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County Home Rule – A Statutory Issue

I. Introduction

A. Cities prior to July 1, 1961–Effective Date of Constitutional Home Rule–Dillon's Rule

1. Art. 12, § 5 of the *Kansas Constitution* in 1960

> " § 5. Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessment borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power."

2. Article 2, § 17 of the *Kansas Constitution* in 1960:

> " § 17. Uniform operation of laws of a general nature; special laws; urban areas. All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted; and whether or not a law enacted is repugnant to this provision of the constitution shall be construed and determined by the courts of the state: *Provided*, The legislature may designated areas in counties that have become urban in character as "urban areas" and enact special laws giving to such counties or urban areas such powers of local government and consolidation of local government as the legislature may deem proper."

B. Counties prior to July 1, 1974–Effective Date Statutory Home Rule: Specific Statutory Authority Required–Dillon's Rule

C. Dillon's Rule in Action

> Dillon's Rule, although formulated by the courts for cities, is a reflection of the general dependency of all local governments upon state legislatures absent a home rule grant of authority. Dillon's Rule states:
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> "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words;

> second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.... These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations....” See Dillon, *Municipal Corporations*, Sec. 237 (5th ed. 1911).

See Attachment 1 for an example of Dillon’s Rule in action.

D. City Home Rule: A New Era

1. A new era in city-state relations was inaugurated on July 1, 1961, the effective date of the City Home Rule Amendment approved by voters at the November 1960 general election. Since that date, cities can look directly to the *Kansas Constitution*, Article 12, §5, for the source of their powers. Cities are no longer dependent upon specific enabling acts of the legislature since the Home Rule Amendment has in effect stood Dillon’s Rule on its head by providing a direct source of legislative power for cities. See Clark, “*State Control of Local Government In Kansas, Special Legislation and Home Rule*,” 20 Kan. L. Rev. 631 at 654 (1972).

2. *Kansas Constitution* Art. 12, §5 states , in part, the following:

“(b) Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class: *Provided*, That the legislature may establish not to exceed four classes of cities for the purpose of imposing all such limitations or prohibitions. Cities shall exercise such determination by ordinance passed by the governing body with referendums 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 of the legislature applicable uniformly to all cities, to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction and to enactments of the legislature prescribing limits of indebtedness. All enactments relating to cities now in effect or hereafter enacted and as later amended and until repealed shall govern cities except as cities shall exempt themselves by charter ordinances as herein provided for in subsection (c).

> (d) 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.”

E. Brief History of County Home Rule

1. Initial interest in improving Kansas county government in the early 1960s can be

traced to the *Second Commission on Revision of the Kansas Constitution* appointed by Governor John Anderson, Jr. The report, made to the Governor and the legislature on January 1, 1963, contained, in lieu of any specific recommendations for constitutional revision regarding county government, a separate report on county reorganization and the *Kansas Constitution*. This separate report was prepared by Dr. Walter E. Sandelius, Chairman of the Second Commission and a political science faculty member at the University of Kansas, and Frances S. Nelson, a research assistant from the University of Kansas Governmental Research Center. The report noted that proposals for structural modernization of counties ordinarily follow one or more of three approaches: consolidation, either geographical or functional; institution of the county manager or executive system; and home rule. In discussing each of these three approaches and changes that would be necessary in the *Kansas Constitution* for their implementation, the report concluded that there were very few constitutional barriers that would impede bringing these changes about. (See *Report of the Second Commission on Revision of the Kansas Constitution*, Prepared by Walter E. Sandelius, January 1, 1963, p. 113.) An article in the January 1972 issue of the *Kansas Government Journal*, entitled *Counties Opt for Home Rule*, listed those various county officials' associations which had jointly endorsed a policy statement recommending the legislature grant counties home rule with broad powers of local self-determination. The article noted that the proposed legislative enactment was substantially similar to the city home rule constitutional amendment. The article contained a preliminary bill draft which set the pattern for future home rule bills submitted to the legislature and for the home rule legislation that eventually passed in 1974.

