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September 28, 1988

ATTORNEY GENERAL OPINION NO. 88- 141

The Honorable Robert D. Miller  
State Representative, One Hundred Tenth District  
516 Sunset  
Box 106  
Russell, Kansas 67665

Re: Counties and County Officers -- Planning and Zoning  
-- Zoning of Certain Lands Within Townships

Counties and County Officers -- Public Improvements  
-- Improvement Districts

State Departments; Public Officers and Employees --  
Kansas Tort Claims Act -- Liability of Governmental  
Entities; County Zoning Administrator

Synopsis: K.S.A. 19-2901 permits a county to adopt zoning resolutions affecting land within an incorporated improvement district when such land is within any township in the county but not within the limits of any incorporated city. Pursuant to the Kansas tort claims act, a county and its employees are excepted from tort liability for proper enforcement of a zoning resolution whether or not the resolution is valid. However, if an employee acts outside the scope of employment in enforcing a zoning resolution, that employee may be personally liable. Moreover, if enforcement of a resolution is not performed with due care, the governmental entity may be liable up to the limits set by K.S.A.

1987 Supp. 75-6105. Cited herein: K.S.A. 19-2753;  
19-2901; 19-2913; 19-2918; 19-2926; 19-2927;  
75-6101; K.S.A. 1987 Supp. 75-6102; 75-6104;  
75-6105.

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Dear Representative Miller:

As the representative for the one hundred tenth district, you request our opinion regarding county zoning. You inform us that a recent Kansas court of appeals decision upheld a district court's refusal to enforce a restrictive covenant prohibiting mobile homes in the building sites area of the Lakeside Village Improvement District. The county zoning administrator then began enforcing a Jefferson county resolution, under which mobile homes are prohibited in the residential unincorporated areas of the county, but are allowed in designated mobile home parks and in unincorporated areas zoned for agriculture. You specifically ask whether the county may enforce this zoning regulation within an incorporated improvement district created pursuant to K.S.A. 19-2753 et seq. You also ask whether the county zoning administrator would be covered by the Kansas tort claims act when asserting power beyond that granted in the zoning resolution.

We note that Lakeside Village Improvement District has been the subject of many opinions issued by the courts and the Attorney General. See e.g. Lakeside Village Improvement Dist. v. Jefferson County, 237 Kan. 106 (1985), Green v. Bean, Kansas Appeals Court Case No. 60, 747, May 13, 1988 (unpublished), Attorney General Opinions No. 83-162, 84-40 and 83-56. As stated in opinion no. 83-56, K.S.A. 19-2753 et seq. does not grant zoning authority to the board of directors of an improvement district. You ask whether Kansas law permits a county to zone within such a district.

The power to zone must be expressly conferred. Johnson County Memorial Gardens, Inc. v. City of Overland Park, 239 Kan. 221 (1986). See also Anderson, American Law of Zoning, § 2.20 (3d ed. 1986). K.S.A. 19-2901 grants certain zoning authority to all counties and provides in pertinent part:

"(a) For the purpose of promoting the public health, safety, morals, comfort,

general welfare and conserving the values of property throughout that portion of any county zoned under the terms of this act, and lessening or avoiding congestion in the public streets or highways, the county commissioners of all counties in this state may by resolution provide that all lands within any township in the county which lie outside the limits of any incorporated city may be zoned according to the provisions of this act, and may divide the territory in such townships outside of the limits of incorporated cities into districts of such number, shape, area and of such different classes, according to the use of land and buildings and the intensity of such use, as may be deemed best suited to carry out the purpose of this act. . . ." (Emphasis added).

Pursuant to K.S.A. 19-2901 et seq., the county's zoning authority extends to all areas not within the boundaries of an incorporated city. An incorporated improvement district is not an incorporated city.

