

2005 North Dakota Planning Handbook

I. Introduction

*We do not inherit this land from our ancestors;
we borrow it from our children.* – Haida Indian saying

Land, in North Dakota, is a key resource. How land should be managed is a key question. The implications of our management will indeed be borne by our children. While the decisions we make must stem from our own values, this handbook explains the tools of local governments (counties, cities, and townships) for managing the land under their control. In this Handbook the term “land use management” means the local government process (planning) of determining the way land should be used and developed in a community, and the implementation (regulation) of tools to ensure that such use and development occurs.

This chapter discusses the overall content of this Handbook, and briefly summarizes the legal basis for land use management by local governments.

A. How to Use This Handbook

This handbook is an educational tool and a reference for citizens and local governments. It is intended to replace the Community Planning Handbook¹ last revised in 1982. It is not a substitute for legal advice from an attorney. Nor is it a complete reference on all land use management or planning. It is intended to be a first source of information on how land use management can be accomplished in North Dakota. As such, it has been organized from general to specific. The most general things to understand about land use management are discussed first, and additional details are added later.

Chapter I explains the general purposes and layout of this handbook, and provides a brief summary of the legal basis for land use management by local governments.

Chapter II explains who has the primary roles in land use management under the laws of North Dakota.

Chapter III summarizes the basic processes of land use management under the laws of North Dakota.

Chapter IV notes the three general purpose types of local government in North Dakota and summarizes their primary differences with respect to land use management.

Chapter V discusses the function of “plans.”

Chapter VI discusses the function of “zoning ordinances.”

Chapter VII discusses the function of “subdivision regulations.”

Chapter VIII discusses the function of “capital improvement plans.”

Chapter IX reviews special topics which are applicable to land use management.

Following these chapters are appendices which provide additional information on terms, other resources, and an index to primary topics in the text.

B. The Legal Basis for Planning

The authority to regulate the use of land is given by the United States Constitution to the States, to delegate to local governments in the manner States see fit. Although the legal basis for land use management or planning extends far back in recorded history, its roots in the United States stem from the application of police power to address concerns about “health, safety, morals or general welfare” in cities during the later part of the 19th century. The first law to control the location of land uses (zoning) was enacted in 1867 by the City of San Francisco.² The practice of zoning continued to grow during the beginning of the 20th century. In 1928, the Standard City Planning Enabling Act was published by the U.S. Department of Commerce as a recommended basis for States to “enable” municipalities to regulate the use of land. Versions of this model legislation were passed by many states, including North Dakota.

Not surprisingly, land use regulation was and continues to be tested in the courts. Over time a body of caselaw, including Supreme Court decisions, has grown to define the parameters of land use regulation. Generally, the direction of the courts has been toward providing additional flexibility in the types of land use controls which may be used by local jurisdictions. Although dozens of other cases could be cited, the following three cases are among the most far-reaching in their impacts.

Pennsylvania Coal Co. vs. Mahon (1922) In this case, the United States Supreme Court determined that there were limits to the regulation of land, and that there were circumstances under which such regulation could be considered a “taking.” A “taking” is an abridgement of the Fifth Amendment which grants private property owners protection from the taking of land for a public use without compensation.

Village of Euclid vs. Ambler Realty Company (1926) In this case, the United States Supreme Court confirmed zoning as a legitimate exercise of police power by a municipality. This case was similar to many others during the same era where zoning was tested in state supreme courts, including one in North Dakota. The result has been long standing support for the practice of zoning.

Penn Central Transp. Co. vs. New York City (1978) In this case, the United States Supreme Court set a test for determining regulatory takings and it found that a reasonable return on property was sufficient to avoid a claim of “takings.” The result of this finding was that property owners could not claim a need for compensation for potential profit due to zoning if they could still make a “reasonable” profit.

The First, Fifth, and Fourteenth Amendments to the U. S. Constitution and the caselaw previously mentioned form the legal foundation by which land use can be regulated. Over time, the courts have provided more flexibility to local jurisdictions in the types of land use controls which may be utilized. However, as is the case with any use of police powers for land use management, the basis for any tools utilized in land use management must be clearly identified and related to the welfare of the community. Additional discussion about these tools is provided in Chapters VI and VII. The “enabling legislation” enacted by the states has provided the authority and procedures for local governments to establish regulations for how land could be used within their jurisdiction.

In North Dakota, enabling legislation was first enacted in 1923 for cities, in 1953 for townships, and in 1955 for counties. Occasionally, significant changes in the legislation have been made to respond to new needs, or to correct limitations in the laws. Since the original Community Planning Handbook was written in 1980, several such changes or decisions have been made in North Dakota law. These changes are summarized in Appendix 1.

Land use regulation in North Dakota has its basis in the enabling legislation found in Titles 11, 40, and 58 of the North Dakota Century Code (NDCC). The North Dakota “Century Code is the codification of all general and permanent law enacted since statehood. In very limited instances, the Century Code contains temporary laws. The numbering system for the Century Code is a three-part number, with each part separated by a hyphen. The first part refers to the title, the second to the chapter, and the third to the section. For example, Section 54-35-01 refers to the first section in Chapter 35 of Title 54. The decimal point system is used to designate sections that have been inserted between two consecutively numbered sections.”³ The table on the following page summarizes the location of various parts of enabling legislation in North Dakota for counties, cities, and townships. It also lists the location of several other topics related to land use management.

Enabling legislation not only provides local jurisdictions the authority and general procedures for land use regulation, it also “may mandate certain aspects of planning.”⁴ In North Dakota the only mandated planning function for local governments is a requirement for Counties to establish solid waste management regulations.

