

**LETTER OPINION
2012-L-12**

November 20, 2012

Mr. Allen Koppy
Morton County State's Attorney
210 2nd Ave NW
Mandan, ND 58554-3124

Dear Mr. Koppy:

Thank you for your letter asking several questions relating to the effect of county recreational district zoning on farming and ranching uses, and the potential for a public nuisance because of such uses. For the reasons indicated below, it is my opinion that, to the extent the county zoning ordinance prohibits or prevents the use of land or buildings in the recreational district for farming or ranching, the ordinance is not valid or enforceable, and such uses of land generally cannot be prosecuted as a public nuisance.

ANALYSIS

You stated that in 1967, the Morton County zoning commission zoned large areas of land along the Missouri River as recreational districts, but that much of the land continued to be used for agricultural purposes. You indicated that recently, the Morton County commission has received complaints from several landowners living within the recreational district who are upset about a neighboring landowner who purchased land within the recreational district in 2010 and continues to use this land for agricultural purposes, a use which is not allowed in a recreational district by the Morton County zoning regulations.

You indicated that in 1981, the North Dakota Legislature enacted a zoning law stating that a board of county commissioners could not prohibit or prevent the use of land or buildings for farming or ranching. In fact, the North Dakota Legislature first enacted a zoning law in 1955 that stated, "[n]o regulation . . . shall prohibit or prevent the use of land or buildings

for farming”¹ In 1999, the Legislature added “or ranching”, so the law would state that a zoning regulation could not “prohibit or prevent the use of land or buildings for farming or ranching.”² In 2007, the Legislature moved this language from N.D.C.C. § 11-33-02 to N.D.C.C. § 11-33-02.1(3).³

You ask how the state law, which provides that “[a] board of county commissioners may not prohibit or prevent the use of land or buildings for farming or ranching”⁴ affects Morton County’s zoning ordinance,⁵ passed in 1967, that zoned land into recreational districts and does not allow for farming or ranching.

Counties have only the authority granted by state law.⁶ When the Morton County zoning ordinance creating the recreational districts was passed in 1967, state law already provided that “[n]o regulation . . . shall prohibit or prevent the use of land or buildings for farming”⁷ As noted above, the phrase “or ranching” was not added to the law until 1999, so a question may be raised regarding the effect of Morton County’s zoning ordinance on the ability to engage in ranching in the recreational district.

“A valid statute repeals an earlier ordinance that conflicts with the statute because a county only has the authority granted to it, and that authority may be modified or taken away at the will of the Legislature.”⁸ To determine whether a county ordinance is currently valid, the current law must be used.⁹ The current law states “[a] board of county

¹ See 1955 N.D. Sess. Laws ch. 119, § 2 (codified as N.D.C.C. § 11-33-02). The North Dakota Legislature enacted a law in 1981 stating that “no . . . [county] regulation . . . [of subdivisions] shall prohibit or prevent the use of land or buildings for farming” See 1981 N.D. Sess. Laws ch. 150, § 3 (codified as N.D.C.C. § 11-33.2-03). In 1981, the North Dakota Legislature also enacted a law stating that “[a]ny ordinance . . . of any unit of local government that makes the operation of any agricultural operation a nuisance . . . is void,” with certain exceptions. See 1981 N.D. Sess. Laws ch. 434, § 1 (codified as N.D.C.C. § 42-04-04).

² See 1999 N.D. Sess. Laws ch. 111, § 1 (amending N.D.C.C. § 11-33-02).

³ See 2007 N.D. Sess. Laws ch. 108, §§ 1 and 2.

⁴ N.D.C.C. § 11-33-02.1(3).

⁵ The terms, “ordinance” and “regulation” are used interchangeably in this opinion. An “ordinance” is “[a] statute or regulation” The American Heritage Dictionary 979 (4th coll. ed. 2010).

⁶ See Cnty. of Stutsman v. State Historical Soc’y of N.D., 371 N.W.2d 321, 329 (N.D. 1985).

⁷ See 1955 N.D. Sess. Laws ch. 119, § 2 (codified as N.D.C.C. § 11-33-02).

⁸ Ramsey Cnty. Farm Bureau v. Ramsey Cnty., 755 N.W.2d 920, 926 (N.D. 2008) (citing State ex rel. City of Minot v. Gronna, 59 N.W.2d 514, 530 (N.D. 1953)).

⁹ See Ramsey Cnty. Farm Bureau, 755 N.W.2d at 926.

commissioners may not prohibit or prevent the use of land or buildings for farming or ranching”¹⁰ Thus, it is my opinion that, to the extent the Morton County zoning ordinance prohibits or prevents the use of land or buildings in the recreational district for farming or ranching, the ordinance is not valid or enforceable.¹¹

You also ask whether Morton County can prosecute agricultural uses of land as a public nuisance based on a violation of its county zoning ordinances. State law provides that “[a] violation of any provision of this chapter [on county zoning] or the regulations and restrictions made thereunder shall constitute the maintenance of a public nuisance and shall be a class B misdemeanor.”¹² Because I have determined that Morton County cannot enforce any zoning ordinance that prohibits or prevents the use of land or buildings for farming or ranching,¹³ such uses of land generally cannot be prosecuted as a public nuisance under N.D.C.C. title 42.¹⁴

¹⁰ N.D.C.C. § 11-33-02.1(3).

¹¹ This effect of N.D.C.C. § 11-33-02.1(3) on Morton County’s zoning ordinance does not violate N.D.C.C. § 1-02-10, which provides, “[n]o part of this code is retroactive unless it is expressly declared to be so.” N.D.C.C. § 11-33-02.1(3) is being applied prospectively. See Fairmount Twp. Bd. of Supervisors v. Beardmore, 431 N.W.2d 292, 294-95 (N.D. 1988). After its effective date, a board of county commissioners may not prohibit or prevent the use of land or buildings for farming or ranching. Thus, a county commission cannot enforce a zoning regulation, even if it was enacted before the effective date of the statute, if such enforcement would prohibit or prevent the use of land or buildings for farming or ranching.

¹² N.D.C.C. § 11-33-21.

¹³ See also N.D.C.C. § 42-04-04 (“Any ordinance . . . of any unit of local government that makes the operation of any agricultural operation a nuisance . . . is void, except that the provisions of this section shall not apply when a nuisance results from the negligent or improper operation of any such agricultural operation or from an agricultural operation located within the corporate limits of any city as of July 1, 1981.”).

¹⁴ If an agricultural operation is negligently or improperly operated, it might be a nuisance. See N.D.C.C. § 42-04-02 (“An agricultural operation is not, nor shall it become, a private or public nuisance by any changed conditions in or about the locality of such operation after it has been in operation for more than one year, if such operation was not a nuisance at the time the operation began, except that the provisions of this section shall not apply when a nuisance results from the negligent or improper operation of any such agricultural operation.”).

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You also ask whether a landowner may bring an inverse condemnation¹⁵ action against Morton County for enforcing zoning regulations that prohibit agricultural uses of land. Because I have determined that Morton County cannot enforce its zoning regulations that prohibit or prevent the use of land or buildings for farming or ranching, this situation will not arise.

Sincerely,

Wayne Stenehjem
Attorney General

las/vkk

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.¹⁶

¹⁵ Inverse condemnation is “[a] cause of action against a government agency to recover the value of property taken by the agency, though no formal exercise of the power of eminent domain has been completed.” Black’s Law Dictionary 740 (5th ed. 1979).

¹⁶ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).