

STATE OF KANSAS

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September 23, 1980

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ATTORNEY GENERAL OPINION NO. 80-207

Mr. Charles H. Menghini  
Pittsburg City Attorney  
City Offices: 4th & Pine Streets  
P.O. Box 698  
Pittsburg, Kansas 66762

Re: Cities and Municipalities--Industrial Development Fund--  
Use of Fund for Repairs and Maintenance of Industrial Park

Synopsis: Moneys from an industrial development fund established under K.S.A. 1979 Supp. 12-1617h may be used to repair and maintain property bought by a municipality for the purpose of inducing industries to locate within or near the city and held for resale to those industries. Cited herein: K.S.A. 1979 Supp. 12-1617h, K.S.A. 12-1617i.

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Dear Mr. Menghini:

You advise that the City of Pittsburg owns property which has been improved with railroad spurs, water lines and overhead water storage facilities for use as an industrial park established for the purpose of inducing new industries to locate locally by offering this improved land for resale. Your question is whether moneys in the city's industrial development fund may be used for repair and maintenance of property in the industrial park before that property is resold.

K.S.A. 1979 Supp. 12-1617h gives cities the power to create an industrial development fund:

"Incorporated cities are hereby authorized to levy annually upon all the taxable tangible property within said city a tax . . . for the purpose of creating a fund to be used in securing industries or manufacturing institutions for such city or near its environs. . . ."

K.S.A. 12-1617i establishes no guidelines under which moneys from this fund may be used. That section merely provides:

"All moneys collected by virtue of the tax hereinbefore authorized shall be replaced [placed] in the fund known as an 'industrial fund,' and shall only be used by ordinance duly adopted by the governing body of such city for the purpose of inducing industries to locate within the said city or near its environs, and said ordinance may be passed only after submitting the proposition to the voter [sic] as provided for in K.S.A. 12-1617h." (Emphasis added.)

The statute does not specifically limit the city's application of the fund in its efforts to secure industry, nor does it provide any standards to guide the city in the expenditures of this money to attract new industrial or manufacturing companies. We are aware of no Kansas cases construing these statutes, but there are a number of opinions of previous Attorneys General which serve to establish criteria by which particular expenditures of the industrial development fund may be judged and by which we may express our opinion whether your city's proposed expenditure is a permissible one.

Clearly, as former Attorney General Curt Schneider expressed, "an expenditure of moneys from the industrial fund should bear some demonstrable and direct relation to the statutory purpose of 'inducing industries to locate' in or near the city." Attorney General Opinion No. 77-178, p. 2. A second criteria recognized by General Schneider and others is that "the city is given broad discretion in the use of the industrial fund." Id. See also, Letter Opinion of Attorney General Kent Frizzell, June 6, 1969, Opinions of the Attorney General, Vol. VI, p. 137. But, that discretion is not unlimited. All of the Attorneys General interpreting these statutes have recognized and affirmed the "public purpose" limitation on the expenditure of the industrial development fund, and have thus established a third criteria for determining whether particular expenditures are permissible. Former Attorney General William Ferguson, construing the predecessors to the

statutes in question, G.S. 1959 Supp. 13-1441 and 13-1442, propounded the "public purpose" limitation thus:

"The inducing of industry to locate in a city or locate near its environs suggests the advertising of the city and the various advantages to be gained by industry in locating there. . . . We think such inducement could properly include the purchase of real property to be offered for sale to prospective industries at prices not less than those paid by the city. . . . The availability of building sites in such an area would quite probably be an inducement to industries to locate in said area. However, we believe the city could not donate the sites but would have to sell them in order that public property not be used for private purposes.

"Cities are organized for public purposes and may not enter into private business ventures. (City of Geneseo v. Gas Company, 55 Kan. 358.) Hence, the general rule is that the legislature cannot authorize a municipality to spend money or lend or donate, directly or indirectly, public property for a purpose which is not public. (State, ex rel., v. The Town of North Miami, 59 So.2d 779, 38 Am.Jur., sec. 395.)" (Emphasis added.) Opinions of the Attorney General, Vol. III, p. 121-122. (See also, Attorney General Opinion No. 80-19, in which we conclude that a municipality may not lawfully purchase real estate when the stated intent of the purchase is to make a gift of the real estate to a private enterprise.)

Applying the foregoing criteria to the question you have raised, it is our opinion that the city's proposed expenditure of moneys in the industrial development fund for repairs and maintenance of industrial park facilities is a permissible use of such moneys. That the public purpose, inducing industry to the city, is served by purchasing land for resale for industrial development has long been recognized. Improvements to the land which serve to enhance its value for industrial purposes further serves the public purpose to secure industry in the local area. Thus, it certainly seems appropriate that rail and water facilities on the industrial site be maintained and repaired as the need arises therefor, to insure the attractiveness of the site to prospective industrial and manufacturing companies which may seek to locate in or near the city. Expenditures of industrial fund moneys for such repairs and maintenance most certainly bear a demonstrable and direct relation to the statutory purpose of "inducing industries to locate" their plants in or near the city.

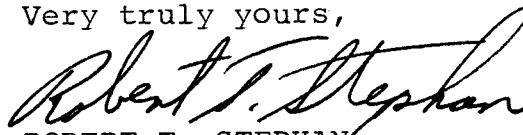
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One important caveat should be noted, however. As former Attorney General Vern Miller emphasized, the industrial development fund was not created as a capital improvement fund. In a 1973 opinion, General Miller concluded that an expenditure of industrial development fund moneys for an electrical transformer necessary to furnish adequate electrical power for a particular industrial installation would be inappropriate since the industry in question had already been attracted to the city. General Miller concluded that

"[t]he improvement of municipal services and city utility facilities necessary to service the proposed industry is not . . . a proper expenditure from a fund which is designed primarily to attract industry in the first instance. The fund was not created as a general contingency fund from which the city may finance any project or municipal service which is necessitated by the decision, final or tentative, of an industrial concern to locate in the city, and that appears to be the nature of the proposed expenditure for an electrical transformer." Opinions of the Attorney General, Vol. VIII, p. 234.

General Schneider expressed a similar view with respect to a proposed expenditure to provide operating capital, or to pay operating expenses to induce new industries to the city. Attorney General Opinion No. 77-269. We affirm both opinions, and we note that nothing in the foregoing should be construed to suggest that an expenditure of industrial development fund moneys for repairs or maintenance of facilities owned by private industries is permissible. We conclude, however, that such expenditures for the purpose of maintaining the attractiveness of an industrial park and its improvements to induce industries to locate in or near the city are permissible, and is a matter left to the sound discretion of the governing body.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Steven Carr  
Assistant Attorney General

RTS:BJS:SC:phf