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ATTORNEY GENERAL OPINION NO. 88- 80

Mr. Craig Cox
Harvey County Attorney
Courthouse, P.O. Box 687
Newton, Kansas 67114

Re: Public Health -- Solid and Hazardous Waste; Solid Waste -- Restrictions on Local Authorities

Synopsis: Pursuant to K.A.R. 28-29-1, Harvey county may not enact an ordinance that impedes the interstate or intrastate transportation or disposal of solid waste collected in Harvey county by requiring that all such solid waste remain in Harvey county. Because disposal of solid waste is affected with a public interest, Harvey county may, where not otherwise precluded, establish a reasonable and nondiscriminatory rate schedule for services connected with such disposal if the schedule bears a rational relation to that public interest. Cited herein: K.S.A. 19-101; K.S.A. 1987 Supp. 19-101a; 65-3401; 65-3405(c)(2); K.A.R. 28-29-1.

* * *

Dear Mr. Cox:

As Harvey County Attorney you ask our legal opinion on the authority of the board of county commissioners to enact two ordinances that would (1) require all trash picked up in Harvey county to be dumped in the Harvey county landfill and (2) set a maximum fee rate schedule setting forth maximum fees that could be charged for collecting trash. You inform

us that the first proposed ordinance results from the board's concern that an out-of-county trash hauler will take all trash out of the county, thereby causing use of the Harvey county landfill to decline to the point that a county mill levy increase would be necessary in order to finance the landfill. You state that the board proposes the second ordinance because of concerns that trash haulers could set prices so high as to be a burden on the general public or so low that harmful competition occurs.

K.S.A. 65-3401 et seq. authorizes each county to establish a solid waste disposal plan. K.S.A. 65-3405(c)(2) states that "every plan shall . . . reasonably conform to the rules, regulations, standards and procedures adopted by the secretary for implementation of this act." K.A.R. 28-29-1 represents such regulation by the secretary of the Department of Health and Environment and it states:

> "[A] local agency shall not enforce a requirement, other than those in this article, which would impede interstate or intrastate transportation or disposal of solid waste. . . ."

As stated in Attorney General Opinion No. 82-21, a condition imposed by the county commission preventing persons outside the county from disposing of solid waste in the county landfill constitutes a requirement that impedes interstate or intrastate transportation or disposal of solid waste, and thus violates the clear intent of K.A.R. 28-29-1. See also Attorney General Opinion No. 84-39. The issue thus becomes whether K.A.R. 28-29-1 also prohibits the inverse situation, where a county prohibits the export of its trash.

Local authorities possess ample power over the disposition of garbage. Courts have both denied and upheld the validity of ordinances prohibiting transportation or dumping of other communities' garbage. See Annot., 83 A.L.R. 2d 795, 827, 830 (1962). See also 56 Am. Jur. 2d, Municipal Corporations, § 464 (1971). However, in Kansas, pursuant to K.S.A. 65-3405(c)(2) and K.A.R. 28-29-1, local control in the area of interstate or intrastate transportation or disposal of solid waste is preempted. Unless a restriction in article 29 states otherwise, a local governmental entity is clearly prohibited from undertaking action that impedes interstate or intrastate transportation or disposal of solid waste.

Impede is defined as "to obstruct; hinder; check; delay," Blacks Law Dictionary 678 (5th ed. 1979); interstate as "between two or more states," id. at 735; intrastate as "in; near; within" one state, id. at 738; and transportation as "the movement of goods or persons from one place to another," id. at 1344. A local ordinance that requires all solid waste collected in Harvey county to remain in Harvey county clearly obstructs, hinders, checks or delays the movement of goods or persons between two states or within the state. Thus, the proposed ordinance violates the prohibition contained in K.A.R. 28-29-1. Therefore, it is our opinion that, unless the state otherwise permits such a restriction, Harvey county is prohibited from enacting an ordinance requiring that all solid waste collected in Harvey county remain in Harvey county.

Your second question concerns the ability or authority of the board of county commissioners to enact an ordinance setting a fee rate that may be properly charged by services collecting trash. K.S.A. 65-3401 et seq. allows the imposition of reasonable fees upon those who use the county landfill. See also Attorney General Opinions No. 84-97, 84-39, 80-221, 80-184, and 79-174. These statutes do not speak to the imposition of fee schedules for collection and hauling of trash.

