



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

December 13, 1976

ATTORNEY GENERAL OPINION NO. 76-363

Mr. David M. Jancich
Assistant City Attorney
City of Overland Park, City Hall
8500 Santa Fe Drive
Overland Park, Kansas 66212

RE: Housing Law--Cities--Municipal Housing Law--
Commissioners--Incompatibility of Office

Synopsis: K.S.A. 19-202 prohibits county commissioners from serving as members of a housing authority created pursuant to K.S.A. 17-2337, et seq. City Council members may serve as commissioners of the municipality's housing authority without creating a prohibited incompatibility of office while serving in such dual capacity. Because the mayor has the power to remove a member of the authority for inefficiency, neglect of duty or misconduct in office, that officer should not be appointed to the Authority, for the holding of two positions by one person is incompatible when the officer in one capacity has the power of supervision of removal of himself in such other capacity.

* * *

Dear Mr. Jancich:

You have requested my opinion as to whether K.S.A. 1975 Supp. 17-2341 is mandatory in requiring the appointment of no more or less than five members to the housing authority. In pertinent part, K.S.A. 17-2341 provides:

"When the governing body of a municipality adopts a resolution as aforesaid, it shall promptly notify the mayor or board of county commissioners of its adoption. Upon receiving the notice, the mayor or board of county commissioners shall appoint five (5) persons as commissioners of the authority created for said municipality..."

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In my view, the use of the word "shall", in the absence of any indication of a contrary intent, signifies that the appointments are mandatory.

Further, you inquire whether members of the city governing body may serve at the same time in the capacity of commissioner of the housing authority. Appointments to the housing authority are governed by K.S.A. 17-2341, wherein it states:

"...Appointments may be made of any persons as commissioners of the authority who reside within its boundaries or area, and who are otherwise eligible for such appointments under this act. The commissioners of an authority shall elect a chairman and vice-chairman from among the commissioners."

"Governing body" is defined by K.S.A. 17-2339(c) to mean:

"...the council, board of commissioners, or other body of the municipality in which is vested legislative authority customarily imposed on the council or board of commissioners..."

In regard to county commissioners as members of the governing body and housing authority simultaneously, K.S.A. 19-202 states:

"No person holding any state, county, township or city office shall be eligible to the office of county commissioner in any county in this state."

Thus, it is clear that K.S.A. 19-202 prohibits county commissioners from appointing themselves as members of the housing authority their resolution creates.

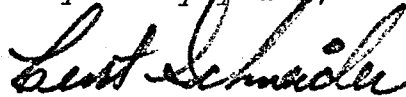
Beyond the parameters of K.S.A. 19-205, the Kansas statutes impose no further specific limitations upon county and city public office holders serving in dual official capacities. However, an additional doctrine which is applicable is that of incompatibility of offices. In Dyche v. Davis, 92 Kan. 971 (1914), the Court stated as follows:

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"... 'Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices. It is difficult to give a definition which will have universal application.' 92 Kan. at 977."

In my view, no incompatibility of office exists wherein a city council member also serves as a commissioner of the municipality's housing authority. The primary support for this conclusion derives from the very nature of the Municipal Housing Law, K.S.A. 17-2337, et seq. First, K.S.A. 17-2340 permits the governing body of the municipality to delegate "...to such authority any or all powers conferred on the municipality by this act..." Thus, those powers which may be delegated to the housing authority may also be exercised by the municipality. The statutes authorize the municipality to perform all functions and prerogatives which could be delegated intent. Therefore, the Legislature in the enactment of the Municipal Housing Law must have presumed that city council members could exercise the powers conferred in that Act without any incompatibility with their city office. The fact that an intermediary agency is created to exercise these powers does not create an incompatibility which does not exist otherwise. Thus, city council members may serve as commissioners of the municipality's housing authority without creating a prohibited incompatibility of office while serving in such dual capacity. Because the mayor has the power to remove a member of the authority for inefficiency, neglect of duty or misconduct in office, that officer should not be appointed to the Authority, for the holding of two positions by one person is incompatible when the officer in one capacity has the power of supervision or removal of himself in such other capacity.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS/HTW/cgm