

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 99-F-07

Date issued: May 17, 1999

Requested by: Richard J. Riha, Burleigh County State's Attorney

- QUESTION PRESENTED -

Once a township has transferred its power to enact zoning regulations to a county, how may the township reacquire that power?

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a township may reacquire the zoning powers it transferred by agreement to the county by following the procedures set forth in North Dakota Century Code § 54-40.5-04. If the township unilaterally relinquished its zoning powers pursuant to N.D.C.C. § 11-33-20 prior to the adoption of Article VII, Section 10 of the North Dakota Constitution and N.D.C.C. ch. 54-40.5, it is my opinion the township may not reacquire the independent right to exercise those powers. However, such a township may acquire some ability to exercise those zoning powers if it enters into a joint powers agreement with the county.

- ANALYSIS -

N.D.C.C. § 11-33-20 was enacted in 1955. 1955 N.D. Sess. Laws ch. 119, § 20. That section states, in part, that "townships may relinquish their powers, or any portion thereof, to enact zoning regulations to the county by resolution of the board of township supervisors." N.D.C.C. § 11-33-20. Thus, the plain language of the statute allows a board of township supervisors to unilaterally transfer its zoning powers to the county without a formal agreement with the county by merely adopting a resolution to do so. Id.

Nothing in the remainder of N.D.C.C. § 11-33-20 allows the township to reacquire those powers once they have been relinquished. Id. Consequently, this office has repeatedly opined that there is no way for a township to reacquire its zoning powers once they have been relinquished pursuant to N.D.C.C. § 11-33-20. See, e.g., Letter from Attorney General Helgi Johanneson to William Paulson (July 6, 1965); Letter from Attorney General Nicholas Spaeth to Gerald Gerntholz

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(February 12, 1986); Letter from Attorney General Nicholas Spaeth to Dan Wogsland (March 24, 1986); See also Letter from First Assistant Attorney General Paul Sand to William Paulson (March 11, 1966).

In 1982, the North Dakota Constitution was amended to include article VII, section 10. 1983 N.D. Sess. Laws ch. 718. Article VII, section 10 states, in part, that "[a] political subdivision may by mutual agreement transfer to the county in which it is located any of its powers or functions as provided by law or home rule charter, and may in like manner revoke the transfer." Since a political subdivision is not required to transfer or reacquire its powers or functions, the word "may" in article VII, section 10 refers to the decision on whether to transfer or reacquire those functions. Once that decision has been made, the requirement that the decision be carried out through a mutual agreement between the county and the political subdivision is mandatory. Cf. Letter from Attorney General Allen I. Olson to John Zuger (April 27, 1977) ("may" refers to the decision to be made, but once that decision is made in the affirmative, the requirements of the statute are mandatory). N.D.C.C. ch. 54-40.5 contains the statutory provisions governing how such an agreement is made and terminated. Accordingly, after article VII, section 10 was added, if a political subdivision desires to transfer some of its powers to the county, it is required to do so by entering into an agreement with the county to transfer those powers. N.D. Const. art. VII, § 10.

N.D.C.C. § 11-33-20 was not amended to reflect the changes mandated by Article VII, Section 10 of the North Dakota Constitution. N.D.C.C. § 11-33-20 still appears to allow a township to unilaterally transfer its zoning powers to the county without an agreement with the county, which would be contrary to the requirement in article VII, section 10. However, another construction of N.D.C.C. § 11-33-20, which would be compatible with article VII, section 10, is possible. See Paluck v. Board of County Comm'rs, Stark County, 307 N.W.2d 852, 856 (N.D. 1981) ("[I]f a statute is susceptible of two constructions, one which will be compatible with constitutional provisions or one which will render the statute unconstitutional, we must adopt the construction which will make the statute valid.").

