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ATTORNEY GENERAL OPINION NO. 91- 25

Mr. David H. Anderson  
Blue Rapids City Attorney  
201 N. Kansas Avenue  
Frankfort, Kansas 66427

Re: Taxation--Property Exempt from Taxation--Property  
Exempt from Property and Ad Valorem Taxes; Property  
Dedicated to Public Use

Synopsis: Property which has been dedicated to public use,  
and which is held by a municipality in trust for  
such use, may lose its eligibility for property tax  
exemption under K.S.A. 79-201a, second if it is  
allowed to be used for private purposes.  
Determinations of whether property is being "used  
exclusively" by a municipality must be made on a  
case-by-case basis. Cited herein: K.S.A. 1990  
Supp. 12-406; K.S.A. 79-201a.

\* \* \*

Dear Mr. Anderson:

As counsel for the city of Blue Rapids, Kansas, you request our opinion regarding taxation of property which has been dedicated to public use as streets and alleys, but which is not being so used. Apparently the streets and alleys were "opened" by operation of law [see K.S.A. 1990 Supp. 12-406; Barrett v. Ninnescah Bow Hunters Assn., No. 64,347, slip op. at 8, \_\_\_\_\_ Kan.App.2d \_\_\_\_\_ (Feb. 22, 1991)] and have not been legally vacated, but are either not being used at all or are being used for private purposes.

K.S.A. 79-201a provides in part:

"The following described property, to the extent herein specified, shall be exempt from all property or ad valorem taxes levied under the laws of the state of Kansas:

. . . .

"Second. All property used exclusively by the state or any municipality or political subdivision of the state. All property owned, being acquired pursuant to a lease-purchase agreement or operated by the state or any municipality or political subdivision of the state which is used or is to be used for any governmental or proprietary function and for which bonds may be issued or taxes levied to finance the same, shall be considered to be 'used exclusively' by the state, municipality or political subdivision for the purposes of this section. . . ." (Emphasis added).

The Kansas Supreme Court has held that to qualify for an exemption under this statute requires actual use of the property for a public purpose. Tri-County Public Airport Auth. v. Board of Morris County Comm'rs, 245 Kan. 301, 310 (1989). In that case, the airport authority leased certain real estate owned by it to private businesses. Although the leases generated revenues which were used in the operation of the airport, the court found that the actual use was not for a public purpose and therefore the airport authority was not entitled to an exemption under K.S.A. 79-201a second. Id. See also Salina Airport Auth. v. Board of Tax Appeals, 13 Kan.App.2d 80, 84, 85 (1988). Pursuant to these cases, if the property in question is actually being used for anything other than a public purpose, it does not meet the criteria for an exemption under K.S.A. 79-201a second.

In Attorney General Opinion No. 88-109, we stated that the fee title to real estate property dedicated to public use vests absolutely in the local unit of government which "forever afterward holds the property in trust for such use." Douglas County v. City of Lawrence, 102 Kan. 656, 658 (1918),

citing A.T. & S.F. Railroad Co. v. Luening, 52 Kan. 732, 735 (1894) and Wood v. Nat'l Water Works Co., 33 Kan. 590 (1885). This being the case, you question whether such property is precluded from being used for any use which is not a public one and therefore necessarily entitled to property tax exemption pursuant to K.S.A. 79-201a second.

Your point is well-taken. See Smith v. City of Leavenworth, 15 Kan. \*81 (1875). However, case law indicates that the language quoted above simply means that title to such property cannot be lost through non-use, adverse possession, laches, estoppel or any statutes of limitation. Douglas County v. City of Lawrence, 102 Kan. 656, 659 (1981); Wallace v. Cable, 87 Kan. 835, 840 (1912); Barrett v. Ninneschah Bow Hunters Assn., supra; Attorney General Opinion No. 87-93. The language does not necessarily imply that it is impossible for such property to be used for other than a public purpose. Even if a city were not authorized to permit private usage of such property, if such private use did in fact occur, the exemption might be lost.

You next ask whether property owned by a municipality which is not being used for any purpose is eligible for an exemption under K.S.A. 79-201a, second. We believe that it is if it "is to be used for any governmental or proprietary function and . . . taxes [are] levied to finance the same. . . ." We believe the exemption is lost only if the property is actually being used for a private purpose. See Tri-County, supra.

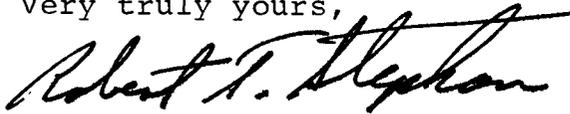
Whether a particular piece of property meets the exclusive use test of K.S.A. 79-201a, second must be determined on a case-by-case basis keeping these rules in mind: "Taxation is the rule, and exemption from taxation the exception under the Kansas Constitution and statutes," Tri-County, 245 Kan. at 304; "[c]onstitutional and statutory provisions exempting property from taxation are to be strictly construed against the one claiming exemption, and all doubts are to be resolved against exemption," id.; "[t]he burden of establishing exemption from taxation is on the one claiming it," T-Bone Feeders, Inc. v. Martin, 236 Kan. 641, 645 (1985).

Finally, you question whether property owned by the state is subject to taxation if it is not "used exclusively" by the state. The test is the same for state-owned or operated property as it is for property owned or operated by a

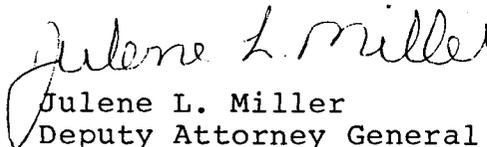
municipality. K.S.A. 79-201a, second. See Attorney General Opinion No. 90-56.

In conclusion, property which has been dedicated to public use and which is held by a municipality in trust for such use may lose its eligibility for property tax exemption under K.S.A. 79-201a, second if it is allowed to be used for private purposes. Determinations of whether property is being "used exclusively" by a municipality must be made on a case-by-case basis.

Very truly yours,



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RTS:JLM:jm