Approved: January 29, 2004
Date

MINUTES OF THE SENATE ASSESSMENT AND TAXATION COMMITTEE

The meeting was called to order by Chairman David Corbin at 10:40 a.m. on January 27, 2004, in Room 519-S of the Capitol.

All members were present except:
Senator David Haley- excused

Committee staff present:
Chris Courtwright, Legislative Research Department
Martha Dorsey, Legislative Research Department
Gordon Self, Revisor of Statutes Office
Shirley Higgins, Committee Secretary

Conferees appearing before the committee:
Don Molar, League of Kansas Municipalities
Richard Cram, Kansas Department of Revenue
Larry Baer, League of Kansas Municipalities
Karl Peterjohn, Kansas Taxpayers Network

Others attending:
See Attached List.

Senator James Barnett requested the introduction of a bill relating to long-term care insurance as recommended by an interim committee which studied health insurance issues and costs. The bill would allow a tax deduction beginning fiscal year 2006 and increasing over a period of five years.

Senator Lee moved to introduce the bill, seconded by Senator Donovan. The motion carried.

Senator Lee moved to introduce a bill dealing with the appraisal of residential property owned by a nearby property owner, seconded by Senator Buhler. The motion carried.

Chris Courtwright, Legislative Research Department, discussed two bills recommended for introduction by the Special Committee on Assessment and Taxation which met during the interim.

The first bill would allow retailers a maximum tax credit of $500.00 for costs to implement the Streamlined Sales Tax destination-based sourcing sales tax rule.

Senator Buhler moved to introduce the bill, seconded by Goodwin seconded. The motion carried.

The second bill relates to the computation of taxes on isolated or occasional sales of motor vehicles.

Senator Donovan moved to introduce the bill, seconded by Senator Buhler. The motion carried.

SCR 1615–Constitutional amendment providing for up to ten classes of cities for local sales tax law

Mr. Courtwright explained that **SCR 1615** and **SB 308** came from the interim tax committee in conjunction with a study on a topic concerning local sales tax uniformity. The committee recommended a two-fold approach to providing additional "breathing room" in order to assure that uniformity is restored to the local sales tax law on a permanent basis. Mr. Courtwright followed with an overview of the interim committee report, which includes background information relating to the uniformity and simplification requirements set forth in the multi-state Streamlined Sales and Use Tax Agreement and a summary of the committee's activities and recommendations. (Attachment 1) In conclusion, Mr. Courtwright noted that the interim committee felt that this is a very important issue because, as a matter of policy, the Legislature has always

maintained control over city and county sales tax. He went on to say that city sales taxes did not exist until the early 1970s, and for many years there was a one cent cap in the law. In the early 1990s, legislation passed allowing an extra one cent for health care, and a number of other exceptions to the rules have been made. He pointed out that cities have the power to charter out of the election requirement and out of any statutory rate cap requirements. He noted that, regardless of the Streamlined Sales Tax environment, both **SCR 1615** and **SB 308** are necessary in restoring uniformity to city sales taxes.

Senator Corbin commented that the problem developed before the Streamlined Sales Tax issue came to the forefront. He recalled that concern about sales tax uniformity was discussed five or six years ago. With the event of Streamlined Sales Tax Project, the issue became magnified and more serious discussions began.

Don Moler, League of Kansas Municipalities, testified in strong opposition to **SCR 1615**. He contended that the bill represents an assault on the constitutional home rule powers of cities, and its passage would endanger the local control and power of cities statewide. In his opinion, a constitutional amendment is not the way to go about correcting nonuniformity in the state sales tax act. He suggested that, if the Legislature wishes to ensure that no city can charter out of the sales tax provisions as required by the Streamlined Sales Tax Project, the existing number of city classifications could be reduced to a number less than five. While he does not support this modification, he argued that it is more appropriate than a constitutional amendment adversely impacting the powers of Kansas citizens. (Attachment 2)

In conclusion, Mr. Moler commented, although the intentions behind **SCR 1615** were good, in another situation he would view the bill as a Trojan horse in a effort to take away local control and constitutional home rule for cities in the future. He emphasized that no city in the state has attempted to change the base, the election requirements, or anything else having to do with the sales tax. He noted that he would bring the weight of the League to bear on a city which attempted to do such a thing because the League is very supportive of the Streamlined Sales Tax. However, the Legislature would have the ability to respond through litigation putting a freeze on the implementation long before the state would be thrown out of the Streamlined Sales Tax compact.

Senator Corbin called the Committee's attention to written testimony in opposition to **SCR 1615** submitted by Erik Satorius, City of Overland Park. (Attachment 3) There being no others wishing to testify, Senator Corbin closed the hearing on **SCR 1615**.

SB 308–Two classes of cities for purposes of city retailers' sales tax law

Richard Cram, Kansas Department of Revenue, commented that, in a nut shell, **SB 308** eliminates all distinctions currently in local sales tax law with the intent of resolving any argument that there is a lack of uniformity in the local sales tax law. He noted that if local sales tax laws are deemed nonuniform so that cities are able to exercise home rule authority to opt out of them, action taken by only one city could potentially throw Kansas out of compliance with the Streamlined Sales and Use Tax Agreement. He called the Committee's attention to memorandums on the uniformity issue presented to the interim tax committee in September 2003. He went on to discuss the proposed statutory amendments in Sections 1 through 5 concerning classes of cities and counties for sales tax purposes (Attachment 4)

Larry Baer, Assistant General Counsel for the League of Kansas Municipalities, testified in opposition to **SB 308** on the grounds that it is premature, it removes powers previously granted to cities and counties, and it would result in inequities between cities. He noted that the League will strive to impress upon cities and counties the importance of not taking any action that could jeopardize compliance with the Streamlined Sales Tax Agreement. He pointed out that a charter ordinance does not become effective until the sixty-first day after its publication. Thus, there is time for the State to take steps to nullify such action. If it is determined that uniformity in the retailers' sales tax act is needed, he suggested the implementation of four factors to keep cities and counties whole. (Attachment 5)

Senator Corbin called the Committee's attention to written testimony submitted by Erik Satorius, City of Overland Park, in support of the League of Municipalities' position on **SB 308**. (Attachment 6)

MINUTES OF THE SENATE ASSESSMENT AND TAXATION COMMITTEE at 10:40 a.m. on January 27, 2004, in Room 519-S of the Capitol.

Karl Peterjohn, Kansas Taxpayers Network, testified in opposition to **SB 308**. He stated, "It moves us even further away from the original K.S.A.12-187." He noted that when the law was passed in the 1970s, there was a two-threshold test necessary for the creation of a local sales tax: a two-thirds vote of the governing body and a petition. He is concerned that **SB 308** basically expands the taxing authority. He noted that the purpose of the bill was to address problems created by a bill passed last year, **HB 2005** concerning destination sourcing rules. In his opinion, **HB 308** will not solve that problem, and it will aggravate a situation that already exists. He argued that a more level playing field is needed. He contended that voter approval for tax increases should not only be extended to sales taxes but also to property taxes. Mr. Peterjohn agreed to submit written testimony at a later date.*

There being no others wishing to testify, Senator Corbin closed the hearing on **SB 308**.

Senator Corbin called the Committee's attention to the minutes of the January 21 meeting.

Senator Donovan moved to approve the minutes of the January 21, 2004, meeting, seconded by Senator Buhler. The motion carried.

The meeting was adjourned at 11:45 a.m.

The next meeting is scheduled for January 29, 2004.

