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June 25, 1979

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ATTORNEY GENERAL OPINION NO. 79- 127

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Re: Taxation--Intangibles Tax--Elimination or
Reduction, Use of Voter Initiative

Synopsis: The initiative and referendum provisions of K.S.A. 12-3013 cannot be utilized to compel a city governing body to eliminate the intangibles tax levied pursuant to K.S.A. 79-3109. However, the latter statute has been amended, effective July 1, to provide a procedure whereby qualified voters of a city can compel the elimination of said tax, even though such procedure requires the voters to concurrently authorize the city's governing body to replace the revenue lost thereby.

* * *

Dear Mr. Anderson:

As city attorney for the City of Blue Rapids, you have inquired whether the qualified electors of a city may compel the city governing body to submit to the electors the question of eliminating or reducing the amount of the intangibles tax.

Of pertinence to your inquiry are the provisions of K.S.A. 79-3109, which authorize the respective governing bodies of counties, cities and townships to establish the intangibles tax rate (within prescribed limits) or in the alternative to

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eliminate such tax altogether. As applied to cities, this statute provides in relevant part as follows:

"The governing body of any city may, in the year 1977 or in any years thereafter, by ordinance fix the rate of tax levied for the benefit of such city upon money, notes and other evidence of debt having a tax situs in such city at a rate other than the rate prescribed in subsection (a) of this section Such governing body may by ordinance, in lieu of prescribing a rate of taxation, elect that no tax shall be levied for the benefit of such city upon money, notes, and other evidence of debt having a tax situs in such city."

This statute also provides that any such ordinance so adopted shall be subject to protest by a prescribed percentage of the city's electors, culminating in an election to determine whether such ordinance shall take effect. Absent such protest, however, it is clear that K.S.A. 79-3109 vests in a city's governing body the authority for levying the intangibles tax within such city. Within this context, you have inquired whether there exists any provisions for the electors of a city to compel the governing body to take the permitted action to eliminate the intangibles tax.

A determination of your inquiry necessarily involves consideration of the concepts of initiative and referendum, which are codified in K.S.A. 12-3013. This statute "provides a procedure whereby a city's electors may initiate by petition any proposed ordinance 'except an administrative ordinance' (and except certain other types of ordinance not relevant here)." City of Lawrence v. McArdle, 214 Kan. 862, 863 (1974). The exception for administrative ordinances leaves with the electors the power to initiate ordinances that are legislative in character.

The legislative-administrative dichotomy is perhaps the strongest of the several tests applied by the Kansas Supreme Court in determining the appropriateness of initiative. It should be noted that the Court has taken a conservative approach in applying these tests, which fact was specifically recognized in McArdle, supra at 870. To more fully understand the Court's approach to this issue, a review of its pertinent decisions is appropriate.

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In Rauh v. City of Hutchinson, 223 Kan. 514 (1978), the Court reaffirmed the principles set forth in McArdle, quoting at length from the syllabus of the prior decision, including:

"'1. The operation of the initiative and referendum statute is to be confined with a considerable degree of strictness to measures which are quite clearly and fully legislative and not principally executive or administrative.

"'2. One crucial test for determining that an ordinance is administrative or legislative is whether the ordinance is one making a new law or one executing a law already in existence. Permanency and generality of application are two additional key features of a legislative ordinance.

"'3. Acts constituting a declaration of public purpose and making provisions for ways and means of its accomplishment may be generally classified as calling for the exercise of legislative power. Acts dealing with only a small segment of an overall policy question are generally of an administrative character.'" 223 Kan. at 519.

Further insight is gained from Rauh, where the Court quotes with approval section 16.55 of 5 McQuillin, Municipal Corporations (3rd Ed.), p. 212, the pertinent portion of which reads as follows:

"'It has been said, however, that if the subject is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state's designated agent for local implementation of state policy, the action receives an 'administrative' characterization, hence is outside the scope of the initiative and referendum." (Emphasis added by court.) 223 Kan. at 519.

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It should be noted, however, that the administrative/legislative test is not the only consideration from which the applicability of the initiative and referendum statutes is determined. The Kansas Supreme Court and courts in other jurisdictions have recognized the unique nature of fiscal measures. In City of Newport v. Gugel, Ky., 342 S.W.2d 517 (1960), a similar question was raised where the electorate sought to initiate an ordinance to restrict the salaries of municipal employees. In holding that such a measure was not the proper subject for initiative, the Court stated:

"To permit the electorate to initiate piecemeal measures affecting the fiscal affairs of the city without regard for the overall fiscal program, or measures not embodying a basic plan or policy for the entire area of government activity upon which the measure touches, could result in destruction of the efficient administration of the affairs of the city, and we do not believe the initiative statute so intends." Id. at 520.

See, also, in accord: Batten v. Hambley, 400 S.W. 2d 683, 684, 685 (1966) (license tax measure); State v. City of Petersburg, 145 So. 175, 176 (1933) (holding that financial matters, though legislative in character, are best left to the "city's responsible officers"); 42 Am. Jur. 2d, Initiative and Referendum §11, 659.

Gugel, as well as the decision in Batten v. Hambley, supra, are particularly significant, since the rationale of these two cases was adopted by the Kansas Supreme Court in McArdle. There, in considering the ability of a city's electors to initiate a salary ordinance, the Court reaffirmed its prior position that a "piecemeal" approach to the fiscal problems of a city is an inappropriate use of referendum, explaining its decision, as follows:

"Such an attack on the city's revenue, made without consideration of the overall needs of the city, might lead to fiscal paralysis." 214 Kan. at 869.

