



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 88-156

John A. Potucek, II
Sumner County Counselor
Courthouse
Wellington, Kansas 67152

Re: Counties and County Officers -- Planning and Zoning
-- Regulations Inapplicable to Existing Uses;
Agricultural Purposes; Mobile Homes; Conditional
Use Permits

Synopsis: K.S.A. 19-2921 prohibits the exercise of county zoning authority affecting property being used for an agricultural purpose. Whether or not a particular mobile home is being used for an agricultural purpose depends upon the relevant facts; placing a mobile home in an area zoned agricultural does not automatically dictate that the mobile home is being used for an agricultural purpose. Cited herein: K.S.A. 1987 Supp. 19-101a; K.S.A. 19-2901; 19-2908; 19-2921; K.S.A. 1987 Supp. 19-2960; K.S.A. 75-1211.

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Dear Mr. Potucek:

As Sumner County Counselor you request our opinion concerning county zoning authority. You state that Sumner county has attempted to require conditional use permits in order to regulate the placement of mobile homes in areas zoned agricultural and ask our opinion as to this regulation. (Please note that K.S.A. 75-1211 et seq. contains the

state's standard code for mobile homes and recreational vehicles.)

Generally, reasonable zoning, especially where it is comprehensive, is constitutional and valid as a proper exercise of police power. McQuillin, Municipal Corporations, § 25.05 (1983). While the zoning power constitutes a type of state police power, it is usually exercised by municipal corporations pursuant to specific delegation. Id. at § 25.35.

A delegation of zoning authority has been made pursuant to K.S.A. 19-2901 et seq. which discusses general county authority to zone and regulate land use. "The grant of a conditional or special use permit does not create a new zone, or constitute an alteration or an amendment of the zoning regulations; it merely affirms the existence of the circumstances under which the ordinance, by its terms, prescribes that such a permit shall issue." 101A C.J.S., Zoning and Land Planning, § 191 (1979). K.S.A. 1987 Supp. 19-2960 specifically allows certain urban counties to issue special or conditional use permits and sets forth an agricultural exemption. Sumner county does not come within the purview of K.S.A. 1987 Supp. 19-2960, and therefore authority to issue conditional or special use permits must be otherwise established.

K.S.A. 1987 Supp. 19-101a allows the exercise of county home rule authority if the measure does not conflict with uniformly applicable statutes. We find no uniformly applicable statutes that prohibit the issuance of county conditional use permits. Kansas case law discussing conditional or special use permits for mobile homes or recreational vehicles includes: International Villages, Inc. of America v. Board of Commissioners of Jefferson County, 224 Kan. 654 (1978); Gaslight Villa, Inc. v. City of Lansing, 213 Kan. 862 (1974); City of Colby v. Hurtt, 212 Kan. 113 (1973); Creten v. Board of County Commissioners, 204 Kan. 782 (1970); and Scherer v. Board of County Commissioners, 201 Kan. 424 (1968). Although these cases do not specifically discuss statutory authority concerning special or conditional use permits, the courts did not rule such permits impermissible. It is our opinion that, pursuant to county home rule authority and K.S.A. 19-2901 et seq., a county may provide for conditional use permits where not otherwise limited or precluded by uniformly applicable statutes or the constitution.

While a municipality may restrict the use of property for the common good, restrictions that are unnecessary or unreasonable may not be imposed. McQuillin, Municipal Corporations, § 25.42 (1983). Moreover, specific statutory limitations may restrict the exercise of zoning authority. K.S.A. 19-2921 protects property used for agricultural purposes from county zoning regulations or restrictions and provides in pertinent part:

"[N]o determination nor rule nor regulation shall be held to apply to the use of land for agricultural purposes, nor for the erection or maintenance of buildings thereon for such purposes so long as such land and buildings erected thereon are used for agricultural purposes and not otherwise." (Emphasis added).

As stated in Attorney General Opinions No. 82-200 and 85-39, K.S.A. 19-2921 is uniformly applicable to all counties and therefore not subject to county home rule authority. The issue thus becomes whether the proposed Sumner county conditional use permits for mobile homes in areas zoned agricultural improperly regulates property used for agricultural purposes.

In State v. Scherer, 11 Kan. App. 2d 362 (1986), the appellate court addressed the agricultural exemption found in K.S.A. 19-2908 which places limitations upon township zoning authority. The language in K.S.A. 19-2908 and 19-2921 contains identical language excepting property used for agricultural purposes. Id. at 366. In Scherer the defendant was charged with operating a salvage yard in violation of township zoning regulations. The defendant claimed he farmed 10 acres in the township and used his 800 to 1,000 pieces of antique farm equipment to raise livestock and cut hay. The appellate court recognized that it was not absolutely clear that the defendant was using the land for agricultural purposes, but disagreed with the trial court's belief that agricultural uses and all other uses are mutually exclusive. Id. at 367. Thus, the trial court was directed to consider what use was being made of the property.

In VanGundy v. Lyon County Zoning Board, 237 Kan. 177 (1985), the landowner argued that a special permit to quarry rock was unnecessary because his land was being used for agricultural purposes. The court agreed and noted that the

owner was blasting rock in order to excavate a pond that was to be used for agricultural purposes and thus it stated, "[W]e cannot say that the quarrying of the rock is not within the legislature's concept of agricultural purposes as set forth in K.S.A. 19-2921." Id. at 182, 183.

Blauvelt v. Board of Leavenworth County Commissioners, 227 Kan. 110 (1980), contains perhaps the most helpful discussion of the agricultural purpose exception. In that case, the plaintiffs were denied a permit to build a septic system that connected with the dwelling house. The landowner-plaintiffs intended to construct a farmhouse in which to live while they conducted farming operations on the property. The court held that under the facts K.S.A. 19-2921 excluded a farmer's dwelling house from county zoning regulations.

When considered together, these cases evidence the variety of uses and types of buildings that may individually represent an agricultural use. Thus, a decision as to whether a mobile home is being used for an agricultural purpose depends upon the specific facts in each situation.

The issue raised by Sumner county concerns conditional use permits affecting mobile homes located in areas zoned agricultural. The exception in K.S.A. 19-2921 does not prohibit zoning in all areas zoned agricultural, it merely places restrictions upon authority to regulate property that is in fact being used for agricultural purposes. The zoning authority must therefore make a case by case factual determination as to whether a particular use is agricultural. Absent such an agricultural use, K.S.A. 19-2921 does not preclude the exercise of zoning authority in areas within the jurisdiction of the board of county commissioners.

Very truly yours,



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