

**OPINION
70-66**

April 1, 1970(OPINION)

Mr. Russell Staiger
Planning Administrator
State Planning Division

RE: Cities - Zoning and Platting - Inclusion of Extra-Territorial Ar

This is in reply to your letter of March 25, 1970, relative to section 40-48-18 of the North Dakota Century Code, as amended.

You state the following facts and questions:

"In the process of preparing a Comprehensive City Plan for an incorporated North Dakota city, a question has been raised as to the intent of 40-48-18, N.D.C.C. and Senate Bill 158 (1967 session). The particular section of the Century Code and the amendment passed in Senate Bill 158, authorize the zoning, platting and control of subdivisions in the six mile area surrounding the corporate limits. This authorization is only legal in the absence of any regional planning and zoning commission or township or county zoning commission.

"The point in question relates to the wording in 40-48-18, N.D.C.C. which states 'shall include all of the land lying within six miles of the corporate limits of the municipality'. The point being that such wording implies mandatory exercise of jurisdiction in the extra-territorial area, and if the area is to be subject to zoning and subdivision regulations, then controls must be uniformly applied within the extra-territorial area.

"The State Planning Division requests the opinion of your office whether this wording is mandatory or merely permissive to municipalities. In other words, has a city the option of exercising zoning and subdivision control in selected areas in the extra-territorial limits? As an example, choosing only to control zoning or subdivisions within one mile of its corporate limits or only along certain highways."

Section 40-48-18 of the North Dakota Century Code provides:

"JURISDICTION OF SUBDIVISION - APPROVAL OF COUNTY PLANNING COMMISSION NECESSARY - FAILURE TO AGREE. The territorial jurisdiction of any municipal planning commission over the subdivision or platting of land shall include all land located in the municipality and all land lying within six miles of the corporate limits of the municipality and not located in any other municipality. In the case of any such nonmunicipal land lying within six miles of more than one municipality having a planning commission, the jurisdiction of each such municipality shall terminate at a boundary line equidistant from the respective corporate limits of such municipalities. The approval of the county planning commission, if there is one, shall be necessary on all plats in areas outside the corporate limits of any municipality. If the county planning commission fails to agree with a city planning commission having jurisdiction over any plat, the board of county commissioners, by a two-thirds vote of its entire membership, may overrule the findings of one planning commission and approve said plat as recommended by another planning commission."

The above-quoted statute applies only to the subdivision or platting of land and does not, of itself, apply to zoning. However, as you have noted in your letter, the 1967 Legislature enacted Senate Bill 158 which has been codified as sections 11-35-01 and 11-35-02 of the North Dakota Century Code. Section 11-35-02 provides:

"ZONING OF TERRITORY ADJACENT TO CITIES. Until the organization of either a regional planning and zoning commission as provided in section 11-35-01 or township or county zoning commission pursuant to sections 58-03-11 through 58-03-15 and chapter 11-33, respectively, any municipal corporation which shall determine to use zoning regulations shall have exclusive jurisdiction and power to zone over all land over which it has authority to control subdivisions and platting of land as provided in section 40-48-18."

The two sections above quoted would give the city the right to zone the area within six miles of the city limits subject to the exceptions contained in section 40-48-18. However, we do not believe the fact the city has the authority, power or jurisdiction to zone this area requires the city, as a matter of law, to do so. We cannot conceive that the Legislature contemplated a mandatory zoning of the entire six mile area adjacent to the municipality if any portion of such area is to be zoned. We are aware that in certain instances so-called "spot" or "area" zoning has been declared invalid. If, however, there is a reasonable basis for zoning a portion of the six mile area rather than the entire area, we believe the municipality may do so. See e.g., 8 McQuillin, Municipal Corporations 217, Zoning, section 25.81 (1965 Revised Edition).

In direct reply to your question, it is our opinion a city has the option of exercising zoning in selected areas in the six mile extra-territorial limits if the exercise of such option has a reasonable basis and is not discriminatory, subject to those limitations and restrictions provided by law.

HELGI JOHANNESON
Attorney General