

N.D.A.G. Letter to Koppy (June 8, 1987)

June 8, 1987

Mr. Allen Koppy
Morton County State's Attorney
210 2nd Avenue N.W.
Mandan, ND 58554

Dear Mr. Koppy:

Thank you for your letter dated May 11, 1987.

You have stated that the Morton County Commission, in the absence of a zoning compliance officer, has requested you, as state's attorney, to send letters to persons who are in violation of planning and zoning regulations pertaining to building and occupancy permits. Since the zoning regulations may impose criminal penalties, you have expressed a concern as to the problem you face, as the criminal prosecutor for the county, in informing the alleged violators of the regulations of the criminal penalties those persons may face as a result of such violations. You have requested that an Attorney General's opinion be issued to determine whether or not the county commissioners have the authority to require the state's attorney to act as the zoning compliance officer in the enforcement of county planning and zoning regulations. In a recent telephone conversation with a member of my staff, you have indicated that a letter response would be sufficient and that a formal opinion would not be necessary.

N.D.C.C. § 11-33-01 grants the board of county commissioners the authority to regulate and restrict the use of property. N.D.C.C. § 11-33-16 provides for the enforcement of such regulations. That section provides:

11-33-16. ENFORCEMENT. The board of county commissioners shall provide for the enforcement of this chapter and of resolutions and regulations made thereunder, and may impose enforcement duties on any officer, department, agency, or employee of the county.

In addition, N.D.C.C. § 11-33-17 sets forth several remedies which may be instituted (in any appropriate action or proceeding) by the proper county authorities in enforcement of zoning regulations and restrictions.

N.D.C.C. § 54-21.3-05 authorizes the county to administer and enforce the state building code within those areas of the county in which the state building code is not administered by a city or township. In addition, the governing body of a county electing to administer and enforce the state building code may designate an enforcement agency.

These statutory provisions impose primary responsibility for the administration and enforcement of county zoning regulations and the state building code upon the board of county commissioners. The determination as to whether or not enforcement action should be taken, which would include a letter to be sent to the alleged violator informing the person of such violations, will be made by the board of county commissioners.

As state's attorney, you have a duty to act as the legal advisor of the board of county commissioners. N.D.C.C. § 11-16-01(12). As noted previously, N.D.C.C. § 11-33-16 authorizes the board of county commissioners to impose enforcement duties upon any department of the county. As legal advisor of the board of county commissioners, you would act as the attorney for the county in informing an alleged violator by letter of the decision of the board of county commissioners to seek enforcement of land use or building regulations. Your action of sending a letter to an alleged violator of land use or building regulations would be taken as the legal advisor of the board of county commissioners. I do not believe that you would be acting as the zoning compliance officer for enforcement of the county planning and zoning regulations. The board of county commissioners would be enforcing such regulations and you, as state's attorney, would merely be acting as its legal advisor and legal representative.

You are correct in your concern as to the manner in which the demand for compliance with the zoning regulations should be worded. Disciplinary Rule 7-105 prohibits an attorney from threatening to present criminal charges solely to obtain an advantage in a civil matter. That rule provides:

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Although you may be permitted to advise the alleged violator of the existence of criminal penalties, care should be taken in drafting any letter to avoid the improprieties governed by Disciplinary Rule 7-105. Since a state's attorney is required by law to be both a public prosecutor and the legal advisor for the board of county commissioners, conduct by an individual may result in your acting in both capacities if criminal action is warranted as a result of such conduct.

It would appear not to be a violation of the current Disciplinary Rule 7-105 if your participation in the presentation of criminal charges against an individual was not done solely to obtain an advantage in a civil matter of which the board of county commissioners may be involved. However, you may desire to review each individual factual situation to determine whether or not participation as legal advisor to the board of county commissioners and as a public prosecutor in a certain matter creates a conflict warranting additional or different counsel. I do not believe, however, that merely conveying by letter the determination of the board of county commissioners that the land use or building regulation has been violated in your capacity as legal advisor for that board will result in a conflict which would prohibit the exercise of your duties as both the legal advisor of the board and as a public prosecutor.

I hope that this letter has adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

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