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March 30, 1987

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ATTORNEY GENERAL OPINION NO. 87- 60

The Honorable Robert V. Talkington
Senate President
State Capitol, Room 359-E
Topeka, Kansas 66612

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

Synopsis: Under the provisions of K.S.A. 12-708, a notice of proposed changes in zoning regulations is sufficient to permit the planning commission to recommend changes which give all or any part of the land described a "zoning classification of lesser change" than that set forth in the notice. What constitutes a "zoning classification of lesser change" must be determined by referring to the specific zoning ordinance, but it generally includes any classification permitting only less intense uses than the classification set forth in the notice.

In establishing a table designating what zoning classifications are lesser changes authorized within the published zoning classifications, a planning commission must recognize the correlation between "lesser change" and "less intense use." Specifically, a "zoning classification of lesser change" must be restricted to those classifications permitting only less intense uses than the classification set forth in the notice.

Where the planning commission submits a "failure to recommend," the governing body may adopt a zoning

classification of lesser change than that set forth in the notice required by K.S.A. 12-708, provided procedural safeguards including notice and hearing are followed: Cited herein: K.S.A. 12-707, 12-708.

* * *

Dear Senator Talkington:

You request our interpretation of K.S.A. 12-708, and the section of the statute which is of concern to you has been numerically indexed by line and attached hereto as Exhibit A. Your questions, and our responses thereto, are set forth below.

1. "Is the phrase 'lesser change' [Line 27], which modifies the phrase 'zoning classification' [Line 26], synonymous with the phrase of less intense use as is used in the urban planning profession?"

Our research has failed to disclose any case wherein the term "lesser change" has been interpreted by any Kansas court. However, since the object of zoning is to restrict the use of buildings and land within each district or zone (K.S.A. 12-707), it is our opinion that the term lesser change refers to a less intense use.

2. "How much flexibility does the planning commission have in defining what is a 'lesser change?'"

In establishing a table designating what zoning classifications are lesser changes authorized within the published zoning classifications, it is our opinion that a planning commission must recognize the correlation between "lesser change" and "less intense use." Specifically, a "zoning classification of lesser change" must be restricted to those classifications permitting only less intense uses than the classification set forth in the notice.

3. "Considering that the notice requirement of K.S.A. 12-708 will most probably include both the current zoning classification (of the property in question) and the proposed zoning classification, does the phrase 'set forth in the notice' [Line 28-29] refer to the current or proposed classification."

It refers to the proposed classification. In order to maintain

the current classification, the planning commission need only recommend disapproval of rezoning, since the current classification is not a "lesser change" (it is "no change").

4. "Does the requirement of 'republication' [Line 29] and 're-mailing' [Line 30] necessarily require an additional public hearing?"

Since the republication and re-mailing relates to a notice which fixes the time and place for a public hearing, it is clear that an additional public hearing must take place where a table has not been established pursuant to the statute.

5. "When, if ever, must the planning commission disclose its recommendations to the public?"

The written summary of proceedings before the planning commission constitutes a public record, and would be open to inspection by the public pursuant to K.S.A. 45-201. Additionally, in Attorney General Opinion No. 84-50 we concluded that binding action would occur when a planning commission votes to approve or deny a particular request, and that such a vote would have to be done in an open meeting.

6. "'Previous' [Line 30] to what event must the lesser change table be established?"


It must be established previous to the initial publication and mailing of notice, since established at any later date would not provide sufficient constructive notice to property owners.

7. "If the planning commission submits a 'failure to recommend' [Line 40-41] to the governing body would the governing body's adoption of a lesser change be an 'appropriate' [Line 46] action?"

