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January 9, 1981

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ATTORNEY GENERAL OPINION NO. 81- 4

Mr. John Dekker
Director of Law and
City Attorney
City of Wichita, Kansas
455 North Main Street
Wichita, Kansas 67202

Re: Cities and Municipalities--Buildings, Structures
and Grounds--Industrial Revenue Bonds

Synopsis: The term "revenues" as is found in K.S.A. 12-1743 refers to revenues derived by a city under a lease agreement covering facilities constructed or improved under the Industrial Revenue Bond Law (K.S.A. 12-1740 et seq.). The term "net earnings," as used in K.S.A. 12-1744, refers to revenues received by the city by virtue of such lease agreement.

The provisions of K.S.A. 12-1740 et seq. do not require by implication or otherwise that, as a condition for issuance of industrial revenue bonds, there be a determination by the city that the tenant industry will realize income and revenues solely from its operation of the facilities in amounts adequate to fulfill its obligation to pay the installments of rent and other charges required under a lease agreement. K.S.A. 12-1743 does not require that rental payments specified in a lease agreement bear a relationship to the fair market rental value of the facilities acquired or constructed from the bond proceeds.

K.S.A. 12-1743 provides that all details pertaining to the issuance of industrial revenue bonds and the terms and conditions thereof shall be determined by ordinance

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of the city. An ordinance issued pursuant to K.S.A. 12-1743 may be adopted by a city even though there is no reasonable expectation that the tenant will realize sufficient income solely from its operation of the tenant industry sufficient to meet its obligations under the lease.

A city may, pursuant to K.S.A. 12-1743, determine by ordinance and authorize the issuance of term bonds maturing in one or more installments. Cited herein: K.S.A. 10-103, 12-1740, 12-1743, 12-1744, 12-1749a, K.S.A. 1980 Supp. 10-103.

* * *

Dear Mr. Dekker:

You have asked our opinion on several matters with respect to the interpretation and application of certain provisions of K.S.A. 12-1740 et seq. commonly referred to as the Kansas Industrial Revenue Bond Law. You indicate the City of Wichita is presently considering several requests for the issuance of industrial revenue bonds pursuant to previously issued letters of intent and that these proposed issues have raised several questions.

Under the terms of the proposed issues the principal would be payable in a single installment maturing in a relatively short time after the date of issuance. The maturity date would typically be from one to five years. During the term of issuance, interest on the bonds would be payable in semi-annual installments. No provisions would be made for the creation of a sinking fund for the retirement of principal, and none of the principal amount of the bonds will be paid prior to maturity. There may or may not be a redemption provision which would call the bonds after one year.

The lease would provide that the city will receive from a tenant rent payments adequate to pay interest on the bonds and the principal thereof at maturity or earlier redemption.

It is anticipated that the city may be asked to issue refunding bonds pursuant to K.S.A. 12-1749 for the purpose of refinancing the principal amount of the bond issue. The tenant's obligation to pay the full principal amount of the bonds at maturity will be absolute and unconditional. The payment of the bonds and interest thereon will be guaranteed under the terms of a separate unconditional guarantee agreement.

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The bond ordinance and lease will contain the customary covenants and agreements providing for issuance of the bonds and the security therefor, including a pledge of the facility and the payments of basic rent and other payments to be received by the city for use of the facility, pursuant to the lease, as security for the bonds.

The bonds will be payable solely and only from the money in revenues to be derived by the city from the lease of the facilities required and constructed from proceeds of the bonds. The city will not incur any obligation of any kind or character, except the obligation to pay the principal of and interest on the bonds, which obligation shall be payable solely and only from such revenues. In accordance with K.S.A. 12-1747, the bond ordinance will provide, and the bonds will recite, that the bonds and the interest thereon are to be paid from the money and revenue received from the fees charged and rental received for the use of the property and facilities improved, constructed, reconstructed, repaired or otherwise improved from the proceeds of the bonds.

It is your understanding that the terms of the proposed bonds have been formulated in an effort to address the current economic and financial market conditions. You further indicate in your request that "in light of the prevailing high interest rates, and recent history of major fluctuations in the bond markets, the city expects to receive further requests for industrial revenue bonds to be structured in much the same manner as described."

You have requested our opinion with respect to the proposed bonds on the following issues.

"1. Do the provisions of K.S.A. 12-1743, authorizing cities to issue 'bonds payable solely and only from the revenues derived from such facilities' [emphasis added] refer to the revenue derived from such facilities by the City?"

It is our opinion that the phrase "revenues derived from such facilities" means the rent payments agreed to under the lease agreement with the tenant. There is no indication in the statute that only revenues resulting from the operation of the facility are to be used to pay the bonds. To imply a statutory requirement for any such finding would, in fact, prohibit the variety of projects frequently financed through the issuance of industrial revenue bonds, which projects must be conceded to be of a economic benefit to the state and issuing city and also in the interest of promoting the physical and mental health and general welfare of

the citizens of the State of Kansas. For example, to impose such a requirement would effectively prohibit the issuance of industrial revenue bonds to finance pollution control facilities and certain health care facilities operated by not-for-profit organizations. Such facilities clearly fall within the contemplation of the act, but obviously may not be of the character which directly will generate "revenues" sufficient to enable the tenant to make rental payments under the lease in amounts calculated to provide for the full payment of the principal of and the interest on the bonds. In such cases some, if not all, of the necessary revenues must be provided by the tenant from sources other than its operation of a particular facility financed through an issue of an industrial revenue bonds.

