



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 146

Joseph P. O'Sullivan  
Reno County Counselor  
315 West First Street  
P.O. Box 2066  
Hutchinson, Kansas 67504-2066

Re: Counties and County Officers -- Planning and Zoning; Planning and Zoning in Counties -- Water and Water Courses; Appropriation of Water for Beneficial Use

Synopsis: A county, acting as a zoning authority, may not deny a special use permit to prevent construction of a municipal water well and related facilities because of the impact on the availability of water to adjacent property owners, under circumstances where a permit for the well has been approved by the division of water resources. Pursuant to the Kansas water appropriation act, K.S.A. 82a-701 et seq., the chief engineer of the division of water resources is exclusively vested with the power to appropriate water for the state of Kansas. Furthermore, this state power will pre-empt the county's zoning power in order to prevent dual regulation which would result in uncertainty and confusion. Cited herein: K.S.A. 19-2916a, as amended by L. 1991, ch. 56, § 7; 82a-701; 82a-702; 82-705.

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Dear Mr. O'Sullivan:

As Reno county counselor, you have requested our opinion as to whether Reno county can, acting as a zoning authority, deny a special use permit to prevent construction of a municipal water well and related facilities because of the impact on the availability of water to adjacent property owners, under circumstances where a permit for the well has been approved by the division of water resources. You also ask whether the authority of the division of water resources to determine and allocate water resources, once exercised, precludes zoning authorities from denying a permit holder the exercise of its right.

Pursuant to K.S.A. 19-2916a, a county may adopt a comprehensive plan which considers preservation and conservation of natural resources in the administration of the land use regulations. K.S.A. 19-2916a, as amended by L. 1991, ch. 56, § 7, specifically states:

"Such comprehensive plans may include recommendations relative to the . . . (f) utilization and conservation of natural resources. . . ."

This provision does not vest the county with the authority to regulate water appropriations in the state of Kansas. It does, however, give the county the authority to consider water supplies in the regulation of land use and zoning.

In Dings v. Phillips, 237 Kan. 551 (1985), the Kansas Supreme Court rejected the defendant's argument that "the entire subject of water availability is exclusively a matter of the state board of agriculture, division of water resources. . . ." Id. at 552. (Emphasis added). The court further held that, "[w]ithout hesitation we conclude the availability of water, both to the subject property and other area properties, is a proper consideration of a zoning body hearing a request for a zoning change." (Emphasis added) Id. at 553. The court in Dings recognizes that a county may consider water supply when it exercises its zoning authority. However, we do not believe that this translates into shifting control over water appropriation to the counties. We read this case to mean that counties may take into consideration the availability of water when deciding such issues as zoning, but that the matter of regulating water availability rests with the division of water resources.

Pursuant to the Kansas water appropriation act, K.S.A. 82a-701 et seq., the chief engineer of the division of water resources under the Kansas state board of agriculture regulates the availability of water for appropriation and beneficial use within the state of Kansas.

"All water within the state of Kansas is here by dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed." K.S.A. 82a-702.

Furthermore, K.S.A. 82a-705 states that "[n]o person shall have the power or authority to acquire an appropriation right to the use of water . . . without first obtaining the approval of the chief engineer." These statutes clearly vest the power of appropriating water in the chief engineer. Therefore, it is our opinion that the Kansas division of water resources, though the chief engineer, has the exclusive right to allow or deny appropriation of water. The county may consider the water supply when it regulates land use but it is not given the statutory authority to grant or deny a request for the appropriation of water.

Furthermore, the Kansas Supreme Court reasoned in Missouri Pacific Railroad v. Board of Greely County Commrs, 231 Kan. 225, 228 (1982), that:

"The rule denying power to a local body when the state has preempted the field is a rule of necessity based upon the need to prevent dual regulation which would result in uncertainty and confusion; and whether the state has preempted the field to the exclusion of local legislation depends not only on the language of the statutes, but upon the purpose of the scope of the legislative scheme. Abbott v. City of Los Angeles, 53 Cal.2d 674, 3 Cal. Rptr. 158, 349 P.2d 974 (1960); Kim v. Town of Orangetown, 66 Misc. 2d 364, 321 N.Y.S.2d 724 (1971); and City of Baytown v. Angel, 469 S.W. 2d 923 (Tex. Cir. App. 1971) Id. 228."

Since the Kansas legislature has vested exclusive control of the appropriation of water in the chief engineer of the

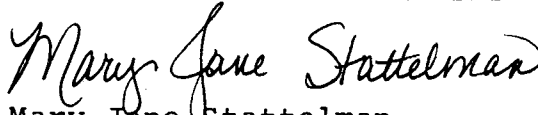
division of water resources, the state power would preempt the local body's power.

In conclusion, Reno county may not prohibit the construction of a water well with its zoning power because the division of water resources is exclusively vested with the power to appropriate water for the state of Kansas pursuant to K.S.A. 82a-701 et seq. Furthermore, once the division of water resources has made a determination to allocate resources it preempts the county's zoning authority, and they may not deny a permit hold from exercising its right.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



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