STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

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ATTORNEY GENERAL OPINION NO. 80-204

Mr. Neil Shortlidge
Assistant City Attorney
City of Overland Park, City Hall
Overland Park, Kansas 66212

Re: Cities and Municipalities--Planning and Zoning--Meaning of Words "Receipt" and "Deliver" as Used in K.S.A. 12-708; Power of City to Establish Supplemental Rezoning Procedures

Synopsis: The words "receipt" and "deliver" as used in K.S.A. 12-708 mean that the governing body shall have formally communicated its statement of disapproval of a planning commission recommendation by letter or delivered message to the planning commission and that the planning commission shall have communicated its recommendations to the governing body in similar fashion.

A city may establish supplemental rezoning procedures when they do not conflict with K.S.A. 12-708. The enactment of a city ordinance requiring a second public hearing of the planning commission when the governing body returns a recommendation for a zoning amendment to the planning commission, and allowing a second fourteen-day filing period for petitions protesting the amendment after said second public hearing, is within the city's home rule power because the ordinance does not conflict with K.S.A. 12-708, but merely supplements those provisions. Cited herein: K.S.A. 12-708, 77-201, Second.

* * *

Dear Mr. Shortlidge:

You request our opinion on two questions, both concerning K.S.A. 12-708. You first inquire as to the meaning of the words "receipt" and "deliver" found in the following passage of K.S.A. 12-708:

> "If the planning commission fails to deliver its recommendations to the governing body within ten (10) days after receipt of the governing body's statement specifying disapproval, the governing body shall consider such course of inaction on the part of the planning commission as a resubmission of the original recommendations and proceed accordingly." (Emphasis added.)

You advise that the city's planning coordinator attends all meetings of the city council and the planning commission. You inquire whether communication of the governing body's disapproval of planning commission recommendations to the planning coordinator constitutes "receipt" of the governing body's statement of disapproval by the planning commission within the meaning of K.S.A. 12-708. We agree with your conclusion that it does not.

We have found no cases or previous opinions defining the words about which you have inquired as used in K.S.A. 12-708. Guided by the rule of statutory construction that "[w]ords and phrases shall be construed according to the context and the approved usage of the language . . ." (K.S.A. 77-201, Second), we note that the word "receipt" is defined as "the act or process of receiving." Webster's Third New International Dictionary (Unabridged, 1966), p. 1884. "Receive" is defined as "to take possession or delivery of" and "deliver" is defined as "yield possession or control of" and "to make known to another." Id., pp. 596, 1884. Applying these definitions, we think it clear that the statute contemplates that the governing body shall have formally communicated its statement of disapproval by letter or delivered message, and that the planning commission shall have communicated its recommendations in similar fashion. Moreover, the statute refers specifically to the governing body and the planning commission and not to individual members of either:

> "The governing body may either approve of such recommendations by the adoption of the same by ordinance or return the same to the planning commission . . . ." (Emphasis added.)

To say that this return occurs when the planning coordinator hears of the disapproval could mean that the ten-day period following receipt of the governing body's statement of disapproval could expire

before the planning commission even hears of the governing body's disapproval. This would not be a workable result. In Williams v. Board of Education, 198 Kan. 115 (1967), the Court announces:

> "It is a cardinal rule of statutory construction that the legislature intended a statute to be given a reasonable construction so as to avoid unreasonable and absurd consequences." 198 Kan. at 125.

It would surely lead to unreasonable consequences to conclude that the ten days could expire without the planning commission ever hearing of the disapproval. By the same token, it is unreasonable to conclude that the planning coordinator's presence at the time the planning commission makes its recommendation constitutes constructive delivery to the governing body. The planning commission's recommendation must be communicated to the governing body itself, not just to one who regularly attends its meetings, just as the governing body's disapproval must also be delivered to the commission, although we think that the planning coordinator could be used to communicate or deliver such messages to the two bodies.

You next inquire whether the city may establish supplemental rezoning procedures by ordinance in addition to those procedures set forth in K.S.A. 12-708. Specifically, you wish to know whether the city, in the exercise of its home rule power, may enact an ordinance requiring a second public hearing before the planning commission for reconsideration of recommendations which have been disapproved by the governing body, and whether a fourteen-day period for filing protests may follow this second public hearing.

K.S.A. 12-708 is clearly uniformly applicable to all cities in the state, so the city may not use its home rule power to exempt itself from the statute. The city may, however, supplement the statute as long as there are no conflicts between statute and ordinance. As the Kansas Supreme Court declared in Leavenworth Club Owners Assn. v. Atchison, 208 Kan. 318 (1971):

> "Where a municipal ordinance merely enlarges on the provisions of a statute by requiring more than is required by the statute, there is no conflict between the two unless the legislature has limited the requirements for all cases to its own prescription." Syl. 3.

In deciding that additional regulation by a city for the purpose of limiting drinking hours in private clubs regulated by state law is permissible, the Court stated, as a general principle, that a city may adopt additional or supplemental ordinances "in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality," so long as the local ordinance does not conflict with the state law. 208 Kan. at 320. (Emphasis added.) The Court has consistently affirmed that rule in later cases. As Justice Prager announced for the Court in Claflin v. Walsh, 212 Kan. 1 (1973),

> "the home rule power of cities is favored and should be upheld unless there is a sound reason to deny it. Where the legislature has acted in some area a city's power to act in the same area should be upheld unless the legislature has clearly preempted the field so as to preclude city action. Unless there is actual conflict between a municipal ordinance and a statute, the city ordinance should be permitted to stand." (Citing Leavenworth Club Owners Assn., supra.) 212 Kan. at 7.

Affirming the above-quoted principles, despite assertions that the legislature had preempted the field, the Court in Hutchinson Human Relations Comm. v. Midland Credit Management, Inc., 213 Kan. 308 (1973) expressly approved the City of Hutchinson's human relations ordinance, notwithstanding the enactment of the Kansas Act Against Discrimination and the establishment of a state commission and procedure for redressing civil rights complaints pursuant thereto, noting that "[t]he ordinance appears simply to supplement the statute. . . ." 213 Kan. at 314. (Emphasis added.) The Court cited the Leavenworth Club Owners Assn. case, supra, for the proposition that "[g]enerally a municipal regulation which is merely additional to that imposed by state law cannot be said to create a conflict therewith." Id. (Emphasis added.)

Thus, in order for a municipal ordinance to enlarge or supplement the provisions of a statute, two requirements must be met. First, the ordinance must not conflict with the statutory provisions on a particular subject, and second, the subject must be one which the legislature has not limited to its own prescription.

The test for determination whether a conflict exists was set forth in City of Junction City v. Lee, 216 Kan. 495 (1975). The Court held that a municipal ordinance making it a crime to carry a firearm on one's person was valid, although the state statute made the carrying of firearms illegal only when concealed. The Court wrote:

> "A test frequently used to determine whether conflict in terms exists is whether the ordinance permits or licenses that which the statute forbids or prohibits that which the statute authorizes, but where both an ordinance and the statute are prohibitory and the only difference is that the ordinance goes further in its prohibition but not counter to the prohibition in the statute and the city does not attempt to authorize by the ordinance that which the legislature has forbidden, or forbid that which the legislature has expressly authorized, there is no conflict." 216 Kan. at 501.

The proposed ordinance certainly does not prohibit that which the statute authorizes, nor does it permit what the statute expressly prohibits. Rather, as the Court said in Leavenworth Club Owners Assn. v. Atchison, supra, it merely "enlarges on the provisions of a statute by requiring more than is required by the statute." K.S.A. 12-708 prescribes the statutory procedure for zoning and rezoning. The statutory requirement of an original public hearing and a fourteen-day petition filing period serve to grant the public the right to participate in this procedure. A city ordinance furthering this right, "in aid and furtherance of the purpose of the general law" does not, in our opinion conflict with the state statute. Leavenworth Club Owners Assn., supra, 208 Kan. at 320.

The second requirement which must be met in order for the city to be able to pass this ordinance is whether the state legislature has preempted the particular field. The Court in City of Junction City v. Lee, supra, stated:

> "Whether a city ordinance is 'subject to' state legislation within the meaning of the home rule amendment depends upon whether the language or the terms of the ordinance conflict with those of the statute and whether the legislature has by legislation preempted the particular field." Syl. 6.

The Court further stated:

> "[L]egislative intent to reserve to the state exclusive jurisdiction to regulate must be clearly manifested by statute before it can be held that the state has withdrawn from the cities power to regulate in a particular area." 216 Kan. at 502.

More recently, in City of Junction City v. Griffin, 227 Kan. 332 (1980), the Court speaks to the issue of preemption, noting that

> "[t]he court has consistently rejected the doctrine of implied preemption of a particular field. Legislative intent to reserve exclusive jurisdiction to regulate an area must be clearly manifested by State law." 227 Kan. at 336.

K.S.A. 12-708 contains no express language to the effect that the legislature has preempted the area of zoning. Therefore, it is our opinion that a city may supplement the zoning and rezoning procedures prescribed by the statutes.

Assuming the city would pass the above-described supplementary zoning ordinance, you also inquire as to the legal effect of a protest in situations where a protest is filed within fourteen days of the statutorily-required public hearing, but not during the ordinance-required fourteen-day filing period following a second public hearing. You ask whether the governing body could approve the rezoning application or amendment without a three-fourths vote. In our opinion, it could not. K.S.A. 12-708 expressly provides that upon the filing of a timely protest, "the ordinance adopting the amendment shall not be passed except by at least three-fourths vote of all the members of the council or board of commissioners." Regardless of whether the city supplements the statutory procedures for rezoning by providing for an additional planning commission hearing and an additional protest period, it is our opinion that the protest filed pursuant to the statutory procedure must be given legal force and effect, thus requiring an extraordinary vote of the governing body to approve the amendment.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Steven Carr

Steven Carr
Assistant Attorney General

RTS:BJS:SC:phf