



STATE OF KANSAS

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Curt T. Schneider
Attorney General

June 10, 1976

ATTORNEY GENERAL OPINION NO. 76- 171

Mr. Theodore Hill
Sedgwick County Counselor
Office of the Board of
County Commissioners
Sedgwick County Courthouse
Wichita, Kansas 67203

Re: Counties--Planning Commission--Flood Protection and
Drainage

Synopsis: It is within the power of a joint city-county planning
commission to require a dedication of property for pur-
poses of flood control and drainage, prior to approval
of a plat of real property.

* * *

Dear Mr. Hill:

You have requested my opinion regarding whether the Metropolitan
Area Planning Commission (MAPC) has authority to require land-
owners wishing to subdivide property to dedicate a portion of
that property for drainage and flood control prior to approval
of the plat for the subdivision.

The City of Wichita and Sedgwick County have joined to create the
Metropolitan Area Planning Commission. Comprehensive plans have
been developed and subdivision regulations promulgated, including
regulations governing the subdivision of land. Under K.S.A. 1975
Supp. 12-705 and K.S.A. 19-2905, zoning boards of both the city
and county are each required to adopt regulations governing the
use and subdivision of land within their respective jurisdictions.
These regulations may provide for the proportionate area of streets
in relation to other existing or planned streets and with respect

Mr. Theodore Hill
Page Two
June 10, 1976

to adequate and convenient open spaces for traffic, utilities, access for fire-fighting apparatus, recreation, light and air or the avoidance of congestion of population, including minimum width and area of lot and minimum ground for area for residences; and such regulations may also provide for the minimum standards and requirements for adequate drainage, flood protection and floodplain regulations and the location and paving of sidewalks, streets, or other public ways which are or may be required by the board to be included in any plat, replat or dedication or deed of dedication for public use which may be presented for approval. In Sedgwick County and the City of Wichita, the board referred to is the Metropolitan Area Planning Commission. In addition to the requirements to be met for the Metropolitan Area Planning Commission, plats must also be considered by the County Commission in the event the area under consideration is not within the corporate limits of the city. K.S.A. 19-2905 requires that no plat or replat or dedication or deed of a street or a public way shall be filed with the Register of Deeds as provided by law until such plat or replat or dedication or deed shall have endorsed thereon, approval by the zoning board of the Board of County Commissioners, and the Wichita City Commission may have jurisdiction in which case approval of both governing bodies is necessary. The Metropolitan Area Planning Commission is given subdivision jurisdiction within the City of Wichita and the unincorporated area within three miles thereof and/or such other unincorporated areas as may be determined appropriate by the Board of County Commissioners of Sedgwick County.

In this regard, K.S.A. 12-705 provides in pertinent part:

"No such regulations or changes or amendments thereto adopted by a city planning commission shall become effective unless and until the same has been submitted to and approved by the governing body of the city and no such regulations or changes or amendments thereto adopted by a joint committee as hereinafter provided, shall become effective unless and until the same has been submitted to and approved by both the board of county commissioners and the governing body of the city. *Such regulations may provide for the harmonious development of the community, including the proper location and width of streets, and for building lines, open spaces, safety and recreational facilities, flood protection and floodplain regulations and for the avoidance of congestion*

Mr. Theodore Hill
Page Three
June 10, 1976

of population, including minimum width, depth and area of lots and compatibility of design." [Emphasis supplied.]

K.S.A. 19-2905 further provides:

"Before exercising the powers referred to above, the zoning board shall adopt regulations governing the subdivision and use of land within its jurisdiction. Such regulations may provide for the proportionate area of streets in relation to other existing or planned streets with respect to adequate and convenient open spaces for traffic, utilities, access for fire-fighting apparatus, recreation, light and air and for the avoidance of congestion of population, including minimum width and area of lots and minimum ground floor area of residences; and *such regulations may also provide for minimum standards and requirements for adequate drainage, flood protection and flood-plan regulations* and the location and paving of sidewalks, streets or public ways which are or may be required by the board to be included in any plat or replat or dedication or deed of dedication for public use which may be presented for approval." [Emphasis supplied.]

K.S.A. 19-2918 states:

"The planning board may adopt regulations governing the subdivision of land within that portion of the unincorporated area of the county, and the incorporated area of any city upon the written request by resolution of the governing body of such city, when the same shall have been designated by resolution of the board of county commissioners for that purpose. No such regulations or changes or amendments thereto adopted by a county planning board shall become effective unless and until the same has been submitted to and approved by the board of county commissioners and no such regulations or changes or amendments thereto adopted by a joint committee as herein-after provided shall become effective unless and

Mr. Theodore Hill
Page Four
June 10, 1976

until the same has been submitted to and approved by both the board of county commissioners and the governing body of the city. *Such regulations may provide for the location and width of streets, building lines, open spaces for traffic, utilities, access for fire-fighting apparatus, recreation, light, and air, for the avoidance of congestion of population, including minimum width and area of lots and for flood protection and flood-plain regulations.* Such regulations may also, as a condition to the approval of any plat, require and fix the extent to which and the manner in which streets shall be graded and improved, and water, sewers, drainage and other utility services and public improvements shall be provided, to protect public health and general welfare." [Emphasis supplied.]

The creation of the Metropolitan Area Planning Commission is permissible under K.S.A. 1975 Supp. 12-716 which authorizes two or more cities or counties of this state having adjoining planning jurisdictions or any county or city or cities within or adjacent to that county to join and cooperate in the exercise and performance of planning powers, duties and functions as provided by state law for cities and counties. The law relating to cities in regard to requirements is found, among other places, at K.S.A. 1975 Supp. 12-705 quoted above, which authorizes the "city planning commission" which has adopted a comprehensive plan to adopt and amend regulations governing the subdivision of land located within an area which shall be designated by resolution of the governing body of the city for this purpose. This area has to include the incorporated area of the city and may include any unincorporated territory lying outside of, but within three miles of the nearest point of the city limits provided that such territory is in the same county in which the city is located. The creation of the Metropolitan Area Planning Commission resulted from joint ordinance-resolution adopted by the city and county in 1967 and the "joint agreement," as amended, entered into by the governing bodies. This "joint-agreement" provides in part:

". . . The Planning commission shall cause to be prepared recommendations governing the control of subdivisions within the area of its jurisdiction . . ." and ". . . shall assume and perform all of the powers, duties and functions hereto vested in the Wichita City Planning Commission, in the Sedgwick County Planning

Mr. Theodore Hill
Page Five
June 10, 1976

Commission and in the previously constituted
Wichita-Sedgwick County Metropolitan Area
Planning Commissions."

Appropriate subdivision rules and regulations, as amended, have been approved and adopted by both governing bodies. The purposes are expressly stated to include provisions for "drainage" and "to exercise the powers conferred by K.S.A. 12-705 and K.S.A. 19-2918."

The precise question which has been presented for my opinion is stated thus:

"Under the 5th and 14th Amendments to the Constitution of the United States, does a board of county commissioners have the authority to require a landowner, in the process of platting his land, to dedicate a portion of said land to the public for flood control, riverbank, bank maintenance and river beautification purposes, as a prerequisite to obtaining final approval of his plat from said commission when said commission is authorized by K.S.A. 82a-307 to enter upon private property for the same purposes?"

A further question is stated as follows:

"If the public's right to acquire land and enter upon private property for flood control, riverbank, bank maintenance and river beautification purposes protected under K.S.A. 82a-307, K.S.A. 12-635 and K.S.A. 19-3307 to the extent that the action of the board of county commissioners in requiring the landowner to make the dedication as indicated above would constitute an unlawful taking of private property without just compensation and due process of law."

Clearly, in my judgment, it is fully within the power of the Metropolitan Area Planning Commission and of the board of county commissioners to require dedication of easements or property for drainage and flood protection purposes prior to granting approval of plats

Mr. Theodore Hill

Page Six

June 10, 1976

of land proposed to be filed. In *Hudson Oil Co. v. City of Wichita*, 193 Kan. 623, 396 P.2d 271 (1964), the court upheld a requirement by the Wichita city commission that, prior to granting a change of zoning, the tract first be platted and that a ten foot strip first be dedicated to be added to the existing right of way as necessary to maintain uniformity in a service or frontage street.

The power of the governing body and of the planning commission to require a dedication of property for drainage and flood control purposes under the cited statutes above rests upon precisely the same statutory base as was involved in the *Hudson Oil Co.* decision. There seems little basis upon which to distinguish the power of the planning commission and the governing body to impose dedication requirements for streets and other public ways from the exercise of the same power for another stated statutory purpose, flood protection and drainage.

It is apparently the argument of interested parties with matters presently before the board of county commissioners that a requirement that property be dedicated or easements granted for flood control and drainage purposes is *per se* unreasonable and therefore a denial of rights under the Fifth and Fourteenth Amendments to the United States Constitution, because other statutes provide means whereby governing bodies may deal with flood protection and control, as well as drainage.

The argument is not persuasive. K.S.A. 82a-307 authorizes the board of county commissioners, upon the petition of fifty taxpayers owning land in the flood plain of any river in the county, to "clean and maintain the banks and channels of the streams and watercourses within definitely established bank lines," and "to keep said streams free of drift, trees and other obstructions, for the purpose of reducing floods and overflows" Under K.S.A. 19-3301 *et seq.*, the board of county commissioners may exercise the power of eminent domain

"where it is required by the federal government as a condition to the construction of any flood control works as provided in this act [works authorized by the Congress to be constructed by the Corps of Engineers of the United States Army or other department or agency of the federal government]." K.S.A. 19-3302.

K.S.A. 12-635 authorizes any city in or near which there flows a natural watercourse from which overflow in the event of high water is liable to cause injury to any bridge, street, alley, public or

Mr. Theodore Hill
Page Seven
June 10, 1976

private property to acquire by condemnation or eminent domain the land or easements necessary, within or without the city limits to the extent of ten miles therefrom, to construct drains, canals and artificial watercourses, levees and embankments, and other works and improvements deemed necessary to relieve the threat of damage from overflowing waters.

Each of these statutes provides a specialized tool, as it were, for a city or county to deal with particularized problems of drainage and flood control. Nothing in any of these statutes suggests, even remotely, that the planning and zoning power of the city may not also be used in the interests of drainage and flood control, or that in the review of plats of property proposed to be filed, that land may not be required to be dedicated for purposes of drainage or flood control in the exercise of the planning and zoning authority of the city or county. Certainly, the powers of the city and county under these particular statutes are highly restricted, and in no fashion do they provide adequate substitutes for the broad authority needed by cities and counties, and granted to them under the statutes cited earlier in this opinion, to make adequate provision for flood and drainage control and protection in the exercise of statutory planning powers and the adoption of appropriate subdivision regulations.

Accordingly, it is my opinion that under the Fifth and Fourteenth Amendments to the United States Constitution, it is fully within the power of the Metropolitan Area Planning Commission and of the board of county commissioners to require dedications of easements or of property for drainage and flood protection purposes prior to granting approval of plats of land which are proposed to be filed for approval.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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