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March 4, 2024

ATTORNEY GENERAL OPINION NO. 2024-2

Bret F. Mangan
Sherman County Attorney
813 Broadway, Room 105
Goodland, KS 67735

Re: Cities and Municipalities—Miscellaneous Provisions—Transient Guest
 Tax Act

 Counties and County Officers—General Provisions—County Home
 Rule

Synopsis: The Transient Guest Tax Act is a nonuniform act. As such, a county
 may exempt itself from provisions of the Act under its home-rule
 powers through a charter ordinance or resolution. Sherman County's
 Charter Resolution No. 18 was a permissible use of its statutory
 authority. However, once it exempted itself, Sherman County cannot
 then require the Kansas Department of Revenue to collect the tax.
 Cited herein: K.S.A. 12-1696; K.S.A. 12-1697; K.S.A. 12-1698; K.S.A.
 12-1699; K.S.A. 12-16,113; K.S.A. 19-101; K.S.A. 19-101a; K.S.A. 19-
 101b; K.S.A. 75-704.

* * *

Dear Mr. Mangan:

As the Sherman County Attorney, you ask whether Sherman County's Charter
Resolution No. 18, which exempted the County from K.S.A. 12-1696 and 12-1697 of

the Transient Guest Tax Act was an appropriate exercise of its home rule authority.¹

Considering the Act in its entirety, we conclude it is nonuniform. That nonuniformity permits Sherman County to opt out of K.S.A. 12-1696 and 12-1697 by charter ordinance. Thus, Charter Resolution No. 18 is appropriate under Sherman County's home-rule powers.

To answer your question, we must construe both the Transient Guest Tax Act and the statutes granting counties home-rule powers.

Unlike cities, whose home-rule powers are derived from the Kansas Constitution, counties' home-rule powers derive from the legislature and are thus subject to statutory limitations.² Each county is authorized by Kansas statute to "exercise the powers of home rule to determine their local affairs and government."³ However, K.S.A. 19-101a(a)(1) explicitly states that counties "shall be subject to all acts of the legislature which apply uniformly to all counties."⁴ But a county board may pass legislation contrary to a state statute or opt of a state statute by means of a charter ordinance or resolution if that state statute does not uniformly apply to all counties.⁵ County home-rule powers are to be "liberally construed for the purpose of giving to counties the largest measure of self-government."⁶

Importantly, the analysis of whether a state law is uniform considers the legislative enactment *as a whole*.⁷ A county can supersede even parts of a law that apply uniformly if other parts of the law do not apply uniformly.⁸

Three pieces of the Transient Guest Tax Act are relevant here: K.S.A. 12-1696, 12-1697, and 12-1698.⁹ K.S.A. 12-1696 defines six particular words and phrases for the purposes of the Act, including "convention and tourism promotion." K.S.A 12-1697,

¹ Although your letter contained other questions, the Attorney General has declined to answer them upon determination that they are not an appropriate subject of a written Attorney General Opinion. See K.S.A. 75-704.

² *Bd. of Cty. Com'rs v. Noone*, 235 Kan. 777, 784, 682 P.2d 1303 (1984).

³ K.S.A. 19-101; *Mo. Pac. R.R. v. Bd. of Cty. Com'rs*, 231 Kan. 225, 226, 643 P.2d 188 (1982).

⁴ See *Perry v. Bd. of Cty. Com'rs*, 281 Kan. 801, 815, 132 P.3d 1279 (2006) ("In Kansas, counties are prohibited from passing any legislation which is contrary to or in conflict with any act of the state legislature which is uniformly applicable to all counties throughout the state.").

⁵ K.S.A. 2020 Supp. 19-101a(b); K.S.A. 12-101b(a); see also K.S.A. 19-101b(b) ("A charter resolution is a resolution which exempts a county from the whole or part of an act of the legislature and which may provide substitute and additional provisions on the same subject.").

⁶ K.S.A. 19-101c; *David v. Bd. of Com'rs*, 277 Kan. 753, 755, 89 P.3d 893 (2004).

⁷ *Home Builders Ass'n of Greater Kan. City v. City of Overland Park*, 22 Kan. App. 2d 649, 663, 921 P.2d 234 (1996), *superseded by statute as stated in Heartland Apartment Ass'n, Inc. v. City of Mission*, 51 Kan. App. 2d 699, 352 P.3d 1073 (2015).

⁸ *Id.*

⁹ Though the Transient Guest Tax Act was passed after county home rule was enacted, no court has held that counties' statutory home-rule powers do not apply to later-enacted statutes.

among other things, permits a city or county “to levy a transient guest tax at not to exceed the rate of 2% upon the gross receipts derived from or paid directly or through an accommodations broker by transient guests for sleeping accommodations, exclusive of charges for incidental services or facilities, in any hotel, motel or tourist court.”¹⁰ And K.S.A. 12-1698 mostly limits the expenditure of any transient guest tax to “convention and tourism promotion.”

Sherman County’s Charter Resolution No. 18 does two things that conflict with these statutes. First, it raises the transient guest tax rate ceiling to 5%. Second, it expands what those funds may be spent on by expanding the definition of “convention and tourism promotion.”¹¹ Thus, the question becomes whether the state’s tax-rate cap and limitation on use of the funds contained in K.S.A. 12-1696 and 12-1697 are part of a uniformly applicable act.

Attorney General Stephan addressed a similar question involving a *city’s* home-rule power in Attorney General Opinion 82-17. In that opinion, he concluded that the Transient Guest Tax Act was not uniform as to all cities because while it generally authorized cities to collect a transient guest tax, K.S.A. 12-1699 (which was enacted as part of the Act) prohibited them from doing so if the city was in a county that had already levied one.¹² Thus, because the Act was not uniformly applicable to all cities, Attorney General Stephan concluded a city could opt out from the Act via charter ordinance under its home-rule power.¹³

We find that prior opinion persuasive when applied to the analogous situation here. First, K.S.A. 12-1699 applies to counties in the same way as it applies to cities. Thus, if a city in Sherman County implemented a transient guest tax, the County would then be prevented from passing its own tax. As such, the Act does not uniformly apply to all counties any more than it applies to all cities. Second, while the home-rule powers of cities and counties might derive from different origins, our courts have stated that the powers appear similar, and cases dealing with cities’ home-rule powers can be helpful when analyzing the home-rule power of counties.¹⁴ In other words, there is nothing about the reasoning in Attorney General Opinion 82-17 that is specific to cities and would not apply with the same force in this scenario.

Our conclusion is bolstered by another statute within the Act. K.S.A. 12-16,113 requires entities that are provided funds for convention and tourism promotion purposes “from moneys received pursuant to K.S.A. 12-1693 or K.S.A. 12-1697, and amendments thereto, or *pursuant to any charter ordinance or resolution which imposes a transient guest tax*” (emphasis added) to provide an accounting of the

¹⁰ K.S.A. 12-1697(a).

¹¹ See Charter Resolution No. 18 (attached).

¹² Att’y Gen. Op. No. 82-17, at 2 (1982).

¹³ *Id.*

¹⁴ *Mo. Pac. R.R.*, 231 Kan. at 226.

funds. The Act itself thus contemplates charter resolutions or ordinances implementing their own taxes separate from K.S.A. 12-1697, something that would be impermissible if the Act were uniform.

Additionally, exemption from K.S.A. 12-1697 seems to be a common practice throughout the state. The Department of Revenue (KDOR) keeps a list of the transient guest taxes throughout the state.¹⁵ As of January 1, 2024, 34 counties and 117 cities (including special districts) have a transient guest tax.¹⁶ Many exceed the 2% statutory cap.¹⁷ It thus appears to be common practice, without controversy, for cities and counties to exempt themselves from K.S.A. 12-1697 and impose their own transient guest tax rates.

Finally, although this was not the focus of your opinion request, we feel compelled to address one part of the resolution that *is not* an appropriate use of the home rule power. Sections 5 and 6 of Charter Resolution No. 18 impose the burden of collecting the transient guest tax on KDOR. This is inappropriate. Attorney General Opinion 82-17 addressed a similar provision in Lenexa's ordinance, stating that the city, having exempted itself from the state statute, could not then require KDOR to collect the tax because cities "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."¹⁸ We must reiterate this principle—the county lacks the authority to order a state agency to undertake a duty under its home-rule powers, as it is not a matter of local concern.¹⁹

We thus extend our determination in Attorney General Opinion No. 82-17: the Transient Guest Tax Act is nonuniform not just as to cities but as to counties as well. Thus, the Act is subject to opt-out via charter ordinance. Sherman County's exemption of itself from portions of the Act under Charter Resolution No. 18 was allowable under its home-rule authority. However, the County may not require KDOR to collect that tax.

¹⁵ *Transient Guest Tax Rates and Effective Dates*, KANSAS DEPARTMENT OF REVENUE, <https://perma.cc/9QYB-U7RU> (last visited February 26, 2024).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Att'y Gen. Op. No. 82-17, at 4-5.

¹⁹ *See* K.S.A. 19-101.

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Attorney General

/s/ Ryan J. Ott

Ryan J. Ott
Assistant Solicitor General