

**OPINION
74-625**

August 30, 1974 (OPINION)

Mr. Vern Fahy
Engineer-Secretary
State Water Commission
900 East Boulevard
Bismarck, ND 58505

RE: SCW File No. C-131

Dear Mr. Fahy:

This is in reply to your letter of August 13, 1974, relative to Public Law 93-234, the Food Disaster Protection Act of 1973. You note that one of the purposes of the Act is to "require states or local communities, as a condition to federal financial assistance, to participate in the flood insurance program and to adopt adequate flood plain ordinances with effective enforcement provisions consistent with federal standards to reduce or avoid future flood losses and to require the purchase of flood insurance by property owners who are being assisted by federal programs or by federally supervised, regulated, or insured agencies or institutions in acquisition or improvement of land or facilities located or to be located in identified areas having special flood hazards." You further note that to enter in the Act and participate in the flood insurance program, a community, urban or rural, is required to prepare, adopt and enforce regulations which will restrict the use of the land and discourage or prevent further building in the designated flood plain areas. You note there appears to be a conflict between the requirements of the flood insurance program and section 58-03-11 of the North Dakota Century Code. You also note a recent opinion of this office with regard to township zoning indicates that the townships cannot relinquish a part of their zoning authority, making it necessary for organized townships to enter the program on an individual basis rather than under a countywide zoning authority. You state there will eventually be many organized townships involved in this type of zoning if they are to meet the requirements of the Federal Disaster Protection Act of 1973.

Based on the above, you request our opinion relating to the township zoning authority and its ability to provide or not provide the zoning as required by the Federal Act.

Section 58-03-11 of the North Dakota Century Code authorizes the establishment of zoning districts and the regulation and restriction of the erection, construction, reconstruction alteration, repair or use of buildings and structures, etc. The section further provides:

"No regulation or restriction, however, shall apply to or prevent the use of land or buildings for farming or any of the normal incidents of farming."

A similar provision is found in section 11-33-02 of the North Dakota Century Code authorizing county zoning.

While the above stated statute has not been construed by the Supreme Court of this State, we believe it must be concluded that the plain language of the statute would not permit the restriction of the usage of land to construct farm buildings even though such land was in a flood plain. While we assume the use of land for farming within the flood plain would be permitted under the flood insurance program, and might even be encouraged, the construction of buildings for farm purposes would appear to be the problem. However, in view of the language providing that no regulation or restriction shall apply to or prevent the use of buildings for farming or any of the normal incidents of farming, it is our opinion that the township zoning authority could not provide a restriction on the construction or use of such buildings in a flood plain area. If such authority is desired, we believe the interested parties must seek legislative action to allow same.

Sincerely yours,

Allen I. Olson

Attorney General