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**From the *Magna Carta* to Hawaiian Shirt Night
A brief legal overview of planning process issues**

Open Meetings – Conducting the Public's Business before the Public

Open meetings laws dictate that the public's business be conducted before the public. Both Kansas and Missouri have vigorous open meetings laws governing the work of their political subdivisions. In Kansas, the requirement is relatively simple to state: an open public meeting is occurring – and the applicable requirements for notice must be followed – when a majority of a quorum of a political body is present and discussing the business or affairs of the body. For example, a five member planning commission has a quorum of three. A majority of a quorum would be two. So whenever two or more planning commission members are discussing the business or affairs of the planning commission an open public meeting of the planning commission is being held. The practical issues quickly grow from there: are written communications among board members allowed? must a planning commission allow a member of the public to speak in addition to attend a public meeting? are there exceptions that allow executive sessions which are applicable to the work of a planning commission?

Due Process – What Process is required in Planning Decisions?

In the *Magna Carta*, due process is referred to as "law of the land" and "legal judgment of his peers." The 5th Amendment to the United States Constitution provides, in part, that *No person shall...be deprived of life, liberty, or property, without due process of law.* The 14th Amendment extends the protection of due process to the actions of states and political subdivisions, such as planning commissions. At its essence, due process refers to how and why laws are enforced. It asks the question what process is due a person? And then further states that whatever process is due for a particular government action such process must be followed. Some commentators label procedural due process requirements as fundamental fairness.

Various state statutes establish the appropriate process for the consideration of planning items. Additionally, courts have established various standards for due process over the years. Must notice be given? Must a public hearing be

conducted? Must both sides be given an opportunity to speak? How do bias and communication with others impact due process requirements? There are less strenuous procedural due process requirements for a planning commission or city council when it is acting in its legislative capacity than when it is acting in its quasi-judicial capacity.

A recent Kansas Supreme Court decision, upholding the decision of Shawnee County in denying a conditional use permit for a construction and demolition landfill, helps illustrate due process considerations in the planning arena. *McPherson Landfill, Inc. v. Board of County Commissioners of Shawnee County*, July 12, 2002.

<http://www.kscourts.org/kscases/supct/2002/20020712/88075.htm>

Short Version of the Facts: Someone wanted to locate a landfill. Neighbors didn't like that. County Commission denied conditional use permit. Landfill operator sues with two major claims: fairness of the process; and denial was unreasonable. The Kansas Supreme Court set out these important legal principles in the syllabus of its decision:

Where the focus of the zoning authority shifts from the entire city or county to one specific tract of land for which a zoning change is urged, the function of the zoning authority becomes more quasi-judicial in nature than legislative. In such quasi-judicial proceedings, it is incumbent upon the authority to comply with the requirements of due process. Thus, the proceedings must be fair, open, and impartial. A denial of due process renders the resulting decision void.

The factors in Golden v. City of Overland Park, 224 Kan. 591, 598, 584 P.2d 130 (1978), have become standard considerations throughout Kansas by those charged with the responsibility of voting on zoning changes. However, the Golden factors are suggestions, and other factors may be equally or more important factors depending on the circumstances of the particular case.

In a quasi-judicial proceeding case involving a claim of prejudgment by the decision maker, prejudgment statements of the decision maker are not fatal to the validity of the zoning determination as long as the statements do not preclude the finding that the decision maker maintained an open mind and continued to listen to all the evidence presented before making the final decision.

When ex parte contacts are present in the context of quasi-judicial zoning decisions such as variances and special use permits, courts will be more receptive to challenges to decisions on grounds of zoning bias.

Ex Parte Communications – “I heard it on the grapevine...”

Ex parte – Latin for “from the part.” *Done for the benefit of one party only, and without notice to, or argument by, any person adversely interested.* If an impartial decision maker is to weigh the facts and make a judgment, it is necessary that all the relevant facts be equally available to all decision makers, and perhaps to a lesser extent interested parties and the public. An undisclosed *ex parte* communication runs the risk of upsetting the impartiality of the decision-making process.

