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April 28, 1981

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ATTORNEY GENERAL OPINION NO. 81-104

Jerry D. Keller  
Chairman  
Cottonwood Falls Planning Commission  
Cottonwood Falls, Kansas 66845

Re: Cities and Municipalities -- Planning and Zoning --  
Membership on and Extraterritorial Powers of City  
Planning Commission.

Synopsis: While a city possesses the power to adopt zoning regulations affecting land located outside the city, such grant of power does not extend to the enforcement of building codes in the same area. As the ordinances of a city may not, in the absence of a specific grant of authority, be enforced in an extraterritorial manner, such an extension is not permissible here, where no such statute exists. Additionally, pursuant to K.S.A. 12-702, a city planning commission must have 2 members who reside outside but within 3 miles of the city, with the rest being city residents. This statutory requirement exists independently of any limits imposed by the city on the scope of the commission's authority. Cited herein: K.S.A. 12-702, 12-715b.

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Dear Mr. Keller:

As Chairman of the Planning Commission for the City of Cottonwood Falls, Kansas, you have requested the opinion of this office on two separate questions concerning that body's authority and composition. Specifically, you wish to know the extent of the city's authority to inspect buildings in areas outside the city which are included in its zoning ordinances, and whether members of the planning commission must live within the area over which the commission has jurisdiction.

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You indicate in your letter that Cottonwood Falls has, in the absence of any zoning ordinance enacted by Chase County, set up its own regulation pursuant to K.S.A. 12-715b. In pertinent part, that statute states:

"Any city shall be authorized to adopt zoning regulations affecting land located outside the city but within three (3) miles thereof under the following conditions, except that nothing in this act shall be construed as authorizing any city to adopt regulations applying to or affecting any land in excess of three (3) acres under one ownership which is used only for agricultural purposes:

"(a) The city has established a planning commission under the provisions of K.S.A. 12-702, which provides for the appointment of two (2) commission members who reside outside the city but within three (3) miles thereof, or the city has established a joint, metropolitan or regional planning commission in cooperation with the county in which such city is located pursuant to the provisions of K.S.A. 12-718."

It should be noted that, notwithstanding the statutory language, Cottonwood Falls has made use of this extraterritorial grant of power only to the extent of affecting land within one mile of the city limits, rather than the full three miles which is authorized. In consequence of this action, you now inquire whether the planning commission or the city itself has the power to inspect the existing buildings in the area, presumably for electrical, plumbing and structural flaws. Chase County, you further inform us, does not have a building inspector who performs such duties.

At the outset, we would note that no separate statute exists which specifically authorizes a building inspector to enter, examine and, if necessary, cite for deficiencies any building outside the corporate limits of the city. Accordingly, such authority must be derived from either the statute cited above or from an inherent, common-law power which the city possesses. In our opinion, neither of these sources in fact authorizes the exercise of such power by Cottonwood Falls, leaving it without the ability to do so.

As quoted above, K.S.A. 12-715b concerns the establishment of city zoning regulations in areas outside the limits of that city, provided certain procedures are followed and certain conditions exist. As such, it allows a city to have control

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over land use and development patterns in an area which, while legally outside the city, is nevertheless close enough to influence the quality of life within the city. However, such control is entirely different from that which is achieved through building codes, which seek to protect the health, safety and welfare of persons by regulating the way in which buildings are constructed. 13 Am.Jur.2d Buildings §2. As such, the passage and enforcement of building codes are aspects of a city's police power which cannot be grafted onto a statute dealing with zoning and planning.

It has long been recognized in Kansas that a city may exercise its police powers in an extraterritorial fashion only when a specific grant of such power is made by the legislature. State ex rel. v. Franklin, 40 Kan. 410 (1887), City of Wichita v. Clapp, 125 Kan. 100 (1928). This view is also reflected in a number of other authorities. 6 McQuillin, Municipal Corporations §24.57, 3rd rev.ed. (1980), 56 Am.Jur. 2d Municipal Corporations §436, 62 C.J.S. Municipal Corporations §141. In addition, a well-known municipal law commentator in this state has taken the position that even the existence of home rule powers does not permit the extension of a city's police power authority beyond its corporate limits. Clark, State Control of Local Government in Kansas, 20 Kan. L. Rev. 631, 676-77 (1972). Accordingly, there exists no implicit power for Cottonwood Falls to enforce its building codes in the county, even in the area which is included in the city's zoning ordinances by virtue of K.S.A. 12-715b.

Your second inquiry, which concerns the existence of residency requirements for members of the city planning commission, is answered by K.S.A. 12-702, which states that the commission shall consist

"of not less than seven (7) or more than fifteen (15) electors of which number two (2) members shall reside outside of but within three (3) miles of the corporate limits of said city, but the remaining members shall be residents of such city, to be appointed by the mayor by and with the consent of the council or board of commissioners." (Emphasis added.)

It should be noted that while the above statute speaks of 2 members being appointed who live within 3 miles of the city, the ordinance enacted by Cottonwood Falls extends to only one mile outside the city limits. In our opinion, this limitation by the city does nothing to alter the mandate of the statute, as the two are independent of one another. Additionally, we believe that the legislative history requires such a result.

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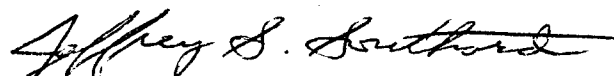
As initially enacted, K.S.A. 12-702 did not contain any provision for members who lived outside a city's boundaries. (L. 1923, ch. 92, §2). The current residency requirements were added by an amendment in 1943 (L. 1943, ch. 93, §5), meaning that for 26 years prior to the passage of K.S.A. 12-715b in 1969, planning commissions were required to have 2 members from outside the city. This, despite the absence of any statute which gave such commissions power to regulate land use outside the city limits. Such power was granted by passage of K.S.A. 12-715b, which adopted the same "3 mile" language found in K.S.A. 12-702 as a limit to the commission's extraterritorial power. However, such power could, as here, be narrower in its scope, leaving the potential for members to live in the county but outside of the commission's jurisdiction. In our opinion, as such a situation was expressly warranted by the legislature prior to the passage of K.S.A. 12-715b, its potential continued existence is not repugnant to the legislative intent expressed in the entire act, of which both that statute and K.S.A. 12-702 are a part. Therefore, while it would be theoretically possible for the two county members to live within the one-mile extraterritorial jurisdiction of the commission, such a result is not required by law.

In conclusion, while a city possesses the power to adopt zoning regulations affecting land located outside the city, such grant of power does not extend to the enforcement of building codes in the same area. As the ordinances of a city may not, in the absence of a specific grant of authority, be enforced in an extraterritorial manner, such an extension is not permissible here, where no such statute exists. Additionally, pursuant to K.S.A. 12-702, a city planning commission must have 2 members who reside outside but within 3 miles of the city, with the rest being city residents. This statutory requirement exists independently of any limits imposed by the City on the scope of the commission's authority.

Very truly yours,



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Attorney General of Kansas



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