for himself, and that he may fulfill his obligation to others according to the law.¹

Georgius Agricola, an early mineralogist, wrote these words nearly four hundred and fifty years ago in a time when mining as an industry was in its embryonic stages.² Indeed, Agricola himself has been credited with devising many of the principles upon which the industry grew and flourished.³ It is, however, Agricola's statement that miners must be intimately acquainted with the law and must not interfere with the use rights of their neighbors that is most striking. The recognition, at such an early era, of a necessary balance between the mining industry's economic goals and the community's safety, health and property use rights is interesting. In this statement, Agricola encapsulated the inherent tensions between mineral development and the health and safety of the general public.

These tensions are especially present in the surface or "strip" mining of coal. Although surface mining may in many cases be the most economical and efficient means of extracting coal, the process

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1. GEORGIUS AGRICOLA, *DE RE METALLICA* 4 (Herbert C. Hoover and Lou H. Hoover eds., Dover Publications 1950) (1556).

2. WILL DURANT, *THE REFORMATION: A HISTORY OF EUROPEAN CIVILIZATION FROM WYCLIF TO CALVIN: 1300-1564* 753 (1957).

3. *Id.*

unfortunately has the potential for causing great environmental damage.⁴ For many years, surface mining was regulated exclusively at the state and local levels.⁵ However, by the 1970s it became apparent that state and local regulations, even if they existed in a given jurisdiction, were not stringent enough to deal with the problems of surface mining. Substantial acres of land were strip mined and then left in unrestored or unreclaimed conditions, causing social and economic damage to nearby areas and a general decline in environmental quality.⁶ For these reasons, Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA).⁷

The enactment of SMCRA has raised the question of what effect should be given to local land use ordinances that regulate and control the location of surface mining operations. In certain situations, local regulation may be desirable, either because SMCRA is inapplicable,⁸ or because more stringent regulation is necessary to deal with uniquely local problems.⁹ Once it is determined that local governments have the authority to enact such ordinances, the next question that must be answered is how far can such ordinances go in regulating surface mining in light of the restrictions placed upon land use regulation by *Lucas v. South Carolina Coastal Council*¹⁰ and other Supreme Court decisions.¹¹

This article discusses the power of local governments to enact ordinances dealing with surface mining. Specific attention is given to SMCRA and whether that act preempts local regulation, particularly in the states of Kentucky and Virginia. After the determination is made that a

4. Leslie E. Renkey, *Local Zoning of Strip Mining*, 57 KY. L.J. 738, 738-39 (1969).

5. M. Deborah Benoit, Note, *Strip Mining: Methods of Control by the Three Levels of Government*, 8 URB. L. ANN. 143, 147 (1974).

6. 30 U.S.C. § 1201(h) (1988).

7. Pub. L. No. 95-87, 91 Stat. 445 (codified as amended at 30 U.S.C. §§ 1201 to 1328 (1988)).

8. SMCRA expressly applies only to the surface mining of coal. See 30 U.S.C. § 1202(a) (1988).

9. See, e.g., *Amerikohl Mining, Inc. v. Zoning Hearing Bd.*, 597 A.2d 219 (Pa. Commw. Ct. 1991) (upholding zoning ordinance that prohibited surface mining operation because of hazardous effects on a contiguous residential subdivision), *appeal denied*, 602 A.2d 861 (Pa. 1992).

10. 112 S. Ct. 2886 (1992).

11. See, e.g., *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377 (N.J. 1992) (upholding licensing ordinance that imposed severe restrictions upon quarrying operation and applying *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), to local ordinances that regulate mining).

local government is not always preempted from such regulation, the article focuses on whether ordinances prohibiting or restricting surface mining are "takings" under the United States and state constitutions. Finally, it concludes by stating that these ordinances generally are valid, provided they are narrowly tailored and contain variance or special exception provisions to avoid possible "takings" challenges.

II. THE ABILITY OF LOCAL GOVERNMENTS TO REGULATE: THE PREEMPTION ISSUE

Surface mining is the process of removing the soil, rocks, and other material called "overburden" covering a deposit of coal in order to extract the coal.¹² Although surface mining is far more efficient than underground mining,¹³ surface mining also has its drawbacks. In addition to adversely affecting water quality,¹⁴ surface mining also may cause air pollution,¹⁵ noise pollution,¹⁶ and aesthetic damages¹⁷ to the land. The

12. JAMES M. MCELFISH, JR. AND ANN E. BEIER, ENVIRONMENTAL REGULATION OF COAL MINING: SMCRA'S SECOND DECADE 14-15 (1990).

13. Surface mining produces a 90-95% recovery rate from a seam of coal, as opposed to underground mining which provides only a 40-45% recovery rate. Benoit, *supra* note 5, at 144. Where underground or "deep" mining is used, coal pillars must be left in place to support the shafts and overlying rock strata; no such pillars are necessary when surface mining, resulting in increased efficiency. *Id.* Surface mining also is safer than underground mining because elaborate ventilation systems and vertical supports are not needed. *Id.*

14. MCELFISH AND BEIER, *supra* note 12, at 17. Surface mining affects water quality primarily in two ways. First, when mined coal is exposed to air, the sulfur present in the coal combines with air to form sulfuric acid. After heavy rains, these acidic solutions seep from the mine site into nearby streams and rivers, contaminating drinking water supplies and killing fish. *Id.* Second, surface mining may disrupt water-bearing rock strata, altering the flow patterns of underground and surface water. *Id.*

15. See *Amerikohl Mining, Inc. v. Zoning Hearing Bd.*, 597 A.2d 219, 225 (Pa. Commw. Ct. 1991) (noting that surface mining causes air pollution by releasing dust and other fine particles into the air that filter into valleys below, causing respiratory distress), *appeal denied*, 602 A.2d 861 (Pa. 1992).

16. 597 A.2d at 225. Vibrations and tremors are created when blasting is used to remove overburden. In certain cases, these vibrations may damage the structural integrity of nearby structures such as dams or houses. *Id.* The use of heavy equipment like shovels, bulldozers, trucks and loaders may cause substantial increases in noise levels and impair the quiet and solitude of adjacent residential communities.

efficiency and economic advantages of surface mining must be balanced against these negative consequences.

Whether a local government has the legal authority to regulate surface mining depends on two factors. First, has the local government been authorized by enabling legislation to regulate surface mining? Second, who owns the surface of the land over the coal being regulated? The first question will be examined in a later section.¹⁸ Regarding the latter question, if a local government seeks to regulate the surface mining of coal, it must determine initially if it is preempted from doing so by SMCRA. If the coal sought to be regulated is underneath federally owned land, a different preemption analysis also applies because SMCRA and other federal statutes vest the federal government with authority over the regulation of federal coal lands.¹⁹ If the local government is regulating a mineral other than coal, the locality must determine if there are any other preempting federal or state statutes. This article primarily will be limited to local regulation of coal surface mining.

A. Local Regulation of Privately Owned Coal Lands

Prior to regulating surface mining of coal on privately owned lands, local governments must determine if they are preempted from doing so by SMCRA.²⁰ Implementation of SMCRA is a coordinated effort between the federal and state governments, so this is primarily a question of federal/state/local preemption.²¹ As discussed in a later section, if local

17. Prior to the enactment of SMCRA, in certain extreme cases, miners left the land ravaged with rubble and deep chasms bearing little or no vegetation. Benoit, *supra* note 5, at 146. In one fascinating early case, gold miners in the 1850's used high pressure hoses to wash down entire mountainsides in the Sierra Nevada mountain range to get at gold deposits buried deep within them. Such "hydraulic mining" had the effect, however, of flooding distant towns and valleys adjacent to the Yuba River which carries water from the Sierra Nevada mountains. Eventually the practice was halted as a common law public nuisance. See *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (C.C. Cal. 1884).

18. See *infra* notes 144 to 149 and accompanying text (discussing authorization through state enabling legislation).

19. See 30 U.S.C. § 1291(5) (1988).

20. Laura A. Lane, Comment, *Local Land Use Policies in the Reclamation of Strip Mined Land*, 41 U. PITT. L. REV. 595, 596 (1980).

21. ARDEN H. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 31.03(13) (Edward H. Ziegler, Jr. ed., 1991).

governments want to regulate mining on federal lands, they need to consider federal/local preemption.²²

Congress enacted SMCRA in 1977 after finding that although surface mining of coal is a significant contributor to our nation's economy and energy supply, many surface mining operations cause extreme environmental damages.²³ Specifically, Congress found that

many surface mining operations result in disturbances of surface areas that burden and adversely effect commerce and the public welfare by destroying or diminishing the utility of the land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.²⁴

For these reasons, Congress established a nationwide program to protect citizens and the environment from the harmful effects of surface mining, and to encourage efficient and ecologically sound surface mining methods.²⁵

SMCRA differs from other federal environmental statutes by delegating the ultimate authority for regulation to the states.²⁶ By establishing minimum standards states could follow in drafting their own surface mining statutes, SMCRA sought to strike a coordinated balance between federal, state and local interests.²⁷ SMCRA's framework has two major components. First, an abandoned mine program was created to reclaim and restore lands mined prior to the enactment of the Act.²⁸ Second, a regulatory and permitting program was set up requiring surface

22. See *infra* notes 87 to 134 and accompanying text (discussing regulation of surface mining on federal lands).

23. See 30 U.S.C. § 1201 (1988).

24. *Id.* § 1201(c).

25. See *id.* § 1202(a), (f).

26. *Id.* § 1201(f).

27. Lane, *supra* note 20, at 600-01.

28. See 30 U.S.C. §§ 1231-43 (1988).

mine operators to comply with detailed reclamation and environmental performance standards.²⁹

To obtain jurisdiction to implement SMCRA's regulatory and permitting program, a state must submit a plan to the Secretary of the Interior demonstrating performance standards, sanctions and a permitting process at least as stringent as SMCRA's minimum requirements.³⁰ The state's plan also must demonstrate sufficient funding and personnel to meet the minimum requirements of the Act.³¹ Upon the Secretary's approval of the state's plan, the state obtains a status known as "primacy."³² After achieving primacy, the state gains exclusive jurisdiction over the regulation of surface mining, with the exception that federal oversight and enforcement is retained to ensure the state is satisfying the minimum requirements.³³ In the event that any state fails to submit a plan, the Secretary must prepare, implement and enforce a plan for the state.³⁴ It remains possible, however, for a state to achieve "primacy" even after a federal plan has been implemented.³⁵

The regulatory scheme under SMCRA consists of three parts: a permitting process,³⁶ environmental protection performance standards,³⁷ and detailed inspection and enforcement provisions.³⁸ Prior to surface mining on any tract of land, a coal operator must apply for and obtain a surface mining permit from the appropriate federal or state agency.³⁹ If the state has attained primacy, then the operator must apply with the state's mining agency. If primacy has not been achieved, the permit is obtained from the Office of Surface Mining Reclamation and Enforcement (OSMRE), which is within the Department of the Interior. In reviewing the permit application, OSMRE or the equivalent state agency, considers, among other things, the sufficiency of the applicant's reclamation plan, the probable effect on water quantity and quality, and whether the proposed

29. *See id.* §§ 1251-79.

30. *Id.* § 1253.

31. *Id.* § 1253(a)(3).

32. MCELFISH AND BEIER, *supra* note 12, at 21.

33. *Id.*

34. 30 U.S.C. § 1254(a) (1988).

35. *Id.* § 1254(e).

36. *Id.* § 1256.

37. *Id.* § 1265.

38. *See id.* § 1267.

39. *Id.* § 1256(a).

mine site is within an area designated as unsuitable for surface mining.⁴⁰ Once a permit is granted it remains in effect for five years, subject to renewal.⁴¹

SMCRA requires extensive environmental protection performance standards in federal and state plans.⁴² The performance standards seek to return the land to its pre-mining condition to the extent possible.⁴³ This goal is achieved through detailed rules requiring the reclamation of soil and vegetation so that the land is returned to its approximate original contour.⁴⁴ The performance standards also seek to restore the land to a condition capable of supporting pre-mining uses, or better uses if possible.⁴⁵ Most of the standards relate to the content and placement of topsoil, overburden, mine wastes, water impoundments and vegetation.

As a final condition, SMCRA requires an elaborate inspection and monitoring system.⁴⁶ Mine sites must be inspected for compliance with applicable federal or state performance standards at least once every month, with a quarterly comprehensive inspection.⁴⁷ Civil and criminal penalties, as well as citizens' suits, ensure that surface mine operators follow SMCRA's mandates.⁴⁸

Surprisingly, there has been little discussion of whether the federal SMCRA or its state law counterparts preempt local governments from regulating or prohibiting surface mining through land use regulations. The authority that does exist on this issue indicates that localities are not preempted from enacting such ordinances in every case.⁴⁹

40. *Id.* § 1260(b).

41. *Id.* § 1256(b).

42. *See id.* § 1265.

43. *Id.* § 1265(b)(2).

44. *Id.* § 1265(b)(3). In certain cases, coal operators may receive a variance from the approximate original contour requirement. *See id.* § 1265(c) and (e). The most typical case where return to contour is not required is when the mountaintop removal mining method is used. The mountaintop removal method is a large-scale operation in which all of the overburden overlying an entire coal seam is removed by heavy equipment and blasting. The entire top of the mountain is literally removed and deposited into valleys or hollows near the mining operation. McELFISH AND BEIER, *supra* note 12, at 15. In such a situation, the surface miner is allowed to leave the land in a level plateau or gently rolling contour. 30 U.S.C. § 1265(c)(2) (1988).

45. 30 U.S.C. § 1265(b)(2) (1988).

46. *See id.* § 1267.

47. *Id.* § 1267(c).

48. *See id.* § 1268.

49. Lane, *supra* note 20, at 598-601, 604-19.

1. *Preemption By Federal SMCRA*

Federal statutes may preempt state or local laws in several ways. First, Congress may preempt state or local law by express statement.⁵⁰ Second, Congress may imply an intent to occupy a field in a given area,⁵¹ or to preempt state law only to the extent it actually conflicts with federal law.⁵² SMCRA's preemption sections expressly provide that state and local regulations are preempted only insofar as they "interfere with the achievement of the purposes and the requirements"⁵³ and are "inconsistent" with the Act.⁵⁴ SMCRA states that

[a]ny provision of any State law or regulation in effect upon August 3, 1977, or which may become effective thereafter, which provides for *more stringent land use* and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of this chapter or any regulation issued pursuant thereto shall not be construed to be inconsistent with this chapter.⁵⁵

Therefore, while state and local land use and environmental laws that are less restrictive than SMCRA are preempted, laws more restrictive than

50. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

51. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

52. *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1982).

53. 30 U.S.C. § 1254(g) (1988). When a federal program has been implemented in a state

any statutes or regulations of such State which are in effect to regulate surface mining and reclamation operations subject to this chapter shall, insofar as they interfere with the achievement of the purposes and the requirements of this chapter and the Federal program, be preempted and superseded by the Federal program. The Secretary shall set forth any State law or regulation which is preempted and superseded by the Federal program.

Id.

54. *Id.* § 1255(a).

55. *Id.* § 1255(b) (emphasis added).

SMCRA are not.⁵⁶

Taken as a whole, the federal SMCRA clearly leaves room for local land use regulation of surface mining.⁵⁷ For instance, in developing performance standards for mine site reclamation, SMCRA expressly states that the post-mining land use must not be inconsistent with "applicable land use policies and plans" or violate "Federal, State, or local law."⁵⁸ Also, under the variance provisions, local land use planning agencies must be consulted before granting a variance from the approximate original contour requirement.⁵⁹ Such a variance is permissible only if the proposed post-mining use is "consistent with adjacent land uses, and existing State and local land use plans and programs."⁶⁰ Localities may be preempted from controlling the actual *conduct* of surface mining operations, but it is clear they have the power "to determine, in conjunction with applicable land use plans of the area, the permanent *use* of the mined land once the mining operations have ceased."⁶¹

If local governments have the power to control post-mining land uses, then, as a logical antecedent, they also must have the power to control the initial location of the mining.⁶² Local governments should have this power for several reasons. First, land use regulations that control the initial location of surface mining are not inconsistent with the federal SMCRA. SMCRA declares that "existing State or local land use plans or programs" must be consulted in determining which areas should be deemed unsuitable for mining, indicating that local zoning should be followed.⁶³ Second, a land use ordinance is more stringent if it prohibits surface mining in a location that would, in the absence of the ordinance, be a permissible location under SMCRA. SMCRA states that more stringent state or local regulations are not preempted.⁶⁴ Third, there is no actual conflict between land use ordinances and the federal SMCRA, because SMCRA primarily is an environmental rather than a land use statute. Finally, localities should retain the power to control where surface mining occurs, because the placement of a surface mine in a particular location

56. Lane, *supra* note 20, at 600-01.

57. *Id.*

58. 30 U.S.C. § 1265(b)(2) (1988).

59. *Id.* §§ 1265(c)(3)(A), (e)(3)(A).

60. *Id.* § 1265(c)(3)(C).

61. Lane, *supra* note 20, at 600 (emphasis added).

62. *Id.* at 600 n.30.

63. 30 U.S.C. § 1272(a)(3)(A) (1988).

64. *See id.* § 1255(b).

requires a balancing of uniquely local interests.⁶⁵

To summarize, the federal SMCRA would not preempt a local government from: (1) enacting an ordinance requiring reclamation standards more stringent than SMCRA,⁶⁶ (2) enacting an ordinance that regulates the post-mining use of the property,⁶⁷ or (3) enacting an ordinance that controls the initial location of surface mining.⁶⁸ In fact, the federal SMCRA seemingly allows a locality to pass any land use ordinance regulating surface mining, so long as that ordinance does not actually conflict with or is more stringent than the federal statute.⁶⁹

2. *Preemption By State SMCRA*

Although the federal SMCRA does not always preempt local regulation of surface mining, localities must determine if they are preempted under a state surface mining act.⁷⁰ A state may preempt local regulation either expressly in its SMCRA or by implied intent based upon the act's provisions.⁷¹ Theoretically such state/local preemption is possible, but in practice few states have opted to preempt local regulation of surface mining.⁷² Most state surface mining acts closely track the language of the federal SMCRA, usually in order to achieve "primacy;" so presumably, local regulations are permissible if there is no actual conflict with the state surface mining act or if they are more stringent than the state act.⁷³ Such non-conflicting concurrent local regulation of surface mining, especially restrictions on location, are generally not preempted.⁷⁴

65. Renkey, *supra* note 4, at 746-48.

66. Lane, *supra* note 20, at 600-01.

67. *Id.* at 600.

68. *Id.* at 600 n.30.

69. See 30 U.S.C. § 1255 (1988); Zoning Ordinance for Mining Operation, Off. Op. S.D. Att'y Gen. No. 86-04 (Mar. 3, 1986) [hereinafter Opinion of the South Dakota Attorney General].

70. Lane, *supra* note 20, at 601.

71. See RATHKOPF, *supra* note 21, at § 31.03[13].

72. *Id.*

73. *Id.*; see also *Frew Run Gravel v. Carroll*, 518 N.E.2d 920, 924 (N.Y. 1987) (holding that local ordinances controlling location or imposing stricter reclamation standards than the state are not preempted by state surface mining act).

74. *Id.*; see also *C. & M. Sand & Gravel v. Board of County Comm'rs*, 673 P.2d 1013 (Colo. App. 1983) (holding that state mining act did not preempt local land use regulation); *Beverly Bank v. Cook County*, 510 N.E.2d 941 (Ill. App. 1987) (holding state

Only a few state surface mining statutes expressly preempt local regulation of mining. For instance, Alabama's Surface Mining Act states that local, municipal and county regulation of surface coal mining is preempted.⁷⁵ Pennsylvania's SMCRA is unique by declaring that all local ordinances regulating surface mining are preempted, except for zoning ordinances.⁷⁶ Judicial decisions accordingly have upheld the ability of localities in Pennsylvania to enact only zoning regulations that control surface mining of coal.⁷⁷

The vast majority of state SMCRA's resemble the language of the federal SMCRA, with a few variations. The surface mining acts of Kentucky and Virginia are good examples.⁷⁸ Local governments in both Kentucky and Virginia are not preempted from implementing land use ordinances controlling the location of surface mining activities.⁷⁹

SMCRA vests concurrent jurisdiction to state and local governments over regulation of sanitary landfill sites); *Frew Run Gravel v. Carroll*, 518 N.E.2d 920 (N.Y. 1987) (holding state Mined-Land Reclamation statute did not preempt town zoning ordinances); *Lower Mount Bethel Township v. Stabler Dev. Co.*, 509 A.2d 1332 (Pa. Commw. Ct. 1986) (ruling that state SMCRA did not preempt local zoning ordinances).

75. ALA. CODE § 9-16-106 (1991).

76. PA. STAT. ANN. tit. 52, § 1396.17 (1991).

77. *See Amerikohl Mining, Inc. v. Zoning Hearing Bd.*, 597 A.2d 219, 225-26 (Pa. Commw. Ct. 1991), *appeal denied*, 602 A.2d 861 (Pa. 1992); *McClimans v. Board of Supervisors*, 529 A.2d 562, 566 (Pa. Commw. Ct. 1987), *aff'd*, 597 A.2d 738 (Pa. Commw. Ct. 1991); *Miller & Son Paving, Inc. v. Wrightstown*, 451 A.2d 1002, 1005 (Pa. 1982).

78. *See KY. REV. STAT. ANN.* §§ 350.010-990 (Baldwin 1982); *VA. CODE ANN.* §§ 45.1-226-270.7 (Michie 1989).

79. *See KY. REV. STAT. ANN.* § 350.610(4) (Baldwin 1982); *VA. CODE ANN.* § 45.1-252(A)(4) (Michie 1989); *see also Lane, supra* note 20, at 615-19 (discussing ability of local governments to regulate surface mining). The Kentucky statute, which generally tracks the language of the federal SMCRA, is unique by adding a specific provision stating that

[d]eterminations of the unsuitability of land for surface coal mining shall be integrated as closely as possible with present and future land use planning and regulation processes at any appropriate level of government, including but not limited to any valid exercise of authority of a municipality or county, acting independently or jointly, pursuant to [the state zoning enabling act].

KY. REV. STAT. ANN. § 350.610(4) (Baldwin 1982). This section provides clear authority for Kentucky localities to control the location of surface mining through zoning. Carolyn S. Bratt, *Surface Mining in Kentucky*, 71 KY. L.J. 7, 21-22 (1982).

Localities in Kentucky also may play a role in controlling post-mining use of the land,⁸⁰ although the authority for local governments in Virginia to do so is less clear.⁸¹

The ability of a local government to regulate surface mining on privately owned land therefore depends mainly on the text of its state SMCRA. In states like Alabama and Pennsylvania, which have more restrictive preemption provisions, municipalities have less power to regulate. As in Kentucky and Virginia, however, most state surface mining acts essentially follow the language of the federal Act and do not expressly preempt local regulation. Thus, in most states, local governments do not appear to be preempted from passing non-conflicting land use regulations, particularly controlling location of coal surface mining.⁸²

If the state has not enacted a surface mining act, then the provisions of the federal SMCRA control.⁸³ There is no indication from the federal SMCRA that local governments are preempted from controlling the initial location of surface mining activities on privately owned land.⁸⁴ There also is no indication local governments are precluded from regulating the post-mining use of the land, so long as the local regulations are not inconsistent with the federal standards.⁸⁵ It is likely that local regulation

80. Lane, *supra* note 20, at 615-19; KY. REV. STAT. ANN. § 350.405 (Baldwin 1982). Regarding the role of Kentucky localities in the reclamation process, one commentator noted

[t]he Kentucky statute reflects a legislative judgment that the prevention of the injurious effects of strip mining lies in the active co-operation of administrative regulatory bodies and local interests. The aim of the Kentucky legislation seems to reach beyond merely *protecting* the interests of local municipalities in land use designations following reclamation, as in Pennsylvania. Rather, it provides a viable role for planning agencies to recognize the developmental potential inherent in strip mine reclamation.

Lane, *supra* note 20, at 619 (emphasis in original).

81. The Virginia SMCRA does not refer to the role of local land use policies in determining post-mining uses. The statute, does, however, incorporate the performance standards of the federal SMCRA, which require coordination of post-mining uses with local land use policies and programs. See 30 U.S.C. § 1265(b) (1988).

82. RATHKOPF, *supra* note 21, at § 31.03[13].

83. Opinion of the South Dakota Attorney General, *supra* note 69.

84. See *supra* notes 57 to 61 and accompanying text.

85. See *supra* notes 50 to 61 and accompanying text.

of post-mining uses would not be deemed inconsistent if they were more stringent than the federal regulations.⁸⁶

B. Local Regulation of Federally Owned Coal Lands

Local government control of coal surface mining is more limited on federally owned land than on privately or state owned coal land. This is largely true because the Property Clause,⁸⁷ combined with the Supremacy Clause,⁸⁸ of the United States Constitution gives Congress the sole authority over the use and development of federally owned lands, even if those lands are within the boundaries of a local government.⁸⁹ The Property Clause is not as exclusive as it may seem on its face, however, because the Supreme Court has interpreted it to allow application of state and local laws to federal lands, if they do not actually conflict with federal statutes or programs.⁹⁰

Mining of fuel and nonfuel minerals on federal lands is founded on the Mining Law of 1872⁹¹ and the Mineral Leasing Act of 1920.⁹² The Mining Law of 1872, consistent with its goal of encouraging mineral exploration on federal lands, states that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase."⁹³ The purpose of the Mining Law, which was enacted when the West was relatively undeveloped, was to encourage

86. See 30 U.S.C. § 1255(b) (1988).

87. U.S. CONST. art. IV, § 3, cl. 2 ("The congress shall have the power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States . . .").

88. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land . . .").

89. Kenneth E. Barnhill and Dianne Sawaya-Barnes, *The Role of Local Government in Mineral Development*, 28 ROCKY MTN. MIN. L. INST. 221, 235 (1983).

90. *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976); see also *State ex rel. Andrus v. Click*, 554 P.2d 969 (Idaho 1976) (ruling no actual conflict was posed by state mining statute requiring operators of surface mines on federally owned lands to obtain a mining permit from the state).

91. *Brubaker*, 652 P.2d at 1055. For a detailed discussion of the Mining Law and mining on federal lands, see JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* (1986).

92. 30 U.S.C. § 181-287 (1988).

93. 30 U.S.C. § 22 (1988).

prospectors to go onto public lands, search for minerals, and upon discovery file a claim for a mining patent.⁹⁴ Although the Mining Law originally applied to all minerals, its control over the disposition of "fuel" minerals like coal and gas has since been superseded by the Mineral Leasing Act of 1920.⁹⁵ Like the Mining Law, the Mineral Leasing Act seeks to facilitate mining on federal lands;⁹⁶ it is also generally more pervasive than the Mining Law.⁹⁷

Because the Mining Law and the Mineral Leasing Act allow mining on federal lands, these statutes nearly always preempt local ordinances that seek to prohibit such mining.⁹⁸ Where Congress authorizes a specific use of federal lands, localities are not permitted to supplant Congress' decision with their own land use plans.⁹⁹ Localities may not use zoning to control the location of mining on federal lands, because that would require use classifications prohibiting mining in certain areas -- a regulatory scheme

94. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1281 (9th Cir. 1980).

95. Mineral Leasing Act of 1920, § 1, ch. 85, 41 Stat. 437 (codified as amended in scattered sections of 30 U.S.C. §§ 181-287 (1982)), cited in Pattie P. Swift, Note, *Federal Public Lands: The States' Authority to Regulate Activities on Federal Land* -- California Coastal Comm'n v. Granite Rock Co., 19 N.M. L. REV. 771, 779 n.59 (1989). Interestingly, however, the purpose section of the Mining Law of 1872 still indicates that *all minerals* (including oil, gas, coal, oil shale and uranium) are subject to the Mining Law's overall purpose of fostering and encouraging mining on federal lands. 30 U.S.C. § 21a (1988).

96. See 30 U.S.C. § 181 (1988).

97. *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050, 1057 (Colo. 1982) (noting that the Mineral Leasing Act of 1920 "is more pervasive than the federal scheme embodied in the Mining Law of 1872.").

98. Barnhill and Sawaya-Barnes, *supra* note 89, at 232; see also AMERICAN LAW OF MINING § 174.04[2][b] (Rocky Mtn. Min. L. Inst. ed., 1992); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (holding that state and local land use laws are preempted from application to federal lands); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980) (holding that county was preempted by the Mineral Leasing Act from requiring a mining company to obtain a drilling permit prior to drilling on federally owned lands); *Brubaker*, 652 P.2d 1050 (holding that the Mining Law of 1872 preempts zoning ordinances prohibiting core drilling on federally owned lands).

99. *Ventura County*, 601 F.2d at 1084. In *Ventura County*, the county attempted to require a federal oil and gas lessee to obtain a drilling permit from the county in accordance with the county's zoning ordinance. *Id.* at 1082. The proposed drill site, although geographically located within the county, was owned by the federal government. *Id.* The lessee already had obtained several permits from the federal government. *Id.* The Ninth Circuit held the county zoning requirement was preempted as attempting to prohibit a use expressly allowed by federal statute. *Id.* at 1086.

clearly preempted by the Mining Law of 1872,¹⁰⁰ the Mineral Leasing Act,¹⁰¹ and possibly the federal SMCRA.¹⁰²

Although local governments are preempted from controlling where coal surface mining occurs on federal lands, they are not always preempted from reasonably regulating the surface mining process used on those lands.¹⁰³ First, a local government must determine if its SMCRA preempts local regulation of surface mining. As discussed previously, this is a case specific inquiry resolved by the actual language of that state's SMCRA.¹⁰⁴ After a local government determines it has the power to regulate surface mining under state law, it may regulate surface mining on federal lands, so long as those regulations do not actually conflict with other federal statutes, such as the federal SMCRA.¹⁰⁵

The federal SMCRA applies to federal lands, but authority for

100. *Granite Rock*, 480 U.S. at 587 (holding that Mining Law of 1872, combined with other federal land use statutes, preempts application of state and local land use laws to federally owned lands).

101. *Ventura County*, 601 F.2d at 1083-85 (holding that Mineral Leasing Act of 1920 preempts county zoning controls on mineral development on federally owned lands), *aff'd mem.*, 445 U.S. 947 (1980).

102. Under the federal Surface Mining Control and Reclamation Act, the Secretary of the Interior is vested with sole authority for determining which federal lands are to be classified as unsuitable for mining. 30 U.S.C. § 1272(b) (1988). Although consultation with appropriate state and local agencies is required prior to classifying lands as unsuitable, SMCRA expressly states that

Nothing in this subsection shall be construed as authorizing the Secretary to delegate to the States his duty to approve mining plans on Federal lands, to designate certain Federal lands as unsuitable for surface coal mining pursuant to section 1272 of this title, or to regulate other activities taking place on Federal lands.

Id. § 1273(c).

103. *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050, 1059 (Colo. 1982) ("State and local laws that merely impose reasonable conditions upon the use of federal lands may be enforceable, particularly where they are directed to environmental protection concerns."); *see also Butte City Water Co. v. Baker*, 196 U.S. 119 (1905) (upholding Montana statute that regulated mining claims on federal lands); *State ex rel. Andrus v. Click*, 554 P.2d 969 (Idaho 1976) (upholding state permit requirement for mining on federal land).

104. *See supra* notes 70 to 82 and accompanying text (discussing state/local preemption of surface mining).

105. Opinion of the South Dakota Attorney General, *supra* note 69; *Brubaker*, 652 P.2d at 1059.

regulating surface mining on federal lands is vested with the Secretary of the Interior.¹⁰⁶ The Secretary has exclusive control over designing programs for federal lands¹⁰⁷ and for initially determining what federal lands are unsuitable for surface mining.¹⁰⁸ The Secretary must design SMCRA programs for federally owned lands at least as stringent as federal standards and any existing state SMCRA standards.¹⁰⁹ The federal preemption provision states, however, that more stringent state and local standards are not preempted.¹¹⁰ This has led some commentators to conclude that local governments are not preempted from enacting surface mining regulations more stringent than the Secretary's federally owned lands program, if the local regulations do not cause actual conflict.¹¹¹

For instance, a zoning ordinance imposing more stringent reclamation requirements on coal mining might be applied to federal lands.¹¹² Such an ordinance would not be preempted unless it prohibited a use allowed under federal law, or conflicted with federal law by interfering with coal mining development or productivity.¹¹³ However, where federal lands are concerned, localities arguably are in a "catch 22" situation: ordinances more stringent than the federal SMCRA may be necessary to overcome SMCRA preemption,¹¹⁴ but overly stringent ordinances may offend the Mineral Leasing Act which seeks to facilitate

106. See 30 U.S.C. § 1273 (1988).

107. *Id.*

108. *Id.* § 1272(b).

109. *Id.* § 1273(a).

110. *Id.* § 1255(b).

111. Lane, *supra* note 20, at 599:

SMCRA clearly preserves existing state laws which are more stringent than federal reclamation guidelines, and provides that states may enter into cooperative agreements with the federal government to control the reclamation of federal land. Unless the state law is inconsistent with the Act, Congress did not intend to supersede or prevent its application to federal coal lands.

See also Opinion of the South Dakota Attorney General, *supra* note 69 (approving a zoning ordinance that imposed reclamation standards on mining on federally owned lands).

112. See Opinion of the South Dakota Attorney General, *supra* note 69.

113. AMERICAN LAW OF MINING § 174.04[2][b] (Rocky Min. Min. L. Inst. ed., 1992).

114. See 30 U.S.C. § 1255(b) (1988).

and control the location of coal mining on federal lands.¹¹⁵ Ordinances with federal lands applications therefore must be carefully drafted.

As a practical matter, local environmental regulations are more easily sustained than ordinances classifying the use of federal lands.¹¹⁶ In *California Coastal Commission v. Granite Rock Co.*,¹¹⁷ the Supreme Court ruled that the federal regulatory scheme controlling mining on federal lands does not preempt state environmental regulations, but would preempt state land use regulations.¹¹⁸ The Court reasoned that the field of federal land use planning is occupied by statutes like the Federal Land Policy and Management Act and the National Forest Management Act.¹¹⁹ The Court drew a distinction between state *environmental* laws, which are not always preempted, and state *land use* laws, which are assumed to be preempted.¹²⁰

115. See *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1084 (9th Cir. 1979) (striking down county zoning ordinance as inconsistent with the Mineral Leasing Act of 1920's goal of authorizing mineral development on federal lands), *aff'd mem.*, 445 U.S. 947 (1980).

116. *Brubaker v. Board of County Comm'rs*, 652 P.2d 1050, 1059 (Colo. 1982).

117. 480 U.S. 572 (1987).

118. *Id.* at 585.

119. *Id.* at 585-89. In *Granite Rock*, the Granite Rock Company had received approval from the National Forest Service to mine limestone in the Big Sur region of the Los Padres National Forest. *Id.* at 576. The California Coastal Commission subsequently informed the mining company that it also must obtain a state coastal development permit because the mine site was within a coastal zone. *Id.* Granite Rock claimed the Coastal Commission was preempted from requiring permits on federal land. The Supreme Court held that the Coastal Commission's permit requirement was not preempted because neither the Forest Service regulations nor federal land management statutes demonstrated a legislative intent to preempt state laws designed to protect the environment. *Id.* at 593.

120. *Id.* at 585. There has been much scholarly discussion on the Court's decision in *Granite Rock*. One commentator views the case as a potential cause of confusion:

After *Granite Rock*, state and local governments are forced to consider, and consider cautiously, the applicability of their laws to federal lands. And their task is one that can overwhelm if the regulation-prohibition distinction and environmental-land use distinctions apply in such a way that a law's validity differs site to site and user to user. This approach, surely, burdens state and local governments unfairly. If for no other reason, greater clarity is needed in fairness to nonfederal lawmakers.

Eric T. Freyfogle, *Granite Rock: Institutional Competence and the State Role in Federal Land Planning*, 59 U. COLO. L. REV. 475, 491 (1988). However, other authors applauded the Court's distinctions as more protective of environmental issues:

Granite Rock's environmental/land use distinction applies to local ordinances.¹²¹ Local environmental laws, such as a reclamation ordinance, are not preempted because Congress has evidenced no intent to exclude local governments "from regulating mining activities on federal land so as to safeguard environmental values."¹²² However, local governments can not impose *land use* ordinances upon federal lands.¹²³ This distinction may be difficult to implement.¹²⁴ Although an ordinance may be labelled "environmental," in effect it really may be a land use ordinance.¹²⁵ If a purported "environmental" ordinance regulates mining on federal lands to the extent that mineral production is halted, it is for all practical purposes a land use ordinance impermissibly prohibiting mining on federal lands.¹²⁶

The Supreme Court's willingness to rule that states may impose environmental regulations on private developers on federally owned lands signals the Court's greater awareness of environmental issues. In previous days, the emphasis of the Court would have been to encourage mining at any cost to the environment.

Megan B. Smith, Note, *Environmental Restrictions or Land Use Regulation -- The Supreme Court Draws a Distinction: California Coastal Commission v. Granite Rock Co.*, 23 U.S.F. L. REV. 123, 144 (1988).

121. Wendy I. Silver, *Local and Federal Regulation of Mining in a Wilderness Area*, 18 COLO. LAW. 1967 (Oct. 1989).

122. *Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Comm'n*, 693 P.2d 227, 238 (Wyo. 1985) ("We have found no cases striking down state regulations on the ground that Congress by enacting mining and environmental protection laws intended to occupy the field of environmental regulation of mineral development on federal land." *Id.* at 236.).

123. Freyfogle, *supra* note 120, at 475-76, *citing* *Granite Rock*.

124. *Id.* at 480.

125. Carl D. Savely, Note, *National Mineral Policy: A Critical Need for Public Awareness* (*California Coastal Comm'n v. Granite Rock Co.*), 25 CAL. W. L. REV. 173, 192 (1988).

126. *Id.* It also is possible for an ordinance to have the effect of being *both* an environmental *and* a land use ordinance, depending upon the economic stability of the mining operation to which it is applied:

A mining law that requires post-mining land reclamation can add great cost to a mining operation. If the mining operation is highly profitable, the rule operates as an environmental regulation, presumably permissible. But if the mining operation is otherwise economically marginal, the statute might halt the mining because of the excessive cost, an effect that seems more like a prohibition.