*Mr. Peterjohn submitted his written testimony on February 3, 2004. (Attachment 7)

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

SENATE ASSESSMENT AND TAXATION COMMITTEE
GUEST LIST

DATE: January 27, 2004

NAME	REPRESENTING
John Zutavern	City of Abilene (LKM)
Don Moler	LKM
Richard Cram	KDOR
April Holman	Kansas Action for Children
Ron Appletoft	Water Dist. No 1 of JoCo
Larry R Baer	LKM
[illegible]	Hein Law Firm
Erik Sartorius	City of Overland Park
Karl Peterjohn	KTA
George Petersen	KTA
Wes Ashton	Overland Park Chamber of Comm.
Terry Holdren	KS Farm Bureau
Bud Burke	Issues Mgmt Group
Steve Johnson	Kansas Gas Service
Michelle Peterson	Ks. Governmental Consulting
Marlee Carpenter	Kansas Chamber
Christy Caldwell	Topeka Chamber of Comm
Danielle Noe	Johnson County
Martha Neu Smith	KMHA

SENATE ASSESSMENT AND TAXATION COMMITTEE
GUEST LIST

DATE: January 27, 2004

NAME	REPRESENTING
Natalie Haag	Security Benefit
Don Denny	Unified Gov. WyCo/KCK
Leslie Kaufman	Ks Coop Council

Special Committee on Assessment and Taxation

Local Sales Tax Uniformity

Conclusions and Recommendations

The Committee recommends a two-fold approach to providing additional "breathing room" in order to assure that uniformity is restored to the local sales tax law on a permanent basis. The Committee recommends legislation which would reduce the number of classes in the local sales tax law to two by effectively extending additional sales tax authority to a number of cities. The Committee further recommends introduction and placement on the November 2004 ballot of a proposed constitutional amendment that would expand to ten the number of classes the Legislature may utilize for the purpose of limiting or prohibiting taxation by cities.

Proposed Legislation: The Committee recommends the introduction of one bill and one concurrent resolution on this topic.

Background

The Legislature in 2003 enacted HB 2005, a bill that made a number of changes to state and local sales tax laws necessary to bring Kansas into conformity with the uniformity and simplification requirements set forth in the multi-state Streamlined Sales and Use Tax Agreement. A number of requirements of that agreement relate to local sales taxation, including a mandate that local sales taxes be administered by the state (section 301); a mandate that the local sales tax base be the same as the state base by 2006, subject to a few limited exceptions (section 302); a mandate that a local taxing jurisdiction have only one rate and that a local use tax rate be the same as the local sales tax rate (section 308); and a mandate that rate and taxing jurisdiction boundary changes only take place on the first day of a calendar quarter after retailers have been given a minimum of 60 days' notice (section 305).

A 1996 Kansas Court of Appeals decision, *Home Builders Ass'n v. City of Overland Park*, held that a statute located within the local sales tax act was nonuniform in its application and that municipalities were therefore authorized to charter out of a separate prohibition within the act on local excise taxation. (Article 12, Section 5 of the *Kansas Constitution* grants cities powers to determine their local affairs with respect to taxation and other issues but also grants the Legislature the power to uniformly limit or prohibit taxation by cities and to establish up to four classes of cities for that purpose.) Within the last two years, four cities have relied upon *Home Builders* as well as guidance from the Attorney General to approve charter ordinances and raise their local sales tax rates above the maximum authorized by state law.

The strong possibility now exists that a city could subsequently decide to charter out of other provisions of the local sales tax statutes requiring state administration; barring multiple rates within a single jurisdiction; requiring an identical tax base with the state; or stipulating when rates and boundaries may change. Any such charter ordinance by a single city could conceivably cause the entire State of Kansas to be out of substantial compliance with the Agreement.

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1-27-04
Attachment 1

The Legislative Coordinating Council therefore asked the Special Committee to evaluate the current status of local sales tax statutes with respect to uniformity and home rule power of cities and to determine whether uniformity should be assured or reestablished in the wake of multi-state streamlined sales tax simplification efforts.

Committee Activities

At the September meeting, staff briefed the Special Committee on city home rule power, as well as local sales tax uniformity history and some of the relevant case law. The Department of Revenue outlined the concern about the lack of uniformity pursuant to the *Home Builders* case and the extent to which the problem imperils Kansas' participation in the Agreement.

The Department also observed that even if the uniformity problem outlined in the *Home Builders* case could be fixed statutorily and the number of classes could be reduced to four the Legislature would then be faced with not allowing any special taxation provisions for cities at any time in the future (or the uniformity problem would have returned). The Department's testimony noted that the current local sales tax laws are extremely complicated and that "creative practitioners can no doubt develop additional arguments as to why the local sales tax laws may be nonuniform." The testimony further observed that if the number of classes could be reduced to one or two, "this would leave some breathing room."

The Chairman said that the uniformity problem was an extremely important issue relative to the Agreement and noted that cities had been the beneficiaries of the local use tax which was imposed as part of the Kansas streamlined sales tax legislation; and that they would be expected to benefit in the future to the extent that the state begins collecting local, as well as state, taxes on sales from remote vendors who are not currently required to remit the tax.

Conclusions and Recommendations

The Committee notes that the people of Kansas, in 1960, had explicitly granted the Legislature the power to uniformly limit or prohibit taxation by cities and to establish up to four classes of cities for that purpose. (Local sales taxes subsequently were not authorized by the Legislature until the early 1970s.) The 1996 court decision indicating that the Legislature had inadvertently exceeded that number of classes effectively granted cities the power to charter out of many of the provisions in the local sales tax law, including mandatory elections, caps on the maximum allowable rates, and requirements that the local tax base generally be the same as the state tax base.

This concern over lack of state control over city sales taxes is magnified further by the fact that the lack of uniformity in the local sales tax statutes could imperil Kansas' participation in the multi-state streamlined sales tax effort - participation that is expected to greatly benefit cities in addition to the state.

Because of the complexity of the local sales tax provisions and the likelihood that additional arguments could be made in court with respect to the lack of uniformity; and because of the propensity of cities to request additional local sales tax authority from the Legislature, the Committee recommends a two-fold approach to providing additional "breathing room" in order to assure that uniformity is restored on a permanent basis. The Committee recommends legislation which would redefine the existing classes in the local sales tax law to create only two classes by effectively extending additional sales tax authority to a number of cities. Enactment of this legislation would accomplish this recommendation. The Committee further recommends introduction and placement on the November, 2004, ballot a proposed constitutional amendment that would

SB308

SCR 1615

1-2

expand to ten the number of classes the Legislature may utilize for the purpose of limiting or prohibiting taxation by cities. Adoption of a concurrent resolution would accomplish this recommendation.

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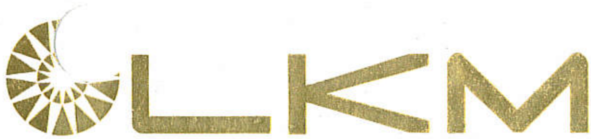

League of Kansas Municipalities

300 SW 8th Avenue
Topeka, Kansas 66603-3912
Phone: (785) 354-9565
Fax: (785) 354-4186

TO: Senate Assessment & Taxation Committee

FROM: Don Moler, Executive Director

RE: Opposition to SCR 1615

DATE: January 27, 2004

First I would like to thank the Committee for allowing the League to testify today in strong opposition to SCR 1615. This bill, on first blush, appears to be a very simple piece of legislation merely changing the number of classes of cities, for local sales tax purposes, from four to ten. Nothing could be further from the truth. In fact this bill represents a frontal assault on the constitutional home rule powers of all 626 cities in the State of Kansas. While the bill was introduced, and ostencibly is described as a way to correct a non-uniformity in the state sales tax act, this is not the way to go about it. If in fact nonuniformity within the local sales tax act is a concern, the Legislature can cure this nonuniformity in many other ways without amending the constitutional home amendment and thus endangering the local control and power of cities statewide. Quite simply, if the Legislature wishes to ensure that no city can charter out of the sales tax provisions which are required by the streamlined sales tax project, then the Legislature can reduce the existing number of city classifications of cities in the sales tax act to a number less than five. While we do not support this modification, that is the appropriate legislative way to do it without impacting the state constitution or its amendments.

The League is adamantly opposed to any revision of the constitutional home rule amendment, for any purpose! While we do not believe that those suggesting this legislation intended this consequence, it does not take a very much of an imagination to wonder how the home rule amendment might be modified, in other substantive ways, to essentially take away local control from cities and our citizens. A vehicle such as SCR 1615, unleashed on the floors of the Kansas Legislature, would very likely attract numerous amendments adversely impacting the powers of citizens of Kansas to control locally those issues of a local nature. As a result we strongly urge this Committee to reject SCR 1615 out of hand.

Finally I would like to thank you for your continued support of Constitutional Home Rule and local control.

