STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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September 13, 1982

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ATTORNEY GENERAL OPINION NO. 82- 197

Marlin Johanning
City Attorney
City Hall
515 Kansas Avenue
Atchison, Kansas 66002

Re: Cities and Municipalities--Planning and Zoning--
Amendments or Changes in Zoning

Synopsis: A city may not "incorporate by reference" to another instrument the legal description required to be set forth in the published notice of a proposed amendment to a zoning ordinance. Cited herein: K.S.A. 12-520a, 12-708, 12-3009.

* * *

Dear Mr. Johanning:

You request advice as to whether an opinion of former Attorney General Vern Miller, relating to the need for separate, "parallel" zoning and annexation ordinances as to land proposed to be annexed by a city, is still "endorsed" by this office. Your specific question is as follows:

> "[Would it be] legally sufficient to adopt a 'by reference' approach which would refer the reader of the zoning ordinance to its necessary legal description as it appears in the annexation ordinance, the latter of which would be published in the same official city newspaper on the same day as the former ordinance?"

We have reviewed the previous opinion, a copy of which is attached hereto, and it is hereby affirmed by this office.

In regard to the possibility of incorporating by reference (in the publication notice of the proposed zoning amendment) the legal description as set forth in the annexation resolution published pursuant to K.S.A. 12-520a(c), it should be noted that K.S.A. 12-3009, which permits certain designated items to be incorporated by reference in city ordinances, also includes the following proviso:

> "[N]othing herein shall be deemed to waive any statutory procedural requirement concerning a zoning ordinance, except that any city may incorporate by reference in conformity with K.S.A. 12-3010 a zoning ordinance or subdivision regulations in code form as that term is defined in K.S.A. 12-3301(c) if all other procedural requirements set forth in K.S.A. 12-708 are met." (Emphasis added.)

The underscored portion of the above-quoted statutory excerpt seems to indicate an intent that the authority to "incorporate by reference" does not apply to procedural requirements set forth in zoning statutes. One such procedural requirement relating to amendment of zoning ordinances is set forth in K.S.A. 12-708, as follows:

> "If such proposed amendment is not a general revision of existing ordinances and will affect specific property, it shall be designated by legal description and general street location and in addition to such publication notice, written notice of such proposed amendment shall be mailed to all owners of lands located within two hundred (200) feet of the area proposed to be altered and an opportunity granted to interested parties to be heard." (Emphasis added.)

As we have noted before (see Kansas Attorney General Opinion No. 81-166), the notice and hearing procedures set forth in K.S.A. 12-708 have, on several occasions, been held to be mandatory. See Carson v. McDowell, 203 Kan. 40 (1969); City of Manhattan v. Ridgeview Building Co., Inc., 215 Kan. 606 (1974). In light of this fact, and in consideration of the legislative intent reflected by the above-quoted language of K.S.A. 12-3009, it is

our opinion that a city may not "incorporate by reference" to another instrument the legal description required to be set forth in the published notice of a proposed amendment to a zoning ordinance.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Terrence R. Hearshman

Terrence R. Hearshman
Assistant Attorney General

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ing, to include that which passes through the sewer, whether it be a storm or sanitary structure. We fully concur with your opinion that the word "sewage" underscored above includes the contents of either a sanitary sewer or a storm sewer, and that accordingly, construction of the pumping station in question may be financed under K. S. A. 12-626 *et seq.*

JRM

LETTER, November 21, 1972, to Edward F. Horne, Manhattan

Re: SAME—*Annexation by City of Land Which is Subject to County Zoning Regulations*

You inquire concerning Ordinance No. 2789 of the City of Manhattan, amending § 30-407 of Ordinance No. 2650. It provides in pertinent part thus:

"# 3-407. Annexed Land. All land which may be hereafter annexed to the City of Manhattan shall, from and after the effective date of such annexation, be subject to the zoning regulations for the district as designated by the annexing ordinance.

"Before the annexing ordinance may designate that the land to [be] annexed shall be placed in district R-2, R-3, R-4, R-5, U, C-1, C-2, C-3, C-4, C-5, C-6, I-1, I-2, I-3, I-4, or PDD full compliance with Kansas Statutes Annotated 12-708 and Article XI of Ordinance # 2650 shall be had. It is the purpose of this provision to require that the hearing procedures before the planning commission of said city be exhausted and that full compliance otherwise be had with the aforesaid statute and ordinance before the City Commission may adopt the annexing ordinance containing a designation of applicable zoning regulations as contained herein.

