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ATTORNEY GENERAL OPINION NO. 83- 137

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Re: Automobiles and Other Vehicles -- Uniform Act
 Regulating Traffic; Parties, Arrests, Citations,
 Procedures and Penalties -- Appearance Bonds

 Cities and Municipalities -- Municipal Courts;
 Appearance and Conditions of Release -- Appearance
 Bonds

 Kansas Constitution -- Corporations -- Municipal
 Home Rule Powers; Appearance Bonds

Synopsis: K.S.A. 8-2107 (as amended by L. 1983, ch. 42, §1)
 authorizes a law enforcement officer to obtain a
 valid Kansas driver's license as security for a
 person's written promise to appear in court at
 the appointed time. However, said statute applies
 only where a law enforcement officer has "halted"
 such person for the violation of a state traffic
 law, and it has no application to violations of
 city traffic ordinances. Although a similar pro-
 cedure is provided by the Kansas Code or Procedure
 for Municipal Courts, it has application only in
 those instances where a law enforcement officer
 has arrested a person for a violation of a city
 traffic ordinance.

A city may by charter ordinance exempt itself from
these provisions of the Municipal Code and provide
a procedure different from the statutorily-prescribed
procedure for obtaining appearance bonds from per-
sons accused of violating traffic ordinances.

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However, the scope of the new procedure contemplated by any such charter ordinance is limited to the extent that the charter ordinance cannot confer upon the city the power to issue, suspend, revoke, restrict or otherwise affect the use of driver's licenses, since such powers vest exclusively in the state and are not within cities' home rule powers to determine their local affairs and government. A city is limited to this same extent with respect to legislative action by the city that would permit a defendant in municipal court to post a driver's license as bond pending the payment of a fine. Cited herein: K.S.A. 8-234a, 8-235, 8-254 (as amended by L. 1983, ch. 34, §2), 8-271, 8-1212, 8-1218, 8-1219, 8-1222, 8-1567 (as amended by L. 1983, ch. 37, §2), 8-2101, 8-2107 (as amended by L. 1983, ch. 42, §1), 8-2110, 8-2111, 12-4211, 12-4212, 12-4213, 12-4301, Kan. Const., Art. 12, §5.

* * *

Dear Mr. Taylor:

You have posed several questions regarding the posting of a driver's license as bond to secure a person's appearance in municipal court for the violation of a municipal ordinance.

First, you inquire whether K.S.A. 8-2107 (as amended by L. 1983, ch. 42, §1) is applicable to traffic offenses established by municipal ordinance. That statute authorizes a law enforcement officer who has halted a driver for a violation of any of the offenses listed in subsection (e) to obtain security for the driver's written promise to appear. However, by virtue of K.S.A. 8-2111, the provisions of K.S.A. 8-2107 (as amended) have application only to violations of state law. K.S.A. 8-2111 provides as follows:

"The foregoing provisions of this article shall govern all police officers in making arrests without a warrant for violations of any provisions of article 15, 16, 17, 18 or 19 of chapter i of Kansas Statutes Annotated, and amendments thereto, but the procedure prescribed herein shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade. Notwithstanding the other provisions of this section, a police officer may arrest for a misdemeanor under K.S.A. 22-2401 on the basis that evidence will be irretrievably lost or that the person may cause self-injury or injury to others or damage to property."

By this statute, the legislature has limited the application of the procedures set forth in K.S.A. 8-2101 to 8-2110, inclusive, to "violations of any provisions of article 15, 16, 17, 18 or 19 of chapter 8 of Kansas Statutes Annotated, and amendments thereto," i.e., they have been limited to violations of state law. Thus, K.S.A. 8-2107 (as amended) has application only where a law enforcement officer halts a person for violating state law. In further support of this conclusion we also note that, while subsection (e) of this statute lists various offenses and sets forth the amount of the appearance bond for each such offense, subsection (f) thereof states as follows:

"In the event of forfeiture of any of the bonds set forth in this section, then \$19 of said forfeited bond shall be regarded as court costs in any court having jurisdiction over said violation of state law." (Emphasis added.)

