ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

The Advisory Commission on Intergovernmental Relations occupies a unique status among committees with legislative membership. The commission differs from usual Legislative Council interim committees in its membership, its permanent status, and its statutory authority to determine its own study priorities.

The powers and duties of the commission are provided in North Dakota Century Code (NDCC) Section 54-35.2-02. Under this section, the commission is free to establish its own study agenda and to accept suggestions from groups or individuals for study.

In conjunction with NDCC Section 54-35.2-02(4), Section 54-40.3-03 provides that a political subdivision entering a joint powers agreement may file a copy of the agreement and the explanatory material with the commission to assist other political subdivisions in exploring cooperative arrangements.

The Legislative Council assigned to the commission the study provided by House Bill No. 1321 (2007) relating to a study of the extraterritorial zoning authority of cities and the impact of that authority on other political subdivisions. In addition, the Legislative Council delegated to the commission the responsibility to receive a report from the North Dakota Association of Counties before April 1 of each even-numbered year regarding how each county has used the county's document preservation fund during the preceding two fiscal years.

Under NDCC Section 54-35.2-01(1), the commission consists of 12 members:

- The Legislative Council appoints four members of the Legislative Assembly as members.
- The North Dakota League of Cities Executive Committee appoints two members.
- The North Dakota Association of Counties Executive Committee appoints two members.
- The North Dakota Township Officers Association Executive Board of Directors appoints one member.
- The North Dakota Recreation and Park Association Executive Board appoints one member.
- The North Dakota School Boards Association Board of Directors appoints one member.
- The Governor or the Governor's designee is a member.

The Legislative Council designates the chairman of the commission. All members of the commission serve a term of two years.

Commission members were Representatives Lee Kaldor (Chairman) and Dwight Wrangham; Senators Arden C. Anderson and Dwight Cook; North Dakota League of Cities representatives Linda Coates, who was replaced by Jim Gilmour and Greg Sund; North Dakota Association of Counties representatives Ron Krebsbach and Rodney Ness; North Dakota Township Officers Association representative Ken Yantes; North Dakota Recreation and Park Association representative Randy Bina; North Dakota School Boards Association representative Bev Nielson; and Governor's designee Brian D. Bitner.

The commission submitted this report to the Legislative Council at the biennial meeting of the Council in November 2008. The Council accepted the report for submission to the 61st Legislative Assembly.

2007-08 INTERIM AREAS OF STUDY

In addition to the study of the extraterritorial zoning authority of cities, the commission focused on six areas of interest.

1. Zoning of feedlot operations.
2. Increasing from four-tenths to five-tenths of one cent the amount of sales tax that is deposited in the state aid distribution fund.
3. Funding for rural township and county roads and bridges.
4. Exempting charitable property from taxation.
5. Replacing references to mills in the North Dakota Century Code with dollar amounts.
6. Providing state's attorney services in counties without a resident state's attorney.

EXTRATERRITORIAL ZONING AUTHORITY STUDY

Section 4 of House Bill No. 1321 (2007) directed the study of the extraterritorial zoning authority of cities and the impact of that authority on other political subdivisions. House Bill No. 1321, as introduced, would have reduced the extraterritorial zoning authority of a city to one-half mile for a city with a population of fewer than 25,000 and one mile for a city with a population of 25,000 or more. As enacted, the bill reduced the extraterritorial zoning authority of cities to:

1. One-half mile for a city with a population of fewer than 5,000.
2. One mile for a city with a population between 5,000 and 24,999.
3. Two miles if the city has a population of 25,000 or more.

This reduction was tempered by grandfathering any extraterritorial zoning regulation in effect before May 1, 2007, and sunsetting the reduction on July 31, 2009. In addition, the reductions in extraterritorial zoning authority did not apply if the extension is approved by at least five members of a six-member committee made up of three members appointed by the governing body of the city and three members appointed jointly by the governing bodies of any political subdivision that is exercising zoning authority within the territory to be extraterritorially zoned. The legislative history reveals that the study was added to the bill so that the issue of how far the extraterritorial zoning authority should reach and the procedure for applying extraterritorial zoning authority could be addressed while there is a moratorium on the extension of extraterritorial zoning authority.

There are four cities in North Dakota with a population of 25,000 or more--Bismarck, Fargo, Grand Forks, and Minot. Only Minot has not expanded its extraterritorial zoning authority to four miles. There are eight cities in North Dakota with a population between 5,000 and 24,999--Devils Lake, Dickinson, Jamestown, Mandan, Valley City, Wahpeton, West Fargo, and Williston. There are 345 cities in North Dakota with a population of fewer than 5,000.

The impetus for the moratorium and the study appears to come from the use of extraterritorial zoning authority by Grand Forks and Bismarck. The main concern of the owners of property over which the extraterritorial zoning jurisdiction was exercised in these instances was the lack of meaningful representation in the decision to exercise the jurisdiction.

History of Extraterritorial Zoning Authority

Extraterritorial zoning and subdivision authority was created by Senate Bill No. 2395 (1975). In that bill the application of a city's zoning regulations extended to:

1. Unincorporated territory located within one-half mile of a city having a population of fewer than 5,000.
2. Unincorporated territory within one mile of a city having a population between 5,000 and 24,999.
3. Unincorporated territory located within two miles of a city having a population of 25,000 or more.

Where there were two or more noncontiguous cities having boundaries at a distance where the boundaries would overlap, each city was authorized to control the zoning of the land on that city's side of the line established in proportion to the authority each city has to zone land outside its limits or pursuant to mutual agreement. The bill also provided for zoning commissions and planning commissions in cities and for extraterritorial subdivision regulation similar to the extraterritorial zoning authority.

In 1978 the North Dakota Supreme Court issued its only major decision relating to extraterritorial zoning authority. The case interpreted what the term "unincorporated territory" meant in the 1975 law. The court interpreted "unincorporated territory" to mean any territory not located within the boundaries of another incorporated city. The court rejected Apple Creek Township's interpretation that "unincorporated territory" means territory that is not part of a corporate public body. This case is used as authority for the proposition that a city may exercise exclusive zoning control over all territory within the extraterritorial zoning authority in spite of previous exercise of zoning authority by other political subdivisions.

Senate Bill No. 2084 (1981) addressed the issue of the zoning authority being bounded by a radial arc of a fixed distance from a city's corporate limits which inevitably resulted in single tracts of land being subject to zoning jurisdiction of more than one governmental entity. The bill applied a city's extraterritorial zoning authority to each quarter-quarter section of unincorporated territory, the majority of which is located within a specified distance of the city's corporate limits.

Senate Bill No. 2384 (1997) doubled the distance of extraterritorial zoning authority and extraterritorial subdivision regulation and provided for a procedure to solve disputes for overlapping areas of extraterritorial zoning or subdivision regulation. The legislative history reveals that this change was done to address the conflicts that had arisen between cities that are extremely close geographically, e.g., Fargo and West Fargo.

The bill authorized the governing bodies of cities that have boundaries at a distance where there is an overlap of extraterritorial zoning or subdivision regulation authority to enter an agreement regarding the extraterritorial zoning or subdivision authority of each city. A city exercising extraterritorial zoning authority must hold a zoning transition meeting if the area to be zoned is currently zoned. The purpose of the zoning transition meeting is to review the existing zoning rules and plan for an orderly transition.

Under the bill, if two or more cities have boundaries where there is an overlap of extraterritorial zoning authority, the governing bodies of the cities may enter an agreement regarding extraterritorial zoning. If a dispute arises concerning extraterritorial zoning which cannot be resolved, the dispute must be submitted to a committee for mediation made up of one member appointed by the Governor, one member of the governing body of each city, and one member of the planning commission of each city who resides outside the city limits. The Governor's appointee presides and acts as a mediator. If the mediation committee is unable to resolve the dispute, the cities may petition the Office of Administrative Hearings to appoint an administrative law judge. At the hearing before the administrative law judge, the Governor's appointee provides information to the administrative law judge on the dispute. Any resident or property owner or representative of the resident or property owner may appear at the hearing and present evidence. The decision of the administrative law judge is binding upon the cities involved in the dispute. The administrative law judge considers the following factors in making the decision:

1. The proportional extraterritorial zoning authority of the cities involved;
2. The proximity of the land in dispute to the corporate city limits of each city;
3. The proximity of the land in dispute to developed property in each city;
4. Whether any of the cities has already exercised extraterritorial zoning authority over the disputed land;
5. Whether natural boundaries are present;
6. The growth patterns of the cities involved; and
7. Other factors.

Senate Bill No. 2290 (1999) required a city exercising its extraterritorial zoning authority to hold a zoning transition meeting if the territory to be extraterritorially zoned is currently zoned. The bill required the city zoning or planning commission to provide at least 14 days' notice of the meeting to the zoning board or boards of all political subdivisions losing their partial zoning authority.

