



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 88- 153

John M. Duma  
Associate County Counselor  
1333 Meadowlark Lane, Suite 102  
Kansas City, Kansas 66102

Re: Counties and County Officers--General  
Provisions--Home Rule; Advisory Elections

Synopsis: The question of whether the city's sale of a municipally owned utility is county business is an administrative decision to be made by the county commissioners in their exercise of the county's powers of home rule. Courts have interpreted powers of home rule as involving a great latitude of discretion. However, the county's authority to exercise its powers of home rule is subject to the limitations upon such grant of power found in K.S.A. 1987 Supp. 19-101a. Limitation number five prohibits a county from superseding or impairing a city's ability to determine its local affairs pursuant to its constitutional and statutory powers of home rule. Whether an advisory election will impair a city's ability to determine its local affairs must be determined on a case by case basis taking all of the facts and circumstances into consideration. Cited herein: K.S.A. 12-101; K.S.A. 1987 Supp. 19-101a; K.S.A. 19-101c.

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Dear Mr. Duma:

As associate county counselor for Wyandotte county you request our opinion as to whether the sale of a municipally owned utility qualifies as "county business" for purposes of holding an advisory election. You indicate that while Attorney General Opinion No. 79-44 states that advisory elections can be initiated by the county, the opinion limits the subject of advisory elections to "county business."

In Attorney General Opinion No. 79-44 we defined an advisory election as an election at which the views of a particular electorate are solicited through the balloting process with respect to a specific question where the results have no binding effect. Because the results have no binding effect, we determined that the authority to conduct an advisory election need not be dependent on express constitutional or statutory authority such as that required for a valid and binding election. However, because the holding of an advisory election necessarily involves the expenditure of public funds, the governing body must have authority to expend funds for such purposes. We concluded that the authority to expend funds for the purpose of holding an advisory election may be invoked under the county's statutory powers of home rule found in K.S.A. 1987 Supp. 19-101a, subject to the limitations found therein.

The county home rule powers found in K.S.A. 19-101 et seq. are subject to twenty-two limitations. K.S.A. 1987 Supp. 19-101a states that:

"(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." (Emphasis added.)

While not defining what county business may or may not entail, the underscored language clearly allows a wide latitude of discretion. The Kansas Supreme Court considered the powers granted counties pursuant to this act in Missouri Pacific Railroad v. Board of Greeley County Comm'rs, 231 Kan. 225 (1982). The case deals with whether a county resolution regulating railroads is beyond the county's powers of home rule by reason of state preemption of the field. However it

is relevant for our purposes for two reasons: First, it establishes conclusively that a county's powers of home rule should be liberally construed (see also K.S.A. 19-101c); and second, it compares and parallels the county's power of home rule with that of a city. 231 Kan. 225, 226.

In light of the discretion accorded counties to determine their local affairs, and that a county's powers of home rule parallel those of a city, in our judgment, the question of whether the city's sale of a municipally owned utility is county business is first an administrative decision to be made by the county commissioners in their exercise of the powers of home rule, and second is subject to the limitations exacted on that power by K.S.A. 1987 Supp. 19-101a once that determination is made. (See Attorney General Opinion No. 83-177). The only pertinent limitation to the county's home rule power that concerns a city's sale of a public utility is found in limitation number 5 that states:

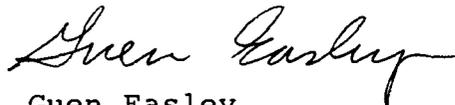
"In the exercise of powers of local legislation and administration authorized under provisions of this section, the home rule power conferred on cities to determine their local affairs and government shall not be superseded or impaired without the consent of the governing body of each city within a county which may be affected." (Emphasis added.)

If the city does not consent, given the possible political and practical ramifications of our factual circumstances, a strong argument could be made that an advisory election regarding disposition of the city's property would weaken the city's ability to determine its local affairs. However, because of the election's non-binding results, we would be hard pressed to conclude that the results of such a poll would necessarily impair the ability of the city to dispose of its property. See K.S.A. 12-101. See also Kan. Const., art. 12, §5; Kalamazoo Mun. Util. Assoc. v. Kalamazzo, 76 N.W.2d 1, 61 A.L.R.2d 583 (1956). Therefore this determination must be made on a case by case basis taking into consideration the economical, political and practical ramifications of such an advisory election under the peculiar circumstances. We do not feel that our office can make this determination with the limited facts presented.

In conclusion, it is our opinion that the question of whether the city's sale of a municipality is county business is an administrative decision to be made by the county commissioners in their exercise of the county's powers of home rule which involve a great deal of discretion. However, the county's authority to exercise its powers of home rule is subject to the limitations upon such grant of power found in K.S.A. 1987 Supp. 19-101a. See Attorney General Opinion No. 79-44. Pertinent to this question is limitation number five that prohibits a county from superseding or impairing a city's ability to determine its local affairs pursuant to its constitutional and statutory powers of home rule. Whether an advisory election will impair a city's ability to determine its local affairs must be determined on a case by case basis.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
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Assistant Attorney General

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