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June 7, 1984

ATTORNEY GENERAL OPINION NO. 84- 50

Donald R. Hoffman
Humpage, Berger and Hoffman
314 West 7th Street
Topeka, Kansas 66603

Re: State Department; Public Officers and Employees --
Open Public Meetings -- Procedures for Bodies Ex-
ercising Quasi-Judicial Functions

Synopsis: In making recommendations as to the zoning of an individual parcel of land, a planning commission acts in a quasi-judicial, rather than a legislative, function. As such, its deliberations may be held in closed session, as a specific exception to the Kansas Open Meetings Law, K.S.A. 75-4317 et seq. For purposes of the Open Meetings Law, "binding action" would occur when the commission votes to approve or deny a particular request, and would have to be done in an open meeting. Further, in that K.S.A. 12-708 requires the commission to adopt its recommendations by affirmative vote at the conclusion of the hearing, it is not possible to have a binding vote before such recommendations, in the form of specific findings, are prepared. Cited herein: K.S.A. 12-708, K.S.A. 1983 Supp. 75-4318, 75-4319.

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Dear Mr. Hoffman:

As attorney for the Topeka-Shawnee County Planning Commission, you request our opinion concerning the procedures which the com-

mission should follow to comply with both the provisions of the statutes dealing with zoning (K.S.A. 12-707 et seq.) and open public meetings (K.S.A. 75-4317 et seq.). You advise us of a number of recommendations which you have made to the commission as its counsel, and seek our opinion as to whether the procedures you outline would comply with the Open Meetings Law. Additionally, you inquire whether, in the interest of avoiding a one month delay between the initial hearing and the final vote, a vote could be taken on the merits of the proposed change, with the commissioners signing off on the formal findings of facts and conclusions of law at a later time, but before the next meeting.

There can be no question but that planning commissions are public bodies or agencies which are subject to the provisions of the Open Meetings Act. K.S.A. 1983 Supp. 75-4318(a). Following the case of Golden v. City of Overland Park, 224 Kan. 591, 597 (1978), there is also little dispute that a planning commission does at some points exercise quasi-judicial functions in weighing evidence, balancing equities, and applying rules and ordinances to a specific set of facts. Accordingly, the following language found at the end of K.S.A. 1983 Supp. 75-4318(a) would apply:

"[A]ny administrative body that is authorized by law to exercise quasi-judicial functions shall not be required to have open meetings when such body is deliberating matters relating to a decision involving quasi-judicial functions."

In light of the above, you have made the following recommendations to the commission:

- (1) The agenda for each meeting be divided into three parts; (a) quasi-judicial matters; (b) legislative matters; and (c) administrative matters.
- (2) Public hearings be held for quasi-judicial matters such as zoning changes.
- (3) Thereafter, private deliberations be held with the staff and written findings of fact and conclusions of law be prepared for public vote at the next meeting.
- (4) In some cases a public vote could be held at the first hearing, if the staff report is adopted by the commission as its findings.
- (5) The commission will have to determine in advance whether a particular matter is legislative or quasi-judicial, so that closed deliberations do not occur for the former.

- (6) An announcement will be made at the beginning of each meeting as to the procedure which will be followed.

In our opinion, each of these recommendations is consistent with the intent and substance of the Open Meetings Act. While deliberations made be held in private session for quasi-judicial matters, no other business may be so discussed [absent one of the six exceptions found in K.S.A. 1983 Supp. 75-4319(b)], and even in the case of these matters, any vote or other binding action must be taken in public. See, e.g. Attorney General Opinion No. 79-225. Adoption of a comprehensive plan, as well as any amendments thereto, is a legislative action the entirety of which is subject to the Act, as are numerous other acts of the commission. The commission must bear the responsibility to determine when a quasi-judicial matter arises which may be properly deliberated in closed session. For a detailed discussion of what actions constitute quasi-judicial functions, see Attorney General Opinion No. 82-266. Copies of both the above-cited opinions are enclosed.

Your second concern deals with the time delay which the above procedures will produce in many cases. At present, the Topeka-Shawnee County Planning Commission meets once a month, at which time public hearings are conducted on proposed zoning changes. Except in those cases where the commission can, following its closed deliberations, adopt the staff recommendations in a public vote, the need to draw up specific findings of fact and conclusions of law will necessitate delaying final action until the next month's meeting. Such findings and conclusions are required to be made in order to comply with cases such as Golden, supra, and subsequent decisions. Taco Bell v. City of Mission, 234 Kan. 879 (1984). As a means of expediting the process, you inquire whether such findings and conclusions could be prepared in written form between meetings, with each commissioner then signing-off, either in concurrence with the decision or in dissent before the next meeting.

In our opinion, such a procedure would be open to challenge on two grounds. First, the Open Meetings Law only exempts deliberations made in quasi-judicial matters, not binding action in the form of votes, which must be taken in public, open session. The procedure of circulating proposed findings and conclusions would contravene this, for either the decision would be made at other than a scheduled meeting, or they would have been decided during the closed session, both of which are improper. Second, assuming that a decision was made during the public portion of the initial meeting (following the hearing and closed deliberations), a problem would still exist with K.S.A. 12-708. That

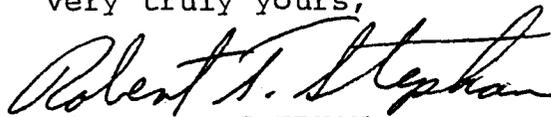
statute, which deals with the procedure for considering changes in zoning, provides that the public hearing

"may be adjourned from time to time and at the conclusion of the same, the planning commission shall prepare its recommendations and shall by an affirmative vote of a majority of all of the members of the commission adopt the same in the form of a proposed zoning ordinance and shall submit the same, together with the accurate written summary of the hearing thereon, to the governing body of the city." (Emphasis added.)

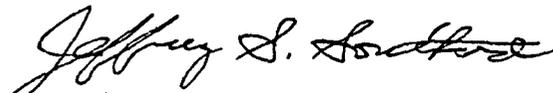
In that the statute requires a vote of the commission to adopt its recommendations for a change in zoning, in our opinion the recommendations, in the form of findings of fact and conclusions of law in the form mandated by Golden, must precede the vote, rather than follow them.

In conclusion, in making recommendations as to the zoning of an individual parcel of land, a planning commission acts in a quasi-judicial, rather than a legislative, function. As such, its deliberations may be held in closed session, as a specific exception to the Kansas Open Meetings Law, K.S.A. 75-4317 et seq. For purposes of the Open Meetings Law, "binding action" would occur when the commission votes to approve or deny a particular request, and would have to be done in an open meeting. Further, in that K.S.A. 12-708 requires the commission to adopt its recommendations by affirmative vote at the conclusion of the hearing, it is not possible to have a binding vote before such recommendations, in the form of specific findings, are prepared.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Deputy Attorney General