

Home Rule in a Nutshell

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I. INTRODUCTION

The only units of local government in Kansas which have the power of home rule are its 627 cities and 105 counties. All other local units, including 304 school districts, 1360 townships, and 1369 special districts,¹ are subject to Dillon's Rule.² Under Dillon's Rule, local government units have only those powers which are expressly granted by the legislature, are necessarily implied by an express grant of power, or are deemed essential to the purposes of the local unit. Dillon's Rule results in a balance of power that weighs heavily in favor of the state. Home rule, in comparison, shifts power to local government. This shift in power is the key characteristic of home rule.

The difference between home rule and Dillon's Rule is illustrated in a 1996 court of appeals opinion and a 1997 attorney general's opinion involving the ability of local units to enter into employment contracts. Employees of the Kansas City, Kansas Housing Authority filed an action alleging breach of employment contract.³ Because the Housing Authority did not have home rule power, the court applied Dillon's Rule and looked at the statute that created the Housing Authority to see whether it had express or implied power to enter into employment contracts.⁴ The court found no such power, with the result that the plaintiffs were employees at will.⁵

The decision in *Wiggins*⁶ prompted the Ellis County Counselor to ask the Attorney General whether employees of the Ellis County Sheriff's

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1. See MICHAEL R. HEIM, KANSAS LOCAL GOVERNMENT LAW §§ 1.02, 1.04 (1991 & Supp. 1998).

2. See *id.* § 3.01; CLAYTON P. GILLETTE & LYNN A. BAKER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 275-76 (2d ed. 1999) (citing JOHN F. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, at 448-51 (5th ed. 1911)).

3. See *Wiggins v. Housing Authority*, 22 Kan. App. 2d 367, 916 P.2d 718 (1996).

4. See *id.* at 368-70, 916 P.2d at 720-21.

5. See *id.* at 372, 916 P.2d at 722. The plaintiffs had also filed a tort claim of retaliatory discharge, which did not require that there be an employment contract. In an earlier opinion, the Court of Appeals affirmed summary judgment on the tort claim because the plaintiffs had failed to provide the notice required by KAN. STAT. ANN. § 12-105b(d) (Supp. 1999). See *Wiggins v. Housing Authority*, 19 Kan. App. 2d 610, 614, 616, 873 P.2d 1377, 1380, 1381 (1993) (reversing summary judgment on the contract claim).

6. 22 Kan. App. 2d 367, 916 P.2d 718.

Department were also employees at will.⁷ The Attorney General responded by looking to the county's power of home rule, which allowed the county to adopt a personnel policy creating an employment contract.⁸

Home rule results in much greater flexibility for local units than is possible under Dillon's Rule.⁹ Where Dillon's Rule prohibits local action unless specifically authorized by the legislature, home rule allows local action unless there is legislative action limiting the use of home rule.¹⁰ Dillon's Rule does not allow this flexibility.

Home rule for cities was adopted by constitutional amendment and became effective on July 1, 1961.¹¹ Home rule provides cities in Kansas with broad powers to "determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions."¹² Home rule was extended to counties by the Kansas legislature effective July 1, 1974.¹³ This Essay will focus on the home rule power of cities, which is older and more established than county home rule.

II. HOME RULE ALLOWS CITY OFFICIALS TO ADDRESS ISSUES UNIQUE TO THE CITY

Two of the landmark home rule opinions in Kansas arose in Junction City. *City of Junction City v. Griffin*¹⁴ and *City of Junction City v. Lee*¹⁵ illustrate how the flexibility of home rule was used by Junction City to address problems attributable to nearby Ft. Riley. In the absence of state law, a city can exercise home rule by adopting an "ordinary" ordinance.¹⁶ The state can limit a city's power of home rule by means of a state law if the requirements of article 12, section 5 of the Kansas Constitution are

7. See 1997 Op. Kan. Att'y Gen. 97-16.

8. See KAN. STAT. ANN. § 19-101 (1995).

9. The Kansas legislature can only act during the 90 days of the year it is in session. An additional complication comes from the preference for general rather than special legislation. See KAN. CONST. art. II, § 17; see also FRANCIS H. HELLER, THE KANSAS STATE CONSTITUTION, A REFERENCE GUIDE (1992) (discussing the history of article II, section 17). Article II, section 17 was important in the Consolidation Act, which led to the consolidation of Wyandotte County and Kansas City, Kansas. The constitutionality of the Consolidation Act was upheld in *State ex rel. Tomasic v. Unified Government*, 264 Kan. 293, 955 P.2d 1156 (1998).

10. County Home Rule, derived from statute, can be easily limited by the legislature, whereas article XII, section 5(b) restricts the legislature's power to limit the home rule power of cities. Kan. Const. art. XII, § 5(b).

11. See KAN. CONST. art. XII, § 5. This amendment was approved by voters on Nov. 8, 1960 with an effective date of July 1, 1961.

12. KAN. CONST. art. XII, § 5(b).

13. See KAN. STAT. ANN. §§ 19-101 to -101c (1995 & Supp. 1999).

14. 227 Kan. 332, 607 P.2d 459 (1980).

15. 216 Kan. 495, 532 P.2d 1292 (1975).

16. See KAN. STAT. ANN. §§ 12-3001 to -3008 (1991).

satisfied. Where there is a state law that pertains to the subject, the next step is to determine whether the state law is uniformly applicable to all cities.¹⁷

A Junction City ordinance imposing a mandatory jail sentence for persons convicted of prostitution was upheld by the court in *Griffin*.¹⁸ Griffin challenged the ordinance on the grounds that the Code of Procedure for Municipal Courts,¹⁹ which allowed probation,²⁰ was uniformly applicable to cities, making Junction City's ordinance invalid. Junction City defended the ordinance as a valid exercise of home rule because the Code of Procedure for Municipal Courts was not uniformly applicable to cities. The Code contained 58 sections, 57 of which were uniform. Section 12-4511 was not uniformly applicable to cities because it required a municipal judge to be an attorney only in first class cities.²¹ The Supreme Court of Kansas initially agreed with Griffin that the Code of Procedure for Municipal Courts was uniformly applicable to cities.²² But on rehearing, the court held that the entire Code was a single legislative enactment, and therefore, the special provision for first class cities made the entire Code nonuniform.²³ Junction City could exercise its home rule power to "charter out"²⁴ of the Code of Procedure for Municipal Courts and adopt its own rule as it had done in this case. This is commonly referred to as "chartering out" of a state statute.

Although a city is not permitted to charter out of a uniform enactment, it may still have the ability to enact local rules, so long as local legislation is not specifically preempted and the local legislation is not in conflict with

17. Article 12, section 5(b) of the KANSAS CONSTITUTION provides that home rule power is "subject only to enactments of the legislature . . . applicable uniformly to all cities."

18. 227 Kan. at 337, 607 P.2d at 465.

19. See KAN. STAT. ANN. § 12-4101 (1995).

20. See KAN. STAT. ANN. § 12-4106 (1995) (authorizing probation).

21. See KAN. STAT. ANN. § 12-4105(c) (1995). Cities in Kansas are classified by population into three classes: third class (under 2000), second class (2000 to 15,000), and first class (over 15,000). See KAN. STAT. ANN. §§ 13-101, 14-101, 15-101 (1995) (establishing the parameters for the first, second, and third class cities). Nonuniformity is typically associated with statutes which apply only to a particular class of cities. See *City of Wichita v. Kansas Taxpayer's Network*, 255 Kan. 534, 538, 874 P.2d 667, 671 (1994); *Clafin v. Walsh*, 212 Kan. 1, 9, 509 P.2d 1130, 1136 (1973).

22. See *City of Junction City v. Griffin*, 226 Kan. 516, 518, 601 P.2d 684, 686 (1979), *rev'd*, 227 Kan. 332, 333, 607 P.2d 459, 465 (1980) (stating that request for rehearing granted in light of fact that cities had used home rule to charter out of the Kansas Code of Procedure for Municipal Courts).

23. See *Griffin*, 227 Kan. at 335-36, 607 P.2d at 464.

24. This must be done by adoption of a charter ordinance. See KAN. CONST. art. XII, § 5(c) (requiring two publications, followed by a 60-day protest period). An ordinary ordinance typically requires only one publication and is effective as of the date of publication. See KAN. STAT. ANN. § 12-3007 (1991) (noting an exception for appropriation ordinances).

state law.²⁵ These issues were addressed in *City of Junction City v. Lee*.²⁶ Lee was arrested while “plinking around” a used car lot carrying a star lug wrench and a nine-and-one-half-inch knife.²⁷ Possession of the knife constituted a violation of a Junction City ordinance,²⁸ although it would not have been an offense under the state criminal code.²⁹

