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ATTORNEY GENERAL OPINION NO. 80- 267

Mr. John Dekker
Wichita City Attorney
Department of Law
455 North Main Street
Wichita, Kansas 67202

Re: Cities and Municipalities--Buildings, Structures and Grounds--Tax Increment Financing of Blighted Areas in a City's Central Business District

Synopsis: If a city acquires privately owned property subject to taxation under the authority granted by the Urban Renewal Law, K.S.A. 17-4742 et seq., without complying with the requirements of K.S.A. 1980 Supp. 12-1772, such city cannot use tax increment financing, provided for in K.S.A. 1980 Supp. 12-1770 et seq., to further develop such property. Cited herein: K.S.A. 1980 Supp. 12-1770, 12-1771; K.S.A. 17-4742, 17-4747, 17-4760; L. 1955, ch. 86, §12 [K.S.A. 17-4753, since amended (see L. 1975, ch. 495, §11)], L. 1955, ch. 86, §21.

* * *

Dear Mr. Dekker:

You seek our opinion regarding the use of tax increment financing by the City of Wichita to complete the redevelopment of an area in the city's central business district.

You explain that the City of Wichita, prior to the enactment of the provisions of K.S.A. 1980 Supp. 12-1770 et seq., commonly referred to as the "Tax Increment Financing Act," adopted a

resolution declaring a portion of the city, including an area in the city's central business district, to be a "blighted area," within the definition of that term as provided in K.S.A. 17-4760(i). Said resolution apparently was adopted in order that the city could exercise the powers granted under the Urban Renewal Law, K.S.A. 17-4742 et seq., as subsection (a) of K.S.A. 17-4747 provides that a municipality cannot prepare an urban renewal plan "unless the governing body has, by resolution, determined such an area to be a slum area or a blighted area or a combination thereof and designated such area as appropriate for an urban renewal project."

It is our understanding that after the adoption of said resolution, the city prepared an urban renewal plan for the area, and, in accordance with said plan and under authority granted it by the Urban Renewal Law, acquired the property in the designated area and removed many of the conditions which led the governing body of the city to declare the area blighted.

The city now is considering the financing of one or more development projects in the formerly blighted area through the use of tax increment financing. However, the city recognizes that tax increment financing for development projects is available only in areas the governing body has, by resolution, determined to be "a blighted area." K.S.A. 1980 Supp. 12-1771. As explained above, because of the actions of the city, pursuant to the powers granted it under the Urban Renewal Law, the area sought to be developed is not, at the present time, a "blighted area." Because of these circumstances, you ask:

> "May the City use its prior determination under the Urban Renewal Law that an area is a 'slum area or blighted area' to find that an area is a 'blighted area' for purposes of the Tax Increment Financing Law. The possibility of 'grandfathering' a prior determination would avoid duplication of effort in some instances and would be particularly important in those projects where the stage of development is such that the formerly 'blighted' area would no longer technically meet the requirements."

You correctly note that under both the Urban Renewal Law and the Tax Increment Financing Act, the governing body of a city must make a finding of "blight" before it can proceed to acquire or redevelop an area of the city. You also correctly note the definition of "blighted area" provided in subsection (a) of

K.S.A. 1980 Supp. 12-1771 (Tax Increment Financing Act) is quite similar to the definition of that term provided in subsection (i) of K.S.A. 17-4760 (Urban Renewal Law); hence, we recognize the distinct possibility that a finding of "blight" under the Urban Renewal Law would constitute a finding of "blight" under the Tax Increment Financing Act. However, a finding that an area is blighted is merely the first of several requirements mandated by the provisions of the Tax Increment Financing Act prior to a city commencing a redevelopment project under the provisions of that act. In particular, while such a finding is required under both the Urban Renewal Law and the Tax Increment Financing Act, the latter contains a limitation not found in the former. Said limitation is provided in subsection (c) of K.S.A. 1980 Supp. 12-1771, which states:

> "No privately owned property subject to ad valorem taxes shall be acquired and redeveloped under the provisions of this act if the board of county commissioners or the board of education levying taxes on such property determines by resolution adopted within thirty (30) days following the hearing provided for in K.S.A. 1979 Supp. 12-1772, and amendments thereto, that the proposed project will have an adverse effect on such county or school district."

Under the provisions of K.S.A. 1980 Supp. 12-1772, the city must provide the board of county commissioners and the appropriate board or boards of education with a copy of the city's resolution fixing the date, time and place of the public hearing to be held to consider the adoption of a redevelopment plan prepared by the city. Thus, under the Tax Increment Financing Act, either the board of county commissioners or a board of education may determine that a redevelopment project proposed by the city would have an adverse effect on the county or the school district, and prevent the city from proceeding with the proposed redevelopment plan, including the acquisition of privately owned property subject to ad valorem taxes.

In our judgment, the notice and hearing prescribed in K.S.A. 1980 Supp. 12-1772 are mandatory, and the right of a board of county commissioners or board of education to prevent the city from acquiring privately owned property subject to taxation, so that the same can be redeveloped, is absolute. Although no such limitations are contained in the Urban Renewal Law, we are aware of no provision in either of these laws which permits a city to amalgamate their provisions so as to disregard these

limitations. Thus, even though we recognize the possibility that a city might proceed under both the Urban Renewal Law and the Tax Increment Financing Act to develop or redevelop a blighted area of the city, we must conclude, absent a legislative declaration to the contrary, that the requirements of each of these laws must be satisfied in order for the city to exercise the powers conferred thereby.

Therefore, it is our opinion that a city cannot proceed under the Tax Increment Financing Act if the city, under the powers granted it by the Urban Renewal Law, has acquired privately owned property subject to taxation in a blighted area without providing the notice required by K.S.A. 1980 Supp. 12-1772, and without giving the board of county commissioners and the board of education an opportunity to prevent such acquisition. If such has occurred, the city cannot complete the redevelopment project using tax increment financing. To conclude otherwise would render meaningless the express limitation provided by the legislature in subsection (c) of K.S.A. 1980 Supp. 12-1771, quoted above.

Thus, in our judgment, the question presented by your inquiry is not whether the city's prior determination of blight under the Urban Renewal Law suffices to fulfill the city's duty under the Tax Increment Financing Act. Instead, the question is whether the city has acquired privately owned property subject to taxation without giving the notice required by K.S.A. 1980 Supp. 12-1772, and without the board of county commissioners and the board of education having had an opportunity to object to such acquisition. If such has occurred, the city has not complied with the mandatory requirements of K.S.A. 1980 Supp. 12-1770 et seq., and cannot proceed under those provisions.

Our opinion is based in part upon the fact that, while the provisions of the Urban Renewal Law had been in effect for over twenty years at the time the provisions of the Tax Increment Financing Act were enacted in 1976, (see L. 1955, ch. 86, §21), the legislature failed to make reference to the former law in the latter, and included no provision in the Tax Increment Financing Act which expressly allowed a city to proceed under that act after the city had acquired property and exercised other powers conferred upon it by the provisions of the Urban Renewal Law. It must be assumed the legislature, when it enacted the Tax Increment Financing Act, and when it amended certain sections thereof in 1979 and 1980, was aware of the provisions of the Urban Renewal Law. (See Jackson v. State Corporation Commission, 183 Kan. 246, 250 (1958) and State, ex rel., v. Moore, 154 Kan. 193, 199 (1941).) If the legislature had intended to authorize a city

to proceed under the provisions of the Tax Increment Financing Act, after the city had acquired property pursuant to the powers granted it under the Urban Renewal Law, the legislature easily could have so provided. It did not do so, however.

Based upon the foregoing, it is our opinion that if the City of Wichita acquired privately owned property subject to taxation under the authority granted it by the Urban Renewal Law, without complying with the requirements of K.S.A. 1980 Supp. 12-1772, it cannot use tax increment financing, provided for in K.S.A. 1980 Supp. 12-1770 et seq., to further develop such property. If such action is to be allowed, the legislature will have to so provide.

Very truly yours,

Robert T. Stephan

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RTS:BJS:RJB:jm