

N.D.A.G. Letter to Graham (March 29, 1985)

March 29, 1985

Mr. John A. Graham
Executive Director
North Dakota Department of Human Services
State Capitol
Bismarck, North Dakota 58505

Dear Mr. Graham:

Thank you for your letter of March 14, 1985, inquiring as to the applicability of N.D.C.C. §25-16-14 to home rule cities.

Of the various political subdivisions of the state of North Dakota, home rules cities enjoy special privileges not shared by the other political subdivisions. Specifically, home rules cities are able to include within their charters and ordinances authority to take action on some 16 specific subject matters regardless of the existence of state laws to the contrary. N.D.C.C. 40-05.1-06. See also, Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980). Among these 16 subject matters which may be the subject of home rule city charters and ordinances and over which state law is superseded by such charters and ordinances is the authority to provide for zoning, planning, and subdivision of public or private property within the city limits of the home rule city. N.D.C.C. 40-05.1-06(11).

During the 1983 Legislative Session, the Legislature took steps to prohibit cities from zoning out of residential areas within its city limits group homes for the developmentally disabled persons. This authority is found in N.D.C.C. 25-16-14(2) which states as follows:

25-16-14. DEFINITIONS -- GROUP HOMES FOR DEVELOPMENTALLY DISABLED PERSONS -- ZONING.

* * *

2. Notwithstanding the provisions in chapter 11-33, 40-47, or 58-03, or any other provisions authorizing any political subdivision to establish or enforce zoning regulations, a licensed group home serving six or fewer developmentally disabled persons shall be considered a permitted use in a single family or equivalent least density residential zone, and a licensed group home serving eight or fewer developmentally disabled persons shall be considered a permitted use in any area zoned for residential use of greater density than single family use.

Of primary importance to the issue at hand is the introductory phrase to N.D.C.C. 25-16-14. That phrase states, in part, as follows:

Notwithstanding the provisions in Chapter 11-33, 40-47, or 58-03, or any other provisions authorizing any political subdivision to establish or enforce zoning regulations, . . .

By use of the above phrase, especially the word "notwithstanding", the Legislature has clearly indicated its intent to prohibit zoning by all political subdivisions which is intended to remove from residential areas group homes for developmentally disabled persons regardless of the existence of other statutes by which such zoning may be accomplished. Although N.D.C.C. 40-05.1-06(11) is not specifically mentioned, such authority of home rule cities does constitute "other provisions authorizing any political subdivision to establish or enforce zoning regulations" as used in this statute.

As such, it is my opinion that there is no conflict between N.D.C.C. §§40-05.1-06(11) and 25-16-14(2). Instead, the Legislature by its enactment of N.D.C.C. 25-16-14(2) clearly intended to prohibit all cities from using zoning as a method to remove group homes from residential areas despite the existence of other statutes within the North Dakota Century Code by which such zoning could be accomplished.

Therefore, it is my opinion that N.D.C.C. 25-16-14(2) is applicable to home rule cities which exercise their zoning authority as found in N.D.C.C. 40-05.1-06(11) in the zoning of residential areas wherein group homes wherein group homes for the developmentally disabled persons may be located.

Sincerely,

Nicholas J. Spaeth

vkk