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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 9, 1997

Jack M. Scoville, Jr., Esquire
Georgetown County Attorney
P.O. Box 1250
Georgetown, South Carolina 29442

Re: Informal Opinion

Dear Mr. Scoville:

You have requested an opinion of this Office on whether it is proper for members of the Georgetown County Planning Commission (hereinafter the "Planning Commission") to make ex parte communications with interested parties in matters pending before the Commission.

You have informed this Office that the Planning Commission was created pursuant to Section 6-7-340 of the South Carolina Code of Laws. Under this Section, local planning commissions, upon the authorization of the governing authority, have the power to:

> (1) Prepare and revise a comprehensive plan and program for development of its jurisdiction.
>
> (2) Prepare and recommend for adoption to the appropriate governing authority as a means for implementing the plan and program:
>
> > (a) Zoning ordinances or resolutions, and maps and appropriate revisions thereof;
> >
> > (b) Regulations for the subdivision of land and appropriate revisions thereof;

(c) An official map and appropriate revision thereof; and

(d) A capital program for its jurisdiction based on the comprehensive plan and the capital improvements necessary to implement the plan.

Courts in this State have never ruled on whether planning commissions are quasi-judicial in nature. However, courts in other jurisdictions have found that planning commissions are quasi-judicial bodies. Jodeco, Inc. v. Hann, 674 F.Supp. 488 (D.N.J. 1987); See Jennings v. Dade County, 589 So.2d 1337 (Fla. Dist. Ct. App. 1991); Blaker v. Planning and Zoning Commission of the Town of Fairfield, 562 A.2d 1093 (Conn. 1989); Rodine v. Zoning Board of Adjustment of Polk County, 434 N.W.2d 124 (Iowa 1988). Consistent with these opinions, it would appear that in exercising a portion of its functions, the Planning Commission would be quasi-judicial in nature.

Due process requires that an administrative board or body, when acting in a quasi-judicial capacity, must consider all the evidence before rendering its decision upon any particular question. Pettiford v. South Carolina State Board of Education, 218 S.C. 322, 62 S.E.2d 780 (1950). This does not mean that the administrative board or body must itself hear the evidence, but it must have the evidence before it, and consider such evidence when rendering its decision. Id.

While proceedings before a quasi-judicial body such as the Planning Commission are informal and are conducted without regard to the strict rules of evidence, the substantial rights of the parties must be preserved. City of Spartanburg v. Parris, 251 S.C. 187, 161 S.E.2d 228 (1968); Blaker v. Planning and Zoning Commission of the Town of Fairfield, supra. It is generally held that these rights include a reasonable opportunity to cross-examine the important witnesses against a party when their credibility is challenged. City of Spartanburg v. Parris, supra. The right to cross-examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, exists even in the absence of express statutory provision, as a requirement of due process of law or the right to a hearing, and no one may be deprived of such right even in an area in which the Constitution would permit it if there is no explicit authorization therefor. Id. In addition, these rights also include the fair opportunity to inspect documents presented and to offer evidence in explanation or rebuttal. Blaker v. Planning and Zoning Commission of the Town of Fairfield, supra.

It is well settled that ex parte communications are inherently improper and are anathema to quasi-judicial proceedings. Jennings v. Dade County, supra; Daniel v. Zoning

Commission of the City of Norwalk, 645 A.2d 1022 (Conn. App. Ct. 1994). Thus, quasi-judicial officers should avoid all such contacts where they are identifiable. Jennings v. Dade County, supra. In addition, rudimentary administrative law clearly prohibits the use of information by a municipal agency that has been supplied by a party to a contested hearing on an ex parte basis. Daniel v. Zoning Commission of the City of Norwalk, supra.[1]

The occurrence of an ex parte communication in a quasi judicial proceeding does not mandate automatic reversal. Jennings v. Dade County, supra. However, an ex parte communication raises a rebuttable presumption of prejudice. Blaker v. Planning and Zoning Commission of the Town of Fairfield, supra; Daniel v. Zoning Commission of the City of Norwalk, supra. Once the plaintiff shows that an improper ex parte communication has occurred, the burden of showing that the communication was harmless shifts to the party seeking to uphold the validity of the zoning commission's decision. Id. The presumption of prejudice may be rebutted by evidence that the ex parte evidence or testimony was not received by the commission or was not considered by it and, therefore, did not affect the commission's final decision. Blaker v. Planning and Zoning Commission of the Town of Fairfield, supra; Daniel v. Zoning Commission of the City of Norwalk, supra.

In PATCO v. Federal Labor Relations Authority, 685 F.2d 547 (1982), the United Stated Court of Appeals, District of Columbia Circuit, set forth the following criteria to be used by a court in determining the prejudicial effect of an ex parte communication:

> ... a court must consider whether, as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either as

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[1] While South Carolina law does not specifically address ex parte communications between a planning commission and interested parties, the rules found in the Administrative Procedures Act, Sections 1-23-310 et seq. of the Code, provide some guidance in this type of situation. Section 1-23-360 of the Code requires that in proceedings before a state agency, unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

> to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communication were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

Based on the foregoing, I would recommend that members of the Planning Commission make every effort to avoid ex parte communications with interested parties. Ex parte communications between members of the Planning Commission and interested parties jeopardize the hearing process and infringe upon the rights of those parties appearing before the Planning Commission. Moreover, the occurrence of an improper ex parte communication has the added detriment of shifting the burden and expense of showing that the communication was harmless to the party seeking to uphold the Planning Commission's decision.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General