



STATE OF KANSAS

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December 4, 1979

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ATTORNEY GENERAL OPINION NO. 79- 270

Mahlon G. Weed
Colonel, USA (Ret)
Division of Emergency Preparedness
Adjutant General
2800 Topeka
Topeka, Kansas 66601

Re: Militia, Defense and Public Safety--Emergency
Preparedness for Disasters--Price Controls During
Emergency

Synopsis: Reasonable regulation of prices for services and
commodities is a permissible element of a state,
local or interjurisdictional disaster emergency
plan adopted pursuant to K.S.A. 48-901 et seq.,
and is enforceable if not inconsistent with
federal or state law not superseded by the
plan.

* * *

Dear Colonel Weed:

On behalf of Eugene Beaver, Coordinator of the Sedgwick County
Civil Preparedness agency, you question whether the City of
Wichita, Kansas, may legislate price controls in the event of
a local disaster emergency. By way of comparison, you point
to the "scalping" which occurred in Wichita Falls, Texas,
following a tornado. You are particularly concerned with
drastic price increases in food staples.

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However, since your request is both hypothetical and provides no details of the controls contemplated, we are able to respond only in a general way. The type of products to be controlled (food, drugs, energy supplies, clothing, housing, etc.); whether prices are regulated at both the wholesale and retail levels; whether goods to be controlled are regulated by state or federal agencies and the methods used to establish base prices and control price increases are all factual elements which will be determinative of the legality of any price control plan. Absent a specific proposal we are limited to analyzing statutory and case law.

K.S.A. 48-901 et seq. constitutes the enactment, applicable statewide, relevant to emergency preparedness for disasters. As this office has noted on prior occasions (Attorney General Opinion Nos. 77-156 and 79-87), this statute contemplates a comprehensive system of local agencies, coordinated and organized under the control of the state, for the prompt and effective response to natural and man-made disasters. Although a disaster may be localized, preemptory authority to respond to the emergency is vested in the governor.

K.S.A. 48-924 provides that, "[t]he governor shall be responsible for meeting the dangers to the state and people presented by disasters." It is the governor who proclaims a state of emergency to "activate the disaster response and recovery aspects of the state disaster emergency plan and of any local and interjurisdictional disaster plans applicable to the political subdivisions or areas affected by the proclamation." Id. at (d). The Governor exercises the extensive and unusual powers enumerated in K.S.A. 48-925. And with regard to the area of economic controls, it is the governor who determines the elements of the state resource management plan and their application to a given emergency. K.S.A. 48-927.

The law does provide for the declaration of a local disaster emergency, to be declared by the governing body of the city or county endangered by calamity (K.S.A. 48-932), but such declaration merely invokes the local or interjurisdictional disaster emergency plans which have been developed with the assistance of the state division of emergency preparedness and which are subject to revision by said division. K.S.A. 48-931. The adjutant general, the state official who serves at the pleasure of the governor and who commands the division of emergency preparedness, has the authority "to require and direct the cooperation and assistance of state and local governmental agencies and officials." K.S.A. 48-907.

The enactment, when read as a whole, evinces clear legislative intent that emergency disaster relief is a matter of statewide concern. Local ordinances are null and void if in conflict with state legislation or state and local disaster emergency plans. K.S.A. 48-935. And the broad home rule powers of Kansas cities (Kan. Const., Art. 12, §5) and counties (K.S.A. 1978 Supp. 19-101) notwithstanding, the state statutes are of uniform application throughout the state and may not be avoided.

The above observations having been made, we would concur with the Wichita city attorney's office, that the preferable method for establishing effective price controls is through the incorporation of such provisions in the state or local disaster emergency plan.

Generally speaking, price controls are a legitimate exercise of police power of the state or local government. In the landmark case of Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1933), the United States Supreme Court declared, "there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells." 291 U.S. at 537.

In upholding a New York statute establishing minimum price restrictions for the retail sale of milk, the Court stated:

"The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence, an unnecessary and unwarranted interference with individual liberty."
291 U.S. at 539.

Limitations on the maximum price charged for food stuffs was upheld in People v. Lewis, 295 N.Y. 42, 64 N.E.2d 702 (1945), and the power of a municipality to establish price differentials for cigarettes was upheld as a proper exercise of the police power to protect public health pursuant to municipal home rule law where the state had not legislated to the contrary. People v. Cook, 34 N.Y.2d 100, 312 N.E.2d 452 (1974).

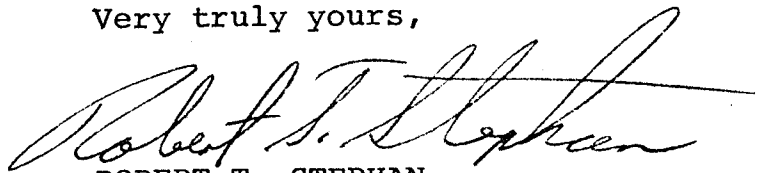
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The exercise, by municipalities, of the police power over private business activities is not unlimited. It cannot be unreasonable and oppressive. In Delight Wholesale Co. v. City of Overland Park, 203 Kan. 99 (1969), an ordinance prohibiting huckstering and peddling was held to be unconstitutional. The Court reasoned that the absolute prohibition of street vendors for the purpose of keeping small children from residential streets was unreasonable. The Court applied the test formulated in McCulley v. City of Wichita, 151 Kan. 214 (1940), saying that "the reasonableness of an ordinance involves a determination as to whether it is for the public benefit of the community in general, and whether the means adopted to produce the public benefit are reasonably necessary to accomplish that purpose and not unduly oppressive upon individuals." 203 Kan. at 104. Accord Delight Wholesale Co. v. City of Prairie Village, 208 Kan. 246 (1971).

In our judgment, a plan including price controls would be reasonable if limited to restraining prices on services and commodities essential for the relief and recovery of the public from the disaster emergency for the period of the declared emergency. On the other hand, regulation of non-essential commodities unrelated to the health, safety and welfare of a public victimized by disaster would be suspect as an undue restriction on local enterprise. This conclusion is subject, however, to any conflicting federal or state law, regulation or order not superseded by a disaster emergency plan established pursuant to K.S.A. 48-901 et seq.

In summary, it is our opinion that reasonable regulation of prices for services and commodities is a permissible element of a state, local or interjurisdictional disaster emergency plan adopted pursuant to K.S.A. 48-901 et seq., and is enforceable if not inconsistent with federal or state law not superseded by the plan.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General