

STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

February 16, 1977

ATTORNEY GENERAL OPINION NO. 77- 59

The Honorable Bill Morris
State Senator
3rd Floor - State Capitol Building
Topeka, Kansas 66612

Re: Cities--Zoning--Liability

Synopsis: The exercise of municipal zoning power is an inherently governmental function, and it is unlikely that members of the city governing body or members of a planning commission will be held liable for damages for injuries resulting from a safety hazard which is constructed as a result of the grant of a zoning change.

* * *

Dear Senator Morris:

I have your letter of February 14, 1977, requesting my opinion whether members of a metropolitan area planning commission, or a city governing body, would be liable for injuries or damages caused, at least in part, by a hazard which was created by a zoning change. Stated otherwise, you ask whether, if it could be established that zoning change in a given area resulted in an accident and injury, the planning commission or city governing body would be liable for the consequent damages.

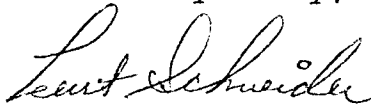
The question of sovereign immunity is one which has been much litigated of late in this state. See Brown v. Wichita State University, 217 Kan. 279, 540 P.2d 66 (1975), and Brown v. Wichita State University, P.E.C., Inc., 217 Kan. 661, 538 P.2d 713 (1975), and on rehearing, 219 Kan. 2 (1976).

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In Carol v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969), the court abolished "governmental immunity for negligence, when the state or its governmental agencies are engaged in proprietary activities. . . ." 203 Kan. at 848. Whether a given activity is governmental or proprietary is, of course, a much litigated question. In my judgment, however, the exercise of municipal zoning power is clearly a governmental function, and it is extremely unlikely that members of the planning commission or governing body would be held liable under the circumstances which you pose.

I wish to emphasize that it is impossible to predict with absolute certainty the potential liability of any party based only upon hypothetical circumstances. The question of sovereign immunity has been a volatile one in recent years in Kansas, and any effort to predict the outcome of future cases must be mindful that on the rehearing in Brown v. Wichita State University, the court withdrew its earlier decision, but only by a vote of four to three. Although that decision affected the state itself, predictions of immunity on the local level are necessarily little more than conjecture when the question is raised on abstract, necessarily sketchy and hypothetical circumstances. Thus, I can only respond to your question with the suggestion that liability in the circumstances posed is unlikely.

Yours very truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj