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ATTORNEY GENERAL OPINION NO. 87- 39

Richard S. Wetzler
Leawood City Attorney
Bennett, Lytle, Wetzler,
Winn & Martin
Second Floor, Johnson County Bank Bldg.
5100 West 95th Street
Prairie Village, Kansas 66207-2584

Re: Cities and Municipalities--Planning and Zoning; Establishment of City Districts and Zones--Zones or Districts; Amendments or Changes in Zoning

Synopsis: The City of Leawood approved a rezoning application in October, 1986, but failed to provide 20 "dear days" between the date of publication and the day of the hearing as is required by K.S.A. 12-708. A property owner appealed the change in zoning pursuant to K.S.A. 12-712, challenging its reasonableness based on both insufficient notice and substantive grounds. In our judgment, the Planning Commission of the City of Leawood may hear a second application to rezone the same property, notwithstanding the fact that the application is substantially identical to the original zoning action appealed to and currently pending in district court. The Planning Commission may, on the other hand, refuse to hear the second application while the district court appeal is pending, but should consider any possible liability under 42 U.S.C. §1983 before taking such action. Cited herein: K.S.A. 12-708, 12-712; 42 U.S.C. §1983.

* * *

Dear Mr. Wetzler:

You request our interpretation of K.S.A. 12-708. Specifically, you advise that the City of Leawood approved a rezoning application in October, 1986, but failed to provide 20 "dear days" between the date of publication and the day of the hearing as is required by K.S.A. 12-708. A property owner appealed the change in zoning pursuant to K.S.A. 12-712, challenging its reasonableness based on both insufficient notice and substantive grounds, and the appeal is currently pending in district court. The original applicant has now filed a second application (in substantially identical form to the first application) to rezone the same property, for the purpose of curing any alleged defect relating to insufficient notice. Your question is whether the city planning commission must hear the second application, or whether it may refuse to consider it until some resolution is obtained in the district court appeal of the original zoning action.

K.S.A. 12-708 provides, in part, that a proposal to amend a zoning ordinance may be initiated by the city governing body, the planning commission or upon application of the owner of property affected. It also prescribes the procedure for adopting a zoning amendment, including a requirement that notice of public hearing (before the planning commission) be published and that "at least twenty (20) days shall elapse between the date of such publication and the date set for hearing." Without expressing any opinion on the merits of the action currently pending in district court, we note that it has been held that the 20 day requirement is mandatory and must be complied with in order to give the planning commission power to recommend a change in zoning. Carson v. McDowell, 203 Kan. 40, 44 (1969).

In regard to the authority of the city planning commission to hear a second rezoning application while an appeal of a nearly identical application is pending in district court, the case of State ex rel. v. Wade, 128 Kan. 646 (1929) is instructive. In that case, the owner of property applied under a zoning ordinance for a permit to repair and reconstruct a building, and permission was denied. He commenced an action in district court challenging the reasonableness of the order denying him a permit, and while that action was pending filed another application for the permit. The city commission approved the second application and issued the permit, but the state contended the permit was illegally issued and void. The court held that "[t]he determination of the commission to deny Wade permission to

erect the building did not preclude him from thereafter making other applications for such permission, nor preclude the commission from thereafter granting such permission." 128 Kan. 651.

It should be noted that the decision in the Wade case was based upon a finding that the city commission acted in an administrative or legislative capacity in hearing the second application. Id. In this regard, we recognize that the Kansas Supreme Court has held that, for purposes of defining the scope of judicial review, rezoning of a specific tract of land is more quasi-judicial than legislative. Golden v. City of Overland Park, 224 Kan. 591, 597 (1978). However, the legislative element present in rezoning, and the absence of any restriction in K.S.A. 12-708 relating to successive applications for rezoning, lead us to conclude that the rule set forth in the Wade case should be applied to rezoning applications under K.S.A. 12-708. Accordingly, it is our opinion that the city planning commission may hear the second application to rezone the subject property, notwithstanding the fact that the application is substantially identical to the original zoning action appealed to and currently pending in district court.

On the other hand, and in response to your specific question, it is our opinion that the planning commission may refuse to hear the second application while the appeal of its previous zoning action is pending in district court. However, the city should consider any possible liability under 42 U.S.C. §1983 before taking such action.

Very truly yours,

Robert T. Stephan

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Terrence R Hearshman by JLM

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RTS:JLM:TRH:jm