

Subject

Counties
Planning & Zoning

Copy to



STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER
Attorney General

June 13, 1974

Opinion No. 74- 183

Mr. Ralph Taylor
Commissioner, First District
White Cloud, Kansas 66094

Dear Mr. Taylor:

We have your letter inquiring, first, the proper way to proceed to repeal zoning in Doniphan County. We note that the county zoning resolution was adopted pursuant to K.S.A. 19-2601 et seq. In opinion no. 73-363, we concluded that a zoning resolution adopted by a county providing for zoning of the territory lying within three miles of the boundaries of an incorporated city, adopted under authority of K.S.A. 19-2927, could not be repealed, because the statutes providing that authority did not authorize repeal.

K.S.A. 19-2901 likewise does not expressly authorize repeal of zoning regulations adopted thereunder. However, by its terms, this statute is not applicable uniformly to all counties. Paragraphs (a) through (d) except from its operation certain counties within prescribed population and valuation categories. Senate Bill 175, adopted by the 1974 Legislation, confers upon counties what is commonly called the power of home rule. Section 2(a) provides in pertinent part thus:

"Counties are hereby empowered to trans-act all county business and perform such powers of local legislation and administration as they deem appropriate, subject only to the following limitations, restrictions, or prohibitions: First, counties shall be subject to all acts of the legislature which apply uniformly to all counties; . . ."

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Because K.S.A. 19-2901 does not apply uniformly to all counties, the board of county commissioners may adopt a charter resolution, as provided for in Senate Bill 175, which would authorize the board to repeal the existing zoning regulation. Procedure for the adoption of a charter resolution is outlined in section 3 of the bill, a copy of which is enclosed.

The charter resolution passed could provide that the question of repeal of zoning be submitted to a vote of the people, under home rule powers granted by Senate Bill 175.

Under the existing provisions of K.S.A. 19-2908 agricultural uses are exempt from zoning regulations. The statute provides in pertinent part:

"No determination nor rule nor regulation shall be held to apply to the use of land for agricultural purposes, nor for the erection or maintenance of buildings thereon for such purposes so long as such land and buildings erected thereon are used for agricultural purposes and not otherwise:"

Your question #4 raises the issue of liability of the county for a purely governmental function. Under existing Kansas case law counties as well as other local units of government are immune from liability arising out of acts which are governmental in nature. We are aware of no decision wherein a county has been held liable in damages for changing its zoning requirements.

We are hopeful that the foregoing will be of assistance.

Very truly yours,



VERN MILLER
Attorney General

VM:DRH:bw

Enclosure



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VERN MILLER
Attorney General

October 19, 1973

Opinion No. 73- 363

Mr. Harrison Smith
Finney County Attorney
Finney County Courthouse
Garden City, Kansas 67846

Dear Mr. Smith:

You inquire whether any statutory provision authorizes a board of county commissioners to repeal a resolution providing for zoning of the territory lying within three miles of the boundaries of an incorporated city. You state that you find no such authority for repeal. We must agree with your conclusion.

We must assume, for the purposes of this opinion, that the zoning resolution in question was adopted under the authority of K.S.A. 19-2927, which states thus in pertinent part:

"For the purpose of promoting the public health, safety, morals, comfort, general welfare, and conserving and protecting property and building values throughout the county, or portions thereof, the county commissioners of any county in this state, having a city of the first, second or third class located therein, whether or not operating under the provisions of any county zoning law, may by resolution at a regular meeting of said board, provide for the preparation, adopting, amendment, extension, enforcement and variation of zoning regulations within the unincorporated territory lying within three (3) miles of any such city of the first, second or third class" [Emphasis supplied.]

At 8 McQuillin, Municipal Corporations, § 25.65, the writer states thus:

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"Generally speaking, amendatory or subsequent zoning ordinances may be enacted where necessary to promote the public welfare or other legitimate object of the police power. And zoning ordinances may be repealed upon the same grounds."

At § 25.67, it is stated further:

"The power of a municipal corporation to amend the provisions of a zoning ordinance, like the power to enact a zoning ordinance, is limited to that conferred by the enabling statutes and laws. The amendment or repeal must be authorized by the grant of power to zone."

K.S.A. 19-2924, cited above, empowers the commission to take appropriate steps for the amendment and variation of zoning regulations. No language in this or in succeeding sections authorizes outright repeal of such regulations once adopted.

At 58 Am.Jur., Zoning, § 169, it is stated thus:

"A municipality which by law has an option to establish a zoning system also has the authority to terminate such a system, abolish the zoning commission created thereunder, and free the property from the restrictions thereof"

The sole authority cited for this statement is Madison v. Kimberly, 118 Conn. 6, 169 A. 909 (1934), wherein the court upheld a city resolution repealing all earlier zoning ordinances, and disestablishing a zoning commission created by an earlier ordinance. The court based its conclusion upon the "familiar principle that the grant of power to enact ordinances ordinarily implies the power to repeal them." It stated thus:

"We cannot read into the statute empowering towns to appoint a zoning commission . . . any expression of intention upon the part of the Legislature that the power once exercised by a town could not thereafter be rescinded. The language of the statute shows clearly that the Legislature intended it to be optional with a town whether or not it shall have a zoning system. If the power is exercised and commissioners appointed, the town, as it had the option to adopt such a system, may thereafter terminate it in like manner. We conclude, therefore, that the vote of April 12 . . . abolished the zoning commission and terminated the zoning system . . . and thereafter, the property of the defendant was freed

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of any restrictions imposed by the zoning regulations" 169 A. at 911.

In Brown v. Arkansas City, 135 Kan. 453, 11 P.2d 607 (1932), it was urged that a city which adopted an ordinance, as authorized by state statute, creating a city court, had the implied and inherent power to repeal that statute. The court rejected that contention. The court recognized that when a municipal council has been granted power to enact ordinances it is generally regarded to have, as an incident thereto and without any express reference, the power to repeal such ordinances. The principle, however, does not apply where the ordinance is enacted pursuant to express and precise statutory authority which appears to describe in toto the authority to be enjoyed by the municipal body. This principle appears squarely applicable here. Nothing in K.S.A. 19-2927 nor in subsequent sections speaks of repeal. K.S.A. 19-2931 states in part thus:

"The county commissioners shall provide for the manner in which such regulations, restrictions and boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed within the unincorporated territory."

Outright repeal is not provided for. Likewise, the procedure for amending regulations and changing districts set forth in K.S.A. 19-2923 speaks only of that, amendment and change, and not of repeal.

In view of the comprehensive statutory scheme provided for implementation of zoning within the three-mile limit surrounding incorporated cities, and the complete absence of any provision authorizing outright repeal of regulations once adopted, we cannot but conclude that the county commission has no power to repeal regulations now in force, but is authorized only to change and amend them in accordance with the procedure and under the conditions prescribed by law.

Yours very truly,

VERN MILLER
Attorney General

VM:JRM:jam

bcc: Dan Turner, Topeka City Attorney

SENATE BILL No. 175

An Act relating to counties; concerning the powers thereof; granting to counties certain powers of home rule; amending K. S. A. 19-101, and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K. S. A. 19-101 is hereby amended to read as follows: 19-101. That each organized county within this state shall be a body corporate and politic, and as such shall be empowered for the following purposes: *First*, to sue and be sued; *second*, to purchase and hold real and personal estate for the use of the county, and lands sold for taxes as provided by law; *third*, to sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interest of the inhabitants; *fourth*, to make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate or administrative powers; *fifth*, to exercise the powers of home rule to determine their local affairs and government authorized under the provisions of section 2 of this act; *sixth*, to exercise such other and further powers as may be especially conferred by law.

