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ATTORNEY GENERAL OPINION NO. 90- 68

George E. Scamman
Legal Counsel for County Planning Board
Courthouse
Wellington, Kansas 67152

Re: Counties and County Officers -- Planning and
Zoning; Planning and Zoning in Counties --
Agricultural Purposes; Greyhound Operations

Synopsis: For county zoning purposes, greyhound operations are not considered an agricultural use. As a non-agricultural use the county may require conditional use permits for greyhound operations in areas zoned agricultural. Under county home rule authority, the county may regulate the size, construction and sanitation of greyhound kennels absent state action to preempt the field. Cited herein: K.S.A. 2-3201; K.S.A. 1989 Supp. 2-3203; K.S.A. 19-101a; 19-2921; 19-2926; 19-2960; 21-4310; 44-505; 47-414; K.S.A. 1989 Supp. 47-607; 47-610; 47-620; 47-1001; 47-1402; K.S.A. 1989 Supp. 47-1501; 47-1701; K.S.A. 47-1718; K.S.A. 1989 Supp. 65-6a18; K.S.A. 76-478; 79-1301; Kan. Const., Art. 11, § 1; 7 U.S.C. § 2131; 7 U.S.C. § 1232.

* * *

Dear Mr. Scamman:

As legal counsel for the Sumner county planning board you request our opinion regarding greyhound operations in relation

to zoning and regulation issues. Specifically, you present three questions for our consideration: "(1) Are greyhound operations properly classified as agricultural or commercial for zoning purposes? (2) Can the county require conditional use permits for greyhound operations? (3) Can the county regulate the size, construction and sanitation of greyhound kennels?" We understand "greyhound operations" or "greyhound farms" to consist of the breeding, raising and training of greyhounds which are subsequently sold as racing animals or boarded as racing animals within a kennel-type facility.

We assume that your first question is asked in relation to K.S.A. 19-2921 which limits the county commission's power to regulate land use:

"[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."

The "obvious purpose" of K.S.A. 19-2921 was stated in Blauvelt v. Board of Leavenworth County Commissioners, 227 Kan. 110 at 133 (1980): "to favor agricultural uses and farmers. Since the state's economy is based largely on the family farm it would appear the intent of the legislature was to spare the farmer from more governmental regulation and not discourage the development of this state's farm industry."

With the enactment of K.S.A. 2-3201 et seq. in 1982, the term "agricultural activity" was defined by Kansas statute for the first time as "the growing or raising of horticultural and agricultural crops, hay, poultry and livestock, and livestock, poultry, and dairy products for commercial purposes." K.S.A. 1989 Supp. 2-3203.

Kansas case law has discussed the term "agriculture" in various contexts, with the oldest definition of the term found in State ex rel., v. Wheat Farming Co., 137 Kan. 697 (1933), which included the rearing of domestic animals. Carp v. Board of County Commissioners, 190 Kan. 177 (1962), held that agriculture includes animal husbandry - the raising and feeding of livestock. Feilds v. Anderson Cattle Co., 193 Kan. 558 (1964), noted that the term "agriculture" includes the breeding, rearing and feeding of livestock in preparation

for market and that the preparation of farm products for market is the dominating purpose of the agriculturalist. In reaching that definition of "agriculture" Fields cited 3 C.J.S., Agriculture, § 1, p. 366:

"It has been said that agriculture includes at once the science or art and process of supplying human wants by raising products of the soil and by associated industries. Accordingly, therefore, it may include not only the tillage of the soil and the cultivation of crops, but also the rearing and feeding of all kinds of farm livestock. . . ."

Under this analysis, the question of whether greyhound operations are properly classified as agricultural or commercial enterprises turns on the question of whether greyhounds are "livestock." Unlike the term "agriculture," the term "livestock" is defined by numerous Kansas statutes and regulations, none of which include dogs within the definition. [K.S.A. 47-414(b), livestock means cattle, sheep, horses, mules, or asses (relating to Marks and Brands); K.A.R. 9-14-1(b), livestock means cattle, swine, horses, sheep, goats and poultry (authorized by and implementing K.S.A. 47-607 and K.S.A. 1989 Supp. 47-610 relating to protection of Domestic Animals); K.A.R. 9-7-1 et seq., authorized by K.S.A. 47-607(d), K.S.A. 1989 Supp. 47-610 and 47-620 and implementing K.S.A. 47-607, relating to the movement of livestock into or through Kansas addresses cattle, heifers, calves, steers, swine, sheep, cats, zoo animals, fur bearing animals, other domesticated wild animals, buffalo, bison, goats, and horses. It is noted that in K.S.A. 47-620, the terms "domestic animals" and "livestock" are used interchangeably; K.S.A. 1989 Supp. 47-1001(b), livestock means cattle, swine, sheep, goats, horses and mules (relating to Public Livestock Markets); K.S.A. 47-1402(c), livestock means cattle, calves, sheep, swine, horses, mules, goats, and any other animal which can or may be used in and for the preparation of meat or meat products (relating to Humane Slaughter); K.S.A. 1989 Supp. 47-1501(c) livestock means cattle, swine, sheep, and horses (relating to Feed Lots). Further, K.S.A. 1989 Supp. 65-6a18(g) defines meat food products as any product capable of use as human food which is made wholly or in part from any meat or other portions of carcasses of any livestock or domestic rabbits except those historically not considered meat by consumers. In addition, K.S.A. 76-478 establishes the international meat and livestock