Since 1981 there have been a number of Attorney General's opinions interpreting NDCC Section 40-47-01.1. These opinions concluded a city's extraterritorial zoning authority preempts township zoning occurring within that same extraterritorial area; only a city may zone in the area affected by extraterritorial zoning authority, even if the city has not adopted zoning ordinances; the authority to license the retail sale of alcoholic beverages is granted to the county for all parts of the county outside the corporate limits of a city notwithstanding a city's extraterritorial police power jurisdiction granted by Section 40-06-01; and a city may apply and enforce its fire prevention code in unincorporated territory within the city's extraterritorial zoning authority to the extent the city has adopted the fire prevention code under its zoning authority and extended the application of the zoning regulations by ordinance.

Other Laws Relating to Extraterritorial Zoning Authority

Zoning in General

Besides dealing with extraterritorial zoning authority, NDCC Chapter 40-47 relates to zoning in general. In addition to the provisions specifically addressed, the chapter contains provisions for creating, amending, enforcement, and repeals of zoning regulations.

If a city has not exercised jurisdiction in areas surrounding the city, the county is the zoning authority unless the township has exercised its zoning authority. Under NDCC Section 40-47-01, the city may regulate the size of buildings, the size of lots and yards, the density of population, and the location of buildings based on the purpose of the buildings. This broad zoning regulation is limited by the provisions in state law relating to the State Building Code. In particular, Section 54-21.3-03 requires a governing body of the city, township, or county that elects to administer and enforce a building code to enforce the State Building Code. However, the State Building Code may be amended by these political subdivisions to conform to local needs.

Under NDCC Section 40-47-02, the city may divide the city into districts for purposes of zoning. All regulations must be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from another. Section 40-47-03 requires that regulations adopted for zoning ordinances must be part of a comprehensive plan and must be designed to:

1. Lessen congestion in the streets.
2. Provide for emergency management.
3. Promote health and the general welfare.
4. Provide adequate light and air.
5. Prevent the overcrowding of land.
6. Avoid undue concentration of population.
7. Facilitate adequate provisions of transportation, water, sewage, schools, parks, and other public requirements.

Under NDCC Section 40-47-06, the governing body of the city may give its zoning authority to a zoning commission. If extraterritorial zoning authority is exercised, the zoning commission must be made up of at least one person residing outside the corporate limits of a city having a population of fewer than 5,000, two persons residing outside the corporate limits of a city having a population between 5,000 and 24,999, or three persons residing outside the corporate limits of a city having a population of 25,000 or more. The persons to be on the zoning commission from outside the corporate limits of the city are appointed by the board of county commissioners within the area in which the zoning authority is exercised and must reside within the area in which zoning regulation authority is exercised by the city.

Under NDCC Section 40-47-07, the city may provide for a board of adjustment to decide appeals from any determination made by an administrative official charged with enforcement of any ordinance. Chapter 40-47 provides procedures for the appeal to, the hearing by, and the effect of a determination by the board of adjustment. Every decision of the board of adjustment is subject to review by the governing body of the city and the decision of the governing body of the city is appealable to the district court.

Under NDCC Section 40-47-13, if regulations are made under Chapter 40-47 which impose higher standards than are required by any other statute or local ordinance, the regulations made under the authority in Chapter 40-47 govern and if any other statute or local ordinance imposes higher standards than are required by Chapter 40-47, the provisions of that statute or local ordinance govern.

Extraterritorial Subdivision Regulation

North Dakota Century Code Chapter 40-48 provides for any city to establish an official master plan of the municipality through a planning commission.

Similar to extraterritorial zoning regulation is the extraterritorial subdivision regulation provided under Section 40-48-18. A city may extend regulation of subdivisions to the same extent it may extend zoning authority. The same dispute mechanism for overlapping authority for extraterritorial zoning jurisdiction applies to extraterritorial subdivision regulation. Under Section 40-48-18.1, the planning commission or governing body may not require as a condition of approval of a request for approval of a plat, the execution of an agreement by the owner of the property stating that the owner will not oppose the annexation of the property by the municipality. There is an exception to this prohibition for property located within one-quarter mile of the municipality's city limits or if the agreement contains a provision requiring the municipality to provide municipal services before annexation.

Regional Planning and Zoning Commissions

Under NDCC Section 11-35-01, counties, cities, and organized townships may cooperate to form a regional planning and zoning commission. The regional commission may exercise any of the powers that are granted to the member counties, cities, or organized townships in matters of planning and zoning.

Annexation

A concept close to extraterritorial zoning authority is the annexation and exclusion of territory by cities under NDCC Chapter 40-51.2. As stated in Section 40-51.2-02, the purpose for an annexation is to:

1. Encourage natural and well-ordered development of municipalities.
2. Extend municipal government to areas that are part of the whole community.
3. Simplify government structure in urban areas.
4. Organize the interrelationship and inter-dependence between a city and the areas contiguous or adjacent to the city.

A city may annex property in any territory contiguous or adjacent to the city upon a written petition signed by not less than three-fourths of the qualified electors or by the owners of not less than three-fourths of the assessed value of property in the territory. However, a city may not annex land located within the extraterritorial zoning or subdivision regulation authority of another city unless the city has written consent from the other city or the annexation is ordered by an administrative law judge. If the land to be annexed lies within the extraterritorial zoning or subdivision regulation of another city and written consent to annex has not been received from the other city, the annexing city may submit the matter to a committee for mediation and to an administrative law judge if mediation does not resolve the matter.

North Dakota Century Code Section 40-51.2-07 allows the city to adopt a resolution to annex a contiguous or adjacent territory. This section requires the city to provide notice, especially to owners of real property who may file written protests. In the absence of protests filed by the owners of more than one-fourth of the territory proposed to be annexed, the territory in the resolution becomes part of the city. The annexation is effective for purposes of general taxation after the next January 31. Agricultural lands must remain agricultural lands until those lands are put to another use. If the owners of one-fourth or more of the territory proposed to be annexed protest, the city may submit the matter to a committee for mediation.

The mediation committee is made up of a member appointed by the Governor, representatives of the petitioners or protesters, the cities, counties, and townships involved, and any other parties. If the city is not satisfied with the mediation, the city may petition for a hearing by an administrative law judge. Under NDCC Section 40-51.2-12, at the hearing, any state or local governmental subdivision or planning or zoning commission or any resident of or person owning property proposed to be annexed may be heard at the hearing. Under Section 40-51.2-13, the administrative law judge must consider the following factors in coming to a decision:

1. The present uses and planned future uses or development of the area;
2. Whether the area sought to be annexed is part of the community of the annexing city;
3. The educational, recreational, civic, social, religious, industrial, commercial, or city facilities and services made available by or in the annexing city to any resident, business, industry, or employee of the business or industry located in the area;
4. Whether any governmental services or facilities of the annexing city are or can be made available to the area sought to be annexed;
5. The economic, physical, and social relationship of the inhabitants, businesses, or industries in the area sought to be annexed and the effect on other political subdivisions;
6. The economic impact of the proposed annexation on the property owners in the area of the proposed annexation and the economic impact if the area were not annexed;
7. Whether the area proposed to be annexed is within the extraterritorial zoning or subdivision regulation authority of another city; and
8. Any other factor.

Based upon those factors, the administrative law judge may order an annexation if the judge finds:

1. The area proposed to be annexed is now, or is about to become, urban in character;
2. City government in the area proposed to be annexed is required to protect public health, safety, and welfare; or
3. The annexation would be in the best interests of the area.

The decision of the administrative law judge is reviewable by a court under an abuse of discretion standard.

Testimony and Discussion

The commission received testimony concerning the use of extraterritorial zoning around the state, and the greatest amount of testimony concerned the three largest cities--Bismarck, Fargo, and Grand Forks. All three have extended extraterritorial zoning authority from two miles to four miles. Some issues related to all three cities and some issues were particular to each city. In Bismarck there was particular concern with the enforcement of zoning by the city, the effects of planning on property value, the effects on water districts, and the loss of permit fee income by the township. In Grand Forks there were issues related to the siting of a landfill and a density restriction. In Fargo there was particular concern with annexation and conflicts over territory with Horace.

The commission received testimony that extraterritorial zoning authority in other cities was working well. For example, West Fargo has extended its extraterritorial zoning authority to two miles. It was noted that there would be problems if the jurisdiction were for one mile; e.g., a developer wanted to place a 600-lot subdivision within 1.5 miles of the city and wanted to use septic systems. The subdivision would now be part of West Fargo, and the residents in the subdivision would have to pay three times more to be on city sewer and water than if there would not have been extraterritorial zoning and septic systems had been used. It was noted that coordination among city, township, and county officials works well and there is cooperation around West Fargo.

Representatives of the three largest cities exercising extraterritorial zoning testified concerning the need for planning and zoning for growth. It was pointed out that one of the primary considerations in planning should be to minimize the tax burden on current and future citizens. As a city grows, the land near the city becomes attractive to developers. Developers need to know where future infrastructure will be placed so that development may occur in an orderly manner. Landowners save money by developers building to connect with future infrastructure--water, sewer, and roads. It was noted that cities have the resources and expertise to properly plan and enforce zoning regulations--planning and zoning has to take in the large picture of water, storm water, livable spaces, services, open spaces, and transportation. It was noted a city plans for growth because the majority of citizens want good jobs, economic development, a place for businesses, and nice houses.

Residents in extraterritorial zoning areas, organized townships, and counties expressed concerns with the exercise of extraterritorial zoning authority. The main concern was that residents living in the extraterritorial zoning area of a city were unable to vote for the individuals in the city making decisions that concerned the residents' property. Testimony pointed out that the extraterritorial zoning power can be exercised at the discretion of the city and without recourse by those residents affected by the decision. It was noted that zoning is a power that is seldom questioned by the courts, and the only recourse against poor zoning is the ballot box. Before there was extraterritorial zoning, the organized township or the county acting as the board of township supervisors was the government with jurisdiction and an individual in that area could vote for the board of township supervisors or the board of county commissioners.

Testimony emphasized that current representation on the city planning and zoning board and provision for a transition meeting are not adequate and that cities regularly dismiss the concerns and recommendations of the previous jurisdiction in extending extraterritorial zoning jurisdiction.

Testimony noted that in addition to the city having the discretionary authority to exercise extraterritorial zoning jurisdiction, a city may extend zoning past where it is needed due to the arbitrary distance in law for extraterritorial zoning, instead of limiting the distance to the projected growth. Although the growth of a city can be predicted with accuracy, planning and zoning resources vary widely around the state and some counties and cities do not have professional planning staff. Although there may not be professional staff to make the projection, commission members discussed whether the governing body of a city could make a reasonable estimation.

When the Legislative Assembly allowed the increase from two miles to four miles for extraterritorial zoning in 1997, testimony indicated the increase was meant particularly for Fargo--the fastest growing city in the state. The commission was informed, however, that Fargo does not extend extraterritorial zoning to the maximum and matches the extension to growth potential. Fargo has the limited ability to grow, however, because of the Red River on the east, West Fargo on the west, and Horace to the south.

The commission was informed that a two-mile extraterritorial zoning authority would not be sufficient for Fargo. Testimony indicated that the population projection for Fargo in 50 years is 165,000 to 240,000. If this increase comes at 15,000 people per decade, it will require five sections of land per decade. In Fargo 10 years ago there were areas not in the extraterritorial zoning area that are now fully built. In Fargo it takes about 10 years to annex after adding an area through extraterritorial zoning authority. If the distance were reduced to two miles, then it would take less than 10 years before annexation. For comparison, Grand Forks has extended the extraterritorial zoning area to include areas in which it would take 115 years to develop. Bismarck has taken 50 years to grow three miles south and north and two miles east, but Bismarck has a four-mile extraterritorial area. Mandan has extended its authority to a point where the city will be after 550 years of growth.

The commission received testimony of the effect of extraterritorial zoning authority on landowners. It was noted that the law provides protection to property owners. City zoning protects landowners by prohibiting other landowners from doing things on their property that negatively affects neighbors. It was noted that city enforcement in some areas may be stricter than previous township enforcement. For example, Bismarck does not allow the use of former schoolbuses as calving shelters or the outdoor storage of parts vehicles, which rural landowners did previously.

Countervailing testimony indicated that city zoning adds cost to the landowner. In one instance, a landowner could not build a garage without the landowner having the property rezoned and having a new survey, subdivision plat, and storm water management plan.

The commission also received testimony planning alone can negatively impact landowners. In one instance, the future plan of a city planned for the landowner’s property to be used for industrial purposes. The effect was the landowner was "punished" for keeping the land agricultural instead of selling it for residential development before the city’s plan was developed. It was stated the decision of the city reduced the worth of the property by approximately 75 percent.

The commission received testimony on the effect of extraterritorial zoning authority on organized townships. It was stated that when Bismarck exercised its extraterritorial zoning authority over Apple Creek Township, the township lost approximately $71,000 in building permit fees. As a result, the township could not afford to pave roads. Commission members discussed whether building permit fees should be tied to the cost of the program rather than used as property tax relief.

The commission received testimony of the effect of extraterritorial zoning authority on rural water districts. The commission was informed that Bismarck stopped the rural water cooperative from providing water

because the city said it would provide the water that the city has not provided in 30 years. It was noted that in the Bismarck area, 20 percent of the revenue for the water district comes from within two miles of the city and 50 percent comes from within four miles of the city. Representatives of the water district testified the district cannot get financing for the area within Bismarck's extraterritorial zoning authority because lenders see that area as an area that potentially will be annexed.

The commission was informed of the effect of a density restriction in the extraterritorial area of Grand Forks on the rural water district. The density restriction limits the number of houses to four houses per 160 acres. It was noted that Grand Forks increased the minimum size of the lots when invoking extraterritorial zoning as opposed to making a maximum limit as is the case in most cities.

Testimony described how Grand Forks and the local water district agreed on a long-range plan, whereby the water district would provide water service just outside the extraterritorial zone. After that agreement was entered, Grand Forks limited development through density restrictions in the extraterritorial area and the water district could not recover the costs of the pipe. The water district had built over $500,000 in infrastructure improvements into the water service area.

The commission was informed of the effect of the extraterritorial zoning authority of the city of Grand Forks on the landfill siting process. Shortly after Grand Forks extended extraterritorial zoning authority from two miles to four miles, Grand Forks changed the zoning regulations in the extraterritorial area to authorize a landfill as a permitted use. When the city of Grand Forks authorized a landfill as a permitted use, a hearing was not needed to site a landfill. Grand Forks sited a landfill in the extraterritorial area in a township in which most of the citizens were against the siting of the landfill. The landfill is a regional facility for seven counties in North Dakota and Minnesota.

The commission was informed that Grand Forks needed a new landfill and could only site a landfill within the city's zoning jurisdiction. If the city did not site a new landfill, the city would have had to haul garbage to Gwinner at great cost. Within the city's zoning jurisdiction, there were very few places a landfill could be sited due to the airport, the amount of land needed, and water issues.

The commission received testimony that there should be legislation to allow people affected by a high-impact or high-pollution facility to have a hearing and for the decision to be made by a politically accountable board. Commission members discussed whether landfill siting should be a state decision because modern landfills serve a regional area larger than one political subdivision.

The commission received testimony that after zoning jurisdictions were expanded in 1997, Fargo and Horace entered an agreement on extraterritorial zoning jurisdiction which established the boundary. In 2006 Horace started a process to extend extraterritorial zoning jurisdiction beyond the boundary contrary to the agreement. In addition, Horace annexed land inside the boundary without the permission of the developer. Fargo became concerned that Horace would annex land that was within the extraterritorial zoning jurisdiction of Fargo. Two developers had acquired property for urban development and were concerned that Horace would try to annex property outside the boundary. The developers did not think Horace would be able to provide the proper infrastructure. It was noted that having land within the extraterritorial zoning authority of Fargo will increase the value of the property and Fargo will be the first city to be able to provide services. Fargo initiated annexation of the developers' property and strips of land to connect the properties along the border with Horace. These strip annexations were completed in 2006-07 and did not go into the extraterritorial zoning authority of Horace. The developers do not expect to develop the property for 20 years. The longest annexation was five miles from the existing city limits.

The commission received testimony in favor of limiting the extraterritorial zoning authority of cities. The most common limitation requested was to return the extraterritorial zoning authority to two miles for cities with four-mile jurisdiction. Because the boundary can always move as the city grows, it was argued that two miles was a long enough distance. Although the majority of testimony was in favor of limiting the extraterritorial zoning jurisdiction of cities, cities and some counties were in favor of the present extension, especially in areas in which there is rapid growth. It was argued that in these situations, the city is in the best position to understand and plan for the future needs of the city.

Testimony also favored limiting the extraterritorial zoning authority of cities by providing for the exercise of zoning authority by the board of county commissioners. It was noted the board of county commissioners is elected by and represents all the residents of the county and has access to professional staff. The commission was informed that Burleigh County uses Bismarck's city planning staff. The only difference is who has the final determination. Although in the Burleigh County, city of Bismarck case the same professional services would be used, and the residents in the extraterritorial area would be able to vote for the final decisionmaker--the board of county commissioners.

Testimony also suggested another limit--exercise of extraterritorial zoning jurisdiction by an organized township. It was argued that township government provides the best representation of the people in the township because it is the most local form of government for township residents.

