



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

December 6, 1976

ATTORNEY GENERAL OPINION NO. 76-356

Mr. Dan E. Turner
City Attorney
Legal Department
215 East Seventh Street
Topeka, Kansas 66603

Re: Cities--Ordinances--Validity

Synopsis: Ordinance providing for the creation of "Mayor's Police" in the City of Topeka is a valid exercise of the legislative power of the city, and does not conflict with K.S.A. 13-2006.

* * *

Dear Mr. Turner:

You advise that questions have arisen concerning the validity of the City of Topeka ordinance, no. 21-201 *et seq.*, establishing special officers in and for the City of Topeka to be known as the "Mayor's Police."

Section 21-202 provides for the appointment of such officers:

"The Police Chief with the consent of the Mayor, shall have authority, and he is hereby authorized, to appoint such number of male or female persons to be known as Mayor's Police as he shall find necessary in the best interests of the City to preserve the peace and promote the general welfare."

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The officers so appointed shall take preappointment training as the Chief of Police shall prescribe. Section 21-206. The Chief exercises authority and control over the Mayor's Police and its members, and may adopt rules and regulations governing the members of the Mayor's Police, the maintenance of discipline and assignment to police duties. The Chief is the sole supervisor of the duties of the members of the Mayor's Police. Section 21-208. Members must comply with all rules and regulations which are applicable to the Police Department insofar as they are consistent with the special class of duty prescribed for such Mayor's Police. Members shall serve without pay, except when and as compensation is authorized by ordinance adopted by the city governing body.

The question is raised whether the creation of the Mayor's Police is within the constitutional home rule power of the city, and whether the ordinance conflicts with K.S.A. 13-2006. This provision, enacted in 1907, provides thus:

"The mayor shall be a conservator of the peace throughout the city, and shall at all times have power to appoint such number of special policemen as he or she may in cases of emergency deem necessary to preserve the peace of the city, and to dismiss the same at pleasure: *Provided*, Such policemen shall not serve longer than the next meeting of the board of commissioners, unless confirmed by said board."

When this statute was enacted almost seventy years ago, cities had no constitutional power of self-government. They enjoyed only those powers expressly granted by law and those reasonably and necessarily implied therefrom. With the adoption of Article 12, § 5 of the Kansas Constitution in 1961, cities were no longer dependent upon express statutory grants of power to address local problems. This change is summarized in *Claflin v. Walsh*, 212 Kan. 1 at 6, 509 P.2d 1130 (1973) thus:

"Prior to the home rule amendment Kansas cities were seriously limited in their power to solve local problems by local legislation. Cities existed by and through statutes and had only such powers as were expressly conferred by statute without resort

to implication. . . . This concept was substantially changed by the home rule amendment effective July 1, 1961. . . .

No longer are cities dependent upon the state legislature for their authority to determine their local affairs and government. Since home rule, cities have power granted directly from the people through the constitution without statutory authorization." 212 Kan. at 6.

Thus, prior to 1961, K.S.A. 13-2006 may well have been the fullest extent of the power of the city to create special police officers in addition to those comprising the regular force. Since that time, however, the city may exercise its general legislative powers vested in it by Article 12, § 5(b) of the Kansas Constitution, which provides in pertinent part thus:

"Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions. . . . Cities shall exercise such determination by ordinance . . . 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."

K.S.A. 13-2006 is not uniformly applicable to all cities, and thus, the city may by charter ordinance exempt itself from its terms, if the city so chooses. If the city does not wish to exempt itself from the statute, but wishes merely to enact additional and independent authority for the city, it may do so by ordinary ordinance. As the court pointed out in *Clafin v. Walsh, supra*, thus:

"Where the legislature has acted in some area a city's power to act in the same area

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should be upheld unless the legislature has clearly preempted the field so as to preclude city action. Unless there is actual conflict between a municipal ordinance and a statute, the city ordinance should be permitted to stand." 212 Kan. at 7.

A legislative intent to preempt an area in which the legislature has spoken must be clear and manifest. *City of Junction City v. Lee*, 216 Kan. 495, 532 P.2d 1292 (1975). There is no suggestion whatever of preemption in K.S.A. 13-2006. Thus, the City of Topeka is free to legislate regarding special police officers, to supplement the express statutory authority, so long as it does not do so in conflict with the statute. In *City of Junction City v. Lee*, *supra*, the court discussed the question of conflict thus:

"A test frequently used to determine whether conflict in terms exists is whether the ordinance permits or licenses that which the statutes 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" 216 Kan. at 501.

K.S.A. 13-2006 authorizes the mayor, as conservator of the peace, to appoint special police officers in times of emergency to preserve the peace, although they may not serve longer than the next meeting of the city commissioners. The ordinance leaves that authority unimpaired, and in addition thereto, permits the chief of police, with the consent of the mayor, to appoint persons to be known as members of the "Mayor's Police," as the chief shall find "necessary in the best interests of the City to preserve the peace and promote the general welfare." The ordinance certainly authorizes more than the statute does, but it certainly does not authorize anything which the statute prohibits, for the statute is not preemptive of local municipal legislative power to provide for the appointment of special police officers in addition to members of the regular force.

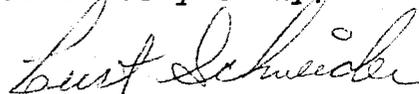
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Thus, in my opinion, there is no conflict whatever between the ordinance found at sections 21-201 *et seq.*, and K.S.A. 13-2006.

Secondly, you inquire whether the "preservation of order, enforcement of law, protection of life and property, and the suppression of crime attributes of state sovereignty and matters of statewide concern not capable of delegation under the 'Home Rule' provision of the Kansas Constitution." The question is raised because of the supposed applicability of *Kansas City, Mo. v. J. I. Case Threshing Mach. Co.*, 87 S.W.2d 195 (Mo. 1935), in which the court considered the taxing power of the city of Kansas City, Missouri, under its home rule charter. Following a number of prior decisions, the court drew a distinction between corporate and governmental functions, holding that the former fell within the province of cities under their respective charters, while the statute legislature retained control of the latter, including the preservation of order, law enforcement and the like. No such distinction is followed in Kansas in the interpretation of Article 12, § 5 of the Kansas Constitution. Clearly, municipal legislative and administrative action regarding the preservation of public peace and safety falls within the province of the legislative and administrative powers granted Kansas cities under the home rule amendment. See *City of Junction City v. Lee*, *supra*.

Accordingly, I cannot but conclude that the ordinance in question constitutes a lawful exercise of municipal legislative power, and is not invalid for any of the reasons discussed above.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj