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October 30, 2017

ATTORNEY GENERAL OPINION NO. 2017- 15

Lisa Robertson, City Attorney
City of Topeka Legal Department
215 SE 7th Street, Room 353
Topeka, Kansas 66603-3914

Re: Cities and Municipalities—General Provisions—Countywide and City Retailers' Sales Tax; Procedure for Imposition; Election Required; Use of Revenue, Use of Excess Revenue

Synopsis: K.S.A. 2017 Supp. 12-192(e) authorizes a city to use apportioned revenue received from the county's imposition of a countywide retailers' sales tax for public purposes. Further, there is nothing in Kansas law that requires a city to spend the excess revenue on the items specifically listed on the ballot proposition that was submitted to the electors to authorize the tax. Therefore, a city may use such excess revenue deposited in the general fund for public purposes. Cited herein: K.S.A. 2017 Supp. 12-187; 12-189; and 12-192.

* * *

Dear Ms. Robertson:

As city attorney for the City of Topeka, you ask two questions generally regarding the city's use of apportioned revenue received from the county's imposition of a countywide retailers' sales tax pursuant to K.S.A. 12-187 *et seq.* First, you ask if the law prohibits the City of Topeka from spending excess sales tax proceeds on items not specifically listed on the ballot proposition that was submitted to the electors to authorize the tax. Second, if the answer to question one is yes, you ask whether the governing body of the city may determine what qualifies as "economic development" as listed on the ballot proposition. We will answer each question in turn.

The Legislature conferred authority to a board of county commissioners (board) to levy a retailers' sales tax through the enactment of K.S.A. 12-187 *et seq.* Pursuant to K.S.A. 2017 Supp.12-187(b)(1), there are two methods of presenting the question of imposing a retailers' sales tax to the electors of the county. First, the board may decide to submit the question to the electors.¹ Second, upon submission of a petition or resolutions as specified in the statute,² the board shall submit the question to the electors.³ Under either method, the board "shall specify the purpose or purposes for which the revenue would be used, and a statement generally describing such purpose or purposes shall be included as a part of the ballot proposition."⁴

The ballot proposition submitted to the electors in Shawnee County in this instance specified the rate and effective date of the sales tax, and provided that the proceeds would be used for economic development and seven specific countywide infrastructure projects, as follows:

SHALL THE FOLLOWING BE ADOPTED?

Shall the one quarter percent (.25%) countywide retailers' sales tax approved by Shawnee County citizens on November 7, 2000 be repealed effective December 31, 2004 and a new one half percent (.5%) countywide retailers' sales tax be levied in Shawnee County, Kansas to take effect January 1, 2005, and expire twelve (12) years after its effective date to provide revenue for:

1. Economic development;
2. Southwest Wanamaker Road from Southwest 39th Street to Southwest 61st Street;
3. Southeast 45th Street from South Topeka Boulevard to Southeast California Avenue;
4. Southeast Croco Road from US 40 Highway to Southeast 29th Street;
5. Southwest 29th Street from Southwest Wanamaker to Southwest Urish Road;
6. Southwest 21st Street from the West city limits of Topeka to Southwest Indian Hills Road;
7. Topeka Boulevard Bridge and bridges in the unincorporated areas of Shawnee County; and
8. The intersection of North Topeka Boulevard and Northwest 46th Street.⁵

¹ K.S.A. 2017 Supp. 12-187(b)(1).

² *Id.*

³ *Id.*

⁴ K.S.A. 2017 Supp. 12-187(g).

⁵ Shawnee County Sales Tax Ballot Proposition, Primary Election, August 3, 2004.

K.S.A. 2017 Supp. 12-192(a) prescribes the general rule for the apportionment of revenue received from the imposition of a countywide retailers' sales tax between the county imposing the tax and the cities located within the county. Although there are exceptions to that general rule,⁶ those exceptions do not apply in this instance. Thus, all cities in Shawnee County received the revenue from the sales tax imposed by Shawnee County as provided by the apportionment formula specified in K.S.A. 2017 Supp.12-192(a).

