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ATTORNEY GENERAL OPINION NO. 84- 111

William A. Taylor III
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P.O. Box 731
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Re: Counties and County Officers -- Planning and Zoning -- Regulations Governing Subdivision of Lands; Approval of Plats

Synopsis: Pursuant to K.S.A. 19-2918c, a county planning board has no authority to review subdivision plats before they are filed with the register of deeds unless the planning board has enacted subdivision regulations pursuant to K.S.A. 19-2918. Under these statutes, a board of county commissioners has the authority to approve subdivision regulations, but has no authority to approve or review a final plat which has been approved by the county planning board. Regardless of the existence of subdivision regulations, however, K.S.A. 19-2633 requires that subdivision plats of land located more than one mile from the limits of an incorporated city be approved by the board of county commissioners before such plats may be filed with the register of deeds. The provisions of this statute are applicable in Cowley County, which has a county planning board (appointed pursuant to K.S.A. 1983 Supp. 19-2915) that has not adopted subdivision regulations.

> The filing and recording of a plat vests title to property designated for public use in the county, and such property is to be held in trust for the purposes of the dedication. A decision as to when a road or public way dedicated to public use is opened or put in condition for public use is within the discretion of the governing body charged with the responsibility of maintenance. Subdivided land which has been platted pursuant to K.S.A. 19-2633 is subject to the restrictions stated in the plats. Cited herein: K.S.A. 12-705; 12-705a; 12-705b; 19-2633; 19-2901; 19-2902; 19-2902a; 19-2905; 1983 Supp. 19-2915; K.S.A. 19-2918; 19-2918b; 19-2918c.

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Dear Mr. Taylor:

As Cowley County Counselor you have requested an opinion on several questions relating to the platting of subdivisions in the unincorporated areas of Cowley County.

First, you inquire whether a plat of a subdivision in the unincorporated area of the county must be approved by the board of county commissioners and/or the county planning board before it is filed with the register of deeds. You inform us that Cowley County has a planning board appointed pursuant to K.S.A. 1983 Supp. 19-2915, but that the planning board has not adopted subdivision regulations authorized by K.S.A. 19-2918. Another pertinent statute, K.S.A. 19-2918c, provides in parts relevant here:

> "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.)

Under the terms of this statute, it is clear that subdivision plats are required to be submitted to the planning board for review only when the board has adopted subdivision regulations. The purpose of such review is simply to determine whether the proposed plat "conforms to the provisions of the subdivision regulations." If there are no subdivision regulations, as you state is the case in Cowley County, the review provisions of K.S.A. 19-2918c are not triggered, and it is not necessary for the planning board to review and approve the plat before it may be filed with the register of deeds.

The Kansas statutes make three possible types of zoning available to counties. K.S.A. 19-2914 through K.S.A. 19-2926 authorize the adoption of a comprehensive plan and the appointment of a "county planning board." Cowley County has appointed a planning board pursuant to K.S.A. 1983 Supp. 19-2915. In such counties there is no separate requirement in the zoning statutes that the board of county commissioners review and approve subdivision plats before they may be filed with the register of deeds. Under another method of county zoning (K.S.A. 19-2901 through 19-2913), a county is authorized to zone all lands within any township in the county which lies outside the corporate limits of any city. In such cases, K.S.A. 19-2905 provides that plats must be approved by the "zoning board" (if it has adopted regulations governing the

subdivision and use of land within its jurisdiction) and the board of county commissioners before filing with the register of deeds. It is apparent, however, that this statute pertains to township "zoning boards" appointed pursuant to K.S.A. 19-2902 or K.S.A. 19-2902a, which are not present in Cowley County.

On the question of approval of plats by the county commissioners, we note that K.S.A. 19-2633, which has appeared unchanged in the statutes since 1929, specifically states that subdivision plats for the unincorporated area of the county more than one mile from the limits of any incorporated city shall be submitted to the board of county commissioners for approval before filing with the register of deeds. The pertinent language follows:

> "Any person, partnership or corporation owning land outside the limits of any incorporated city, said land being located more than one mile from the limits of any incorporated city, desiring to subdivide any such tract of land, may plat the same and submit the plat thereof, together with an abstract of title to the land so platted, to the board of county commissioners of the county in which such land is situated. The plat shall contain a description of the land as subdivided, giving the name of said subdivision, and the restrictions to which the land or separate tracts thereof are subject.
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> "When said plat is approved by the board of county commissioners of the proper county, the same shall be filed with the register of deeds of said county, . . ." (Emphasis added.)

This statute remains "on the books" and would appear to answer your question regarding approval by the commissioners for plats of land more than one mile from the limits of an incorporated city. Unfortunately, the answer is not that clear. In 1980 the Kansas Supreme Court held that K.S.A. 19-2633 was repealed by implication with the enactment of K.S.A. 19-2901 et seq. and K.S.A. 19-2905 in particular. The case of City of Salina v. Jaggers, 228 Kan. 155, 170 (1980), addressed the question of what governmental bodies

must approve the designation of a plat in an unincorporated area located more than one mile but less than three miles from the nearest limits of an incorporated city, before the plat may be recorded with the register of deeds.

The case involved a conflict between the City of Salina and Saline County over the zoning of the three mile unincorporated area surrounding the City of Salina. Certain individuals had platted an area more than one mile but less than three miles from the city. The city sought to prevent the plat from being recorded with the register of deeds pending approval by the city planning commission and governing body. The city planning board had adopted regulations for the unincorporated three-mile perimeter of the city, as authorized by K.S.A. 12-705. The county had also designated the area for regulation some 10 years before the city's action, apparently pursuant to the authority granted by K.S.A. 19-2905. The city argued that K.S.A. 19-2633 and K.S.A. 19-2905 were repealed by implication when the legislature enacted K.S.A. 12-705a and 12-705b. The latter statutes authorize a city to enact subdivision regulations which may be effective in the three-mile perimeter of the city. Noting that the statutes were confusing at best, the court declined to attempt to reconcile them. Construing the statutes in an effort to determine legislative intent, however, the court pointed out that the legislature provided methods for resolving the conflict between city and county zoning regulations in K.S.A. 12-705a and 19-2918b. Thus, it concluded the county's authority to enact subdivision regulations pursuant to 19-2905 was not repealed by implication with the enactment of 12-705a and 12-705b. With regard to K.S.A. 19-2633 the court said, without further elaboration:

> "Although K.S.A. 19-2633 has no direct application to this case because the land in question is located more than one mile from the city limits but still within the three mile unincorporated area, the parties have included it within their stipulated issue. We find although the statute was not repealed by the enactment of K.S.A. 12-705a and K.S.A. 12-705b, its provisions are not encompassed by K.S.A. 19-2901 et seq., and in particular K.S.A. 19-2905. This irreconcilable conflict results in the statute's repeal by implication."

As noted above, there is a definite distinction between the requirements of K.S.A. 19-2905, which provides for the approval of subdivision plats in counties which have chosen township zoning and appointed township "zoning boards", and the requirements of K.S.A. 19-2918c, applicable in counties which have chosen county-wide zoning and appointed a "county planning board." K.S.A. 19-2905 provides that subdivision plats must be approved by the "zoning board" which has adopted subdivision regulations and by the board of county commissioners. By contrast, K.S.A. 19-2918c provides that subdivision plats must be approved by the "county planning board" before filing with the register of deeds. There is no requirement that such plats be approved by the board of county commissioners. The commissioners' authority extends only to the approval of the subdivision regulations enacted pursuant to K.S.A. 19-2918. The court did not address this difference in the statutes when it concluded that an irreconcilable conflict existed between K.S.A. 19-2633 and K.S.A. 19-2905. Obviously, the same conflict does not exist between 19-2633 and 19-2918c, for the requirements of these two statutes are reconcilable. Thus we are faced with the question of whether the court's holding that K.S.A. 19-2633 was repealed by implication due to conflict with the subsequently enacted 19-2905 means that 19-2633 is no longer effective in circumstances where no such conflict exists.

If K.S.A. 19-2633 has been repealed by implication in all circumstances, it follows that in Cowley County, which has a "county planning board" (pursuant to K.S.A. 1983 Supp. 19-2915) which has not adopted subdivison regulations, subdivision plats may be filed without first being approved by the planning board or the county commissioners. We do not believe this result was intended; either by the legislature when it tied a county planning board's authority to approve plats to the previous adoption of subdivision regulations or by the supreme court when it held that K.S.A. 19-2633 was repealed by implication with the enactment of K.S.A. 19-2905. It is our opinion that the court's holding in Jaggers that K.S.A. 19-2633 was repealed by implication is applicable to the extent of the conflict between its provisions and those of 19-2905 which the court was considering. Both statutes make it the responsibility of the board of county commissioners to approve subdivision plats before recording them with the register of deeds.

