



STATE OF KANSAS

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August 11, 1980

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ATTORNEY GENERAL OPINION NO. 80- 182

The Honorable William M. Beezley  
State Representative, Fourth District  
R.R. #2  
Girard, Kansas 66743

Re: Intoxicating Liquors and Beverages--Local Alcoholic  
Liquor Fund--Expenditure for Recreational Services

Synopsis: A private, non-profit enterprise which provides recreational services and programs, such as a Young Men's Christian Association (YMCA), may receive moneys distributed from the local alcoholic liquor fund only if the funds are expended for a public purpose. When such moneys are to be placed into the private association's building fund, without any further limits on their use, the benefit to the public is at most an indirect one, rendering the donation impermissible. Cited herein: K.S.A. 1979 Supp. 79-41a02, 79-41a04.

\* \* \*

Dear Representative Beezley:

As state representative for the fourth district, which comprises a good portion of Crawford County, you request our opinion concerning an allocation of funds made by the county commissioners of that county. Specifically, you inform us that the commission has decided to use a portion of the revenue it receives from the local alcoholic liquor fund (established by K.S.A. 1979 Supp. 79-41a04) to make a contribution to the Pittsburg Young Men's Christian Association, better known as the YMCA. You inquire whether this is a permissible use of such moneys.

The local alcoholic liquor fund is financed through a ten percent (10%) tax on alcoholic drinks sold in private clubs which is mandated by another section of the same act, K.S.A. 1979 Supp. 79-41a02. Revenues thus generated are placed in the fund by the state treasurer, and are allocated to

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each city and/or county on the basis of how many clubs contributed to the fund within that particular governmental unit. One-third of the money thus received is earmarked for a special parks and recreation fund. As this situation involves a county's portion of the liquor fund, K.S.A. 1979 Supp. 79-41a04(e) is applicable, which declares that such money may be "expended only for the purchase, establishment, maintenance or expansion of park and recreational services, programs and facilities." Whether the contribution of \$5,000 to the YMCA building fund is authorized by this language is the focus of your inquiry.

In our opinion, such an appropriation must satisfy two criteria before it can be said to have been contemplated by the statute. First, it must be shown that the purposes to be served are those enunciated by the language of the subsection, as quoted above. Second, it must be demonstrated that a public purpose is being served, as the law generally looks with disapproval on the transfer of public money to private organizations, even those which are non-profit and perform a beneficial service such as the YMCA.

To begin with, we note that Webster's New World Dictionary, College Edition, 1962, defines the word "recreation" at p. 1216 to include:

"(1) refreshment in body or mind, as after work, by some form of play, amusement or relaxation, (2) any form of play, amusement, or relaxation used for this purpose, as games, sports, hobbies, reading, walking, etc."

There can be little doubt that a YMCA is indeed a facility which provides a wide-range of programs for the leisure time use of its members, as well as those who use the facilities for a fee, and is thereby recreational in nature. In addition to athletic facilities for people of all ages, a YMCA can serve as a community center for meetings, lectures, crafts or art classes, and so forth. We also note that these programs and services are in many cases available year round, unlike parks or outdoor facilities which may be unusable during inclement weather.

The second requirement, that of a public purpose, stems from the fact that it was decided early on in Kansas that revenues produced from taxation must be used for a public, and not merely a private, benefit. Leavenworth County Comm's v. Miller, 7 Kan. 479, 518 (1871), State ex rel. Griffith v. Davis, 113 Kan. 4, 8 (1923). A typical example of such a "private purpose" is found in the case of In re Page, 60 Kan. 842 (1899), where 40% of the revenue generated by a tax was to be used for the benefit of paid or volunteer fire departments. It was the inclusion of these latter, private individuals which the court found rendered the statute defective, stating that:

"The taxing power of the state, however, can hardly be exercised in order to bestow public money on a department made up of volunteers who are not employed by the municipality, and for whose services no expense is assumed or incurred by it. However commendable the object of such an organization may be, it is clear that public money can only be used to discharge a public liability. As will be observed, the money when collected is to be applied to the benefit of such a department and not for the benefit of the municipality, but taxes cannot be imposed nor public money expended for the benefit of private individuals or enterprises, nor can it be given away for such purposes." 60 Kan. at 848. (Emphasis added.)

