



STATE OF KANSAS

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May 28, 1981

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ATTORNEY GENERAL OPINION NO. 81-121

Lilian E. Welker
City Clerk
Alton, Kansas 67623

Re: Cities and Municipalities -- Public Utilities --
Termination of Water Service for Non-Payment of
Charges

Public Officers and Employees -- Tort Claims Act --
Immunity from Liability; Enforcement of Ordinance

Synopsis: A city in Kansas may use its home rule power to enact an ordinance which provides for the termination of water service as a consequence of nonpayment of charges previously incurred for such service. However, when a municipality is the sole source of water service, this service becomes a constitutionally protected entitlement, and the termination of such service must be accompanied by due process procedures. Additionally, under the provisions of the Tort Claims Act, K.S.A. 1980 Supp. 75-6101, et seq., the city and any employees acting within the scope of their employment are not liable for damages which may occur as a result of the enforcement of such an ordinance. Cited herein: K.S.A. 1980 Supp. 75-6104, Kan. Const., Art. 12, §5.

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Dear Ms. Welker:

As City Clerk for Alton, Kansas, you have requested our opinion concerning a problem relating to the city's municipal water

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system. Specifically, you wish to know whether Alton may legally terminate water service to customers for non-payment of water bills. You also wish to know whether the city would be liable for any damages (in this case, to a customer's poultry) which might result from such termination.

The power of a city to terminate services for utility users who become delinquent in their bills is generally recognized. 64 Am.Jur.2d Public Utilities, §62, 12 McQuillin, Municipal Corporations, §35.35d, 3rd ed. (1971). These general authorities approve of the exercise of such power by a city pursuant to state statute, and it has been held by courts in Kansas that a city may adopt ordinances which so provide. Cooper v. City of Goodman, 80 Kan. 121 (1909); City of Lawrence v. Robb, 175 Kan. 495 (1954).

At the present time, however, the existence of an enabling statute is unnecessary, due to Article 12, Section 5 of the Kansas Constitution, which is popularly known as the city home rule amendment. A city's home rule power, which by the terms of this constitutional provision is to be construed liberally, enables a city to determine its local affairs and to enact ordinances even when not specifically empowered to do so by state statute. Clafin v. Walsh, 212 Kan. 1 (1973). This power is restricted only in certain prescribed cases, i.e., when the legislature has enacted a law uniformly applicable to all cities which regulates the subject a [City of Junction City v. Griffin, 227 Kan. 332 (1980)] or which expressly pre-empts the field. [Uhl v. City of Ness City, 590 F.2d 839 (10th Cir. 1979).] Insofar as the legislature has not addressed the question before us, there is no uniformly applicable legislation, leaving the city of Alton free to act.

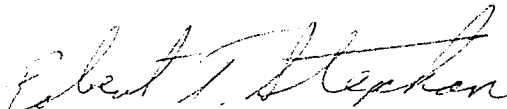
However, it is clear that, pursuant to any such ordinance notice and hearing procedures must be established and followed, since the termination of a municipally-provided service of this type becomes, in the absence of any private water source, the removal of an entitlement which is constitutionally protected. Donnelly v. City of Eureka, 399 F. Supp. 64 (D.Kan. 1975). This office has previously advised cities that such due process guarantees are afforded if a notice of the delinquency is provided to the customer, together with the information that: (1) he may request a hearing within a fixed number of days with the city council or an officer designated by it, and (2) failure to do so may result in the termination of water service. Such a result was reached in a recent opinion of this office, No. 81-100, and we see no reason why the same result would not apply here.

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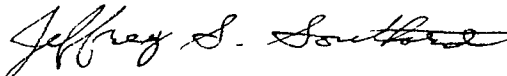
Furthermore, due to the enactment of the Tort Claims Act by the Kansas Legislature in 1979, any potential liability problems which might arise from the enforcement of such an ordinance would appear to have been met. While K.S.A. 1980 Supp. 75-6103(a) renders governmental entities liable for the negligent or wrongful acts of their employees, the succeeding statute contains an exception which would seem to apply here. Specifically, K.S.A. 1980 Supp. 75-6104(c) creates immunity for a governmental entity or an employee acting within the scope of his or her employment for damages resulting from the enforcement of any statute, regulation, ordinance or resolution. As any damages which might result from the termination of water service (following due process) would be covered by this exemption, the potential for liability would be limited to the more remote situations involving wanton, willful or reckless conduct.

In conclusion, a city in Kansas may use its home rule power to enact an ordinance which provides for the termination of water service as a consequence of nonpayment of charges previously incurred for such service. However, when a municipality is the sole source of water service, this service becomes a constitutionally protected entitlement, and the termination of such service must be accompanied by due process procedures. Additionally, under the provisions of the Tort Claims Act, the city and any employees acting within the scope of their employment are not liable for damages which may occur as a result of the enforcement of such an ordinance.

Very truly yours,



ROBERT T. STEPHAN
Attorney General Of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle:jm