F. County Grant of Home Rule

The 1974 Legislature enacted SB 175 which granted counties home rule powers. K.S.A. 19-101a provides:

"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 following limitations, restrictions or prohibitions...

(b) Counties shall apply the powers of local legislation granted in subsection (a) by resolution of the board of county commissioners. If no statutory authority exists for such local legislation other than that set forth in subsection (a) and the local legislation proposed under the authority of such subsection is not contrary to any act of the legislature, such local legislation shall become effective upon passage of a resolution of the board and publication in the official county newspaper. If the legislation proposed by the board under authority of subsection (a) is contrary to an act of the legislature which is applicable to the particular county but not uniformly applicable to all counties, such legislation shall become effective by passage of a charter resolution in the manner provided in K.S.A. 19-101b, and amendments thereto.

(c) Any resolution adopted by a county which conflicts with the restrictions in subsection (a) is null and void.

KSA 19-101c provides:

"The powers granted counties pursuant to this act shall be referred to as county home rule powers and they shall be liberally construed for the purpose of giving to counties the largest measure of self-government."

G. Johnson County Charter

Home rule took a different twist for Johnson County in November, 2000 when voters approved a home rule charter for county government authorized under K.S.A. 19-2680 *et seq.* as amended by the legislature in 1999 (HB 2429). The charter does not expand Johnson County's home rule power except as it relates to county government structure. Briefly, the charter establishes a seven member board of county commissioners with six members elected by district and one member elected at large to serve as chair. The election for the board seats is on a non-partisan basis. The elected county offices of clerk, treasurer, and register of deeds were made appointive after the expiration of the then current officeholder's term. The charter also provides for a county manager to be appointed by the board. The charter contains a procedure to amend the charter by a three-fourths vote of the board's full membership and requires approval of the amendments by the electors of the county. Finally, the charter requires the appointment of future charter commissions to study Johnson County government at least every 10 years thereafter.

H. General Characteristics of City and County Home Rule

A general characteristic of the City Home Rule Amendment and the county home rule statutes is that both apply to all cities and all counties respectively regardless of their size. Further, both are self-executing in that there is no requirement that the legislature enact any law implementing it, nor are cities or counties required to hold an election, to adopt a charter, constitution or some type of ordinance declaring their intent to exercise home rule powers. 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 special case of Johnson County noted earlier.

J. City and County Home Rule Similarities and Differences

City and county home rule powers, despite key differences, are in many ways substantially the same. This similarity was recognized by the Kansas Supreme Court in its first decision interpreting the county home rule statutes. In *Missouri Pacific Railroad v Board of Greeley County Commissioners*, 231 Kan. 225, 226, 643 P.2d 188 (1982), the court said:

"Although there have been numerous cases decided by the appellate courts of this state dealing with city home rule, we find no Kansas cases dealing with county home rule powers. However, the home rule powers granted to cities by constitutional amendment and to counties by legislative act appear to be similar and parallel each other in many particulars. The case law dealing with city home rule powers should be particularly helpful here" (my underline).

The legislature can restrict city home rule powers only by enacting uniform laws that apply in the same way to all cities unless it is one of the specific areas listed in the Home Rule Amendment *e.g.* debt limitations. By contrast, the state legislature has a much freer hand to restrict or even repeal county home rule. Because of its constitutional origins, only the voters of Kansas have the ability to repeal city home rule and voters may do this only after two-thirds of both houses of the Kansas Legislature have adopted a concurrent resolution calling for the amendment or repeal of the home rule provision. Another obvious difference which distinguishes city and county home rule is the numerous exceptions to county home rule powers that are found in the statutory home rule grant of power. There were eight statutory exceptions to county home rule listed in K.S.A. 19-101a in 1974 now there are 38 exceptions.

II. How City and County Home Rule is Exercised: "Ordinary" versus "Charter" Ordinances or Resolutions

A. City Ordinances–County Resolutions

Home rule powers of cities must be exercised by ordinance. See *Kansas Constitution* Article 12, §5(c). City ordinances are subject to certain formalities and other requirements that are contained in K.S.A. 12-3001 *et seq.* Home rule power of counties must be exercised by the board of county commissioners by resolution.

