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July 15, 1980

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ATTORNEY GENERAL OPINION NO. 80-149

Mr. Neil R. Shortlidge
Assistant City Attorney
City Hall, 8500 Santa Fe Drive
Overland Park, Kansas 66212

Re: Cities and Municipalities--Planning and Zoning--
Effect of Protest Petition Filed After Second
Public Hearing on Rezoning Application

Synopsis: K.S.A. 12-708 requires only one public hearing before the city planning commission on rezoning applications and zoning ordinance amendments and only one protest filing period preceding action by the governing body on such rezoning applications or amendments. If no protest is filed after the statutorily-prescribed public hearing within the prescribed time period for such protests, regardless of any subsequent protest filed by landowners or other interested persons, the governing body may proceed to approve the rezoning application or amendment without a three-fourths vote of the governing body. Cited herein: K.S.A. 12-708.

* * *

Dear Mr. Shortlidge:

You request our opinion as to the procedure prescribed by K.S.A. 12-708 regarding the fourteen-day filing period for petitions protesting rezoning applications. You advise that the city's customary procedure for considering such applications generally involves a second public hearing before the planning commission in those instances the governing body disapproves the commission's initial recommendations, although the statute in question requires only one such public hearing. You note that the City of Overland Park's informal policy in cases of "controversial" rezoning applications, when the planning commission and the governing body cannot initially agree

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as to the proper action to be taken, is that a second public hearing should be held in order to provide an opportunity for maximum public input. You further advise that after the second public hearing, another fourteen-day filing period for the filing of protest petitions is allowed before the governing body considers the application for the second time.

K.S.A. 12-708 establishes the procedure for consideration of zoning ordinances and amendments thereto. The statute requires that all proposed rezoning applications or proposed zoning ordinance amendments first be submitted to the city planning commission for recommendation and report. The statute further requires that the planning commission shall give notice of the time and place for a public hearing on the proposed zoning change to provide an opportunity for all interested parties to be heard in the matter of the application or proposed change. Upon hearing the matter, the planning commission must take action to approve or disapprove the amendment, and is required to submit its recommendation or "failure to recommend" to the governing body. Before the governing body may take action on the application, however, it must wait the statutorily-prescribed fourteen-day period to allow interested persons to file a protest of the proposed amendment. The statute provides, in pertinent part, as follows:

"Regardless of whether or not the planning commission approves or disapproves a proposed zoning amendment or 'fails to recommend,' if a protest against such amendment be filed in the office of the city clerk within fourteen (14) days after the date of the conclusion of the public hearing pursuant to said publication notice . . . the ordinance adopting such amendment shall not be passed except by at least three-fourths (3/4) vote of all the members of the council or board of commissioners." (Emphasis added.)

You inquire whether legal effect can be given to a protest petition filed after a second public hearing before the planning commission, pursuant to the above-described policy of the city, so as to require a three-fourths vote of the governing body to approve the rezoning application. You advise that the city is presently faced with a situation in which no protest was filed after the first public hearing, but you anticipate that one will be filed after the second hearing.

You have concluded that no legal effect can be given to the protest filed after the second hearing and that a three-fourths vote of the governing body to approve the rezoning application in question is not required. We agree. You have correctly noted that a protest pursuant to K.S.A. 12-708 is tied to the statutorily-required public hearing, as emphasized in the above quotation. Moreover, the statute contemplates only one public hearing to be conducted by the planning commission before the commission submits its initial recommendation to the governing body. The statute then provides as follows:

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"Upon receipt of a recommendation of the planning commission which the governing body disapproves, the governing body shall return such recommendation to the planning commission with a statement specifying the basis for disapproval and such recommendations shall be considered in like manner as that required for the original recommendations returned to the planning commission." (Emphasis added.)

As former Attorney General Curt Schneider concluded in Attorney General Opinion No. 77-221, the language emphasized in the above quotation refers to that previous portion of K.S.A. 12-708 which pertains to the procedure for the governing body's consideration and adoption of the original zoning ordinances and regulations (as distinguished from the procedure for approval of rezoning applications and zoning ordinance amendments) and which provides as follows:

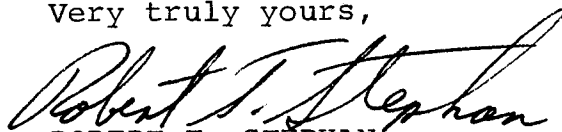
"The governing body may either approve such recommendations by the adoption of the same by ordinance or return the same to the planning commission for further consideration, together with a statement specifying the basis for disapproval. The planning commission, after reconsidering the same, may submit its original recommendations giving the reasons therefor or submit new and amended recommendations. Upon the receipt of such recommendations the governing body may adopt or may revise or amend and adopt such recommendations by ordinance, or it need take no further action thereon. If the planning commission fails to deliver its recommendations to the governing body within ten (10) days after receipt of the governing body's statement specifying disapproval, the governing body shall consider such course of inaction on the part of the planning commission as a resubmission of the original recommendation and proceed accordingly."

Accordingly, as you have correctly noted, the governing body may take final action on a proposed zoning change as early as ten days after the governing body expresses its disapproval of the planning commission's recommendation. Thus, even if the planning commission were to hold a second public hearing in the matter, any property owners or other interested persons desiring to file a protest would not necessarily have fourteen days in which to file such protest prior to any final action on the rezoning application by the governing body. The statute does not require a second public hearing to be held and neither does it require a second protest filing period.

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Therefore, applying the foregoing statement of the law to the factual situation which prompts your inquiry, we conclude that K.S.A. 12-708 requires only one public hearing before the city planning commission on rezoning applications and zoning ordinance amendments and only one protest filing period preceding action by the governing body on such rezoning applications or amendments. We further conclude that, if no protest is filed after the statutorily-prescribed public hearing before the planning commission within the prescribed time period for such protests, regardless of any subsequent protest filed by landowners or other interested persons, the governing body may proceed to approve the rezoning application or amendment without a three-fourths vote of the members of the governing body.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


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Assistant Attorney General

RTS:BJS:SC:pf