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January 15, 2014

ATTORNEY GENERAL OPINION NO. 2014- 03

Gary E. Thompson
Linn County Counselor
P.O. Box 184
Mound City, KS 66056

Re: Cities and Municipalities—Planning and Zoning; Planning, Zoning and Subdivision Regulations in Cities and Counties—Planning and Zoning in Cities and Counties; Authorization; Planning Commission; Creation; Membership; Incompatibility of Offices

Cities of the Third Class—Powers and Duties of Mayor—General Powers and Duties of Mayor; Mayor-Council Form of Government; Qualifications of Officers; Incompatibility of Offices

Synopsis: The common law doctrine of incompatibility of offices precludes a person from concurrently serving as a member of a county planning commission and a mayor of a city of the third class operating under the mayor-council form of government that is located in the county served by the planning commission. Cited herein: K.S.A. 2013 Supp. 12-693; 12-6a01; 12-6a02; K.S.A. 12-743; 12-744; 12-747; 12-749; 15-301.

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Dear Mr. Thompson:

As counselor for Linn County, Kansas, you request our opinion regarding whether one person may concurrently serve as a member of a county planning commission and a mayor of a city of the third class operating under the mayor-council form of government that is located in the county served by the planning commission.

We have not found a state statute that precludes a person from concurrently serving as a member of a county planning commission and a mayor of a city of the third class that

is located in the county served by the planning commission. We turn, therefore, to the common law doctrine of incompatibility of offices to determine whether such service is permitted.

The common law doctrine of incompatibility of offices prohibits an individual from holding more than one public office at the same time when there is an incompatibility between the offices.¹ “Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other.”² This is something more than a physical impossibility to discharge the duties of both offices at the same time.³ It is an inconsistency in the functions of the two offices.⁴ “A person holding both offices is confronted with the duty of faithfully, impartially and efficiently discharging the duties of these offices in the best interests of the respective constituencies,” a duty that may be impossible when the constituencies served by the public officer have competing interests.⁵

A board of county commissioners may create a planning commission for the county.⁶ The planning commission is to be composed of not less than five members, a majority of whom reside outside the corporate limits of any incorporated city in the county.⁷ “A county planning commission is authorized to make or cause to be made a comprehensive plan for the coordinated development of the county, including references to planning for cities as deemed appropriate.”⁸ “A county planning commission may establish subdivision regulations for all or for parts of the unincorporated areas of the county.”⁹ “A county . . . planning commission may serve as the planning commission for a city.”¹⁰ Regardless whether the county planning commission serves as the planning commission for a city, the plan adopted by the county planning commission may affect property located within a three-mile area of the corporate limits of a city.¹¹ The plan is effective upon approval by the county commission.¹²

[N]o public improvement, public facility or public utility of a type embraced within the recommendations of the comprehensive plan or portion thereof shall be constructed without first being submitted to and being approved by the planning commission as being in conformity with the plan. . . . If the planning commission finds that any such proposed public improvement,

¹ *Unified School District No. 501 v. Baker*, 269 Kan. 239, 249 (2000).

² *Dyche v. Davis*, 92 Kan. 971, 977 (1914).

³ *Baker*, 269 Kan. at 248.

⁴ *Id.*

⁵ Attorney General Opinion No. 83-9.

⁶ K.S.A. 12-744(a).

⁷ *Id.*

⁸ K.S.A. 12-747(a).

⁹ K.S.A. 12-749(a).

¹⁰ K.S.A. 12-744(a).

¹¹ See K.S.A. 12-743(b).

¹² K.S.A. 12-747(b).

facility or utility does not conform to the plan, the commission shall submit, in writing to the [county commission], the manner in which such proposed improvement, facility or utility does not conform. The [county commission] may override the plan and the report of the planning commission, and the plan for the area concerned shall be deemed to have been amended.¹³

The mayor of a city of the third class is the presiding officer at meetings of city council meetings and may cast a vote on matters brought before the council only in those instances when the council is evenly divided.¹⁴ Among the matters that may be brought before the council is whether the city should create a planning commission having authority to plan, zone or administer subdivision regulations in the three mile area surrounding the corporate limits of the city.¹⁵ A city council may also consider establishment of an improvement district pursuant to K.S.A. 12-6a01 *et seq.*

(a) All cities are hereby authorized to make improvements¹⁶ authorized by and in the manner provided for in the general improvement and assessment law as contained in chapter 12, article 6a of Kansas Statutes Annotated, in those *unincorporated areas beyond their corporate limits and within three miles thereof*. Before any such improvements shall be made: (1) The city shall have adopted, in the manner provided by law, regulations governing the subdivision of land in such unincorporated area; (2) the city shall have obtained the county's consent to making such improvements; or (3) 100% of the property owners located outside the city limits and benefited by such improvements shall have signed a petition requesting that the city make such improvements.

(b) Such improvements may be located in a *proposed improvement district which is wholly outside the corporate limits of the city* or partially within the city limits. Improvements *within such three mile area* located in a proposed improvement district which is wholly outside the corporate limits of the city shall be commenced only upon a petition submitted pursuant to K.S.A. 12-6a04, and amendments thereto, signed by both a majority of the owners of record of property and the owners of record of more than one-half of the area liable for special assessment under the proposal.¹⁷

Regardless of whether a person is a resident of a city, as a member of a county planning commission that person is involved in establishing a comprehensive development plan and subdivision regulations that meet the needs of the county as a whole, including the three mile area surrounding the corporate limits of the city. A mayor functions for the benefit of the city and may need to take action affecting the

¹³ K.S.A. 12-748(a).

¹⁴ K.S.A. 15-301.

¹⁵ See K.S.A. 12-744(a); 12-749(a).

¹⁶ Examples of municipal works or improvements are provided in K.S.A. 2013 Supp.12-6a02.

¹⁷ K.S.A. 2013 Supp. 12-693 (emphasis added).

three mile area outside the corporate limits of the city that is adverse to the county's interests or the planning commission's development plan or subdivision regulations. Regulation of the three mile area surrounding the corporate limits of a city has proven contentious throughout the years, even when a city and county operate under a joint planning commission.¹⁸ The performance of the duties of one of the offices interferes with the performance of the duties of the other in such fashion that one person cannot "faithfully, impartially and efficiently discharg[e] the duties of these offices in the best interests of the respective constituencies." The common law doctrine of incompatibility of offices precludes a person from concurrently serving as a member of a county planning commission and a mayor of a city of the third class operating under the mayor-council form of government that is located in the county served by the planning commission.

Sincerely,

Derek Schmidt
Attorney General

Richard D. Smith
Assistant Attorney General

DS:AA:RDS:sb

¹⁸ See *City of Topeka v. Board of Shawnee County Comm'rs*, 277 Kan. 874 (2004) (city and county operated under joint planning commission beginning in 1960; in 2001, dispute between governing bodies over plat approval led to dissolution of the joint commission, with each body thereafter attempting to enforce its subdivision regulations in three-mile area).