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STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

October 9, 1974

Opinion No. 74-335

Mr. Robert C. Londerholm
Special Attorney
P. O. Box 1
Olathe, Kansas 66061

Dear Mr. Londerholm:

You inquire concerning airport zoning powers which may be exercised by the Johnson County Airport Commission, which operates a single-runway airport located at 151st and Pflumm Road, within the corporate limits of the City of Olathe, and the recently acquired Johnson County Industrial Airport, formerly the Olathe Naval Air Station, located between Olathe and Gardner.

Present and potential development in the areas of these airports have raised important questions concerning the existence and exercise of airport zoning powers based upon articles 3 and 7, ch. 3, K.S.A. For example, you advise that substantial residential construction is now occurring in and around the first airport, particularly in areas immediately to the north and northeast of the airport, within the Olathe corporate city limits. The areas immediately to the west, south and east of this airport are in Oxford Township and although no immediate construction is underway there, advance zoning to industrial use has been recommended by the township zoning board. The Industrial Airport, located between Olathe and Gardner, is likewise an area of potential growth and development, of residential, commercial and industrial character. The area immediately surrounding the Industrial Airport is in Gardner Township, with the city limits of both Olathe and Gardner thereby.

The Johnson County Airport Commission was created pursuant to K.S.A. 1973 Supp. 3-307a et seq., sections enacted as part of ch. 10, L. 1967, applicable presently only to Johnson County. Under K.S.A. 1973 Supp. 3-307b, it is vested with

"the authority and control over public airports operated by the county, including any buildings, grounds, and other airport structures located anywhere within the county."

K.S.A. 1973 Supp. 3-307c enumerates certain responsibilities of the commission it must discharge in the exercise of its powers:

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"In exercising the powers conferred by this act, the airport commission shall....(5) act as an airport zoning commission for the county commissioners...."

K.S.A. 1973 Supp. 3-307e elaborates on its responsibilities in this capacity, and the correlative responsibilities of the board of county commissioners thus:

"The airport commission shall act as an airport zoning commission for the county and as such shall make recommendations and serve in the same capacity as an airport zoning commission provided for in subsection (2) of K.S.A. 3-705. Said commission *shall* make such recommendations concerning type and boundary of zones and regulations to be adopted for public airports and all property within one (1) mile thereof. The board of county commissioners *shall* act on such recommendations and *may* zone such public airports and the surrounding areas within one (1) mile except where such areas have already been zoned by city action. In such cases, city zoned areas shall keep such city zoning control except that any changes in existing city zoning must have the approval of the board of county commissioners. All airport zoning regulations adopted as provided for herein shall be administered by the airport commission, as directed by the board of county commissioners. The county commissioners shall exercise directly all the zoning authority granted by this act in the event an airport commission is not appointed or functioning." [Emphasis supplied.]

The question is raised in the first instance, whether the requirement that the board of county commissioners adopt airport zoning regulations is mandatory or directory. As you point out, the terms "shall" and "may" have frequently been subject to judicial construction in various statutory contexts. The word "shall," ordinarily a term of mandatory and imperative import, may, in a particular statutory enactment, be construed to mean "may," making the duty permissive and discretionary rather than mandatory. See, e.g., *Bock v. Stack*, 132 Kan. 533 (1931). Conversely, the term "may" has been construed to mean "shall," to describe a mandatory and imperative duty. *First National Bank of Ottawa v. Brown*, 117 Kan. 339 (1924). When, by statutory amendment, the term "may" is substituted for "shall," the legislative intent

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is deemed to be clear, that what formerly was mandatory shall thereafter be discretionary. See, e.g., *Foster v. Harper County Commissioners*, 143 Kan. 361, 55 P.2d 349 (1936).

