



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

April 9, 1981

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 81-85

Mr. Dennis D. Roth
Buckles, Roth & Boyce
Attorneys at Law
101 South 4th, P.O. Box 206
Burlington, Kansas 66839

Re: Cities and Municipalities--Refuse Collection and
Disposal--Ordinance Describing Duties; Constitutionality
of Exclusive Privilege

Synopsis: A municipal ordinance, enacted pursuant to the
provisions of K.S.A. 12-2103, may prohibit persons
other than the municipal contractor from making
garbage collections, and such an ordinance is in
all respects constitutional. The application and
enforceability of such an ordinance against a currently
licensed garbage collector, however, during the term
of the collector's unexpired license, depends upon
the reasonableness of the ordinance. Cited herein:
K.S.A. 12-2102, 12-2103.

*

*

*

Dear Mr. Roth:

You request our interpretation of K.S.A. 12-2103. Specifically,
you pose several questions regarding the granting of an exclusive
right to collect and dispose of refuse by the city of Burlington,
Kansas. Your letter sets forth the following facts:

"On November 5, 1980, Don Attebury, d/b/a Coffey
County Sanitation (hereinafter 'Attebury'),
entered into a contract for collection and
disposal of refuse pursuant to K.S.A. 12-2102.

Mr. Dennis D. Roth
Page Two
April 9, 1981

The contract is annexed hereto as Exhibit 'A'. On November 19, 1980, the city council passed Ordinance No. 289, granting Attebury the exclusive right to collect and dispose of garbage within the city. That ordinance was duly published November 21, 1980, and is annexed hereto as Exhibit 'B'.

"Before the city entered into the contract with Attebury and passed the ordinance, the city had one other licensed sanitation service, Fred Effinger, d/b/a Effinger Sanitation Service (hereinafter "Effinger"). Effinger purchased a license to do business from the city on October 14, 1980 pursuant to Chapter 7, Article 8 of Burlington's Revised Ordinances, a copy of which is annexed as Exhibit 'C'. The license is good for one year. Effinger began to solicit for customers and had a certain number of customers by the time that Ordinance No. 289 became effective.

"Since the effective date of Ordinance No. 289, Effinger has continued to solicit new customers and Attebury has asked the City to prevent this by virtue of the contract and Ordinance No. 289."

Section 3 of Ordinance No. 289 provides as follows:

"Section 3. That Attebury's right to collect refuse within the City of Burlington and disposal of the same is exclusive during the term of the contract and any other persons, companies, corporations, individuals or entities of any nature are prohibited from making collections of refuse within the City of Burlington or disposing of the same."

Article 8 of Burlington's Revised Ordinances, relating to garbage and trash collection, is attached hereto as Appendix "A."

You first inquire as to whether "the city can grant an exclusive privilege to collect and dispose of refuse under the applicable statutes." K.S.A. 12-2102 provides, in part, that any city may provide for the collection and disposal of garbage or trash "by contract." K.S.A. 12-2103 prescribes that an ordinance shall be passed when a city makes provision for the collection and disposal of garbage by contract, and specifies that the city may prohibit

Mr. Dennis D. Roth
Page Three
April 9, 1981

persons other than the contractor from making collections. The great weight of authority, both in this state and elsewhere, is that a municipality may regulate the removal of garbage within its limits by contracting with private removal enterprises and in so doing grant such enterprises an exclusive license or privilege. O'Neal v. Harrison, 96 Kan. 339 (1915); Zerr v. Tilton, 224 Kan. 394, 398 (1978); 56 Am.Jur.2d Municipal Corporations, Etc., §462; 83 A.L.R.2d 801. Hence, in our judgment, the prohibition authorized by K.S.A. 12-2103 is constitutional and enforceable, and a municipality may grant an "exclusive privilege" to remove garbage thereunder.

You next inquire whether the contract and ordinance adopted by the city of Burlington are "valid manifestations" of the power to grant an exclusive privilege, and whether Effinger retains any right to serve his current customers or solicit new business. It should initially be noted that the license issued to Effinger by the City of Burlington creates no contractual or property right. In 51 Am.Jur.2d Licenses and Permits, §18, the applicable principle is stated as follows:

"Under the theory that a license is not a contract between the sovereignty and the licensee, and is not property in any constitutional sense, that it does not confer a vested, permanent, or absolute right, but only a personal privilege, it has generally been held that the constitutional inhibition as to the impairment of the obligation of contracts does not extend to licenses."

Further, the granting of a license to engage in any activity does not, in itself, invest the licensee with an absolute right to continue in the activity. 51 Am.Jur.2d Licenses and Permits, §14. Nor does the granting of an exclusive right to collect and dispose of refuse violate constitutional due process or equal protection. State ex rel. Moock v. Cincinnati, 166 N.E. 583 (Ohio, 1929); Burns v. Enid, 217 P.1038 (Okla., 1923); 83 A.L.R.2d 815. Thus, challenges to ordinances prohibiting refuse collection by persons other than the city contractor have not, in most instances, been upheld when based upon the above-cited grounds.

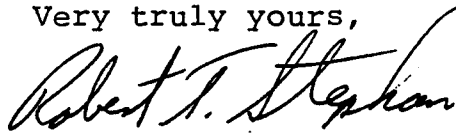
Although, as indicated above, a municipality may exercise broad authority in regulating the collection and disposal of refuse, such authority is subject to certain constraints. In the O'Neal case, supra at 342, the court stated as follows regarding municipal ordinances granting an exclusive privilege to remove garbage:

Mr. Dennis D. Roth
Page Four
April 9, 1981

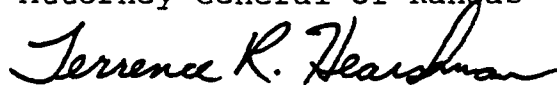
"The reasonableness of the course pursued, in view of all the circumstances, and the degree of inconvenience resulting to individuals, may be taken into account. But where as in this case the matter is one of great public importance, which the legislature has entrusted to the action of local authorities--no doubt wisely, because of the differences in local conditions--the action of the city commission becomes entitled to consideration almost equal to that accorded to a statute, and should not be interfered with except upon grounds the force of which is reasonably free from doubt."

Thus, applying the above-cited principle to the questions you have posed, we believe a court would enforce the prohibition set forth in Ordinance No. 289 unless it was patently unreasonable in view of all the circumstances. One of the circumstances which would be taken into account, at least during the term of the Effinger license, is the fact that the city issued said license only one month prior to adopting the prohibition set forth in Section 3 of Ordinance No. 289. Effinger's right to serve his current customers, or solicit new business, during the term of his license, depends upon whether the prohibition adopted by the city is reasonable. Since the reasonableness of the city's action may depend upon disputed factual issues which may be decided only upon trial before a court, we are unable to render a more definitive opinion as to what rights, if any, Mr. Effinger may have during the term of his license.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:BJS:TRH:jm