

**OPINION
70-52**

June 9, 1970(OPINION)

Mr. Dale W. Moench
City Attorney
Dickinson, North Dakota

RE: Cities - Planning and Zoning Commission - Membership

This is in response to your letter in which you ask for an opinion as to what number comprises the Planning and Zoning Commission. You call our attention to section 40-49-03, as amended, and to section 40-48-10, as amended. You the ask what is the total membership of a planning and zoning commission. You also ask, does the two-thirds vote of the membership as set out in section 40-48-10, as amended, contemplate two-thirds of the entire membership?

Section 40-48-03, as amended, of the North Dakota Century Code provides as follows:

"PLANNING COMMISSION - CREATION - MEMBERS - EX OFFICIO MEMBERS. The governing body of any municipality may create, by ordinance, a planning commission to consist of not more than ten members to be appointed by the executive officer of the municipality with the approval of its governing body. The executive officer, the engineer, and the attorney of the municipality shall be ex officio members of the commission."
(Underscoring ours.)

The above section provides that the municipality by ordinance may create a planning commission. The planning commission created by such ordinance shall not have more than ten members. The City can determine the numbers of members on the planning commission within the limitation. The question might be raised whether the ex officio members, namely the executive officer, the engineer and the city attorney, are to be included in the ten. Upon examination of the statutory language, the membership which is limited to not more than ten members refers to members which are appointed by the executive officer of the municipality with approval of its governing body. Naturally the executive officer could not appoint himself, nor could he appoint the engineer and the city attorney because these are members of that body by operation of the law. The executive officer, the engineer and the city attorney are members of the commission by virtue of their office. No appointment need be made. Once the City, by ordinance, has created a planning commission, these three officials by virtue of holding their respective offices are members of the planning commission.

The language in section 40-48-04, "* * * The terms of the ex officio members of the commission shall correspond to their respective official tenures, * * *", clearly and unmistakably established that the ex officio members are in addition to the other members created by ordinance. For example, if your City has created a planning commission by ordinance and has designated the membership of such committee to be ten, the ten members would then be appointed by the executive officer, and be subject to approval of the governing body and, in addition thereto, the executive officer, the engineer and the city attorney would be ex officio members of such commission, bringing the total membership to thirteen.

The term "ex officio member" does not imply that such person does not have full membership or has only limited authority. Such term merely means that the person holding a certain office is automatically a member of the commission with all rights and responsibilities. Such persons are members by operation of law.

In direct response to Question No. 1, it is therefore our opinion that where the ordinance created a planning commission and established its membership to ten members, the maximum allowed by law, the total membership on such commission consists of thirteen members or commissioners by including the three ex officio members of the commission. The three ex officio members of the commission, namely the executive

officer, the engineer and the city attorney, are full members of the commission, bringing the total number to thirteen members.

Section 40-48-10, as is material to the question submitted, provides in part as follows:

"The adoption of the plan, or part thereof or amendment thereto, shall be by a resolution of the commission carried by the affirmative votes of not less than two-thirds of the members thereof. * * *."

It is noted that it requires two-thirds of the members thereof as distinguished from two-thirds of the members voting. The distinction is quite obvious. In this particular instance the Legislature specifically provided that it takes two-thirds of a favorable vote by the membership to approve a plan. Thus, in direct response to your second question, it is our opinion that any plan which is required to be approved and adopted by the planning commission as provided for in section 40-48-10 requires an affirmative vote of two-thirds of the thirteen members where the City, by ordinance, has established appointive membership on the commission to be ten members.

HELGI JOHANNESON
Attorney General