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ATTORNEY GENERAL OPINION NO. 91-142

The Honorable Rick Bowden
State Representative, Ninety-Third District
433 Walnut
Goddard, Kansas 67052

Re: Constitution of the State of Kansas--Finance and
Taxation--Revenue for Current Expenses

Synopsis: The legislature is prohibited, pursuant to article 11, section 4 of the Kansas constitution, from imposing a permanent statewide property tax levy. However, a series of annual or biennial impositions would be permissible. The legislature may require the board of education of each school district to levy a specified number of mills and to transfer a portion of the proceeds to the state for distribution to other school districts if done in compliance with article 11, sections 4 and 5, and any other applicable constitutional provisions. Cited herein: Kan. Const., Art. 6, § 6; Art. 7, § 6; Art. 11, §§ 4, 5.

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Dear Representative Bowden:

As chairman of the task force on public school finance, you request our opinion regarding the legislature's authority to provide for the financing of public elementary and secondary education by means of a property tax.

Initially you inquire whether the legislature may "impose a permanent statewide property tax levy to fund public

elementary and secondary education." Article 6, section 6(b) of the Kansas constitution requires the legislature to "make suitable provision for finance of the educational interests of the state." The legislature's authority under this provision is limited, however, by other constitutional provisions, one of which is article 11, section 4 of the constitution which states:

"The legislature shall provide, at each regular session, for raising sufficient revenue to defray the current expenses of the state for two years."

Article 11, section 4 was discussed by the Kansas Supreme Court in State, ex rel., v. Bailey, 56 Kan. 81, 82, 83 (1895):

"This section imposes on the legislature at each biennial session a duty to levy taxes for the ensuing two years. That duty must be fully performed by the legislature at each regular session, and one body of legislators cannot, by making a continuing levy, encroach on the province of a succeeding one. The act of 1889 was valid as a levy for two years only."

The companion provision prohibiting the making of appropriations for a term longer than two years was removed in 1974. L. 1974, ch. 458, § 1. Article 11, section 4, however, has not been amended since 1875. We therefore presume the court's analysis of this provision's purpose would remain unchanged from that set forth in Bailey. Thus, the legislature may not impose a property tax to meet the state's expenses which extends beyond the two year limit. This conclusion is supported by constitutional provisions adopted subsequent to the Bailey decision which specifically authorize the legislature to levy a permanent tax for the benefit of state institutions of higher education (Kan. Const., art. 6, § 6) and for the creation of a building fund for certain state institutions (Kan. Const., art. 7, § 6).

You next ask whether "a series of annual or biennial statewide property tax impositions [would] be construed to be the levy of a permanent tax and, thus, unconstitutional." In our opinion a series of impositions, if enacted annually or biennially, would be permissible. In Bailey, supra, the

court held that the 1889 tax statute was valid for a period of two years only, but an amendment to that statute in 1895 revived the tax for two more years. Such analysis meets the stated purpose of article 11, section 4, to prevent legislators from encroaching on the province of succeeding legislatures, and to actively review the state's fiscal needs at least biennially.

Your third and fourth questions deal with whether the legislature's authority to "require the board of education of each school district to levy a minimum number of mills and, if such levy generates more than a prescribed amount of money, pay the excess tax proceeds to the state to fund the costs of providing public elementary and secondary education in other school districts." In Attorney General Opinion No. 91-37 we were asked to opine on 1991 Senate Bill No. 26 which would have required essentially the same thing as you are suggesting. We concluded that the proposed bill was in violation of article 11, section 5 of the constitution in that it was an attempt to apply a tax for a purpose other than for which it was levied. Thus, if a tax is levied for the purpose of funding a local school district's needs, proceeds of the tax may not be transferred to the state to meet the needs of other school districts or the state.

Conversely, if one of the stated purposes of the levy is to transfer a specific portion of the proceeds to the state to fund the needs of other school districts, it would meet the requirement of article 11, section 5 [see State, ex rel., Schneider v. City of Topeka, 227 Kan. 115, 122 (1980)], but the tax in essence becomes a state property tax subject to the provisions of article 11, section 4. See 71 Am.Jur.2d State and Local Taxation, § 98 (1973) ("What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result").


In conclusion, the legislature is prohibited, pursuant to article 11, section 4 of the Kansas constitution, from imposing a permanent statewide property tax levy. However, a series of annual or biennial impositions would be permissible. The legislature may require the board of education of each school district to levy a specified number of mills and to transfer a specific portion of the proceeds to the state for distribution to other school districts if done

in compliance with article 11, sections 4 and 5, and any other applicable constitutional provisions.

Very truly yours,



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RTS:JLM:jm