



STATE OF KANSAS

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October 30, 1991

ATTORNEY GENERAL OPINION NO. 91-137

H. Scott Beims
Rawlins County Attorney
P.O. Box 449
Atwood, Kansas 67730

Rawlins County Commissioners
Henry E. Cahoj, Chairman
607 Main
Atwood, Kansas 67730

Re: Counties and County Officers -- Hospitals and
Related Facilities -- Repeal of a Mill Levy

Synopsis: There are no statutory provisions mandating
Rawlins county to hold an election to decide the
issue of whether a previously approved county
hospital tax levy should be repealed. Cited
herein: K.S.A. 1990 Supp. 19-4606; K.S.A.
19-4625.

* * *

Dear Mr. Beims and Mr. Cahoj:

As Rawlins county attorney and chairman of the board of
county commissioners you request our opinion regarding whether
the electorate of Rawlins county can file a petition
requiring an election asking for the repeal of a mill levy for
the county hospital which they approved of approximately one
year ago.

"The commission or, in the case of an elected board, the board may annually levy a tax for the purpose of operating, maintaining, equipping and improving any hospital managed and controlled under the provisions of this act and for the purpose of paying a portion of the principal and interest on bonds issued under the authority of K.S.A. 12-1774, and amendments thereto. The commission or, in the case of an elected board, the board may levy such tax in any amount not exceeding six mills in any year without an election as provided in subsection (c) and such tax shall not be subject to or within any aggregate tax levy limit prescribed by law. In the event the commission or the board proposes to levy such tax in an amount which exceeds two mills but is less than six mills in any year, such proposition shall be published once each week for two consecutive weeks in the official county newspaper. If, within 30 days after the last publication of the proposition, a petition signed by not less than 5% of the electors of the county who voted for the office of secretary of state at the last preceding general election requesting an election thereon [sic], no such levy shall be made unless the proposition is submitted to and approved by a majority of the voters of the county voting at an election held thereon. Such election shall be called and held in the manner provided under the general bond law. Any tax levied for the purpose of paying the principal and interest upon any general obligation bonds issued pursuant to this act is not subject to the six-mill limitation imposed under the provisions of this subsection.

. . . .

"(c) The commission or, in the case of an elected board, the board shall not levy any tax exceeding six mills under authority of subsection (a) or in the case

of the commission, issue general obligation bonds under authority of subsection (b) until the levy of such tax or the issuance of such bonds has been authorized by resolution of the commission and approved by a majority of the qualified electors of the county voting on such question at a regular county primary or county general election or, if no regular county election is to be held within six months from the date of adoption of the resolution, at a special election called by the commission for the purpose of submitting such question to the qualified electors. The increase in any tax levy authorized by any such election shall not be subject to or within any aggregate tax levy limit prescribed by law." K.S.A. 1990 Supp. 19-4606.

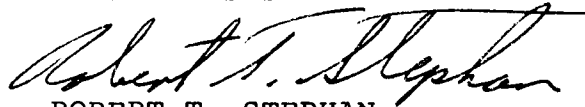
The electorate can gather signatures from 5% of the electors who voted for the secretary of state at the last general election and request an election if the commission or hospital board is seeking to levy a tax as set out in K.S.A. 1990 Supp. 19-4606 or if the commission is proposing to close a hospital as set forth in K.S.A. 19-4625. However, there are no statutes which allow the electorate to require the commission to hold an election regarding the repeal of a tax levy which they had previously approved through a past election.

"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. Sellew, 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 [lower] the rate of

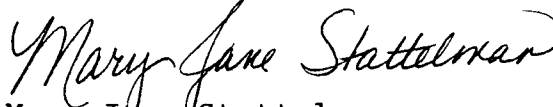
taxation of any legally imposed revenue raising tax. City of Pittsburg v. Alco, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974). See also Tanque Verde Enterprises v. City of Tucson, 691 P.2d 302 (Az. 1984); Casey Development Corp. v. Montgomery County, 129 A.2d 63, 68 (Md. 1957); Layne v. Strode, 317 S.W. 2d 6, 9 (Ark. 1958)." Attorney General Opinion No. 89-78.

Therefore, it is our opinion that the electors of Rawlins county do not have the power to mandate an election to be held to determine whether to repeal the current county hospital levy.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Mary Jane Stattelmar
Assistant Attorney General

RTS:JLM:MJS:bas