You have noted that K.S.A. 8-2107 (as amended) authorizes a person halted by a law enforcement officer to deposit with the officer a valid Kansas driver's license, in addition to such person's written promise to appear, as security for such person's appearance in court at the appointed time. Anticipating our response that K.S.A. 8-2107 (as amended) is not applicable to violations of municipal ordinances, you also have inquired whether bonding provisions, including the option to deposit a valid Kansas driver's license in lieu of bond, could be enacted by charter ordinance.

In response, it should be noted initially that our conclusion as to the applicability of K.S.A. 8-2107 (as amended) should not be construed as suggesting the absence of statutory provisions regarding appearance bonds for alleged violations of municipal ordinances. Under the Kansas Code of Procedure for Municipal Courts, there are provisions specifically permitting such appearance bonds. In particular, K.S.A. 12-4301 provides, in pertinent part, as follows:

"A person having the right to post bond for appearance shall, in order to do so, execute in writing a promise to appear at the municipal court at a stated time and place." (Emphasis added.)

This statute then provides that the bond "shall be in an amount as determined by the municipal judge, and may be secured" in one of the ways listed in the statute. Three of the four methods listed are of general application to all alleged violations of city ordinances, but the fourth method

has application only where a person is arrested for violation of an ordinance relating to the operation of a motor vehicle. This method is detailed in subsection (d) of the statute, which provides, in pertinent part:

"(d) In lieu of giving security in the manner provided by subsections (a), (b) and (c) above, if the arrest is for the violation of a city ordinance relating to the operation of a motor vehicle the accused person may deposit with the arresting law enforcement officer or the clerk of the municipal court a valid license to operate a motor vehicle in the state of Kansas in exchange for a receipt therefor issued by the law enforcement officer or the clerk of the municipal court, the form of which shall be approved by the division of vehicles of the state department of revenue." (Emphasis added.)

Thus, under the Code, a person having the right to post bond for appearance for an alleged violation of a traffic ordinance may deposit a valid Kansas driver's license in lieu of giving monetary security. However, the question arises as to which persons have "the right to post bond" for their appearance in the municipal court. The response is provided by K.S.A. 12-4213, which states in part:

"Any person arrested by a law enforcement officer shall be taken immediately by said law enforcement officer to the police station of the city or the office in said city designated by the municipal judge. At that time, such person shall have the right to post bond for his or her appearance, in accordance with K.S.A. 12-4301 and 12-4302. . . . Any person who does not make bond for his or her appearance shall be placed in the city or county jail, to remain there until he or she makes bond for his or her appearance, or appears before the municipal court at the earliest practical time: Provided, however, Any such person who has not made bond and who has not appeared before the municipal court within twelve (12) hours after being arrested shall be released on his or her personal recognizance to appear at a later date." (Emphasis added.)

It is clear from the foregoing statutory provisions, particularly the emphasized language thereof, that the right to post bond for a person's appearance in municipal court occurs after such person has been arrested and taken by the arresting

officer to the police station or appropriate city office. Consistent with this requirement are the provisions of K.S.A. 12-4211. In part, that statute sets the circumstances when a law enforcement officer may "detain" a person, and it then provides, as follows:

"A law enforcement officer having detained a person pursuant to the preceding paragraph, except subsection (a) or (b) thereof, may release the person or may prepare and serve upon such person a complaint and notice to appear, as provided by K.S.A. 12-4204 or 12-4205 and shall then release such accused person from such detention, except in such instances where the law enforcement officer has power and authority to arrest such accused person as hereinafter set forth." (Emphasis added.)

In addition, the succeeding section of the Code, K.S.A. 12-4212, provides law enforcement officers with the power to arrest, persons for violations of municipal ordinances. The following portion of that statute is pertinent here:

"A law enforcement officer may arrest a person when:

. . . .

