



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

CURT T. SCHNEIDER
ATTORNEY GENERAL

December 11, 1978

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 78- 383

The Honorable Norman E. Gaar
State Senator
Stinson, Mag & Fizzell
2100 TenMain Center
Post Office Box 19251
Kansas City, Missouri 64141

Re: Cities--Home Rule Powers--Single Family Housing Mortgage
Revenue Bonds

Synopsis: In the exercise of its constitutional home rule powers under Article 12, § 5 of the Kansas Constitution, a Kansas municipality may provide for the issuance of revenue bonds to provide funds to make loans and to acquire mortgages in order to permit the construction of single family residences within the corporate boundaries of such city.

* * *

Dear Senator Gaar:

You request my opinion whether Kansas municipalities are authorized to issue revenue bonds for the purpose of providing funds to make loans and to acquire mortgages in order to permit the construction of single family residences within or without the boundaries of such cities under either 1) the Municipal Housing Law, K.S.A. 17-2336 *et seq.*, or 2) cities' constitutional home rule powers under Article 12, § 5 of the Kansas Constitution.

In Opinion No. 78-218, we concluded that acting under this Law, a city or housing authority created thereunder was authorized to "furnish dwelling accommodations to persons of low income by making such accommodations available by lease or rental," and

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that the Law "does not authorize cities or housing authorities created thereunder to operate merely as a builder or vendor of housing." Accordingly, the Municipal Housing Law, in and of itself, in my opinion furnishes no authority for the issuance of revenue bonds in order to provide funds in order to make loans and acquire mortgages for the construction and sale of single family dwellings by a city or municipal housing authority.

The further question remains whether a city may provide for the issuance of such revenue bonds in the exercise of its constitutional home rule powers under Article 12, § 5. Section 5(b) thereof 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 passed by the governing body with referendums only in such cases as prescribed by the legislature, 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, . . . and to enactments of the legislature prescribing limits of indebtedness."

This amendment, approved by the voters at the general election in November, 1960, constituted a drastic change in the status of Kansas municipalities. As stated in *Claflin v. Walsh*, 212 Kan. 1, 509 P.2d 1130 (1973),

"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.

In Opinion No. 78-317, we considered the authority of a city under this amendment to issue general obligation bonds for which there was no express statutory authority:

"Article 12, § 5 vests a broad measure of self-government in Kansas cities. This direct constitutional grant vests in city governing bodies general legislative authority to determine the 'local affairs and government' of the city. The management of a city's financial affairs, and the manner and method of meeting its financial obligations, are the preeminent responsibilities of the city governing body, and are clearly local in nature. Within the constraints of express statutory restrictions, the city governing body is free to exercise its legislative authority to provide such funds as are needful for the city's obligations. The issuance and sale of general obligation bonds of the municipality, and the levy of taxes therefor, is clearly a lawful municipal revenue source for the city. The city may exercise its legislative powers to provide the necessary legal authority for such bonds and their sale, and for the levy of taxes therefor."

In that instance, cities' home rule authority was proposed to be used to supplant express statutory authority for certain bonds which had been repealed by the 1978 legislature, former K.S.A. 10-427.

For the purposes of Article 12, § 5(b), I can find no meaningful distinction to be drawn between general obligation and revenue bonds. General obligation bonds, of course, are payable by general ad valorem taxes which are levied by the city governing body for

that purpose. Revenue bonds are generally payable from the revenue derived from the project or improvement for which they are issued, and which revenues are pledged by the city governing body for that purpose. Both are equally accepted and conventional means of financing public undertakings, and cities' power to choose one or the other as a means of financing a proposed municipal improvement rests within its sound legislative discretion, as an incident of its power to determine and conduct local municipal affairs, and provide for the financing thereof.

In the exercise of cities' home rule authority, cities are subject to "enactments of the legislature [which are] applicable uniformly to all cities." The Municipal Housing Law, K.S.A. 17-2337 et seq., was enacted in 1957, three years prior to the adoption of the home rule amendment in 1960. As the court pointed out in *Clafin, supra*, in 1957, cities had only those powers which were granted by statute. Cities had no legal tools with which to respond to the growing need for an adequate supply of safe, sanitary dwelling accommodations. The 1957 Housing Law was prefaced by a number of legislative findings demonstrating the public need for municipal efforts to provide such housing:

"(a) That there exist in urban areas in the state insanitary, unsafe, and overcrowded dwelling accommodations; that in such urban areas within the state there is a shortage of safe or sanitary dwelling accommodations available at rents or prices which persons of low income can afford and that such shortage forces such persons to occupy insanitary, unsafe and overcrowded dwelling accommodations;

(b) that the aforesaid conditions cause an increase in a spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the residents of the state; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities;

(c) that these slum areas cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons of low income

be relieved through the operation of private enterprise, and that the construction of housing projects for persons of low income (as herein defined) would therefore not be competitive with private enterprise;

* * *

(e) that the clearance, replanning and preparation for rebuilding of these areas and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern;

(f) that residential construction activity is closely correlated with general economic activity and that the undertakings authorized by this act to aid the production of better housing and more desirable neighborhood and community development at lower costs will make possible a more stable and larger volume of residential construction which will assist materially in maintaining full employment; and that the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination."

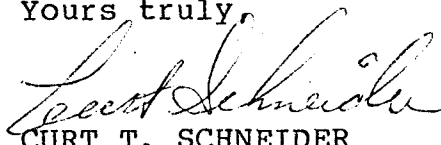
Nothing in the act bespeaks an effort to preempt local municipal powers in respect to providing public housing. Indeed, the legislative purpose was to provide cities with powers which they did not and would not have otherwise. With the passage of seventeen years since the home rule amendment became effective, there has been no amendment to the Municipal Housing Law to preempt cities in the exercise of their powers under Article 12, § 5 respecting public housing. In *Claflin, supra*, the court stated that "[w]here the legislature has acted in some area a city's power to act in the same area 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. In my opinion, the Municipal Housing Law does not preempt local municipal authority to provide, by local legislative action, for improved supplies of residential housing by means other than those set out in that act.

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Thus, a city may make its own legislative findings respecting the need for additional single family dwellings in the city, the impact of any such shortage on the city and its public resources, the capacity of the private sector to respond to and alleviate the shortage satisfactorily, the need for public intervention under the aegis of the city, and such other matters as it deems necessary and appropriate. On the basis of such findings, the city may declare the need for municipal intervention to accelerate the construction of and provide financing for single family dwellings and thence, in the exercise of its constitutional legislative powers, provide for the issuance and sale of revenue bonds, the proceeds of which are to be devoted to providing the financing necessary for such additional housing.

We have long construed Article 12, § 5 to constitute a grant of power which cities may exercise only locally, *i.e.*, within the corporate boundaries of the city. In my judgment, a city has no authority thereunder or elsewhere to make legislative findings respecting the shortage of single family residences beyond the territorial limits of the city, or to exercise its municipal legislative powers to provide for additional housing which is not located within its corporate boundaries.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj