



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

October 29, 1975

ATTORNEY GENERAL OPINION NO. 75- 419

Mr. Donald E. Martin
City Attorney
Legal Department of Kansas City
Ninth Floor - Municipal Office Building
One Civic Center Plaza
Kansas City, Kansas 66101

Re: Cities--Expenditures of Public Funds--Public Purpose

Synopsis: Under extant decisions of the Kansas Supreme Court, a Kansas municipality has no authority to engage in a commercial venture solely for profit, and the City of Kansas City, Kansas, has no authority to construct and operate a cable television system for profit absent a judicial determination that such an undertaking is not prohibited by previous decisions of the Court.

* * *

Dear Mr. Martin:

You request my opinion whether "a municipality may construct a cable television system and operate such system for a profit."

You advise that in an area north of the Kansas River and I-70, Midway Cable Television, a non-exclusive franchise holder since 1966, has provided very adequate service commensurate with the public need. However, for citizens in the south part of the city, no cable television service is available, due to the fact that Kansas Telecable, Inc. has held a franchise for that area since 1966 but has never commenced construction of a CATV system. Thus, half of the city is left with no cable television service, which include educational programming, Public Broadcast System programming, wide commercial broadcast selection and broadened program

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choice. The City of Kansas City, Kansas, is contemplating using Federal revenue-sharing funds to establish CATV service at competitive cost to the users in the area where it is not now available. The revenue received from the service would be dedicated to the city's general fund, thus reducing the burden upon the city's taxpayers. Although no formal financial study has been completed, it is tentatively estimated that additional revenue generated by this service would reach one million dollars annually when service is fully operable.

You indicate that it is also envisioned that the service provided by this CATV system could be used to bring governmental operations closer to the citizenry, providing for telecasting city business meetings, zoning hearings, and the like. In addition, educational matter dealing with law enforcement and fire prevention would be presented.

However, inasmuch as federal revenue-sharing funds may be spent only for those capital projects authorized by state law, the question arises whether the city has the legal authority to own and operate such a system.

K.S.A. 1974 Supp. 12-2006 commences thus:

"The furnishing of cable television service by means of facilities in place in the public ways, streets and alleys is hereby declared to be a private business affected with such a public interest by reason of its use of the public ways, alleys and streets so as to require that it be reasonably regulated by cities."

This legislature declaration was contrary to the underlying premise of *Community Antenna TV of Wichita, Inc. v. City of Wichita*, 205 Kan. 537, 471 P.2d 360 (1970), which held that it was a private business subject to no greater regulation by the cities than local grocery stores or other comparable private commercial ventures. In *Capitol Cable, Inc. v. City of Topeka*, 209 Kan. 152, 495 P.2d 885 (1972), the court upheld franchise regulation of CATV by the City of Topeka by an ordinance antedating the 1972 legislative enactment. The court held as a matter of law that "CATV is a private business affected with such a public interest as to require reasonable regulation by the city." 209 Kan. at 161.

As you point out, these authorities respecting the power of the city to regulate CATV systems which are privately owned are not determinative whether a city may own and operate a system itself.

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It has long been recognized that the city acts in two separate capacities, governmental and municipal, or proprietary. In *Krantz v. City of Hutchinson*, 167 Kan. 449, 196 P.2d 227 (1948), the court observed thus:

"We have had frequent occasion in our decisions to recognize the well-established proposition that a municipal corporation has a dual capacity and exercises, correspondingly, two classes of rights and duties. One capacity is ordinarily designated as *governmental*, while the other capacity is variously referred to as *proprietary*, private, quasi-private, business, commercial or *municipal*." [Emphasis by the court.]

The court turned to *Corpus Juris* and *American Jurisprudence* for descriptions of municipal, or proprietary, activities. From 43 C.J. 183 and 184, the court quoted thus:

"All functions of a municipal corporation, not governmental, are strictly municipal. Municipal functions are those granted for the specific benefit and advantage of the urban community embraced within the corporated boundaries. Logically all those are strictly municipal functions which specially and peculiarly promote the comfort, convenience, safety, and happiness of the citizens of the municipality, rather than the welfare of the general public. . . . In respect of its purely business relations as distinguished from those that are governmental, a municipal corporation is held to the same standard of just dealing that the law prescribes for private individuals or corporations. When the municipality acts for the private advantage of the inhabitants of the city, and to a certain extent for the city itself. . . . It is performing a function, not governmental, but often committed to private corporations or persons, with whom it may come into competition." [Emphasis supplied by the court omitted.]