program, the purpose of which is to assist producers of Kansas livestock, meat products and commodities in foreign marketing. The advisory committee for the international meat and livestock program is required to be composed of representatives from the sheep association, pork producers council, dairy industry, cow-calf division of the livestock association, feedlot division of the livestock association, meat processing association, national meat packers association, agricultural committee of the legislature, and the director of the international meat and livestock program.]

It is noted that in chapter 79 of Kansas Statutes Annotated, article 13 addresses enumeration and taxation of dogs by providing "a dog shall be considered as personal property and have the rights and privileges and be subject to like lawful restraints as other livestock." K.S.A. 79-1301. However, "the purpose of R.S. 79-1301 (now K.S.A. 79-1301) appears to have been to classify dogs for taxation purposes, to grant dogs upon which the tax had been paid the same rights and privileges and to subject them to the same restraints as other livestock. It also appears to have been designed to prevent the recovery of an unjust amount for the unlawful killing of dogs." State v. Fenske, 144 Kan. 560 (1936). We do not believe this statute makes dogs livestock for all purposes. But see Sims v. Montgomery, Case No. 81-C-110, District Court of Dickinson County, Kansas (Dec. 6, 1982) (a dog kennel, by virtue of Dickinson County Zoning Regulations, is a lawful conforming use in an agricultural district based on K.S.A. 19-1301). In any event, as of 1989, article 11, section 1(b)(2) of the Kansas Constitution exempts livestock from property taxation. Thus, K.S.A. 79-1301 now appears to be moot for taxation purposes.

From the foregoing analysis we conclude that greyhounds are not "livestock," and therefore greyhound operations are not animal husbandry and do not fall within the meaning of the term "agriculture."

This conclusion is supported by Whitham v. Paris, 11 Kan.App.2d 303 (1986), a worker's compensation case, which required the court to determine whether an employer was engaged in an agricultural pursuit under the provisions of the Kansas worker's compensation act. The court held:

"The following factors provide a framework for substantive analysis and determination whether a specific pursuit or business is an agricultural pursuit within the meaning

of K.S.A. 1985 Supp. 44-505(a)(1): (1) the general nature of the employer's business; (2) the traditional meaning of agriculture as the term is commonly understood; and (3) each business will be judged on its own unique characteristics." Syl. 3.

Applying those factors, the court held that the respondent's business of boarding and showing horses was primarily a commercial enterprise not associated with the traditional meaning of agriculture. While an earlier court in Board of County Commissioners v. Brown, 183 Kan. 19 (1958) found that the raising of canaries was an agricultural pursuit because of the similarity to the raising of chickens or other poultry (commonly regarded as an agricultural pursuit) it is our opinion that the later Whitham case provides a stronger legal rationale for the analysis and determination of whether a specific pursuit is agricultural. It appears that the Whitham factors could be applied to greyhound operations with the same conclusion as the Whitham court reached regarding boarding and showing horses.

In other jurisdictions, the weight of authority, that is four out of five states where the issue at hand has been addressed, have held that the kenneling (whether care, production, breeding, training, boarding, and/or raising) of dogs is not an agricultural pursuit. Mioduszewski v. Town of Saugus, 148 N.E.2d 655 (Mass. 1958) (breeding and training of greyhounds commercial, not agricultural); Hume v. Building Inspector of Westford, 243 N.E.2d 189 (Mass. 1969) (operation of kennels containing more than ten dogs, primarily to raise dogs for show purposes, rather than for sale, was not "farming" or "agriculture" within zoning bylaw and was not a permissible or incidental use); Development Associates v. The Wake County Board of Adjustment, 269 S.E.2d 700 (N.C. App. 1980) (dog breeding and boarding commercial, not within agricultural exemption); City of Omaha v. Gsantner, 77 N.W.2d 663 (Neb. 1956) (dog kennel not commercial livestock farm operation); Beatrice v. Goodenkauf, 366 N.W. 2d 411 (Neb. 1985) (dogs are not livestock and the care or production of dogs cannot be included in the term "animal husbandry"); State ex rel. Rybolt v. Easley, 600 S.W.2d 601 (Mo. 1980) (dog kennel not within permitted and conditional uses of agriculture district). But see Harris v. Rootstown Township Zoning Board, 338 N.E.2d 763 (Ohio 1975) (breeding and raising dogs is animal husbandry and therefore agriculture.)

