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ATTORNEY GENERAL OPINION NO. 79- 260

Mr. Rex Lorson
Saline County Attorney
Government Center
300 West Ash
Salina, Kansas 67401

Re: Counties and County Officers--Planning and Zoning--Regulations Inapplicable to Land Used for Agricultural Purposes

Synopsis: The exemption from regulation provided for in K.S.A. 19-2921 broadly extends to all uses of land which may be defined as "agricultural."

Absent a statutory definition of the terms, the board of county commissioners has no authority under the zoning statutes to define "agricultural" or "agricultural purposes" more restrictively or narrowly than the approved usage of those terms.

A rural dwelling is not a "building" used for agricultural purposes within the meaning of the proviso in K.S.A. 19-2921.

* * *

Dear Mr. Lorson:

You have asked for our interpretation of K.S.A. 19-2921. That statute limits the county commission's power to regulate land use thus:

> "Provided, That no 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."

Specifically, you inquire whether "hobby farms," which you describe as small acreages owned by rural residents who raise crops for personal consumption and animals for personal enjoyment, contribute enough to the agricultural economy of Kansas to be exempt from zoning regulations under the statute. Concerning the statute's reference to "buildings," you have raised two additional questions. First, "at what point is a building considered as being used for 'agricultural purposes'?" Second, can the term "building" be interpreted to include a rural dwelling?

In consideration of your first question, we find that the legislature uses the term "agricultural purposes" throughout the county zoning statutes (see also, K.S.A. 19-2908 and 19-2929) but does not define the term. Significantly, and contrary to your suggestion, the statute in question imposes no "economic contribution" requirement, or acreage limitation, or other such test to determine whether certain parcels may qualify for exemption under the above-quoted proviso. Rather, the exemption applies broadly to "the use of land for agricultural purposes." (Emphasis added.)

Absent a statutory definition of the term "agricultural purposes," K.S.A. 77-201, Second, guides our inquiry. That section provides, in pertinent part, that "[w]ords and phrases shall be construed according to the context and the approved usage of the language." (Emphasis added.) The Kansas Supreme Court construed the term "agricultural purposes" as that term is used in K.S.A. 19-2929 in Carp v. Board of County Commissioners, 190 Kan. 177 (1962). Unfortunately, the Court offered no comprehensive definition of the term, concluding only that "agriculture includes animal husbandry--the raising and feeding of livestock." Id. at 179. Accord, Fields v. Anderson Cattle Company, 193 Kan. 558 (1964).

In Fields, the Court looked for its definition of "agriculture" in 3 C.J.S. Agriculture, §1, which states in part:

> "'Agriculture' is the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock. In its more common and appropriate sense, it has been said, the word 'agriculture' is used to signify that species of cultivation which is intended to raise grain and other field crops for man and beast . . . [I]t may include not only the tillage of the soil and the cultivation of the crops, but also the rearing and feeding of all kinds of farm livestock,

> and in some instances the manufacture of the products of the farm into such forms as may be more convenient or more valuable for use or for sale.
>
> "In modern usage, agriculture is a wide and comprehensive term, and statutes using it without qualification must be given an equally comprehensive meaning." (Emphasis added.)

In County of Lake v. Cushman, 40 Ill.App.3d 1045, 353 N.E.2d 399 (1976), the Illinois court construed an Illinois statute very similar to the statute in question. At issue was whether the county could, under its zoning ordinance, prevent a landowner from building a poultry barn on his 3.09 acre lot in view of the statutory provision relating to county zoning which prohibited any county regulation (other than set back requirements) of structures used or to be used for "agricultural purposes." The county zoning ordinances in question provided that lots less than 200,000 square feet in size in an area zoned "Agriculture" were nonconforming lots. The Court explained the effect of the ordinance, and the reason for its invalidity, thus:

