



*Opinion #81-33
has been modified
by opinion #94-125*

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February 6, 1981

ATTORNEY GENERAL OPINION NO. 81- 33

The Honorable Paul Hess
State Senator, 30th District
State Capitol, Room 123-S
Topeka, Kansas 66612

Re: Cities and Municipalities--City and County Service
Programs for the Elderly--Procedure for Submitting
Tax Levy Proposition to Voters

Synopsis: The provisions of K.S.A. 1980 Supp. 19-117 are uniformly applicable to all counties in restricting the exercise of home rule powers regarding the enactment of tax and other revenue measures. Pursuant thereto, if there is no statutory procedure for levying any such tax or revenue measure, the provisions of K.S.A. 1980 Supp. 19-117 must be followed. However, if such a procedure has been prescribed by legislative enactment, a board of county commissioners must follow such statutorily-prescribed procedure.

Thus, county home rule powers do not permit a board of county commissioners on its own initiative to submit to the county's electors the question of levying a tax to fund a service program for the elderly, because the procedure prescribed by K.S.A. 1980 Supp. 12-1680 for making such levy does not contemplate such action. To the extent of its conflicting conclusions, Attorney General Opinion No. 75-415 is to be disregarded. Cited herein: K.S.A. 1980 Supp. 12-1680, 19-101a, 19-117.

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Dear Senator Hess:

You have inquired whether "it is possible for a board of county commissioners to pass a resolution authorizing a levy of 1.00 mill for the aged for referendum without a petition of 5% of the qualified electors of that county."

Your inquiry has obvious reference to K.S.A. 1980 Supp. 12-1680, which provides in pertinent part:

"Whenever a petition containing the signatures of not less than five percent (5%) of the registered voters of any city or county is filed with the appropriate election officer requesting an election on the question of whether a tax levy of not more than one mill shall be made on all of the taxable tangible property in the city or county for the purpose of creating or continuing a service program for the elderly operated by municipalities as defined in K.S.A. 10-101 or non-profit organizations, such proposition shall be submitted to the voters of the city or county at a question submitted election held in accordance with the provisions of K.S.A. 1979 Supp. 10-120. . . . If a majority of the qualified electors voting on the proposition vote 'yes' such tax levy shall be made annually on all of the taxable tangible property within the city or county for such purpose In any year after the year in which a tax is first levied under the provisions of this act, the board of county commissioners of the county or the governing body of the city may resubmit the proposition to make a levy in such amount as may be determined necessary to fund such program or may on their own motion by resolution or ordinance fix the amount of such levy in any amount, not exceeding the amount stated in the original proposition submitted to and approved by the electors of the county or city, which such board of commissioners or governing body deems necessary to finance the service program in such year."

It is clear from the foregoing that, "[i]n any year after the year in which a tax is first levied" pursuant to 12-1680, a board of county commissioners has the authority to "resubmit" the proposition of making such levy without the necessity of a petition therefor being filed. However, with respect to submission of the question of making

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the initial tax levy under this section, provision is made for having an election on this proposition only after the filing of a petition signed by not less than five percent of the county's registered voters. No provision is made in this statute for the board of county commissioner calling an election on the original question on its own motion. Thus, we understand your inquiry to be whether the statute's silence in this regard precludes such action. In our judgment, it does.

In reaching this conclusion we have reviewed Attorney General Opinion No. 75-415 in which former Attorney General Curt Schneider reached the opposite conclusion, which is expressed in the opinion's synopsis, as follows:

"A city or county may, in the exercise of its constitutional or statutory powers of self-government, respectively, submit the question of a levy for services to the elderly to the voters on the initiative of the governing body, without the filing of a petition therefor. . . ."

Attorney General Schneider's opinion was predicated on the fact that "[n]othing in the statute prohibits the city or county governing body from providing by ordinary ordinance or resolution for the submission of the question of such a levy to the voters on the initiative of the governing body itself, and omitting the requirement of the filing of a petition as a prerequisite therefor." Id. at p. 2. Thus, citing Attorney General Opinion No. 74-303 as authority, he concluded "that it was within the lawful exercise of county home rule powers, K.S.A. 19-101a to provide for the levy of a tax for which there was no express authority provided." Att'y Gen. Op. No. 75-415 at p. 2.

The county home rule powers relied upon in that prior opinion are those prescribed in K.S.A. 1980 Supp. 19-101a. Pursuant to that statute, "[c]ounties are . . . empowered to transact all county business and perform such powers of local legislation and administration as they deem appropriate," subject only to the thirteen enumerated restrictions contained therein. The first such restriction is that "counties shall be subject to all acts of the legislature which apply uniformly to all counties." At the time Opinion No. 75-415 was written, there were no uniformly applicable statutory provisions relating to the adoption of tax or other revenue measures by counties. Thus, it was concluded in that prior opinion that, since 12-1680 was silent as to the authority of a board of county commissioners to adopt a resolution providing for a tax levy to fund a service program for the elderly, subject to a referendum of the county's electors, a county commission

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could exercise its home rule powers in this manner so as "to provide a supplemental procedure for submission of the question of the levy." Att'y Gen. Op. No. 75-415 at p. 2.

However, in 1977 the legislature enacted what is now K.S.A. 1980 Supp. 19-117. (See L. 1977, ch. 56, §5.) This statute prescribes a procedure for the adoption of county tax or other revenue measures that is uniformly applicable to all counties. It not only provides for the submission of such measures to the county's electors upon presentation of proper petitions, but it also authorizes the adoption of such measures by the board of county commissioners on its own initiative. The procedure prescribed for the exercise of such authority is substantially the same as that required for the adoption of a charter resolution, and it requires that such procedure be utilized

"[w]here the board of county commissioners of any county by resolution proposes to levy for revenue purposes any tax, excise, fee, charge or other exaction other than permit fees or license fees for regulatory purposes, a procedure for the levy of which is not otherwise prescribed by enactment of the legislature" (Emphasis added.)

Clearly, therefore, the manifest purpose of the legislature in enacting this statute is to restrict the exercise of a county's home rule powers with respect to tax or other revenue measures. Thus, if there is no statutory procedure prescribed for levying any such tax or revenue measure, the provisions of K.S.A. 1980 Supp. 19-117 must be utilized. However, if such a procedure has been prescribed by enactment of the legislature, the emphasized portion of the foregoing quoted language evidences a clear legislative intent that the county must follow such statutorily-prescribed procedure.

As a result, since K.S.A. 1980 Supp. 12-1680 prescribes a procedure for levying a tax to fund a service program for the elderly, such tax levy can be made only in accordance with the procedure prescribed by that statute. Such procedure contemplates that the question of making the initial levy may be submitted to the county's electors only pursuant to petitions filed by the requisite number of qualified electors. Therefore, a board of county commissioners may not submit such question to the voters on its own initiative.

At the time Attorney General Opinion No. 75-415 was issued, the legislature had not prescribed any specific limitations on a county's

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home rule powers regarding tax and revenue measures that did not conflict with statutory provisions. Thus, that prior opinion's determination that a county commission could supplement the tax levy procedure set forth in 12-1680 was in harmony with the then existing statutory provisions. However, because of the restrictions on a county's home rule powers concerning tax and revenue measures effected by the subsequent enactment of K.S.A. 1980 Supp. 19-117, that determination is no longer consonant with the statutory scope of county home rule, and that portion of Opinion No. 75-415 in conflict herewith should be disregarded.

Very truly yours,



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RTS:WRA:phf