This office has previously opined that once the governing body has disapproved and returned a recommendation concerning a proposed zoning amendment to the planning commission, and the planning commission resubmits its original recommendation, with reasons therefor, or submits new and amended recommendations, the "revisory power" of the governing body is unlimited. See Attorney General Opinion No. 77-221 (copy enclosed). It would be incongruous if the options of the governing body were more restricted where the planning commission submits a "failure to recommend," and we reject such a construction of the statute. Accordingly, it is our

opinion that where the planning commission submits a "failure to recommend," the governing body may adopt a zoning classification of lesser change than that set forth in the notice required by K.S.A. 12-708. However, although the statute is silent as to the procedural safeguards to be observed by the governing body, the decision in Golden v. City of Overland Park, 224 Kan. 591 (1978), suggests that the governing body conduct a hearing on the proposed "lesser change" and send a written notice of the hearing and the proposed change to property owners within two hundred feet of the tract to be rezoned. See 1984 Kansas Government Journal, 146-147.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas



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RTS:JLM:TRH:jm

1. The governing body may from time to time supplement, change or generally
2. revise the boundaries or regulations contained in such zoning ordinance
3. by amendment. A proposal for such amendment may be initiated by the
4. governing body, the planning commission or upon application of the owner
5. of property affected. Any such amendment shall, if based upon the
6. comprehensive land use plan, be presumed to be reasonable. The governing
7. body may establish reasonable fees to be paid in advance by the owner of
8. any property at the time of making application for a change in zoning of
9. the same. All such proposed amendments shall first be submitted to the
10. city planning commission for recommendation and report. Upon the develop-
11. ment of tentative recommendations, the planning commission shall hold a
12. public hearing thereon and shall cause an accurate written summary to be
13. made of the proceedings, and shall give notice in like manner as that
14. required for the original zoning recommendations. Such notice shall fix
15. the time and place for such hearing and contain a statement regarding the
16. proposed changes in regulations or restrictions or in the boundary of any
17. zone or district. If such proposed amendment is not a general revision
18. of existing ordinances and will affect specific property, it shall be
19. designated by legal description and general street location and in addition
20. to such publication notice, written notice of such proposed amendment
21. shall be mailed to all owners of lands located within two hundred (200)
22. feet of the area proposed to be altered and an opportunity granted to
23. interested parties to be heard. Failure to receive such notice shall not
24. invalidate any subsequent action taken. Such notice is sufficient to
25. permit the planning commission to recommend amendments to zoning ordinances

26. which affect only a portion of the land described a zoning classifi-
27. cation of lesser change than that set forth in the notice: Provided,
28. That recommending a zoning classification of lesser change than that set
29. forth in the notice shall not be valid without republication and, where
30. necessary, remaining unless the planning commission shall have previously
31. established a table or publication available to the public which desig-
32. nates what zoning classifications are lesser changes authorized within the
33. published zoning classifications. The procedure for the consideration and
34. adoption of the original zoning ordinance except where hereinbefore or
35. hereinafter modified. For action on zoning amendments, a quorum of the
36. planning commission is more than one-half of all the members. A vote
37. either for or against an amendment by a majority of all of the planning
38. commissioners present constitutes a recommendation of the planning commission;
39. whereas a vote either for or against an amendment by less than a majority
40. of all of the planning commissioners present constitutes a "failure to
41. recommend." When the planning commission submits a recommendation of
42. approval or disapproval of such amendment, the governing body if it
43. approves such recommendation by ordinance or take no further action
44. thereon, as appropriate. In the event the planning commission submits a
45. "failure to recommend" to the governing body, the governing body may take
46. such action as it deems appropriate. Upon receipt of a recommendation of
47. planning commission which the governing body disapproves, the governing body
48. shall return such recommendation to the planning commission with a state-
49. ment specifying the basis for disapproval and such recommendation shall be
50. considered in like manner as that required for the original zoning recommend-

51. ation of the planning commission which the governing body disapproves,
52. the governing body shall return such recommendation to the planning
53. commission with a statement specifying the basis for disapproval and
54. such recommendation shall be considered in like manner as that required
55. for the original zoning recommendations returned to the planning
56. commission. . .

57. . . . Regardless of whether or not the planning commission approves or
58. disapproves a proposed zoning amendment or "fails to recommend," if a
59. protest against such amendment be filed in the office of the city clerk
60. within fourteen (14) days after the date of the conclusion of the public
61. hearing pursuant to said publication notice, duly signed and acknowledged
62. by the owners of twenty percent (20%) or more of any real property pro-
63. posed to be rezoned or by the owners of twenty percent (20%) of the total
64. area. . .

65. . . . the boundaries of the property proposed to be rezoned the ordinance
66. adopting such amendment shall not be passed except by at least three-
67. fourths (3/4) vote of all of the members of the council or board of
68. commissioners.