



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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September 3, 1982

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ATTORNEY GENERAL

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CONSUMER PROTECTION 296-3751

ATTORNEY GENERAL OPINION NO. 82- 188

Delton M. Gilliland
Fairfax Township Treasurer
Tiffany Building
Lyndon, Kansas 66451

Virginia Kersten
Osage County Clerk
County Courthouse
Lyndon, Kansas 66451

Re: Roads and Bridges -- County and Township Roads --
Tax Levies by Townships; Effect of Election on
Certification of Budget and Levy Amount

Synopsis: Pursuant to K.S.A. 68-518c, a township located in a county which does not operate a county road unit system may make an annual tax levy of up to 5 mills for road purposes. If additional moneys are required, a resolution authorizing a levy of up to 8 mills may be passed. Such an increased figure is subject to the approval of township voters in an election if valid petitions to that effect are submitted. If such an election is held in conjunction with the general election in November, after the township is required to submit its budget and the county clerk is required to levy the tax at issue, such deadlines are directory in nature and may be enlarged to await the outcome of the election. Cited herein: K.S.A. 1981 Supp. 10-120, K.S.A. 68-518c, 72-8809, K.S.A. 1981 Supp. 79-1801, 79-1803 (as amended by L. 1982, ch. 391, §38), K.S.A. 79-1962.

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Dear Mr. Gilliland and Ms. Kersten:

As the Treasurer for Fairfax Township and the Osage County Clerk, respectively, you request the opinion of this office

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on several interrelated questions concerning the application of K.S.A. 68-518c. This statute, which allows certain townships to increase the annual amount levied for road purposes, also provides that the increase is subject to a referendum of the township voters. Your opinion request concerns problems which the election schedule creates with statutes providing for the approval of the township budget and the certification of the levies contained therein, as well as the actual levying of the necessary amounts.

In pertinent part, the relevant statute (K.S.A. 68-518c) states:

"The township board of any such township desiring to levy an annual tax for road purposes in an amount exceeding the limitation prescribed by K.S.A. 79-1962, but in an amount not exceeding eight mills, may adopt a resolution authorizing such levy and shall publish the same once each week for three consecutive weeks in a newspaper of general circulation in the township. If within thirty days after the date of the last publication of such resolution a petition, signed by electors of the township equal in number to not less than ten percent of the qualified electors of the township who voted for the office of governor at the last general election for such office, is filed in the office of the county election officer no such increased levy shall be made without having been approved by a majority of the electors of the township voting at an election called and held thereon. All elections held under the provisions of this section shall be called and held in the manner prescribed by K.S.A. 1980 Supp. 10-120, and amendments thereto." (Emphasis added.)

You inform us that the Fairfax Township Board, on May 25, 1982, passed a resolution providing for the 8 mill levy (rather than the 5 mill limit set by K.S.A. 79-1962) and that a petition protesting such an increase was properly filed as set forth by statute hereinabove. As a result, an election must be held before the 8 mill levy may be effective.

K.S.A. 68-518c refers to the provisions of K.S.A. 1980 Supp. (now 1981 Supp.) 10-120 in determining the manner of holding such an election. The latter statute provides that the proper municipal officer shall set the election to be held within 45 days after the necessary requirements have been met, or within

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90 days, if this longer period includes the date of a general election. As such was the case here, the county clerk set the election on this matter for the general election on November 2, 1982. However, as you note, this date is one day after the clerk is required to complete the task of spreading the tax levies which had been previously certified by the township. (K.S.A. 1981 Supp. 79-1803.) The deadline for such certification, we note, is August 25. (K.S.A. 1981 Supp. 79-1801.)

You first inquire whether the township may certify a budget to the county clerk on or before August 25 which contains the contested 8 mill figure. In our opinion, the higher figure may be used, as the necessary resolution authorizing such was passed as required by statute. While the increased figure cannot be levied without voter approval, this step does not occur until later in the process. Action by the township in August merely involves the certification by the board of the amount of tax to be levied in the future, and is not the actual levying itself.

Your next question concerns the effect of the November 1 deadline established by K.S.A. 1981 Supp. 79-1803, as amended by L. 1982, ch. 391, §38. Therein, the county clerk is required to "compute the final tax levy rate to be applied to each tract or lot of real property" and to deliver the certified tax rolls by that date. As it will be impossible for the county clerk to predict what the township road levy will be until the evening of November 2 at the earliest, you inquire how to resolve this apparent conflict.

It is our opinion that the problem is more apparent than real, given Kansas decisions concerning the effect of dealines like the November 1 date set by K.S.A. 1981 Supp. 79-1803, as amended. Like the August 25 date prescribed in K.S.A. 1981 Supp. 79-1801, [School Board of Rural High School Dist. No. 4 v. Rupp, 152 Kan. 636 (1940)], the November 1 date fixed by 79-1803 has been held to be directory, rather than mandatory. School Dist. No. 40 v. Clark County Commr's, 155 Kan. 636 (1942). This distinction was explained in City of Hutchinson v. Ryan, 154 Kan. 751 (1942), where the Court said:

"In determining whether statutory provisions are mandatory or directory, it is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system and dispatch of the public business, the provision is directory." Id. at Syl. ¶1.

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In light of these holdings, it is our opinion that the county clerk may await the outcome of the November 2 election before completing the spreading of the levies required by K.S.A. 1981 Supp. 79-1803. Therefore, if the 8 mill figure certified by the township board is rejected by the voters, the county clerk may use the lesser, 5 mill figure set by K.S.A. 79-1962. Such action is provided for in K.S.A. 1981 Supp. 79-1965. In this regard, the county clerk may advise the township board, in writing, that if the voters reject the increased mill levy, the clerk will change the amount of ad valorem taxes to be levied by the township under the authority of K.S.A. 68-518c. This written notice should be given to the board at least 7 days prior to November 3.

Your final question concerns the future effect of the township board's resolution to increase the road levy to 8 mills, if such action is approved by the voters in November, i.e. whether the increased levy will be effective in future years, or will additional board action be required at that time. In examining the language of K.S.A. 68-518c, we find nothing which would indicate that action must be taken in succeeding years to keep the increased levy in effect, once a resolution so providing has been enacted and, if subjected to an election, approved by the voters. This may be contrasted with other statutes where renewal is required at periodic intervals if the increased levy is to continue in effect. See, e.g., K.S.A. 72-8809, concerning approval of school district capital outlay fund limits at 5 year intervals. As it must be presumed that the legislature could have inserted such a requirement in the act of which K.S.A. 68-518c is a part, its absence is an indication of a contrary legislative intent.

In conclusion, pursuant to K.S.A. 68-518c, a township located in a county which does not operate a county road unit system may make an annual tax levy of up to 5 mills for road purposes. If additional moneys are required, a resolution authorizing a levy of up to 8 mills may be passed. Such an increased figure is subject to the approval of township voters in an election if valid petitions to that effect are submitted. If such an election is held in conjunction with the general election in November, after the township is required to submit its budget and the county clerk is required to levy the tax at issue, such deadlines are directory in nature and may be enlarged to await the outcome of the election.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General