

**LETTER OPINION
2001-L-17**

June 1, 2001

Mr. James O. Johnson
Mercer County State's Attorney
PO Box 39
Stanton, ND 58571-0039

Dear Mr. Johnson:

Thank you for your letter asking the following questions:

1. If a county enforces zoning regulations, should a comprehensive plan be part of the zoning regulations?
2. If a comprehensive plan is included in the zoning regulations, to what extent should it be followed by a county planning commission and county commission when making zoning decisions?
3. Can a county government be held liable for approving zoning applications which do not follow a comprehensive plan?
4. Can a county government be held liable for approving a zoning application which creates a potential safety hazard resulting in an injury or fatality?

Regarding a county's authority to zone, state law provides:

11-33-01. County power to regulate property. 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 . . . 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. . . .

11-33-02. Board of county commissioners to designate districts.

1. For any or all of the purposes designated in section 11-33-01, the board of county commissioners may divide by resolution all or any parts of the county . . . into districts of such number, shape, and area as may be determined necessary, and likewise may enact suitable regulations to carry out the purposes of this chapter. . . .

. . . .

11-33-03. Object of regulations. These regulations shall be made in accordance with a comprehensive plan and designed for any or all of the following purposes:

1. To protect and guide the development of nonurban areas.
2. To provide for emergency management. "Emergency management" means a comprehensive integrated system at all levels of government and in the private sector which provides for the development and maintenance of an effective capability to mitigate, prepare for, respond to, and recover from known and unforeseen hazards or situations, caused by an act of nature or man, which may threaten, injure, damage, or destroy lives, property, or our environment.
3. 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.
4. To lessen governmental expenditures.
5. To conserve and develop natural resources.

These regulations shall be made with a reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses. The comprehensive plan shall be a statement in documented text setting forth explicit goals, objectives, policies, and standards of the jurisdiction to guide public and private development within its control.

N.D.C.C. §§ 11-33-01, 11-33-02, and 11-33-03 (emphasis added). Thus, zoning regulations must be made “in accordance with a comprehensive plan,” which is “a statement in documented text setting forth explicit goals, objectives, policies, and standards of the jurisdiction to guide public and private development within its control.” N.D.C.C. § 11-33-03.¹

In answer to your first question, it is my opinion that the comprehensive plan is not part of the county’s zoning regulations but, instead, the zoning regulations must be made in accordance with the comprehensive plan. In other words, the zoning regulations should reflect or be consistent with the goals, objectives, policies, and standards itemized in the comprehensive plan.

In answer to your second question, although a comprehensive plan is not included as part of the zoning regulations, it is my opinion that the comprehensive plan should serve as a guide to a county planning commission and county commission when making zoning decisions. Courts have looked favorably upon decisions which are consistent with a comprehensive plan and have indicated disapproval of decisions which are inconsistent with the comprehensive plan.² Thus, it is important that a county not only comply with its

¹ These same requirements for a comprehensive plan apply to city zoning and township zoning. See N.D.C.C. §§ 40-47-03 and 58-03-12, respectively.

² See, e.g., Eck v. City of Bismarck, 302 N.W.2d 739 (N.D. 1981) (The ordinance zoning certain land as agricultural effectuates a comprehensive plan to provide orderly development in areas which are undesirable for residential development because of excessive noise levels caused primarily by flying aircraft.); Bigwood v. City of Wahpeton, 565 N.W.2d 498 (N.D. 1997) (A city, when rezoning, was not “spot zoning,” but was acting in accordance with a comprehensive plan for the general welfare of the community.); Shaw v. Burleigh County, 286 N.W.2d 792 (N.D. 1979) (The court supported a county’s decision to deny a special use permit based, in part, on its being disharmonious with the purpose of the county’s master zoning plan.); Knudson v. City of Decorah, 622 N.W.2d 42 (Iowa 2000) (The court determined that a city’s approval of an urban renewal project that permitted leapfrog development did not violate a statute requiring the project to conform to the city’s

zoning ordinances, but also keep in mind the goals, objectives, policies, and standards in its comprehensive plan, when making zoning decisions.

Your third and fourth questions relate to potential liability of the county when approving zoning applications. Although not specifically stated, I interpret your questions to relate to tort liability. Accordingly, I will not address in detail issues relating to eminent domain "liability." Furthermore, because of the broad nature of the questions, I can only provide general responses.

Your third question is limited to a county government's liability for approving zoning that does not follow a comprehensive plan. Generally, a county government cannot be held monetarily liable for approving zoning applications that do not follow a comprehensive plan. "[Z]oning is relatively insulated from claims for damages." Minch v. City of Fargo, 297 N.W.2d 785, 790 (N.D. 1980). Typically, the appropriate remedy if a county does not follow the comprehensive plan would be declaratory relief, not an action for monetary damages. Id.; Eck v. City of Bismarck, 283 N.W.2d 193, 201-02 (N.D. 1979). Furthermore, as discussed in more detail below, under most circumstances an action seeking monetary damages based upon zoning approval would be barred by discretionary function immunity.

