



STATE OF KANSAS

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May 29, 1981

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ATTORNEY GENERAL OPINION NO. 81-123

Mr. Dwight Thompson
Mayor of Osage City, Kansas
827 California
Osage City, Kansas 66523

Re: Cities--Zoning--Mobile Homes

Synopsis: Section 2(a) of Ordinance No. 957 of the city of Osage City, which section requires, as a precondition to the location of a single wide mobile home within the city limits, the "consent of all ascertainable property owners within 300 feet of the property," constitutes an unlawful delegation of legislative power, and violates the due process clause of the Fourteenth Amendment to the Federal Constitution. Cited herein: K.S.A. 75-1218; U.S. Const., 14th Amend.

* * *

Dear Mr. Thompson:

You request our opinion as to the constitutionality of Ordinance No. 957 of the city of Osage City, which ordinance restricts the location of mobile homes within the city. Section 2 of the ordinance provides, in part, as follows:

"Section Two: Mobile Homes -- Where Permitted.

Within the corporate limits of the City, a single wide mobile home may be permitted subject to the following requirements:

- a. The consent of all ascertainable property owners within 300 feet of the property.

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- b. A minimum building site of not less than 7,250 square feet.
- c. Conformity to all regulations of side and front yards.
- d. Full Utility Service.
- e. Stands and skirts as provided by section 5 herein.
- f. A permit issued only by affirmative vote of the City Council after Planning Commission review as to architectural conformity with the surrounding neighborhood, based upon the following:
 1. The Physical condition of the structure is sound, well maintained and of neat appearance.
 2. The Proposed site of the structure may not be in a neighborhood where the property values of the existing homes would be depressed by the presence of a mobile home in that area." (Emphasis added.)

As is readily apparent, subsection (a) of the above-quoted section requires, as a precondition to the location of a single wide mobile home within the city limits, the "consent of all ascertainable property owners within 300 feet of the property." The constitutionality of this type of zoning provision, which is commonly referred to as a "consent requirement," has been considered in numerous cases. In some cases, courts have struck down such requirements on the basis that they constitute an unlawful delegation of legislative authority and confer an arbitrary power of discrimination. Eubank v. City of Richmond, 226 U.S. 137 (1912); State, ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928); Concordia Collegiate Inst. v. Miller, 93 N.E.2d 632 (N.Y., 1950); Schulte v. City of Garnett, 186 Kan. 117 (1960). In other cases, particularly where "offensive uses" are involved, consent requirements have been upheld. Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); Epstein v. Weissner, 102 N.Y.S.2d 678 (1951); Eskridge v. Sandusky, 136 N.E.2d 465 (Ohio, 1955). There is considerable conflict between decisions from the various jurisdictions as to the validity of consent requirements, and one commentator has stated that the only conclusion which can be drawn is that in some cases consent requirements have been upheld, and in other cases, they have not. 21 A.L.R.2d 551, 553.

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Our research has revealed only one Kansas case concerning the validity of consent requirements in zoning ordinances. That case, Schulte v. City of Garnett, supra, concerned a zoning ordinance which prohibited service stations in a designated area of the city of Garnett, subject to a proviso that the mayor and commissioners could grant a special permit to conduct such a business "upon a petition signed by all of the resident owners of property within two hundred and fifty feet of a proposed location." Suit was brought by a property owner challenging the consent requirement and praying for injunctive relief, which relief was denied by the trial court. The Kansas Supreme Court reversed the judgment of the trial court, holding that the ordinance was invalid because it failed to establish a uniform standard for its application, and because it constituted an unlawful delegation of power to residential property owners. The court stated as follows regarding the consent requirement:

"No other conclusion can be reached herein than to hold this ordinance is invalid for the reason it places plaintiff and the use of his property for service station purposes at the mercy--of not only the mayor and city commissioners--but also the residential property owners within 250 feet who by opinion, whim or caprice may refuse to sign his petition."
(Id. at 120.)