By contrast, K.S.A. 19-2918 permits a county to subdivide land only ". . . within that portion of the unincorporated area of the county. . . ." See also Opinion of the Attorney General, Volume VII, pp. 285, 286 (1971); See also K.S.A. 19-2927 et seq. (counties ability to zone unincorporated territory within three miles of cities). K.S.A. 19-2901 contains no statutory expression of legislative intent that incorporated improvement districts are immune from zoning regulations promulgated pursuant to that authority.

Intergovernmental zoning was discussed by the Kansas Court of Appeals in Brown v. Kansas Forestry, Fish and Game Commission, 2 Kan. App. 2d 102 (1978). The court adopted a "balancing of interests" test to determine whether municipal land use zoning ordinances are applicable to governmental projects. Syl. 2 of the court's opinion concisely states this test:

"In the absence of a clear expression of legislative intent, whether one governmental agency is subject to land use regulations of another depends on an

inference of legislative intent derived from an overall evaluation of all relevant factors, including (1) the nature and scope of the instrumentality seeking immunity, (2) the kind of function or land use involved, (3) the extent of the public interest to be served thereby, (4) the effect local land use regulation would have upon the enterprise concerned and (5) the impact of the proposed use upon legitimate local interests. In some instances one factor will be more influential than another or may be so significant as to completely overshadow all others. No one, such as the granting or withholding of the power of eminent domain, is to be thought of as ritualistically required or controlling." 2 Kan. App. 2d at 102.

Unlike the fact situation in the Brown case, the land use in question (mobile homes) is not a use undertaken by another governmental entity. Rather, it is a private use, tolerated by an improvement district that does not have authority to either permit or prohibit such a use. The balancing test articulated in Brown may nevertheless be useful in determining the reasonableness of the county zoning resolution.

Exercise of statutorily granted zoning authority must not be unreasonable, oppressive, arbitrary, discriminatory or an abuse of discretion. K.S.A. 19-2926; 19-2913; Keeney v. City of Overland Park, 203 Kan. 289 (1969). See also McQuillin, Municipal Corporations § 25.05 (1983); 101 C.J.S., Zoning § 17 (1958). Kansas cases discussing the validity and reasonableness of zoning resolutions affecting mobile homes include; Creten v. Board of County Commissioners, 204 Kan. 782 (1970); City of Colby v. Hurtt, 212 Kan. 113 (1973); Scherrer v. Board of County Commissioners, 201 Kan. 424 (1968); and Gaslight Villa, Inc. v. City of Lansing, 213 Kan. 862 (1974). See also Annot., 42 A.L.R. 3d 598 (1972); Hartach, "Mobile Homes in Kansas: A Need for Proper Zoning," 20 K.L.R. 87 (1971). Kansas case law recognizes the presumption that a zoning governmental body acts reasonably. The test of an unreasonable action is whether it is taken without regard to the benefit or harm involved in the community at large, including all interested parties, and whether it is so wide of

its mark that its unreasonableness lies outside the realm of fair debate. Gaslight at 865.

In Green v. Bean, supra, the Kansas appellate court stated that the character of Lakeside Village Improvement District had changed to such an extent that the benefits of the restrictive covenant prohibiting mobile homes had been neutralized and those restrictions were therefore no longer reasonable. We cannot predict whether such a judicially recognized change in circumstances would persuade a court to declare unreasonable a zoning resolution possibly adopted prior to those changes. Restrictive covenants are matters of private contract, whereas zoning regulations constitute governmental exercise of police power. McDonald v. Emporia-Lyon County Joint Bd. of Zoning Appeals, 10 Kan. App. 2d 235 (1985).

It is our opinion that K.S.A. 19-2901 permits a county to adopt zoning resolutions affecting land within an incorporated improvement district when such land is within any township in the county but not within the limits of any incorporated city. Whether such a resolution is a reasonable exercise of authority must be determined upon the basis of facts presented to the zoning authority. Martin Marietta Aggregates v. Board of County Com'rs of Leavenworth County, 5 Kan. App. 2d 774 (1981). As the facts surrounding enactment of this zoning resolution are not before us, we cannot give our opinion as to the reasonableness of the resolution in question.

