FILE

Subject Cities
Urban Renewal

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STATE OF KANSAS

Office of the Attorney General

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Attorney General

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Opinion No. 74-362

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Dear Mr. Everett:

You inquire whether the City of Manhattan may divest the Urban Renewal Agency of that city of its powers, and vest the exercise of those powers in the governing body of the city itself. The question has become of particular interest since enactment on August 22, 1974, of P.L. 93-383, the Housing and Community Development Act of 1974.

We have been furnished a copy of an opinion dated January 20, 1964, prepared by Mr. John Dekker, Director of Law of the City of Wichita, concluding that the city governing body could not, after electing to have its urban renewal project powers exercised by the Urban Renewal Agency, by further resolution withdraw that election, and vest those powers in the local governing body. We have also been furnished a copy of the much more recent opinion of Mr. Ed Horne, City Attorney of the City of Manhattan, reaching a contrary conclusion. You enclose a copy of your own opinion, concurring with Mr. Dekker. Remarkably, this question has not been squarely addressed in any opinion issued by any Attorney General since enactment of the Urban Renewal Law, K.S.A. 17-4742 et seq., in 1955.

Resolution of the question requires, first, detailed reference to the Kansas urban renewal law. The exercise of urban renewal powers at the outset requires, as a prerequisite therefor, that the local governing body adopt a resolution pursuant to K.S.A. 17-4746, finding thus:

> "(1) One or more slum or blighted areas exist in such municipality, and (2) the rehabilitation, conservation, or redevelopment, or a combination thereof, of such area or areas is necessary in the interest of the public health, safety, morals or welfare of the residents of such municipality."

K.S.A. 17-4748 prescribes that every city "shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions" of the act, including those enumerated in that section. K.S.A. 17-4756 and 17-4757 deal with the vehicle through which those powers shall be exercised. K.S.A. 17-4757(a) states thus:

> "There is hereby created in each municipality a public body corporate and politic to be known as the 'urban renewal agency' of the municipality; *Provided*, That such agency shall not transact any business or exercise its powers hereunder until or unless the local governing body has made the finding prescribed in section 5 [17-4746] and has elected to have the urban renewal project power exercised by an urban renewal agency as provided in section 15 [17-4756]."

Thus, in every municipality there was created in 1955 by operation of law an "urban renewal agency," which exists only as an empty and powerless legal instrumentality unless and until (1) the local governing body makes the findings set out above, and (2) elects to have urban renewal powers exercised by the agency. Under (b) "[i]f the urban renewal agency is authorized to transact business and exercise powers hereunder," the mayor, with the consent of the governing body, appoints a board of commissioners of the agency, who then, under subsection (c) exercise the powers of the urban renewal agency.

The city may choose to exercise its urban renewal project powers itself, under K.S.A. 17-4756(a):

> "A municipality may itself exercise its urban renewal project powers (as herein defined) or may, if the local governing body by resolution determines such action to be in the public interest, elect to have such powers exercised by the urban renewal agency (created by section 16 [17-4757]) except the powers listed in section 7 [17-4748] (h). *In the event the local governing body makes such determination, the urban renewal agency shall be vested with all of the urban renewal project powers in the same manner as though all such powers were conferred on such agency or authority instead of the municipality.* If the

> local governing body does not elect to make such determination, the municipality in its discretion may exercise its urban renewal project powers through a board of commissioners or through such officers of the municipality as the local governing body may by resolution determine." [Emphasis supplied.]

The view that an election to vest urban renewal project powers in the agency made pursuant to the foregoing irrevocable is based on the status of the agency as a creature of state legislation, being a distinct body corporate and politic, independent of and separate from the governing body of the city; the italicized language above, whereby upon election by the local governing body, urban renewal project powers are vested in an urban renewal agency, in the same manner as though such powers were conferred, presumably by state law; and the lack of any statutory provision for withdrawal by the local governing body of the power so vested. Mr. Dekker states this view thus:

> "Since the city has previously elected that the urban renewal powers created by the state legislature shall be exercised by the urban renewal agency, the situation ....is the same as if the state legislature had created and empowered the Urban Renewal Agency of the Wichita Metropolitan Area in the first instance. This being the case, the City of Wichita has no general authority and control over the urban renewal agency other than that expressed or implied from the urban renewal law. The City of Wichita has no more authority to destroy, abandon, or divest the urban renewal agency of its powers than it would have with regard to the Board of Education, County Government, or any other quasi-municipal corporation."

