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ATTORNEY GENERAL OPINION NO. 87- 131

Philip B. Wolfe
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Re: Constitution of the State of Kansas--Corporations--Cities' Powers of Home Rule; Authority to Abate or Defer Special Assessments Levied under K.S.A. 12-6a01 et seq.

Synopsis: The home rule amendment to the Kansas Constitution authorizes a city to implement a program to relieve or defer special assessments based upon criteria established by the city if such a program may be incorporated into the framework of the legislative act which the city is using to authorize the special assessments and is not in conflict with that statutory framework. When special assessments have been lawfully levied on property benefited by municipal improvements and bonds issued in anticipation of payment of those assessments, all as authorized by K.S.A. 12-6a01 et seq., a city's use of home rule authority to "abate" or relieve those assessments well after completion of the prescribed statutory process for authorizing the improvements and assessments conflicts with the provisions of K.S.A. 12-6a01 et seq. Cited herein: K.S.A. 12-6a01; 12-6a04; 12-6a06; 12-6a07; 12-6a14; Kan. Const., Art. 12, §5.

* * *

Dear Mr. Wolfe:

As bond counsel to the City of Topeka, and on the City's behalf, you have requested an opinion regarding authority for the city governing body to abate or relieve special assessments levied on property in a benefit district for improvements accomplished and financed pursuant to K.S.A. 12-6a01 et seq.

We are informed that the proposed abatements will be available only when the landowner responsible for the special assessments has promised to maintain what the city defines as a "qualifying business" and provide for a certain, unspecified number of jobs. We note at the outset that we do not have a copy of a proposed city ordinance establishing the city's policy for the abatements, and thus our comments regarding the proposed abatements are based solely on the descriptions contained in your letter requesting this opinion and our conversations concerning the proposal.

The assessments which the city proposes to abate were levied under the authority of K.S.A. 12-6a01 et seq., which authorizes Kansas cities to construct various improvements and to finance such improvements by levying special assessments against the benefited property. Such assessments may be payable in annual installments for up to 20 years and in that situation the cost of the improvement is paid by the issuance of bonds by the city. K.S.A. 12-6a14(c). The City of Topeka has issued bonds to pay for the improvements here in question. The outstanding bonds are general obligations of the city, payable from the special assessments, and further secured by the city's obligation to levy ad valorem taxes against all the taxable property in the city should such special assessments prove insufficient to pay principal and interest on the bonds. Thus, if the city abates or relieves the obligation of certain landowners to pay the special assessments, the bonds issued to pay such assessments, to the extent of the abatement, will be payable by the city as a whole.

Your question thus concerns a city's authority to provide for abatement when special assessments have been lawfully levied and bonds issued in anticipation of the payment of special assessments. K.S.A. 12-6a01 et seq. does not authorize the abatement of lawfully levied special assessments for any reason and we are not aware of other Kansas statutes which do so. The general rule concerning the abatement of special assessments, like the rule concerning the abatement of general

taxes, is that a municipality may not remit, abate, cancel, or compromise assessments legally levied unless specifically authorized to do so by law. State, ex rel., Donsante v. Pethtel, 158 Ohio St. 35, 106 N.E.2d 626 (1952); McQuillin, Municipal Corporations, §38.338 (3d ed., 1987); Annotation, 28 A.L.R.2d 1425. Having stated this general rule, and noting that no Kansas statutes appear to authorize a city to abate lawfully levied special assessments, we turn to whether such abatements may be authorized by the city under the home rule amendment of the Kansas Constitution.

Pursuant to Article 12, Section 5 of the Kansas Constitution, cities in Kansas have the power to determine their local affairs through ordinance without specific authorization in the form of a legislative enactment. The home rule amendment places some limitations on the exercise of this power providing, in relevant parts:

> "Cities are hereby empowered to determine their local affairs and government . . . by ordinance passed by the governing body . . . subject only to enactments of the legislature of statewide concern applicable uniformly to all cities, to other enactments of the legislature applicable uniformly to all cities, to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction and to enactments of the legislature prescribing limits of indebtedness." Art. 12, §5(b).

The first, third and fourth limitations of home rule powers stated in Art. 12, Sec. 5 do not appear to prevent the action proposed by the City of Topeka. First, there is no uniformly applicable enactment of the legislature of statewide concern which would preclude city action in this instance. Nor does it appear that any enactment applicable to cities of the same class "limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction" exists to invoke the third limitation of city home rule powers. Finally, the proposed city action does not attempt to exempt the city from statutory limitations on indebtedness and thus is not precluded by the fourth limitation of the amendment.

