



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 48

Ross B. Griggs  
Andover City Attorney  
310 W. Central, Suite G  
Andover, Kansas 67002-0125

Re: Fire Protection--Fire Safety and Prevention--  
Adoption of Rules and Regulations, Procedure;  
Applicability of "State Action" Exemption From  
Federal Anti-Trust Laws

Synopsis: The provision of K.S.A. 1990 Supp. 31-134(b), that "nothing in this act shall be construed to impair the power of any municipality . . . to prohibit or regulate the sale, handling, use or storage of fireworks within its boundaries," does not constitute a clear articulation of an anti-competitive policy and, therefore, does not bring municipal actions based on the statute within the "state action" exemption from the federal anti-trust laws. Cited herein: K.S.A. 1990 Supp. 31-134; Kan. Const., art. 12, § 5; 15 U.S.C. § 1 et seq.

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Dear Mr. Griggs:

You request our opinion regarding ordinance no. 652 of the city of Andover (copy attached hereto). Specifically, you ask whether the city's regulation of fireworks under that ordinance is subject to the "state action" exemption from the Sherman Antitrust Act, 15 U.S.C. § 1 et seq.

Although municipalities are not wholly beyond the reach of the anti-trust laws, they are immune from anti-trust liability if they can "demonstrate that their anti-competitive activities were authorized by the state pursuant to state policy to displace competition with regulation or monopoly public service." Hallie v. Eau Claire, 471 U.S. 34, 39, 85 L.Ed.2d 24 (1985). To prove the existence of such a state policy, a municipality need not "point to a specific, detailed legislative authorization," Id. at 39, or prove "active state supervision." Id. at 46. Instead, the municipality is required to show "a clearly expressed state policy," Id. at 40, sanctioning anti-competitive conduct. Additionally, the provisions of a home rule amendment conferring on municipal governments general authority to govern local affairs does not constitute a "clear articulation" of a state policy to authorize anti-competitive conduct. Community Communications v. Boulder, 455 U.S. 40, 70 L.Ed.2d 810 (1982).

K.S.A. 1990 Supp. 31-134(b) authorizes the state fire marshal to adopt the Kansas fire prevention code, and further provides that "nothing in this act shall be construed to impair the power of any municipality . . . to prohibit or regulate the sale, handling, use or storage of fireworks within its boundaries." This provision does not "authorize" any action by a municipality; it merely clarifies that the enactment of the statute, and adoption of the Kansas fire prevention code, is not intended to preempt city action under the home rule amendment (Kan. Const., art. 12, § 5) to prohibit or regulate the sale, handling, use or storage of fireworks. Therefore, in our opinion this statutory provision does not constitute a clear articulation of an anti-competitive policy and, therefore, does not bring the adoption of ordinance no. 652 of the city of Andover within the "state action" exemption from the anti-trust laws. See Community Communications v. Boulder, supra.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General