Local surface mining reclamation ordinances, if permitted by state law,¹²⁷ are one example of environmental regulations that may be applied to federal lands.¹²⁸ Other examples might include local ordinances aimed at pollution control¹²⁹ or a local ordinance designed to guide mineral development on federal lands through simple permitting procedures.¹³⁰ Prior to drafting any ordinance, local governments should decide that the ordinance will be merely a guide to federal mineral development, not a prohibition on such development.¹³¹ Local governments may also need to consult other federal environmental statutes such as the Clean Air Act¹³² and the Clean Water Act¹³³ to minimize the likelihood of federal preemption.¹³⁴

III. THE EXTENT TO WHICH LOCAL GOVERNMENTS CAN REGULATE: THE TAKINGS ISSUE

The previous section determined that local governments are not always preempted from enacting zoning and other ordinances which regulate the surface mining of coal. This section discusses how far local governments may go in regulating without running afoul of the "takings" clauses of the Fifth¹³⁵ and Fourteenth¹³⁶ Amendments of the United

Freyfogle, *supra* note 120, at 480-81.

127. See *supra* notes 70 to 86 and accompanying text (discussing state/local preemption of local ordinances regulating surface mining) and *infra* notes 144 to 149 and accompanying text (discussing enabling authorization for local ordinances).

128. Freyfogle, *supra* note 120, at 480-81. Such an ordinance would, of course, only be permissible if it did not have the effect of prohibiting the mining of coal on federal lands. *Id.*

129. Barnhill and Sawaya-Barnes, *supra* note 89, at 232. It is unlikely that the Clean Air Act or the Clean Water Act would preempt such an ordinance, because those acts expressly recognize the connection between pollution control and land use planning. *Id.*

130. See *State ex rel. Andrus v. Click*, 554 P.2d 969 (Idaho 1976). The locality would, however, probably be preempted from denying a permit under such a permitting program because a permit denial is tantamount to a prohibition on mining. Barnhill and Sawaya-Barnes, *supra* note 89, at 237-38.

131. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 587 (1987).

132. 42 U.S.C. §§ 7401-642 (1988).

133. 33 U.S.C. §§ 1251-1387 (1988).

134. Opinion of the South Dakota Attorney General, *supra* note 69.

135. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

States Constitution and similar clauses of their own state constitutions.

Localities may regulate the surface mining of coal in several ways. First, many localities have used zoning ordinances to prohibit mining anywhere within the locality, or to restrict mining to certain zones.¹³⁷ Within the framework of zoning, local governments occasionally permit surface mining by variance or conditionally through special use permits.¹³⁸ For example, some ordinances disallow surface mining "as of right," but conditionally permit it in certain zones, such as agricultural, if the mineral developer successfully applies for and obtains a special use permit from the local zoning board.¹³⁹

Outside of zoning, local governments regulate surface mining through licensing ordinances,¹⁴⁰ ordinances requiring post-mining reclamation of the land,¹⁴¹ or more sophisticated "mineral ordinances" that guide the surface mining process.¹⁴² When applied to coal mining, these non-zoning ordinances are more susceptible to preemption problems than traditional zoning ordinances, which merely control the *location* of mining through use restrictions or prohibitions.¹⁴³ For the sake of simplicity, and because they are the most commonly used method of local control, most of the following discussion is limited to zoning ordinances.

A. Authority to Regulate Under Enabling Legislation

At the outset, a municipality must determine whether it is able to

136. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

137. Renkey, *supra* note 4, at 746-48.

138. Benoit, *supra* note 5, at 159-60.

139. See, e.g., *Amerikohl Mining, Inc. v. Zoning Hearing Bd.*, 597 A.2d 219, 220 (Pa. Commw. Ct. 1991) (discussing township zoning ordinance that permitted surface mining only by special exception in A-1 agricultural districts), *appeal denied*, 602 A.2d 861 (Pa. 1992).

140. See, e.g., *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1379 (N.J. 1992) (discussing quarry licensing ordinance).

141. Lane, *supra* note 20, at 601-28.

142. Benoit, *supra* note 5, at 160. These types of mineral ordinances are more likely to be preempted than other types of ordinances, because of their potential overlap with state surface mining statutes. *Id.*

143. *Id.* at 159-60.

enact ordinances regulating surface mining.¹⁴⁴ This is a separate issue from the preemption question discussed previously. Although a locality may not be preempted from regulating surface mining through land use ordinances, it generally must be authorized by enabling legislation to enact such ordinances.¹⁴⁵ Before a locality zones surface mining, it must consult the state zoning enabling statute. All state zoning statutes are patterned after the Standard Zoning Enabling Act,¹⁴⁶ which courts construe as implicitly authorizing zoning of natural resources.¹⁴⁷ Some states, like Kentucky and Virginia, have modified the language of the Standard Act to expressly authorize such regulation.¹⁴⁸ Localities must look to other enabling legislation when regulating the surface mining of coal through ordinances other than zoning.¹⁴⁹

B. General Principles of the Takings Clause

Zoning and other ordinances that regulate surface mining have been challenged frequently as "takings" of private property without just compensation, especially where they prohibit surface mining from

144. See *Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 228 A.2d 169, 173 (Pa. 1967).

145. DANIEL R. MANDELKER, *LAND USE LAW* § 4.16 (2d ed. 1988). Most state constitutions give municipalities, and sometimes counties, home rule powers which allow them to legislate in certain areas without statutory authority. *Id.* at § 4.27. The power to enact land use ordinances, including zoning, is usually within the home rule power. *Id.* § 4.28. However, in most home rule states, localities still must follow the state zoning statute because zoning is a matter of both state and local concern. *Id.*

146. *Id.* at § 4.16. The Standard Zoning Enabling Act, which forms the basis for zoning in the United States, was developed by the U.S. Department of Commerce in the mid-1920's. It was quickly adopted in some form by most states. *Id.*

147. *Exton Quarries*, 228 A.2d at 177. The actual text of the Standard Act is silent as to zoning of natural resources development. *Id.*

148. KY. REV. STAT. § 100.203 (Baldwin 1992) ("The city or county may regulate . . . the removal of natural resources . . ."); VA. CODE ANN. § 15.1-486 (Michie 1989) (Counties and municipalities may "regulate, restrict, permit, and determine . . . [t]he excavation or mining of soil or other natural resources."). Both of these states also expressly authorize local governments to consider natural resources when preparing comprehensive plans. See KY. REV. STAT. § 100.187(3) (Baldwin 1992); VA. CODE ANN. § 15.1-447 (Michie 1992).

149. See, e.g., *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1380-81 (N.J. 1992) (discussing municipal authorization to enact quarry licensing ordinance by state licensing enabling statute).

occurring anywhere within the locality.¹⁵⁰ Rather than challenging the ordinance on its face, plaintiffs typically assert the ordinance is a taking "as-applied" to their property.¹⁵¹ For example, in *East Fairfield Coal Company v. Booth*,¹⁵² a coal company successfully challenged a zoning ordinance prohibiting the strip mining of coal on its property or anywhere else in the township.¹⁵³ Ordinances that restrict, but do not prohibit, surface mining also have been heavily contested.¹⁵⁴ In one such case, a mining company challenged an ordinance allowing surface mining only by special exception in one district, the A-1 agricultural zone.¹⁵⁵

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation;"¹⁵⁶ the Fourteenth Amendment applies this to the

150. See Annotation, *Prohibiting or Regulating Removal or Exploitation of Oil and Gas, Minerals, Soil, or Other Natural Products Within Municipal Limits*, 10 A.L.R.3d 1226 (1992).

An ordinance absolutely prohibiting surface mining anywhere in the municipality also raises exclusionary zoning problems. In some states, such as Pennsylvania and Ohio, local governments may not totally exclude surface mining as a use. See *East Fairfield Coal Co. v. Booth*, 143 N.E.2d 309, 311 (Ohio 1957); *Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 228 A.2d 169, 179-82 (Pa. 1967) (holding that municipal ordinance prohibiting rock quarrying was unconstitutionally exclusionary). However, a detailed discussion of the exclusionary nature of these ordinances is beyond the scope of this paper.

151. Generally, nearly all cases challenging zoning ordinances as takings allege the ordinance is a taking "as-applied" to a particular existing or proposed mine site. This is so because until the property owner is injured by enforcement of the ordinance against his surface mine, all he can bring is a facial challenge contesting the very enactment of the ordinance. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-95 (1987). A facial challenge asserts the ordinance is invalid under every set of facts. *Id.* Property owners avoid facial challenges because they rarely are successful. *Id.* at 495. Furthermore, a facial challenge against regulations restricting surface mining was rejected by the Supreme Court in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (upholding federal Surface Mining Control and Reclamation Act (SMCRA) against facial attack).

152. 143 N.E.2d 309 (Ohio 1957).

153. *Id.* at 311-12.

154. See Annotation, *supra* note 150, at 1256-57.

155. *Amerikohl Mining, Inc. v. Zoning Hearing Bd.*, 597 A.2d 219 (Pa. Commw. Ct. 1991), *appeal denied*, 602 A.2d 861 (Pa. 1992).

156. U.S. CONST. amend. V.

states.¹⁵⁷ Initially it was thought the Takings Clause only protected against direct physical appropriations of private property by the government,¹⁵⁸ but the Supreme Court came to realize that unduly onerous government regulations can have the same effect as direct appropriation.¹⁵⁹ In the oft-quoted words of Justice Oliver Wendell Holmes, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹⁶⁰ The question of whether an ordinance or regulation takes a private owner's property is therefore one of degree -- is the regulation so harsh it works to deprive the owner of his property?¹⁶¹

However, property rights have never been viewed as so absolute that all regulation of private property is prohibited.¹⁶² As the Supreme Court stated recently in *Lucas v. South Carolina Coastal Council*,¹⁶³ property owners expect their property to be regulated from time to time to a certain degree for the common good.¹⁶⁴ If government had to pay compensation every time it regulated private property, then government could hardly exist.¹⁶⁵ Courts have used a variety of tests to determine when a regulation crosses the line and becomes a taking.¹⁶⁶ Many courts apply a balancing test which weighs the harm suffered by the individual property owner against the public purposes promoted by the land use regulation.¹⁶⁷ Other courts may use a harm/benefit theory that upholds regulations preventing a harm, but invalidates regulations conferring a benefit on the public.¹⁶⁸

In recent years, the Supreme Court and a growing number of state

157. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of . . . property without due process of law . . .").

158. *Legal Tender Cases*, 79 U.S. 457, 551 (1870).

159. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) (holding that unduly onerous government regulations may have the effect of physically appropriating property).

160. *Id.* at 415.

161. *Id.* at 416.

162. Leslie Bender, *The Takings Clause: Principles or Politics*, 34 BUFF. L. REV. 735, 748-64 (1985) (discussing the historical conception of property rights and the takings clause).

163. 112 S. Ct. 2886 (1992).

164. *Id.* at 2899.

165. *Mahon*, 260 U.S. at 413.

166. MANDELKER, *supra* note 145, at § 2.06.

167. *Id.* at § 2.11.

168. *Id.* at § 2.08.

and federal courts have come to favor the two part test set forth in *Agins v. City of Tiburon*.¹⁶⁹ Under the *Agins* test, to establish a taking the private property owner must show either that the zoning ordinance does not substantially advance legitimate state interests, or that it denies the owner all economically viable use of his land.¹⁷⁰ The Court has emphasized, however, that this test is not a set formula, but rather is a case specific, ad hoc factual inquiry.¹⁷¹

Since *Euclid v. Ambler Realty Co.*,¹⁷² zoning has been viewed as a preferred means of land use control and is entitled to a presumption of validity. To prove an ordinance is unsupported by legitimate public interests, the private owner generally must show the ordinance is not related to the public's safety, health, morals or general welfare.¹⁷³ The ordinance must serve the public interests which it purports to promote.¹⁷⁴ If the private owner succeeds in proving the ordinance is unrelated or insufficiently related to the asserted public interests, then the ordinance is a "taking" of his or her property.¹⁷⁵ On the other hand, if the ordinance is supported by legitimate goals, and is reasonably calculated to achieve those goals, it is a valid exercise of the police power.¹⁷⁶

Even if the government satisfies the first phase of the taking inquiry by demonstrating legitimate state interests in support of the ordinance, the ordinance may nevertheless be a "taking" if it denies the private owner all economic use of his property.¹⁷⁷ The Supreme Court has held that to present such a case, the private owner must be left without

169. 447 U.S. 255 (1980).

170. *Id.* at 260. The Supreme Court recently has applied the *Agins* test in whole or in part in a variety of cases. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (using second prong of *Agins* to strike down beachfront management regulations as total deprivations of all viable use); *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992) (citing *Agins* to show that petitioners had mounted a facial challenge); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (using *Agins*' two part test to strike down mandatory dedication of public beach easement). Professor Mandelker notes that the Court "adopted" the *Agins* test in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). MANDELKER, *supra* note 145, at § 2.23.

171. *Lucas*, 112 S. Ct. at 2893. For discussion of recent Supreme Court takings doctrine, see generally Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600 (1988).

172. 272 U.S. 365 (1926).

173. *DeBenedictis*, 480 U.S. at 487-88.

174. *Nollan*, 483 U.S. at 834-37.

175. *Id.* at 841-42.

