

EXTRATERRITORIAL ZONING AUTHORITY OF CITIES - BACKGROUND MEMORANDUM

House Bill No. 1321, Section 4 (attached as an appendix), directs the Legislative Council to study the extraterritorial zoning authority of cities and the impact of that authority on other political subdivisions. House Bill No. 1321, as introduced, would have reduced the extraterritorial zoning authority of a city to one-half mile for a city with a population of fewer than 25,000 and one mile for a city with a population of 25,000 or more. As passed, the bill reduced the extraterritorial zoning authority of cities to:

1. One-half mile for a city with a population of fewer than 5,000.
2. One mile for a city with a population between 5,000 and 24,999.
3. Two miles if the city has a population of 25,000 or more.

This reduction was tempered by grandfathering any extraterritorial zoning regulation in effect before May 1, 2007, and sunseting the reduction on July 31, 2009. In addition, the reductions in extraterritorial zoning authority do not apply if the extension is approved by at least five of a six-member committee made up of three members appointed by the governing body of the city and three members appointed jointly by the governing bodies of any political subdivision that is exercising zoning authority within the territory to be extraterritorially zoned. The legislative history reveals that the study was added to the bill so that the issue of how far the extraterritorial zoning authority should reach and the procedure for the application of extraterritorial zoning authority could be addressed while there is a moratorium on the extension of extraterritorial zoning authority.

LEGISLATIVE HISTORY

The impetus for the moratorium and this study appears to come from the use of extraterritorial zoning authority in Grand Forks and Bismarck. The main concern of the owners of property over which the extraterritorial zoning jurisdiction was exercised in these instances was the lack of meaningful representation in the decision to exercise the jurisdiction. It would appear meaningful representation would equate to the ability to stop the exercise of the jurisdiction if there is sufficient support in the area.

The legislative history for House Bill No. 1321 includes these main issues when extraterritorial zoning authority is exercised:

1. The need for cities to plan future expansion and contain urban sprawl.
2. The rights of landowners as to property.
3. The effect of zoning on property values and use of property.

4. The representation of people in the area to be extraterritorially zoned in the decision to have the area extraterritorially zoned.
5. The effect of extraterritorial zoning moving development past the area zoned.
6. The proper distance for extraterritorial zoning authority in relation to the time it takes a city to develop in the area zoned.
7. The use of extraterritorial zoning authority by cities with overlapping areas.
8. The effect of changing the population thresholds to fairly represent the cities of like population and the effect of that change on distances of extraterritorial zoning authority and perhaps the need for distance modification.
9. The use of extraterritorial zoning to avoid premature annexation and the attendant tax implications for property owners and to the contrary, using extraterritorial zoning authority as a way to expedite annexation.
10. The loss of rural water service area and rural school district growth potential by the exercise of extraterritorial zoning authority.

PRE-2007 EXTRATERRITORIAL ZONING AUTHORITY

Before the 2007 legislative session, North Dakota Century Code (NDCC) Section 40-47-01.1 provided for the extraterritorial zoning of cities to reach:

1. One mile if the city has a population of fewer than 5,000.
2. Two miles if the city has a population between 5,000 and 24,999.
3. Four miles if the city has a population of 25,000 or more.

There are four cities in North Dakota with a population of 25,000 or more--Bismarck, Fargo, Grand Forks, and Minot. Only Minot has not expanded its extraterritorial zoning authority to four miles. There are eight cities in North Dakota with a population between 5,000 and 24,999--Devils Lake, Dickinson, Jamestown, Mandan, Valley City, Wahpeton, West Fargo, and Williston. There are 345 cities in North Dakota with a population of fewer than 5,000.

Under NDCC Section 40-47-01.1, a city may exercise extraterritorial zoning authority. A city exercising extraterritorial zoning authority must hold a zoning transition meeting if the area to be zoned is currently zoned. The purpose of the zoning transmission meeting is to review the existing zoning rules and plan for an orderly transition.

If two or more cities have boundaries where there is an overlap of extraterritorial zoning authority, the

governing bodies of the cities may enter an agreement regarding extraterritorial zoning. If a dispute arises concerning extraterritorial zoning which cannot be resolved, the dispute must be submitted to a committee for mediation made up 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 of the city limits. The Governor's appointee presides and acts as a mediator. If the mediation committee is unable to resolve the dispute, the cities may petition the Office of Administrative Hearings to appoint an administrative law judge. At the hearing before the administrative law judge, the Governor's appointee provides information to the administrative law judge on the dispute. Any resident or property owner or representative of the resident or property owner may appear at the hearing and present evidence. The decision of the administrative law judge is binding upon the cities involved in the dispute. The administrative law judge considers the following factors in making the decision:

1. The proportional extraterritorial zoning authority of the cities involved.
2. The proximity of the land in dispute to the corporate city limits of each city.
3. The proximity of the land in dispute to developed property in each city.
4. Whether any of the cities has already exercised extraterritorial zoning authority over the disputed land.
5. Whether natural boundaries are present.
6. The growth patterns of the cities involved.
7. Other factors.

HISTORY OF EXTRATERRITORIAL ZONING AUTHORITY

Extraterritorial zoning and subdivision authority was created in 1975 Senate Bill No. 2395. In that bill the application of a city's zoning regulations extended to:

1. Unincorporated territory located within one-half mile of a city having a population of fewer than 5,000.
2. Unincorporated territory within one mile of a city having a population between 5,000 and 24,999.
3. Unincorporated territory located within two miles of a city having a population of 25,000 or more.

The bill provided that where there were two or more noncontiguous cities having boundaries at a distance where the boundaries would overlap, each city was authorized to control the zoning of the land on that city's side of the line established in proportion to the authority each city has to zone land outside its limits or pursuant to mutual agreement. The bill also provided for zoning commissions and planning commissions in cities and for extraterritorial

subdivision regulation similar to the extraterritorial zoning authority.

In 1978, the North Dakota Supreme Court issued its only major decision relating to extraterritorial zoning authority. The case interpreted what the term "unincorporated territory" meant in the 1975 law. The court interpreted "unincorporated territory" to mean any territory not located within the boundaries of another incorporated city. The court rejected Apple Creek township's interpretation that "unincorporated territory" means territory that is not part of a corporate public body. This case is used as authority for the proposition that a city may exercise exclusive zoning control over all territory within the extraterritorial zoning authority in spite of previous exercise of zoning authority by other political subdivisions.

The 1975 law was amended in 1981 by Senate Bill No. 2084. This bill addressed the issue of the zoning authority being bounded by a radial arc of a fixed distance from a city's corporate limits which inevitably resulted in single tracts of land being subject to zoning jurisdiction of more than one governmental entity. The bill applied a city's extraterritorial zoning authority to each quarter-quarter section of unincorporated territory, the majority of which is located within a specified distance of the city's corporate limits.

The next change to the law occurred in 1997 with Senate Bill No. 2384. The bill doubled the area of extraterritorial zoning authority and extraterritorial subdivision regulation and provided for a procedure to solve disputes for overlapping areas of extraterritorial zoning or subdivision regulation. The legislative history reveals that this change was done to address the conflicts that had arisen between cities that are extremely close geographically, for example, Fargo and West Fargo.

The bill authorized the governing bodies of cities that have boundaries at a distance where there is an overlap of extraterritorial zoning or subdivision regulation authority to enter an agreement regarding the extraterritorial zoning or subdivision authority of each city. The bill provided that if a dispute arises concerning the extraterritorial zoning or subdivision authority of the city and the governing bodies of the cities involved failed to resolve the dispute, the dispute must be submitted to a committee for mediation. The bill further provided that 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 or subdivision authority of the cities in the disputed area. The bill established factors that the administrative law judge must consider in making a decision regarding the extraterritorial zoning or subdivision authority.