See also Spencer v. Jt. School Dist. No. 6, 15 Kan. 259, 262 (1875), and Darby v. Otterman, 122 Kan. 603, 605 (1927). In the latter case, the court noted that the private organization involved (the Veterans of Foreign Wars) would render services wholly independent of, separate from and outside the control of any government department, and reaffirmed that taxes cannot be levied for such purposes.

Perhaps the best enunciation of the differences between public and private uses in Kansas law was made by Justice Brewer (later of the United States Supreme Court) in his dissenting opinion in the case of State ex rel., v. Nemaha County Commr's, 7 Kan. 542 (1871). There, he at length analyzes the different characteristics of the two--the right to control the times of use, the way in which any fees charged are ultimately used, and who controls the right to terminate the use. Additionally, he addresses the situation where a private entity provides a service to the public, and concludes:

"It does not follow, because a state may do a certain work as a public improvement, and for the public use, that it can give of the public funds to a private individual to enable him to do a like work as a private speculation and for personal gain. And this, notwithstanding the general convenience of the community is promoted in one case equally with the other. For, in the one case, the public owns it; the public controls it; it is public. In the other, the individual owns it; the individual controls it; it is private." 7 Kan. at 571.

In the present situation, there can be no question but that the organization which is to receive the funds is private and is not subject to the control of any governmental or quasi-governmental unit. Additionally, it is clear that the YMCA will reap a tangible and long-lasting

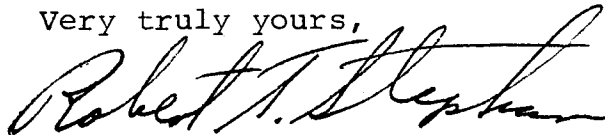
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benefit from the completion of the new building project, part of which is to be paid for by county funds. On the other hand, there can be little doubt that the public will also benefit from having these additional facilities available in the community. The question accordingly becomes one involving both a public and a private benefit. In such situations, the permissibility of the expenditure must depend upon whether the public benefit is the primary result. If so, it is immaterial that private organizations or individuals are also benefitted thereby. 63 Am.Jur.2d, Public Funds, §60.

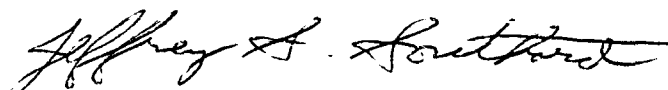
In our opinion, it cannot be concluded that the public will be the principal beneficiary under the facts here presented. The use of local alcoholic liquor funds must be for the purposes described by statute, and while the erection of new buildings by the YMCA may benefit the public by making new recreational facilities available, such a benefit is an indirect one, as the chief beneficiaries are those individuals who are actual members of the organization. While the public conceivably could utilize the new facilities at certain times through the payment of a fee, such a use is always subject to the discretion of a private entity, free of any county control. Such a situation is in clear contrast to one in which funds are paid to the YMCA in exchange for the use of the latter's facilities by the public at specific times and for specific programs, e.g., use of the swimming pool on Saturdays by anyone upon the payment of a nominal charge. Here, any benefits conferred to the public are speculative, for once the donation is made, the county will have nothing tangible to show for it, and the public may or may not be able to enjoy the new facilities. When this is compared to the concrete gain made by the YMCA, we are forced to conclude that the private gain here outweighs that of the public, making the appropriation an impermissible one.

In conclusion, a private, non-profit enterprise which provides recreational services and programs, such as a Young Men's Christian Association (YMCA), may receive moneys distributed from the local alcoholic liquor fund only if the funds are expended for a public purpose. When such moneys are to be placed into the private association's building fund, without any further limits on their use, the benefit to the public is at most an indirect one, rendering the donation impermissible.

Very truly yours,



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