STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

March 19, 1979

ATTORNEY GENERAL OPINION NO. 79- 31

The Honorable Jack Steineger
State Senator
Kansas Senate
State Capitol
Topeka, Kansas 66612

Re: Kansas Constitution--Finance and Taxation--Uniform and Equal Rate of Assessment and Taxation

Synopsis: The provisions of 1979 House Bill No. 2205 which provide for the total exemption of certain property from taxation do not violate Article 11, Section 1, of the Kansas Constitution. However, the provisions of said bill which provide for "partial exemptions" for such property, during the first four years said exemptions are to be effective, do not constitute a uniform and equal rate of assessment and taxation and are violative of said constitutional provisions.

* * *

Dear Senator Steineger:

You request our opinion as to whether the exemption from property or ad valorem taxes set forth in Section 1 of 1979 House Bill No. 2205, as amended by House Committee of the Whole, is constitutionally permissible under Article 11, §1, of the Kansas Constitution.

House Bill No. 2205 provides an initial partial exemption, and an eventual total exemption, to the following classes of personal property defined therein: all personal property held within the State of Kansas, by a merchant, as inventory in his or her business as a merchant; all personal property held within the State of Kansas by a manufacturer as inventory in such manufacturing business; and all livestock held within the State of Kansas by any person, firm or corporation.

Section 1 of Article 11 of the Kansas Constitution provides as follows:

> "The legislature shall provide for a uniform and equal rate of assessment and taxation, except that the legislature may provide for the classification and the taxation uniformly as to class of motor vehicles, mineral products, money, mortgages, notes and other evidence of debt or may exempt any of such classes of property from property taxation and impose taxes upon another basis in lieu thereof. All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and all household goods and personal effects not used for the production of income, shall be exempted from property taxation."

Said constitutional provision has been construed in numerous cases involving challenges to various statutory enactments, and this judicial history must be examined in order to determine whether there is any constitutional infirmity in Section 1 of House Bill No. 2205.

In Wheeler v. Weightman, 96 Kan. 50 (1915), the Court considered the constitutionality of Chapter 250 of the Laws of 1915, which broadly stated, exempted real estate mortgages from taxation and, in lieu thereof, substituted a mortgage registration fee. The Court held that said statute was void for the reason that it placed real estate mortgages in a class by themselves and subjected them to a specific tax, contrary to Article 11, Section 1, of the Constitution. It should be noted that said decision was prior to the constitutional amendment allowing the separate classification of real estate mortgages for purposes of taxation.

In the Wheeler case, the Court reviewed previous Kansas cases dealing with the power of the legislature to enact exemptions apart from, and in addition to, those specifically enumerated in Article 11, Section 1. Said review yielded the following analysis and conclusion:

> "When the subject came before the court it took the view which evidently prevailed when the people first commenced to regulate their governmental affairs according to the constitution, and held that the constitution prescribed a minimum exemption which may be enlarged according to the wisdom and discretion of the legislature." Id. at 59.

The power of the legislature to create exemptions in addition to those enumerated in the Constitution has been consistently upheld in subsequent cases; however, the Court has always held that Article 11, Section 1, places limitations on the type of statutory exemptions which may be created.

In the Wheeler case, the Court stated that statutory exemptions "must rest on the definite basis of promoting the public welfare in some peculiar and substantial way." 98 Kan. at 68. It was further stated that this limitation was "illustrated by the constitution itself" (98 Kan. at 60), by reason of the nature of the exemptions therein enumerated. Quoting Washburn College v. Comm'rs of Shawnee Co., 8 Kan. 344 (1871), the Court gave this further explanation of the limitation:

> "'The obligation to pay taxes is co-extensive with the protection received. An exemption from taxation is a release from this obligation. It is the receiving of protection without contributing to the support of the authority which protects. It is an exception to a rule, and is justified and upheld upon the theory of peculiar benefits received by the state from the property exempted. (p. 348)'" 98 Kan. at 60.

This and other restrictions on statutory exemptions were applied in later cases, discussed below, involving the constitutionality of particular exemptions.

Following the amendment of Article 11, Section 1, in 1924, which amendment permitted the classification of four types of property, the Court, in Voran v. Wright, 129 Kan. 601 (1930), made the following statement regarding the constitutional rule of uniformity and equality:

> "Whatever may have been proper as to classification of owners under this section before amendment, there can no longer be any question in that regard. A classification of owners is not now permissible." Id. at 606.

In Alpha Tau Omego v. Douglas County Comm'rs, 136 Kan. 675(1933), the Court considered the constitutionality of a statute (R.S. 79-203) which exempted certain real estate "used exclusively by any college or university society as a literary hall or as a dormitory, if not leased or otherwise used with a view of profit." The Court held that said statutory exemption did not promote the public welfare and did not have a "beneficient or public purpose," and that it therefore violated Article 11, Section 1, of the Constitution. The Court observed that said statute created two classes of boarding houses (or "dormitories"): one that paid taxes (those owned by entities other than university societies) and one that did not (those owned by university societies). Although the Court held the statute void on the ground that it did not have a public purpose, it is clear that said exemption created a classification based on ownership, which classification was declared constitutionally impermissible in Voran v. Wright, supra, and that this was the primary factor in the Court's decision.

In State ex rel., v. Board of Regents, 167 Kan. 587 (1949), the Court discussed the function of the judiciary in applying the test of "promotion of the public welfare" to particular statutory exemptions:

> "It is the legislature, and not the courts, that is charged with the duty of determining what, in its judgment, will best accomplish that purpose and thus be conducive to the public welfare." Id. at 596.