Of course, zoning actions may result in eminent domain "liability," irrespective of whether the county government followed a comprehensive plan. And it is possible that the failure to follow a comprehensive plan may be relevant in an inverse condemnation action.

If a zoning ordinance forbids substantially all use of regulated property, a landowner may have a viable inverse condemnation claim. Minch, 297 N.W.2d at 790; Eck, 283 N.W.2d at 201. Whether the landowner relied on prior zoning provisions and representations by county officials may be relevant to the takings issue. Minch, 297 N.W.2d at 790. It is possible a comprehensive plan could be one element of the reasonable reliance equation.

comprehensive development plan, which included a policy seeking to minimize leapfrog development, but not to prohibit it. The court also determined that a city's approval of an urban renewal project that included a 4000-foot street ending in a cul-de-sac violated a statute requiring the project to conform to the city's comprehensive development plan, which limited cul-de-sac streets to 600 feet in length.); Gullickson v. Stark County Bd. of County Comm'rs, 474 N.W.2d 890 (N.D. 1991) (Given that a county's zoning ordinances must be made in accordance with a comprehensive plan under N.D.C.C. § 11-33-03, a county may not authorize isolated and standardless changes of use or structure classifications by variance.).

Thus, although liability would not exist for not following the plan, the failure to follow the plan may be relevant to whether the zoning ordinance constitutes a taking.³

Your fourth question concerns liability when a county government approves a zoning ordinance that creates a potential safety hazard that results in personal injury. Responding to this question requires a review of N.D.C.C. § 32-12.1-03, which provides the county's potential liability in tort.

Under N.D.C.C. § 32-12.1-03, stated broadly, a county is liable for money damages for injuries proximately caused by the negligence or wrongful act of an employee where the employee would be liable if a private person. Subsection 3 of N.D.C.C. § 32-12.1-03 provides the circumstances under which a county is not liable. The language in subsection 3 constitutes what has become known as the discretionary function exception to political subdivision liability. See Peterson v. Traill County, 601 N.W.2d 268 (N.D. 1999). The discretionary function exception does not apply, however, when a personal injury arises from execution of the discretionary act. N.D.C.C. § 32-12.1-03(3) provides:

This subsection does not limit the liability of a political subdivision or an employee thereof for a personal injury arising out of the execution of any legislative or quasi-legislative act, judicial or quasi-judicial act, or discretionary function.

Zoning decisions are discretionary acts. McLain v. Midway Township, 326 N.W.2d 196, 198-99 (N.D. 1982). Your question, however, goes beyond a county government's potential liability for zoning decisions. It assumes the zoning application created a potential safety hazard that resulted in actual personal injury. Because discretionary function immunity does not apply when execution of the discretionary function results in personal injury, the ultimate factual issues would be (1) whether approval of the zoning application constituted negligence or a wrongful act of the county or its employees and (2) whether the personal injury arose out of the execution of the zoning decision.⁴ Under the

³ It is also possible that the failure to follow the plan may be used as evidence in a 42 U.S.C. § 1983 action. Depending on the specific facts, a county government's failure to follow the comprehensive plan may strengthen an argument a zoning ordinance was adopted for constitutionally impermissible reasons.

⁴ The North Dakota Supreme Court has construed the phrase "personal injury arising out of the execution of any . . . discretionary function" to mean "a personal injury arising directly out of the execution of the discretionary function or decision itself, regardless of whether it is caused by an allegedly negligent affirmative act or omission to act." Peterson, 601 N.W.2d at 275.

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facts assumed in your question, if both of the above factual issues were resolved in favor of a plaintiff, it is possible a county government could be liable. In other words, a county government may be liable for a zoning decision if the decision is negligent or wrongful and a personal injury arises out of execution of the zoning decision.⁵

Sincerely,

Wayne Stenehjem
Attorney General

las/rel/dab/lk

⁵ See Peterson v. Traill County, 601 N.W.2d 268 (N.D. 1999) (even if decision by sheriff was discretionary, exception in N.D.C.C. § 32-12.1-03(3) for “personal injury” did not make county immune from negligence claim for personal injury caused by the failure of the sheriff to take detainee to hospital for treatment). McCroskey v. Cass County, 303 N.W.2d 330 (N.D. 1981) (allegations that jailers did not properly notify family of detained person nor make observations concerning intoxication required by statute and jail policy, stated cause of action for personal injury caused by non-discretionary actions in execution of jail rules).