The commission considered 12 bill drafts that would have limited extraterritorial zoning authority or activities within the extraterritorial zoning area. These bill drafts ranged from addressing a singular issue within extraterritorial zoning authority to the repeal of extraterritorial zoning authority.

Landfill Siting Hearing Bill Draft

The commission considered, but does not recommend, a bill draft that would have required a city zoning authority to hold a hearing on a particular landfill at a particular site. The bill draft addressed the situation

where a landfill is a permitted use, and hence, there is not a hearing.

Commission discussion noted that there is a hearing on the zoning change that allows for a landfill to be a permitted use. Even if there is a hearing, however, the hearing is by a body that is not voted for by the people most directly affected by the decision. It was suggested that a mandatory countywide election may be a more appropriate solution.

Density Restrictions Bill Draft

The commission considered, but does not recommend, a bill draft that would have prohibited density restrictions more stringent in the outside half of the extraterritorial zoning jurisdiction than in the inside half.

Commission discussion noted that the density restriction issue is a narrow issue that is addressed by other bill drafts that broadly address extraterritorial zoning authority. In addition, the bill draft prohibited more restrictive density requirements even if everyone agreed.

Board of County Commissioners Approval Bill Drafts

The commission received a proposal to strengthen the county role in extraterritorial zoning. Under the proposal, if a city wanted to change the extraterritorial zoning boundaries, the city would be required to submit an application to the county planning commission. After public notice, the county planning commission would have a hearing. The county planning commission would make a recommendation to the board of county commissioners. The board of county commissioners would have a hearing and accept, modify, or deny the planning commission's recommendation. The city would have to follow the decision of the county. A list of relevant factors was suggested to be considered by the board of county commissioners. These factors include:

- Present and projected population of subject area;
- Natural topography of the area;
- Present and projected transportation network;
- An analysis of whether necessary government services can best be provided through the proposed action or another type of boundary adjustment; and
- The degree of contiguity of boundaries of the subject area and adjacent units of government.

The commission considered, but does not recommend, a bill draft that would have required the board of county commissioners to hold a hearing on any regulation in the extraterritorial zoning authority area and approve or disapprove the regulation. Under the bill draft, the board of county commissioners could refer the matter first to the county planning commission for a recommendation.

The commission considered, but does not recommend, a second draft of the bill draft providing for the board of county commissioners to resolve zoning disputes in the extraterritorial zoning area. The major change in the second draft was to provide weight to a previous township determination. If there was a change from a previous township regulation, the board of county commissioners would need to find by a preponderance of evidence for the change desired by the city using the factors listed in the bill draft.

Opponents to the second draft testified that the bill draft created another level of zoning and did not provide recourse for a property owner when the city denies a property owner's request. In addition, there was testimony in favor of the township having zoning control rather than the board of county commissioners who are elected at large and underrepresent the rural areas in matters of extraterritorial zoning authority.

Commission discussion noted that the greatest concern with extraterritorial zoning was lack of the residents' right to vote and complicating zoning or creating more government to address that concern was needless.

Joint Jurisdiction - Dispute Resolution by Office of Administrative Hearings Bill Draft

The commission considered, but does not recommend, a bill draft that would have required a city to receive the approval of the governing body that previously had zoning jurisdiction before a change in zoning in an extraterritorial area. The bill draft would have allowed a governing body involved in the dispute to petition the Office of Administrative Hearings to appoint an administrative law judge to issue a binding determination relating to a disputed regulation.

Testimony in favor of the bill draft noted the bill draft returned the right to vote to all individuals in the extraterritorial zoning authority of a city.

Joint Jurisdiction - Outside Half Bill Draft

The commission considered, but does not recommend, a bill draft that would have provided for joint zoning regulation between a city and the previous jurisdiction with zoning authority in the outside half of the allowed area for extraterritorial zoning authority. The bill draft would have required any changes in that area to be approved by both governing bodies, otherwise the regulation in place at the time of the extension was deemed the regulation of the city. Under present law, the city has full jurisdiction in the outer half and under the bill draft there would need to be joint approval for any change in the outer half.

Testimony in favor of the bill draft expressed support for the concept of the initial regulation being the "default" regulation if agreement cannot be reached. The concern with extraterritorial zoning authority did not occur until 1997 when the distance was doubled. Because most of the testimony was directed toward issues with zoning in the expanded area, the bill draft was tailored to these concerns.

The commission noted that the bill draft required a property owner that wanted a change in zoning to have the approval of both boards and if either body rejected the change, there would not be a change. The commission also noted a concern that there was not a method for dispute resolution.

Testimony in opposition to the bill draft expressed the main concern that the bill draft did not return the right to

vote to the individuals living within the inside half of the extraterritorial zoning area.

Joint Jurisdiction - 10-Year Growth Plan - Dispute Resolution by Office of Administrative Hearings Bill Draft

The commission considered, but does not recommend, a bill draft that would have limited extraterritorial zoning jurisdiction to within a city's 10-year growth plan, required joint jurisdiction of the city and the governing body that exercised zoning or subdivision jurisdiction before the extension in the area of extraterritorial zoning, and provided for dispute resolution through the Office of Administrative Hearings to determine whether the proposed regulation is substantially related to the purpose of the regulation and does not unnecessarily burden affected persons. The bill draft had an application section that gave cities six months to phase back to the 10-year growth limit.

Testimony in opposition to the bill draft noted that growth projections are arbitrary and the standard used by the administrative law judge was improper. It was argued that there is no need for a city to expand unless the property owners want the city to expand. In addition, it was noted the bill draft required a landowner to go to two governing bodies to receive permission for a zoning change.

Commission discussion noted that many cities do not have a 10-year growth plan and requiring one provides for an unfunded mandate. As such, the bill draft provided a business opportunity for some contractors. However, commission discussion noted that a 10-year growth plan may be an appropriate factor for an administrative law judge. Other discussion noted that 10 years may not be long enough and a growth plan should be in the range of 20 years to 30 years.

Commission discussion noted that growth trends tailor the distance of extraterritorial zoning to the city. Growth trends would provide a more reasoned limit to extraterritorial zoning than an arbitrary distance for all cities of a particular class. Commission discussion also noted that distance of extraterritorial zoning jurisdiction does not matter if there is joint authority in the area.

The commission received testimony in favor of a city having zoning and subdivision authority in the city's 25-year growth area and for the board of county commissioners to approve or reject changes in the distance for that area.

Joint Jurisdiction - Outside Half - Dispute Resolution by Office of Administrative Hearings Bill Draft

The commission considered, but does not recommend, a bill draft that would have provided for joint jurisdiction between a city and the previous jurisdiction with zoning authority in the outside half of the area to be extraterritorially zoned and for any dispute to be resolved by the Office of Administrative Hearings. The standard for review by the Office of Administrative Hearings would have been whether the proposed regulation is substantially related to planning practices consistent with the city's comprehensive plan and does not unnecessarily limit appropriate land use by affected persons.

Testimony in opposition to the bill draft noted that by making the city's comprehensive plan the standard used by the administrative law judge, the comprehensive plan becomes legitimized. Presently, comprehensive plans are advisory.

Testimony in support of the bill draft favored the use of a comprehensive plan because a comprehensive plan is a public document.

The commission discussed whether a standard for review different from "substantially related" to a comprehensive plan should be used. The commission reviewed factors that could be used by an administrative law judge to resolve disputes in extraterritorial zoning authority regulation, including factors used by an administrative law judge in annexation disputes. Although there was concern that the more factors that were listed, the more legal problems that may arise, the commission determined a list of factors would be helpful in guiding the decision of the administrative law judge.

Commission discussion noted that the bill draft was considered a good compromise between no extraterritorial zoning authority and the present extraterritorial zoning authority especially considering if extraterritorial zoning authority is reduced there may be things that had been done that may be difficult to undo. However, commission discussion noted support for the concept of joint jurisdiction in the entire area, not just the outside half. It was noted that the issue concerning the right to vote was not addressed for the inside half. Commission discussion reiterated unwillingness to compromise on the issue of the right of citizens to vote for governing bodies that make decisions that concern them. Commission members noted that most of the testimony did not relate to concerns about the actual zoning but with the inability to vote.

Testimony in support of the bill draft noted that cities are unique in that they are the only political subdivision that may grow. Some counties have 10 cities and the county would be overburdened if it were the dispute resolution mechanism. Therefore, it was logical that the Office of Administrative Hearings be the decisionmaker. Although in support of the bill draft, there was some concern that the bill draft could make the system more difficult for the user. There also was support for one governing body taking care of zoning change requests from landowners. A landowner wishing to change zoning generally hires an attorney or engineer and increasing the entities involved and consequently the number of meetings to attend may increase the cost to the landowner. The commission was informed that although there may be two separate hearings for a landowner, these hearings would not have to be sequential but could be concurrent. The commission also discussed giving veto power to the township and having the city hold the hearing instead of having two hearings.

