



STATE OF KANSAS

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July 12, 1979

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ATTORNEY GENERAL OPINION NO. 79-137

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Augusta, Kansas 67010

Re: Kansas Turnpike Authority--Characterization as
a Public or Private Agency

Synopsis: Pursuant to Kansas law the Kansas Turnpike Authority is a public agency and not a "private organization or individual" as these terms are used in the U. S. Department of Interior "Heritage Conservation and Recreation Service Manual."

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Dear Mr. Munroe:

Our office has been asked to determine whether the Kansas Turnpike Authority (hereafter referred to as Authority) can qualify as a "private" organization under the provisions of the U. S. Department of Interior's "Heritage Conservation and Recreation Service Manual." Programs administered in accord with the Manual allow matching federal funds for contributions from "private organizations or individuals." You advise that the Kansas Turnpike Authority plans to donate certain real estate to the City of Andover, Kansas, for use as a park. If said donation is considered to be from a "private" source, federal funds would be available to the City to complete the park project.

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The pertinent provisions from the Manual state the following: "B. Applicability of Donations. The Bureau encourages the donation of cash and in-kind contributions including real property to participants by private parties. The value of the in-kind contributions may be used as all or part of the participant's share of the project cost." U. S. Dep't of Agriculture, Heritage Conservation and Recreation Service Manual, 670.1.4B (1978). "M. Real Property Acquired By Donation. The value of real property donated to the participants by private organizations or individuals will be eligible for matching funds as defined in 670.1.4B, as determined by an appraisal." Id. at 670.1.8M.

However, other provisions of the Manual indicate that where real property is acquired for purposes under the federal program from other public agencies, the federal share will be limited to the fair market value or the minimum amount for which the property could be transferred under state law, whichever is less. Thus, where one public agency donates real property to another public agency, the federal share is zero. Id. at 670.1.8K.

Thus, for the purpose of determining the federal share, the essential issue is whether the Authority is a "private" or a "public" entity.

The Authority has continually been held to be part of state government, both in statute and in the Kansas case law. K.S.A. 1978 Supp. 68-2013 provides:

"The exercise of the powers granted by this act will be in all respects for the benefit of the people of the state, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of turnpike projects by the authority will constitute the performance of essential governmental functions, the authority shall not be required to pay any taxes or assessments upon any turnpike project or any property acquired or used by the authority under the provisions of this act or upon the income therefrom, and any bonds issued under the provisions of this act . . ." (Emphasis added.)

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In Flax v. Kansas Turnpike Authority, No. 49,140 (Kan., filed June 9, 1979), the Kansas Supreme Court reaffirmed its traditional position in this matter by acknowledging the above-emphasized language. In this case plaintiff argued that the legislature's failure to include the word "authority" in K.S.A. 46-901(a)(2), the governmental immunity statute, revealed a legislative intent to exclude the Authority as an arm of the state (this statute has since been repealed; L. 1978, ch. 186). Although the Court dissolved the Authority's immunity on constitutional grounds, the Court refused to adopt plaintiff's characterization, concluding: "This court has consistently held that the Kansas turnpike authority is an arm or agency of the state, created by the legislature to perform an essential governmental function." Id. at 5. See also in accord: Woods v. Kansas Turnpike Authority, 205 Kan. 770 (1970); Miller v. Kansas Turnpike Authority, 193 Kan. 18 (1964); Hosterman v. Kansas Turnpike Authority, 183 Kan. 590 (1958); Anderson Cattle Co. v. Kansas Turnpike Authority, 180 Kan. 749 (1957); Pennington v. Kansas Turnpike Authority, 180 Kan. 638 (1957); State, ex rel., v. Kansas Turnpike Authority, 176 Kan. 683 (1954).

In addition, K.S.A. 1978 Supp. 68-2006 grants to the Authority the powers of eminent domain. Historically, this grant of power has been given only to public bodies. Such is also the practice in Kansas. In Concerned Citizens, United, Inc., v. Kansas Power and Light Co., 215 Kan. 218 (1974) the Court declared "The power of eminent domain is an inherent power which is vested exclusively in the sovereign - the State of Kansas." Further, in Urban Renewal Agency v. Decker, 197 Kan. 157 (1966), the Court considered the ability to delegate the power of eminent domain, stating that: "The legislature has the inherent power of eminent domain limited only by constitutional restrictions. Such power may be delegated by the legislature to any public authority to be exercised as directed." At 162 (emphasis added). From the above-cited cases, it is clear that the power of eminent domain is available only to the state or a designated "public authority." Thus, the presence of eminent domain powers in the Authority is indicative of the Authority's "public" character.

There remain several statutory provisions that warrant recognition. K.S.A. 1978 Supp. 68-2003 provides that "[t]here is hereby created a body politic and corporate to be known as the 'Kansas turnpike authority.' The authority is hereby constituted a public instrumentality." (Emphasis added.) Also, K.S.A. 75-5012 provides in part that: "On August 15, 1975, the Kansas Turnpike Authority created by K.S.A. 1974 Supp. 68-2003 shall be and is hereby attached to the department of transportation . . ."

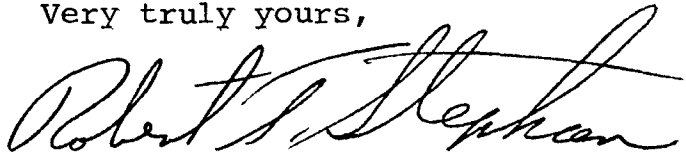
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Though the Authority, by this same statute, retains its autonomy separate from the Department of Transportation, we cannot escape the realization that this statute attaches the Authority to an agency which is beyond doubt "public" in nature.

Finally, K.S.A. 68-2002, 68-2007 and 68-2008 provide that the Authority has the ability to issue revenue bonds to finance its activities. This source of funding is the only way that the Authority can finance its activities. Thus, the Authority is precluded from utilizing general tax revenues of the State. This consideration, standing alone, might suggest that the Authority is a "private" entity. However, in view of the special public powers granted the Authority, such as the ability to take real estate by eminent domain, and the longstanding legal recognition of this agency as an arm of State government, the fact that tax dollars are not available to the Authority is of little consequence. Indeed, agency funding by the issuance of revenue bonds is a uniquely "public" financing mechanism unavailable to private enterprise.

Therefore, in our opinion, the message announced by the statutes and controlling case law is clear: the Kansas Turnpike Authority constitutes a public entity and as such does not fit within the meaning of "private organizations or individuals" as this phrase is used in the "heritage Conservation and Recreation Service Manual," supra, at 2.

Very truly yours,



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RTS:BJs:gk