Lee challenged the Junction City ordinance because of its inconsistency with the state criminal code,³⁰ which is uniformly applicable to all cities. Lee asserted that the uniform state law preempted the local ordinance.³¹ The city’s position, which was affirmed in subsequent opinions,³² was that legislative preemption must be expressly stated and cannot be implied. The Criminal Code did not expressly preempt local action. Lee claimed that the ordinance was nonetheless invalid because it conflicted with the state criminal code. The court found there was no conflict because the Junction City ordinance was more strict than the state statute.³³

A conflict would occur if the local ordinance were more lenient than the state statute. This happened when Junction City adopted an ordinance allowing a third OUI to be prosecuted in municipal court.³⁴ Prosecution in municipal court would allow the city to be more aggressive with these cases, which were not given a high priority in the district courts. Cadoret was charged with a third OUI in violation of the Junction City ordinance.³⁵ He challenged the jurisdiction of the municipal court which is restricted to misdemeanors; a third OUI is a felony under state law.³⁶ The city’s attempt to be more lenient than the state was not a permissible use of home rule, so the court invalidated the Junction City ordinance.³⁷

25. Although preemption and conflict are distinct concepts, they are frequently confused.

26. 216 Kan. 495, 532 P.2d 1292 (1975).

27. *See id.* at 496-97, 532 P.2d at 1294.

28. *See id.* at 496, 532 P.2d at 1294.

29. *See* KAN. STAT. ANN. § 21-4201 (1995).

30. *See Lee*, 216 Kan. at 498, 532 P.2d at 1295.

31. *See id.*

32. *See, e.g.,* *Water Dist. No. 1 of Johnson County v. City Council*, 255 Kan. 183, 871 P.2d 1256 (1994) (requiring that preemption be express).

33. *See Lee*, 216 Kan. at 501, 532 P.2d at 1298-99. The Kansas Supreme Court has also held a 1:30 a.m. closing hour is stricter than state law permitting a club to be open until 3:00 a.m. Home rule allowed cities to adopt the earlier closing hour which does not conflict with state law. *See Leavenworth Club Owners v. Atchison*, 208 Kan. 318, 492 P.2d 183 (1971).

34. *See City of Junction City v. Cadoret*, 263 Kan. 164, 165, 946 P.2d 1356, 1358 (1997). Junction City adopted an ordinance prescribing a sentence of 365 days in jail and a \$1000 fine. *See id.* The city ordinance removed language from section 8-1567(f), making a third OUI conviction a nonperson felony. KAN. STAT. ANN. § 8-1567(f) (1995). This made the city ordinance more lenient.

35. *See Cadoret*, 263 Kan. at 165, 946 P.2d at 1358.

36. *See id.*

37. *See id.* at 174, 946 P.2d at 1363.

III. HOME RULE ALLOWS CITIES TO CREATE UNIQUE SOLUTIONS TO COMMON PROBLEMS

In *Griffin, Lee, and Cadoret*, Junction City looked to home rule to allow the city to solve problems unique to the city. Other problems are common to many cities, but cities may not prefer a common solution. An example of this is the increased demand for city services, such as utility service, schools, and roads, that accompanies growth and development. Several cities in Johnson County have addressed the cost of road construction to accommodate increases in traffic in areas of new construction. Leawood and Olathe chose to fund road improvements through impact fees³⁸ and special assessments.³⁹

The construction affected roads which had been designated as main trafficways under the Main Trafficway Act.⁴⁰ The landowners in *McCarthy* and *Davis* took the position that improvements to main trafficways could only be paid for by the city at large from general funds or general improvement bonds.⁴¹ The city could not spread the costs over a smaller number of taxpayers through the use of impact fees or special assessments.

The Kansas Supreme Court examined the Main Trafficway Act carefully and concluded that it did not purport to prescribe the exclusive means of financing improvements to main trafficways; in fact, one section of the act⁴² would be rendered meaningless by such an interpretation.

The landowners in *Bauer* did not contest the use of special assessments, but claimed that the assessments were a violation of equal protection because Olathe assessed acquisition costs only against landowners who did not dedicate the right-of-way, making those assessments higher than assessments of landowners who voluntarily conveyed right-of-way to the city.⁴³ On appeal the supreme court denied the equal protection claim. The city's attempt to balance the financial burdens among landowners offered a rational basis for the differential assessments. Where right-of-way was not voluntarily conveyed to the city,

38. See *McCarthy v. City of Leawood*, 257 Kan. 566, 567-89, 894 P.2d 836, 837-50 (1995) (addressing the conditioning of building permits and plat approval on impact fees).

