

N.D.A.G. Letter to Dykshoorn (Aug. 2, 1991)

August 2, 1991

Ms. Shirley Dykshoorn
Director
Office of Intergovernmental Assistance
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Ms. Dykshoorn:

Thank you for your July 11, 1991, letter asking about liability of political subdivisions in connection with enforcement of the state building code.

The state building code consists of the most recently published version of the Uniform Building Code and supplements to that code, as amended by rules adopted by the director of the Office of Management and Budget. North Dakota Century Code (N.D.C.C.) § 54-21.3-03. Political subdivisions "may" administer and enforce the state building code.

N.D.C.C. § 54-21.3-05. In a previous opinion this office concluded that enforcement of the state building code by local governments is discretionary and the code may not be enforced in connection with buildings in those jurisdictions where the governing body has not elected to adopt and enforce that code. Letter from Attorney General Allen I. Olson to Steven L. Vogelpohl (December 19, 1979).

Until recently N.D.C.C. § 54-21.3-03(3) provided that a local government which elected to adopt the state building code could amend the code only if the standards established by amendment met or exceeded those of the state building code. However, the 1991 Legislative Assembly deleted language requiring that local standards meet or exceed the standards of the state building code. 1991 N.D. Sess. Laws ch. 593.

Under current law local governments may elect to enforce the state building code, although there is no requirement that they do so. Furthermore, local authorities are now free to adopt amendments to the state building code to conform to local needs whether or not those amendments impose standards that meet or exceed those of the state building code.

Political subdivision liability is governed by N.D.C.C. ch. 32-12.1. Pursuant to N.D.C.C. § 32-12.1-03(1) there are two separate and independent grounds upon which a political subdivision can be held liable for injuries: (1) a political subdivision can be liable for injuries caused by some condition or use of property in the same manner as a private person, and (2) a political subdivision can be liable for injuries caused by the negligence or wrongful act or omission of an employee acting within the scope of the employee's

employment. Fastow v. Burleigh County Water Resource District, 415 N.W.2d 505, 509 (N.D. 1987).

Thus, a political subdivision can be liable for injuries caused by the construction or maintenance of a government building in an unsafe manner whether or not a building code has been adopted. Property owners generally have a duty to maintain their property in a reasonably safe condition. O'Leary v. Coenen, 251 N.W.2d 746, 751 N.D. 1977). This duty is particularly important in connection with buildings used by the general public. Therefore, if local government officials breach this duty in connection with public buildings, the government may be liable for injuries causally related to that negligence.

Furthermore, improper enforcement of a building code with respect to buildings not owned by the local government can also create grounds upon which the government can be liable for injuries. If the government elects to undertake certain tasks or to provide services to the public, the government and its employees have an obligation to act in a lawful and reasonable manner when providing the service. Failure to do a certain thing mandated by law or negligence of an employee acting within the scope of his or her employment can result in liability for injuries caused by that failure or negligence. Therefore, if a political subdivision adopts a building code and employs inspectors or other employees to enforce the code by inspecting buildings, issuing permits, and so forth, the government can be liable for injuries caused by the failure to exercise due care when performing that function. For example, a city may be liable for the failure of the city building inspector to exercise reasonable care under the circumstances in issuing a building permit. Tom Buechler Construction, Inc. v. City of Williston, 392 N.W.2d 403 (N.D. 1986).

Pursuant to N.D.C.C. § 32-12.1-03(3) political subdivisions are immune from liability in connection with claims that result from: (1) the decision to adopt or not adopt legislation, (2) the decision to undertake or the refusal to undertake any judicial or quasi-judicial act, and (3) the decision to perform or refusal to exercise or perform a discretionary function or duty. Political subdivisions are not required by law to adopt and enforce a building code. Thus, political subdivisions are immune from liability in connection with the decision to adopt or not adopt a building code.

A political subdivision that has elected not to adopt a building code has no duty to inspect buildings or issue building permits and cannot be held liable for its refusal to provide that service. A political subdivision may adopt the state building code and may amend the code to conform to local needs. If a political subdivision elects to adopt a building code, it may be liable for the failure to exercise reasonable care in enforcing that code.

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

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