

**OPINION**  
**73-620**

January 30, 1973 (OPINION)

Mr. Lester J. Trnka  
City Attorney  
Box 88  
Oakes, ND 58474

Dear Mr. Trnka:

This is in reply to your letter of January 23, 1973, with regard to you city's planning and zoning ordinance and commission.

You inform us that on November 13, 1968, your city council by ordinance created a Planning Commission and requested that same make a master plan for the physical development of the municipality and of any land outside its boundaries which, in the commission's judgment, bears a relation to the planning of the municipality. You indicate that this was done pursuant to the provisions of chapter 40-48 of the North Dakota Century Code.

You inform us that some time prior to November 13, 1968, the Board of Township Supervisors of the township in which you city is located pursuant to section 58-03-11 through section 58-03-14 of the North Dakota Century Code established by resolution a township zoning commission. You indicate that this commission has taken no action to date, having not only not held any meetings of the members of this commission, but they have not made any recommendations to the township supervisors nor have they had any public hearings concerning the possible zoning of their township.

You indicate that prior to November 13, 1968, the county in which the aforementioned city and township are located did not have a county planning commission. You indicate that they have since established a county planning and zoning commission but that same was sometime during the latter months of 1971 or early 1972.

You indicate that the city planning commission presented a municipal master plan to the city council, which master plan was adopted by ordinance on June 7, 1971, and its title and penalty clause was published in a named newspaper, which our research would indicate is the official newspaper of the county, on the 19th of August, 1971.

you indicate that your letter is written to us by you as city attorney acting on behalf of the city planning commission, to request an opinion as to who has jurisdiction outside the city limits. You indicate that a conflict has arisen due to the fact that one of the council members has built in an area within one-half mile of the city limits, said area being covered in the municipal master plan and has not sought the approval of the city planning commission and has not complied with the requirements of the master plan in general.

You indicate that this individual allegedly has contacted the township planning commission and has been told that they have jurisdiction in this matter.

You indicate that there is no legal action pending in this matter, nor is there any contemplated in the future. You indicate that it is merely the desire of the city planning commission to establish for future reference, whether or not they have sole jurisdiction in this area, or have dual jurisdiction with the Township Planning Commission, or whether their efforts to this point have been in vain.

You indicate that it would appear that section 40-48-38 sets forth the penalty for violations of this ordinance, indicating they shall be punishable as a misdemeanor. You reiterate there are no intentions on the part of the Planning Commission to bring a criminal action against any of the alleged violators, but they would also like to know for future reference the exact procedure to follow in the event that this ordinance is violated in the future.

We have not examined the municipal master plan to which you have made reference, nor have we considered the facts upon which your conclusion is based that the building you indicate was built in the six miles limits of the city and does not comply with the requirements of your master plan. It is possible, however, that some general comments by this office may help you to solve your problems in this respect.

We would note that chapter 40-48 of the North Dakota Century Code gives the city planning commission quite broad powers in the "planning" field, presumably over the territorial limits of the city. We would note further, however, that city "zoning" is covered under another chapter, i.e., chapter 40-47 of the North Dakota Century Code. We would note, however, that city extraterritorial zoning is covered by 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."

Under the facts you give, as of the date of the creation of the City Planning Commission, your city thus did not have extraterritorial zoning power as the township had already in the words of said section 11-35-02 organized a "township \* \* \* zoning commission", regardless of whether such organized zoning commission had acted to zone or not. Thus, as of the time of the organization of the township zoning commission, any extraterritorial zoning jurisdiction of the city terminated (see paragraph numbered 2 of page 3 of photocopy of our opinion of date June 26, 1967, enclosed herewith).

As heretofore noted, the "planning" authority of the City given in chapter 40-48 is quite broad, within the territorial limits of the city. The legislature also apparently intended to extend at least a part of the "planning" authority to the land lying within six miles of the corporate limits of the municipality and not located in any other municipality. They did not, however, indicate that the entire broad "planning" authority was to be extended to this six mile area, rather they state in the first sentence of said section 40-48-18 that:

"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 laying within six miles of the corporate limits of the municipality and not located in any other municipality. \* \* \* "  
(emphasis supplied by us)

It would appear to us that the only possible purpose of the language we have underlined in this statute would be to limit the quantum of the planning authority granted to the municipal planning commission over this territory within six miles of the city limits.

We feel that the meaning of the terms "subdivision" and "platting" are quite clear, and must logically relate to planning for and defining the limits and boundaries of subdivisions, blocks, lots, etc., by means of maps, plats, metes and bounds, other legal descriptions, etc. The "jurisdiction" of the planning commission over such "subdivision or platting" is more difficult to define. Quite obviously, approval of plats by commission as set forth in section 40-48-21 would come within such jurisdiction. We would also feel that approval of plats of a subdivision as specified in section 40-48-19 would fall within this jurisdiction.

It would seem rather doubtful that the power of the municipality to "accept, lay out, open, improve, grade, pave or curb any street," or for that matter the adoption of a "major traffic street plan" mentioned in section 40-48-24 of the North Dakota Century Code would be a part of this "subdivision" and "platting" authority, though we would assume that any plats or subdivisions of territory, handled under this chapter would necessarily indicate street locations as well as the locations of lots and blocks. We would assume the enforcement provisions with regard to transfer of lots "by reference to or exhibition of a plat of a subdivision, or by any other use thereof," would come within this extraterritorial authority. It seems doubtful that the authority over "subdivision" and "platting" would include authority over construction, issuance of building permits, etc., as specified in sections 40-48-12 and 40-48-25 of the North Dakota Century Code, though we do not recognize that a building erected in the middle of a potential street could raise havoc with the eventual development of the premises in accordance with prior plans.

Thus, in response to your basic question, it would be our conclusion that the city planning commission would have jurisdiction of the subdivision and platting of land, within six miles of the territorial limits of the city, and the township named, other townships, or the county would have jurisdiction of zoning in such area dependent on the precise facts of that situation. It seems doubtful to us that one township would include all the territory within six miles of any city in the state.

As to your secondary question, it would appear to us that section 40-48-38 of the North Dakota Century Code provides for punishment for violations of chapter 40-48 of the North Dakota Century Code not the municipal ordinances. On such basis we would suggest that in the event of violations of this section, the complaining witness in consultation with the state's attorney of the county should make

complaint before the appropriate magistrate of the county. Violations of municipal ordinances would, of course, have to be handled before the municipal court in the first instance.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely yours,

Allen I. Olson

Attorney General