



overruled
Blevins
v Hebert
247 Kan 1 (90)

STATE OF KANSAS

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July 31, 1985

ATTORNEY GENERAL OPINION NO. 85- 90

Norman E. Gaar
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Overland Park, Kansas 66210

Re: Counties and County Officers -- General Provisions
-- Home Rule

Roads and Bridges -- County and Township Roads --
Arterial Highways; Financing

Synopsis: The construction of a system of "bypass highways" is a valid exercise of Douglas County's power of local legislation or "home rule" as provided by K.S.A. 19-101 and K.S.A. 1984 Supp. 19-101a, as amended. The home rule resolution may authorize the necessary financing of the project, in part, through issuance of general obligation bonds of the county, as long as the issuance is subject to acts of the legislature prescribing a county's limit of indebtedness. K.S.A. 68-580 et seq., which allows for the designation of "primary arterial highways" by a board of county commissioners, does not specifically address the proposed "bypass" but does provide procedures whereby the bypass project could be accomplished. However, K.S.A. 68-580 et seq., does not prescribe the exclusive method for accomplishing such a project, and the existence of this alternative does not limit the county's authority under the home rule statutes. If the board of county commissioners decides to use home rule authority, the authorizing resolution may be enacted as an ordinary, rather than a charter, resolution. Cited herein: K.S.A. 1984 Supp.

10-306, as amended by L. 1985, ch. 62; K.S.A. 19-101; K.S.A. 1984 Supp. 19-101a, as amended by L. 1985, ch. 95; K.S.A. 19-101c; 68-580; 68-581; K.S.A. 1984 Supp. 68-584; L. 1981, ch. 173, §74.

* * *

Dear Mr. Gaar:

On behalf of the Board of County Commissioners of Douglas County, you have requested our opinion concerning the county's use of its statutory home rule power provided in K.S.A. 19-101 and K.S.A. 1984 Supp. 19-101a, as amended by L. 1985, ch. 95.

You report that the county commission has determined that it is in the public interest to construct a system of bypass highways around the City of Lawrence. The proposed bypass system would be funded through a combination of available federal and state highway funds, funds from other local units of government and the issuance of general obligation bonds of the county. The county wishes to utilize its statutory home rule authority to accomplish the bypass project. The proposed local legislation, in the form of a resolution enacted pursuant to K.S.A. 1984 Supp. 19-101a, as amended, would authorize the necessary steps for construction of the bypass system and would authorize the financing of the project as discussed above. The Douglas County general obligation bonds necessary to finance part of the project would be issued without an election but would not exceed the county's statutory aggregate debt limitations. (See K.S.A. 1984 Supp. 10-306, as amended by L. 1985, ch. 62.)

K.S.A. 19-101 provides that each Kansas county shall be a body corporate and politic, empowered to:

" . . . fourth, to make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate or administrative powers; fifth, to exercise the powers of home rule to determine their local affairs and government authorized under the provisions of K.S.A. 19-101a"

K.S.A. 1984 Supp. 19-101a, as amended, provides in part:

"(a) The board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate, subject only to the following limitations, restrictions, or prohibitions: (1) counties shall be subject to all acts of the legislature which apply uniformly to all counties;

"(b) Counties shall apply the powers of local legislation granted in subsection (a) of this section by resolution of the board of county commissioners. If no statutory authority exists for such local legislation other than that set forth in subsection (a) of this section and the local legislation proposed under the authority of such subsection is not contrary to any act of the legislature, such local legislation shall become effective upon passage of a resolution of the board and publication in the official county newspaper. If the legislation proposed by the board under authority of subsection (a) of this section is contrary to an act of the legislature which is applicable to the particular county but not uniformly applicable to all counties; such legislation shall become effective by passage of a charter resolution in the manner provided in K.S.A. 19-101b."
(Emphasis added.)

Moreover, K.S.A. 19-101c provides that the home rule powers granted counties are to be liberally construed "for the purpose of giving to the counties the largest measure of self government."

In determining the extent of county home rule authority, the threshold question is always whether the subject of the proposed exercise of power is "county business" and an appropriate matter for "local legislation." If this question is answered in the affirmative, then consideration must be given to whether the proposed exercise of home rule authority

is precluded by one of the enumerated limitations found in K.S.A. 1984 Supp. 19-101a, as amended. In our opinion, the bypass highway proposal is clearly "county business" and thus, is an appropriate subject for "local legislation." As you note in your letter, a number of circumstances peculiar to the City of Lawrence and Douglas County dictate the need for the bypass highways. These are clearly local factors which the board of county commissioners may properly consider in enacting local legislation. Further, it does not appear that the bypass highways will have such significant extra-local impact as to remove them from the realm of "county business."

Another limitation of county home rule power which may be relevant here is the provision of K.S.A. 1984 Supp. 19-101a(1) which provides that "[c]ounties shall be subject to all acts of the legislature which apply uniformly to all counties." Thus, counties may not pass any legislation which is contrary to or in conflict with any act of the state legislature that is of uniform application to all counties throughout the state. See Missouri Pacific Railroad v. Board of Greeley County Commr's, 231 Kan. 225, 227 (1982).

