



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

June 24, 1977

ATTORNEY GENERAL OPINION NO. 77- 212

Mr. George H. Herrelson, Jr.
Attorney at Law
528 Main Street
Post Office Box 49
Galena, Kansas 66739

Re: Cities--Offices--Incompatibility

Synopsis: One individual may not hold a position as member of the city planning commission and a second office as member of the city governing body, for the two offices are incompatible.

* * *

Dear Mr. Herrelson:

You inquire whether a member of the city council of a city of the second class may also serve as a member of the city planning commission.

Members of the planning commission are appointed pursuant to K.S.A. 12-702 by the mayor with the consent of the council. K.S.A. 12-704 prescribes the powers and duties of the planning commission. It is charged with the preparation of a comprehensive plan for the development of the city. After approval of a plan, the planning commission must submit it to the city governing body, and consider any recommendations of that body before adopting the plan officially. Under K.S.A. 12-704a, the planning commission must consider the construction of any public improvement, public facility or public utility which falls within the scope of a comprehensive plan which has been adopted. If it recommends against a proposed project as not complying with the plan, the governing

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body may overrule the planning commission only by a vote of three-fourths of its membership. The planning commission under K.S.A. 12-705 may adopt subdivision regulations, but they shall not become effective until submitted to and approved by the city governing body. Under K.S.A. 12-708, the planning commission may recommend a zoning ordinance for the city or any part thereof, and may propose amendments to existing zoning ordinances. In each instance, the recommendations are subject to action by the city governing body. In short, in the adoption of a comprehensive plan, subdivision regulation and zoning ordinances and amendments thereto, the planning commission has substantial statutory responsibilities in a statutory process in which its recommendations in almost each instance are subject to review, approval or disapproval by the city governing body.

In Dyche v. Davis, 92 Kan. 971 (1914), the court stated thus:

"Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices." 92 Kan. at 977.

At 63 Am.Jur.2d, Public Officers and Employees, § 74 at p. 676, the writer states that "One of the most important tests as to whether offices are incompatible is found in the principle that . . . incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in some degree to the other's revisory power." [Footnote omitted.]

The statutory scheme outlined above clearly contemplates that the decisions of the planning commission are to play an important role in municipal planning, subdivision regulation and zoning; however, its decisions are in virtually every instance subject to the review and approval or disapproval of the governing body. Obviously, a member of the planning commission who sits also as a member of the governing body is placed in the position in the latter capacity of passing upon his or her own decisions in the former capacity. Dual membership between the two bodies defeats the purpose of the entire statutory scheme in which the initial decisions regarding planning are assigned to the planning commission, subject to review and final action by the governing body.

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Two offices are incompatible when one individual, acting in one official capacity, is empowered to pass upon his decisions which were rendered in the other official capacity. That is precisely the result of dual membership on both the planning commission and the city governing body, and in my opinion the positions are incompatible.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj