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March 15, 1979

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ATTORNEY GENERAL OPINION NO. 79- 27

Mr. Joseph W. Snell
Executive Director and
State Historic Preservation Officer
Kansas State Historical Society
120 West Tenth Street
Topeka, Kansas 66612

Re: State Historical Society--National Historic
Preservation Act of 1966--Internal Improvements

Synopsis: Article 11, Section 9 of the Kansas
Constitution precludes the State Historical
Society from disbursing federal funds
to a private individual for the rehabilita-
tion or renovation of an historic building
or site, where such funds are appropriated
by the legislature for such purpose and
such building or site is used primarily
in connection with a commercial enterprise.

* * *

Dear Mr. Snell:

You inquire whether the Kansas State Historical Society, as the designated state agency to administer federal assistance under the provisions of the National Historic Preservation Act of 1966, 16 U.S.C.A. §470 (1974 & Supp. 1978), may disburse federal funds to private individuals pursuant to federal and state law. You advise that such federal funds are apportioned to the various states. The Kansas share is presented to the legislature as part of the governor's annual budget and appropriations to the Society for each specific project are then made by the legislature in its discretion. You further advise that application for federal funds has been made by a private owner of a building currently listed on the federal Register of Historic Places.

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Federal law clearly contemplates the award of grants-in-aid to private individuals for the protection, rehabilitation, restoration and reconstruction of historical buildings that qualify under the provisions of the act.

Section 470a of the referenced federal act provides:

"(a) The Secretary of the Interior is authorized . . .

. . . .

"(2) to establish a program of matching grants-in-aid to States for projects having as their purpose the preservation for public benefit of properties that are significant in American history, architecture, archeology, and culture"

Further, the Act defines "project" as meaning

"programs of State and local governments and other public bodies and private organizations and individuals for the acquisition of title or interests in, and for the development of, any district, site, building, structure, or object that is significant in American history, architecture, archeology, and culture, or property used in connection therewith, and for its development in order to assure preservation for public benefit of any such historical properties."
(Emphasis added.) 16 U.S.C.A., §470a (1974 & Supp. 1978)

Likewise, the Kansas law would authorize the expenditure of federal grant-in-aid funds to private individuals. K.S.A. 75-2723(b) declares:

"The state historical society . . . shall have the right and is authorized and empowered to: . . . (2) Disburse federal and state funds to eligible local governments and private agencies and individuals as directed by the historic sites board of review according to priorities established in the Kansas preservation plan." (Emphasis added.)

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Without commenting on the eligibility of any particular applicant, we conclude that projects of private individuals were intended to be within the scope of the federal and state historic preservation laws. However, within the existing framework for appropriating and disbursing funds for specific projects, we also must conclude that the Kansas Constitution prohibits the proposed disbursement of federal funds to private individuals through the Kansas State Historical Society.

Article 11, Section 9 of the Kansas Constitution provides,

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

The constitutional prohibition against state participation in works of internal improvement has been with us since statehood. The current exceptions to its proscriptions were added to allow limited state participation in highway development and flood control. And over the years it has been interpreted and applied in numerous instances, so that today its broad restraint of legislative action is more readily discernible.

The purpose of Article 11, Section 9 of the Kansas Constitution is to defend the state treasury from insolvency, "logrolling" and involvement in commercial enterprise. See State v. Kelly, 71 Kan. 811 (1905); State ex rel., v. Board of Regents, 167 Kan. 587 (1949).

Yet, in view of Article 11, Section 6 of the Kansas Constitution, which specifically authorizes the state to contract a public debt for "public improvements," the Kansas courts, from time to time, have been required to classify a given legislative endeavor as either a constitutional "public improvement" or an unconstitutional work of "internal improvement." In so doing, the court

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has framed its distinctions around the nature of the project and its relationship to the performance of necessary government functions. In Leavenworth County v. Miller, 7 Kan. 479, 493 (1871), Chief Justice Valentine declared:

"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 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--by any and every private individual who may choose to use it--such as public roads, bridges, etc"

The court then added, by way of example, that the state, not cities or counties, is "prohibited from opening up or constructing any roads, highways, bridges, ferries, streets, sidewalks, pavements, wharfs, levees, drains, waterworks, gas works, or the like"

Two cases in particular are illustrative. The first is State ex rel., v. Board of Regents, supra, in which the court classified a university dormitory as a "public improvement" because of its obvious connection with a recognized governmental function, namely, education. The legislative action was held to be valid. On the other hand, in State v. Kelly, supra, the court held that a law attempting to establish, in connection with one another, an oil refinery and a branch penitentiary, was void as an unconstitutional attempt by the state to participate in an "internal improvement."

