

OPINION
70-62

May 28, 1970(OPINION)

Mr. Jon R. Kerian
Assistant City Attorney
Attorney for Planning Commission
Attorney for Minot Urban Renewal Agency

RE: Cities - Urban Renewal Agency - Conflict of Interest

Your letter of May 19, 1970, states in substance that on November 6, 1967, the City Council, pursuant to Section 40-58-05 of the North Dakota Century Code, adopted a resolution which found that one or more blighted areas existed in the City of Minot and that rehabilitation, conservation and redevelopment were necessary. The resolution also provided that the renewal powers be exercised by an urban renewal agency under Section 40-58-15 and Section 40-58-16 of the North Dakota Century Code.

In addition to the basic resolution, the City Council on November 6, 1967, adopted a resolution, (which you referred to as Resolution A and which will also be referred to hereinafter as Resolution A), which described the metes and bounds of the area to be included. The area and project were designated as "Operation Horizon." Thereafter, further proceedings were had, such as hiring consultants and formulating plans. The City Council, as constituted when the above was acted upon, consisted of fourteen members, one of which had an interest in the area. Ten of the City Council members voted in favor of the resolution, of which one had an interest in the area. Four members were absent.

On June 5, 1969, a resolution was adopted by the City declaring and finding that a further area, (now referred to as "Flood Redevelopment"), was blighted and was in need of rehabilitation, redevelopment, etc. This resolution you described as Resolution B and will be referred to as such herein. As a result of the new area embraced in Resolution B, seven members of the City Council had an interest in the area. The resolution was acted upon by eleven of the fourteen aldermen. Of the eleven who voted in favor of the resolution, six own property in the renewal area. Three members or aldermen were absent. Subsequent to this resolution, hearing were had and the plan was approved by the City Council. The plan was acted upon by six member of the City Council (aldermen), all voting in favor of the plan. One member was absent and seven members passed their votes upon instructions from the City Attorney after they had made disclosures in writing to the City Council that they presently controlled or owned, or controlled within the preceding two years, an interest direct or indirectly in the property included in the area described in Resolution B.

You also make reference to actions taken by the Planning Commission and the recommendations made by such body, but because the Planning Commission only makes recommendations we are not concerned with the composition of such body under the present circumstances.

You further advise that two of the five members of the Minot Urban Renewal Agency have an interest in "Operation Horizon" set out in Resolution A, and one of the five has an interest in the "Flood Redevelopment" set out in Resolution B.

You further state you have not asked the officials, commissioners or employees other than those from the groups mentioned, (City Council Members, Planning Commission and Urban Renewal Agency), to file any disclosure in writing to the City Council because they do not participate in any action and do not have votes on any boards, even though approximately eighty-five of the two hundred and fifty city employees have a conflict. You further advise that when Resolution A and Resolution B were passed, no council member had made any disclosure as required by Section 40-58-17, nor did any such person or member refrain from voting because of having an interest.

You then ask for an opinion as to the procedure to be followed when council action is necessary to approve plans or enter into contracts where seven of the councilmen (aldermen) have an interest as mentioned in Section 40-58-17. You also ask for an opinion whether or not a majority of council members who have no interest as mentioned in Section 40-58-17 could constitute a quorum to transact urban renewal business if the other council members having an interest abstain from any action or discussion.

The provisions of Section 40-58-17 are significant in reaching an answer to the questions you submitted. It provides as follows:

INTERESTED PUBLIC OFFICIALS, COMMISSIONERS OR EMPLOYEES. No public official or employee of a municipality or board or commission thereof, and no commissioner or employee of a housing authority or urban renewal agency which has been vested by a municipality with urban renewal project powers under Section 40-58-15 shall voluntarily acquire any interest, direct or indirect, in any urban renewal project, or in any property included or planned to be included in any urban renewal project of such municipality or in any contract or proposed contract in connection with such urban renewal project. Where such acquisition is not voluntary, the interest acquired shall be immediately disclosed in writing to the local governing body and such disclosure shall be entered upon the minutes of the governing body. If any such official, commissioner or employee presently owns or controls, or owned or controlled within the preceding two years, any interest, direct or indirect, in any property which he knows is included or planned to be included in an urban renewal project, he shall immediately disclose this act in writing to the local governing body, and such disclosure shall be entered upon the minutes of the governing body, and any such official, commissioner or employee shall not participate in any action by the municipality or board or commission thereof, housing authority, or urban renewal agency affecting such property. Any disclosure required to be made by this section to the local governing body shall concurrently be made to a housing authority or urban renewal agency which has been vested with urban renewal project powers by the municipality pursuant to the provisions of Section 40-58-15. No commissioner or other officer of any housing authority, urban renewal agency, board or commission exercising powers pursuant to this chapter shall hold any other public office under the municipality other than his commissionership or office with respect to such housing authority, urban renewal agency, board or commission. Any violation of the provisions of this section shall constitute misconduct in office."

