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ATTORNEY GENERAL OPINION NO. 2022- 9

Adam T. Carey, City Attorney
City of Elkhart, Kansas
737 Villymaca St.
P.O. Box 1061
Elkhart, KS 67950

Re: Public Utilities—Miscellaneous Provisions—Kansas Energy Choice Act;
Customer's Use of Utility Service; Limitations on Municipalities Related Thereto

Synopsis: The Kansas Energy Choice Act prohibits city ordinances that restrict where propane or natural gas tanks may be used but does not prohibit the regulation of the size and placement of these tanks in all instances. Cities cannot directly enforce federal Occupational Safety and Health Administration regulations. Cited herein: K.S.A. 55-1802; K.S.A. 2022 Supp. 66-1288; Kan. Const., Art. 12, § 5.

* * *

Dear Mr. Carey:

As Elkhart City Attorney, you request our opinion on whether the Kansas Energy Choice Act, codified at K.S.A. 2022 Supp. 66-1288, prohibits cities from enacting ordinances regulating propane¹ and natural gas tanks based on city-planning and safety concerns. Specifically, you ask:

1. May cities enact ordinances, such as zoning ordinances, restricting the areas in a city where propane and natural gas tanks may be used?
2. May cities impose size and placement restrictions on these tanks based on public safety considerations, and if so, would these restrictions be enforceable if enforcement would prevent use of a tank?

¹ See K.S.A. 55-1802(j) (defining propane for purposes of the Propane Education and Research Act).

3. May cities require compliance with regulations regarding the placement of propane tanks required by the Occupational Safety and Health Administration (OSHA)?

We believe a city ordinance restricting where natural gas or propane tanks may be used would violate K.S.A. 2022 Supp. 66-1288, regardless of the ordinance's rationale. But the statute does not necessarily prohibit ordinances addressing related issues, such as the size and placement of tanks. Finally, cities cannot directly enforce federal OSHA regulation, and any ordinance adopting and requiring compliance with those standards would also need to comply with the statute.

K.S.A. 2022 Supp. 66-1288 limits local regulation of the use of propane and natural gas.

(a) As used in this section:

(1) "Municipality" means any county, city, township or other political or taxing subdivision thereof, or any board, bureau, commission, committee, department, division or other agency thereof.

(2) "Utility service" means the retail provision of natural gas or propane.

(b) A municipality shall not impose any ordinance, resolution, code, rule, provision, standard, permit, plan or any other binding action that prohibits, discriminates against, restricts, limits, impairs, or has the effect thereof, an end use customer's use of a utility service.

(c) This section shall not be construed to restrict the ability of a municipality to limit an end use customer's use of a utility service if the end use customer is such municipality.²

To interpret statutes, we begin with the statute's plain language, giving common terms their ordinary meaning.³ If the statute is clear and unambiguous, we will not read into the statute a meaning that the language does not readily support.⁴

We note that K.S.A. 2022 Supp. 66-1288 limits city home rule. Under home rule, cities may enact ordinances governing their local affairs unless a uniformly applicable state law addresses the same issue.⁵ If the law does not expressly prohibit local regulation, cities may continue to enact ordinances that do not conflict with the statute.⁶ K.S.A. 2022 Supp. 66-1288 is a uniformly applicable law but does not expressly prohibit the local regulation of propane and natural gas. Cities may enact ordinances that do not conflict with the statute.

² K.S.A. 2022 Supp. 66-1288(a)-(c).

³ *Johnson v. U.S. Food Service*, 312 Kan. 597, 600 (2021).

⁴ *Id.*, at 601.

⁵ See Kan. Const. Art. 12, § 5(b).

⁶ See *Dwagfys Manufacturing, Inc. v. City of Topeka*, 309 Kan. 1336, 1340-41, 1343-44 (2019)

K.S.A. 2022 Supp. 66-1288 applies when three conditions exist. First, the statute only protects end use customers. Second, because "utility service" is "the retail provision of natural gas or propane," the gas must have been purchased. And third, the statute concerns the use of gas; here, "use" most naturally refers to consumption.⁷ Once these conditions exist, an ordinance that directly or indirectly prohibits, limits, restricts, or impairs that use would conflict with the statute.

Turning to your questions, we believe a city ordinance restricting where propane or natural gas tanks may be used in a city would violate the statute. That ordinance would encompass the use of natural gas or propane and apply to purchased gas used by end use customers. And it would prohibit that use in certain areas. Even if enacted as a zoning ordinance, the ordinance would violate the statute.

Depending on the circumstances, an ordinance regulating the size and placement of tanks may not violate K.S.A. 2022 Supp. 66-1288. On its face, such an ordinance would govern the storage of gas and propane, not its use, and so it would not necessarily implicate the statute. But enforcement of the ordinance could violate the statute if doing so would have the effect of interfering with or prohibiting, limiting, or restricting an end use customer's use of that gas. This would depend on the unique facts and circumstances of each end use customer.

For example, the statute does not prevent a city from requiring tanks to be placed a certain distance away from buildings. But a city could not enforce the ordinance if doing so would prevent a person from installing a tank; in that case, the ordinance would effectively prohibit a person from using propane or natural gas. Likewise, a city may limit the size of tanks. But the line between permissible regulation and an impermissible restriction or limitation of use would depend on the individual circumstances, such as the person's energy needs and the availability of additional natural gas or propane.

Lastly, employers are required to comply with OSHA regulations, but cities cannot directly enforce them. And any ordinance requiring compliance with those regulations would only be enforceable if it did not violate K.S.A. 2022 Supp. 66-1288.

The Occupational Safety and Health (OSH) Act⁸ is a federal law designed to improve employee safety.⁹ It applies to private employers with employees working in the United States and its territories—it excludes employees of a state or state subdivision.¹⁰ The Act requires the United States Secretary of Labor to enact regulations specifying workplace safety standards and enforce those standards.¹¹ States may enact and enforce their own standards if no federal standard exists.¹² But if a federal standard does exist, states may only do so if they implement an approved state plan.¹³

⁷ <https://www.merriam-webster.com/dictionary/use> (accessed November 29, 2022).

⁸ 29 U.S.C. § 651 *et seq.*

⁹ 29 U.S.C. § 651.

¹⁰ 29 U.S.C. §§ 652(5)-(6), 653(a), 654.

¹¹ 29 U.S.C. §§ 652(1), 655(b), 658(a), 659.

¹² 29 U.S.C. § 667(a)

¹³ 29 U.S.C. § 667(b), (e).

Relevant here, OSHA has promulgated a regulation governing the placement of liquefied petroleum gas tanks.¹⁴ And Kansas has not adopted a state plan.

In *Gade v. National Solid Wastes Management Ass'n*,¹⁵ the United States Supreme Court found the OSH Act preempts states without an approved state plan from enacting occupational safety laws supplementing OSHA regulations.¹⁶ Instead, Congress intended employers to be subject to a single standard—either the federal OSHA standards or state plan standards.¹⁷

Federal regulations may preempt state laws.¹⁸ As applied to employers, the OSHA regulation would preempt K.S.A. 2022 Supp. 66-1288. But cities cannot directly enforce it; as Kansas has not adopted a state plan, only OSHA may do so.¹⁹ A city might be able to require compliance by enacting an ordinance adopting the OSHA regulation by reference; doing so would not conflict with the federal standard.²⁰ But the ordinance would only be enforceable if it also complied with K.S.A. 2022 Supp. 66-1288.

Therefore, we conclude an ordinance restricting where propane or natural gas tanks may be used would violate K.S.A. 2022 Supp. 66-1288. An ordinance restricting the size and placement of tanks would not violate the statute in all circumstances. Cities cannot directly enforce OSHA regulations. And any ordinance requiring compliance would need to comply with the statute.

Sincerely,

Derek Schmidt
Kansas Attorney General

Paul Keithley
Assistant Attorney General

DS:RH:PK:sb

¹⁴ 29 C.F.R. § 1910.110(b)(6) and Table H-23.

¹⁵ 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992).

¹⁶ *Id.* at 98-99 (plurality) (applying conflict preemption); *id.* at 109 (Kennedy, J., concurring) (applying field preemption).

¹⁷ *Id.* at 100-02 (plurality); *id.* at 112-14 (Kennedy, J., concurring).

¹⁸ See *Wyeth v. Levine*, 555 U.S. 555, 576 (2009); *Fidelity Federal Sav. & Loan Assn v. De La Cuesta*, 458 U.S. 141, 153 (1982).

¹⁹ See *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98-100 (1992) (plurality) (OSH Act preempts states from supplementing OSHA regulations unless states adopts state plans); *id.* at 112-14 (Kennedy, J., concurring).

²⁰ But see 29 U.S.C. § 659 (OSHA enforces federal regulations); 29 U.S.C. § 667(e) (after state adopts state plan, enforcement shifts to state only after OSHA determines the state plan is being enforced).