Prejudgment – “You’re guilty, now let’s have the trial.”

Prejudgment is the argument that the decision-makers in a quasi-judicial setting have prejudged the merits of the proposal before all of the evidence was presented at the formal hearing.

In the *McPherson* decision, the Kansas Supreme Court indicated that the pre-hearing comments of commissioners were potentially beneficial to the applicants because they served to highlight the commissioners’ concerns which then could be addressed at the formal hearing with additional evidence. In contrast to the facts in *McPherson*, decision makers who have already made up their minds prior to a hearing are susceptible to the charge of prejudgment.

In *McPherson*, the Kansas Supreme Court favorably quoted a Missouri Court of Appeals decision: “Familiarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decision maker, in the absence of a showing that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances.” *Wagner v. Jackson Cty Bd of Zon. Adj.*, 857 S.W.2d 285, 289 (Mo. App. 1993)

Conflict of Interest – Do Not Use a Public Position for Private Gain

Government is a trust; and the officers of government are the trustees, and both the trust and the trustees are created for the benefit of the people. Henry Clay in a speech in Lexington, Kentucky.

Federal, state and local laws prohibit certain conduct by public officials and establish certain ethical standards. A number of municipalities have their own ethics codes. Kansas statutes provide a disclosure requirement for local government officers in the State Conflict of Interest law K.S.A. 75-4301a et seq. The law prohibits public officers and employees with a substantial interest in a business or compensation from voting on contracts with the public entity (K.S.A. 75-4304) and sets out disclosure requirements for other actions in K.S.A. 75-4305.

75-4305. Same; filing of report of interest if statement of substantial interest not filed; abstaining from action. (a) Any local governmental officer or employee who has not filed a disclosure of substantial interests shall, before acting upon any matter which will affect any business in which the officer or employee has a substantial interest, file a written report of the nature of the interest with the county election officer of the county in which is located all or the largest geographical part of the officer's or employee's governmental subdivision. (b) A local governmental officer or employee does not pass or act upon any matter if the officer or employee abstains from any action in regard to the matter.

Most planning officials are not involved in approving contracts, but the Statement of Substantial Interest disclosure requirements of K.S.A. 75-4305 are a possibility for many planning commissioners.

Most ethics and conflict of interest laws emphasize two essential requirements: disclose interests and abstain from voting on matters in which you have a financial interest. Best practices in this area indicate that in addition to abstaining from voting it is recommended that a commissioner refrain from participation in discussion on a matter and leave the room until discussion and action has been completed.

A Final Word – The Hawaiian Shirt Night Case

The California Court of Appeals (*Lacy Street Hospitality Service v. City of Los Angeles*, 125 Cal App. 4th 526, 2004) recently held that the inattentiveness of Los Angeles City Council members during a zoning condition modification hearing deprived the applicant of due process. City Council members – newspaper reports indicated that it was Hawaiian shirt night at the Council meeting – conducted a public hearing on an applicant's request to modify land use conditions for an adult cabaret. The applicant videotaped the proceedings. The tape showed Council members talking with aides, eating, reviewing paperwork, talking on cell phones, leaving their seats, talking with other council members, and other examples of failure to listen attentively to the hearing proceedings.

The Court of Appeals, noted that the hearing was a quasi-judicial proceeding. "*A fundamental principle of due process is "he who decides must hear."...It is not our province to insist that the council members consider every word of every witness. Good judgment and common sense are entitled to prevail...Here, however, the tape shows the council cannot be said to have made a reasoned decision based upon hearing all the evidence and argument, which is the essence of sound decision-making and to which [the applicant] was entitled as a matter of due process...We reverse and remand to the city council for a hearing that satisfies [the applicant's] due process right to be heard. "*