> "The only principal permitted use on a nonconforming lot in an 'Agriculture' zone is a single-family dwelling; in other words despite the clear language of the statute the ordinance attempts to bar any and all agriculture uses if the lot is less than 5 acres in size. This cannot be done. No rights exist and no powers are conferred with respect to zoning except by statute [citations omitted], and the county board is bound by the powers, conditions and restrictions contained in the Act. [citations omitted] The County argues that the statute is silent as to whether acreage limitations may be imposed on agricultural uses. But in fact the contrary is true. The statute clearly provides that there can be no regulation of any land or buildings used for agricultural purposes except that building or set back lines may be regulated. Nor can the power to impose such a limitation be read into the statute on the theory that the legislature only meant the term 'agriculture' to apply to large farms. In People ex rel. Pletcher v. City of Joliet (1926), 321 Ill. 385, 152 N.E. 159, our Supreme Court, at page 389, said:

> "'. . . The words "agricultural purposes" are descriptive of the nature of the use to which the land is put [citations omitted], and so the amount of land involved would have no bearing on the meaning of the words . . . . If the legislature desires to limit the application of the words to tracts containing more than two and one-half acres then it must fix the limitations. We have no authority to do so.'
>
> ". . . [T]he definition of 'agriculture' in the ordinance is not binding on the court as to the meaning of the statute. A county board can hardly dictate to the legislature what is the import of a statute nor can it change the import and meaning of the statute by the enactment of an ordinance." 40 Ill.App.3d at 1047-1048. (Emphasis in original.)

After extensive review of Illinois cases, and cases from other jurisdictions, the Court determined that the terms "agriculture" and "agricultural purposes" are broadly defined, covering a wide range of agricultural activities and applications.

Applying the foregoing principles, it is our judgment that the statutory exemption about which you have inquired broadly extends to all uses of land which may be defined as "agricultural." The legislature has declared that all land used for such purposes shall be exempt from county zoning rules and regulations. In reaching this conclusion, it also is our opinion that absent a statutory definition, the board of county commissioners has no authority under the zoning statutes to define "agricultural" or "agricultural purposes" more restrictively or narrowly than the approved usage of those terms. You advise that the Saline County Department of Planning and Zoning has purported to do so by limiting the statutory exemption's application to persons who derive at least fifty-one percent of their income from the business of farming for profit. Such a narrow definition would necessarily exclude or affect other agricultural uses of land to which the statutory exemption applies. Such regulation is expressly precluded by K.S.A. 19-2921.

In answer to your next question, it is our opinion that the broad definition of "agricultural" and "agricultural purposes" applies with equal force to the definition of buildings used for such purposes.

Lastly, you inquire whether buildings used for agricultural purposes may include rural dwellings. You have submitted for our consideration a copy of District Judge John W. Brookens' memorandum decision construing the Pottawatomie County zoning ordinance, adopted pursuant to K.S.A. 19-2901 et seq., in Flanagan v. Holt (Pottawatomie County District Court, Case No. 11,638, June 21, 1977). The following excerpt from the judge's opinion is pertinent:

> "Defendants contend the provisions of K.S.A. 19-2908 are such that the county may not regulate, one way or another, buildings on land used for agricultural purposes, and that the word 'building' includes a dwelling, whether a frame house or a mobile home.
>
> "The statute provides '. . . no 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 erected thereon for such purposes so long as such land and buildings erected thereon are used for agricultural purposes and not otherwise . . .'
>
> "The court is of the opinion that a dwelling, whether frame house or mobile home, is not included within the meaning of the statute; a dwelling is not used for agricultural purposes. A dwelling is used for dwelling purposes, whether the occupant is a farmer . . . or plumber. Simply because a plumber uses a dwelling does not make it for plumbing purposes. The statute means barns, machine sheds, and the like." (Memorandum Decision, pp. 2-3.)

Though we have found an Attorney General's opinion to the contrary (see Opinions of the Attorney General, Vol. III, pp. 260-261), we are inclined to accept Judge Brookens' construction for the reasons stated, and we apply that interpretation to K.S.A. 19-2921. Accord, People v. Husler, 34 Ill.App.3d 977, 342 N.E.2d 401 (1975).

