STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

October 20, 1981

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 81-246

Dorothy K. White
County Clerk
Room 211
Sedgwick County Courthouse
Wichita, Kansas 67203

Re: Cities and Municipalities -- Governmental Organization -- Consolidated Agency; Power to Tax

Synopsis: The resolutions passed by the city of Wichita and Sedgwick County creating the City-County Intergovernmental Council are invalid as beyond the authority granted by K.S.A. 12-3901 et seq. The Sedgwick County Clerk may refuse to certify a budget for said Council and may refuse to collect taxes levied by said Council. Cited herein: K.S.A. 12-3901, 12-3903, 12-3907, 12-3908, 12-3909, K.S.A. 79-5001.

* * *

Dear Ms. White:

You have requested the opinion of this office regarding the recently created City-County Intergovernmental Council jointly established by the City of Wichita and Sedgwick County. Specifically you desire to know whether this new agency, ostensibly created pursuant to K.S.A. 12-3901 et seq., has the authority to levy taxes "on its own accord." For the reasons detailed below, we are of the opinion such an agency is totally without authority to levy and collect taxes.

Briefly, by way of background, we note the city and county desire to combine the administration of certain common governmental functions, namely, emergency communications, flood control, refuse disposal, planning, community health and animal control. In addition, the new agency is designed to levy its own taxes, so that neither the city nor the county will continue to budget and appropriate for such operations.

The impact of this maneuver is to permit the city and county to spend additional amounts on other government services without increasing taxes beyond the maximum amount permitted under the "Tax Lid Law," K.S.A. 79-5001 et seq.

As noted, the city and county have attempted to create the new agency pursuant to the authority granted by K.S.A. 12-3901 et seq. The 1974 Kansas Legislature enacted this legislation with the following statement of purpose:

> "It is the purpose of this act to authorize and permit political and taxing subdivisions of this state to more efficiently and effectively serve the needs of their constituents by consolidating or cooperating in the consolidation of operations, procedures and functions of offices and agencies of such subdivisions which may be more efficiently and effectively exercised or provided by a single office or agency."

Upon a determination that duplication exists in the operations, procedures or functions of the offices or agencies of any political or taxing subdivisions, the act authorizes the governing bodies of such subdivisions

> "to consolidate any or all of the operations, procedures or functions performed or carried on by such offices or agencies by the passage of a resolution or identical resolutions setting out the time, form and manner of consolidation and designating the surviving office or agency." K.S.A. 12-3903.

The consolidated office or agency is to "be the successor in every way to the powers, duties and functions now or hereafter granted to or imposed by law upon the offices or agencies so consolidated." K.S.A. 12-3907.

There is no statute expressly granting authority to the new agency to levy a tax to support its operations. Moreover there are numerous indications in the Act that such power is not to be implied by the above-quoted language.

First, it is the creation of a new office or agency and not creation of a new taxing or political subdivision which is authorized by K.S.A. 12-3901 et seq. Since the existing "offices" and "agencies" of these local governments do not currently have the power to levy taxes, the attempt to bestow this power to tax on the new consolidated agency is an attempt to grant a power reserved in the legislative body of the po-

litical subdivision. For example, since neither the flood control agency of Sedgwick County nor the Wichita planning agency have been granted by law the power to levy taxes, but rather rely upon the budgeted and appropriated funds provided by the city or county, the consolidated agency created by the proposed merger cannot accede to such power. Simply put, the consolidated agency or office does not receive the general powers of the political or taxing subdivisions creating it, rather it only succeeds to the powers, duties and functions of agencies or offices so consolidated.

Second, the act clearly contemplates that revenues will be raised by the political and taxing subdivisions and appropriated to or otherwise given to the new consolidated agency or office. Specifically, K.S.A. 12-3908 provides:

> "Any political or taxing subdivision of this state entering into an agreement with any other such political or taxing subdivision pursuant to this act may appropriate funds and may sell, lease, give, or otherwise supply to any surviving office or agency designated by an agreement made hereunder such personnel or services therefor as may be within its legal power to furnish."

Such grant of authority would have been unnecessary if the new agency was endowed with the authority to levy taxes to support its operations. There is no evidence that any other form of funding was contemplated. We call your attention to the doctrine of "expressio unius est exclusio alterius." In this instance that is, the granting of an express authority to perform a function in one fashion excludes the implication that it may be performed in another fashion. This doctrine is amply expressed in Kansas in the case of LeSueur v. LeSueur, 197 Kan. 495 (1966), wherein the Court said:

> "The direct mention of this discretionary authority [to grant or refuse a divorce] implies exclusion of any other implied authority. The general rule is thus stated in 82 C.J.S., Statutes, §333a, p. 668:
>
> "'Under the general rule of express mention and implied exclusion, the express mention of one matter excludes other similar matters not mentioned; every positive direction in a statute contains an implication against everything contrary to it; the specification of one particular class excludes all other classes; and

> an affirmative description of powers granted implies a denial of all non-described powers.'" 197 Kan. at 500.

Hence, to now imply authority to grant to a consolidated agency the power to tax under K.S.A. 12-3901 et seq., rather than to merely receive revenues by appropriation from the political or taxing subdivisions creating the agency, would be contrary to this rule of statutory construction.

Third, K.S.A. 12-3909 states in pertinent part that "[n]othing in this act shall be construed as authorizing the consolidation of any political or taxing subdivision with any other political or taxing subdivision." The most fundamental function of a taxing subdivision is the power to levy taxes. Consolidation of this power in another political or taxing subdivision seems clearly beyond the intent of the legislature. Indeed, were we to sanction the interpretation offered by the City of Wichita and Sedgwick County that this action is only a partial consolidation of political or taxing subdivisions, such subdivisions could consolidate all their functions and powers, save one agency or function, and create consolidated government or a series of consolidated agencies, leaving only a skeleton city and county government. We are convinced beyond all doubt that such was not the desire of the legislature, and that the legislative will is amply expressed in K.S.A. 12-3909.