Joint Jurisdiction - Outside Half - 20-Year Growth Plan - District Court - Dispute Resolution Bill Draft

The commission discussed whether a bill draft could include all the elements in the bill drafts for which there was consensus. These concepts included joint jurisdiction and dispute resolution. In addition, there was support for including a list of statutory factors for an administrative law judge to base a decision. Commission discussion noted that if the factors for the administrative law judge are designed correctly, the law will adapt to each city. There also was consensus against creating extra layers of government. Generally, there was a support for linking extraterritorial zoning authority to a growth plan instead of an arbitrary mile limit and preference for political subdivisions involved to agree to the growth plan. There was contention as to whether the growth plan should be 10 years or up to 30 years but support for the proposition that joint jurisdiction made distance irrelevant. Commission discussion noted support for the board of county commissioners determining what growth is reasonable. There also was support for including townships in the decisionmaking process.

The commission received testimony from the Office of Administrative Hearings in favor of more factors on which an administrative law judge makes a decision relating to a dispute in an area of joint jurisdiction. The testimony noted concern for the funding mechanism for the administrative law judge. The Office of Administrative Hearings receives compensation by charging for its services. In addition, the commission was informed there should be a detailed procedure for appeal rights.

The commission discussed criteria the administrative law judge should use in making a determination, including the annexation criteria and factors. In addition, the commission suggested a number of factors, including whether the government in the area is willing to maintain the roads, whether zoning is compatible with adjacent land uses, whether the limit will lead to urban sprawl, and whether the city made a reasonable case for the growth plan. However, there was dissension over use of the term "urban sprawl" because it was not well-defined. The commission attempted to define urban sprawl as when development is expensive. Commission discussion noted the criteria of looking at the compatibility of land use with the city, township, and county plans and whether the land use would have a negative effect on the health and safety of the citizens. Commission discussion favored factors instead of the statutory annexation factors because annexation is for the very near term and extraterritorial zoning authority is for long-range planning.

The commission discussed the effect of dual hearings--one with the city and one with the previous jurisdiction with zoning authority--on the landowner. It was suggested that the city take the lead in the review and have a joint hearing of the township board and the planning commission, which would provide a recommendation to the city. If the planning commission recommends against the property owner, then the property owner would have to go to the board of township supervisors and the governing body of the city. In addition, the property owner would most likely go to both entities to follow through on the requested change. Discussion noted that it is not unreasonable for the property owner to go to both hearings and because these are important decisions, two hearings gives additional due process.

The commission considered, but does not recommend, a bill draft that would have limited the extraterritorial zoning authority of cities to a 20-year projected growth plan that was approved by the board of county commissioners. The district court was used as a dispute mechanism for the approval of a growth plan, instead of an administrative law judge, because of the idea that using the district court would quicken the process. The rationale was that only one issue would be before the district court--whether the growth plan reasonably projects growth.

The bill draft would have required joint jurisdiction with the previous entity with jurisdiction in the area of a 10-year growth plan to a 20-year growth plan with a dispute mechanism of an administrative law judge. A property owner would request zoning or subdivision decisions from the city unless the decision was to change zoning classification or for a conditional use permit, in which case, the owner would be able to request a change from the other jurisdiction, if the city denied the request. If the other jurisdiction rejected city's position, the city could petition the Office of Administrative Hearings to make a determination as to the dispute. The bill draft listed eight factors for the administrative law judge to consider in making determinations.

In practice the 20-year growth plan would be a 25-year plan with 1-year lines between 10 years and 15 years and between 20 years and 25 years. The plan would be updated on a yearly basis for a period of five years at which time the board of county commissioners could review the plan to determine if the assumptions used in the plan have become unreasonable due to significant changes in circumstances. For a major change in zoning, a property owner anywhere within the extraterritorial zoning jurisdiction, not just the outside half, would be provided a second chance with the previous entity with jurisdiction and an administrative law judge as a dispute mechanism for a major change in zoning.

The commission received testimony in opposition to the bill draft because of the use of terms that are confusing to planners. The bill draft used terms of art which have different meanings when used by planners. In addition, opponents pointed out the confusion that would have been caused by the multiple boundaries to be drawn as part of a growth plan which also would be burdensome to cities.

Repeal of Extraterritorial Zoning and Subdivision Regulation Authority Bill Draft

The commission considered, but does not recommend, a bill draft that would have repealed extraterritorial zoning and subdivision regulation by cities.

The commission received testimony in opposition to the bill draft because of the increased costs attributable to a repeal. There would be costs to individuals living in the former extraterritorial zoning area to transition from city water back to rural water if there was a repeal. It was argued that poor planning hinders economic development and cities are the best equipped to plan for growth around a city. Testimony indicated there would be additional costs for individuals when annexed into a city if there was no extraterritorial zoning because the individuals would pay for all improvements through special assessments instead of having some of these services paid citywide. In addition, there would be duplication of services which would be paid for when the area was annexed.

Commission discussion noted support for the bill draft because extraterritorial zoning authority is not essential. It was noted that the major reason for extraterritorial zoning authority was to plan for growth of cities and this reason should not disenfranchise voters.

The commission received testimony in favor of the bill draft from a few organized townships. However, concern was expressed over removing jurisdiction from the city and not replacing it with something else. The proposed solution was to have townships act as a group so there was uniformity in regulation around a city.

Commission members discussed whether any bill recommended by the commission should focus on improving existing law rather than starting over in the area of extraterritorial zoning authority. It was noted that extraterritorial zoning authority has worked well in most cases because there has been cooperation between the township and the city.

Extraterritorial Zoning Authority of One-Half Mile and Similar Regulation Bill Draft

In an attempt to address the concern of a city for health and safety immediately next to the city, the commission considered, but does not recommend, a bill draft that would have limited extraterritorial zoning authority to one-half mile and required the city to adopt regulations previously or subsequently adopted by a governmental entity with authority in the area before the extension. The one-half mile distance was used because under NDCC Section 40-06-01 a city has health and safety jurisdiction when within one-half mile of the border of the city.

Commission discussion pointed out that the bill draft did not provide any benefit to a city and was basically the same as a repeal of extraterritorial zoning authority. The contrary view was expressed that benefit to the city is that the city would be able to enforce regulations.

Repeal of Sunset on Present Extraterritorial Zoning Authority Law Bill Draft

The commission considered, but does not recommend, a bill draft that would have removed the sunset on present extraterritorial zoning authority law. The present law has limits at one-half mile, one mile, and two miles and allows an extension up to two times the distance allowed if approved by five members of a six-member committee. The committee consists of three members appointed by the governing body of the city and three members appointed, jointly, by the bodies of any political subdivision that is exercising zoning authority in the territory to be extraterritorially zoned. The bill draft had an application section that would have allowed the limits to be phased in over time as the cities expanded.

The commission received testimony in opposition to the bill draft because the bill draft related to determining the distance of extraterritorial zoning authority, rather than the regulations within that authority, and did not address the right to vote. Dislike for the present law also was noted because of the creation of a statutory committee that is considered unnecessary.

Joint Jurisdiction - Outside Half - Dispute Resolution by Administrative Law Judge Using Factors Bill Draft

The commission considered a bill draft that provided for joint jurisdiction between a city and the previous jurisdiction with zoning authority in the outside half and for an administrative law judge as the dispute mechanism with eight factors for the administrative law judge to consider.

Commission discussion noted that the bill draft balanced the rights of property owners with the need for cities to control growth. The bill draft addressed the major issues of whether there should be joint jurisdiction in the whole area or the outside half and which factors should be used to make a determination in the dispute mechanism. Testimony indicated that if the proper factors are used, joint jurisdiction in the entire area would not be difficult to administer.

The North Dakota League of Cities testified in favor of the bill draft and the list of factors. It was noted that one factor is whether the change is within the growth plan. Consideration of this factor will place the city in a stronger position to defend a change if the change is within the growth plan. The bill draft is intended to address future changes, not what is already in place, and the present regulation in the two-mile to four-mile area would remain the same.

Commission discussion noted that the complaint of people in the extraterritorial zoning area not having the right to vote for the person who makes a decision concerning them is not solved by having the decision made by an administrative law judge. The process in the bill draft would operate when a landowner requested a change from the city and the city does not grant the change. The landowner would then go to the township and if the township approved the change, then the administrative law judge would make the decision. An individual could get the township and city to agree before going to an administrative law judge.

