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ATTORNEY GENERAL OPINION NO. 88- 47

The Honorable Don Montgomery
State Senator, Twenty-First District
State Capitol, Room 503-N
Topeka, Kansas 66612

Re: Corporations--Agricultural Corporations--
Prohibition Against Certain Corporations Owning
Agricultural Land; Exemption; 1988 Senate Bill No.
727

Synopsis: Section 7(a)(15) of a 1988 Senate Bill No. 727,
amending K.S.A. 1987 Supp. 17-5904 by providing
an additional exemption to the corporate farming
act, is unconstitutional. It violates Sections 1
and 2 of the Kansas Bill of Rights and the Equal
Protection Clause of the 14th Amendment to the
United States Constitution in that it establishes
an arbitrary classification that does not bear a
rational relationship to the purpose of the act.
Cited herein: K.S.A. 17-5902; K.S.A. 1987 Supp.
17-5904; 1988 Senate Bill No. 727; Kan. Bill of
Rights, §§ 1, 2; U.S. Const., Amend. XIV.

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Dear Senator Montgomery:

As vice-chairman of the Senate Committee on Agriculture, you
inquire whether Section 7(a)(15) of Senate Bill No. 727 (S.B.
727) is constitutional. Specifically you inquire whether the
amendment to K.S.A. 1987 Supp. 17-5904 of the corporate
farming act is subject to constitutional challenge under
sections 1 and 2 of the Kansas Bill of Rights and the Equal

Protection Clause of the Fourteenth Amendment to the United States Constitution.

The corporate farming act, K.S.A. 17-5902 et seq., prohibits certain corporate entities from either directly or indirectly owning, acquiring or otherwise obtaining or leasing any agricultural land in this state. K.S.A. 1987 Supp. 17-5904 lists several exceptions to this general prohibition. Sections 7(a)(15) of 1988 Senate Bill No. 727 provides an additional exemption for:

"Agricultural land owned or leased by a corporation for use as a swine confinement if (A) such corporation is operating a swine confinement facility within the state which was exempted from the restrictions of this section by subsection (a)(7) and (B) land acquired for such use is located within 20 miles of the land upon which the swine confinement facility originally exempt from the restrictions of this section is operated."

The Kansas Supreme Court has interpreted §1 of the Kansas Bill of Rights as having much the same effect as the Equal Protection Clause of the 14th Amendment. State ex rel. Tomasic v. City of Kansas City, 237 Kan. 572, 583 (1985). While we note that the phrase "equal protection of the laws" is not subject to exact definition, it generally provides that all persons shall be treated alike under like circumstances, both in privileges conferred and liabilities imposed. 16 Am.Jur.2d Constitutional Law §§736 and 738; Lowe v. Kansas, 163 U.S. 81, 16 S.Ct. 1031, 41 L.Ed. 78 (1896). [We note at this point that for some purposes a corporation is treated differently from an individual without violating constitutional guaranties of equality. 16 Am.Jur.2d Constitutional Law §778. For our purposes this distinction is not relevant.]

The Kansas Supreme Court reiterates the rules that govern the courts of this state in determining issues pertaining to the constitutionality of legislative enactments in Henry v. Bauder, 213 Kan. 751 (1974) (a denial of equal protection challenge against the Kansas guest statute, K.S.A. 8-122b). Citing Tri-State Hotel Co. v. Londerholm, 195 Kan. 748 (1965) the court states:

"This court is by the Constitution not made the critic of the legislature, but rather, the guardian of the Constitution; and every legislative act comes before this court surrounded with the presumption of constitutionality. That presumption continues until the Act under review clearly appears to contravene some provision of the Constitution. All doubts of invalidity must be resolved in favor of the law. It is not in our province to weigh the desirability of social or economic policy underlying the statute or to question its wisdom, those are purely legislative matters. . . . While the legislature is vested with a wide discretion to determine for itself what is inimical to the public welfare which is fairly designed to protect the public against the evils which might otherwise occur, it cannot, under the guise of the police power, enact unequal, unreasonable or oppressive legislation or that which violates the Constitution. If the classification provided is arbitrary, . . . and has no reasonable relation to objects sought to be attained, the legislature transcended the limits of its power in interfering with the rights of persons affected by the Act. . . . (p. 760.)" 213 Kan. at 753.

