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May 14, 1992

ATTORNEY GENERAL OPINION NO. 92- 63

Ms. Mary F. Carson
Bond Counsel for the City of Edwardsville,
Kansas
Gilmore & Bell
Financial Plaza II, Suite 150
6800 College Blvd.
Overland Park, Kansas 66211-1533

Re: Cities and Municipalities--Buildings, Structures
and Grounds; Redevelopment of Central Business
District Areas--Special Obligation Tax Increment
Bonds; Payments in Lieu of Taxes

Synopsis: K.S.A. 12-1770 et seq., when read in its
entirety, authorizes cities to grant 10-year tax
exemptions to improved property within
redevelopment districts. Such an exemption is
consistent with the act's stated purpose found in
K.S.A. 12-1770 to "promote, stimulate and develop
the general and economic welfare of the state of
Kansas and its communities and to assist in the
development and redevelopment of central business
district areas of cities, blighted areas located
within cities and enterprise zones located within
cities, thus promoting the general welfare of the
citizens of this state. . . ." Payments in lieu of
taxes are contractual in nature and origin and
should not be treated as part of the tax increment
on improved redevelopment property. Such
obligations are a matter of contract and should not
be characterized as a statutorily imposed tax.
Cited herein: K.S.A. 12-1740; 12-1770; 12-1771;
12-1742; 12-1774; 12-1775; 12-1778; 79-201 Second.

Dear Ms. Carson:

As bond counsel for the city of Edwardsville, Kansas, you seek an Attorney General opinion on questions relating to the establishment of a redevelopment district (district) pursuant to K.S.A. 12-1770 et seq., and the use of a tax increment financing structure which would involve a ten year tax exemption and payments in lieu of taxes.

You pose two questions for our consideration, each of which will be addressed separately. Your first question is whether it is within the city's authority pursuant to K.S.A. 12-1770 et seq. to issue tax-increment bonds to finance redevelopment construction and at the same time grant a 10-year property tax exemption for the district improvements.

As background, you explain that the proposed financing structure for the district would involve two separate bond issues: the issuance of industrial revenue bonds pursuant to K.S.A. 12-1740 et seq., to finance the construction of a major commercial distribution facility, and the issuance of special obligation tax increment bonds pursuant to the provisions of K.S.A. 12-1774, to finance certain improvements to the site in the city where the facility would locate. The owners of the facility have asked the city to grant a 10 year tax exemption to the facility under K.S.A. 79-201a Second or pursuant to provisions of the Kansas constitution authorizing such exemptions. The city in turn would enter into an agreement with the owners of the facility to make payments in lieu of taxes of approximately 10% of the amount which would otherwise be collected if the property were not granted an exemption. The agreement would be in effect for the 10 year period of the exemption.

During the 10 year period the city would not realize any property tax increment from the redeveloped property and would not have funds to pay the special obligation tax-increment bonds if payments were due on such bonds during the period of exemption. To allow for both the issuance of the tax-increment bonds and the 10 year tax exemption on the redeveloped property the city is considering the issuance of capital appreciation bonds requiring payment of principal and interest only after completion of the 10 year exemption period and when the city begins to realize the property tax increment on the redeveloped property.

You note that you have examined the applicable statutes and believe that the proposed financing structure is permissible. You seek our concurrence in this judgment.

K.S.A. 12-1774 provides authority for Kansas cities to issue special obligation bonds to finance the undertaking of redevelopment projects. The statute provides:

"[S]uch special obligation bonds shall be made payable, both as to principal and interest: (A) From property tax increments allocated to, and paid into a special fund of the city under the provisions of K.S.A. 12-1775, and amendments thereto;

"(B) from revenues of the city derived from or held in connection with the undertaking and carrying out of any redevelopment project or projects under this act;

(C) From any private sources, contributions or other financial assistance from the state or federal government; or

"(D) by any combination of these methods.

"The city may pledge such revenue to the repayment of such special obligation bonds prior to, simultaneously with or subsequent to the issuance of such special obligation bonds." (Emphasis added.)