We observe that Section 40-06-03 of the North Dakota Century Code states what constitutes a quorum. It provides as follows:

QUORUM. A majority of the members of the governing body of a municipality shall constitute a quorum to do business but a smaller number may adjourn from time to time. The governing body may compel the attendance of absentees under such penalties as may be prescribed by ordinance, and may employ the police of the municipality for that purpose."

The above quoted section refers to the governing body. The governing body is composed of more than councilmen or aldermen in this State in cities operating under the council form of government. Section 40-08-01 of the North Dakota Century Code states as follows:

CITY COUNCIL - WHO CONSTITUTES. The governing body of a city operating under the council form of government shall be the city council, which shall be composed of the mayor and aldermen."

This clearly illustrates that the reference in Section 40-06-03 to members of the governing body includes others than the council and in this instance the mayor.

The Supreme Court of Iowa in Griffin v. Messenger, 86 N.W. 219, had under consideration the question whether or not the mayor is part of the council. The statute in question was substantially the same as the ones referred to above. The Court held that the mayor is part of the council. It said: "The mayor was by law

made a constituent part of the city council. How is it possible to eliminate him in determining the number of persons composing the council, we are unable to see. * * * The language of the statute is clear and unambiguous where it declares that such ordinances shall be read on 'three different days unless three-fourths of the council shall dispense with the rule.' It does not say three-fourths of the council, excluding the mayor, nor three-fourths of the council ordinarily voting, and to give it the construction contended for by the appellant would require judicial legislations." (Citations omitted.)

By reading together the provisions of Section 40-06-03 and Section 40-08-01, which we must do, results in the conclusion that the governing body (in this instance of the City of Minot) is comprised of fifteen individuals; fourteen councilmen and the mayor. A majority of this body would be eight. Seven councilmen and the mayor would bring the total membership to eight. Thus, even under an interpretation that Section 40-06-03 means members elected, there would be a quorum. Because of the conclusions reached herein, it is unnecessary to further explore the question whether or not "themajority" in Section 40-06-03 refers to all members elected or otherwise.

It is, therefore, our opinion that seven councilmen out of fourteen, together with the mayor, constitute a quorum authorizing such body to act upon questions involving urban renewal projects or programs. Such action would be valid even though seven of the other councilmen were prevented or prohibited from participating in the action taken because of having a "disqualifying interest."

It is our further opinion that all prior actions taken by the city should be confirmed and ratified by the present governing body, (excluding those who have a disqualifying interest), so as to eliminate any question or doubt as to their validity and to validate prior actions taken which might be vulnerable because of the failure to disclose interest.

It is our further opinion that the members of the urban renewal agency or commission should be so constituted as to have only members of the five-member board who do not have any interest in any of the urban renewal projects or programs, such as "Operation Horizon" or "Flood Development" areas designated under Resolutions A and B, respectively.

In examining the provisions of Section 40-58-17, it appears quite obvious that the Legislature intended to have only such officials of the city governing body act or participate in the urban renewal project or program who do not have any financial interest in the area or areas involved. Obviously the Legislature did not wish to have any persons who have a financial interest to exercise any official influence. The objective is to have all action taken by the governing body to be free of any personal interest or gain, financially or otherwise.

We do note, however, that the Legislature has not provided for any method to replace officials who have a "disqualifying interest", nor has the Legislature provided any procedure should a majority of governing body be disqualified because of having an interest.

It is conceivable that in certain instances, particularly in the smaller cities, an urban renewal project or program could not be undertaken because members of the governing body having a "disqualifying interest" in the area to be redeveloped, etc.

The Legislature might wish to entertain legislation which would permit either an election or appointments of persons to positions to act on urban renewal projects or programs where a member or members become disqualified because of having an interest in the area. The Legislature might also wish to entertain a procedure providing for the submission of the question to the electorate in instances where more than a certain number of the governing body have a "disqualifying interest."

HELGI JOHANNESON
Attorney General