

N.D.A.G. Letter to Dotzenrod (April 6, 1992)

April 6, 1992

Honorable Jim Dotzenrod
Senator, District 27
PO Box 217
Wyndmere, ND 58081

Dear Senator Dotzenrod:

Thank you for your February 9, 1992, letter wherein you ask about the relationship between the zoning authority of counties, townships, and cities. You also ask about the difference between the eminent domain powers of non-home rule and home rule counties. I apologize for the delay in responding to your request.

It is a basic proposition of law that political subdivisions such as counties, cities, and townships have only those powers expressly conferred upon them by the Legislature, or those necessarily implied from the powers expressly granted. See e.g., Parker Hotel Co. v. City of Grand Forks, 177 N.W.2d 764 (N.D. 1970); Murphy v. Swanson, 198 N.W. 116 (N.D. 1924).

A city's zoning authority is derived from N.D.C.C. § 40-05-02(13) and N.D.C.C. ch. 40-47. In addition, a home rule city may attempt to expand its zoning powers pursuant to N.D.C.C. § 40-05.1-06(11). A township organized pursuant to N.D.C.C. ch. 58-02 derives zoning authority from N.D.C.C. §§ 58-03-01 and 58-03-11 through 58-03-15.

A county derives its zoning authority primarily from N.D.C.C. ch. 11-33. N.D.C.C. § 11-33-01 provides that the county commissioners of any county are empowered to make zoning regulations within the county subject to the provisions of N.D.C.C. § 11-33-20. N.D.C.C. § 11-33-20 states:

The provisions of this chapter [N.D.C.C. ch. 11-33] shall in no way prevent townships from making regulations as provided in sections 58-03-11 through 58-03-15, but such townships may relinquish their powers, or any portion thereof, to enact zoning regulations to the county by resolution of the board of township supervisors. The provisions of this chapter shall not be construed to affect any property, real or personal, located within the zoning or subdivision authority of any city of this state, except that any such city by resolution of its governing body may relinquish to the county its authority, or any portion thereof, to enact zoning regulations under chapter 40-47 or subdivision regulations under chapter 40-48, in which case such property shall be subject to the provisions of this chapter.

Thus, it is my opinion, that the regulations or ordinances established by a township zoning commission or a city zoning commission, if they are within the zoning authority of the township or city and are in accordance with the statutes, take precedence over any contrary zoning regulation enacted by a county zoning commission.

If the county is a home rule county it may, if included in the charter and implemented through ordinances:

[p]rovide for zoning, planning and subdivision of public or private property within the county limits but outside the zoning authority of any city or organized township.

N.D.C.C. § 11-09.1-05(7). Thus, a home rule county may attempt to expend its zoning authority beyond that of non-home rule counties, but a home rule county's zoning authority still may not infringe upon the zoning authority of any city or organized township. In other words, from the perspective of a city or organized township, whether a county is home rule or non-home rule is irrelevant as far as the county's zoning authority is concerned. The city or organized township's zoning authority remains the same regardless of whether the county is home rule or non-home rule.

The power of any political subdivision to zone, however, may be affected by previously-enacted zoning or land use regulations of another political subdivision having concurrent zoning authority in a particular geographical area. See, for example, 1970 N.D. Op. Att'y Gen. 104. (A joint park board's authority to issue land use regulations could affect a county or township's authority to zone.)

You also ask about the difference between eminent domain powers of non-home rule and home rule counties. Subject to the provisions of N.D.C.C. ch. 32-15 on eminent domain and subject to Legislative authorization, a county may exercise the right of eminent domain for the benefit of the county. N.D.C.C. § 32-15-02. The Legislature has given counties specific authority to exercise eminent domain for certain purposes such as for purposes of establishing an airport, N.D.C.C. § 2-02-02; and for purposes of establishing county roads, N.D.C.C. § 24-05-09. A home rule county may, if included in the charter and implemented through ordinances, attempt to expand its powers of eminent domain. N.D.C.C. § 11-09.1-05(1). Thus, a home rule county with eminent domain powers pursuant to N.D.C.C. § 11-09.1-05, may be able to exercise such powers for purposes beyond those which are specifically authorized by statute. See, City of Fargo v. Fahrlander, 199 N.W.2d 30 (N.D. 1972), regarding the eminent domain powers of a home rule city as opposed to those of a non-home rule city.

It is possible for conflicts to arise between two political subdivisions over the authority of one to exercise its rights of eminent domain and the power of the other to zone. In a case such as this involving a home-rule city and a township, the North Dakota Supreme Court indicated that a balancing of public interests test should be used to resolve the issue. See City of Fargo v. Harwood Township, 256 N.W.2d 694 (N.D. 1977).

I trust I have responded to your questions.

Sincerely,

Nicholas J. Spaeth

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