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April 15, 1980

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ATTORNEY GENERAL OPINION NO. 80-87

The Honorable John M. Solbach
State Representative, Forty-Fifth District
R.F.D. No. 1
Lawrence, Kansas 66044

Re: Counties and County Officers--General Provisions--Home Rule Powers

Synopsis: Counties subject to the provisions of K.S.A. 19-620 et seq. may, by charter resolution, exempt themselves from those provisions since the statutes in question, and therefore county legislation exempting the county therefrom, do not affect the courts within the meaning of the third limitation on the exercise of county home rule power [subsection (a), third of K.S.A. 1979 Supp. 19-101a], and because the statutes in question do not apply uniformly to all counties.

Cited herein: K.S.A. 19-101b, 19-620 et seq., and subsection (a), First and subsection (a) third of K.S.A. 1979 Supp. 19-101a.

* * *

Dear Representative Solbach:

You have asked for our opinion whether boards of county commissioners in counties with populations in excess of 70,000 may, by charter resolution, exempt themselves from the provisions of K.S.A. 19-620 et seq. As you have correctly noted, those statutes require all counties containing populations of more than 70,000 but not more than 300,000 to have a county auditor. K.S.A. 19-620 provides that the auditor shall be appointed by "the district court of the judicial district in which such county is located." Specifically, you inquire whether this section (K.S.A. 19-620), which vests the power of appointment in the district court, restricts or

limits the exercise of home rule power since subsection (a), third of K.S.A. 1979 Supp. 19-101a, the home rule statute, provides that "counties shall have no power under this section to affect the courts located therein." (Emphasis added.)

Unquestionably, absent any consideration of the above-quoted limitation on the home rule power (hereinafter referred to as the third limitation), counties subject to the provisions of the statutes in question could exempt themselves from relevant provisions of said statutes by charter resolution since the statutes are not "acts of the legislature which apply uniformly to all counties." [See subsection (a), First of K.S.A. 1979 Supp. 19-101a and K.S.A. 19-101b.] However, that the district court is empowered to appoint the county auditor in such counties under the statutes in question raises an important concern whether the third limitation on the exercise of county home rule power operates to preclude such an exemption by charter resolution.

In a case which antedates the enactment of the county home rule statute, the Kansas Supreme Court considered a question of constitutionality of statutes similar to the statutes in question vesting the power of appointment of county auditors in district courts. In Sartin v. Snell, 87 Kan. 485 (1912), the Court rejected the argument that the statute was an unconstitutional exercise of legislative authority and an improper delegation of the power of appointment of nonjudicial officers on the judicial branch of government. The Court also determined that, although the statute provided that the appointment of the auditor was to be made by the district court, the legislature nonetheless intended that the power of appointment be imposed upon the judge, or if there be two or more judges in a particular judicial district, that the power be exercised jointly or by a majority of them. The Court wrote:

> "The legislature often uses the words 'court' and 'judge of the court,' and 'judge of the district court' without discrimination. Whenever the power or duty imposed is found from a consideration of the object and purposes of the act to be one which is more properly the function of the court, it will be so construed, and whenever it is manifest that the legislature meant the judge and not the court, that meaning will be applied to the words in order to carry out the legislative intent. 'Court' will always be interpreted to mean 'judge' when necessary to carry into effect the intention of the legislature. . . .

> "Obviously the legislature had no thought of having the appointment made by the court, but, reposing confidence in the integrity and discretion of the person who happened to hold the office of judge of the district court, intended that he personally should name the auditor. The power conferred is not in any sense judicial, because the office in no manner affects the business or functions of the court. One argument made by the defendant in support of his contention that the power was intended to be imposed upon the court and not upon the judge is based upon the fact that the legislature, at an earlier session, expressly conferred the power of appointment upon the district judge, in providing for filling vacancies in the office of county attorney. But it is manifest that in both instances the legislative intent was to impose the power upon the judge and not upon the court." (Citations omitted; emphasis added.) 87 Kan. at 491-492.

Notably, although the above-quoted decision was made long before the enactment of the county home rule statute and the third limitation, the decision nonetheless answers the question you have raised. As noted above, the Court concluded that the appointment power imposed on the judges is not a judicial power, and the Court expressly stated that "the office [of county auditor] in no manner affects the business or functions of the court." 87 Kan. at 492.

Accordingly, we conclude that counties subject to the provisions of K.S.A. 19-620 et seq. may, by charter resolution, exempt themselves from those provisions since the statutes in question, and therefore county legislation exempting the county therefrom, do not affect the courts within the meaning of the third limitation on the exercise of county home rule power [subsection (a), third of K.S.A. 1979 Supp. 19-101a], and because the statutes in question do not apply uniformly to all counties.

Very truly yours,

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RTS:WRA:SC:gk