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ATTORNEY GENERAL OPINION NO. 90- 74

The Honorable Michael O'Neal
State Representative
One Hundred Fourth District
P.O. Box 2977
Hutchinson, Kansas 67504-2977

Re: Taxation--Aggregate Tax Levy Limitations--
Elimination of Intangibles Tax; Ability of City to
Levy Property Taxes to Replace Intangibles Tax

Synopsis: While at the time of the election to eliminate the
intangibles tax in the city of Hutchinson the
city was authorized to offset the lost revenues
with property taxes notwithstanding the aggregate
tax limit then in effect, the city currently does
not have that authority. Thus, the city must
either partially exempt itself from the provisions
of the tax lid pursuant to K.S.A. 79-5036, as
amended, or make application to the state board of
tax appeals pursuant to K.S.A. 79-5030 for
authority to levy in excess of the limit. Cited
herein: K.S.A. 1989 Supp. 12-1,101; K.S.A. 77-201;
79-5022, as amended by 1990 H.B. No. 2700; 79-5030;
79-5036, as amended by 1990 H.B. No. 2700; K.S.A.
79-5022 (Ensley 1989); Kan. Const., art. 12,
sec. 5; U.S. Const., art. I, sec. 1.

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Dear Representative O'Neal:

You request our opinion regarding the effect, if any, of 1990
House Bill No. 2700, on the city of Hutchinson's April 4,

1989 election to eliminate its intangibles tax. You state that the question appearing on the April 4, 1989 ballot was in the following form:

"SHALL THE FOLLOWING BE ADOPTED?

"Shall the City of Hutchinson, Kansas, eliminate the tax on gross earnings derived from money, notes and other evidence of debt and be authorized to impose and levy property taxes, in additional [sic] to any aggregate levy amount limitation on the taxing subdivision's ad valorem tax levy authority, as may be necessary to offset the revenue lost from the elimination of the tax on gross earnings derived from money, notes and other evidence of debt? [Emphasis added.]"

This language is in conformance with the requirements of K.S.A. 1989 Supp. 12-1,101. You inform us that a majority of the electors voting at the April 4, 1989 city election voted in favor of this proposition.

K.S.A. 1989 Supp. 12-1,101(e) provides in part:

"If a majority of the electors voting thereon at such election shall vote in favor of such proposition, the board of county commissioners or the township board shall provide by resolution or the governing body of any city shall provide by ordinance that no tax shall be levied upon gross earnings derived from money, notes and other evidence of debt as follows: When such election is held prior to August in any year, the resolution or ordinance shall provide that no such tax shall be levied thereon in the calendar year following the year of such election and in each year thereafter. . . . The governing body of the taxing subdivision shall thereupon be authorized to offset the loss in revenue from the elimination of such tax by the imposition and levying of any other taxes as may be authorized by law or by increasing its ad valorem tax levy for the general fund. . . . With respect to townships, the increase in the amount of such ad valorem tax authorized herein shall be in addition to any

aggregate levy amount which may be fixed by any existing state law or any law which may hereafter be enacted. With respect to cities and counties, any such levy shall be exempt from the limitation imposed under the provisions of K.S.A. 79-5001 to 79-5016, inclusive.

Notwithstanding the provisions of this subsection to the contrary, the governing body of a county, city or township may either reimpose or submit to the electors of such subdivision a proposition to reimpose a tax on gross earnings derived from money, notes and other evidence of debt in the manner and at the rate prescribed by this section." (Emphasis added).

At the time the city's proposal to eliminate the intangibles tax was submitted and adopted, the tax lid law, K.S.A. 79-5021 et seq., provided in part:

"(d) Except for adjustments described in K.S.A. 1987 Supp. 79-5024 to 79-5027, inclusive, and amendments thereto, in each year after [1989] the aggregate levy limit for cities and counties shall be the authorized aggregate levy limit in effect for the year prior to [1989]. All tax levies existing or authorized hereafter by law, except those levies specifically exempt pursuant to K.S.A. 1987 Supp. 79-5028, and amendments thereto, or levy authorizations exempted from the provisions of K.S.A. 1987 Supp. 79-5021 to 79-5027, inclusive, and amendments thereto, or levy authorizations exempted from the provisions of K.S.A. 79-5001 to 79-5016, inclusive, as existing prior to January 1, 1989, shall be subject to the aggregate limit prescribed hereunder. K.S.A. 79-5022. (Emphasis added).

Thus, it appears that at the time the proposal was adopted, the statutes authorized the city to offset the loss in revenue from the elimination of the intangibles tax by levying property taxes, and such levy was to be exempt from the

aggregate tax levy limit. However, subsequent to the proposal's adoption but prior to the date offsetting property taxes were to be first levied, K.S.A. 79-5022(d) was repealed. 1990 House Bill No. 2700, effective May 1, 1990. Consequently, there is currently nothing in the tax lid law which would authorize such offsetting property taxes to be levied outside the lid. With this background in mind, your questions, are as follows:

"1) Inasmuch as the election was held prior to the passage of H.B. 2700, and inasmuch as it complied with the law then in effect, should not the City be allowed to complete the bargain, as it were, notwithstanding the provisions of H.B. 2700? In other words, did not the April 4, 1989 election create a vested right in the City to replace the lost revenue?

"2) If the effect of H.B. 2700 is to prevent the City from replacing some or all of the lost intangibles revenues, then has not the legislation defeated one of the principal aspects of the election such that the election should be voided and the question resubmitted in view of the new statutory environment?

"3) If the effect of H.B. 2700 prevents the City from replacing some or all of the lost intangibles revenues, the City is in a position of having to 'charter out' in order to give effect to what the voters approved in 1989.

