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June 14, 1989

ATTORNEY GENERAL OPINION NO. 89- 73

Elaine M. Esparza
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Re: Agriculture -- Weeds -- Noxious Weed Control; Control of Non-Noxious Weeds

Counties and County Officers -- General Provisions -- Home Rule Powers; Eradication of Weeds

Synopsis: Moneys in the county noxious weed fund may be used only to treat and eradicate weeds declared noxious by Kansas statute. A county may by its home rule powers appropriate county general funds for the control of weeds not listed as noxious. Cited herein: K.S.A. 2-1314a, repealed L. 1988, ch. 3, § 4; K.S.A. 19-101; 19-101a; 19-101c.

* * *

Dear Ms. Esparza:

As Harper County Attorney, you have asked our opinion regarding the effect of the repeal of K.S.A. 2-1314a. Specifically, you inquire whether a county may control and erradicate weeds not declared as noxious on private land.

The legislature repealed K.S.A. 2-1314a in 1988. See L. 1988, ch. 3, § 4. This statute gave counties authority to cooperate with landowners in the treatment and eradication of weeds which had not been declared noxious by the legislature. The 1987 Report on Kansas Legislative Interim Studies provides

insight into why K.S.A. 2-1314a was repealed. The special committee on agriculture and livestock received testimony that county noxious weed programs were competing with local chemical dealers. The committee expressed concern in the report on Proposal No. 1 that the county noxious weed programs were selling chemicals for the treatment of weeds other than those declared to be noxious by statute, thereby having a detrimental effect on the businesses of private chemical dealers. The report states:

> "The Committee recommends H.B. 2623 to repeal K.S.A. 2-1314a and make other clarifying amendments to the Noxious Weed Law so that the Law will apply only to the treatment of noxious weeds." 1987 Legislative Interim Studies Report, p. 9 (Emphasis added).

With the repeal of K.S.A. 2-1314a, county noxious weed supervisors may only expend monies in the noxious weed fund for the treatment and eradication of noxious weeds.

The question remains whether a county may appropriate moneys from its general fund to treat weeds on private lands not declared to be noxious. By statute, K.S.A. 19-101, counties have home rule powers "to determine their local affairs and government." Home rule powers are "liberally construed for the purpose of giving to counties the largest measure of self-government." Missouri Pacific Railroad v. Board of Greeley County Comm'rs, 231 Kan. 225, Syl. ¶ 2 (1982). See K.S.A. 19-101c. These powers, however, are not without limitation. A county is "subject to all acts of the legislature which apply uniformly to all counties." K.S.A. 19-101a(a)(1). The noxious weed laws are uniformly applicable to all counties. See Attorney General Opinion No. 88-106. However, there is no statute which prohibits a county from using general funds to control non-noxious weeds.

Another restriction on a county's home rule powers is that a county may not legislate in any area preempted by the state.

> "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." Missouri Pacific Railroad v. Board of Greeley County Comm'rs, 231 Kan. at 227.

The courts' rationale for this restriction on county home rule powers has been stated as follows:

> "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." Id. at 228.

The legislature has not preempted the field of non-noxious weed regulation. In the absence of state laws regarding the control of weeds not declared as noxious, a county may enact local legislation.

The remaining question is whether expending county funds to control non-noxious weeds on private lands serves a public purpose. As a general rule, a governmental entity "may authorize by ordinance the appropriation of public money for private individuals as long as the appropriation is for a public purpose and promotes the public welfare." Duckworth v. City of Kansas City, 243 Kan. 386, Syl ¶ 1 (1988). In Leavenworth Co. v. Miller, 7 Kan. *479, Syl. ¶ 13 (1871), the court stated:

> "It is the ultimate object to be obtained which must determine whether a thing is a public or a private purpose."

In Ullrich v. Board of Thomas County Comm'rs, 234 Kan. 782, 789 (1984), the Kansas Supreme Court stated:

> "It has been said that a strict formula to determine public purposes for all times cannot be formulated, since the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, and necessitates the expenditure of tax funds for purposes which were not classified as public. What is a public purpose for

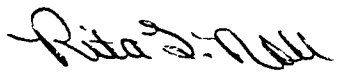
> which public funds may be expended is not a matter of exact definition, and the line of demarcation is not immutable or incapable of adjustment to changing social and economic conditions that are properly of public and governmental concern." See 63A Am.Jur.2d Public Funds § 59.

Courts presume that a legislative body acts constitutionally, and any challenger must therefore defeat the presumption by establishing that a particular legislative action is not rationally related to a legitimate purpose. "As long as a governmental action is defined to fulfill a public purpose, the wisdom of the governmental action generally is not subject to review by the courts." Duckworth v. City of Kansas City, 243 Kan. at 389.

In summary, a county weed supervisor may use moneys in the noxious weed fund only to treat and eradicate weeds declared by Kansas statute as noxious. The board of county commissioners may use its county home rule powers to pass a resolution appropriating county funds for the control of non-noxious weeds. Such local legislation is not contrary to an act of the legislature and does not invade an area preempted by the state. Given the presumption that a legislative body acts constitutionally, and that the object of the appropriation would be to benefit the county, we believe such a resolution meets the public purpose test.

Very truly yours,

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



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