In summary, we conclude that the exemption from regulation provided for in K.S.A. 19-2921 broadly extends to all uses of land which may be defined as "agricultural." Secondly, the board of county commissioners has no authority under the zoning statutes to define "agricultural" or "agricultural purposes" more restrictively or narrowly than the approved usage of those terms. Finally, it is our opinion that a rural dwelling is not a building used for agricultural purposes within the meaning of the proviso in K.S.A. 19-2921.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Steven Carr

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Assistant Attorney General

RTS:WRA:SC:gk

When the 1961 legislature enlarged the zoning power of counties to allow zoning within three miles of any city of the first, second or third class (ch. 154, L. 1961), it did not amend G. S. 1959 Supp., 19-2933, to provide that the county commissioners had the right to use the planning commission of a third class city. Rather, by its terms, the statute restricts the county to use of the planning commission of first and second class cities.

We see no ambiguity in this statute or room for construction. The legislature has provided that planning commissions of first and second class cities may be used when it is proposed to zone around the corporate limits of those cities; it has not so provided in regard to planning commissions of third class cities. It is possible to apply chapter 154, Laws of 1961, together with G. S. 1959 Supp., 19-2933, without conflict, and we see no amendment by implication. In our opinion, if the county commissioners desire to zone within the unincorporated territory lying within three miles of a third class city, the commissioners must appoint a planning commission under G. S. 1959 Supp., 19-2933, to perform the functions of a planning commission.

Members of the county planning commission must be residents of the unincorporated territory of the county (G. S. 1959 Supp., 19-2933). Therefore, it would not be possible to appoint as members of this commission the persons serving on the third class city planning commission, as all but two members of the city planning commission must be residents of the city (G. S. 1949, 12-702). These two members, who must reside in the three-mile area surrounding the incorporated city (G. S. 1949, 12-702) could also serve on the planning commission appointed by the county commissioners.

OPINION (61-42), February 22, 1961, to Mr. H. Thomas Payne, City Attorney, Olathe, Kan.

Re: SAME—*Planning and Zoning, Classification of Residence Building on Farm*

QUESTION: Is a farm residence located on land farmed by the occupant a building used for agricultural purposes within the meaning of G. S. 1949, 19-2908? ANSWER: Yes.

G. S. 1949, 19-2908, provides that zoning regulations adopted under the act of which the statute is a part shall not be held to apply to the use of land for agricultural purposes, nor for the erection or maintenance of buildings thereon for such purposes.

In *People v. Village of Oak Park,* 107 N. E. 636, a city ordinance prohibited erection of a public garage on a site where two-thirds of the buildings within a radius of five hundred (500) feet were used exclusively for residence purposes. It was held that in determining this question, private garages and barns used in connection with residences were to be counted as buildings used for residence purposes. In *State, ex rel., v. Johnston,* 113 S. W. 1083, a building used as a private boarding school remained exempt from taxes as a building used exclusively for school purposes, even though the schoolmaster and his family lived in the building, his only vocation being conduct of the school. In *Mary Immaculate School v. Board of Assessors,* 175 N. Y. Supp., 701, the residence of a school chaplain situated on a farm occupied by the school was held to be a building used for educational purposes, and the residence of a farmer who cared for livestock on the farm also was considered to be a building used for educational purposes.

By analogy, it is our opinion that a residence erected on land farmed by the occupant of the residence is a building erected for agricultural purposes, and falls within the statutory exemption.

OPINION (61-285), July 28, 1961, to Mr. Wendell G. Winkler, Miami County Attorney, Paola, Kan.

Re: SAME—*Plats of Land Outside City, Filing With Commissioners*

QUESTION: Is it permissive or mandatory to approve a plat of a subdivision located beyond one mile from the city limits of an incorporated city? ANSWER: Yes, permissive.

G. S. 1949, 19-2633 provides in part as follows:

"Any person . . . owning land outside the limits of any incorporated city, . . . located more than one mile from the limits of any incorporated city, desiring to subdivide any such tract of land, may plat the same and submit the plat . . . to the board of county commissioners of the county in which such land is situated. . . . When said plat is approved by the board of county commissioners . . . the same shall be filed with the register of deeds. . . ."

The purposes of this statute are to provide a means for proper regulation of subdivisions within a county and also to afford the subdivider an easy mode for conveyancing, and other obvious advantages.

The right given to the county commissioners to approve the plat infers that they are also given the right to disapprove it. The law does not intend that they shall do a useless thing or