"a) Does H.B. 2700 allow a City to 'charter out' with regard to an area as limited as the one addressed herein, i.e., to 'charter out' only to the extent that the City would be allowed to replace lost intangibles taxes?

"b) If the City must 'charter out' in order to fulfill and give effect to what the voters approved in 1989, and the charter ordinance is limited to the sole issue addressed herein, would this procedure be subject to a protest petition where the voters have, in effect, already approved the proposed action of the City?"

Your first question essentially is whether a valid election may serve to preclude application of subsequent statutory enactments. In this case, it is our opinion that the election does not have this effect. K.S.A. 1989 Supp. 12-1,101(e), in conjunction with K.S.A. 79-5022(d) prior to its repeal, authorized the city to offset the lost revenue through property taxes notwithstanding the then-existing aggregate tax

lid. The statutes did not mandate the offsetting levy, nor make the validity of the election dependent upon it. The legislature does not appear to be precluded from "changing the rules mid-stream" in this case. Cf. McQuillin Municipal Corporations, § 21.32 (1988) ("attached to every statute, every charter, every ordinance or resolution affecting or adopted by a municipality, is the implied condition that the same must yield to the predominant power of the state." "Repeal" of municipal authority need not be express); City of McPherson v. Hanson, 87 Kan. 769, 772 (1912); State v. Keener, 78 Kan. 650, 651 (1908) ("restraints upon the power to organize and regulate municipal government must be found in the constitution or none exists"). K.S.A. 77-201 First provides that the repeal of a statute [here, K.S.A. 79-5022(d)] does not "affect any right which accrued, any duty imposed, any penalty incurred or any proceeding commenced, under or by virtue of the statute repealed." Article I, section X of the United States Constitution provides in part that "no state shall . . . pass any . . . law impairing the obligation of contracts." However, in this case the city itself has no "rights" which may be protected by these provisions. Pawhuska v. Pawhuska Oil & Gas Co., 250 U.S. 394, 398, 39 S.Ct. 526, 528, 63 L.Ed. 1054, 1057 (1919) ("as respects grants of political or governmental authority to cities, towns, counties, and the like the legislative power of states is not restrained by the contract clause of the Constitution"). 56 Am.Jur.2d Municipal Corporations, § 100 (1971) ("The general rule is that since a municipal corporation is merely a governmental agency, legislation regulating or affecting such a corporation does not amount to a contract with the corporation, the obligation of which cannot be impaired by provisions of the Constitution of the United States prohibiting the impairment of the obligation of contract"). See also Attorney General Opinion No. 89-145, and cases cited therein.

"Municipalities have and exercise some powers that are not strictly governmental in character. They may lawfully make contracts under which rights are acquired or liabilities incurred, and the legislature cannot legally pass any statute impairing rights thus acquired either by a municipal corporation or by persons dealing with it, provided, of course, that the contract is one which the municipality is authorized to make. Thus,

when a contract is made with a municipal corporation on the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition as to the impairment of the obligation of contracts." 56 Am.Jur.2d Municipal Corporations § 100 (1971) (footnotes omitted).

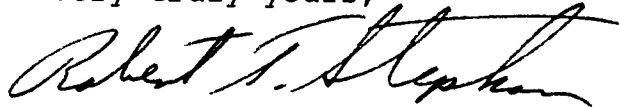
Further, courts have held that the legislature may not impair obligations of a municipal corporation by restricting its power to tax and therefore its ability to meet those obligations. Louisiana, ex rel. Hubert v. New Orleans, 215 U.S. 170, 54 L.Ed. 144, 147, 148, 30 S.Ct. 40 (1909), Liddell v. State of Missouri, 731 F.2d 1294, 1322 (8th Cir. 1984). However, these principals apply only when the city is performing a function that is not strictly governmental, or when a specific obligation is impaired because the tax revenues in question were earmarked for payment of that obligation. See Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980). In this case the power is that of taxation which is strictly governmental; it is our understanding that the moneys to be generated were general fund moneys, not for a specific obligation. Individual taxpayers' rights, if any, are protected by the availability of the election to suspend, modify or exempt out from the tax lid law. K.S.A. 79-5029, K.S.A. 79-5036, as amended by 1990 House Bill No. 2700, § 8(a).

The above analysis addresses your second question as well. Legislative removal of the city's ability to offset the revenues lost through elimination of the intangibles tax does not void an otherwise valid election.

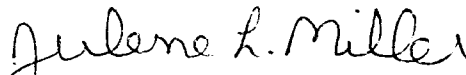
You next ask whether a city may, under section 8 of 1990 House Bill No. 2700, exempt itself from the lid only to the extent that the city would be allowed to replace lost intangibles tax revenues. K.S.A. 79-5036(a), as amended, authorizes the governing body of a city to "modify the provisions" of K.S.A. 79-5021 to 79-5033. It is therefore our opinion that the city may exempt itself for a limited purpose such as the replacement of the revenues in question.

Finally, you question whether the procedure of exempting the city for this limited purpose would be subject to a protest petition since "the voters have, in effect, already approved the proposed action of the City." The authority of the city to exempt itself from, or modify, the provisions of the tax lid law is granted by K.S.A. 79-5036(a), as amended by 1990 House Bill No. 2700, § 8. The provision requires cities to utilize the procedures of section 5, article 12 of the Kansas Constitution. Subsection (c)(3) of article 12, section 5 provides for the ability to petition for referendum. We note, however, that the city may, pursuant to K.S.A. 79-5030, make application to the state board of tax appeals for authority to levy taxes in excess of the aggregate limit, without first pursuing K.S.A. 79-5036 remedies.

Very truly yours,



ROBERT T. STEPHAN
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Julene L. Miller
Deputy Attorney General

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