



STATE OF KANSAS

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September 24, 1976

ATTORNEY GENERAL OPINION NO. 76-296

Honorable Lloyd Buzzi
Honorable Neil H. Arasmith
Special Committee on Federal and
State Affairs
State Capitol Building
Topeka, Kansas 66612

RE: Airports - State Grants - Constitutionality

SYNOPSIS: Article 11, §9 of the Kansas Constitution prohibits the use of state funds for the construction and development of municipal and county airports, although it does not prohibit the use of such funds for local aviation planning. The levy of a motor-fuel tax on aircraft fuel to fund such grants is constitutionally permissible.

* * *

Dear Gentlemen:

You advise that the Special Committee on Federal and State Affairs is considering, as an interim study proposal, the desirability of establishing a state program of rural airport aid and development.

You inquire whether a state program of grants for the construction and development of airports which are owned and operated by cities would be constitutionally permissible. Article 11, §9 of the Kansas Constitution states thus:

"The state shall never be a party in carrying on any work of internal improvement except that: (1) It may adopt, construct, reconstruct

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and maintain a state system of highways, but no general property tax shall ever be laid nor general obligation bonds issued by the state for such highways; (2) it may be a party to flood control works and works for the conservation or development of water resources." [Emphasis supplied.]

In contrast to the prohibition against "internal improvements," Article 11, §6 expressly authorizes the state to undertake "public improvements." The distinction between the two was observed in *State ex rel. Boynton v. State Highway Comm'n.*, 138 Kan. 913, 28 P.2d 770 (1934) thus:

"The term 'public improvements,' as used in section 5, meant public buildings which the state should need in carrying on its functions, such as the statehouse, state penal, educational and eleemosynary institutions (Wyandotte Constitutional Convention, p. 327), while the term 'internal improvements,' as used in section 8, applied to turnpikes, canals and the like." 138 Kan. at 919.

Thus, student dormitories at state universities are "public," and not "internal," improvements. Thus, as pointed out in Opinion No. 75-315, in which the question was treated at some length, the scope of the term "public improvement" was stated thus:

"The term 'public improvement' describes, basically, improvements to property owned and used by the state in the discharge of its duties and responsibilities as a sovereign corporation, and is restricted to state buildings and improvements associated therewith."

We pointed out in that opinion that the constitutional prohibition was absolute and unqualified. In *Leavenworth County v. Miller*, 7 Kan. 479 (1871), the court stated thus:

"The state as a state is absolutely prohibited from engaging in any works of internal improvement. We will concede that this prohibition does not extend to the building of a statehouse, penitentiary, state university, and such other public improvements as are used

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exclusively by and for the State, as a sovereign corporation; but it does extend to every other species of public improvement. It certainly extends to the construction of every species of public improvement which is used, or may be used, by the public generally . . . such as public roads, bridges, etc. . . . [I]t is prohibited from opening up or constructing any roads, highways, bridges, ferries, streets, sidewalks, pavements, wharfs, levees, drains, waterworks, gas-works, or the like."
7 Kan. at 493.

In *State ex rel. Hopkins v. Raub*, 106 Kan. 196 (1920), the court stated that the construction of highways was a work of internal improvement in which the state could not engage. (Construction of a "state system of highways" is now permitted by amendments to Article 11, §9.) An airport is equally a work of internal improvement, to which the state may not be a party. Certainly, the state is a party to the construction of an airport when it appropriates funds therefor. *State ex rel. Hopkins v. Raub, supra*, at 202. Accordingly, I can but conclude that the adoption of a state program of grants for the construction and development of municipal airports would constitute the state a party to works of internal improvement, in violation of Article 11, §9 of the Kansas Constitution.

Secondly, you ask whether a state program of grants for the planning of airports which are owned and operated by cities or counties would be constitutionally permissible. The direction that the state shall not be a "party in carrying on any work of internal improvement" does not prohibit all state involvement whatever with cities and counties in responding to their aviation needs. In providing funds to cities and counties to survey and assess local and regional aviation uses, to project future needs, and to determine the feasibility of alternative sites for aviation facilities, state funds are not used, in my judgment, to carry on any work of improvement, but rather, to assist local authorities to determine whether such improvements are in fact needed, and if so, precisely what facilities will best serve local needs. Thus, in my judgment, state funds may be made available for planning by cities and counties, regarding local aviation facilities, within the limits of the foregoing.

Lastly, you inquire whether the imposition of a state motor-fuel tax on fuels for aircraft to fund such grants would be constitutionally permissible. Article 11, §10 of the Kansas Constitution states thus:

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"The state shall have power to levy special taxes, for road and highway purposes, on motor vehicles and on motor vehicles."

In *State ex rel. Arn v. State Commission of Revenue and Taxation*, 163 Kan. 240, 181 P.2d 532 (1947), the court pointed out that this provision was superfluous:

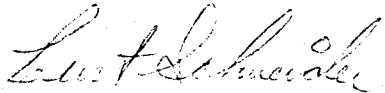
"We point out, however, that this constitutional provision was not necessary in order to give the legislature that authority. The state, in its sovereign capacity, has power, through its legislature, to levy excise taxes for revenue purposes, and in fact our legislature had done so before this constitutional amendment was adopted. One may inquire if this is true, why the amendment was submitted to and adopted by the people. Perhaps the reason was that many of our citizens had questioned previous legislative acts levying such a tax, and that it was done to quiet any feeling of that kind. But, irrespective of the reason for it, it must be interpreted in harmony with not only other provisions of the constitution, but with the fundamental inherent power of the state. This legislative power arises from the fact that our government is one of the people, who act through their legislatures in enacting laws, the only restriction being that the people so acting cannot exercise powers which have been granted to the federal government by the adoption of the federal constitution or limited by our state constitution. Section 10, article 11, is a recognition of an existing power. The legislature needed no grant of such power it had previously exercised, and it is not a limitation of legislative power." [163 Kan. at 249.]

Thus, no constitutional provision was needed to authorize the levy of motor fuel taxes for road and highway purposes. Similarly, no constitutional authority is required to authorize the levy of a motor-fuel tax on aircraft fuel for whatever purpose the legislature wishes to designate. Prior to 1928, when this provision of the constitution was adopted, the legislature was free to levy a tax on fuels for whatever purpose it deemed needful, and subsequent to that amendment, it remains just as free to do so. This provision does not forbid the use of any motor-fuel tax for any purpose other than roads and highways, so long as the statute under which the tax is levied

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designates the purposes to which it is to be applied. Accordingly, in my judgment, the imposition of a state motor-fuel tax on fuels for aircraft to fund grants as described above would be constitutionally permissible.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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