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1-27-04
Attachment 2

The City of Overland Park KANSAS

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Overland Park, Kansas 66212
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Erik Satorius

Testimony Before The

Senate Assessment and Taxation Committee

SCR 1615

January 27, 2004

- The City of Overland Park opposes SCR 1615.
- The existing language of Kansas' constitutional Home Rule Amendment dates from 1960, forty-four years ago.
- Voters approved this language.
- If the motivation for SCR 1615 is to protect the State's participation in Streamlined Sales Tax Act, SCR 1615 is unnecessary because SB 308 takes care of that situation.
- If the motivation for SCR 1615 is to return the local sales tax statutes to uniform applicability, SCR 1615 again is unnecessary because SB 308 returns the local sales tax statutes to uniform applicability.
- Increasing the number of permissible tax classifications is an invitation to creating even greater non-uniformity.
- SB 308 is evidence that the Legislature can legislate within the boundaries of the current Home Rule Amendment. There is no need to change the rules when SB 308 shows the Legislature can live within the existing rules.
- SCR 1615 would affect more than just sales taxes.

K A N S A S

JOAN WAGNON, SECRETARY

DEPARTMENT OF REVENUE
OFFICE OF POLICY AND RESEARCH

KATHLEEN SEBELIUS, GOVERNOR

Testimony to the Senate Committee on Assessment and Taxation
Richard Cram, Director of Policy and Research

January 27, 2004

Explanation of Senate Bill 308--Ensuring Uniformity of the Local Sales Tax Laws

Chairman Corbin and Members of the Committee:

Senate Bill 308 follows from the recommendations of the Special Committee on Assessment and Taxation, as a result of the study of the issue of uniformity of the local sales tax statutes. If the local sales tax laws are deemed non-uniform, so that cities could exercise home rule authority to opt out of them, then action taken by any city could potentially throw Kansas out of compliance with the Streamlined Sales and Use Tax Agreement, which requires that local sales taxes be administered at the state level, state and local tax bases must be the same, and that multiple rates within a taxing jurisdiction on different items cannot be used.

Statutory Amendments Proposed

Section 2

K.S.A. 12-188 sets up 4 classes of cities, for purposes of levying sales and excise taxes. Section 2 amends K.S.A. 12-188 to reduce the 4 classes to 2 classes, Class A for all cities, and Class B for any city that, prior to July 1, 2004, exercised home rule authority to enact a local sales tax. Current Class B, for cities with health care sales taxes, Class C for the City of Wichita (which has a special exemption from the bonded debt limits on sales tax-financed bonds), and the Class D for cities in certain counties to levy economic development sales taxes would be eliminated. All cities would be given the latitude provided in current Classes B, C and D.

The Kansas Constitution provides the legislature the leeway to impose limits and restrictions on cities' power to levy taxes, through up to 4 classes. If the number of statutory classes are reduced from 4 to 2, there will at least be 2 unused classes for dealing with future non-uniformity issues that may arise.

Section 3

K.S.A. 12-189 sets the rate limits on cities and counties, imposing rate caps of 1% on Class A, B and C cities, and 1.75% on Class D cities. Counties are generally given a 1% rate cap. Counties must share this sales tax revenue with cities within those counties, pursuant to the formulas established in K.S.A. 12-192. However, numerous specific counties are given authority to levy special sales taxes for up to an additional 1% above that cap, with those special sales tax revenues dedicated entirely to financing those special projects. Section 3 would amend K.S.A. 12-189 to impose a general 1% rate cap on all cities (in increments of .25%, .5%, .75% or 1%

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only). Section 1 would amend K.S.A. 12-187 to grant additional authority to cities of up to another 1% (in increments of .125%, .25%, .5%, .75% or 1% only) to levy special taxes for health care or economic development initiatives. Counties would keep the 1% rate cap (in increments of .25%, .5%, .75% or 1% only) for sales taxes that must be shared with cities, and would be given an additional 1% authority (in increments of .125%, .25%, .5%, .75% or 1% only) for the purposes of financing special projects, for which all of that sales tax revenue would be dedicated to the special project. The proposal also includes a "grandfather clause" for city sales taxes enacted pursuant to home rule authority prior to July 1, 2004.

The bill needs to be amended to correct a drafting error in Section 3. At line 43, page 8, the following language needs to be deleted: "1.25%; the board of county." At lines 1 and 2, page 9, the following language needs to be deleted: "commissioners of Osage county, for the purposes of paragraph (2) of subsection (b) of K.S.A. 12-187, and amendments thereto, may fix such rate at." At line 14, page 9, the word "or" needs to be deleted.

Section 1

K.S.A. 12-187 authorizes for Class B and D cities certain special purpose city sales taxes (health care for Class B cities in which the county does not have such a tax, and economic development initiatives for Class D cities) and for certain counties, special county sales taxes. It also imposes rate restrictions (1% being the highest authorized rate) on them. For the special purpose county sales taxes for specific counties, K.S.A. 12-187 authorizes the dedication of all such revenue to the financing of those special projects. Section 1 amends K.S.A. 12-187 to gather all of these special types of city and county sales taxes and provides authority to all cities the authority to enact those special project city sales taxes of up to 1%, and further provides to all counties the authority to enact special project county sales taxes of up to 1%, with the revenues from those special county sales taxes to be dedicated to finance those projects. Between all the city and county sales taxes authorized, a total of up to 4% of local sales tax authority would exist, doubling the authority that currently exists.

The non-uniformity issue involved in the Court of Appeals decision in *Home Builders Assoc. v. City of Overland Park*, 22 Kan. App. 2d 649, 921 P.2d 234 (1996) concerned the Class B authority for certain cities to enact a health care sales tax, if the county did not have one. The court identified this as a non-uniformity issue in the local sales tax laws. By extending to all cities authority to enact a health care sales tax, whether the county has one or not, this non-uniformity argument should be defeated.

Extending to all counties the authority granted to some counties to enact special project sales taxes, with the revenues dedicated entirely to funding the special project, would defeat a non-uniformity argument that cities located in counties having authority to enact special project sales taxes (which will not be shared with those cities), are being treated differently than cities in counties that do not have special project sales tax authority (county sales taxes in such counties must be shared with the cities pursuant to applicable formulas).

Section 4

K.S.A. 12-192 provides the revenue sharing formula that counties must use in dividing up the county sales tax revenue between the county and cities in the county. Johnson County has its own special formula. Section 4 amends K.S.A. 12-192 to give any county the option to use the Johnson County formula. Another potential non-uniformity argument that could be raised is that by statute, cities in Johnson County have a different revenue formula for sharing county sales tax

:evenue than cities in the other counties. By extending to all counties the option to use the Johnson County formula, this non-uniformity argument should be blunted.

Section 5

Class C in K.S.A. 12-188 only applies to the City of Wichita. K.S.A. 12-195b provides to the City of Wichita a special exemption from the bonded debt limits for sales tax-financed bonds. Section 5 would amend K.S.A. 12-195b to extend the exemption from the bonded debt limits to all cities, not just Wichita. Because the Class C for the City of Wichita is to be eliminated, the special exception to the bonded debt limits for the City of Wichita needs to be extended to all cities. Otherwise, a non-uniformity argument could develop.

KANSAS

JOAN WAGNON, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

DEPARTMENT OF REVENUE
OFFICE OF POLICY AND RESEARCH

Testimony to the Special Committee on Assessment and Taxation
Richard Cram, Director of Policy and Research

September 4, 2003

Issues Concerning the Streamlined Sales and Use Tax Agreement and Uniformity of the Local Sales Tax

Chairman Corbin and Members of the Committee:

Background--Agreement Provisions Concerning Local Sales Tax

As a result of House Bill 2005 enactment, including provisions contained in the Streamlined Sales and Use Tax Agreement (Agreement), Kansas is now in a position to apply for membership. The threshold of at least 10 states representing at least 20% of the population of states with sales tax having passed the required legislation has been reached. Those states can now begin the application process. Several of the major requirements in the Agreement concern local sales tax. These are described below.

The local sales tax must be administered at the state level. Section 301. Kansas law already required state-level administration of the local sales tax.

The state sales tax base must be the same as the local sales tax base by 2006 (with some limited exceptions). Section 302. Whatever is taxable at the state level must be taxable at the local level and whatever is exempt at the state level must be exempt at the local level. One of the changes made in House Bill 2005 to meet this requirement was to make sales of water for residential or agricultural use exempt from local sales tax, effective in 2006. This change was needed because those items are exempt from state sales tax now.

