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Kentucky Law Survey: Municipal Law

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Municipal Law

BY J. DAVID MORRIS*

INTRODUCTION

The 1980 General Assembly enacted a sweeping reform of municipal law in Kentucky. The body of existing municipal law which had dated to 1894 was repealed in great part and replaced by a concise municipal code (hereinafter referred to as the Code) consisting of less than fifty statutes.[1] This economy of legislation, so rare in this prolix age, was made possible by one statutory section of only fifty-two words which fundamentally changed the way the General Assembly delegates power to cities.[2] That statute granted to cities what has come to be known as "home rule." Home rule made possible three fundamental changes in municipal law. First, it obviated the need for the great number of statutes delegating specific powers which had previously been the only way the General Assembly could delegate powers to cities. Second, it permitted statutes to be drafted broadly so that cities would have greater discretion. Third, because necessary statutory guidelines can be drafted broadly, more statutory provisions can be uniform for all cities. Together these changes give cities in Kentucky far greater flexibility and authority to handle their local affairs than they ever had in the past. This Survey will examine those changes and what the new law means to Kentucky's more than 400 cities.

I. MUNICIPAL POWERS

A. *Dillon's Rule*

Cities derive all their powers from the state, either through the state constitution, statutes, or charters authorized by the state.[3] While a minority view asserts that local governments have

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[1] 1980 Ky. Acts, chapters 115, 116, 232, 233, 234, 235 & 239.

[2] KY. REV. STAT. ANN. § 82.082(1) (Bobbs-Merrill 1980) [hereinafter cited as KRS].

[3] A city is a type of municipal corporation which may be described as

a basis independent of the state, "the great weight of authority denies *in toto* the existence . . . of *any inherent right of local self-government which is beyond legislative control.*"[4] The nineteenth century commentator on municipal law, Judge Dillon, forcefully explained the status cities enjoy under the common law:

> Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation . . . the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the state, and the *corporation* could not prevent it.[5]

Judge Dillon developed this observation into what became known as "Dillon's Rule," the fundamental principle of municipal law:

> 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.[6]

The vast majority of American jurisdictions adhere to Dillon's Rule. As recently as 1980, the Kentucky Supreme Court affirmed its adherence to this rule in *City of Bowling Green v. T & E Electrical Contractors*,[7] by stating that the "general rule

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> a body politic and corporate, established by a sovereign power, evidenced by a charter, with a defined area, a population, a corporate name, and perpetual succession, established primarily to regulate the local or internal affairs of the area incorporated, and secondarily to share in the civil government of the state in the particular locality.

C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 1.3, at 2 (1980).

[4] 1 J. DILLON, MUNICIPAL CORPORATIONS § 98, at 154 (5th ed. 1911), *quoted in* Note, *Municipal Home Rule for Kentucky?*, 54 KY. L.J. 757 (1965-66).

[5] City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 475 (1868).

[6] 1 J. DILLON, *supra* note 4, § 237, at 448-49.

[7] 602 S.W.2d 434 (Ky. 1980).

[is] that a city possesses only those powers expressly granted by the Constitution and statutes plus such powers as are necessarily implied or incident to the expressly granted powers and which are indispensable to enable it to carry out its declared objects, purposes and expressed powers."[8]

Because of Dillon's Rule, cities have tended to be overly cautious, seldom undertaking an action unless explicitly permitted by statute, and have thus encouraged state legislatures to enact municipal legislation to ensure an express grant of power for every occasion. Therefore cities have been slow to adopt innovative ideas and solutions either because they felt they lacked the authority, or because, by the time they convinced the legislature to grant the authority, the idea was no longer innovative.[9]

B. *The Effect of Dillon's Rule in Kentucky*

In Kentucky, Dillon's Rule contributed to the growth of a vast accretion of municipal statutes spread from one end of the Kentucky Revised Statutes to the other.[10] This unbridled growth process began when Kentucky adopted a new constitution in 1891 that required a change in the way powers were granted to cities.[11] Prior to that new constitution, the General Assembly had enacted special charters for individual cities. The new constitution forbade special legislation but permitted the division of cities into classes based upon population, permitting laws for cities to differ between classes but requiring uniformity within a particular class.[12] This classified charter system was necessary because it was practically impossible to apply the same laws to all cities, and—as a result of the specificity demanded by Dillon's Rule—it

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[8] *Id.* at 435.

[9] *See* Dean, *The Dillon Rule—A Limit on Local Government Powers*, 41 MO. L. REV. 546 (1976).

[10] In 1976, the Municipal Statute Revision Commission undertook the task of compiling every provision of the KRS relating to cities. The resulting document was presented on newspaper size pages in a four column format and was 377 pages long. THE MUNICIPAL STATUTE REVISION COMMISSION, A COMPARATIVE ARRANGEMENT OF MUNICIPAL STATUTES OF KENTUCKY (1976).

[11] For a discussion of the treatment afforded cities under Kentucky's three previous constitutions, see LEGISLATIVE RESEARCH COMMISSION, INFORMATIONAL BULLETIN NO. 138, THE NEW MUNICIPAL LAW 25 (1981) [hereinafter cited as THE NEW MUNICIPAL LAW].

[12] KY. CONST. §§ 59, 60 & 156.

would have been impossible to construct a body of municipal law equally beneficial and useful to the largest and the smallest cities.[13]

In 1893 the General Assembly enacted, in effect, six different municipal codes in conformity with the scheme laid out in the Kentucky Constitution.[14] This system, and in fact most of the laws first enacted in 1893, remained in effect until 1980 when the Code was enacted. The 1893 legislation served as a core around which new legislation was layered year after year. A cycle developed which found city officials and other interest groups making biennial trips to Frankfort to plead for new legislation to satisfy their current individual needs. Unfortunately, rarely did the legislature take the time to examine the body of law that it had allowed to develop so haphazardly, to repeal obsolete laws or to correct inconsistencies or contradictions. As a 1979 legislative report stated, "the body of municipal law . . . had grown like

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[13] The cities and towns of this Commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. To the first class shall belong cities with a populaton of one hundred thousand or more; to the second class, cities with a population of twenty thousand or more, and less than one hundred thousand; to the third class, cities with a population of eight thousand or more, and less than twenty thousand; to the fourth class, cities and towns with a population of three thousand or more, and less than eight thousand; to the fifth class, cities and towns with a population of one thousand or more, and less than three thousand; to the sixth class, towns with a population of less than one thousand. The General Assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and change assignments made as the population of said cities and towns may increase or decrease and in the absence of other satisfactory information as to their population, shall be governed by the last preceding Federal census in so doing; but no city or town shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefor. The General Assembly, by a general law, shall provide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named; but such assignment shall be made at the first session of the General Assembly after the organization of said town or city.

KY. CONST. § 156.

[14] See note 18 *infra* for a list of former KRS chapters devoted to city charters.

'Topsy' during the past 80 years."[15] Over 2000 statutes applied to cities,[16] some applicable to all classes, some to just one class, and some to several classes. It became increasingly difficult for city officials to negotiate this thicket of legislation to determine exactly what powers their cities did possess.[17]

Each class of city still retained a separate "charter" of laws, although the reasons for much of the disparate treatment had long since ceased to exist.[18] A typical charter for a city class consisted of a core of statutes, dating from the original 1893 legislation, which set out the organizational structure of the city, the officers required and their qualifications, and the basic powers and responsibilities of the city. Over the years an ever increasing number of statutes granting specific powers were tacked on to this core. These statutes were usually permissive, but if the city decided to exercise the power delegated, specific requirements and procedures were usually mandated.[19] These statutes greatly

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[15] LOCAL GOVERNMENT STATUTE REVISION COMMISSION, TOWARD A NEW FOUNDATION: A REPORT TO THE GOVERNOR AND THE 1980 GENERAL ASSEMBLY 9 (1979) [hereinafter cited as TOWARD A NEW FOUNDATION]. This commission was the last in a line of legislatively authorized study groups which had considered the possible revision of Kentucky's municipal statutes. Beginning in 1974, the Interim Joint Committee on Cities, a standing committee of the General Assembly, began a series of hearings to determine the state of Kentucky's cities. Those investigations led to the creation of the Municipal Statute Revision Commission. That commission, after two years of work, drafted a proposed municipal code which was introduced before the 1978 General Assembly. The bill, 1978 House Bill 87, failed to pass, but a new commission, the Local Government Statute Revision Commission, was established to keep alive the idea of municipal statute revision. The commission proposed a series of bills based upon the unsuccessful 1978 House Bill 87, which were enacted by the 1980 General Assembly and constitute the subject of this article. TOWARD A NEW FOUNDATION, *supra*, at 9-11.

[16] *Id.*

[17] The situation was exacerbated by the fact that municipal government in Kentucky is a part-time endeavor. Only the two largest cities have full-time mayors and no cities have legislative bodies made up entirely of persons who devote full time to their elected positions. This basic fact of municipal life was one of the primary reasons for simplifying the law.

[18] Each class of city had a separate chapter of the KRS devoted to its charter. KRS chapter 83 (repealed in part, renumbered in part 1980) related to cities of the first class, KRS chapter 84 (repealed in part 1980) to cities of the second class, KRS chapter 85 (repealed in part 1980) to cities of the third class, KRS chapter 86 (repealed in part, renumbered in part 1980) to cities of the fourth class, KRS chapter 87 (repealed 1980) to cities of the fifth class, and KRS chapter 88 (repealed 1980) to cities of the sixth class. In addition, KRS chapter 89 (repealed in part 1980) related to city manager and commission plan cities.

