



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

February 23, 1976

ATTORNEY GENERAL OPINION NO. 76- 69

Mr. Kenneth W. McClintock
Morris County Attorney
418 East Main Street
Post Office Box 224
Council Grove, Kansas 66846

Re: Cities--Ordinances--Radio Receiving Equipment

Synopsis: Ordinance No. 1530 of the City of Council Grove constitutes an unreasonable and arbitrary exercise of the municipal police power, for it prohibits the possession within the city limits of radio receiving sets and like equipment which receive the frequency used by the police department of that city, which is used commonly by other law enforcement agencies of the state and other political subdivisions of the state. As presently in effect, it subjects state highway patrolmen, sheriffs and deputies of other counties, agents of the Kansas Bureau of Investigation, game protectors of the Forestry, Fish and Game Commission and other public safety officers to prosecution under the ordinance, and because it is not susceptible of a narrower construction, it is unenforceable in its entirety.

* * *

Dear Mr. McClintock:

On November 3, 1975, the governing body of the City of Council Grove adopted Ordinance No. 1530, section 1 of which states thus:

"It shall be unlawful for any person, firm, or corporation to own, possess, or use a radio receiving set or radio communications

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for receiving police communication on the frequency of the Council Grove Police Department."

Section 2 excludes therefrom

"the Sheriff and his paid deputies of Morris County, Kansas; the duly appointed police officers of the City of Council Grove, Kansas; nor to any radio which is not used for the primary purpose of receiving or obtaining the radio communications on the frequency used by and for the Council Grove Police Department."

Pursuant to K.S.A. 1975 Supp. 48-929(a),

"Each county within this state shall establish and maintain a disaster agency responsible for emergency preparedness and coordination of response to disasters or shall participate in an interjurisdictional arrangement for such purposes under an interjurisdictional disaster agency as provided in K.S.A. 1975 Supp. 48-930."

You advise that in May, 1975, a revised emergency operations plan for Morris County was published under the auspices of the State Division of Emergency Preparedness, and you enclose a copy of Annex F, pertaining to communications. That plan specifically provides for a communications capability extending "horizontally and laterally throughout all levels of government," and assigns to the Civil Defense Director responsibility for coordination and continuity of all communications. The communications described in the annex specifically include police frequencies frequently used by the Council Grove Police Department.

You advise that the three main frequencies used by the Council Grove Police Department are those used by law enforcement agencies throughout the state. The city and Morris County are jointly providing radio dispatching service, and Morris County holds the license for utilization of the three frequencies mentioned.

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You advise also that under the emergency operations plan, the local Emergency Preparedness Agency has the responsibility for monitoring local weather conditions, and to provide emergency services in the event of tornadoes, floods, winter storms and transportation accidents. In actual operation, the Agency has provided radio monitoring equipment which is capable of receiving radio communications on the frequencies used by the Council Grove Police Department, as well as other police departments, plus weather stations, citizen band radios, and so on.

The question you pose is whether Ordinance No. 1530 is constitutional and enforceable in the City of Council Grove against the Morris County Emergency Preparedness Agency and its volunteer personnel acting in accordance with the emergency operation plan, and also whether the ordinance is enforceable against the general public. In the latter regard, you point out that in the community, as in many others, there are a large number of multi-band radio receivers capable of receiving police frequencies, and also a number of "scanners" capable of receiving only, or primarily, police frequencies.

In *Grigsby v. Mitchum*, 191 Kan. 293, 380 P.2d 363 (1963), the court spoke to the tests for determining the validity of an ordinance which is challenged as unconstitutional;

"Almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, or involve an injury to a person, or deprive a person or property within the meaning of the Fourteenth Amendment to the Constitution of the United States. Nevertheless, it is well settled that an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public, and if it is not unreasonable or arbitrary.

"Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public, and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such

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legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them.

In determining whether an ordinance which has the effect of prohibiting pinball machines by conditions imposed upon the issuance of a license is reasonable, and whether it has a substantial relationship to the health, morals, safety or general welfare of the people of a municipality, the court may weigh the benefit to those people affected by the elimination of such devices against the benefits in having such devices available for use by those people, and the interests of the appellees as the owners of those devices." 191 Kan. at 302.