The Kansas Supreme Court dealt with a similar attempt to claim status as a "taxing subdivision" in Fort Scott Board of Library Directors v. Drake, 147 Kan. 157 (1938). In that case the legislature had included "library boards" in the definition of "taxing subdivision" in the budget law. With the city desiring to levy all the taxes it could without levying any for library purposes, the governing body of the library attempted to prepare its own budget and certify the tax levy to the county clerk. Upon suit filed by taxpayers the Supreme Court rejected this procedure. The Court concluded as follows:

> "The specific question for our determination is whether the inclusion of the words 'library boards' in the first section of the budget law (G.S. 1935, 79-2925) made plaintiff a 'taxing subdivision' of the state. We feel confident in holding that it did not. Prior to that time plaintiff did not have authority to levy taxes, hence was not a taxing subdivision of the state. It was not the purpose of the budget law to create new taxing subdivisions of the state. It did not attempt to do

> so. The status of plaintiff as to being or not being a taxing subdivision of the state was not changed by the budget law. Section 12-1201, G.S. 1935, requiring the governing body of the city to levy a tax annually for the support of the library, was not amended, or attempted to be amended, or repealed, by the budget law." Id. at 159.

The analogy to the present circumstance is inescapable and we do not believe the Kansas courts would be inclined to hold that the legislature intended by K.S.A. 12-3901 et seq. to authorize the creation of new taxing subdivisions.

In addition, the legislative history of 1974 Senate Bill No. 59, enacted as L. 1974, Chapter 426, does not support the attempt to consolidate the taxing function in a new taxing subdivision. The interim study report [I Interim Study Report to the 1973 Kansas Legislature, 356 (1972)] notes the opposition to consolidated city and county government. Nowhere does the report suggest that any function other than administrative functions should be consolidated. Moreover, we are aware of no Kansas judicial decisions or opinions of the Attorney General which sanction such a delegation (under K.S.A. 12-3901 et seq.) of a subdivision's power to tax.

It has been argued that Kansas Attorney General Opinion No. 74-361 supports the conclusion that a new taxing subdivision may be created under K.S.A. 12-3901 et seq. Attorney General Opinion No. 74-361 declared an animal control commission created by a number of cities in Johnson County to be a "political subdivision" for purposes of the social security laws. The commission created by the joint action was established by the cities under home rule powers (Kan. Const., Art. 12, §5) rather than K.S.A. 12-3901 et seq., as is the case here. Moreover, the commission was a purely administrative agency which did not levy taxes. Indeed, the opinion observed:

> "As we view the Commission thus created and empowered, it is a legal entity separate and apart from each of the participating cities. It prepares and adopts its own budget, which is presented to and approved or adjusted and approved by each of the participating cities, to which they must then contribute proportionately, as provided in the ordinance. Once the budget is thus approved, control of the funds thus contributed to the Commission is vested solely and exclusively in that body." (Emphasis added.) VIII Kan. Att'y. Gen. Op. 223-224 (1974).

Reliance upon this opinion to support the legality of the resolutions bestowing taxing power upon the City-County Intergovernmental Council is sorely misplaced.

Finally, we are struck by the irony of the situation presented here. K.S.A. 12-3901 et seq., is a law designed to promote efficiency in government. Indeed, some conferees to the interim study made their support of consolidated city-county government contingent upon saving money for the taxpayer. Sedgwick County and the City of Wichita now attempt to rely upon this statute to permit circumvention of the tax lid law. Clearly the purpose here is to permit additional funds to be raised and expended within Sedgwick county for government services, and not for the purpose of reducing the costs of those services. Such action is repugnant, contrary to the expressed purpose of the Act and in our opinion, invalid.

In passing, we note that the resolutions adopted by the city and county calling for the tax levy by the consolidated agency make provision for levy of a tax by the county if it is determined that the Intergovernmental Council lacks authority to levy such a tax. Since it is our opinion that the Council may not levy a tax, the provision in the resolutions authorizing such tax is to be considered null and void. The resolutions provide a procedure for funding the Council in the event that the Council is determined to lack taxing authority. This procedure calls for the city to "pass to the County its tax lid capacity for the joint operations." This language is incorporated in the resolutions in question here and in the jointly adopted resolutions (No. 147-1981) passed by the City and County in July of 1981. We are concerned however to know the authority under which the city proposes to transfer the city's "tax lid capacity." Certainly, the city is authorized to impose a tax for the purpose of supporting the functions to be performed by the Intergovernmental Council. Revenues from the city tax may be appropriated to the Council pursuant to K.S.A. 12-3908. However, it is unclear as to the authority under which the city proposes to transfer its taxing authority to the county. Such transfer of authority is not authorized by K.S.A. 12-3901 et seq. This concern raises serious question regarding the force and effect of Resolution No. 147-1981 jointly adopted by the parties on July 21, 1981 and referenced in the second resolution.

Therefore, in our opinion, the resolutions passed by the city of Wichita and Sedgwick County creating the City-County Intergovernmental Council are invalid as beyond the authority

granted by K.S.A. 12-3901 et seq. The Sedgwick County Clerk may refuse to certify a budget for said Council and may refuse to collect taxes levied by said Council.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Bradley J. Smoot
Deputy Attorney General

RTS:BJS:hle