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STATE OF KANSAS

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August 10, 1979

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ATTORNEY GENERAL OPINION NO. 79- 174

Mr. Charles F. Bennett
City Attorney
P. O. Box 766
Chanute, Kansas 66720

Re: Public Health--Solid Waste--Application of
County Plan to Cities in County

Synopsis: The residents of the City of Erie, Kansas, are required to use the solid waste pickup service provided by Neosho County, Kansas. However, Neosho County may not require the City of Erie to collect fees imposed by said county for operation of the Neosho County landfill and for payment of the collection services provided by said county.

* * *

Dear Mr. Bennett:

In your request for our opinion, you relate the following facts:

(1) Neosho County, Kansas, pursuant to K.S.A. 1978 Supp. 65-3405, adopted a solid waste management plan, and on June 18, 1975, adopted a resolution to implement said plan.

(2) The county contracted with a private firm to provide solid waste collection services for all residential, commercial and industrial premises within the county, except for the City of Chanute, which city properly elected to be excluded from the county plan. The City of Erie, however, did not choose to be so excluded.

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(3) Pursuant to certain sections of the county resolution, the county has required the City of Erie to collect from the residents of said city the "landfill operation fee" imposed by said resolution. In addition, the county expects the city to collect the "pickup service fee."

Based upon the foregoing facts, you request our opinion as to the following questions:

"1. Is the City of Erie required to utilize the solid waste pickup service provided by the county?

"2. If the City of Erie is required to utilize the solid waste pickup service as provided by the County, can the County require the City to collect the fees for the payment of such pickup service?

"3. May the County require the City to collect from its citizens the fees to operate the landfill and remit such fees to the County?

"4. If the City is not required to utilize the solid waste pickup service as furnished by the County, is the City required to furnish solid waste pickup service for its citizens; that is, may the citizens of the City of Erie individually make arrangements to have their waste materials collected and transported to the landfill?"

Before responding to your specific questions, it should be noted that the legislature, pursuant to K.S.A. 1978 Supp. 65-3405, required all counties within the state to submit, on or before June 30, 1974, a workable plan for the management of solid waste. It must be emphasized that this legislative requirement applied to each county in the state. At the same time, the legislature provided that each city could elect to be excluded from the county plan and could submit a separate plan for solid waste management. Pursuant to K.S.A. 1978 Supp. 64-3405, however, any such plan had to be submitted "on or before June 30, 1974." Said statute became effective on July 1, 1970, and each city was given three (3) years from that date within which to decide whether to be excluded from the county plan. Although cities were not required to develop their own plan, by failing to do so within the prescribed time, they were statutorily subjected to the county's plan. K.S.A. 1978 Supp. 65-3405. The City of Erie did not elect to establish its own plan and, therefore, is encompassed within the plan of Neosho County.

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With this background established, we now turn to your specific inquiries. Both your first and fourth questions concern the city's usage of the services of the firm with whom the county has contracted to collect and transport solid waste materials, and reference to Sections 5 and 10 of the county resolution is pertinent. Section 5 provides:

"The city of Chanute is hereby permitted to provide its own collection service, or may contract with a person, firm, corporation, county, another city or a combination thereof, for the entire city or portions thereof as deemed to be in the best interest of the city. Other cities and towns within Neosho County may provide for the collection of all solid waste within its boundaries, as above set out, provided that such cities and towns, shall first obtain permission from the Neosho County Commissioners." (Emphasis added.)

Section 10 provides:

"No person, firm or corporation shall engage in the business of collecting, transporting, processing or disposing of solid wastes within Neosho County, without first obtaining a permit from the county." (Emphasis added.)

Pursuant to the express provisions of Section 5, the City of Erie "may provide for the collection of all solid waste within its boundaries," if the city obtains permission from the Neosho County Commissioners. Likewise, under Section 10, individual residents of the city could "engage in the business of collecting," etc., solid wastes if they obtained a permit from the county. However, the county may be reluctant to or, in fact, be prohibited from granting such approval or issuing such permits. It may be obligated to the firm with whom the commissioners have contracted, during the term of the contract, to grant that firm the exclusive right to provide collection and transportation services, or it may be able to obtain a better rate for such services if the commissioners allow only one person or firm to provide such services.

Thus, while the county resolution does not absolutely require either the city or the residents thereof to utilize the solid waste pickup service furnished by the county (via the firm with whom it has contracted), the county may, as a practical matter, be forced to withhold the requisite permission under Sections 5 and 10 of its resolution. If such is the case, we are of the opinion that the City of Erie and the residents thereof are bound to utilize the service provided by the county.

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The foregoing conclusion is buttressed by O'Neal v. Harrison, 96 Kan. 339 (1915). In that case, the City of Hutchinson, Kansas, adopted an ordinance for the disposal of garbage which, among other things, provided that no person, except one with whom the city had contracted, could remove it along city streets. The persons who had been awarded this contract brought the action to restrain others from engaging in such activity. The defendants argued that the city had no authority to create a monopoly for the providing of such services. In rejecting the argument of the defendants, the Court quoted Dillon on Municipal Corporations, where it is said:

"[I]t is therefore within the power of the city not only to impose reasonable restrictions and regulations upon the removal of garbage, but also, if it sees fit, to assume the exclusive control of the subject [emphasis by the author], and to provide that garbage and refuse matter shall only be removed by the officers of the city, or by a contractor hired by the city, or by some single individual to whom an exclusive license is granted for the purpose." (Emphasis added.) 2 Dillon on Municipal Corporations, 5th ed., 7 678.

