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February 9, 2017

ATTORNEY GENERAL OPINION NO. 2017- 6

Laura E. Johnson-McNish
Marshall County Counselor
Marshall County Courthouse
1201 Broadway
Marysville, KS 66508

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

Synopsis: The petitioning process afforded in K.S.A. 2016 Supp. 12-187(b)(1) is not an option under K.S.A. 2016 Supp. 12-187(b)(5). Whether a question authorizing a countywide retailers’ sales tax, the proceeds of which would be pledged to support health care services, is submitted to the electors is solely within the discretion of the board of county commissioners. A private not-for-profit hospital may be included as health care services under K.S.A. 2016 Supp. 12-187(b)(5). Cited herein: K.S.A. 2016 Supp. 12-187; 12-189; 12-192; K.S.A. 12-4906; 13-14b12; 14-640d; 19-2106; 19-4606; 65-204; 65-212; 65-468.

* * *

Dear Ms. Johnson-McNish:

As Marshall County Counselor and on behalf of the Board of Marshall County Commissioners, you request our opinion regarding whether petitioners may, through the petition process, force a board of county commissioners to place on the ballot a question authorizing a countywide retailers’ sales tax the proceeds of which would be pledged to support health care services. You also ask whether “health care services” under K.S.A. 2016 Supp. 12-187(b)(5) includes a private not-for-profit hospital.

You state that Community Memorial Hospital (CMH), located in Marysville, Kansas, is a Kansas not-for-profit corporation in good standing and is exempt from paying federal income taxes under § 501(c) of the Internal Revenue Code. You also indicate that there is currently no city or county tax levy in place to provide public funding of CMH. During the August 29, 2016, meeting of the Board of Marshall County Commissioners, a motion was made to place on the November 8, 2016, ballot a question seeking authorization to levy a 0.5% retailers' sales tax to provide support for CMH.¹ The motion died for lack of a second.² Individuals have indicated they may circulate a petition that would obligate the Board to submit to the electors a question seeking authorization to levy a retailers' sales tax to provide support for CMH.

The authority of a board of county commissioners to levy a retailers' sales tax is conferred by the Legislature through K.S.A. 2016 Supp. 12-187 *et seq.* The relevant provisions for the issues presented are:

(b)(1) 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. . . .

. . . .

(5) The board of county commissioners of any county may submit the question of imposing a retailers' sales tax at the rate of 0.25%, 0.5%, 0.75% or 1% and pledging the revenue received therefrom for the purpose of financing the provision of health care services, as enumerated in the question, to the electors at an election called and held thereon. . . . The tax imposed pursuant to this paragraph shall be deemed to be in addition to the rate limitations prescribed in K.S.A. 12-189, and amendments thereto. . . .³

. . . .

(g) The governing body of the city or county proposing to levy any retailers' sales tax shall specify the purpose or purposes for which

¹ Marshall County Commission, Meeting Minutes, August 29, 2016.

² *Id.*

³ K.S.A. 2016 Supp. 12-187(b) includes 31 provisions. The remaining provisions of K.S.A. 2016 Supp. 12-187(b) validate seven elections and confer authority upon designated counties to submit questions seeking approval of retailers' sales taxes for the purposes set out in the individual provisions.

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 rate limitations are set forth in K.S.A. 2016 Supp. 12-189:

The rate of any countywide retailers' sales tax shall be fixed in an amount not to exceed 1% and shall be fixed in increments of 0.25%, and which amount shall be determined by the board of county commissioners, except that:

....

(d) the board of county commissioners of any county for the purposes of K.S.A. 12-187(b)(5), and amendments thereto, may fix such rate at a percentage which is equal to the sum of the rate allowed to be imposed by a board of county commissioners on the effective date of this act plus 0.25%, 0.5%, 0.75% or 1%, as the case requires. . . .

The manner of apportioning the sales tax revenues is established in K.S.A. 2016 Supp. 12-192:

(a) Except as otherwise provided by subsection (b), (d) or (h), all revenue received by the director of taxation from a countywide retailers' sales tax shall be apportioned among the county and each city located in such county in the following manner: (1) One-half of all revenue received by the director of taxation shall be apportioned among the county and each city located in such county in the proportion that the total tangible property tax levies made in such county in the preceding year for all funds of each such governmental unit bear to the total of all such levies made in the preceding year; and (2) one-half of all revenue received by the director of taxation from such countywide retailers' sales tax shall be apportioned among the county and each city located in such county, first to the county that portion of the revenue equal to the proportion that the population of the county residing in the unincorporated area of the county bears to the total population of the county, and second to the cities in the proportion that the population of each city bears to the total population of the county. . . . All revenue apportioned to a county shall be paid to its county treasurer and shall be credited to the general fund of the county.

....

⁴ K.S.A. 2016 Supp. 12-187.

[(d)](2) Except as otherwise provided in K.S.A. 12-187(b)(5), and amendments thereto, all revenues received from a countywide retailers' sales tax imposed pursuant to K.S.A. 12-187(b)(5), and amendments thereto, shall be remitted to and shall be retained by the county and expended only for the purpose for which the revenue received from the tax was pledged.

