



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

February 17, 1984

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 84- 19

The Honorable Kenneth D. Francisco  
State Representative, District 90  
Kansas House of Representatives  
Capitol  
Topeka, Kansas 66612

Re: Counties and County Officers -- Planning and Zoning --  
Adoption or Amendment of Zoning Regulations; Area  
Included.

Synopsis: Under K.S.A. 19-2919 the decision to adopt zoning reg-  
ulations for an entire county or "portions thereof" is  
within the discretion of the county commissioners.  
The language of K.S.A. 19-2919 which provides that a  
resolution adopting zoning regulations "may" include  
certain areas in the county is permissive and not ex-  
clusive. The county may enact zoning regulations which  
are applicable in any of the specified areas, in other  
non-specified areas or in any combination thereof.  
Cited herein: K.S.A. 12-701, 12-715, 12-715b, 12-715d,  
19-2901, 19-2913, 19-2914, 19-2919, K.S.A. 1983 Supp.  
19-2920, 19-2926, 19-2927, 19-2937.

\*

\*

\*

Dear Representative Francisco:

As State Representative for the 90th District you have requested an  
Attorney General's opinion concerning certain county zoning statutes.  
You indicate that a question has arisen among your constituents  
regarding the ability of Sedgwick County to adopt zoning regula-  
tions which cover all unincorporated areas of the county except  
the three mile ring around certain cities which is presently reg-  
ulated by city zoning authorities.

As you point out, the Kansas statutes make three types of zoning available to counties. Under K.S.A. 19-2901 through 19-2913, a county may zone all lands within any township in the county which lie outside the limits of any incorporated city. Under K.S.A. 19-2914 through K.S.A. 19-2926 county-wide zoning is authorized. K.S.A. 19-2927 through K.S.A. 19-2937 authorize county commissioners of any county having a city of the first, second, or third class located therein to adopt zoning regulations for the incorporated territory lying within three miles of any such city which has established a city planning commission and has adopted a zoning ordinance under the provisions of K.S.A. 12-701 et seq. You indicate that Sedgwick County planning officials have recommended county-wide zoning under K.S.A. 19-2914 through 19-2926 and that a question has arisen concerning whether the county may except from county-wide zoning regulations the three mile area surrounding the perimeter of any city which has chosen to zone that area under the authority of K.S.A. 12-715 et seq.

In particular you inquire about the interpretation of K.S.A. 19-2919(a) which provides in relevant part:

"For the purpose of promoting health, safety, morals, comfort or the general welfare, and conserving and protecting property values throughout the county or portions thereof, the board of county commissioners of any county may by resolution at a regular meeting of the board, provide for the adoption, or amendment, of zoning regulations in the manner provided by this act. . . .

Such resolution shall define the area to be governed by such zoning regulations and may include:

(1) All of the unincorporated area of the county, or the unincorporated area of any township containing or adjoining a city which has adopted a zoning ordinance, or which may adopt a zoning ordinance; (2) any lands within any township of any county which lie outside the limits of any incorporated city, upon recommendation and approval of the township board of the township; (3) the unincorporated area lying within three miles of any city having adopted a zoning ordinance; or (4) the unincorporated area lying within three miles of the conservation pool waterline of any existing or proposed artificial impoundment of water exceeding 100 surface acres at conservation pool level." (Emphasis added.)

You indicate that a local planning official has interpreted this statute to mean that the county-wide zoning regulations must cover one of the areas listed in the statute and that the county has no discretion to exclude the three mile area surrounding a city if

the county chooses to adopt regulations covering all of the unincorporated area of the county. In our opinion this is an overly strict interpretation of the statute. We note that K.S.A. 19-2919 provides that a resolution adopted by the board of county commissioners which established zoning regulations "shall define the area to be governed by such zoning regulations and may include" certain defined areas. You inquire whether the word "may," as used in this context, should be read as mandatory and exclusive, thus limiting the areas a county may zone to those listed in the statute.

Ordinarily the word "may" as used in a statute is permissive rather than peremptory. The word is sometimes regarded as synonymous with "must" in cases where public authorities are authorized to perform an act for the benefit of the public or for an individual who has a right to its performance. The word should be given its ordinary, permissive meaning, however, unless the terms and provisions of the statute compel another view. The State v. School District No. 1 of Edwards County, 80 Kan. 667, 669 (1909).

The distinction between mandatory and directory provisions of statutes has often been the subject of court decision. In Paul v. City of Manhattan, 212 Kan. 381, 511 P.2d 244 (1973), the Kansas Supreme Court discussed such provisions in the context of a city zoning question and set out the following rules:

"In determining whether a legislative provision is mandatory or directory, it is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system and dispatch of the public business, the provision is directory.