K.S.A. 19-101 grants counties the authority "to exercise the powers of home rule to determine their local affairs and government." Subject to enumerated exceptions, K.S.A. 1987 Supp. 19-101a gives counties "powers of local legislation and administration it deems appropriate." If the county desires local legislation in an area in which no conflicting state law exists, the county may promulgate such local legislation by ordinary resolution pursuant to K.S.A. 1987 Supp. 19-101a(b). This general rule, however, is also subject to federal constitutional limitations which restrict the actions and authority of a county. See McQuillin, Municipal Corporations, § 19.02 (3d ed. 1981).

K.S.A. 65-3401 et seq. allows, and in some areas requires, county regulation concerning solid waste disposal. This authority implicitly promotes public health and welfare interests. Courts recognize that local regulation, when reasonable, may control trash disposal without improper impairment of a trash hauling business. See, O'Neal v. Harrison, 96 Kan. 339, 342 (1915); See also, 56 Am. Jur. 2d, Municipal Corporation, § 457 (1971). However, local legislation may not, under the guise of protecting the

public, arbitrarily interfere with contractual relationships or with a legally operated private business by imposing unreasonable or unnecessary restrictions. Louis K. Liggett Co. v. Baldridge, Pa., 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204 (1928); See also, 16B C.J.S. Constitutional Law § 857 (1985).

Courts permit regulatory price control by government action when such control promotes a legitimate public purpose:

> "Accordingly, constitutional due process guaranties are not violated by regulations of prices, rates, and charges, which are reasonable, nondiscriminatory, and promulgated in the proper exercise of the police power, or for the general welfare, or where a private business, or private property, is affected with a public interest. . . . The police power of the state to fix prices is not confined to industries which are public utilities in the conventional sense, and price fixing in the interest of the public is sanctioned when it bears a reasonable and logical relation to the public health, welfare, safety, and morals. As otherwise stated, the private character of a business does not necessarily exempt it from the regulation of prices by the state, and it may be competent for the legislature to fix minimum prices for commodities and services regardless of whether the particular business is one affected with a public interest." 16D C.J.S. Constitutional Law, § 1345 at 489, 490 (1985). (Emphasis added).

Thus, the issue becomes whether imposition of fee schedules establishing maximum prices arbitrarily interferes or places an unreasonable or unnecessary restriction on a private business.

Property rights cannot be unlawfully invaded under the pretense of protecting public health. McQuillin, Municipal Corporations § 24.224 (1981). In connection with an exclusive contract for the removal of waste, a municipality has been permitted to use that contract to fix maximum fees. Butler v. Nuth, 65 A.2d 687, 788 (Pa. 1949).

When more than one trash hauler offers the service, an established fee schedule affects the competition between private businesses. The Supreme Court has approved governmentally established economic curbs deemed to promote public welfare when such regulation promotes free competition or restricts harmful competition. Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934); See also 89 A.L.R. 1469 (1934); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835 (1937); 16A Am. Jur. 2d Constitutional Law, 3437 (1979). If the restriction protects a public interest in a nondiscriminatory manner, governmental bodies may adopt price controls that interfere with individual liberties. Nebbia, 291 U.S. at 537.

Governmental price control of a business that is affected with a public interest does not violate constitutional due process guarantees when such regulation protects the public health, safety and welfare and is reasonable and nondiscriminatory. See McQuillin, Municipal Corporations, § 24.397 (1981). K.S.A. 65-3401 et seq. evidences the public nature of trash hauling and allows governmental control of it. Thus, trash hauling is a service that is affected with a public interest. The service is one that citizens cannot choose to do without; the law requires that certain wastes be properly disposed of. Moreover, without trash services a county faces potential health problems. When a citizen has no choice but to use a trash hauler, there is a public interest in insuring that such service remains available and affordable. Harmful competition endangers the availability of the service and unreasonably high prices threaten both the availability of and ability to afford the service.

Therefore, it is our opinion that, because disposal of solid waste is a service that affects a public interest, Harvey county, where not otherwise precluded, may establish a reasonable and nondiscriminatory rate schedule if such a schedule bears a rational relation to that public interest.

Very truly yours,

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