There are three basic types of local governments which have general authority to regulate land use. These are Counties, Cities, and Townships. It should be noted that in addition to these three political subdivisions, park districts are also a political subdivision, and under Chapter 2-04 of the North Dakota Century Code also have authority to zone for airports under certain conditions. This special airport zoning is not discussed in this Handbook.

Guide to Key Chapters of the North Dakota Century Code				
		County Chapters	Township Chapters	City Chapters
Enabling Legislation	Zoning	11-33	58-03	40-47
	Subdivision	11-33.2	none	40-48
	Annexation	none	none	40-51.2
	Airport Zoning*	2-04	2-04	2-04
Other Topics	Platting	11-24	none	40-50
	Home Rule	11-09.1	none	40-05.1
	Parks	11-28	58-17	40-49
	Dedication and Vacation of Land for Public Use		none	40-39
	Ordinances	11-09.1	58-03	40-11

* Airport zoning may be applicable in counties, townships, and cities.

It is important to note the difference between the enabling legislation discussed above, and “home rule authority.” The NDCC also gives counties and cities a right, called “home rule authority,” to establish certain powers for themselves which extend beyond the authority specifically granted by state law. This additional authority can only be obtained by a county or city after the question has been submitted to a vote and approved in a general or primary election, or in the case of cities, at a regular or special city election.⁵ Typically, counties or cities may establish home rule authority in order to give themselves additional flexibility in the way they address certain issues, such as taxing authority.

II. Roles and Terms in Planning

As noted in Chapter I, there are three basic types of local governments which have general authority to regulate land use. These are Counties, Cities, and Townships. This chapter discusses the roles in land use management played by four general groups of people. These groups are: governing bodies, advisory bodies (such as planning and zoning commissions), administrative staff, and citizens. It also explains the meaning of some key terms used in this Handbook.

A. Governing Body

The governing body is the group of elected officials who form the highest authority within a local government. In counties, this body is the County Commission. In cities, this body is the Council or the Commission, depending on the form of government selected by the city. In townships, this body is the Board of Supervisors.

The governing body of local jurisdictions has the authority to pass laws applicable within the jurisdiction's boundaries. It also has the authority to appoint members to other land use management roles, including the appointment of planning commission and zoning commission members.

In counties and townships, the governing body has an additional role of hearing and deciding appeals. In cities, this function may be assigned to an appointed Board of Adjustment.

B. Planning or Zoning Commission

Planning or zoning commissions serve as advisory bodies to the governing body in most instances. The NDCC names the advisory body a planning commission when its role relates to subdivision authority, and a zoning commission when its role relates to zoning authority. The NDCC also allows the same body to serve both functions. Consequently, many cities in North Dakota have a combined body named the Planning and Zoning Commission.

There are certain ambiguities about the authority, roles and processes of city planning commissions and subdivision authority which make it difficult to clearly delineate their role.⁶ Generally, cities in North Dakota have placed the planning commission in the review or advisory role for the approval of plats.⁷

The planning commission generally has the responsibility of developing and recommending a comprehensive plan and land use regulations to the elected body for adoption. A zoning commission generally has the same type of responsibility for a

master plan. Additional information about master plans and comprehensive plans is discussed in Chapter V.

C. Administration

In order to properly administer or implement the comprehensive plan and land use regulations, jurisdictions typically appoint officials who are responsible for ensuring compliance with the plans and regulations. These officials may include a zoning administrator, a planner, and/or a building inspector. The persons appointed to these administrative functions may have existing roles in local government, or they may simply have been appointed because they are willing to serve in the administrative role. These and other similar positions are essential to the consistent implementation of the jurisdiction's regulations. Additional information about the administration and enforcement of land use regulations is discussed in Chapters VI and VII.

D. Citizens

The citizens of a local jurisdiction represent the fourth group of people involved in land use management. They may be involved in a number of ways:

- As the general public, they have the right to provide input on land use decisions including the details of comprehensive plans and land use regulations. They also have the right to offer comments on any other land use decision being made by the advisory body or governing body.
- As petitioners, they have the right to submit applications requesting permission to use or develop land.
- As complainants, they can request redress of grievances where they feel wronged.
- As appellants, they can request consideration of a land use related decision to the appropriate appeals body.

Additional information about procedures relating to citizens' roles are discussed in Chapters V-IX.

E. Terms

There are a number of terms that are essential to the understanding of this Handbook. The following list of definitions provides an explanation of these terms as they are used in this Handbook. Additional terms are defined in the glossary found in Appendix 2.

Comprehensive Plan – an officially adopted document of a local unit of government which provides direction for the future development of the community by establishing goals, objectives, and policies to guide community decision-making and which does so in a manner consistent with a state's planning and zoning enabling legislation.

Zoning – “a police power measure, enacted primarily by general purpose units of local government, in which the community is divided into districts or zones within which permitted and special uses are established, as are regulations governing lot size, building bulk, placement and other development standards....”⁸

Subdivision – “the division of a tract or parcel of land into lots for the purpose, whether immediate or future, of sale or of building development, and any plat or plan which includes the creation of any part of one or more streets, public easements or other rights-of-way, whether public or private, for access to or from such lots, and the creation of new or enlarged parks, playgrounds, plazas, or open spaces.”⁹

Ordinance – a law enacted by a local unit of government; used synonymously with regulation.

Enabling Legislation – state law which provides authority to local units of government to establish and enforce a law; in this Handbook it refers to the authority to establish laws relating to land use and development.

Development – human action which causes a site or an area to be modified from the natural landscape including modifications above or below ground or water.¹⁰

Land Use – the use or development of land or water including below or above surface uses or development.

Community – the general area of a local jurisdiction (county, township, or city) including its people, organizations, businesses and government; or, in some contexts, the government of a local jurisdiction.