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ATTORNEY GENERAL OPINION NO. 83- 89

The Honorable Steven A. Ediger
Representative, One Hundred-Fourth District
716 East 14th Street Terrace
Hutchinson, Kansas 67501

Re: Counties and County Officers -- Planning and
Zoning -- Subdivision of Land; Reasonableness of
Regulations

Synopsis: Pursuant to K.S.A. 19-2918b, the board of county commissioners and the governing body of any city within the county may establish a joint committee for subdivision regulation. The committee is empowered to adopt regulations governing the subdivision of land within the area subject to the jurisdiction of both the city and the county. Such regulations may provide for, among other things, the location and width of streets. Provided a regulation requiring the dedication of land for future improvements to an existing, adjoining highway is reasonable, it is a legitimate exercise of the police power granted to counties and cities in the area of land use and development, and is not a taking of property without just compensation. Cited herein: K.S.A. 19-2918, 19-2918b, 19-2918c.

* * *

Dear Representative Ediger:

As State Representative for the 104th District, which includes a portion of the City of Hutchinson, Kansas, you request our opinion on a question concerning a subdivision regulation and its effect on a landowner. Specifically, you inform us that a constituent who owns land in Reno County outside the city has been informed that he must dedicate a 20-foot strip of land adjacent to K-96 Highway before the subdivision plat

will be approved. You wish to know whether such a dedication requirement is authorized by existing Kansas statutes and, if so, whether the effect of the regulation here is so unreasonable as to constitute a taking of private property without due compensation. You further inform us that the strip in question contains a number of evergreen trees, and that the property itself is located well outside the city limits of Hutchinson.

Initially, it should be said that the area of subdivision regulation involves a close relationship between planning, zoning and platting. Hudson Oil Co. v. City of Wichita, 193 Kan. 623, 628 (1964). Prior to 1965, the state of the law in these areas evinced confusion. City of Salina v. Jagers, 228 Kan. 155 (1980). In that year, the legislature took steps to coordinate the development of subdivisions, especially in unincorporated areas of a county located near a city. It did so by enacting what are now K.S.A. 19-2918, 19-2918b and 19-2918c, which set forth the procedure for creating a joint subdivision regulation committee, its powers, and the nature and extent of regulations it could adopt concerning subdivision of land. In that each of these statutes is of relevance here, their pertinent provisions should be examined.

K.S.A. 19-2918b attempts to deal with situations in which both the county and a city therein have an interest in regulating development through subdivision of tracts of land. In part, it states:

"If the area designated by the board of county commissioners shall include lands lying within any area designated and governed by the regulations of any city, a copy of the resolution of the board of county commissioners shall be certified to the governing body of said city or if at any time subsequent to the adoption of regulations governing the subdivision of land by the county, the governing body of any city shall by resolution designate an area for such purposes which shall include lands lying within the area designated and governed by regulations of the county, the governing body of such city shall certify a copy of such resolution to the board of county commissioners and regulations governing the subdivision of land within the area designated by the city shall be adopted and administered in the manner hereinafter provided. Within sixty (60) days after the date of the certification of said resolution by the board of county commissioners or the governing body of the city there shall be established by joint resolution,

of said board of commissioners and governing body, a joint committee for subdivision regulation which shall be composed of three (3) members of the county planning board and three (3) members of the city planning commission to be appointed by the chairmen of such board and commission and one (1) member to be selected by the six (6) members. Such joint committee shall have such authority as is provided by law for county planning boards and city planning commissions relating to the adoption and administration of regulations governing the subdivision of land within the area of joint designation." (Emphasis added.)

K.S.A. 19-2918 contains the procedure for the adoption of such subdivision regulations, as well as the areas which may be covered and provides in pertinent part thus:

"The planning board may adopt regulations governing the subdivision of land within that portion of the unincorporated area of the county, and the incorporated area of any city upon the written request by resolution of the governing body of such city, when the same shall have been designated by resolution of the board of county commissioners for that purpose. No such regulations or changes or amendments thereto adopted by a county planning board shall become effective unless and until the same has been submitted to and approved by the board of county commissioners and no such regulations or changes or amendments thereto adopted by a joint committee as hereinafter provided shall become effective unless and until the same has been submitted to and approved by both the board of county commissioners and the governing body of the city. Such regulations may provide for the location and width of streets, building lines, open spaces for traffic, utilities, access for fire-fighting apparatus, recreation, light, and air, for the avoidance of congestion of population, including minimum width and area of lots and for flood protection and flood-plain regulations. . . ." (Emphasis added.)

Lastly, K.S.A. 19-2918c sets forth the impact of the subdivision regulations on a landowner who wishes to develop his or her property.

