

Subject

*Counties  
General*

Copy to



STATE OF KANSAS

*Office of the Attorney General*

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER  
Attorney General

November 21, 1974

Opinion No. 74- 370

Mr. Les Jayne, Executive Director  
Flint Hills Regional Planning Commission  
Strong City, Kansas 66869

Dear Mr. Jayne:

We have your letter of November 9, addressed to the Quad-County Bus Committee, and all county commissioners of Chase, Lyon, Marion and Morris counties, enclosing a copy of a proposed intergovernmental cooperation agreement for the development and operation of a bus transportation facility for the elderly.

The proposed agreement is ambiguous in one important respect--it does not identify the entity or county which is to have actual and direct responsibility for operating the bus service, e.g., who is to purchase or lease the buses, employ drivers, purchase supplies and insurance, and the like. The advisory board is given some substantial responsibilities, and with "recommending action to be taken by the Counties relative to developing, coordinating and administering the bus program." Yet, the advisory council is not, under the proposed agreement as drafted, the operating entity for the bus service. Nor is any of the counties proposed to be made a member of the agreement. K.S.A. 1973 Supp. 12-2904(d) states thus:

"In the event that the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking, the agreement shall, in addition to items 1, 3, 4, 5, and 6 enumerated in subdivision (c) hereof, contain the following:

1. Provision for an administrator or a joint board or one of the participating public agencies to be responsible for administering the joint or cooperative undertaking. In the case of a joint board public agencies party to the agreement shall be represented.

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2. The manner of acquiring, holding, and disposing of real and personal property used in the joint or cooperative undertaking."

Both of these requirements are lacking in this instance.

In addition, under the agreement, the advisory board is not constituted as a legal or administrative entity of any identifiable and precise nature. If that board is to be merely advisory in nature, of course, this is not necessary. However, under paragraph 19, of general provisions, for example, it is made the assignee of unpaid accounts receivable. As such an assignee, the board should be constituted with a carefully defined legal or administrative description of its makeup and definition.

Lastly, we cannot approve paragraph 23, an executory agreement to submit to arbitration by three judges of "any differences" arising over the construction of this agreement. Such agreements are generally unenforceable save by an action for breach of contract, and generally, specific performance will not lie to enforce an agreement to arbitrate a prospective controversy. *Thompson v. Phillips Pipe Line Co.*, 200 Kan. 669, 438 P.2d 146 (1968). In this state of the law, it is our view that such an agreement is beyond the authority of the participating counties.

If further questions arise in the revision of this proposed agreement, please feel free to call upon us.

Yours very truly,



VERN MILLER  
Attorney General

VM:JRM:tp