In 1999 Senate Bill No. 2290, a city exercising its extraterritorial zoning authority was required to hold a zoning transition meeting if the territory to be extraterritorially zoned is currently zoned. The bill

required the city zoning or planning commission to provide at least 14 days' notice of the meeting to the zoning board or boards of all political subdivisions losing their partial zoning authority. The bill also provided that 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. In 1999 a technical correction was made to the law in House Bill No. 1049.

Since 1981, there have been a number of Attorney General's opinions interpreting NDCC Section 40-47-01.1. These opinions included:

- A letter dated November 6, 1989, which stated a city's extraterritorial zoning authority preempts township zoning occurring within that same extraterritorial area. If a city's floodplain regulations, building permits, building code ordinances, and building code regulations are enacted under a city zoning authority, these regulations and permits will preempt township counterparts within the extraterritorial area. If a city chooses to enforce the State Building Code, including any amendments it enacts to that code, township enforcement of the same code is preempted within the extraterritorial area.
- A letter opinion in 1996, 96-L-188, which stated only a city may zone in the area affected by extraterritorial zoning authority, even if the city has not adopted zoning ordinances.
- An Attorney General's opinion in 1997, 97-F-10, which opined that the authority to license the retail sale of alcoholic beverages is granted to the county for all parts of the county outside the corporate limits of a city notwithstanding a city's extraterritorial police power jurisdiction granted by Section 40-06-01. Section 40-06-01 provides that except whereas otherwise provided by law, a city has jurisdiction over all places within one-half mile of city limits for the purposes of enforcing health ordinances and regulations, and police regulations and ordinances adopted to promote the peace, order, safety, and general welfare of the city. However, a city's zoning authority includes the power to regulate and restrict the location and use of a retail alcoholic beverage establishment and as such a city may effectively prohibit a person from engaging in the sale of alcoholic beverages at a particular location within the extraterritorial zoning jurisdiction of the city.
- An Attorney General's opinion in 1998, 98-F-18, which opined that a city may apply and enforce its fire prevention code in unincorporated territory within the city's extraterritorial zoning authority to the extent the city has adopted the fire prevention code under its zoning authority and extended the application of the zoning regulations by ordinance.

OTHER LAWS RELATING TO EXTRATERRITORIAL ZONING AUTHORITY

Zoning in General

Besides dealing with extraterritorial zoning authority, NDCC Chapter 40-47 relates to zoning in general. In addition to the provisions specifically addressed, the chapter contains provisions for creating, amending, enforcement, and repeals of zoning regulations.

Presently in the areas surrounding a city in which the city has not exercised jurisdiction, the county is the zoning authority, unless the township has exercised its zoning authority. Under NDCC Section 40-47-01, for the purpose of promoting health, safety, morals, or the general welfare of the community, the city may regulate the size of buildings, the size of lots and yards, the density of population, and the location of buildings based on the purpose of the buildings. This broad zoning regulation is limited by the provisions in state law relating to the State Building code. In particular, Section 54-21.3-03 requires a governing body of the city, township, or county that elects to administer and enforce a building code to enforce the State Building Code. However, the State Building Code may be amended by these political subdivisions to conform to local needs.

Under NDCC Section 40-47-02, the city may divide the city into districts for purposes of zoning. All regulations must be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from another. Section 40-47-03 requires that regulations adopted for zoning ordinances must be part of a comprehensive plan and must be designed to:

1. Lessen congestion in the streets.
2. Provide for emergency management.
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.
7. Facilitate adequate provisions of transportation, water, sewage, schools, parks, and other public requirements.

Under NDCC Section 40-47-06, the governing body of the city may give its zoning authority to a zoning commission. If extraterritorial zoning authority is exercised, the zoning commission must be made up of at least one person residing outside the corporate limits of a city having a population of fewer than 5,000, two persons residing outside the corporate limits of a city having a population between 5,000 and 24,999, or three persons residing outside the corporate limits of a city having a population of 25,000 or more. The persons to be on the zoning commission from outside the corporate limits of the city are appointed by the board of county commissioners within the area in which the zoning authority is exercised and must reside within the area in which zoning regulation authority is exercised by the city.