All of which leaves us with the more difficult question of whether the uniformly applicable K.S.A. 12-6a01 et seq., under which the improvements and assessments in question were authorized, prevents the exercise of home rule under the circumstances described in your letter.

The home rule amendment requires a liberal construction of the powers granted therein for the purpose of granting cities the largest measure of self-government. Where the legislature has acted in some area, a city's power to act in the same area should be upheld unless the legislature has clearly preempted the field so as to preclude city action. The measure for determining whether city action is precluded is whether an "actual conflict" exists between the city ordinance and state statute. If no such conflict exists the city ordinance should be permitted to stand. Claflin v. Walsh, 212 Kan. 1, 7 (1973). Conversely, of course, if there is a conflict, under the limitations of the home rule amendment, the city ordinance gives way to the state statute. The frequently stated test for determining whether conflict exists is whether the city ordinance permits or licenses that which the statute prohibits, or prohibits that which the statute authorizes. City of Junction City v. Lee, 216 Kan. 495, 501 (1975).

K.S.A. 12-6a01 et seq. applies uniformly to all Kansas cities and is concerned with the provision of municipal improvements financed, at least in part, by the levy of special assessments on specially benefited property. As we said in Attorney General Opinion No. 87-56, the statute does not provide the exclusive methodology for accomplishing such improvements and, in fact, states that it is intended as a "complete alternative to all other methods provided by law." Thus, as we concluded in Attorney General Opinion No. 87-56, K.S.A. 12-6a01 et seq. does not preclude the exercise of home rule powers on the subject of providing for municipal improvements to be financed by assessments on specially benefited property. K.S.A. 12-6a01 et seq., is, however, a uniformly applicable statute which is not subject to exemption or alteration by a city charter ordinance enacted under the home rule amendment, Art. 5, §(c)(1). Thus, if the city chooses to utilize the provisions of K.S.A. 12-6a01 et seq. to accomplish improvements and levy special assessments, it is bound by the uniformly applicable provisions of the statute.

It is our understanding that the City of Topeka does not propose to enact a home rule charter ordinance exempting from portions of K.S.A. 12-6a01 et seq. and enacting

substitute provisions therefor. Instead, the city proposes to enact a "pure" home rule ordinance authorizing the abatement of special assessments levied under K.S.A. 12-6a01 et seq. Attorney General Schneider, in Opinion No. 78-3 (enclosed), addressed a similar proposal and concluded the home rule amendment authorized a city to undertake a program for the indefinite deferral of special assessments levied under K.S.A. 12-6a01 et seq. (based upon economic hardship criteria established by the city) in improvement districts in areas containing owner-occupied residential property. The cost of such deferred assessments is borne by the city at large through the issuance of bonds paid by general ad valorem taxation. Under that program the deferred assessments become payable upon the transfer of the property to a non-eligible owner or if the use of the property changes. The deferred assessments abate after a period of 25 years.

Under the deferral program discussed in Opinion No. 78-3 (utilized in the City of Wichita) the resolution creating the improvement district contains provision for the indefinite deferral of certain assessments according to the criteria established by the city. A property owner has 20 days after the mailing of a statement of assessment to make application for the deferral. The ordinances levying the special assessments for which a deferral has been granted must state that the assessments are deferred in accordance with city ordinances and thus, the deferral is noted when the assessments are certified to the county clerk. [Cf. K.S.A. 13-10,137 concerning delay of assessments in cities of the first class.]

Attorney General Opinion No. 78-3 concluded that nothing in the indefinite deferral program described above conflicted with the procedures established by K.S.A. 12-6a01 et seq. and thus, the city could utilize its constitutional powers of home rule to supply the necessary legal authority for the deferral program. The opinion stated:

> "Thus, in this instance, the city may provide by local legislation additional steps and procedures in the assessment process which are not now provided but, not in conflict with, the existing act under which it proposes to continue to make general public improvements." (Emphasis added.)

We continue to agree with the conclusions of Opinion No. 78-3 and find the abatement proposal (as described to us) made by the City of Topeka both analogous and distinguishable. The analogous point consists largely of the fact that in both instances the cities in question use home rule authority to provide relief from the payment of special assessments based upon criteria established by the city which is not included in the statutory provisions for apportioning the costs of an improvement. In our opinion, such an exercise of home rule is consistent with the statutory authority which the city is also relying upon to accomplish the improvements and levy assessments. The basis upon which relief from assessments may be offered is certainly within the authority of a city governing body to provide, consistent, of course, with the general constraints of the public purpose doctrine.

