



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

July 14, 1977

ATTORNEY GENERAL OPINION NO. 77-229

Mr. Edward F. Horne
Fick, Myers and Horne
Union National Bank Tower
Manhattan, Kansas 66502

Re: Cities--Transient Guest Tax--Abolition

Synopsis: Under 1977 Senate Bill 37, the city or county governing body which has authorized a transient guest tax to be levied may by resolution authorize the discontinuance of such levy in its jurisdiction, when it deems the levy no longer necessary. Such resolution should be adopted in accordance with any applicable rules and regulations of the Secretary of Revenue to coordinate the collection of the tax with the date of its abolition.

* * *

Dear Mr. Horne:

Ch. 93, L. 1977, authorizes the governing body of any city or county to levy a transient guest tax, the percentage of which is to be fixed by the resolution of the governing body which authorizes the tax. As you point out, the act, 1977 Senate Bill 37, is silent as to the power of the governing body to repeal the authorizing resolution and abolish the tax, and you inquire whether, in the absence of language providing for repeals, whether a city which once has levied the transient guest tax may thereafter cease to do so without explicit statutory authorization.

As a general rule, of course, a city is deemed to have the power to abolish by ordinance whatever it has the power to create. However, the rule is subject to exceptions. In Brown v. Arkansas

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City, 135 Kan. 453, 11 P.2d 607 (1932), the court considered an ordinance of the city which repealed an earlier ordinance creating a city court under a 1923 act, R.S. 20-1401 et seq., the initial section of which provided thus in pertinent part:

"Whenever it is made to appear to the satisfaction of the governing body of any city . . . that there is need for the establishment of a city court in such city for the administration of justice, such governing body may establish a city court in such city by ordinance of such city"

In an earlier case, State ex rel. Smith v. Smith, 130 Kan. 228, 285 Pac. 542 (1930), the court had upheld the validity of the statute, holding that it did not constitute a delegation of legislative power:

"[T]he act came from the legislature in due form, complete in itself, providing in detail as to jurisdiction, procedure, officers and their duties. There is nothing in the act which purports to give the governing body of the city power to add to, take from or to modify the provisions of the act. The legislature simply provided that when a certain condition is found to exist in any city of the class named the act comes into operation. Upon the happening of a specified contingency, a fact to be found by a local agency, the act is to take effect in that city." 130 Kan. at 230-231.

In Brown v. Arkansas City, *supra*, the court held that a city could not repeal the ordinance creating the court, lacking legislative power to create the court in the first place:

"If the city in the first place lacked legislative power there was no possibility of its possessing an implied power to rescind or repeal. This is in harmony with the general law on this subject.

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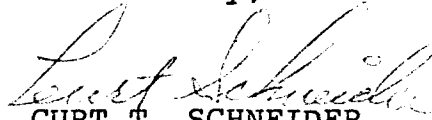
'The general rule governing the power of municipal councils to repeal ordinances does not apply where the ordinance has been enacted under a narrow, limited grant of authority to do a single designated thing in the manner and at the time fixed by the legislature, which precludes the implication that the common council was given any further authority over the subject than to do the one act. (43 C.J. 563.)'" 135 Kan at 456.

See also, State ex rel. Wheeler v. Bentley, 96 Kan. 344 (1915).

In the cases involving city courts, the city was deemed not to exercise any legislative power in creating the court. Rather, the city governing body merely found a fact to exist, i.e., that there was a need for a city court for the administration of justice, whereupon the court was created by operation of law, i.e., the statutory enactment. The court declined to infer a further implied power in the city governing body to find that the previously found fact no longer existed, i.e., that there was no longer a need for a city court for the administration of justice.

The power to levy a tax is, however, a legislative power. Although Senate Bill 37 is a fairly detailed enactment covering the levy, collection and distribution of transient guest taxes, the detailed provisions which are included in the bill do not suggest, in my judgment, that the legislature intended to preclude an implied power of the city or county governing body to discontinue the tax when it deemed it no longer necessary. There is no suggestion in the act that the legislature has intended to do other than provide statutory authority for a transient guest tax to be levied when the governing body deemed it appropriate to do so, and accordingly, to permit the governing body to discontinue the levy, as any other tax which it is empowered to make, when it deemed the tax no longer necessary.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

cc: Mr. Kent Kalb