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ATTORNEY GENERAL OPINION NO. 82- 84

The Honorable Larry E. Erne
State Representative, Seventh District
State Capitol, Room 281-W
Topeka, Kansas 66612

Re: Cities and Municipalities--Repair or Removal of Unsafe or Dangerous Structures--Ordinances and Resolutions for the Payment of Proceeds of Certain Insurance Policies to Cities or Counties

Synopsis: The provisions of 1982 Senate Bill No. 545 (As Amended by Senate Committee), which authorize a Kansas city or county to establish (by ordinance or resolution) a procedure for the payment of up to $5000 of the proceeds of any insurance policy based upon a covered claim payment (exceeding 75% of the face value of the policy) made for damage or loss to a building or structure, caused by or arising out of any fire or explosion, would not, if enacted, violate the constitutional prohibition against laws impairing the obligation of contracts, or constitutional due process requirements. Cited herein: K.S.A. 12-1750, U.S. Const., Art. I, §10.

* * *

Dear Representative Erne:

You have requested our opinion as to the constitutionality of 1982 Senate Bill No. 545 (As Amended by Senate Committee). Said bill, if enacted, would authorize a Kansas city or county to establish (by ordinance) a procedure for the payment (to the city or county) of up to $5000.00 of the proceeds of any

insurance policy based upon a covered claim payment (exceeding 75% of the face value of the policy) made for damage or loss to a building or structure, caused by or arising out of any fire or explosion. An insurer would be required to withhold and pay to the city or county said proceeds from an insured's claim payment, unless the city or county had issued, under authority set forth in Section 6 of the bill, a "certificate to permit covered claim payment to the insured without deduction." Under Sections 1(c) and 3(c) of the bill, the city or county could retain the entire amount of said moneys for 30 days, or for a longer period if legal proceedings were instituted, but any amount "in excess of that necessary to comply with the provisions of K.S.A. 12-1750 et seq. for removal of the building or structure, less salvage value," would be required to be returned to the insured. Additionally, under Sections 2 and 4 of the bill, a city or county is authorized to create, by ordinance or resolution, a tax lien in favor of the city or county in the proceeds of any insurance policy "based upon a covered claim payment made for damage or loss to a building or other structure, caused by or arising out of any fire or explosion." The lien would arise

> "upon any unpaid tax, special ad valorem levy, special assessment or other charge imposed upon real property by or on behalf of the city which is an encumbrance on real property, whether or not evidenced by written instrument, or such tax, levy, assessment, expense or other charge that has remained undischarged for at least one year prior to the filing of a proof of loss."

It is clear that, to some extent, the provisions of 1982 Senate Bill No. 545 impair the obligations of contracts between an insured and an insurer. However, this fact does not necessarily mean that the bill violates the provisions of Article I, §10 of the Federal Constitution, since said provisions prohibit only an unreasonable impairment, and permit legislation impairing the obligation of contracts where such legislation is addressed to a legitimate end, and the measures taken are reasonable and appropriate to that end. 16 Am.Jur.2d, Constitutional Law §694. In this regard, it would appear that the intent of the subject bill is to insure that damaged property is repaired or removed by the owner of the property or, if the owner refuses to act, by the city or county using a percentage of any insurance money to cover the cost of removal. Given this fact, it is our opinion that the bill addresses a legitimate objective, and is not an unreasonable impairment of insurance contracts or a violation of the constitutional prohibition against impairing the obligation of contracts.

Neither, in our judgment, does 1982 Senate Bill No. 545 violate the constitutional requirement of due process of law. With regard to "substantive" due process requirements, it is well settled that the enjoyment of property (including insurance proceeds) is subject to the valid exercise by the state of its police power [Martin v. Davis, 187 Kan. 473, 484 (1960)], and that the regulation of the insurance business is a proper subject for a state's exercise of its police power. Country-Wide Ins. Co. v. Harnett, 426 F.Supp. 1030, 1035 (1977), aff'd 431 U.S. 934 (1977).

In regard to the constitutional requirement of "procedural" due process, it is clear that 1982 Senate Bill No. 545 does not provide for a hearing prior to depriving an insured of insurance proceeds. However, the right to a "pre-deprivation hearing" is conditioned upon a weighing of three factors:

> "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

Weighing these factors, it should be noted that, under Sections 1(c) and 3(c) of 1982 Senate Bill No. 545, an insured's proceeds (and any interest accrued thereon) would be released within 30 days unless proceedings for removal of the unsafe or dangerous structure had been instituted pursuant to K.S.A. 12-1750 et seq. Although an "erroneous" deprivation could occur during said thirty-day period, we cannot conclude that a deprivation for such a short period of time would outweigh a city or county government's interest in ensuring that unsafe or dangerous structures are removed at the expense of the owner of the subject real estate. Therefore, in our judgment, procedural due process of law does not require a pre-deprivation hearing regarding insurance proceeds which may be withheld pursuant to 1982 Senate Bill No. 545.

Although what has been said above is dispositive of the issues which have been raised, we note, in passing, that at least five states have enacted laws resembling, to some degree, 1982 Senate

Bill No. 545, and that there have been no reported court decisions striking down any of said laws on constitutional grounds.

Very truly yours,

Robert T. Stephan

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RTS:BJS:TRH:jm