

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

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State Representative
106th District
State Capitol, Room 149-S
Topeka, Kansas 66612
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May 7, 2013

Honorable Derek Schmidt, Attorney General
120 SW 10th Avenue 2nd Floor
Topeka, Kansas 66612

Dear General Schmidt:

On April 22, 2013, the Joint Committee on Administrative Rules and Regulations reviewed proposed regulation KAR 4-28-6, as adopted by the Kansas Department of Agriculture pursuant to KSA 2012 Supp. 65-688 and requests your opinion on the proposed rule and regulation.

Understanding that KAR 4-28-6 would adopt risk levels and fees for licensed food establishments and KSA 65-688 states "application fees may be adjusted in accordance with the type of establishment or based on other criteria as determined by the secretary," the Joint Committee poses the following questions:

- First, does the Kansas Department of Agriculture have the statutory authority to base fees on risk levels as defined by KAR 4-28-6(a); and
- Secondly, if the Kansas Department of Agriculture does have the statutory authority to base fees on risk levels as defined by KAR 4-28-6(a), is there legislation or law other than KSA 65-688 to support this authority?

If you have any questions regarding this matter, please contact me or Raney Gilliland at 296-3181. Please provide a copy of your response to Mr. Gilliland at Legislative Research. Thank you very much for your consideration.

Sincerely,

Sharon Schwartz
Representative 106th District
Chairperson, Joint Committee on
Administrative Rules and Regulations

RLG/kal



STATE OF KANSAS
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May 13, 2013

The Honorable Sharon J. Schwartz
State Representative, 106th District
State Capitol, Room 149-S
Topeka, Kansas 66612

Re: **K.A.R. 4-28-6**

Dear Representative Schwartz:

Attorney General Schmidt has asked me to respond to your letter of May 7, 2013, requesting input as to the following:

1. Does the Kansas Department of Agriculture have the statutory authority to base fees for food establishments on risk levels as defined by K.A.R. 4-28-6(a); and
2. If so, is there a statute other than K.S.A. 2012 Supp. 65-688 to support such authority?

During our legal review of K.A.R. 4-28-6, we determined that the answer to the Joint Committee's first question is yes, as evidenced by our approval of that regulation. K.S.A. 2012 Supp. 65-688(a) authorizes the Secretary of Agriculture to adopt rules and regulations "establishing a *graduated* application and license fee schedule to cover all of the cost of inspection of food establishments and food processing plants."¹ K.S.A. 2012 Supp. 65-688(c) establishes caps on annual license fees depending on the size of the establishment. K.S.A. 2012 Supp. 65-688(e) directs the Secretary of Agriculture to amend the rules and regulations which fix application and licensure fees whenever the Secretary determines that the revenues collected are either insufficient to carry out the purposes for which the fees are collected, or that the fee revenue is in excess of the amount necessary to carry out the purposes for which the fees are collected. Pursuant to K.S.A. 2012 Supp. 65-688(a), the purpose of application and license fees is to cover all of the cost of inspection of food establishments.

The Department of Agriculture has advised us that the risk-based fee structure is

¹ Emphasis added.

intended to more precisely cover the cost of inspections. We were advised that a food establishment serving higher-risk food items requires more inspection time, and therefore costs more to inspect, than a food establishment serving low-risk food items. In our opinion, this approach is consistent with K.S.A. 2012 Supp. 65-688(e), which requires the agency to adjust fees so that they are neither insufficient to cover inspection costs nor exceed such costs.

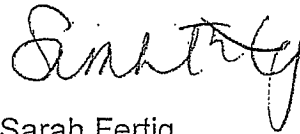
Further, K.S.A. 2012 Supp. 65-688(a) permits the agency to develop a "graduated" license fee structure, the only limits to which are the caps based on square footage found in K.S.A. 2012 Supp. 65-688(c). The fees in K.A.R. 4-28-6 do not exceed those statutory caps.

For these reasons, we determined that the agency has the authority to develop a risk-based license fee structure that does not exceed the caps set forth in K.S.A. 2012 Supp. 65-688(c). We find no other provision of law other than K.S.A. 2012 Supp. 65-688 that would authorize the agency to establish fees, and therefore we believe that this statute provides the sole authority for the risk-based license fee structure proposed by the agency.

I hope this letter adequately responds to the Joint Committee's questions.

Sincerely,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT



Sarah Fertig
Assistant Attorney General

Cc: Raney Gilliland, Legislative Research, State Capitol, Room 68-W