

**OPINION
67-38**

June 26, 1967 (OPINION)

Mr. Fred P. Brandt

Director

Economic Development Commission

RE: Cities - Zoning - Jurisdiction

This is in reply to your letter of June 9, 1967, relative to Senate Bill 158 as enacted by the 1967 Legislative Assembly and section 40-48-18 of the North Dakota Century Code. You state the following questions:

1. In the absence of either a county or township zoning commission, does the municipality have the absolute authority to zone the six mile area surrounding it? If so what are the stipulations if any?
2. If a municipality does zone this six mile area in the absence of any other zoning authority and then at a later date one or more county, township or regional zoning commission is organized, is the zoning authority of the municipality in the six mile area surrounding its corporate limits negated? Further, may the newly created county, township or regional zoning commission change the zoning regulations established by the municipality?
3. Does a county commission have the absolute authority to override the authority of a municipal zoning commission and give the authority to zone to the township, county, regional or another municipal zoning commission.
4. Finally in Section 2 of the Senate Bill 158 (subsequently made an Act) states that the municipal corporation, which shall determine the use of zoning regulations shall have exclusive jurisdiction and power to zone over all lands over which it has authority to control subdivisions and plotting of land as provided in section 40-48-18 of the North Dakota Century Code until either a regional planning and zoning commission or township or county zoning commission is set up. Does the setting up of such a county zoning commission take away rights of the townships regarding zoning under Section 11-33-20 or do municipalities automatically lose their rights to zone as soon as county or regional planning and zoning commissions are set up? Is the new law retroactive so as to annul the zoning regulations formed by townships in accordance with section 58-03-11 to 58-03-15 either within its area or the zoning regulations framed by municipal planning commission for its land located in the municipality and all lands lying within six miles but not subject to jurisdictional dispute with a neighboring municipality?"

Section 40-48-18 of the North Dakota Century Code provides:

JURISDICTION OF SUBDIVISION - APPROVAL OF COUNTY PLANNING COMMISSION NECESSARY - FAILURE TO AGREE. The territorial jurisdiction of any municipal planning commission over the subdivision or platting of land shall include all land located in the municipality and all land lying within six miles of the corporate limits of the municipality and not located in any other municipality. In the case of any such nonmunicipal land lying within six miles of more than one municipality having a planning commission, the jurisdiction of each such municipality shall terminate at a boundary line equidistant from the respective corporate limits of such municipalities. The approval of the county planning commission, if there is one, shall be necessary on all plats in areas outside the corporate limits of any such municipality. If the county planning commission fails to agree with a city planning commission having jurisdiction over any plat, the board of county commissioners, by a two-thirds vote of its entire membership, may overrule the findings of one planning commission and approve said plat as recommended by another planning commission."

Section 1 of Senate Bill 158 provides for the establishment of regional planning and zoning commissions. The section further provides: "The regional commissions, when requested by the governing board of a political subdivision in its region, may exercise any of the powers which are specified and granted to counties, municipal corporations, or organized townships in matters of planning and zoning."

Section 2 of Senate Bill 158 provides:

ZONING OF TERRITORY ADJACENT TO CITIES. Until the organization of either a regional planning and zoning commission as provided herein or township or county zoning commission pursuant to sections 58-03-11 through 58-03-15 and chapter 11-33, respectively, of the North Dakota Century Code, any municipal corporation which shall determine to use zoning regulations shall have exclusive jurisdiction and power to zone over all land over which it has authority to control subdivisions and platting of land as provided in section 40-48-18 of the North Dakota Century Code."

Section 3 of Senate Bill 158 repeals chapter 11-34 of the North Dakota Century Code relating to zoning of territory adjacent to cities.

In reply to your questions:

1. Under the provisions of section 40-48-18 of the North Dakota Century Code a municipal planning commission has jurisdiction over the subdivision or platting of land lying within six miles of the corporate limits of the municipality and not located in any other municipality. This does not include the authority to zone. However, the

provisions of section 2 of Senate Bill 158 give the municipality power to zone land lying within six miles of the corporate limits of the municipality if a regional planning and zoning commission or township or county zoning commission has not been organized.

2. If a municipality does zone the six mile area in the absence of any other zoning authority and then at a later date one or more county, township or regional zoning commissions are organized, it is our opinion the zoning authority of the municipality in the six mile area surrounding its corporate limits is terminated. Thus section 2 of Senate Bill 158 permits a municipality to zone "until the organization of either a regional planning and zoning commission * * * or township or county zoning commission * * * ."

It is our further opinion that the newly created county, township or regional zoning commission may change the zoning regulations established by the municipality prior to the organization of such county, township or regional zoning commissions but, in so doing, may not interfere with any vested rights which have been acquired under the municipal zoning regulations. For example, if an area is zoned by a municipality as a business area and subsequently zoned as a residential area by a regional, township or county zoning commission, it would appear the business must be allowed to continue as a nonconforming use.

3. Prior to the enactment of Senate Bill 158, a municipality only had authority to regulate the subdivision or platting of land lying within six miles of the corporate limits of the municipality. Senate Bill 158 does, as we have noted, extend this authority to zoning if a regional, township or county zoning commission has not been organized. If such a commission has been organized, the municipality has no authority to zone in the six mile area although they still continue to have authority over subdivision or platting of land in the six mile area.

The county zoning commission is establishment under the provisions of chapter 11-33 of the North Dakota Century Code. Section 11-33-20 of this chapter provides in part: "The provisions of this chapter shall not be construed to affect any property, real or personal, located within the limits of any incorporated municipality of this state, except that any such municipality by resolution of its governing body may relinquish to the county its power to enact zoning regulations under chapter 40-47, in which case such property shall be subject to the provisions of this chapter." Under this provision the county has no authority over the property within the corporate limits of the municipality unless the municipality has by resolution relinquished such power to the county. This does not apply to the six mile area referred to in questions 1 and 2. It should be noted, however, that a municipality has no authority to zone this area if a county, township or regional planning commission has been organized and the city's power to zone this area extends only to the time such commission or commissions are organized. As noted in our reply to question 2, we believe the county, regional or township zoning

commissions, when organized, may change the zoning regulations established by a municipality but in so doing may not affect nonconforming uses already established under the municipal zoning regulations.

4. It would appear that some of the questions listed in your question number 4 are similar to those asked previously. However we would note that section 1 of Senate Bill 158 provides that the regional commissions "when requested by the governing board of a political subdivision in its region," may exercise any of the powers which are specified and granted to counties, municipal corporations or organized townships in matters of planning and zoning. Therefore the mere establishment of a regional planning commission would not take away rights of the townships regarding zoning as provided by section 11-33-20 of the North Dakota Century Code. There must be a request by the governing board of a political subdivision in the region defined in order for the commission to exercise any authorities. At such time as a request is made it would then appear the regional planning and zoning commission would take precedence over a township zoning commission within the defined area. There is a distinction between a regional planning commission and a county planning commission. The regional planning commission is created by authority of Senate Bill 158. The county planning commission by authority of chapter 11-33 of the North Dakota Century Code. Section 11-33-20 permits a township to surrender its right to zone to a county planning commission. It does not refer to a regional planning commission.

With respect to cities zoning in the six mile area outside of the corporate limits of the city, the power vested in the cities by section 2 of Senate Bill 158 would expire at such time as the regional planning commission is created. See answers to previous questions.

With respect to the retroactive effect of Senate Bill 158, it should first be noted that up to this time the city only has had the authority to make provisions for subdivisions and platting within the six mile area surrounding the city limits. It has not had the authority to zone as such. Therefore there are no existing city zoning regulations in this six mile area. After July 1, 1967, a city may zone the six mile area if a regional, township or county zoning commission has not been created. Assuming that a city or township does zone an area and subsequently a regional planning commission could alter the zoning regulations established by the city or township zoning commissions, but, in so doing, may not interfere with any vested rights which have been acquired under the existing zoning regulations. In other words if the zoning regulations are changed, any uses made nonconforming uses by reason of such change must be permitted to continue. See answer to question 2. The zoning regulations previously adopted by a city or township would stand until changed.

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