Thus, our concern with the proposal described in your letter is not with the concept but more with timing and semantics. On the latter point, it would appear the city may more appropriately refer to its plan as one for the indefinite deferral of assessments, as we understand the continued "abatements" would be conditioned upon a property owner's continued compliance with the city's criteria qualifying it for "abatement". Presumably, should a property cease to qualify the city would require payment of the special assessments. To "abate" generally means to permanently cancel or nullify and, in tax practice, often presupposes an erroneous assessment or levy which is corrected by abatement or cancellation. See generally, Ballentine's Law Dictionary, (3d Edition 1969); Words and Phrases, "Abate; Abatement" (Permanent Edition, 1969). This does not appear to be what the city proposes to do. If such assessments were abated or nullified and at some future date the property in question failed to meet city criteria the city would be in the unenviable position of attempting to levy abated assessments anew. If deferred, the original assessments would be in place and could become payable when the property no longer qualified for deferral.

The other difficulty with the City of Topeka's proposal concerns timing and the requirement that a city's use of home rule authority not conflict with the state law which the city uses to authorize the levy of special assessments. The timing problem and hence, the potential conflict, arise from the City's proposal (as described to us) to consider the "abatement" of assessments levied in conformity with K.S.A. 12-6a01 et seq. after the statutory process for making such assessments is complete. Given the procedures required

by K.S.A. 12-6a01 et seq., it is our opinion that such after-the-fact abatement or deferral presents a conflict with statutory procedures as well as a potential for abuse.

K.S.A. 12-6a01 et seq. prescribes uniformly applicable and rather extensive procedures to be followed by a city to accomplish improvements under its authority. Upon initiation of an improvement, K.S.A. 12-6a04 requires a city governing body to make findings as to the advisability and nature of a proposed improvement, the estimated cost, the boundaries of the improvement district, the method of assessment, and the apportionment of cost, if any, between the improvement district and the city at large. K.S.A. 12-6a06 provides for the adoption of a resolution authorizing the improvement, in accordance with the findings made under §12-6a04, which is effective only upon publication in the official city newspaper. If an improvement is initiated by a petition of landowners in the benefit district, the city may proceed with authorizing resolutions without providing notice and public hearing as provided in §12-6a04. If, however, the improvement is initiated by the city, §12-6a04 provides for published public notice and a public hearing on matters relating to the improvement including the apportionment of cost between the benefit district and the city at large. Moreover, K.S.A. 12-6a06 provides that city initiated improvements will not be made if, within 20 days of publication of a resolution approving the improvement, 51% of the resident landowners in the improvement district protest the making of the improvement.

In our opinion, the purpose of such requirements is to provide the governing body, the potentially affected landowners, and other interested residents of the city with adequate information about the proposed improvement, its benefits and cost, and the apportionment of its costs as between the city at large and the benefited property. The statutory process provides the city governing body with the opportunity to apportion the costs of an improvement in view of the benefits which appear to accrue to the improvement district and the city at large. In our opinion the city may rely on home rule powers to mandate the consideration of the city's own criteria for relieving certain property of assessments based upon a city policy determination regarding the benefits such improvement will provide to the city at large and the benefit district. Here home rule powers provide the authority to incorporate additional criteria into the existing statutory process as long as such additions do not conflict with the statutory procedures.

It is our opinion, however, that to provide for relief from assessments and thereby transfer the obligation for the costs of an improvement from the benefited landowners to the city at large after special assessments have been levied against those landowners in accordance with the city governing body's original determinations pursuant to K.S.A. 12-6a04 and 12-6a06 presents a conflict with the statutory procedures. In that case the city has made a policy determination regarding the benefits of the improvement and the proper apportionment of cost according to prescribed statutory procedures. No criteria for abatement or deferral of special assessments was made part of the original determinations required of the city by K.S.A. 12-6a04 and 12-6a06. We do not believe that the city's home rule authority permits an after-the-fact policy determination made outside the prescribed statutory procedures. If this were permissible the limitations of the home rule amendment making cities subject to uniformly applicable enactments of the legislature would become meaningless. A city could use the provisions of a uniformly applicable statute to authorize a particular activity and, that accomplished, argue the city's "pure" home rule authority permits subsequent alteration of determinations made under the statute without regard to the statutory process. This does not mean that a city is precluded from using home rule authority to expand the authority of a uniformly applicable statute, nor is a city precluded from using home rule authority in conjunction with a uniformly applicable statute. Such use of home rule powers, however, must be consistent with the uniformly applicable statute which the city is also relying upon to authorize a particular undertaking.

