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ATTORNEY GENERAL OPINION NO. 81-203

Patrick J. Hurley
Secretary of Administration
State Capitol, Room 263-E
Topeka, Kansas 66612

Re: State Departments -- Department of Administration --
State Capital Improvement Projects Not Subject to
Municipal Building Codes

Synopsis: Responsibility for the planning, design and construction of buildings for state agencies has been vested by the legislature in the Secretary of Administration, who is advised in the performance of these duties by the state building advisory commission. The existence of this statutory framework evinces a clear intent on the part of the legislature that, as control of such capital improvement projects be kept at the state level, they are therefore not matters of local concern. Accordingly, while deference should be given if possible to city building ordinances, the state is not bound by such local codes in the event of a dispute. However, such pre-emption is not the rule where local zoning and site plan regulations are concerned. There, in the event of a dispute, the district court may balance the interests of the state against those of the municipality, following Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan.App.2d 102 (1978). Cited herein: K.S.A. 1980 Supp. 75-3741, 75-3783, 75-5407b, 75-5409a, Kan. Const., Art. 12, Sec. 5(b).

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Dear Secretary Hurley:

As Secretary of Administration, you request our opinion on a question which involves one facet of the inter-relationship between state and local governments. Specifically, you inquire concerning the power of a city to enforce the provisions

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of its municipal building codes with regards to a building which is being constructed by the State of Kansas for one of its agencies. You inform us that while, as an administrative matter, the state has consistently taken the position that it is not subject to such requirements, you now desire a more substantive legal evaluation of the question.

The immediate situation which gives rise to this request has taken place in the City of Shawnee, in Johnson County. There, near the intersection of K-10 and K-7, the Kansas Department of Transportation wishes to construct a "sub-area" building to house maintenance equipment and supplies. The City of Shawnee, through its Community Development Director, has notified the Division of Architectural Services (the agency in charge of the preliminary stages of the project) that the project must comply with "all city building and zoning regulations." The city has identified three specific areas where its approval will be required: a change in the current zoning classification; site plan approval by the planning commission; and the obtaining of a building permit, thus requiring compliance with city building codes. We presume the latter include not just structural requirements but also those concerning the plumbing, electrical, mechanical and fire protection components of the structure.

At the outset, it should be noted that, as far as we are able to determine, the question you present has never been settled or even ruled upon by a court of record in this state. While there are two recent cases which are of some assistance in defining the issues presented [State ex rel. Schneider v. City of Kansas City, 228 Kan. 25 (1981) and Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan.App.2d 102 (1978)], as yet Kansas does not have the benefit of a judicial determination on the effect of a city's building codes on a state building project. The only opinion of this office, a 1954 letter from then Attorney General Fatzer, is of limited help, coming as it did well before the city home rule constitutional amendment. However, it does provide a convenient starting point for this inquiry, in that it adopts a position which has been traditionally taken by courts in this area.

In his letter to the State Architect, Attorney General Fatzer relied on the general rule that ordinances of a municipal corporation are not binding upon the state or an agency thereof. Citing City of Charleston v. Southeastern Construction Co., 134 W. Va. 666, 64 S.E.2d 676 (1951) and State ex rel. v. Allen, 158 Ohio St. 168, 107 N.E.2d 345 (1952), he concluded that the state of Kansas could not be made to pay a building permit fee required by a city. Through his reliance on these cases, the Attorney General implicitly recognized two theories which have generally put forward to limit a

city's power in this regard, *i.e.*, the state as "superior sovereign" and the governmental use/proprietary use distinction. Under either theory, a state or one of its agencies is presumed to be immune from local land use regulations, in the absence of express statutory language to the contrary. See, *e.g.*, Hall v. City of Taft, 47 Cal.2d 177, 302 P.2d 574 (1956), Board of Regents v. City of Tempe, 88 Ariz. 299, 356 P.2d 399 (1960), Paulus v. City of St. Louis, 446 S.W.2d 144 (1969), and McQuillin, Municipal Corporations, §15.31a, 3rd rev. ed. (1969).

Since the time of this opinion, however, several events have occurred which would arguably affect a decision on the same question today. First, Kansas cities have been granted home rule by constitutional amendment (Kan. Const., Art. 12, §5) and accordingly can determine their local affairs, subject only to certain limits, one of which concerns uniform legislative enactments "of statewide concern." Second, consideration must be given to the decisions in Schneider, *supra*, and Brown, *supra*, as each speaks to a situation involving a conflict between state and local authority over land use/development questions.

The Brown case, it may be recalled, involved an attempt by the City of Manhattan to require the State to meet municipal zoning ordinances in the installation of a public rest area. In the decision, the court rejected the two theories mentioned above and instead adopted a "balancing of interests" test of the sort adopted in the leading case of Rutgers v. Piluso, 60 N.J. 142, 286 A.2d 697 (1972). Employing such a test, the court in Brown looked to factors such as the nature of the use, the inconvenience to the public if the use was denied, and the impact on surrounding land if the use was approved. In addition, the judgment of the state agency was "entitled to considerable deference." Brown, *supra* at 113. The Brown holding has subsequently been applied by this office to a situation involving the effect of local zoning ordinances on a school district. Attorney General Opinion No. 80-14. In our opinion, the Brown holding requires the state in the present situation to either comply with the local zoning and site plan ordinances or to seek a judicial determination in which a balancing of interests could be made.

The issue of local building code enforcement was more directly addressed in the other recent Kansas case cited above, namely State ex rel. Schneider v. City of Kansas City, *supra*. There, the City of Kansas City sought to require the University of Kansas Medical Center to comply with local building codes in the construction of buildings on state-owned property. In a narrowly-drawn opinion, the state supreme court rejected the City's arguments, citing K.S.A. 1980 Supp. 31-150 as evidence of an intent by the state to establish its own standards in the construction of school buildings, stating that

"[d]ue to the statutes requiring statewide uniformity in the application of the various building codes to construction projects at the various institutions of higher learning under the control of the Board of Regents, such construction does not fall within the purview of local affairs [under the home rule amendment]." 228 Kan. at 32.

The court also considered, but rejected, the adoption of a Brown-type "balancing of interests" test, finding that:

"Whatever may be the merits of such a balancing of interests approach to the use of land by a state agency under city or county zoning laws, we do not feel such a test would be feasible or practical as applied to local building codes and proposed construction by the Board of Regents. For example, the 1980 session of the Legislature authorized and appropriated funds for the Board of Regents to undertake capital improvements in Kansas City, Lawrence, Manhattan, Wichita, Hays and other cities where institutions of higher learning under the control of the Board are located. To say that each of these projects should be delayed until such time as a final court determination could be made whether local building codes were applicable would not only unreasonably delay construction but in these days of uncontrolled inflation might doom the projects altogether. We decline to adopt such a position in this case."

Again, however, the Court's decision was limited to projects of the Board of Regents, and did not extend to a general statement of the state's immunity.

Despite such a limitation, it is our opinion that, as to the instant situation, the reasoning of the court in Schneider is persuasive, i.e., regulation of state construction projects through municipal building codes is not a local affair, and so is not within the power of a city to act upon, even given the existence of the home-rule amendment. We believe this to be so in light of legislative enactments which evince a desire that the construction of state buildings be handled in such a way so as to preclude the application of local ordinances.

Specifically, we refer to a series of statutes contained in chapter 75 of the Kansas Statutes Annotated, wherein the

Secretary of Administration is vested with wide-ranging powers concerning the planning, design and construction of state buildings. Included among the secretary's powers are: the approving of plans and specifications for each project (K.S.A. 1980 Supp. 75-5407b); the letting of bids and the completion of contracts (K.S.A. 1980 Supp. 75-3741); and the inspection of the project, both while in progress and upon completion prior to final acceptance (K.S.A. 1980 Supp. 75-5409a). Of particular interest to this inquiry is K.S.A. 1980 Supp. 75-3783(b) which empowers the secretary to, with the advice of the state building advisory commission,

"develop and adopt rules and regulations in accordance with the provisions of K.S.A. 77-415 et seq., and amendments thereto, establishing standards for planning, design and construction of buildings and major repairs and improvements to buildings for state agencies, which standards shall include energy conservation standards." (Emphasis added.)

In our opinion, the presence of this series of statutes has the same effect here as did K.S.A. 1980 Supp. 31-150a in Schneider. Admittedly, the above do not explicitly prescribe building codes which must be followed for state projects, as 31-150a does for schools. However, the effect is the same, for the legislature has clearly placed the responsibility for the planning, design and construction of such projects with the secretary of administration. A sharing of this responsibility with local officials would be unworkable, for unlike zoning, where the question of use can be settled by one decision at the outset, the enforcement of building codes occurs continuously throughout the process, from initial design to final completion. Haggling over the various mechanical, electric, plumbing and fire codes on a provision-by-provision basis could drastically affect completion of a project, if not doom it altogether, as the court in Schneider noted. 228 Kan. at 38.

Nor is this situation analogous to cases such as Blue Star Supper Club, Inc. v. City of Wichita, 208 Kan. 731 (1972), where a city's police powers were held to allow an ordinance more restrictive than a state statute. As opposed to the closing time of a private club, building codes which vary may or may not be more stringent, but merely different, thus requiring a balancing of interests determination of the type found inappropriate in Schneider. Likewise, if the standards of a city building inspector differed from those of an inspector for the state, a judicial resolution could be ruinous in terms of time and money, and the quality of state services provided in the interim could well suffer.

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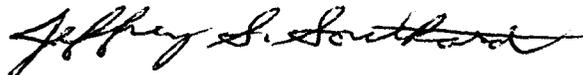
Of course, this is not to say that the state should not make an effort to take local building ordinances into account when planning and contracting its projects. Such cooperation, as noted in Schneider, supra at 38, has existed in the past to the benefit of both the state's agencies and of municipalities. The state, while possessing the final authority to resolve disputes in its favor, ought, as was noted in Rutgers, supra, "to consult with the local authorities and sympathetically listen and give every consideration to local objections, problems and suggestions in order to minimize the conflict as much as possible." 60 N.J. at 153-154. Additionally, as the municipality may provide utilities, fire protection and sewer service, the state's projects are a matter of local concern (even if not a "local affair"), a fact of which the state should be cognizant. Schneider, supra at 32.

In conclusion, the responsibility for the planning, design and construction of buildings for state agencies has been vested by the legislature in the Secretary of Administration, who is advised in the performance of these duties by the state building advisory commission. The existence of this statutory framework evinces a clear intent on the part of the legislature that, as control of such capital improvement projects be kept at the state level, they are therefore not matters of local concern. Accordingly, while deference should be given if possible to city building ordinances, the state is not bound by such local codes in the event of a dispute. However, such pre-emption is not the rule where local zoning and site plan regulations are concerned. There, in the event of a dispute, the district court may balance the interests of the state against those of the municipality, following Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan.App.2d 102 (1978).

Very truly yours,



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