

OPINION
66-33

June 22, 1966 (OPINION)

Mr. Harold B. Herseth

Zap Village Attorney

RE: Cities and Villages - Incorporation of Village as Council City -

Date of Election

This is in reply to your letter of June 20, 1966, relative to the following facts and questions:

"The Village Board was presented with a petition under the provisions of Section 40-03-01. The petition appears to be a valid petition and was accepted by the Board. It was agreed that the matter would have to be submitted to the electors. The only question remaining then is when the election must be held.

"I have taken the position that it has to be held within a reasonable length of time, but have refused to pass on whether it would be reasonable to wait until the next regular election, or whether a special election has to be called within the next month or so.

"The backers of the petition maintain that it would be unreasonable to wait for the next general election and the Village Board maintains that it is not unreasonable and that the Village cannot afford to call a special election. * * * ."

Chapter 40-03 of the North Dakota Century Code, as amended, governs the incorporation of a council city from a village. Section 40-03-01 of the North Dakota Century Code, as amended, provides for the filing of a petition requesting the change and further provides: " * * * Such governing body shall appoint a time when and a place or places where the election shall be held and shall designate the clerks and judges at such election."

We would compare this provision with the provisions found in Chapter 40-08 of the North Dakota Century Code, as amended, governing the change from commission system of government to the council form of government. Thus Section 40-04-10 of the North Dakota Century Code, as amended, requires that the governing body call a special election on the question of change in form of government not less than thirty days nor more than ninety days after the date of the auditor's certificate that a sufficient petition has been filed. The comparison in the language leaves no doubt that in the case of change from a village to a council city the village governing body has discretion as to when the election will be held, while in the case of change from a commission city to a council city the election must be held within a specified period.

While the statutes governing this matter do give the village board

discretion as to when the election is to be held, we are in agreement with your conclusion that such election must be held within a reasonable time. This office cannot however state, as a matter of law, that the next regular village election is not a reasonable time within which to hold the election. This is a matter which must be determined within the good judgment of the village board. Should those residents of the village who feel aggrieved by the decision of the village board determine to contest the reasonableness of the time, they may, of course, do so in a court of law. The court will then determine whether a delay until the next regular village election is reasonable.

We would note that if the election is delayed until the next regular village election (the third Tuesday in March, 1967) and if the change in incorporation is approved at that election, Section 40-03-06 of the North Dakota Century Code provides that the governing body of the village shall designate the time and places of holding an election to elect city officers. Again the statute does not specify the time within which such election would be held and the same conclusion as reached above would apply to such election.

HELGI JOHANNESON

Attorney General