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ATTORNEY GENERAL OPINION NO. 2020- 10

The Honorable Mary Jo Taylor
State Senator, 33rd District
114 N. Union
Stafford, KS 67578

Re: Cities and Municipalities—City Land Banks—City Land Banks; Exemption of Property from Taxation; Exceptions

Synopsis: The county treasurer has no discretion under K.S.A. 2020 Supp. 12-5909. The county treasurer is statutorily required to remove from the tax rolls all taxes, assessments, charges, penalties and interest that are due and payable on property at the time the property is acquired by the board of trustees of the land bank. The county treasurer is similarly required to remove from the tax rolls any special assessments on such property that are abated. Any special assessments that are deferred or reamortized by a municipality must be corrected on the tax rolls by the county treasurer as of the effective date of the ordinance or resolution providing for such deferral or reamortization. Cited herein: K.S.A. 2020 Supp. 12-5901; 12-5902; 12-5907; 12-5908; 12-5909; K.S.A. 19-26,103; 60-801; K.S.A. 2020 Supp. 79-1801; L. 2015, ch. 99, § 17; L. 2010, ch. 116, §§ 29, 30; L. 1996, ch. 264, §§ 12, 22.

* * *

Dear Senator Taylor:

As Senator for the 33rd District, you request our opinion regarding the county's authority to tax property acquired by a city land bank. Specifically, you ask whether a county is authorized to levy ad valorem taxes on property acquired by a city's land bank and whether the county treasurer has discretion in removing from the tax rolls any assessments, charges, penalties and interest that are due and payable on a property at the time the property is acquired by a land bank.

Cities have been authorized since July 1, 2009, to establish city land banks.¹ A land bank is not a financial institution, but rather is a “public or community-owned entit[y] created for a single purpose: to acquire, manage, maintain, and repurpose vacant, abandoned, and foreclosed properties. . . .”² A land bank is “often created to replace an antiquated system of tax foreclosure and property disposition” and “give[s] [a] communit[y] the opportunity to repurpose abandoned properties in a manner consistent with the communit[y’s] values and needs.”³

A land bank in Kansas is governed by a board of trustees (board), the members of which are appointed by the city’s governing body.⁴ The board is required to, in part, “plan for and use the board’s best efforts to consummate the sale or other disposition of [] property [in its possession and control] at such times and upon such terms and conditions deemed appropriate.”⁵ The board is authorized to determine the terms and conditions of any sale.⁶ “The sale of any real property by the board . . . on which there are delinquent special assessments to finance public improvements shall be conditioned upon the approval of the governing body of the municipality which levied the special assessments.”⁷

K.S.A. 2020 Supp. 12-5909 sets out the taxation obligations of property acquired by a city’s land bank.

(a) Until sold or otherwise disposed of by the bank and *except for special assessments* levied by a municipality to finance public improvements, *any property acquired by the bank shall be exempt from the payment of ad valorem taxes levied by the state and any other political or taxing subdivision* of the state.

(b) *Except for special assessments* levied by a municipality to finance public improvements, when the board acquires property pursuant to this act, *the county treasurer shall remove from the tax rolls all taxes, assessments, charges, penalties and interest that are due and payable on the property at the time of acquisition by the board.*

(c) Property held by the bank shall remain liable for special assessments levied by a municipality to finance public improvements, but no payment

¹ See K.S.A. 2020 Supp. 12-5901 *et seq.* The Unified Government of Wyandotte County/Kansas City was first authorized in 1996 to establish a land bank. See L. 1996, ch. 264, §§ 12 through 22, codified at K.S.A. 19-26,103 *et seq.* The authority was extended to all counties in 2010. See L. 2010, ch. 116, §§ 29, 30.

² U.S. Dept. of Housing and Urban Development, Neighborhood Stabilization Program, *Land Banking 101: What is a Land Bank?*, September 2010.

³ *Id.*

⁴ K.S.A. 2020 Supp. 12-5902(b).

⁵ K.S.A. 2020 Supp. 12-5907(d).

⁶ K.S.A. 2020 Supp. 12-5908(a).

⁷ *Id.*

thereof shall be required until such property is sold or otherwise conveyed by the bank.

(d) *The governing body of any municipality which has levied special assessments on property acquired by the bank may abate part or all of the special assessments, and the bank and governing body may enter into agreements related thereto. Any special assessments that are abated shall be removed from the tax rolls by the county treasurer as of the effective date of the abatement.*

(e) *The governing body of any municipality which has levied special assessments on property acquired by the bank may enter into an agreement with the bank to defer or reamortize part or all of the special assessments. The governing body of the municipality shall provide for such deferral or reamortization by passage of an ordinance, if a city, and by passage of a resolution by any other municipality. Any special assessments that are deferred or reamortized shall be corrected on the tax rolls by the county treasurer as of the effective date of the ordinance or resolution providing for such deferral or reamortization.*⁸

In determining the authority of the county and the duty of the county treasurer regarding taxation of property acquired by a city's land bank, we look to the language in K.S.A. 2020 Supp. 12-5909.