In K.S.A. 3-307, both words appear, "shall" to describe the duty of the airport commission to make zoning recommendations and the duty of the county commissioners to "act" upon them, at least in some unspecified fashion, and "may" to prescribe and describe the responsibility of the county commissioners to adopt zoning regulations. Giving the term "shall" its usual and ordinary meaning, that the duty which the term defines or describes is mandatory and imperative, the statute requires that the airport zoning commission make zoning recommendations, and that the board of county commissioners "shall act on such recommendations." Similarly, if the term "may" is given its ordinary and usual import of discretion, the board of county commissioners, after having received the recommendations and taken some unspecified action thereon, which may be no more than mere acknowledgment, is free to adopt or not to adopt any zoning regulations whatever as a result of the recommendations.

This leads to the somewhat anomalous result that the airport commission, i.e., the sole body empowered to make zoning regulation recommendations, is required to do so, while the legislative body empowered to act upon those recommendations, enjoys discretion to zone or not to zone, as a result of those recommendations, as it chooses. This anomaly, perhaps slight in itself, is compounded by the following:

"The county commissioners shall exercise directly all the zoning authority granted by this act in the event an airport commission is not appointed or functioning."

Hereunder, presumably, in the absence of an airport commission, the county commissioners fall heir to its duties, be they mandatory or directory. If mandatory, the county commissioner is theoretically required in lieu of the absent airport commission, to adopt recommendations for airport zoning, which the same commissioners are then free to implement or not as they see fit.

In *Foster v. Harper County Commissioners*, *supra*, the court quoted from 59 C.J. 1079-1082 thus:

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"As a general rule, the word "may," when used in a statute, is permissive only and operates to confer discretion....These words ["may" and "shall"], however, are constantly used interchangeable in statutes, and without regard to their literal meaning,....the court may consider the legislative history of the statute...."

Ordinarily, of course, the Legislature is deemed to have chosen the use of such words advisedly. The view that the board of county commissioners has discretionary power to adopt airport zoning regulations under K.S.A. 3-307e would agree with article 7, ch. 3, K.S.A. Under K.S.A. 3-703,

"In order to prevent the creation or establishment of airport hazards, any political subdivision....owning, controlling, or operating an airport....*may* adopt, administer, and enforce, in the manner, and upon the conditions hereinafter prescribed, airport zoning regulations for such airport hazard area...." [Emphasis supplied.]

Under K.S.A. 3-705(2), the governing body of the political subdivision may not adopt airport zoning regulations until the recommendations and report of the airport zoning commission are received. K.S.A. 3-702 sets forth an elaborate statement of legislative findings, on the basis of which airport hazards, as defined at K.S.A. 3-701(2) are declared to be public nuisances and contrary to the public interest. A local legislative decision to zone would implicitly entail a determination by the governing body that such zoning was necessary to eliminate or prevent the establishment of airport hazards. This determination involves, of course, an exercise of judgment, only after which the decision to zone follows.

It is consistent with the legislative scheme, as well as with the literal language of K.S.A. 3-307e, to conclude that the responsibility of the board of county commissioners to adopt airport zoning regulations is a discretionary one, which rests in the judgment of the board of county commissioners, in this instance. K.S.A. 3-307e provides that the airport commission shall serve in the same capacity as an airport zoning commission provided for under K.S.A. 3-705(2). Its recommendations are a prerequisite for action by the governing body. However, under the latter provision, the governing body has no mandatory duty to zone after receiving the recommendations of the commission, and K.S.A. 3-307e suggests no departure from this legislative scheme in this regard.

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Secondly, you inquire whether the grant of zoning power under article 3, ch. 3, K.S.A., constitutes special legislation which by implication preempts Johnson County from adopting "airport hazard" zoning regulations under art. 7, ch. 3. K.S.A. 3-307e states that the airport commission appointed thereunder shall "serve in the same capacity as an airport zoning commission provided for in subsection (2) of K.S.A. 3-705," and provides that the provisions of art. 7, ch. 3, "shall, insofar as the same can be made applicable, govern judicial review and enforcement and remedies for airport zoning regulation adopted pursuant to this act." The 1967 enactment contains virtually no substantive material, with one exception, on the exercise of the zoning powers of the airport commission and governing body thereunder. This silence, together with the cited references therein to art. 7, ch. 3, suggest that in its capacity as an airport zoning commission, the airport commission acts within the statutory framework provided for airport zoning commissions under art. 7, ch. 3.

