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ATTORNEY GENERAL OPINION NO. 2012-17

Clancy Holeman
Riley County Counselor
115 N. 4th Street, 3rd Floor
Manhattan, KS 66502

Re: Cities and Municipalities–General Provisions–Countywide and City Retailers' Sales Taxes; Procedure for Imposition; Election Required; Rates, General and Special Purposes, Exceptions for Certain Counties; Obligation to Submit Question Continuing Retailers' Sales Tax; Ability to Amend or Revise Purposes Stated in Original Proposition

Synopsis: K.S.A. 2011 Supp. 12-187 does not require a county to submit the question of imposing a countywide retailers' sales tax to the electors upon passage of a ballot question directing the county commission to do so. If the electors approve a ballot question that purports requiring resubmitting the question at a future election, such question must be resubmitted to the electors to avoid a challenge on the basis of a misleading ballot. There is no statutory mechanism for a city or county governing body to modify the purpose of a local retailers' sales tax that was previously adopted by the electorate. Cited herein: K.S.A. 2011 Supp. 12-187; K.S.A. 12-195; 19-101a; 19-101c.

* * *

Dear Mr. Holeman:

As Riley County Counselor, you ask whether Riley County is required to resubmit to the electorate the question of whether to continue a countywide retailers' sales tax first authorized in 2002. If our answer to that question is yes, you also ask whether the purposes for the sales tax established in the 2002 proposition may be amended or revised.

The language of Riley County's 2002 countywide retailers' sales tax ballot question is as follows:

> Shall the following be adopted?
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> Shall a countywide retailers' sales tax in the amount of one-half of one percent (.5%) (the "Sales Tax") be levied in Riley county, Kansas ("the County"), to take effect when the County's current one-half of one percent (.5%) sales tax levied by Resolution No. 051997-15 expires in accordance with K.S.A. 12-187(b)(2), with the proceeds of the Sales Tax distributed to the County and the cities located within the County as required by law and used: (i) by the County to pay the costs of developing, improving, and maintaining the system of roads, bridges and culverts located in the County, (ii) by the City of Manhattan for economic development initiatives that occur within Riley County and which benefit the City of Manhattan, Kansas as determined and authorized by the Governing Body of the City; provided, however, such revenue may be used for economic development initiatives that occur outside of Riley County, if the Governing Body of the City determined that Riley County will benefit from such initiative, and the Board of Riley County Commissioners agree, in writing, with such determination, and (iii) the proceeds distributed to other cities within the county will be used as those cities determine to be in their best interests, *provided further that, the question of continuing the Sales Tax shall be submitted to the electors of the County at the general election held in 2012, all pursuant to K.S.A. 12-187 et seq. as amended*?[1]

You further note in your letter that subsequent to the approval of the above ballot question by the electors of Riley County, the Riley County Commission passed Resolution No. 032504-10, which states that the countywide retailers' sales tax "shall expire on December 31, 2012, unless it is extended by electors of the County in 2012." This language and the above italicized language in the 2002 ballot inform the electorate that the question of whether to continue the tax will appear on the 2012 ballot.

You ask whether the italicized language in the 2002 ballot question above requires the Riley County Commission to resubmit the retailers' sales tax to the electors in 2012. Your question requires an analysis of county home rule powers and election laws.

In general, counties have broad home rule powers;[2] however, such powers are subject to statutory restrictions. One such restriction relates to counties' powers to adopt retailers' sales taxes. K.S.A. 2011 Supp. 19-101a(a)(7) states:

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[1] Emphasis added.
[2] K.S.A. 19-101c.

> The board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate, subject only to the following limitations, restrictions or prohibitions:
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> . . .
>
> (7) Counties shall be subject to the limitations and prohibitions imposed under K.S.A. 12-187 to 12-195, inclusive, and amendments thereto, prescribing limitations upon the levy of retailers' sales taxes by counties.

