

**LETTER OPINION
95-L-112**

May 16, 1995

Mr. John R. Gregg
Dunseith City Attorney
PO Box 26
Bottineau, ND 58318-0026

Dear Mr. Gregg:

Thank you for your April 7, 1995, letter requesting an Attorney General's opinion on three questions relating to a city's extension of the application of its zoning regulations beyond the city limits pursuant to N.D.C.C. ? 40-47-01.1.

N.D.C.C. ? 40-47-01.1 authorizes cities to extend their zoning authority beyond the city limits:

40-47-01.1. Territorial authority of zoning regulations. Based upon the population of the city as determined by the last official regular or special federal census or, in case of a city incorporated subsequent to such census, a census taken in accordance with chapter 40-02, the governing body of a city may, by ordinance, extend the application of a city's zoning regulations:

1. To each quarter quarter section of unincorporated territory the majority of which is located within one-half mile [.80 kilometer] of its limits in any direction if it is a city having a population of less than five thousand.
2. To each quarter quarter section of unincorporated territory the majority of which is located within one mile [1.61 kilometers] of its limits in any direction if it is a city having a population of five thousand or more, but less than twenty-five thousand.
3. To each quarter quarter section of unincorporated territory the majority of

John R. Gregg
May 16, 1995
Page 2

which is located within two miles [3.22 kilometers] of its limits in any direction if it is a city having a population of twenty-five thousand or more.

. . . . The governing body may thereafter enforce such regulation in the area to the same extent as if such property were situated within the city's corporate limits. . . .

You first ask whether the procedure for the adoption of an ordinance pursuant to N.D.C.C. ? 40-47-01.1 is subject to the notice and hearing requirements of N.D.C.C. ? 40-47-04. The Attorney General's office has previously issued an Attorney General's opinion specifically addressing this question. See 1977 N.D. Op. Att'y Gen. 21, copy enclosed. That opinion concluded that the adoption of an ordinance pursuant to N.D.C.C. ? 40-47-01.1 is not subject to the notice and hearing requirements of N.D.C.C. ? 40-47-04.

Your second question is whether an ordinance adopted pursuant to N.D.C.C. ? 40-47-01.1 must include a map showing the area brought within the city's zoning authority, and whether the failure to include such a map renders the ordinance void due to vagueness. N.D.C.C. ? 40-47-01.1 authorizes a city to extend application of its zoning regulations, by ordinance, to a specified perimeter beyond the city limits. N.D.C.C. ch. 40-11 outlines the procedure for adopting city ordinances. Neither N.D.C.C. ? 40-47-01.1 nor N.D.C.C. ch. 40-11 specifically requires including in the ordinance a map showing the area brought within the city's zoning authority, nor do these statutes necessarily imply that such a map be included. Indeed, in a 1976 letter from this office, then Chief Deputy Attorney General Gerald VandeWalle suggested as follows:

It would seem to me that the city could pass a general ordinance that all areas within one-half mile [N.D.C.C. ? 40-47-01.1 was later amended to change the extraterritorial boundary] of the city limits would be subject to the city zoning regulations without specifically describing such area in the ordinance itself. The city would obviously have to maintain some records to show what

John R. Gregg
May 16, 1995
Page 3

areas were included. However, such an ordinance would mean the zoning authority would automatically extend whenever additional area was annexed to the city. If, however, the zoning ordinance specifically sets forth the property included such ordinance must be amended each time additional property is annexed to the city.

Letter from Chief Deputy Attorney General Gerald W. VandeWalle to Mr. Mark L. Hinthorne (Nov. 2, 1976).

Based on the foregoing, it is my opinion that an ordinance adopted pursuant to N.D.C.C. ? 40-47-01.1 need not include a map showing the area brought within the city's zoning authority and the failure to include such a map does not render the ordinance void due to vagueness.

Your third question is whether a county retains zoning authority over unincorporated territory which is subject to a city's N.D.C.C. ? 40-47-01.1 ordinance where the city has yet to enact amendments to its existing zoning ordinance to classify the territory into specific zoning districts, i.e., residential, commercial, etc.

N.D.C.C. ? 40-47-01.1 states that "the governing body of a city may, by ordinance, extend the application of a city's zoning regulations" to unincorporated territory beyond the city limits. N.D.C.C. ? 40-47-01.1 (emphasis added). This type of ordinance would take effect and be in force from and after the governing body's final approval thereof unless otherwise expressly provided in the ordinance. N.D.C.C. ? 40-11-07.

The North Dakota Supreme Court has concluded that N.D.C.C. ? 40-47-01.1 enables a city "to exercise exclusive zoning control over all territory" within the extraterritorial area, despite the fact that the extraterritorial area is situated within another political subdivision. Apple Creek Township v. City of Bismarck, 271 N.W.2d 583, 585 (N.D. 1978). The authority of a county to zone "may not be construed to affect any property, real or personal, located within the zoning . . . authority of any city of this state," unless the city has relinquished to the county its authority to zone. N.D.C.C. ? 11-33-20.

Based on the foregoing, it is my opinion that a county does not retain zoning authority over unincorporated territory which is subject to a city's N.D.C.C. ? 40-47-01.1 ordinance,

John R. Gregg
May 16, 1995
Page 4

where the city has yet to enact amendments to its existing zoning ordinance to classify the territory into specific zoning districts, i.e., residential, commercial, etc. This conclusion is supported by a 1976 Attorney General's opinion concluding that there can be no application of a county zoning ordinance within the territory over which the city has authority to apply its zoning ordinance. 1976 N.D. Op. Att'y Gen. 24, 26 (emphasis added).

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

las\jfl
Enclosure