176. *DeBenedictis*, 480 U.S. at 487-88.

177. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

any economically productive use of his property, typically to the extent the land must be left undeveloped.¹⁷⁸ The most recent of the Court's decisions in this area is *Lucas v. South Carolina Coastal Council*.¹⁷⁹

1. *Lucas v. South Carolina Coastal Council*

In *Lucas*, a private real estate developer had purchased two beachfront lots on the South Carolina barrier island of the Isle of Palms.¹⁸⁰ There were no restrictions on development rights when Lucas purchased the lots. However, the state of South Carolina subsequently imposed beachfront development restrictions on the lots pursuant to its Beachfront Management Act.¹⁸¹ A setback line was established on Lucas' lots which effectively prevented him from constructing any occupiable dwellings.¹⁸² On appeal, the Supreme Court agreed with the trial court that Lucas had been deprived of all economically viable use of his property.¹⁸³ The Court then held that regulations depriving the owner

178. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894-95 (1992).

179. 112 S. Ct. 2886 (1992).

180. *Id.* at 2889. Lucas purchased the lots, which were zoned single-family residential, for \$975,000. *Id.* Evidence showed that although the lots were capable of being built upon (and indeed, homes existed on directly adjacent lots), the lots had been completely underwater for a six year period between 1957 and 1963 and were occasionally flooded by the ebb and flow of the tide. *Id.* at 2905 (Blackmun, J., dissenting).

181. *Id.* at 2889. Among the purposes enunciated by the state for the Beachfront Management Act were the protection of life and property from beach erosion and wave energy, promoting tourism, nurturing the habitats of numerous plants and animals, and providing a natural environment for the physical and mental well-being of the state's citizens. *Id.* at 2896 n.10.

182. *Id.* at 2890.

183. *Id.* at 2896. Justice Blackmun, who dissented, believed this finding of the trial court to be erroneous. Blackmun stated:

Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts have frequently recognized that land has economic value where the only residual economic uses are recreation or camping.

Id. at 2908 (Blackmun, J., dissenting) (citation omitted). *But see* Vatalaro v. Department of Env'tl Regulation, 601 So.2d 1223, 1227 n.5 (Fla. App. 1992) (holding that "passive

of all beneficial use of his land can be sustained only if the owner never had the legal right to use the property for the proscribed use.¹⁸⁴ To determine if the owner had the right to put the property to such a use, in this case the construction of dwellings, one must consult state nuisance and property law.¹⁸⁵ The Court ruled:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.¹⁸⁶

Furthermore, the Court held, limitations on the owner's title cannot be newly legislated, but must originate from relevant background principles of the common law.¹⁸⁷ The Court remanded the case for a determination of whether Lucas would have been permitted to develop his lots under

recreational uses" are insufficient residual uses to defeat a claim of total deprivation of economic value); *see also infra* notes 264 to 291 and accompanying text (discussing the relationship between investment backed expectations and residual uses).

184. *Lucas*, 112 S. Ct. at 2899.

185. *Id.* at 2901. The Court provided some guidelines for this inquiry:

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law normally entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so[.]) So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

Id.

186. *Id.* at 2899.

187. *Id.* at 2900.

state property and nuisance law.¹⁸⁸ Lucas could be prevented from developing his lots only if the state could identify "background principles of nuisance and property law that prohibit the use he now intends in the circumstances in which the property is presently found."¹⁸⁹ The Court, however, suggested a doubt that the common law would prohibit Lucas from building houses.¹⁹⁰

Lucas particularly applies to ordinances restricting or prohibiting surface mining because, although total takings cases are rare, they are more common where minerals are involved.¹⁹¹ This is true because, "[f]or practical purposes, the right to coal consists in the right to mine it What makes the right to mine coal valuable is that it can be exercised with profit."¹⁹² Ordinances denying or severely limiting an owner's right to mine her coal may have the effect of depriving her of all economically viable use of the coal.¹⁹³ This does not mean, however, that the right to mine coal may never be restricted.

C. Relationship to Legitimate Public Interests

In testing the validity of a zoning ordinance that prohibits or restricts surface mining, courts should engage in the typical two phase takings inquiry.¹⁹⁴ First, the court should decide if the ordinance furthers legitimate state interests by being substantially related to the safety, health, morals or general welfare of the community.¹⁹⁵ Courts have repeatedly upheld zoning ordinances prohibiting surface mining when related to preserving safety, health and general welfare.¹⁹⁶ Such ordinances are upheld even where the property owner suffers economic hardship or loss

188. *Id.* at 2901.

189. *Id.* at 2901-02.

190. *Id.* at 2901.

191. *See Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 n.9 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 406 (1991).

192. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (quoting *Commonwealth ex rel. Keator v. Clearview Coal Co.*, 100 A. 820 (Pa. 1917)).

193. *Id.* ("To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.").

194. *McClimans v. Board of Supervisors*, 529 A.2d 562, 568 (Pa. Commw. Ct. 1987), *aff'd on appeal after remand*, 597 A.2d 738 (Pa. Commw. Ct. 1991).

195. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

196. Annotation, *supra* note 150, at 1250.

of profits.¹⁹⁷ The critical determination is whether the prohibition on surface mining is reasonably calculated to deal with legitimate safety, health and general welfare concerns.¹⁹⁸ The consensus of the cases on this issue suggests that a court will uphold a zoning ordinance if the ordinance prohibits surface mining near populated or residential areas.¹⁹⁹ However, if the ordinance bans surface mining in a relatively unpopulated or rural area, where little possibility of danger exists, it is less likely to be upheld.²⁰⁰

Several cases illustrate the distinction between ordinances relating to safety, health and welfare, and those held not to have such a relationship. In *G.M.P. Land Co. v. Board of Supervisors*,²⁰¹ a

197. *Id.* Note, however, that if the private property owner suffers a *complete* deprivation of profits and economic use, then the second phase of the takings inquiry is triggered. See *infra* notes 236 to 323 and accompanying text.

198. *McClimans*, 529 A.2d at 568.

199. See *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377 (N.J. 1992) (upholding ordinance prohibiting quarries that would pose dangers to the public safety and environment); *Amerikohl Mining, Inc. v. Zoning Hearing Bd.*, 597 A.2d 219 (Pa. Commw. Ct. 1991) (upholding denial of special exception for surface mine operation that would create air, noise and water pollution affecting contiguous residential areas), *appeal denied*, 602 A.2d 861 (Pa. 1992); *G.M.P. Land Co. v. Board of Supervisors*, 457 A.2d 989 (Pa. Commw. Ct. 1983) (sustaining zoning ordinance prohibiting surface mining in areas where drinking water contamination and erosion were possible); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962) (ordinance prohibiting quarrying held valid because of danger to nearby residential areas and schools); *Consolidated Rock Products Co. v. City of Los Angeles*, 370 P.2d 342, 345 (Cal. 1962) (upholding zoning ordinance prohibiting rock and gravel operations that would create appreciable quantities of dust injurious to the public health), *appeal dismissed*, 371 U.S. 36 (1962); see also *Village of Spillertown v. Prewitt*, 171 N.E.2d 582 (Ill. 1961) (ordinance banning strip mining upheld in light of property owner's excavations of large trenches near homes on village street).

200. See *East Fairfield Coal Co. v. Booth*, 143 N.E.2d 309, 312 (Ohio 1957) (striking down zoning ordinance that prohibited coal surface mining on run-down farm land adjacent to an existing surface coal mine); *Midland Elec. Coal Corp. v. Knox County*, 115 N.E.2d 275, 285 (Ill. 1953) (striking down zoning ordinance prohibiting surface mining of coal in an agricultural area that posed no danger to the safety, health or general welfare); see also *Frelk v. County of Kendall*, 357 N.E.2d 1325 (Ill. 1976) (denial of special exception to surface mine in agricultural area overturned as unrelated to safety, health or welfare); *Herman v. Village of Hillside*, 155 N.E.2d 47 (Ill. 1959) (invalidating zoning ordinance that prohibited expansion of a quarry which was adjacent to an existing quarry); *Ex parte Kelso*, 82 P. 241 (Cal. 1905) (invalidating ordinance excluding rock quarrying absent proof that such quarrying injured the public health, safety or welfare).

201. 457 A.2d 989 (Pa. Commw. Ct. 1983).

Pennsylvania court upheld a zoning ordinance restricting surface mining to an "S-3 Special Purpose Mining Area" because the ordinance was related to legitimate concerns over the environment.²⁰² The court found that allowing mining outside of the S-3 district would increase the erosion of slopes and pose a substantial risk to a nearby reservoir.²⁰³ Witnesses also testified that blasting from the strip mine would damage an aquifer, impair the natural recharge of the reservoir by creating water barriers, and contaminate drinking water supplies by acid mine drainage.²⁰⁴ For these reasons, the court held that the ordinance clearly was related to the valid government interest of preserving the environment.²⁰⁵

Similarly, in *Village of Spillertown v. Prewitt*,²⁰⁶ a property owner unsuccessfully challenged an ordinance forbidding surface mining anywhere within the township.²⁰⁷ Arguing in defense of the ordinance, the village presented evidence that Prewitt, the property owner, was digging trenches seventeen feet deep in order to extract coal from underneath his half-acre lot in the village.²⁰⁸ Not only had Prewitt excavated within six feet of his neighbor's lot line, he also had left these trenches uncovered and filled with water, knowing that small children lived and played within thirty feet of the lot.²⁰⁹ In rejecting Prewitt's takings claim, the court held that under such circumstances it was obvious the ordinance was enacted to preserve the public health and safety, and Prewitt acted in utter disregard of those concerns.²¹⁰

In contrast, other cases have invalidated ordinances prohibiting or restricting surface mining if the proposed surface mine posed no dangers to the public safety, health or welfare. In *Midland Electric Coal Corp. v. Knox County*,²¹¹ the court held that a zoning ordinance banning surface mining in every district within the county except for the "G" district was an unconstitutional taking of property without relation to safety, health or welfare.²¹² Significant in the court's analysis was the fact that Midland

202. *Id.* at 995.

203. *Id.*

204. *Id.*

205. *Id.*

206. 171 N.E.2d 582 (Ill. 1961).

207. *Id.* at 583.

208. *Id.*

209. *Id.*

210. *Id.* at 583-84.

211. 115 N.E.2d 275 (Ill. 1953).

212. *Id.* at 287.

Electric Coal Corporation's mine site produced no air, noise or water pollution, nor did it create any traffic hazards, noxious odors or bacteria, or decrease the property values of surrounding homes and businesses.²¹³ Also important were the economic interests at stake: \$25,000,000 in coal (in 1953 dollars!) and 300 jobs.²¹⁴ In light of the economic interests at risk and the unobtrusiveness of the particular mine, the court concluded that the ordinance was insufficiently related to public health, safety, morals or general welfare.²¹⁵ The court commented: "The evidence and the findings clearly demonstrate that the gain from the prohibition is negligible while the hardship visited upon the plaintiff is great. The plaintiff's coal is being confiscated without any compensation."²¹⁶

In a case with somewhat less economically compelling circumstances, an Ohio court enjoined enforcement of a zoning ordinance that prohibited surface mining. In *Kane v. Kreiter*,²¹⁷ the proposed surface mine was on steep, hilly, run-down farm land with very few residences in close proximity.²¹⁸ The area surrounding the land also had been extensively strip mined over the years.²¹⁹ The site was of little value as agricultural property.²²⁰ The court held that, as applied to this particular site, the ordinance was a taking of property without just compensation.²²¹ The public interests were not served by excluding mining at such a location because there were few adjacent owners who would be adversely affected.²²²

213. *Id.* at 281.

214. *Id.* at 278, 281. One commentator suggested *Midland Electric* was decided primarily on economic values, rather than on a careful consideration of the public safety and health concerns. See Renkey, *supra* note 4, at 750. This assertion probably contains merit, given the plaintiff in *Midland Elec.* contributed over 20 percent of the county's property tax revenues and was the county's only major industry. 115 N.E.2d at 281.

215. 115 N.E.2d at 287.

216. *Id.*

217. 195 N.E.2d 829 (Ohio 1963).