"2. Do the provisions of K.S.A. 12-1744, authorizing the City to 'pledge the facility purchased or constructed and the net earnings therefrom [emphasis added] to the payment' of the Bonds, refer to the net earnings received by the City by virtue of the lease?"

The term "net earnings" is not defined in K.S.A. 12-1744 or elsewhere in the Industrial Revenue Bond Law, and your question emphasizes the fact that the meaning of this term is not clear on its face, being susceptible of more than one interpretation. Because of such ambiguity it is appropriate to employ established rules of statutory construction to resolve your inquiry. Of particular relevance are the rules reiterated in Brown v. Keill, 224 Kan. 195 (1978), to wit:

"The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statute, even though words, phrases or clauses at some place in the statute must be omitted or inserted. (Farm & City Ins. Co. v. American Standard Inc. Co., 220 Kan. 325, Syl. ¶3, 552 P.2d 1363 [1976].) In determining legislative intent, courts are not limited to a mere consideration of the language used, but look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under the various constructions suggested. (State, ex rel., v. City of Overland Park, 215 Kan. 700, Syl. ¶10, 527 P.2d 1340 [1974].) In order to ascertain the legislative intent, courts

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are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts thereof in pari materia. When the interpretation of some one section of an act according to the exact and literal import of its words would contravene the manifest purpose of the legislature, the entire act should be construed according to its spirit and reason, disregarding so far as may be necessary the literal import of words or phrases which conflict with the manifest purpose of the legislature (Kansas Commission on Civil Rights v. Howard, 218 Kan. 248, Syl. ¶2, 544 P.2d 791 [1975].)" Id. at 199, 200.

Without unduly burdening this opinion by a recitation of the various considerations generated by application of the foregoing rules to 12-1744 and the other provisions of the Industrial Revenue Bond Law, suffice it to state that, in our opinion, these rules compel the conclusion that the legislature intended that the terms "rentals," "revenues" and "net earnings," as used in these statutes, be treated as synonymous.

Therefore, it is our opinion that the "net earnings therefrom" as is found in K.S.A. 12-1744 refers to revenues or rents received by the city under the lease agreement.

"3. Do the provisions of K.S.A. 12-1740 to 12-1749a, inclusive, as amended, require, by implication or otherwise, that as a condition for issuance of the Bonds there be a determination by the City that the tenant industry will realize income and revenues solely from its operation of the facilities in amounts adequate to fulfill its obligations to pay the installments of basic rent and other charges required under the lease?"

We find no provision either explicitly or by implication requiring a determination that the tenant industry will realize income and revenues solely from its operation of a facility in amounts adequate to fulfill its obligations to pay the installments of rents under the lease and, therefore, it is our opinion that no such determination need be made by the governing body.

"4. Does K.S.A. 12-1743 require that the rental payments specified in the lease bear any relationship to the fair market rental value of the facilities acquired or constructed from proceeds of the Bonds?"

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As discussed above, an industrial revenue bond lease purchase agreement is primarily a financing device and not a true lease. The lease rentals are not rentals in the ordinary sense of the word, but rather, payments intended to retire the bonds and pay expenses relating to the issue. It follows that there is no requirement that the rental payments specified in the lease bear any relationship to the fair market rental value of the facility. The act requires only that such rental payments be sufficient to provide for payment of the principal of and interest on the bonds. The act does not require that there be any reasonable expectation that the tenant will realize sufficient income solely from its operation of the facility to meet its obligations under the lease.

"5. Under K.S.A. 12-1743, which provides that, 'All details pertaining to the issuance of such bonds and the terms and conditions thereof shall be determined by ordinance of the City,' may the City adopt an ordinance authorizing the issuance of Bonds which reasonably may be expected to be paid, in whole or in part, from payments received by the City from the tenant industry pursuant to the lease when there is no reasonable expectation that the tenant will realize sufficient income solely from its operation of the facility to meet its obligations under the lease?"

As stated in the answer to question four, it is our opinion that no such determination need be made by the governing body.

"6. Is the maturity schedule a detail pertaining to the issuance of such Bonds which may be determined by ordinance of the City pursuant to K.S.A. 12-1743, and if so, may the City authorize the issuance of term bonds maturing in one or more installments?"

All details pertaining to the issuance of such industrial revenue bonds and the terms and conditions thereof shall be determined by ordinance of the city pursuant to K.S.A. 12-1743. Such legislation must be contrasted with the provisions of numerous statutes relating to specific requirements imposed by the legislature in connection with the issuance of bonds by municipalities for certain specified purposes, as well as the provisions of K.S.A. 1980 Supp. 10-103. Unlike K.S.A. 1980 Supp. 10-103, which imposes specific requirements with respect to the maturity schedule and maximum interest rates with respect to municipal bonds subject to the general bond law, K.S.A. 12-1743 contains no such specific requirement. As previously stated in Attorney General Opinion Nos. 76-336 and 80-58, the

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Kansas General Bond Law (K.S.A. 10-103 et seq., as amended)
does not apply to bonds issued under K.S.A. 12-1740 et seq.

Given the specific language of K.S.A. 12-1743, taken in the context of the act, it is our opinion, that the schedule of bond maturities is a detail which may be determined by the governing body. Accordingly, the city, in its discretion, may authorize the issuance of term bonds maturing in one or more installments as may be necessary to carry out and give effect to the financing plan in connection with such industrial revenue bonds.

Very truly yours,



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