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As may be gleaned from K.S.A. 79-3109, the legislature has placed the responsibility of local implementation of the intangibles tax upon a city's governing body. While we recognize that an argument can be made that the action contemplated does have a "permanent" effect, and that the tax is merely a means to carry out a public purpose, in our judgment voter initiative is inapplicable to the provisions of this statute. The tax measure encompassed therein is but a portion of the overall financial picture of the municipality. Thus, to allow initiative on this proposition would be to justify an action irrespective of its effect upon the overall fiscal policies of the city, and such effect can reasonably be determined only by people who have a broad conceptualization of the financial needs of the municipality. The people comprising the city's governing body are most likely to possess these abilities. This body not only administers the funds gained from this tax, but from all sources of city revenue; and it is precisely this city governing body that has been specifically designated by the legislature to decide if the intangibles tax should be removed.

This important distinction brings us to one final point-- legislative intent. The Kansas Supreme Court has, at times in the past, pitched all tests per se and hinged its decision upon a determination of the legislative intent. In State, ex rel., v. City of Kingman, 123 Kan. 207 (1927), the Court had before it the question of whether a municipal ordinance for street improvement was the proper subject for a referendum. In holding in the negative, the Court explained its decision:

"We do not base the decision upon the ground that the ordinance here under consideration is non-legislative, although it seems more properly describable as administrative; but we think, apart from this consideration, the legislature did not intend to bring it within the operation of the referendum statute"
Id. at 210.

See Rauh, supra, at 521, in accord.

As applied to K.S.A. 79-3109, the legislature made several provisions for alteration or deletion of the intangibles tax provisions. The city governing body is empowered to remove or lower the tax if they deem it proper, and the electors may petition to have the tax reinstated if the city governing body has chosen to remove it. If the legislature had intended to give the electorate the ability to remove the tax, such a

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provision would have easily been included. Such conclusion is borne out by the fact that the 1979 Legislature did, in fact, amend K.S.A. 79-3109 to provide for a measure of voter initiative. (See Section 1 of 1979 Senate Bill No. 196.) The amendment to this section, which takes effect on July 1, 1979, applies to cities as follows:

"Upon submission of a petition signed by not less than five percent (5%) of the qualified electors of a city requesting the same, the governing body of such city shall be required to submit to the electors of that city at the next primary or general election held in such city a proposition which shall be placed on the ballot in substantially the following form: 'Shall the city of _____ eliminate the tax on intangible personal property and be authorized to impose and levy any other taxes as may be authorized by law or to levy taxes on real estate and tangible personal property in addition to any aggregate levy amount limitation on the county's ad valorem tax levy authority as may be necessary to offset the revenue lost from elimination of the tax on intangible personal property?' Notice of any such election shall be given in the manner prescribed in the general bond law. If a majority of the electors voting thereon at such election shall vote in favor of such proposition, the governing body of the city shall provide by ordinance that no tax shall be levied upon money, notes and other evidence of debt as follows: When such election is held prior to August in any year, the ordinance shall provide that no such tax shall be levied thereon in the calendar year following the year of such election and in each year thereafter, and when said election is held in August or thereafter of any year, the ordinance shall provide that no such tax shall be levied thereon in the second calendar year following the year of such election and in each year thereafter. The governing body of such city shall thereupon be authorized to offset the loss in revenue from the elimination of said tax by the imposition and levying of any other taxes as may be authorized

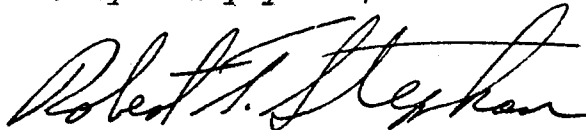
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by law or by increasing its ad valorem tax levy for the general fund for any year in which revenue is not received from the tax on money, notes and other evidence of debt in an amount not to exceed the amount of such tax received in the year prior to elimination of such tax. The increase in the amount of such ad valorem tax authorized herein shall be in addition to any aggregate levy amount which may be fixed by any existing state law or any law which may hereafter be enacted."

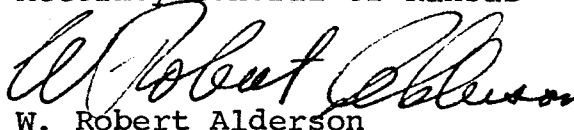
As can be seen from the foregoing, effective July 1 of this year, the legislature has provided a procedure whereby a city's electors can compel a referendum on the proposition of eliminating the intangibles tax in such city. However, it should be noted that such procedure is not the equivalent of the initiative and referendum contemplated by K.S.A. 12-3013, and it also should be recognized that the new law permits a city electorate to eliminate the intangible tax only if it concurrently authorizes the city governing body to levy ad valorem or other taxes in an amount sufficient to offset the revenue lost by elimination of the intangibles tax.

In conclusion, it is our opinion that the initiative and referendum provisions of K.S.A. 12-3013 cannot be utilized to compel a city governing body to eliminate the intangibles tax levied pursuant to K.S.A. 79-3109. Such conclusion is not altered by the fact that the latter statute has been amended, effective July 1, to provide a limited and conditional voter initiative procedure. In our judgment, the recent amendment is a clear manifestation of legislative intent that voter initiative is available only in accordance with the new procedure.

Very truly yours,



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