The police power may not be exercised unreasonably, arbitrarily or vindictively. The prohibition imposed by an ordinance must have a "substantial relationship to the health, morals, safety or general welfare." As stated in *Delight Wholesale Co. v. City of Overland Park*, 203 Kan. 99, 453 P.2d 82 (1969):

"[W]hile the police power is wide in its scope and gives a governmental body broad power to enact laws to promote the health, morals, security and welfare of the people, and further, a large discretion is vested in it to determine for itself what is deleterious to health, morals or is inimical to public welfare, it cannot under the guise of the police power enact unreasonable and oppressive legislation or that which is in violation of the fundamental law." 203 Kan. at 103.

It is not at all clear what purpose this ordinance is designed to serve. It has been suggested that one reason for its enactment was the allegation that when a police officer was dispatched to the scene of a reported crime, disturbance or other incident, others who overheard the broadcast travelled to the scene of the crime or incident, and their presence interfered with the officer in the performance of his duties. Law enforcement officers have ample authority, of course, to order observers and bystanders to refrain from interfering with the performance of their duties. Moreover, bystanders, passersby, neighbors and others frequently

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congregate at the scene of a disturbance to which a police officer has been called, apart from those who may have been alerted to the disturbance by radio broadcasters. Moreover, it is the experience of many police officers that volunteer citizen assistance derived from their access to the police frequencies may be invaluable. For example, recently in Topeka, a citizen with such a receiving set located a car of a bank robbery suspect very shortly after the offense had been committed, having heard the vehicle description broadcast. His alertness and cooperation with the police led to the prompt arrest of the suspects. Thus, it is highly questionable whether the ordinance bears any relationship whatever to the assistance of police officers, if that is indeed its purpose.

Moreover, many citizens possess such receiving sets, and like equipment, for clearly lawful purposes. A police officer's family, for example, might have one at home, to keep informed concerning the officer's assignments and well-being. Other citizens possess such equipment with the express intention of providing assistance to law enforcement officers if the occasion should arise.

We are advised that the frequencies 39.46 and 39.58 are used widely, if not universally, for sheriffs' communications throughout the state. Under this ordinance, any sheriff or deputy of another county passing through the City of Council Grove would be subject to prosecution. Likewise, state highway patrol troopers, game protectors of the State Forestry, Fish and Game Commission, and agents of the Kansas Bureau of Investigation, to mention but three examples, would also be subject to prosecution under this ordinance. Clearly, it is overbroad, for there is no police power justification whatever for such a sweeping prohibition, for so applied, not only does the prohibition bear no relationship whatever to the public health, morals, security and welfare, but is indeed contrary and detrimental to the public safety.

You inquire particularly concerning application of the ordinance to the Morris County Emergency Preparedness Agency and its volunteer personnel acting in accordance with the emergency operation plan. We are advised that the primary, and perhaps the sole, source of weather and tornado information available to the agency is the radio communications of the sheriff's department. Once again, there seems no conceivable justification in terms of public safety to deny one public safety agency access to the radio frequency and communications of another public safety agency.

To return to your specific questions, you asked whether the ordinance was enforceable, first, against the general public, and secondly, against the Morris County Emergency Preparedness Agency and its designated personnel acting in the course of their duties on behalf of the agency. This particular ordinance is clearly overbroad. It is manifestly an arbitrary and unreasonable exercise of the police

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power of a municipality to bar from its territorial limits all radio receiving sets and like equipment which operate on the frequency used by the city police department, when that frequency is one which is common to many law enforcement agencies throughout the state. Because that prohibition extends to police and other law enforcement and public safety agencies of other counties, as well as those of the state, and the ordinance is not susceptible of any construction which would restrict its application more narrowly, it is unenforceable, in my opinion, in its entirety, against either the public and members of other law enforcement and public safety agencies, including the county emergency preparedness agency.

Yours very truly,



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