



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

August 8, 1975

ATTORNEY GENERAL OPINION NO. 75- 331

Mr. Thomas C. Lysaught
County Counselor, Wyandotte County
Office of County Counselor
511 Huron Building
Kansas City, Kansas 66101

Re: Municipal Corporations--Creation, Existence and
Incidents--De Facto Existence--Defective Organization--
Transfer of Unexpended Tax Assets.

Synopsis: Those assets remaining in the control of credited to
Piper City, whether it be tangible, personal property,
such as machinery or equipment or property held in
the form of tax revenue become subject to the control
of the municipality now responsible for providing
the function government to that region formally known
as Piper City. In this case, Prairie Township became
reinvested with that responsibility and is therefore,
entitled to those assets which remain.

* * *

Dear Mr. Lysaught:

You have requested an opinion from this office concerning the
disposition of certain unexpended tax funds levied by the governing
body of the now defunct municipality of Piper City during that
city's final budgetary year. In reference thereto, you describe
the following factual history:

On November 24, 1971, the Board of County Commissioners
of Wyandotte County, Kansas, entered an order granting
the petition of certain citizens of Piper City for incor-
poration as a city of the third class.

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On December 16, 1971, the City of Kansas City, Kansas appealed the decision of the Board of County Commissioners to the District Court of Wyandotte County, Kansas. On April 19, 1972, the District Court held that Piper City was legally constituted as a corporate entity. The City of Kansas City, Kansas subsequently appealed the District Court decision to the Supreme Court of Kansas.

On January 26, 1974, the Supreme Court of Kansas held that incorporation was improperly granted for the reason that the City of Kansas City, Kansas was not notified of the hearing of the petition for incorporation of the area known as Piper City. (City of Kansas City v. Board of County Commissioners, 213 Kan. 777, 518 P.2d 549 (1974)).

City officials had been properly elected for the City of Piper in April of 1973. The City adopted a budget in August of 1973, and pursuant thereto, levied city taxes which were collected commencing November 1, 1973. Tax collections continued through 1974.

The attempted creation of a municipal corporation may result in either (1) a de jure corporation which is wholly valid, (2) a de facto corporation which is merely voidable in a direct proceedings initiated by the State and, (3) an organization which is neither a de jure nor a de facto corporation and which is wholly invalid and void. 1 McQuillin, Municipal Corporation, 3rd Edition, Sec. 3.48c, p. 323. A de facto municipal corporation has been defined as one so defectively created as not to be de jure, but nevertheless the result of a bona fide attempt to incorporate under existing statutory authority, coupled with the exercise of corporate powers. The general rule is that in order for a municipality to exist de facto there must be (1) a general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempted compliance in good faith with the requirements of the statute as to incorporation; (3) a colorable compliance with the statutory requirements; and (4) an assumption of corporate powers. Oswego Township v. Anderson, 44 Kan. 214, 24 p. 486 (1888), 1 McQuillin, Municipal Corporations, 3rd edition, Section 3.48c et seq., pg. 318-320. In City of

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Kansas City v. Board of County Commissioners, 213 Kan. 777, 518 P.2d 439 (1974), the Kansas Supreme Court stated in reference to Piper City that:

The creation of a municipal corporation may be either valid, void, or voidable. The creation in the present case was neither valid nor void. It was at most voidable on direct attack. 213 Kan. at 785.

Piper City's incorporation, therefore, resulted merely in the creation of a de facto corporation. In this respect, the holding in this case represents the minority view. The majority of those jurisdictions which have considered this particular question have held that a defect such as the failure to give notice to all interested parties is not a mere technical matter, but rather is material to the corporation's creation and consequently, prevents the formation of a de facto municipality. 1 McQuillin, Municipal Corporations, 3rd Edition, Section 3.48c et seq. The distinction is important for purposes here since the status of that Piper City maintained during the time prior to its termination by the ruling in the case of City of Kansas City v. The Board of County Commissioners, supra determines the disposition of those tax assets remaining to the credit of Piper City on the account books of the Wyandotte County Treasurer. In the above cited case, the Supreme Court gave no indication as to the precise ramifications their decision would have upon the expenditure of the remaining tax assets.