It does not appear that any enactment of the state legislature, uniformly applicable or not, specifically authorizes a "bypass" system of highways as proposed in Douglas County. K.S.A. 68-580 et seq., however, permits a board of county commissioners to designate all or any portion of an existing or proposed new county road or highway as a "primary arterial highway." Once this designation is accomplished, K.S.A. 68-581 provides that a board of county commissioners may use any available public funds for construction, reconstruction, maintenance, or repair of the primary arterial highway. The board may also issue general obligation bonds as provided in K.S.A. 1984 Supp. 68-584. The latter section provides that bonds issued pursuant to its terms shall not issue until the question of issuance is submitted to and approved by the electors of the county. Presumably, Douglas County could use these statutory procedures to finance and construct the proposed bypass highways. We find no indication in these statutes, however, that the legislature intended them to provide the exclusive method of accomplishing a project like that proposed in Douglas County. Under K.S.A. 68-581, the designation of a highway or proposed highway as a "primary arterial highway" is discretionary with the board of county commissioners. In short, we find no indication in the statutory language that such a designation is the only method available to the county to construct a "bypass" system as proposed in Douglas County.

In one of the few Kansas cases concerning county home rule, the Supreme Court held:

"The legislature may reserve exclusive jurisdiction to regulate in a particular area when an intent is clearly manifested by state law to pre-empt a particular field by uniform laws made applicable throughout the state. (Citations omitted.) The rule denying power to a local body when the state has pre-empted the field is a rule of necessity based upon the need to prevent dual regulation which would result in uncertainty and confusion; and whether the state has pre-empted the field to the exclusion of local legislation depends not only on the language of the statutes, but upon the purpose and scope of the legislative scheme." (Citations omitted; Emphasis added.) Missouri Pacific Railroad v. Board of Greeley County Comm'rs., 231 Kan. 225, 227-228 (1982).

In addition, the court noted that:

"The primary method of determining whether an ordinance or resolution of a county is inconsistent with a statute of the state is to see whether the local law prohibits what the state law permits or the state law prohibits what the local law permits." 231 Kan. at 227.

As noted earlier, K.S.A. 68-580 et seq., provides the county with procedures which could be utilized in this case. There is no language in those statutes, however, to indicate that this is an area in which the legislature intended to reserve exclusive jurisdiction. In our opinion, K.S.A. 65-580 et seq., does not establish an exclusive method of accomplishing projects like that proposed in Douglas County. It exists as an alternative which could presumably be utilized in this case but does not, in our opinion, provide anything other than an alternative method of accomplishing the project which the county may consider. It is our opinion, therefore, that the existence of this statutory alternative does not limit or restrict the authority of the county under K.S.A. 19-101 and K.S.A. 1984 Supp. 19-101a, as amended.

Accordingly, the county may use its statutory home rule power to finance and construct a system of bypass highways around the city of Lawrence. In such a case, the authority for the county's acts may be derived from K.S.A. 1984 Supp. 19-101a, as amended. It is not necessary for the county to exempt from or adopt the provisions of K.S.A. 68-580 et seq., as it does not appear that those statutes provide the exclusive method for county action in this case. Therefore, it is not necessary to further consider the uniform application of K.S.A. 68-580 et seq., although we do note that K.S.A. 1984 Supp. 68-584, which authorizes and prescribes the procedures for the issuance of bonds was last amended by L. 1981, ch. 173. that enactment, which amended a number of unrelated statutes, contains provisions which are not uniformly applicable to all counties. See L. 1981, ch. 173, §74.


It is therefore our opinion that the board of county commissioners may, if they deem it appropriate, exercise home rule power to adopt an ordinary resolution providing the necessary authority for the bypass project. As long as the county is not exempting from or adapting the provisions of any state statute on the subject or acting contrary to such a statute, it may accomplish its purpose through an ordinary rather than a charter resolution. K.S.A. 1984 Supp. 19-101a(b), as amended.


Finally, we note that any county use of home rule authority must respect the limitations upon the exercise of county legislative power which are set forth in K.S.A. 1984 Supp. 19-101a(a), as amended. Those limitations provide that "counties shall be subject to acts of the legislature prescribing limits of indebtedness." K.S.A. 1984 Supp. 19-101a(a)(4). While we have concluded in previous opinions that a county may exempt itself by charter resolution from particular issue limitations found in non-uniformly applicable statutes, a county may not utilize a home rule charter resolution to exempt from the aggregate debt limitations applicable to the county [K.S.A. 1984 Supp. 10-306, as amended].

We thus conclude that the construction of a system of "bypass highways" is a valid exercise of Douglas County's power of local legislation or "home rule" as provided by K.S.A. 19-101 and K.S.A. 1984 Supp. 19-101a, as amended. The home rule resolution may authorize the necessary financing of the project, in part, through issuance of general obligation bonds of the county as long as the issuance is subject to acts of

the legislature prescribing a county's limit of indebtedness. K.S.A. 68-580 et seq., which allows for the designation of "primary arterial highways" by a board of county commissioners, does not specifically address the proposed "bypass" but does provide procedures whereby the bypass project could be accomplished. K.S.A. 68-580 et seq., does not prescribe the exclusive method for accomplishing such a project, and the existence of this alternative does not limit the county's authority under the home rule statutes. If the board of county commissioners decides to use home rule authority, the authorizing resolution may be enacted as an ordinary, rather than a charter, resolution.

Very truly yours,


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