

## The State of South Carolina



Office of the Attorney General

Opinion No. 5-1-86  
P. 052

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May 1, 1986

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Dear Mr. Kern:

You have asked for the opinion of this Office as to six questions related to the Freedom of Information Act and acquisition or disposal of real estate by a city council. You had enclosed a memorandum, outlining your responses, as required by our policy. Each question and our response will be discussed separately, as follows.

Question 1

What sections of state law govern the holding of executive sessions by a city council?

We concur with your conclusion that Section 30-4-70, Code of Laws of South Carolina (1985 Cum. Supp.), governs the holding of executive sessions by a public body, including city councils.

Question 2

When a city council votes to go into executive session for the announced purpose of taking up a personnel matter, can that body legally discuss and vote on other unrelated, unannounced items such as personnel, land sales, and purchases?

You have noted that the procedure to be followed in Section 30-4-70(a)(5) requires a vote on the question of going into executive session, and when such vote is favorable, the presiding officer shall announce the purpose of the executive session, which of course must be one of the four listed in

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Section 30-4-70 of the Code. You have concluded that, by inference, only the purpose announced is a proper subject for discussion. We concur with your conclusion, as discussed in a previous opinion.

In opinion no. 84-46, dated April 24, 1984, this Office discussed a situation in which more action was taken in executive session by the Highway Commission than was announced prior to entering executive session. In that opinion we advised that

we believe the [Freedom of Information] Act contemplates that executive sessions should be preceded by the disclosure of such information as is sufficient to apprise the public in attendance of the subject matter to be undertaken.<sup>3/</sup> In this instance, while a court could find that the public announcement that "personnel matters" were to be discussed was sufficient to go into executive session to select all the officers in question, clearly a more detailed and specific announcement as to each position would have been preferable, given the purpose of the Act.

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<sup>3/</sup> When this is not done, however, courts have been hesitant to nullify actions taken in executive session, unless some prejudicial effect to the public is demonstrated, choosing to enforce compliance prospectively such as by injunctive relief. See, Karol v. Bd. of Ed. Trustees, 122 Ariz. 95, 593 P.2d 649 (1979). Whether prejudicial effect has been demonstrated would, of course, necessitate a finding of fact by the appropriate body in an appropriate proceeding.

The full text of this opinion is enclosed herewith, as well as a copy of opinion no. 83-49, dated July 26, 1983.

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Question 3

How soon after making decisions in executive session must matters be ratified in public session?

As you have pointed out, Section 30-4-70(a)(5) states only that formal action taken in executive session must thereafter be ratified in public session prior to such action becoming effective. As you have stated, the better practice would be ratification at the earliest time possible. There may be reasons to delay ratification, such as when the interest of the city or an individual would be prejudiced by premature public disclosure of the subject matter. Until such time as the decision is ratified, however, the action taken is ineffectual. We concur with your conclusion.

The ratification process has been addressed in numerous opinions of this Office. As stated in opinion no. 84-46,

[w]e believe the better practice, and one more in keeping with the spirit and intent of the Freedom of Information Act, is to ratify, in public, action taken in executive session immediately upon return to public session. However, there is authority that such ratification may still be accomplished at a later public meeting, ... and the Act itself does not expressly prohibit this.

The process is discussed in detail in that opinion and also in opinions enclosed herewith dated April 17, 1985, and November 8, 1979.

Question 4,

Do minutes and recorded votes of executive sessions held by a city council become matters of public record the same as for public meetings?

Citing Sections 30-4-40(a)(5) (matters exempted from disclosure by statute) and 30-4-50(7) (minutes of proceedings and votes taken at public meetings, but not at closed meetings, would be public information), you have concluded that minutes and recorded votes of executive sessions would not be matters of public record. We concur with your conclusion; see Ops. Atty. Gen. dated March 23, 1983 and September 7, 1978, copies of which are enclosed. See also Section 30-4-90 (b).

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Question 5

(A) Can a council member change his vote in a public session from that he cast in executive session?

