

OPINION
76-63

August 25, 1976 (OPINION)

The Honorable Layton Freborg
State Representative
Underwood, North Dakota 58576

Dear Representative Freborg:

This is in response to your letter of August 7, 1976, wherein you make inquiry of this office relative to composition and powers of a county planning commission as authorized by Section 11-33-04, North Dakota Century Code. You submit the following questions for our response:

"Because of my concern for the people of McLean County and because I believe that the intent of the Legislature was that all decisions made at the County level under Chapter 11-33 be made by elected officials, I am respectfully requesting an official opinion from your office on the following issues:

- I. Can a County Commissioner be appointed to the County Planning Commission as a Member at Large?
- I. Does a County Planning Commission have the authority to:
 1. Approve or deny applications and permits if the Board of Bounty (sic) Commissioners has not retained that right?
 2. Hire a full time land use administrator who is directly responsible to them?
 3. Establish and administer rules and procedures for conducting the zoning affairs of said County?
 4. Conduct hearings on conditional uses and set conditions for certain uses?
 5. Issue certificates of Zoning compliance?
 6. Issue temporary permits?
 7. Hold hearings for any or all of the five purposes in Chapter 11-33-03 even if they only make recommendations to the County Commissioners?"

With initial regard to your first question, as to whether a county commissioner may be appointed to the county planning commission as a member at large, we would note the provisions of Section 11-33-04, of the North Dakota Century Code, setting forth the composition of the board, providing as follows:

- 11-33-04. COUNTY PLANNING COMMISSIONS AUTHORIZED - MEMBERSHIP.
- The board of county commissioners of any county desiring to

avail itself of the powers conferred by this chapter, shall establish, by resolution, a county planning commission to recommend the boundaries of the various county zoning districts and appropriate regulations and restrictions to be established therein. Membership of such commission shall be composed of nine members, two of whom shall be appointed from the board of county commissioners, and two from the governing body of the city designated as the county seat of the county to serve for their respective terms of elective office. The remaining five members shall be appointed from the county at large. When appointments to said commission are first made, three members-at-large shall be appointed for a two-year term and two members-at-large for a four-year term, after which all subsequent appointments for members-at-large shall be for a four-year term. Appointments to fill vacancies shall be for the unexpired portion of the term. All appointments to the county planning commission shall be made by the board of county commissioners. (Emphasis supplied.)

It is to be noted that the statute first limits the membership to nine members, specifying particularly certain representatives to membership, i.e., two from the board of county commissioners, and two from the governing body of the city designated as the county seat of the county. While it may be perhaps argued that such specification is not exclusive, it appears clear that in so specifying, a balance was created in the representation of these governing boards affected by the determination of the planning commission. For this reason it is our opinion that the remaining five members of the commission are to be appointed from the general public, other than those persons who are serving upon the boards which have specific representation authorized. The result of this conclusion preserves the balance of representation specified by the statute.

With regard to your second question, as to whether or not the county planning commission has certain authority, we would note that the provisions governing the duties and purposes of such commission are basically set forth in Sections 11-33-05, 11-33-06, 11-33-07 and 11-33-08 of the North Dakota Century Code, copies of which are enclosed. These statutes provide essentially that the commission shall organize its membership and hold meetings, make investigations, prepare a plan or resolution to be submitted to the board of county commissioners, and to give notice and hold hearings upon the proposed resolution. Actual adoption of the resolution appears to be left exclusively with the board of county commissioners (Section 11-33-09, N.D.C.C.); amendment or repeal of same appears to be left exclusively with the board of county commissioners (Section 11-33-09); hearings of specific grievances or petitions appears to be left exclusively with the board of county commissioners (Section 11-33-10); and, enforcement, adjustment of enforcement and regulations of nonconforming uses appear to be left exclusively with the board of county commissioners (Sections 11-33-11, 11-33-14, 11-33-16, N.D.C.C.). We would also note that Section 11-33-18 of the North Dakota Century Code makes specific provisions for the board of county commissioners to provide for the issuance of permits.

Accordingly, it would appear that the exercise of these powers and acts which are the subject of your letter of inquiry, which you have

designated as items 1 through 7, are all powers which are by statute granted to the board of county commissioners rather than to the county planning commission. We do not believe that creation of such a commission authorizes a delegation of authority which is statutorily granted to the board of county commissioners, particularly in absence of specific provision therefor permitting such delegation of authority.

In conclusion, and in direct response to your inquiry, we are of the opinion that since the statute provides for specific representation by the board of county commissioners and other certain governmental officers on the planning commission, that such representations are exclusive and that the remaining five members are to be selected from the general public as members at large.

We are further of the opinion that the county planning commission has only the authority prescribed by statute and that the board of county commissioners may not delegate its statutory duties and authority to the county planning commission in absence of statutory provision therefor.

We trust that the foregoing observations, comments and expressions will adequately set forth the thinking of this office upon the questions presented by your letter of inquiry.

Sincerely,

ALLEN I. OLSON

Attorney General