Your second question is whether the county zoning administrator would be covered by the Kansas tort claims act when asserting power beyond that granted in a zoning resolution which applies to unincorporated areas.

The Kansas tort claims act (KTCA), K.S.A. 75-6101 et seq., replaced the common law concept of governmental immunity with statutory provisions under which governmental immunity is no longer the rule but rather the exception. See Palmer, "A Practitioners Guide to the Kansas Tort Claims Act," 48 J.B.A.K. 299 (1979). The KTCA encompasses all units of government as defined by K.S.A. 1987 Supp. 75-6102. Thus counties and county officers, employees, servants or members of boards, commissions, committees, divisions, departments, branches or councils may be subject to liability for tort claims.

In order to determine whether and to what extent a claimant's injury is governed by the KTCA, the following must be ascertained: (1) Was the claimant injured by a governmental employee acting within the scope of employment; (2) was the claimant's injury proximately caused by a negligent or wrongful act or omission; (3) did the injury occur under circumstances where the governmental entity, if a private person, would be liable under the laws of this state and (4) does one of the exceptions to liability apply pursuant to K.S.A. 1987 Supp. 75-6104. See Note, "Governmental Liability: A Review of Judicial Decisions Applying the Kansas Tort Claims Act," 24 W.L.J. 499, 502 (1985).

K.S.A. 19-2901 et seq. allows a county to promulgate and enforce zoning resolutions. Thus, enforcement of zoning resolutions is a statutorily approved governmental function. We assume Jefferson county hired the zoning administrator as an employee of the county. See K.S.A. 19-2910. If enforcement of zoning resolutions is one of the purposes for which such an employee is hired, enforcement of zoning resolutions is within the scope of employment. However, if enforcement of zoning resolutions is not one of the administrator's duties, improperly attempting to assert such authority could be found to be acting outside the scope of employment thus subjecting the administrator to personal liability. See e.g. Meyers v. Grubaugh, 242 Kan. 716 (1988).

K.S.A. 1987 Supp. 75-6104(c) excepts a governmental entity, or an employee acting within the scope of the employee's employment, from liability for damages resulting from "enforcement of or failure to enforce a law, whether valid or invalid, including but not limited to, any statute, regulation, ordinance or resolution." This law enforcement exception to liability has been judicially discussed in Consler v. State, 234 Kan. 554 (1984), Jackson v. City of Kansas City, 235 Kan. 278 (1984), and Lantz v. City of Lawrence, 232 Kan. 492 (1983).

The court in Lantz focused its analysis on whether a city employee acted within the purview of a weed abatement ordinance in removing trees from the plaintiffs' property. The court stated that the law enforcement exception of K.S.A. 75-6104 would apply if in fact the employee's removal of the trees was an enforcement of the weed abatement ordinance exercised with due care. However, if the removal of the trees was an action taken without due care (i.e. if the trees could not be mistaken for weed), the city could be liable within the

limits set by K.S.A. 75-6105. Please note that either situation assumes that the employee is acting within the scope of his employment. Thus, if the Jefferson county zoning administrator has the duty or power to enforce zoning regulations, portions of the KTCA would apply to actions taken pursuant to that authority regardless whether the resolution is valid. If the employee is performing a duty and enforcing a resolution with due care, K.S.A. 1987 Supp. 75-6104(c) would most likely disallow all liability. If, however, an employee is performing a duty and enforcing a resolution without due care, the analysis in Lantz could persuade a court that liability exists up to the limits established by K.S.A. 1987 Supp. 75-6105.

It is therefore our opinion that a county employee entrusted with the authority to enforce zoning regulations may be immune from liability for proper enforcement of such resolution, whether the resolution is valid or not. However, if the particular zoning resolution exempts all incorporated areas (not just cities), a possibility exists that enforcement of the zoning resolution in such an incorporated area could subject the employee to personal liability for acting outside the scope of employment or the governmental entity for negligent actions taken outside the scope of the authority granted by the resolution.

Very truly yours,



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