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April 17, 1989

ATTORNEY GENERAL OPINION NO. 89-48

Thomas A. Glinstra
Municipal Counsel
City of Olathe
100 West Santa Fe
P.O. Box 768
Olathe, Kansas 66061

Re: Bonds and Warrants--General Provisions--Local
Legislative Powers--Financing; Issuance of Bonds

Synopsis: A city which has adopted an ordinance prescribing how revenues from a combined water and sewer system may be expended may not pledge those revenues for an unauthorized purpose. The City of Olathe may not use revenues from the City's combined water and sewer system to pay debt service on general obligation bonds issued by the City to finance improvements and extensions to such system. The City has pursuant to ordinance limited the availability of the system surplus revenues to the purposes stated therein: Cited herein: K.S.A. 12-860.

* * *

Dear Mr. Glinstra:

On behalf of the City of Olathe, you have requested our opinion concerning the authority of the City to use revenues from its combined water and sewer system to pay debt service on general obligation bonds the City proposes to issue to finance improvements and extensions to such system.

You inform us that the City has created a water and sewer system in accordance with K.S.A. 12-856 to 12-869, inclusive, as amended, and has two series of bonds outstanding which are payable from water and sewer revenues - the water and sewer system refunding bonds, Series 1984, of the City dated June 15, 1984 (the "1984 Bonds"), which were authorized by Ordinance No. 84-80 of the City, as amended by Ordinance No. 87-74 (collectively, the "1984 Bond Ordinance"), and the Water and Sewer System Refunding Revenue Bonds, Series 1987, of the City (the "1987 Bond Ordinance"). You also inform us that the City is considering financing certain improvements to its water and sewer system which would be payable either from revenue bonds or from general obligation bonds, but that regardless of the type of financing used the city would like for the debt service to be paid from the revenues collected from the water and sewer system.

K.S.A. 12-860 authorizes the governing body of a city to use revenues collected from the water and sewer system to pay the debt service on revenue bonds or general obligation bonds. The statute provides in relevant part:

"The governing body of the city shall establish such rates and charges for water and for the use of the sewage disposal system as shall be reasonable and sufficient to pay the cost of operation, repairs, maintenance, extension and enlargement of the water and sewage system . . . and the payment of any bonds and the interest thereon as may be issued for such water and sewage system . . . provided that such revenue may be used to pay revenue bonds or general obligation bonds payable by the city at large issued for either the waterworks system or sewage disposal system before the systems were combined or for the water and sewage system after they have been combined."
(Emphasis added.)

The emphasized portions of the statute quoted above make it clear that the city is granted the authority to issue either revenue bonds or general obligation bonds payable by the city at large for a water and sewage system subject to certain restrictions.

Having made this determination, it is necessary to examine the 1984 Bond Ordinance and the 1987 Bond Ordinance passed by the city to ascertain whether it is permissible pursuant to these ordinances to issue general obligation bonds payable from the revenues of the system. The city in the 1984 Bond Ordinance and the 1987 Bond Ordinance included additional provisions and restrictions pertaining to the use of water and sewer revenues from the system.

Section 14 of the 1984 Bond Ordinance provides, in part, as follows:

"[T]he City hereby covenants and agrees that so long as the Bonds remain outstanding and unpaid, all of the revenues derived by the City from the operation of the system . . . shall only be used to pay the costs of operation and maintenance of the system and to pay the principal of and interest on the Bonds and any prior revenue bonds or general obligation bonds outstanding and unpaid as provided by law. (Emphasis added.)

Section 14 of the 1987 Bond Ordinance provides, in part, as follows:

"[T]he City hereby covenants and agrees that so long as the Series 1987 bonds remain outstanding and unpaid, the pledged revenues . . . shall only be used to pay the costs of operation and maintenance of the system and to pay the principal of and interest on the Series 1987 bonds, the Parity bonds and any additional bonds issued on a Parity with the Series 1987 bonds and/or the Parity bonds pursuant to the 1984 Ordinance or this 1987 Ordinance."

Pledged revenues are defined in Section 1 of the 1987 ordinance as "all the revenue derived by the City from the rates, fees or charges collected by the City from the operation of the system, including all revenues from all improvements, extensions and enlargements of the system hereinafter constructed by the City."

Section 15 of the 1984 Ordinance provides further, in part, that after all required payments have been made into the

principal and interest account for the revenue bonds and into the bond reserve account, the City shall next pay into the surplus fund "any and all remaining moneys" and that moneys in the surplus fund may be used for (among other things) "acquiring replacements for or additions to any part of the system or for enlarging, extending and improving the same." Section 15 further provides that "moneys held in the [Surplus] [A]ccount shall not be used for general governmental or municipal purposes of the City so long as any of the bonds remain outstanding and unpaid." (Emphasis added.)

Section 15 of the 1987 Ordinance does not establish a surplus fund but after establishing the various accounts to be funded provides that "moneys held in said accounts shall not be used for general governmental or municipal purposes of the city so long as any of the Series 1987 Bonds remain outstanding and unpaid."

It is commonly accepted that a municipal legislative body may generally exercise discretion in passing ordinances differing in terms and limits from statutes so long as those limits are not broader than and in conflict with statutory provisions. See McQuillin, Municipal Corporations, §21-32 (3d Ed. 1988). Where the legislature has acted in some area, a city's power to act in the same area should be upheld unless the legislature has clearly preempted the field so as to preempt municipal action. So long as a statute and ordinance on the same subject do not conflict, effect will be given to both, and the city ordinance should be permitted to operate. Clafin v. Walsh, 212 Kan. 1, 7 (1973). In this situation, in our opinion, the city has permissibly enacted legislation which is narrower than the authority granted in K.S.A. 12-860, which arguably authorizes the use of revenues of the water and sewer system to pay debt service on general obligation bonds issued to finance improvements to the system.

As previously set forth, Section 14 of both the 1984 Ordinance and the 1987 Ordinance impose certain limitations on the use of revenues derived by the city from the operation of the system. While language in Section 14 of the 1984 ordinance might arguably be construed to allow the use of such revenues for the payment of outstanding and unpaid general obligation bonds, the 1987 Ordinance passed by the city omits any reference to payment of general obligation bonds. Further, the cited language in the 1987 Ordinance makes an express pledge of the revenues derived from the system to wit: "the pledged revenues . . . shall only be used to pay the principal of and interest on the Series 1987 Bonds, the Parity Bonds and

any additional bonds issued on a parity with the Series 1987 Bonds and/or the Parity Bonds pursuant to the 1984 ordinance or this 1987 ordinance."

An examination of the applicable rules that govern when two ordinances appear in conflict reveals that ordinances are to be construed by the same rules that govern the construction of statutes. As in statutory construction, the cardinal objective in construing ordinances is to ascertain and give effect to the municipal legislative intention. See McQuillin, Municipal Corporations §20.38 (3d Ed. 1988).

It is well established that the latest expression of the governing body upon a subject applies and when two ordinances are in conflict, the one enacted at a later date controls. The ordinances passed by the City are in apparent conflict concerning the issuance of general obligation bonds and therefore, the 1987 ordinance should govern this issue. See Lines v. City of Topeka, 223 Kan. 772, 775 (1978). Because the City in the 1987 Ordinance deleted any reference to the use of water and sewer system revenues for the payment of general obligation bonds it is our opinion that the available uses of such revenues were limited accordingly to the purposes clearly enumerated therein.

In any event, in our opinion, Section 15 of the 1984 Ordinance does not grant the city the requisite authorization to use surplus revenues to pay debt service on general obligation bonds. The language in Section 15 sets forth the permissible uses of moneys contained in the surplus fund, limiting such uses to "acquiring replacements for or additions to any part of the system for enlarging, extending or improving the same." While it is possible to interpret this section as indirectly authorizing the issuance of general obligation bonds payable from the surplus revenues, such an interpretation seems unnecessarily broad when weighed against the competing interests of the bondholders. Use of the revenue to pay long-term general obligation debt is distinguishable from the use of surplus revenues to pay for improvements to the system without incurring additional debt. The commitment of surplus funds to the payment of general obligation debt could be construed as jeopardizing bondholder security in the event that surplus funds might some day be required for debt service payment on outstanding revenue bonds. In further providing in Section 15 that "moneys held in the [Surplus] [A] ccount shall not be used for general governmental or municipal purposes of the city so long as any of the bonds remain outstanding and unpaid," it is even less

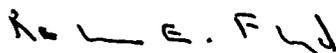
likely that authority to issue general obligation bonds can be found. Section 15 of the 1987 Ordinance further provides that "moneys held in the reserve account shall be used solely to prevent any default in the payment of the principal of or interest on the Series 1987 Bonds (and the Parity Bonds as provided in the 1984 Ordinance) if at any time the moneys in the principal and interest account are insufficient to pay the principal of and/or interest on such bonds." (Emphasis added.) In this regard, the maxim, *expressio unius est exclusio alterius* is applied in the construction of ordinances; the expression of one thing excludes another. Hence, the enumeration of certain powers or things in an ordinance excludes these not named. See McQuillin Municipal Corporations, §20.57 (3d ed. 1988).

The applicability of this rule is evidenced by a survey of municipal ordinances passed by other cities. An analysis of these ordinances reveals that when surplus utility revenues may be used to pay debt service on general obligation bonds the authorization is generally set forth clearly in the authorizing documents in much the same manner as it is stated in the authorizing statute.

In conclusion, it is our opinion that the City may not use revenues from the City's combined water and sewer system to pay debt service on general obligation bonds issued by the City to finance improvements and extensions to the system. There is no clear authorization for such use of the revenues in either the 1984 or 1987 Ordinance. Even if the 1984 Ordinance had more clearly provided express authorization for the City to use surplus revenues for the payment of general obligation bonds, it is our opinion that whatever authority may have been granted in the 1984 ordinance to issue general obligation bonds was nullified by the 1987 ordinance. The 1987 ordinance operating as the latest expression of the municipality's intention on the subject appears to preclude any possibility of the utilization of surplus revenues for the payment of general obligation bonds by deleting all references to the payment of general obligation bonds, and the surplus fund and by making a further commitment of the revenues solely to the payment of operation and maintenance of the system and to debt service on revenue bonds.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas



Rebecca E. Floyd
Assistant Attorney General