



STATE OF KANSAS

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July 17, 1981

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ATTORNEY GENERAL OPINION NO. 81-166

Robert F. Duncan
City Attorney
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Atchison, Kansas 66002

Re: Cities and Municipalities -- Planning and Zoning --
Repeal of Zoning Ordinance; Procedure to be Followed

Synopsis: K.S.A. 12-708 provides that the governing body of a city may supplement, change or generally revise a zoning ordinance, providing that specified notice and hearing procedures are followed. While the statute does not specifically set forth different procedures to be used in repealing a zoning ordinance in its entirety, given the legislative intent to provide notice and hearing before a change in land-use policy may be made, it may be concluded that the completion of these procedures is necessary prior to a valid repeal of a zoning ordinance by the governing body of a city. Cited herein: K.S.A. 12-708, 12-715b, 12-715c.

* * *

Dear Mr. Duncan:

As City Attorney for the City of Atchison, Kansas, you have requested the opinion of this office on the following:

"When a Municipality wishes to repeal a zoning ordinance in its entirety, is it necessary that the repealing ordinance be first referred to the Planning Commission?" (Emphasis original.)

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You inform us that the city enacted an extra-territorial zoning ordinance in 1981, pursuant to K.S.A. 12-715b et seq., and further state that "[i]t is anticipated that consideration will be given to the repeal" of this ordinance in its entirety.

As you note, K.S.A. 12-708 is the applicable statute in the area of amending zoning ordinances, as well as prescribing the way in which such ordinances may be adopted initially. Insofar as the statute is quite lengthy and has not been divided into paragraphs, it will be sufficient to summarize those portions of the statute regarding zoning ordinance amendments as follows:

- 1) The governing body of a city is granted the power to "from time to time supplement, change or generally revise the boundaries or regulations contained in such zoning ordinance by amendment[sic]."
- 2) "All such proposed amendments shall first be submitted to the city planning commission for recommendation and report. Upon the development of tentative recommendations, the planning commission shall hold a public hearing thereon and shall cause an accurate written summary to be made of the proceedings, and shall give notice in like manner as that required for the original zoning recommendations."
- 3) "Such notice shall fix the time and place for such hearing and contain a statement regarding the proposed changes in regulations or restrictions or in the boundary of any zone or district. If such proposed amendment is not a general revision of existing ordinances and will affect specific property, it shall be designated by legal description and general street location and in addition to such publication notice, written notice of such proposed amendment shall be mailed to all owners of lands located within two hundred (200) feet of the area proposed to be altered and an opportunity granted to interested parties to be heard. Failure to receive such notice shall not invalidate any subsequent action taken."
- 4) "When the planning commission submits a recommendation of approval or disapproval of

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such amendment, the governing body if it approves such recommendation may either adopt such recommendation by ordinance or take no further action thereon, as appropriate. In the event the planning commission submits a 'failure to recommend' to the governing body, the governing body may take such action as it deems appropriate. 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 recommendation shall be considered in like manner as that required for the original zoning recommendations returned to the planning commission."

From the above, it is obvious that the amendment of a zoning ordinance is subject to a carefully-worded, detailed set of procedures, with those dealing with notice and hearing having on occasion been held to be mandatory. Carson v. McDowell, 203 Kan. 40 (1969), Paul v. City of Manhattan, 212 Kan. 381 (1973), City of Manhattan v. Ridgeview Building Co., Inc., 215 Kan. 606 (1974). However, as you note, the statute is silent as to the procedure to be used when a zoning ordinance is to be removed from the city ordinance book entirely, leaving the question of whether the above-outlined provisions must be followed in such a case. If this question is answered in the affirmative, there is no doubt that such procedures would apply here, for K.S.A. 12-715c provides that actions taken by a city in the area of extra-territorial zoning shall be in conformity with the provisions of article 7 of chapter 12, which would include K.S.A. 12-708.

At the outset, there can be no question but that, in the absence of a statutory bar to such action, a city has the power to repeal a zoning ordinance it earlier enacted. Brown v. Arkansas City, 135 Kan. 453 (1932), 101A C.J.S. Zoning and Land Planning, §98, p. 362 (1979). Additionally, a number of authorities have held that the municipal authority which adopted the zoning ordinance initially may abolish it in the same manner as it was adopted. See, e.g., McQuillin, Municipal Corporations, §25.06, p. 19 (1976), Anderson, American Law of Zoning, §4.25, p. 200, 1st ed. (1968). Put another way, it has been held that the "same formalities" necessary to the enactment of an ordinance must be observed in its amendment or repeal. Reiff v. City Council of Hamilton, 32 Ohio App.2d 224, 289 N.E.2d 358 (1972), 56 Am.Jur.2d Municipal Corporations, §411, p. 453 (1971).

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In the area of zoning, we believe that the public policy argument which requires such procedures be taken to be a strong one. As noted in McQuillin, Municipal Corporations, §25.06, p. 19 (1971):

"Amendment or repeal of zoning laws should be just as carefully considered and prepared, perhaps more so, since private arrangements, property purchases and uses, the location of business in commercial or industrial zones, and the making of homes in residential districts, occur with reasonable anticipation of the stability of existing zones. Consequently, procedure in the amendment of zoning ordinances ordinarily embraces safeguards similar to or greater than those of the original zoning, against unreasonable, capricious, needless and harmful rezoning or changes of use classification, including petitions, notices, protests, hearings, study by commissions or committees, and initiative and referendum of amending measures." (Footnotes omitted.)

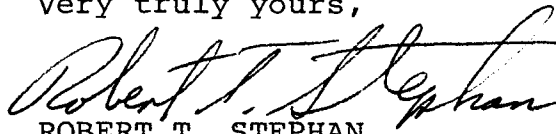
And, while it may be noted that the second sentence quoted above refers only to procedure in the "amendment" of zoning, it has been held, and in our opinion reasonably so, that the repeal of a zoning ordinance should be subject to the same procedures as an amendment where it effectively changes the land use designation of every parcel of land in the affected area. Wanamaker v. City Council of El Monte, 19 Cal. Rptr. 554, 200 Cal.App.2d 453 (1962).

In our opinion, the same result should be reached here, in that the proposed change would effect every individual landowner in the area outside the city which is now zoned. The revocation of a zoning ordinance is as much a land-use decision as the creation of a zoning system or a subsequent amendment thereto. Accordingly, given the high priority placed by the legislature on notice and hearing requirements in the enactment or amendment of an ordinance, it would appear consistent with legislative intent to afford those parties interested in preserving the status quo notice and an opportunity to be heard before a zoning ordinance can be repealed. Given the lack of clear and unambiguous language in K.S.A. 12-708, such considerations may be taken into account in construing the statute [State ex rel. Stephan v. Martin, 227 Kan. 456 (1980)], and in our opinion are determinative here.

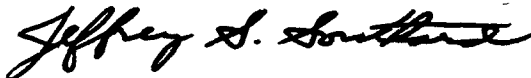
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In conclusion, K.S.A. 12-708 provides that the governing body of a city may supplement, change or generally revise a zoning ordinance, providing that specified notice and hearing procedures are followed. While the statute does not specifically set forth different procedures to be used in repealing a zoning ordinance in its entirety, given the legislative intent to provide notice and hearing before a change in land-use policy may be made, it may be concluded that the completion of these procedures is necessary prior to a valid repeal of a zoning ordinance by the governing body of a city.

Very truly yours,



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RTS:BJS:JSS:hle