

**OPINION  
74-598**

May 21, 1974 (OPINION)

Mr. John O. Garaas  
State's Attorney  
Cass County  
10-1/2 Broadway  
Fargo, ND 58102

Dear Mr. Garaas:

This is in response to your letter of May 10, 1974, wherein you request an opinion of this office relative to zoning powers and authority of townships and the relinquishment of such powers to the county. You submit the following facts and inquiry in your letter:

"As I have received a copy of a letter from Lynn E. Erickson, Assistant Attorney General, directed to Mark A. Beardsley, Assistant Planner at R. C. and D. concerning relinquishment of powers by the township to the county. In this letter, your office states that 'accordingly, it would appear that it (a township) may not relinquish rights to only selected areas or facets of zoning since there would be no proper designation of powers remaining as to future zoning.'

"This question has arisen out of attempts by Cass County and by the townships in Cass County to come within the provisions of the 1973 Flood Disaster Protection Act. This office on May 8, 1974 did advise the Cass County Commissioners and members of the Township Board of Supervisors throughout Cass County that the townships could relinquish to the county only those powers relating to flood plain zoning and retain in the township all other zoning powers.

"The problem faced by an applicant under the Flood Disaster Protection Act is that the application must be made by the local community having 'primary' land use authority. We have taken the position that unless a township relinquishes its floodplain zoning powers to the county, the county does not have primary land use authority and cannot make application to enter the flood insurance program. It was the consensus at the public meeting held in Fargo on May 8, 1974, that most townships would like to relinquish their floodplain zoning powers to the county but retain their powers as far as zoning for other purposes.

"Accordingly, I would like to request an official opinion as to whether the zoning powers of a township are divisible so that the zoning pertaining to floodplain could be relinquished to the county and the other zoning powers retained by the township.

"I would like to call your attention to section 61-16-11(19) of the North Dakota Century Code which is in the chapter pertaining to water management districts. This subject would

seem to contemplate that not only a township but also cities, regions, and counties could either relinquish or transfer their floodplain zoning powers to a water management district. This would indicate to me that floodplain zoning powers are divisible from other zoning powers.

"I would also request your opinion as to whether a county could obtain primary land use authority as it pertains to floodplain zoning through use of chapter 54-40 of the North Dakota Century Code pertaining to joint exercise of governmental powers. In view of the fact that a relinquishment by a township is apparently irreversible, we are also interested in other means of getting the power from the township to the county without having the transfer designated as a relinquishment.

"Part of our reasoning for the issuance of the public opinion on May 8, 1974, by this office was based upon an opinion from your office dated April 1, 1963, directed to Mr. Albert A. Wolf, Assistant State's Attorney, Burleigh County, Bismarck, North Dakota. Particularly, we relied on the first full paragraph on page 2 of that letter and we would like to know whether this opinion is current."

The letter to which your letter of inquiry relates, addressed to Mr. Mark A. Beardsley, Assistant Planner, Lake Agassiz R C and D, Fargo, North Dakota, was in response to a similar question and provided as follows:

"This is in response to your letter of April 29, 1974, wherein you make inquiry of this office concerning section 11-33-20 of the North Dakota Century Code relating to relinquishment of zoning powers by townships to the county. You submit the following for our consideration:

'Is it possible for townships to relinquish only zoning controls that pertain to the zoning of land that may be located within the floodplain of that township, or in other words floodplain zoning (n-33-20).

'This question has arisen as a result of the 1973 Flood Disaster Protection Act. The Act stipulates that the unit of government in charge of regulating land use will have the responsibility of compliance with the requirements of the act. While townships are reluctant to relinquish total zoning authority, a number of townships have expressed interest in relinquishing this specific aspect of zoning.'

"Initially, we would note the provision of section 11-33-20 of the North Dakota Century Code as the same makes provision for the relinquishment of zoning powers specified in your letter. The same provides as follows:

'11-33-20. TOWNSHIP ZONING NOT AFFECTED - TOWNSHIP AND MUNICIPALITIES MAY RELINQUISH POWERS. The provision of this chapter shall in no way prevent townships from making regulations as provided in sections 58-03-11 to 58-03-15, inclusive, but such townships may relinquish their power to

enact zoning regulations to the county by resolution of the board of township supervisors. 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.' (emphasis supplied)

"We would note that the statute makes no provision for other than that the townships may relinquish their power to enact zoning regulations to the county by resolution of the board of township supervisors. Accordingly, it would appear that it may not relinquish rights to only selected areas or facets of zoning since there would be no proper designation of powers remaining as to future zoning. It would appear that if a resolution of relinquishment as specified by the statute is adopted, such would stand as a complete relinquishment of such zoning powers.