See also *General Building Contractor L. L. C. v Board of Shawnee County Commissioners*, 275 Kansas 525, 66 P. 2d 873 (2003) where the court stated that a county exercising the power of eminent domain under home rule must do this by resolution–not by

motion citing K.S.A .19-101a(b).

B. "Ordinary" Home Rule Ordinances — County "Ordinary" Resolutions

The term "ordinary ordinance" was coined after the passage of the City Home Rule Amendment but is not specifically used therein. 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. Ordinary ordinances are those referred to in Article 12, §5(b), where it provides that "...cities shall exercise such determination (home rule) by ordinance passed by the governing body with referendums only in such cases as prescribed by the legislature..."

A similar term, "ordinary home rule resolution" is used for counties for the same purpose.

I. Where No State Law Exists

There are several instances where cities and counties may use ordinary home rule ordinances or resolutions. The first is 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.

The regulation and licensure of massage parlors or adult entertainment studios by counties, upheld in *Moody v Board of Shawnee County Commissioners*, 237 Kan. 67, 697 P.2d 1310 (1985) is a good illustration of the first situation.

The county resolution was aimed at attacking prostitution occurring at adult entertainment studios. The resolution established fees, set forth provisions for revocation of licenses and permits upon notice and hearing, established hours of operation, prohibited unlawful sex acts and established criminal penalties. The court said the resolution clearly had a reasonable relationship to the harms sought to be prevented. The court rejected an argument of the plaintiff that the resolution somehow prohibited or infringed upon the protected right of nude dancing.

Another example of this type of home rule action is illustrated in Op. Att'y Gen. 55 (2000) where cities and counties were said to have the power under home rule to prohibit ticket scalping at sporting or entertainment events on state and federal property

2. Local Supplement to a State Law

The second instance where cities or counties may enact ordinary home rule ordinances or resolutions is when there is a uniform state law on the subject, the city or county wants to supplement the state law and there is no conflict between the state law and the local addition or supplement.

a. The Kansas Supreme Court upheld a Wichita ordinance extending the city's driving under the influence (DUI) ordinance to cover operating a bicycle while under the influence. See *City of Wichita* v *Hackett*, 275 Kan. 848, 69 P.3d. 621 (2003) where the court noted state law did not expressly authorize riding a bicycle under the influence of alcohol - state law merely failed to proscribe it.

b. See *Hutchinson Human Relations Commission* v *Midland Credit Management, Inc.*, 213 Kan. 308, 517 P.2d 158 (1973) where the court affirmed the ability of cities to establish local civil rights agencies despite the existence of a state civil rights commission and of state laws prohibiting acts of discrimination.

3. Supplement to a Charter Ordinance or Charter Resolution

A third instance of where an ordinary home rule ordinance may be used is as a supplement to a charter ordinance or charter resolution. This is the situation the Kansas Supreme Court addressed in *Farha* v *City of Wichita*, 284 Kan. 507, 161 P3d 717 (2007). The *City of Wichita* passed a charter ordinance exempting itself from a provision of the Kansas Code of Procedure for Municipal Courts which prohibits the imposition of court costs on defendants. The charter ordinance authorized the city to assess costs in certain cases and stated the specific costs would be set in the city code. A separate ordinary ordinance was passed by the city establishing court cost amounts tied to specific offenses and witness fees. Plaintiff argued the court cost schedule should have been included in the charter ordinance. The court held that the "substitute and additional provisions" requirement of Article 12§5(c)(3) was met by the city's charter ordinance.

