



STATE OF KANSAS

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February 15, 1980

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ATTORNEY GENERAL OPINION NO. 80-49

Mr. Warren D. Andreas
City Attorney, City of Winfield
P. O. Box 646
Winfield, Kansas 67156

Re: Cities and Municipalities--General Powers--
Waiver and Remission of Penalties Fixed by
Ordinance

Synopsis: The city attorney, as prosecutor in the
municipal court under K.S.A. 12-4110 may,
in the reasonable exercise of prosecutorial
discretion, determine that certain cases
involving alleged violations of city
ordinances should not be filed.

In the determination of its "local affairs
and government" under Article 12, Section 5
of the Kansas Constitution, a city may
establish for itself authority for the
remission of fines and penalties imposed
for violations of city ordinances.

* * *

Dear Mr. Andreas:

You have asked for our opinion whether the governing body of
a city may waive civil or criminal penalties fixed by ordi-
nance when circumstances warrant such a waiver. You have
cited the city's diseased or dead tree ordinance as one
example. That ordinance provides for notice to the land-
owner that the diseased or dead tree be removed within a
certain period of time and fixes a penalty of a certain
sum of dollars for failure or refusal to timely comply with
the city's order under the ordinance. Alternatively, and
additionally, the ordinance fixes a misdemeanor criminal
sanction for noncompliance with the ordinance.

We have found no authority addressing your specific question. We think it important to note first, however, that before any penalty or fine imposed for violation of a city ordinance may be assessed, a complaint must have been entered and prosecuted in the municipal court, and the alleged violator must have been found guilty. The city attorney, as prosecutor in the municipal court under K.S.A. 12-4110, may exercise considerable discretion in determining whether certain cases should be brought. Generally speaking, in criminal cases, the prosecutor

"is vested at common law with the responsibility of determining whether or not a criminal accusation should be pressed to trial, and is expected to be impartial in abstaining from prosecuting, as well as prosecuting, but he is not excused from enforcing the laws because of local sentiment or prejudice.

". . . [T]he prosecuting attorney is charged with the duty of determining when to commence a particular prosecution and when to discontinue it and has control of criminal proceedings in the trial court."
27 C.J.S. District & Prosecuting Attorneys, §14(1).

Likewise, in civil actions, the prosecutor "has a certain discretion as to when, how and against whom to proceed." Id. at §15(1). Thus, under certain circumstances, and in the reasonable exercise of his or her prosecutorial discretion, the city attorney may obviate any consideration of waiver of penalties by the city by a decision, in a particular case, not to prosecute. Importantly, only the prosecutor can make such determinations.

Although not directly responsive to your question, there is authority recognizing a municipality's power to remit fines and penalties imposed for violations of municipal ordinances. In 56 Am.Jur.2d Municipal Corporations, §422, the following are stated as general principles:

"Where the proceedings for the violation of a municipal ordinance are considered to be civil in character, the municipal authorities may remit the entire fine for violation of an ordinance, or may accept a part in discharge of the whole, provided they do so in good faith and before the expiration of the time for defendant to appeal from the judgment imposing the fine. . . . When the proceedings are considered to be criminal, it would seem that the administrative officers would have no power to remit a penalty.

"There is no constitutional objection to a statute which confers upon the municipal authorities the power to remit penalties for violation of municipal ordinances." (Emphasis added.)

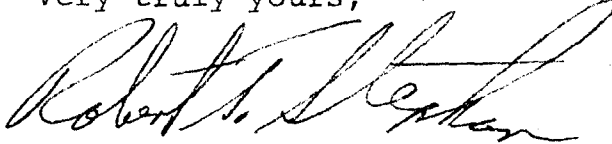
Notably, in at least one instance, the Kansas Legislature enacted such a statute empowering the city commissions of cities of the first class "to remit fines and forfeitures, to grant reprieves and pardons for all offenses arising under the ordinances of such city, by a majority vote of said board." (Emphasis added.) K.S.A. 13-1901. We can find no statute granting such authority to other classes of cities, but neither can we find any statutory limitation on the exercise of a city's home rule powers in this regard. Accordingly, in our judgment, in the determination of its "local affairs and government" under Article 12, Section 5, of the Kansas Constitution, a city may establish for itself such authority for the remission of fines and penalties imposed for violations of city ordinances.

One important caveat should be noted. Nothing in the foregoing should be construed to suggest that municipal officers are excused from their constitutional duty to administer local laws fairly and impartially, to apply equal justice to all citizens within their respective jurisdictions. We acknowledge, however, that under some circumstances the fixing of a penalty for violation of an ordinance may be

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an unjust application of the law, in which cases the penalty should be remitted. The conclusions reached herein address the means by which municipal officers may make such determinations.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Robert T. Stephan".

ROBERT T. STEPHAN
Attorney General of Kansas

A handwritten signature in cursive script, appearing to read "Steven Carr".

Steven Carr
Assistant Attorney General

RTS:WRA:SC:gk