K.S.A. 12-1771(h) requires that the increment in ad valorem taxes, which is defined as that amount of tax in excess of what was produced prior to the redevelopment project, "shall be apportioned to a special fund for the payment of principal and interest on any special obligation bonds or full faith and credit tax increment bonds issued to finance such project. . . ." K.S.A. 12-1778 reaffirms these provisions.

The tax-increment provisions are found in K.S.A. 12-1775. K.S.A. 12-1775(b) states that "[a]ll tangible taxable property located within a redevelopment district shall be assessed and taxed for ad valorem tax purposes pursuant to law

in the same manner that such property would be assessed and taxed if located outside such district. . . ." K.S.A. 12-1775(c) provides in relevant part:

"Beginning with the first payment of taxes which are levied following the date of approval of any redevelopment district established pursuant to K.S.A. 12-1771 . . . real property taxes received by the county treasurer resulting from taxes which are levied subject to the provisions of this act by and for the benefit of a taxing subdivision . . . on property located within such redevelopment district constituting a separate taxing unit under the provisions of this section shall be divided as follows: . . ."

The statute next provides for division of such taxes between the various taxing subdivisions entitled to them and for the payment of the increment to a special fund of the city as provided by K.S.A. 12-1774(a)(1)(A). Nowhere in the statute is there a requirement mandating or providing a specific time frame after which ad valorem taxes must be levied. The statute is, in our opinion, primarily a procedural statute principally concerned with directing the ministerial task of levying taxes. Direction is given in K.S.A. 12-1775(b) to assess tax property within a redevelopment district in the same manner as property located outside the district. Since property outside a redevelopment district may also qualify for a tax exemption and K.S.A. 12-1774 specifically sanctions the issuance of industrial revenue bonds under K.S.A. 12-1740 et seq., to finance construction of facilities within a redevelopment district it is difficult to conclude that the direction to levy taxes in a redevelopment district in the same manner as on other property was meant to preclude granting a tax exemption on redevelopment property.

This construction is supported by standards of statutory review as set forth in Kansas case law:

"In construing statutes, the legislative intention is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and every part thereof. To this end it is the duty of the court, as far as practicable, to reconcile the

different provisions so as to make them consistent, harmonious, and sensible." State v. Adee, 241 Kan. 825, 829, 740 P.2d 611 (1987).

"In determining legislative intent, courts are not limited to consideration of the language used in the statute, but may look to . . . the purpose to be accomplished, and the effect the statute may have under the various constructions suggested." Citizens State Bank of Grainfield v. Kaiser, 12 Kan.App.2d 530, 535, rev. denied 243 Kan. 777 (1988).

Applying these guidelines to construe the act at hand it is reasonable to deduce that while the drafters may not have directly contemplated that a tax exemption would be a component of a tax-increment finance plan involving the issuance of capital appreciation bonds pursuant to K.S.A. 12-1770 et seq., they did not intend to preclude municipalities from utilizing this option. When the act is read in its entirety it becomes significant that various methods of payment for special obligation bonds are provided for in K.S.A. 12-1774(a)(1)(A), (B), (C), and (D). It is clear that the legislature intended that cities be afforded both flexibility and latitude in structuring their financial obligations under this act. K.S.A. 12-1774(a)(1)(D) provides for the pledge of revenues to the repayment of special obligation bonds and states it may be "prior to, simultaneously with or subsequent to the issuance of such special obligation bonds." The legislature conferred upon cities the ability to choose among several revenue possibilities which might be available to pay for special obligation bonds and authorized the pledge of revenues at various points in time including subsequent to the issuance of such bonds. The act when read in its entirety certainly bolsters the contention that a tax-exemption and delay in the collection of revenues for a period of time is permissible. The argument for tax exemption is also strengthened when the act's purpose stated in K.S.A. 12-1770 is considered:

"It is hereby declared to be the purpose of this act to promote, stimulate and develop the general and economic welfare of the state of Kansas and its communities and to assist in the development and redevelopment of central business district

areas of cities, blighted areas located within cities and enterprise zones located within cities, thus promoting the general welfare of the citizens of this state, by authorizing cities to acquire certain property and issue special obligation bonds . . . for the financing of redevelopment projects. . . ."

While we are not unmindful that a strict construction of K.S.A. 12-1775 could be argued to require a levy of taxes immediately following establishment of a redevelopment district, such an interpretation seems neither warranted or required. To construe the statute in a manner which necessitates the immediate imposition of taxes on a redeveloped property thereby potentially driving away exactly the type of industry the act attempts to promote and seek and which defeats the act's cited purpose seems contradictory and inconsistent with the act's intent. It is, therefore, our opinion that the city may grant a 10-year tax exemption to the redevelopment district consistent with the provisions of K.S.A. 12-1770 et seq.

Your second question is whether the payments in lieu of taxes (PILOTS) contracted for during the ten-year exemption period should be considered part of the property tax increment realized on the redeveloped property. It is our opinion that PILOTS should not be considered part of the property tax increment realized on the redeveloped property.

While we are unable to find any Kansas case law which sheds definitive light on the subject, the treatment of PILOTS in Kansas statutes and by other authorities suggests that payments made pursuant to a contractual agreement are simply that -- contractual payments.

Under K.S.A. 12-1742 all payments made pursuant to an industrial revenue bond lease agreement other than rental and origination fees are deemed "payments in lieu of taxes," an axiomatic phrase. The statute also states:

"Payments in lieu of taxes received pursuant to agreements . . . shall include all fees or charges paid for services normally and customarily paid from the proceeds of general property tax levies except for extraordinary services provided for the facility or an extraordinary level

of services required by a facility. Payments in lieu of taxes may be required only upon property for which an exemption from ad valorem property taxes has been granted by the state board of tax appeals."

Payments required by such agreements are unlike taxes in that they are not required by any statute. Courts in jurisdictions which have addressed this issue are in agreement with this analysis and have distinguished contractual obligations from taxes in holdings that have found:

"A tax is a charge imposed by the legislature for the purpose of revenue. It is not founded on contract and does not establish the relationship of debtor and creditor. It is an enforced proportional contribution levied by authority of the state." Bailies v. City Council of City of Des Moines, 102 N.W. 813 (Iowa 1905), quoting and adopting definition in Meriwether v. Garrett, 102 U.S. 472, 26 L.Ed. 197 (1880).

"A tax is a legal imposition, exclusively of statutory origin, and liability to taxation must be read in statute or it does not exist." Bentee v. Bugbee, 137 A. 552, 553 (N.D. 1927).

The Missouri courts when presented with a similar situation wherein PILOTS were collected under the real property tax increment allocation redevelopment act, in an amount equal to that which would have been assessed and levied as tax increment, found the PILOTS were not a tax. The court held that the payments were contractual in nature and characterized them as special assessments levied against property for improvements provided under a redevelopment plan. The court stated that "an exaction demanded by . . . government for a special privilege or for specific purposes and not intended to be paid into the general fund to defray general public needs or governmental expenditures is not a tax. Tax Increment Fin. Com'n v. J.E. Dunn Const., 781 S.W.2d 70 (Mo. 1989).

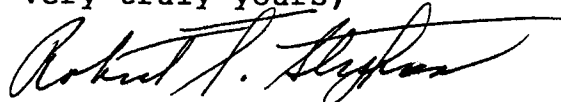
PILOTS are also distinguishable from taxes in that state law does not require PILOTS to be equivalent to all or any portion of the taxes which would be otherwise due. Nothing requires

the payments to be anything but a contractually agreed upon amount.

We are cognizant that two aspects of PILOTS are similar to general property taxes. First, pursuant to Kansas law the proceeds of PILOTS are distributed proportionately (see e.g., K.S.A. 12-1742) to each of the taxing subdivisions in which the exempt property is located based on the amount each jurisdiction's total mill levy bears to the aggregate levy of all the taxing jurisdictions. Second, the payments are then utilized for general public purposes in the same manner as general property taxes. We do not believe that these similarities are sufficient to make PILOTS equivalent to general property taxes as supported by previously cited case law.

In conclusion, it is our opinion that PILOTS are readily distinguishable from taxes in that they are not statutorily imposed obligations and are instead solely a matter of contract. We find, therefore, that the PILOTS should not be considered or in any way treated as a part of the property tax-increment realized on the redevelopment property.

Very truly yours,



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