"There may, however, be other solutions to the problem which is apparently presented by the desires expressed in your letter of inquiry. While we do not find any provision for townships 'joining' counties in the county zoning chapter, we note that section 11-33-06 of the North Dakota Century Code requires the county planning commission to make its investigations and determinations 'in conjunction with the township boards of the affected areas'. However, the county planning commission prepares the proposed resolution submitted to the board of county commissioners and the county commissioners establish the districts and prescribe the regulations (section 11-33-07 of the North Dakota Century Code), except where townships have officially acted to the contrary. WE feel it obvious that the mere fact that the township boards cooperated with the county planning commission in the preparation of the proposed resolution, would not prevent the township from adopting its own zoning regulations, though as the county commissioners establish districts and prescribe regulations the mere fact that the township changed its mind on its original recommendation to a county planning commission would not appear to necessarily repeal or modify such a county zoning plan.

"We are herewith enclosing a copy of an opinion issued to Mr. William L. Paulson, Barnes County State's Attorney, on July 6, 1965, in which this office indicates that once a township has validly relinquished its zoning authority to the county, in the absence of statutory procedure for same, there is no method by which the township can withdraw from that relinquishment. To our knowledge the statutes relative to this matter have not been amended since that time.

"In direct response to your inquiry, then, it is our position that a township may not relinquish only a specified part or facet of its zoning authority to the county, retaining all other aspects of such authority in absence of statutory

provision therefor."

With regard to your first question upon which an official opinion is sought, as to whether the zoning powers of a township are divisible so that the zoning pertaining to floodplain could be relinquished to the county and the other zoning powers retained by the township, it appears this is the identical issue upon which response was made in our letter of May 7, 1974, addressed to Mr. Beardsley, contemplating the relinquishment of zoning authority to the county, pursuant to the provision of section 11-33-20 of the North Dakota Century Code, the text of which was quoted in that letter. Insofar as the statute makes no provision for other than that the townships may relinquish their power to enact zoning regulations to the county by resolution of the board of township supervisors, without further specification or modification, we can only conclude that the conclusions expressed in that letter are correct and the governing law upon the issue. Certain other possible solutions to the problem expressed in Mr. Beardsley's letter of inquiry are set forth, however, the same would have relevance to the issue herein presented.

With regard to section 61-16-11(19) of the North Dakota Century Code, as amended, to which your letter directs our attention, we would initially note the text of the same which provides as follows:

"61-16-11. POWERS AND DUTIES OF BOARD OF COMMISSIONERS. The board of commissioners shall have the power:

\* \* \*

9. To petition any zoning authority established pursuant to chapter 11-33, 11-35 or 40-47 or section 58-03-13 to assume jurisdiction over a floodplain for zoning purposes when such zoning is required to regulate and enforce the placement, erection, construction, reconstruction, repair and use of buildings and structures in order to protect and promote the health, safety and general welfare of the public lying within a floodplain area. In the event such zoning authority fails to act or does not exist the board may request the state water commission to assist it in a study to determine and delineate the floodplain area. Upon completion of such study the board shall make suitable recommendations for the establishment of a floodplain zone to all zoning authorities and the governing bodies of all political subdivisions having jurisdiction within the floodplain area." (emphasis supplied)

Of primary significance concerning section 61-16-11, is the fact that the same relates to the Water Management District rather than to the county. This is a special statute which provides that the board of commissioners of the district may petition the zoning authority, including the township authority, to assume jurisdiction over a floodplain for zoning purposes under given circumstances. While this statute apparently contemplates the division of specific zoning powers, we must recognize that the division of zoning powers provided therein is to a specific board and for a specific purpose, which board deals exclusively with that facet of zoning powers which relate to water management. We do not believe that this alters the position

heretofore expressed that the township may not relinquish certain zoning powers to the count and retain other zoning powers as a primary authority. We do not believe that the subject statute (section 61-16-11, North Dakota Century Code) providing for assumption of zoning powers by a Water Management District creates such an inference that it alters the clear unspecified language of section 11-33-20 relating to the relinquishment by the township of its zoning authority to the county.