218. *Id.* at 832.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* Several other cases have held zoning ordinances prohibiting surface mining to be unsupported by legitimate public interests. See *East Fairfield Coal Co. v. Booth*, 143 N.E.2d 309 (Ohio 1957) (holding that public interests were not protected by banning surface mining on run-down farm land located at the edge of the township, over two miles away from any developed areas and adjacent to an existing strip mine); *Herman v. Village of Hillside*, 155 N.E.2d 47, 50, 53 (Ill. 1959) holding that financial interests justified

In practice, cases striking down surface mining ordinances as insufficiently related to safety, health or welfare have become less frequent in recent decades.²²³ As courts become more conscious of the environment and rural areas become more urbanized, striking down zoning ordinances regulating surface mining will become the trend.²²⁴ When a court does closely scrutinize the public interests in support of the ordinance, it considers the following factors to be important: the proximity of the mine site to residential areas and schools,²²⁵ the possibility of air, water and noise pollution from the mine,²²⁶ the importance of the mine to the community's economic and job base,²²⁷ aesthetics,²²⁸ and the hardship imposed upon the private owner desiring to surface mine.²²⁹

Activities regulated by extensive state and federal regulations sometimes are shielded to a certain degree from exclusion by zoning.²³⁰ The argument is that, because of heavy regulations, these activities will not have as great an impact on the community. Proving that a ban on such activities is necessary to preserve the public welfare, therefore, is presumably more difficult. For example, in *General Battery Corp. v. Alsace Township*,²³¹ the court held that a zoning ordinance excluding waste disposal facilities was unrelated to the public health, safety or

invalidating a rezoning which prohibited the plaintiff from expanding his limestone quarry even though the quarry was now surrounded by single-family residences and businesses that were inconvenienced by blasting, noise, vibrations and air pollution emanating from the site); *Ex parte Kelso*, 82 P. 241 (Cal. 1905) (striking down an ordinance proscribing quarrying, rather than regulating blasting, anywhere within the city and county of San Francisco because the ordinance did not further legitimate police power interests).

223. *Renkey*, *supra* note 4, at 751.

224. *Id.* ("These cases were decided at a time when environmental concerns were considered less important than economic factors, explaining the obvious absence of any discussion of the former.").

225. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962); *Village of Spillertown v. Prewitt*, 171 N.E.2d 582, 584 (Ill. 1961).

226. *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1384 (N.J. 1992); *G.M.P. Land Co. v. Board of Supervisors*, 457 A.2d 989, 995 (Pa. Commw. Ct. 1983).

227. *Midland Elec. Coal Corp. v. Knox County*, 115 N.E.2d 275, 281-82 (Ill. 1953).

228. *Bernardsville Quarry*, 608 A.2d at 1384; *G.M.P. Land Co.*, 457 A.2d at 995.

229. *Kane v. Kreiter*, 195 N.E.2d 829, 832 (Ohio 1963); *Herman v. Village of Hillside*, 155 N.E.2d 47, 52-53 (Ill. 1959); *Midland Elec.*, 115 N.E.2d at 283.

230. *See General Battery Corp. v. Alsace Township*, 371 A.2d 1030 (Pa. Commw. Ct. 1977) (invalidating ordinance that excluded a heavily regulated activity because the activity therefore had little potential for harming the public safety, health or welfare).

231. 371 A.2d 1030 (Pa. Commw. Ct. 1977).

welfare because those interests already were adequately protected by extensive state regulations.²³² Similarly, the surface mining of coal is subject to considerable regulation by federal and state SMCRA's and other environmental statutes,²³³ but this argument essentially was made and rejected in another Pennsylvania case, *Amerikohl Mining, Inc. v. Zoning Hearing Board*.²³⁴ In *Amerikohl* the court reasoned that regulation by a state SMCRA does not foreclose a local zoning board from considering the welfare of the citizens of a *particular district*.²³⁵

D. Effect of Total Deprivation of Economically Viable Uses

Once a municipality overcomes the first phase of the takings inquiry by proving the zoning ordinance substantially furthers legitimate state interests, the court then should decide if second phase inquiry is triggered by the owner being deprived of all economically viable use of his property.²³⁶ Judging whether a regulation proscribing the mining of coal is one that deprives the owner of all beneficial use of his property has been especially problematic for the courts for two reasons. First, for all practical purposes the ownership of coal consists of the right to mine the coal.²³⁷ A regulation depriving the owner of the right to mine in effect denies him ownership of the coal.²³⁸ Second, the degree of ownership often is important. Frequently where minerals are involved, the mineral or subsurface estate is split by conveyance from the surface estate.²³⁹ If the property owner's total ownership consists only of the mineral estate, then obviously a regulation obstructing the right to mine coal has an entirely different effect on him from that on an individual who owns both the surface and subsurface estates. Whether, for "takings" purposes, the fee simple can be split into a subsurface mineral estate and a surface estate

232. *Id.* at 1032-33.

233. *See supra* notes 20 to 86 and accompanying text (discussing federal and state regulation of coal surface mining).

234. 597 A.2d 219, 226 (Pa. Commw. Ct. 1991), *appeal denied*, 602 A.2d 861 (Pa. 1992).

235. *Id.*

236. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

237. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

238. *Id.*

239. *See id.* at 412.

has caused a division among courts.

1. Property Owner Owns Only the Subsurface

If only the mineral estate is owned, under the right facts, all courts should hold that an ordinance prohibiting the right to mine is a "taking" because it deprives the owner of all economic value of his property.²⁴⁰ The qualification "under the right facts" is important, because, as will be discussed later, if the mining amounts to a nuisance, it may be banned.²⁴¹ The situation in which the owner's total interest consists of the mineral estate, is exemplified by *Pennsylvania Coal Co. v. Mahon*.²⁴² In *Mahon*, the surface and subsurface estate was split; the Pennsylvania Coal Company owned the minerals and the Mahons owned the surface.²⁴³ When the state passed a statute effectively forbidding Pennsylvania Coal from mining its mineral estate, the company brought a takings claim.²⁴⁴ The Supreme Court, in an opinion by Justice Holmes, agreed with the plaintiff, holding that the statute had the same effect as appropriating or destroying the mineral estate by making it commercially impossible to mine.²⁴⁵ Because the mineral estate was all the coal company owned, its destruction by regulation required payment of just compensation.²⁴⁶

In most cases the deeds under which surface mining companies hold title grant rights solely to minerals, with covenants licensing use of the surface of the land only for mining.²⁴⁷ Hence, the restriction of the right to mine coal creates the possibility of a situation similar to *Mahon*. Because mining companies may have no rights to use the surface for anything other than mining, and because the subsurface has value only if

240. *Id.* at 414. Professor Michelman refers to this as "conceptual severance." Michelman, *supra* note 171, at 1614-21.

241. *See infra* notes 302 to 323 and accompanying text (discussing the nuisance exception).

242. 260 U.S. 393 (1922).

243. *Id.* at 412.

244. *Id.*

245. *Id.* at 414-15.

246. *Id.*

247. Benoit, *supra* note 5, at 151-53.

mined, mining may be the only viable use.²⁴⁸ Where surface mining on federally owned lands is restricted, such takings claims are common.²⁴⁹ All private surface mining on federal lands is done by individuals and entities with claims only to the minerals, so an ordinance prohibiting surface mining on federally owned land divests the private miner of the use of his only property -- the minerals.²⁵⁰

2. *Property Owner Owns Both Surface and Subsurface*

A property owner holding title to both the surface and the subsurface may seek to surface mine. Under these facts, courts are divided on whether an ordinance or regulation banning the right to mine usurps from the owner all economically viable use of the land. Major issues on which courts are divided include the importance of the owner's investment backed expectations, the feasibility of residual land uses, and whether property can be split into separate estates for "takings" purposes. In *Penn Central Transportation Co. v. City of New York*,²⁵¹ the Supreme Court laid out three factors to be considered in takings cases.²⁵² One was the extent to which the regulation interferes with the private owner's reasonable, investment backed expectations.²⁵³ Courts have reached different interpretations as to the meaning and importance of reasonable, investment backed expectations.²⁵⁴ When the Supreme Court uses the

248. In re Permanent Surface Mining Regulation Litig., 22 Env't Rep. Cas. (BNA) 1557 (1985) (quoting 47 Fed. Reg. 25296-97 (1982) ("For owners of only coal rights, there is not reasonable remaining use where surface coal mining operations cannot occur by any technological means . . .")).

249. Barnhill and Sawaya-Barnes, *supra* note 89, at 241.

250. *Id.*

251. 438 U.S. 104 (1978).

252. *Id.* at 130-31.

253. *Id.* The other two factors are the economic impact of the regulation and the character of the government action. *Id.* The three factors specified by *Penn Central* generally have been viewed by commentators as confusing and difficult to apply. MANDELKER, *supra* note 145, at § 2.18. Apparently the current Supreme Court also dislikes *Penn Central*'s three factors, usually preferring to use the two part inquiry of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), with occasional reference to *Penn Central*. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I -- A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1327-29 (1989).

254. Peterson, *supra* note 253, at 1320.

phrase, it typically is referring to whether the private property owner relied to her detriment on an expectation that the government would not act as it did.²⁵⁵ For instance, in *Lucas*, the Court reasoned that property owners' investment backed expectations usually are founded upon the bedrock of the common law of property and nuisance.²⁵⁶ Private property owners may rely on the reasonable expectation that they can use their property for any use permitted under the common law.²⁵⁷ Therefore, when a regulation goes beyond the common law, compensation must be paid to the property owner who was injured by reliance on the "historical compact" of the common law.²⁵⁸

Although surface mining traditionally has been viewed as a legitimate business and is not a nuisance per se, enough cases have held particular surface mines to be nuisances in fact that it is doubtful any such "historical compact" exists.²⁵⁹ Nevertheless, some courts have held that if the property owner purchased the property with the expectation he could surface mine, a regulation depriving the owner of the right to mine is a "taking."²⁶⁰ These courts seem to elevate interference with investment backed expectations as the sole test for a taking.²⁶¹ Other courts hold

255. *Id.*

256. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900-01 (1992); *id.* at 2903 (Kennedy, J., concurring).

257. *Id.* at 2901

258. *Id.* at 2900-01. Justice Blackmun, who dissented, found himself in fundamental disagreement concerning this "historical compact." "It is not clear from the Court's opinion where our 'historical compact' or 'citizens' understanding' comes from, but it does not appear to be history." *Id.* at 2914-17 (Blackmun, J., dissenting)

259. See *infra* notes 310 to 323 and accompanying text (discussing surface mining as a nuisance under the common law).

260. See *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174-76 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 406 (1991) (invalidating ban on mining in alluvial valley floors as applied to property of coal company which invested over a million dollars in the land with the pre-regulation expectation that it would be able to surface mine); *McClimans v. Board of Supervisors*, 529 A.2d 562, 569-70 (Pa. Commw. Ct. 1987), *aff'd on appeal after remand*, 597 A.2d 738 (Pa. Commw. Ct. 1991) (invalidating zoning ordinance prohibiting plaintiff from surface mining where plaintiff invested in the property exclusively for mining purposes).

261. Cf. *Vatalaro v. Dep't of Envir. Reg.*, 601 So.2d 1223, 1228 (Fla. App. 1992) (holding that interference with investment backed expectations is the sole test for determining a taking).

In his concurring opinion in *Lucas v. South Carolina Coastal Council*, Justice Kennedy appeared to endorse investment backed expectations as the sole test for a taking:

that, even though the owner may have expected to reap great profits by mining, he is not deprived of all use of his property if he can put it to other, albeit less profitable uses.²⁶²

Courts also disagree on the feasibility or reasonableness of residual uses of the land, and how investment backed expectations relate to those residual uses. It is fundamental that if economically productive uses remain, no taking exists.²⁶³ However, just how "productive" must the residual use be to defeat the takings claim, and to what degree is the reasonableness of such uses subjectified by the intentions of the property owner? After *Lucas*, it is possible that marginally productive residual uses will not negate the takings claim, especially where the property owner is ill-equipped for the residual use, or never expected to use the property in such a manner.²⁶⁴ In *Lucas*, a complete taking was found even though the owner could have used his property for less profitable uses such as a camp or mobile home site.²⁶⁵

The following cases illustrate the different approaches courts take regarding the reasonableness of post-regulation residual uses. In *G.M.P. Land Co. v. Board of Supervisors*,²⁶⁶ a Pennsylvania court upheld a zoning ordinance restricting G.M.P. from surface mining because the property could be used for other, alternative uses.²⁶⁷ The court stated:

GMP could develop, among other things, tree farming,

Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved. In my view, reasonable expectations must be understood in light of the whole of our legal tradition.

112 S. Ct. 2886, 2903 (1992) (Kennedy, J., concurring).

262. *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1387 (N.J. 1992); *G.M.P. Land Co. v. Board of Supervisors*, 457 A.2d 989, 994 (Pa. Commw. Ct. 1983).

263. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

264. Even prior to *Lucas*, some commentators maintained that residual uses must be economically "significant" before the takings claim can be rejected. Peterson, *supra* note 253, at 1331.

265. *Lucas*, 112 S. Ct. at 2908 (Blackmun, J., dissenting).

266. 457 A.2d 989 (Pa. Commw. Ct. 1983).

