



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 90- 107

The Honorable Eugene P. "Gene" Amos
State Representative, 18th District
5925 Bluejacket
Shawnee, Kansas 66203

Re: Constitution of the State of Kansas -- Corporations
-- Cities' Powers of Home Rule; Regulation of
Abortion

Synopsis: Local legislation which is an exercise of police power does not involve the home rule provisions of the Constitution, but is subservient to preempting acts of the state legislature. If the local legislation is not an exercise of police power, then the measure is subject to uniform state law. In either case, the regulation may not conflict with other statutes or constitutional provisions. Cities may therefore exercise their police power by regulating the performance of abortions through ordinary ordinances since the legislature has not expressly preempted the field. Any abortion regulation is subject to Roe v. Wade and any limitations imposed by the federal and Kansas constitutions. Cited herein: Kan. Const., Art. 12, § 5; K.S.A. 21-3407; K.S.A. 65-444.

* * *

Dear Representative Amos:

You have requested our opinion regarding the authority of cities in Kansas to regulate the performance of abortions, for

example by imposing fees, taxing, licensing, franchising, requiring permits, or even prohibiting them altogether. Our discussion focuses on cities' general authority to legislate through ordinances based upon home rule or police power.

The home rule amendment, article 12, section 5 of the Kansas Constitution, authorizes cities to determine their local affairs and government. This home rule power is totally self-executing and is not dependent upon state legislative action. See City of Junction City v. Lee, 216 Kan. 495, 498 (1975) [citing Claflin v. Walsh, 212 Kan. 1, 6 (1973)]. Section 5(d) requires a liberal construction of powers and authority granted cities; the home rule power of cities is favored and should be upheld unless there is sound reason to deny it. Junction City, 216 Kan. at 498. Professor Pierce has outlined four principles which summarize home rule power in Kansas:

"First, no ordinance can exceed the constitutional limitations written into the home rule amendment, or the general provisions of the federal and Kansas constitution. Second, no ordinance can be unreasonable. Third, no ordinance can operate in an area preempted by uniform state legislation. Fourth, no ordinary ordinance can conflict with any state statute." Pierce, Home Rule and Municipal Environmental Regulation in Kansas, 26 U. Kan. L. Rev. 535, 536 (1978).

Article 12 contains specific limitations on the scope of cities' authority to enact local legislation. Section 5(a) exclusively reserves to state legislation the incorporation of cities, the methods by which city boundaries may be altered, the methods by which cities may be consolidated or merged, and the methods by which cities may be dissolved.

In areas not specifically reserved for state legislation in section 5(a), the home rule power is dependent on the role the state legislature has chosen to take. If the legislature is silent on a matter, section 5(b) permits cities to enact "ordinary" ordinance measures concerning local affairs. In contrast, subsection (c) applies when state legislation does exist but is of a non-uniform nature. Cities may exempt themselves from non-uniform legislation by enacting charter ordinances.

The existence of uniform state legislation does not entirely foreclose local legislation. The Kansas Supreme Court recently refined its rulings on home rule power in Blevins v. Hiebert, No. 62,450 (S.Ct., 1990) (slip opinion), holding that while home rule is generally prohibited when a uniform state statute exists, cities may nonetheless legislate by ordinary ordinance local police power laws as long as there is no conflict with the state law or an express preemption of the field by the legislature. Blevins at 12. The court stated that this power is distinct from the powers granted in Article 12, § 5, and in fact predates the home rule amendment. Blevins at 17.

To determine whether a local ordinance conflicts with an existing state law, the Court stated in City of Junction City v. Lee, 216 Kan. 495 (1975) that it reviews

"whether the ordinance permits or licenses that which the statute forbids or prohibits that which the statute authorizes; if so, there is conflict, but where both an ordinance and the statute are prohibitory and the only difference is that the ordinance goes further in its prohibition but not counter to the prohibition in the statute, and the city does not attempt to authorize by the ordinance that which the legislature has forbidden, or forbid that which the legislature has expressly authorized, there is no conflict (see 56 Am.Jur.2d, Municipal Corporations, Etc., § 374, p. 408-409)." 216 Kan. at 501.

Thus, local police power abortion regulations would pass this "conflict" test if they would only serve to provide higher standards of performance than those set by state law or otherwise supplement legislation. See Pierce, 26 U. Kan. L. Rev. at 538.

Even if the proposed ordinance is not in conflict with existing state law the legislature may prohibit local police power legislation by expressly preempting the field. "In Kansas, the intent to preempt must be in express and clear terms, and will not be implied." Pierce, 26 U. Kan. L. Rev. at 538; see Moore v. City of Lawrence, 232 Kan. 353 (1982); Garten Enterprises, Inc. v. City of Kansas City, 219 Kan. 620, 623 (1976); Junction City 216 Kan. at 495; Claflin 212 Kan. at 7. Kansas courts have

repeatedly rejected the argument that the mere enactment of the state criminal code by the legislature preempted the field of criminal law. See e.g. Junction City 216 Kan. at 503. The state has not preempted the field of abortion regulation.

Whether particular regulatory measures are in fact exercises of police power calls for a determination which we are unable to make without more specific information. The exercise of police power is for the protection of the public health, safety and welfare. Blevins at 8. In determining the validity of or construing police power legislation, we must review the entire context of legislation on the subject and not in isolated sections. Kansas State Board of Healing Arts v. Foote, 200 Kan. 447, 452 (1968).

In summary, if the local legislation involves an exercise of police power, home rule provisions of the Constitution are not involved, and the city can regulate unless the field is preempted. If the local legislation is not an exercise of police power, then the measure is subject to uniform state laws. In either case, the regulations may not conflict with other statutes or constitutional provisions.

As discussed above, home rule power is restricted by both the federal and Kansas constitutions. Therefore, any abortion regulation promulgated by a city is subject to the constitutional limitations set forth in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and its progeny. We examined the criminal abortion statute, K.S.A. 21-3407, in light of the Supreme Court's recent decision in Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989), and determined that the statute was unconstitutional and unenforceable in its current form. See Kansas Attorney General Opinion No. 89-98. In particular, the opinion focused on the licensing requirement found in K.S.A. 21-3407(2)(a) which was held to be unconstitutional in Poe v. Menghini, 339 F.Supp. 986 (D. Kan. 1972), as well as the failure of the statute to distinguish between first and third-trimester abortions. In Menghini, K.S.A. 65-444 (civil statute containing similar restrictions on abortions) was also held unconstitutional. 339 F.Supp. at 996. The state presently does not have a viable statutory scheme limiting abortions on demand. Any further statute is subject to scrutiny under the Fourteenth Amendment. A city ordinance would be subject to the same scrutiny. C.f., Planned Parenthood of Kansas v. City of Wichita, 729 F.Supp. 1282, 1291 (D. Kan. 199) (county and city legislation barring

contract with Planned Parenthood for family planning services unconstitutional).

In conclusion, it is our opinion that, local legislation which is an exercise of police power does not involve the home rule provisions of the Constitution, but is subservient to preempting acts of the state legislature. If the local legislation is not an exercise of police power, then the measure is subject to uniform state law. In either case, the regulation may not conflict with other statutes or constitutional provisions. Cities may therefore exercise their police power by regulating the performance of abortions through ordinary ordinances since the legislature has not expressly preempted the field. Any abortion regulation is subject to Roe v. Wade and any limitations imposed by the federal and Kansas constitutions.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Mark W. Stafford
Assistant Attorney General

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