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STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

July 15, 1974

Opinion No. 74- 223

Larry R. Mears
Assistant County Attorney
Atchison County Courthouse
Atchison, Kansas 66002

Dear Mr. Mears:

You inquire concerning 1974 Senate Bill 750, effective July 1, 1974, which provides in pertinent part thus:

"On or before the first day of July of each calendar year, the board of county commissioners of any county may, by resolution establish a schedule of fees to be imposed on real property within any county solid waste service area, revenue from such fees to be used for the acquisition, operation and maintenance of county waste disposal sites and/or for financing waste collection, storage, processing, reclamation, and disposal services, where such services are provided."

You inquire whether any resolution establishing a schedule of fees is absolutely required to be adopted on July 1, or whether if, for example, a resolution adopted on July 2, would be equally effective.

In School District No. 40 v. Clark County Comm'rs, 155 Kan. 636, 127 P.2d 418 (1942), the court states thus:

"There is a rule of statutory construction familiar to all lawyers, which is that when the legislature prescribes the time when an official act is to be performed, the broad legislative purpose is to be considered by the courts whenever they are called upon to decide whether the time

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prescribed by statute is mandatory or directory. If mandatory, there must be strict conformity. If directory, the legislative intent is to be complied with a [sic] nearly as practicable. Instances of the latter sort frequently arise, and indeed they are particularly applicable in respect to the official mode of procedure in matters of taxation."

The court goes on to recite a number of instances in which revenue statutes require certain acts to be performed on prescribed dates. The want of strict compliance will not, however, jeopardize the collection of otherwise lawfully levied taxes. In City of Hutchinson v. Ryan, 154 Kan. 751, 121 P.2d 179 (1942), the court quoted with approval from 59 C.J. 1078:

"'A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer.'"

Thus, in this instance, nothing in the act suggests that July 1 should be regarded as a mandatory direction, thus limiting the power of the board of county commissioners to adopt a schedule of fees for county solid waste service to a single day. The date is doubtless prescribed in order to assure the orderly conduct of county business. However, it is our view that under the authorities cited above, the date of July 1 must be regarded as directly only, and not as a mandatory limitation on the power of the commissioners.

Secondly, you inquire concerning the notification required by the act to affected property owners of the adopted fee schedule. It provides in part thus:

"The board shall set a reasonable fee for each category established and divide the real property within the county service areas according to categories and ownership. The board shall impose the appropriate fee upon each division of land and provide for the billing and collection of such fees. The fees may be established, billed and collected on a monthly, quarterly or yearly basis. Fees collected on a yearly basis may be billed on the ad valorem tax

statement. Prior to the collection of any fees levied on real property by the board under this section, the board shall notify affected property owners by causing a copy of the schedule to be mailed to each property owner to whom tax statements are mailed in accordance with K.S.A. 1973 Supp. 70-2001, or any amendments thereto." [Emphasis supplied.]

The underscored language speaks of the fees being "levied on real property," a phrase commonly associated with taxation of property. Elsewhere in the act the board is authorized to establish a "schedule of fees to be imposed on real property." However, insofar as the act speaks at all directly to the matter, the measure of the fee is to be the "various uses to which the real property is put," and "the volume of waste occurring from the different land uses." Essentially, then, the fee is to be determined by the burden which land use and the solid waste resulting therefrom places on the waste disposal service provided by the county. The fee is thus a service charge rather than a tax. Moreover, under the act, the fees adopted by the board are to be "imposed" only upon real property within the county solid waste service area, and not necessarily upon all real property within the county, as would be required were the fee to constitute a "tax" subject to the "uniform and equal" requirement of Article 11, § 1 of the Kansas Constitution. The act does provide that the fees shall be billed to and assessed against property owners, rather than the recipients of waste collection and disposal services. This is not, however, determinative of the characterization of the nature of the charge. At 64 Am.Jur.2d, Public Utilities, § 60, the writer states thus:

"Accordingly, a requirement in a statute making a landlord liable for light or water furnished by the city to his tenants is reasonable, is such a power as may be conferred by the state upon the municipality, and does not violate due process in requiring one person to pay the debt of another."

The same general principles apply, in our view, to the charges in question here, which are imposed for equally vital public services, i.e., disposal of solid wastes. The charge remains one for services provided by the county for the benefit of the properties within its solid waste service area, and may be assessed against the property owners if a statute, as here, authorizes such assessment.

The question remains as to what constitutes "collection of any fees levied on real property" under this act, prior to which a

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copy of the fee schedule must be mailed to property owners. Under the act, fees may be billed on either a monthly, quarterly, or yearly basis. Inasmuch as notification of the schedule of fees to affected property owners of the fees to be levied prior to any collection, the term "levied" as used in the underscored sentence quoted above refers to a levy in its strict sense, as defined in Missouri, Kansas & Texas Railroad Company v. Hays, 119 Kan. 249 (1925), "meaning the determination of the amount of tax to be charged against the property of the district." Here, of course, it is a fee, and not a tax, which is being levied. Prior to collection of any fee established under Senate Bill 750, whether billed on a monthly, quarterly or annual basis, it is our view that each affected property owner must be notified by the board of the schedule of fees which it has adopted pursuant to this act. Thus, if a quarterly billing system is adopted, and the first billing date falls prior to the time ad valorem tax statements are required to be mailed, the schedule of fees must be mailed before those statements are required to be mailed, and, prior to the date the first quarterly installment of fees falls due.

If further questions remain concerning this matter, please do not hesitate to call upon us.

Yours very truly,



VERN MILLER
Attorney General

VM:JRM:jsm