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July 31, 1992

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ATTORNEY GENERAL OPINION NO. 92-103

Greg A. Bengston  
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Salina, Kansas 67401-0380

Re: Cities and Municipalities--General Provisions--  
Initiative Election on Levying Tax or Other Revenue  
Measure

Synopsis: A specific ad valorem tax levy may be proposed by electors under K.S.A. 12-138a if the authority for the tax is home rule power. If the specific levy is properly proposed under K.S.A. 12-138a, it must be put to a referendum, and if approved, the city must adopt it. A specific ad valorem tax may be proposed by electors under K.S.A. 12-3013 if the authority for the tax is statutory. A proposed levy is not necessarily inherently administrative in character and initiative is not precluded. Any levy adopted pursuant to initiative must be considered in determining the city's aggregate tax levy limit. Cited herein: K.S.A. 12-137; 12-138a; 12-138c; 12-3013; K.S.A. 1991 Supp. 25-301, as amended by L. 1992, ch. 194, § 2; 25-3602, as amended by L. 1992, ch. 194, § 3; K.S.A. 79-1948; K.S.A. 1991 Supp. 79-5022; 79-5022; 79-5036; Kan. Const., art. 12, sec. 5.

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Dear Mr. Bengston:

You ask our opinion on a number of questions concerning property tax levies proposed by petition.

First you ask whether a city may be required to levy a specific number of mills of ad valorem property tax dedicated to a specific purpose as the result of a vote initiated by petition pursuant to K.S.A. 12-138a or 12-3013.

Prior to the enactment of the home rule amendment to the Kansas constitution, a city's authority to levy taxes depended on legislation. Such statutes, which still play an important role, typically authorize a particular mill levy for a particular purpose. Additionally, cities are authorized to establish general funds. See K.S.A. 79-1948 et seq.

When the Kansas constitution was amended to grant cities home rule power, cities' authority to tax changed. Article 12, section 5(b) of the constitution now provides in relevant part:

"(b) Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class: Provided, That the legislature may establish not to exceed four classes of cities for the purpose of imposing all such limitations or prohibitions. Cities shall exercise such determination by ordinance passed by the governing body with referendums only in such cases as prescribed by the legislature, subject only to enactments of the legislature of statewide concern applicable uniformly to all cities, to other enactments of the legislature applicable uniformly to all cities, to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction and to enactments of the legislature prescribing limits of indebtedness. All

enactments relating to cities now in effect or hereafter enacted and as later amended and until repealed shall govern cities except as cities shall exempt themselves by charter ordinances as herein provided for in subsection (c)."

This amendment, in effect, reversed the presumption: Cities may now tax unless limited or prohibited by the legislature.

K.S.A. 12-137 et seq. is the procedure which cities must use in exercising their home rule taxing authority. K.S.A. 12-137 begins:

"Where, under the power of cities granted by paragraph (b) of section 5 of article 12 of the constitution of Kansas, the governing body of any city by ordinance proposes to levy for revenue proposes any tax, excise, fee, charge . . . which is not limited or prohibited or a procedure for the levy of which is not otherwise prescribed by enactment of the legislature as provided by said paragraph (b). . . ."

This statute then goes on to require enactment of the levy by a procedure very similar to enactment of a charter ordinance under article 12, section 5(c)(2).

K.S.A. 12-138a, which you inquire about, provides an initiative procedure by which "the question of levying any tax or other revenue measure, authorized by the provisions of this act or other enactment referring to this act," may be proposed by electors. By referring to "this act" the legislature has limited application of K.S.A. 12-138a to initiating a tax imposed under home rule authority, rather than a tax authorized by legislation, unless the general statute refers to K.S.A. 12-137 et seq.

You ask whether, under K.S.A. 12-137, a specific levy may be imposed. Specific levies are both constitutional and common -- many statutes provide for them and in fact article 11, section 5 of the Kansas constitution provides: "No tax shall be levied except in pursuance of a law, which shall distantly state the object of the same; to which object such tax shall be applied."

Is it mandatory for the city to enact such a tax if properly proposed? K.S.A. 12-138a provides, in part: "If a majority of the electors voting thereon at such election shall approve the proposed tax or other revenue measures, the governing body of such city shall then provide by ordinance for the levy of such tax or revenue measure." (Emphasis added). The language of the statute makes it mandatory for the city to impose the tax assuming the tax is properly proposed and otherwise legal.

You next ask whether a tax levy may be initiated under K.S.A. 12-3013. K.S.A. 12-3013 sets forth a general procedure for petitions proposing ordinances and referendums based on the petitions. Subsection (e) provides:

"(e) The provisions of this section shall not apply to:

"(1) Administrative ordinances;

"(2) ordinances relating to a public improvement to be paid wholly or in part by the levy of special assessments; or

"(3) ordinances subject to referendum or election under another statute."

Because levies enacted under home rule authority are subject to a separate procedure in K.S.A. 12-137 et seq., only levies authorized by statute may be proposed under K.S.A. 12-3013.

You suggest that a levy may not be initiated under this section as a levy would amount to an "administrative ordinance." In City of Lawrence v. McArdle, 214 Kan. 862 (1974) the Court set forth guidelines for determining whether a proposed ordinance is legislative and proper for initiative and referendum, and when the ordinance is administrative and not proper for initiative. The court said:

"One crucial test for determining that an ordinance is administrative or legislative is whether the ordinance is one making a new law or one executing a law already in existence. Permanency and generality of application are two additional key features of a legislative ordinance.

"Acts constituting a declaration of public purpose and making provisions for ways and means of its accomplishment may be generally classified as calling for the exercise of legislative power. Acts dealing with only a small segment of an overall policy question are generally of an administrative character.

"Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of policy." 214 Kan. at Syl. ¶ 2, 3 and 4.

The determination of whether a proposed ordinance is administrative or legislative is made on a case by case basis. Rauh v. City of Hutchison, 223 Kan. 514, Syl. ¶ 3 (1978). We do not view a proposal for an ordinance creating a levy as necessarily administrative in character. Whether a proposed levy is administrative or legislative would depend on the individual facts and circumstances.

You next ask the impact of K.S.A. 12-138c on any ordinance proposed. K.S.A. 12-138c provides:

"All ad valorem tax levies, levied by cities under the authority of article 12, section 5 of the constitution of the state of Kansas, are hereby limited or prohibited as authorized by said article 12, section 5, in the manner herein provided. Cities are hereby prohibited from levying any such taxes, the ordinance authorizing the levy of which does not specifically authorize the use of a portion of the proceeds of the levy to pay the principal of and interest on special obligation bonds issued by such city under the provisions of K.S.A. 12-1774, and amendments thereto, to finance, in whole or in part, such redevelopment project."

You are concerned with the portion referring to using proceeds to pay for bonds. The purpose of this language is discussed in great detail in State ex rel Schneider v. City of Topeka, 227 Kan. 115 (1980), and need not be repeated here, except to say it makes tax increment financing possible. K.S.A. 12-138c clearly indicates what language must be included in the ordinance.

K.S.A. 1991 Supp. 25-3601, as amended by L. 1992, ch. 194, § 2, sets forth the requirements for all petitions. This section's requirements control unless a specific provision in another statute is in conflict. K.S.A. 1991 Supp. 25-3602(b), as amended by L. 1992, ch. 194, § 3 provides, in part

"Each petition shall, unless otherwise specifically required: (1) clearly state the question which petitioners seek to bring to an election. . . ."

We have consistently interpreted the requirements of K.S.A. 1991 Supp. 25-3602 quite strictly. See, e.g. Attorney General Opinions No. 85-160 and 86-19.

Because K.S.A. 12-138c indicates language that must be included in an ordinance, a petition filed under K.S.A. 1991 Supp. 12-138a, to properly state the question, would need to contain all provisions to be included in the ordinance, including the language of K.S.A. 12-138a. From this, it follows that when the question is then put to a referendum, the operative language must again be included.

You next ask if the tax levies enacted pursuant to K.S.A. 12-138a et seq. are included in a city's aggregate tax levy limit under K.S.A. 1991 Supp. 79-5022. You state that you recognize that a 12-138a home rule levy is not listed as exempt under K.S.A. 1991 Supp. 79-5028.

We see no evidence of legislative intent for home rule levies not to be included within the aggregate limit. We note that in exercising home rule taxation, a city is still bound by the legislature's limitations on indebtedness. As such, if such home rule levy would cause the city to exceed the limit, the city would have to suspend the levy limit, K.S.A. 79-5029,

charter out of it pursuant to K.S.A. 1991 Supp. 79-5036, or  
reduce some other levy.

Very truly yours,



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