"(c) the law enforcement officer, having no warrant, detained such person pursuant to subsection (c) or (d) of K.S.A. 12-4211 and (1) such person refuses to give a written promise to appear in court when served with a notice to appear, or (2) such person is unable to identify himself or herself to the reasonable satisfaction of the law enforcement officer, or (3) such person is not a resident of the state of Kansas or (4) the law enforcement officer has probable cause to believe that such person may cause injury to himself, herself or others or may damage property unless immediately arrested." (Emphasis added.)

When considered in concert, the above-quoted provisions of K.S.A. 12-4211 and 12-4212 augment the requirements of K.S.A. 12-4213, which effectively limits the necessity for an appearance bond except in those instances where a person is arrested.

Therefore, it is apparent that cities have available to them a procedure for obtaining from a person accused of violating

a city ordinance a valid Kansas driver's license, as a means for securing such person's subsequent appearance in municipal court. The only significant difference between this procedure and the comparable procedure prescribed by K.S.A. 8-2107 (as amended) is that a person alleged to have violated a city's traffic ordinance cannot be required to post any type of security for such person's appearance, including the deposit of a Kansas driver's license, until such person has been arrested, while an alleged violator of the state's traffic laws may deposit a Kansas driver's license or other security in conjunction with the issuance of a notice to appear and without the necessity of an arrest.

Accordingly, we would assume that your inquiry regarding the adoption of a charter ordinance providing bonding provisions would be to eliminate this difference. As you are probably aware, the Kansas Code of Procedure for Municipal Courts is nonuniform in its application to cities, and a city may exempt itself from the whole or any part of the Code. City of Junction City v. Griffin, 227 Kan. 332, 337 (1980). Of course, a city's home rule powers, including the power to adopt charter ordinances, are provided by Article 12, Section 5 of the Kansas Constitution. Under these powers, a city not only may exempt itself by charter ordinance from legislative enactments which do not apply uniformly to all cities, but a charter ordinance also "may provide substitute and additional provisions on the same subject." Kan. Const., Art. 12, §5(c)(2). However, any legislative action of a city that is not dependent on a grant of statutory authority must remain within the parameters of the home rule amendment, which empowers cities "to determine their local affairs and government." Thus, a charter ordinance which exempts a city from all or a portion of the Code and also adopts "substitute and additional provisions" regarding appearance bonds must be consistent with this constitutional grant of authority.

We note this in light of your apparent interest in providing a procedure similar to that prescribed in K.S.A. 8-2107 (as amended, whereby a law enforcement officer may "halt" a person for violating a city's traffic ordinance and, in addition to the person's written promise to appear, may obtain the person's Kansas driver's license as security for such person's appearance. As a result, the question arises whether a city's power to determine its "local affairs and government" carries with it the authority to legislate regarding driver's licenses.

A response to that question requires a consideration of the Motor Vehicle Driver's License Act (K.S.A. 8-234a to 8-271). A review of these statutes clearly indicates that the licensing of persons to operate vehicles on the streets and highways of this state is an administrative function of the state. The following provisions of K.S.A. 8-235 are relevant to this conclusion:

"(b) Any person licensed under the motor vehicle driver's [sic] license act may exercise the privilege thereby granted upon all streets and highways in this state and shall not be required to obtain any other license to exercise such privilege by any local authority. Nothing herein shall prevent cities from requiring licenses of persons who drive taxicabs or municipally franchised transit systems for hire upon city streets, to protect the public from drivers whose character or habits make them unfit to transport the public"

In our opinion, the foregoing provisions effect a preemption of the field of driver licensing by the state. In reaching this conclusion, we are mindful of the following statement of the Kansas Supreme Court in Griffin, supra:

"The court has consistently rejected the doctrine of implied preemption of a particular field. Legislative intent to reserve exclusive jurisdiction to regulate in an area must be clearly manifested by State law. City of Lyons v. Suttle, 209 Kan. 735, 738, 498 P.2d 9 (1972); City of Junction City v. Lee, 216 Kan. 495, 503, 532 P.2d 1292 (1975); Garten Enterprises, Inc. v. City of Kansas City, 219 Kan. 620, Syl. ¶3, 549 P.2d 864 (1976)." 227 Kan. at 336.