Thus, K.S.A. 2011 Supp. 19-101a(a)(7) restricts county home rule powers by limiting the manner in which counties may adopt, amend or repeal countywide retailers' sales taxes to the methods prescribed in K.S.A. 12-187 to 12-195, and amendments thereto. A resolution adopted by a county which conflicts with the restrictions in K.S.A. 2011 Supp. 19-101a(a) is null and void.[3]

K.S.A. 2011 Supp. 12-187(b)(1) prescribes the method by which a countywide retailers' sales tax may be submitted for election:

> The board of county commissioners of any county *may submit* the question of imposing a countywide retailers' sales tax to the electors at an election called and held thereon, and any such board *shall be required to submit* the question upon submission of a petition signed by electors of such county equal in number to not less than 10% of the electors of such county who voted at the last preceding general election for the office of secretary of state, or upon receiving resolutions requesting such an election passed by not less than ⅔ of the membership of the governing body of each of one or more cities within such county which contains a population of not less than 25% of the entire population of the county, or upon receiving resolutions requesting such an election passed by ⅔ of the membership of the governing body of each of one or more taxing subdivisions within such county which levy not less than 25% of the property taxes levied by all taxing subdivisions within the county.[4]

Thus, a board of county commissioners generally has discretion to submit the question of imposing a countywide retailers' sales tax for an election, but the board *must* submit the question for election in any of three situations: (1) upon petition by a sufficient number of county electors; (2) upon passage of a resolution by at least ⅔ of the governing body of one or more cities of sufficient size within the county; or (3) upon passage of a resolution by at least ⅔ of the governing body of one or more taxing subdivisions of sufficient size within the county.

We note that K.S.A. 2011 Supp. 12-187(b)(1) does not address the situation presented here. It does not require a board of county commissioners to submit the question of

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[3] K.S.A. 2011 Supp. 19-101a(c).
[4] Emphasis added.

whether to continue a countywide retailers' sales tax as directed by the electorate in a ballot question passed at a prior election. Further, based upon the information presented in your letter, we presume that none of the three situations that would *require* the Riley County Commission to submit the retailers' sales tax to the electors of the county in 2012 pursuant to K.S.A. 2011 Supp. 12-187(b)(1) apply to your question. Therefore, we conclude that the Riley County Commission is not required *by statute* to resubmit the retailers' sales tax to the electors in 2012.

It has been suggested that the Riley County Commission is not bound to act in accordance with the 2002 ballot question because one legislative body may not bind a future legislative body.[5] While it is settled law that a legislative body may not bind its successor as to the amendment or repeal of its laws,[6] we do not believe this argument directly applies in this case. The 2002 Riley County ballot language does not prevent the current Commission from repealing or amending any county resolutions, nor does it require the Commission to adopt legislation. Although the 2002 ballot language requires the Commission to resubmit the countywide retailer's sales tax to the electors, whether the tax will be continued is entirely dependent on the will of the electorate. Thus, the 2002 ballot language does not impermissibly bind the Commission.

It has also been suggested that if the question of continuing the countywide retailers' sales tax is not resubmitted to the electorate in 2012, then the 2002 ballot question was misleading. If this argument is correct, the 2002 election could be deemed invalid:

> Election law contemplates that when a special proposition is submitted to a popular vote, the recitals on the ballot shall clearly state the substance of the question the electors are to vote upon; and where that proposition is so obscurely stated that the electors may be misled thereby, the election is vitiated."[7]

Several Kansas Supreme Court cases have examined whether certain ballot questions are misleading. In *Kansas Electric Power Co. v. City of Eureka*,[8] the city commissioners called a special election on the question of whether $65,000 in bonds should be issued for the purpose of constructing a power plant and supplying the city with electricity. The ballot question did not mention the fact that the $65,000 would purchase only a building for housing power plant machinery, and if the electorate approved the bonds, the city would be required to expend an additional $99,974 for engines and equipment. The Court held that the ballot question was misleading:

