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January 16, 1980

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ATTORNEY GENERAL OPINION NO. 80-14

Mr. Mike Norris
Payne & Jones, Chartered
P. O. Box 151
Olathe, Kansas 66061

Re: Schools--Buildings--Compliance with Municipal
Zoning and Building Code Requirements

Synopsis: Under the Municipal Code of the City of Olathe, §19.58.010, a building permit may be issued only after all zoning requirements and building code specifications have been complied with. As a school district is required to follow the building codes specified by K.S.A. 1979 Supp. 31-150, the power of a city in this respect has been preempted. However, in the absence of any statutory expression of legislative intent that a school district is immune from zoning requirements, compliance by a district must be determined by application of the "balancing of interests" test stated in Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan.App.2d 102 (1978). In this regard, Attorney General Opinion No. 79-28 is reaffirmed.

* * *

Dear Mr. Norris:

On behalf of Unified School District No. 233 (Olathe), you request the opinion of this office on the following question;

"May a school district be required to obtain a building permit from a municipality, and to pay the fee required therefor, to construct a new school building within the city?"

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Although previous opinions on this subject have been issued by Attorneys General Fatzer, Miller and Schneider, recent case law and statutory developments require that the issue be examined once again.

In general, it may be noted that unified school districts are quasi-corporations created by the legislature, having only such powers as are bestowed upon them by statute or necessarily implied to carry out those powers which have been so granted. K.S.A. 79-8201; State ex rel. McAnarney v. Rural High School Dist. No. 7, 171 Kan. 437 (1951). While under the general supervision of the state board of education, they are maintained, developed and operated by locally elected boards. Kan. Const., Art. 6, §5. Such local boards are given the power to acquire land for use by the district, and may additionally construct (subject to voter approval) necessary buildings thereon. K.S.A. 72-8212, 72-6761.

It also is true that cities are likewise creations of the legislature and can exercise only those powers which either are expressly granted or are necessary to make effective those powers so conferred. State ex rel. Jordan v. City of Overland Park, 215 Kan. 700 (1974). However, since the addition of the "home rule" amendment to the Kansas Constitution, Article 12, Section 5(b), cities are no longer dependent on the legislature for authority to determine their local affairs and government. Junction City v. Lee, 216 Kan. 495 (1975). Of course, such power is not absolute, and may be proscribed in those areas where an act of the legislature has made the matter one of statewide, rather than local, concern. Kan. Const., Art. 12, §5(b).

Turning to the facts of the question presented here, we would initially note that no Kansas statutes appear to exist which restrict the power of cities to require building permits for the construction of school buildings, or to impose fees for the issuance of such permits. On the surface, then, it would appear that such an exercise of authority by a city is permissible, under its general police power authority. However, it is necessary at this point to examine the purposes for which a building permit is issued, in order to determine if conflicts with state statutes do occur, i.e., does the city require the district to comply with standards different than those (if any) which are required by the state? If such a conflict is found, it remains to determine whether the city must give way to the state on the particular matter of regulation involved.

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We have been able to find no section of the Municipal Code of the City of Olathe which defines the purposes behind the requirement that a building permit be obtained for the construction of any building in the city. However, an indirect statement of purpose appears in the chapter dealing with zoning at §19.58.010, which states: "No permit shall be issued for any building, structure or construction unless the same be in conformity in every respect with all the provisions of this title and the building code of the city." It would appear, therefore, that it is through the permit mechanism that the city seeks to enforce compliance with both zoning and building code requirements. The question then becomes one of whether the state also has spoken in these areas, at least as regards school buildings.

In the area of building codes, the answer would appear to be in the affirmative. K.S.A. 1979 Supp. 31-150 is quite specific on the requirements for new school building construction, stating at (a):

"Except as otherwise provided in subsection (b), the construction of school buildings shall comply with the requirements of the 1976 edition of the uniform building code, volume I, and the 1976 edition of the uniform mechanical code, of the international conference of building officials. All electric wiring shall conform to requirements of the 1975 issue of the national electric code of the national fire protection association. Minimum plumbing requirements shall meet the 1976 edition of the uniform plumbing code issued by the international conference of building officials." (Emphasis added.)

