STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 75-388

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Re: Counties--Public Funds--Investment of Idle Monies

Synopsis: Section 2 of ch. 69, L. 1975 is void and ineffective to amend K.S.A. 19-101a and to restrict county home rule powers granted thereby. Counties in the exercise of statutory home rule powers may provide by ordinary resolution legislative authority in addition to that provided presently by statute, and in so doing, may authorize the purchase of certificates of deposit for periods of less than 90 days and more than 180 days at rates of interest which are not subject to the restrictions of K.S.A. 1974 Supp. 12-1676 as amended.

* * *

Gentlemen:

You inquire whether, in the exercise of county home rule powers under K.S.A. 19-101a(b), the board of county commissioners of Sedgwick County may by resolution authorize the investment of idle county funds for periods of less than 90 days and more than 180 days at rates of interest greater than those fixed by K.S.A. 1974 Supp. 12-167 as amended.

We find no statutory authority prior to 1968 for investment of idle county funds. Ch. 217, L. 1968, the original enactment of the present K.S.A. 1974 Supp. 12-1675 *et seq.* as amended, thus provided, at the time of its enactment, the sole authority for investment of idle county money. In 1968, counties had only those powers expressly granted by statute and those reasonably to be inferred therefrom. *State ex rel. Griffith v. Mowry*, 119 Kan. 74, 237 P. 1032 (1925). Thus, as enacted, ch. 217, § 1, L. 1968, was written as a grant of authority which counties did not theretofore enjoy:

> "The governing body of any county or school district is hereby authorized and empowered to invest any moneys not immediately required for the purposes for which the moneys were collected or received in . . . [certain specified forms of investment.]"

(By subsequent amendment, the authority originally granted only to counties and school districts has been extended to cities and quasi-municipal corporations, defined as drainage, cemetery and hospital districts, and other governmental subdivisions having authority to levy taxes.)

In 1974, the Kansas Legislature granted to counties certain powers of self-government. K.S.A. 19-101a(a) commences thus:

> "Counties are hereby empowered to transact all county business and perform such powers of local legislation and administration as they deem appropriate, subject *only* to the following limitations, restrictions or prohibitions . . . ." [Emphasis supplied.]

Thus, rather than requiring that the county look to specific statutory authority for the exercise of each particular power, the counties were in 1974 granted broad legislative and administrative power to deal with local matters as the boards of county commissioners deem appropriate, subject, of course, to the enumerated statutory restrictions on that power.

The investment of idle county funds is clearly a matter of local county business. On July 21, 1961, three weeks after Article 12, § 5 of Kansas Constitution became effective, empowering cities with direct constitutional authority "to determine their local affairs and government," Attorney General William Ferguson concluded that notwithstanding the lack of direct statutory authority for investment of municipal monies, it was a matter of "local affairs and government" for which cities were constitutionally empowered to provide. Similarly, the investment of idle county monies, which belong to the county and are held for county purposes, is surely a proper subject of local county governmental attention. Thus, at the outset, the investment of idle county monies meets the first prerequisite for the exercise of county home rule powers, i.e., it is a matter of *local*, as distinguished from extra-local, effect.

K.S.A. 1974 Supp. 12-1675 authorizes investments as follows:

> "The governing body of any county . . . is hereby authorized and empowered to invest . . . in (a) temporary notes issued by such county . . .; (b) time deposit, open accounts for periods of not less than thirty (30) days, or certificates of deposit for periods of not less than ninety (90) days and not exceeding six (6) months, in commercial banks or trust companies . . . ; or (c) United States treasury bills or notes with maturities as the governing body shall determine, but not exceeding three (3) months."

K.S.A. 1974 Supp. 12-1676 specifies the interest rate payable on the enumerated investments above:

> "Interest paid by commercial banks on time deposit, open accounts and certificates of deposit *as authorized herein* shall be at a rate equal to the average yield before taxes were received on ninety-one (91) day United States treasury bills as determined by the federal reserve banks as fiscal agents of the United States at its most recent public offering of such bills prior to the inception of such deposit contract."

The statutory interest rate restriction applies to investments which are authorized by K.S.A. 1974 Supp. 12-1675 as amended, as set out above.

The question presented is whether in the exercise of its county home rule authority, the board of county commissioners may authorize the investment of idle county monies in certificates of deposit for periods of less than ninety days and of more than 180 days. If such additional investments are authorized, interest which was earned on such investments would be freed from the statutory rate restrictions which apply only to those investments authorized by statute, and not to those authorized by county resolution. If not prohibited from doing so, the board could authorize such investments pursuant to K.S.A. 19-101a(b):

> "Counties shall apply the powers of local legislation granted in subsection (a) of this section by resolution of the board of county commissioners. If no statutory authority exists for such local legislation other than that set forth in subsection (a) of this section and the local legislation proposed under the authority of such subsection is not contrary to any act of the legislature, such local legislation shall become effective upon passage of a resolution of the board and publication in the official county newspaper."

Clearly, the Legislature sought to forestall the exercise of county home rule power in the investment of public moneys by 1975 Senate Bill 55. Ch. 69, § 2, L. 1975, states thus:

> "The provisions of K.S.A. 1974 Supp. 12-1675, 12-1676, 12-1677 and 12-1678a, as amended, shall govern the investment of public moneys by counties and shall not be subject to the exercise of home rule by counties under the provisions of K.S.A. 19-101a and 19-101b. No county shall be authorized to exempt itself from the provisions of K.S.A. 1974 Supp. 12-1675, 12-1676, 12-1677 or 12-1678a, as amended, or to

> provide substitute or additional provisions in lieu thereof."

This provision is patently unconstitutional.

Article 2, § 16 of the Kansas Constitution states thus in pertinent part:

> " . . . [N]o law shall be revived or amended, unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed."

Ch. 69, L. 1975, contains no provision repealing K.S.A. 19-101a or 19-101b, despite the express reference thereto and the substantial amendment of home rule powers affected thereby. K.S.A. 19-101a constitutes a broad grant of local legislative and administrative powers which are stated to be subject "only to the . . . limitations, restrictions or prohibitions" contained therein. Eight such specific limitations, restrictions and prohibitions are enumerated therein. The effect of section 2 of ch. 69, L. 1975, is to add a ninth, to exempt from the exercise of county home-rule powers a ninth category of governmental concern, the investment of public funds. In effect, this constitutes a substantive amendment of K.S.A. 19-101a, sought to be accomplished without compliance with Art. 2, § 16 of the Kansas Constitution.

In *Atchison, Topeka and Santa Fe Railway Co. v. Board of Education*, 123 Kan. 378, (1927), the court considered a similar question. There, the court considered a 1909 enactment which purported to alter school levy authority granted and fixed by a 1907 act. Section 22 of the 1909 section in question commenced thus:

> "The authority of boards of education in cities of the first class to levy taxes, as provided in chapter 330, Laws of 1907, is hereby limited so that the board of education of any such city shall not fix a rate of levy for the respective purposes in excess of the following named rates . . . ."

Chapter 330 of the Laws of 1907 was not reenacted as amended, nor was it repealed save by a provision that "All acts or parts of acts in conflict with this act are hereby repealed," which the court dismissed as "nonsensical." After pointing out the substantial alterations in prior law sought to be effected by the 1909 act, the court held it invalid under Article 2, section 16, and the requirement thereof that no law shall be revived or amended unless the new act contained the entire act revived or the section or sections amended, and those so amended shall be repealed:

> "If the act of 1909 had contained but a single section consisting of the matter contained in section 22, besides the repealing section, it would have been patently invalid. Invalidity was multiplied, not cured, by dealing in wholesale fashion with many statutes whose provisions were changed without compliance with the constitutional requirement. *The act was not legislation by reference, because legislation by reference leaves the law referred to unmodified.* (*State v. Shawnee County*, 83 Kan. 199, 110 Pac. 92.) *The act was not a new, independent superceding act, a code complete in itself,* relating to power of taxing bodies, including boards of education in cities of the first class, to levy taxes. *It was not interpretative. It could not operate to repeal the law of 1907 by implication because that law was expressly referred to and modified,* and attempt was made to repeal the inconsistent portion. The purpose of the constitutional restriction was 'to prevent uncertainty and confusion which might arise from adding to striking out words and making additions and substitutions without rewriting the section as amended.' . . . That purpose was flagrantly disregarded." [Emphasis supplied.]

As Justice Valentine wrote for the court in *Stephens v. Ballou*, 27 Kan. 594 (1881):

> "[C]an the legislature amend these sections or the sections of any statute in any other

> mode than that prescribed by the constitution? It is only in rare cases and reluctantly that we should hold that it can. But, as before intimated, we must hold, though cautiously, that statutes may in some cases be amended or modified or repealed even *by implication*, and without the new act containing the entire section or sections amended, or modified or repealed." 27 Kan. at 601.

However,

> "as has often been said by this as well as other courts, 'repeals by implication are never favored in law;' and this is preeminently true in Kansas, where the constitution of the state requires that 'no law shall be revived or *amended* unless the new act contain the *entire* act revived, or *the section or sections amended*." [Emphasis by the court.] 27 Kan. at 600.

This is not a case in which prior law has been amended by implication. Section 2 of ch. 69, L. 1975, refers expressly to K.S.A. 19-101a and expressly to county home rule powers granted by that precise section. The literal and explicit references operate expressly and substantively to amend and curtail home rule powers granted by K.S.A. 19-101a. There is no occasion or need to imply anything whatsoever.