The bill draft was amended to include joint jurisdiction in the entire area. The testimony against this change pointed out that extraterritorial zoning authority has worked well in the inside half. It was suggested that joint jurisdiction in the outside half be implemented first to see how well joint jurisdiction works before extending joint jurisdiction to the entire area. Testimony in favor of this change pointed out joint jurisdiction in the entire area

gives everyone in the extraterritorial area the right to vote for someone with control over the decision that relates to that individual. Commission discussion noted there should be little problem with extending joint jurisdiction to the entire area if the criteria are weighted toward the city when determining a dispute over property close to the city. Commission discussion suggested that future legislative changes most likely will center on the factors used by the administrative law judge.

Recommendation

The commission recommends Senate Bill No. 2027 to provide joint jurisdiction in the entire extraterritorial zoning area. The city and the previous jurisdiction with zoning authority would need to approve any changes in zoning. If unable to agree, an administrative law judge would settle the dispute after considering the following factors:

1. Whether the change is consistent with a project growth plan;
2. Whether the proposed change is substantially related to adopted comprehensive plans;
3. The impact on present and planned uses of the area;
4. The impact on health and safety;
5. The comparable ability of the jurisdictions involved to staff and enforce the change adequately;
6. The effect on the economic, physical, and social relationship of the people and businesses in the area and the effect on other political subdivisions;
7. A comparison of the economic impact of the change on property owners and on the city if there is not a change; and
8. Any other factor.

FEEDLOT ZONING

House Concurrent Resolution No. 3061 (2007) directed a Legislative Council study of the zoning of feedlot operations. Although the Legislative Council did not prioritize that study, the commission considered studying the zoning of the feedlot operations. It was suggested that the commission monitor Senate Bill No. 2278 (2007), which required the State Department of Health to operate an electronically accessible central repository for all county and township zoning regulations that pertain to concentrated feeding operations.

The commission received testimony in opposition to studying feedlot zoning. It was pointed out the Legislative Council did not prioritize the study because the parties involved needed time to review the operation of Senate Bill No. 2278. It also was argued that issues relating to feedlot zoning should be before the Agriculture Committee.

The commission was informed that issues relating to feedlot zoning may be addressed on a case-by-case basis and cleaning up a failed feedlot only requires spreading out the manure and filling up the waste ponds with dirt.

Commission members noted that the study could include a study of the classification of agricultural and industrial property for taxation purposes. The consensus was that the interim Taxation Committee was studying these matters and was the proper committee for taxation issues.

STATE AID DISTRIBUTION FUND

Under NDCC Section 57-39.2-26.1, the state aid distribution fund provides for allocation of a portion of sales, use, and motor vehicle excise tax collections among political subdivisions. The fund was created in 1987 to become effective in 1989 to combine preexisting personal property tax replacement and state revenue sharing programs. The 1987 legislation introduced a provision dedicating 60 percent of one percentage point of sales, use, and motor vehicle excise tax revenues for state aid distribution fund allocation in equal amounts to personal property tax replacement and state revenue sharing.

Personal Property Tax Replacement

Personal property tax replacement allocations to political subdivisions began with 1969 legislation intended to eliminate the personal property tax. Because personal property made up a large portion of the tax base of political subdivisions, eliminating the tax required the Legislative Assembly to overcome several obstacles, the biggest of which was replacing lost personal property tax revenues for political subdivisions. The 1969 legislation added a separate one percentage point to sales, use, and motor vehicle excise tax and broadened the sales tax base. These additional tax revenues were intended to provide for allocations to political subdivisions to offset the loss of the personal property tax base. Personal property tax replacement allocations were funded through general fund appropriations from 1969 until 1989 and incorporated in allocations from the state aid distribution fund beginning in 1989. The allocation formula was based on personal property taxes assessed in 1969 with a growth formula. Personal property tax replacement continued to be allocated under this legislation until the formula was repealed in 1997.

State Revenue Sharing

An initiated measure approved by the voters of the state on November 7, 1978, created the state revenue sharing program. The initiated measure created a state revenue sharing fund to which 5 percent of net proceeds from state income taxes and state sales and use taxes were to be deposited and allocated to city and county governments. One-half of the money in the state revenue sharing fund was to be allocated among counties and cities on the basis of population and the remaining one-half was to be allocated among counties and cities on the basis of property tax levies. State revenue sharing was funded through general fund appropriations from 1979 until 1989 and from the state aid distribution fund beginning in 1989.

State Aid Distribution Fund

The legislation establishing the state aid distribution fund retained the separate statutory allocation formulas

for state revenue sharing and personal property tax replacement. The legislation provided that 60 percent of revenue from one percentage point of state sales, use, and motor vehicle excise taxes would be allocated among political subdivisions, with equal amounts allocated under the state revenue sharing formula and the personal property tax replacement formula. The legislation also provided that state aid distribution fund allocations were subject to legislative appropriation. In 1997 significant changes were made to the state aid distribution fund. The amount allocated for distribution through the fund was reduced from 60 percent to 40 percent of revenue from one percentage point of state sales, use, and motor vehicle excise taxes. In addition, state aid distribution fund allocations would be provided under a continuing appropriation rather than a biennial appropriation. The preexisting state revenue sharing and personal property tax replacement formulas were eliminated and a single formula was created for allocation of state aid distribution fund revenues among political subdivisions. The following table shows biennial amounts allocated from the state aid distribution fund and the predecessor personal property tax replacement and revenue sharing programs:

Biennium/Funding Source	Personal Property Tax Replacement	Revenue Sharing	Counties	Cities	Total
1969-71/general fund	$18,900,000				$18,900,000
1971-73/general fund	$42,600,000				$42,600,000
1973-75/general fund	$18,170,000				$18,170,000
1975-77/general fund	$21,900,000				$21,900,000
1977-79/general fund	$24,300,000				$24,300,000
1979-81/general fund	$26,044,401	$17,403,838			$43,448,239
1981-83/general fund	$32,577,000	$21,840,000			$54,417,000
1983-85/general fund	$29,377,000	$22,000,000			$51,377,000
1985-87/general fund	$31,289,226	$28,654,079			$59,943,305
1987-89/general fund	$20,877,700	$20,877,700			$41,755,400
1989-91/state aid distribution fund	$27,104,150	$27,104,150			$54,208,300
1991-93/state aid distribution fund	$28,375,000	$28,375,000			$56,750,000
1993-95/state aid distribution fund	$25,750,000	$25,750,000			$51,500,000
1995-97/state aid distribution fund	$25,750,000	$25,750,000			$51,500,000
1997-99/state aid distribution fund			$28,968,508	$24,992,092	$53,978,600
1999-2001/state aid distribution fund			$33,940,222	$29,263,170	$63,203,392
2001-03/state aid distribution fund			$35,502,898	$30,610,328	$66,113,226
2003-05/state aid distribution fund			$39,489,898	$34,048,087	$73,537,985
2005-07/state aid distribution fund			$44,966,766	$38,770,228	$83,736,994
2007-09/state aid distribution fund (June 2008 estimate)			$50,987,537	$43,961,322	$94,948,859

The state aid distribution fund allocation divides revenues 53.7 percent to counties and 46.3 percent to cities. The distribution to counties and cities is based on population categories. Each population category receives a percentage of the county or city share of the total. The counties or cities within the categories receive their amounts based on population. The following chart shows the allocation of the fund among county and city population categories before the allocations formulas were revised based on the 2000 federal census:

Population Category			
Counties	Percentage	Cities	Percentage
100,000 or more	10.4%	20,000 or more	53.9%
40,000 or more but fewer than 100,000	18.0%	10,000 or more but fewer than 20,000	16.0%
20,000 or more but fewer than 40,000	12.0%	5,000 or more but fewer than 10,000	4.9%
10,000 or more but fewer than 20,000	14.0%	1,000 or more but fewer than 5,000	13.1%
5,000 or more but fewer than 10,000	23.2%	500 or more but fewer than 1,000	6.4%
2,500 or more but fewer than 5,000	18.3%	200 or more but fewer than 500	3.5%
Fewer than 2,500	4.1%	Fewer than 200	2.2%
Total	100.0%	Total	100.0%

Effective August 1, 2003, the state aid distribution formula for cities and counties was revised to account for population changes resulting from the 2000 federal census. The total distribution percentages to counties and cities remain at 53.7 percent to counties and 46.3 percent to cities. However, the allocation formula among counties and cities was changed as illustrated by the following table:

Population Category			
Counties	Percentage	Cities (Based on Population)	Percentage
17 counties with the largest population (allocated equally)	20.48%	80,000 or more	19.4%
17 counties with the largest population (allocated based on population)	43.52%	20,000 or more but fewer than 80,000	34.5%
Remaining counties (allocated equally)	14.40%	10,000 or more but fewer than 20,000	16.0%
Remaining counties (allocated based on population)	21.60%	5,000 or more but fewer than 10,000	4.9%
		1,000 or more but fewer than 5,000	13.1%
		500 or more but fewer than 1,000	6.1%
		200 or more but fewer than 500	3.4%
		Fewer than 200	2.6%
Total	100.0%	Total	100.0%

2007 Legislation

During the 2007 legislative session, House Bill No. 1447, which failed to pass the House, would have increased the amount allocated through the state aid

distribution fund from 40 percent to 50 percent of the revenue from one percentage point of state sales, use, and motor vehicle excise taxes. The fiscal note stated the change would increase the state aid distribution fund by $21 million with a corresponding reduction in general fund revenues.

