STATE OF KANSAS

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July 20, 1977

ATTORNEY GENERAL OPINION NO. 77-234

The Honorable Kalo A. Hineman
State Representative
Dighton, Kansas 67839

Re: Counties--Home Rule--Brand Inspection

Synopsis: A county may not, in the exercise of its statutory home rule powers, impose brand inspection duties upon the state brand commissioner, and accordingly, Kearny County Charter Resolution No. 6 is void and of no effect, because it purports to require the state brand inspection to conduct brand inspections prior to certain movements of cattle.

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Dear Representative Hineman:

You inquire concerning Kearny County Charter Resolution No. 6, which exempts the county from K.S.A. 47-441 and -442, and enacts substitute provisions therefor.

In Opinion No. 76-338, I reviewed Charter Resolution No. 3, adopted by the board of county commissioners of Greeley County, Kansas, whereby the county undertook to exempt itself from K.S.A. 47-441 and -442. I concluded that this resolution was a lawful exercise of county home rule powers under K.S.A. 19-101a et seq. The Kearny County resolution goes further. It does not merely exempt the county from K.S.A. 47-441 and -442, but also adopts other provisions in lieu thereof. Section 2 of the resolution provides in pertinent part thus:

> "It shall be unlawful for any person, in the Kearny County brand inspection area . . . to move . . . any cattle from any point in such brand inspection area . . . to any point outside such area other than another brand inspection area unless such cattle shall have first been inspected for brands by the state brand commissioner . . . unless such cattle are accompanied by a brand inspection certificate. Provided, the brand commissioner . . . may give permission for such movement of cattle without inspection, when: (1) There is no change of ownership involved; or (2) shipment of such cattle is to a market where Kansas brand inspection is maintained."

Section 3 provides in part as follows:

> "It shall be unlawful for any person in the Kearny County brand inspection area, to move any cattle within such area unless such cattle have been first inspected for brands by the brand commissioner . . . Provided, (1) Cattle may be so moved by the owner . . . when there is no change in ownership; (2) such cattle may be moved without prior inspection to a market where Kansas brand inspection is maintained."

It should be noted that section 4 provides that any person convicted of a violation of the resolution shall be guilty of a misdemeanor and shall upon conviction be punished as provided in section 21-112 of G.S. 1949. That provision was repealed in 1969, with the enactment of the new criminal code; hence, there seems to be no effective penalty provided by this resolution.

As you point out, the 1977 legislature amended K.S.A. 47-441 and -442 with the enactment of 1977 Senate Bill 114. Those amendments became effective July 1, 1977. The resolution in question here in effect readopts K.S.A. 47-441 and -442 as those sections read prior to the 1977 amendments. You raise the question whether the county has overreached its home rule powers in the adoption

of this resolution because it appears to impose inspection duties on a state officer. K.S.A. 19-101a commences thus:

> "(a) Counties are hereby empowered to transact all county business and perform such powers of local legislation and administration as they deem appropriate . . . ." [Emphasis supplied.]

Necessarily, thus, counties may deal only with "county business," and matters of "local legislation and administration." Greeley County Resolution No. 3 merely exempted that county from the restrictions and prohibitions of K.S.A. 47-441 and -442 as they applied to that county. It dealt, thus, with an entirely local matter. This resolution goes further, however, to require, in effect, the state brand commissioner to inspect cattle for brands prior to their movement within the area or to any point outside the brand inspection area, except another brand inspection area. The resolution thus effectively imposes an affirmative duty of inspection on the state brand commissioner. The direction of the duties of a state officer is in no fashion a function of "county business," and it is beyond the scope of "local legislation and administration" entrusted to counties under K.S.A. 19-101a. In enacting legislation regarding county business, the county has no authority to extend its legislative power to state officers and employees, either directly or by indirection. For this reason, I can but conclude that sections 2 and 3 of Kearney County Charter Resolution No. 6 are beyond the scope of the statutory home rule powers under which the resolution was adopted, and are void and of no effect, for the county has no authority to require the state brand inspector to conduct the inspections obviously contemplated by those sections.

Section 1 of the resolution exempts the county from K.S.A. 47-441 and -442. Sections 2 and 3, which I conclude are invalid, provide substitute provisions in lieu of those statutory provisions. The question arises whether section 1 is effective to exempt the county from K.S.A. 47-441 and -442, if sections 2 and 3, which offer substitute provisions, is void, as I believe it to be. The resolution contains no severability clause. In *Reilly v. Knapp*, 105 Kan. 565, 185 Pac. 47 (1919), the court stated thus:

> "The general rule is, that where an act contains two separate and independent subjects

> having no connection with each other, and the title is broad enough to cover both, both portions of the act fall together and are treated as void, because, generally, it is impossible for the court to choose between the two and hold one part valid and the other void, but where no such difficulty arises, and it is apparent, as in the present case, that the enactment of the provisions of section 2 furnished no inducement to pass the other part, and where a consideration of the entire chapter warrants the belief that the legislature would have passed the appropriation act alone, the rule does not apply . . . ."

In that case the court quoted from 1 Lewis' Sutherland Statutory Construction, 2d ed. §§ 296, 297, thus, in pertinent part:

> "'Where a part only of a statute is unconstitutional, and therefore void, the remainder may still have effect under certain conditions. The court is not warranted in declaring the whole statute void unless all the provisions are connected in subject matter, depend on each other, were designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the legislature would have passed one without the other.'"

In this instance, section 1, exempting Kearny County from K.S.A. 47-441 and -442, was adopted for the manifest purpose of permitting the adoption of substitute provisions, those found in sections 2 and 3. Those substitute provisions being void, there remains no basis upon which to hold section 1 to be separable and severable. In my judgment, thus, the entire resolution is void and of no effect, that the cited statutes, as amended by 1977 Senate Bill 114, remain effective in Kearny County.

Yours truly,

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