The fundamental rule of statutory interpretation is that legislative intent governs if it can be discerned. We begin this inquiry with the plain language of the statute. Indeed, statutory language is an appellate court's paramount consideration because the best and only safe rule for ascertaining the intention of the makers of any written law is to abide by the language they have used. When . . . a statute is plain and unambiguous, th[e] court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.⁹

K.S.A. 2020 Supp. 12-5909(a) and (b) state that "any property acquired by the bank *shall* be exempt from the payment of ad valorem taxes" and "the county treasurer *shall* remove from the tax rolls all taxes, assessments, charges, penalties and interest that are due and payable on the property at the time of acquisition by the board."¹⁰ The Kansas courts have held that "the legislature's use of the word 'shall' can have different meanings in different provisions. Because the word's meaning is not plain, statutory construction rather than statutory interpretation is necessary."¹¹

⁸ K.S.A. 2020 Supp. 12-5909 (emphasis added). Similar provisions apply to a land bank established by a county. See K.S.A. 19-26,111.

⁹ *In re T.S.*, 308 Kan. 306, 309-10 (2018) (internal citations and quotation marks omitted).

¹⁰ Emphasis added.

¹¹ *Ambrosier v. Brownback*, 304 Kan. 907, 912 (2016).

“[T]here is no absolute test to determine whether a ‘shall’ in a statute makes the provision mandatory or directory.”¹² The courts have developed the *Raschke*¹³ four-factor test to assist in determining whether a “shall” is directory or mandatory.¹⁴ “Courts should consider ‘(1) legislative context and history; (2) substantive effect on a party’s rights versus merely form or procedural effect; (3) the existence or nonexistence of consequences for noncompliance; and (4) the subject matter of the statutory provisions. . . .’”¹⁵

In considering legislative context and history, we note that K.S.A. 2020 Supp. 12-5909 was proposed in 2009 House Bill No. 2155. As originally proposed, the bill authorized the City of Topeka to establish a land bank. During the legislative process, the authority was expanded to all cities in the State of Kansas.¹⁶ The legislation largely reflected statutory provisions that authorized Wyandotte County to establish a county land bank. Testimony given during the legislative process provided that:

The primary benefit that the City [] will receive is the forgiveness of outstanding ad valorem taxes of these tax-delinquent, abandoned properties. . . . A secondary benefit will be the ability of the Land Bank to have property exempt from ad valorem taxes while it is in the Land Bank. Like the initial forgiveness of property taxes, this too will provide the legal basis for exemption that will help the City [] break the “Cycle of Speculation/Abandonment/Delinquency.”¹⁷

“The City [] needs the legal authority to address the components of this cycle by having property taxes forgiven and exempted so as to make the properties attractive to new owners once they are transferred out of the Land Bank.”¹⁸

In 2015, authority to defer or reamortize special assessments on property acquired by a land bank was added.¹⁹ Testimony referred to the property’s exemption from taxation.²⁰

In addition, we note that “shall” is used in K.S.A. 2020 Supp. 12-5909(a) and (b) while the term “may” is used in K.S.A. 2020 Supp. 12-5909(d) and (e). “An appellate court must consider all of the provisions of a statute *in pari materia* rather than in isolation, and these

¹² *State v. Raschke*, 289 Kan. 911, 920 (2009).

¹³ *Id.*

¹⁴ See *Ambrosier*, 304 Kan. at 912.

¹⁵ *Id.*

¹⁶ Journal of the Senate, March 25, 2009, p. 499-50.

¹⁷ Senate Committee on Local Government, Minutes, Attachment 2, March 9, 2009, Testimony of Randy Speaker.

¹⁸ *Id.*

¹⁹ See . L. 2015, ch. 99, § 17.

²⁰ House Committee on Local Government, Minutes, Attachment 3, February 17, 2015, Testimony of Larry Baer, League of Kansas Municipalities; Senate Assessment and Taxation Committee, Minutes, Attachment 2, February 3, 2015, Testimony of Larry Baer, League of Kansas Municipalities.

provisions must be reconciled, if possible, to make them consistent and harmonious. As a general rule, statutes should be interpreted to avoid unreasonable results.”²¹ The use of different terms indicates an intent to achieve different meanings. “Clearly the Legislature knew how to grant . . . discretionary power when it wanted to and chose instead to use the mandatory word ‘shall’ . . . instead of the permissive ‘may’ . . .”²²

The legislative context and history of the statute indicates a legislative intent that “shall” as used in K.S.A. 2020 Supp. 12-5909(a) and (b) is mandatory, rather than discretionary.