The Kansas Supreme Court has consistently rejected efforts to circumvent the pertinent requirements of Article 2, § 16. See, in addition to the cases cited above, *School District No. 22 v. Hahn*, 126 Kan. 117, 267 Pac. 28 (1928); *School Districts v. Stafford County Commissioners*, 141 Kan. 108, 40 P.2d 334 (1935); and *Hicks v. Davis*, 97 Kan. 312 (1916). In the last named case the court described the case thus in paragraph six of the syllabus:

> "In the body of a section of a statute enacted by the legislature of 1913 was an item appropriating a sum of money to the petitioner. The legislature of 1915 sought to abrogate that item by an act purporting

> to repeal the act of 1913 "in so far as it relates to item 106 of section 1 of said chapter.' *Held*, that the later act wholly disregarded section 16 of article 2 of the constitution and is consequently void."

In its opinion, the court states thus:

> "The constitution plainly instructs the legislature as to its procedure when it deliberately sets out to amend or repeal a specific statute or a section of a statute. Of course, when the legislature is legislating directly on any subject, it may close its eyes, and frequently does, to all earlier legislation, and a later act, as the last expression of the legislative will, will supersede and repeal by implication all inconsistent earlier legislation. But when the legislature has a direct and special purpose in view, as it had when it attempted to revoke and expunge item 106 in the act of 1913, it was bound to amend the section in which it was incorporated. This it could do only by rewriting the section to suit its determination. . .
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> * * *
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> The section of the act carrying the item appropriated to the petitioner . . . contains many matters which the legislature of 1915 had no intention to meddle with. Therefore the only way to eliminate the item appropriated for petitioner was to rewrite the section. So says the constitution, and consequently the act of 1915 is plainly, palpably and utterly void."

See also the denial of a petition for rehearing the case. *Hicks v. Davis*, 97 Kan. 662 (1916).

In *State v. Carter*, 74 Kan. 156, 86 Pac. 138 (1906), the court again invalidated an amendment for failure to comply with the constitutional requirement. The court pointed out

that one of the purposes of the constitutional requirement was

> "to prevent members of the legislature from practicing deception by the enactment of blind and confusing amendments, to prevent them from misleading themselves and the public as to changes in the law, and to remove the difficulties and uncertainties accompanying extended examinations and comparisons of various acts to ascertain the true state of the statute law upon any subject." 74 Kan. at 163.

This purpose was particularly frustrated by the legislative device resorted to in this instance. K.S.A. 19-101a was itself amended by the 1975 legislature by House Bill No. 2551. See ch. 152, L. 1975. Ch. 69, the enactment of Senate Bill No. 55, equally amended the county home rule statute. However, anyone seeking to ascertain the true state of the law regarding county home rule powers would have been misled by regarding House Bill 2551 as correctly stating the law as finally passed by the 1975 Legislature, and indeed, no other statute would have advised the reader that K.S.A. 19-101a had been amended, despite the substantial incursion upon those powers by Senate Bill 55.

I cannot but conclude that section 2 of ch. 69, L. 1975, is utterly void and ineffectual to amend K.S.A. 19-101a, and that the local legislative and administrative powers vested in counties thereunder are completely unaffected by the purported and attempted restriction thereof by section 2 of the 1975 enactment, for the reason that it constitutes an attempted amendment of K.S.A. 19-101a totally and flagrantly in violation of Article 2, § 16 of the Kansas Constitution.

The investment of idle county monies being a purely local matter, it is an appropriate subject for the exercise of those powers of local legislation and administration vested in counties under K.S.A. 19-101a. The exercise of that power is "subject to all acts of the legislature which apply uniformly to all counties." K.S.A. 1974 Supp. 12-1675 as amended is a statutory grant of authority which applies equally to all counties. A major purpose of K.S.A. 19-101a is to permit counties to provide for themselves legislative authority in regard to local matters where no statutory authority exists or where the existing statutory

authority is inadequate to permit the county to achieve its desired object and purpose. Clearly, in my judgment, it is an appropriate exercise of county home rule authority for the board of county commissioners to augment and supplement the statutory investment authority provided by K.S.A. 1974 Supp. 12-1675 by additional authority fashioned by ordinary resolution adopted pursuant to K.S.A. 19-101a(b), and that the county may lawfully enlarge its authority to include the purchase of certificates of deposit for periods both shorter and longer than those for which statutory authority presently exists. The interest limitations of K.S.A. 1974 Supp. 12-1676 as amended apply by its terms to only those investments authorized by statute, and not to those additional investments which may be authorized by county resolution.

Yours very truly,

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