By 2006, a state must have only one state sales tax rate. A local taxing jurisdiction can have only one local sales tax rate, and the local use tax rate must be the same as the local sales tax rate. Section 308. Kansas law already provided for this, but more on this topic later.

Local sales tax rate and local taxing jurisdiction boundary changes can only take place on the first day of a calendar quarter, after retailers have been given a minimum of 60 days notice of those changes. Section 305. Kansas law meets these standards.

Background--Home Rule Authority

...

In *Kansas City Renaissance Festival Corp. v. City of Bonner Springs*, __ Kan. __, 8 P.3d 701 (2000) the Kansas Supreme Court summarized the "home rule" authority granted to cities by

the Kansas Constitution:

> In 1961, the home rule amendment to the Kansas Constitution took effect and empowered cities to determine their local affairs. Kan. Const. art. 12, § 5(b). The legislature retains power over statewide matters. Hence, home rule power does not authorize cities to act where the state legislature has precluded municipal action by clearly preempting the field with a uniformly applicable enactment. Generally speaking, where the legislature has not preempted the field with a uniformly applicable enactment, cities may exercise their home rule power by one of two means. Where there is a nonuniform legislative enactment that is in conflict with the action a city wants to take, a charter ordinance may be used to exempt the city from the legislative enactment. Kan. Const. art. 12, § 5(c). Where there is no legislative enactment in conflict with the local action, an ordinary ordinance will suffice.

Section 5(b) of article 12 of the Kansas Constitution provides:

> (b) Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class: *Provided,* That the legislature may establish not to exceed four classes of cities for the purpose of imposing all such limitations or prohibitions. Cities shall exercise such determination by ordinance passed by the governing body with referendums only in such cases as prescribed by the legislature, subject only to enactments of the legislature of statewide concern applicable uniformly to all cities, to other enactments of the legislature applicable uniformly to all cities, *to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction* and to enactments of the legislature prescribing limits of indebtedness. All enactments relating to cities now in effect or hereafter enacted and as later amended and until repealed shall govern cities except as cities shall exempt themselves by charter ordinances as herein provided for in subsection (c).

Pursuant to the above section, the legislature can establish not more than 4 classes of cities for the purpose of imposing limitations or prohibitions on cities' taxing authority. K.S.A. 12-188 established 4 such classes:

> The following classes of cities are hereby established for the purpose of imposing limitations and prohibitions upon the levying of sales and excise taxes or taxes in the nature of an excise upon sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services by cities as authorized and provided by article 12, section 5, of the constitution of the state of Kansas:
>
> Class A cities. All cities in the state of Kansas which have the authority to levy and collect excise taxes or taxes in the nature of an excise upon the sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services by cities.
>
> Class B cities. All cities in the state of Kansas which have the authority to levy and collect excise taxes or taxes in the nature of an excise upon the sales or

transfers of personal or real property or the use thereof, or the rendering or furnishing of services for the purpose of financing the provision of health care services.

Class C cities. All cities in the state of Kansas having a population of more than 290,000 located in a county having a population of more than 350,000 which has the authority to levy and collect excise taxes or taxes in the nature of an excise upon the sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services.

Class D cities. All cities in the state of Kansas located in Cowley, Ellis, Ellsworth, Finney, Harper, Johnson, Labette, Lyon, Montgomery, Osage, Reno or Woodson county or in both Riley and Pottawatomie counties which have the authority to levy and collect excise taxes or taxes in the nature of an excise upon the sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services.

Relevant Case Law

The Court of Appeals in *Home Builders Ass'n v. City of Overland Park*, 22 Kan.App.2d 649, 921 P.2d 234, *rev. denied* 260 Kan. 993 (1996) held that K.S.A. 1995 Supp. 12-187(a)(2), a statute contained in the local sales tax laws, was non-uniform in its application. Therefore, under home rule authority, a municipality could impose an excise tax on platting, even though K.S.A. 12-194 expressly prohibited municipalities from enacting that type of excise tax. At issue was whether the 1992 amendment to K.S.A. 12-187 made it nonuniform, which rendered the local retailers' enactment subject to the charter ordinance home rule authority of the city. K.S.A.1995 Supp. 12-187(a)(2) was added by the legislature in 1992, and provided:

> "*The governing body of any city located in any county which does not impose a countywide retailers' sales tax pursuant to paragraph (5) of subsection (b) may submit the question of imposing a retailers' sales tax at the rate of .25%, . 5%, .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.* As used in this paragraph, health care services shall include but not be limited to the following: Local health departments, city, county or district hospitals, city or county nursing homes, preventive health care services including immunizations, prenatal care and the postponement of entry into nursing homes by home health 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." (Emphasis added.)

The Court of Appeals concluded that the enactment was not uniformly applicable, thus permitting the cities to opt out by charter ordinance:

> "K.S.A.1995 Supp. 12-187(a)(2) has the effect of treating cities within the four classes of K.S.A.1995 Supp. 12-188 nonuniformly depending upon whether the county in which a particular city sits has enacted the retailers' sales tax in K.S.A.1995 Supp. 12-187(b)(5). Take, for instance, a class B City under K.S.A.1995 Supp. 12-188. According to K.S.A.1995 Supp. 12-189, 'the rate of

> any class B city retailers' sales tax shall be fixed in the amount of .25%, .5%, .75%, 1%, 1.25%, 1.5%, 1.75% or 2%.' However, class B cities sitting in a county which has not enacted a countywide retailers' sales tax pursuant to K.S.A.1995 Supp. 12-188(b)(5) may submit the question of an additional retailers' sales tax to their electors. K.S.A.1995 Supp. 12-187(a)(2). Thus, it appears the legislature, pursuant to the 1992 amendment to K.S.A. 12-187(a), is treating cities of the same class within the local retailers' sales tax enactment nonuniformly. By treating cities within the same class nonuniformly, the legislature has opened up the local retailers' sales tax enactment to home rule authority." 22 Kan.App.2d at 668, 921 P.2d 234.

The Kansas Supreme Court has noted and discussed the *Home Builders* decision in two recent opinions, *Kansas City Renaissance Festival Corp. v. City of Bonner Springs*, __ Kan. __, __ P.3d __ (2000) and *Bigs v. City of Wichita*, __ Kan. __, 3 P.3d 855 (2001). In neither case did the court expressly affirm or reject the *Home Builders* rationale. *Renaissance Festival* involved a successful challenge to a Bonner Springs ordinary ordinance enacting an amusement tax. Bonner Springs raised the issue that K.S.A. 12-194, the same statute challenged as non-uniform in *Home Builders*, was non-uniform. However, the decision against Bonner Springs was based on the fact that Bonner Springs had enacted an ordinary ordinance to impose the amusement tax, instead of a charter ordinance. The Kansas Supreme Court therefore did not need to address the issue of whether the statute itself was uniform. *Bigs* involved a successful challenge brought by various liquor establishments against the City of Wichita's charter liquor license ordinance and fees. The city unsuccessfully claimed that the Club and Drinking Establishment Act, K.S.A. 41-2601 et seq. was non-uniform, raising *Home Builders* as a supporting case. The court rejected the city's argument that *Home Builders* was relevant. In discussing *Home Builders*, the court stated: "As we have seen, however, the basis for the *Home Builders* decision was the legislature's imposing different rate limitations on cities of the same class. The differential rate limitations . . . made the enactment non-uniformly applicable for the purpose of cities' home rule analysis." In this statement, the Kansas Supreme Court expressed no disagreement with the *Home Builders* rationale.

Recent Actions By Municipalities

In reliance on *Home Builders* as well as recent Attorney General guidance, and in order to raise their local sales tax rates above the statutory cap, the following cities have enacted charter ordinances intended to opt out of the local sales tax laws:
Caney, effective April 1, 2003 (city tax rate is 2.75%);
Coffeyville, effective Oct 1, 2002. (city tax rate is 2.50%);
Independence, effective Oct 1, 2002 (city tax rate is 2.25%); and
Bonner Springs, effective October 1, 2003 (city tax rate is 1.25%).

The department has entered into agreements with these municipalities to continue administering their local sales taxes, even though they have attempted to charter out of the local sales tax laws. The possibility exists that additional municipalities may attempt to follow suit.

