

N.D.A.G. Letter to Ratcliffe (June 19, 1990)

June 19, 1990

Ms. Phyllis A. Ratcliffe
Grant County State's Attorney
Grant County Courthouse
Carson, ND 58529

Dear Ms. Ratcliffe:

Thank you for your June 14, 1990, letter inquiring of the possible ramifications to the city of Flasher should it decide to repeal its current building, fire, plumbing, and the electrical codes.

Your first question is whether the repeal of the city ordinances concerning building, electrical, plumbing, and fire codes will subject the city to liability for the failure to provide for such standards. Authority is provided to a city to adopt a building code, fire prevention code, plumbing code, electrical code, and sanitary code. N.D.C.C. §§ 40-05-01(1); 40-05-01(25). In these various statutes, however, the authority is discretionary with the city. There is no statute which requires a city to adopt or enact any ordinance providing for a building code, fire prevention code, plumbing code, electrical code, or sanitary code. Indeed, N.D.C.C. § 54-21.3-05 allows a city to administer and enforce the state building code within its jurisdictional area or, in the alternative, to relinquish its authority to administer the state building code to the county in which it is located. There is no affirmative requirement placed upon a city to adopt its own set of codes concerning buildings, fire prevention, plumbing, electrical, or sanitary measures.

I cannot conclude as a matter of law that the failure of a city to have in place building, electrical, plumbing, and fire codes in place will subject it to liability in any one particular instance. I cannot foresee all potential legal arguments that may be presented or particular facts which may give rise to a legal duty which a jury could believe has been violated in one particular case or another. In the end, it is the trier of fact which will have to determine whether the essential elements of negligence are present in a particular case.

However, I can tell you that as a general rule the courts across this country have held that a municipality is not liable for the failure to enact ordinances. 57 Am. Jur. 2d Municipal, Etc., Tort Liability § 211 (1988). For example, the Michigan Supreme Court agreed with the California Law Revision Commission's recommendation to not extend tort liability to decisions as to whether legislation should or should not be enacted.

"Decisions of legislators to enact or not enact legislation; decisions of prosecutors to prosecute or not to prosecute persons suspected of crime; decisions of judges to grant or not to grant judgment for a particular party -- these and other comparable types of governmental activity are examples of

the kinds of functions which imperatively require complete independence from threat or tort consequences to ensure their fearless and objective performance." 5 Cal. Law Revision Comm. Report, Recommendations and Studies, 281, 282 (1963).

Thomas v. Dep't of State Highways, 247 N.W.2d 530, 538-39 (Mich. 1976). Applying this general rule, the failure of the city of Flasher to have building, electrical, plumbing, and fire codes in place probably will not subject it to liability.

Your next question is whether the repeal of these various ordinances may jeopardize present outstanding loans as well as those loans applied for in the future. I cannot respond to this question because I do not know the conditions of the loans. I believe you have taken the correct path by speaking to the lending institutions to determine whether the loan agreements require these various ordinances during the loan's life. For future loans, I can only recommend that loan agreements be carefully scrutinized to determine whether these various ordinances must be in place.

Your last question concerns potential city liability if the city relinquished its state building code enforcement authority to the county pursuant to N.D.C.C. § 54-21.3-05. Again, I cannot conclude as a matter of law whether the city would be liable in each and every factual situation. Relying on the general rule that a governmental entity cannot be held liable in tort for failure to enact ordinances, a strong argument can be made that the city's decision to not enact its own building or electrical code and to rely on the county's enforcement of the building code should result in a conclusion not different from the situation where the city simply does not address the issue at all.

I hope my discussion of these issues is helpful to you and the Flasher city officials.

Sincerely,

Nicholas J. Spaeth

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