

**LETTER OPINION
79-80**

January 11, 1979 (OPINION)

Mr. Vern Fahy, State Engineer
State Water Commission
State Office Building
900 East Boulevard
Bismarck, North Dakota 58505

Dear Mr. Fahy:

This is in response to your letter of October 23, 1978, wherein you requested an opinion from this office regarding the authority of counties and organized townships to regulate and control subdivision development within each of these jurisdictions. In your letter you set forth the following facts and questions:

As you are aware, the State Water Commission has been designated by the governor as the agency to provide state coordination for the National Flood Insurance Program. The National Flood Insurance Program was established by the National Flood Insurance Act of 1968 to make specified amounts of flood insurance, previously unavailable from private insurers, available under Federal auspices. In return for the provision of subsidized insurance to existing properties, the Act requires that local governments adopt and enforce land use development regulations in floodprone areas in order to avoid or reduce future flood damage. To qualify for the National Flood Insurance Program, a county or township (this, of course, applies only to organized townships) must have adopted land use and control measures which are consistent with the standards set forth in the Program regulations (24 CFR 1910, Subpart A). Those standards require the adoption of both zoning regulations and regulations governing subdivision development.

The authority for the adoption of such regulations is derived from Section 58-03-11 through 58-03-15 of the North Dakota Century Code, for organized townships, and Sections 11-33-01 through Section 11-33-04 of the North Dakota Century Code, for counties. My question is whether those statutes authorize counties and organized townships to adopt regulations controlling subdivision development as well as zoning regulations. There has been no question that counties and organized townships can adopt zoning regulations. However, the Federal Insurance Administration has not accepted applications by counties and organized townships for participation in the National Flood Insurance Program because, as they state:

"certain political subdivisions (i.e., counties and townships) appear to lack the requisite land use enabling authority to participate in the Program . . . Specifically, although counties and organized townships may adopt zoning ordinances, apparently the legislature has not expressly granted to counties and organized townships the authority to adopt subdivision regulations."

However, it is my belief that the interpretation by the Federal Insurance Administration is totally incorrect. A close reading of the applicable statutes indicates that organized townships and counties have been granted the authority to regulate subdivision development. Your interpretation and opinion in this matter would be extremely helpful. If you determine that the necessary authority exists, assuming that all other procedural requirements have been satisfied, counties and organized townships can be accepted into the National Flood Insurance Program. If you determine otherwise, perhaps this office can seek legislative amendment to the relevant statutes to ensure that counties and organized townships can participate in this program.

Insofar as your questions pertain to counties, we note initially that the purpose of the county zoning laws, Chapter 11-13 of the North Dakota Century Code, is set forth in Section 11-33-01, which provides:

11-33-01. COUNTY POWER TO REGULATE PROPERTY. - For the purpose of promoting health, safety, morals, public convenience, general prosperity, and public welfare, the board of county commissioners of any county is hereby empowered to regulate and restrict within the county, subject to the provisions of section 11-33-20, the location and the use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes.

In order for a county to fulfill these purposes it must by resolution first establish a county planning commission under Section 11-33-04, whose duty it is to recommend "appropriate regulations and restrictions" to the board of county commissioners, following certain procedures for notice and hearing on these recommendations. North Dakota Century Code Sections 11-33-05 through 11-33-10. The board of county commissioners may then by resolution, under the provisions of Section 11-33-02, divide the county into districts and also by resolution adopt "suitable regulations to carry out the purposes of" Chapter 11-33.

Under Section 11-33-03, the object of the regulations that may be adopted by the board of county commissioners is specifically limited. The section provides as follows:

11-33-03. OBJECT OF REGULATIONS. - These regulations shall be made in accordance with a comprehensive plan and designed for any or all of the following purposes:

1. To protect and guide the development of nonurban areas.
2. To secure safety from fire, flood, and other dangers.
3. To regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, the height, number of stories, and size of buildings and structures, the percentage of lot that may be occupied, the size of courts, yards, and other open spaces,

the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

4. To lessen governmental expenditures.

5. To conserve and develop natural resources.

These regulations shall be made with a reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses.

Upon a review of the remaining provisions of Chapter 11-33, we can find no other section affirmatively describing the purposes for which such regulations may be adopted. Your question of whether the regulations may be adopted to control "subdivision development" is likely, therefore, to depend upon what is meant by that term, as used in your letter, and possibly in the provisions of the federal standards set forth at 24 CFR 1910, Subpart A, as well. As the words "subdivision development" are normally used, we believe there to be little question that the same is within the scope of the regulations provided for in Section 11-33-03. While there appear to be no decisions from North Dakota on this matter, we note that there are numerous cases from other jurisdictions which state simply that "subdivision" is the result of a process of taking or creating a smaller tract of land from a larger tract of land by action of the landowner. "Development" whether used in reference to development of property already subdivided, or used in reference to the act of making the subdivision itself, we believe to include those actions set forth in subsection 3 of Section 11-33-03 set out above. We would therefore conclude that "subdivision development", barring any peculiar definition of that term by the federal regulations you have cited to us, may be regulated by a county under the authority of Chapter 11-33. Certain limitations on this authority do exist, however, and because of their similarity to restrictions on township authority, these limitations will be discussed in connection with the township authority set out below.

