



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

December 1, 1987

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 87-177

Mr. David K. Markham
Labette County Counselor
P.O. Box 611
Parsons, Kansas 67357

Re: Counties and County Officers--County
Commissioners--Powers and Duties

Counties and County Officers--General Provisions--
Home Rule Powers

Synopsis: Pursuant to general authority granted by K.S.A. 19-212 Sixth and K.S.A. 19-101a, a board of county commissioners may pass a resolution prohibiting certain elected officials from bidding upon and purchasing property at a tax foreclosure sale, as long as the resolution is passed according to statutory requirements and the elected official so prohibited occupies a position that makes his individual interests as a purchaser inconsistent with his official duties. Such a resolution would merely codify the already existing common law prohibitions against such an elected official bidding and purchasing at tax foreclosure sales. Cited herein: K.S.A. 19-101; K.S.A. 1986 Supp. 19-101a; 19-212 Sixth; 60-1007; 79-2804.

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Dear Mr. Markham:

As Labette County Counselor you request our opinion on whether elected officials of the county can bid on property

sold at a tax foreclosure sale. Additionally, you ask whether a county could pass a resolution preventing certain elected officials from bidding at a tax sale.

Kansas statutes do not expressly prohibit elected county officials from purchasing at a tax sale. However, Kansas case law and general legal principles appear to discourage such a practice.

In Norton v. Friend, 13 Kan. 395 (1874) the Kansas Supreme court held a tax sale void when the county treasurer bought the property for the county. The court stated "the county had no authority to enter the list as a competitor against private parties for the purchase of land sold for taxes." Id. at 397. The rationale for this rule was to secure competition in bidding and to protect the rights of the owner. See also, Sponable v. Woodhouse, 48 Kan. 173 (1892); Spicer v. Rowland, 39 Kan. 740 (1888). K.S.A. 79-2804 now permits a county to bid at a tax foreclosure sale in the name of the county, within prescribed limitations. This statute does not address the question of elected county officials purchasing in their private capacity.

72 Am.Jur.2d, State and Local Taxation, §940 (1974) states the general rule regarding who may purchase at a tax sale:

"In general, any person legally qualified to contract may become the purchaser at a tax sale unless he has some duty to perform in reference to the sale inconsistent with his character as purchaser, or occupies a position in reference to the property that will make his individual interest as a purchaser inconsistent with his duties. There are, however, many persons who, by reasons of their interest in the premises and their relationship to others interested therein, may not, for equitable reasons, become purchasers. (Emphasis added.)

When holding a tax sale certain elected and county officials act in a fiduciary capacity towards the general public. In regard to fiduciaries bidding at tax sales, Am.Jur. states:

"[I]t seems well established that subject to certain exceptions one who holds property in a fiduciary capacity cannot

purchase that property for his own account, irrespective of his good faith or the fairness of the transaction, even at a judicial sale of such property if the sale is conducted and directed by the fiduciary, or at a sale made at his instance or at the instance of the beneficiary, or because of the fiduciary's default or neglect. The rationale of the rule is to remove the temptation to abuse power for selfish purposes and to prevent an abuse of confidence." 47 Am.Jur.2d, Judicial Sales §212, (1969).

In Shell Oil Co. v. Board of County Commissioners, 171 Kan. 159 (1951), the Kansas Supreme Court affirmed the decision of the lower court, declaring a county commissioner, as a private individual, an invalid purchaser at a tax foreclosure sale:

"The law and ethics of a situation such as this should not rest upon the principle of actual fraud, but are founded on the theory that fraud in such cases is best prevented by removing all temptation. In other words, the rule rests on prevention of fraud and is based upon the moral obligation of everyone, and particularly a public official, to refrain from placing himself in a position which ordinarily creates or excites a conflict between self-interest and integrity. We think it is better that the danger and cause of the evil should be prohibited in all cases than that courts should be relied upon to apply the remedy by inquiring into the facts of a particular case to ascertain whether there has been fraud in fact. Fullness of price, absence of fraud, and fairness of purchase, are not sufficient to overcome this rule of policy. Entirely aside from any element of actual fraud, the only adequate remedy is to declare one occupying the position of defendant an ineligible purchaser at such a sale." Id. at 165, 166, (emphasis added.)

In Shell the Kansas Supreme Court cites two other cases where a county treasurer was similarly prohibited from bidding on property at a tax foreclosure sale. Thus, while 60-2412 and K.S.A. 60-1007 prohibit a sheriff or his staff from bidding at certain sales, Kansas statutes do not specifically prohibit participation in tax sales by elected officials. Kansas case law and general legal principles have long frowned upon certain elected officials purchasing at a tax sale and the proposed resolution would merely codify the common law rule.

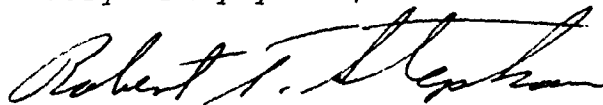
K.S.A. 19-212, Sixth states that the county commissioners of each county:

"[S]hall have the power, at any meeting, [t]o represent the county and have the care of the county property, and the management of the business and concerns of the county, in all cases where no other provision is made by law."

K.S.A. 1986 Supp. 19-101a grants counties the power of home rule, subject to the statutory limitations contained therein. Absent a uniform enactment of the legislature inconsistent with prohibiting an elected county official from purchasing at a tax sale, we see no reason why a county may not adopt a resolution providing for such prohibition pursuant to its home rule powers. Elected officials choose to run for office, and in doing so, become something different than private citizens. With the elected position goes certain powers and restrictions inherent in the office.

To summarize, a board of county commissioners may pass a resolution prohibiting certain elected officials from purchasing at a tax sale when done pursuant to the statutory requirements for passing such a resolution and when the elected official occupies a position that makes his individual interests as a purchaser inconsistent with his official duties.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General