In our judgment, these requirements have been satisfied by the previously-quoted provisions of K.S.A. 8-235. We believe these provisions clearly manifest a legislative intent to reserve to the state the exclusive jurisdiction to regulate and control the area of driver licensing. However, irrespective of whether such provisions have preempted municipal action in this area, it is clear that the licensing of persons to operate motor vehicles is a state function, and it is our opinion that it is impermissible for a city to adopt an ordinance which would place such city in the posture of regulating the licensing of drivers. In our judgment, such an ordinance is not a matter of local concern and exceeds the cities' constitutional powers to "determine their local affairs and government." In reaching this conclusion, we are cognizant of the following statement of the Court in City of Junction City v. Griffin, supra, where it is considering the contention that a Junction City ordinance prohibiting solicitation of prostitution was

"a matter of statewide concern and should not be left to determination by local government. We are inclined to agree, but the language

of the constitutional amendment, which empowers cities to determine their 'local affairs and government,' was never intended as a limitation on the power, so as to restrict it to matters of strictly local concern. Barkley Clark, Associate Dean and Professor of Law at the University of Kansas published a comprehensive article State Control of Local Government in Kansas: Special Legislation and Home Rule, 20 Kan.L.Rev. 631, 669 (1972). He points out:

"'Nearly all matters dealt with by ordinance are of concurrent interest to both city and state; limiting home rule power to "purely" local matters as the courts in autonomy-type states have sometimes been compelled to do would totally emasculate article 12, section 5. . . .'" 227 Kan. at 337.

We find no occasion to dispute these statements, and we agree that the home rule amendment does not restrict cities to legislating on matters of "strictly" local concern. We recognize there are instances where a matter that is of state concern may also be of local concern and, under proper circumstances may be the subject of both state and municipal legislation. However, as regards the licensing of persons to operate vehicles throughout this state, we find no basis for concluding that this is a matter of local concern.

In the law review article excerpted in the above-quoted statement in the Griffin case, Professor Clark, who is considered one of the foremost authorities on cities' home rule powers, recognizes in the following statement that a city's power to act in a given area should be measured by a consideration of whether the contemplated action is a local matter:

"Although the home rule provision should not be so literally construed as to prevent cities from acting in matters that are of concern both to the state and to local governments, there would seem to be room in the test of article 12, section 5 to invoke the phrase 'local affairs' as a limitation on municipal power even when there is no state statute in 'conflict' with the ordinance." Clark, State Control of Local Government in Kansas: Special Legislation and Home Rule, 20 Kan.L.Rev. 631, 666 (1972).

In the above-quoted article, the author also suggests that the "textual limitation" as to a city's authority to legislate regarding "local affairs and government" should be

invoked by the courts "only in those cases in which no conflicting statute exists but in which it seems clear that the matter is not subject to local variations and thus requires statewide uniformity." Id. at 669. Even where a city ordinance does not conflict with a state statute, but merely duplicates or runs parallel to the statute, Professor Clark contends that "the court should approach it with a presumption of validity unless (1) the statute expressly states that its purpose is to preempt the field, or (2) local enforcement of the ordinance would substantially interfere with state enforcement of the statute." Id.

Professor Clark, a strong proponent of home rule for cities, urges careful attention to the constitutional mandate that the home rule amendment "be liberally construed for the purpose of giving to cities the largest measure of self-government." Id. Yet, he recognizes that, even though an ordinance may not have been expressly preempted by legislative enactment or does not "conflict" with a state statute, there are instances where such an ordinance cannot be regarded as a "local affair" of the city, viz., where the matter requires statewide uniformity or where local enforcement of the ordinance would substantially interfere with state enforcement of the statute. Id. at 669, 671.

