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June 8, 1979

ATTORNEY GENERAL OPINION NO. 79-110

Mr. Joseph O'Sullivan
Reno County Attorney
206 West First Street
Hutchinson, Kansas 67501

Re: Fire Protection--Fire Safety and Prevention--State and Local Regulation of Sale and Use of Fireworks

Synopsis: The authority of a county or other municipality to regulate the sale, handling and storage of fireworks within its jurisdiction, as defined by pertinent statutes and state regulations, does not empower the county to prohibit retail sale and private use of state-approved fireworks. Inasmuch as K.S.A. 31-132 et seq. is an act of the Legislature uniformly applicable to all counties, which act expressly commands that state rules and regulations adopted pursuant thereto shall have "uniform force and effect throughout the state," the home rule power of counties is limited with respect to regulation of fireworks. A county resolution prohibiting retail sale and private use of fireworks conflicts with the uniform state law and is, therefore, invalid.

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Dear Mr. O'Sullivan:

You have submitted for our review County Resolution 79-6, adopted by the Reno County Commissioners on February 12, 1979. Such resolution makes it unlawful "for any person to offer for sale, expose for sale, sell at retail, or use or explode any fireworks" within the county, except for commercial or supervised public displays by special permit. As

you have correctly advised, K.A.R. 22-6-7 expressly approves of the "sale, use, manufacture, and possession" of certain fireworks within the state of Kansas. You also have noted that K.A.R. 22-6-15 precludes the county from enacting or enforcing any resolution which is inconsistent with state regulations, but permits the county to exercise its power to "regulate the sale, handling and storage of fireworks" within its boundaries. In light of these regulations, you inquire whether the county, in the exercise of its home rule powers, may prohibit the retail sale and private use of fireworks within its jurisdiction as provided by Resolution 79-6.

Your inquiry is prompted by a concern that the county resolution in question conflicts with the provisions of K.A.R. 22-6-7, which regulation you characterize as a "uniform state law," as well as your concern that "provisions of K.A.R. 22-6-15 are conflicting as to the authority of the county to enact a regulation inconsistent with State regulations." Thus, a close examination of the pertinent regulations which define the authority of counties and other municipalities relative to regulation of fireworks is warranted before we address the home rule question you have raised.

The regulations in question were promulgated by the state fire marshal pursuant to the marshal's statutory authority found at K.S.A. 1978 Supp. 31-133. The fire marshal is empowered to adopt reasonable rules and regulations "for the safeguarding of life and property from the hazards of fire and explosion." The statute provides in part:

> "Such rules and regulations shall include . . .
> "(1) The keeping, storage, use, sale, handling, transportation or other disposition of . . . explosives, including gunpowder, dynamite, fireworks and firecrackers; and any such rules and regulations may prescribe the material and construction of receptacles and buildings to be used for any of said purposes . . . ."

K.S.A. 31-134 requires that all such rules and regulations shall be adopted in compliance with K.S.A. 77-415 et seq., with some minor exceptions not relevant here [K.S.A. 31-134(a)], and further provides that the rules and regulations "shall have uniform force and effect throughout the state, and no municipality shall enact or enforce any ordinance, resolution or rule or regulation inconsistent therewith . . . ." The latter section

expressly recognizes, however, "the power of any municipality to regulate the use of land by zoning or fire district regulations." Finally, the following provision in that statute also is relevant:

> "Whenever a question shall arise as to whether another state statute or enactment of a municipality is inconsistent with the provisions of the fire prevention code, it shall be the duty of the state fire marshal to make such determination after a hearing thereon with all interested parties."

Pursuant to the above-cited statutory authority, K.A.R. 22-6-7 and 22-6-15 were adopted. K.A.R. 22-6-7 is an express statement of the state's approval of the sale, use, manufacture and possession of an authorized list of ten kinds or classes of "pyrotechnic items" within the state of Kansas. By virtue of the statutory command of K.S.A. 31-134(b), the regulation has uniform force and effect throughout the state, but that does not of itself preclude a municipality's ordinance or resolution to prohibit sales and use of fireworks. K.A.R. 22-6-7 is permissive only; the state fire marshal, in the exercise of lawful discretion, has determined that sale and use of certain fireworks is permissible, consistent with the safety of persons and property in the state.

K.A.R. 22-6-15 does impose a limitation on municipalities, however. That regulation provides as follows:

> "No city, county or political subdivision of this state shall enact or enforce any ordinance, resolution, rule or regulation inconsistent with the provisions of these regulations except that <u>nothing in these regulations shall be construed so as to impair the power of any city, county or political subdivision to regulate the sale, handling and storage of fireworks as defined in 22-6-7 within their respective</u> boundaries." (Emphasis added.)

Thus, home rule considerations aside, an important question central to your inquiry is this: Is the power to regulate the power to prohibit? Most of the authority we find on this question impels a negative answer. The Kansas Supreme Court, interpreting a constitutional provision and statute by which the holding of land by aliens was regulated, ruled that "the words restrain and regulate are not synonymous with prohibit." Madden v. The State, 68 Kan. 658, 661 (1904). Construction of the word "regulate" in other jurisdictions is in general accord with the Kansas rule. See Words and Phrases, Permanent Edition, Vol. 36A, pp. 315-319, and supplement.

With respect to the particular regulatory power in question, McQuillin states the following as a general proposition:

> "Municipal regulation or prohibition of fireworks must conform and not conflict with governing state law. Accordingly, a municipal corporation cannot prohibit the possession, sale or distribution of fireworks in a city for state law expressly or by necessary implication authorizes the sale of fireworks." 7 McQuillin, Municipal Corporations, §24.488.

In King v. City of Louisville, 42 So. 2d 813 (1949), the Supreme Court of Mississippi struck down a municipal enactment which would have prohibited storage and sale of fireworks within the city, and stated the rule thusly: "[A] municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required, or authorize what the legislature has expressly forbidden." Id. at 816. We are, therefore, persuaded that the authority of the county to regulate the sale, handling and storage of fireworks within its jurisdiction, as defined by pertinent statutes and state regulations, does not empower the county to prohibit retail sale and private use of state-approved fireworks. But, the question remaining is whether the county may exercise its home rule powers to take such action.

Subsection (a) of K.S.A. 1978 Supp. 19-101a provides, in pertinent part:

> "Counties are hereby empowered to transact all county business and perform such powers of local legislation and administration as they deem appropriate, subject only to the following limitations, restrictions, or prohibitions: First, counties shall be subject to all acts of the legislature which apply uniformly to all counties; . . ."

In our opinion, the first limitation on county home rule power, cited above, is applicable here. Inasmuch as K.S.A. 31-132 et seq. is an act of the Legislature uniformly applicable to all municipalities (including all counties) in the state, which act expressly commands that state rules and regulations adopted pursuant thereto shall have "uniform force and effect throughout the state" [K.S.A. 31-134(b)], the home rule power of counties is limited with respect to regulation of fireworks. Notwithstanding that the rules and regulations in question are not "acts of the legislature which apply uniformly to all counties," the uniform act, from which said rules and regulations derive their sanction, only empowers municipalities to regulate the sale and handling of fireworks and the use of land [K.S.A. 31-134(b)] within the prescribed limits established by the state fire marshal's rules and regulations. Accordingly, any county resolution or enactment relating to the regulation of fireworks may be enacted "subject to" the uniform state act and the regulations adopted pursuant thereto.

This does not mean, of course, that local legislation is precluded or preempted. K.A.R. 22-6-15 expressly permits local regulation so long as it is not "inconsistent with the provisions of these regulations [K.A.R. 22-6-1 et seq.]." Consistent with our conclusion stated above, it is our judgment that a prohibitory enactment, such as Resolution 79-6 approved by the Reno County Commissioners and presented for our review, conflicts with state regulations, because the municipality's power to regulate the sale, handling and storage of fireworks does not include within its meaning the power to prohibit retail sale and private use of state-approved fireworks.

While it is true that the Kansas Supreme Court has held that cities may, in the exercise of their home rule powers and traditional police powers, enact stricter regulations than are generally applicable in the state at large, we do not construe these decisions as authorizing the municipality to prohibit an activity which is expressly approved by the state. In Leavenworth Club Owners Assn. v. Atchison, 208 Kan. 318 (1971), the Court held that a uniform state law which restricted the sale and consumption of alcoholic liquor between certain morning hours did not preclude a city from setting an earlier hour to restrict such sales and consumption. The Court acknowledged that "[t]he problems which arise from the serving of alcoholic beverages to thirsty patrons unto the wee hours of the morning may well be more numerous, more disturbing and more acute in Leavenworth than the problems encountered in more rural and placid communities,"

and that such a difference justified the stricter regulation of club hours by local ordinance. Accord, Blue Star Supper Club, Inc. v. City of Wichita, 208 Kan. 731 (1972) (upholding ordinance requiring private clubs to close during the same hours in which sale and consumption of alcoholic liquors is restricted by state law).

Similarly, in City of Junction City v. Lee, 216 Kan. 495 (1975), the Court rejected the argument that a city has no authority to enact an ordinance to regulate the possession of dangerous weapons by imposition of provisions more stringent than the provisions of state law. The Court applied the following test and found that no conflict existed between the ordinance and the state's criminal statute:

> "A test frequently used to determine whether conflict in terms exists is whether the ordinance permits or licenses that which the statute forbids or prohibits that which the statute authorizes; if so, there is conflict, but where both an ordinance and a 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 . . . ." Id. at 501.

The Court noted previous cases in which the test was applied.

> "In City of Beloit v. Lamborn, 182 Kan. 288 [1958] . . . it was held the mere fact that an ordinance provides for greater restrictions does not necessarily make it inconsistent or in conflict with the statute . . . . In Leavenworth Club Owners Assn. v. Atchison [supra] . . . [t]his court held . . . 'Where a municipal ordinance merely enlarges on the provisions of a statute by requiring more than is required by the statute, there is no conflict between the two unless the legislature has limited the requirements for all cases to its own prescription.'" Id.

Although all these cases pertained to the exercise of home rule powers and police powers by cities, the cases are analogous to county home rule questions. Applying the Lee test to resolve the instant question, we find that, in fact, the county purports to "forbid that which the legislature has expressly authorized." The prohibition of fireworks effected by the Reno County resolution goes far beyond "greater restrictions" or "stricter regulations" and goes further than to "merely enlarge" upon the provisions of state law.

In summary, it is our opinion that Reno County's prohibitory resolution goes beyond the scope of permissible regulation of fireworks. A county may regulate the sale, handling and storage of fireworks within its boundaries, but the power to regulate does not include within its meaning the power to prohibit absolutely the retail sale and private use of fireworks in the county, and the exercise of county home rule powers is so circumscribed.

Very truly yours,

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