

**OPINION  
79-77**

December 19, 1979      (OPINION)

Mr. Steven L. Vogelpohl  
Assistant State's Attorney  
Mercer County  
Mercer County Courthouse  
Stanton, North Dakota 58571

Dear Mr. Vogelpohl:

This is in response to your inquiry with regard to the State Building Code, chapter 54-21.3 of the 1979 Supplement to the North Dakota Century Code.

You call our attention to the amendment to section 11-33-01 making county zoning power subject to the provisions of chapter 54-21.3 of the North Dakota Century Code. You call our attention to section 54-21.3-03 and indicate that the same provides that the State Building Code shall consist of the Uniform Building Code as amended, that the state construction superintendent is to implement and may amend the code, and that a county (or other local political subdivision) may amend the code provided its standards are met or exceeded. You call our attention to section 54-21.3-01 and indicate that the same states, in part, that the purposes of chapter 54-21.3 are to provide the citizens with nationally recognized construction standards and requirements, to eliminate certain regulations and to ensure adequate construction of buildings throughout the state. You call our attention to section 54-21.3-05 and indicate that it provides, in part, that a county (or other local political subdivision) may elect to "administer and enforce" the State Building Code.

You state that what appears to be lacking in chapter 54-21.3 is a clear direction that building construction must now conform to the State Building Code, regardless of the action or inaction of a local political subdivision with reference to the code. You indicate that you, therefore, have the following question:

Must a building, which is not exempt under section 54-21.3-04 and which is constructed within a county's zoning jurisdiction, conform with the state building code even if the county has not elected to enforce the state building code or adopt building or zoning regulations encompassing the substance of the state building code?

You request our written opinion on same.

You apparently have fairly thoroughly considered chapter 54-21.3 and section 11-33-01. On such basis, you are undoubtedly aware that there is no provision in the chapter unequivocally declaring that buildings not exempt under section 54-21.3-04 constructed within a county's zoning jurisdiction must conform to the State Building Code, particularly where the county has not elected to enforce the State Building Code or adopt building or zoning regulations encompassing

the substance of the State Building Code. Also, you may be aware that no large quantity of rules implementing or amending same have been promulgated on the state level pursuant to the second sentence of section 1 of section 54-21.3-03 of the 1979 Supplement to the North Dakota Century Code. Your question, therefore, really turns on the meaning of the term "must" in your question.

As you are aware, there is no provision in chapter 54-21.3 or rules promulgated thereunder for state inspectors or other officials to inspect these buildings, condemn same or otherwise take action in regard thereto, though the state superintendent is required to provide city, township, and county enforcement agencies with necessary information in their effectuation of the purposes of said section 54-21.3-06. We would also assume that the state superintendent of construction would be subject to subpoena in proper litigation requiring information from him on this subject matter.

As to city, township or county enforcement, there is nothing in the state statute requiring them to commence administering and enforcing the State Building Code pursuant to section 54-21.3-05 at any particular time, on which basis we would assume that they could commence administering and enforcing same at any time they wished or when particular factual situations make it desirable that they do so. Also, to some extent, local enforcement officials are between two fires. Thus, under subsection 2 of section 54-21.3-04, they may amend the state code though standards established by amendment under that subsection which must meet or exceed those of the State Building Code. On the other hand, one of the stated purposes of the chapter in terms of subsection 2 of section 54-21.3-01 is to:

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2. Eliminate restrictive, obsolete, conflicting, and unnecessary construction regulations that tend to increase construction costs unnecessarily or restrict the use of new materials, products, or methods of construction, or provide preferential treatment to types or classes of materials or products or methods of construction.

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Considering the same in the light of the 11-33-01 amendment, it would thus seem possible that the state code would be relevant in determining enforceability of local regulations in some types of litigation.

Lastly, as to private enforcement, in some instances this State Building Code may be the only arguably relevant standard a building owner, contractor, or material supplier would have available. We have been aware of a few occasions, for example, in situations where the State Plumbing Code may not have been claimed to be directly applicable, but where the owner and builder have had a dispute as to whether particular installations met the contractual requirements; the State Plumbing Code has been presented and state inspectors have been called as witnesses as to the sufficiency of the installation actually made. We would thus assume that in similar disputes as to application of contractual terms between owner, contractor, and

materialmen, builders and materialmen may find the code to be of some protection in private litigation where they have complied with same and owners may find some of some help where builders and materialmen have not complied with same. On a similar basis, it does seem possible that compliance or noncompliance with the State Building Code may be relevant in litigation sounding in tort for injuries resulting from allegedly defective structures.

In conclusion, therefore, it is our opinion that there is no requirement that a building not exempt under section 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. On the other hand, it is also our opinion that all persons and officials involved with a building would probably be in a more comfortable and secure position if the building did comply with the State Building Code.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely,

ALLEN I. OLSON

Attorney General