With regard to your question relating whether a county can obtain primary land use authority as it pertains to floodplain zoning through the use of chapter 54-40 of the North Dakota Century Code, pertaining to the joint exercise of governmental powers, we first must assume that the suggested solution to the problem initially submitted by Mr. Beardsley, which was outlined in our letter of May 7, 1974, in response to his request, does not satisfy the requirement of the 1973 Flood Disaster Protection Act as the same apparently relates to "primary" land use authority. We would recognize that the solution therein set forth would not alter nor change the "primary land use authority" as the same appears established by North Dakota law, hence, it would not appear to be a satisfactory solution as to the apparent requirements of the Act.

Chapter 54-40 of the North Dakota Century Code relating to joint exercise of governmental powers contemplates an "agreement" (section 54-40-01, North Dakota Century Code) through which governing bodies may jointly or cooperatively exercise "their respective separate powers, or any power common to the contracting parties or any similar powers, including those which are the same except for the territorial limits within which they may be exercised \* \* \* ". We do not believe this can be construed to grant to either of the contracting parties or governmental units any additional powers which they do not have in their own right or which are not granted to such unit of government by law. In other words, we do not conclude that the provisions relating to joint exercise of powers can be by agreement used to extend or enlarge the authority granted to either of the contracting parties. Further, we fail to see that the "primary" land use authority can be extended, enlarged or changed by any agreement between the township or the county. It appears clear that the township and the county may "jointly" exercise such zoning powers, however, the "primary" authority would not change simply because the agreement provided for the exercise of such powers as are common to both the township and the county. If an agreement were entered into which in effect attempted to change the "primary" land use authority, it would appear that such would contravene the provisions of section 11-33-20 of the North Dakota Century Code which specifies the only method by which the township can relinquish its authority to the county. Any other method would appear to be legally ineffectual as pertaining to the relinquishment of the zoning authority.

Accordingly, it is our opinion that chapter 54-40 of the North Dakota Century Code and the use of the provisions therein contained relating to the joint exercise of governmental powers would not serve to change the "primary" land use authority from the township to the county.

With regard to the opinion of this office dated April 1, 1963,

addressed to Mr. Albert A. Wolf, Assistant State's Attorney, Burleigh County, North Dakota, to which your letter of inquiry makes reference, upon which you state part of your reasoning in issuing a public opinion on May 8, 1974, was based, we would note the specified paragraph of that opinion as follows:

"It is our opinion that the regulations established by the township zoning commission, if they are in accordance with the statutes, take precedence over any contrary previous zoning regulation enacted by the county zoning commission. While the establishment of a township zoning commission would not invalidate all previous county zoning commission regulations, it would invalidate all inconsistent previous county zoning commission regulations."

We fail to see where the text of this paragraph or opinion bears relevance to the question of relinquishment of zoning powers by the township to the county since the issue presented upon which the opinion was expressed related to county zoning in an instance where the township had not acted or exercised its zoning authority and had not relinquished such authority to the county. The question was basically to determine the priorities between the county and township as regards to the establishment of zoning commissions as based upon the furnished facts. In essence, it would seem to us that this opinion relates more to the "primary" land use authority than to the authority existing subsequent to a relinquishment of zoning powers as provided by section 11-33-20 of the North Dakota Century Code, or as concerning a relinquishment as a separate fact. The text of the previous paragraph of that opinion would appear to bear this out, providing as follows:

"The first section of the county zoning law, section 11-33-01 of the North Dakota Century Code, provides that the county commissioners of any county are empowered to make zoning regulations within the county subject to the provisions of section 11-33-20. Section 11-33-20 provides that the provisions of chapter 11-33 shall in no way prevent the townships from making regulations as provided in sections 58-03-11 to 58-03-15, but such townships may relinquish their power to enact zoning regulations to the county by resolution of the board of township supervisors. Thus, even though the county has a zoning commission in operation, the township is at liberty to begin their own zoning operation provided they have not previously relinquished their authority to the county as set out in the statute, namely, adopting the resolution by the board of township supervisors specifically relinquishing such power. If such a resolution has not been adopted, the township has not relinquished such power even though they have taken part in the county zoning commission operation."

This opinion has not been superseded, overruled or modified since its issuance and we believe its holding to be correct and in accordance with the present law of this state.

We trust that the foregoing expressions and observations will adequately set forth the opinion of this office upon the matters submitted.

Sincerely yours,

Allen I. Olson

Attorney General