This statute is of uniform application, and would therefore appear to preempt the field as far as the regulation of school building construction is concerned, regardless of whether the building is located in a first-class city or not. Similar results have been reached in other states in the cases of Board of Education v. West Chicago, 55 Ill.App.2d 401, 205 N.E.2d 63 (1965) (fire codes), and Kavery v. Board of Com'rs Town of Montclair, 71 N.J. Super. 244, 176 A.2d 802 (1962) (plumbing codes). While the opposite result (no preemption)

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was reached in Hartford Union High School v. City of Hartford, 51 Wis.2d 591, 187 N.W.2d 849 (1971), the court's decision there was based on specific statutory language which allowed a city to impose more stringent building code requirements.

As no such statute exists in Kansas, it is our opinion that the City of Olathe may not condition the grant of a building permit to a school upon compliance with its building codes, as they have been preempted by K.S.A. 1979 Supp. 31-150, which makes the matter no longer one of local concern. The alternative (to let the city's code apply whenever it was more stringent) would be unworkable, for the codes would have to be compared on a provision-by-provision basis, and in many building matters, it could not be determined which of the two codes is more "stringent." In this sense, this matter differs from cases such as Blue Star Supper Club, Inc. v. City of Wichita, 208 Kan. 731 (1972), where a city's police powers were used to restrict the hours that a private club could be open for business. Such an extension was clearly more stringent, as opposed to here, where code provisions which vary may or may not be more stringent, but merely different.

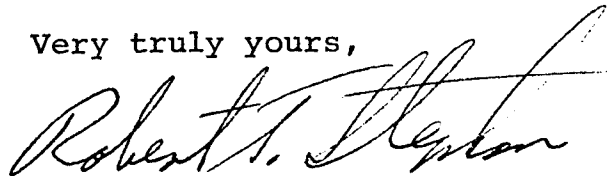
However, this result is not dispositive of the inquiry, for Olathe also requires compliance with its zoning requirements prior to the grant of a building permit. (We assume that such requirements would include height and set-back limits, as well as provisions for the number of parking spaces which must be provided.) A city is empowered by K.S.A. 12-707 et seq. to establish zones in which certain land uses may be restricted, and there is no statutory expression of legislative intent that a school district is immune from such zoning requirements. This conclusion was reached in a recent opinion of this office, Attorney General Opinion No. 79-28, and we reaffirm the result therein, namely that such requirements may in fact be applicable, once the "balancing of interests" test is applied by local zoning authorities. If such a balancing process indicates that the local zoning ordinance should apply, then a permit could be required, pursuant to §19.58.010 of the Olathe Municipal Code. If not, then there would be no further reason for the city to require a permit, as none of the stated objectives would be capable of attainment. A copy of Attorney General Opinion No. 79-28 is enclosed for your reference.

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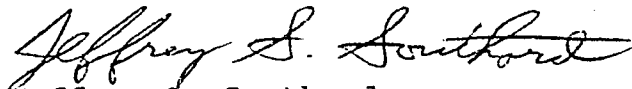
As for the cost of obtaining such a permit, we note that \$19.58.060 sets a minimum fee of five dollars with no maximum set. However, \$15.05.040 establishes the level of such fees based on the size of the building, presumably because of the additional inspection work required when a larger structure is involved. As it is our conclusion that city-mandated codes do not apply, the imposition of a permit fee calculated in this manner could raise questions as to the presence of any rational relationship between it and the actual burden to the city. However, as this issue has not yet been addressed by the city commission of Olathe and no fee set, it would be premature for this office to express an opinion thereon at this time.

In conclusion, under the Municipal Code of the City of Olathe, §19.58.010, a building permit may be issued only after all zoning requirements and building code specifications have been complied with. As a school district is required to follow the building codes specified by K.S.A. 1979 Supp. 31-150, the power of a city in this respect has been preempted. However, in the absence of any statutory expression of legislative intent that a school district is immune from zoning requirements, compliance by a district must be determined by application of the "balancing of interests" test stated in Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan.App.2d 102 (1978). In this regard, Attorney General Opinion No. 79-28 is reaffirmed.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:gk

Enclosure: Attorney General Opinion No. 79-28