

**OPINION  
77-21**

February 4, 1977 (OPINION)

Mr. Theodore Kessel, Jr.  
City Attorney  
LaMoure, ND 58458

Dear Mr. Kessel:

This is in reply to your letter of February 2, 1977, wherein you state the following facts and questions:

"I am the city attorney of LaMoure, North Dakota. The City has commenced zoning and planning procedures pursuant to Chapters 40-47 and 40-48 of the North Dakota Century Code. By Ordinance adopted June 7, 1976 the Council extended its zoning and planning authority over unincorporated territory within one-half (1/2) mile of its corporate limits pursuant to 40-47-01.1 (LaMoure's population is less than 1,000 according to the last census) and provided that one (1) person residing in the one-half (1/2) mile unincorporated territory shall serve on the Zoning-Planning Commission pursuant to 40-47-06. (Copy of Ordinance attached). Thereafter a person residing in that one-half (1/2) mile area was appointed to the Zoning-Planning Commission by the Board of County Commissioners. No hearing was held on the issue of extending the zoning authority to the one-half (1/2) mile area outside the corporate limits other than two (2) readings and adoption of the Ordinance. The Ordinance was not published. Further due to location of the City of LaMoure, land in four (4) townships will come under the City's zoning and planning authority.

I have two (2) questions upon which there is some doubt:

1. May the City of LaMoure adopt an Ordinance to extend the application of its Zoning and Planning Regulations to unincorporated territory within one-half (1/2) mile of its corporate limits, without the need for a Notice Of Hearing and hearing on that issue?

I am of the opinion that no hearing need be held until a hearing is held pursuant to 40-47-04 relating to regulations, restrictions and district boundaries, which would be held at a later date.

2. Are each of the four (4) townships entitled to have one (1) person residing within the one-half (1/2) mile area appointed to the Zoning-Planning Commission by the County Commissioners?

I am of the opinion that the answer is in the negative in view of 40-47-06 wherein it is provided in part:

' . . . the Zoning Commission shall include at least one (1) person residing outside of the corporate limits of a City having a population of less than 5,000. . . .'

Section 40-47-01.1 of the N.D.C.C., as amended, provides in part:

"Based upon the population of the city as determined by the last official regular or special federal census or, in case of a city incorporated subsequent to such census, a census taken in accordance with chapter 40-02, the governing body of a city may, by ordinance, extend the application of city's zoning regulations:

1. To unincorporated territory located within one-half mile of its limits in any direction if it is a city having a population of less than five thousand. . . ."

Section 40-47-04 of the N.D.C.C., as amended, provides:

"DETERMINING AND ENFORCING REGULATIONS - PUBLIC HEARING AND NOTICE THEREOF. The governing body of a city which shall use zoning regulations shall provide for the manner in which the regulations and restrictions shall be established, enforced, or supplemented, and for the manner in which the boundaries of the districts shall be established and from time to time changed. No regulation, restriction or boundary shall become effective until after a public hearing thereon at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days' notice of the time and place of such hearing shall be published in the official newspaper of the city and such notice shall contain a description of any property involved in any zoning change, by street address if streets have been platted or designated in the area affected."  
(Emphasis ours)

It appears to us that the term "boundaries of the districts" as used in the above quoted statute must necessarily refer to section 40-47-02 of the N.D.C.C. which provides:

"DIVISION OF CITY INTO DISTRICTS TO CARRY OUT REGULATIONS. The governing body may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this chapter, and may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land within such districts. All regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts."

Thus we believe the requirement in section 40-47-04 of a public hearing before the "boundaries of the districts" can be established or changed refers to section 40-47-02 and not to the boundaries resulting for the exercise of the city's authority under section 40-47-01.1 of the N.D.C.C.

There is no general requirement of a notice of public hearing and hearing on the adoption of ordinances by the city. We further note that section 40-47-04 of the N.D.C.C. was last amended in 1971. See Ch. 417, 1971 Session laws. Section 40-47-01.1 was not enacted until 1975. See chapter 385, section 2, 1975 Session Laws. Therefore it

would be difficult to conclude that section 40-47-04 was meant to apply to section 40-47-01.1 of the N.D.C.C.

While we conclude that no Notice of Hearing and hearing on the issue of extending the authority of the city pursuant to section 40-47-01.1 is necessary, it would appear that the city should contact the township or county which has exercised zoning authority in the area to inform them of the city action and also that the persons affected by the action of the city be given some notice that they are subject to the city zoning authority even though not residing within the city limits. In this respect, we note that the ordinance would not need to be published since it does not contain any penalty, fine, imprisonment or forfeiture provisions. See section 40-11-06. However we do believe it would be difficult to enforce any regulation against a person who lived within the one-half mile area but not within the city limits and who had no notice of the action of the city in extending its zoning authority. It appears from the statements in your letter that the city of LaMoure has not yet adopted zoning regulations and that notice will be given when such regulations are adopted. However, had the city already adopted zoning regulations and only intended to make those regulations applicable within the one-half mile area, it would appear there would be no notice and we are concerned with that aspect of the matter.

With respect to your second question, section 40-47-06 of the N.D.C.C., as amended, provides in part:

"The governing body of a city desiring to avail itself of the powers conferred by this chapter shall appoint a commission, to be known as the zoning commission, to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. In addition to the members appointed by the city, the zoning commission shall include at least one person residing outside of the corporate limits of a city having a population of less than five thousand . . . if zoning authority is exercised pursuant to section 40-47-01.1. Such persons shall be appointed by the board or boards of county commissioners of the county or counties within which such zoning authority is to be exercised and shall reside within the territorial limits of the zoning regulation authority exercised by the city, if such persons are available and will serve on the zoning commission. \* \* \* \*"

In cities with five thousand or less population, the statute requires at least one member from the area within which such zoning authority is to be exercised and who resides within such territory. The city may provide for more members but must provide for one. There is no requirement that each of the townships involved are entitled to have one person residing within the area appointed to the zoning commission, although the city could so provide. There is, in fact, no mention of the townships whatsoever since the member from the area is to be appointed by the county commissioners.

I trust this will adequately set forth our position on the questions presented.

Sincerely,

ALLEN I. OLSON

Attorney General