4. What is a Uniform Enactment?

The clearest statement by the court concerning what is a uniform enactment applicable to all cities is found in the flagship city home rule case of *City of Junction City* v *Griffin*, 227 Kan. 332, 607 P.2d 459 (1980) strongly reaffirmed in *Kline*, 277 Kan. 516 (2004) and

in Farha, 284 Kan. 507 (2007). The *Griffin* court determined that the entire Kansas Code of Procedure for Municipal Courts (K.S.A. 12-4101 through 12-4701) did not apply uniformly to all cities since one section of that act, K.S.A. 12-4105, required municipal judges in cities of the first class to be attorneys but did not require the same of municipal judges in cities of the second or third class. The court noted that this section was one of the sections included in L. 1973, ch. 61 and was clearly one of the sections comprising the legislative enactment. The court stated:

> "The division into chapter, article and sections in the Kansas Statutes Annotated does not have the effect of making separate enactments of a single bill passed by the legislature of the State of Kansas."

The *Griffin* court cited *Marks* v *Frantz*, 179 Kan. 638, 644, 298 P.2d 316 (1956) which contains the same summary conclusion. An enactment, then, is all sections of a single bill enacted by the Kansas Legislature. Every section of a bill must apply uniformly to all cities if the bill is to be a uniform enactment (at 335-336).

5. What if two or more enactments deal with the same subject – doctrine of in pari materia?

Clafin v. *Walsh*, 212 Kan. 1, 509 P.2d 1130 (1973), is the home rule case most frequently cited regarding the doctrine of in pari materia. In *Claflin*, the Court upheld a Kansas City charter ordinance exempting the city from K.S.A. 73-407 and providing substitute provisions transferring management and control of the Soldiers' and Sailors' Memorial Building from a board of trustees to the city commissioners. The issue was whether K.S.A. 73-407 was "applicable uniformly to all cities" and, therefore, not subject to charter ordinance. The Court found that the statute was not uniformly applicable to all cities because it permitted three exceptions in its application to various cities. Moreover, the Court noted that another statute, K.S.A. 73-427, which was part of a separate enactment, authorized control of memorials by certain city governing bodies. In determining whether the legislature intended to have a statute apply "uniformly to all cities", the Court concluded that all statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together: "In order for a statute to be applicable uniformly to all cities there must be no exceptions." (212 Kan. at. 9)

6. Conflict and Preemption

a. How Does the Legislature Preempt City or County Home Rule

i. Where a uniform Law exists

The legislature, with some frequency, has preempted city and county home rule powers by passage of a uniform law which also contains clear preemptive language. Both are normally required. Some uniform laws, however, do not need any preemptive language since the law simply prohibits some action by a city. The primary areas where the legislature has preempted local action are in the levy of taxes, excises, fees, charges, and other exactions, in licensing and other regulatory activities in gun control and in gaming.

b. Conflicts: Not Always Easy to Determine

The test most frequently cited to determine whether a conflict exists is found in the *City of Junction City* v *Lee*, 216 Kan. 495 (1975) case, cited in *City of Wichita* v *Hackett*, 275 Kan. 848, 851 69 P.3d 621 (2003) as follows: Does the local law permit or license that which the state law forbids or prohibit that which the state statutes authorize? If so, there is a conflict. Where both a local law and the statute are prohibitory and the local law goes further in its prohibition but not counter to the state prohibition, there is no conflict.

c. Home Rule: Charter Ordinances, Charter Resolutions

1. Article 12, § 5(c) of the *Kansas Constitution* states:

"(c) (1) 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.

(2) A charter ordinance is an ordinance which exempts a city from the whole or any part of any enactment of the legislature as referred to in this section and which may provide substitute and additional provisions on the same subject. Such charter ordinance shall be so titled, shall designate specifically the enactment of the legislature or part thereof made inapplicable to such city by the adoption of such ordinance and contain the substitute and additional

provisions, if any, and shall require a two-thirds vote of the members-elect of the governing body of such city. Every charter ordinance shall be published once each week for two consecutive weeks in the official city newspaper or, if there is none, in a newspaper of general circulation in the city.

2. K.S.A. 19-101b states:

"(a) Any county, by charter resolution, may elect in the manner prescribed in this section that the whole or any part of any act of the legislature applying to such county other than those acts concerned with those limitations, restrictions or prohibitions set forth in subsection (a) of K.S.A. 19-101a, and amendments thereto, shall not apply to such county.