267. *Id.* at 994.

hiking trails, resort hunting camps, a scenic overlook and drive, and cross-country skiing and snowmobile trails. Although those alternatives are potentially less profitable than stripmining, their availability clearly demonstrates that the township's [zoning] ordinance does not render GMP's surface estate in the yellow area [where mining is prohibited] valueless or useless.²⁶⁸

A similar result was reached in *Consolidated Rock Products Co. v. City of Los Angeles*,²⁶⁹ which upheld an ordinance that shut down a rock and gravel quarry because the property remained useful for certain agriculture, livestock raising, golf courses, and recreation.²⁷⁰

Although the courts in *G.M.P. Land Co.* and *Consolidated Rock* believed that basic agricultural and recreational residual uses were sufficient to defeat a claim of total deprivation, other courts have directly opposed this viewpoint. In *Whitney Benefits, Inc. v. United States*,²⁷¹ the plaintiff coal company succeeded in persuading the court that the SMCRA took its minerals without payment of compensation by banning surface mining in alluvial valley floors.²⁷² The court rejected the government's argument that the company was not deprived of all economic use because it could farm the land.²⁷³ Stating that the government's argument was "completely off the mark," the court emphasized the company had purchased the property with the expectation it would be able to mine it, and that SMCRA took the company's coal rights.²⁷⁴ As one early case noted, "us[ing] the surface for farming purposes provides no use for the mineral property beneath it."²⁷⁵

Likewise, the court in *Morris County Land Improvement Co. v.*

268. *Id.*

269. 370 P.2d 342 (Cal. 1962), *appeal dismissed*, 371 U.S. 36 (1962).

270. *Id.* at 351.

271. 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 406 (1991).

272. *Id.* at 1174.

273. *Id.* The court also held that SMCRA's "coal exchange" provision, a sort of transferable development right (TDR) for minerals, did not compensate the coal company for the taking. *Id.* at 1176 ("To hold that mere presence of an exchange provision precludes a court from finding a taking on enactment in cases like this one would eviscerate the constitutional just compensation guarantee.").

274. *Id.* at 1174.

275. *Midland Elec. Coal Corp. v. Knox County*, 115 N.E.2d 275, 283 (Ill. 1953).

Township of Parsippany-Troy Hills,²⁷⁶ cited approvingly by the Supreme Court in *Lucas*, found the presence of marginal residual uses to be unavailing.²⁷⁷ In *Morris County*, the court held that the township's zoning ordinance was a "taking" because it required the property owner to leave his land substantially in its natural state.²⁷⁸ The ordinance prohibited the land company from continuing to mine sand and gravel from the wetlands area, as well as just about any other significantly productive use.²⁷⁹ The court noted, "All in all, about the only practical use which can be made of property in the zone is a hunting or fishing preserve or a wildlife sanctuary, none of which can be considered productive."²⁸⁰ The test of whether a residual use is sufficient is reasonableness and economic feasibility.²⁸¹ Under this ordinance, the land company's residual use rights were hollow and could not defeat its claim for just compensation.²⁸²

The approach taken by the United States Supreme Court in *Lucas* - now the law of the land for Fifth and Fourteenth Amendment takings purposes -- regarding the reasonableness or feasibility of residual uses is more like *Whitney Benefits* and *Morris County*; in fact, the Court expressly adopted *Morris County*.²⁸³ In contrast, the views of Justice Blackmun, who dissented in *Lucas*, bear a closer relationship to the reasoning of *G.M.P. Land Co.* and *Consolidated Rock*.²⁸⁴ In *Lucas*, Justice Blackmun maintained the plaintiff wasn't deprived of all beneficial use of his property because he still could exclude others, picnic, swim, camp in a tent, or live in a movable trailer on the lot.²⁸⁵ These are the same types of residual uses cited by the courts in *G.M.P. Land Co.* and *Consolidated Rock* to support their holdings that other economically viable uses

276. 193 A.2d 232 (N.J. 1963).

277. *Id.* at 240.

278. *Id.* at 243.

279. *Id.* at 239-40.

280. *Id.* at 240.

281. *Id.*

282. *Id.* at 243. For another case rejecting passive recreational uses as sufficient to negate a claim of total deprivation, see *Vatalaro v. Dep't of Envir. Reg.*, 601 So.2d 1223 (Fla. App. 1992) (sustaining a claim of total deprivation even though plaintiff still could use the land for passive recreational uses such as a boardwalk).

283. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894-95 and n.7 (1992).

284. See *id.* at 2908 (Blackmun, J., dissenting).

285. *Id.*

remained.²⁸⁶ Yet the *Lucas* majority, like the courts in *Whitney Benefits* and *Morris County*, denied that these types of marginally productive residual uses will defeat a claim of total deprivation.²⁸⁷

Apparently the Supreme Court requires some sort of substantial residual use before denying a claim of total deprivation of economically viable uses.²⁸⁸ An example of this type of substantial residual use was present in the recent case of *Bernardsville Quarry, Inc. v. Borough of Bernardsville*,²⁸⁹ which cited *Lucas* in rejecting a takings claim brought against a municipal ordinance restricting rock quarrying.²⁹⁰ In *Bernardsville Quarry*, the quarry owner still could use the property, quite profitably, as a blacktop and concrete plant, as well as for a variety of other commercial and residential uses.²⁹¹ After *Lucas*, the Supreme Court might require the same type of economically productive residual use.

There also is uncertainty among the courts on whether a property owner can receive compensation for a taking of a separate, distinct estate or interest in minerals, apart from the surface estate.²⁹² Although some courts have interpreted Supreme Court decisions as holding that the Takings Clause cannot be used to compensate for takings of fractional

286. See *G.M.P. Land Co. v. Board of Supervisors*, 457 A.2d 989, 994 (Pa. Commw. Ct. 1983); *Consolidated Rock Prods. Co. v. City of Los Angeles*, 370 P.2d 342, 351 (Cal. 1962), *appeal dismissed*, 371 U.S. 36 (1962).

287. *Lucas*, 112 S. Ct. at 2894-95. The majority opinion in *Lucas* does not say much about *Lucas*' residual uses. Rather, the majority chose to adopt the trial court's finding that there were no economically productive residual uses. *Id.* at 2890. It can be implied, however, that the majority would require something more than a marginally productive use by its citation of *Morris County* and its rejection of Justice Blackmun's position. Indeed, even prior to *Lucas*, some commentators believed the court required more than marginally productive residual uses. Peterson, *supra* note 253, at 1331 ("Thus, for a claimant to establish a taking under the 'no economically viable use' test, he evidently must show that the challenged law prevents landowners from obtaining any *significant* economic benefit from owning their land.") (emphasis added).

288. Peterson, *supra* note 253, at 1331.

289. 608 A.2d 1377 (N.J. 1992).

290. *Id.* at 1387.

291. *Id.* at 1387.

292. Compare *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir. 1991) (holding property owner may be completely deprived of separate mineral estate, requiring payment of compensation), *cert. denied*, 112 S. Ct. 406 (1991), with *Bernardsville Quarry*, 608 A.2d at 1389 (holding plaintiff may not bring a takings claim based upon deprivation of separate estate or interest in property).

property interests like mineral estates,²⁹³ others have concluded that mineral is an estate unto itself deserving Takings Clause protection in the same degree as the fee simple absolute.²⁹⁴ *Whitney Benefits* is an example of cases in the latter category. This confusion is manifested by the majority's statement in *Lucas* that: "Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."²⁹⁵

To resolve this confusion, *Lucas* holds (in a footnote) that if the property interest allegedly taken is one recognized as a distinct property interest under state law, then the Takings Clause protects that interest.²⁹⁶ Therefore, if the property law in a particular state recognizes a separate mineral or subsurface estate, then a regulation denying all use of that estate can be challenged as a taking under federal law.²⁹⁷ By this holding, *Lucas* essentially affirms *Whitney Benefits* and opens the door for claims of total deprivations of separate, distinct property interests such as a "mineral estate," at least to the extent such an interest is recognized by state law.²⁹⁸

In his dissent in *Lucas*, Justice Stevens maintained the majority's broad definition of property encourages property owners to manipulate their property interests to take advantage of the Court's new rule.²⁹⁹

293. *Bernardsville Quarry*, 608 A.2d at 1389 (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500 (1987)).

294. *See Whitney Benefits*, 926 F.2d at 1174, 1176.

295. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992).

296. *Id.* In answering the question of whether takings of fractional interests in property can be compensated, the Court noted:

The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property -- i.e., accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that *Lucas* has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law

Id.

297. *Id.*

298. *Id.* at 2919 (Stevens, J., dissenting).

299. *Id.* at 2919-20.

"The smaller the estate, the more likely that a regulatory change will effect a total taking," noted Stevens.³⁰⁰ If Justice Stevens is correct, mineral developers anticipating prohibitions on surface mining may be able to make out a prima facie case of total deprivation merely by acquiring only the mineral estate.³⁰¹ However, the inherent risks involved with takings litigation and the presumption of validity attaching to zoning presumably would deter developers from acquiring smaller estates just to take advantage of the Court's takings jurisprudence.

3. *The Nuisance Exception*

Even if an ordinance does deprive a property owner of all beneficial use of his property, a taking will not necessarily be found in every case. If the proscribed use is one the owner had no legal right to make in the first place, i.e. if it amounts to a nuisance, then the government is need not pay compensation.³⁰² This reasoning stems from the common law maxim *sic utero tuo ut alienum non laedas*, which means that property may not be used in a manner injurious to the property of another.³⁰³ A zoning ordinance legitimately can circumscribe an activity that amounts to a common law nuisance.³⁰⁴ Before *Lucas*, it also was

300. *Id.* at 2919.

301. *See id.* at 2920 n.4:

In past decisions, we have stated that a regulation effects a taking if it "denies an owner economically viable use of his *land*," . . . indicating that this "total takings" test did not apply to other estates. Today, however, the Court suggests that a regulation may effect a total taking of *any* real property interest. (emphasis in original).

Criticism of *Whitney Benefits* and other cases finding takings of the distinct mineral estate relied on this land/property distinction which Justice Stevens, probably correctly, suggests has been abrogated by *Lucas*. *See* *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1389 (N.J. 1992) (criticizing *Whitney Benefits* because only land can be taken, not property). Thus, *Lucas* can be read as supporting total takings claims of property interests other than land. *Bernardsville Quarry*, although decided after *Lucas*, is incorrect to the extent it says otherwise.

302. *Lucas*, 112 S. Ct. at 2901; *see also* *Village of Spillertown v. Prewitt*, 171 N.E.2d 582, 584 (Ill. 1961) (upholding prohibition of surface mining constituting a nuisance to the public and adjacent landowners).

303. *Lucas*, 112 S. Ct. at 2901.

304. MANDELKER, *supra* note 145, at § 4.16.

thought "noxious" or "nuisance-like" activities, not amounting to public nuisances, could be enjoined.³⁰⁵ *Lucas* narrowed the scope of the nuisance exception by declaring that if a regulation denies all economically productive use of land, the court will sustain it only if "background principles of nuisance and property law" would proscribe the use.³⁰⁶ If the use declared "off limits" by the ordinance or regulation could not have been enjoined in a state common law public or private nuisance action, then the owner must receive just compensation.³⁰⁷

Under *Lucas*, if a zoning ordinance forbidding surface mining has the effect of depriving the owner of all beneficial use of his land, the owner must receive compensation unless the proposed surface mine would amount to a common law nuisance under state law.³⁰⁸ This inquiry necessarily must be case specific.³⁰⁹ Although in certain cases surface mining has been held to constitute a common law nuisance, surface mining is a legitimate business and has never been viewed as a nuisance per

305. *Lucas*, 112 S. Ct. at 2910-14 (Blackmun, J., dissenting); see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-93 (1987) (maintaining that nuisance-like activities may be abated by the police power).

306. *Lucas*, 112 S. Ct. at 2901-02. Three of the justices disapproved of the Court's narrowing of the nuisance exception. Justice Kennedy, although he concurred in the judgment, was troubled because only common law, not legislatively declared, nuisances now come under the exception. *Id.* at 2903-04 (Kennedy, J., concurring).

Maintaining the majority's reading of precedent was "distorted," Justice Blackmun noted that the use of nuisance law as a standard could be problematic:

There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There is simply no reason to believe that new interpretations of the hoary common law nuisance doctrine will be particularly "objective" or "value-free."

Id. at 2914 (Blackmun, J., dissenting). Justice Stevens voiced similar concerns in his dissent, arguing the majority was departing from precedent. *Id.* at 2920-22 (Stevens, J., dissenting).

307. *Id.* at 2901.

308. See *id.* at 2900.

309. See *id.* at 2901-02.

se.³¹⁰ It is well established that

Mining is a lawful and necessary business and a reasonable use of property, and neither mining nor quarrying is a nuisance per se, even though carried on in a populous community. So long as the business is conducted in the ordinary way and with the usual and customary precautions, the operator is not accountable for incidental annoyances to others that necessarily follow the mining operations. This is true of coal mining as well as other mining. Of course, mining, like any other business, may become a nuisance by reason of the manner in which it is carried on.³¹¹

A particular surface mining operation can, however, be a common law nuisance if excessive smoke, fumes or dust are produced, or if noise and vibrations from equipment or blasting disturb the peace.³¹² Other factors used to determine if mining is a nuisance are the potential for water pollution, erosion, landslides, and the release of noxious gases.³¹³ Surface mining also may be a nuisance if it poses substantial safety risk, such as where the mine is in close proximity to houses or schools.³¹⁴

The fact that a surface mine was once in a rural area, but is now surrounded by residential and commercial development, is another factor to consider.³¹⁵ However, if the mine was a nonconforming use when the zoning ordinance was enacted, a court cannot enjoin it as a nuisance

310. 54 Am. Jur.2d "Mines and Minerals" § 204 (1992). For a discussion of the historical understanding of mining as a legitimate business, *see generally* L.F. SALZMAN, *ENGLISH INDUSTRIES OF THE MIDDLE AGES* 1-83 (1923) (discussing mining as a legitimate industry in medieval England); T.A. RICKARD, *A HISTORY OF AMERICAN MINING* (1932) (discussing development of the mining industry in the United States).