Reasons Why the Local Sales Tax Laws Should Be Uniform

So long as municipalities attempt to exercise home rule authority to charter out of the local sales tax laws only for the purpose of raising their rates above the statutory caps, Kansas' compliance with the Streamlined Sales and Use Tax Agreement will not be threatened. However, were a municipality to attempt to charter out of the local sales tax laws for the purpose

of administering the local sales tax itself, to impose more than one rate, to create its own exemptions or impositions, or to shorten the notice rules for imposing or changing the tax or changing jurisdiction boundaries, that municipality's actions could jeopardize Kansas' compliance with the Agreement and standing as a member. As long as the argument exists that the local sales tax laws are non-uniform, Kansas' ability to comply with the Agreement provisions can be placed at risk by the action of a single municipality.

The large number of local taxing jurisdictions and variety of different local sales tax rates has made implementation in Kansas of destination-based sourcing, one of the requirements of the Agreement, a challenge. If the legislature desires to consider simplifying the local sales tax laws by reducing the number of different local sales tax rates and jurisdictions, the local sales tax laws must be uniform, in order for such measures to be effective. Otherwise, municipalities could attempt to charter out of them.

Thoughts for Legislation to Ensure that the Local Sales Tax Laws are Uniform

As previously discussed, the Kansas Constitution authorizes the legislature to impose 4 classes of cities, and K.S.A. 12-188 establishes 4 such classes. This leaves no room for error when a court scrutinizes each paragraph of the local sales tax laws for non-uniformity in application. If the 4 classes were reduced to 1 or 2, this would leave some breathing room.

Any legislative effort to ensure uniformity would need to encompass and "bless" existing local sales taxes, so as to avoid the possibility of making unlawful an existing local sales tax. This may result in raising the statutory rate caps for all or at least some municipalities to equal the highest existing local sales tax rate.

Although K.S.A. 12-187(a)(2) has been amended since *Home Builders* and the new statutory language has not been tested in the courts, municipalities have argued that it remains vulnerable to the same non-uniformity issues identified in *Home Builders*: it treats cities of the same class differently, depending on whether the city is located in a county that has enacted a K.S.A. 12-187(b)(5) sales tax. A legislative solution to this problem would also involve raising the statutory local sales tax rate cap, giving cities authority to impose a health care sales tax, without regard to whether the county has imposed one.

Creative practitioners can no doubt develop additional arguments as to why the local sales tax laws may be non-uniform. Reducing the number of classes of cities and establishing fewer rate caps at levels that will cover the maximum number of cities, should weaken those arguments.

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September 4, 2003

To: Special Committee on Assessment and Taxation

From: Mike Heim, Principal Analyst

Re: City Home Rule and Local Sales Tax

The focus of this memorandum will be on city home rule powers and the local sales tax law. County home rule powers are granted by statute and the statute already restricts the exercise of these powers in reference to the local sales tax law. (See KSA 19-101 a (8)) which states: Counties shall be subject to the limitations and prohibitions imposed under KSA 12-187 to 12-195, inclusive, and amendments thereto, prescribing limitations upon the levy of retailers' sales taxes by counties.

HOME RULE

Introduction

All local units of government must look to state constitutions or to state statutes for the source of their powers. Courts have rejected the theory that local governments enjoy any inherent right to local self-government. Under our system of federalism, states are sovereign not their local governments.

Local governments are considered creatures of the state as well as subdivisions of the state and as such are dependent upon the state for their existence, structure, and scope of powers. See *Hunter v Pittsburgh*, 207 U.S. 161, 28 S.Ct 40, 52 L.Ed 151 (1907).

State legislatures have plenary power over the local units of government they create, limited only by such restrictions they have imposed upon themselves by state law and by provisions of their state constitutions, most notably home rule provisions.

Dillon's Rule

Dillon's Rule, although formulated by the courts for cities, is a reflection of the general dependency of all local governments upon state legislatures absent a home rule grant of authority. Dillon's Rule states:

> "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of

power is resolved by the courts against the corporation, and the power is denied . . . . These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations . . . ."

See Dillon, *Municipal Corporations*, Sec. 237 (5th ed. 1911).

Home Rule Reverses Dillon's Rule

A grant of home rule power to cities, counties, or other local unit of government particularly if the grant is contained in the state constitution changes the rules of dependency cited above. Home rule power constitutes both a grant of power to the local unit of government as well as a real limitation on state legislative power. See Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 Minn. L. Rev. 643 (1964). Home rule, in effect, reverses Dillon's Rule because a local unit of government may exercise power over its own affairs despite the lack of statutory authority.

City Home Rule—What Powers Are Granted

Key language of the city home rule constitutional grant of power is the following:

"(b) Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class: *Provided*, that the legislature may establish not to exceed four classes of cities for the purpose of imposing all such limitations or prohibitions. Cities shall exercise such determination by ordinance passed by the governing body with referendums only in such cases as prescribed by the legislature, subject only to enactments of the legislature of statewide concern applicable uniformly to all cities, to other enactments of the legislature applicable uniformly to all cities, to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge, or other exaction and to enactments of the legislature prescribing limits of indebtedness. . .

(c) (4) Each charter ordinance enacted shall control and prevail over any prior or subsequent act of the governing body of the city and may be repealed or amended only by charter ordinance or by enactments of the legislature applicable to all cities.

(d) Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government."

How and When City Home Rule is Exercised: "Ordinary" versus "Charter" Ordinances

"Ordinary" City Home Rule Ordinances. The term "ordinary ordinance" was coined after the passage of the home rule amendment but is not specifically used in the *Kansas Constitution*. The intent of using the term is to distinguish ordinances passed under home rule authority which are not charter ordinances from other ordinances enacted by cities under specific enabling acts of the legislature. Ordinary ordinances are those referred to in Article 12, §5(b), where it provides that ". . . cities shall exercise such determination (home rule) by ordinance passed by the governing body with referendums only in such cases as prescribed by the legislature. . ."

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According to one commentator, Barkley Clark, "State Control of Local Government in Kansas: Special Legislation and Home Rule," 20 Kan. L.Rev. 631 at 658 (1972), the above language is the most significant aspect of the Home Rule Amendment since it gives Kansas cities the power to initiate legislation by ordinance without relying on enabling statutes. Clark's term for this power and procedure is "affirmative home rule."

Use of Ordinary Home Rule Ordinances. There are several instances where cities may use ordinary home rule ordinances as follows:

- **No State Law.** The first is when a city desires to act and there is no state law on the subject sought to be addressed by the local legislation. The regulation and licensure of massage parlors or adult entertainment studios by counties, upheld in *Moody v Board of Shawnee County Commissioners*, 237 Kan. 67, 697 P.2d 1310 (1985) is an illustration of the first situation. Another example of this type of home rule action is illustrated in the situation which a city became a limited partner in an enterprise to construct a wind turbine system and to sell electricity. See Op. Att'y Gen. 160 (1981). See also Op. Att'y Gen. 55 (2000) where cities and counties were said to have the power under home rule to prohibit ticket scalping at sporting or entertainment events on state and federal property if needed.

- **Local Supplement to a Uniform State Law.** The second instance where cities may enact ordinary home rule ordinances (resolutions) is when there is a uniform state law on the subject and the local government wants to supplement the state law, there is no conflict between the state law and the local addition or supplement, and the Legislature has not clearly preempted local action. In regard to the police power, this ability in reference to cities predates the home rule amendment.

The following are three examples of local supplemental legislation to state laws:

  - See *Hutchinson Human Relations Commission v Midland Credit Management, Inc.*, 213 Kan. 308, 517 P.2d 158 (1973) where the court affirmed the ability of cities to establish local civil rights agencies despite the existence of a state civil rights commission and of state laws prohibiting acts of discrimination.

  - The use of home rule was the underlying assumption of the court in *City of Junction City v Lee,* 216 Kan. 495, 499, 532 P.2d 1292 (1975) when the court upheld an ordinary home rule ordinance defining the crime of unlawful use of weapons as the carrying of both concealed and unconcealed weapons. A uniform state law made it a crime only to carry a concealed weapon. See KSA 21-4201.

