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December 28, 2017

ATTORNEY GENERAL OPINION NO. 2017-19

The Honorable Jeff Longbine
State Senator, 17th District
2801 Lakeridge Rd.
Emporia, KS 66801

Re: Constitution of the State of Kansas—Corporations—Cities' Powers of Home Rule

Counties and County Officers—General Provisions—County Home Rule Powers; Limitations, Restrictions and Prohibitions

Taxation—Cigarettes and Tobacco Products—Cigarettes; Unlawful Acts

Synopsis: Cities and counties may use home rule to enact an ordinance or resolution that prohibits the sale of cigarettes and tobacco products to persons less than 21 years of age. Cited herein: K.S.A. 2017 Supp. 19-101a; K.S.A. 19-101c; K.S.A. 2017 Supp. 79-3302; 79-3321; Kan. Const. Art. 12, § 5.

* * *

Dear Senator Longbine:

As the State Senator for the 17th District, you ask for our opinion on whether a city ordinance or county resolution that prohibits the sale of cigarettes or tobacco products to persons under the age of 21 is valid. For the reasons described below, we believe such an ordinance or resolution would be a valid exercise of home rule powers.

City and County Home Rule Powers

Kansas cities and counties have powers of home rule. City home rule powers derive from Article 12, Section 5 of the Kansas Constitution, which reads in relevant part:

> Cities are hereby empowered to determine their local affairs and government. . . . 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.
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> . . .
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> 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.[1]

County home rule power derives from statute. K.S.A. 19-101 states that a county "shall be empowered . . . to exercise the powers of home rule to determine their local affairs and government authorized under the provisions of K.S.A. 19-101a." K.S.A. 2017 Supp. 19-101a states that "[t]he 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 limitations, restrictions or prohibitions enumerated in K.S.A. 2017 Supp. 19-101a(a). That statute specifies the areas in which county home rule is prohibited. The only provision of K.S.A. 2017 Supp. 19-101a relevant to your question is subsection (a)(1), which states: "[c]ounties shall be subject to all acts of the legislature which apply uniformly to all counties."

K.S.A. 19-101c states: "[t]he powers granted counties pursuant to [the county home rule act, L. 1974, Ch. 110] 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."

In *Blevins v. Hiebert*,[2] the Kansas Supreme Court summarized the home rule power of cities and counties as follows:

> [H]ome rule is available to cities and counties in all areas of local government in which it is not prohibited by Article 12, § 5 of the Kansas Constitution or by K.S.A. 19-101a. Home rule is prohibited, however,

[1] Kan. Const. Art. 12, §5(b) and (d) (emphasis added).
[2] 247 Kan, 1 (1990).

> where there is a statute uniformly applicable to all cities or counties, as the case may be.
>
> Home rule is applicable in two other areas. The first is in the area of regulation and prohibition, where local government exercises its police power for the health, safety, and general welfare of the public. Local regulatory legislation is a special area of law governed by different rules than home rule; its origins precede both Article 12, § 5 of the Kansas Constitution and K.S.A. 19-101a.
>
> The final area of the law available for home rule is where a statute is nonuniformly applicable to all cities or counties or to specific cities or counties. A municipality may opt out of such a law only by charter ordinance or charter resolution.[3]

The *Blevins* court held:

> We conclude that a municipality has the right to legislate by ordinary ordinance or resolution non-conflicting local police power laws even though there are state laws on the subject uniformly applicable to all municipalities. This is a court-imposed exception to constitutional and statutory home rule. The legislature may prohibit such local authority by expressly preempting the field.[4]

We believe the regulation of the sale of cigarettes and tobacco products would fall within the police power of a city or county because the sale of those products relates to the health, safety, and general welfare of the public.

Home Rule Power to Regulate the Sale of Cigarettes and Tobacco Products

As you note in your letter, K.S.A. 2017 Supp. 79-3321(l) states that "[i]t shall be unlawful for any person . . . [t]o sell, furnish or distribute cigarettes, electronic cigarettes or tobacco products to any person under 18 years of age." K.S.A. 2017 Supp. 79-3321(m) and (n) also prohibit persons under 18 years of age from purchasing and possessing cigarettes, electronic cigarettes or tobacco products.[5] These statutory provisions apply uniformly statewide; there are no exceptions for certain cities or counties.