39. See *Bauer v. City of Olathe*, 257 Kan. 540, 547-57, 894 P.2d 823, 828-34 (1995) (addressing an equal protection challenge to special assessment funding under KAN. STAT. ANN. § 12-6a01 (Supp. 1999)); *Davis v. City of Leawood*, 257 Kan. 512, 513-28, 893 P.2d 233, 235-45 (1995) (determining whether the City of Leawood was precluded from imposing special assessment funding under § 12-6a01).

40. See KAN. STAT. ANN. §§ 12-685 to -690 (1991 & Supp. 1999).

41. *McCarthy*, 257 Kan. at 571, 894 P.2d at 839-40; *Davis*, 257 Kan. at 513, 893 P.2d at 235.

42. See KAN. STAT. ANN. § 12-690 (1991 & Supp. 1999).

43. The district court did not reach this claim, holding instead that the use of special assessments was preempted by the Main Trafficway Act. See *Bauer*, 257 Kan. at 547, 894 P.2d at 828.

it had to resort to condemnation. The city's assessment of right-of-way costs against the property that had been condemned equalizes the burden against property similarly benefitted by the improvement and encourages dedication of property for public improvement.

Overland Park took a different approach to funding the increased traffic and roads associated with growth by imposing an excise tax on platting of real property.⁴⁴ The Home Builders Association challenged the tax on a number of points with the overall goal of requiring the city to use only city-at-large funding for improvement of thoroughfares, similar to *McCarthy* and *Davis*.

The first step for the court was to determine whether the financing mechanism at issue was a tax and/or a fee.⁴⁵ Although both taxes and fees are permissible uses of home rule, they are treated differently for some purposes.⁴⁶ Cities have the power to impose any tax, excise, fee, charge, or other exaction subject to "enactment of the legislature applicable uniformly to all cities of the same class"⁴⁷ The legislature may establish up to four classes of cities for purposes of uniformity.⁴⁸ This has only been done with respect to the local retailers' sales tax.⁴⁹

Analysis of the legislative history supported the city's claim that section 12-194 of the Kansas Code is part of the local retailers' sales tax enactment. Further, a 1992 amendment to section 12-187(a)(2) of the Kansas Code⁵⁰ makes the local retailers' sales tax nonuniform by treating cities located in counties which have adopted a countywide sales tax differently from cities located in counties without a county sales tax.⁵¹ Overland Park had the power under home rule to charter out of the local retailers' sales tax and enact an excise tax on platting real property by means of a charter ordinance.

44. See *Home Builders Ass'n v. City of Overland Park*, 22 Kan. App. 2d 649, 650, 921 P.2d 234, 237 (1996).

45. See *id.* at 670, 921 P.2d at 248. The distinction between fees and taxes is explained in *Executive Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 422-31, 845 P. 2d 57, 59-65 (1993).

46. See, e.g., KAN. STAT. ANN. § 12-194 (1991 & Supp. 1999). This statute prohibits a tax on platting that was not a tax on the sale, transfer, or use of real property.

47. KAN. CONST. art. XII, § 5(b).

48. See *id.*

49. Section 12-188 of the Kansas Code establishes four classes of cities. See KAN. STAT. ANN. § 12-188 (1991 & Supp. 1999). This classification is not the same as the population-based designation of first, second, and third class cities.

50. KAN. STAT. ANN. § 12-187(a)(2) (Supp. 1999).

51. The Attorney General relied on the same nonuniformity in ruling that a city could exempt original construction services from the local sales tax. See 1992 Op. Kan. Att'y. Gen. 92-96.

IV. CONCLUSION

As Kansas rockets through cyberspace into the future, home rule will be invaluable to cities as they strive to adapt to the change that is inevitable. The successes of the past offer hope for the future. In the words of the poet Langston Hughes, "We have tomorrow bright before us like a flame."⁵²

52. LANGSTON HUGHES, *Youth*, in THE COLLECTED POEMS OF LANGSTON HUGHES 39 (1994). The above quoted portion of the poem *Youth* has been adopted as the City Motto of Lawrence, Kansas.

