

XVI Kan. Op. Atty. Gen. 6 (Kan.A.G.), Kan. Atty. Gen. Op. No. 82-17, 1982 WL 187506

Office of the Attorney General

State of Kansas

Opinion No.

82

17

January 28, 1982

**\*1 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.

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

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.

\*2 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.

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,

\*3 Robert T. Stephan  
Attorney General of Kansas  
Terrence R. Hearshman  
Assistant Attorney General

XVI Kan. Op. Atty. Gen. 6 (Kan.A.G.), Kan. Atty. Gen. Op. No. 82-17, 1982 WL 187506

Kan. Atty. Gen. Op. No. 87-185 (Kan.A.G.), 1987 WL 290509

Office of the Attorney General

State of Kansas

Opinion No.

87

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185

December 29, 1987

**\*1 Re: Bonds and Warrants—Miscellaneous Provisions—Interest Rates; Limitations**

Cities and Municipalities—General Provisions—Countywide and City Retailers' Sales Taxes; Proceeds as Guarantee for Payment of Bonds

Cities and Municipalities—Miscellaneous Provisions—Transient Guest Tax

**Synopsis: Sales tax revenue bonds issued by a city or county pursuant to L.1987, ch. 60, § 7, are subject to the interest rate limitations which apply to bonds as stated in K.S.A. 10-1109, as amended.**

A city issuing sales tax revenue bonds may apply revenues derived from a transient guest tax levied in the city to the payment of sales tax revenue bonds if such use is consistent with the laws and ordinances authorizing the transient guest tax and providing for the objects of its expenditures. The existence of such additional security may be conveyed to bondholders in the same manner as other credit enhancements.

Pursuant to the Home Rule Amendment to the Kansas Constitution, a city may issue bonds backed by a pledge of revenue derived from the levy and collection of a transient guest tax. Cited herein: K.S.A. 10-1009, as amended by L.1987, ch. 60; K.S.A.1986 Supp. 12-187; 12-195, as amended by L.1987, ch. 60; K.S.A. 12-1696; K.S.A.1986 Supp. 12-1698; K.S.A. 12-1699; Kan. Const., Art. 12, § 5.

Robert J. Watson  
City Attorney  
City of Overland Park  
8500 Santa Fe Drive  
Overland Park, Kansas 66212

Dear Mr. Watson:

As attorney for the city of Overland Park you seek an opinion on three questions relating to the city's proposed issuance of bonds to be paid from the revenue produced by a local option sales tax (as authorized by L.1987, ch. 60) and the possible use of revenues generated by the city's transient guest tax to further guarantee payment of the sales tax revenue bonds.

Chapter 60 of the Kansas Session Laws of 1987 amends K.S.A.1986 Supp. 12-195 to authorize Kansas cities and counties which receive revenue from a local option sales tax (levied pursuant to K.S.A. 12-187 et seq.) to issue bonds backed by a pledge of those revenues. The bonds may be issued to pay for:

"[A]ll or any portion of the cost of public facilities or improvements of [the] city or county for which [the] city or county is authorized pursuant to the constitution or laws of this state to issue general obligation bonds, excluding any facilities or improvements to be used for commercial or retail purposes." L.1987, ch. 60, § 7(b).

Your first question about bonds issued under the new law concerns the interest rate on such bonds. L.1987, ch. 60 provides in § 7(b)(1) that such bonds:

"[M]ay bear interest payable at such times and at such rate or rates ... all as the city or county shall determine."

Section 6 of Chapter 60 amends K.S.A. 10-1009 to provide:

"The maximum stated rate of interest which may be fixed on bonds issued by a municipality or taxing subdivision of the state of Kansas shall be determined on the day the bonds are sold and shall not exceed the index of treasury bonds published by the weekly Credit Markets, in New York, New York, on the Monday next preceding the day on which the bonds are sold, plus 2%." L.1987, ch. 60, § 6. (Emphasis added.)

\*2 You ask whether, in our opinion, the language of Section 7(b)(1) of Chapter 60 quoted above may be interpreted to exempt sales tax revenue bonds from the interest rate limitations stated in K.S.A. 10-1009, as amended by Section 6 of Chapter 60.

The interest rate limitations stated in K.S.A. 10-1009, as amended, apply to "... bonds issued by a municipality or taxing subdivision of the state of Kansas." The statute does not qualify the term "bonds" with respect to the type of bond or nature of its security. Thus, in our opinion, the limitations stated in K.S.A. 10-1009 apply unless the bonds in question are specifically exempted. The language of § 7(b)(1) of Chapter 60 relating to interest rates on sales tax revenue bonds does not contain language exempting such rates from the generally applicable limitations stated in K.S.A. 10-1009, as amended.