Accordingly, the desirability of social or economic policy underlying a statute is purely a legislative matter and as such, reasonable classifications do not offend the concept of equality. However, classifications cannot be made arbitrarily. In other words, equal protection of the laws does not mean that a statute cannot make any distinctions or classifications, but rather, that a statute cannot make any arbitrary distinctions or classifications that do not bear a rational relationship to the purpose of the act.

As such, the question is whether the classification of land owned or leased by a corporation operating a swine confinement facility [that (A) meets the exemption restrictions of (a) (7), K.S.A. 1987 Supp. 17-5904(a) (7), and (B) is located within 20 miles of the originally exempt swine confinement facility] is a reasonable classification in view of the purpose of the

corporate farming act. In other words, we must determine whether the classification established by 1988 Senate Bill No. 727, Section 7(a)(15) reasonably relates to the purpose of the act.

The classification established is that of corporations operating swine confinement facilities that must first have been exempted under K.S.A. 1987 Supp. 17-5904(a)(7). Generally this provision provides that a corporation owning or leasing agricultural land prior to July 1, 1965 (relying on existing law) is allowed to continue its operation in spite of the repeal of the law it relied on. In other words, the section is a "grandfather clause" that permits certain corporations engaged in business before the passage of the act prohibiting the activity, to continue in business without meeting the criteria of the new law. A grandfather clause attempts to balance the burden imposed by the repeal of existing law with the need to change the law. By definition, a grandfather clause provision contravenes the purpose of the new law. K.S.A. 1987 Supp. 17-5904 states in part:

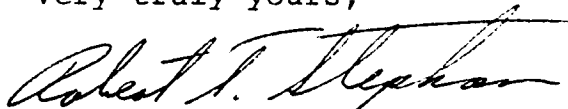
"No corporation, trust, limited partnership or corporate partnership, other than a family farm corporation, authorized farm corporation, limited agricultural partnership, family trust, authorized trust or testamentary trust shall, either directly or indirectly, own, acquire or otherwise obtain or lease any agricultural land in this state."

Therefore, if the purpose of the corporate farming act is to restrict the use of agricultural land by corporations, then it contravenes the purpose of the act to allow corporations grandfathered in under K.S.A. 1987 Supp. 17-5904(a)(7) to expand. In other words, the grandfather clause allowed certain corporations (those relying on the law as it existed prior to repeal) to continue operations in contravention to the new law. The amendment found in S.B. 727 would allow those grandfathered in to further contravene the law by allowing expansion if that expansion is within 20 miles of an originally exempt facility. It is therefore our opinion, without questioning the underlying policy reasons for the legislation that the classification made by S.B. 727 is arbitrary and thus unconstitutional because it does not bear a reasonable relationship to the purpose of the corporate farming act. We note that while S.B. 727 may promote the public purpose of economic growth by the retention and

expansion of existing business, we cannot reach the question of underlying policy. Our conclusion is not based on the wisdom of the amendment but solely on the determination that the classification provided in the amendment is arbitrary and discriminatory in that it bears no rational relationship to the fundamental purpose of the act in which it appears.

In conclusion, section 7(a)(15) of 1988 Senate Bill No. 727, amending K.S.A. 1987 Supp. 17-5904 by providing an additional exemption to the corporate farming act is unconstitutional. It violates sections 1 and 2 of the Kansas Bill of Rights and the Equal Protection Clause of the 14th Amendment of the United States Constitution in that it establishes an arbitrary classification that does not bear a rational relationship to the purpose of the act.

Very truly yours,



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