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ATTORNEY GENERAL OPINION NO. 82- 17

The Honorable August Bogina, Jr., P.E.  
Kansas State Senator  
13513 West Ninetieth Place  
Lenexa, Kansas 66215

Re: Cities and Municipalities--Home Rule Powers--  
Charter Ordinances

Synopsis: The provisions of the transient guest tax act, K.S.A. 1980 Supp. 12-1696 et seq., are non-uniform in application to cities and hence are subject to charter ordinance pursuant to Article 12, Section 5 of the Kansas Constitution. However, after having exempted itself from the provisions of a non-uniform state statute, a city may not impose administrative duties upon a state agency. Cited herein: K.S.A. 1980 Supp. 12-1696, 12-1697, 12-1699, 12-16,101; Kan. Const., Art. 12, §5.

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Dear Senator Bogina:

You have requested our opinion as to the legality and validity of Charter Ordinance No. 16 of the city of Lenexa, Kansas. Said ordinance, which is attached hereto as Exhibit "A," exempts the city of Lenexa from the provisions of K.S.A. 1980 Supp. 12-1696, 12-1697, 12-1698, and 12-16,101 and provides substitute and additional provisions relating to the levy of a transient guest tax for tourism and conventions. You specifically question the legality of the city of Lenexa imposing said tax at a rate not to exceed six percent, as is permissible under section 3 of the charter ordinance, and the use of the tax levy, under section 11 of the ordinance, to retire existing bonds for

"community centers, parks, or recreational facilities," and "to defray the cost of providing municipal services to convention and tourism functions, such as, but not limited to, police, fire, street department or park and recreation departments."

Article 12, Section 5(c)(1) of the Kansas Constitution provides as follows:

"Any city may by charter ordinance elect in the manner prescribed in this section that the whole or any part of any enactment of the legislature applying to such city, other than enactments of statewide concern applicable uniformly to all cities, other enactments applicable uniformly to all cities, and enactments prescribing limits of indebtedness, shall not apply to such city." (Emphasis added.)

In City of Junction City v. Griffin, 227 Kan. 332 (1980), the Kansas Supreme Court observed the following test regarding uniform applicability:

"The grant of home rule power to cities under Article 12, §5 of the Kansas Constitution has therefore added a new dimension to be considered in determining whether the legislature has occupied a field. Legislative intent to preempt a field is alone insufficient. It is now necessary to examine the provisions of the State enactment to determine whether the constitutional standard of uniform application to cities has been met. If not uniform, legislative intent as expressed within the enactment will not overcome the constitutional requirement for uniform application.

. . . .

"Regardless of whether an enactment of the State legislature addresses a matter of statewide or a matter of local concern, a city may in either case act by charter ordinance to exempt itself from all or part of the enactment unless the State enactment applies uniformly to all cities." Id. at 336-337.

In Griffin, the Kansas Supreme Court also held that Section 5(d) of the Home Rule Amendment requires a liberal construction of the powers and authority granted cities for the purpose of giving cities the largest measure of self-government. Id., Syllabus No. 1.

In accordance with these pronouncements of the court, the Lenexa ordinance is valid unless the 1977 transient guest tax act, K.S.A. 1980 Supp. 12-1696 et seq., applies uniformly to all cities. In this regard, it should be noted that K.S.A. 1980 Supp. 12-1697(a) authorizes the governing body of any city to levy a transient guest tax at not to exceed the rate of 2% upon the gross receipts derived from or paid by transient guests for sleeping accommodations in any hotel, motel, or tourist court. However, another section of the 1977 Act, K.S.A. 1980 Supp. 12-1699, provides, in part, that "no city located within a county where a transient guest tax is being levied and collected according to law shall levy any such tax."

Therefore, cities located within the subject three counties are prohibited from levying a transient guest tax under the 1977 Act, whereas all other cities are permitted to levy such a tax. Under such circumstances, it is our opinion that the 1977 transient guest tax act, K.S.A. 1980 Supp. 12-1696 et seq., is not uniformly applicable to all cities, and that a city may, in accordance with the Home Rule Amendment, exempt itself from any part of said act. As a factual matter, we are advised that there are currently three counties (Finney, Geary, and Reno) in which county-wide transient guest taxes are being levied and collected.

Having concluded that a city may exempt itself in whole or in part from the provisions of K.S.A. 1980 Supp. 12-1696 et seq., it follows that sections 3 and 11 of Charter Ordinance No. 16 of the city of Lenexa, Kansas, constitute a valid exercise of the city's power of home rule under Article 12, Section 5(c)(1) of the Kansas Constitution. Said sections prescribe substitute provisions relating to the levy of a transient guest tax under the 1977 Act, as is specifically authorized under subsection (c)(2) of the Home Rule Amendment. However, we note that section 7 of the ordinance attempts to impose the responsibility for collection of the city tax upon the State Department of Revenue. Having exempted itself from the statute which authorizes a state agency to collect the transient guest tax, the city is not free to impose similar burdens on a state agency. Simply stated, state agencies are creatures of the state legislature, and cities, even in the exercise of their extensive home rule powers, lack authority to impose administrative duties on state agencies, as such is not a matter of local concern within the meaning of Article 12, Section 5.

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Therefore, in our judgment the provisions of the transient guest tax act, K.S.A. 1980 Supp. 12-1696 et seq., are non-uniform in application to cities and hence are subject to charter ordinance pursuant to Article 12, Section 5 of the Kansas Constitution. However, after having exempted itself from the provisions of a non-uniform state statute, a city may not impose administrative duties upon a state agency.

Very truly yours,



ROBERT T. STEPHAN  
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RTS:BJS:TRH:jm