

**LETTER OPINION  
2004-L-66**

October 29, 2004

Mr. Dale L. Frink, P.E.  
State Engineer  
900 E Boulevard Ave  
Bismarck, ND 58505-0850

Dear Mr. Frink:

Thank you for your letter asking whether a county, city, or township may adopt an ordinance that incorporates future amendments to the relevant federal flood insurance study and rate map. It is my opinion that a county, city, or township may not adopt an ordinance that incorporates future revisions of a document such as the flood insurance study and rate map except through re-enactment of the ordinance to adopt a version of the map in existence at the time the amendment is adopted.

**ANALYSIS**

Cities, counties, and townships having authority to zone are authorized to enter into a program of flood plain management with the state engineer and to participate in the National Flood Insurance Program<sup>1</sup> sponsored by the federal government. N.D.C.C. §§ 61-16.2-03, 61-16.2-04.<sup>2</sup> Each participating community must adopt a flood plain management ordinance pursuant to the National Flood Insurance Program. N.D.C.C. § 61-16.2-05. The ordinance must first be submitted to the state engineer who will review it for compliance with N.D.C.C. ch. 61-16.2 and federal program requirements. *Id.* Participating communities benefit by having federal flood insurance made available to their citizens in special flood hazard areas identified in the federal flood insurance study and flood insurance rate map which are part of the ordinance. Section 3.2 of the State Model Flood Plain Management Ordinance. See also 44 C.F.R. § 59.22(a)(3) (requiring a community to submit flood plain management ordinance to qualify for flood insurance).

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<sup>1</sup> See Generally, 42 U.S.C. § 4001 *et seq.*

<sup>2</sup> Communities eligible to participate are any political subdivisions that have the authority to zone. N.D.C.C. § 61-16.2-02(2). Counties have authority to zone under N.D.C.C. ch. 11-33, cities have authority to zone under N.D.C.C. ch. 40-47, and townships have authority to zone under N.D.C.C. ch. 58-03.

You ask whether a county, city, or township may adopt an ordinance intended to allow the automatic adoption of revisions to the community's flood insurance study and flood insurance rate map.

Numerous courts, including the North Dakota Supreme Court, have held that a statute attempting to incorporate future changes of another statute, code, regulation, standard, or guideline is an unconstitutional delegation of legislative power to the entity publishing the referenced item. McCabe v. Workers Compensation Bureau, 567 N.W.2d 201, 204 (N.D. 1997). A state statute may adopt by reference the laws or regulations of another entity that are in existence at the time of the enactment of the adopting state statute without creating an unlawful delegation of legislative power. State v. Julson, 202 N.W.2d 145, 151 (N.D. 1972). If the state statute that adopts by reference the other entity's law or regulation provides that it is adopting the law or regulation "as amended," that adoption will be interpreted to mean the act or regulations as amended at the time of the enactment of the state statute, and will not include changes made subsequent to the enactment of the state statute. Id.<sup>3</sup> This rule includes adoption by reference of federal laws or regulations. Id.

Rules of statutory construction apply to ordinances. City of Fargo v. Ness, 551 N.W.2d 790, 792 (N.D. 1996). Consequently, an ordinance that attempts to adopt subsequent modifications of a law, rule, guideline, etc., will also be unconstitutional. See Professional Houndsmen of Missouri, Inc. v County of Boone, 836 S.W.2d 17, 21 (Mo. 1992); City of Salem v. Jungblut, 732 P.2d 919, 920 (Or. 1987).

Therefore, it is my opinion that a county, city, or township ordinance may adopt by reference a flood insurance study and flood insurance rate map that is in existence at the time of enactment, but may not adopt subsequent revisions except by amending the ordinance.<sup>4</sup>

Sincerely,

Wayne Stenehjem  
Attorney General

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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 question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

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<sup>3</sup> There is an exception under N.D. Const. art. X, § 3 which allows the Legislature to adopt future amendments to federal income tax laws.

<sup>4</sup> A community participating in the National Flood Insurance Program has six months to adopt a new flood insurance study and flood insurance rate map after new data is submitted to the community by the Federal Insurance Administrator. 44 C.F.R. § 59.24(a).