[19] *See, e.g.*, KRS chapters 97 (repealed in part 1980), 104 (repealed in part 1980), 105 (repealed 1980), & 106.

complicated municipal law, because they had been enacted in a piecemeal rather than an orderly fashion to meet the ad hoc needs of individual cities. Because of the detail contained in these statutes, cities were often unwilling to use one which, while applicable to their class, had actually been enacted specifically for a particular city in the class. Therefore, as was often the case, City of *X* would request the legislature to enact a statute granting a power already granted to the class, but tailored to the desires of City of *Y*. A statute would then be enacted granting the same power to City of *X*, but specifying a different procedure. This process in one case resulted in seven different statutes detailing who would control a city parks system.[20]

Legislative study groups began to examine the need for municipal statute revision in the early 1970's and undertook the task of tidying up the litter of statutes that had developed. However, it was no simple task to "tidy up" the statutes because no one knew which cities were operating under what statutes. Every statute, no matter how obscure, seemed to have one city championing it and alleging that it was absolutely necessary for that city's purposes. Of course this also pointed out the incredible lack of uniformity which existed among cities in Kentucky. Every city seemed to be using its own unique set of statutes. The simplest solution was to discard the old system entirely and then to grant powers in a broad general fashion. Cities would lose their specific grants of power, but would retain those powers by a single grant of broad "home rule" powers. Cities would be free to fashion their own programs, but would also be free to continue to operate as they had previously under a specific grant, if they so desired.

C. *Home Rule*

Home rule for cities is not a new concept. The first grant of municipal home rule was to St. Louis in 1875.[21] In Kentucky,

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[20] *See* KRS chapter 97 (repealed in part 1980). In addition, many statutes granted authority to do things which were outdated or downright archaic. *See, e.g.*, KRS § 86.170 (1971) (repealed 1980) which in a rather Hogarthian turn of phrase permitted cities of the fourth class to protect the public morals by restraining and punishing "rakes and whoremongers."

[21] MO. CONST. of 1875, art. IX § 20.

Louisville, the only city of the first class, was granted home rule by the General Assembly in 1972.[22] In 1972 and 1978 counties were granted home rule.[23]

1. *The Theory of Home Rule*

Home rule is a simple concept which reverses the equation by which the legislature grants power to cities. Home rule does not abrogate Dillon's Rule; cities still possess only those powers specifically delegated. What home rule does is reverse how the General Assembly delegates powers. Instead of only delegating those powers it feels are necessary for cities, as in the past, the General Assembly under home rule delegates all possible municipal

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[22] The legislative body of a city of the first class shall have the power to exercise all of the rights, privileges, powers, franchises, including the power to levy all taxes, not in conflict with the constitution and so as to provide for the health, education, safety and welfare of the inhabitants of the city, to the same extent and with the same force and effect as if the general assembly had granted and delegated to the legislative body of the city all of the authority and powers that are within its powers to grant to a municipal corporation as if expressly enumerated herein. Nothing therein contained to the contrary, the provisions of KRS chapters 65, 66, 76, 77, 79, 80, 89, 91, 93, 95, 96, 97, 98, 99, 103, 104, 105, 106, 107, 108 and 109 shall be considered permissive rather than mandatory and the powers, rights and duties therein delineated may be modified or delegated by the legislative body to different departments and agencies of city government and any restrictions therein set forth shall not be considered abridging in any manner the complete grant of home rule set forth in this grant of power except no right heretofore vested by operation of statute shall in any way be affected.

Act of Mar. 28, 1972, ch. 243, § 12, 1972 Ky. Acts 1018, 1023 (codified at KRS § 83.520 (1980)).

[23] The 1972 enactment, Act. of Mar. 27, 1972, ch. 384, 1972 Ky. Acts 1652, was declared unconstitutional in Fiscal Court of Jefferson County v. City of Louisville, 559 S.W.2d 478 (Ky. 1977). The 1972 Act read as follows:

(1) The fiscal court of any county is hereby authorized and empowered to exercise all the rights, powers, franchises, and privileges including the power to levy all taxes not in conflict with the constitution and statutes of this state now or hereafter enacted, which the fiscal court shall deem requisite for the health, education, safety, welfare, and convenience of the inhabitants of the county and for the effective administration of the county government to the same extent as if the General Assembly had expressly granted and delegated to the fiscal court all the authority that is within the power of the General Assembly to grant to the fiscal court of said counties. (2) The county judge is hereby authorized and empowered to exercise all of the exec-

> utive powers pursuant to subsection (1) of this section. (3) The powers granted to counties by this Act shall be in addition to all other powers granted to counties by other provisions of law. A permissive procedure authorized by this Act shall not be deemed exclusive or to prohibit the exercise of other existing laws and laws which may hereafter be enacted but still be an alternative thereto.

Act of Mar. 27, 1972, ch. 384, 1972 Ky. Acts 1652. The 1978 General Assembly quickly enacted a new home rule statute, to meet the objections of the Court. The 1978 Act, as amended by the 1980 General Assembly, reads as follows:

> (1) It is the purpose of this section to provide counties as units of general purpose local government with the necessary latitude and flexibility to provide and finance various governmental services within those functional areas specified in subsection (3) of this section, while the general assembly retains full authority to prescribe and limit by statute local governmental activities when it deems such action necessary.
>
> (2) The fiscal court of any county is hereby authorized to levy all taxes not in conflict with the Constitution and statutes of this state now or hereafter enacted.
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> (3) The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, the fiscal court of any county may enact ordinances, issue regulations, levy taxes, issue bonds, appropriate funds and employ personnel in performance of the following public functions: (a) Control of animals, and abatement of public nuisances; (b) Regulation of public gatherings; (c) Public sanitation and vector control; (d) Provision of hospitals, ambulance service, programs for the health and welfare of the aging and juveniles, and other public health facilities and services; (e) Provision of corrections facilities and services, and programs for the confinement, care and rehabilitation of juvenile law offenders; (f) Provision of parks, nature preserves, swimming pools, recreation areas, libraries, museums and other recreational and cultural facilities and programs; (g) Provision of cemeteries and memorials; (h) Conservation, preservation and enhancement of natural resources including soils, water, air, vegetation and wildlife; (i) Control of floods; (j) Causing the repair or demolition of structures which present a hazard to public health, safety or morals or are otherwise inimical to the welfare of residents of the county; causing the redevelopment of housing and related commercial, industrial and service facilities in urban or rural areas; providing education and counseling services and technical assistance to present and future residents of publicly assisted housing; (k) Planning, zoning and subdivision control according to the provisions of KRS Chapter 100; (l) Adoption, by reference or in full, of technical codes governing new construction, renovation or maintenance of structures intended for human occupancy; (m) Regulation of commerce for the protection and convenience of the public; (n) Regulation of the sale of alcoholic beverages according to the provisions of KRS Chapters 241 through 244; (o) Exclusive management of solid wastes by ordinance or contract or by both and disposition of abandoned vehicles; (p) Provision of public buildings, including armories, necessary for the effective delivery of public services; (q) Cooperation with other units of government and private agencies for the provision of public services, including but not limited to training, education-

al services and cooperative extension service programs; (r) Provision of water and sewage and garbage disposal service but not gas or electricity; including management of onsite sewage disposal systems; (s) Licensing or franchising of cable television; (t) Provision of streets and roads, bridges, tunnels and related facilities, elimination of grade crossings, provision of parking facilities, enforcement of traffic and parking regulations; (u) Provision of police and fire protection; (v) Regulation of taxis, buses and other passenger vehicles for hire; (w) Provision and operation of air, rail and bus terminals, port facilities, and public transportation systems; (x) Promotion of economic development of the county, directly or in cooperation with public and private agencies, including the provision of access roads, land and buildings, and promotion of tourism and conventions; (y) Preservation of historic structures.

(4) The county judge/executive is hereby authorized and empowered to exercise all of the executive powers pursuant to this section.

(5) A county acting under authority of this section may assume, own, possess and control assets, rights and liabilities related to the functions and services of the county.

(6) If a county is authorized to regulate an area which the state also regulates, the county government may regulate the area only by enacting ordinances which are consistent with state law or administrative regulation. (a) If the state statute or administrative regulation prescribes a single standard of conduct, a county ordinance is consistent if it is identical to the state statute or administrative regulation. (b) If the state statute or administrative regulation prescribes a minimal standard of conduct, a county ordinance is consistent if it establishes a standard which is the same as or more stringent than the state standard. (c) A county government may adopt ordinances which incorporate by reference state statutes and administrative regulations in areas in which a county government is authorized to act.

(7) County ordinances which prescribe penalties for their violation shall be enforced throughout the entire area of the county unless: (a) Otherwise provided by statute, or (b) The legislative body of any city within the county has adopted an ordinance pertaining to the same subject matter which is the same as or more stringent than the standards that are set forth in the county ordinance. The fiscal court shall forward a copy of each ordinance which is to be enforced throughout the entire area of the county to the mayor or chairman of the board of trustees of each city in the county.

(8) The powers granted to counties by this section shall be in addition to all other powers granted to counties by other provisions of law. A permissive procedure authorized by this section shall not be deemed to be exclusive or to prohibit the exercise of other existing laws and laws which may hereafter be enacted but shall be an alternative or supplement thereto.

(9) Any agency or county government exercising authority pursuant to subsection (3)(y) of this section shall, prior to exercising such authority, obtain the voluntary written consent of the owner of the structure. Consent may be obtained only after advising the owner in writing of any advantages and disadvantages to the owner which are likely to result from the exercise of such authority.

powers to cities except those it specifically denies to them.[24]

In Kentucky, the constitution grants no direct authority to cities, but instead vests plenary power over cities in the General Assembly.[25] One can view home rule as a bridge to the Kentucky Constitution, permitting cities to bypass the General Assembly and derive their powers directly from the constitution. The General Assembly, however, retains absolute control over cities because it may specifically deny any power which would otherwise be contained in the home rule grant.

2. *Kentucky Revised Statutes (KRS) section 82.082: Kentucky's Home Rule Provision*

The heart of the new municipal code is the home rule provision. Without that law the rest of the provisions would be practically impossible to implement because they are functionally dependent upon the city having the broad discretionary authority which only home rule can provide.

The home rule grant, codified as KRS section 82.082, is rather brief:

> (1) A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with the provisions of the Eminent Do-

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Act of Mar. 28, 1978, ch. 118, § 3, 1978 Ky. Acts 275, 277, *as amended by* Act of Apr. 3, 1980, ch. 149, § 3, 1980 Ky. Acts 393, 394 (codified as amended at KRS § 67.083 (1980)).

