

OPINION 40

OFFICIAL OPINION NO. 40

July 7, 1954

Mr. John C. Mellett, Director
Indiana Economic Council
140 N. Senate Avenue
Indianapolis 4, Indiana

Dear Mr. Mellett:

This is in reply to your letter of June 1, 1954, in which you inquire as to the following:

"1. May a citizen member of a plan commission be removed from office by the appointing authority?

"2. If the answer to the preceding question is in the affirmative, upon what grounds may such citizen member be removed from office?"

The Acts of 1947, Ch. 174, Secs. 9 through 14, as found in Burns' Indiana Statutes (1951 Repl.), Sections 53-709 through 53-714, provide for the appointments of the citizen members of the City and County Plan Commissions and sets forth their qualifications and definite terms of office.

Nowhere in the City and County Plan Commission Acts are there provisions for the removal of the said Plan Commission members.

Section 10 and Section 14 of Chapter 174, *supra*, provide that the citizen members of the City and County Plan Commissions shall have a term of office for four years' duration.

Section 2 of Article 15 of the Indiana Constitution provides:

"When the duration of any office is not provided for by this Constitution, it may be declared by law; and, if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the General Assembly shall not create any office, the tenure of which shall be longer than four years."

Under the above-quoted section of the Constitution, it is only when the duration of the term of office is not provided for by the Constitution or declared by law that the office is held during the pleasure of the authority making the appoint-

ment. State *ex rel.* Manlove v. Curtis (1913), 180 Ind. 191, 102 N. E. 827; Wier v. State *ex rel.* Axtell (1884), 96 Ind. 311; Roth v. The State (1901), 158 Ind. 242, 63 N. E. 460.

In the case of Shira *et al.* v. State *ex rel.* Ham *et al.* (1918), 187 Ind. 441, 119 N. E. 833, the Court points out at page 444 that in the event a term of office is a fixed tenure within the meaning of the law, the official is not subject to being dismissed from service except for cause and then only after a hearing on proper notice. The power to remove an officer as an incident of the power of appointment does not apply in the event a term is fixed by statute, 1925 O. A. G., page 33; 1945 O. A. G., page 120 at 126, No. 26. In my opinion, the power vested in the plan commission in relation to the adoption of a master plan which regulates and limits land use, type and nature of private and public structures and the other matters included therein is an exercise of a degree of sovereign powers of the state, and that therefore the members of such plan commission should be classified as public officers.

The Acts of 1897, Ch. 182, as found in Burns' Indiana Statutes (1951 Repl.), Section 49-836 provide for the deprivation of office upon conviction of refusal or neglect of duties pertaining to the office. The Acts of 1875, Ch. 58, as found in Burns' Indiana Statutes (1951 Repl.), Section 49-837, provide for removal for intoxication. See also 1945 O. A. G., page 120, No. 26.

In the case of Bateman v. State (1937), 214 Ind. 138, 14 N. E. (2d) 1007, the Court said:

“Removal from office should be exercised with caution, and for reason based upon willful or malicious failure or neglect to perform the official duties pertaining to that office.”

In answer to your first question, it is my opinion that a citizen member of the plan commission may not be removed from office at the pleasure of the appointing power but may be removed upon the establishment of cause for hearing on proper notice.

In answer to your second question, the grounds for removal would be those set forth in the statutes above referred to and in line with the above quoted opinion of the Supreme Court.