Under NDCC Section 40-47-07, the city may provide for a board of adjustment to decide appeals from any determination made by an administrative official charged with enforcement of any ordinance. Chapter 40-47 provides procedures for the appeal to, the hearing by, and the effect of a determination by the board of adjustment. Under Section 40-47-11, every decision of the board of adjustment is subject to review by the governing body of the city and the decision of the governing body of the city is appealable to the district court.

Under NDCC Section 40-47-13, if regulations are made under Chapter 40-47 which impose higher standards than are required by any other statute or local ordinance, the provisions of the regulations made under the authority in Chapter 40-47 govern and if any other statute or local ordinance imposes higher standards than are required by Chapter 40-47, the provisions of that statute or local ordinance govern.

Extraterritorial Subdivision Regulation

North Dakota Century Code Chapter 40-48 provides for any city to establish an official master plan of the municipality through a planning commission.

Similar to extraterritorial zoning regulation is the extraterritorial subdivision regulation provided under NDCC Section 40-48-18. A city may extend regulation of subdivisions to the same extent it may extend zoning authority. In addition the same dispute mechanism for overlapping authority for extraterritorial zoning jurisdiction applies to extraterritorial subdivision regulation. Under Section 40-48-18.1, the planning commission or governing body may not require as a condition of approval of a request for approval of a plat the execution of an agreement by the owner of the property stating that the owner will not oppose the annexation of the property by the municipality. There is an exception to this prohibition for property located within one-quarter mile of the municipality's city limits or if the agreement contains a provision requiring the municipality to provide municipal services before annexation.

Regional Planning and Zoning Commissions

Under NDCC Section 11-35-01, counties, cities, and organized townships may cooperate to form a regional planning and zoning commission as agreed to by the parties. The regional commission may exercise any of the powers which are specified and granted to the counties, cities, or organized townships that are part of the commission in matters of planning and zoning.

Annexation

A concept close to extraterritorial zoning authority is the annexation and exclusion of territory by cities under NDCC Chapter 40-51.2. As stated in Section 40-51.2-02, the purpose for an annexation is to:

1. Encourage natural and well-ordered development of municipalities.
2. Extend municipal government to areas that are part of the whole community.
3. Simplify government structure in urban areas.
4. Organize the interrelationship and interdependence between a city and the areas contiguous or adjacent to the city.

North Dakota Century Code Section 40-51.2-02.1 allows for agreements between cities regarding the annexation of property located within the extraterritorial zoning or subdivision regulation authority of the cities for a term not greater than 20 years.

North Dakota Century Code Section 40-51.2-02.2 prohibits a city from annexing land located within the extraterritorial zoning or subdivision regulation authority of another city unless the city has written consent from the other city or the annexation is ordered by an administrative law judge.

North Dakota Century Code Section 40-51.2-03 allows a city to annex property in any territory contiguous or adjacent to the city upon a written petition signed by not less than three-fourths of the qualified electors or by the owners of not less than three-fourths of the assessed value of property in the territory.

Under NDCC Section 40-51.2-04, the same electors and owners may petition the city to exclude property that has not been platted and where municipal improvements have not been made. In addition, if the petition is for property that has been part of the city for 10 years and is not platted and does not have municipal improvements, the city may exclude this territory. Under Section 40-51.2-05, the city must provide notice before acting on a petition. If the land to be annexed lies within the extraterritorial zoning or subdivision regulation of another city and written consent to annex has not been received from the other city, the annexing city may submit the matter to a committee for mediation and to an administrative law judge if mediation does not resolve the matter.

North Dakota Century Code Section 40-51.2-06 requires annexation to be done by ordinance and provides that the annexation is effective for purposes of general taxation after the last date of the next January. Agricultural lands that are annexed must be classified as agricultural lands until those lands are put to another use.