The quotation from *American Jurisprudence* pointed out that when acting in its proprietary or private character, the city is "frequently regarded as having the rights and obligations of a

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private, rather than those of a public, corporation," and in that capacity, is exercising its "private rights as a corporate body."

Thus, the city may undertake an activity which might otherwise be committed to private enterprise, so long as it does so for the special, albeit public, benefit of its inhabitants. A CATV system would unquestionably, in my judgment, constitute a proprietary or municipal undertaking.

However, any municipal undertaking in such an activity must be considered in light of a pronounced public policy which has been declared by the Kansas Supreme Court. In *State ex rel. Mellott v. Kaw Valley Drainage District*, 126 Kan. 43, 267 Pac. 31 (1928), there was challenged the operation of a sand plant for profit by a drainage district organized under state law. The district proposed to apply the proceeds from the sale of sand to its flood protection responsibilities. Although recognizing that the organic law of the district facially authorized the undertaking, the court disapproved it, relying upon

"our definite state policy, as provided in our constitution and elsewhere, that the state, or its municipal subdivisions, shall not engage in purely commercial enterprises." 126 Kan. at 50.

This policy was stated more emphatically in *State ex rel. Coleman v. Kelly*, 71 Kan. 811, 81 Pac. 450 (1905), in which the court held an oil refinery authorized to be built by the legislature to be an "internal improvement" prohibited by Art. 11, § 8 of the Kansas Constitution. The court stated thus:

"This constitutional provision is a limitation placed by the people in their paramount law upon the power of the legislature, preventing it from diverting the energies of the state from public and governmental functions into private and business enterprises. No circumstances can arise which will justify its violation by any governmental department

* * *

"[T]his is the first time that it has become necessary to invoke the aid of

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this provision of the constitution to protect the state in its sovereign capacity from the public disaster that history shows would follow its engaging in a purely private business enterprise. It has been the policy of our government to exalt the individual rather than the state, and this has contributed more largely to our rapid national development than any other single cause. Our constitution was framed, and our laws enacted, with the idea of protecting, encouraging and developing individual enterprise, and if we now intend to reverse this policy, and to enter the state as a competitor against the individual in all lines of trade and commerce, we must amend our constitution and adopt an entirely different system of government." 71 Kan. at 829, 836.

In *State ex rel. Smith v. City of Hiawatha*, 127 Kan. 183, 272 Pac. 113 (1928), the court held the city to be without express or statutory authority to conduct moving-picture and road shows for profit in a military memorial auditorium. Although the decision turned largely upon statutory interpretation, the court stated in *obiter dicta* thus:

"Aside from the consideration that the statute does not expressly or impliedly authorize municipalities to carry on the business in which defendants are engaged, we think it is beyond the reach of municipal powers, in that it is repugnant to our state policy as evidenced by the constitutional, statutory and common law of the state."
127 Kan. at 185-186.

It may be argued that these cases are no longer applicable, and are not controlling in this instance in any event. The constitutional prohibition which forbids the state to be a party to internal improvements does not apply to the city. *State ex rel. Hopkins v. Raub*, 106 Kan. 196 (1920). Questions of the want of statutory authority are no longer pertinent. Since the adoption of Article 12, § 5 of the Kansas Constitution, the city is not restricted in its undertakings to those expressly or impliedly authorized by statute, but enjoys direct constitutional power to determine its local affairs. *Claflin v. Walsh*, 212 Kan. 1,

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509 P.2d 1130 (1973). Moreover, the court has emphatically disclaimed any role as the arbiter of public policy. In *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 308 P.2d 537 (1957), the court stated thus:

"[O]ne of the established principles which has become cardinal and elementary in the field of constitutional law is that the propriety, wisdom, necessity and expedience of legislation are exclusively matters for legislative determination and courts will not invalidate laws, otherwise constitutional, because the members of the court do not consider the statute in the public interest of the state, since, necessarily, what the views of members of the court may be upon the subject is wholly immaterial and it is not the province nor the right of courts to determine the wisdom of legislation touching the public interest as that is a legislative function with which courts cannot interfere." 180 Kan. at 659.