The contrary view, that the city governing body, may rescind or revoke its election, and assume urban renewal project powers, is based on the general proposition that that which a city may do, it may undo, and that powers which are within the power of the city to bestow, are within the power of the city to withdraw and reassume.

The Kansas Supreme Court has acknowledged this general principal, but has given it only the most restricted application. In *State ex rel. Wheeler v. Bentley*, 96 Kan. 344, (1915), there was at issue the validity of a resolution adopted by a city commission rescinding a resolution of a previous commission, which created a city library governed by a library board. The court stated thus:

> "The effect of this act [under which the library was established initially] is to authorize the maintenance of public libraries in accordance with the provisions of the act of 1903, and the closing requirement that after the adoption of the resolution such libraries shall be governed and maintained in accordance with such act of 1903 and amendments thereto puts it beyond the power of the incoming commissioners to take the library out from under the operation of such statutes, hence the attempt to rescind the resolution adopted by the outgoing administration was futile...."
> 96 Kan. at 346.

In *Brown v. City of Arkansas City*, 135 Kan. 453, 11 P.2d 607 (1932), the issue was the validity of a city ordinance repealing an earlier ordinance which had established a city court under R.S. 1931 Supp. 20-1401, which provided in pertinent part thus:

> "Whenever it is made to appear to the satisfaction of the governing body of [the]....city....that there is need for the establishment of a city court in such city for the administration of justice, such governing body may establish a city court in such city by ordinance of such city...."

According to the court, the city urged that

> "R. S. 14-401, which gives the governing body of a city the power to enact, ordain, alter, modify or repeal any and all ordinances not repugnant to the constitution and laws of the state, fully authorizes the city to repeal this ordinance. The reasoning is that since the governing body was to determine the need for the establishment of such a court, the same body should determine when that need ceased to exist, and then discontinue the court. Counsel for defendants

> cite 2 McQuillin on Municipal Corporations (2d ed., § 514) as to the power of a city to abolish by ordinance whatever it has power to create by ordinance. That general proposition, however, is modified by the following expression 'unless restraint exist in the organic law.' The organic law was quoted above from R.S. 14-401, which limits both enactments and repeals by cities of the second class to ordinances 'not repugnant to the constitution and laws of this state.'"

Looking to the organic law, i.e., the statutes under which the court was created, the court held, following a previous decision in *State ex rel. Smith v. Smith*, 130 Kan. 228, 285 Pac. 542 (1930), that the court was a creature of state law, and not of city ordinance. As stated in that 1930 decision,

> "There is nothing in the act which purports to give the governing body of the city power to add to, take from or to modify the provisions of the act. The legislature simply provided that when a certain condition is found to exist in any city of the class named the act comes into operation. Upon the happening of a specified contingency, [i.e., a finding of need] a fact to be found by a local agency, the act is to take effect in that city. The contingency under which the act was to become operative in a city was defined by the legislature; that is, a finding and declaration of the governing body that there is need for the establishment of a city court for the administration of justice within the city." 130 Kan. at 231, 233.

The finding of such need was not itself an exercise of legislative power, but a happening, upon the occurrence of which the act became operative within the city, and the court was created thereupon by operation of law. It being a creature of statute, and not of ordinance, and no power being granted to the city save and except to make the finding of need, and no power being granted to make a further finding that the need no longer existed, the city governing body was powerless to disestablish that which was created within its jurisdiction by operation of state law. The court reiterated the then current rule that cities had no power save except those expressly granted and those reasonably to be implied

therefrom. The power to disestablish the court, or to declare that the need for it no longer existed, was not, the court concluded, reasonably to be implied from the power to make the finding of need in the first instance.

The court followed this view in *Russell State Bank v. Steinle*, 159 Kan. 293, 153 P.2d 906 (1944), determining once again that, in this instance, a county, had no power to disestablish a county court which was organized in the county pursuant to G.S. 1935-20-801, adopted by the county, which commenced thus:

> "The provisions of this act shall apply only to such counties in this state as shall by resolution of their respective boards of commissioners duly adopt the same...."

The court reiterated its position thus:

> "The delegation of all power to determine facts which bring a court into being does not embrace the power to abolish a court thus created, unless there is also a delegation of power to determine facts upon which its disestablishment may be based....No such delegation of power to disestablish the county court is embraced in the instant act. It follows the rescinding resolution of the board was without authority and a nullity." 159 Kan. at 299.