"The annexing ordinance may designate that the zoning regulations of RS, R, or R-1, shall apply to the land to be annexed, *without the necessity of complying with Kansas Statutes Annotated 12-708 or Article XI of Ordinance # 2650.*

"In those instances where compliance with Kansas Statutes Annotated 12-708 and Article XI of Ordinance No. 2650 is required, full compliance herewith shall be concluded before the annexing ordinance shall be adopted." (Emphasis supplied.)

Accordingly, as to land which is to be annexed and placed in a more restrictive zoning classification than single family use, the city planning commission must necessarily complete its hearing procedures prior to annexation concerning land which is at that time beyond the corporate limits of the city. K. S. A. 12-715b provides in pertinent part thus:

"Any city shall be authorized to adopt zoning regulations affecting land located outside the city but within three (3) miles thereof under the following conditions, except that nothing in this act shall be construed as authorizing any

city to adopt regulations applying to or affecting any land in excess of three (3) acres under one ownership which is used only for agricultural purposes:

* * *

"(c) The county or township does not have in effect zoning regulations for such area outside the city but within three (3) miles thereof adopted in conformity with the statutes prescribing procedure for the adoption of county zoning regulations."

You indicate that the county does have zoning regulations for this extraterritorial three-mile area. The question remains whether the city planning commission may lawfully discharge its duties under K. S. A. 12-708 as to land which is not at the time thereof within the corporate boundaries of the city, and which is subject to county zoning regulations.

K. S. A. 12-707 provides in pertinent part thus:

"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 the 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, floodplain or other purposes deemed necessary. . . .

"Any floodplain zone or district shall include the floodplain area within any incorpoarted area of the city and may include any unincorporated territory lying outside of but within three (3) miles of the nearest point of the city limits. . . ."

K. S. A. 12-708 commences thus:

"Before any city shall create any zone or district or regulate or restrict the use of buildings or land therein, the governing body shall require the planning commission to recommend the nature and number of zones or districts which it deems necessary and the boundaries of the same and appropriate regulations or restrictions to be enforced therein. . . . The governing body may either approve such recommendations by the adoption of the same by ordinance or return the same to the planning commission for further consideration. . . . The planning [illegible]ion, after reconsidering the same, may resubmit its original recomme[illegible] the reasons therefor or submit new and amended recommend[illegible] of such recommendations, the governing body may adop[illegible]d and adopt such recommendations by ordinance.

The [illegible]s of the city planning commission are, of cour[illegible]not legislative in character. *Coughlin v. City of* [illegible] 552, 480 P. 2d 91 (1971). Nothing in K. S. A. 1[illegible] as a jurisdictional prerequisite to the conduct of [illegible]urnishing of recommendations to the governing [illegible]d which is the subject of such hearings and recom- at that time within the corporate limits of the city. visory capacities, the powers and duties of the com-

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mission are not so restricted. For example, K. S. A. 12-704 provides thus in pertinent part:

"The planning commission is hereby authorized to make or cause to be made a comprehensive plan for the development of such city and any unincorporated territory lying outside of the city but within the county in which such city is located, which in the opinion of the commission forms the total community of which the city is a part."

See also K. S. A. 12-704a, and 12-705.

In our view, the city planning commission may likewise exercise its powers under K. S. A. 12-708 as to areas outside the city at the time of the commission's actions with respect thereto.

The general rule regarding the zoning status of annexed land is stated in 101 C. J. S., *Zoning*, § 134 at p. 892:

"The zoning status of property annexed to a municipality depends on the provisions of the municipal ordinances, and in the absence of any provision covering the matter it has been held that unincorporated territory, on being annexed to a city, occupies the status of unzoned property regardless of its zoning status before annexation. County zoning regulations cease to apply to territory which has become part of a city."

Applying the general rule in this case, we cannot but conclude that upon annexation, the newly annexed land becomes subject to the zoning power of the city. Insofar as the ordinance authorizes all steps precedent to adoption of a zoning classification by the governing body to be accomplished prior to annexation, we believe that it constitutes a valid exercise of the police power of the city.

A second question which arises is the propriety of incorporating in an annexing ordinance zoning designations for the annexed land. An ordinance similar to that involved here was considered in *Beshore v. Town of Bel Air*, 237 Md. 398, 206 A. 2d 678 (1965). The ordinance in question there provided thus:

"In all cases where territory has not been specifically included within a district, such territory shall automatically be classified as R-1 District until otherwise classified, but in cases of annexation of territory where the annexation proceeding provides a zoning classification for the territory to be annexed, such territory shall be so classified upon incorporation into the town of Bel Air."