Applying the foregoing to the question at hand, we believe the adverse "extraterritorial impact" of a municipal endeavor in this field far outweighs any local concern to be satisfied by such efforts. We think it scarcely can be contended that the administration, control and enforcement of driver licensing laws do not demand statewide uniformity, or that the unfettered ability of cities to suspend, revoke, restrict or otherwise affect the use of drivers' licenses issued by this or another state would not interfere with the state's enforcement of these laws. Here, we also note that the legislature has enacted into law a driver license compact, providing for reciprocal enforcement of our driver licensing laws and those of the other states which have enacted the compact. (See K.S.A. 8-1212 to 8-1218, inclusive.) Further, as recently as 1982 (L. 1982, ch. 46), the legislature provided for the state's entry into the Nonresident Violator Compact (K.S.A. 8-1219 to 8-1222, inclusive), specifically designed to make uniform among the party jurisdictions the requirements regarding the security for a traffic violator's appearance in court. These compacts further enhance or conclusion as to the need for uniformity in the enforcement of our driver licensing laws.

Although we cannot advise you in a vacuum as to the validity of a charter ordinance dealing with appearance bonds for traffic violators, we do express the opinion that any such

charter ordinance must avoid conferring authority on the city to issue, suspend, revoke, restrict or otherwise affect the use of drivers' licenses. In our judgment, such authority vests exclusively in the state. We express this opinion in full recognition of the fact that cities presently exercise some or all of such authority with respect to particular traffic violations. However, the cities exercise such authority pursuant to specific grants of legislative authority. (See, e.g., K.S.A. 8-254, as amended by L. 1983, ch. 34, §2; K.S.A. 8-1567, as amended by L. 1983, ch. 37, §2; K.S.A. 12-4301.) Such delegation of authority is within the province of the legislature, but it is our opinion that, absent such specific grants of statutory authority, cities cannot impinge upon the state's authority to control and regulate drivers' licenses. Cities cannot, pursuant to their own legislative action, exercise such authority.

A similar response is required for your final question as to whether "a defendant can be permitted to post a driver's license as bond pending payment of a fine." We are aware of no statute authorizing such action, and as regards a city's ability to exercise its home rule powers to provide such procedure, we cannot express a definitive conclusion in the absence of a specific proposal. However, we believe the city's authority in this regard is limited to the same extent previously indicated regarding the use of drivers' licenses as security for an alleged violator's appearance in municipal court.

In summary, therefore, it is our opinion that K.S.A. 8-2107 (as amended by L. 1983, ch. 42, §1) authorizes a law enforcement officer to obtain a valid Kansas driver's license as security for a person's written promise to appear in court at the appointed time. However, said statute applies only where a law enforcement officer has "halted" such person for the violation of a state traffic law, and it has no application to violations of city traffic ordinances. Although a similar procedure is provided by the Kansas Code of Procedure for Municipal Courts, it has application only in those instances where a law enforcement officer has arrested a person for a violation of a city traffic ordinance.

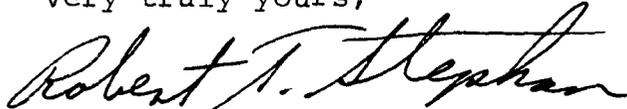
It is our further opinion that a city may by charter ordinance exempt itself from these provisions of the Municipal Code and provide a procedure different from the statutorily-prescribed procedure for obtaining appearance bonds from persons accused of violating traffic ordinances. However, the scope of the new procedure contemplated by any such charter ordinance is limited to the extent that the charter ordinance cannot confer upon the city the power to issue, suspend, revoke, restrict or otherwise affect the use of

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drivers' licenses, since such powers vest exclusively in the state and are not within cities' home rule powers to determine their local affairs and government.

Finally, it also is our opinion that a city is limited to this same extent with respect to legislative action by the city that would permit a defendant in municipal court to post a driver's license as bond pending the payment of a fine.

Very truly yours,



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RTS:BJS:hle