We are not unmindful that numerous Kansas statutes authorizing the issuance of bonds specifically state that the interest rates payable on such bonds shall be limited by K.S.A. 10-1009. In our opinion, however, the failure to include such a statement in Chapter 60, § 7(b)(1) does not mean that sales tax revenue bonds are thereby exempted from the application of K.S.A. 10-1009. We are not of the opinion that an exception to the general statute may be found inferentially on the basis of language employed in drafting various unrelated legislation. Moreover, we note that K.S.A. 10-1009 was considered and amended by the 1987 legislature in Chapter 60, the same chapter which amends K.S.A. 12-195 to provide authority for the issuance of sales tax backed revenue bonds. Thus, we must presume the legislature recognized the two subjects as related. Had an exemption been intended for sales tax revenue bonds it easily could have been provided. In the absence a stated exemption, it is our opinion that sales tax revenue bonds issued by a city or county pursuant to L.1987, ch. 60, § 7 are subject to the interest rate limitations which apply to bonds stated in K.S.A. 10-1009, as amended by L.1987, ch. 60, § 6.

Your second question asks whether, in our opinion, the city may utilize, as additional security for a proposed issue of sales tax revenue bonds, revenues derived from the levy of a transient guest tax in the city. Your question has at least two facets, first, whether transient guest tax revenues may be so utilized and second, whether certain language in L.1987, ch. 60 precludes the use of transient guest tax revenues to further secure payment of sales tax revenue bonds.

Addressing the first aspect of your question, we note that the city of Overland Park levies a transient guest tax in the amount of 5% upon the gross receipts derived from the sale of guest accommodations at hotels, motels, and tourist courts within the city. The tax is levied pursuant to K.S.A. 12-1696 et seq. and three charter ordinances enacted by the city (Nos. 39, 41 & 42). Revenues produced by the tax are used to "promote tourism and conventions" in the city.

\*3 As is apparent from the fact the city has enacted three charter ordinances providing substitute provisions for the transient guest tax statutes, those statutes are subject to charter ordinances pursuant to the Home Rule Amendment to the Kansas Constitution (Art. 12, § 5). In Opinion No. 82-17 (attached) the Attorney General concluded the Transient

Guest Tax Act (K.S.A. 12-1696 et seq.) is non-uniform in its application to cities and hence subject to home rule charter ordinance. That opinion further concluded that such a charter ordinance legitimately might provide for a higher tax rate than permitted by the statute and for use of transient guest tax revenues to retire "existing bonds [issued] for community centers, parks, or recreational facilities."

Utilizing home rule authority, the city of Overland Park enacted Charter Ordinance No. 42 which exempts the city from K.S.A.1986 Supp. 12-1698 and enacts substitute provisions providing that revenue received from the transient guest tax shall be "... credited to such fund or funds of the City and shall be expended for such purposes and in such priority as shall be set out by the City in an ordinary ordinance." At present the city has provided for use of transient guest tax revenues by Ordinance No. TGT-1469 which provides in relevant part:

"SECTION 1. Revenue from the transient guest tax shall be credited to the Convention and Tourism Fund and shall be expended for convention and tourism purposes in the priority as follows:

"First To pay the costs of the tourism and convention activities of the Convention and Tourism Bureau which amount is contained in the annual budget proposed by the Chamber of Commerce, reviewed by the Convention and Tourism Committee, and approved by the Governing Body of the City.

"Second Any funds remaining shall be held in reserve and may be used for the payment of any expenditures relating to tourism and convention activities as determined by the Governing Body of the City."

In our opinion the ordinances discussed above provide sufficient authority for the city to utilize revenues produced by the transient guest tax to secure sales tax revenue bonds issued pursuant to L.1987, ch. 60, § 7 should the city governing body determine that such use is appropriate and consistent with the purpose of the transient guest tax.

Having so concluded, the second aspect of your question is whether a "pledge" of transient guest tax revenues to provide additional security for sales tax revenue bonds is permissible under the statute authorizing issuance of the latter bonds. This question relates to language in Chapter 60, § 7(b)(4) which provides that bonds issued pursuant to its authority shall plainly state:

"[O]n the face of such bond that it has been issued under this act, that the bonds shall be special obligations of the city or county payable solely and only from the revenues derived from the collection of such local sales taxes, and that, in no event shall the bonds constitute an indebtedness of the state of Kansas or the city or county for which the faith and credit of the state of Kansas or city or county is pledged." (Emphasis added.)

