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ATTORNEY GENERAL OPINION NO. 89- 139

Mr. Michael K. Schmitt  
Horton City Attorney  
P.O. Box 240  
117 South Sixth Street  
Hiawatha, Kansas 66434-0240

Re: Cities and Municipalities--Buildings, Structures  
and Grounds; Public Building Commission--Authorized  
Constitution of the State of Kansas--Corporations--  
Cities' Powers of Home Rule

Synopsis: K.S.A. 1988 Supp. 12-1758, as amended by L. 1989,  
ch. 62, § 2, K.S.A. 12-1759 (as amended) and K.S.A.  
12-1763 (as amended) are part of an enactment (L.  
1989, ch. 62) which is not uniformly applicable to  
all cities. Accordingly, a city may by charter  
ordinance exempt itself from the provisions of  
those statutes and adopt substitute and additional  
provisions on the same subject, in accordance with  
article 12, section 5 of the Kansas Constitution.  
However, substitute and additional provisions in  
charter ordinance no. 10 of the city of Horton,  
which would authorize a public building commission  
to lease and operate a correctional facility for  
one thousand inmates, have a substantial impact on  
residents outside the territorial limits of the  
city of Horton. Recognizing that impact, it is  
our opinion that the substitute and additional  
provisions prescribed by charter ordinance no. 10  
of the city of Horton do not fit within the  
"local affairs and government" language of article  
12, section 5 of the Kansas Constitution and are  
outside the authority granted by that

constitutional provision. Cited herein: K.S.A. 12-1757; K.S.A. 1988 Supp. 12-1758; K.S.A. 12-1759; 12-1763; L. 1989, ch. 62, § 2; L. 1989, ch. 62, § 4; Kan. Const., Art. 12, § 5.

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Dear Mr. Schmitt:

You request our opinion as to whether the Horton Correctional Facility Commission is authorized, under K.S.A. 12-1757 et seq., as modified by charter ordinances of the city of Horton, to lease and operate a correctional facility for approximately one thousand inmates. You indicate that a substantial amount of the inmates will come from governmental agencies located outside the state of Kansas, but that it is anticipated that the state of Kansas and its political subdivisions will eventually be significant suppliers of inmates for the correctional facility.

K.S.A. 12-1757 et seq. authorize any city to create a public building commission for certain purposes prescribed therein. The city of Horton has exempted itself, by charter ordinance nos. 9 and 10, from the provisions of K.S.A. 1988 Supp. 12-1758, as amended by L. 1989, ch. 62, § 2, K.S.A. 12-1759 (as amended) and K.S.A. 12-1763 (as amended), and has adopted substitute and additional provisions relating to its public building commission. The substitute provisions authorize the Horton Correctional Facility Commission to lease and operate a prison within the city of Horton, or no more than five miles outside the territorial limits of the city of Horton. The commission is also authorized to charge service fees or inmate per diem rates to any federal, state or county governmental agency, or any municipal corporation, wherever located, within or without Brown County or the state of Kansas.

All the statutes, enumerated above, from which the city of Horton has exempted itself by charter ordinance are part of an enactment (L. 1989, ch. 62) which is not uniformly applicable to all cities by virtue of section 4 thereof. That section places use restrictions on buildings located in cities having a population of more than 50,000 which are not applicable to buildings in other cities. Accordingly, it is our opinion that a city may by charter ordinance exempt itself from the provisions of the above-referenced statutes and adopt substitute and additional provisions on the same subject, in

accordance with article 12, section 5 of the Kansas Constitution. However, it is necessary to consider whether the substitute and additional provisions set forth in charter ordinance no. 10 of the city of Horton are in harmony with the home rule powers granted by article 12, section 5.

The home rule amendment grants cities the power to determine "their local affairs and government." While the Kansas Supreme Court has adopted the position that the constitutional language was never intended to restrict city home rule power to matters of strictly local concern, City of Junction City v. Griffin, 227 Kan. 332, 337 (1980), it is clear that there are some cases where the extraterritorial impact of a home rule ordinance will result in a finding that it is outside the authority granted by article 12, section 5 of the Kansas Constitution. This conclusion was reached by Professor Barkley Clark of the University of Kansas in State Control of Local Government in Kansas: Special Legislation and Home Rule, 20 U. Kan. L. Rev. 631, 676-677 (1972). In that article, which was quoted with approval in the Griffin case, supra, Professor Clark offers the following guidance to the Kansas Supreme Court in interpreting the home rule amendment:


"[T]he court should . . . be wary of ordinances which may not 'conflict' with statutory law but which have a substantial impact on interests outside the boundaries of the municipality. After all, these interests may not be represented in city legislative deliberations, and municipal parochialism should not, in the name of home rule, be allowed to trample over adversaries unable to protect themselves." Id. at 677.

Additionally, in the above-quoted article, Professor Clark suggests that "ordinances involving . . . substantial extraterritorial impact do not fit within the 'local affairs and government' language of article 12, section 5." Id.

It seems clear that the portion of charter ordinance no. 10 which authorizes the operation of a one thousand inmate prison has a substantial extraterritorial impact on county and township residents living outside the city of Horton. Specifically, there may be a perceived compromise of their personal security from the threat of inmates escaping from the prison. Further, inmates will be transported in and out of

the city of Horton on county and local roads, and "friends" and "business associates" of convicted felons will converge on the area for visitation at the prison. Under the charter ordinance, the prison may even be established outside the city limits and in the midst of the county and township residents. For these reasons, it is our opinion that the substitute and additional provisions prescribed by charter ordinance no. 10 of the city of Horton do not fit within the "local affairs and government" language of article 12, section 5 of the Kansas Constitution, and are outside the authority granted by that constitutional provision.

Very truly yours,

  
ROBERT T. STEPHAN  
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