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ATTORNEY GENERAL OPINION NO. 89- 78

Joseph O'Sullivan
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P.O. Box 2066
Hutchinson, Kansas 67504-2066

Re: Cities and Municipalities -- Miscellaneous
Provisions -- City and County Service for Programs
for the Elderly; Tax Levy; Proper Mill Levy Rate

Townships and Township Officers -- Miscellaneous
Provisions -- Tax Levies for Funds to Improve
Township Roads; Proper Mill Levy Rate

Synopsis: After the first year in which a tax is levied, the
mill levy rate specified by voters pursuant to
K.S.A. 12-1680 may be adjusted by the board of
county commissioners, subject to the voter approved
upper limit and other pertinent budgetary
constraints.

Similarly, the mill levy rate established and
approved pursuant to K.S.A. 80-1413 does not
obligate the township board to henceforth levy the
maximum approved rate. Cited herein: K.S.A.
12-1680, 79-1802; 79-1945; 79-1964; 80-1413.

* * *

Dear Mr. O'Sullivan:

As Reno County Counselor you request our opinion concerning
whether voter approval of certain tax levy mill rates

obligates the county and township boards to levy the maximum approved mill levy or if, rather, the respective boards may establish a mill levy rate below the maximum levy specified by the voters. K.S.A. 12-1680 (county services for programs for the elderly) and K.S.A. 80-1413 (improvement of township roads) permit the specific tax levies in question.

The authority of a county to generate income through taxes is discussed at K.S.A. 79-1802: "The county commissioners shall . . . estimate and determine the amount of money to be raised by tax for all county purposes, and all other taxes which they shall be required by law to levy." K.S.A. 79-1945 allows "the board of county commissioners . . . to levy in each year taxes for the several county purposes . . . not to exceed the tax levy rates and amounts specified. . . ." See also K.S.A. 79-1964.

General budgetary principles allow the proper governing board discretionary authority to establish the necessary mill rates:

"Subject to the restriction that there must be a compliance with the constitutional or statutory requirements with respect to the manner or mode of determining and fixing the amount or rate, and with respect to the limitation of such amount or rate, the amount levied should be commensurate with public needs, and such a rate of taxation should be fixed as will produce the amount required to be raised, and it is illegal as to any excess over the amount necessary to produce the funds required to be raised. Within these limitations the levying board, provided it uses sound business judgment, may exercise a reasonable discretion in determining what amount or rate of taxes shall be raised for any general or particular purposes; and in determining such amount it should consider and deduct funds on hand which are available and applicable to the purpose or purposes for which the tax is being levied." 84 C.J.S. Taxation § 361 (1954). (Emphasis added).

K.S.A. 12-1680 permits qualified voters to approve or reject an annual tax of a specified mill rate. The voters may approve a specified mill rate or a rate not to exceed a

specified amount: "An annual tax of _____ (a specified amount or not to exceed a specified amount) mill shall be levied . . . if the proposition does not specify the amount of the levy but prescribes the maximum, such levy shall be in the amount specified by the board . . . not exceeding the maximum so specified." However, after the first year the board may fix the amount of the levy:

"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." (Emphasis added).

It is our opinion that if the proposition specifies the amount of the levy, after the first year in which the tax is levied a mill levy rate specified by voters pursuant to K.S.A. 12-1680 may be adjusted by the board of county commissioners. The mill rate remains subject to the limits specified or approved by the voters and other pertinent budgetary constraints.

K.S.A. 80-1413 allows a tax levy question to be submitted to qualified voters by a township board. If a majority of those electors approve the question, the township board is thereby authorized to levy a tax not to exceed ten mills for a specified number of years for the purpose of improving township roads. The statute provides the form of question to be presented to the voters:

"At such election the question on the ballot shall be stated in substantially the following form: 'Shall _____ township in _____ county, Kansas, levy a tax of _____ mills for _____ year(s) to raise funds for the purpose of improving the township roads?'

If a majority of those voting on such question shall vote in favor thereof the township board shall levy the tax as authorized on all the taxable tangible property in such township which has a tax situs outside the corporate limits of any city. Such levy shall be in addition to all other taxes authorized or limited by law." (Emphasis added).

Reno county submits a resolution presented by a township board which, for purposes of this opinion, substantially conforms with the requirements of K.S.A. 80-1413.

Washington Township v. Hart, 168 Kan. 650 (1950) involved a challenge to a tax under K.S.A. 80-1413. The voters approved a three mill levy and the township board authorized a 2.725 mill levy rate. The plaintiff railroad company challenged the tax levy as being contrary to the budget laws. The court held that the levy was legal and, while the court did not address the issue, it appears that it had no problem with the township board levying less than the maximum mill rate approved by the voters.

If a board has a duty to levy a tax and does not, a mandamus action may be used to compel the levy. See Board of County Commissioners of the County of Leavenworth v. Sellev, 99 U.S. 624, 25 L.Ed. 333 (1878); State v. Lander, 87 Kan. 474 (1912); Phelps v. Lodge, 60 Kan. 122, 124 (1899). See generally, McQuillin, Municipal Corporations § 44.34 (3d ed. 1984). However, statutory authority to tax is not mandatory where funds are not owing or needed. See 71 Am.Jur.2d State and Local Taxation § 91 (1973). Generally, taxing powers granted to local authorities allow those authorities to discretionarily set the rate of taxation of any legally imposed revenue raising tax. City of Pittsburg v. Alco, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974). See also Tanque Verde Enterprises v. City of Tucson, 691 P.2d 302 (Az. 1984); Casey Development Corp. v. Montgomery County, 129 A.2d 63, 68 (Md. 1957); Layne v. Strode, 317 S.W. 2d 6, 9 (Ark. 1958).

Pursuant to the above cited authorities, it is our opinion that the mill levy rate established pursuant to K.S.A. 80-1413 voter approval sets the maximum rate that the township board

may levy, but does not require the board to levy the maximum rate if there is no debt or necessity.

Very truly yours,



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