311. 54 Am. Jur.2d § 204 (1992).

312. *Id.* at § 205; *see also* Consolidated Rock Prods. Co. v. City of Los Angeles, 370 P.2d 342, 345, 353 (Cal. 1962) (holding that dust created by rock and gravel operation could be a nuisance), *appeal dismissed*, 371 U.S. 36 (1962); *In re Kelso*, 82 P. 241, 242 (Cal. 1905) (holding that blasting may constitute a nuisance).

313. 54 Am. Jur.2d § 205 (1992); *see also* Amerikohl Mining, Inc. v. Zoning Hearing Bd., 597 A.2d 219 (Pa. Commw. Ct. 1991) (holding water, noise, and air pollution caused by coal surface mine could be a nuisance), *appeal denied*, 602 A.2d 861 (Pa. 1992).

314. Village of Spillertown v. Prewitt, 171 N.E.2d 582, 584 (Ill. 1961); Kane v. Kreiter, 195 N.E.2d 829, 832 (Ohio 1963); Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1384 (N.J. 1992).

315. 54 Am. Jur.2d § 204 (1992).

merely because it violates the ordinance.³¹⁶ Furthermore, the intensive state and federal environmental controls, to which surface mines often are subject does not determine whether a mine is a nuisance but merely one more factor in the equation.³¹⁷ The actual determination of whether a specific surface mining operation can be banned by a zoning ordinance turns on whether the mine is a public or private nuisance under that state's law.³¹⁸

Results will vary from case to case as to when surface mining is a nuisance, because each case turns on its own facts and there are variations in state law on what constitutes a nuisance.³¹⁹ For example, in *McClimans v. Board of Supervisors*,³²⁰ the court held that the plaintiffs, whom a zoning ordinance had deprived of all beneficial use of their minerals, were entitled to compensation even though the proposed surface mine might adversely affect drinking water, emit toxic blasting smoke, damage nearby homes, and cause a decline in property values of adjacent owners.³²¹ But in *Amerikohl Mining, Inc. v. Zoning Hearing Board*,³²² nearly the same types of negative effects were cited by the court in affirming the denial of a special exception that would have permitted the mining company to surface mine coal in an agricultural zone abutting residential areas.³²³ These two cases show different results may occur even within the same state, depending upon the particular court.

E. Summary of Takings Issue

To summarize, first a court must determine if the ordinance is substantially related to legitimate public interests. The trend is in favor of finding this relationship when dealing with zoning ordinances that prohibit or restrict surface mining, especially when unique environmental and

316. *Id.*; see also *Herman v. Village of Hillside*, 155 N.E.2d 47, 53 (Ill. 1959) (holding expansion of nonconforming quarry could not be prohibited by zoning ordinance).

317. 54 Am. Jur.2d § 204 (1992).

318. *Cf. Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901-02 (1992) (holding that whether development of beachfront lot could be prohibited by land use regulation turns on whether the use would be a nuisance under South Carolina law).

319. *Id.* at 2914 (Blackmun, J., dissenting).

320. *Supra* note 194.

321. *Id.* at 568-70.

322. 597 A.2d 219 (Pa. Commw. Ct. 1991), *appeal denied*, 602 A.2d 861 (Pa. 1992).

323. *Id.* at 225.

public safety concerns exist, such as where the mine site adjoins a built-up area or would cause substantial water pollution.³²⁴ Next, a court must decide if the property owner has been totally deprived of all beneficial use of his property. *Lucas* makes it easier for a property owner to allege such a deprivation because of its emphasis on investment backed expectations³²⁵ and its dictum that the Takings Clause applies to all property interests recognized by state law, including a separate property interest in minerals.³²⁶ If the property owner retains residual uses, then he is not deprived of all use. However, *Lucas* seems to require that these residual uses have significant economic productivity.³²⁷ Finally, even if the ordinance deprives the owner of all productive use of his property, the government need not pay compensation if the proposed surface mine would constitute a nuisance under state common law.³²⁸

If a regulatory taking is found under federal constitutional law, courts have a variety of remedies.³²⁹ The court can invalidate the ordinance and award compensation for any temporary taking caused by the regulation,³³⁰ or the court may allow the ordinance to stand and order the government to pay compensation for the permanent taking.³³¹

IV. THE LATITUDE OF *LUCAS*: SOME SUGGESTIONS

If a local government decides to enact an ordinance restricting or forbidding surface mining, it must exercise caution after the Supreme Court's decision in *Lucas*.³³² Initially, the locality must determine if it

324. See *supra* notes 194 to 235 and accompanying text (discussing the necessity of finding a relationship to legitimate public interests).

325. See *supra* notes 251 to 262 and accompanying text (discussing investment backed expectations).

326. See *supra* notes 240 to 250 and accompanying text (discussing takings of just the mineral estate).

327. See *supra* notes 263 to 291 and accompanying text (discussing residual uses).

328. See *supra* notes 302 to 323 and accompanying text (discussing the nuisance exception).

329. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2922 n.6 (1992) (Stevens, J., dissenting).

330. *Id.* at 2901 n.17; *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

331. *Lucas*, 112 S. Ct. at 2922 n.6 (Stevens, J., dissenting); *First English*, 482 U.S. at 335.

332. *Lucas*, 112 S. Ct. at 2922 (Stevens, J., dissenting).

has the ability to enact such an ordinance. This means the local government must ascertain if authority exists under home rule power or state enabling legislation to enact an ordinance,³³³ and whether the ordinance is preempted by federal or state law.³³⁴ In addition, the local government must be sensitive to the possibility of takings challenges.

Takings challenges are avoided by ensuring the ordinance substantially furthers legitimate public interests.³³⁵ Valid, not arbitrary, reasons must exist for enacting the ordinance. Examples of legitimate purposes include prevention of water, air or noise pollution, control of erosion, and other local environmental problems directly caused by surface mining.³³⁶ Legislators can more easily prove that ordinances prohibiting surface mining near residences, businesses and schools are designed to protect the public health and safety. Ordinances that forbid mining in more rural, undeveloped areas are more suspect as being unrelated to valid police power goals.³³⁷

Next, the local government must decide if it wishes to prohibit surface mining in certain districts, or everywhere within its boundaries. Ordinances limiting a property owner from mining on his property are likely to be challenged as takings. Prior to regulating, a locality should investigate whether parcels subject to the surface mining prohibition would have the potential for other economically significant uses. If property owners are left with the potential for other residential, commercial or industrial uses, then any takings claim will likely fail.³³⁸ However, if the zoning scheme is such that the property owner retains only hollow residual rights, then the validity of the ordinance is questionable after *Lucas*. For instance, if the use classification requires the owner to leave his property in an undeveloped state, then *Lucas* indicates significant takings concerns may arise.³³⁹

333. See *supra* notes 144 to 149 and accompanying text (discussing home rule and land use enabling legislation).

334. See *supra* notes 50 to 134 and accompanying text (discussing the preemption issue).

335. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

336. *G.M.P. Land Co. v. Board of Supervisors*, 457 A.2d 989, 995 (Pa. Commw. Ct. 1983).

337. See *supra* notes 199 to 200 and accompanying text.

338. *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1388 (N.J. 1992).

339. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894-95 (1992); *Morris County Land Imp. Co. v. Township of Parsippany-Troy Hills*, 193 A.2d 232, 243 (N.J. 1963).

To accommodate situations where the owner is left with little or no economically productive use, local governments have several alternatives. One alternative is to retain limited control by allowing surface mining by variance or conditional use permit.³⁴⁰ Granting of special exceptions or variances to those few property owners who are left without productive uses would save the ordinance from invalidity.³⁴¹ Another alternative is to rezone problematic areas so, where topographically possible, the owner can use the property for other residential, commercial or industrial uses. Again, variances or conditional use permits can help to accomplish this if the locality does not wish to make substantial alterations to district classifications. In these situations, the locality also must avoid the appearance of spot zoning. Finally, the local government can argue that allowing surface mining on a particular site would constitute a nuisance under state law.³⁴²

The most difficult situation local governments may encounter is the property owner who alleges a taking of only his "mineral estate."³⁴³ *Lucas* further limits the power of local governments by apparently authorizing such claims.³⁴⁴ If the ordinance forbids access to a property owner's mineral estate, then the local government must be prepared to argue that state law does not recognize a separate estate, or that permitting surface mining of this mineral would create a nuisance. Otherwise, the local government may have to allow the mining, perhaps by special

340. Benoit, *supra* note 5, at 157-58. The difference, of course, between using variances and conditional use permits is that variances permit the applicant to surface mine even though the ordinance forbids it, whereas an ordinance containing conditional or "special" use permit provisions expressly allows surface mining by permit. MANDELKER, *supra* note 145, at § 6.35. Variances are harder to obtain because the applicant must overcome a higher burden of proof; in contrast, a zoning board's discretion to deny a special exception is much more narrow. *Id.* at § 6.53. Permitting surface mining only by variance would therefore grant the municipality greater autonomy over the location of mining.

341. Benoit, *supra* note 5, at 157-58; *see also* 1991 Op. Va. Att'y Gen. 31, 34 (noting that special exception provisions in the Chesapeake Bay Preservation Act save it from takings challenges).

342. *See supra* notes 302 to 323 and accompanying text (discussing the nuisance exception to takings jurisprudence). For other suggestions on how local governments can safely regulate mining, *see generally* Paul J. Schlauch, *Tripartite Federalism -- The Emerging Role of Local Government as a Regulator of the Extractive Industries*, 20 ROCKY MTN. MIN. L. INST. 359 (1974).

343. *See supra* notes 240 to 250 and accompanying text.

344. *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 n.7 (1992).

exception or variance, or pay just compensation.

Lucas v. South Carolina Coastal Council obviously burdens the ability of local governments to combat the problems of surface mining, especially because of the investment backed expectations and occasional lack of significant alternative uses present when surface mining is involved. In the words of Justice Stevens, *Lucas* may "greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation."³⁴⁵ However, many of the health, safety and environmental problems with which these ordinances are designed to deal should fall within *Lucas'* nuisance exception.³⁴⁶ Surely a surface mine that spews out toxic gases, pollutes drinking water supplies, or destroys the peace and solitude of nearby homes and schools constitutes a nuisance.³⁴⁷ Therefore, although *Lucas* hinders local governments, its latitude may not be as wide as some fear.

V. CONCLUSION

Local governments desiring to enact ordinances restricting surface mining have a number of issues with which to concern themselves. First, they must consult federal and state law to determine whether the locality is preempted from enacting such an ordinance. Surface mining of coal is regulated at the state and federal level by the Surface Mining Control and

345. *Id.* at 2922 (Stevens, J., dissenting). Stevens continued:

As this case -- in which the claims of an *individual* property owner exceed \$1 million -- well demonstrates, these officials face both substantial uncertainty because the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.

Id. (emphasis in original)(footnote omitted).

346. See, e.g., *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1384-86 (N.J. 1992) (using *Lucas'* nuisance exception in upholding ordinance effectively prohibiting rock quarrying).

347. Cf. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962) (upholding ordinance that halted rock quarrying because the quarry posed a substantial danger to adjacent homes and schools); *G.M.P. Land Co. v. Board of Supervisors*, 457 A.2d 989, 995 (Pa. Commw. Ct. 1983) (upholding zoning ordinance banning surface mining where such mining would cause erosion, water pollution, contamination of drinking water, and a decrease in property values).

Reclamation Act of 1977 (SMCRA).³⁴⁸ Nothing in the federal SMCRA indicates localities are preempted from controlling the initial location of surface mining through zoning, nor is there any indication that ordinances more stringent than federal standards would be impermissible. If the state has opted to obtain jurisdiction by enacting its own SMCRA, then the text of the state statute may control the issue; a few states preempt local governments from regulating surface mining, but most do not. If the zoning ordinance will be applied to federally owned lands, the locality is limited to ordinances that don't conflict with federal laws, and do not prohibit mining on federal lands.

Next, the local government must decide if enabling legislation or home rule powers authorize it to pass an ordinance, and whether the ordinance might be challenged as a taking. To avoid takings challenges, the ordinance must substantially relate to legitimate public interests, such as safety or protection of the environment. If the ordinance would deprive a property owner of all productive use of his property interest, then local governments have a number of other considerations. The Supreme Court's decision in *Lucas v. South Carolina Coastal Council*³⁴⁹ poses some limitations on what local governments can do to control the problems of surface mining through zoning.

348. 30 U.S.C. §§ 1201-1328 (1988).

349. 112 S. Ct. 2886 (1992).