Testimony and Discussion

The commission received testimony in support of increasing from four-tenths to five-tenths of one cent of the first penny of sales tax, the amount of sales tax that is deposited into the state aid distribution fund. An increase in funding from the state aid distribution fund should have an impact on levies and hence property taxes.

Commission discussion noted that the state aid distribution fund is related to property tax. The interim Taxation Committee was studying the feasibility and desirability of property tax reform in providing property tax relief to taxpayers of the state and the state aid distribution fund is a form of property tax relief. Commission consensus was that a study of the statewide distribution fund should be before the interim Taxation Committee.

RURAL ROADS AND BRIDGES

The commission received testimony in support of studying funding of rural township and county roads and bridges. Senate Bill No. 2275 (2007), which failed to pass, would have provided $4 million for county and township roads and bridges.

The interim Taxation Committee was studying the allocation of oil and gas revenues to or for the benefit of political subdivisions with emphasis on determining whether allocations sufficiently address oil and gas development infrastructure impact to political subdivisions. In addition, the interim Transportation Committee was studying highway funding and transportation infrastructure needs, including those needs resulting from energy and economic development in this state. Commission discussion noted that the commission should avoid duplicating studies by other interim committees.

The commission was informed that the Upper Great Plains Transportation Institute was conducting a study on generating public involvement in the transportation policy and funding decisionmaking process. The high costs of maintaining the transportation system are not generally known by the public and the transportation system is generally taken for granted because of the good job that is done in maintaining the system. The purpose of the study was to receive and continue public involvement to meet the transportation needs of this state, especially as a result of inflation. Inflation has increased costs up to 30 percent and maintenance projects have been delayed because of these costs.

The commission was informed on recent activities relating to the federal highway fund. The Department of Transportation testified that Congress is making rule changes in apportionments for states. Every year the appropriation is a little bit less than the apportionment, causing a recision. These recisions used to be absorbed in categories that are not used that much in this state. Congress may start to enforce these recisions across the board, however, instead of allowing states to transfer them to unused categories. This will result in less federal aid flowthrough to cities and counties.

Commission discussion noted that the federal government will not lower the match percentage because the federal government requires local governments to pay more in related fees, e.g., engineering fees, with the result that the 20 percent match is more like 40 percent when the fees local governments have to pay are included.

CHARITABLE ORGANIZATIONS' PROPERTY TAX EXEMPTIONS

The Constitution of North Dakota provides in Article X, Section 5, that ". . . property used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation."

North Dakota Century Code Section 57-02-08(8) provides a property tax exemption for:

> All buildings belonging to institutions of public charity, including public hospitals and nursing homes licensed pursuant to section 23-16-01 under the control of religious or charitable institutions, used wholly or in part for public charity, together with the land actually occupied by such institutions not leased or otherwise used with a view to profit . . . .

2005-06 Interim Study

During the 2005-06 interim, the Advisory Commission on Intergovernmental Relations received testimony on the use of the phrase "in part," as in "used wholly or in part for public charity." A letter from the Tax Commissioner's office to the Grand Forks state's attorney in 1979 stated that "If a property is used partly for the charitable purposes of the public charity owner of the building and partly for other uses, the dominant use determines the use of the property." The commission was informed that the use of the words "in part" are inherently unclear; however, if the standard were "used wholly" for charitable purposes, there may be difficulty in having support for that proposition.

Testimony and Discussion

The commission was informed that a large percentage of the property in cities is exempt from property tax because the property is used for charitable purposes. The dominant use determines the use of the property and the term "in part" is a term that needs to be interpreted. Commission discussion included the term "in part" should be defined by the amount of revenue, the cost of providing charitable services, or by square footage.

ALTERNATIVES TO EXPRESSING PROPERTY TAX LEVIES IN MILLS

The commission reviewed information provided to the 2005-06 interim Finance and Taxation Committee relating to alternatives to the current method of

expressing property tax levies in mills per dollar of taxable valuation include:

2007 Legislation

Senate Bill No. 2033 (2007), which failed to pass the Senate, would have required property tax statements to include, or be accompanied by, information showing for the taxable year for which each tax statement applies for each taxing district levying taxes against the property taxes levied in dollars and taxes expressed in dollars per $1,000 of true and full valuation of the property. The legislative history reveals the main reason for the failure of the bill was that it imposed an unfunded mandate. It was argued that the bill would increase printing, postage, and computer programming costs while removing flexibility. The opinion also was expressed that the bill may have provided too much information for the taxpayer, thereby making the statement more confusing. If wanted by a taxpayer, the information may be accessed online in most counties.

Commission Discussion

Commission discussion noted the reason for looking at this subject was because placing taxes in terms of mills confuses and complicates taxation. It was argued that taxes should be changed to dollars per thousand dollars, which would provide a more transparent taxation structure.

Commission discussion also noted, however, that changing mills to dollars would not address the confusion on statements relating to assessed, taxable, and full and true value. Any change would be a major undertaking and would have a great impact on financial officers and auditors and political subdivisions. In addition, there was the constitutional concern of mills being used in the constitution; thereby requiring a constitutional change to express taxation in dollars instead of mills.

STATE'S ATTORNEYS IN RURAL AREAS

The North Dakota State's Attorneys Association testified that current law provides options to share state's attorneys with adjoining counties. The main issue is those counties that do not have a resident state's attorney. In addition, the testimony supported the proposition that state's attorneys should be elected and not appointed by boards of county commissioners so that state's attorneys remain independent and beholden to the electorate.

Statutory Provisions

Under NDCC Section 11-16-01, the state's attorney is the public prosecutor of the county and institutes and defends civil actions for the county. Under Section 11-16-05, a state's attorney generally is prohibited from being an attorney for another party besides the county. Under Section 11-16-02, the state's attorney may appoint assistant state's attorneys who have the same powers as the state's attorney. The work of an assistant state's attorney is required to be assigned by the state's attorney. Under Section 11-16-06, if a county does not have a state's attorney or the state's attorney is absent or unable to attend to the duties of state's attorney or has refused or neglected to perform certain duties, a judge of district court is to request the Attorney General to take charge of the prosecution or proceeding or may appoint an attorney to take charge of the prosecution or proceeding.

The general rule under NDCC Section 11-10-02 is that each organized county must have an elected state's attorney. There are two kinds of exceptions to the requirement that the office is elective--appointment and agreement.

North Dakota Century Code Section 11-10-02.3 provides that 10 percent or more of the qualified electors of a county may petition the board of county commissioners to place the question of appointing the state's attorney on the ballot. A majority vote at that election changes the position from elective to appointive. Under Section 11-10-04, a state's attorney must be a qualified elector of the county at the time of the election if elected and a qualified elector in the county if appointed. However, upon the approval of the board of county commissioners of each affected county, a state's attorney may serve as an elected officer in more than one county if the state's attorney is a qualified elector of one of the counties. In addition, two or more counties may appoint a person to be state's attorney in each county if the state's attorney is a qualified elector of one of the counties. There are special provisions for the boards of county commissioners of two or more counties to agree by resolution to elect a multicounty jurisdiction state's attorney. In this case, the state's attorney must be a qualified elector of the multicounty jurisdiction at the time of the election. In addition, the board of county commissioners of two or more counties may agree by resolution to allow any candidate for the office of state's attorney to petition for office in each county. The state's attorney may serve in both counties if the state's attorney is a qualified elector of one of the counties at the time of election and the state's attorney receives the highest number of votes for office in the county in which the state's attorney is not a resident.

Under NDCC Section 44-02-01, a vacancy in the office of state's attorney may occur for a number of reasons, including ceasing to be a resident of the county or other political subdivision in which the duties of the office are to be discharged or ceasing to possess any of the qualifications of the office. In addition under Section 44-02-02, a state's attorney may resign from office. Section 44-02-04 provides for the filling of vacancies in county offices. Under this section, generally a vacancy in the office of state's attorney must be filled by the board of county commissioners. In addition under Section 44-01-04, if a person is elected state's attorney but fails to qualify for the office, the office is deemed vacant and must be filled by appointment as provided by law. Under Section 44-02-09, the person appointed must qualify in the manner required of a person elected or appointed to the office.