Factors which would indicate that a statute or ordinance is mandatory are: (1) the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated, or (2) a provision for a penalty or other consequence of noncompliance." (Syl. ¶¶ 1,2)

See also Board of Lincoln County Commissioners v. Berner, 5 Kan. App. 2d 104, 111, 623 P.2d 676 (1980).

The portions of K.S.A. 19-2919 at issue here are not provisions which require strict compliance in order to preserve the rights of the parties affected or to protect the validity of the proceedings. The decision to adopt zoning regulations for the entire

county or "portions thereof" is one left in the discretion of the county commissioners. No individual is legally entitled to the adoption of such regulations in certain specified areas. Further, there is no language in the statute indicating that compliance with the section at issue here is necessary to ensure the validity of the proceedings. [Certain procedural portions of these statutes may be regarded as affecting the validity of proceedings, for example, the notice, protest, and hearing requirements found in K.S.A. 1983 Supp. 19-2920. See, e.g. Koppel v. City of Fairway, 189 Kan. 710, 713, 371 P.2d 113 (1962).] Moreover, the statute does not impose penalties or consequences for non-compliance with the portions at issue here. Nor do the relevant portions contain negative words requiring that the zoning regulations cover only those areas listed in K.S.A. 19-2919.

In our opinion the language of K.S.A. 19-2919 which indicates that a county resolution adopting zoning regulations "may" include certain areas is permissive and non-exclusive. The county may zone in any of the specified areas, in other non-specified areas or in any combination thereof. We note that some of the areas specified in the statute are those about which there could be some conflict over who is the proper authority to adopt and enforce zoning regulations. K.S.A. 19-2919 simply makes it clear that the county's authority to zone in the county takes precedence over the other entities which may enjoy some jurisdictional authority over portions of the county. We do not read the statute to require that county zoning regulations be applicable only to one of the areas listed. Thus, in our opinion, Sedgwick County may adopt county-wide zoning regulations which exempt the three mile area surrounding the perimeter of any city which has chosen to zone that area under the authority of K.S.A. 12-715 et seq.

The combination of city and county zoning authority over the three mile perimeter of any city has been the subject of previous attorney general opinions and is discussed in many of the relevant statutes. For example, if Sedgwick County should decide to zone in the three mile area surrounding a city which has adopted a zoning ordinance such action is subject to protest. K.S.A. 1983 Supp. 19-2920 provides in part:

"If a written protest against the proposed zoning or rezoning of any land lying within three miles of the city limits of any municipality having a zoning ordinance is received from the governing body of the city, the county commissioners shall not adopt the proposed zoning of the land except by a vote of all members which shall be recorded in the minutes of the meeting along with a statement of the reason for the action."

The statutory authority which permits the city to extend its zoning regulations to include the three mile area outside the city

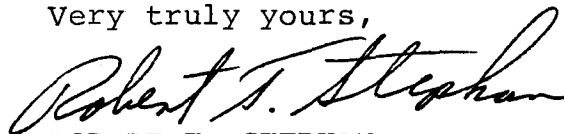
limits is K.S.A. 12-715b. That statute places certain prerequisites upon the exercise of that power including a requirement stated in 12-715b(c) that "the county or township does not have in effect zoning regulations for such area outside the city but within three (3) miles thereof. . . ." In addition, K.S.A. 12-715d provides:

"This act [\*] is supplemental to the provisions of the laws of this state which authorize counties to adopt zoning regulations for all or any part of the land located within the county and outside of any incorporated city, which laws are specifically K.S.A. 19-2901 to 19-2937, inclusive, and amendments thereto. Existing city zoning regulations and the authority of any city to adopt zoning regulations for land located outside the city but within three (3) miles thereof shall cease and terminate on the date the county or township places in effect zoning regulations which are in reasonable conformance with a comprehensive plan and have been adopted in conformity with the appropriate statutes set forth in this section."

Thus the city zoning regulations in the three mile zone remains effective until the county places regulations in effect. If the county chooses not to zone that area, the city retains the authority under K.S.A. 12-715b to extend regulations into the area. The inaction of the county in zoning this area prejudices its right to zone thereafter only to the extent that they continue not to act. See Attorney General Opinion No. 75-214. The county, when it acts under K.S.A. 19-2919, however, is not required to include the three mile area in county-wide zoning regulations.

We conclude, that that under K.S.A. 19-2919 the decision to adopt zoning regulations for an entire county or "portions thereof" is within the discretion of the board of county commissioners. The language of K.S.A. 19-2919 which provides that a resolution adopting zoning regulations "may" include certain areas in the county is permissive and not exclusive. The county may enact zoning regulations which are applicable in any of the specified areas, in other non-specified areas or in any combination thereof.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Mary F. Carson  
Assistant Attorney General