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P-1 Home Rule

Introduction

The Kansas Supreme Court recently reaffirmed that cities have broad home rule powers granted directly by the people of the State of Kansas and that the constitutional home rule powers of cities shall be liberally construed to give cities the largest measure of self government. The opinion, *State ex rel. Kline v. Unified Government of Wyandotte County/Kansas City, Kansas*, upheld the ability of cities to authorize by charter ordinance the Sunday sale of alcoholic liquor despite a state law prohibiting such sales. The Court found that the state liquor laws were nonuniform in their application to cities and therefore subject to charter ordinance.

Most states confer home rule powers on some or all of their cities and counties. The Advisory Commission on Intergovernmental Relations in 1993 reported cities in 37 states and counties in 23 states have constitutional home rule powers. Another 11 states provide home rule for cities by statute and 13 additional states provide statutory home rule for counties.

Local governments are considered creatures of the state as well as subdivisions of the state and as such are dependent upon the state for their existence, structure and scope of powers. State legislatures have plenary power over the local units of government they create, limited only by such restrictions they have imposed upon themselves by state law or by provisions of their state constitutions, most notably home rule provisions. The courts developed a rule of statutory construction to reflect this rule of dependency known as "Dillon's Rule."

Dillon's Rule states that a local government has only those powers granted in express words, those powers necessarily or fairly implied in the statutory grant and those powers essential to the accomplishment of the declared objects and purposes of the local unit. Any fair, reasonable, or substantial doubt concerning the existence of power is resolved by the courts against the local government. Local governments without home rule powers are limited to those powers specifically granted to them by the Legislature.

City, County, and School District Home Rule— Brief History of Kansas Home Rule Provisions

A new era in city-state relations was inaugurated on July 1, 1961, the effective date of the City Home Rule Constitutional Amendment approved by voters at the November, 1960 general election. Cities now can look directly to the *Kansas Constitution, Article 12, section 5*, for the source of their powers. Cities are no longer dependent upon specific enabling acts of the Legislature. The Home Rule Amendment has, in effect, stood Dillon's Rule on its head by providing a direct source from the people of legislative power for cities.

Home rule for counties was enacted by statute in 1974. The county statutory grant generally is patterned after the city home rule constitutional amendment.

Schools in 2003 were granted expanded administrative powers referred to by some as limited home rule powers. This limited grant of added administrative power to schools occurred as a result of several years of effort to expand the powers of school districts by the Kansas Association of School Boards and others.

Constitutional Home Rule Grant for Cities

The key constitutional language contained in Article 12, section 5 of the *Kansas Constitution*, reflecting the broad scope of the grant of home rule power for Kansas cities are the following:

- ! "Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions . . . "
- ! "Cities shall exercise such determinations by ordinance passed by the governing body with referendum only in such cases as prescribed by the legislature subject only to enactments of the legislature of statewide concern applicable uniformly to all cities, to other enactments applicable uniformly to all cities. . . "
- ! "Any city may by charter ordinance elect in the manner prescribed in this section that the whole or any part of any enactment of the legislature applying to such city, other than enactments of statewide concern applicable uniformly to all cities, other enactments applicable uniformly to all cities, and enactments prescribing limits of indebtedness, shall not apply to such city."
- ! "Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government."

The Home Rule Amendment applies to all cities regardless of their size. Further, the Home Rule Amendment is self-executing in that there is no requirement that the Legislature enact any law implementing it, nor are cities required to hold an election, adopt a charter, constitution, or some type of ordinance declaring their intent to exercise home rule powers.

Cities are granted the power to levy taxes, excises, fees, charges, and other exactions by the Home Rule Amendment. The Legislature, however may restrict this power by establishing not to

exceed four classes of cities. These classes are not classes for general government purposes: cities of the first, second, and third class. Rather, these are constitutional classes for purposes of imposing revenue limitations or prohibitions. The only example, to date, where the Legislature has classified cities for the purpose of imposing limits upon or prohibiting taxes has been in the area of local retailers' sales taxes.

The rules are simple—Cities can only be bound by state laws uniformly applicable to all cities, regardless of whether the subject matter of the state law is one of statewide or local concern. If there is a nonuniform law that covers a city, the city may pass a charter ordinance and exempt itself from all or part of the state law and provide substitute or additional provisions. If there is no state law on a subject, a city may enact its own local law. Further, if there is a uniform law that does not expressly preempt local supplemental action, then cities may enact additional non-conflicting local regulations compatible with the uniform state law.

County Statutory Grant of Home Rule

The county home rule act provides that “the board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate . . .” subject only to the limits, restrictions, and prohibitions listed in the act. (KSA 19-101a.) The statutory grant, likewise, contains a statement of legislative intent that the home rule powers granted to counties shall be liberally construed to give counties the largest measure of self-government. (KSA 19-101c.)

County home rule is self-executing in the same sense as city home rule. The power is there for all 105 counties to use. No charter or local constitution need be adopted nor any election held to achieve the power except in the case of Johnson County which is covered by a special law authorizing the adoption of a charter by county voters. Voters in Johnson County approved the charter in November 2002.

Counties can be bound by state laws uniformly applicable to all counties. Further, nonuniform laws can be made binding on counties by amending the county home rule statute which now contains 34 limitations on county home rule. Counties may act under home rule power if there is no state law on the subject. Counties also may supplement uniform state laws which do not clearly preempt county action by passing non-conflicting local legislation.

School District Expanded Powers—Limited Home Rule

KSA 72-8205 was amended in 2003 to expand the powers of school boards as follows:

- ! The board may transact all school district business and adopt policies that the board deems appropriate to perform its constitutional duty to maintain, develop, and operate local public schools.
- ! The power granted by this subsection shall not be construed to relieve a board from compliance with state law. The power granted by this subsection shall not be construed to relieve any other unit of government of its duties and responsibilities which are prescribed by law, nor to create any responsibility on the

part of a school district to assume the duties or responsibilities which are required of another unit of government.

- ! The board shall exercise the power granted by this subsection by resolution of the board of education.

The expanded administrative powers of school districts have not been reviewed by an appellate court, to date.

City and County Home Rule Differences

The major distinction between county home rule and city home rule is the crucial fact that the county home rule is granted by statute whereas the city home rule is granted directly by the people. Because of its constitutional origins, only the voters of Kansas can ultimately repeal city home rule after two-thirds of both houses of the Kansas Legislature have adopted a concurrent resolution calling for amendment or repeal, or a constitutional convention has recommended a change. The Legislature can restrict city home rule powers only by enacting uniform laws that apply in the same way to all cities unless the subject matter is one of the few specific areas listed in the Home Rule Amendment, such as taxing powers and debt limitations. By contrast, the state Legislature has a much freer hand to restrict or repeal statutory county home rule. Finally, the other factor distinguishing city and county home rule is the numerous (34) exceptions to county home rule powers found in the statutory home rule grant of power.

“Ordinary” versus “Charter” Ordinances or Resolutions

City home rule must be exercised by ordinance. The term “ordinary” home rule ordinance was coined after the passage of the Home Rule Amendment but is not specifically used in the *Kansas Constitution*. The intent of using the term is to distinguish ordinances passed under home rule authority which are not charter ordinances from other ordinances enacted by cities under specific enabling acts of the legislature. Similar terminology is used to refer to “ordinary” county home rule resolutions.

There are several instances where cities and counties may use ordinary home rule ordinances or resolutions. The first occurs when a city or county desires to act and there is no state law on the subject sought to be addressed by the local legislation. A second instance is where cities or counties may enact ordinary home rule ordinances or resolutions when there is a uniform state law on the subject, but the law does not explicitly preempt local action. The city or county may supplement the state law as long as there is no conflict between the state law and the local addition or supplement. A third instance that sometimes has been recognized involves situations where either uniform or nonuniform enabling or permissive legislation exists but a city or county chooses not to utilize the available state legislation and instead acts under home rule.

City Charter Ordinances and County Charter Resolutions

A city charter ordinance is an ordinance which exempts a city from the whole or any part of any enactment of the legislature which is nonuniform in its application to cities and which provides substitute or additional provisions on the same subject. A county charter resolution may be used in

essentially the same way.

Procedures for passage of city charter ordinances require a two-thirds vote of the members-elect of the governing body of the city. Publication of the charter ordinance is required once each week for two consecutive weeks in the official city newspaper. The charter ordinance is subject to a 10 percent protest petition and election procedures. County charter resolutions must be passed by a unanimous vote in counties where a three-member commission exists unless the board determines ahead of time to submit the charter resolution to a referendum, in which case a two-thirds vote is required. In counties with a five or seven-member commission, a two-thirds vote is required to pass a charter resolution unless the charter resolution will be submitted to a vote, in which case a majority is required.

County charter resolutions must be published once each week for two consecutive weeks in the official county newspaper and are subject to a two percent or 100 electors (whichever is greater) protest petition and election procedure.

Conclusion

Cities and counties in Kansas have broad home rule powers although the home rule powers of cities are more secure due to the constitutional basis for these powers. The Kansas appellate courts, for the most part, have construed the home rule powers of both cities and counties in broad fashion upholding the exercise of these powers. There are, however, some appellate decisions which have negated home rule actions and, in the process, have established restrictive rules of interpretation that cannot be reconciled with other home rule decisions. Time will tell whether the court has developed two conflicting lines of rationale for deciding home rule cases. The expanded administrative powers of school districts are referred to by some as limited home rule powers. The scope of these expanded powers is considerably less comprehensive when compared to the city and county home rule powers.

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