

Testimony in Opposition to House Bill 1165  
February 4, 2021  
House Political Subdivisions Committee  
Bill Wocken on behalf of the North Dakota League of Cities

Good Morning Mr. Chairman and members of the House Political Subdivisions Committee. For the record, my name is Bill Wocken. I am testifying in opposition to House Bill 1165 on behalf of the North Dakota League of Cities. House Bill 1165 gives every resident of the extraterritorial area of a city exercising extraterritorial zoning authority the right to vote in every municipal election.

State law governing the manner in which extraterritorial zoning decisions are reached has changed several times over the years to give extraterritorial residents and their elected representatives more voice in extraterritorial zoning decisions. County and township representatives have been added to the statutory Planning and Zoning Commission makeup. (NDCC 40-47-06 attached) All zoning decisions are made at open public hearings but since 2009 extraterritorial zoning decisions in the outer part of the extraterritorial area are also subject to joint jurisdiction. The city and county must both agree on a zoning decision or the matter can be sent to mediation by a board consisting of both city and county elected officials along with a gubernatorial representative. The final decision, should mediation be ineffective, is made by the county commission. (NDCC 40-47-01.1) Appeals are very uncommon, but I am aware of one such situation that settled itself amicably.

In lieu of this joint jurisdiction approach existing law allows for a city and a county to divide the extraterritorial area into any configuration the two bodies can agree upon and to establish exclusive jurisdictions. This is used in a number of areas throughout the state with very few issues. With both the appeal and subdivision of the extraterritorial area options available there are many fewer zoning disputes.

Giving extraterritorial residents the ability to vote in all municipal elections is hard to justify in any event. The extraterritorial residents have no financial stake in the city yet they would be able to vote on all city issues including, Home Rule governance and fiscal matters.

For these reasons the North Dakota League of Cities respectfully asks for a DO NOT PASS recommendation on House Bill 1165.

## CHAPTER 40-47 CITY ZONING

### **40-47-01. Cities may zone - Application of regulations.**

For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing body of any city may, subject to the provisions of chapter 54-21.3, regulate and restrict the height, number of stories, and the size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. Such regulations may provide that a board of adjustment may determine and vary the application of the regulations in harmony with their general purpose and intent and in accordance with general or specific rules therein contained. The governing body of a city may establish institutional controls that address environmental concerns with the department of environmental quality as provided in section 23.1-04-04.

### **40-47-01.1. Extraterritorial zoning - Mediation - Determination by administrative law judge - Definition.**

1. a. A city may, by ordinance, extend the application of a city's zoning regulations to any quarter quarter section of unincorporated territory if a majority of the quarter quarter section is located within the following distance of the corporate limits of the city:
    - (1) One mile [1.61 kilometers] if the city has a population of fewer than five thousand. A city that has exercised its authority under this subdivision has joint zoning and subdivision regulation jurisdiction from one-half mile [.80 kilometer] to one mile [1.61 kilometers] with the other political subdivision.
    - (2) Two miles [3.22 kilometers] if the city has a population of five thousand or more, but fewer than twenty-five thousand. A city that has exercised its authority under this subdivision has joint zoning and subdivision regulation jurisdiction from one mile [1.61 kilometers] to two miles [3.22 kilometers] with the other political subdivision.
    - (3) Four miles [6.44 kilometers] if the city has a population of twenty-five thousand or more. A city that has exercised its authority under this subdivision has joint zoning and subdivision regulation jurisdiction from two miles [3.22 kilometers] to four miles [6.44 kilometers] with the other political subdivision.
  - b. Any section or portion of a section of unincorporated territory within the area of joint zoning and subdivision regulation jurisdiction in which a plat or site plan has been presented before May 1, 2009, remains subject to the zoning designations and the regulations in place on May 1, 2009, unless changed as allowed under this section.
  - c. The extraterritorial zoning jurisdiction and authority to receive applications and issue permits under this section may be changed by written agreement between the city and the other political subdivision.
2. Joint jurisdiction is jurisdiction in which the other political subdivision has jurisdiction to receive applications and issue permits and impose administrative fees for applications and permits. In addition, under this jurisdiction the other political subdivision may adopt, modify, and enforce any zoning designation or regulation and approve any subdivision plat or regulation. For a decision to be final, the other political subdivision shall give written notice to the city. The city may request negotiation as to any decision made by the other political subdivision under the other political subdivision's jurisdiction within thirty days of notice. If negotiation is not requested, the decision of the other political subdivision is final. If the governing body of the other political subdivision and the city do not come to an agreement as to the disputed zone or subdivision regulation within thirty days of request for negotiation, the dispute must be submitted to a committee for mediation. The committee must be comprised of one member appointed by the governor and two members of the governing body of the

- other political subdivision and two members of the governing body of the city. The governor's appointee shall arrange and preside over the meeting and act as mediator at the meeting. A meeting may be continued until the dispute has been resolved or until the mediator determines that continued mediation is no longer worthwhile. If the mediation committee is unable to resolve the dispute to the satisfaction of the governing bodies, the dispute must be resolved by the board of county commissioners.
3. Notwithstanding subsection 2, in any section or portion of a section of unincorporated territory in which there would otherwise be joint jurisdiction and in which a plat or site plan has been presented before May 1, 2009, the city has jurisdiction to receive applications and issue permits and impose administrative fees for applications and permits relating to zoning and subdivision regulation. In addition, under this jurisdiction the city may adopt, modify, and enforce any zoning designation or regulation and approve any subdivision plat or regulation. For a decision of the city made after May 1, 2009, to be final, the city shall give written notice of the decision of the governing body of the political subdivision that would otherwise have jurisdiction. The governing body may request negotiation as to any decision made by the city under the city's jurisdiction within thirty days of notice. If negotiation is not requested, the decision of the city is final. If the city and governing body of the political subdivision that would otherwise have jurisdiction do not come to an agreement as to the disputed zoning or subdivision regulation within thirty days of the request for negotiation, the dispute must be submitted to a committee for mediation. The committee must be comprised of one member appointed by the governor and two members of the governing body of the other political subdivision and two members of the governing body of the city. The governor's appointee shall arrange and preside over the meeting and act as mediator at the meeting. A meeting may be continued until the dispute has been resolved or until the mediator determines that continued mediation is no longer worthwhile. If the mediation committee is unable to resolve the dispute to the satisfaction of the governing bodies, the dispute must be resolved by the board of county commissioners.
  4. If a quarter quarter section line divides a platted lot and the majority of that platted lot lies within the quarter quarter section, a city may apply its extraterritorial zoning authority to the remainder of that platted lot. If the majority of the platted lot lies outside the quarter quarter section, the city may not apply its extraterritorial zoning authority to any of that platted lot.
  5. A city exercising its extraterritorial zoning authority shall hold a zoning transition meeting if the territory to be extraterritorially zoned is currently zoned. The city's zoning or planning commission shall provide at least fourteen days' notice of the meeting to the zoning board or boards of all political subdivisions losing their partial zoning authority. The purpose of the zoning transition meeting is to review existing zoning rules, regulations, and restrictions currently in place in the territory to be extraterritorially zoned and to plan for an orderly transition. The zoning transition meeting must take place before the city's adoption of an ordinance exercising extraterritorial zoning.
  6. If two or more cities have boundaries at a distance where there is an overlap of extraterritorial zoning authority under this section, the governing bodies of the cities may enter into an agreement regarding the extraterritorial zoning authority of each city. The agreement must be for a specific term and is binding upon the cities unless the governing bodies of the cities agree to amend or rescind the agreement or unless determined otherwise by an administrative law judge in accordance with this chapter. If a dispute arises concerning the extraterritorial zoning authority of a city and the governing bodies of the cities involved fail to resolve the dispute, the dispute must be submitted to a committee for mediation. The committee must be comprised of one member appointed by the governor, one member of the governing body of each city, and one member of the planning commission of each city who resides outside the corporate city limits. The governor's appointee shall arrange and preside over the meeting and act as mediator at the meeting. A meeting may be continued until the

dispute has been resolved or until the mediator determines that continued mediation is no longer worthwhile.

