

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 95-11

Date Issued: November 8, 1995

Requested By: Shirley Dykshoorn, Director
Office of Intergovernmental Assistance

- QUESTIONS PRESENTED -

I.

Whether home rule cities and home rule counties are required to adopt the state building code if they choose to administer and enforce a building code.

II.

Whether cities, counties, and townships may adopt a version of the Uniform Building Code or Uniform Mechanical Code of a year different from that adopted as the state building code by the Office of Management and Budget.

III.

Whether cities, counties, and townships choosing to administer and enforce a building code must adopt the building code pursuant to their zoning authority.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that certain home rule cities are not, and all home rule counties are, required to adopt the state building code if they choose to administer and enforce a building code.

II.

It is my opinion that cities (except certain home rule cities), counties, and townships may not adopt a version of the Uniform Building Code or Uniform Mechanical Code of a year different from that adopted as the state building code by the Office of Management and Budget.

III.

It is my opinion that cities choosing to administer and enforce a building code may adopt the building code pursuant to either their

zoning authority or their general authority relating to buildings, while home rule cities may also adopt a building code pursuant to their home rule power as indicated in part I. It is my further opinion that counties and townships choosing to administer and enforce a building code must adopt the building code pursuant to their zoning authority.

- ANALYSES -

I.

N.D.C.C. § 54-21.3-03(3) provides:

The governing body of a city, township, or county that elects to administer and enforce a building code shall adopt and enforce the state building code. However, the state building code may be amended by cities, townships, and counties to conform to local needs.

Despite N.D.C.C. § 54-21.3-03(3), a home rule city's ordinances may supersede state law in the subject areas listed in N.D.C.C. § 40-05.1-06 if those subject areas or powers are included in the city's home rule charter and are properly implemented through ordinances. N.D.C.C. §§ 40-05.1-05, 40-05.1-06. One power listed in N.D.C.C. § 40-05.1-06 authorizes a home rule city:

To provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare, and penalties for a violation thereof.

N.D.C.C. § 40-05.1-06(7). Thus, if this power is included in a city's home rule charter, that city may adopt ordinances "to provide for public health, safety, morals, and welfare, and penalties for a violation thereof." N.D.C.C. § 40-05.1-06(7). A purpose of the state building code is to "protect the health, safety, and welfare of the people of this state." N.D.C.C. § 54-21.3-01(3). If a city's home rule charter includes the power quoted above as N.D.C.C. § 40-05.1-06(7), that city may supersede the requirement in N.D.C.C. § 54-21.3-03(3) that cities choosing to adopt a building code must adopt the state building code.

Further indication that home rule cities may adopt a building code different from the state building code is that even non-home rule cities, all counties, and all townships that have adopted the state building code may amend it. This indicates the Legislature did not intend that the state building code preempt all local ordinances on the same subject. For a more detailed discussion of preemption, see

State v. Gronna, 59 N.W.2d 514,530-531 (ND 1953); 1990 N.D. Op. Att'y. Gen. 90; 1994 N.D. Op. Att'y. Gen. 64. One of the purposes of the state building code is to "[e]liminate restrictive, obsolete, conflicting, and unnecessary construction regulations" for the benefit of the construction industry. N.D.C.C. §54-21.3-01(2). This, arguably, may imply a legislative direction for uniformity. However, cities, townships, and counties that elect to administer and enforce a building code have the authority to amend the state building code to conform to local needs. N.D.C.C. §54-21.3-03(3). Thus, it may be inferred that strict uniformity across the state was not intended by the Legislature. Also, N.D.C.C. §54-21.3-03(3) formerly provided that a local government could amend the code only if the standards established by amendment met or exceeded those of the state building code, but this language was deleted during the 1991 Legislative Session. 1991 N.D. Sess. Laws ch. 593; see also Letter from Attorney General Nicholas J. Spaeth to Shirley Dykshoorn (August 2, 1991). This also demonstrates that the standards included in the state building code were not intended to be absolute statewide standards.

In conclusion, it is my opinion that a home rule city whose home rule charter includes the power in N.D.C.C. §40-05.1-06(7) is not required to adopt the state building code if it chooses to administer and enforce a building code.

Home rule authority is available not only to cities, but also to counties. Home rule counties, like home rule cities, have the power to enact ordinances to provide for "public health, safety, and welfare." N.D.C.C. §11-09.1-05(5). However, this power "does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency." Id. The activity of building construction is regulated by N.D.C.C. ch. 54-21.3, the law establishing the state building code. Thus, it is my opinion that home rule counties are subject to N.D.C.C. §54-21.3-03(3) and, therefore, are required to adopt the state building code if they choose to administer and enforce a building code.