The only state statute restricting the persons to whom cigarettes and tobacco products may be sold is K.S.A. 2017 Supp. 79-3321. That statute is part of the Kansas Cigarette and Tobacco Products Act,[6] whose purpose is "to regulate the sale of cigarettes and

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[3] *Id*. at 5.
[4] *Id.* at 8.
[5] These statutes also prohibit the attempted purchase or possession of cigarettes, electronic cigarettes or tobacco products by persons under 18 years of age.
[6] K.S.A. 2017 Supp. 79-3301 *et seq*.

tobacco products in this state and to impose a tax thereon."[7] There is no provision of K.S.A. 2017 Supp. 79-3321 or the Kansas Cigarette and Tobacco Products Act that restricts the power to enact local legislation or indicates that the state has preempted the field so as to preclude local action. Likewise, there is no provision of K.S.A. 19-101a that prohibits counties from exercising home rule in this area. Therefore, the state has not preempted the field of regulating the sale of cigarettes or tobacco products.

The question, then, is whether an ordinance or resolution that prohibits the sale of cigarettes or tobacco products to persons under the age of 21 conflicts with state law. We do not believe it does.

In *Junction City v. Lee*,[8] the Kansas Supreme Court considered a similar case in which a city enacted an ordinance that went further than state law in criminalizing certain behavior. At issue in that case was whether a city ordinance that prohibited the carrying of certain weapons conflicted with a state law that prohibited only the *concealed* carrying of those weapons, so as to render the city ordinance void. Finding no conflict with state law, the Court stated:

> A test frequently used to determine whether conflict in terms exists is whether the ordinance permits or licenses that which the statute forbids or prohibits that which the statute authorizes; if so, there is conflict, but where both an ordinance and the statute are prohibitory and the only difference is that the ordinance goes further in its prohibition but not counter to the prohibition in the statute, and the city does not attempt to authorize by the ordinance that which the legislature has forbidden, or forbid that which the legislature has expressly authorized, there is no conflict.[9]

With respect to county resolutions, the Court has similarly stated that "[t]he primary method of determining whether an ordinance of resolution of a county is inconsistent with a statute of the state is to see whether the local law prohibits what the state law permits or the state law prohibits what the local law permits."[10]

By outlawing sales to persons aged 18 to 20, the local legislation you describe would go further than the state in its prohibition of cigarette sales, but not counter to the prohibition in statute because it would not authorize sales to persons less than 18 years of age. We also note that there is no statute that expressly *authorizes* persons at least 18 years of age to purchase cigarettes or tobacco products, so an ordinance or resolution such as you describe would not forbid that which a statute authorizes. For these reasons, a city ordinance or county resolution that prohibits the sale of cigarettes or tobacco products to persons less than 21 years of age would not conflict with state law.

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[7] K.S.A. 2017 Supp. 79-3302(b).
[8] 216 Kan. 495 (1975).
[9] *Id*. at 501.
[10] *Missouri Pac. R.R. v. Board of County Com'rs of Greeley County*, 231 Kan. 225, 227 (1982).

Conclusion

Based on the foregoing, it is our opinion that a city ordinance or county resolution that prohibits the sale of cigarettes or tobacco products to persons less than 21 years of age would be a valid exercise of home rule powers.

Finally, we note that in your letter you state that supporters of such local laws have suggested that K.S.A. 2017 Supp. 21-6114 provides sufficient authority for those laws. We disagree. That statute is part of the Kansas Indoor Clean Air Act,[11] which regulates *where* individuals may smoke, not the sale or purchase of cigarettes. By its own terms, K.S.A. 2017 Supp. 21-6114 authorizes local regulation of smoking, but is silent on local regulation of the sale of cigarettes and tobacco products. Therefore a city or county may not rely on K.S.A. 2017 Supp. 21-6114 as authority for enacting an ordinance or resolution concerning the sale of cigarettes or tobacco products.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Attorney General

/s/Sarah Fertig

Sarah Fertig
Assistant Attorney General

DS:AA:SF:sb

[11] K.S.A. 2017 Supp. 21-6109 *et seq*.