Procedure

In order to determine whether petitioners may force a board of county commissioners to submit to the electors a question seeking authorization of a countywide retailers' sales tax to fund health care services, the preceding statutory provisions must be construed.

[T]he fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. When language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there.

Statutory language is our 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. But even when various statutory provisions are unambiguous, we may still construe them in *pari materia* with a view of reconciling and bringing the provisions into workable harmony.⁵

After reviewing the statutory provisions, we note that the Legislature has provided in K.S.A. 2016 Supp. 12-187(b)(1) a method for establishing a retailers' sales tax generally, then, in K.S.A. 2016 Supp. 12-187(b)(5), established a method for establishing a retailers' sales tax for a specific purpose. The Legislature continues the distinction by establishing different rate limits and apportionment provisions if the retailers' sales tax provides revenue for financing health care services. It is clear that the retailers' sales tax for financing the provision of health care services as authorized in K.S.A. 2016 Supp. 12-187(b)(5) is separate and distinct from a sales tax instituted pursuant to K.S.A. 2016 Supp. 12-187(b)(1). The provisions in K.S.A. 2016 Supp. 12-187(b)(1) are not applicable when seeking authorization from the electors for establishment of a retailers' sales tax for the purpose of financing health care services under K.S.A. 2016 Supp. 12-187(b)(5). The petitioning process afforded in K.S.A. 2016 Supp. 12-187(b)(1) is, therefore, not an option under K.S.A. 2016 Supp. 12-187(b)(5).

⁵ *Neighbor v. Westar Energy, Inc.*, 301 Kan. 916, 918-19 (2015) (internal quotation marks and citations omitted). See also *Ullery v. Othick*, 304 Kan. 409 (2016).

Whether such a question is submitted to the electors under K.S.A. 2016 Supp. 12-187(b)(5) is solely within the discretion of the board of county commissioners.

Health Care Services

K.S.A. 2016 Supp. 12-187(b)(5) provides some direction as to the types of programs or services that may receive the proceeds derived from a retailers' sales tax established for the purpose of financing health care services:

As used in [K.S.A. 2016 Supp. 12-187(b)(5)], health care services shall include, *but not be limited to*, the following: Local health departments, city or county hospitals, city or county nursing homes, preventive health care services including immunizations, prenatal care and the postponement of entry into nursing homes by home care services, mental health services, indigent health care, physician or health care worker recruitment, health education, emergency medical services, rural health clinics, integration of health care services, home health services and rural health networks.⁶

The provision includes a nonexclusive list of examples of institutions and services that are deemed by the Legislature to be health care services.⁷ The bulk of institutions and services expressly included in the list may receive some form of local public funding under other statutes.⁸ However, it appears that at least one type of listed institution and service is not supported through some form of local taxation.⁹ Because the list provided in K.S.A. 2016 Supp. 12-187(b)(5) is nonexclusive and the Legislature has not indicated that only institutions and services eligible for support through local taxation under other statutes are to be

⁶ Emphasis added.

⁷ See *Board of County Comm'rs v. Smith*, 18 Kan.App.2d 662, 669 (1993) (statute provides that land devoted to agricultural use means land devoted to the production of plants, animals, or horticultural products, then provides a nonexclusive list of examples of plants, animals, and horticultural products). See also Attorney General Opinion Nos. 2004-24 ("'[P]ersonal property' is not included in the statutory list of permissible costs. However, since the list is preceded by the words 'including but not limited to,' the longstanding statutory construction maxim of *expressio unius est exclusio alterius* (the mention of one thing implies the exclusion of other things not mentioned) is not applicable."); 92-40 ("K.S.A. 19-119 allows for expenditures that encompass 'machinery, vehicles and any other equipment or personal property including but not limited to, computer hardware and software.' Since such language is very broad and research into the legislative history of K.S.A. 19-119 does not show that the phrase was meant to cover only a certain, few items, we interpret this statute to authorize expenditures for anything that fits within the definition of equipment or personal property, if the item is something the county is authorized to purchase for municipal purposes.").

⁸ See K.S.A. 12-4906 (home for the aged; cities); 13-14b12 (hospital; city of the first class); 14-640d (hospital; city of the second class); 19-2106 (home for the aged; counties); 19-4606 (hospital; county); 65-204 (local health department; county); 65-212 (mental health clinic; county).

⁹ See K.S.A. 65-468 *et seq.* (rural health network).

included as health care services,¹⁰ a private not-for-profit hospital may be included as health care services under K.S.A. 2016 Supp. 12-187(b)(5).

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Richard D. Smith

Richard D. Smith
Assistant Attorney General

DS:AA:RDS:sb

¹⁰ “When statutory language is plain and unambiguous, the court does not speculate as to legislative intent, and does not read into the statute words not readily found there.” *Whaley v. Sharp*, 301 Kan. 192, 196 (2014).