II.

The state building code generally consists of the Uniform Building Code and the Uniform Mechanical Code. N.D.C.C. §54-21.3-03(1). The director of the Office of Management and Budget "shall adopt rules to implement and periodically update the code and may adopt rules to amend the code." Id. Thus, the state building code is that code reflected in the rules of the Office of Management and Budget.

As indicated previously, N.D.C.C. §54-21.3-03(3) provides:

The governing body of a city, township, or county that elects to administer and enforce a building code shall

adopt and enforce the state building code However, the state building code may be amended by cities, townships, and counties to conform to local needs.

(Emphasis added.) To comply with this statute, it is my opinion that cities (except home rule cities whose home rule charter includes the power discussed in part I), counties, and townships that elect to administer and enforce a building code must adopt the state building code as adopted in the rules of the Office of Management and Budget. Adoption of the state building code includes the versions of the Uniform Building Code and Uniform Mechanical Code of the same year as adopted by the Office of Management and Budget. After such adoption, the state building code may be amended to conform to local needs.

To help accomplish this, cities may adopt the state building code by reference to such code, thereby incorporating any amendments made to the state building code by the Office of Management and Budget. See N.D.C.C. § 40-05-01(1).

III.

A city's zoning authority includes the following:

40-47-01. Cities may zone -- Application of regulations. For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing body of any city may, subject to the provisions of chapter 54-21.3 [regarding the state building code], regulate and restrict the height, number of stories, and the size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, 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. Such regulations may provide that a board of adjustment may determine and vary the application of the regulations in harmony with their general purpose and intent and in accordance with general or specific rules therein contained.

40-47-02. Division of city into districts to carry out regulations. The governing body may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter, and may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within such districts. . . .

40-47-09. Hearing of appeal by board of adjustment -- Notice -- Authority of board -- Items taken into consideration by board. . . . Where there is practical

difficulty or unnecessary hardship in the way of carrying out the strict letter of the ordinance, the board, in passing upon an appeal, may vary or modify any of the regulations or provisions of the ordinance relating to the use, construction, or alteration of buildings or structures or the uses of land so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

In addition to a city's zoning authority, a city has general authority relating to buildings, including N.D.C.C. §§ 40-05-01(1) and 40-05-02(7). N.D.C.C. § 40-05-01(1) authorizes cities to "adopt by ordinance the conditions, provisions, and terms of a building code." In addition, N.D.C.C. § 40-05-02(7) authorizes the city council in a city operating under the council form of government and the board of city commissioners in a city operating under the commission system of government to "prescribe the manner of constructing buildings, structures, and the walls thereof; to require and regulate the construction of fire escapes on buildings; and to provide for the inspection of all buildings within the limits of the municipality and for the appointment of a building inspector."

The statutes discussed above indicate that cities may adopt a building code under either their zoning authority or their general authority relating to buildings. In either case, a city may administer and enforce the building code in the area in which it has zoning jurisdiction. See N.D.C.C. §§ 54-21.3-05, 54-21.3-02(5).

In addition, home rule cities may have the power to adopt a building code pursuant to the powers included in their home rule charters. See part I of this opinion.

Counties may also adopt a building code through their zoning authority. N.D.C.C. § 11-33-01, relating to county zoning, provides, in part:

For the purpose of promoting health, safety, morals, public convenience, general prosperity, and public welfare, the board of county commissioners of any county may regulate and restrict within the county, subject to . . . chapter 54-21.3 [regarding the state building code], 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.

The county zoning regulations may be designed to accomplish the following purpose:

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.

N.D.C.C. § 11-33-03(3). No statutes other than N.D.C.C. §§ 11-33-01 and 11-33-03(3) authorize counties to regulate building construction. Therefore, it is my opinion that counties choosing to administer and enforce a building code must adopt the building code pursuant to their zoning authority as indicated in N.D.C.C. §§ 11-33-01 and 11-33-03(3).

State law regarding township zoning provides:

For the purpose of promoting the health, safety, morals, or the general welfare . . . the board of township supervisors may establish one or more zoning districts and within such districts may, subject to the provisions of chapter 54-21.3 [regarding the state building code], 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.

N.D.C.C. § 58-03-11. No statutes other than N.D.C.C. § 58-03-11 authorize townships to regulate building construction. Therefore, it is my opinion that townships choosing to administer and enforce a building code must adopt the building code pursuant to their zoning authority under N.D.C.C. § 58-03-11.

To the extent that the conclusion reached in part III of this opinion conflicts with a November 6, 1989, letter opinion from Attorney General Nicholas Spaeth to Mr. Brian D. Neugebauer, this opinion governs.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.