

LETTER OPINION
96-L-188

October 28, 1996

Jeff Rotering
Hettinger City Attorney
215 South Main
Box 1379
Hettinger, ND 58639

Dear Mr. Rotering:

Thank you for your letter asking several questions regarding the area outside the Hettinger city limits over which the city of Hettinger has extraterritorial zoning authority.

Your letter states:

The city of Hettinger adopted its current zoning ordinance in 1972. That zoning ordinance provides that "property which has not been included within a district which has become a part of the City by annexation shall automatically be classified as lying and being in the Hettinger residential district until such classification has been changed. . . ."

In 1974, the Adams County Board of Commissioners adopted a comprehensive county-wide zoning ordinance. This ordinance provides in part, as follows: "No single family dwelling shall be erected or building altered to accommodate one family as a residence on less than one and one-half (1½) acre of lot area. . . ."

In 1977, the city of Hettinger passed an ordinance providing for the exercise of extraterritorial zoning jurisdiction over all territory within ½ mile of the city limits as authorized by N.D.C.C. § 40-47-01.1. However, it appears that the city never classified the territory outside of the city limits into specific zoning districts.

Recently a lot, within ½ mile of Hettinger city limits, and on which is constructed a house and a separate garage, was split, resulting in 2 smaller, non-conforming parcels, one with the house and one with the garage. The county is without power to enforce zoning in this area because of the city's exercise of extraterritorial zoning authority.

You ask:

1. Is the city authorized to enforce the county's zoning scheme within ½ mile of the city limits; is there no zoning scheme in effect within the ½ mile area; or is the area within ½ mile of the city considered residential pursuant to the city zoning ordinance quoted above?
2. Does N.D.C.C. § 40-47-13 provide a solution to the problem as outlined above?

N.D.C.C. § 40-47-01.1 authorizes cities to extend their zoning authority beyond the city limits:

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.

. . . . 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. . . .

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In a recent opinion, I stated:

The North Dakota Supreme Court has concluded that N.D.C.C. § 40-47-01.1 enables a city "to exercise exclusive zoning control over all territory" within the extraterritorial area, despite the fact that the extraterritorial area is situated within another political subdivision. Apple Creek Township v. City of Bismarck, 271 N.W.2d 583, 585 (N.D. 1978). The authority of a county to zone "may not be construed to affect any property, real or personal, located within the zoning . . . authority of any city of this state," unless the city has relinquished to the county its authority to zone. N.D.C.C. § 11-33-20.

1995 N.D. Op. Att'y Gen. L-112, L-114 (to John R. Gregg, dated May 16, 1995). I concluded "it is my opinion that a county does not retain zoning authority over unincorporated territory which is subject to a city's N.D.C.C. § 40-47-01.1 ordinance, where the city has yet to enact amendments to its existing zoning ordinance to classify the territory into specific zoning districts, i.e., residential, commercial, etc." 1995 N.D. Op. Att'y Gen. L-112, L-114. Thus, the county's zoning ordinance is ineffective within the extraterritorial area over which the city of Hettinger has extended the application of its zoning regulations. It is my opinion that the city of Hettinger has no authority to enforce the county's zoning scheme within the extraterritorial area over which the city has extended the application of its zoning regulations.

Under the circumstances where the city has passed an ordinance extending the application of its zoning regulations to territory beyond the city limits, and the city has not yet classified the territory into specific zoning districts, it is my opinion that there is no zoning scheme in effect within the extraterritorial area.

It is also my opinion that the 1972 city ordinance which automatically classifies land annexed to the city as being in a residential district does not apply to land which has not been annexed to the city. Therefore, it is my opinion that the extraterritorial area over which the city has extended the application of its zoning regulations is not considered residential pursuant to the 1972 city zoning ordinance.

Your final question is whether N.D.C.C. § 40-47-13 provides a solution to the problem. N.D.C.C. § 40-47-13 provides:

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If the regulations made under the authority of this chapter require a greater width or size of yards or courts, or require a lower height of building or a lesser number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under the authority of this chapter shall govern. If the provisions of any other statute or local ordinance or regulation require a greater width or size of yards or courts, or require a lower height of building or a lesser number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under the authority of this chapter, the provisions of such statute or local ordinance shall govern.

This statute provides that whichever applicable local ordinance, local regulation, or state law has the highest standards shall govern. Under the circumstances, the county zoning regulations are inapplicable within the city's extraterritorial zoning area, the city has exclusive zoning authority within that area, and there are no relevant statutes. Under these circumstances, it is my opinion that N.D.C.C. § 40-47-13 does not apply.

In conclusion, only the city of Hettinger has the authority to establish zoning regulations within the area over which it exercises extraterritorial jurisdiction pursuant to N.D.C.C. § 40-47-01.1. Under the circumstances where the city has passed an ordinance providing for the exercise of extraterritorial zoning authority, but has yet to classify the extraterritorial area into specific zoning districts, there are currently no zoning ordinances in effect within the area over which the city has extraterritorial zoning authority.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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