The authority of townships to enact zoning regulations is derived from North Dakota Century Code Sections 58-03-11 through 58-03-15. Because your letter implies you are aware that townships must be organized in order to exercise the regulatory authority provided in these sections, we assume for the purposes of this opinion that the townships seeking the benefit of the national flood insurance program are so organized. The purposes of any township regulations, adopted under the procedure set forth in other sections of 58-03, are governed by the provisions of Section 58-03-11, which provides as follows:

58-03-11. ESTABLISHMENT OF ZONING DISTRICTS - LIMITATION - SCOPE OF ZONING REGULATIONS AND RESTRICTIONS. - For the purpose of promoting the health, safety, morals or the general welfare, or to secure the orderly development of approaches to municipalities, the board of township supervisors may establish one or more zoning districts and within such districts may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings and

structures, the height, number of stories, and size of buildings and structures, the percentage of lot that may be occupied, the size of courts, yards, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence or other purposes. All such regulations and restrictions shall be uniform throughout each district, but the regulations and restrictions in one district may differ from those in other districts. No regulation or restriction, however, shall apply to or prevent the use of land or buildings for farming or any of the normal incidents of farming. The provisions of sections 58-03-11 through 58-03-15, shall not be construed to include any power relating to the establishment, repair and maintenance of highways or roads.

The language of this section specifying the purposes for which regulations may be adopted is nearly identical to that language of Section 11-33-02 referred to above. We may therefore easily conclude that this language, like the language of Section 11-33-02, is intended to allow control of "subdivision development," barring, again, any peculiar definition of those words in the federal regulations.

Finally, we note that some similar limitations exist on the powers of both the counties and organized townships to control subdivision development as construed above. County authority is limited in two ways: first, county authority is denied to those uses of land or premises existing at the time of adoption of a resolution pursuant to Section 11-33-13, and secondly, the county may not adopt any regulation which would "prohibit or prevent the use of land or buildings for farming or any of the normal incidents of farming." Under the first limitation, the authority of the board of county commissioners to regulate subdivision development, as construed herein, could not be extend to nonconforming uses existing at the time of the adoption of a regulation by the board. We note parenthetically, however, that even nonconforming uses are subject to some degree of county control by regulation adopted under Section 11-33-14. This section provides:

11-33-14. NONCONFORMING USES REGULATED. - The board of county commissioners, may, by resolutions, as herein provided, prescribe such reasonable regulations, not contrary to law, as it deems desirable or necessary to regulate and control nonconforming uses and occupancies.

Under this section even nonconforming uses may be regulated as long as such regulation does not discontinue existing "lawful use or occupation of land" at the time of the adoption of the original regulation. Under the second limitation, that contained in Section 11-03-02, concerning farmland and buildings, the authority of the board to regulate subdivision development may not "prohibit or prevent" certain farming practices or uses of land or buildings for farming. We believe it should be clear that a large degree of subdivision regulation of farm lands or buildings may be undertaken without the use of such land or buildings thereby being "prohibited" or "prevented." The extent to which such control may extend, however, would be a question of fact that must be decided under the

circumstances.

Similar "farm use" restrictions exist on the authority of a township to control the development of any subdivision property which would in turn affect farmland and buildings. The applicable language of Section 58-03-11, set out above, specifically states that the regulations and restrictions adopted by a township board of supervisors shall not "apply to" certain farmlands or buildings. We understand this "farm use" restriction to be significantly broader than the corresponding restriction on county authority, and the power of the township board to control subdivision property which includes farmland or buildings would thus be more limited than the authority of the counties. Whether the land to be subdivided or buildings located within a subdivision does in fact fall within the language of the "farmland or buildings" exception contained in Sections 11-33-02 and 58-03-11 would be a question of fact to be decided on a case by case basis on the strengths of the facts of each case.

In summary, we believe that the governing bodies of both counties and organized townships have authority to control subdivision development. The extent of that authority, however, is limited in each instance, to some degree in the case of counties under Section 11-33-02 and to a much greater degree in the case of townships under Section 58-03-11, by restrictions upon that authority as it may be applied to farmland and buildings.

We trust that the foregoing will adequately answer your inquiry.

Sincerely,

ALLEN I. OLSON

Attorney General