Based on these principles, the conclusion of the Court was that the ordinance, under which the exclusive contract was let, was valid.

The Court's conclusion in O'Neal is cited with approval in the recent case of Zerr v. Tilton, 224 Kan. 394 (1978). In this case, residents of Gove County, Kansas, filed an action seeking to restrain the Gove County Commissioners from assessing fees or charges under the county resolution establishing a solid waste management system pursuant to the requirements of K.S.A. 65-3401 et seq. The county had contracted with an individual for the collection of the solid waste, but plaintiffs refused to pay the fees for the services, which were fixed by said resolution. Here, the Kansas Supreme Court quotes the memorandum decision of the trial court and adopts said decision as the opinion of the Court. In the course of its opinion, the Court states:

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"The collection service is available to each plaintiff. Pickup service is furnished at least once a week to all persons who are billed. The fact that plaintiffs voluntarily chose not to avail themselves of the service is not susceptible of the construction that they are not 'receiving the service' or that fees are imposed or revenue used 'where service is not provided'." (Emphasis added.) Id. at 400.

Moreover, in rejecting a claim that the collection services contract was invalid, the Court held:

"The county may contract with a private individual to carry out any or all of its solid waste management plan under K.S.A. 65-3410(c).

. . . .

"There is no question but what such a contract is reasonably necessary to the protection of a public interest" (Emphasis added.) Id. at 400.

Finally, in concluding its opinion, the Court states:

"In absence of unconstitutionality, abuse of statutory authority or unreasonableness to the point of fraud, Courts have no power to substitute their judgment over the legislative judgment of the elected county commission [citing: Schulenberg v. City of Reading, 196 Kan. 43 (1966)]." Id. at 400.

In light of these judicial pronouncements, we must conclude that the City of Erie and the residents thereof are required to use the solid waste pickup service provided by the county, unless permission to the contrary is granted by the county pursuant to either Section 5 or 10 of the county resolution.

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Turning then to your second and third inquiries, regarding the county imposing upon the city the duty to collect fees, it is to be noted that no provision of K.S.A. 65-3401 et seq. destroys the distinction between a county and a city, the former being a political subdivision or governmental agency, and the latter being a municipal corporation. State, ex rel. v. Wyandotte County Comm'rs, 140 Kan. 744, 748 (1934). Nor do these provisions alter the fact that each is a separate and distinct "body corporate and politic." See K.S.A. 19-101 and 12-101, respectively. In our judgment, the law is too well-settled to dispute that, without enabling legislation or consent of the other, neither body can impose duties on the other. That such is the law is clearly reflected in K.S.A. 1978 Supp. 19-101a, by the provisions of which counties are granted home rule powers. Subsection (a) of said statute, in relevant part, provides:

"Counties are hereby empowered to transact all county business and perform such powers of local legislation and administration as they deem appropriate subject only to the following limitations, restrictions, or prohibitions . . . fifth, in the exercise of powers of local legislation and administration authorized under provisions of this section, the home rule power conferred on cities to determine their local affairs and government shall not be superseded or impaired without the consent of the governing body of each city within a county which may be affected . . ."
(Emphasis added.)

While cities that did not elect to be excluded from the county solid waste management plan are required by statute to be subject to said plan, nothing contained in K.S.A. 65-3401 et seq. expressly or implicitly authorizes counties to impose any duty on cities located within said counties, and as we are aware of no contractual agreement to the contrary, we are unable to ascertain any authority by which the county may require the city to collect fees imposed by the county.

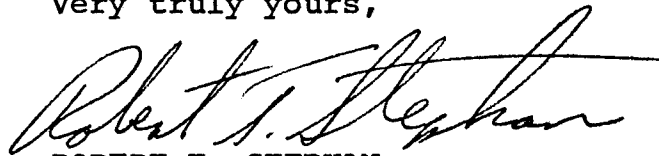
In addition to the above, K.S.A. 1978 Supp. 65-3410 expressly provides that the board of county commissioners shall impose the appropriate fees and provide for the billing and collection of such fees. It also grants a county broad powers to collect any fees which remain delinquent for more than sixty (60) days after the date upon which they are billed. Given these statutory directives, we are of the opinion that a board of county

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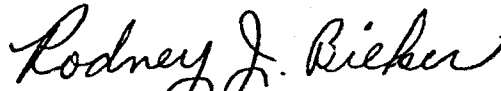
commissioners may not require a city to collect fees regarding the solid waste management plan of the county.

In summary, therefore, it is our opinion that the residents of the City of Erie, Kansas, are required to use the solid waste pickup service provided by the county and may not, individually or collectively, collect and transport their solid waste materials to the county landfill. However, we are of the further opinion that the county may not require Erie to collect fees assessed by the county for operation of the county landfill and for payment of collection services provided by said county.

Very truly yours,



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