> [I]t is undeniable that the concluding language of the ballot, "for the purpose of supplying said city and its inhabitants with electric current for lighting, power and other purposes," not only would lead the voters to

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[5] *Gilleland v. Schuyler*, 9 Kan. 569 (1872).
[6] *Id.*; *Taneyhill v. Kansas City*, 133 Kan. 725 (1931).
[7] *Wycoff v. Board of County Com'rs of Logan Co.*, 189 Kan. 557, 559-60 (1962) (citing *Board of Education of City of El Dorado v. Powers*, 142 Kan. 664, 668 [1935] and *Leavenworth v. Wilson*, 69 Kan. 74 [1904]).
[8] 142 Kan. 117 (1935).

> assume that was exactly what they were voting for, but would tend to obscure the idea that it was only a part of a municipal plant they would get for their bond issue.[9]

Similarly, in *Heller v. Rounkles*,[10] the Court considered a rural school district's ballot question authorizing the issuance of bonds to pay for repair and remodeling of a high school building, including the construction of classrooms that would be used by another school district. The rural school district had reached an agreement with the other school district that the rural district would issue $95,000 in bonds towards the project, and the other district would issue $55,000 in bonds, for a total project cost of $150,000. The ballot proposition in *Heller* described neither the construction of classrooms for the benefit of another school district, nor the $55,000 in bonds that the other school district would use to pay for part of the construction. The Court held that the ballot question was misleading because an elector "would never discover from the proposition as stated in the resolution, election notice or ballot, just what the school board actually proposed to do."[11] The Court further noted that a ballot question "must be informative of the whole and not of a part only" of the issue to be voted upon.[12]

The foregoing cases illustrate that a ballot proposition seeking authorization from electors to raise revenues for public purposes must be crafted to fully inform the electorate of the circumstances surrounding the proposition. A ballot proposition may not withhold from the electorate information regarding the full cost of the ballot proposition; nor may a ballot proposition lead voters to assume that they are voting for an outcome that will not actually occur upon passage of the proposition.

The 2002 Riley County ballot question informed voters of the purpose of the countywide retailer's sales tax, and correctly informed voters that the tax would continue for at least ten years. As such, we do not believe the 2002 ballot question was misleading on its face. However, the ballot question clearly informed voters that they would have the opportunity to vote on the tax again in ten years. To paraphrase the *Heller* court, a voter would never discover from the 2002 ballot language that the County Commission could later decline to resubmit the tax to the electors. Accordingly, consistent with Kansas case law, we opine that if the Riley County Commission does not resubmit the tax to the electorate, the 2002 ballot question is susceptible to challenge as being misleading.

Having so opined, we now turn to your second question, namely, whether the purposes for the sales tax established in the 2002 proposition may be amended or revised. This office previously answered a similar question in Attorney General Opinion No. 2007-04. In that opinion, we stated:

> Once the sales tax is approved, the tax can be repealed or the rate reduced or increased within certain limitations only by utilizing the same

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[9] *Id.* at 121.
[10] 171 Kan. 323 (1951).
[11] *Id.* at 329.
[12] *Id.*

> process utilized for adopting and approving the original tax, but no statutory mechanism exists whereby the electorate or a governing body can modify the purpose for which local retailers' sales tax proceeds can be used. In the absence of such a statute, it is our opinion that neither the electorate or a city or county governing body can modify the purpose of a local retailers' sales tax that was previously adopted by the electorate.

We find Attorney General Opinion No. 2007-04 to be consistent with our view that counties are bound to follow the procedures set forth in K.S.A. 2011 Supp. 12-187 in the absence of statutory authority providing otherwise. Accordingly, we opine that the purposes for the 2002 countywide retailers' sales tax may not be amended or revised. However, a county may adopt a new countywide retailers' sales tax with a different purpose in accordance with the provisions set forth in K.S.A. 12-187 to 12-195.

Sincerely,

Derek Schmidt
Kansas Attorney General

Sarah Fertig
Assistant Attorney General

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