  - See also *Leavenworth Club Owners Association v Atchison*, 208 Kan. 318, 492 P.2d 183 (1971) where the court upheld an ordinance which established a 1:30 a.m. closing time for private clubs although state law provided a 3:00 a.m. closing time.

- **Alternative to Permissive Legislation.** A third instance where many believe ordinary home rule ordinances can be used involve situations where either uniform or nonuniform enabling or permissive legislation exists, but a city chooses not to utilize the available state enabling legislation but instead acts under home rule. This instance is different from the second example of the use of ordinary

ordinances since the city would use its home rule authority as a complete alternative to what exists in the state enabling or permissive law.

See *Clark v City of Overland Park,* 226 Kan. 609, 617, 602 P.2d 1292 (1979) where the court rejected the argument that a charter ordinance should have been used in a situation where alternative statutory procedures for the enactment of a local sales tax existed and where there was not a substantive conflict between the state and local enactments.

See *Blevins v Hiebert,* 13 K.A.2d 318, 770 P.2d 486 (1989) wherein the Court of Appeals upheld an ordinary county resolution authorizing the issuance of general obligation bonds for a highway bypass project even though a nonuniform enabling act was available for use in Douglas County. See also Op. Att'y Gen. 90 (1985) reaching the same conclusion. The Kansas Supreme Court, in *Blevins v Hiebert,* 247 Kan. 1, 795 P.2d 325 (1990) however, held this third use of ordinary home rule city ordinances or county resolutions was improper and overruled the Court of Appeals case cited above. The *Blevins* case did not overrule *Clark* and the Supreme Court appears to have limited *Blevins* by later decisions.

Statutory Procedure for Enacting Ordinary Home Rule Ordinance Tax Measures

The Legislature in 1961, the same year the city home rule amendment became effective, enacted KSA 12-137 and 12-138. KSA 12-137 provides that when a city proposes to levy for revenue purposes any tax, excise, fees, charge, or other exaction other than permit fees or licenses fees for regulatory purposes, it must enact the home rule revenue measure by a two-thirds vote of the city governing body and the ordinance is subject to a protect petition and election procedure that parallels the procedure for the passage of a charter ordinance by cities under Article 12, § 5 (c) of the *Kansas Constitution*.

The law was supplemented in 1977 with a procedure allowing initiative of tax measures for revenue purposes by petition of not less than 10 percent of the electors who voted at the last city election triggering an election on the tax proposal. See KSA 12-138a.

A similar law applies to counties enacting tax measures under home rule and includes an initiative measure. See KSA 19-117.

Charter Ordinances

City Charter Ordinances. Several subsections of the Home Rule Amendment deal with charter ordinances–when these ordinances may be used, and the procedure to be used for their adoption. *Kansas Constitution*, Article 12, §5(c)(2) defines a charter ordinance as "an ordinance which exempts a city from the whole or any part of any enactment of the legislature and which may provide substitute and additional provisions on the same subject." See also Article 12, §5(c)(1) which states that a city by charter ordinance may elect that the whole or any part of any appropriate legislative enactment applying to the city shall not apply to such city. Subsection (c)(1) specifies some of the circumstances when the use of charter ordinances is appropriate and when it is not.

Framework for Exercise of Home Rule

Several questions must be asked when analyzing whether a city may exercise home rule power in a given situation. First, is there a state law that governs the subject? Second, if there is a state law, is it uniformly applicable to all cities? Third, if there is a uniform state law, does it contain specific language which clearly preempts further action by cities under home rule? And fourth, if there is a uniform state law, and there has been no preemption by the Legislature, will the local regulation clearly conflict with the uniform state law?

Uniformity: What Does It Mean

Griffin Case. The key question is: What is meant by "enactments applicable uniformly to all cities"? The clearest statement by the court to date concerning what is a uniform enactment applicable to all cities is found in the city home rule case of *City of Junction City v Griffin,* 227 Kan. 332, 607 P.2d 459 (1980). The court determined that the entire Kansas Code of Procedure for Municipal Courts law (KSA 12-4101 through 12-4701) did not apply uniformly to all cities since one section of that act, KSA 12-4105, required municipal judges in cities of the first class to be attorneys but did not require the same of municipal judges in cities of the second or third class. The court noted that this section was one of the sections included in L. 1973, Ch. 61 and was clearly one of the sections comprising the legislative enactment. The court stated:

> "The division into chapter, article and sections in the Kansas Statutes Annotated does not have the effect of making separate enactments of a single bill passed by the legislature of the state of Kansas."

An enactment then is all sections of a single bill enacted by the Kansas Legislature. Every section of a bill must apply uniformly to all cities if the bill is to be a uniform enactment (at 335-336).

The court went on to state:

> "Regardless of whether an enactment of the state legislature addresses a matter of statewide or a matter of local concern, a city may in either case act by charter ordinance to exempt itself from all or part of the enactment unless the state enactment applies uniformly to all cities" (at 337).

Earlier, the court had stated that statutory express intent to make a law uniformly applicable to all cities *cannot* supplant the constitutional requisite of uniformity.

Claflin: Statutes *In Pari Materia* Another key ingredient in determining uniformity was expressed in the case of *Claflin v Walsh,* 212 Kan. 1, 8, 9, 509 P.2d 1130 (1973). The court stated that all statutes on the same subject whether enacted at the same time or not were *in pari materia* and should be construed together to determine uniformity. The issue in the case was whether the city of Kansas City had the power to pass a charter ordinance providing for a different method of management of a Soldiers and Sailors' Memorial Building. The statute in question, KSA 73-407, was part of what the court described as a hodgepodge of statutes pertaining to memorials, monuments and grave markers with many exceptions pertaining to cities of various classes and counties of various sizes. The statute in question permitted three exceptions in its application to various cities.

See *General Building Contractors,* ***LLC*** *v Board of Shawnee County Commissioners,* ___ Kan. ___, ___ P.3d ___ (2003), where the court agreed with the district court analysis that held that KSA 19-101, KSA 19-3801 *et seq.*, and KSA 19-4101 *et seq.* when considered *in pari materia* provided the authority for Shawnee County to condemn property for economic development purposes under its home rule authority. See also *Home Builders Association v. City of Overland*

Park, 22 KA 2d 649, 921P. 2d 234 (1996) which used the doctrine of in *pari materia* to find KSA 12-194 was part of the local sales tax act.

Moore Case: Permissive Laws Are Uniform Laws. A second area of confusion has been the effect of both uniform and nonuniform permissive state laws on cities. These laws enable cities to act in a particular area but do not require any action, *i.e.*, permissive enabling legislation. In *Moore v City of Lawrence,* 232 Kan. 353, 654 P.2d 445 (1982), the court described permissive laws as follows: "It is clear that initially these statutes are not uniformly applicable to all cities as they provide an optional procedure which may be adopted by any city as a means of governing matters pertaining to city planning and subdivision regulation." The opinion went on to say, though, that the statutes were uniform since the Legislature intended that they be uniform. Granted, the court's reasoning is less than clear but the case stands for the rule that a law which applies uniformly to all cities which authorizes the exercise of some power is considered a uniform law.

***Bigs Case: County Option Uniformly Applicable—At Least for Liquor*.** The *Moore* permissive law analysis was extended by the court in *Bigs v City of Wichita*, 271 Kan. 455, 23 P.3d 855 (2001). At issue in *Bigs* was whether the Club and Drinking Establishment Act, KSA 41-2601 *et seq.* was a uniform law for cities. The law contains a section allowing drinking establishments in counties where the qualified electors of the county approved the liquor by the drink constitutional amendment at the election in November 1986 or where the county electors voted later in favor of liquor by the drink. See KSA 41-2642 and 41-2643. An earlier version of the law had a special provision for certain cities located in certain counties. This provision was repealed by the Legislature in 1988. The court extended the *Moore* rationale that giving the cities the option to adopt provisions of an enactment did not create nonuniformity by stating that giving counties the option to be covered by a state law did not create nonuniformity. The *Bigs* court stated that the legislative intent was clear, and to allow <u>counties</u> who elect to adopt the provisions of the enactment to then opt out by charter ordinance defeats the intent and purpose of the Legislature. The court's use of the word "counties" was in error. The election for selling liquor under the state law is a county by county option—so it is the county making the election but it was the City of Wichita which opted out of what it considered a non-uniform state law due to the county option. Cities in these counties approving drinking establishments were given certain powers or authority not granted to other cities. Regardless of the confusing language, the court's conclusion was clear: that the county drinking establishment option law was applicable uniformly to all cities within the meaning of Article 12, §5 of the *Kansas Constitution*.

