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ATTORNEY GENERAL OPINION NO. 79- 28

Mr. Clyde Miller, President
Board of Education
Kaw Valley U.S.D. No. 321
P. O. Box 160
St. Marys, Kansas 66536

Re: Counties and County Officers--Planning and Zoning--School Buildings

Synopsis: There is no statutory expression of legislative intent that local boards of education are immune from zoning regulations promulgated by county zoning authorities. Such legislative intent must be inferred by application of the "balancing of interests" test stated in Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan. App. 2d 102 (1978), with such test to be applied initially by local zoning authorities. If this initial decision is arbitrary or unreasonable in balancing the respective interests of the local board of education and the county, such decision may be overturned on review by the district court.

* * *

Dear Mr. Miller:

You inquire generally as to the authority of a local board of education to select a site for school development in the school district, but more specifically you ask whether the board of education must comply with city or county zoning requirements in the exercise of the board's power to construct school buildings.

In framing your request, you have called our attention to "recent court decisions which have indicated that schools are not under the jurisdiction of other governmental units . . . in matters regarding zoning." Further, you have advised that the county zoning board of Pottawatomie County retains the zoning jurisdiction over the proposed school site, but that the city council of St. Marys desires a change in the existing ordinance which would prohibit school construction on that site, because such construction purportedly would conflict with the city's long-range development plan for the area. It also has been brought to our attention that, in 1974, the Pottawatomie Board of County Commissioners approved zoning regulations recommended by the county planning board, which allow school buildings as permitted uses in districts zoned for residential or agricultural purposes (including the area where the St. Marys school board proposes to build).

A county is vested with prescribed zoning powers by K.S.A. 19-2901 et seq. to "provide that all lands . . . which lie outside the limits of any incorporated city may be zoned . . . as may be deemed best suited to carry out the purpose of this act." (Emphasis added.) Pursuant to K.S.A. 19-2916a, county planning boards may develop comprehensive plans which "may include recommendations relative to the . . . general location, extent and relationship of the use of land for agriculture, residence, business, industry, recreation, education, public buildings and facilities . . . ." (Emphasis added.)

In contrast, the authority and responsibility of local boards of education are derived initially from Article 6, Section 5 of the Kansas Constitution, which provides:

> "Local public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected boards . . . ."

General statutory powers of local boards of education are set forth at K.S.A. 72-8212, which states in part:

> "The board shall have title to, and the care and keeping of all school buildings and other school property belonging to the school district . . . .
>
> "The board shall have the power to acquire personal and real property by purchase, gift or by the exercise of the power of eminent domain . . . ."

Thus, your inquiry requires consideration of whether the powers of one governmental entity to acquire and improve real property are subject to land-use regulations of another governmental body. Although we have discovered no decisions of the Kansas Supreme Court directly on point, a Kansas district court decision and an opinion of the Kansas Court of Appeals have addressed this precise issue. The question of whether a local board of education may exercise its legal authority to acquire land and to construct buildings with immunity from local zoning laws was at issue in Unified School District No. 501 v. City of Topeka (Shawnee County District Court, Case No. 132757, April 6, 1977, Journal Entry of Judgment and Memorandum of Decision). District Judge (now Justice) Kay McFarland, in an extensive review of authorities on the question, cited as a general rule the proposition that "[m]unicipal zoning ordinances generally are not held to be applicable to the State or any of its agencies in the use of property for a governmental purpose unless the legislature has clearly manifested a contrary intent." Noting that local boards of education are agencies or political subdivisions of the State [see Wichita Public Employees' Union v. Smith, 194 Kan. 2 (1964)], and finding no express statement in Kansas law that local boards shall be subject to municipal zoning ordinances, Judge McFarland concluded that "zoning ordinances of the city of Topeka limiting land use are not applicable to the School District's use of its land." (Memorandum of Decision, p. 13.)

It was further noted in this decision that "[t]he courts of several states have determined that municipal land use zoning ordinances are inapplicable to governmental projects for the construction of which the governmental body in question has the power to condemn or appropriate lands by the power of eminent domain," and that rule was cited as an alternative or additional ground for the court's holding. (Memorandum of Decision, p. 12.)

However, subsequent to this decision, the Kansas Court of Appeals decided Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan. App. 2d 102 (1978), holding that "[a] state agency is not automatically immune from local zoning and land-use regulation just because it is a state agency, or because it is exercising a governmental function, or because it is clothed with the power of eminent domain." (Syl. 1) The Court adopted a "balancing of interests" test which, in the Court's view, "better promotes the public's interest than any of the traditional mechanical tests." Id. at 112.

In Brown, the Kansas Forestry, Fish and Game Commission brought an appeal from Riley County District Court, which had enjoined the Commission from proceeding to install a parking lot and toilet facilities in the middle of a subdivision zoned for single family residences, because such use would have violated county zoning regulations. The Commission argued that, as an agency of the state, performing a governmental function, it was immune from land-use regulation by a political subdivision in the absence of a contrary legislative intent, and the Commission further urged that its power of eminent domain indicates a legislative intent that the Commission's use of land not be subject to local zoning controls. The Court rejected these "traditional tests," upon which the decision in the above-cited Shawnee County District Court case was predicated as "too simplistic, avoiding the kind of analysis needed for rational resolution of the complex issues posed by land use problems in a modern, urban-oriented society." 2 Kan. App. 2d at 104.

Noting that the Kansas Supreme Court had never before considered the precise question, the Court of Appeals reviewed "the new wave of intergovernmental zoning decisions" decided over the past decade and adopted the "balancing of interests" test set forth in Rutgers v. Piluso, 60 N.J. 142, 286 A. 2d 697 (1972). That test is concisely stated in syllabus 2 of the Court's opinion:

> "In the absence of a clear expression of legislative intent, whether one governmental agency is subject to land use regulations of another depends on an inference of legislative intent derived from an overall evaluation of all relevant factors, including (1) the nature and scope of the instrumentality seeking immunity, (2) the kind of function or land use involved, (3) the extent of the public interest to be served thereby, (4) the effect local land use regulation would have upon the enterprise concerned and (5) the impact of the proposed use upon legitimate local interests. In some instances one factor will be more influential than another or may be so significant as to completely overshadow all others. No one, such as the granting or withholding of the power of eminent domain, is to be thought of as ritualistically required or controlling." 2 Kan. App. 2d at 102.

In our judgment, the Brown case, being the latest and highest expression of Kansas judicial authority on this proposition, provides the basis for answering the question under consideration. Since our review of the pertinent statutes has revealed an "absence of a clear expression of legislative intent" whether local boards of education are subject to a county's land-use regulations, such intent must be inferred by application of the "balancing of interests" test adopted in Brown. However, as noted in that opinion, it is most appropriate that this test be applied initially by local zoning authorities:

> "It seems to us that, on balance, the initial decision on reasonableness . . . can be made more expeditiously and with greater discernment by the local zoning authority . . . . That being so, we infer a legislative intent that the responsibility should be imposed on that body." Id. at 114.

Based on the foregoing, our response to your inquiry cannot answer precisely the questions posed. However, it is our opinion that there is no express statutory exemption for school districts from a county's zoning regulations. Thus, the applicability of such regulations to a local board of education is a factual question, to be decided in the first instance by the county's board of zoning appeals. If this initial decision is arbitrary or unreasonable in balancing the respective interests of the school board and the county, such decision may be overturned on review by the district court.

For these reasons, we think it inappropriate for us to conjecture as to the appropriate "balancing of interests." The factors relevant to such consideration can best be discerned and evaluated by the local zoning authority.

Very truly yours,

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