(B) Does an executive session vote bind a council in its public vote?

Based upon the recent decision by the South Carolina Court of Appeals in Multimedia, Inc. v. Greenville Airport Commission, Op. No. 0623, filed January 28, 1986 (S. C. Ct. App.), you have answered the first question negatively and the second question affirmatively.

In opinion no. 84-64, these questions were discussed. Therein, it was stated:

Finally, you seek guidance on the question of whether a member may change his vote in the public session from the way he voted in executive session. Again, we note that Section 30-4-70(a)(5) explicitly states that until public ratification occurs, no formal action taken in executive session is effective. ... There is nothing in the Act that requires a member to vote a particular way on the issue of ratification merely because he voted in a certain manner in executive session. Since the ratification vote is entirely separate and indeed serves to make the executive session action effective, a member is free to choose whether or not to ratify the Committee's action taken in executive session as he sees fit.

A copy of this opinion is enclosed. It should be noted that this opinion was written before the decision in Multimedia was handed down.

Since the Multimedia decision, however, the necessity of taking a public vote to ratify action taken in executive session is uncertain. Ratification, according to the decision,

commonly means the approval, by act, word, or conduct, of that which was attempted, but which was improperly or unauthorizedly performed in the first instance. [Cite omitted.] It may be manifested by any

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writing, act, or words which evidence an intent to confirm or adopt a previous act of oneself or of another. In other words, "ratify" has a much broader meaning than that urged by Multimedia.

Davis Advance Sheets, page 20. In Multimedia, the Greenville Airport Commission publicly announced a unanimous vote to hire an individual as airport director. The Court of Appeals, noting that the action had been so reflected in the Commission's minutes, found this to be sufficient ratification.

While an announcement such as the one in Multimedia would apparently satisfy the requirements of Section 30-4-70(a)(5), as interpreted by the Court of Appeals, a public body certainly would not be precluded from voting to ratify when it returns to public session. In such an instance, the conclusion of opinion no. 84-64 would appear to be applicable. The ultimate answer to your question would depend largely on how the public body carried out the ratification process, however; if a city council chose to ratify in the same manner as the commission in Multimedia, a council member apparently would not be able to change his vote and council would be bound. If an announcement of the results of a vote is made, without a public vote, no opportunity would be given for dissenting votes to be expressed. If no announcement were made, however, council would not be bound until the announcement is made. You have further advised that a prior vote of Council may not be changed under rules adopted by Council unless a proper Motion to Reconsider is adopted by vote of Council at the next meeting. Thus, there may be instances, when a city council has adopted rules of procedure or ratification is effected as in Multimedia, that a vote may not be changed and a council would be bound.

#### Question 6

Is a city council required to secure a competent real estate appraisal before buying and selling land for a public purpose?

We concur with your conclusion that no state law requires an appraisal before a city council may buy or sell real estate. Section 5-7-40 of the Code deals with ownership and disposition of property by municipalities but is silent as to obtaining appraisals:

All municipalities of this State may own and possess property within and without their corporate limits, real, personal or

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mixed, without limitation, and may, by resolution of the council adopted at a public meeting and upon such terms and conditions as such council may deem advisable, sell, alien, convey, lease or otherwise dispose of personal property and in the case of sale, alienation, conveyance, lease or other disposition of real or mixed property, such council action must be effected by ordinance.

We have not examined any procurement policies or ordinances of the City of Greenville and thus are unaware of any possible local requirements for appraisal.

In an analogous situation, this Office opined as to the sale of property by the State College Board of Trustees; the opinion dated August 27, 1985, is enclosed herewith as it contains a great deal of research on such issues as adequacy of consideration and other policy and constitutional matters.

We trust that the foregoing has satisfactorily responded to your inquiries. If you need clarification or additional assistance, please advise.

Sincerely,

*Patricia D. Petway*

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Assistant Attorney General

PDP/an

Enclosures

REVIEWED AND APPROVED BY:

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