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ATTORNEY GENERAL OPINION NO. 79- 292

Mr. Joseph W. Snell
State Historic Preservation Officer
120 West Tenth
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees--
State Historical Society--"Project" Defined

Synopsis: The enactment of, or amendment to, a municipal zoning ordinance is not a "project" within the meaning of K.S.A. 75-2724 requiring opportunity for the state historic preservation officer to comment.

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Dear Mr. Snell:

You inquire of this office whether a proposed city zoning change that arguably affects recognized historical properties within the city, is a "project" of the city within the meaning of K.S.A. 75-2724. You advise that the zoning change in question would permit certain commercial properties, including large parking facilities, to be developed in an older residential area.

The Kansas historic preservation law is an enactment of the 1977 Legislature having uniform statewide application. The act elaborates the policy of the state as follows:

> "The legislature hereby finds that the historical, architectural, archeological and cultural heritage of Kansas is an important asset of the state and that its preservation and maintenance should be among the highest priorities of government. It is therefore declared to be the public policy and in the public interest of the state to engage in a comprehensive program of historic preservation and to foster and promote the conservation and use of historic property for the education, inspiration, pleasure and enrichment of the citizens of Kansas." K.S.A. 75-2715.

K.S.A. 75-2724 provides in pertinent part:

> "The state or any political subdivision of the state, or any instrumentality thereof, shall not undertake any project which will encroach upon, damage or destroy any historic property included in the national register of historic places or the state register of historic places or the environs of such property until the state historic preservation officer has been given notice and an opportunity to comment upon the proposed project."

The meaning of the term "project" within the context of the state historic preservation law is subject to varying interpretations. Unfortunately, there is no Kansas case law or administrative rules and regulations to suggest the scope of such a term. In addition, the legislative history of K.S.A. 75-2715 et seq. is of little assistance. Section 10 of Senate Bill No. 130 of the 1977 Session contained the term "project" from its introduction by the Senate Committee on Federal and State Affairs. There was no legislative interim study to provide further background information.

Since the proscriptions of the statute apply to units of government, private enterprise and projects of individuals are not constrained directly by the Act. Where the construction or destruction of the physical environment is conducted, paid for or supervised by a city or county government, there can be little question that such activity constitutes a "project" within the meaning of the Act. The difficulty arises when the participation by the governmental unit is not that of a principal developer or builder but is limited to authorizing building and development activities by the private sector.

The term "project" has been considered by courts of other jurisdictions on numerous occasions and within a variety of contexts. Of particular importance are cases construing preservation laws of other states similar to the Kansas law and environmental legislation at both the federal and state level which provide for "impact review" procedures having a recognizable similarity to the Kansas law.

In Hoboken Environ. v. German Seaman's Mission, 391 A.2d 577, 161 N.J. Super. 256 (1978), the Superior Court of New Jersey refused to restrain the demolition of an historic site. A citizens' group had hoped to preserve the structure under a statute virtually identical to the Kansas law. However, the Court ruled that the administrative action of the city in issuing the demolition permit did not constitute a "project" within the intent of the New Jersey Law.

However, the precedential value of this case is limited by the reasoning of the Court which based its conclusions as to which governmental actions constitute a "project" on administrative interpretative regulations promulgated under the New Jersey law. Said regulations construed "project" to include only acts of active participation by the governmental unit, not administrative functions, such as the issuance of building permits and, by analogy, the demolition permit. In addition, the issuance of a building permit by a municipality involves considerably less participation by the governmental unit than a change of zoning classification.

A far better judicial analysis of the term "project" in the law of land use control can be found in the case of Friends of Mammoth v. Board of Super. of Mono County, 502 P.2d 1049 (1972). In Mammoth, the Supreme Court of California considered as a matter of first impression, the term "project" within the context of the California Environmental Quality Act of 1970 (CEQA), Pub. Resources Code, §§21000-21151. Without benefit of a statutory or administrative interpretation, the

Court held that "project" includes private activity for which a government permit of some type is necessary. The permit in question was a conditional use permit issued by the county for the construction of a resort complex in a rural and undeveloped area.