North Dakota Century Code Chapter 11-10.3 allows for the multicounty combination of elective officers. Under Section 11-10.3-01, a proposal for combining county elective offices may be accomplished by a joint

powers agreement subject to the right of referendum or by initiative of electors of the affected county. In the case of a joint powers agreement, this section provides for the procedures to refer the issue and procedures for the electors to submit the issue for consideration at an election. A plan adopted under this chapter may be revised or terminated through another joint powers agreement, by petition in the same manner as for adopting a plan, or pursuant to the terms of the original joint powers agreement. Section 11-10.3-02 provides for suggested terms of the joint powers agreement and provides that the plan may not diminish the term of office, redesignate the office, or reduce the salary of the office.

Legislative History and Attorney General's Opinions

Since the 1999 legislative session, there have been at least six Attorney General's opinions to relate to these statutes and state's attorneys. The year of 1999 is chosen as the beginning date because that was the year in which the last major change to these statutes occurred and is after a change in the Constitution of North Dakota.

Article VII, Section 8, of the Constitution of North Dakota as amended in 1998 and 2002 provides, in part:

> Elective officers shall be elected by the electors in the jurisdiction in which the elected officer is to serve. A candidate for election for sheriff must be a resident in the jurisdiction in which the candidate is to serve at the time of the election. The office of sheriff shall be elected. The Legislative Assembly may provide by law for the election of any county elective officer, other than the sheriff, to serve one or more counties provided the affected counties agree to the arrangement and any candidate elected to the office is a qualified elector of one of the affected counties.

In 1999 NDCC Section 11-10-02.3 was created to authorize a county to place the question of appointing the state's attorney before the county electors upon submission to the board of county commissioners of a petition signed by 10 percent or more of the total number of qualified electors in the county voting for Governor at the most recent gubernatorial election or upon resolution of the board of county commissioners.

In 2001 NDCC Section 11-10-04 was amended to authorize the boards of county commissioners of two or more counties to agree by resolution to elect a multicounty jurisdiction state's attorney pursuant to the provisions of law relating to multicounty officers. In addition, the boards of county commissioners of two or more counties were authorized to agree by resolution to allow any candidate for office of state's attorney to petition for office in each county and to serve if elected if the candidate is a qualified elector of one of the counties at the time of the election.

In 2001 the Attorney General issued a letter opinion (2001-L-33) that interpreted this 2001 law. At issue was whether the Grant County commissioners could appoint a state's attorney who was not a resident of Grant County upon the resignation of the current state's attorney who was the only licensed attorney in Grant County. The Attorney General opined that although the change in the law appeared to provide county commissioners with more options regarding the appointment of a state's attorney, Article IV, Section 8, of the Constitution of North Dakota placed a limitation that all candidates for county elections must be a resident in the jurisdiction in which they are to serve at the time of the election. The opinion stated that although NDCC Section 11-10-04 purports to provide an option to a board of county commissioners when appointing a state's attorney to fill a vacancy in the elective office, the constitution limits the available options.

The opinion illuminated a provision that seemed to provide a method for addressing the dilemma in Grant County. Under NDCC Section 11-10-04(5), a state's attorney may be elected with multicounty jurisdiction pursuant to an agreement between county commissioners of two or more counties in accordance with Chapter 11-10.3.

The opinion noted two other exceptions in which a nonresident could be appointed as state's attorney, but these exceptions applied solely if the state's attorney were appointed rather than elected. First, Grant County could change the form of government to the county consolidated office form of government or the short form of county managership, thereby authorizing the appointment of a state's attorney from an adjoining county. Second, Grant County could become a home rule county and get voter approval to make the state's attorney an appointed official, thereby allowing the home rule county to establish its own qualification requirements for its appointed state's attorney.

In 2001 the Attorney General opined (2001-L-37) that a board of county commissioners may not hire a private attorney to represent the board without first obtaining the advice and consent of the county state's attorney. The opinion noted that the board may employ additional counsel to assist the state's attorney under limited circumstances and those circumstances require the advice and consent of the state's attorney.

In another letter (2002-L-67) the Attorney General addressed the fact situation of a state's attorney not seeking reelection and the individual elected to the position in the November general election was not a resident of the county and had not notified the county that that person would assume the position. The opinion stated that when the new state's attorney did not take office there would be a vacancy that must be filled by an appointment by the board of county commissioners; however, the person appointed must meet the qualifications for that office as required by law. One of those qualifications is to be a resident unless there is an exception. One exception is when two or more counties agree that one person may serve as the state's attorney of more than one county; however, the state's attorney must be a qualified elector in one of the counties. The Attorney General suggested an alternative if the county with the vacancy could not find a state's attorney to serve or if an agreement could not be reached with another county. Under NDCC Section 11-16-02, a

state's attorney may appoint assistant state's attorneys. The assistant state's attorney is not an elected county officer and no residency or qualified elector status is required for that person to perform the duties of a state's attorney. The law does not make the continued employment of an assistant state's attorney dependent upon the continued presence of the state's attorney, provided the board of county commissioners has approved the appointment by establishing compensation for the assistant state's attorney.

In 2002 the Attorney General opined (2002-L-68) that an individual elected in two separate counties as state's attorney may serve as state's attorney in both counties if the individual is an elector in one of the counties and the board of county commissioners in each of the counties approves as required by NDCC Section 11-10-04(2).

In 2006 the Attorney General opined (2006-L-33) that a person appointed to fill a vacant state's attorney position must have resided in the county for at least 30 days before the appointment in order to qualify for office. In addition, a candidate for state's attorney need not be a resident of the county at the time the candidate circulates petitions to appear on the ballot for the state's attorney position but must be a resident at least 30 days before the general election.

In a letter opinion (2006-L-38), the Attorney General addressed the fact situation in which the Foster County state's attorney was the state's attorney of Griggs County through a joint powers agreement that was about to expire. The Attorney General opined that absent the approval of the two counties, the office of state's attorney in Griggs County would be vacant and the Griggs County board of commissioners would be free to appoint an attorney who is a qualified elector as state's attorney until the next general election. An interesting fact was that the person who was the Foster and Griggs Counties state's attorney received the highest number of votes for the position of state's attorney in Griggs County for the period of time after which the joint powers agreement expired. However, in the most recent primary election, the question of whether the Griggs County state's attorney should be appointed was defeated. In addition, the Attorney General stated the runnerup in the recent general election was not entitled to assume the elective office when the high votegetter was ineligible or not qualified to serve.

Testimony and Discussion

The commission was informed that three counties do not have a state's attorney who is an elector of that county. The counties are in different parts of the state. The difficulty with having a resident state's attorney is similar to meeting the residency requirement for other elected positions. The commission received testimony on two instances of particular concern. First, in one county the state's attorney is appointed and is a member of an out-of-state law firm. Second, a state's attorney could run for the purpose of appointing an assistant state's attorney to do the work of state's attorney.

Despite these two concerns, the commission was informed that the present law works well even when there is not a resident attorney in the county who can or wants to run for the position of state's attorney. The present laws that allow a county to appoint a state's attorney are relatively new. The North Dakota State's Attorneys Association testified that these laws may need minor changes to address particular problems but as a whole address the vast majority of issues. In addition, the association was in favor of retaining the county-based system instead of moving to a state-based system.

REPORT ON COUNTY DOCUMENT PRESERVATION FUNDS

History

In 2005 the Legislative Assembly enacted Senate Bill No. 2024. The bill removed the June 30, 2005, expiration date for the document preservation fund and continued the additional fees imposed for the purpose of funding the document preservation fund. Revenue in the fund may be used only for contracting for and purchasing equipment and software for a document preservation, storage, and retrieval system; training employees to operate the system; maintaining and updating the system; and contracting for offsite storage of microfilm or electronic duplicates of documents for the county recorder's office. The bill required each recorder, before March 1 of each even-numbered year, to prepare a report that specifies how the county used the county's document preservation funds during the preceding two fiscal years, how the county's use of the document preservation funds has furthered the goal of document preservation, and the county's general strategic plans for its document preservation. The county reports must be submitted to the North Dakota Association of Counties for compilation and submission to the Legislative Council. Since 2005 the Legislative Council has designated the Advisory Commission on Inter-governmental Relations as the entity to receive the reports.

The commission monitored the survey of county recorders on the use of county document preservation funds. On March 26, 2008, the commission received the report from the Association of Counties on the use of document preservation funds. The report provided information on how each county used the county's document preservation fund during the preceding two fiscal years. Every county has continued the creation of archival copies of each land record on microfilm. All records are duplicated back to the very first records. Fifty counties, compared to 46 counties two years ago, have implemented one of five different automated systems of land record management. Thirty-three counties use the system provided by Computer Software Associates. Forty-five counties, compared to 40 counties two years ago, have linked the county automated system into one central repository. The joint repository allows duplicate electronic images of each record to be immediately sent to a backup server in Fargo for the image to be published on the World Wide Web and for an automatic copy of the image to be placed in archival microfilm storage. All but four counties need books for old records.