The exception noted above concerns the area as to which the commission may make zoning recommendations, and in which the governing body may adopt airport zoning regulations. K.S.A. 3-307e empowers the commission to

"make such recommendations concerning type and boundary of zones and regulations to be adopted for public airports and all property within one (1) mile thereof. The board of county commissioners shall act on such recommendations and may zone such public airports and the surrounding areas within one (1) mile except where such areas have already been zoned by city action."

In our opinion, the area concerning which the Johnson County Airport Commission, appointed under K.S.A. 3-307a, is restricted to the area of the airport and within one mile thereof, under K.S.A. 3-307e. Under K.S.A. 3-703, the airport zoning commission may make recommendations for, and the governing body of the political subdivision may zone, the area known as the "airport hazard area," which under K.S.A. 3-701(3), is

"any area of land or water upon which an airport hazard might be established if not prevented as provided in this act."

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Any political subdivision within or partly within 50,000 feet of a military airfield control tower may likewise zone within the "airport hazard area" thereof. Under K.S.A. 3-307e, the area concerning which the airport commission, in the capacity of airport zoning commission, may make recommendations, and within which the governing body may zone, is not defined as the "airport hazard area," but only as the "surrounding area within one (1) mile."

Thus, although the airport commission, acting under art. 3, ch. 3, acts within the statutory framework of art. 7, the territorial area subject to its area is much reduced, and is limited to the one-mile restriction, in our opinion.

You inquire, further, whether the zoning power over "airport hazards," as defined by K.S.A. 3-701(3), extends to height and similar restrictions only, which operate against hazards to the safety of aircraft operation and flight, or whether the zoning power includes the power to restrict and regulate land uses which pose potential ground safety hazards resulting from aircraft operation, such as restrictions against places of public assembly, e.g., schools, shopping centers and the like. As you point out, a one-story school or shopping center in the general landing approach area poses no greater threat to the safety of the aircraft than a two-story or split-level single family residence. Viewed from the standpoint of the safety of persons on the ground, however, it would be advisable to zone out places of public assembly in such approach areas, to reduce the potential number of persons who might be injured or killed in the event of an air tragedy on landing or take-off.

K.S.A. 3-703 provides in part thus:

"In order to prevent the creation or establishment of airport hazards, any political subdivision or subdivisions owning, controlling, or operating an airport, or those within or partly within fifty thousand (50,000) feet of a military airfield control tower, may adopt, administer, and enforce in the manner and upon the conditions hereinafter prescribed, airport zoning regulations for such airport hazard areas, whether such hazard area is located within or without the territorial limits of such subdivision, which regulations may divide such area into zones, and, within such zones, specify the land uses permitted and regulate and restrict the height to which structures and trees may be erected or allowed to grow...." [Emphasis supplied.]

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The stated permissible purpose of airport zoning under this provision is to prevent the creation or establishment of "airport hazards," defined at K.S.A. 3-701(2) as

"any structure or tree or use of land which obstructs the airspace required for the flight of aircraft in landing or taking-off at any airport or is otherwise hazardous to such landing or taking-off of aircraft."

The hazards which regulations may permissibly regulate, we must infer, are hazards to the safety of aircraft flight, landing, and take-off, and not hazards to occupants of land in the vicinity. K.S.A. 3-702 does, in the statement of legislative findings, state that

"an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also if of the obstruction type, in effect reduces the size of the area available for the...maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment or interest therein."

The definition of "airport hazard" is so specific, however, that we are compelled to conclude that the safety considerations which control the determination and identification of airport hazards are the safety of flight operations, and not of occupants of the surrounding areas. Certainly, of course, any aircraft mishap may endanger those on the ground, residents of the area and others. It is apparently this danger which is recognized in the legislative findings, and not the concern which you express, to avoid large concentrations of persons, places of public assembly and the like, within the areas of airport operations. Thus, it is our view that the zoning power extends only to "airport hazards," as defined above and identified as hazards to aircraft operation, and that the zoning power under art. 7, ch. 3 does not extend to the broader safety considerations you describe respecting population density, places of assembly and the like. Certain types of industrial development, e.g., types which produce smoke, might properly be zoned out as an "airport hazard," even though no physical structure poses a hazard. In that instance, it is the "use of land" which would be hazardous to aircraft operation, a permitted object of regulation and restriction under art. 7.

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K.S.A. 3-704(2) states thus:

"In the event of conflict between any airport zoning regulations adopted under this act and any other regulations applicable to the same area, whether the conflict be with respect to the height of structures or trees, the use of land, or any other matter, and whether such other regulations were adopted by the political subdivisions which adopted the airport zoning regulations or by some other political subdivision, the more stringent limitation or requirement as to airport hazards shall govern and prevail."

Thus, existing zoning regulations applicable in an "airport hazard area," such as those of the City of Olathe, would continue to apply, unless and until the political subdivision, in this case the county, adopted zoning regulations relating to the "height of structures or....use of land" which would override the existing regulations provided the newly adopted ones imposed more stringent limitations or requirements. Thus, as you suggest, any "airport hazard" zoning regulations adopted by the County would override city or township zoning previously adopted if no structure had been built or commenced pursuant to such zoning. If advanced zoning had been granted for a particular tract, but no construction commenced, a more stringent zoning regulation adopted by the County would then control.

K.S.A. 3-706(1) requires that all airport zoning regulations adopted thereunder "shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this act." In determining upon regulations to be adopted, the political subdivision must consider, among other factors "the character of the flying operations expected to be conducted at the airport...." This factor is particularly important, you indicate, for the Johnson County Industrial Airport, only recently acquired by the county, at which air traffic is presently minimal. However, it is a large installation, and projected possible uses include large commercial cargo planes and commercial passenger traffic by major airlines. You question whether the County "may zone based upon projected use of the airports," or if only present use may be considered. The planning and projection of air traffic and airport usage is often a complex and abstruse science. Certainly, the county is entitled to consider "expected" use, which, in turn, includes uses and character of flying operations which at the time zoning regulations are considered are presently expected or projected to occur or develop in the reasonably foreseeable future. Purely speculative or hopeful anticipations, of course are not sufficient.

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If a regulation based upon projected uses is challenged as overly restrictive and not supported by planned or anticipated uses, it would surely be sufficient to justify the restriction that the County could demonstrate that at the time of adoption of the regulation, it took into consideration the character of flying operations which were at that time planned or reasonably anticipated to develop within a period of time for which the county, as a governmental unit, might today reasonably plan. Obviously, a large area of "reasonableness" may be at issue here, but certainly, we agree that presently projected uses may be considered in developing zoning regulations.

A proviso to K.S.A. 3-703 states thus:

"Provided, That the governing body of any political subdivision within the boundaries of which, or within five (5) miles of the territorial limits of which is located a privately owned airport which uses its facilities to provide a service to the public, may exercise *zoning powers granted herein* if in the opinion of said governing body such action is necessary to protect the public interests in the services afforded by said privately owned airport." [Emphasis supplied.]

The "zoning powers granted herein" are those granted "[i]n order to prevent the creation or establishment of airport hazards." Although this proviso refers to necessary "to protect the public interests" in the services provided by the privately owned airport, the zoning powers granted are limited to the object of preventing airport hazards. Thus, we agree with you that the standards governing a determination to zone under this proviso are identical to those which govern the zoning of aircraft operations.

I hope the foregoing deals fully with the questions posed in your letter. If further questions arise, please feel free to contact us.

Yours very truly,



VERN MILLER
Attorney General

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