

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 81-1

Date Issued: January 20, 1981

Requested by: William F. Lindell, City Attorney for the City of Washburn

- QUESTION PRESENTED -

Whether the change by a city commission in the zoning of a parcel of land is an action that can be referred to the voters.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that an action by a city commission or a city council in changing the zoning of a parcel of land cannot be referred to the voters under chapter 40-12 of the North Dakota Century Code.

- ANALYSIS -

Section 40-12-08 of the North Dakota Century Code (N.D.C.C.) reads in part:

"An ordinance which has been adopted by the governing body of a municipality may be referred to the electors of the municipality by a petition protesting against such ordinance."

An action taken by a city in amending the zoning classification of a particular parcel of land is not of the same nature as the enactment of an ordinance as contemplated by section 40-12-08, N.D.C.C. There are real and substantive differences in the procedures to be followed in enacting an ordinance and in amending a zoning restriction.

The procedures to be followed by a municipality in enacting an ordinance are set forth in chapter 40-11, N.D.C.C. section 40-11-01, N.D.C.C., prescribes the enacting clause which must be used in every ordinance. Section 40-11-02, N.D.C.C., requires that all proposed ordinances receive two readings at least one week apart prior to adoption. Section 40-11-08, N.D.C.C., requires the city auditor to record all ordinances in an ordinance book. The procedures to be followed in amending a zoning ordinance are set forth in chapter 40-47, N.D.C.C. Subject to certain minimal requirements set forth in the chapter, cities are allowed to establish their own procedures. Briefly, section 40-47-04, N.D.C.C., requires that a copy of any proposed regulation be filed with the city auditor and that a public hearing be held following a notice published once a week for two successive weeks in the city's official newspaper. Section 40-47-05, N.D.C.C., provides that the requirements of section 40-47-02, N.D.C.C., also apply to amendments and provides that upon protest of twenty percent of the owners of, favorable vote of three-fourths of all members of the governing body is required to effect the change. Section

40-47-08, N.D.C.C., provides for a zoning commission to make recommendations on zoning matters to the city governing body.

A reading of these provisions reveals several major differences in the procedures followed by a city governing body in enacting an ordinance and the procedures followed by a city governing body in amending a zoning plan. There is no requirement that a zoning amendment contain an enacting clause, receive two readings, or be recorded in an ordinance book. Additionally, section 40-47-05, N.D.C.C., specifically sets forth a procedure for the approval of a protested zoning change requiring the favorable vote of three-fourths of the members of the governing body.

There are no reported North Dakota cases on this question, but the courts of a number of other states have addressed this issue. Although there is a split of authority,

"The general rule is that such referendum provisions apply only to the question of whether a comprehensive zoning ordinance should be enacted, i.e., whether the legislative body is to be permitted to zone the community at all, and has no reference to the detailed manner in which it is to be zoned nor to the modifications or amendments thereof." 1 Rathkopf, *The Law of Zoning and Planning*, Chapter 27, section 3 at 31.

Several reasons for this rule have been advanced, but the most common reasoning used by courts that have held zoning amendments not subject to referendum procedures concerns the distinction between legislative and administrative actions. The general rule is that actions of a legislative body which are administrative or executive in nature are not subject to initiative and referendum. 42 Am. Jur.2d., *Initiative and Referendum*, section 11. In applying this general rule to zoning actions, it has been said:

"While zoning within fixed areas is a legislative matter that may be subject to referendum procedures, once the policy has been determined and the changing of such areas or the granting of exceptions has been committed to a planning commission and a city council in order to secure the uniformity necessary to the accomplishment of the purposes of the comprehensive zoning ordinance, such action is said to be administrative and not referable." 2 Yokley, *Zoning Law and Practice*, section 11-5 at 125 (Fourth Ed. 1978).

-EFFECT-

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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