From this review of authority in other jurisdictions, we remain persuaded that our analysis of Kansas statutes and case law is well founded. We therefore conclude that greyhound dogs are not livestock from which it follows that the care, production, breeding, training, boarding, and/or raising of greyhound dogs is not animal husbandry and therefore not an agricultural pursuit for zoning purposes.

We now turn to the second issue you raise: Can the county require conditional use permits for greyhound operations? Authority to zone and regulate land use has been delegated to counties pursuant to K.S.A. 19-2901 et seq. While "exceptions" are explicitly provided for in K.S.A. 19-2926(b), the enabling county zoning statutes do not explicitly authorize special use or conditional use permits (with the exception of Johnson county pursuant to K.S.A. 19-2960). "Notwithstanding the lack of explicit statutory authority for the use of special use permits, cities and counties throughout the state have utilized the tool for many years. Although the 'authority' issue has yet to be directly addressed by a Kansas appellate court, special use permits have been the subject of many reported decisions." Vol. IV, Kansas Municipal Law Annual, "Regulating the Pig in the Parlor: Special Use Permits in Kansas", pg. 23, and cases cited therein (1987).

"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 circumstances under which the ordinance, by its own terms, prescribes that such a permit shall issue." 101A C.J.S. Zoning and Planning § 191 (1979).

As mentioned, conditional use permits have been employed as a zoning tool for years throughout the state of Kansas. Authority for the use of this nonstatutory zoning tool may be found pursuant to the exercise of county home rule authority assuming the county resolution does not conflict with uniformly applicable statutes. K.S.A. 19-101a. We find no uniformly applicable statutes that would prohibit the issuance of county conditional use permits relating to kennel or greyhound operations. The county may therefore, pursuant to county home rule authority, require conditional use permits for greyhound operations. As with all county zoning regulations, any such conditional use regulation is subject to the requirement of reasonableness. K.S.A. 19-2926. See 62

C.J.S. Municipal Corporations, § 218 (1949); Prinz v. Borough of Paramus, 198 A. 284 (N.J. 1938) (municipal ordinance requiring dog kennels to be minimum of 100 feet from adjacent property and from public highway not unreasonable); and Town of Huntington v. Sudana, 346 N.Y. Supp. 2d 582 (N.Y. 1973) (regulation on operation of a kennel may include limitation on number and age of dogs permitted).

Rephrasing your second question, the issue becomes whether the proposed Sumner county conditional use permits for greyhound operations in areas zoned agricultural properly regulate land used for agricultural purposes. Obviously this issue ties in with the question of whether greyhound operations are an agricultural pursuit. We have concluded they are not. The agricultural exception provided for 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. 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. Since greyhound operations are not an agricultural use, conditional use permits may be required by the county as a proper exercise of zoning authority.

Finally, we address your third question: Can the county regulate the size, construction and sanitation of greyhound kennels? K.S.A. 19-101a provides that the board of county commissioners may transact all county business and perform all powers of local legislation and administration as it deems appropriate, subject to 22 limitations, restrictions and prohibitions found in the statute. The primary limitation which must be considered is the first which reads: "(1) counties shall be subject to all acts of the legislature which apply uniformly to all counties."

"Counties are prohibited, however, from passing any legislation which is contrary to or in conflict with any act of the state legislature which is of uniform application to all counties through the state. . . . The primary method of determining whether an ordinance or resolution of a county is inconsistent with the statute of the state is to see whether the local law prohibits what the state law permits or the state law prohibits what the local law permits.

"The legislature may reserve exclusive jurisdiction to regulate in a particular area when an intent is clearly manifested by law to pre-empt a particular field by uniform laws made applicable throughout the state." Missouri Pacific Railroad v. Board of Greeley County Commissioners, 231 Kan. 225, 227 (1982).

We look first to determine whether there is any applicable uniform state law which would either permit or prohibit activity affected by the proposed Sumner county regulation, that is the regulation of size, construction and sanitation of greyhound kennels. We find none. The animal dealers act found in K.S.A. 47-1701 et seq. and amendments thereto is a statewide regulation of "animal dealers." This term refers to any person who operates an animal dealer premises, defined as any premises where dogs or cats, or both, are sold or offered or maintained for sale at wholesale or resale to another, excluding animal pounds, animal shelters, and hobby kennels. K.S.A. 1989 Supp. 47-1701(e) and (f). Registered greyhounds are specifically excluded from the definition of the word "dog," K.S.A. 1989 Supp. 47-1701(j). The animal dealers act is applicable to the question you raise to the extent that greyhound operations include greyhound dealers. These persons and their activities are specifically excluded from regulation uniformly and statewide. Otherwise the animal dealers act does not regulate private dog, including greyhound, kennel operations.

