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ATTORNEY GENERAL OPINION NO. 80-117

Keith Wilson
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Re: Cities and Municipalities--Planning and Zoning--
Effect of Annexation upon Tract Previously Zoned
by County

Synopsis: Upon annexation by a city, a tract of land previously zoned by a county does not retain its previous designation, but may be zoned by the city commission as this body deems to be in the best interests of the city. However, where there has been substantial construction or expenditure, the right to continue under the previous zoning cannot be affected by a subsequent change, with such a determination being a question of fact to be determined at the time the change occurs. In addition, a city may condition the grant of building permits upon a showing by the developer that drainage problems will be dealt with in a manner that will protect existing developments. Cited herein: K.S.A. 12-705, 12-705b.

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Dear Mr. Wilson:

As Assistant City Attorney for the City of Liberal, you have requested the advice of this office concerning a matter which will come before the city commission in the near future. Specifically, you inform us that a private developer wishes to construct a shopping mall on the outskirts of the city that could have a significant impact on the central business district. Additionally, concerns have been raised over potential drainage problems which could be caused by any such large facility built on the particular site in question. You inquire whether these concerns would be sufficient to allow the commission to "stop the project," and, presumably, still be within its legal authority.

We are informed that the site in question lies on the southwestern edge of the City of Liberal on a triangular piece of land which is itself not within the city limits, although it adjoins the city on two sides. However, the parcel has been zoned C-2 by the county, a classification which allows general commercial activities. This is considered by city authorities to include shopping malls, so that when (or if) the site is annexed into the city, the zoning would not of necessity need to be altered. Annexation seems assured, as it would not be possible for the property to receive any city services without being a part of the city.

Keeping the above in mind, it remains to address the two concerns mentioned earlier, that is, economic impact and drainage. The first of these has traditionally been addressed at the time when a city commission establishes the zoning classification for a particular parcel. It is at this stage that city commissioners, by refusing to establish a new classification, alter an existing one, or grant a variance, may stop development that they believe would be inimical to one or more interests of the city. See Hukle v. City of Kansas City, 212 Kan. 627 (1973) (denial of rezoning reasonable) and Golden v. City of Overland Park, 224 Kan. 591 (1978) (denial unreasonable). We note that the joint planning commission for Liberal and Seward County targeted the area for use as single and two-family residential housing in the 1974 Comprehensive Community Plan, and that the plan furthermore evinced commitments to the central business district and to local commercial development which would serve the needs of individual neighborhoods. These decisions, together with any position taken by the planning commission, are the types of factors which the city commission would legally be able to consider in determining whether to provide the necessary zoning for a shopping mall development. See Coughlin v. City of Topeka, 206 Kan. 552 (1971).

Furthermore, the fact that the property is now zoned C-2 does not preclude the city commission from deciding, nor the planning commission from recommending, that a different classification be assigned to the property upon its annexation. It has been recognized by a number of authorities, both case law and otherwise, that when land is annexed to a municipality, prior county zoning of the same land is thereafter without any effect. Taylor v. Bowen, 272 N.C. 726, 158 S.E.2d 837 (1968); Ben Lomond, Inc. v. City of Idaho Falls, 92 Idaho 595, 448 P.2d 209 (1968); 4 Yokley, Zoning Law and Practice, 4th ed., §25-13; 1 Rathkoph, The Law of Zoning and Planning, 3rd ed., ch. 25, §3. As a result, the property in question here would come into the city as unzoned property, subject to the recommendations of the planning commission and the ultimate decision of the city commission.

However, an exception to this power does exist, namely where progress has proceeded on the development so as to make the use an "actual" one. While such use could be rendered non-conforming by any subsequent zoning classification made by the city, the right to continue under that use would be vested, and would be preserved regardless. To achieve such protection, it is necessary that "substantial" construction must have begun on the project, or that "substantial" expenditures have been incurred. City of Syracuse v. Farmers/Elevator, Inc., 182 Neb. 783, 157 N.W.2d 394 (1968); Blundell v. City of West Helena, 258 Ark. 123, 522 S.W.2d 661 (1975); 49 A.L.R.3d 13, 20 (1973). The fact that the property was purchased with the particular use in mind, or that such use has previously been contemplated, is insufficient to find that an actual use exists. Boise City v. Blaser, 98 Idaho 789, 572 P.2d 892 (1977); Perkins v. Joint City-Council Planning Commission, 480 S.W.2d 166 (Ky. 1972); Phoenix City Council v. Canyon Ford, Inc., 12 Ariz. App. 595, 473 P.2d 797 (1970). What is "substantial" construction or investment is a question of fact to be determined in light of the particular circumstances which exist at the time the zoning change occurs.

As to the drainage problem, you inform us that the property in question has in the past been an area where water has "ponded" after rains. Given the large amount of parking space which is needed for a shopping mall, it would appear reasonable for the city to anticipate that there will be significant run-off into adjoining areas, with those to the east and south being residential in character. It is our opinion that the plat approval stage would be the appropriate one in which to raise such concerns, and that approval of a final lay-out could be conditioned on the developer's handling of excess run-off. If it appeared that such run-off could not be dealt with in a manner designed to safeguard existing development, this could be a basis for denial of building permits. K.S.A. 12-705, 12-705b.

In conclusion, upon annexation by a city, a tract of land previously zoned by a county does not retain its previous designation, but may be zoned by the city commission as this body deems

to be in the best interests of the city. However, where there has been substantial construction or expenditure, the right to continue under the previous zoning cannot be affected by a subsequent change, with such a determination being a question of fact to be determined at the time the change occurs. In addition, a city may condition the grant of building permits upon a showing by the developer that drainage problems will be dealt with in a manner that will protect existing developments.

Very truly yours,

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RTS:BJS:JSS:phf