

**OPINION
70-104**

December 28, 1970(OPINION)

Mr. Neil Thompson
State's Attorney
Ramsey County

RE: Counties - Joint Park Districts - Zoning Authority

This is in reply to your letter enclosing a letter from the chairman of a joint park board with regard to priority of various governing bodies with regard to zoning, land use and similar regulations.

As we understand the background of the problem, it appears from your letter and enclosure that the park board is apparently contemplating acquisition of park property, though apparently the mill levy for same has been defeated, but is expected to be sustained in a subsequent election.

Our attention is called to subsection 7 of section 11-28-16 of the North Dakota Century Code which provides insofar as here applicable:

"POWERS AND DUTIES OF BOARD. The board of joint park commissioners, shall have the following powers and duties:

* * * *

7. To promulgate, publish, and impose rules and regulations concerning the uses to which such land and water areas may be put, including the regulation or prohibition of the construction, establishment, or maintenance therein or thereon or within one-half mile thereof of any concession, dance hall, dance pavilion, establishments selling soft drinks or alcoholic beverages, and of any and all establishments of every name, nature, or description which may, in the judgment of the board, be unsightly, noisome, improper, inappropriate, or detrimental to the social usages of the area or areas for park and recreational uses;"

The question is stated as:

"Which group would have priority within this area as described above: The county's zoning board, the township zoning, or the Tri-County Park Board as stated in this portion of the law?"

It is indicated that the board has in the past and anticipates in the future coordination of thoughts with all concerned, but, of course, cannot speak for future board members. It is suggested as an example that the county and township governing boards could give permission and grant a liquor license to someone who would plan to operate within the half mile limitations where the Tri-County Board has jurisdiction. As another example is given, any type of industry that could operate within the half-mile boundary.

It is also mentioned that there may be some problem with regard to the City Zoning-Planning Commission in view of the fact that part of the lake is within a six-mile radius from the major city of your county.

While we recognize there is generally language in zoning regulations indicating permissive uses, licensed projects, etc., possibly indicating some form of authorization of certain projects, the usual function of zoning ordinances, land use regulations, etc., is to prohibit certain uses that a property owner could otherwise make of his premises. The function of that portion of a zoning ordinance or land use regulation indicating that a particular use of premises is usually only to clearly define an exception to the prohibitions of the zoning ordinance or regulation. On such basis, we do not think it is theoretically impossible for a given tract of land

to be within the territory of several different governmental entities all having zoning ordinance of land use regulating authority and for a particular use to be permitted (not prohibited by the zoning ordinances or land use regulations of all but one of the governmental units involved, and to be successfully prohibited by an ordinance of regulation of that one of the units having such jurisdiction of the area.

Possibly to meet the problem of having several governmental units all prescribing regulations for the same territory, our legislature in enacting the various statutes providing for zoning ordinances and land use regulations has in some instances made provisions for priority of regulations and ordinances. Thus we note that section 40-47-13 of the North Dakota Century Code indicates that in such instances the higher standard ordinance or regulation will prevail. In this same light, we note that section 11-33-20 of the North Dakota Century Code makes provision for townships to relinquish their power to enact zoning regulations to the county and also authorizes municipalities to relinquish their power to enact zoning regulations to the county. We find no such statutory provisions with regard to joint park commissioner's zoning, land use and similar regulations.

Looking to chapter 11-28 of the North Dakota Century Code as a whole, it appears that no exception is made therein for recognizing other zoning or land use regulations or establishing priorities between joint park and other governmental units zoning or land use regulations. On such basis we would assume that another governmental unit could not issue permissive regulations or license that would nullify rules and regulations properly promulgated under the authority granted by subsection 7 of section 11-28-16 of the North Dakota Century Code.

We are not suggesting that there may not be problems with existent zoning permitted uses and licensed uses at the time a rule and regulation of the joint park district comes into existence. We note for example at 58 Am. Jur. 1022, Zoning, Section 148 the following statement:

"148. CONSTITUTIONALITY OF NONEXEMPTION. The right of a municipality to enact zoning restrictions has been declared subject to vested property interest acquired prior to the enactment of the zoning law, and it is generally held that a zoning ordinance may not operate to suppress or remove from a particular district an otherwise lawful business or use already established therein. Even if the general welfare, for the promotion of which zoning legislation is justified, were interpreted to include the protection of economic values of adjacent property, so that the establishment of a new business may be prohibited to protect such value, that is considered a different matter from ousting a business already there, with reference to which the economic value of the adjacent property has long since been fixed. There is, however, some authority upholding a zoning ordinance as applied to existing businesses prohibited by the ordinance, at least where a reasonable time for liquidation of the business is given. Of course, a zoning regulation may operate to abate that which constitutes a nuisance."

Thus there could be problems with regard to vested rights in areas where the joint park district is acquiring park property and enacting rules and regulations. Among such problems, the fact that another entity, by permissive zoning or particular licensing had encouraged establishment of particular industries or businesses, might well have a bearing. It seems, for example, doubtful that a county could charge a substantial fee for a liquor license for a specified length of time, thus encouraging the proprietor to expend an extensive amount of funds in improvement of his premises for such purpose and then abrogate the license by establishment of a park district that would immediately prohibit the licensed liquor establishment during the term of such license and fee.

In the absence of any such vested right problems however, we would assume that under the authority granted by section 11-28-16, subsection 7 the joint park district would have exclusive original jurisdiction over park and surrounding one-half mile area to determine the propriety of particular regulations or rules enacted thereunder for park purposes. We would assume that to the extent joint park district regulation did not affect vested rights, the prohibitions of same would be enforceable, even though other zoning authorities having jurisdiction of the area did not prohibit the same use. We are not suggesting, however, that the joint park

district could affirmatively permit structures or uses, prohibited by other authorities having zoning jurisdiction, where such prohibitions had been properly promulgated by such other zoning authority.

We would further assume that in such instances as those to which section 40-47-13 of the North Dakota Century Code applies, the most restrictive regulation as between city and joint park district regulations would be applied and effective to the extent indicated in that statute.

We hope the above general outline will be of assistance in considering the scope of operation of joint park district regulations in this context. It would probably be advisable at such time as specific regulations are contemplated to consider also regulations of other authorities having similar authority to determine which joint park district regulations are necessary, and the precise effect park district regulations will have on the area to be covered thereby.

HELGI JOHANNESON
Attorney General