



STATE OF KANSAS

Office of the Attorney General

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

Curt T. Schneider
Attorney General

September 27, 1976

ATTORNEY GENERAL OPINION NO. 76-302

Mr. Warden L. Noe
Assistant County Attorney
Jackson County Courthouse
Holton, Kansas 66436

Re: Counties--Road Equipment--Rental

Synopsis: Counties may not sell blacktop and other asphaltic paving materials for use by private individuals and corporations. It may rent county road equipment and machinery, under the supervision of county personnel, under the authority of K.S.A..68-141a.

* * *

Dear Mr. Noe:

You advised that the Jackson County board of county commissioners has received two requests that the county furnish blacktop paving materials, county employees and equipment for the paving of private driveways and parking areas. In one instance, the request is from an incorporated business operator, located in a rural area and adjacent to a state highway and in the other, from a county resident for improvements on his residential property located in a rural area of the county. You question whether the county is authorized to supply and sell blacktop materials to residents of the county.

As you point out, K.S.A. 68-141a provides in pertinent part thus:

"That the boards of county commissioners and township trustees in the various counties of the state are hereby authorized to rent or

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hire county and township machinery and equipment to residents of the county or township."

Such rentals are subject to K.S.A. 68-141b:

"Any machinery or equipment requiring an experienced operator shall be rented or hired only under the supervision of an experienced employee of the county or township. It shall be hired or rented only at such times as it is not being used by the county or township in its own work. The charges for the use of said machinery or equipment shall be sufficient to defray the expense of the county or township employee operating said machinery or equipment, and the cost of operating said machinery or equipment, together with any charges for additional insurance that the county or township may be called upon to pay for the additional liability assumed. . . ."

Prior to the enactment of these provisions, the Kansas Supreme Court decided a number of cases in which it enunciated a strong public policy against the undertaking of commercial enterprises by public governmental entities. See *State ex rel. Mellott v. Mason*, 126 Kan. 43, 267 Pac. 31 (1928); *State ex rel. Smith v. Hiawatha*, 127 Kan. 183, 272 Pac. 113 (1928); *State ex rel. Logan v. Allen*, 133 Kan. 376, 299 Pac. 630 (1931); and *Glen W. Dickinson Theaters, Inc. v. Lambert*, 136 Kan. 498, 16 P.2d 515 (1932). Relying on these cases, Attorney General Vern Miller concluded, in an opinion dated March 8, 1973, to W. B. Buechel, Concordia city attorney, that "installation of asphaltic paving by the City of private property was tantamount to a commercial enterprise which was prohibited to municipal corporations."

K.S.A. 68-141a *et seq.*, was enacted in 1933, one year after the *Dickinson Theaters, Inc. v. Lambert* decision, and may well have been a legislative response thereto, perhaps to sanction a practice which even at the time was of long-standing.

Since that time, as you point out, Kansas counties now enjoy a measure of home rule power. K.S.A. 19-101a permits counties to "transact all county business and perform such powers of local legislation and administration as they deem appropriate," subject to certain restrictions, none of which are applicable here. Thus, counties need not

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look for express statutory authority for the exercise of county legislative and administrative powers, so long as they involve only local county matters. The furnishing of asphaltic blacktop materials and equipment and employees is, of course, a local county matter. However, the exercise of these local powers is subject to any overriding public policy of the state, as pronounced either by the legislature or by the state supreme court. In this instance, the legislature has expressly authorized the rental of county machinery to residents of the county, under the supervision of county employees. While this authority may seem at odds somewhat with the cited previous decisions of the Kansas Supreme Court, the authority is precise and limited, without the benefit of any decision of the Kansas Supreme Court involving this statutory authority, its validity is not questioned here.

Thus, in my judgment, the only authority which the county has to rent its equipment to private persons is that set forth in this statute. Because of the clearly enunciated public policy stated by the Kansas Supreme Court, the county may not, in my opinion, utilize its statutory home rule powers to authorize the sale of county materials and use of county personnel and equipment beyond the terms of this precise statutory authority. Thus, in my opinion, the county has no authority to supply or sell blacktop materials to residents of the county, whether private individuals or incorporated entities. It may rent county machinery or equipment only at such times as it is not being used by the county in its own work, and in accordance with the other restrictions of K.S.A. 68-141a *et seq.*

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj