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ATTORNEY GENERAL OPINION NO. 79- 119

Mr. Milton P. Allen
City Attorney
City of Lawrence
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Lawrence, Kansas 66044

Re: Cities and Municipalities--Planning and Zoning--Establishment of City Districts and Zones

Synopsis: The proposed creation of a "conservation zoning district," by which each lot in the district is restricted to its existing use would be invalid because the use of buildings and land on adjacent and otherwise similarly situated pieces of property would be non-uniform contrary to the requirements of K.S.A. 12-707. Such a restriction imposes a far broader restriction on a landowner's use of property than is reasonably necessary to achieve the goals of density control and stabilization of neighborhood development.

* * *

Dear Mr. Allen:

You have asked for our opinion whether a proposed restrictive zoning district may be validly established consistent with the Kansas enabling statutes for city planning and zoning, K.S.A. 12-701 et seq. You have advised that the city's inquiry is prompted by the request of Lawrence residents who are purchasing and rehabilitating older homes for single-family dwellings in some older neighborhoods in the city and who seek to have the area zoned more restrictively in order to protect their investments. You have further advised that one

such neighborhood, east of the University of Kansas, is presently a mixed-density residential area, with single-family houses, duplexes, triplexes and high-density apartment buildings.

In this context, you ask whether the city may lawfully create a zoning district by which the existing lot uses in such mixed density neighborhoods are "conserved," thus stabilizing the development of the neighborhood and precluding the future construction of additional high-density units. The significant feature of the proposal is that existing lot uses would be effectively frozen. As you have explained the proposal,

> "if a single-family house was located on a particular lot, the zoning restrictions for that lot would be such that only a single-family house would be an allowed use. Similarly, an existing duplex density would be zoned for duplexes, existing triplexes for triplexes, and so on." (Emphasis added.)

Specifically, you inquire first whether the creation of such district would violate the provisions of K.S.A. 12-707. Secondly, you ask whether such action, after thorough study and the favorable recommendation by the planning commission, would be arbitrary and capricious, given that a particular lot would be restricted to its existing use even though surrounding properties could be employed for higher intensity uses.

The legislature has established the means by which cities in Kansas may exercise zoning powers in K.S.A. 12-701 et seq. K.S.A. 12-707 provides in pertinent part:

> "The governing body of any city is hereby authorized by ordinance to divide such city into zones or districts, and regulate and restrict the location and use of buildings and the uses of land within each district or zone. Such zones or districts may be created for the purpose of restricting the use of buildings and land located within the same for dwellings, business, industry, conservation, flood plain . . . or for other purposes deemed necessary. The use of buildings and land and the regulations and restrictions upon the use of the same shall be uniform as to each zone or district but the uses and regulations and restrictions in any one zone or district may differ from those in other zones or districts."

K.S.A. 12-708 provides, in part, that upon review and recommendation of proposed zoning changes by the planning commission, "[t]he governing body may from time to time supplement, change or generally revise the boundaries or regulations contained in such zoning ordinance by amendement [sic]."

While unquestionably the city is empowered to change its zoning ordinance or ordinances when the governing body deems it reasonably necessary to do so, it is our opinion that the "conservation district" rezoning proposal, as you have outlined it, would be fatally defective under the above-cited statutes for its lack of uniform application to all the property in the proposed district. K.S.A. 12-707 requires, as you have correctly noted and as stated above, that "[t]he use of buildings and land and the regulations and restrictions upon the use of the same shall be uniform as to each zone or district." (Emphasis added.) Inasmuch as individual lots would be zoned according to their present uses under the proposed zoning restrictions, the use of buildings and land on adjacent and otherwise similarly situated pieces of property in the proposed district or districts would be non-uniform. In our judgment, such non-uniformity would invalidate the proposed zoning change because of the requirements of K.S.A. 12-707.

More importantly, however, we submit that the proposed rezoning would be invalid on another ground. In our opinion, the proposal would operate to propose a far broader restriction on the landowner's use of property than is reasonably necessary to achieve the desired end. Density may be controlled and growth in neighborhoods may be stabilized by less drastic means than that which the proposal in question contemplates. The restriction of each lot in the district to its existing use would be an unreasonably restrictive classification of similarly situated pieces of property in a particular residential neighborhood. For example, the restriction would preclude the landowner who presently has a duplex or triplex on his lot from later building a single-family dwelling. Such a restriction has no reasonable relation to the desired goal, i.e., density control, in such instances, and would therefore be invalid.

> "In making [zoning] classifications, a municipality must recognize natural reasons and differences suggested by necessity and circumstances existing in the area with which the ordinance deals, and constitutional uniformity and equality requires that classification be founded in real and not feigned differences having to do with the purposes for which the classes are formed. The classification, however, must be fair. The classification or division of a city into districts by a zoning regulation must be reasonable, uniform, or universal, and non-discriminatory, and bear a reasonable and just relation to the general object of the legislation . . . . Hence, it is usually required that there be reasonable uniformity of restrictions within districts having the same general characteristics, that the restrictions imposed operate generally, equally, and uniformly within the particular zones established, and that lands in like situations be classified alike with respect to the restrictions on use imposed." (Emphasis added.) 101 C.J.S. Zoning §33.

This encyclopedic statement continues in a subsequent section, as follows:

> "Uniformity of classification is necessary to avoid arbitrary action, but dissimilar treatment does not inevitably bespeak capriciousness. Where the situation of a piece of property appears to be the same as that of surrounding property and no facts justifying its special treatment are apparent, placing it in a different classification from that of the surrounding territory will on its face appear arbitrary, capricious, and unreasonable . . . ." Id. at §71.

Undeniably, all zoning ordinances, by their nature, restrict the use of property in the exercise of the police power, but "if the regulation goes too far" an ordinance or amendment may be held to be confiscatory, or a taking of property in contravention of the Fifth and Fourteenth Amendments. 82 Am. Jur.2d Zoning and Planning, §13.

Accordingly, in addition to our previous conclusion as to the non-uniform applicability of the proposed ordinance, we also conclude that the rezoning proposal in question would, if passed, be invalid because of its unduly restrictive nature. In reaching this conclusion we do not mean to suggest that the city may not, by means of restrictive zoning, control increases in population growth and density in a particular area or district. The Kansas Supreme Court has declared that such regulation is a legitimate exercise of the zoning power. See Hukle v. City of Kansas City, 212 Kan. 627, 636 (1973). But we think that the desired goal of density control and neighborhood stabilization may be achieved in this instance by a means much less drastic and much less restrictive of the use of property than the proposal in question.

Very truly yours,

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Attorney General of Kansas

W. Robert Alderson
First Deputy Attorney General

RTS:WRA:gk