New Sec. 2. (a) Counties are hereby empowered to transact all county business and perform such powers of local legislation and administration as they deem appropriate, subject only to the following limitations, restrictions, or prohibitions: *First*, counties shall be subject to all acts of the legislature which apply uniformly to all counties; *second*, counties shall have no power under this section to consolidate or alter county boundaries; *third*, counties shall have no power under this section to affect the courts located therein; *fourth*, counties shall be subject to acts of the legislature prescribing limits of indebtedness; *fifth*, in the exercise of powers of local legislation and administration authorized under provisions of this section, the home rule power conferred on cities to determine their local affairs and government shall not be superseded or impaired without the consent of the governing body of each city within a county which may be affected; *sixth*, counties shall have no power under this section to legislate on social welfare administered under state law enacted pursuant to or in conformity with public law No. 271—74th congress, or amendments thereof; *seventh*, counties shall be subject to all acts of the legislature concerning general elections and the election of county officers; and *eighth*, counties shall be subject to the limitations and prohibitions imposed under K. S. A. 1973 Supp. 12-172 *et seq.* prescribing limitations upon the levy of retailers' sales taxes by counties.

(b) Counties shall apply the powers of local legislation granted in subsection *(a)* of this section by resolution of the board of county commissioners. If no statutory authority exists for such local legislation other than that set forth in subsection *(a)* of this section and the local legislation proposed under the authority of such subsection is not contrary to any act of the legislature, such local legislation shall become effective upon passage of a resolution of the board and publication in the official county newspaper. If the legislation proposed by the board under authority of subsection *(a)* of this section is contrary to an act of the legislature which is applicable to the particular county but not uniformly applicable to all counties, such legislation shall become effective by passage of a charter resolution in the manner provided in section 3 of this act.

New Sec. 3. (a) Any county may by charter resolution elect in the manner prescribed in this section that the whole or any part of

any act of the legislature applying to such county other than those acts concerned with those limitations, restrictions or prohibitions set forth in subsection (a) of section 2 of this act shall not apply to such county.

(b) A charter resolution is a resolution which exempts a county from the whole or any part of an act of the legislature and which may provide substitute and additional provisions on the same subject. Such charter resolution shall be so titled, shall designate specifically the act of the legislature or part thereof made inapplicable to such county by the passage of the resolution and shall contain any substitute and additional provisions. Such charter resolution shall require the unanimous vote of all board members unless the board determines prior to passage it is to be submitted to a referendum in the manner hereinafter provided, in which event such resolution shall require a two-thirds ($\frac{2}{3}$) vote of the board. Every charter resolution shall be published once each week for two (2) consecutive weeks in the official county newspaper. A charter resolution shall take effect sixty (60) days after final publication unless it is submitted to a referendum in which event it shall take effect when approved by a majority of the electors voting thereon.

(c) If within sixty (60) days of the final publication of a charter resolution a petition signed by a number of electors of a county equal to not less than two percent (2%) of the number of electors who voted at the last preceding November general election or one hundred (100) electors, whichever is the greater, shall be filed in the office of the county election officer demanding that such resolution be submitted to a vote of the electors, it shall not take effect until submitted to a referendum and approved by the electors. An election if called, shall be called within thirty (30) days and held within ninety (90) days after the filing of the petition. The board shall by resolution call the election and fix the date, which resolution shall be published once each week for three (3) consecutive weeks in the official county newspaper, and the election shall be conducted in the same manner as are elections for officers of such county. The proposition shall be: "Shall charter resolution No. _____, entitled (title of resolution) take effect?" The board may submit any charter resolution to a referendum without petition in the same manner as charter resolutions are submitted upon petition, except elections shall be called within thirty (30) days and held within ninety (90) days after the first publication of the charter resolution. Each charter resolution which becomes effective shall be recorded by the county election officer in a book maintained for that purpose with a statement of the manner of adoption, and a certified copy shall be filed with the secretary of state, who shall keep an index of the same.

(d) Each charter resolution passed shall control and prevail over any prior or subsequent act of the board and may be repealed or amended only by charter resolution or by an act of the legislature uniformly applicable to all counties.

New Sec. 4. The powers granted counties pursuant to this act shall be referred to as county home rule powers and they shall be

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liberally construed for the purpose of giving to counties the largest measure of self-government.

Sec. 5. K. S. A. 19-101 is hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the
SENATE, and passed that body

SENATE adopted
Conference Committee report _____

President of the Senate.

Secretary of the Senate.

Passed the HOUSE
as amended _____

HOUSE adopted
Conference Committee report _____

Speaker of the House.

Chief Clerk of the House.

APPROVED _____

Governor.