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FILE NO. S-1363

ZONING:

**Due Process Requirements for
County Board's Consideration
of Zoning Amendment**

Honorable Thomas J. Difanis
State's Attorney of Champaign County
Court House
Urbana, Illinois 61801

Dear Mr. Difanis:

You have asked my opinion on a question concerning "AN ACT in relation to county zoning" (Ill. Rev. Stat. 1977, ch. 34, par. 3151 et seq.). Section 5 of that Act (Ill. Rev. Stat. 1977, ch. 34, par. 3158) provides that a county's zoning ordinance may be amended by the county board; however, the proposed change must first be considered at a public hearing before the zoning board of appeals. Notice must be published in a newspaper at least 15 days before the hearing, and section 8 of the Act (Ill. Rev. Stat. 1977, ch. 34, par. 3161) states that

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"[a]ll testimony by witnesses in any hearing provided for in this Act shall be given under oath."

However, the Open Meetings Act (Ill. Rev. Stat. 1977, ch. 102, par. 41 et seq.), which establishes the only notice requirements applicable to the county board meeting, does not require newspaper notice for a regular meeting. In addition, statements at the county board meeting need not be sworn. Because of these two factors, you ask whether due process may be denied if citizens are allowed to make comments concerning the proposed amendment at the county board meeting. It is not possible to give a categorical answer applying to all situations; however, this opinion will set forth guidelines which may be helpful in dealing with the situation you describe.

The structure of section 5 of the Act, providing for zoning ordinance amendments, clearly indicates that the public hearing before the zoning board of appeals is to be the basic forum for presenting information and arguments about a proposed amendment. Notice is required to be given in a newspaper of general circulation in the area affected, and if any affected property owner so requests, the hearing must be held in the township or road district affected by the amendment. As noted above, section 8 also requires that any "testimony" at the hearing

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be under oath. These provisions are designed to allow persons on both sides to present their views and evidence, subject to contradiction and criminal sanctions for perjury. If significant new arguments or information are presented at a later county board meeting, these legislative purposes will be violated and due process may be denied, particularly if persons harmed by the county board's decision are not all present to contest the statements made.

An example of such a denial is in a case you cite, Humble Oil and Refining Co. v. Board of Aldermen (1974), 286 N.C. 170, 209 S.E.2d 447. The board of aldermen ruled against a party based on evidence introduced at a meeting, held some days after the public hearing, in which that party was not allowed to participate. The court held this a violation of due process.

Thus, if the county board believes there are major facts or issues that were not considered at the public hearing, it should remand the question to the zoning board of appeals for a supplemental hearing, which should comply with all the requirements for an original hearing. However, a legislative body such as a county board is not required to limit itself to the record

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before it as strictly as a court must. I see no legal impediment to discussion between the board and interested citizens of the evidence or arguments from the earlier public hearing, provided the conversation is limited to such matters and does not introduce significant new arguments or evidence. In Heaton v. City of Charlotte (1971), 227 N.C. 506, 178 S.E.2d 352, under a statute very similar to our own, the court upheld the city council's action in adopting a zoning amendment with minor changes, proposed by the planning commission after the public hearing. Since the public had been allowed to comment fully at the hearing, and the planning commission's proposals merely interpreted and tried to give effect to the public's views expressed there, no due process violation was found.

If public comment at the county board meeting follows the guidelines above, due process should require neither notice of the county board meeting beyond that mandated by the Open Meetings Act, nor administration of oaths to those who comment before the county board. The public hearing will have provided an opportunity to each side to contest all the arguments and evidence of the other. However, to protect the outcome from challenge, the person presiding at the public hearing should

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announce that a final decision will be made at the county board meeting, stating the time and date of that meeting.

Very truly yours,

A T T O R N E Y G E N E R A L