K.S.A. 19-2905, enacted after 19-2633, adds the additional requirement that the plat also be approved by a township zoning board to determine its compliance with subdivision regulations. To the extent of that conflict, K.S.A. 19-2633 is repealed by implication and the more recently enacted provisions of 19-2905 control.

No such conflict exists between the provisions of the county-wide zoning statutes (in particular K.S.A. 19-2918c) and K.S.A. 19-2633. The additional approval authorized by K.S.A. 19-2633 may be effectuated along with the provisions of K.S.A. 19-2918c, although admittedly not without some awkwardness. In the case where, as in Cowley County, there are no subdivision regulations to trigger the requirements of 19-2918c, there is no conflict or awkwardness. In such a case the only opportunity that any governmental body will have to review a subdivision plat is that afforded by K.S.A. 19-2633.

This conclusion is supported by the Kansas Supreme Court's statements of the law governing repeals by implication. Repeal by implication is not favored and acts will not be held to be repealed by implication unless a later enactment is so repugnant to the provisions of the first act that both cannot be given force and effect. Jenkins v. Newman Memorial County Hospital, 212 Kan. 92, Syl. 1 (1973); City of Overland Park v. Nikias, 209 Kan. 643 (1972). When there is an irreconcilable conflict between the provisions of two statutory sections, (as the court found in the case of K.S.A. 19-2633 and 19-2905), the latest expression of the legislature upon the subject must be regarded as the existing law, and "it operates to repeal the earlier provision to the extent of the repugnancy in the two acts, although both may be incorporated in the General Statutes." See Mannell v. Mannell, 186 Kan. 150, 153 (1966) and cases cited therein.

It is our opinion, based upon the circumstances and these statements of the law, that the provisions of K.S.A. 19-2633 are still in effect where there is no conflict, and require that subdivision plats for tracts of land located more than one mile from the limits of an incorporated city in Cowley County be submitted to the board of county commissioners for approval before recording with the register of deeds. This

conclusion is applicable to the circumstances which presently exist in Cowley County, and presumes the non-existence of any city regulations affecting the three-mile unincorporated area surrounding a city.

Your final inquiries concern the effect of the filing of the plat with the register of deeds. You ask whether the roads within the plat become "public roads" upon recording with the register of deeds.

A number of Kansas cases hold that the "filing and recording" of a plat vests title to property designated therein for public use in the county to be held in trust for the purposes of the dedication. See Moore v. City of Lawrence, 232 Kan. 353, 360 (1982); City of Kechi v. Decker, 230 Kan. 315, 318-319 (1981); City of Council Grove v. Ossmann, 219 Kan. 120, 127 (1976). Although these cases pertain to plats which affect property within a city, the rule of law is equally applicable and consistent with the provisions of K.S.A. 19-2633 and plats filed pursuant to that statute. The statute provides that when the plat is approved by the commissioners and filed with the register of deeds

> ". . . said land and tracts shall be subject to the restrictions contained in the plat filed with the register of deeds. . . ."

In our opinion, therefore, any property dedicated to public use, such as streets, alleys, parks, etc., in a plat approved and filed pursuant to K.S.A. 19-2633 becomes "public property" in accordance with the terms of the plat.

A decision as to when a road or public way so dedicated is to be opened or put in condition for public use is within the discretion of the governing body charged with the responsiblity of maintenance. See Moore v. City of Lawrence, supra at 363; Hill v. City of Lawrence, 2 Kan.App.2d 457, 458, rev. den. 225 Kan. 844 (1978).

Finally, you inquire as to the effect of restrictive language in the plat such as "owners and their assigns will maintain all roads." As noted above, K.S.A. 19-2633 provides that land platted, approved and filed pursuant to its terms shall be subject to the restrictions contained in the plat. Thus,

absent any language in a particular plat which would modify such a result, it appears that such a restriction may be enforced. Conditions and limitations may be attached to land dedicated to a public use as long as the conditions are not repugnant to the grant, do not limit lawful control of public authorities and are not against public policy. City of Kechi v. Decker, supra. Restrictions like those you describe would appear to meet this criteria.

Very truly yours,

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