\*4 You ask whether the emphasized language should be read to prevent the city from utilizing any other available fund or source of revenue to provide additional security for the sales tax revenue bonds. The cited language makes an express pledge of the revenues derived from the local sales tax. It creates a lien upon those revenues and for the life of the pledge (the term of the bonds), precludes the lawful appropriation of those revenues to any other municipal purpose which would be prejudicial to the payment of the bonds. See McQuillin, *Municipal Corporations*, § 43.132 (3d Ed.1985).

The language which must appear on the face of a sales tax revenue bond stating that the bond is a special obligation payable "solely and only from the revenues derived from the collection of such local option sales taxes" makes it clear that a city or county issuing bonds pursuant to L.1987, Chapter 60, § 7 has no obligation under that statute to pay the bonds from any other source or fund. The recital required on the bond further states that the bonds so issued do not constitute an indebtedness for which the faith and credit of the state, city, or county is pledged. This is, however, the only language in Chapter 60, § 7 which indicates that the bonds are to be secured only with the revenues derived from local sales taxes. In fact, at least two other portions of the statute might be argued to contemplate the use of other revenues

to secure such bonds. Section 7(b)(1) of Chapter 60 relates to the provisions of an ordinance or resolution authorizing the issuance of sales tax revenue bonds and states that a city or county may provide therein for:

“[O]ther terms, covenants and conditions that the city or county deems reasonable and desirable, including without limitation those pertaining to ... the nature and extent of any security for payment of the bonds the custody and application of the proceeds of the bonds, the collection, transfer and disposition of sales tax revenues, the investing of bond proceeds or any funds pledged to the repayment of the bonds, and the rights, duties and obligations of the city or county and the owners of the bonds.” (Emphasis added.)

The emphasized portions of the statute quoted above certainly may be argued to contemplate the use of funds other than sales tax revenues to enhance the security for bonds issued pursuant to its terms. At the same time the statute requires that such bonds shall plainly state they are payable “solely and only” from local sales tax revenues. The intent of the legislature is at best, obscure.

Given these adverse expressions of intent we are left with the task of attempting to reconcile them in a manner best serving what the statute as a whole appears to require. The recital stating that the bonds are payable “solely and only” from sales tax revenue provides that the only lien produced by the bonds under the terms of the statute is a lien on the sales tax revenues. It is a clear statutory requirement that such a recital appear on the bonds. Giving effect to the other provisions of the statute, however, we do not believe that the required recitals prevent a city issuing bonds under the statute from voluntarily assuming the obligation to apply other lawfully available funds to the payment of sales tax revenue bonds. Thus, in our opinion a city issuing sales tax revenue bonds pursuant to L.1987, ch. 60, may apply revenues derived from a transient guest tax to further secure payment of sales tax revenue bonds as long as such use is permitted by the laws and ordinances authorizing the transient guest tax and providing for the objects of its expenditure.

\*5 This raises the obvious difficulty of how the existence of such additional security may be conveyed to bondholders. Obviously, a pledge of transient guest tax revenues to the payment of sales tax revenue bonds is inconsistent with the recital, required by § 7(b)(4) of Chapter 60, that such bonds are payable “solely and only” from sales tax revenues. While clarification from the legislature of the intended limitations would provide the best solution to this problem, in the meantime we might venture to suggest that a city issuing sales tax revenue bonds which are further secured by other available revenues inform bondholders of the additional, voluntarily supplied security in the same manner that other credit enhancements (such as bond insurance) are reported to bondholders. In this way it should be understood that the city has voluntarily contracted to provide security for payment of the bonds which is not derived from the statute authorizing issuance of the bonds.

Your third question asks whether the city may use home rule powers to issue “revenue bonds backed solely and only by a pledge of [revenue derived from the collection of the] Transient Guest Tax.” As discussed above, the Attorney General concluded in Opinion No. 82-17 that the statutes authorizing cities to levy a transient guest tax K.S.A. 12-1694 et seq., do not apply uniformly to all cities (see K.S.A. 12-1699) and, therefore, that cities may, in accordance with the Home Rule Amendment, enact a charter ordinance exempting from the whole or any part of the enactment providing for levy of the transient guest tax and providing substitute and additional provisions on the same subject.

Matters relating to the use of transient guest tax revenues are certainly included within the purview of the “same subject” and thus may be determined by the city through the enactment of a charter ordinance. Thus, in our opinion the city may use home rule powers to enact a charter ordinance providing for the issuance of revenue bonds backed solely and only by revenues derived from the collection of the city's transient guest tax.

Very truly yours,

Robert T. Stephan  
Attorney General of Kansas  
Mary F. Carson

Assistant Attorney General

Kan. Atty. Gen. Op. No. 87-185 (Kan.A.G.), 1987 WL 290509

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