



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 56

Mr. Michael P. Howe
City Attorney
City Hall, 12350 West 87th St. Parkway
P.O. Box 14888
Lenexa, Kansas 66215

Re: Constitution of the State of Kansas--
Corporations--Cities' Powers of Home Rule;
General Improvement and Assessment Law

Synopsis: The home rule amendment to the Kansas constitution authorizes a city to utilize home rule legislation in all areas of local government subject only to the provisions of article 12, section 5. A city may implement a program to provide for the prepayment of costs for certain street improvements by private property owners of a development district if such a program is supplemental to and does not attempt to replace or circumvent provisions of a uniform statutory enactment. A city's use of home rule authority to establish a non-conflicting procedure to address a local government problem not dealt with by state legislation is authorized by article 12, § 5 of the Kansas constitution. Cited herein: Kan. Const., art. 5, § 5; K.S.A. 12-6a01 et seq.

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Dear Mr. Howe:

As city attorney for the city of Lenexa you inquire whether a city has the authority to administer a "public improvement

street development policy." The city wants to implement such a policy pursuant to its home rule powers within the framework of K.S.A. 12-6a01 et seq. and is concerned that Blevins v. Hiebert, 247 Kan. 1 (1990) may affect its authority.

Your question is concerned with the city's ability to implement this policy. Pursuant to article 12, section 5 of the Kansas constitution, cities in Kansas have the power to determine their local affairs through ordinance without a specific legislative enactment. The home rule amendment places some limitations on the exercise of this power. It states in relevant part:

"Cities are hereby empowered to determine their local affairs and government . . . by ordinance passed by the governing body . . . subject only to enactments of the legislature of statewide concern applicable uniformly to all cities, to other enactments of the legislature applicable uniformly to all cities, to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction and to enactments of the legislature prescribing limits of indebtedness." Art. 12, § 5(b).

The Kansas Supreme Court interpreted these limitations in Blevins v. Hiebert, 247 Kan. 1 (1990), a case which examines municipal home rule powers and sets forth guidelines for analyzing when and how municipalities may use home rule legislation. The court acknowledged that legislative silence on a subject no longer prevents local government action and that home rule is available to cities and counties in all areas of local government in which it is not prohibited by article 12, section 5 of the Kansas constitution and by K.S.A. 19-101a. Blevins, 247 Kan. at 5. The court explains this to mean that if a uniform statute exists which authorizes all cities or counties to "perform certain acts," then such statutes preempt the field of their application unless there are express exceptions in the statutes. Blevins, 247 Kan. at 11. If express exceptions in the statute are found then a city or county may opt out of the statute through the use of a charter ordinance. The court does, however, leave open one avenue for municipalities to exercise their home rule powers through ordinary ordinance, stating that "where the

legislature is silent, a municipality is free to carve out its own local solution to problems." Blevins, 247 Kan. at 13.

In our opinion the city has expressed its intent to comply fully with the provisions of K.S.A. 12-6a01 et seq., a uniformly applicable enactment which deals with improvements and the levying of special assessments to pay for those improvements. The proposed policy does not contravene or circumvent the provisions of the act, and does not attempt to substitute different provisions.

The policy establishes procedures for the payment of the costs of constructing certain streets and related improvements within benefit districts. The primary purpose of the policy is to establish an escrow payment arrangement requiring certain property owners, i.e., developers, who frequently request city assistance in the construction of new streets, to pre-pay certain of the costs associated with such street construction. The policy establishes three methods for accomplishing its goals on each of three types of streets (local service and collector streets, arterial streets abutting development property, and non-abutting arterial streets located within a proposed development).

The city chooses which method to use in each particular case. The subject of this request focuses only on the escrow account methodology summarized as follows:

"Upon the issuance by the City of an engineering permit or building permit for a development, the Developer pays to the City a sum specified by the Policy, the amount of such payment determined by the nature and type of street to be constructed on the developing property, and the City deposits these payments into an escrow account held by the City. If a Developer makes a payment into an escrow account established pursuant to the Policy, the City will include the Developer's property in any benefit district established by law for the purpose of improving a street benefiting the Developer's property and will levy special assessments against the Developer's property. The City will then apply the escrowed funds to the payment of any special assessments levied on the

Developer's property for such street improvements within the period of time designated by the City for prepayment of such assessments. If the escrowed funds plus interest earned are insufficient to meet the assessed cost of the improvements benefiting the Developer's property, the City at large will pay the difference. Conversely, if the Developer has paid money into the escrow account or if interest earnings have increased the escrow account to an amount greater than is ultimately necessary to pay his/her share of the assessed cost of the improvements, the excess will be refunded to the Developer."

The policy also provides that if after 5 years, no activity has begun relating to the construction of the street, the city may return the escrow funds, plus accrued interest, to the developer, or the city may retain the funds for two additional 5-year periods with city review each 5 years.

When the need arises for construction of the street or streets, the city may establish a benefit district under K.S.A. 12-6a01 et seq. (the "act") to provide for the street improvements and costs thereof including costs not attributable to the developer. The benefit district would include other non-developer owned benefitted properties as well as developer-owned properties which would be assessed a portion of the costs of the improvements. Assessments would be levied against the escrow account as described and funds would be applied to their payment during the repayment period designated by the city. The policy provides that any developer affected by the policy may seek administrative review within the city and any decision made by the city in implementing the policy.

The policy is completely non-conflicting and would supplement the city's plan for reasonable development and K.S.A. 12-6a01 et seq. Neither this nor any other state enactments deal with the subject addressed by the policy. The city's policy does not attempt to change or avoid compliance with the requirements of any uniformly applicable statute, and instead, deals with a subject the legislature has not addressed in such a way as to benefit the city by reducing the issuance of long term general obligation debt to finance the costs of special assessments levied in improvement districts. It therefore

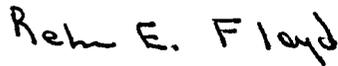
appears to be within the guidelines set forth by the court in Blevins which indicate how home rule legislation should be utilized.

Thus, it is our opinion that the city may implement the procedures described in the policy pursuant to its home rule authority. The legislature is silent on the subject of a prepayment program by private property owners for the costs of certain street developments on their property. The policy promulgated by the city does not conflict with or attempt to supplant any existing legislative scheme, and instead will be implemented to meet the city's specialized needs in addition to the provisions of K.S.A. 12-6a01 et seq. The policy addresses a situation not considered by present state legislation and is a valid exercise of the city's home rule authority pursuant to article 12, section 5 of the Kansas constitution.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rebecca E. Floyd
Assistant Attorney General

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