(b) A charter resolution is a resolution which exempts a county from the whole or any part of an act of the legislature and which may provide substitute and additional provisions on the same subject. Such charter resolution shall be so titled, shall designate specifically the act of the legislature or part thereof made inapplicable to such county by the passage of the resolution and shall contain any substitute and additional provisions. Such charter resolution shall require the unanimous vote of all board members unless the board determines prior to passage it is to be submitted to a referendum in the manner hereinafter provided, in which event such resolution shall require a 2/3vote of the board. In counties with five or seven county commissioners, such charter resolution shall require a 2/3 vote of all board members unless the board determines prior to passage it is to be submitted to a referendum in the manner hereinafter provided, in which event such resolution shall require a majority vote of the board. Every charter resolution shall be published once each week for two consecutive weeks in the official county newspaper. A charter resolution shall take effect 60 days after final publication unless it is submitted to a referendum in which event it shall take effect when approved by a majority of the electors voting thereon.

In summary, a county charter resolution can be used when a nonuniform state law: (1) applies to the particular county, but (2) is not one of those laws covered by any of the other limitations listed in K.S.A. 19-101a(a)."

3. County Charter Resolution Procedure

Procedures required for the passage of county charter resolutions are generally similar to those required of cities for the passage of charter ordinances, with some exceptions. In counties with three commissioners, charter resolutions must be passed by a unanimous vote unless the board determines ahead of time to submit the charter resolution to a referendum, in which case a two-thirds vote is required. The Attorney General has said that a charter resolution is validly adopted when approved by a unanimous vote, the vote does not have to be on a written resolution and a member of a three-member board who later refuses to sign the charter resolution does not affect its validity. The statute does not require a unanimous signature and does not permit a later veto of the charter resolution by a commissioner who later refuses to sign it. See Op. Att'y Gen. 22 (1989).

A unanimous vote of a quorum is not sufficient to pass a valid charter resolution; a unanimous vote of all county commissioners is necessary. See Op. Att'y Gen. 4 (1997). 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. See K.S.A. 19-101b.

County charter resolutions must be published once each week for two consecutive weeks in the official county newspaper. A charter resolution shall take effect 60 days after final publication unless submitted to a referendum in which case the effective date is when a majority of the electors approve it.

An election on the issue may be required if a petition signed by two percent of the number of electors who voted in the last November election or 100 electors, whichever is greater is drawn. The election must be called within 30 days and held within 90 days after filing the petition with the county election officer. The election is required to be conducted in the same manner as elections for officers of the county. Op. Att'y Gen. 49 (1986) concluded that the mail ballot election act could be utilized for such elections since the language "in the same manner as are elections for officers of the county" was deemed ambiguous. The Attorney General rejected a literal meaning of the language that would require an election on the issue of a charter resolution only at an election for county officers. Note that the mail ballot law may not be used at any election where any candidate is elected, retained, or recalled. See K.S.A. 25-432(d).

III. County Home Rule: Growth of Restrictions

Due to the statutory nature of county home rule, the legislature may pass virtually any nonuniform law it sees fit to enact, regardless of subject matter, and then "lock out" the use of home rule by simply adding a further statutory restriction to county home rule. The eight statutory restrictions on county home rule powers incorporated in the original law enacted in 1974 (see L. 1974, ch. 110), have increased to 38 restrictions by 2009.

Restrictions similar to those contained in the city home rule amendment include: counties are subject to all acts which apply uniformly to all counties; counties may not alter or consolidate county boundaries; and counties are subject to acts of the legislature prescribing limits of indebtedness.

Restrictions generally fall into two categories: general prohibitions against counties engaging in certain types of activities and specific exceptions to the uniform enactments rule. The latter type of restriction is used whenever the legislature passes a nonuniform law applying to one or more counties but not all counties and desires to prohibit counties from exercising statutory home rule power to charter out of the nonuniform law. This latter type restriction accounts for a majority of the 38 restrictions.