"Whenever regulations governing the subdivision of land shall have been adopted under the provisions of this act, the owner or owners of any land located within the area governed by such regulations, subdividing the same into lots and blocks or tracts or parcels, for the purpose of laying out any subdivision, suburban lots, building lots, tracts or parcels or the owner of any land establishing any street, alley, park or other property intended for public use or for the use of purchasers or owners of lots, tracts or parcels of land fronting thereon or adjacent thereto, shall cause a plat to be made which shall accurately describe the subdivision, lots, tracts or parcels of land giving the location and dimensions thereof or the location and dimensions of all streets, alleys, parks or other properties intended to be dedicated to public use or for the use of purchasers or owners of lots, tracts or parcels of land fronting thereon or adjacent thereto and every such plat shall be duly acknowledged by the owner or owners thereof. All such plats shall be submitted to the county planning board or to the joint committee for subdivision regulation if such has been formed, which shall determine if the same conforms to the provisions of the subdivision regulations" (Emphasis added.)

Given the above statutory framework, it remains to examine the particular regulation involved here. As adopted by the Hutchinson-Reno County Joint Subdivision Committee, and subsequently approved by both the county commission and the city commission, the regulation at issue requires that a principal rural arterial street have a minimum right-of-way of 100 feet. K-96 Highway, which abuts the constituent's property on one side, is classified as such a street. At present, K-96 has a 60 foot right-of-way. The 20 feet required for dedication by the landowner-developer is accordingly half of the amount needed to meet the minimum standard set forth by the regulation. Despite a request for a variance, the joint committee required the dedication to be made as a condition for obtaining a plat. Factors presented by the Reno County Public Works Department for the committee's consideration included the need for such right-of-way in the future. Potential development could necessitate the addition of more lanes, a frontage road, and bicycle lanes, as well as

providing for uses such as a bus stop. While there are trees in the 20 foot strip, the lots themselves, being over 350 feet deep, are not greatly reduced in size by the proposed dedication.

As noted by numerous Kansas decisions, land use restrictions are grounded in the authority of the state and (through delegation) cities and counties to protect the public health, safety and welfare. City of Douglass v. Tri-Co. Fertilizer, Inc., 214 Kan. 154 (1974), Grigsby v. Mitchum, 191 Kan. 293 (1963). While broad discretion is vested in the governing body to determine what is deleterious to health, morals or the general welfare, it does not have the power to impose restrictions that are so arbitrary, oppressive or capricious as to have no reasonable basis. State ex rel. Stephan v. Lane, 228 Kan. 379 (1980). The mark of unreasonable action by zoning authorities is "when the action is so arbitrary it can be said it was taken without regard to the benefit or harm involved to the community at large including all interested parties and was so wide of the mark its unreasonableness lies outside the realm of fair debate." Gaslight Villa, Inc. v. City of Lansing, 213 Kan. 862, Syl. ¶3 (1974). Of course, as is the case in other fields of the law, the determination of what is reasonable in a land use dispute has troubled trial and appellate courts alike. Golden v. City of Overland Park, 224 Kan. 591 (1978).

As a general rule, when in doubt courts have deferred to the determination of the governing body who passed the regulation as to its reasonableness. It has been repeatedly said that a court may not substitute its judgment for that of a city or county [Hukle v. City of Kansas City, 212 Kan. 627 (1962)], and will not declare the action unreasonable unless clearly compelled to do so by the evidence. Arkenberg v. City of Topeka, 197 Kan. 731 (1966). Should the regulation be found to be unreasonable, the governing body may still act, but under the more restrictive procedures of eminent domain, whereby the taking must be compensated. Smith v. State Highway Commission, 185 Kan. 445 (1959).

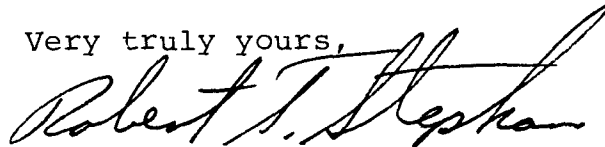
In our opinion, it cannot be concluded here that the right-of-way requirement is so arbitrary, oppressive or capricious as to be without reasonable basis. Given the nature of the road involved (a state highway) and the distance from the Hutchinson city limits (between 2 and 3 miles), the potential for further development is not merely theoretical. The considerations for the dedication of the additional land are valid ones, and the statute (K.S.A. 19-2918) specifically allows for regulations governing the location and width of streets, with nothing said about whether the streets must be new or existing. Since any development in the subdivided

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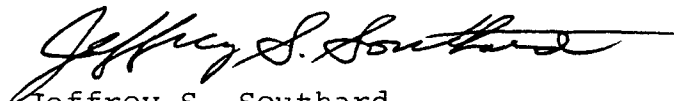
property will contribute in part to heavier traffic on the highway, the requirement that a portion of land be dedicated for future improvements has a rational basis. While the need at this time for such action can be debated, such issues are not for the courts but for the legislature. State ex rel. Stephan v. Lane, supra, at 392.

In conclusion, pursuant to K.S.A. 19-2918b, the board of county commissioners and the governing body of any city within the county may establish a joint committee for subdivision regulation. The committee is empowered to adopt regulations governing the subdivision of land within the area subject to the jurisdiction of both the city and the county. Such regulations may provide for, among other things, the location and width of streets. Provided a regulation requiring the dedication of land for future improvements to an existing, adjoining highway is reasonable, it is a legitimate exercise of the police power granted to counties and cities in the area of land use and development, and is not a taking of property without just compensation.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

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