[24] There are two basic models for home rule grants. The *imperio in imperium* model grants cities autonomy over local affairs and prohibits the state legislature from intruding into that area of local affairs. Local enactments then need to be consistent with state law only on matters involving statewide concern. The *imperio* model has been discarded in recent years and most home rule grants today, including Kentucky's home rule statutes, are based upon the legislative supremacy model. In "supremacy" statutes the legislature delegates to cities all possible municipal powers, subject to withdrawal or alteration by statute or constitution. Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1 (1975).

[25] KY. CONST. § 156. There have been attempts to revise the Kentucky Constitution and grant constitutional home rule to local governments. Most recently, in 1966, the Constitutional Revision Assembly proposed a new constitution which would have contained the following legislative supremacy home rule grant: "Units of local government may create any democratic form of government or perform any functions not denied to them by the Constitution, by law or by their own charters." LEGISLATIVE RESEARCH COMMISSION, INFORMATIONAL BULLETION NO. 52, A COMPARISON—THE PRESENT, THE PROPOSED KENTUCKY CONTITUTION 60 (1966).

> main Act of Kentucky, that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute.
>
> (2) A power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes including, but not limited to, the provisions of KRS Chapters 95 and 96.[26]

KRS section 82.082 is still virgin territory for Kentucky's courts. In fact, no Kentucky court has yet squarely faced the question of municipal home rule. A county home rule statute similar to KRS section 82.082 was found to be constitutionally infirm but, as shall be discussed below, the traditional differences between the nature of cities and counties make that case a dubious precedent for municipal home rule.

KRS section 82.082 contains three basic limitations on the exercise of municipal powers. First, an exercise must be "in furtherance of a public purpose;" second, an exercise may not take place outside the boundaries of the city; and third, the exercise may not be "in conflict with a constitutional provision or statute."[27]

To take the easiest limitation first, home rule powers may be exercised only within the corporate boundaries of the city. Any extraterritorial exercise of powers must be pursuant to a specific statutory grant of power.[28]

The "in furtherance of a public purpose" limitation is more difficult to apply because it injects a new concept into municipal law. Under the old "specific power grant" system, there was seldom a need to consider whether an action furthered a public purpose. The inquiry instead was whether the action in question was in accordance with statutory authority. When the question of public purpose has been raised, Kentucky courts have seldom explained their reasoning but have generally blithely passed over

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[26] KRS § 82.082 (1980).

[27] KRS § 82.082(1) (1980).

[28] *See, e.g.*, KRS § 96.190 (1982) (a city may construct utility facilities outside the city); KRS § 96A.020 (1982) (a city may provide mass transit service outside of its transit area if it shows necessity or public convenience); KRS § 104.030 (1982) (a city may construct a flood control system outside the city).

this issue on their way to the dispositive issue of the case.[29] No clear-cut understanding of "public purpose" is discernable from the cases, since courts seem to deal with the question in a strictly case-by-case fashion.[30] Basically, the phrase means what it says on its face. The governmental act must further the interests of the residents of the city at large, not just those of a few.[31] It is doubtful that the public purpose language will constitute much of a limitation on the exercise of municipal powers.

The significant limitation on the exercise of municipal powers is the requirement that an exercise not be in conflict with a constitutional provision or statute. This limitation allows the General Assembly to retain absolute control over municipalities in the Commonwealth. Thus a local action can, in effect, be repealed by statute. This approach does not represent a new concept because state legislation has always been considered superior to local legislation.[32] As the Kentucky Court of Appeals (now the Kentucky Supreme Court) stated in 1970: "It is a fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state. An ordinance in conflict with a state law of general character and state-wide application is universally held to be invalid."[33]

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[29] A typical example is presented in a case where the Court was asked to determine if "take-home" police cars were a proper use of public property. The Court quickly dispensed with the public purpose issue by declaring: "To take the easy phrase first, there can be little doubt but that the police automobiles are used by the city for purely 'public purposes.' " Thomas v. Elizabethtown, 403 S.W.2d 269, 271-72 (Ky. 1965).

[30] *See, e.g.*, Youtsey v. County Debt Comm'n, 501 S.W.2d 266, 268 (Ky. 1973); Industrial Dev. Auth. v. Eastern Ky. Regional Planning Comm'n, 332 S.W.2d 274, 276-77 (Ky. 1960).

[31] *See* City of Owensboro v. McCormick, 581 S.W.2d 3 (Ky. 1979). In *McCormick*, the Court attempted to distinguish "public purpose" from "public use" without really defining either term. It appears that the Court determined that public purpose is a broader concept than public use because it may encompass an act which only incidentally benefits the public. *See also* Smith v. City of Kuttawa, 1 S.W.2d 979 (Ky. 1928) (quoting *In re* Mayor of New York, 2 N.E. 642 (N.Y. 1885). In *Smith*, the Court approved the following definition of public purpose: "[I]t is impossible to formulate a perfect definition of what is meant by a city purpose. . . . The purpose must be primarily the benefit, use, or convenience of the city as distinguished from that of the public outside of it." 1 S.W.2d at 982.

[32] *See* C. RHYNE, *supra* note 3, § 19.11, at 454.

[33] Boyle v. Campbell, 450 S.W.2d 265, 268 (Ky. 1970) (quoting 37 AM. JUR. *Municipal Corps.* § 165 (1941)).

The drafters of KRS section 82.082 attempted to codify the common law rule of state supremacy over local governments, legislatively defining "conflict" in section (2) of the statute. That section states: "A power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes including, but not limited to, the provisions of KRS Chapters 95 and 96."[34]

It is unclear if the courts will feel bound by this legislative restatement of a judicially formulated rule of statutory construction. Since the definition so closely parallels the common law rule, it may well be ignored and the courts may continue reconciling clashes between local governments and the state in accordance with the common law principles already developed.

Two types of clashes are recognized by both KRS section 82.082(2) and the common law. First and most obvious are the situations where a local government attempts to perform some act which is expressly forbidden by a state statutory or constitutional provision. This is called a grammatical conflict. As formulated by the Kentucky courts, this type of conflict exists "between an ordinance and a statute when the ordinance permits conduct which is prohibited by the statute."[35]

The second and more troublesome type of conflict occurs when a local entity attempts to legislate regarding a subject on which there exists state legislation. With grammatical conflicts one merely lays the ordinance and the statute together and, if a conflict is apparent, the ordinance must give way to the statute; nevertheless, where the local body and the General Assembly have legislated on the same general subject, even though there is no apparent grammatical conflict, one must look beyond the surface to the intent of the legislature. If the state legislation is a "comprehensive scheme" or can be said to have "occupied the field," the local ordinance will have to give way even though on its face it does not conflict with the state statute. As Kentucky's highest court stated in 1942: "An ordinance may cover an authorized field of local laws not occupied by general laws,

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[34] KRS § 82.082(2) (1980).

[35] Louisville & N. R.R. v. Commonwealth, 488 S.W.2d 329, 330 (Ky. 1972).

but . . . may not run counter to the public policy of the state as declared by the legislature."[36]

The doctrine of pre-emption recognizes that there are instances where the state intends its legislation to be the final word on a subject with no room for supplementation by local legislation. The doctrine of pre-emption has not developed very thoroughly in Kentucky because as long as municipal powers were parcelled out bit by bit there was little opportunity for a city to run afoul of state legislation. Thus it is not very clear what the Court means when it speaks of the General Assembly "occupying the field." In *Boyle v. Campbell*,[37] the Court said that state legislation must be deemed to have pre-empted any local legislation when "[t]he subject matter was fully and completely covered by [the] general law which expressed a state-wide public policy and by its terms indicated a paramount state concern not requiring or contemplating local action."[38] The *Boyle* Court failed to lay out any tests for determining when this standard has been met. It did, however, cite with approval a California case, *In re Hubbard*,[39] which provides a more detailed discussion of state pre-emption.

The *Hubbard* court laid out the initial premise that as long as there is no direct grammatical conflict, local legislation is permissible to supplement or further the purposes of state legislation on the same subject unless the state legislation has occupied the field.[40] The court then set out three situations where it would find that state legislation precluded local legislation. The California court also implied that the presumption was against the state legislation being deemed to have occupied the field.[41] It stated that state legislation has not occupied the field and precluded local legislation on the same subject unless:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been

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[36] City of Harlan v. Scott, 162 S.W.2d 8, 9 (Ky. 1942).
[37] 450 S.W.2d 265 (Ky. 1970).
[38] *Id.* at 267.
[39] 396 P.2d 809 (Cal. 1964).
[40] *Id.* at 812.
[41] *Id.* at 814-15.

> partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.[42]

When state legislation is intended to occupy the field, a city has no power to enact local legislation on the subject. As the *Boyle* Court stated: "[W]here the state has occupied the field of prohibitory legislation on a particular subject, a municipality lacks authority to legislate with respect thereto."[43] It necessarily follows that the city lacks any power to legislate on the subject even if the local legislation is identical to the state legislation. While the language of KRS section 82.082(2) speaks of state legislation which is a "comprehensive scheme" rather than of "occupying the field," it is clear that the drafters intended that phrase to embody the pre-emption theory developed by the courts.[44]

The effect of the home rule legislation may yet be far-reaching,[45] but, in the short time it has been in effect, it has had little impact on how cities operate. Of the approximately 430 cities in Kentucky,[46] only two have full-time mayors and none have full-time legislative bodies.[47] Most city attorneys are prac-

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[42] *Id.* at 815.

[43] 450 S.W.2d at 267 (citing 62 C.J.S. *Municipal Corps.* § 143(3) (1949)).

