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ATTORNEY GENERAL OPINION NO. 2012-21

Steven W. Hirsch
Decatur County Attorney
124 S. Penn Avenue
Oberlin, KS 67749

Re: Cities and Municipalities–Franchises–Granting of Franchises; Organized Collection Service Establishment; Application

Synopsis: The Organized Service Collection Act is triggered by a municipality's decision to establish an organized collection service as defined by K.S.A. 2011 Supp. 12-2035(b), and does not apply to the renewal or renegotiation of contracts for an existing organized collection service system. K.S.A. 2011 Supp. 12-2001(a)(6) does not prohibit a city or county from contracting for solid waste collection services in lieu of granting a franchise for such services. Cited herein: K.S.A. 2011 Supp. 12-2001; 12-2034; 12-2035; 12-2036; 12-2037; K.S.A. 19-2676; 19-2677; 75-704.

* * *

Dear Mr. Hirsch:

As County Attorney for Decatur County, you ask for our opinion as to whether a municipality must comply with the Organized Collection Service Act¹ ("Act") when renewing or renegotiating contracts for municipal solid waste collection services. You also ask whether K.S.A. 2011 Supp. 12-2001(a)(6) requires a city or county to grant a franchise to, rather than execute a contract with, an independent contractor to provide municipal solid waste collection services.

¹ K.S.A. 2011 Supp. 12-2034 *et seq.*

In your letter, you state that several years ago, the City of Oberlin and Decatur County entered into contracts with an independent contractor for solid waste collection services, and those contracts are now ready for renewal and renegotiation.

The Act authorizes municipalities² to establish organized collection services by ordinance or resolution.³ Prior to the adoption of an ordinance or resolution establishing an organized collection service, a municipality must follow the procedure outlined in K.S.A. 2011 Supp. 12-2036. Such procedure requires, among other things, that the municipality announce its intent to establish an organized collection service by passage of a resolution of intent at least 180 days before adoption of an ordinance or resolution establishing the organized collection service.⁴ After the adoption of the resolution of intent, the municipality must develop a plan for organized collection service and allow all persons providing solid waste or recyclables collection services in the municipality to participate in planning meetings.⁵ Additionally, a municipality may not commence organized collection service for a period of at least 18 months from the date of the adoption of the ordinance or resolution establishing such service.⁶ In sum, the procedure required by K.S.A. 2011 Supp. 12-2036 takes at least two years to complete.

Your first question is whether the Act would apply to the renewal or renegotiation of current contracts for solid waste collection services. When interpreting statutes, the plain meaning of a statute controls unless a contrary legislative intent can be shown.⁷ Therefore, to answer your question, we consider the plain meaning of the Act.

K.S.A. 2011 Supp. 12-2035(b) defines organized collection service as follows:

[A] system for collecting solid waste, recyclables or both, including franchise, organized collection, or a process in which a municipality goes from multiple haulers to one single contracted hauler in which a specified collector, or a member of an organization of collectors, is authorized to collect from a defined geographic service area or areas some or all of the solid waste or recyclables that is released by generators.

We note that this definition includes examples of organized service such as franchise, organized collection, or switching from multiple haulers to one hauler. Each of these examples is a departure from an open market system in which there are no municipal restrictions on private businesses providing waste collection services. Therefore, it appears that K.S.A. 2011 Supp. 12-2035(b) is intended to broadly define organized solid waste collection systems as those that exclude some or all private businesses

² "Municipality" is defined as any county, city, township and other political subdivision or taxing subdivision including any board, bureau, commission, committee or other agency having authority to create, regulate or otherwise impact the delivery of collection services. K.S.A. 2011 Supp. 12-2035(a).

³ K.S.A. 2011 Supp. 12-2036(a).

⁴ K.S.A. 2011 Supp. 12-2036(b).

⁵ K.S.A. 2011 Supp. 12-2036(c).

⁶ K.S.A. 2011 Supp. 12-2036(f)(1).

⁷ See, e.g., *City of Wichita v. Patterson*, 22 Kan. App. 2d 557, 558 (1996).

from providing such services to municipal customers, or to restrict the manner or area(s) in which such businesses may provide services.

This interpretation is consistent with the legislative history of the Act. In legislative testimony, proponents of the Act stated that the Act prevents municipalities from taking business away from private waste collection companies without prior notice.⁸ A proponent of the Act also testified that his waste collection business was “forced out” of a city by the city’s decision to grant a franchise to a single hauler.⁹ Finally, proponents of the Act testified that the Act is intended to lessen the impact of lost business due to a municipality’s decision to change from an open market waste collection system to a government-managed system that limits the number of waste collection businesses that may provide service to the municipality.¹⁰ Each of these examples involves the loss of business by a private company due to municipal decisions to depart from an open market approach to solid waste collection.

Whether the solid waste collection contracts in the City of Oberlin and Decatur County fall within the definition of organized collection service is a question of fact, and not a question of law upon which we may opine.¹¹ We have no information regarding the content of such contracts, the proposed terms for renewal or renegotiation, or whether the current solid waste collection systems in the city and county would be considered organized collection services for the purposes of the Act. However, based upon the plain language of K.S.A. 2011 Supp. 12-2035(b) and the legislative history of the Act, we opine that a contract would constitute an organized collection service if the contract serves to exclude other solid waste collection companies from providing services in the municipality or restrict the manner or area(s) in which such businesses may provide services.

