

## **N.D.A.G. Letter to Neugebauer (Nov. 6, 1989)**

November 6, 1989

Mr. Brian D. Neugebauer  
West Fargo City Attorney  
901 13th Avenue East  
P.O. Box 458  
West Fargo, ND 58078-0458

Dear Mr. Neugebauer:

Thank you for your August 18, 1989, letter concerning a city's extraterritorial zoning and building permit authority. Enclosed with your letter was the opinion of Cass County State's Attorney Robert Hoy's opinion concluding that the city's zoning authority which has been extended to extraterritorial areas preempts existing township zoning authority within that extraterritorial area.

State's Attorney Hoy's opinion is well supported by the North Dakota Supreme Court decision in Apple Creek Tp. v. City of Bismarck, 271 N.W.2d 583 (N.D. 1978). In Apple Creek, the North Dakota Supreme Court held that North Dakota cities enjoy exclusive zoning authority within the extraterritorial zoning authority of a city pursuant to N.D.C.C. § 40-47-01.1.

We conclude that the Legislature in enacting § 40-47-01.1, N.D.C.C., intended to give cities the power to establish zoning control beyond their corporate limits. . . . Therefore, we hold that . . . the City of Bismarck may establish zoning controls over the area of Apple Creek Township, that is located within two miles of the Bismarck city limits, in accordance with the statute.

271 N.W.2d at 587. The same conclusion applies with respect to flood plain regulations to a city's extraterritorial zoning authority.

Your letter goes on, however, to inquire concerning the exclusivity of city building permits, building code ordinances, and building code regulations within the city's extraterritorial zoning areas. The answers to these questions depend upon the authority exercised to issue building permits, building code ordinances, and building code regulations.

Under the Apple Creek decision the city's enactment of building permit and code ordinances and regulations under a city's general authority (N.D.C.C. § 40-47-01) is simply an extension of its zoning authority. The city's issuance of building permits and enactment of building code ordinances and regulations pursuant to N.D.C.C. § 40-47-01 preempts township building permits, building code ordinances, and building code regulations within the extraterritorial zoning area.

A city may also enact building permit and code ordinances and regulations through its administration and enforcement of the state building code. N.D.C.C. § 54-21.3-05 allows both cities and townships to administer and enforce the state building code within their "jurisdictional area." "Jurisdictional area, means the area within which a city or township has zoning jurisdiction." N.D.C.C. § 54-21.3-02(5). Because the city has preemptive authority with respect to zoning within its extraterritorial area, the city's enforcement of the state building code, which may also include any amendments to that code enacted by the city pursuant to N.D.C.C. § 54-21.3-03(3), preempts township enforcement of that same code within the extraterritorial zoning area.

Finally, a city may choose to enact its own building code and issue its own building permits separate and apart from the city's zoning authority. N.D.C.C. §§ 40-05-01(1), 40-05-02(6), (7). An ordinance establishing a city building code would be effective in and within all places within one-half mile of the city's boundaries. N.D.C.C. § 40-06-01(2).

However, a city's authority to implement and enforce its building code in an area within one-half mile of the city's boundaries does not preclude a county or township's authority to implement and enforce their building codes within the same area. In 1965, this office concluded that concurrent jurisdiction exists within the one-half mile area. Letter from Gerald W. Vande Walle to J. Howard Stormon (July 8, 1965). On the other hand, this office has concluded that a city ordinance is not effective beyond the city's boundaries where two cities share a common boundary. Letter from Terry L. Adkins to Brian Neugebauer (October 28, 1981).

In summary, the city's extraterritorial zoning authority authorized by N.D.C.C. § 40-47-01.1 preempts township zoning occurring within that same extraterritorial area. Where a city's flood plain regulations, building permits, building code ordinances, and building code regulations are enacted pursuant to the city's zoning authority, such regulations and permits will preempt the township counterparts within the extraterritorial area. If a city chooses to enforce the state building code, including any amendments it enacts to that code, township enforcement of the same code is preempted within the extraterritorial area. However, where a city chooses to utilize its building code regulation authority provided to it by N.D.C.C. § 40-05-01(1), 40-05-02(6), and 40-05-02(7), its enforcement authority within one-half mile of its municipal limits coexists with township authority which may also exist within that same one-half mile area.

I hope this discussion is helpful to you and to all municipal and township authorities.

Sincerely,

Nicholas J. Spaeth

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