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ATTORNEY GENERAL OPINION NO. 80-89

Mr. Joseph O'Sullivan
Reno County Attorney
Law Enforcement Center
210 West First Street
Hutchinson, Kansas 67501

Re: Counties and County Officers--Fire Protection--Exercise of Home Rule Authority to Raise Revenue for Salaries of Fire Fighters

Synopsis: There is no specific statutory authority providing for the payment of salaries and salary-related expenses of fire district personnel in fire districts created pursuant to K.S.A. 1979 Supp. 19-3601, and the proceeds from the levy authorized by K.S.A. 19-3610 may not be used for the payment of salaries and salary-related expenses.

A home rule resolution by which the board of county commissioners has provided for the levy of a tax (in addition to the aforesaid levy) on the property in a fire district created pursuant to K.S.A. 1979 Supp. 19-3601 is beyond the scope of "county business" and "local legislation and administration," and is therefore invalid and ineffective.

Statutes and constitutional provisions cited herein: K.S.A. 19-3610, 19-3612a, 19-3613, 19-3620 and 19-3622; K.S.A. 27-315 et seq.; K.S.A. 1979 Supp. 19-101a, 19-101a et seq., 19-117, 19-3601, 19-3601a and 19-3601b; Article 2, Section 21, Kansas Constitution; Article 3, Section 1, Kansas Constitution.

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Dear Mr. O'Sullivan:

You have asked for our opinion on two questions relating to the authority of the board of county commissioners to produce revenue for the payment of salaries of full-time fire fighters working for a fire district located in Reno County, which district was organized pursuant to K.S.A. (now 1979 Supp.) 19-3601.

First, you ask whether proceeds of the tax levied pursuant to K.S.A. 19-3610 may be used for the payment of salaries and salary-related expenses for full-time employees of the district. You state that it is your opinion that such proceeds may not be so used since the statute provides that

> "[a]ll proceeds of such levy shall be used for the purchase and maintenance of fire fighting materials, equipment and apparatus and the maintenance and equipping of buildings belonging to the district and for the payment to any city for fire protection services under contract with the district." K.S.A. 19-3610.

We concur in your interpretation of the above-quoted statute. As you have correctly noted, there is no specific statutory authority providing for the payment of salaries of fire district personnel in counties the size of Reno County. In contrast, fire districts created pursuant to K.S.A. 19-3613, in any county with a population of more than 90,000 containing a city of the first class with a population less than 50,000, have specific authority for the payment of compensation of district employees, under K.S.A. 19-3620 and 19-3622.

Accordingly, you state that you advised the county commissioners that they could adopt a resolution to establish a tax levy to produce revenue for the payment of salaries and salary-related expenses of employees of the fire district by exercise of the Board's home rule authority under K.S.A. 1979 Supp. 19-101a *et seq*. You further state that the Board adopted Home Rule Resolution VI in June, 1979, establishing an eight-mill levy in the district for that purpose. You have asked for our opinion whether the Board properly exercised its home rule authority in the adoption of the resolution providing for the aforesaid levy for salaries.

K.S.A. 1979 Supp. 19-101a provides, in pertinent part:

> "(a) 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 [certain enumerated] limitations, restrictions, or prohibitions."

The threshold question which must be addressed to answer your second inquiry is whether the exercise of power to establish the aforesaid levy comes within the meaning of "county business and . . . local legislation and administration" and thus within the scope of the county's home rule powers. In our opinion, it does not, and we conclude that Reno County Home Rule Resolution VI is invalid and ineffective.

Importantly, it is our judgment that the question of payment of salaries of fire district personnel is not a matter of "county business" but rather a matter of business of the fire district and its governing body. Certainly, as the statutes in question expressly provide, the board of county commissioners may serve as the fire district's governing body (as is the case in Reno County) or the board may appoint a fire district board of trustees. See K.S.A. 1979 Supp. 19-3601 and K.S.A. 19-3612a. However, the authority of the county commissioners, serving both as the governing body of the county and as the governing body of the fire district, is not coextensive. A fire district is a separate and distinct political or taxing subdivision of the state, vested with certain governmental powers as prescribed by the legislature. Under K.S.A. 1979 Supp. 19-3601a,

> "the governing body [of the fire district] shall have the authority to enter into contracts, operate and maintain fire fighting equipment, to acquire and construct buildings to house the same, to buy, sell and dispose of real property, and . . . shall have the right of eminent domain." (Emphasis added.)

Under K.S.A. 1979 Supp. 19-3601b, the fire district's governing body has authority to issue general obligation bonds and no-fund warrants for fire district purposes. In short, as they are described in Antieau's Local Government Law, Vol. 3A, Independent Local Government Entities, §30D.00, fire protection districts are "separate entities with independent corporate life." Hence, county commissioners serving as the governing body of both the county and the fire district wear two different hats. Wearing the "hat" as the governing body of the fire district, the board of county commissioners has no home rule power, but may only exercise the authority granted to the district by the legislature. But, thus considered, your question may be rephrased: May the board of county commissioners, wearing the "county hat," exercise the county's home rule power to establish a tax levy in the district for fire district purposes? We think not, for the following reasons.

The question you have raised is very much analogous to the question considered in Attorney General Opinion No. 79-262. In that opinion (attached hereto for your consideration) we determined that a city had no home rule authority to dissolve a public airport authority created pursuant to state law (the Surplus Property and Public Airport Authority Act, K.S.A. 27-315 et seq.), and that such an authority may only be dissolved as provided by the state law. We noted that while the airport authority could only come into existence by some action of the city, action to "trigger" the process of creation of the authority, the authority was nonetheless a creature of state law, "an agent of the law," empowered to function as prescribed by state law. Accordingly, we concluded that "once created, the Authority is subject only to such control by the City as the latter is given by the Act" and that "the matter is no longer a 'local affair' over which the City has power." Attorney General Opinion No. 79-262, p. 5.