[44] *See* KRS § 82.082(2) (1980). The statute lists two examples of comprehensive schemes: KRS chapter 95, relating to municipal police and fire departments, and KRS chapter 96, relating to municipal utilities. *Id.* It is possible that the courts could examine these chapters and conclude that they are not true examples of "comprehensive schemes" or "occupying the field" as the courts have developed those terms. For example, if the courts were to conclude that those chapters were mentioned not so much because they are clearly comprehensive schemes but because of pressure from interest groups, they might not feel bound by the legislative pronouncement that these two chapters are "comprehensive schemes of legislation." *See id.*

[45] Some of the more common benefits touted for home rule are that it will "[d]ecrease state meddling and interference in the internal affairs of cities . . . ; [a]llow cities to better fashion individual solutions to their unique problems; and [e]ncourage experimentation which may ultimately lead to improvement in local government." THE NEW MUNICIPAL LAW, *supra* note 11, at 15.

[46] TOWARD A NEW FOUNDATION, *supra* note 15, at 9.

[47] *See* OFFICE FOR RESEARCH, UNIVERSITY OF KENTUCKY COLLEGE OF BUSINESS AND ECONOMICS, CENTER FOR PUBLIC AFFAIRS, PERSONNEL DATA FOR KENTUCKY MUNICIPAL-

ticing attorneys for whom the city is just one of many clients. This amateur nature of city government tends to limit innovation and initiative because few city officials have the time or resources to do other than follow the way things have always been done in the city where they serve. Thus it is reasonable to expect that it will take time for most city officials to adjust to the freedom, and the correlative responsibilities, of home rule.

3. *Constitutionality of Home Rule*

Home rule could be "nipped in the bud" before cities ever become aware of its potential. Kentucky courts have not treated legislative attempts to grant home rule to local governments very favorably, but instead have shown hostility or, more commonly, incomprehension. The first time a home rule statute came before the Supreme Court it was ruled unconstitutional. In 1977 in *Fiscal Court of Jefferson County v. City of Louisville*,[48] the Supreme Court declared KRS section 67.083,[49] granting home rule to counties, an overbroad delegation of legislative authority. In a memorable turn of phrase, Justice Jones stated: "[W]hile the General Assembly may grant governmental powers to counties it must do so with the precision of a rifle shot and not with the casualness of a shot gun blast."[50] The General Assembly was quick to react and in 1978 enacted a new "rifle shot" home rule statute to meet the objections of the Court.[51]

It does not necessarily follow that the Supreme Court will rule on the municipal home rule statute in the same fashion. The distinction, although somewhat blurred in the decision,[52] lies in

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ITIES (Fall 1978) (statistics set out the number of hours worked by mayors and legislative bodies).

[48] 559 S.W.2d 478 (Ky. 1977).

[49] KRS § 67.083 (amended 1978). See note 23 *supra* for the text of the 1972 Act.

[50] 559 S.W.2d at 482.

[51] KRS § 67.083 (1980). See note 23 *supra* for the text of the 1978 Act as currently codified.

[52] The distinction is blurred because the Court, while generally being careful to limit its ruling to counties, unfortunately supported its ruling by citing a commentary which reads "counties and cities." Fiscal Court of Jefferson County v. City of Louisville, 559 S.W.2d at 482.

the different nature of city and county government. The Court in *Fiscal Court* appeared to intend to limit its ruling to counties since it pointed out that,

> historically counties, although containing municipalities, have existed primarily to perform state functions . . . and to provide governmental services to rural areas; whereas municipalities have existed to supply the governmental needs of compact urban areas. Municipalities have been delegated vast authority to exercise the police power . . . and consequently the range of municipal functions greatly exceeds that of county functions.[53]

It is certainly reasonable to infer from this language that the Court would permit a far broader delegation of powers to cities than it would to counties.

The *Fiscal Court* case is interesting, nevertheless, for it shows that the Supreme Court is really not comfortable with the idea of delegating broad authority to local governments. The Court cited no authority to support its contention that a broad grant of authority to counties is unconstitutional. Rather it made the statement that, "[i]n essence, this court views such overly broad delegation of powers of the General Assembly to fiscal courts as a 'quitclaim deed' to all its powers."[54] Notwithstanding the fact that the statute could in no way be termed a quitclaim deed,[55] since the General Assembly still retained its power to limit county powers by statute, no reason is given to support the Court's statement that a quit claim deed would be impermissible. In support of its decision, the Court cites a Kentucky govern-

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[53] *Id.* at 480 (quoting LEGISLATIVE RESEARCH COMMISSION, INFORMATIONAL BULLETIN NO. 36, THE CONSTITUTION AND LOCAL GOVERNMENT 9 (1964)). The Court is referring to the doctrine that counties are merely

> quasi-municipal corporations organized as subordinate agencies of the state government whose purpose is to aid in the proper administration of state affairs with such powers and functions as are prescribed by law. Hence counties differ from municipal corporations proper which are created primarily for the advantage and convenience of the people within their boundaries.

C. RHYNE, *supra* note 3, § 1.5, at 5-6.

[54] 559 S.W.2d at 481.

[55] "Quitclaim deed" is defined as "[a] deed of conveyance operating by way of release; that is, intended to pass any title, interest, or claim which the grantor may have in the premises, but not professing that such title is valid, nor containing any warranty or covenants for title." BLACK'S LAW DICTIONARY 1126 (5th ed. 1979).

ment agency report that power must be expressly delegated to counties.[56] That report really offers little support, however, for the phrase "expressly delegated" does not go to the issue of how specific that delegation need be. A commentary published soon after the *Fiscal Court* case pointed out that the reasons given in opposition to county home rule were not so much legal as visceral:

> It is significant that the court cites no cases in support of its traditional premise that all power must be expressly delegated to it by statute. Surely the history and traditions of the Commonwealth are important as guideposts and are not to be ignored without sound reasons. But at the same time the past should not prevent the legislature and courts from embarking upon a new course for the future merely because it differs from the traditional manner. The county governments must now deal with vastly different problems than they were required to do in past decades, and the legislature responded to this change by granting the fiscal courts broad power under section 67.083. In its decision, the court did not explain why history and tradition prevented broad grants of power to county governments, but simply stated that it did so.[57]

The Court's next opportunity to interpret a home rule statute arose in *Stansbury v. Maupin*,[58] but the Court neatly sidestepped the issue. *Stansbury* arose out of a controversy between the mayor and the legislative body in the City of Louisville. The Board of Aldermen sought to subpoena the Mayor over alleged wrongdoings on his part. The Mayor challenged the Board's power of subpoena. One basis cited by the Board to support its authority to subpoena was KRS section 83.520, the home rule statute for cities of the first class.[59] The decision shows that home rule has a long way to go before it is accepted or even understood by Kentucky's courts. The *Stansbury* Court ignored KRS section 83.520 and, by ignoring it, seriously endangered its vitality. The Court dispensed with the home rule statute by stating that it

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[56] 559 S.W.2d at 481 (quoting LEGISLATIVE RESEARCH COMMISSION, INFORMATIONAL BULLETIN No. 115, COUNTY GOVERNMENT IN KENTUCKY (1976)).

[57] Note, Fiscal Court v. Louisville, 5 N. KY. L. REV. 107, 118-19 (1980).

[58] 599 S.W.2d 170 (Ky. 1980).

[59] See note 22 *supra* for the text of KRS § 83.520.

agreed "with the Court of Appeals that . . . the city 'home rule' act, does not include" the subpoena power.[60] However, the decision of the court of appeals merely contained a blanket statement that "KRS 83.520, insofar as it pertains to this case involving the right to subpoena, administer oaths or investigate, confers no power upon the legislative body of the city to do so."[61] Neither court explained the conclusion any further. The problem the Supreme Court was having with home rule is readily evidenced by its statement that "[t]he authority to subpoena witnesses and compel them to give evidence is too powerful, and too susceptible of abuse, to be implied in the absence of utter necessity."[62] By talking about implied powers, the Court was falling back on the old Dillon's Rule method of analyzing municipal powers.

The implied powers doctrine was a legal fiction developed to mitigate the harshness of Dillon's Rule.[63] To hold cities strictly to the powers expressly granted would be practically impossible because the performance of a function might require preparatory acts not allowed for in the enabling legislation. Thus the implied powers concept was intended to fill in the gaps which might exist in authorizing legislation. One commentator has cited the following "[e]xamples of express grants of power" which courts have found to carry implied power:

> power to operate a utility system includes the power to sell fixtures; to incur debt for building jails authorizes purchase of land upon which to situate them; to issue bonds implies the power to refund them; to maintain parks includes the power to operate a nursery; and the power to purchase real estate implies the power to assume indebtedness therefor.[64]

Through the grant of home rule, the General Assembly made the implied powers doctrine unnecessary. There are no longer

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[60] 599 S.W.2d at 172.

[61] Maupin v. Stansbury, No. 79-CA-108-MR, slip op. at 7 (Ky. Ct. App., Aug. 3, 1979) (unpublished).

[62] Stansbury v. Maupin, 599 S.W.2d at 171.

[63] "The term 'implied powers' designates those powers which arise by natural implication from the grant of express powers, or by necessary inference from the purposes and functions of the municipality." C. RHYNE, *supra* note 3, § 4.7, at 65.

[64] C. RHYNE, MUNICIPAL LAW § 4.7, at 71-72 (1957).

any unexplained gaps in municipal powers because home rule grants a city all possible municipal powers except those expressly withheld by the legislature. The *Stansbury* Court failed to grasp the elementary fact that it has only three options when ruling on a municipal power: (1) uphold the exercise of the power; (2) point to a statute which conflicts with and therefore forbids the power;[65] or (3) strike down the home rule statute as unconstitutional.

By not exercising any of these options, the Supreme Court put home rule in a state of legal limbo. In effect, by neither finding home rule unconstitutional nor identifying any conflicting statutes, but still refusing to allow a city to exercise the power in question, the Court is substituting its own opinion of what is an appropriate city power for the General Assembly's opinion.[66] Section 156 of the Kentucky Constitution grants the General Assembly sole responsibility for fashioning the powers of cities.[67] It is

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[65] See the text accompanying notes 33-44 *supra* for a discussion of types of statutory conflicts.