The second *Raschke* factor examines whether the statutory provision has a substantive effect on a party's rights or whether it deals with form or procedural effect.²³ “Statutory requisitions are deemed directory only when they relate to some immaterial matter, where a compliance is a matter of convenience rather than substance.”²⁴

[I]t 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.²⁵

K.S.A. 2020 Supp. 12-5908 confers upon the board of trustees of a land bank the authority to “sell any property acquired by the board at such times, to such persons, and upon such terms and conditions, and subject to such restrictions and covenants deemed necessary or appropriate to assure the property's effective reutilization.” The only limitation on the authority is that if delinquent special assessments are owed on the property, the sale is conditioned on the approval of the municipality that levied the special assessments.²⁶

K.S.A. 2020 Supp. 12-5909(a) and (b) further clarify the right of the board of trustees to determine the terms and conditions of the sale with the goal of assuring a property's effective utilization. If “shall” in those provisions is viewed as discretionary, it effectively allows the county treasurer to establish terms and conditions on the sale. Such a view restricts the rights of the board of trustees and obstructs the purpose of the land bank. The second *Raschke* factor indicates “shall” in K.S.A. 2020 Supp. 12-5909(a) and (b) is mandatory.

The third *Raschke* factor requires determining whether the statute contemplates consequences for noncompliance. The statute itself does not include a penalty for

²¹ *Welch v. Via Christi Health Partners, Inc.*, 281 Kan. 732, 750 (2006).

²² *Weide v. Lavis*, No. 120,185, 2019 WL 3977565 at *4 (Kan.App. 2019) (unpublished opinion).

²³ *Matter of Davis*, 56 Kan.App.2d 39, 51 (2018).

²⁴ *Raschke*, 289 Kan. at 916, quoting *Jones v. State of Kansas, ex rel. Atherby and Kingbury*, 1 Kan. *273 (1863).

²⁵ *Id.* at 916, quoting *City of Hutchinson v. Ryan*, 154 Kan. 751, Syl. ¶ 1 (1942).

²⁶ K.S.A. 2020 Supp. 12-5908.

noncompliance.²⁷ The only potential consequence is that the county treasurer becomes subject to a mandamus action.²⁸ “Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law.”²⁹ However, “[r]elief in the nature of a writ of mandamus is discretionary.”³⁰ The third *Raschke* factor likely leans to a discretionary application of K.S.A. 2020 Supp. 12-5909(a) and (b).

The final *Raschke* factor reviews the subject matter of the statutory provisions. The courts have recognized that statutes dealing with election notices and DUI notices tend to be mandatory.³¹ We have been unable to locate a court opinion that extends a similar blanket recognition regarding statutes dealing with taxation.

“Taxation is an unloved subject, but no one in modern times, to our limited knowledge, has come up with a practical alternative. Government is indispensable to any civilized society and an orderly system of assessment and collection of taxes is an imperative to a government's successful operation.”³² Therefore, the legislature has established a tax procedure and time schedule that “requires the work of taxation to be done speedily and to the end that the business of government may be carried on.”³³ Under that procedure:

[T]he county clerk shall place the tax upon the tax roll of the county, in the manner prescribed by law, and the tax shall be collected by the county treasurer. The county treasurer shall distribute the proceeds of the taxes levied by each taxing subdivision in the manner provided by K.S.A. 12-1678a, and amendments thereto.³⁴

“[T]he duties which are imposed upon the County Clerk and the County Treasurer at this stage of the taxing process are clear, purely ministerial and in no sense discretionary.”³⁵

Given the nature of taxation, it is our opinion that the county treasurer has no discretion in the collection and distribution of taxes. The fourth *Raschke* factor favors the argument that the word “shall” in the taxation provisions of K.S.A. 2020 Supp. 12-5909 is mandatory.

In review, we conclude that the county treasurer has no discretion under K.S.A. 2020 Supp. 12-5909. Any property acquired by a land bank is exempt from the payment of ad valorem taxes levied by the state and any other political or taxing subdivision of the state.

²⁷ See *Paul v. City of Manhattan*, 212 Kan. 381, Syl. ¶ 2 (1973); *Pishny v. Bd. of County Comm'rs*, 47 Kan.App.2d 547, 561 (2012).

²⁸ See K.S.A. 60-801 *et seq.*

²⁹ K.S.A. 60-801.

³⁰ *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 410 (2008).

³¹ *Ambrosier*, 304 Kan. at 915.

³² *Northern Natural Gas Co. v. Bender*, 208 Kan. 135, 141 (1971).

³³ *Id.*, quoting *Mobile Oil Corp. v. McHenry*, 200 Kan. 211, 223 (1968).

³⁴ K.S.A. 2020 Supp. 79-1801.

³⁵ *Mobile Oil Corp.*, 200 Kan. at 228.

The governing body of any municipality which has levied special assessments on property acquired by the land bank may abate part or all of the special assessments. The county treasurer is statutorily required to remove from the tax rolls all taxes, assessments, charges, penalties and interest that are due and payable on the property at the time of acquisition by the board of trustees of the land bank. The county treasurer is similarly required to remove from the tax rolls any special assessments that are abated. Any special assessments that are deferred or reamortized by a municipality must be corrected on the tax rolls by the county treasurer as of the effective date of the ordinance or resolution providing for such deferral or reamortization.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
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/s/Richard D. Smith

Richard D. Smith
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