Likewise, a fire district, which may only come into existence by action of the board of county commissioners and whose governing body is the board of county commissioners pursuant to state law, is "an agent of the law," a creature of state law empowered to function only as prescribed by state law. Therefore, once the board of county commissioners "triggers" the process of creation of a fire district, the matter of fire protection in the district thus created is no longer a matter of "county business" upon which home rule powers may be exercised, but is only the business of the fire district. The fire district is empowered to levy a tax, pursuant to K.S.A. 19-3610, but, as noted above, the proceeds of that tax may not be used for the payment of salaries and salary-related expenses. Since the matter of fire protection in the district is beyond the scope of "county business," once a fire district is established in accordance with state law, the county thereafter has no power to provide for an additional tax levy in the district for fire protection purposes.

A similar question was considered by the Kansas Supreme Court in Russell State Bank v. Steinle, 159 Kan. 293 (1944). The question presented in that case was whether the board of county commissioners was empowered to abolish a county court which the county itself established in accordance with an act of the legislature. The board argued that under Article 2, Section 21 of the Kansas Constitution (since amended), the legislature conferred legislative power upon the board of county commissioners to create the court and that "the power conferred to create the court includes by implication the power to abolish it." 159 Kan. at 296. The Court disagreed, stating, in pertinent part:

> "It will be observed the powers of the legislature which may be conferred upon county tribunals are only powers '. . . of local legislation and administration. . . .' (Emphasis supplied.) We have held that under this constitutional provision only such local legislative and administrative powers as pertain to the transaction of county business can be conferred. . . . Manifestly the county court was not created for the purpose of transacting the business affairs of Russell county or any other county. The court is a judicial tribunal vested with powers and jurisdiction prescribed by law. . . . The mere fact this particular court was located within the physical boundaries of Russell county did not make it a tribunal for transacting the business affairs of the . . . county. . . ." (Emphasis in original.) 159 Kan. at 296.

The Court determined that the constitutional provision relied upon by the board did not authorize the legislature to confer upon county commissioners legislative power to create the court, but that only the legislature was empowered to provide for additional courts, under Article 3, Section 1 of the Kansas Constitution. Contrary to the board's assertion,

> "the county court . . . was not created by any single board of county commissioners but by an act of the legislature. . . . The legislature prescribed the jurisdiction of the court it created. The legislature designated its officers and provided for their compensation. The legislature regulated the practice and the procedure in such courts. . . . The legislature therefore left nothing for any board of county commissioners to do with respect to the establishment of a county court in any county except to determine whether it wanted the newly created court. If it did it was merely required to adopt the provisions of the act which created the court." 159 Kan. at 297-298.

Analogously, in consideration of the instant question, the legislature has provided the means by which fire districts may be established by boards of county commissioners, and the legislature has prescribed the authority such boards, acting as the governing bodies of fire districts, may exercise. To be sure, a fire district thus created occupies territory within the territorial boundaries of the county creating it, but, as in the _Steinle_ case, that fact does not make the district a tribunal or political subdivision created for the transaction of _county business_, nor does it mean that the board of county commissioners may exercise its powers to control or otherwise affect such district, except as authorized by the statutes by which fire districts are established. Acting as the governing body of a fire district, the board of county commissioners conducts _the business of the fire district_, a separate and distinct political and taxing subdivision of the state, and as noted above, its authority therefor is not coextensive with its authority as the governing body of the county under K.S.A. 1979 Supp. 19-101a _et seq_.

Finally, in our judgment, the county's home rule taxing authority, as limited by the provisions of K.S.A. 1979 Supp. 19-101a and 19-117, only empowers the county to levy a countywide ad valorem tax. Since the county may only levy such tax for the transaction of "county business," within the scope of "local legislation and administration," the county therefore has no authority to levy a tax which will burden only the property lying within the territory of a fire district created pursuant to state law, the proceeds from which will only be used for fire protection within said district.

We think it important to distinguish here between the levying of an ad valorem property tax pursuant to the county's home rule power, and the exercise of the county's home rule power to establish a special benefit district and to levy special assessments on the property benefited, when not otherwise authorized by state law. We have no doubt that the creation of such special benefit districts within the county would be a permissible exercise of the county's home rule authority, and nothing in the foregoing opinion should be construed to suggest to the contrary. However, it is our judgment, as more fully explained above, that once the board of county commissioners has established separate political or taxing subdivisions, such as fire districts, as provided by state law, and acts as the governing body of such districts or subdivisions, the board may not exercise its home rule authority in so doing because the business of such districts or subdivisions is not "county business" within the contemplation of the home rule statutes.

In summary, we conclude that there is no specific statutory authority providing for the payment of salaries and salary-related expenses of fire district personnel in fire districts created pursuant to K.S.A. 1979 Supp. 19-3601, and that the proceeds from the levy authorized by K.S.A. 19-3610 may not be used for the payment of salaries and salary-related expenses. Secondly, we conclude that a home rule resolution by which the board of county commissioners has provided for the levy of a tax (in addition to the aforesaid levy) on the property in a fire district created pursuant to K.S.A. 1979 Supp. 19-3601 is beyond the scope of "county business" and "local legislation and administration" and is therefore invalid and ineffective.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Steven Carr

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RTS:WRA:gk
Enclosure: Attorney General Opinion No. 79-262