

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-18

Date Issued: June 8, 1998

Requested by: Brian Neugebauer, Attorney, City of West Fargo

- QUESTION PRESENTED -

Whether a city may apply and enforce its fire prevention code in unincorporated territory within the city's extraterritorial zone.

- ATTORNEY GENERAL'S OPINION -

It is my opinion a city may apply and enforce its fire prevention code in unincorporated territory within the city's extraterritorial zone to the extent the city has adopted all or portions of the fire prevention code under its zoning authority and, by ordinance, extended the application of the city's zoning regulations pursuant to N.D.C.C. § 40-47-01.1.

- ANALYSIS -

Municipalities of the state of North Dakota are creatures of state statute and, therefore, have only such authority as the Legislature chooses to grant. N.D.C.C. § 40-05-01 establishes the general powers of all municipalities. A city's powers include the power to adopt by ordinance a fire prevention code. N.D.C.C. § 40-05-01(1). Where such a code is adopted by a city, it becomes a part of and has the effect of a city ordinance. See Letter from Attorney General Nicholas Spaeth to Donald Kilander (Oct. 8, 1985). Unless otherwise provided by law, city ordinances only apply in and over all places within one-half mile of the city's boundaries. N.D.C.C. § 40-06-01(2). North Dakota law does not provide that a city's fire prevention code applies beyond one-half mile of the city limits. Accordingly, a city's fire prevention code only applies in and over all places within one-half mile of the city limits.

N.D.C.C. § 40-05-02(13) grants cities zoning authority. N.D.C.C. § 40-05.1-06(11) grants home rule cities the authority to "provide for zoning, planning and subdivision of public or private property within the city limits; to provide for such zoning, planning, and

subdivision of public or private property outside the city limits as may be permitted by state law." Cities' zoning authority is clarified in N.D.C.C. ch. 40-47. N.D.C.C. § 40-47-01.1 grants cities authority to extend the application of the city's zoning regulations outside the city limits based upon the population of the city. 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, 587 (N.D. 1978).

Although a city's fire prevention code does not apply outside the jurisdiction of the city, all or portions of a city's fire prevention code properly adopted as a zoning ordinance could apply within the city's extraterritorial zone. In order to promote health, safety, morals, or the general welfare of the community, the governing body of any city may "regulate and restrict the height, number of stories, and the size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, 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." N.D.C.C. § 40-47-01. Through zoning powers, cities may also divide the city into districts and "regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within such districts." N.D.C.C. § 40-47-02. One specific purpose for zoning is to secure safety from fire. N.D.C.C. § 40-47-03(2). Thus, although a city's fire prevention code does not apply outside the jurisdictional limits of the city, provisions of the fire prevention code properly adopted¹ through the zoning process would apply in the city's zoning jurisdiction, including any extraterritorial zone. See 1995 N.D. Op. Att'y Gen. 51, 55 (a city that adopts a building code under its zoning authority may administer and enforce the building code in the area in which it has zoning jurisdiction).²

¹ Some provisions of a fire prevention code may not meet the statutory requirements of a zoning ordinance. Only provisions of a fire prevention code that satisfy the requirements of an authorized zoning ordinance may be adopted under the zoning process. A city could adopt its entire fire prevention code as a zoning ordinance if all its provisions meet the statutory requirements for zoning ordinances.

² Building codes typically provide for fire-safe construction and operation. Whether a city adopts a building code under its zoning

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- EFFECT -

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 questions presented are decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Douglas A Bahr
Assistant Attorney General

jjs/bah

authority or its general authority relating to buildings, the city may administer and enforce the building code in the area in which it has zoning jurisdiction. 1995 N.D. Op. Att'y Gen. 51, 55. Thus, provisions of a fire prevention code properly included in a building code also apply in the area in which a city has zoning jurisdiction.