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ATTORNEY GENERAL OPINION NO. 88- 46

Mr. Norman E. Gaar
Burke, Williams, Sorensen & Gaar
Lighton Plaza
7300 College Boulevard, Suite 220
Overland Park, Kansas 66210

Re: Cities and Municipalities--Local Residential
Housing--Mortgage Credit Certificate Program

Synopsis: The local residential housing act, K.S.A. 12-5219 et seq., does not through its provisions authorize participation in a mortgage credit certificate program as established by section 25 of the Internal Revenue Code of 1986, as amended. Neither does the local residential housing act preclude participation in a mortgage credit program. Kansas cities may, therefore, by the exercise of their constitutional powers of home rule as provided in Article 12, Section 5 of the Kansas Constitution, join in a mortgage credit program of the type organized by Geary County and Riley County. Cited herein: K.S.A. 1987 Supp. 12-5219 to 12-5235; Kan. Const., Art. 12, Sec. 5.

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Dear Mr. Gaar:

As special counsel to Geary county and Riley county you have requested an opinion from this office regarding the authority of Kansas cities and counties to issue "mortgage credit certificates" as defined in the federal qualified

mortgage certificate program authorized by section 25 of the Internal Revenue Code of 1986, as amended. The questions you raise are: (1) Whether Kansas cities and counties can use K.S.A. 1987 Supp. 12-5231 or any other authority to cooperate in putting together a program area across the state for a qualified mortgage certificate program as authorized by the code; and (2) assuming compliance with the Internal Revenue Code and supporting federal income tax regulations, can Geary county and Riley county issue "mortgage credit certificates" under existing Kansas law?

The statute you cite as a mechanism for allowing Kansas cities and counties to cooperate in a mortgage certificate program (the program) is a part of the local residential housing act (the act), K.S.A. 12-5219 et seq. K.S.A. 1987 Supp. 12-5231, the interlocal cooperation provision, allows for a joint exercise of the powers granted by the act. In order to utilize this provision, it is first necessary to determine if the act in its entirety provides authorization for the implementation of a mortgage credit certificate program. Such a program would provide for the allowance of a credit against federal income tax through the issuance of mortgage credit certificates.

K.S.A. 1987 Supp. 12-5219 sets forth the legislature's findings with respect to the scope and purposes for the act. Relevant sections provide:

"(g) [I]n order to remedy the existing shortage of residential housing within the financial means of persons and families of low and moderate income and to realize the social, economic and other benefits which will result therefrom, it is necessary and desirable for the implementation of public programs designed to provide alternative means of financing the acquisition, rehabilitation, improvement and purchase of safe, decent and sanitary housing by persons and families of low and moderate income;

"(h) it is necessary and desirable that the state's cities and counties be authorized to issue revenue bonds to provide funds necessary, in whole or in part, to reduce the costs of financing the acquisition, rehabilitation, improvement

and purchase of safe, decent and sanitary housing by persons and families of low and moderate income;

"(i) the implementation of such programs and the issuance of revenue bonds pursuant to this act are in the public interest and constitute essential governmental functions of cities and counties of the state." (Emphasis added.)

It is a fundamental tenet of statutory construction that all parts of a legislative act must be read and construed in pari materia. Matter of Guardianship and Conservatorship of Stremel, 233 Kan. 136 (1983). Where a statute is plain and unambiguous, courts must give effect to the intention of the legislature as expressed. Johnston v. Tony's Pizza Service, 232 Kan. 848 (1983). If the language of the statute is ambiguous, however, courts may properly look to extrinsic evidence for aid in construction. State v. Bagemehl, 213 Kan. 210 (1973). It is our opinion that in considering the applicable statutes in pari materia, there is sufficient ambiguity as to whether the legislature intended to provide for the authorization of financing under the provisions of the act other than through the issuance of mortgage revenue bonds. Therefore, we have looked to extrinsic evidence of the legislature's intent for aid in construction.

An examination of the legislative history evidences that the act was intended to provide only for the issuance of mortgage revenue bonds as a method of financing low cost housing programs. The act is discussed as providing authorization for cities and counties to issue mortgage revenue bonds for the purpose of providing moneys for persons of low or moderate income to acquire a home at interest rates significantly less than interest rates offered by lending institutions for conventional home loans.

In our opinion, the legislature provided only for the issuance of mortgage revenue bonds through the provisions of this act. Sections 12-5222 to 12-5225, inclusive, deal with the terms and conditions concerning the issuance of the bonds.

We now address your second question, whether, assuming compliance with the Internal Revenue Code and supporting federal income tax regulations, Geary county and Riley county may issue "mortgage credit certificates" under existing

Kansas law. Although in our opinion the act does not afford authorization for the implementation of a mortgage credit certificate program, we are not concluding that cities do not have the power and authority to participate in such a program. K.S.A. 1987 Supp. 12-5233 clearly provides that the act is not exclusive, stating in particular part:

"The powers conferred by this act are in addition to, and the limitations imposed by this act shall not affect, the powers conferred upon municipalities under the provisions of the constitution or laws of the state of Kansas. . . . Nothing in this act shall be deemed or construed to prohibit the exercise of the powers conferred upon municipalities in connection with the financing of federally assisted housing for persons of low and moderate income." (Emphasis added.)

The act acknowledges that other types of alternative finance programs may be made available. The language of the act clearly indicates that the act is not intended to provide the exclusive procedure for the provision of low cost financing, but instead prescribes through its terms one way in which a financing program may be implemented. Nothing in the act suggests that additional programs established to provide similar benefits to persons of low and moderate income would be incompatible with or in contravention of the terms of the act.

The act carefully recognizes that the powers which it confers are in addition and supplemental to those powers conferred upon municipalities under the provisions of the constitution and the laws of the state of Kansas. In our opinion, nothing in the act would preclude Kansas cities from participating in the mortgage credit program by utilizing the cities constitutional powers of home rule as provided in Article 12, Section 5 of the Kansas Constitution.

The home rule amendment provides in significant part:

"Cities are hereby empowered to determine their local affairs and government . . . by ordinance passed by the governing body . . . subject only to enactment of the legislature of statewide concern applicable uniformly to all cities, to

other enactments of the legislature applicable uniformly to all cities, to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction and to enactments of the legislature prescribing limits of indebtedness." Kan. Const., Art. 12, §5(b).

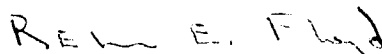
The Kansas Supreme Court has stated that the home rule amendment grants cities the power to determine their local affairs and government without legislative authorization in the form of an enabling statute. In certain circumstances, home rule powers are subject to legislative limitations, but the powers are to be liberally construed to allow cities the largest measure of self government. Claflin v. Walsh, 212 Kan. 1 (1971); City of Junction City v. Lee, 216 Kan. 495, 498 (1975). In our opinion, participation in a mortgage credit certificate program as defined in section 25 of the Internal Revenue Code is within the cities constitutional powers of home rule and is not precluded by any of the limitations stated in Article 12, §5.

We conclude, therefore, that while the local residential housing act does not provide the requisite authorization for implementation of the mortgage credit certificate program, cities, nevertheless, would be able to participate in such a program through the valid exercise of their constitutional powers of home rule as set forth in Article 12, §5 of the Kansas Constitution. Thus, Cities may join in the program established by Geary county and Riley county pursuant to home rule authority. In our judgment participation in the mortgage credit certificate program through the exercise of the cities constitutional home rule powers is not prohibited by any limitations found in the local residential housing act, K.S.A. 12-5219 et seq. or any limitations imposed by Article 12, §5 of the Kansas Constitution.

Very truly yours,



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