It is our opinion that the method of relieving special assessments proposed by the City of Topeka creates a conflict with the uniform provisions of K.S.A. 12-6a01 et seq. because it would allow the city to make an after-the-fact policy determination regarding benefits and apportionment of costs without regard to the prescribed statutory procedures for making that determination. Unlike the indefinite deferral program described in Opinion No. 78-3, the Topeka proposal would not be incorporated into the statutory proceedings authorizing the improvements and assessments, but instead would be grafted onto to the accomplished proceedings well after their completion. As noted above, we believe the procedures for initiating an improvement and apportioning costs prescribed by K.S.A. 12-6a01 et seq. exist to provide that all persons potentially affected by a proposed improvement may be adequately informed of issues relating to the advisability, costs, and benefits of such an improvement.

If consideration of the policy supporting deferral or abatement of some assessments and the fact that some assessments may be relieved under this policy is not incorporated into the statutory process and is instead grafted on after completion of the process, the purpose of the statutory process is defeated. The city governing body has provided itself with the ability to make after-the-fact policy determinations which, by ignoring the statutory process for making such determinations, creates a conflict with the statute. As noted earlier, such conflict precludes the use of home rule powers to implement the program. Were the program incorporated into the statutory proceedings and thus made a factor which is known and considered at the time a project is authorized and its costs apportioned we believe it would be an appropriate use of the city's home rule power. In that case the home rule amendment would supply the necessary authority to provide for relief from special assessments under certain circumstances without creating a conflict with the statutes on which the city is relying for authority to make the improvements and levy the assessments.

We are not unmindful of the argument, presented in your letter, that K.S.A. 12-6a07(b) may be read as contemplating the action proposed by the City. K.S.A. 12-6a07 provides in its entirety:

> "(a) The city may pay such portion of the cost of the improvement as the governing body may determine, but not more than ninety-five percent (95%) of the total cost thereof. The share of the cost to be paid by the city at large shall be paid in the manner provided by K.S.A. 12-6a14.
>
> "(b) <u>If any property deemed benefited shall by reason of any provision of law be exempt from payment of special assessments therefor, such assessment shall, nevertheless, be computed and shall be paid by the city at large</u>." (Emphasis added.)

It is our opinion that the language of paragraph (b) does not contemplate the abatement or deferral of special assessments. K.S.A. 12-6a07(b) refers to benefited property which is "<u>exempt</u> from the payment of special assessments." (Emphasis added.) An exemption would prevent any levy of special assessment at the outset. The property included in the city's

proposal is not exempted from special assessments by any provision of law; the need for abatement from the lawfully levied assessments makes this abundantly clear. Moreover, it does not appear that an exemption is what the city is contemplating as relief from special assessments is conditional, based upon the property owners continued compliance with the city's criteria qualifying the property for relief from special assessments. Thus, the assessments must be levied.

In our opinion K.S.A. 12-6a07(b) addresses the circumstances where property in a benefit district is not subject to special assessments. In such a case the charges attributable to that property are computed (but not assessed or levied) and paid by the city at large. The intent of the provision is to prevent an exemption of certain property from special assessment from resulting in nonexempt properties carrying the cost of benefits received by exempt properties. See Garvey Elevators Inc. v. City of Wichita, 238 Kan. 682, 689 (1986). We do not read K.S.A. 12-6a07 as authority for the abatement of lawfully levied special assessments.

We conclude thus, the home rule amendment to the Kansas Constitution authorizes a city to implement a program to relieve or defer special assessments based upon criteria established by the city if such a program may be incorporated into the framework of the legislative act which the city is using to authorize the special assessments and is not in conflict with that statutory framework. When special assessments have been lawfully levied on property benefited by municipal improvements and bonds issued in anticipation of payment of those assessments, all as authorized by K.S.A. 12-6a01 et seq., a city's use of home rule authority to "abate" or relieve those assessments well after completion of the prescribed statutory process for authorizing the improvements and assessments is inconsistent with the provisions of K.S.A. 12-6a01 et seq.

Very truly yours,

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