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ATTORNEY GENERAL OPINION NO. 2016-10

The Honorable Sharon Schwartz
State Representative, 106th District
2051 20th Road
Washington, KS 66968

Re: Cities and Municipalities—Planning and Zoning—Agricultural Land
Exempted, Exception

Counties and County Officers—Planning and Zoning—Zoning Regulations
Inapplicable to Existing Structures or Agricultural Land; Exceptions

Synopsis: A county may not apply zoning regulations to a beef cattle feedyard or dairy, or to any structure on that property used for such purposes, such as a feed mill, scale house, office, or machine shop. A county may not require buildings used solely for agricultural purposes to comply with construction codes adopted by the county government. A county may require a person desiring to construct an agricultural building to receive a prior determination that the building is exempt from county zoning regulations and building codes. Cited herein: K.S.A. 2015 Supp 2-3202; K.S.A. 12-741; 12-742; 12-758; K.S.A. 2015 Supp. 19-101a; K.S.A. 19-2921.

* * *

Dear Representative Schwartz:

As State Representative for the 106th District, you ask our opinion on two questions concerning the authority of counties to zone beef cattle feedyards and dairy facilities, including structures located on those properties, and require agricultural buildings to comply with local building codes. First, may a county zone a beef cattle feedyard or dairy, and any structure on that property used for such purposes, such as a feed mill,

scale house, office, or machine shop? Second, may a county require agricultural buildings to comply with construction codes adopted by the county government? Because both questions involve similar analysis, we will address them together.

A county generally has home rule authority to “perform all powers of local legislation and administration it deems appropriate,” subject to legislative enactments that restrict such authority.¹ A county is also generally empowered to enact planning and zoning laws and regulations “for the protection of public health, safety and welfare.”² “Zoning” is defined as “the regulation or restriction of the location and uses of buildings and uses of land.”³

In your letter, you suggest that the answer to your questions is no, based upon the following statutory provisions:

Except for flood plain regulations in areas designated as a flood plain, regulations adopted by a city . . . or a county pursuant to [K.S.A. 12-741 *et seq.*] shall not apply to the use of land *for agricultural purposes*, nor for the erection or maintenance of buildings thereon for such purposes so long as such land and buildings are used *for agricultural purposes and not otherwise*.⁴

Except for flood plain regulations in areas designated as a flood plain, regulations adopted [by a county] shall not apply to the use of land *for agricultural purposes*, nor for the erection or maintenance of buildings thereon for such purposes so long as such land and buildings erected thereon are used *for agricultural purposes and not otherwise*.⁵

The answers to your questions, therefore, will depend on whether a particular building or plot of land is actually used for “agricultural purposes and not otherwise.” This is a case-specific inquiry that depends on the facts of a particular case. However, Kansas courts have generally read the term “agricultural purposes” broadly, holding that such activities as raising canaries;⁶ operating a wildlife hunting preserve;⁷ blasting rock to excavate a pond for irrigation purposes;⁸ operating a landing field for aircraft used in a farming operation;⁹ and constructing a farmer’s personal residence on agricultural property¹⁰ were all agricultural purposes based upon the facts of each case.¹¹

¹ K.S.A. 2015 Supp. 19-101a(a).

² K.S.A. 12-741.

³ K.S.A. 12-742(a)(10).

⁴ K.S.A. 12-758(b) (emphasis added).

⁵ K.S.A. 19-2921 (emphasis added).

⁶ *Board of County Com’rs v. Brown*, 183 Kan. 19 (1958).

⁷ *Corbet v. Board of Shawnee County Com’rs*, 14 Kan. App. 2d 123 (1989).

⁸ *Fields v. Anderson Cattle Company*, 193 Kan. 558 (1964).

⁹ *Miami Co. v. Svoboda*, 264 Kan. 204 (1998).

¹⁰ *Blauvelt v. Board of County Com’rs of Leavenworth Co.*, 227 Kan. 110 (1980).

¹¹ *But see Seward County ex rel. Seward County Bd. of Com’rs v. Navarro*, 35 Kan. App. 2d 744 (2006) (training horses for racing was not an agricultural use) and *Weber v. Board of County Com’rs of Franklin*

Turning to your first question, the Kansas Supreme Court has held that “the feeding of livestock for market is an agricultural pursuit and that the structures used in connection therewith are for agricultural purposes.”¹² We believe a court would also conclude that a dairy is an agricultural pursuit, and that structures used in connection therewith are for agricultural purposes. Indeed, the Kansas Court of Appeals has suggested that the definition of “agricultural activity” in K.S.A. 2015 Supp. 2-3202(a), which includes the growing and raising of dairy products and is part of an act designed to protect against nuisance suits, “expresses the same purpose as that exempting agricultural uses from county zoning authority.”¹³

Therefore, assuming that no flood plain regulations apply to the beef cattle feedyard, dairy, or structure in question, it is our opinion that the plain language of K.S.A. 12-758(b) and 19-2921 prohibit a county from imposing zoning regulations upon that land or structure. “The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language.”¹⁴

With respect to your second question, we believe that a county is not authorized to require compliance with county-adopted building or construction codes during the construction of an agricultural building so long as the land and the building being built thereon are used for agricultural purposes and not otherwise. It is our opinion that K.S.A. 12-758(b) and 19-2921 foreclose the ability of a county to impose such building codes under those circumstances.

You also ask whether a county may require a landowner to obtain a building permit or recognition of the agricultural use exception prior to the landowner constructing a building to be used for agricultural purposes on agricultural land. We assume that “permit” refers to a process by which the person desiring to construct a building applies to the county and provides building plans and other information necessary for the county to determine whether the building will comply with zoning, building codes, and other local regulations.

We found no statutory provisions that directly answer this question. However, the general rule is that a county is authorized to adopt and enforce zoning and building regulations, *unless* the land or structure in question is exempt from those county regulations because it is used solely for agricultural purposes. In addition, the agricultural use exemption does *not* apply to county flood plain regulations.

Co., 20 Kan. App. 2d 152 (1994) (raising and keeping greyhounds for racing or sale was not an agricultural use).

¹² *Fields v. Anderson Cattle Co.*, 193 Kan. 558, 565 (1964).

¹³ *Weber* at 156-57.

¹⁴ *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607 (2009).

It would appear, then, that a county must have some way of determining whether a particular structure falls within the county's regulatory authority, or whether the structure is entirely exempt. Generally, a county is empowered to determine its own affairs, subject to acts of the legislature.¹⁵

It is our opinion that a county could lawfully require a landowner to obtain prior determination of a proposed structure's exemption from county regulations, so long as the purpose of the prior determination is simply to assess whether the proposed structure qualifies for the agricultural purposes exemption. We believe that such a requirement would not violate the intent of K.S.A. 12-758(b) and 19-2921 because it would not have the effect of improperly imposing zoning regulations on an exempt property; rather, it would serve to clarify in advance whether county building codes and zoning regulations would need to be followed during construction. However, we believe K.S.A. 12-758(b) and 19-2921 prohibit a county from requiring a landowner to receive county approval of construction plans or obtain a building permit once it is determined that a structure falls within the agricultural purposes exemption.

Sincerely,

Derek Schmidt
Attorney General

Sarah Fertig
Assistant Attorney General

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¹⁵ K.S.A. 2015 Supp. 19-101a.