Note the *Bigs* case did not overrule either the *Home Builders* case nor the *Clark* case discussed below.

Uniformity and Four Classes for Tax Purposes

***Home Builders: Local Sales Tax Law Has More Than Four Classes of Cities*.** *Home Builders Association v. City of Overland Park*, 22 K.A. 2d 649, 921 P.2d 234 (1996) held that the Kansas Local Retailers' Sales Tax Act was not uniform and therefore was subject to charter ordinance by a city. The court upheld the charter ordinance and three ordinary ordinances which imposed an excise tax to be paid by those who apply for plat approval and recordation in the city. The court held that KSA 12-194 prohibiting excise taxes was a part of the local sales tax act and that the entire local sales tax act was nonuniform since the Legislature has treated cities within the same class (class B) in a nonuniform manner.

Under KSA 1995 Supp. 12-189, local sales tax rates of any class B city could be from .25 percent in quarter cent increments not to exceed 2 percent. However, class B cities located in a county which had not enacted a local sales tax for health care could levy an added tax for health care services. The *Home Builders* court did not decide the issue of whether a charter ordinance was needed or whether home rule action could be taken by a city under an ordinary home rule ordinance.

The city home rule amendment, Article 12, §5, when describing the use of charter ordinances, does not require or even mention the use of such ordinances in reference to the four classes of cities that the Legislature may create under to impose nonuniform limits of cities taxing powers.

When *Clark v City of Overland Park*, 226 Kan. 609, 602 2d 1292 (1979) was decided, there was statute, KSA 12-172, which allowed cities where over half their territory was located in a county where a county sales tax proposition had failed to submit the question of a city sales tax to voters. Overland Park covered by both KSA 12-172 and KSA 12-137 and 12-138, opted to utilize the KSA 12-137 and 12-138 procedure.

The *Clark* court said KSA 12-172 clearly brought all cities within its scope, since all cities would have to examine their relationship with their county to determine which city was permitted to levy the tax. The court went on to hold that KSA 12-172 treated cities differently—some cities were permitted to levy and collect taxes, some cities would be required to quit levying a tax if a county tax were approved, and other cities may or may not be able to levy a tax depending on what the county did. The court said "explicit classification and uniform applicability to all cities of the same class are required where complete uniformity is not declared." The *Clark* court went on to hold that both KSA 12-172 and KSA 12-137 provided alternate methods for enacting a local sales tax and upheld the "ordinary" home rule ordinance of Overland Park.

Renaissance Festival: Local Sales Tax Law Cannot be Ignored. The ordinary home rule ordinance issue, not decided in *Home Builders*, was taken up by the court in *Kansas City Renaissance Festival Corp. v. City of Bonner Springs*, 269 Kan. 670, 8 P.3d 701, (2000). The court held that a city's ordinary home rule resolution enacted under KSA 12-137 and 12-138 establishing an amusements admission tax was invalid. The court rejected the city's argument that the city was not bound by any tax limiting legislation that was not uniformly applicable to all cities or at least uniformly applicable to cities within one of the four classes permitted under Article 12, §5. The city had argued that the rule of the *Clark* case applied and that a charter ordinance was not necessary since KSA 12-137 and 12-138 provided an alternative basis for enacting the excise tax. The court distinguished *Clark*, saying that Overland Park was not prohibited by the local sales tax law from enacting a local sales tax, unlike Bonner Springs which, under KSA 12-194, was prohibited from enacting an excise tax.

How to Cure Nonuniformity

The *Bigs* court addressed another uniformity issue: Can the Legislature cure or make a non-uniform state law uniform by amending the non-uniform section only or must it reenact the entire law for which it seeks to cure or fix the non-uniformity? The court held that it was sufficient to amend only the section that contained the non-uniform provision. The court further held that as a result of repeal of the nonuniform provision of the Club and Drinking Establishment Act, that this state law amendment was sufficient to cause the repeal of the City of Wichita's charter ordinance which provided the higher local license fee.

Local Sales Tax

Cities and counties each may levy local sales taxes, generally at rates ranging between .25 to 2 percent subject to voter approval. See KSA 12-187 *et seq*. Note several cities have passed charter ordinances raising the rate of the local sales tax above the statutory rate that applied. Net collections of local sales taxes in FY 2003 were nearly $548 million.

Classes of Cities Created for Local Sales Tax Limitation

The Legislature, under KSA 12-188, has created four classes of cities for the purpose of imposing limitations and prohibitions upon the levying of sales and excise taxes or taxes in the nature of an excise upon sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services by cities as authorized by Article 12, §5, of the *Kansas Constitution*. The four classes are:

- **Class A Cities**. All cities in the State of Kansas which have the authority to levy and collect excise taxes or taxes in the nature of an excise upon the sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services by cities. This first classification covers all cities.

- **Class B Cities**. All cities in the State of Kansas which have the authority to levy and collect excise taxes or taxes in the nature of an excise upon the sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services for the purpose of financing the provision of health care services. (The second class of cities is tied to cities which have the authority to levy a local sales tax to finance health care services. A city can levy this tax only if the county in which it is located does not levy such a tax.)

- **Class C Cities**. All cities in the State of Kansas having a population of more than 290,000 located in a county having a population of more than 350,000 that has the authority to levy and collect excise taxes or taxes in the nature of an excise upon the sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services. (This third class of cities applies only to the City of Wichita.)

- **Class D Cities**. All cities in the State of Kansas located in Cowley, Ellis, Ellsworth, Finney, Harper, Johnson, Labette, Lyon, Montgomery, Osage, Reno, Woodson, or Wyandotte counties, or in both Riley and Pottawatomie counties that have the authority to levy and collect excise taxes or taxes in the nature of an excise upon the sales or transfers of personal or real property or the use thereof, or the rendering or furnishing of services. (This final class of cities applies to all cities within the first 13 counties listed above plus the City of Manhattan, which lies in both Riley and Pottawatomie counties.)

Local Sales Tax Rate Limits Established By Class of Cities

The city sales tax rate limitations are set in KSA 12-189 and further modified in KSA 12-187. Under KSA 12-189, the rate of any class A, class B, or class C city retailers' sales tax shall be fixed in the amount of .25 percent, .5 percent, .75 percent, or 1 percent, which amount shall be determined by the governing body of the city.

The rate of any class D city retailers' sales tax shall be fixed in the amount of .10 percent, .25 percent, .5 percent, .75 percent, 1 percent, 1.125 percent, 1.25 percent, 1.5 percent, or 1.75 percent.

KSA 12-189 refers back to KSA 12-187 for further modification of the local sales rate limitations as described in the following discussion.

Classes of Cities: Further Defined

Class A Cities Further Clarified. Class A cities is the fall back or default classification because it applies to all cities unless the city falls within one of the other three classes. Class A cities are limited to imposing a local sales tax in an amount not to exceed 1 percent.

Class B Cities Further Defined; Health Care Services Defined. Under KSA 12-187(a)(2), any class B city, located in a county that does not levy a local sales tax for health care services, may levy a city tax for health care at a rate of .25 percent, .5 percent, .75 percent, or 1 percent, if electors approve. In effect, class B cities are limited to those cities located in a county that does not impose a local sales tax for health care services. This added 1 percent tax authority is in addition to the one percent maximum rate set under KSA 12-189.

Health care services are defined to include: local health departments, city, county or district hospitals, city or county nursing homes, preventive health care services including immunizations, prenatal care, and the postponement of entry into nursing homes by home health 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.

Class C Cities Further Defined. The distinguishing feature of class C cities is an exemption from bonded debt limits rather than a tax rate variation. Class C cities (Wichita) are set apart from the other cities under KSA 12-195b(d)(3). The thrust of KSA 12-195b is to authorize cities and counties to issue general obligation bonds to pay the cost of any public facilities and improvements and to pledge local sales taxes to pay the bonds. These general obligation bonds are counted against the city's bonded debt limit unless excluded from the debt limit by another law. For class C cities (Wichita), however, KSA 12-195b(d)(3) provides a blanket exclusion from bonded debt limits, meaning that the City of Wichita does not have to rely on another exclusion statute because this statute provides the exclusion itself.

