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ATTORNEY GENERAL OPINION NO. 88-123

The Honorable Dan Thiessen
State Senator, Fifteenth District
Route 1
Independence, Kansas 67301-9801

Re: Constitution of the State of Kansas--Finance and
Taxation--Exemption of Property for Economic
Development Purposes; Requirement of "Exclusive Use"

Synopsis: Property which is leased for profit to a business
for use for purposes enumerated in article 11,
section 13 of the Kansas Constitution is not
property used exclusively for those purposes and
thus is not qualified for the tax exemption
authorized by that provision. The legislature may,
however, statutorily authorize such an exemption.
Cited herein: K.S.A. 79-201 (1973); 79-201b
(1979); Kan. Const., Art. 11, §§1, 13.

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Dear Senator Thiessen:

As Chairman of the Special Committee on Assessment and
Taxation, you request our interpretation of the term "used
exclusively" as used in article 11, section 13 of the Kansas
Constitution. Specifically, you question whether property
which is leased to a business for use for constitutionally
exempt purposes meets the requirement that the property be
used exclusively for such tax exempt purposes.

Article 11, section 13 provides in part:

"(a) The board of county commissioners of any county or the governing body of any city may, by resolution or ordinance, as the case requires, exempt from all ad valorem taxation all or any portion of the appraised valuation of: (1) All buildings, together with the land upon which such buildings are located, and all tangible personal property associated therewith used exclusively by a business for the purpose of: (A) Manufacturing articles of commerce; (B) conducting research and development; or (C) storing goods or commodities which are sold or traded in interstate commerce, which commences operations after the date on which this amendment is approved by the electors of this state;

. . . .

"(d) The provisions of this section shall not be construed to affect exemptions of property from ad valorem taxation granted by this constitution or by enactment of the legislature, or to affect the authority of the legislature to enact additional exemptions of property from ad valorem taxation found to have a public purpose and promote the general welfare."

The issue is whether property is "used exclusively by a business for the purpose[s]" enumerated in the constitutional provision if the property is leased by that business from another entity.

In interpreting the provision in question, we are guided by the following:

"(1) Constitutional and statutory provisions exempting property from taxation are to be strictly construed.

"(2) The burden of establishing exemption from taxation is on the one claiming it.

"(3) The exemption from taxation depends solely upon the exclusive use made of the

property and not upon the ownership or the character, charitable or otherwise, of the owner.

. . . .

"(5) The question is not whether the property is used partly or even largely for the purposes stated in the exemption provisions, but whether it is used exclusively for those purposes.

(Clements v. Ljungdahl, 161 Kan. 274, 278, 167 P.2d 603; State, ex rel., v. Security Benefit Ass'n, 149 Kan. 384, 87 P.2d 560.)

"(6) The phrase 'used exclusively' as contained in Section 1, Article 11, of the Kansas Constitution, was intended by the framers in the sense that the use made of property sought to be exempt from taxation, must be only, solely, and purely for the purpose stated in the Constitution, and without admission to participation in any other use. (Sigma Alpha Epsilon Fraternal Ass'n v. Board of County Comm'rs, supra [207 Kan. 514, 485 P.2d 1297].)" Lutheran Homes, Inc. v. Board of County Commissioners, 211 Kan. 270, 275-276 (1973).

While the court in the Lutheran Home case was construing K.S.A. 79-201 and article 11, section 1 of the constitution, we believe the rules enunciated are similarly applicable to the exemption authorized by article 11, section 13. Thus we are constrained to a strict interpretation of the term "used exclusively."

The 1979 Kansas Supreme court considered factual situation similar to that which you present. The court was asked to determine whether property owned by a for profit corporation, but which was leased to a nonprofit corporation for use for tax exempt purposes, is property "actually and regularly used exclusively" by the nonprofit corporation so as to be exempt from property and ad valorem taxation under K.S.A. 79-201b First. The court concluded that this was a dual or simultaneous use of property and thus the property was not

"used exclusively" for tax exempt purposes. In re Board of Johnson County Commissioners, 225 Kan. 517, 523 (1979).
The court reasoned:

"To say that an investor who owns property, real or personal, and leases it for profit is not using his property ignores the obvious fact that the owner-lessor is exercising his right to use the property just as surely as if he were utilizing it in a physical sense for his own objectives. . . . The renting by the lessor and the physical use by the lessee constitute simultaneous uses of the property and when an owner leases his property to another, the lessee cannot be said to be the only one using the property."

Similarly, property which is leased to a business which uses the property for tax exempt purposes under article 11, section 13 is not property "used exclusively" for those purposes, i.e. it is also used for rental property. It is therefore our opinion that property owned by one entity leased for profit to a potentially tax exempt entity, is not property being used exclusively for the tax exempt purposes enunciated in article 11, section 13 and is not entitled to a tax exemption pursuant to that provision.

You further inquire whether, notwithstanding the above conclusion, the legislature may by statute grant an exemption for property leased to a business to use for the purposes listed in article 11, section 13. Subsection (d) of that constitutional provision appears to specifically condone such legislative action. Further, the courts have long recognized the legislature's inherent power to enact tax exemptions beyond those granted by the constitution and to broaden exemptions contained in the constitution when not specifically prohibited by the constitution from doing so. See, e.g., In re Tax Protest of Strayer, 239 Kan. 136, 141 (1986); State ex rel. Tomasis v. Kansas City, Kansas Port Authority, 230 Kan. 404, 411-412 (1981); Topeka Cemetery Ass'n v. Schnellbacher, 218 Kan. 39, 42 (1975).

In conclusion, property which is leased for profit to a business for use for purposes enumerated in article 11, section 13 of the Kansas Constitution is not property used exclusively for those purposes and thus is not qualified for

the tax exemption authorized by that provision. The legislature may, however, statutorily authorize such an exemption.

Very truly yours,



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RTS:JLM:jm