[66] The common reason for the Court's denial of home rule in both *Stansbury* and *Fiscal Court* was that the Court thought the proposed activities in both cases were improper and inappropriate. In *Fiscal Court*, the Court worried about the consequences which would follow if counties could enforce their ordinances pursuant to home rule within the boundaries of cities:

> This position would create numerous problems. . . . The overly broad grant of authority to fiscal courts would magnify those problems. . . . In baseball parlance, it would be difficult for the citizenry, as well as officers of the municipalities to ascertain whose turn it was at bat. No one could ever tell who was "on first." The problems created would be sufficient for the citizens of municipalities, as well as those of unincorporated areas to " 'Cry Havoc' and let slip the dogs of war."

559 S.W.2d at 481 (citing William Shakespeare's *Julius Caesar*. In *Stansbury*, the Court gave the following reason why it felt the subpoena power was not "implied":

> The authority to subpoena witnesses and compel them to give evidence is too powerful, and too susceptible of abuse, to be implied in the absence of utter necessity. It is a tool of inquisition, short only of the rack and screw. Even in the hands of a grand jury it can be and sometimes is used in a manner so oppressive as to seem inconsistent with the high value of individual liberty which is traditional in this country.

599 S.W.2d at 171.

[67] KY. CONST. § 156 reads in part:

> The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall

the responsibility of the General Assembly to determine the wisdom of legislation; the Court should be concerned only with whether the law is in accord with the constitution. By acting as it did in *Fiscal Court* and *Stansbury*, the Court was guilty of forgetting its own warning that

> "[c]ourts should be extremely careful to accord to the Legislature the power to exercise those matters of discretion which are preserved to it by the Constitution. Thus the wisdom or folly of Legislative enactments within constitutional bounds, may not be weighed in judicial construction of a statute free of ambiguity."[68]

4. City of Radcliff v. Hardin County[69]

Only one decision to date has attempted to construe KRS section 82.082. In *City of Radcliff v. Hardin County*,[70] the court of appeals was asked to referee a conflict between city and county governments over who had the power to franchise garbage collection. A number of other issues were involved, but of interest to the present inquiry is the question whether KRS section 67.083 (the county home rule statute) granted exclusive jurisdiction to the county for the management of solid waste. The county pointed to a subsection of KRS section 67.083 providing that a county is to have "[e]xclusive management of solid wastes by ordinance or contract or by both."[71] The court ruled that the county did not have exclusive powers in the area of waste disposal[72] and dragged in KRS section 82.082 to justify its decision in a rather unusual fashion. As discussed above, the county home rule

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possess the same powers and be subject to the same restrictions. . . . The General Assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and change assignments. . . . The General Assembly, by a general law, shall provide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named. . . .

[68] Clark v. Riehl, 230 S.W.2d 626, 628-29 (Ky. 1950).

[69] 607 S.W.2d 132 (Ky. Ct. App. 1980).

[70] *Id.*

[71] KRS § 67.083(3)(o) (1980). See note 23 *supra* for the complete text of KRS § 67.083.

[72] City of Radcliff v. Hardin County, 607 S.W.2d at 136.

statute is of the legislative supremacy type and therefore contains the following exception to its laundry list of powers: "except as otherwise provided by statute or the Kentucky Constitution."[73] The court determined that KRS section 82.082 "otherwise provided" that cities could franchise waste collection[74] because prior to the enactment of the Code there had been a specific grant of the authority to franchise garbage collection to cities.[75] Even though the statute had been repealed, the court treated it as still existing through the enactment of KRS section 82.082 and thereby "otherwise providing." As the court of appeals stated: "This section supplants KRS section 94.282 and does not take away the powers formerly granted the cities. Therefore, we hold that under KRS 82.082 the cities still have the power over collection of garbage within their limits."[76]

The court was wrong in its analysis because it failed to take into account that the powers granted by KRS section 82.082 also must not conflict with a statute.[77] In essence the court of appeals' analysis was backward. The inquiry should not have been whether KRS section 82.082 "otherwise provided," but whether KRS section 67.083(3)(o) conflicted with the city's exercise of its powers. The court's statement that home rule "does not take away the powers formerly granted cities"[78] was incorrect. The statute does grant all possible municipal powers, but subject to statutory withdrawal.[79] *Radcliff* presented a situation of duelling home rule statutes, one specifically listing powers[80] and the other generally describing the powers.[81] The city statute won, but the court did not allow a fair fight. While it is true, as the court stated, that home rule was designed to supplant the specific sta-

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[73] KRS § 67.083(3) (1980).

[74] 607 S.W.2d at 135.

[75] *See* KRS § 94.282, *repealed by* Act of Apr. 9, 1980, ch. 239, § 4, 1980 Ky. Acts 729, 730.

[76] City of Radcliff v. Hardin County, 607 S.W.2d at 136.

[77] *See* KRS § 82.082(1) (1980).

[78] 607 S.W.2d at 136.

[79] See the text accompanying notes 34-44 *supra* for a discussion of legislative limitations on home rule.

[80] KRS § 67.083 (1980) (the county home rule statute).

[81] KRS § 82.082 (1980) (the municipal home rule statute).

tutes it repealed, it is not true that, because a specific statute had permitted the power, ipso facto home rule allows the power. The court erred seriously in not inquiring as to whether KRS section 67.083(3)(o) conflicted with the exercise of the power to franchise garbage collections.

It is evident that home rule seems a very strange animal indeed to Kentucky courts. They really have not figured out what to do with it, and have persisted in trying to clothe it in traditional garb, with little success. Home rule can be an important and vital tool for Kentucky's cities, and the General Assembly has taken the giant step of entrusting cities with the power it feels is necessary for them to function. The courts, assuming there is nothing constitutionally impermissible about home rule, should attempt to come to grips with the concept so that cities can begin to take advantage of it.

II. MUNICIPAL ORGANIZATIONS AND PROCEDURE

No matter how broad and far-reaching the powers granted a municipality, they can be utilized effectively only if there exists an organized and efficient government to wield them. Once the drafters of the Code decided that home rule should be granted to cities, they studied the existing statutes which established the organization and structure of Kentucky's cities.[82] They found that:

> In substance, the functions required of cities under existing law are generally the same regardless of class. However, the methods by which functions are to be performed varies [sic] from class to class. Some classes may perform functions in ways not available to other classes. For example, in the assignment of roles to specified officers, titles vary, selection procedures vary and division of work varies from one class to another, specified officers with the same titles have totally different responsibilities and specified officers with the same or similar responsibilities have different titles.[83]

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[82] The author is the Committee Staff Administrator for the Standing Committee on Cities in the Kentucky General Assembly and thus has first hand knowledge of the drafters' procedures.

[83] TOWARD A NEW FOUNDATION, *supra* note 15, at 14.

Because such diversity no longer seemed necessary, the drafters decided the existing charter chapters for cities should be repealed and replaced with a single chapter providing uniform organizational plans for cities regardless of class. The new plans would not have to be as specific as the plans they replaced. Instead they would set out in broad outline the structure of the city government, to be filled in through the enactment of ordinances to meet the needs of the particular city.[84]

A. *Forms of Municipal Government*

There are three basic forms of municipal government common in the United States: the mayor-council plan, the commission plan, and the city manager plan.[85] All three plans call for the same elected officials, a mayor and a legislative body, to run the government. The plans differ, however, in the distribution of powers between the two branches. Prior to enactment of the Code, Kentucky statutes authorized all three forms of government. The mayor-council plan was standard, although a different version existed for each class of city. There were two commission plans, one available to cities of the second, third and fourth classes, and the other available to cities of the fifth and sixth classes.[86]

The Code provides a uniform mayor-council plan (except for cities of the first class),[87] a uniform commission plan,[88] and a uniform city manager plan.[89] All plans are available for adoption by

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[84] *Id.* This is the so-called optional charter system where the state draws up a variety of organizational plans or charters, and permits a city to choose the charter best suited to its needs.

[85] *See* THE NEW MUNICIPAL LAW, *supra* note 11, at 2-12.

[86] See note 17 *supra* and the text accompanying notes 45-47 *supra* for a discussion of the part-time nature of municipal government in Kentucky.

[87] KRS § 83A.130 (1980). Cities of the first class continue to be organized pursuant to KRS chapter 83, but the plan provided is a strong mayor plan very similar to the Code mayor-council plan. The mayor is the chief executive officer. The legislative powers are vested in a twelve member unicameral council called the Board of Aldermen. Except for KRS § 83A.130, the provisions of KRS chapter 83A apply to cities of the first class unless specifically excepted. See THE NEW MUNICIPAL LAW, *supra* note 11, at 70 for further discussion.

[88] KRS § 83A.140 (1980).

[89] KRS § 83A.150 (1980).

all classes of cities.[90] In addition, the Code permits the establishment of a city administrative officer in any city regardless of which plan it uses.[91] When the Code became effective on July 15, 1980, existing city charters were repealed. Cities of the second through the fifth class, which had been mayor-council cities, are now governed by the Code mayor-council plan.[92] All cities which had operated under the old city manager plan now operated under the Code city manager plan.[93] All cities which had operated under the old commission plan, and cities of the sixth class which operated under the old board-of-trustees plan, are now operating under the Code commission plan.[94] If the transition necessitated a change in the number of members on the city legislative body, a city had two years from July 15, 1980 to comply.[95]

1. *Mayor-Council Plan*

There are two basic subtypes of mayor-council governments, the strong mayor-council model and the weak mayor-council model. In the first model, the mayor is the chief executive officer responsible for the day-to-day operation of the city; the council is confined to a strictly legislative role.[96] In the latter model, the line of demarcation between executive and legislative functions is blurred, especially with respect to executive functions. Those functions are shared by the mayor, the legislative body, and often by separately elected officers such as a clerk, a treasurer, or a controller.[97] Under the old law, Kentucky's mayor-council plans ran the gamut from strong mayor in cities of the first class, to an extremely weak mayor in cities of the sixth class.[98] The

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[90] KRS § 83A.160 (1980).

[91] KRS § 83A.090 (1980). Any city may create the position of city administrative officer. The officer shall be employed by the executive authority to assist in the administration of the city. The qualifications required of the officer shall include "professional training and experience in administration sufficient to insure competence." KRS § 83A.090(1) (1980).

[92] KRS § 83A.020(1) (1980).

[93] *Id.*

[94] *Id.*

[95] KRS § 83A.030 (1980). *See* Op. Ky. Att'y Gen. No. 80-439 (Aug. 12, 1980).

[96] NATIONAL MUNICIPAL LEAGUE, FORMS OF MUNICIPAL GOVERNMENT 5 (1973).

[97] *Id.* at 11.

[98] Cities of the first class possess a very strong mayor plan. See note 87 and accom-

Code allows all cities, not just the larger ones, the option of a strong mayor plan.

The Code plan is a moderately strong mayor-weak council plan.[99] The mayor is the chief executive officer of the city, and the council is precluded from performing any executive function except as provided by statute.[100] The mayor is the appointing authority for all officers and employees, but appointments of officers must be ratified by the council.[101] The mayor is responsible for preparing the budget and for the day-to-day management of the city.[102] The mayor, subject to disapproval by the council, promulgates procedures for the orderly administration of city government.[103]

The city council is a unicameral legislative body composed of from six to twelve members, depending on the city's class.[104] The council is limited to performing purely legislative functions such as enacting legislation to ensure the orderly operation of the city.[105] The mayor possesses the right to veto any ordinance en-

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panying text *supra* for the structure of the strong mayor plan. Cities of the second class had a fairly strong mayor-council plan, except that the legislative body was a very large, unwieldy, bicameral body. Accordingly all cities of the second class used city manager plans. Cities of the third and fourth classes had similar plans, wherein the balance of power had swung to the council. These plans were characterized as weak mayor plans because the council, not the mayor, appointed officers and employees. The plan that provided for cities of the sixth class was actually a commission plan. The mayor (called the chairman) was not separately elected, but was appointed from among the members of the council (called the board of trustees). The mayor possessed no executive powers outside his position as a member of the board of trustees. *See* THE NEW MUNICIPAL LAW, *supra* note 11, at 68.

[99] *See* KRS § 83A.130 (1980).

[100] KRS § 83A.130(3) (1980). *See* Op. Ky. Att'y Gen. No. 80-551 (Oct. 14, 1980).

[101] KRS § 83A.080(2) (1980); KRS § 83A.130(9) (1980). The mayor's appointment powers do not extend to "employees of the council." KRS § 83A.130(9) (1980). The council, however, may only employ persons to assist it in the performance of its legislative functions. Such employees include a "clerk, bookkeeper, sergeant at arms, doorkeeper, secretarial help, legislative aide, attorney." Op. Ky. Att'y Gen. No. 81-74 (Feb. 18, 1981).

[102] KRS § 91A.030(5) (1982). *See* KRS § 83A.130(3) (1980).

[103] KRS § 83A.130(4) (1980).

[104] KRS § 83A.030(1) (1980). In cities of the first class, the council is composed of twelve members. In cities of the second through the fourth classes, the council is composed of from six to twelve members as established by ordinance. In cities of the fifth and sixth classes, the council consists of six members. *Id.*

[105] KRS § 83A.130(11) (1980). *Cf.* Op. Ky. Att'y Gen. No. 80-273 (May 20, 1980) (mayor supervises all city departments and chief administrative officer may be established under mayoral supervision); Op. Ky. Att'y Gen. No. 80-468 (Aug. 22, 1980) (mayor may delegate supervisory power to administrative officers or to subordinate officers).

acted by the council, although his veto may be overridden by a vote of a majority of the council plus one.[106] The mayor also presides over meetings of the council but he may not vote unless his vote is necessary to break a tie.[107]

2. *Commission Plan*

The commission plan represents an entirely different approach to the management of city government than the mayor-council plan. Under the commission plan, all legislative, executive, and administrative powers are vested in the legislative body.[108]

The Code commission plan replaces two separate commission plans. It was modeled closely after them, but drafted in broader terms.[109] Under the Code plan, the city commission is composed of four commissioners and the mayor.[110] Other than his position as a member of the commission the mayor has no statutory duties and serves merely as the titular head of the city.[111] One of the distinguishing characteristics of a commission plan is that the commissioners individually serve as administrators of the various city departments.[112] The old plan set out what departments were to be established in the city and how they were to be divided among the commissioners.[113] The Code is more flexible, and merely provides that the commission shall establish city departments and designate which commissioners have supervision over each de-

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[106] KRS § 83A.130(5) (1980).

[107] *Id.;* Op. Ky. Att'y Gen. No. 81-175 (Apr. 21, 1981).

[108] The commission plan was developed in 1901 after a tidal wave devastated the city of Galveston, Texas. By vesting all executive, legislative, and administrative authority in one body, that body could then quickly take the decisive action needed. The plan enjoyed a brief vogue, but is now soundly criticized as an ineffective governmental plan. One critic commented that "[t]he commission plan violates one of the fundamentals of public administration by making no organizational distinction between the legislative . . . and the administrative . . . functions." PATE, LOCAL GOVERNMENT AND ADMINISTRATION 202 (1954).

[109] *See* KRS § 83A.140(3) (1980).

[110] KRS § 83A.140(2) (1980).

[111] *See* KRS § 83A.130(4) (1980). The mayor executes bonds, notes, contracts, and written obligations of the city, but his signing is purely a ministerial act. *Id.*

[112] THE NEW MUNICIPAL LAW, *supra* note 11, at 6.

[113] KRS § 81.190, *repealed by* Act of Apr. 9, 1980, ch. 303, § 15, 1980 Ky. Acts 1024, 1027; KRS § 89.180, *repealed by* Act of Apr. 9, 1980, ch. 235, § 20, 1980 Ky. Acts 705, 718.

partment.[114] In the alternative, the commission may delegate its administrative duties to a city administrative officer.[115]

As mentioned above, cities of the sixth class, which formerly had been organized under the board-of-trustees plan provided by KRS chapter 88, are now to be organized as commission plan cities.[116] This change was probably made because the old board-of-trustees plan more closely resembled a commission plan than a mayor-council plan, and thus placing sixth class cities under the commission plan would be less disruptive than placing them under a mayor-council plan.

3. *City Manager Plan*

The last plan available to Kentucky cities is the city manager plan.[117] This plan is essentially a commission plan with the addition of the city manager, an appointed officer to administer the affairs of the city.[118] All executive and legislative powers are vested in the board of commissioners, composed of four commissioners and the mayor.[119] The mayor has no substantive powers outside his position as a member of the board of commissioners,[120] and the day-to-day operation of the city is to be administered by a city manager appointed by the board.[121] In a model city manager plan, the manager possesses all the powers a mayor would

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[114] KRS § 83A.140(6) (1980).

[115] *Id.*

[116] KRS § 83A.020(1) (1980); Op. Ky. Att'y Gen. No. 80-439 (Aug. 12, 1980).

[117] KRS § 83A.150(1) (1980).

[118] KRS § 83A.150(8) & (9) (1980). The city manager plan continues to gain popularity for cities of medium and small size. The plan recognizes that the part-time and amateur nature of local elected officials often results in poor public administration. The Kentucky Court of Appeals (then the high court) extolled the virtues of the plan when it affirmed a city manager plan's constitutionality:

> This arrangement in operating government recognizes governmental administration as a science and technique within itself. Indeed, it admits on its face that politically elected or appointed officials, whose integrity and honesty of purpose may be unquestioned, are frequently unsuited for administering and executing the highly complicated and involved problems of the modern city.

Rawlings v. City of Newport, 121 S.W.2d 10, 14 (Ky. 1938).

[119] KRS § 83A.030(2) (1980); KRS § 83A.150(3) (1980).

[120] KRS § 83A.150(3) (1980).

[121] *See* KRS § 83A.150(7) (1980).

possess in a strong mayor-council plan.[122] The theory behind the city manager plan is that the actual administration of a modern city is too complex to be trusted to whomever is selected by the democratic process, but instead should be undertaken by a person trained and skilled in the art of municipal management.[123] The Code plan does not go as far as model plans would dictate, however. Under the Code, the manager is given all the executive and administrative powers of a mayor in a mayor-council plan *except* for the two most important. First, the board is the appointing authority;[124] the manager may only recommend persons for employment or dismissal.[125] Second, the manager may not veto ordinances passed by the board.[126]

The Code manager plan is virtually identical to the old manager plan, which had been soundly criticized because it failed to grant the authority which many felt was necessary for a city manager plan. A 1959 study stated that "[a] reading of the present council-manager law will lead to the conclusion that the law no longer embodies the essential features of the city manager plan, for under it, the manager's duties correspond more closely to those of a chief administrative officer than to a bona fide city manager."[127] The reason given for this charge was that the manager "lacks the requisite authority to make his own appointments, and must rely on the commission's prerogative to follow or not to follow his recommendations."[128]

A city may change its plan of government at any time, although once it makes a change it may not do so again for a period of five years.[129] The change must be approved by a majority of the participating voters.[130] Under the old law, since each class

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[122] R. CHILDS, THE FIRST 50 YEARS OF THE COUNCIL-MANAGER PLAN OF MUNICIPAL GOVERNMENT 5 (1965).

[123] See note 118 *supra* for a discussion of the city manager plan.

[124] KRS § 83A.080(2) (1980); KRS § 83A.150(3) (1980).

[125] KRS § 83A.150(7)(b) (1980).

[126] *See* KRS § 83A.150 (1980) (manager may not veto ordinances because there is no grant of a veto power in the statute).

[127] LEGISLATIVE RESEARCH COMMISSION, METROPOLITAN GOVERNMENT RESEARCH PUBLICATION NO. 64, at 72-73 (1959).

[128] LEGISLATIVE RESEARCH COMMISSION, INFORMATIONAL BULLETIN NO. 96, KENTUCKY GOVERNMENT 98 (7th ed. 1973).

[129] KRS § 83A.170(5) (1980).

