STATE OF KANSAS

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November 3, 1975

ATTORNEY GENERAL OPINION NO. 75-423

Mr. Robert M. Corbett
Department of Health and Environment
1st floor, Building 740
Forbes AFB
Topeka, Kansas 66620

RE: Administrative Law--Public Health Regulation. Whether the provision of K.A.R. 28-5-4(3) making the maintenance of a domestic animal pen located within 300 feet of a dwelling other than that of the owner of the pen a public health nuisance per se is a reasonable and valid regulation.

Synopsis: The decision to limit animal pens to 300 ft. from a residence is not a valid or reasonable administrative requirement when not coupled with a public health problem.

* * *

Dear Mr. Corbett:

You have requested an opinion as to whether K.A.R. 28-5-4(3) is valid. That regulation provides in part:

> "Public health nuisances. The following conditions and practices are declared to be public nuisances hazardous to public health and local boards of health are directed to order their abatement whenever they are called to their attention by the state department of health or any citizen of the state..."
>
> "(3) Any domestic animal pen that pollutes a domestic water supply, underground waterbearing formation; or stream in a manner that is hazardous to human health; or is maintained in a manner that creates

> a fly attraction or breeding place for flies or mosquitoes; or is a rodent harborage or breeding place; or is located within 300 feet of a dwelling other than that of the owner of the animal pen."

According to 39 Am. Jur.2d, Health, §20;

> "Health regulations are of the utmost consequence to the general welfare; and if they are reasonable, impartial, and not against the general policy of the state, they must be submitted to by individuals for the good of the public, irrespective of pecuniary loss... Such regulations will be sustained if, on a reasonable construction, there appears to be some substantial reason why they are needed to promote the public health and if they are reasonably adopted to or tend to accomplish the result sought."

Thus, the enjoyment of private property is subject to regulation; that regulation, however, must be reasonable and in accordance with due process. Smith v. Steinhauf, 140 K. 407 (1934) Likewise, in Miller v. State Board of Embalming, 110 K. 135 (1921), it was stated that while the official board is authorized to make and enforce rules, such rules must be reasonable, and any rule clearly unreasonable is void.

Thus, regulations may not properly extend beyond such reasonable interferences as tend to preserve and promote public health. Further, they must effect a reasonable and legitimate exercise of police power and may not arbitrarily invade private property or personal rights. The test, when regulations are questioned, is whether they have some relation to the public health or public welfare, and whether that is in fact the end sought to be attained. Regulations enacted by a subordinate agency must be in the authority conferred upon it and may not be arbitrary, oppressive or unreasonable and may not conflict with statutory or constitutional rights. 39 Am. Jur.2d., Health, §20.

The legislature has empowered the Department of Health to regulate nuisances through 1974 Supp. K.S.A. 65-101 which states in part:

> "The secretary of health and environment shall have general supervision of the health of the citizens of the state...it shall be his duty to take such action

> and adopt and enforce such rules and regulations as he may, in the exercise of his discretion, deem sufficient in preventing the introduction or spread of such infectious or contagious disease or diseases within this state."

As a rule, animals are not regarded as nuisances per se. However, "noises made by animals on adjoining grounds may be a nuisance affording grounds for an injunction. The keeping of large numbers of animals in a residential area in a city or near a public thoroughfare may be a nuisance where the resulting offensive odors are detrimental to the comfort of those living in the neighborhood or passing by". 4 Am. Jur.2d. Animals §61. [Emphasis supplied]

It was held in City of Goodland v. Popejoy, 98 K. 183 (1916) that cities may suppress hogpens only when they are located or kept so as to cause an annoyance. The court went on to cite 2 Dillon, Municipal Corporations, 5th ed., §690 et seq. for the proposition that neither a stable nor a cowpen is a nuisance per se; whether or not it is a nuisance depends on where it is located and how it is kept. Since the ordinance in question made things nuisances which were not, the ordinance was declared void.

In Smith v. Steinrauf, 140 K. 407 (1934), the ordinance in question related to the keeping of cats within a measured distance from another's dwelling without regard to the purpose or manner of keeping the animals. Although the facts alleged in the petition failed to show a nuisance, there was no defense because the city had conclusively presumed that the keeping of five cats was a nuisance. The court went on to hold the ordinance void.

Likewise, K.A.R. 28-5-4(3) makes one prima facie liable for placing an animal pen within 300 feet of a residence, regardless of whether the activity is so maintained as to constitute a nuisance.

The Kansas Supreme Court, in Bailey v. Kelly, 93 K. 723, 727, 145 p. 556 (1923) stated definitively that:

> "Unless prejudice or damage threaten or result as a necessary consequence of the act done there is no nuisance...a material, substantial and appreciable injury must be occasioned to the person or property of another."

It appears, therefore, that the State Department of Health may not arbitrarily conclude that the keeping of animal pens within 300 feet of a dwelling is a nuisance unless there are some detrimental effects which result from such activity. According to Knowles v. Central Allapattae, 198 So. 819 (Fla. 1940), anything which is detrimental to health or threatens danger to persons or property within a city may be retarded and dealt with by the municipal authorities (and presumably the State Board of Health) as a nuisance. But generally, a city cannot declare by ordinance (likewise, regulations) that to be a nuisance which is not so in fact.

It appears therefore, that K.A.R. 28-5-4(3) on its face goes beyond the authority entrusted to the State Board of Health, as an attempt to regulate activities other than those which unreasonably interfere with personal and property rights or which harm the public.

Very truly yours,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS/MBR/cgm