The rule of law disposing of Piper City's unexpended tax assets is firmly settled. The majority of those jurisdictions which have considered this issue hold that when a municipal corporation is legislated out of existence, its territory permanently annexed to another municipal corporation or to other political and taxing subdivisions, the latter, unless the legislature otherwise provides, becomes entitled to all its assets, property and immunities and shall be separately liable for proportionate share of all its then subsisting legal debts. Kocsis v. Chicago Park Dist. et al., 362 Ill. 24, 198 NE 847 (1935); Nesbitt v. Gettys, 219 SC 221, 64 SE 2d 651 (1951); Milwaukee v. Sewerage Commission of Milwaukee, 268 Wis. 342, 67 NW 2d 624 (1954). There is no question that tax revenue constitutes assets within the purview of the above rule. Furthermore, there is no practical nor logical distinction between property as tax dollars and property derived or purchased from those same tax dollars for purposes of this rule. Tax dollars, when properly levied and collected become the

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property of the taxing government in the same manner as property purchased with those taxes. At the time these taxes were originally levied, there is little dispute that the governing body of Piper City had proper authority to make a tax levy. This is not a situation where de facto incorporation never occurred and accordingly rendered any taxes levied by that body void for the lack of authority. Town of Balkan v. Village of Buhl, 518 Minn. 271, 197 NW 266 (1924); Peterson v. Bountiful City, 24 Utah 2d 126, 477 P.2d 153, 155 (1970). Accordingly, those assets remaining in the control of credited to Piper City, whether it be tangible, personal property, such as machinery or equipment or property held in the form of tax revenue become subject to the control of the municipality now responsible for providing the functions of government to that region formally known as Piper City. In this case, Prairie Township became reinvested with that responsibility and is therefore, entitled to those assets which remain. The one exception to this rule is discussed below.

The exception to this broad ruling centers upon those funds held to the credit of the special city and highway fund. It seems a logical proposition that the de facto existence of a municipality is sustained only so long as the requisite elements from which it arose remain present. The de facto incorporation of Piper City then must have terminated contemporaneously with the decision in City of Kansas City, Kansas v. Board of County Commissioners, supra, since as of that date the requisite of colorable compliance with the statutory requirements had been judicially determined adversely against Piper City. The end of de facto existence should have prohibited the officers of Piper City from making any further assumption of corporate powers after January 26, 1974, the date of the Supreme Court ruling. Peterson v. Bountiful City, 24 Utah 2d. 126, 477, P.2d 153, 155 (1970). Effective as of July 1, 1974, Wyandotte County, by virtue of K.S.A. 68-516a and K.S.A. 68-516b, adopted by the County Road Unit System. K.S.A. 68-516a specifically provides:

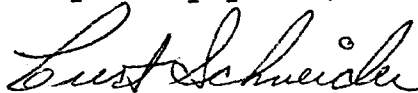
"That upon the adoption of the county road unit system in any county, the township board of any township in such county shall forthwith pay over to the county treasurer of such county any and all unused money or funds or surplus funds in the hands of such township board which have been received or

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acquired by such township from any source for road purposes or for the purchase of machinery or equipment for the construction and maintenance of road."

Since technically for purposes here Prairie Township assumed title to all of Piper City's assets as of January 26, 1974, the township was vested with legal title, if not actual control, to all remaining tax revenues, including the special city and highway fund. Accordingly, at the time Wyandotte County adopted the present road system, these monies were constructively "in the hands of the township" and "had been received or acquired... for road purposes." Therefore, those funds credited to the Piper City special highway fund should be transferred to the Wyandotte County treasury and expended in accordance with K.S.A. 68-516a and K.S.A. 68-516b.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:HTW:bv