



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

ATTORNEY GENERAL OPINION NO. 87- 114

Joseph W. Snell
Executive Director
Kansas State Historical Society
120 W. Tenth
Topeka, Kansas 66612

Re: State Departments; Public Officers and Employees --
State Historical Society -- "Project" Defined

Synopsis: The change or amendment of a municipal zoning ordinance is a "project" within the meaning of K.S.A. 75-2716(c) and K.S.A. 1986 Supp. 75-2724. Accordingly, a city is required to give the state historic preservation officer notice and an opportunity to comment when such change or amendment is being considered. The term "environs," as used in the Kansas historic preservation act, may include property surrounding a designated historic site even though said properties are not adjoining. Cited herein: K.S.A. 75-2715; 75-2716; K.S.A. 1986 Supp. 75-2724; 77-201 second.

* * *

Dear Mr. Snell:

As Executive Director of the Kansas State Historical Society, you request our opinion on the interpretation of K.S.A. 75-2701 et seq., the Kansas historic preservation act. Specifically, you ask whether a change of zoning would constitute a "project" under K.S.A. 75-2716(c) and K.S.A. 1986

Supp. 75-2724. You inform us that in January, 1987, the city of Lawrence approved a zoning change for six lots across the street from the east boundary of the Old West Lawrence Historic District. The city did not contact the preservation office of the State Historical Society for review of the effects of the zoning change.

Kansas' historic preservation law requires Kansas governmental agencies and municipalities, including cities, to give the state historic preservation officer notice and an opportunity to investigate and comment upon any proposed project which affects recognized historical properties. Specifically, K.S.A. 1986 Supp. 75-2724 provides:

"The state or any political subdivision of the state, or any instrumentality thereof, shall not undertake any project which will encroach upon, damage or destroy any historic property included in the national register of historic places or the state register of historic places or the environs of such property until the state historic preservation officer has been given notice and an opportunity to investigate and comment upon the proposed project. . . ." (Emphasis added).

K.S.A. 75-2716(c) defines "project" to include:

"(1) Activities directly undertaken by the state or any political subdivision of the state, or any instrumentality thereof;

(2) activities undertaken by a person which are supported in whole or in part through grants, subsidies, loans or other forms of financial assistance from the state or any political subdivision of the state, or any instrumentality thereof; and

(3) activities involving the issuance of a lease, permit, license, certificate or other entitlement for use, to any person by the state or any political subdivision of the state, or any instrumentality thereof." (Emphasis added).

The Kansas Supreme Court has held that in determining legislative intent, courts are not bound to an examination of the language alone but may properly look into the causes which impel the statute's adoption, the objective sought to be attained, the statute's historical background and the effect the statute may have under the various constructions suggested. State, ex rel., v. City of Overland Park, 215 Kan. 700 (1974); In re Petition of City of Moran, 238 Kan. 513, 520 (1986). In the case at hand, legislative history is particularly important in gaining a clear understanding of the meaning of the term "project".

In 1979, this office was asked to determine whether a zoning change by the city of Wichita constituted a "project" within the meaning of K.S.A. 75-2724. Attorney General Opinion No. 79-292 opined that, based upon then-existing state historic preservation law, the construction or destruction of a historic physical environment by a government unit was a "project" within the meaning of the Act. However, the absence of either a statutory definition for "project," or other expression of legislative intent, caused the Attorney General to conclude that the term "project" under Kansas' historic preservation law was not intended to include zoning activities of Kansas municipalities. Thus, a change in zoning did not require the city to give the state historic preservation officer notice and an opportunity to comment.

Subsequent to the issuance of Opinion No. 79-292, 1981 Senate Bill No. 322 was passed by the Kansas legislature. According to the Senate Ways and Means Committee minutes of April 6, 1981, the bill was requested by the Kansas State Historical Society in response to Opinion No. 79-292, because the opinion stated that the term "project" in current law included only those activities in which a governmental unit is an active participant and not those in which the governmental unit plays a regulatory role. Further, the minutes state:

"S.B. 322, as amended would define 'project' to include not only activities paid for or supervised by a government unit, but also activities for which governmental authorization is necessary. . . ." (Emphasis added).

In our opinion, the committee minutes clearly indicate that the 1981 legislature intended activities which require governmental authorization, such as a change in zoning, be included within the statutory definition of "project."

We note also the remarks of Joseph W. Snell, executive director of the Historical Society, before the Senate Ways and Means committee regarding 1981 Senate Bill No. 322. Mr. Snell pointed out that the bill was consistent with federal law and more progressive laws of other states which require public input not only where a government unit is the principal sponsor of the destruction of historic property, but also where funding or sponsorship of the activity is private, if the activity requires official approval in the form of a license or permit from some government body.

In addition, his testimony indicates his belief that under 1981 Senate Bill No. 322, acts of local governments approving changes in zone designations would constitute governmental action subject to Kansas' historic preservation law. In Mr. Snell's words:

"The local unit of government is not a passive partner where a zoning change is required to permit private development projects. . . . The acts of local governments in approving private projects or changes in zone designations constitute 'governmental action' which should be subject to our historic preservation law." (Emphasis added).

The Attorney General's office also testified before the committee regarding 1981 Senate Bill No. 322. Our written testimony states:

"Under Senate Bill No. 322, 'projects' sponsored and funded by governmental units would be covered, as well as, projects with non-government sponsors where government action or approval is required to make the project possible. In short, if government is to participate in a project which infringes on historic properties the Kansas historic preservation law would apply." (Emphasis added).

While the Attorney General's testimony does not specifically refer to the term "zoning," it does reflect his belief that under 1981 Senate Bill No. 322, any government action which makes possible an infringement on historic properties should be subject to Kansas' historic preservation law. A change in

zoning is a quasi-judicial function of a municipality which, simply stated, entitles the owners of certain property to use it for purposes different from those previously authorized; but for the change in zoning, the property could not be used for a new and different purpose. Just as in the case about which you inquire, the action of the city in changing the zoning designation of certain lots entitles the owners of such property to use it for purposes that were not permitted prior to the amendment or change. It is the action of the municipality in amending or changing the zoning designation which makes the new use possible.

While the language of the statute itself referring to "entitlement for use" is sufficiently broad to cover a change in zoning, there is further reason to construe this language broadly. The Kansas historic preservation act contains a section which declares historic preservation to be the policy of the state. K.S.A. 75-2715 provides:

"The legislature hereby finds that the historical, architectural, archeological and cultural heritage of Kansas is an important asset of the state and that its preservation and maintenance should be among the highest priorities of government. It is therefore declared to be the public policy and in the public interest of the state to engage in a comprehensive program of historic preservation and to foster and promote the conservation and use of historic property for the education, inspiration, pleasure and enrichment of the citizens of Kansas." (Emphasis added).

Where the policy of an act is to protect the public, the act should be considered remedial in nature. It is fundamental that legislation which is remedial should be liberally construed to effectuate the purpose for which it was enacted. Smith v. Marshall, 225 Kan. 70, 75 (1978). Furthermore, a statute which is designed to protect the public must be construed in light of legislative intent and purpose and is entitled to a broad interpretation so that its public purpose may be fully carried out. Johnson v. Killion, 178 Kan. 154, 158 (1955). See also, Gonzales v. Callison, 9 Kan. App. 2d 567, 570 (1984).

After reviewing the plain language of K.S.A. 75-2716(c)(3), as well as the committee minutes and testimony from the Historical Society and the Attorney General's office, and applying commonly accepted rules of statutory construction, we must conclude that the purpose and intent for amending K.S.A. 75-2716 in 1981 was to include certain zoning activities within the definition of "project" under Kansas' historic preservation law. Thus, in our opinion, a Kansas municipality is required to give notice and an opportunity to comment to the state historic preservation officer prior to changing its zoning laws which affect historic property.

We emphasize two points in reaching this conclusion. First, as pointed out by Mr. Snell in his testimony before the 1981 Kansas legislature, a government unit is just as much a party to the destruction of the historic properties when it approves the demolition of a historic building as when it funds the demolition. Second, as noted by Mr. Snell and the Attorney General's office in testimony, K.S.A. 75-2716(c) and K.S.A. 1986 Supp. 75-2724 do not absolutely prohibit destruction or alteration of historic properties. Rather, they provide a procedure for preventing ill-considered destruction, and an opportunity for state and local officials to consider preservation issues.

You next inquire whether the Historical Society should be allowed to review demolition and moving permits for buildings located on the six rezoned lots across the street from the Old West Lawrence Historic District. K.S.A. 1986 Supp. 75-2724 provides that a political subdivision of the state shall not undertake any project:

"[W]hich will encroach upon, damage or destroy any historic property . . . or the environs of such property until the state historic preservation officer has been given notice and an opportunity to investigate and comment upon the proposed project. . . ." (Emphasis added).

As previously indicated in this opinion, the damage, destruction or encroachment of a historic physical environment by a government unit or by a non-governmental entity or person with the license, permit or approval of a governmental unit is a "project" within the meaning of the historic preservation act. The issuance of a demolition permit or building permit constitutes governmental action sufficient to

trigger the notice and comment provisions of the Kansas historic preservation laws. See Attorney General Opinion No. 79-292. Thus, the only remaining issue is whether the specific buildings in question lie within the "environs" of the Old West Lawrence Historic District. Although this factual determination can best be made by the Historical Society, we observe that the legislature chose to include in the protections provided by the Kansas historic preservation act not only properties on the state and national registers of historic places, but also those sites which lie within the "environs" of historic properties.

Generally, in construing a statute, words and phrases should be construed according to the context and approved usage of the language (See K.S.A. 201 Second), and words in common use are to be given their natural and ordinary meaning. In re Petition of City of Moran, 238 Kan. 513, 519-520 (1986). In the absence of case law construing "environs" as used in K.S.A. 1986 Supp. 75-2724, we look to rules of statutory construction and a general dictionary definition of "environs" to interpret this term.

"Environs" is defined in Webster's Third New International Dictionary 760 (1968) as "the suburbs or districts around about a city or other populated place," and "any adjoining or surrounding region or space." (Emphasis added). Given this definition, it is our opinion that buildings located on lots across the street from a historic district would lie within the "environs" of the historic district. Although the lots do not "adjoin" the historic district, they do "surround" it. (See Attorney General Opinion No. 79-207, for a similar interpretation of the term "environs" allowing a city to issue industrial revenue bonds for the development of a site which "surrounds," but does not "adjoin," issuing city.)

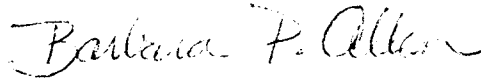
As noted previously in this opinion, a statute which is designed to protect the public must be construed in light of legislative intent. Johnson v. Killion, supra; Gonzales v. Callison, supra. The legislature's choice of the term "environs" should be read to effectuate the purpose of the Act, namely the protection of historic properties from unnecessary destruction, damage or encroachment. See K.S.A. 75-2715; K.S.A. 1986 Supp. 75-2724. Assuming the Historical Society determines that the buildings are within the environs of the historic district, K.S.A. 1986 Supp. 75-2724 would require the city of Lawrence to give the state historic preservation officer notice and an opportunity to comment on the demolition and moving permits.

In summary, the change or amendment of a municipal zoning ordinance is a "project" within the meaning of K.S.A. 75-2716(c) and K.S.A. 1986 Supp. 75-2724. Accordingly, a city is required to give the state historic preservation officer notice and an opportunity to comment when such change or amendment is being considered. The term "environs," as used in the Kansas historic preservation act, may include property surrounding a designated historic site even though said properties are not adjoining.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Barbara P. Allen
Assistant Attorney General

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