Although we are unaware of any Kansas cases concerning the validity of imposing consent requirements as a condition precedent to the location or placement of mobile homes or mobile home parks, there are numerous such cases from other jurisdictions, which cases are in considerable conflict. In Huff v. City of Des Moines, 56 N.W.2d 59 (Iowa, 1952), an ordinance prohibiting trailer parks within 200 feet of permanent residential buildings in multiple building zones, but providing that the prohibition could be waived by the consent of 60% of the property owners within the protected area, was held valid. The court based its decision on the fact that the ordinance was "prohibitory in character," and relied upon the following distinction:

"Generally speaking, it has been held that regulations or ordinances requiring the consent of property owners * * * in the vicinity for the erection or use of particular kinds of buildings, are invalid on the ground that such is a delegation of governmental power to private citizens * * *. However, a distinction is to be kept in mind in matters of this kind between an ordinance which leaves the enactment of a law to individuals

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and an ordinance prohibitory in character. The prohibition may be modified with the consent of the persons most affected by such modification; hence an ordinance is not invalid by reason of a provision that buildings may be erected or used for particular purposes, if the consent of a part or all of the property owners in the vicinity is obtained.'" (Id. at 58.)

An ordinance imposing a consent requirement as a condition precedent to the issuance of a license for a trailer park was upheld in Cady v. City of Detroit, 286 N.W. 805 (1939). The basis for the decision and reasoning of the court was very similar to that set forth in the Huff case, supra.

In contradiction to the Huff and Cady cases, supra, there are at least four cases wherein consent requirements for the location of mobile homes or mobile home parks have been struck down as constituting an unlawful delegation of legislative authority to individuals. Williams v. Whitten, 451 S.W.2d 535 (Texas, 1970); Bashant v. Walter, 355 N.Y.S.2d 39 (1974); Janas v. Town Bd. & Zoning Bd. of Appeals, 382 N.Y.S.2d 394 (1976); Town of Gardiner v. Stanley Orchards, Inc., 432 N.Y.S.2d 335 (1980). In the Williams case, the court rejected both the Huff and Cady cases, supra, and noted that "there is no uniformity in the holdings of the courts in other States since some have held ordinances like the one here valid, and some have held them invalid." The New York courts have held that the validity of a consent requirement depends upon whether such requirement is applied to an offensive or inoffensive use, and have struck down such requirements as applied to use of property for the placement of a mobile home, which use it declared to be inoffensive. Town of Gardiner v. Stanley Orchards, Inc., supra.

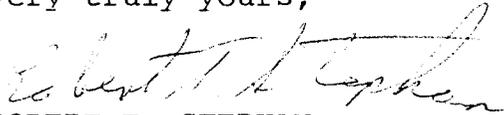
Recognizing the division of authority in other jurisdictions regarding the validity of consent requirements, it is our opinion that, in considering the validity of the Osage City ordinance relating to mobile homes, controlling effect must be given to the pronouncements of the Kansas Supreme Court in the Schulte case, supra. That case indicates that our court is not inclined to look with favor upon consent requirements, and although the ordinance struck down in Schulte dealt with zoning of service stations, we do not perceive any ground upon which the result would change simply because the Osage City ordinance applies to zoning of mobile homes. Therefore, in our judgment, Section 2(a) of Ordinance No. 957 of the city of Osage City, which section requires, as a precondition to the location of a single wide mobile home within the city limits,

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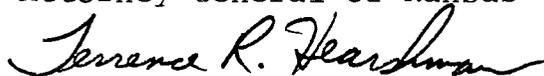
the "consent of all ascertainable property owners within 300 feet of the property," constitutes an unlawful delegation of legislative power, and violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

Finally, the above opinion as to the invalidity of consent requirements should not be construed as prohibiting municipal enactment of lawful zoning provisions relating to mobile homes. In particular, it is well established that a city may lawfully forbid the location of mobile homes for residential purposes in any area of the city except those locations zoned expressly for mobile home parks or mobile home communities. City of Colby v. Hurtt, 212 Kan. 113 (1973); Gaslight Villa, Inc. v. City of Lansing, 213 Kan. 862 (1974); also, see Attorney General Opinion No. 78-251. Additionally, K.S.A. 1980 Supp. 75-1218 specifically states that "all mobile homes shall be subject to zoning regulations of counties and cities applicable to areas in which such homes are located." Therefore, it is clear that lawful zoning ordinances (relating to mobile homes), not including consent requirements, may be enacted by cities, and such ordinances are in all respects constitutional.

Very truly yours,



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RTS:BJS:TRH:jm