Thus, presumably, the court would not today disapprove a venture by a Kansas municipal corporation merely because members of the court thought it to be unwise or unsound.

Notwithstanding these arguments, the decisions described above remain extant, and remain binding precedent which are extremely pertinent to the question here. Their applicability is augmented somewhat by the legislative declaration that the furnishing of CATV service is a "private business affected with a public interest" by virtue of its use of the streets, alleys and public ways of the city so as to warrant public regulation.

If these arguments were deemed persuasive reasons for departure from these past decisions, however, there would remain the question whether the expenditure of city funds for this purpose would be an expenditure for a public purpose. In the cases cited above, the Kansas Supreme Court did not bottom its opposition to cities and other political subdivisions engaging in private enterprise on the lack of a public purpose, expressly, but upon a judicially enunciated public policy against ventures by public bodies into private enterprise. Other courts have held that expenditures for particular ventures were not for a public purpose, on the ground that the enterprise engaged in was of a private nature. In an annotation at 115 A.L.R. 1456, the writer

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canvasses a number of such cases in which courts have both approved and disapproved particular ventures. At p. 1458, the writer cites cases upholding such ventures as the purchase and sale of land to soldiers, construction and lease of warehouse on vacant city tide and submerged land, purchase and resale of coal, wood and fuel, manufacture and sale of hog-cholera serum and the purchase and resale of gasoline and oil.

In *State ex rel. White v. Kansas City*, 134 Kan. 157, 4 P.2d 422 (1931), there was questioned a legislative act, and city ordinance adopted pursuant thereto, providing for the issuance of general obligation bonds of the city for the reconstruction and repair of street railway tracks belonging to a private corporation operating in the city. It was objected that the act authorized a loan of the credit of the city for a private purpose. The court responded thus:

"It is granted that a municipality has no authority to loan its credit or issue its bonds to promote a private purpose. Can it be said that an act authorizing cities to aid in the building or reconstruction of a street railway is for a private purpose? The street railroad is a means of public transportation. It is a public utility to carry passengers and property at rates which are fixed by the public service commission, which exercises the same control and regulations as are exercised over steam railroads At an early day it was decided that it was competent for the legislature to authorize municipalities to grant aid for the construction of railroads, on the theory that the transportation of passengers and freight for the public is a public purpose although operated by a private agency which was subject to the regulations and control of the state."

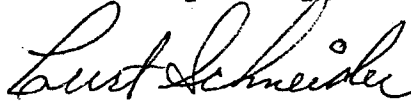
The furnishing of public television service over publicly owned facilities to residents of the city might well be deemed a modern analog of the public aid to private transportation companies which has been historically sanctioned in this state. Nonetheless, there are obvious factual dissimilarities between transportation of persons and goods, and the furnishing of CATV service.

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Despite very reasonable grounds for argument that the decisions cited above should not be construed to foreclose the proposal considered here, these decisions do enunciate an emphatic public policy against public bodies engaging in commercial ventures or activities deemed to lie in the province of the private sector. These decisions remain outstanding. Even if the court were to be persuaded that Article 12 § 5 of the Kansas Constitution contained no inherent or implied prohibition against cities engaging in such activities, it still must conclude, in order to uphold such an undertaking, that funds spent for the project were indeed expenditures for a public purpose, and it is likely that the public policy described herein would be persuasive that indeed, such expenditure were indeed for a private business, as the legislature has declared CATV to be, despite the fact that it is one which is clearly affected by a public interest.

Accordingly, on the basis of the foregoing, we must conclude that under the extant decisions of the Kansas Supreme Court, a Kansas municipality may not construct a cable television system and operate such a system for a profit. In view of the very interesting questions raised by the proposal, however, the City might wish to consider seeking a judicial determination of the question if it wished to pursue the proposal.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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