

**LETTER OPINION**  
**96-L-246**

December 27, 1996

The Honorable Kim Koppelman  
District 13  
513 1st Ave NW  
West Fargo, ND 58078

Dear Representative Koppelman:

Thank you for your letter asking about the extraterritorial zoning authority of contiguous North Dakota cities and the rights of landowners in relation to extraterritorial zoning.

Cities in North Dakota have jurisdiction to zone land beyond their city limits. State law provides:

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 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.

Provided, that where two or more noncontiguous cities have boundaries at a distance where there would be an overlap of zoning authority under this section, each city is authorized to control the zoning of land on its side of a line established in proportion to the authority each city has to zone land outside its limits in accordance with this section or pursuant to mutual agreement. 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. This territorial authority shall not authorize the application of zoning regulations to territory outside the corporate limits of land attached to a city by a strip of land not more than one hundred feet [30.48 meters] wide, nor shall this territorial authority authorize application of zoning regulations to territory outside the corporate limits of land included within such a strip of land. For the purposes of this section, a quarter quarter section shall be determined in the manner provided by 2 Stat. 313 [43 U.S.C. 752].

N.D.C.C. § 40-47-01.1 (emphasis supplied). Similar provisions apply to a city's jurisdiction to develop a municipal master plan for the subdividing or platting of land outside of a city under N.D.C.C. ch. 40-48. N.D.C.C. § 40-48-18.<sup>1</sup>

N.D.C.C. § 40-47-01.1 gives cities authority to establish zoning control within a specified distance beyond their corporate limits and, within that jurisdiction, to zone any territory not located within the boundaries of another incorporated city. Apple Creek Township v. City of Bismarck, 271 N.W.2d 583, 587 (N.D. 1978). As pointed out in your letter, this statute does not address the issue of extraterritorial zoning jurisdiction for contiguous cities.

N.D.C.C. § 40-47-01.1, as quoted above, addresses extraterritorial zoning jurisdiction for cities and provides a separate rule for determining the extraterritorial zoning jurisdiction of cities which are close enough for this jurisdiction to overlap. However, the statute is silent regarding the boundaries of the extraterritorial

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<sup>1</sup> Therefore, any interpretation or discussion of zoning under N.D.C.C. § 40-47-01.1 may also be applicable to subdividing and platting under N.D.C.C. § 40-48-18.

jurisdiction of contiguous cities. The common law can adapt to fit situations where the Legislature has not spoken on an issue. Lembke v. Unke, 171 N.W.2d 837, 841-42 (N.D. 1969).

N.D.C.C. § 40-47-01.1 carefully attempts to separate zoning jurisdiction between cities in order to prevent overlapping, and potentially contradictory, zoning. This purpose can also be met by applying the same principles to contiguous cities. It is my opinion that a court reviewing a controversy involving competing claims of extraterritorial zoning jurisdiction between two or more contiguous cities would apply the principle in N.D.C.C. § 40-47-01.1, i.e., "each city is authorized to control the zoning of land on its side of a line established in proportion to the authority each city has to zone land outside its limits in accordance with this section or pursuant to mutual agreement" to determine the boundaries of the extraterritorial zoning jurisdiction of contiguous cities as well as noncontiguous cities. The application of the statutory principles of N.D.C.C. § 40-47-01.1 to contiguous cities would include the recognition of mutual agreement by the cities.

The grant of extraterritorial zoning authority to cities presents issues affecting landowners' vested rights through shifting jurisdiction. Each city may control the zoning of land on its side of a line established in proportion to the extraterritorial zoning authority each city possesses. N.D.C.C. § 40-47-01.1. As an example, a city with a one-mile extraterritorial zoning authority may have a boundary at a distance which overlaps with the extraterritorial zoning authority of a city having a two mile extraterritorial limit. Under N.D.C.C. § 40-47-01.1, the smaller city may zone land within one-third of the distance between it and the larger city and the larger city may zone land within two-thirds of the distance between it and the smaller city. A change in a city's boundaries may cause land which had been in the extraterritorial zoning jurisdiction of one city to shift to that of a neighboring city.

Also, the statute does not address the effect of population changes. In the previous example, if the smaller of the two cities were to grow in population to have a two-mile extraterritorial zoning distance like the larger city, the extraterritorial zoning boundary line would change, and each city would have zoning authority over one-half the distance between the cities. These changes in jurisdiction may cause land within the extraterritorial zoning jurisdiction of one city to come within the extraterritorial zoning jurisdiction of a different city with a different zoning ordinance.

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Changes in zoning may require some landowners to be compensated. Generally, landowners who merely hope or plan to use their property in a certain way sometime in the future have no protection against zoning changes; however, a landowner who has made substantial expenditures in reliance upon existing zoning or has otherwise committed resources to the landowner's substantial disadvantage before the zoning change, may be protected by law. City of Fargo v. Harwood Township, 256 N.W.2d 694, 700 (N.D. 1977), see also Buegel v. City of Grand Forks, 475 N.W.2d 133, 134-135 (N.D. 1991). A change in zoning, whether by a local jurisdiction or by virtue of state law, may result in an inverse condemnation action by a landowner who has substantially relied upon existing zoning. Id. A court may grant an exemption from the application of a zoning ordinance where a landowner has shown an injury or the destruction of a vested right. See Leonard v. Medlang, 264 N.W.2d 481, 484 (N.D. 1978).

However, cities with existing zoning have used several techniques to protect landowners' vested rights. The confiscatory effect of changes in a zoning ordinance may be avoided by the application of a variance from the ordinance. Gullickson v. Stark County Bd. of County Comm'rs, 474 N.W.2d 890, 892 (N.D. 1991). Further, vested rights in a prior zoning classification may be preserved as a non-conforming use through savings provisions in new zoning regulations. It is my further opinion that provisions allowing for variances or savings provisions may be added to new zoning ordinances covering parcels of land where the city having jurisdiction to zone a particular parcel of land has changed. The adverse effects of potential shifts in zoning authority may also be minimized if affected cities, together with the counties and neighboring organized townships, were to form a regional planning and zoning commission. N.D.C.C. § 11-35-01.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

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