Following the Court decision, the California legislature amended CEQA to adopt the Court's conclusions and subsequently, the California courts have determined that a variety of acts of local and state government approving and authorizing private activities are "projects" under the Act. See Shawn v. Golden Gate Bridge, 131 Cal. Rptr. 867 (1976), holding that a rate increase for a toll bridge is a "project" within the meaning of CEQA; Natural Res. Defense Coun. Inc., v. Arcata Nat'l. Corp., 131 Cal. Rptr. 172 (1976), holding a timber harvesting plan approved by the state to be a "project" under CEQA; Erven v. Riverside County Board of Supervisors, 126 Cal. Rptr. 285 (1975), where a plan to provide road maintenance to new areas of the county was a "project" under CEQA; People v. Dept. of Housing & Community Development, 119 Cal. Rptr. 266 (1975), holding a building permit to be a "project" under CEQA; and Bozung v. Local Agency Form. Com'n. of Ventura Cty., 118 Cal. Rptr. 249, 13 Cal. 3d 263 (1975) where the California Supreme Court held the annexation of rural lands for commercial development to be a "project" under CEQA.

As the California Supreme Court noted in Mammoth, supra, the dictionary definition of "project" is of little help. And, as with the Kansas law, where no definition is provided by statute or administrative interpretation, the courts must look to the purposes of the Act, specifically, that which it was intended to accomplish or prevent, in order to ascertain the legislative intent. Unfortunately, the Kansas historic preservation law, unlike the California Environmental Quality Act, provides few, if any, clues as to the activities of government which are to be included in the term "project." In fact, it is this absence of expression, when contrasted with the California law, which forces us to conclude that "project" under the Kansas historic preservation law was not intended to include zoning activities of Kansas municipalities.

In analyzing the California law, the Court identified sections of the Act which referred to governmental regulatory activities and other sections referring to private interests and public decisions. 502 P.2d at 1055. All this, the Court reasoned, indicated an intent to adopt the more expansive meaning of "projects." The Court then compared CEQA to the National Environmental Policy Act (NEPA), 42 U.S.C.A. §4321 (1970); the former having been patterned after the latter. Regulations adopted under NEPA include licenses, permits, etc., under the meaning of "projects" constituting actions of the federal government effected by the NEPA mandates.

Apart from K.S.A. 75-2715, supra, which identifies the Act's paramount purpose of preserving historically valuable properties, the Kansas preservation law contains no identifiable references to the regulation of private interests which would imply a reading of "project" to include private activities merely permitted by public entities.

In contrast, the federal law regarding historic preservation, the National Historic Preservation Act, as amended, specifically identifies activities of the federal government which must comply with the Act's reporting requirements. The Act by its express terms covers "any Federal department or independent agency having authority to license any undertaking." 16 U.S.C.A. §470(f) (as amended, 1976). This law, of course, was in effect at the time of the adoption of the Kansas historic preservation statute, but the language of federal law was not adopted by the Kansas legislature.

"'Zoning' has been defined as the legislative division of a community into areas in which are permitted only certain designated uses of land or structure." 8 McQuillin, Municipal Corporations, §25.07 (1976). And the authority of a municipality to zone is an exercise of the police power and therefore must be for the purpose of the promotion of the public health, safety and welfare. Id. at §25.10.

Zoning is the enactment of planning determinations ranging in scope from the establishing of a comprehensive districting scheme, to spot zoning or the granting of variances from zoning requirements. Such determinations are discretionary and legislative in nature, rather than judicial. Id. at §25.07.

Although municipal zoning differs somewhat from licensing (Id. at §25.10), for purposes of inclusion within the meaning of the term "project," if zoning may be included, so might other legislative activities of a city or county which fall within the exercise of the police power, such as the adoption of building codes, signboard regulations, traffic ordinances, pollution controls, and other regulatory activities. We believe that the legislature did not intend by the enactment of K.S.A. 75-2715 et seq., to impose the burdens contained therein, upon such regulatory functions.

We note in passing that since the enactment of the state historic preservation law, zoning changes have not been interpreted as falling within the meaning of the term "project" and the legislature has not appropriated additional funds for the rather numerous opportunities for review by the historic preservation officer which would be necessary under such an interpretation.

Thus, while "project" might include activities of the city affecting historical property such as construction of sewer systems or urban renewal projects, physical alterations to streets and highways or the issuance of industrial revenue bonds when the municipality is an active participant, where the role of the governmental unit is regulatory only, it cannot be said to be a "project" of the governmental unit within the meaning of K.S.A. 75-2724.

Therefore, we must conclude that the enactment of, or amendment to, a municipal zoning ordinance is not a "project" within the meaning of K.S.A. 75-2724 requiring opportunity for the state historic preservation officer to comment.

Very truly yours,

ROBERT T. STEPHAN
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RTS:BJS:gk