

N.D.A.G. Letter to Vogel (May 7, 1990)

May 7, 1990

Ms. Sarah Vogel
Commissioner of Agriculture
Department of Agriculture
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0020

Dear Commissioner Vogel:

Thank you for your March 30, 1990, letter and the attached "model regulations" which pertain to grasshopper control. You stated counties may wish to adopt regulations similar to this. You then quoted N.D.C.C. § 4-33-10 as authorizing political subdivisions to "adopt and enforce regulations to control and prevent the spread of pests."

Your first question concerns the applicable procedure for adoption of such regulations. N.D.C.C. § 4-33-10 does not prescribe the procedure for passing an ordinance or resolution.

N.D.C.C. § 11-09.1-05(5) provides that a home rule county may include within its charter a provision "for the adoption, amendment, [or] repeal . . . of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare." Thus, in a situation involving a home rule county you should look to the county charter to determine the procedure for adopting ordinances. With regard to nonhome rule counties or home rule counties whose charter does not provide a procedure for adoption of ordinances, following the procedure for the adoption of zoning ordinances as prescribed by N.D.C.C. ch. 11-33 may be appropriate.

The procedure for adopting zoning ordinances under N.D.C.C. ch. 11-33 includes the establishment by resolution of the county commissioners of a county planning commission. N.D.C.C. § 11-33-04. The county planning commission is to investigate and determine whether districts should be established and whether regulations regulating those districts should be adopted. N.D.C.C. § 11-33-06. Once the investigation is completed, the planning commission prepares a proposed resolution which is submitted to the board of county commissioners. N.D.C.C. § 11-33-07. Hearings are then held on the proposed resolution. N.D.C.C. § 11-33-08. Notice of the hearing is to be published once each week for two consecutive weeks in the county's official newspaper and in other newspapers published in the county if the planning commission deems necessary. Id. After the hearing the county commissioners may adopt the resolution or make amendments to the resolution. After adoption a notice of adoption is to be published for two weeks in the official county newspaper and in other newspapers chosen by the county commissioners. N.D.C.C. § 11-33-09. If no one petitions for a separate hearing the

resolution takes effect upon the expiration of the time for filing the petition. On the other hand, if a petition for a separate hearing is filed, the resolution will not take effect until the county commissioners have held the separate hearing and have affirmed that resolution. N.D.C.C. § 11-33-09. In the event a separate hearing is requested, the board is to hold the hearing not earlier than seven days nor later than 30 days after the petition requesting the hearing is filed with the auditor.

Another procedure for adopting a method of controlling pests would be by resolution of the county commission.

To determine which of the procedures discussed here is applicable in a county, it would be advisable to contact the county auditor who serves as the clerk of the board of county commissioners. N.D.C.C. § 11-13-02(1).

Your second question involves two parts:

- a. May counties by regulation, require landowners to control grasshoppers; and
- b. Presuming the answer to a. is affirmative, if a landowner does not control grasshoppers may the county do so in his stead and assess the expenses involved as taxes against the property.

While the legislature has enacted legislation allowing the board of county commissioners to levy a tax for a fund for abatement and extermination of gophers, rabbits, and crows, no similar procedure exists for the eradication of grasshoppers. Thus, it is my opinion that a county could not make special assessments against a property owner for grasshopper control.

However, a county may levy a general assessment for control of grasshoppers. N.D.C.C. §§ 4-33-01(8) and 4-33-11. N.D.C.C. § 4-33-11 authorizes governing bodies of political subdivisions to appropriate money for control of pests and, upon approval of 60 percent of persons voting in an election, authorizing a tax on all taxable property in the political subdivision to reimburse the expenditure from the general fund. The tax levied may not exceed the limitation of section 57-15-28.1(1). N.D.C.C. § 4-33-11. N.D.C.C. § 57-15-28.1(1) provides that the maximum levy for pest control under N.D.C.C. § 4-33-01 may not be not be greater than one mill. In addition, a county is authorized to levy a tax which is not greater than two mills for emergency purposes. N.D.C.C. § 57-15-06.7(22). Emergency funds made available by an emergency levy can be used for "emergencies caused by nature." N.D.C.C. § 57-15-28. Whether a grasshopper infestation is an emergency for which a tax could be levied is a question of fact for which I cannot give an opinion.

With regard to the draft rules submitted with your March 30, 1990, letter, it is my opinion that to the extent those rules authorize a county to make individual assessments against landowners, that they would be invalid. Because the entire procedure is dependant upon

that levy, substantial redrafting of the rules would be required. Thus, if you choose to redraft them it would be advisable to submit the new draft to my office for review.

I trust this discussion answers your questions.

Sincerely,

Nicholas J. Spaeth

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