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October 3, 1980

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ATTORNEY GENERAL OPINION NO. 80- 221

Mr. Alan M. Boeh  
Doniphan County Attorney  
P.O. Box 486  
Troy, Kansas 66087

Re: Public Health--Solid and Hazardous Waste--Funding for  
Waste Collection System

Synopsis: A county has no authority to adopt a charter resolution by which the county would exempt itself from the provisions of K.S.A. 1979 Supp. 65-3410, since that section is part of an act of the legislature uniformly applicable to all counties. However, the waste disposal fee system authorized by that section is not mandated. The provision is permissive, and the county may exercise its home rule power to levy a tax to finance its waste collection system, pursuant to the procedure prescribed by K.S.A. 1979 Supp. 19-117. Cited herein: K.S.A. 1979 Supp. 19-101a, as amended by L. 1980, chs. 84, 85, 19-117, K.S.A. 65-3401, K.S.A. 1979 Supp. 65-3405, 65-3410.

\* \* \*

Dear Mr. Boeh:

You request our opinion as to the legality of levying an ad valorem tax to finance a proposed solid waste collection system in Doniphan County. K.S.A. 1979 Supp. 65-3410 establishes a means of financing solid waste collection systems, but the county wishes to levy an ad valorem tax instead. You state that you have found no authority either authorizing or prohibiting such a tax levy, but that if the means of financing prescribed under K.S.A. 1979 Supp. 65-3410 is

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construed to be the sole means of financing authorized by law, you inquire whether the county, under its home rule powers, may exempt itself from the provisions of this statute by charter resolution and levy a tax pursuant to said charter resolution.

K.S.A. 1979 Supp. 65-3410 provides, in pertinent part:

"Each city or county or combination of such cities and counties may provide for the storage, collection, transportation, processing and disposal of solid wastes generated within its boundaries; and shall have the power to purchase all necessary equipment, acquire all necessary equipment, acquire all necessary land, build any necessary structures, lease or otherwise acquire the right to use land or equipment and to do all other things necessary for a proper effective solid waste management system including the levying of fees and charges upon persons receiving service. 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. In establishing the schedule of fees, the board of county commissioners shall classify the real property within the county solid waste service area based upon the various uses to which the real property is put, the volume of waste occurring from the different land uses and any other factors that the board determines would reasonably relate the waste disposal fee to the real property upon which it would be imposed.

"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 of fees to be mailed to each property owner to whom tax statements are mailed in accordance with K.S.A. 1973 Supp. 79-2001, or any amendments thereto."  
(Emphasis added.)

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In Attorney General Opinion No. 80-65, we concluded that counties may not, by charter resolution, exempt themselves from the provisions of K.S.A. 65-3401 et seq., the Solid and Hazardous Waste Management Act, since that act is applicable uniformly to all counties and not subject to exemption by such charter resolution. Accordingly, the Doniphan County Board of County Commissioners has no authority to adopt a charter resolution by which the county would exempt itself from the provisions of K.S.A. 1979 Supp. 65-3410, since that section is part of an act of the legislature uniformly applicable to all counties.

However, the question remains whether the waste disposal fee method of financing county solid waste collection systems prescribed by K.S.A. 1979 Supp. 65-3410 is the sole means of financing available to counties. We note that the section in question appears to give counties an option whether to employ the statutory financing scheme because of the legislature's use of the word "may" in the following sentence:

"On or before the first day of July 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. . . ." (Emphasis added.)

Since the legislature chose not to use the word "shall" in place of "may" in the above-quoted sentence, it may be argued that the legislature chose not to foreclose other means of financing solid waste collection services, including an ad valorem tax levy. That a county may establish a schedule of waste disposal fees to finance its waste collection system implies that a county may not, and may instead choose an alternative method of financing, and nothing in 65-3410 expressly prohibits a county from doing so. Thus, it seems arguable that a county may adopt a resolution to impose a tax for purposes of financing its waste collection system, by authority of subsection (b) of K.S.A. 1979 Supp. 19-101a, as amended by L. 1980, chs. 84, 85. That subsection provides, in pertinent part:

"If no statutory authority exists for . . . local legislation other than that set forth in subsection (a) of this section [19-101a] and the local legislation proposed under the authority of such subsection is not contrary to any act of the legislature, such local legislation shall become effective upon passage of a resolution of the board and publication in the official county newspaper." (Emphasis added.)

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It is clear that "statutory authority exists" by which counties may finance waste collection systems, as prescribed in 65-3410. What is not clear, however, is whether the legislature intended the waste disposal fee method to be the only means of financing available to counties, and whether a county resolution imposing a tax levy for such purposes would be "contrary" to an act of the legislature.

In 73 Am.Jur.2d, Statutes, the following are stated as general principles:

"The intention of the legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof. Words or phrases which are generally regarded as making a provision mandatory include 'shall' and 'must.' On the other hand, a provision couched in permissive terms is generally regarded as directory or discretionary. This is true of the word 'may,' or 'authorizes,' or 'power,' or the phrase 'it is lawful.'" 73 Am.Jur.2d, Statutes §22.  
(Notes omitted.)

Affirming the above-quoted rule in The State v. School District, 80 Kan. 667 (1909), the Kansas Supreme Court declared:

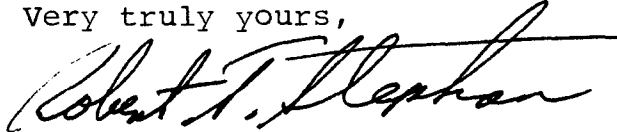
"Primarily and as ordinarily used in a statute the word 'may' is permissive rather than peremptory. . . . It should be given its ordinary meaning . . . unless the terms and provisions of the statute compel to other view."

Guided by the foregoing rule, and after careful review of the provisions of the act in question, we conclude that the authority vested in counties under 65-3410 to levy waste disposal fees is permissive and not mandatory. It is clear that if the county chooses to establish a system of waste disposal fees, it "shall" do so as mandated by the statute. The legislature uses the word "shall" in its description of what said system of fees must entail, but it is our opinion that the legislature did not mandate the fee system. Our conclusion is reinforced by other language in the statute. The statute provides that "[a]ny fees authorized pursuant to this section" which become delinquent for a period of 60 days or more may be collected pursuant to a procedure further prescribed by the statute. K.S.A. 1979 Supp. 65-3410, para. 3.  
(Emphasis added.)

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Accordingly, we conclude that the county may adopt a resolution to impose a tax for purposes of financing the county waste collection system. In so doing, the county must follow the procedures set forth in K.S.A. 1979 Supp. 19-117, which section pertains to the levy of "any tax, excise, fee, charge or other exaction other than permit fees or license fees for regulatory purposes, a procedure for which is not otherwise prescribed by enactment of the legislature."

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Steven Carr  
Assistant Attorney General

RTS:BJS:SC:pf