For the county, the law provides that “[a]ll revenue apportioned to a county shall be paid to its county treasurer and shall be credited to the general fund of the county.”⁷ Additionally, the law provides that “[a]ll revenue apportioned to the several cities of the county shall be paid to the respective treasurers thereof and deposited in the general fund of the city.”⁸

Although there is no statutory restriction on the cities' expenditure of their apportioned funds, in 2004, the City of Topeka and the County agreed, through an interlocal cooperation agreement, that their apportioned shares would be deposited into an account created and maintained by the Joint Economic Development Finance Committee.⁹

Public agencies¹⁰ may utilize authority granted under the Interlocal Cooperation Act to enter into cooperative agreements to provide governmental functions such as those involving economic development and public improvements.¹¹ Pursuant to the 2004 interlocal cooperation agreement discussed above, the revenue owed to the County and the City was combined and used to fund economic development and the seven countywide infrastructure projects specified on the ballot proposition.¹² Further, the interlocal cooperation agreement provided that upon expiration of the sales tax and the completion of the projects, “unless otherwise agreed to by the parties, these excess monies, less any economic development . . . or county bridge . . . commitments, shall be distributed to the City and the County in the proportional rates as provided by Kansas law at the time of the excess monies determination.”¹³ Nothing in the interlocal cooperation agreement that you provided us, or the amendment in 2014,¹⁴ specifies how the excess

⁶ K.S.A. 2017 Supp. 12-192(b) and (d).

⁷ K.S.A. 2017 Supp. 12-192(a).

⁸ K.S.A. 2017 Supp. 12-192(e).

⁹ Interlocal Cooperation Agreement between Shawnee County and the City of Topeka, December 9, 2004, Section 3, page 4, (Shawnee County Contract No. C334-2004 and City of Topeka Contract No. 34790).

¹⁰ “Public agency” under the interlocal cooperation agreement act includes any county or city. K.S.A. 2017 Supp. 12-2903(a).

¹¹ K.S.A. 12-2901 *et seq.*

¹² Interlocal Cooperation Agreement between Shawnee County and the City of Topeka, December 9, 2004 (Shawnee County Contract No. C334-2004 and City of Topeka Contract No. 34790).

¹³ *Id.*, Section 3(a), page 5.

¹⁴ Interlocal Cooperation Agreement between Shawnee County and the City of Topeka, March 24, 2014 (Shawnee County Contract No. C103-2014 and City of Topeka Contract No. 43522).

revenue is to be *spent* by Shawnee County or the City of Topeka for sales tax receipts associated with the sales tax that expired on December 31, 2016.¹⁵

Kansas law provides that “revenue that is received from the imposition of a local retailers’ sales tax which exceeds the amount of revenue required to pay the costs of a special project for which such revenue was pledged shall be credited to the city or county general fund, as the case requires.”¹⁶ In this case, the tax revenue was used for the purposes specified in the ballot proposition as required by law and the provisions of the 2004 interlocal cooperation agreement. Since the purposes specified were satisfied, the excess proceeds were apportioned and distributed to the County and the Cities pursuant to law. Once the cities and the county received the proceeds, such excess proceeds were deposited in the general funds of Shawnee County and the City of Topeka. Because there is no restriction in either the statute or the interlocal cooperation agreement regarding the City’s use of the excess proceeds, the City can use these excess funds as determined by the governing body of the city.¹⁷

To summarize, there is nothing in Kansas law that requires the City of Topeka to spend the excess revenue on the items specifically listed on the ballot that was submitted to the electors to authorize the tax. Therefore, the City may use such excess revenue deposited in the general fund for public purposes. Our conclusion on the first question renders the second question moot.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Athena E. Andaya

Athena E. Andaya
Deputy Attorney General

DS:AA:sb

¹⁵ We were not asked to review the Interlocal Cooperation Agreement between Shawnee County and the City of Topeka dated April 19, 2016 (Shawnee County Contract No. C129-2016 and City of Topeka Contract No. 44926) which provides for the *distribution* of excess revenue to be in accordance with K.S.A. 2017 Supp. 12-192(a). This agreement also is silent on how the excess revenue is to be spent.

¹⁶ K.S.A. 2017 Supp. 12-189.

¹⁷ See Attorney General Opinion 76-277, where Attorney General Curt Schneider stated, “Defined in a most general sense, the general fund is the fund for which the municipality accounts for all revenues and expenditures therefrom.” See also, Attorney General Opinion 88-1, where Attorney General Robert T. Stephan, stated, “Use of general fund moneys is limited to those uses which serve a valid public purpose and actions by the board are subject to continuing fiduciary duties.”