

Date Issued: February 9, 1981 (AGO 81-12)

Requested by: Ben Meier, Secretary of State

- QUESTION PRESENTED -

Whether a corporation is bound by the number of directors stated in the original articles of incorporation when no provision is set forth in the articles of incorporation for the regulation of the internal affairs of the corporation.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a corporation is not bound by the number of directors stated in the original articles of incorporation unless the corporation has failed to adopt a bylaw that fixes the number of directors and which is not inconsistent with the law or the articles of incorporation. The fact that bylaws will be adopted to regulate the internal affairs of the corporation need not be set forth in the original articles of incorporation.

- ANALYSIS -

Section 10-19-37 of the North Dakota Century Code (N.D.C.C.) states, in part, as follows:

10-19-37. NUMBER AND ELECTION OF DIRECTORS. The number of directors of a corporation shall be not less than three nor more than fifteen. Subject to such limitation, the number of directors shall be fixed by the bylaws, except as to the number constituting the initial board of directors, which number shall be fixed by the articles of incorporation. The number of directors may be increased or decreased from time to time by amendment to the bylaws, but no decrease shall have the effect of shortening the term of any incumbent director. In the absence of a bylaw fixing the number of directors, the number shall be the same as that stated in the articles of incorporation. . . . (Emphasis supplied).

Accordingly, the corporation can adopt bylaws which it may amend from time to time setting the number of directors at not less than three nor more than fifteen. If they have not adopted a bylaw setting forth the number of directors, then the number of directors of the corporation shall equal the number of directors set forth in the original articles of incorporation.

Section 10-19-53(9), N.D.C.C., states that the articles of incorporation shall set forth "Any provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including any provision which under chapters 10-19 through 10-23 is required or permitted to be set forth in the bylaws." (Emphasis supplied.) This provision refers to any extraordinary or particular provisions for the regulation of the internal affairs of the corporation. Section 10-19-25, N.D.C.C., provides that the initial bylaws of the corporation shall be adopted by its

board of directors. That same section goes on to note that the bylaws "may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation." This clearly indicates that the bylaws are to be consistent with any special provisions set forth in the articles of incorporation as provided for under section 10-19-53(9), N.D.C.C.

Section 10-19-57, N.D.C.C., provides that after the issuance of a certificate of incorporation the board of directors named in the articles of incorporation shall meet "for the purpose of adopting bylaws." Clearly if the bylaws are to be adopted at that point, they ought not to be included as part of the original articles of incorporation. All that is required in the original articles of incorporation is the existence of any special provision for the regulation of the internal affairs of the corporation that the incorporators elect to set forth in the articles of incorporation. These special provisions may or may not relate to the number of directors of the corporation as determined by the incorporators. Since the bylaws are clearly to be adopted by the initial board of directors at their first meeting pursuant to sections 10-19-25 and 10-19-57, N.D.C.C., the original articles of incorporation need not set forth the fact that bylaws will be adopted. The fact that bylaws shall be adopted is set forth by law.

Since there is no provision in the North Dakota Century Code for the filing of the bylaws with your office, your only concern must be that the initial directors set forth in the articles of incorporation be not less than three nor more than fifteen. The fact that the bylaws subsequently adopted may provide for a different number of directors than set forth in the original articles of incorporation has no effect upon the performance of your duties. That is a matter solely left to the concern of the stockholders of the particular corporation.

-EFFECT-

This opinion is issued pursuant to section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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