[130] KRS § 83A.160(1) (1980).

had a separate charter, each class had different requirements for qualifications for officers, different procedures for enactment of legislation, and many other differences which seemingly had no rational basis except to confuse.[131] The Code, however, provides uniform administrative procedures and standards regardless of the form of government under which a city operates.[132]

B. *Municipal Officers*

Under the Code, only two types of elected city officers are permitted, a mayor and members of the city legislative body.[133] If other elected offices existed at the time of the effective date of the Code, they are to continue until abolished by ordinance.[134] Under the old law the qualifications for officers varied greatly from class to class, but under the Code the qualifications are uniform. To qualify for the office of mayor, a person shall: (1) be twenty-five years of age; (2) be a qualified voter in the city; (3) reside in the city for the duration of his term;[135] and (4) not be interested in any contract with the city (except in cities of the third class).[136] The same qualifications apply to members of the city legislative body except that the age requirement is twenty-one years.[137]

Mayors are elected for four year terms or until their succes-

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[131] Qualifications required of officers differed in each class; the procedures for enacting ordinances differed; even the names assigned legislative bodies differed from class to class (*e.g.*, board of aldermen, board of councilmen, common council, city council, board of trustees).

[132] The uniform procedures and standards are set out in KRS §§ 83A.030-.120 (1980).

[133] KRS § 83A.080(4) (1980).

[134] KRS § 83A.080(3) (1980). Under prior law, depending on a city's class, the following officers were either required or permitted to be elected: comptroller and inspector, treasurer, assessor, attorney, marshal, clerk, collector, and chief of police. *See* THE NEW MUNICIPAL LAW, *supra* note 11, at 6.

[135] KRS § 83A.040(1) (1980). A common requirement dispensed with in the Code is that an officer must own real estate in the city. Such a requirement might not be constitutional in light of recent interpretations of the equal protection clause of the United States Constitution. *Cf.* Turner v. Fouche, 396 U.S. 346 (1970) ("freeholder" requirement for school board membership held to be in violation of the equal protection clause). No Kentucky court has ruled on the question, although the Attorney General opined that such requirements are unconstitutional. Op. Ky. Att'y Gen. No. 75-686 (Nov. 18, 1975).

[136] KRS §§ 61.260-.280 (1980).

[137] KRS § 83A.040(3) (1980).

sors qualify, and members of legislative bodies are elected for two year terms.[138] All elected officers commence their terms on the first Monday in January following the year of their election.[139] Cities of the second class operating under the city manager plan must elect officers on a non-partisan basis, but any city may elect officers on a non-partisan basis if it obtains voter approval.[140] Election of legislative body members may be staggered, with one half being elected in one year and the other half being elected in the next;[141] otherwise all city officers are elected in odd-numbered years. Any vacancy in an elected city office must be filled by the legislative body of the city,[142] and, except in cities

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[138] KRS § 83A.040(1)-(3) (1980). The Kentucky Constitution permits mayors to hold over in office "until their successors shall be qualified." KY. CONST. § 160. There is no comparable language for city legislative body members; their terms may not extend beyond two years unless re-elected. *See id.* Mayors in cities of the first two classes are ineligible to succeed themselves, *id.;* mayors in all other classes of cities and members of legislative bodies may succeed themselves in office. *See id.*

[139] KRS § 83A.040(1) & (3) (1980). This represents a change only for elected officers in cities of the first class who, prior to the Code, took office on December 1 of the year in which they were elected.

[140] *See* KRS § 83A.170 (1980). This provision has engendered a great deal of confusion. Prior to the Code, only cities operating under city manager plans or commission plans could conduct non-partisan elections. KRS § 83A.170 was designed to extend that option to all cities. If a city adopts non-partisan elections, no candidate may run under a party label. All nominees must run in a primary. The two candidates receiving the highest number of votes for each office are then nominated to run in the general election. The confusion was caused because, prior to the Code, many cities in Kentucky conducted de facto non-partisan elections. Elections were conducted under the general election laws of KRS chapters 118 and 119, but no one would file for party nominations in the primary elections and all candidates would run as independents in the general election pursuant to KRS § 118.315 (1982). In fact, primary elections are prohibited by KRS § 118.105(4) for members of legislative bodies in cities of the fifth and sixth classes, mayors and commissioners in cities of the fourth class operating under the commission plan, and all officers in cities of the second, third and fourth classes operating under the city manager plan. KRS § 118.105(4) (1982). The Code did not amend the general election laws and cities may still conduct de facto non-partisan elections, as was done prior to the Code, without adopting the provisions of KRS § 83A.170 (1980). *See generally* Op. Ky. Att'y Gen. No. 80-322 (June 4, 1980); Op. Ky. Att'y Gen. No. 81-43 (Feb. 6, 1981); Op. Ky. Att'y Gen. No. 81-79 (Feb. 23, 1981); Op. Ky. Att'y Gen. No. 81-163 (May 4, 1981); Op. Ky. Att'y Gen. No. 81-221 (June 12, 1981); Op. Ky. Att'y Gen. No. 81-279 (Aug. 3, 1981).

[141] KRS § 83A.110 (1980). Staggered elections may be adopted only if approved by the voters of the city pursuant to the public question procedure of KRS § 83A.120 (1980).

[142] KRS § 83A.040(2), (4) (1980). Vacancies must be filled within 30 days of occurrence or they will be filled by gubernatorial appointment. KRS § 83A.040(5) (1980). If there is more than one vacancy on the legislative body, the vacancies must be filled one at

of the first class, any elected official may be removed for reasons of "misconduct, inability, or willful neglect in the performance of the duties of his office."[143] The compensation of all elected officers must be fixed not later than the first Monday in May in the year of the election and may not be changed during an officer's term.[144]

All non-elected offices must be established by ordinance.[145] The Code sets out no required non-elected offices although any such offices existing prior to the effective date of the Code continue until abolished by ordinance.[146] All non-elected city officers are to be appointed by the executive authority, with the approval

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a time so that each newly appointed member may vote on the filling of the remaining vacancies. If there are so many vacancies on the legislative body that it lacks a quorum, the Governor shall appoint enough members to form a quorum. An appointed "elected" official serves only until the next regular election. *See* KY. CONST. § 152.

[143] KRS § 83A.040(6) (1980). Removal must be approved by a unanimous vote of the legislative body, exclusive of the member to be removed. *Id.* No officer may be removed unless he has been given the right to a "full public hearing." *Id.* In cities of the first class, removal is done by a more complicated impeachment procedure. That procedure would not seem to apply to members of the Board of Aldermen since it is applicable to only "executive and ministerial officers." KRS § 83.660 (1980).

[144] KY. CONST. § 246; KRS § 83A.070(1) (1980). While an elected officer's compensation may not be "changed" during the term of office, it may be "adjusted" to reflect loss of purchasing power caused by inflation pursuant to the "rubber dollar theory." Matthews v. Allen, 360 S.W.2d 135 (Ky. 1962). Under this theory, the monetary limits on compensation imposed by a 1949 amendment of the Kentucky Constitution are not absolute, but may increase as the purchasing power of the dollar decreases. KY. CONST. § 246 (1891, amended 1949). Thus the actual limits are not the amounts set out in the constitution, but rather the amount of today's dollars it takes to equal the purchasing power of those dollars in 1949. The consumer price index is the guide employed for the calculation. Op. Ky. Att'y Gen. No. 80-171 (Mar. 11, 1980). *Contra* Op. Ky. Att'y Gen. No. 80-659 (Dec. 18, 1980).

[145] KRS § 83A.080(1) (1980). The ordinance establishing an office "shall specify: (a) [t]itle of office; (b) [p]owers and duties of office; (c) [o]ath of office; (d) [b]ond, if required; and (e) [c]ompensation." *Id.* An officer is defined as

> any person elected to a position by the voters or any person appointed to a position which (a) is created by the Constitution, the general assembly, or a city; (b) possesses a delegation of a portion of the sovereign power of government; (c) has powers and duties to be discharged which are conferred directly or by implication by the city; (d) has duties performed independently and without control of a superior power other than law; (e) has some permanency; (f) requires an official oath; (g) is assigned by a commission or other written authority; and (h) provides for an official bond if required by proper authority.

KRS § 83A.010(9) (1980).

[146] KRS § 83A.080(3) (1980). Pre-Code law required or defined the following offices

of the legislative body if the legislative body is separate from the executive authority.[147]

C. *Legislative Body Procedure*

A city legislative body may speak as a body only through the passage of legislative measures. Thus rules and procedures are necessary so the process of deriving a consensus of the members can be obtained in an orderly fashion. Prior to the Code, there was no standard format for the enactment of municipal legislation. The Code provides a uniform procedure modeled upon the current practice in the Kentucky General Assembly. The procedures set out apply only to ordinances. The statute defines an ordinance as "an official action of a city legislative body, which is a regulation of a general and permanent nature and enforceable as a local law or is an appropriation of money."[148] A city legislative body may also enact municipal orders[149] and resolutions.[150]

City ordinances must follow a specified form. They must: (1) be in writing; (2) embrace only one subject and have a title which clearly states that subject; and (3) have an enacting clause which reads: "Be it ordained by the City of _____."[151]

Ordinances can be introduced only by a member of the legislative body.[152] Before an ordinance can be voted upon, it must have been read twice at meetings held on two separate days.[153]

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in certain classes of cities: comptroller, clerk, attorney, treasurer, auditory, assessor, collector of taxes, marshal. *See* Op. Ky. Att'y Gen. No. 80-43 (Jan. 24, 1980); Op. Ky. Att'y Gen. No. 81-153 (Apr. 15, 1981).

[147] KRS § 83A.080(2) (1980). *See* Op. Ky. Att'y Gen. No. 80-239 (Apr. 22, 1980); Op. Ky. Att'y Gen No. 80-457 (Aug. 20, 1980).

[148] KRS § 83A.010(10) (1980).