7. If the mediation committee is unable to resolve the dispute to the satisfaction of the governing bodies of all the cities involved, the governing body of any of the cities may petition the office of administrative hearings to appoint an administrative law judge to determine the extraterritorial zoning authority of the cities in the disputed area. A hearing may not be held until after at least two weeks' written notice has been given to the governing bodies of the cities involved in the dispute. At the hearing, the governor's appointee who mediated the meetings under subsection 6 shall provide information to the administrative law judge on the dispute between the cities involved and any proposed resolutions or recommendations made by a majority of the committee members. Any resident of, or person owning property in, a city involved in the dispute or the unincorporated territory that is the subject of the proposed extraterritorial zoning, a representative of such a resident or property owner, and any representative of a city involved, may appear at the hearing and present evidence on any matter to be determined by the administrative law judge. A decision by the administrative law judge is binding upon all the cities involved in the dispute and remains effective until the governing bodies of the cities agree to a change in the zoning authority of the cities. The governing body of a city may request a review of a decision of an administrative law judge due to changed circumstances at any time ten years after the decision has become final. An administrative law judge shall consider the following factors in making a decision under this subsection:
  - a. The proportional extraterritorial zoning authority of the cities involved in the dispute;
  - b. The proximity of the land in dispute to the corporate limits of each city involved;
  - c. The proximity of the land in dispute to developed property in the cities involved;
  - d. Whether any of the cities has exercised extraterritorial zoning authority over the disputed land;
  - e. Whether natural boundaries such as rivers, lakes, highways, or other physical characteristics affecting the land are present;
  - f. The growth pattern of the cities involved in the dispute; and
  - g. Any other factor determined to be relevant by the administrative law judge.
8. For purposes of this section, the population of a city must be determined by the last official regular or special federal census. If a city has incorporated after a census, the population of the city must be determined by a census taken in accordance with chapter 40-22.
9. When a portion of the city is attached to the bulk of the city by a strip of land less than one hundred feet [30.48 meters] wide, that portion and strip of land must be disregarded when determining the extraterritorial zoning limits of the city. This subsection does not affect the ability of a city to zone land within its city limits.
10. For the purposes of this section, a section or a quarter quarter section is as determined in the manner provided by 2 Stat. 313 [43 U.S.C. 752]. When appropriate, the phrase "quarter quarter section" refers to the equivalent government lot.
11. As used in this section, "other political subdivision" means a political subdivision, not including another city, which would otherwise have zoning or subdivision regulation jurisdiction.

#### **40-47-01.2. Agreements to not oppose annexation void.**

The zoning commission or governing body may not require as a condition of approval of a request to amend or modify a zoning regulation the execution of an agreement by the owner of the property requesting the amendment or modification stating that the owner will not oppose the annexation of the property by the municipality. This section does not apply to property located within one quarter mile [.40 kilometer] of the municipality's corporate limits or to an agreement that contains a provision whereby the municipality agrees to provide a municipal service or services before the annexation. Any agreement entered in violation of this section is void.

**40-47-01.3. Extraterritorial zoning - Limitation.**

Notwithstanding any other provision of law, a city that exercises extraterritorial jurisdiction under this chapter may not impose building permit fees on any section of unincorporated territory which are higher than the building permit fees within the city exercising the jurisdiction.

**40-47-02. Division of city into districts to carry out regulations.**

The governing body may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter, and may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within such districts. All regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

**40-47-03. Regulation for zoning made for what purposes.**

The regulations provided for in this chapter shall be made in accordance with a comprehensive plan and shall be designed to:

1. Lessen congestion in the streets;
2. Provide for emergency management. "Emergency management" means a comprehensive integrated system at all levels of government and in the private sector which provides for the development and maintenance of an effective capability to mitigate, prepare for, respond to, and recover from known and unforeseen hazards or situations, caused by an act of nature or man, which may threaten, injure, damage, or destroy lives, property, or our environment;
3. Promote health and the general welfare;
4. Provide adequate light and air;
5. Prevent the overcrowding of land;
6. Avoid undue concentration of population; and
7. Facilitate adequate provisions for transportation, water, sewage, schools, parks, and other public requirements.

