

**2015 SENATE POLITICAL SUBDIVISIONS**

**SB 2024**

# 2015 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee  
Red River Room, State Capitol

SB 2024  
January 8, 2015  
21763

- Subcommittee  
 Conference Committee

*Mary Jo Wacker*

## Explanation or reason for introduction of bill/resolution:

Relating to relinquishing township or city zoning authority to the county.

## Minutes:

**Chairman Burckhard** opened the hearing on SB 2024. All committee members were present.

**Samantha Kramers** with Legislative Council introduced the bill. SB 2024 came out of the interim committee from the ACIR, Advisory Commission on Intergovernmental Relations. The current law is once a township gives away its zoning authority to the county, it is rather difficult for that township to get it back. A 1984 constitutional amendment provides that a political subdivision can get that back through mutual agreement to revoke the transfer. Then there is also an Attorney General's opinion that provides that a joint powers agreement is the only way to get that authority back. So this bill would create a statutory provision to implement that 1984 constitutional amendment. Then in Section 2, it is just to repeal the old law to allow the township to unilaterally give away its authority.

**Chairman Burckhard** asked Samantha why they gave it away to begin with, the authority.

**Samantha's response.** I am not positive on that. The discussion this interim was that it was just a burden or something that didn't want to be paid for by the political subdivision so it was easier for the county to handle.

**Senator Judy Lee:** I think perhaps it might have been a rural township who wasn't geared up for dealing with development that might take place and either the county or the adjoining city beyond extraterritorial zoning boundaries perhaps would be better prepared because they might have staff that could manage some of that, whereas the township wouldn't have money or staff. A smaller political sub wouldn't be in a position to handle the work that was coming up and so they deferred it another body.

**Senator Anderson:** Why doesn't the language in the first section that is not being changed there, take care of what we're saying in that little underlined new portion there? It seems to

me it says exactly the same thing. Both parties agree they can do it. That is what the bottom says now; both parties say they can to it.

**Samantha responded** the new language is decided upon by the interim committee to just provide clarification to that constitutional amendment and go over that attorney general opinion so that there is no confusion anymore. This is how this will take place.

**Senator Dotzenrod:** In 1984 there was an amendment to the Constitution that said they could do this. It seems like an unusual amendment. Was the amendment a consequence of something bigger? Was there some lawsuit or some incident that caused us to get into that situation where we felt we had to amend the state constitution? Was the amendment to the Constitution something bigger and this would just decide a consequence of that amendment.

**Samantha responded:** I don't have the full history with me, but I would be happy to get back to the committee. Is it something the committee is interested in?

**Senator Dotzenrod:** Just on the face this bill seems pretty straightforward. It makes sense and it's reasonable. We amend the constitution normally because we respond to some issue that has come up in the state for something that we are trying to solve or allow an authority that we didn't have before. This seems like such an unusually inconsequential thing, that I am surprised that we've had a constitutional amendment that does that. I don't think we need to delay the process in any way.

**Larry Severson (22:48):** North Dakota Township Officers Association We supported this bill in the ATIR and I voted for it there and I support it here. The reason this was necessary was previous to the change in the Constitution, there were townships that simply threw up their hands unilaterally gave the authority to the county. After a change in the Constitution and the Attorney General's opinion on that, any township that did unilaterally could not get it back. The county could not even give it to them. That is the reason for this bill.

**Senator Dotzenrod:** The 1984 amendment to the Constitution. I think you're saying that amendment by virtue of its being there prevented them from giving it back where I had thought that I had heard that the amendment to the Constitution had allowed them to give it back, but they were having some problems making that work. What is the 1984 amendment to the constitution? You're saying we amended the constitution and then after that amendment they couldn't get this authority back again.

**Larry Severson (24:17-24:46)** the amendment is us in favor of the joint powers agreement and the Attorney General's opinion that without the joint powers agreement, then it's not possible to get it back. Not that it was the goal, it's just the consequence.

**Blake Crosby (24:56- 25:44)** Executive Director of the North Dakota League of Cities. We also followed this bill during the interim in the ACIR and we are in favor of it. The history that Larry just presented to you and the addition of what Samantha Kramer had to say pretty much exemplifies the intent of the bill. Two parties are agreeing that is the way it should work in North Dakota. We should be able to get this authority back without having to go through a lot of hoops and hurdles.