[149] A municipal order is defined as "an official act of the legislative body of a municipality which is binding upon the officers and employes of the municipality and any governmental agency over which the municipality has jurisdiction." KRS § 83A.010(8) (1980). *See* Op. Ky. Att'y Gen. No. 81-80 (Feb. 26, 1981).

[150] A resolution is not defined by the Code, but is usually characterized as "an act of a special or temporary character, not prescribing a permanent rule of government, but is merely declaratory of the will or opinion of a municipal corporation." 62 C.J.S. *Municipal Corps.* § 411 (1949).

[151] KRS § 83A.060(1)-(2) (1980).

[152] *See* Op. Ky. Att'y Gen. No. 81-207 (May 15, 1981).

[153] KRS § 83A.060(4) (1980). The procedural requirements of this statute apply only

The reading requirement is satisfied by stating the title and reading a summary of the ordinance.[154] If an emergency is declared through a vote of two-thirds of the legislative members, an ordinance may be voted on after one reading.[155]

If an ordinance receives a majority vote of the members present, it becomes effective when published in a local newspaper.[156] In a mayor-council plan city, an ordinance which has passed the legislative body must be approved by the mayor before it can become effective.[157] The mayor may veto any ordinance, but his veto may be overridden by a vote of one more than a majority of the council.[158]

In the past cities did not keep enacted ordinances in any orderly fashion. Thus it was often very difficult to discover what, if any, law existed on a particular topic.[159] The Code requires that all ordinances be kept easily accessible, either in a minute book, indexed alphabetically by subject matter, or in a code of ordinances.[160] Furthermore, every five years, the city is required to review and revise ordinances "to eliminate redundant, obsolete, inconsistent and invalid provisions."[161]

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to the enactment of ordinances. *See* Op. Ky. Att'y Gen. No. 81-80 (Feb. 26, 1981).

[154] KRS § 83A.060(4) (1980). A summary is defined as "a brief narrative prepared under the supervision of an attorney succinctly covering the main points of an official statement, ordinance or rule in a way reasonably calculated to inform the public in a clear and understandable manner as to its meaning." KRS § 83A.010(11) (1980).

[155] KRS § 83A.060(7) (1980).

[156] KRS § 83A.060(9) (1980). Except for bond ordinances, any ordinance imposing fines, forfeitures, imprisonment, taxes, or fees must be published in full. *Id.* All other ordinances may be published in summary form. *Id.* Publication shall be pursuant to the provisions of KRS chapter 424. *Id.* The newspaper used for publication must: (1) be published in the city; (2) be a regular, at least weekly, paper; (3) have the largest paid circulation in the area; and (4) have a name or title, consist of at least four pages and be the type of publication "to which the general public resorts for passing events . . . and for current happenings, announcements, miscellaneous reading matter, advertisements and other notices." KRS § 424.120 (1972).

[157] KRS § 83A.130(6) (1980).

[158] *Id.*

[159] This has been a particularly troublesome problem since the abolition of local police courts and the establishment of the unified court system. *See* KY. CONST. §§ 109-13 (establishing the unified court system).

[160] KRS § 83A.060(8)(b) (1980).

[161] KRS § 83A.060(11) (1980).

D. *Financial Administration*

Prior to enactment of the Code, there were few statutory requirements for the financial administration of cities. Even that most basic of financial planning devices, the budget, was required only of cities of the first class and cities operating under the city manager plan.[162] Understandably, the drafters of the Code believed it was necessary that cities be required to conduct their financial affairs in a responsible manner.[163] Accordingly, the Code imposes stringent standards for financial administration.[164]

1. *Budget*

The budget, formally adopted by a legislative body, is the basic instrument of governmental finance. A budget is defined by the Code as "a proposed plan for raising and spending money for specified programs, functions, activities or objectives during a fiscal year."[165] The Code requires that all cities, regardless of class, adopt a budget prior to the beginning of the fiscal year.[166] The legislative body must adopt the budget as an ordinance and no city money may be spent unless the expenditure is pursuant to the budget.[167] In mayor-council cities, the mayor must propose the budget to the legislative body,[168] but the format of the budget ordinance is determined by the legislative body.[169] The budget

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[162] *See* KRS § 89.630, *repealed by* Act of Apr. 9, 1980, ch. 232, § 7, 1980 Ky. Acts 694, 697, and Act of Apr. 9, 1980, ch. 235, § 20, 1980 Ky. Acts 705, 718; KRS § 91.290, *repealed by* Act of Apr. 9, 1980, ch. 232, § 7, 1980 Ky. Acts 694, 697.

[163] *See* TOWARD A NEW FOUNDATION, *supra* note 15, at 15.

[164] KRS §§ 91A.020, .030, .040 (1982).

[165] KRS § 91A.010(1) (1982).

[166] KRS § 91A.030(1) (1982). Cities may adopt a fiscal year beginning January 1, June 1 or July 1. KRS § 92.020 (1982).

[167] KRS § 91A.020(1) (1982).

[168] The budget must be prepared by the executive authority and presented to the legislative body. KRS § 91A.030(5) (1982). (Of course, only in cities with a mayor-council plan is the executive separate from the legislative body.) The budget proposal must be presented at least 30 days prior to the beginning of the fiscal year. KRS § 91A.030(7) (1982). A budget message must accompany the proposal explaining features of the budget and changes from the previous year's budget. *Id.*

[169] KRS § 91A.030(8) (1982).

period is one fiscal year.[170] The budget must cover every proprietary[171] and governmental fund[172] of the city,[173] and no budget is permitted to provide for appropriations that exceed revenues in any given fiscal year.[174]

2. *Accounting System*

To determine compliance with the budget during the course of the fiscal year, the city must adopt an accounting system in accordance with generally accepted principles of governmental accounting.[175] The executive authority is responsible for the administration of the budget and must prepare quarterly operating statements reflecting the financial state of the city.[176]

3. *Audit*

A budget and an accounting system are incomplete financial

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[170] KRS § 91A.030(4) (1982).

[171] Governmental finances are accounted for on a fund basis. A proprietary fund accounts for activities "that are financed and operated in a manner similar to private business enterprises," especially where it is necessary to measure net income. MUNICIPAL FINANCE OFFICERS ASSOCIATION OF THE UNITED STATES AND CANADA, GOVERNMENTAL ACCOUNTING, AUDITING, AND FINANCIAL REPORT 9 (1981) [hereinafter cited as MUNICIPAL FINANCE OFFICERS].

[172] Government funds are used to account for the basic governmental functions of the city. There are five basic types: (1) the general fund; (2) special revenue funds; (3) capital projects funds; (4) debt service funds; and (5) special assessment funds. *Id.*

[173] *See* KRS § 91A.030(1) (1982).

[174] KY. CONST. § 157; KRS § 91A.030(8)(b) (1982).

[175] KRS § 91A.020(1)(b) (1982). Generally accepted principles of governmental accounting (GAAP), are defined to mean "those standards and procedures promulgated and recognized by the National Council of Governmental Accounting, the municipal finance officers of the U.S. and Canada and the American Institute of Certified Public Accountants." KRS § 91A.010(6) (1982). GAAP consists of twelve principles "grouped into seven categories; GAAP and legal compliance, fund accounting, fixed assets and long-term liabilities, basis of accounting, the budget and budgetary accounting, classification and terminology and financial reporting." MUNICIPAL FINANCE OFFICERS, *supra* note 171, at 8. The main requirement of GAAP for an accounting system is that it be organized on a fund basis. Fund accounting differs from business accounting where the entire business is accounted for as a single entity, because with fund accounting "a governmental unit is a combination of several distinctly different fiscal and accounting entities, each having a separate set of accounts and functioning independently of other funds and account groups." NATIONAL COUNCIL ON GOVERNMENTAL ACCOUNTING, GOVERNMENTAL ACCOUNTING AND FINANCIAL REPORTING PRINCIPLES: STATEMENT 1, at 6 (1979).

[176] KRS § 91A.030(11) (1982).

management tools unless their accuracy is verified regularly and independently. The Code requires that all cities conduct an audit of all city funds at the close of each fiscal year.[177] The audit must be conducted by either a certified public accountant or the state auditor of public accounts,[178] and a summary of the audit must be published in a local newspaper.[179]

CONCLUSION

The municipal code is an ambitious effort by the Kentucky General Assembly to give cities every opportunity to be effective governmental units. It is, of course, far too early to determine if the experiment will be a success. If the Code is a failure, blame can only be laid at the feet of the cities themselves. The General Assembly has taken seriously the often heard complaints of city officials that they are placed in straitjackets by Frankfort and restrained from functioning at the level they otherwise could. The General Assembly has stripped off the straitjackets and placed in the hands of cities every tool it has to give them. If cities fail to take advantage of this newly won ability it may appear to future General Assemblies that cities did not really mean what they said when they asked for more freedom. Failure to take advantage of home rule could then very well result in the loss of it and in a return to the old system, a result which would be extremely unfortunate for all of the Commonwealth's cities.

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[177] KRS § 91A.040(1) (1982). The audit must be completed within 270 days of the close of the fiscal year. *Id.* The contract entered into by the city with the auditor must, at a minimum, require the auditor to: (1) examine the balance sheets of all city funds; (2) conduct the audit in accordance with generally accepted governmental auditing standards; (3) prepare a report embodying financial statements and his opinion thereon; (4) express his opinion if the statements express fairly the financial condition of the city; and (5) present the audit to the legislative body. KRS § 91A.040(2) (1982).

[178] KRS § 91A.040(1) (1982).

[179] KRS § 91A.040(4) (1982). In addition to the audit requirements, each city, except those of the first class, is required to publish a financial statement showing "the amount of funds collected and received, from what source received, the amount disbursed, the date of each disbursement, for what purpose expended and to whom paid." KRS § 424.220 (Cum. Supp. 1980). The Attorney General first opined that KRS § 424.220 was repealed by implication by KRS § 91A.040. *See* Op. Ky. Att'y Gen. No. 80-594 (Nov. 7, 1980). He withdrew that opinion, however, and now reports that cities must comply with both requirements. Op. Ky. Att'y Gen. No. 81-37 (Feb. 4, 1981).