The ordinance was considered in the context of a statute which stated thus:

"The [annexing] resolution shall describe . . . the exact area proposed to be included in the change, and shall contain complete and detailed provisions as to the *conditions and circumstances applicable to the change in boundaries and to the residents and property within the area to be annexed.*" (Emphasis supplied.)

The court regarded zoning as a "condition applicable to property,"

and properly incorporated into an annexing ordinance. As to the charge that the resolution in question violated the state constitution on the grounds that it embraced more than one subject, annexation and zoning, and that the title omitted mention of zoning, the court regarded the resolution as falling within the principle that "[i]f several sections of the law refer to and are germane to the same subject matter, which is described in its title, it is considered as embracing a single subject, and as satisfying the requirements of the Constitution in this respect."

An ordinance purporting both to annex and to zone certain land was upheld, albeit without discussion of this precise question, in *Westwood Development Company v. City of Abilene*, 273 S. W. 2d 652, Tex. Civ. App. (1954). See also *Mayor and Aldermen of the City of Annapolis v. Kramer*, 235 Md. 231, 201 R. 2d 333 (1964).

Kansas lacks the broad statute quoted above in *Beshore, supra*, allowing the incorporation in an annexing ordinance or resolution of detailed provisions applicable to conditions and circumstances of the annexation. K. S. A. 12-3004 provides thus:

"No ordinance shall contain more than one subject, which shall be clearly expressed in its title; and no section or sections of an ordinance shall be amended unless the amending ordinance contains the entire section or sections as amended and the section or sections amended shall be repealed."

In *State ex rel. Ramsey v. City of Hutchinson*, 102 Kan. 325 (1918), the court considered an ordinance of the city which was described in its title as one extending the city limits. As the new boundary was described, however, certain portions of tracts were omitted from the then existing boundary, notwithstanding the limits were elsewhere extended. The court stated thus:

"The plaintiff contends, *and the contention is clearly well founded*, that inasmuch as the title of an ordanance is required to express its subject . . . any part of this one which undertakes to reduce the territory of the city is rendered void by the fact that the title refers only to an extension and not to a restriction of the limits." [Emphasis supplied.] 102 Kan. at 327.

As the court indicated in *Babcock v. City of Kansas City*, 197 Kan. 610, 419 P. 2d 882 (1966), "it has been uniformly held that the extension of corporate limits to include new territory . . . is, in effect, a reorganization of the city. . . ." Corporate reorganization is, broadly, a different subject than exercise of the police power to regulate and restrict the location and uses of buildings and the uses of land in such annexed area. We must concur with the opinion of Attorney General Fatzer, dated October 28, 1955, who stated thus:

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"In other words, it would not be permissible for the city to include in one ordinance the establishment of a zone of platted territory, and also provide for the annexation of that territory. The cardinal rule is that an ordinance must have but one subject."

However, we agree with your suggestion that land to be annexed may be annexed and zoned at the same time by merely using two separate parallel ordinances, the first to provide for annexation and the other to designate the zoning classification for the land.
JRM

LETTER, November 29, 1972, to Rae E. Batt, City Attorney, Kinsley

Re: SAME—*Funds for Centennial Celebration*

As City Attorney, you raise the question whether the City of Kinsley may lawfully appropriate public funds, in the amount of $2,000, as a grant to a centennial celebration committee of the Kinsley Chamber of Commerce, to support planned centennial celebration activities to be sponsored by the Chamber. We concur fully with your view that the City may not make a grant or loan of public funds to a private organization to support such activities.

It has been uniformly held that such an expenditure does not serve a public municipal corporate purpose. See 15 *McQuillin, Municipal Corporations*, § 39.21 at p. 41 and § 39.22 (1970 Ed.). In the latter section, the writer states thus:

"Without express authority, a municipal corporation may not appropriate the public revenue for celebrations, entertainment, sports and games, etc. Such power cannot be implied."

See also *Historical Pageant Ass'n of the City of Philadelphia*, 103 A. 824 (Penn. 1918).

LETTER, December 11, 1972, to Barry L. Arbuckle, Deputy County Attorney, Wichita

Re: SAME—*Charter Ordinance, Enactment of*

In your letter dated November 28, 1972, you posed the following question:

"In a vote on a proposed charter ordinance, does a three out of five vote determination comply with the requirement of Article 12, Section 5 (*c*) (2) of the Kansas Constitution?"

It is our opinion that there must be strict compliance with the procedure set out in Article 12 before a charter ordinance can be validly enacted.