Class D Cities Further Defined. KSA 12-187(e) clarifies the power of class D cities to levy added local sales taxes, *i.e.*, taxes are not to exceed .75 percent for economic development and infrastructure. The statute provides that a class D city shall have the same power to levy and collect a city retailers' sales tax as that of a class A city. In addition, a class D city may submit the question of imposing an additional local sales tax in the amount of .125 percent, .25 percent, .5 percent, or .75 percent and pledge the revenue for economic development initiatives, for strategic planning initiatives, or for public infrastructure projects including buildings to the electors at an election. Any additional sales tax imposed under this authority shall expire no later than five years from the date of its imposition unless imposed after July 1, 2000, in which case, the tax shall expire no later than ten years from the date of imposition.

Countywide Local Sales Tax Apportionment of Revenue—Other Examples of Non-Uniformity or Added Classes?

The general rule for apportionment of the proceeds of a local countywide sales tax is stated in KSA 12-192(a), as follows:

> "(1)One-half of all revenue received shall be apportioned among the county and each city located in the county in the proportion that the total tangible property tax levies made in the county in the preceding year for all funds of each governmental unit bear to the total of all levies made in the preceding year; and (2) one-half of all revenue received shall be apportioned among the county and each city located in the 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. Note that no persons residing within the Fort Riley military reservation shall be included in the determination of the population of any city located within Riley 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.

Special Rule for Johnson County. In lieu of the apportionment formula provided above, in Johnson County, countywide retailers' sales taxes imposed at the rate of .75 percent or 1 percent may be apportioned among the county and each city located in the county in the following manner:

- The revenue received from the first .5 percent rate of tax shall be apportioned in the manner prescribed above in the general rule; and
- The revenue received from the rate of tax exceeding .5 percent shall be apportioned as follows:
  - one-fourth shall be apportioned among the county and each city located in the county in the proportion that the total tangible property tax levies made in the county in the preceding year for all funds of each governmental unit bear to the total of all levies made in the preceding year;
  - one-fourth shall be apportioned among the county and each city located in the 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; and
  - one-half shall be retained by the county for its sole use and benefit.

Other County Tax Apportionment Special Rules. See KSA 12-187 (b) for a list of special local sales tax provisions for counties where the county is able to retain the entire amount of the local tax.

League of Kansas Municipalities

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Date: January 27, 2004

To: Senate Assessment and Taxation Committee

From: Larry R. Baer
Assistant General Counsel

Re: SB 308 - Testimony in Opposition

Thank you for allowing me to appear before you today on behalf of the League of Kansas Municipalities and its member cities and present testimony on SB 308.

The League opposes SB 308's attempt to "make uniform" the retailers' sales tax act. One of the reasons put forward for the need for uniformity is that a city could, by charter ordinance, exempt itself from some portion or all of the sales tax act, particularly as it relates to exemptions or administration. Thereby, taking Kansas out of compliance with the SST agreement. This concern is, if anything, premature. To date all actions taken by cities regard establishing excise taxes and rates. These do not come into play when considering compliance with the SST agreement. No city has shown any desire to alter the sales tax base as it would apply to it or to undertake local administration of its sales tax.

The League supports the SST. To this end, while we will always encourage our member cities to exercise local control, we will strive to educate and impress upon them the importance of taking no action that could jeopardize compliance with the SST agreement.

A city cannot exempt itself from sales tax provisions and substitute other provisions that would cause non-compliance with the SST in a vacuum or overnight. The adoption of the charter ordinance is only the first step. The charter ordinance does not become effective until the 61st day after its last publication. This permits time for the State to take steps to nullify such action by the city.

SB 308 would eliminate the distinction between the sales tax rates now available to Class A, B, C and D cities. If SB 308 is enacted, all cities, that do not now have sales tax in effect in excess of 1%, would be capped at a maximum of 1%, plus the additional limit granted for enumerated special projects in the proposed amendment to K.S.A. 12-187(2). These special limits would also apply to those cities that now exceed 1%. This creates inequities between cities in similar situations. Under current law cities can by local action eliminate the inequities.

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Interestingly, you are hearing testimony today regarding reducing or restricting the sales tax authority of a city or county. But on Thursday, you will be holding hearings on bills seeking to expand the sales tax authority of two counties. Kansas must decide what its sales tax philosophy is. Is it to restrict the authority and flexibility that cities and counties have had for years or is it one to continue with the status quo and to trust the cities and counties?

The phrase "that have levied city retailers' sales taxes pursuant to home rule authority", or something similar, appears in several places in SB 308. The League does not know what this phrase means. All action taken by cities is based upon home rule authority.

While we appear here in opposition to SB 308 because it is premature, removes powers previously granted to cities and counties and would result in inequities between cities, if the State believes that uniformity in the retailers' sales tax act is needed, uniformity would need to be done in a way so as not to harm cities, counties and our taxpayers, and continue to maintain the powers already granted to the cities and counties. To accomplish this any bill, whether SB 308 or some other, would need to do the following things to keep the cities and counties whole:

- Remove the sales tax cap for cities and counties.
- Maintain the recently enacted local compensating use tax.
- Contain specific language to "grandfather in" all existing local sales and excise taxes.
- Contain language that would allow cities to adopt and levy local excise taxes. This could be patterned after the county provisions found in K.S.A. 19-117.

In summary, the League opposes SB 308 and requests that the Committee reject SB 308 because it is premature, erodes powers previously given to cities and counties and could result in inequities between cities. In the alternative, if this body is convinced that uniformity in the retailers' sales tax act is required, then the League requests that at minimum the above four factors be implemented in the "uniformity legislation".

Thank you for allowing me to appear before you today. I will be happy to stand for questions.

The City of Overland Park KANSAS

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Erik Satorius

Testimony Before The

Senate Assessment and Taxation Committee

Senate Bill No. 308

January 27, 2004

- The City of Overland Park supports the position of the League of Kansas Municipalities on SB 308.

- In addition, the City's Law Department wishes to offer amendments to the bill from the point of view of the City of Overland Park's existing sales and excise tax situation.

- The City wants to make sure that the language we propose to take care of Overland Park's situation does not adversely affect other cities' situations, and we are in contact with those other cities to ensure that they are not adversely affected by our proposed changes.

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27 January 2004

Testimony Opposing SB 308

Karl Peterjohn
Exec. Dir.

Kansas has a lousy tax climate. SB 308 would make it easier to expand our already high overall sales tax rate by making it easier for local units to raise city or county sales taxes.

These taxes are quite common around this state. Sadly, we have strayed far from the excellent law contained in KSA 12-187 that requires a petition of electors to place these issues on the ballot.

The Kansas Taxpayers Network has regularly appeared before this committee complaining about the large number of signatures needed to force tax referendum votes in this state. This bill would eliminate the basic provisions of KSA 12-187.

It is sad that SB 308 would tilt the law to make it easier for local units to raise this tax. Today, the state sales tax rate is 5.3 percent but there are many communities where local sales taxes now make the total rate much higher. In Wichita, we have a one percent add on, but Topeka and a number of other cities have much higher rates.

Today, in border areas sales taxes are providing an incentive for Kansans to shop out-of-state. Kansans are going into adjacent and generally lower tax states to make retail purchases on a wide variety of products.

The excellent principle contained in KSA 12-187a and b1 requiring that tax hike proponents collect signatures from 10 percent of the voters to place this issue on either the city or county ballot is a provision that should be strengthened and not weakened. This statute should be the starting point for all tax hikes at all levels of government: state, city, county, school, and special taxing districts in this state. Tax hike proponents should forthrightly declare their support for higher taxes and petition for them just like taxpayers are allowed to do to stop tax hike on occasion under Kansas law.

If KSA 12-187's petition requirement was in place for all local tax hikes in Kansas, this state's tax climate would not be as high as it is and we would have a much more competitive fiscal climate with our neighboring states.

Expanding local units' taxing authority during a recession is not a cure for this state's economic problems. Raising taxes during a recession will make a bad situation worse. SB 308 should be rejected by this committee.

Senate Assessment + Taxation
Submitted 2-3-04 for
1-27-04 meeting
Attachment 7