If one construes the applicable provisions of N.D.C.C. § 11-33-20 to set out the first step a board of township supervisors must take to transfer its zoning powers to the county, rather than setting out the complete process of relinquishing those powers, the statute does comply with article VII, section 10. Thus, a board of township supervisors may adopt a resolution pursuant to N.D.C.C. § 11-33-20 to relinquish their zoning powers to the county, and then complete that

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transfer of power by entering into an agreement with the county pursuant to N.D.C.C. § 54-40.5-03. This construction harmonizes N.D.C.C. § 11-33-20 with both Article VII, Section 10 of the North Dakota Constitution and N.D.C.C. ch. 54-40.5.

Once the township and county have entered into an agreement transferring township zoning powers to the county, N.D.C.C. § 54-40.5-04 provides the process by which the agreement may be terminated and the powers transferred back to the township. Accordingly, it is my opinion that a township may reacquire the zoning powers it transferred by agreement to the county by following the provisions of N.D.C.C. § 54-40.5-04. To the extent former Attorney General Nicholas Spaeth's opinions to Gerald Gerntholz on February 12, 1986, and to Dan Wogsland on March 24, 1986, conflict with this opinion, they are hereby overruled.

Prior to the adoption of Article VII, Section 10 of the North Dakota Constitution and N.D.C.C. ch. 54-40.5, the only statute dealing with the relinquishment or transfer of zoning power from a township to a county was N.D.C.C. § 11-33-20. No specific means existed by which a township could reacquire zoning powers it had relinquished to the county. A township's unilateral transfer of its zoning power to a county pursuant to N.D.C.C. § 11-33-20 did effect a valid transfer of that power, which transfer was unaffected by the adoption of article VII, section 10 and N.D.C.C. ch. 54-40.5. Cf. Paluck, 307 N.W.2d at 858 ("[T]he validity of a statute is ordinarily determined by the constitutional provisions in effect at the time of the enactment of the statutes rather than by the current constitutional provisions.").

Although article VII, section 10 and N.D.C.C. ch. 54-40.5 now provide the manner in which a township may terminate an agreement to transfer its zoning powers to a county, there is still no provision for a township's reacquisition of its zoning powers if the powers were unilaterally relinquished pursuant to N.D.C.C. § 11-33-20 prior to the adoption of article VII, section 10 and N.D.C.C. ch. 54-40.5. A proposal to add a provision to allow townships to reacquire the zoning powers it relinquished was defeated by the 1987 Legislature. H. Bill No. 1268, 50th N.D. Leg. (1987); Final Bill Status Report, 50th N.D. Leg. Assembly, p. 72-73 (1987).

The revocation of the power transfer allowed by article VII, section 10 and N.D.C.C. § 54-40.5-04 does not provide the authority for a township to reacquire its zoning powers if relinquished prior to the adoption of article VII, section 10 and N.D.C.C. ch. 54-40.5 because those provisions speak in terms of terminating an "agreement" to transfer zoning powers. Prior to the adoption of article VII,

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section 10 and N.D.C.C. ch. 54-40.5, there was no "agreement" to transfer zoning powers; the township unilaterally relinquished them to the county, and the county had no choice but to accept the powers. N.D.C.C. § 11-33-20. The township may not revoke an agreement to transfer zoning powers to the county if there is no agreement to revoke.

Although a township may not reacquire those powers, a township may acquire a certain amount of zoning power if it enters into a joint powers agreement with the county pursuant to N.D.C.C. ch. 54-40.3. The joint powers agreement could provide for the township's exercise of the zoning powers it relinquished pursuant to N.D.C.C. § 11-33-20. See N.D.C.C. § 54-40.3-01(1) ("Any county, city, township, . . . or other political subdivision of this state . . . may enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them."). Accordingly, it is my opinion that a township that unilaterally relinquished its zoning powers pursuant to N.D.C.C. § 11-33-20 prior to the adoption of Article VII, Section 10 of the North Dakota Constitution and N.D.C.C. ch. 54-40.5 may not reacquire the independent right to exercise those powers. However, it is my further opinion that the township may acquire some ability to exercise those zoning powers if it enters into a joint powers agreement with the county.

- EFFECT -

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

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