The regulations shall be made with reasonable consideration as to the character of each district and its peculiar suitability for particular uses with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city. The comprehensive plan shall be a statement in documented text setting forth explicit goals, objectives, policies, and standards of the jurisdiction to guide public and private development within its control.

**40-47-04. Determining and enforcing regulations - Public hearing and notice thereof - Publication of regulations, restrictions, and boundaries.**

1. The governing body of a city which uses zoning regulations shall provide for the manner in which the regulations and restrictions must be established, enforced, or supplemented, and for the manner in which the boundaries of the districts must be established and from time to time changed. A copy of each proposed regulation, restriction, or boundary must be filed with the city auditor. No regulation, restriction, or boundary may become effective until after a public hearing at which parties in interest and citizens shall have an opportunity to be heard. Notice of the hearing must be published once a week for two successive weeks before the time set for the hearing in the official newspaper of the city. The notice must contain the following items:
  - a. The time and place of the hearing.
  - b. A description of any property involved in any zoning change, by street address if streets have been platted or designated in the area affected.
  - c. A description of the nature, scope, and purpose of the proposed regulation, restriction, or boundary.
  - d. A statement of the times at which it will be available to the public for inspection and copying at the office of the city auditor.
2. Upon establishment of any regulation, restriction, or boundary hereunder, the governing body of a city shall file a certified copy thereof with the city auditor and shall

cause notice of the same to be published in the official newspaper of the city. The notice must describe the nature, scope, and purpose of the regulation, restriction, or boundary and must state the times at which it will be available to the public for inspection and copying at the office of the city auditor.

3. The governing body of a city, a city zoning commission, and a board of adjustment shall state the grounds upon which any request for a zoning amendment or variance is approved or disapproved, and written findings upon which the decision is based must be included within the records of the governing body, commission, or board.

**40-47-05. Amendments to or repeals of zoning regulations - Protest - Required vote for passage.**

Regulations, restrictions, and boundaries may be amended, supplemented, changed, modified, or repealed from time to time. If a protest against a change, supplement, modification, amendment, or repeal is signed by the owners of twenty percent or more:

1. Of the area of the lots included in such proposed change; or
2. Of the area adjacent, extending one hundred fifty feet [45.72 meters] from the area to be changed, excluding the width of streets,

the amendment shall not become effective except by the favorable vote of three-fourths of all the members of the governing body of the city. The provisions of section 40-47-04 relating to public hearings, official notice, and publication of regulations, restrictions, and boundaries shall apply equally to all changes or amendments provided in this section; provided, that protests in writing must be filed with the city auditor prior to the time set for the hearing.

**40-47-06. Zoning commission - Appointment - Duties - Preliminary and final report.**

The governing body of a city desiring to avail itself of the powers conferred by this chapter shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. In addition to the members appointed by the city, the zoning commission shall include at least one person residing outside of the corporate limits of a city having a population of less than five thousand, two persons residing outside the corporate limits of a city having a population of five thousand or more, but less than twenty-five thousand, or three persons residing outside the corporate limits of a city having a population of twenty-five thousand or more if zoning authority is exercised pursuant to section 40-47-01.1. Such persons shall be appointed by the board or boards of county commissioners of the county or counties within which such zoning authority is to be exercised and shall reside within the territorial limits of the zoning regulation authority exercised by the city, if such persons are available and will serve on the zoning commission. Of the members of the commission appointed by a board or boards of county commissioners pursuant to this section, the first member appointed shall hold office for five years, the second member appointed shall hold office for three years, and the third member appointed shall hold office for one year. Thereafter, the members shall be appointed for terms of five years. Such commission shall make a preliminary report and hold public hearings thereon before submitting its final report. The governing body shall not hold its public hearings or take action until it has received the final report of the zoning commission. If a city has a planning commission, it may be appointed as the zoning commission.

**40-47-07. Board of adjustment - Members - Term - Hear and decide appeals and review orders.**

The governing body may provide for the appointment of a board of adjustment consisting of five members, each member to be appointed for a term of three years. The board of adjustment shall hear and decide appeals from and shall review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this chapter. It shall hear and decide all matters referred to it or upon which it is required to pass under any such ordinance. The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official or to decide in favor of the applicant any matter upon which it is