**Chairman Burckhard** asked Mr. Crosby about the acronym ACIR. Am I the only one that doesn't know what that means?

**Blake Crosby** responded Advisor Committee on Intergovernmental Relations.

**Blake Crosby** then responded to Senator Dotzenrods' question before the committee was called to order (26:01- 26:49). Concurrent resolution 4002 is looking at statutory usage of various references to political subdivisions.

**Chairman Burckhard** closed the hearing on SB 2024.

**Senator Judy Lee** moved that we recommend a Do Pass on SB2024.

**Senator Bekkedahl 2nd.**

**Chairman Burckhard** asked the committee if there was further discussion. (27:34- 31:15) Senator Anderson replied that he still doesn't see that we've added anything that isn't in the first paragraph. But, I don't have any problems with the bill, but I don't know whether the Attorney General has ever looked at it in the light of the previous opinion or whatever. But there is a risk here that is it doesn't say anything new, the opinion has changed. I don't know if two people have asked the Attorney General's office to look at it in relation to that opinion or not.

**Senator Dotzenrod:** I think I may have misunderstood about what happened in 1984 and the constitutional amendment. I get the impression that the amendment was about zoning and townships. I think what really happened in 1984 the voters had in front of them, a question of approving the joint powers act that allowed cooperation between various subdivisions across the state and cities and counties. It was probably a larger set of rules that really zoning was part of. I am thinking this is a clarification of what was intended to be part of what happened. Out in the country, zoning has become a little bit more of an important matter than it was many years ago. Today, people are realizing that there are real issues for our township out here, and we had better get it straightened out.

**Senator Lee:** I agree with what Senator Anderson was talking about but I see where the Attorney General probably came from cause it talks about an agreement; it talks about joint action and again I think than rather than having a joint powers agreement in order to make this change, it can be done with a simpler process. I think we're right, absolutely that there is a way to do it. But they didn't have really a joint powers agreement in the first place, that apparently is the rub. That is the impression that I have. That the joint powers agreement is the only vehicle through which this could happen and I think the goal of the bill is that it shouldn't have to be that hard if both sides agree it is the thing to do.

**Senator Bekkedahl** responded, before the joint powers act was passed in 1984, some townships had unilaterally granted the authority. Because it didn't go through the joint powers process, the Attorney General has said you can't give it back now because it didn't go through this process. Correct! So this is the clarification.



**REPORT OF STANDING COMMITTEE**

**SB 2024: Political Subdivisions Committee (Sen. Burckhard, Chairman)** recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2024 was placed on the Eleventh order on the calendar.

**2015 HOUSE POLITICAL SUBDIVISIONS**

**SB 2024**

# 2015 HOUSE STANDING COMMITTEE MINUTES

## Political Subdivisions Committee Prairie Room, State Capitol

SB 2024  
3/5/2015  
24375

- Subcommittee  
 Conference Committee

*Armonda Muscha*

### Explanation or reason for introduction of bill/resolution:

Relating to relinquishing township or city zoning authority

### Minutes:

Testimony 1, 2

Representative Hatlestad: Opened hearing on SB 2024.

Representative Kretschmar: There may be someone from Legislative Management who knows something about the bill.

John Walstad: Testimony 1- The reason for the request is the odd relations between township or city zoning authority.

Representative Zubke: I am bound up in the legality. Is there some other way to give up your zoning authority other than unilateral?

John Walstad: You can also use mutual agreement.

Representative Beadle: Can you explain the situation in which someone who gave up their zoning authority unilaterally where they would want it back unilaterally versus otherwise for the county wouldn't agree to it by mutual agreement. Why would they need to be able to unilaterally take it back? Under what situation would the county say no we are going to keep it?

John Walstad: There may be many things that come into play. The location of a feed lot, a waste disposal place, or a large industrial facility. Then there are the local politics involved. Would the county be agreeable to giving that authority back to the township if the township wants it located elsewhere?

Representative Beadle: By allowing them to unilaterally move it back and forth are we setting up a situation where they may disagree, take it back, do what they want, then give it back?

John Walstad: No they have to be in agreement.

Representative Hatlestad: What happens with extraterritoriality in this situation? If as a city I have jurisdiction and township wants it back what happens?

