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January 21, 1992

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ATTORNEY GENERAL OPINION NO. 92- 10

David C. VanParys
County Counselor
Courthouse
4th & Walnut
Leavenworth, Kansas 66048

Re: Counties and County Officers -- General Provisions
-- Home Rule Powers; Limitations; Ability to Opt
Out of State Administrative Regulation Regulating
Open Burning

Synopsis: Leavenworth county cannot opt out of the
regulation prohibiting open burning within 1,000
feet of an occupied dwelling or public roadway
through their home rule powers. Cited herein:
K.S.A. 1991 Supp. 19-101a; K.S.A. 65-3005;
65-3006, 65-3007, 65-3010; K.A.R. 28-19-47.

* * *

Dear Mr. VanParys:

As Leavenworth county counselor you request our opinion as to whether Leavenworth county can, through the county's home rule powers, opt out of the requirements set out in K.A.R. 28-19-47, and reduce the minimum distance requirement that prohibits open burning within 1,000 feet of an occupied dwelling.

The home rule powers of counties are set out in K.S.A. 1990 Supp. 19-101a. This ability to exercise home rule power is limited by K.S.A. 1990 Supp. 19-101a(1) which states:

"[c]ounties shall be subject to all acts of the legislature which apply uniformly to all counties."

"The rules and regulations of a public administrative body, or officer usually comprise those actions of such body or officer in which the legislative element predominates. They are the duly made general rules relative to the subject on which the administrative agency acts, subordinate to the terms of the statute under which they are promulgated, and in aid of the enforcement of its provisions. Indeed, an administrative regulation promulgated under a statute is not a 'statute' but is at most an offspring of the statute. . . . The promulgation of rules by an agency constitutes an administrative action, or administration act." 73 C.J.S. Public Administrative Law & Procedure § 87 (1983).

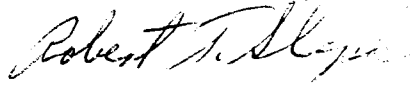
The court in Blevins v. Hiebert, 247 Kan. 1 (1990) held that "home rule legislation is prohibited in a field of law in which there is a state statute uniformly applicable to all cities or counties. Home rule is applicable [] in the area of regulation and prohibition, where local government exercises its police power for the health, safety and general welfare of the public."

The Blevins court went on to state that "an enabling act is uniformly applicable to all cities or counties if it authorizes all cities or counties to perform certain acts. Such statutes are state law and preempt the field of their application without the use of preemptive language unless there are express exceptions in the statutes or unless the statutes pertain to police power regulations." See Blevins, 247 Kan. at 11.

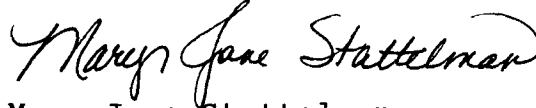
The authorizing statutes for K.A.R. 28-19-47 are K.S.A. 65-3005, 65-3006, 65-3007, and 65-3010. These statutes speak to the secretary's ability to enact regulations to control air contamination. Therefore, an emission control regulation, such as the one about which you request, is uniformly applicable to all cities and counties and is of such a state-wide impact that Leavenworth county is not allowed to opt out of this regulation through their home rule authority. Furthermore, these authorizing statutes apply uniformly to all

counties and therefor, a county could not opt out of these statutes. Because these statutes give the agency the authority to develop these rules and regulations, it is our opinion that a county cannot opt out of a regulation if it cannot opt out of the authorizing statute.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



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