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ATTORNEY GENERAL OPINION NO. 80-165

Thomas W. Stockwell
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Suite 302
United Kansas Bank & Trust Building
Highway 50 at Antioch
Merriam, Kansas 66202

Re: Cities and Municipalities--Planning and Zoning--Amendments or Changes in Zoning

Synopsis: The provisions of K.S.A. 12-708, relating to protests against zoning amendments, are mandatory, and the City of Merriam must allow a full fourteen-day period for the filing of protests before taking any action upon a recommendation of the planning commission. Cited herein: K.S.A. 12-708.

* * *

Dear Mr. Stockwell:

You request our opinion as to the procedure which the City of Merriam, Kansas, must follow in considering applications for changes in zoning under the following proviso set forth in K.S.A. 12-708:

> "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, duly signed and acknowledged by the owners of twenty percent (20%) or more of any real property proposed to be rezoned or by the owners of twenty percent (20%) of the total area, excepting public streets and ways, located within or without the corporate limits of the city and located within two hundred (200) feet of the boundaries of the property proposed to be rezoned the ordinance adopting such amendment shall not be passed except by at least three-fourths (3/4) vote of all of the members of the council or board of commissioners."

Your question is whether, under the above-quoted statutory provision, "the governing body has to wait the full fourteen (14) days to see if a protest petition is filed before it can take any action on the recommendation of the planning commission either to deny or approve the zoning matter." You state that there will be eight times during the current year when 14 days will not have elapsed between meetings of the City of Merriam Planning Commission and the regular session of the city council.

The provisions of K.S.A. 12-708, relating to amendment of zoning regulations and boundaries, have been construed in numerous cases. In Ford v. City of Hutchinson, 140 Kan. 307, 311 (1934), an amendatory zoning ordinance of the city of Hutchinson was held to be void, for the reason that the city did not comply with notice and hearing requirements prescribed by K.S.A. 12-708. The court stated that,

> "The power of the city government to change the zoning of property can only be exercised in conformity with the statute . . .
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> . . . .
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> "The potency of the statute and of a city ordinance passed in conformity therewith has been repeatedly emphasized by the court. Without the statutory notice for thirty days of a hearing before the planning board, it has no power to give its official recommendation of a proposed change in zoning, and the city government is without power to pass an ordinance making such change."

In Carson v. McDowell, 203 Kan. 40, 44 (1969), an ordinance changing zoning in the City of Kansas City was struck down upon the ground that the City Planning Commission allowed only 19 "clear days" between the publication notice and date of hearing, rather than the 20 days prescribed in K.S.A. 12-708. The court quoted Ford v. City of Hutchinson, supra, and held that the provision requiring that "at least twenty (20) days shall elapse between the date of such publication and the date set for hearing" was mandatory, not directory. The court also stated that said provision "must be complied with in order to give the planning commission power to officially recommend a change in zoning and the city commission jurisdiction to pass the ordinance."

In Paul v. City of Manhattan, 212 Kan. 381, 385 (1973), the court, in considering whether certain provisions of a zoning ordinance were mandatory or directory, quoted the following rule from City of Hutchinson v. Ryan, 154 Kan. 751 (1942):

> "In determining whether statutory provisions are mandatory or directory, it is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of processing and a time within which an official act is to be done, and is intended to secure order, system and dispatch of the public business, the provision is directory." (Emphasis added.)

The court also noted that "negative words importing that the acts required shall not be done in any other manner or time than that designated," and a "provision for the consequences of non-compliance" are often features of mandatory legislation.

In City of Manhattan v. Ridgeview Building Co., Inc., 215 Kan. 606, 614 (1974), the court construed the provision of K.S.A. 12-708 which provides that, upon disapproval of a planning commission recommendation,

> "the governing body shall return such recommendation to the planning commission . . . and such recommedation shall be considered in like manner as that required for the original zoning recommendations returned to the planning commission."

The court, quoting Paul v. Manhattan, supra, and City of Hutchinson v. Ryan, supra, ruled that said provision was mandatory, and struck down a zoning amendment (of the City of Manhattan) which was altered by the governing body without complying with the above-quoted procedure.

The construction to be given to the provision of K.S.A. 12-708, relating to protests against zoning amendments, must be considered in light of the rules laid down in the above-cited cases. The provision in question gives certain property owners the right (through the filing of a timely protest) to impose a 3/4 majority requirement upon the governing body, in order for said body to pass an ordinance adopting a zoning amendment. It seems clear, therefore, that allowance of the full 14-day protest period is "essential to the preservation of the rights of parties affected," and that the provision is mandatory rather than directory. See City of Hutchinson v. Ryan, supra, and City of Manhattan v. Ridgeview Building Co., Inc., supra. Also, the provision contains "negative words" [i.e., "shall not be passed except by at least three-fourths (3/4) vote of all of the members], which words were said to be indicative of mandatory legislation in the Paul case, supra. Finally, if the provision were held to merely directory, the governing body could effectively bar the protest right by meeting immediately after the conclusion of the public hearing conducted by the planning commission. We cannot conclude that the legislature intended to allow such a course of conduct.

For the reasons set forth above, it is our opinion that the provisions of K.S.A. 12-708, relating to protests against zoning amendments, are mandatory, and the City of Merriam must allow a full fourteen-day period for the filing of protests before taking any action upon a recommedation of the planning commission.

Very truly yours,

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RTS:BJS:TRH:jm