John Walstad: I am not sure what the answer is but once cities have extended the zoning authority they supersede zoning authority in townships for zoning in that area and that is unilateral. It is not a choice for the township on whether they keep it. I think it supersedes county as well.

Larry Syverson: Testimony 2

Terry Traynor: We too support the bill.

Representative Kelsh: Moved a do pass

Representative Koppelman: Second

A Roll Call Vote Was Taken: Yes 13, No 0, Absent 1 (Strinden)

Motion carries

Representative Kelsh will carry the bill

**2015 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 2024**

House Political Subdivisions Committee

Subcommittee  Conference Committee

Amendment LC# or Description: \_\_\_\_\_

Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Kelsh Seconded By Koppelman

Representative	Yes	No	Representative	Yes	No
Chairman Lawrence R. Klemin	X		Rep. Pamela Anderson	X	
Vice Chair Patrick R. Hatlestad	X		Rep. Jerry Kelsh	X	
Rep. Thomas Beadle	X		Rep. Kylie Oversen	X	
Rep. Rich S. Becker	X		Rep. Marie Strinden	—	
Rep. Matthew M. Klein	X				
Rep. Kim Koppelman	X				
Rep. William E. Kretschmar	X				
Rep. Andrew G. Maragos	X				
Rep. Nathan Toman	X				
Rep. Denton Zubke	X				

Total (Yes) 13 No 0

Absent 1

Floor Assignment Kelsh

If the vote is on an amendment, briefly indicate intent:

motion carried

**REPORT OF STANDING COMMITTEE**

**SB 2024: Political Subdivisions Committee (Rep. Klemin, Chairman) recommends DO PASS (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2024 was placed on the Fourteenth order on the calendar.**

**2015 TESTIMONY**

**SB 2024**

SB 2024

3/5/2015

1.1

### Township Zoning

The Township Officers Association requested consideration of a simplified means for a township to reacquire zoning authority that was previously transferred to the county. A 1982 constitutional amendment provided that a political subdivision may, by mutual agreement, transfer to the county any of its powers and may, in like manner, revoke the transfer. The opinion concluded that a township that unilaterally transferred its zoning authority to the county between 1955 and 1982 had no specific statutory provision to recover that zoning authority, but could enter a joint powers agreement with the county to recover zoning authority.

The commission considered a bill draft to allow a township that unilaterally transferred its zoning authority to the county before 1982 to enter a mutual agreement with that county to reacquire the zoning authority. The bill draft also repeals Section 11-33-02, which permits unilateral transfers, because those transfers are no longer valid after the 1982 constitutional amendment.

### TOWNSHIP ZONING

Chairman Heller called on Mr. Walstad for presentation of a bill draft [15.0078.02000] regarding recovery of zoning authority by a township that previously unilaterally transferred its zoning authority to the county. He said at the previous meeting, the commission considered a 1999 Attorney General opinion concluding that North Dakota Century Code Section 11-33-20, enacted in 1955, allowed townships to unilaterally transfer zoning authority to the county. He said in 1982 the Constitution of North Dakota was amended to provide that a political subdivision may by mutual agreement transfer to the county any of its powers and may in like manner revoke the transfer. He said the Attorney General opinion concluded that a township that unilaterally transferred its zoning authority to the county between 1955 and 1982 has no statutory provision to recover that zoning authority. He said the Attorney General opinion concluded that a township that unilaterally transferred zoning authority could enter a joint powers agreement with the county to recover zoning authority. He suggested to the commission that it would be simpler to provide by statute that a township that unilaterally transferred zoning authority to the county may reacquire the zoning authority by mutual agreement with the county. He said the bill draft provides for that kind of agreement. He said the bill draft also repeals Section 11-33-20, which permits unilateral transfers, because those transfers are apparently no longer valid after the 1982 constitutional amendment.

**Section 10.** Agreements, including those for cooperative or joint administration of any powers or functions, may be made by any political subdivision with any other political subdivision, with the state, or with the United States, unless otherwise provided by law or home rule charter. 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.

## 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

ATTORNEY GENERAL'S OPINION 99-07  
May 17, 1999  
Page 2

(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

ATTORNEY GENERAL'S OPINION 99-07  
May 17, 1999  
Page 3

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,

## ATTORNEY GENERAL'S OPINION 99-07

May 17, 1999

Page 4

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.

Heidi Heitkamp  
Attorney General

Assisted by: Scott A. Miller  
Assistant Attorney General

SB 2024  
3/5/2015

In support of SB 2024

March 5, 2015

2.1

Good Morning, Chairman Klemin and members of the House Political Subdivisions Committee. I am Larry Syverson, Chairman of the Board of Township Supervisors of Roseville Township of Traill County. I am also the Executive Secretary of the North Dakota Township Officers Association.

NDTOA represents the 6,000 township officers that serve more than 1,100 dues paying member townships.

My prepared testimony this morning consists of excerpts from the ACIR meetings where this bill originated. Also included is the Attorney General's opinion from 1999 which is referenced in those minutes.

Chairman Klemin and Committee Members I ask that you give SB 2024 your favorable recommendation and I will try to answer any questions.

#### **Minutes of the Advisory Commission on Intergovernmental Relations**

July 9, 2014

#### **BILL DRAFT FOR TOWNSHIP TO RECLAIM ZONING AUTHORITY**

Vice Chairman Unruh called on Mr. Walstad for presentation of a bill draft [15.0078.02000] regarding recovery of zoning authority by a township that previously unilaterally transferred its zoning authority to the county. He said at a previous meeting, the commission considered a 1999 Attorney General opinion concluding that North Dakota Century Code Section 11-33-20, enacted in 1955, allowed townships to unilaterally transfer zoning authority to the county. He said in 1982 the Constitution of North Dakota was amended to provide that a political subdivision may by mutual agreement transfer to the county any of its powers and may in like manner revoke the transfer. He said the Attorney General opinion concluded that a township that unilaterally transferred its zoning authority to the county between 1955 and 1982 has no statutory provision to recover that zoning authority. He said the Attorney General opinion concluded that a township that unilaterally transferred zoning authority could enter a joint powers agreement with the county to recover zoning authority. He suggested to the commission that it would be simpler to provide by statute that a township that unilaterally transferred zoning authority to the county may reacquire the zoning authority by mutual agreement with the county. He said the bill draft provides for that kind of agreement. He said the bill draft also repeals Section 11-33-20, which permits unilateral transfers, because those transfers are apparently no longer valid after the 1982 constitutional amendment.

September 25, 2014

#### **BILL DRAFTS**

Chairman Heller called on Mr. Walstad to review a bill draft [15.0078.02000] relating to a township's zoning authority. Mr. Walstad said under current law once a township has given its zoning authority to the county, it is rather difficult for the township to get that authority back. He said a 1984 constitutional amendment provides that a political subdivision may by mutual agreement revoke the transfer. He said an opinion by the Attorney General provides that a joint powers agreement is the only way in current law for a township to get the zoning authority back. Chairman Heller asked what happens when a county does not want to give the authority back. Mr. Walstad said that is the issue, the county is not required to give it back after the 1984 constitutional amendment.

Chairman Heller asked if this bill draft clarifies the constitution. Mr. Walstad said this would create a statutory provision to implement the constitutional amendment. Chairman Heller asked what is being repealed in Section 2 of the bill draft. Mr. Walstad said that is the old section of law that says the township or city can unilaterally give its zoning authority to the county, which is not in compliance with the constitution.

Chairman Heller asked for commission discussion. Mr. Syverson and Ms. Andersen said they would prefer the township to be able to unilaterally take the zoning authority back without needing an agreement, but this bill draft meets the needs while remaining within constitutional authority.

**It was moved by Mr. Syverson, seconded by Senator Cook, and carried on a roll call vote that the bill draft [15.0078.02000] regarding township zoning authority be approved and recommended to the Legislative Management.** Representative Heller, Senators Cook and Unruh, Citizen Members Andersen, Kubat, Martinson, Schwartz, Syverson, West, and Governor's Designee Pelham voted "aye." No negative votes were cast.

## 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

2.4

ATTORNEY GENERAL'S OPINION 99-07

May 17, 1999

Page 2

(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

2.5

ATTORNEY GENERAL'S OPINION 99-07

May 17, 1999

Page 3

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,

2.6

ATTORNEY GENERAL'S OPINION 99-07  
May 17, 1999  
Page 4

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.

Heidi Heitkamp  
Attorney General

Assisted by: Scott A. Miller  
Assistant Attorney General

2.7 .

ATTORNEY GENERAL'S OPINION 99-07  
May 17, 1999  
Page 5

pg