The issue raised here is closely analogous to those decided in these cases. Under K.S.A. 17-4757(a), there is created in each municipality a "public body corporate and politic to be known as the 'urban renewal agency' of the municipality." It is a creature of state law, and not of city ordinance. It may transact no business, however, unless and until the local governing body elects not to exercise its urban renewal project powers, but instead, elects to have them exercised by the agency. Then, under K.S.A. 17-4756(a),

> "In the event the local governing body makes such determination, the urban renewal agency shall be vested with all of the urban renewal project powers *in the same manner as though all such powers were conferred on such agency or authority instead of the municipality*." [Emphasis supplied.]

The election by the city to have its urban renewal project powers exercised by the agency is a contingency fixed by state law, upon the making, or occurrence, of which, the agency becomes invested with urban renewal project powers *by operation of state law*. The election is not, in and of itself, an exercise of legislative power. Rather, it is a choice by the local governing body of the vehicle, as it were, through which certain powers vested in the city shall be exercised. Under the law in force in 1955, and certainly until adoption of the home rule amendment, Art. 12, § 5, no city could by ordinance abolish the urban renewal agency created therein by K.S.A. 17-4757, whether the local governing body had elected to have the agency exercise urban renewal project powers, or chose to exercise those powers itself or through another instrumentality. The urban renewal agency existed by virtue of state law, independently of any action by the city, whether it was empowered to transact any business or not. In what we may call the "court cases" cited above, *Brown v. City of Arkansas City*, and *State ex rel. Smith v. Smith*, the city court likewise came into existence by reason of state law, which, however, became operative in the city upon a finding by the city, a finding which the court held to be nonlegislative in character, of the need for such a court in the administration of justice. Once the governing body made this determination, the state laws establishing the courts became operative, prescribing its powers and all else, and the city was thereafter powerless to oust the operation of state laws establishing and organizing the city courts.

Unlike the city or county courts involved in those cases, which under state law were not established until some formal action was taken by the governing body, by resolution, ordinance or otherwise, there came into being in 1955 an urban renewal agency in every municipality, by operation of law. The agency became invested with urban renewal project powers, however, only when the local governing body by resolution determined it to be in the public interest to have the powers so exercised. In making this determination, and election, the local governing body does not vest the agency with those powers. Rather, a determination by the local governing body by resolution that it is the public interest to have urban renewal powers exercised by the agency, is precisely that and no more; thereupon, those powers are vested in the agency *by operation of law*. Those

powers can be divested, likewise, by operation of law. There is, however, no provision whereby a city, by ordinary ordinance or resolution, may withdraw its election. A local governing body which has heretofore determined that it was in the public interest to have urban renewal powers exercised by the agency, might, of course, adopt a subsequent and further resolution determining that it is no longer in the public interest that the agency exercise those powers. Once again, this determination would not be a legislative act, but merely a finding of how the public interest, in the judgment of the governing body, would best be served. Such a finding has no sanction in the urban renewal act, and is given no operative effect by state law to divest the agency of those powers which were initially vested in the agency solely by operation of state law.

We cannot but conclude that the local governing body, having heretofore determined it to be in the public interest that urban renewal project powers be exercised by the urban renewal agency may not by resolution or ordinary ordinance lawfully divest that agency of urban renewal project powers and revest those powers in the local governing body or in any other entity or instrumentality.

The question remains whether this purpose may be accomplished by charter ordinance, adopted pursuant to Art. 12, § 5 of the Kansas Constitution, in the exercise of home rule powers. Section 5(b) provides in pertinent part thus:

> "Cities are hereby empowered to determine their local affairs and government....Cities shall exercise such determination by ordinance passed by the governing body...,subject only to *enactments* of the legislature of statewide concern applicable uniformly to all cities, to other enactments of the legislature applicable uniformly to all cities....All enactments relating to cities now in effect or hereafter enacted and as later amended and until repealed shall govern cities except as cities shall exempt themselves by charter ordinances as herein provided for in subsection (c)." [Emphasis supplied].

The term "enactment" as used in this amendment has never been considered by the Kansas Supreme Court. It appears not to have been raised, for example, in *Claflin v. Walsh*, 212 Kan. 1, 509, P.2d 1130 (1973). Article 2, § 20, of the Kansas Constitution states thus:

> "The enacting clause of all bills shall be 'Be it enacted by the Legislature of the State of Kansas:'. No law shall be enacted except by bill."

The urban renewal law, K.S.A. 17-4742 et seq., was enacted as a single enactment, see ch. 86, L. 1955, consisting of several sections. The Kansas Supreme Court has heretofore held that distribution by the Revisor of the several sections of an act among different articles and chapters of the codified and compiled laws of Kansas does not have the effect of making separate statutes. In *Marks v. Frantz*, 179 Kan. 638, 289 P.2d 316 (1956), the court stated thus:

> "We note that the optometry act was originally enacted as Laws 1923, Ch. 220, and covered the field. The division into chapter, article and section numbers in the Revised Statutes of 1923, and subsequent compilations of our statutes did not have the effect of making two separate statutes. We consider Ch. 65, Art. 15, and Ch. 74, Art. 15, as one act." 179 Kan. at 644.

The urban renewal law of 1955 constitutes a single enactment, passed as but one law under a single enacting clause. If it is not uniformly applicable to all cities, it becomes subject to charter ordinance. As originally enacted, it was uniformly applicable in all its parts to all cities. In 1957, however, then G.S. Supp. 1955 17-4754 was amended by, inter alia, the addition of the following proviso:

> "Provided further, That no city with a population of less than 125,000 shall issue general obligation bonds under the urban renewal law unless issued pursuant to and as the result of such an election as hereinbefore prescribed." See ch. 156, § 1, L. 1957.

This proviso was made more elaborate by the 1959 Legislature. See ch. 122, § 1, L. 1959. The amendments, of course, destroyed the integrity of the enactment as one of uniform application to all cities, for the proviso deals specially

with the power of a described class of cities to issue general obligation bonds under the urban renewal law.

On the face of the act, thus, it is no longer applicable uniformly in its entirety to all cities. The question then becomes whether in the exercise of home rule powers, the city is free to exempt itself from one or another provision of the act, and to substitute other provisions therefor. In 1955, when the urban renewal law was enacted, cities "existed by and through statutes and had only such powers as were expressly conferred by statute without resort to implication." *Claflin v. Walsh*, supra at 6. The act perforce provided the sole and exclusive authority for city urban renewal projects, not because the act so stated, but simply because it was the sole statutory authority. As the court pointed out in *Claflin*,

> "No longer are cities dependent upon the state legislature for their authority to determine their local affairs and government. Since home rule, cities have power granted directly from the people through the constitution without statutory authorization.
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> * * *
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> Section 5(d) of Article 12 requires a liberal construction of the powers and authority granted cities for the purpose of giving to cities the largest measure of self-government. *This provision simply menas that the home rule power of cities is favored and should be upheld unless there is a sound reason to deny it. Where the legislature has acted in some area a city's power to act in the same area should be upheld unless the legislature has clearly preempted the field so as to preclude city action.* Unless there is actual conflict between a municipal ordinance and a statute, the city ordinance should be permitted to stand." [Emphasis supplied.]

A legislative enactment in 1955 such as the urban renewal law, clearly at that time preempted the field, so to speak, simply because cities had no authority to act than the statutory grant itself. The question here, in our view, is whether such a legislative grant of authority, preemptive of the field at the time of its enactment only because of the lack of any independent basis for municipal authority, continues to preempt municipal exercise of home rule authority in the field when

the enactment is no longer uniformly applicable to all cities, and when there is no legislative expression upon which to base a judgment that the legislation is intended to foreclose the exercise of home rule authority which is otherwise now available to cities.

Paragraph (d) of the amendment offers a forthright and compelling rule of construction in this case:

> "Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government."

As the court pointed out in *Claflin*, supra, this provision means simply "that the home rule power of cities is favored and should be upheld unless there is a sound reason to deny it." Whether it is in the public interest in a particular municipality that urban renewal project powers be exercised by the local governing body, the urban renewal agency or such other instrumentality as the governing body may determine upon is surely a matter of "local affairs and government," appropriate for local determination. Indeed, under K.S.A. 17-4756, considered separately, the legislature did not seek to preempt this determination, but left the initial decision to the local governing body. The adoption of a charter ordinance which provided, in lieu of this provision, that the city might reassume powers which it previously permitted to be exercised by the agency, would be only supplemental to the existing provision, and not in conflict with it.

It is our opinion that in the lawful exercise of constitutional home rule powers, a municipality may by charter ordinance provide substitute and/or additional provisions to K.S.A. 17-4756, whereunder the city governing body may be empowered to revest in itself urban renewal project powers heretofore exercised by the agency.

Yours very truly,

VERN MILLER
Attorney General

VM:JRM:tp
cc: Ed Horne, Manhattan City Attorney
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