We note that "the legislature may reserve exclusive jurisdiction to regulate in a particular area. . . ." Missouri Pacific, supra. Arguably, legislative authority to regulate matters relating to registered greyhounds has been granted pursuant to K.S.A. 1989 Supp. 74-8802(r):

"'Racetrack facility' means a racetrack within Kansas used for the racing of horses or greyhounds, or both, including the track surface, grandstands, clubhouse, all animal housing and handling areas, other areas in which a person may enter only upon payment of an admission fee or upon presentation of authorized credentials, and such additional areas as designated by the commission." (Emphasis added).

At this time the Kansas racing commission has not exercised authority to regulate greyhound kennels and there is not therefore any uniform statewide regulation pertaining to greyhound kennels. If, at some future time, the commission chose to exercise this authority, any existing county regulations should be reviewed for conformity or conflict with such statewide uniform regulations.

We note that within the animal dealers act, K.S.A. 47-1718 provides highly regulated and specific means by which a dog shall be euthanized, although the state does not regulate the treatment of a living dog, other than by dog dealers, with the exception noted above.

Public nuisance laws have traditionally been a method of regulating noise, odors and unsanitary premises where dogs are kept both in Kansas, City of Fort Scott v. Brown, 133 Kan. 401 (1931), as well as in other jurisdictions. 7 McQuillin Mun. Corp., §§ 24.284 and 24.285 (3rd Ed. 1989); 4 Am.Jur.2d Animals, § 20, p. 267 (1962).

Within the Kansas criminal code is found K.S.A. 21-4310(c), cruelty to animals, which defines as criminal conduct in part "having physical custody of any animal and failing to provide such food, potable water, protection from the elements, opportunity for exercise and other care as is needed for the health or well being of such animal." The exemptions found within K.S.A. 21-4310(2) are not applicable to a private kennel operation. The issue here is whether prohibited conduct defined as criminal, in effect provides statewide uniform regulation of human conduct in relation to animals. In our opinion it does not. The criminal code is penal in nature, making illegal certain defined conduct, the violation of which will result in a sentence as provided by law. The proposed Sumner county resolution would require affirmative action to be taken prior to receiving a license to operate a greyhound kennel facility. Failure to comply with the affirmatively required conditions would result in a license not being issued or a license being revoked after issuance. Since the burden of proof differs in civil and criminal actions, failure to comply with the civil regulatory provisions would not necessarily result in a criminal prosecution and conviction.

We conclude that state law neither permits what the proposed local regulation would prohibit, nor prohibit what the proposed local county regulation would permit, nor has any uniform state law preempted the regulation of greyhound

operations. The only caveat concerns the exemption of registered greyhounds from the animal dealers act which uniformly prohibits the regulation of registered greyhound dealers.

A further limitation of county home rule authority is that such local legislation cannot abuse federal constitutional rights. Harris v. Anderson, 194 Kan. 302, cert. denied, 382 U.S. 894 (1965). The animal welfare act (7 U.S.C. § 2131 et seq.) was promulgated under the authority of the commerce clause of the United States Constitution and therefore local legislation cannot abuse the provisions of that federal regulation. The statement of policy found at 7 U.S.C.S. § 2131 provides in part:

"The Congress further finds that it is essential to regulate, as provided in this act (7 U.S.C.S. § 2131 et seq.), the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use."

The definition of the terms "research facility," "dealer," and "exhibitor" found within 7 U.S.C.S. § 2132 exclude from federal regulation greyhound operations as we understand that term, unless greyhound operations in part include sale in commerce of registered greyhounds. Therefore, we conclude the federal animal welfare act has not preempted the regulation of greyhound operations by the proposed Sumner county resolution.

As with any regulation enacted under the police power concerning the keeping, use and enjoyment of animals, the regulation must be rationally related to a legitimate governmental purpose and such regulation must be reasonable. 4 Am.Jur.2d Animals, § 20 (2nd Ed. 1962); and 62 C.J.S. Municipal Corporations, § 218 (1949). See also Attorney General Opinion No. 87-173.

In conclusion, for county zoning purposes, greyhound operations are not considered an agricultural use. As a non-agricultural use the county may require conditional use permits for greyhound operations in areas zoned agricultural.

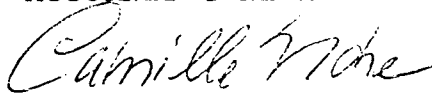
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Under county home rule authority, the county may regulate the size, construction and sanitation of greyhound kennels.

Very truly yours,



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