

N.D.A.G. Letter to Sinner (Jan. 25, 1991)

January 25, 1991

Honorable George A. Sinner
Governor
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Governor Sinner:

Thank you for your recent request concerning adoption and enforcement of floodplain management regulations and North Dakota statutes controlling that process. For the reasons stated below, it is my opinion that N.D.C.C. §§ 11-33-02 and 58-03-11 and ch. 54-21.3 do not preclude North Dakota counties and townships from adopting and enforcing flood plain management regulations meeting the minimum requirements of the national flood insurance program.

Your request was prompted by a letter from the Federal Emergency Management Agency (FEMA). FEMA administers the National Flood Insurance Act of 1968. This federal law prohibits FEMA from providing flood insurance coverage to the residents of a community unless the community has adopted and is enforcing floodplain management regulations meeting the minimum criteria of the National Flood Insurance Program. FEMA is concerned that existing North Dakota state zoning enabling authority may not allow counties and townships participating in the National Flood Insurance Program to enforce their floodplain management regulations on the construction of farm buildings or on the use of land for agricultural purposes or any of the normal incidents of farming. If counties and townships cannot enforce such regulations, they may lose eligibility to participate in the National Flood Insurance Program. FEMA requires an answer before January 29, 1991.

Township and county zoning authority is found in N.D.C.C. chs. 11-33 and 58-03. Both townships, under N.D.C.C. ch. 58-03, and counties, under N.D.C.C. ch. 11-33, have the authority to adopt and enforce land use and control regulations relating to floodplain management. N.D.C.C. § 11-33-02 provides, with regard to adoption of regulations, that "[n]o regulation or restriction, however, shall prohibit or prevent the use of land or buildings for farming or any of the normal incidents of farming." Identical language is found in N.D.C.C. § 58-03-11 with regard to the adoption of zoning regulations by townships.

A prior opinion of this office concluded that under this language in N.D.C.C. § 11-33-02 extensive subdivision regulation of farm land or buildings can be undertaken without the use of such land or buildings being prohibited or prevented. Letter from Attorney General Allen I. Olson to Vern Fahy, State Engineer (Jan. 11, 1979)

Prior to 1979, N.D.C.C. § 58-03-11 specifically provided that the regulations and restrictions adopted by a township did not "apply to" certain farm lands or buildings. In another prior opinion of this office, the Attorney General concluded that this language would preclude the township zoning authority from imposing a restriction on the construction or use of such buildings in the floodplain area. Letter from Attorney General Allen I. Olson to Very Fahy, State Engineer (Aug. 30, 1974). Under this interpretation, townships would not have been able to participate in the National Flood Insurance Program.

As a result, the 1979 Legislative Assembly amended N.D.C.C. § 58-03-11 by making the restriction for townships the same as that for counties in order to provide townships with the necessary authority to fulfill the minimum conditions of the National Flood Insurance Program. These restrictions do not preclude regulation of the use of farmland. Ordinances requiring a building to be elevated or floodproofed can be adopted under these restrictions. Consequently, North Dakota laws differ from the Missouri law discussed in the correspondence from FEMA. In Missouri, the law specifically prohibited regulation, and provided that permits could not be required on farm buildings, farm structures, or land used for raising crops, orchards, or forestry. St. Charles County v. Dardenne Realty Co., 771 S.W.2d 838, 829 (Mo. 1989).

In addition, the North Dakota Floodplain Management Act of 1981, N.D.C.C. ch. 61-16.2, prohibits ordinances or rules permitting uses within floodplains that are inconsistent with federal law. N.D.C.C. § 61-16.2-06 provides that uses are permitted in the floodway to the extent they do not cause any increase in the elevation of the base flood. N.D.C.C. § 61-16.2-08 provides that certain listed uses are permitted in the flood fringe to the extent they are not prohibited by any other ordinance, regulation, or statute. Any other ordinance, regulation, or statute includes federal regulations or statutes. Because uses which conflict with a federal rule or statute are not permitted, a community could not adopt a rule or ordinance allowing a use prohibited by a federal rule or statute.

FEMA also asked whether floodplain management requirements that are directly related to the construction of buildings, i.e., floodproofing requirements, must be administered under the State Building Code authority, N.D.C.C. ch. 54-21.3, or whether these requirements can be administered under general zoning enabling authority. FEMA asks this question because construction of a building used for agricultural purposes is exempt from the State Building Code. N.D.C.C. § 54-21.3-04(3).

Section 61-16.2-08 contains the only floodplain management requirement in the Floodplain Management Act of 1981 that relates to construction. Nothing in that section requires floodproofing requirements to be administered under the State Building Code.

Although N.D.C.C. § 54-21.3-05 gives townships and counties the authority to administer and enforce the State Building Code, neither townships or counties are required to adopt the State Building Code. See N.D. Op. Att'y Gen. Allen I. Olson to Steven L. Vogelpohl (Dec. 19, 1979). "[T]here is no requirement that a building not exempt under N.D.C.C. § 54-21.3-04, which is constructed within a county's zoning jurisdiction must comply with

the State Building Code where the county has not yet elected to enforce the State Building Code or adopt building or zoning regulations encompassing the substance of the State Building Code." Id. (Emphasis supplied.) This conclusion was reaffirmed by the Attorney General in 1986. See letter from Attorney General Nicholas J. Spaeth to Margy Bonner, Williston City Attorney (Jan. 24, 1986) (concurring with December 19, 1979, opinion).

Therefore, while counties and townships may adopt the State Building Code, they may also adopt and enforce their own building or zoning regulations. Counties may do so under N.D.C.C. § 11-33-01, which gives them the authority to regulate and restrict "the location and use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes." Townships may do so under N.D.C.C. § 58-03-11, which gives them the authority to regulate and restrict, among other things, "the erection, construction, reconstruction, alteration, repair, or use of buildings and structures." Consequently, floodproofing requirements can be administered and enforced under the general zoning enabling authority for counties and townships rather than the State Building Code.

I trust this resolves the issues raised by FEMA. If you need further assistance on this matter, please contact me again.

Sincerely,

Nicholas J. Spaeth

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