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ATTORNEY GENERAL OPINION NO. 91- 61

The Honorable Joan E. Adam
State Representative, 48th District
305 N. Terrace
Atchison, Kansas 66002

Re: Counties and County Officers -- Planning and
Zoning; Planning and Zoning in Counties -- Home Rule

Synopsis: The board of Atchison county commissioners may enact a moratorium on the establishment of a salvage yard as long as such moratorium is enacted in good faith, without discrimination, and bears a reasonable relationship to the public health, safety and general welfare. Cited herein: K.S.A. 19-101; 19-2919; 19-2921; 68-2202.

* * *

Dear Representative Adam:

As representative for the forty-eighth district you ask whether the board of Atchison county commissioners can enact a moratorium on the development of automobile salvage yards until a sanitation code is enacted.

Initially, we note that K.S.A. 19-2919 enables county commissioners to adopt zoning regulations so as to promote the "health, safety, morals, comfort or the general welfare and conserving and protecting property values throughout the county or portions thereof. . . ." However, Atchison county has not adopted nor are they planning to adopt a zoning ordinance.

Counties may also act through home rule powers as set forth in K.S.A. 19-101 et seq. The home rule powers are restricted by Blevins v. Hiebert, 247 Kan. 1 (1990) which determined that "home rule legislation is prohibited in a field of law in which there is a state statute uniformly applicable to all cities or counties. The court defines an enabling act as 'uniformly applicable to all cities or counties if it authorizes all cities or counties to perform certain acts.' Such statutes are state law and preempt the field of their application without the use of preemptive language unless there are express exceptions in the statutes or unless the statutes apply to police power regulations." See Attorney General Opinion No. 91-3. Through a county's police power, the board of county commissioners "may adopt moratorium zoning ordinances of a limited duration, provided they are enacted in good faith and without discrimination . . . and the intent is merely to maintain the status quo until the general zoning ordinance can become operative." 101A C.J.S. Zoning and Land Planning § 16 (1979). However, "Kansas courts have not yet decided the question of whether moratoria can be enacted under either implied authority or home rule. Some states have found that in the absence of express authorization, moratoria cannot lawfully be enacted, even under home rule. Kline v. City of Harrisburg, 68 A.2d 182 (Pa. 1949). On the other hand, a majority of states have found moratoria to be a lawful exercise of the police power as implied from a zoning enabling statute or directly granted through statutory or constitutional home rule. See, e.g., West Lane Properties v. Lombardi, 139 A.D.2d 748, 527 N.Y.S. 2d 498 (1988), upholding a 90-day zoning moratorium on building permits, special use permits, and site-plan approvals pending comprehensive zoning changes." Michael J. Davis, Kansas Municipal Law Annual, Vo. 8, p. 40-41 (1991). We agree with the majority and conclude that counties do have authority, pursuant to home rule powers, to enact moratoria in appropriate circumstances. We note that the above cases regarding moratoria involve counties or cities that had proposed zoning to go into effect as opposed to a proposed sanitation code. However, this difference may not be of great significance since both are forms of land use controls.

The board must, however, be aware of certain constitutional limits on the exercise of this authority. The following outlines the necessary questions to be asked and answered when deciding whether a person's constitutional rights have been violated:

"Zoning laws and regulations, in order to be valid, must meet the constitutional demands of due process. Generally speaking, these demands are met if such laws or regulations bear a substantial relation to public health, safety, morals, or general welfare, and are not arbitrary or unreasonable. Conversely, laws or regulations of this nature are unconstitutional, either generally or as applied to particular property, if they bear no substantial relation to public health, safety, morals, or general welfare, or are arbitrary and unreasonable." C.J.S. 101A Zoning and Land Planning, § 23 (1979).

The Kansas court in Ware v. City of Wichita, 113 Kan. 153 (1923), in deciding whether zoning districts which restrict property uses were legal, stated:

"The assumption that the police power extends only to the protection of the health, safety and morals of the public, which was at one time quite general, is now out of date. The modern view is that the state may control the conduct of individuals by any regulations which upon reasonable grounds can be regarded as adapted to promoting the common welfare, convenience, or prosperity."

The facts that this office has been given do not state whether the salvage yard would be considered a nuisance. Since "no individual has the right to use his property so as to create a nuisance or otherwise harm others, the state has not 'taken' anything when it asserts its power to enjoin nuisance-like activity." Keystone Bituminous Coal Association v. Duncan, 480 U.S. 470, 711 F.2d 707, 89 L.Ed.2d 787 (1987). Therefore, if the salvage yard is deemed to be a health hazard then it may be abated as a nuisance.

It should be noted that the highway beautification act of 1967 restricts the "establishment, operation, and maintenance of junk yards in areas adjacent to the highways, roads and streets" so as to promote "the public safety, health, welfare, convenience and enjoyment of public travel, to protect the

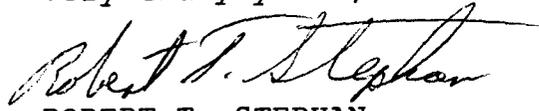
public investment in public highways, and to preserve and enhance the scenic beauty of lands bordering public highways. . . ." K.S.A. 68-2202. This establishes that the state has recognized the necessity to impose certain regulations on junk yards so as to promote a more healthy and aesthetically pleasing environment.

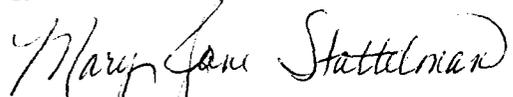
The courts have gone both ways regarding their view as to whether or not it is constitutional to totally exclude salvage yards. The court in Lower Southampton Township Board of Supervisors v. Schurr, 456 A.2d 702 (Pa. 1983), held that "total exclusion of auto salvage yards did not bear a substantial relationship to the health, safety, and welfare of the township." Conversely, the court in Oregon City v. Hartke, 400 P.2d 255 (Or. 1965), held that "the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community."

The commissioners' authority to enact any regulation which would restrict land use is also limited by specific statutes that exempt certain land and/or use of such land from the regulation (i.e. agricultural exemption set out in K.S.A. 19-2921).

In conclusion, this office is of the opinion that the board of Atchison county commissioners may enact a moratorium on the establishment of a salvage yard as long as it is enacted in good faith, without discrimination, and the moratorium bears a reasonable relationship to the public's health, safety and general welfare.

Very truly yours,


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