Assuming that such contracts are organized collection services, we next consider whether the Act applies to the renewal and renegotiation of such contracts. “Regarding statutory construction, it is fundamental that the intent of the legislature governs and, when construing a statute, a court should give words in common usage their natural and ordinary meaning.”¹² “The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted.”¹³

Pursuant to K.S.A. 2011 Supp. 12-2036(a), the Act is triggered by a municipality’s decision to establish an organized collection service. That statute states in relevant part:

⁸ *Minutes*, House Local Government Committee, February 17, 2011, Attachments 1 and 2; *Minutes*, Senate Local Government Committee, March 14, 2011, Attachments 5 and 6.

⁹ *Minutes*, House Local Government Committee, February 17, 2011, Attachment 1; *Minutes*, Senate Local Government Committee, March 14, 2011, Attachment 6.

¹⁰ *Minutes*, House Local Government Committee, February 17, 2011, Attachments 1 and 2; *Minutes*, Senate Local Government Committee, March 14, 2011, Attachments 5 and 6.

¹¹ K.S.A. 75-704.

¹² See, e.g., *Fisher v. State Farm Mut. Auto. Ins. Co.*, 264 Kan. 111, 118 (1998).

¹³ See, e.g., *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 378 (2001).

A municipality may establish an organized collection service as a municipal service by ordinance, in the case of a city, or by resolution, in the case of other municipalities.

“Establish” is ordinarily defined as “to bring into existence.”¹⁴ We presume that the legislature’s choice of the word “establish” indicates that the Act is intended to apply to a municipality’s decision to bring an organized system into existence. It follows that the Act is *not* intended to apply to organized collection systems that are already established, such as the renewal or renegotiation of a contract for the existing organized system.

We find support for this interpretation in other sections of the Act. When construing statutes, various provisions of an act must be considered *in pari materia* with a view of reconciling and bringing them into workable harmony if possible.¹⁵ Notably, there is no provision of the Act that expressly applies to renewals or renegotiations. This suggests that the legislature did not contemplate requiring the two-year procedure outlined in K.S.A. 2011 Supp. 12-2036 to be followed for renewals or renegotiations of existing organized service contracts.

Further, K.S.A. 2011 Supp. 12-2036(e)(2)(B) states that a municipality’s plan to establish an organized collection service shall be evaluated in regard to “minimizing displacement and economic impact to current solid waste collectors.” This language presupposes that the plan, if adopted, would displace current businesses. A renewal or renegotiation of an existing contract for organized service would not displace or impact economically other waste collection businesses; such displacement or economic impact would have occurred, if at all, when the municipality first adopted an organized collection system that excluded or restricted such businesses.

Finally, K.S.A. 2011 Supp. 12-2037(a) states that the Act “shall be applied to all municipalities regardless of the *stage of development* of an organized collection system.”¹⁶ The phrase “stage of development” suggests that the Act applies only to organized collection systems that are not yet fully developed.

Taken together, the various provisions of the Act suggest that the Act is intended to apply only when a municipality decides to bring into existence an organized collection system where such system did not previously exist. Therefore, we opine that the Act does not apply to the renewal or renegotiation of a contract for an existing organized collection service.

Your second question asks us whether the City of Oberlin and Decatur County must grant a franchise to, rather than execute a contract with, an independent contractor to provide municipal solid waste collection services. The authority of a city to grant a franchise is governed by K.S.A. 12-2001 *et seq.*

¹⁴ <http://www.merriam-webster.com/dictionary/establish>.

¹⁵ See, e.g., *State ex rel. Morrison v. Oshman Sporting Goods Co.*, 275 Kan. 763, 768 (2003).

¹⁶ Emphasis added.

Generally, a franchise is defined as the grant of a right to maintain and operate public utilities within a municipality and to exact compensation for such services.¹⁷ A franchise is the subject of a contract between the municipality and the grantee, and in fact constitutes a contract when consideration is present.¹⁸

You note that K.S.A. 2011 Supp. 12-2001(a)(6) provides that a “governing body of a city *may permit* any person, firm or corporation to . . . use the streets in the carrying on of any business which is not prohibited by law.”¹⁹ While this statute authorizes cities to grant franchises for the use of city streets, the statute does not require cities to do so. Further, that statute applies only to grants of franchises by *cities*; other statutes apply to grants of franchises for solid waste collection services by *counties*.²⁰ Therefore, K.S.A. 2011 Supp. 12-2001(a)(6) does not require either a city or a county to grant a franchise rather than contract for solid waste collection services.

“The power of the governing body of a city to grant or refuse to grant a franchise is essentially legislative in nature requiring the exercise of judgment and discretion”²¹ Whether a franchise or a contract is the better choice for your city and county is a question of policy, and not a question of law upon which we may opine.²² However, if the City of Oberlin and/or Decatur County choose to grant a franchise for solid waste collection services, and such franchise constitutes the establishment of an organized collection service system, then the city or county must follow the Act in addition to all other applicable laws.

Sincerely,

Derek Schmidt
Kansas Attorney General

Sarah Fertig
Assistant Attorney General

DS:AA:SF

¹⁷ 12 McQuillin, *Municipal Corporations* §34.03 (1995).

¹⁸ *City of Liberal v. Teleprompter Cable Service, Inc.*, 218 Kan. 289, 292 (1975) (citing 36 Am. Jur. 2d. *Franchises*, §6).

¹⁹ Emphasis added.

²⁰ K.S.A. 19-2676; 19-2677.

²¹ *Capitol Cable, Inc. v. City of Topeka*, 209 Kan. 152, 161 (1972).

²² K.S.A. 75-704.