North Dakota Century Code Section 40-51.2-07 allows the city to adopt a resolution to annex a contiguous or adjacent territory. This section requires the city to provide notice, especially to owners of real property who may file written protests. In the absence of protests filed by the owners of more than one-fourth of the territory proposed to be annexed, the territory in the resolution becomes part of the city. The annexation is effective for purposes of general taxation after the next January 31. Agricultural lands must remain agricultural lands until those lands are put to another use. If the owners of one-fourth or

more of the territory proposed to be annexed protest, the city may submit the matter to a committee for mediation.

Under NDCC Section 40-51.2-07.1, the mediation committee is made up of a member appointed by the Governor, representatives of the petitioners or protesters, the cities, counties, and townships involved, and any other parties. The Governor's appointee arranges and presides over the meeting. Under Section 40-51.2-08, if the city is not satisfied with the mediation, the city may petition for a hearing by an administrative law judge. Under Section 40-51.2-09, the administrative law judge must designate a time and a place at which the petition for annexation will be heard if the annexing city has substantially complied with all the procedural requirements. Under Section 40-51.3-11, the administrative law judge must provide notice, especially to the landowners, of the hearing. Under Section 40-51.2-12, at the hearing, any state or local government subdivision or planning or zoning commission or any resident of or person owning property proposed to be annexed may be heard at the hearing. Under Section 40-51.2-13, the administrative law judge must consider the following factors in coming to a decision:

1. The present uses and planned future uses or development of the area.
2. Whether the area sought to be annexed is part of the community of the annexing city.
3. The educational, recreational, civic, social, religious, industrial, commercial, or city facilities and services made available by or in the annexing city to any resident, business, industry, or employee of the business or industry located in the area.
4. Whether any governmental services or facilities of the annexing city are or can be made available to the area sought to be annexed.
5. The economic, physical, and social relationship of the inhabitants, businesses, or industries in the area sought to be annexed and the effect on other political subdivisions.
6. The economic impact of the proposed annexation on the property owners in the area of the proposed annexation and the economic impact if the area were not annexed.
7. Whether the area proposed to be annexed is within the extraterritorial zoning or subdivision regulation authority of another city.
8. Any other factor.

Based upon those factors, the administrative law judge may order an annexation if the judge finds:

1. The area proposed to be annexed is now, or is about to become, urban in character;
2. City government in the area proposed to be annexed is required to protect public health, safety, and welfare; or
3. The annexation would be in the best interests of the area.

The administrative law judge is required to mail a copy of the decision to all parties to the annexation proceeding and the order granting the petition and an accurate map of the annexed area must be filed by the city in the office of the recorder of the county.

Under NDCC Section 40-51.2-14, the administrative law judge may make fair and reasonable terms and conditions and direct conformity with those terms and conditions in making an order for annexation. These powers are quite broad. Under Section 40-51.2-15, the decision of the administrative law judge is reviewable by a court under an abuse of discretion standard.

Under NDCC Section 40-51.2-16, the annexation is effective after the next January 31 and agricultural lands may not be reclassified for taxation purposes until those lands are put to another use.

Under NDCC Section 40-51.2-17, the cost of the administrative law judge must be paid by the annexing city.

SUGGESTED STUDY APPROACH

The commission could receive information on how cities and surrounding political subdivisions manage the infrastructure development in bordering territories with and without extraterritorial zoning authority. Once the commission hears how the procedures are typically used to manage these border areas, the commission could receive testimony from individuals aggrieved by the exercise of these procedures. The commission could weigh the success of these procedures and determine if any modifications would generally improve the procedures to provide more political redress for those individuals negatively affected by the decision of a city to exercise its extraterritorial zoning authority. To come to this determination, the commission could receive testimony from townships, cities, counties, and individuals in areas zoned extraterritorially.

ATTACH:1