On the same subject, the Court further stated as follows:

> "Having concluded the exemption of this property from taxation would advance the public welfare, the legislature was competent to make it. (Ryan v. State Tax Commission, 132 Kan. 1, 4, 294 Pac. 938.) With the wisdom of legislation touching the public interest courts have no concern. (State, ex rel., v. Kansas City, 140 Kan. 471, 37 P.2d 18; State, ex rel., v. State Highway Comm., 163 Kan. 187, 182 P.2d 127.) While courts may entertain different views on the subject it is not their privilege to supersede the judgment of the lawmaking body unless its judgment is entirely devoid of a rational basis. (State, ex rel. v. Sage Stores Co., 157 Kan. 404, 413, 141 P.2d 655.)" Id. at 596.

From the above, it can be seen that the Court will only make a limited inquiry into whether a particular exemption is conducive to the public welfare, the nature of said inquiry being to determine whether there is any "rational basis" to support the legislative conclusion.

State, ex rel. v. Kansas Armory Board, 174 Kan. 369 (1953), upheld the constitutionality of a statute exempting revenue bonds issued to obtain funds for the construction and improvement of armory buildings. The Court quoted with approval State ex rel. v. Board of Regents, supra, and stated that "[c]ertainly National Guard armories have a public purpose." 174 Kan. at 381. Although it did not specifically so state, it appears that the Court must have been applying the "rational basis" test set forth in the Board of Regents case.

In Topeka Cemetery Ass'n vs. Schnellbacher, 218 Kan. 39 (1975), the Court struck down an amendment to K.S.A. 79-201, Second (L. 1969, ch. 429, §1), which would have exempted cemetery lots owned by "individual owners," but not those owned by corporations. In said opinion, the Court discusses "some of the general principles of law which this Court has followed in applying the constitutional provision to specific taxing statutes enacted by various state legislatures down through the years." Id. at 41. One of those "principles" enumerated by the Court was as follows: "We have consistently held that where public property is not involved, a tax exemption must be based upon the use of the property and not on the basis of ownership alone." Id. at 42.

Since, by statute (K.S.A. 17-1302 et seq.), all lots in a cemetery must be used only for burial purposes, the Court held that there was no "rational basis for treating differently land owned by individuals and that owned by the corporation, except ownership, which is not a permissible basis for classification." Id. at 44.

Considering all provisions of House Bill No. 2205 other than the "phased-in" aspect (which will be discussed subsequently), and in accordance with the cases cited above, we do not find any constitutional infirmity. It is well settled that the legislature may exempt property other than that which is specifically enumerated in Article 11, Section 1, so long as there is a rational basis to support the conclusion that the exemption will be conducive to the public welfare. In this regard, we are unable to conclude that House Bill No. 2205 lacks a rational basis for the exemptions set forth therein. Although there is no Kansas authority on this subject, it should be noted that the Idaho Court, in Leonardson v. Moon, 451 P.2d 542 (1969), 553, held that a business inventory exemption "would benefit Idaho's economic climate," and that an exemption relating to certain livestock was "a valid purpose."

Likewise, with regard to the exemptions relating to inventories, it would appear that House Bill No. 2205 does not establish an exemption based on ownership, which exemption would be constitutionally impermissible under the Schnellbacher case. Although said exemptions relate to personal property held within the State of Kansas by a merchant and by a manufacturer, said terms are defined very broadly and are necessary to establish the use which is declared to be exempt. It is clear that it is the use of personal property as inventory, in a business context, and not the ownership thereof, which establishes eligibility for the exemption.

However, there is one provision of House Bill No. 2205 which, in our opinion, does violate the constitutional rule of uniformity and equality: the "phasing-in" of the exemptions whereby only a percentage of the assessed value is "exempt" during the first four years. In Addington v. Board of County Commissioners, 191 Kan. 528 (1963), 531, the Court makes the following statement regarding uniformity: "Uniformity in taxing implies equality in the burden of taxation, and this equality cannot exist without uniformity in the basis of assessment as well as in the rate of taxation."

Clearly, a partial exemption created by altering the assessed value of certain property, such alteration being accomplished by means of "exempting" a stated percentage of said assessed value, destroys "uniformity in the basis of assessment." In reality, such a partial exemption amounts to putting the subject property in a class by itself. In our judgment, Article 11, Section 1, does not allow "partial exemptions"; if the legislature chooses to exempt certain property, it must do so totally. It should be noted that in the early case of Comm'rs of Ottawa Co. v. Nelson, 19 Kan. 234 (1877), the Court implied that it was in agreement with this result. This implication arose from the Court's statement that it did not "take issue" (Id. at 239) with a Wisconsin case (Knowlton v. Supervisors of Rock Co., 9 Wis. 410 (1859), which held that partial exemptions were unconstitutional.

We note that the Idaho court has upheld "phased-in" exemptions (Leonardson v. Moon, supra); but the decision is not persuasive in this instance, for the reason that the Idaho constitutional provisions are considerably dissimilar to those of this state.

In summary, it is our opinion that 1979 House Bill No. 2205 violates Article 11, Section 1, of the Kansas Constitution only insofar as it provides for "partial exemptions" during the first four years said exemptions are to be effective.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Terrence R. Hearshman

Terrence R. Hearshman
Assistant Attorney General

RTS:BJS:TRH:gk