Applying the judicial determinations herein cited to the facts of the present situation, we can but determine that the proposed project would constitute an internal improvement. You advise that the private individual making application for a grant pursuant to the federal grant-in-aid program is engaged in a profit-making,

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commercial enterprise which proposes to rehabilitate and renovate a recognized historic site, namely, the Columbian Title Building in downtown Topeka, Kansas.

This building is not to be used exclusively or even primarily for the business of state government, but rather will be leased on a commercial basis. The fact that the owners and operators of the building may offer to comply with public access requirements, maintenance provisions or other contractual prerequisites to the approval of federal assistance does not alter the character of the project. Nor does the fact that the public may receive some benefit from the preservation of the building transform an obvious "internal" improvement into a "public improvement." See, In re Opinion of the Justices, 187 So. 244 (1939). As noted in Kelly, supra, the construction of an oil refinery would have benefited Kansans in 1905 but such benefit does not overcome the constitutional prohibition. Likewise, we cannot see how federal recognition of the importance of historic preservation would alter the nature of the enterprise herein described.

Of course, it is not enough to establish that the work to be done is an "internal improvement" within the meaning of Article 11, Section 9 of the Kansas Constitution, it also must be determined whether the state action involved makes the state a "party" to the internal improvement.

In State ex rel., v. Raub, 106 Kan. 196 (1920), prior to the amendment of Article 11, Section 9, the court held that, although the state could not engage in highway construction because such was an internal improvement, the state may regulate and coordinate local highway projects. The court said:

"The fact that state funds are expended for inspection and regulation does not make the state a party to the business or the work carried on. In the building of roads and bridges the state neither buys nor furnishes any material, and does not directly invest any money in the work. The state highway commission is performing a very important work in an educational and regulatory way and in coordinating the efforts of the communities and municipalities of the

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state to build and maintain trunk and lateral highways throughout the state, but important as the work is, it does not furnish a basis for the complaint that the state itself is engaged in carrying on a work of internal improvement."

On the other hand, the Kansas Supreme Court in State ex rel., v. Knapp, 99 Kan. 852 (1917), quoted with approval language of a Minnesota Supreme Court case, which said "[i]f one furnishes the money and directs the execution of an enterprise, he is a party in carrying it on." Id. at page 857.

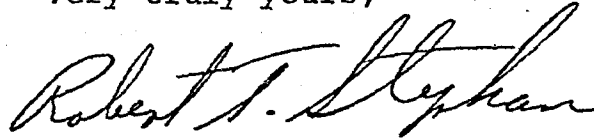
In the case of federal historic preservation funds disbursed under K.S.A. 75-2715 et seq., there can be little question but that the state of Kansas is, indeed, a "party." Such funds are deposited in the state treasury pursuant to the mandate of K.S.A. 75-3734 and are treated as other state moneys under K.S.A. 75-4201 et seq. The legislature may appropriate such moneys to the Society, following submission of the governor's budget report pursuant to K.S.A. 75-3721. No money may be expended from the state treasury without a specific appropriation made by law. Kan. Const. Art. 2, §24. The legislature, in its wisdom, may fund or refuse to fund individual projects submitted by the historical society in its annual budget, or place lawful restrictions on such expenditures. Except for state appropriations, federal funds would not be disbursed by the state historical society. Thus, by virtue of our appropriation process, the State is "a party in carrying on any work" herein described.

Therefore, in our judgment, Article 11, Section 9 of the Kansas Constitution precludes the State Historical Society from disbursing federal funds to a private individual for the rehabilitation or renovation of an historic building or site, where such funds are appropriated

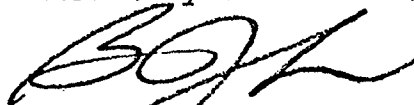
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by the legislature for such purpose and such building
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enterprise.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:gk