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ATTORNEY GENERAL OPINION NO. 81-150

The Honorable Kerry Patrick
10009 Howe Drive
Leawood, Kansas 66206

Re: Kansas Constitution -- Banks -- Establishment of Banks Pursuant to General Banking Laws

Synopsis: Prior to its revision at the general election in November, 1980, the provisions of Article 13 of the Kansas Constitution applied only to banks of circulation and were designed to preserve control over any currency issued in this state by such banks. As revised, however, this article of the constitution applies to all banks, and section 1 thereof requires that all banks be corporations which are established under a general banking law. If enacted, 1981 House Bill No. 2026, which proposes to establish the Public Bank of Kansas, would not constitute a general banking law. Thus, if the Public Bank of Kansas would be, in fact, a bank, the enactment of this bill would contravene said constitutional requirements. Cited herein: K.S.A. 9-702, Kan. Const., Art. 13, §§1,2, 12 U.S.C. §§264, 321.

* * *

Dear Representative Patrick:

You have requested our opinion regarding 1981 House Bill No. 2026 which would create the Public Bank of Kansas. As one of the bill's sponsors, you have inquired whether the bank so created would comport with the provisions of Article 13 of the Kansas Constitution.

Until the general election held in November of 1980, the provisions of Article 13 of our constitution had remained nearly unchanged since statehood. However, at the last general election, the state's voters approved a comprehensive revision of this article which eliminated seven of its nine sections, amended one of the remaining sections and renumbered the other. Also, the title of the article was changed from "Banks and Currency" to "Banks." As a result of these changes, this article now reads as follows:

> "Article 13 -- Banks.
>
> "§1. Banking laws. No bank shall be established otherwise than under a general banking law, nor be operated otherwise than by a duly organized corporation.
>
> "§2. State not to be stockholder. The state shall not be a stockholder in any banking institution." (Emphasis added.)

It should be noted that the emphasized language in section 1 is an amendment effected by the revision, while the substance of section 2 was unchanged, although it was section 5 of the original article.

Prior to the 1980 revision, the Kansas Supreme Court had construed the provisions of Article 13 as applying only to banks of circulation. Pape v. Capitol Bank, 20 Kan. 440 (1878); State v. Dietrich, 117 Kan. 105 (1924). However, as a result of the changes in 1980, these decisions and their interpretation of Article 13 are no longer applicable. The decision in Pape was based primarily on the then existing sections 1 through 8 and the title of the article, all of which related to the issuance and control of currency. As the Court stated: "[T]hey manifestly indicate the scope of the article to be only concerning banks of circulation, and the purpose to preserve control over any currency issued in the state." Id. at 443. However, the 1980 revision eliminated all the sections relating to currency and amended the title to read "Banks" as opposed to "Banks and Currency" as it read when Pape was decided. Therefore, in our opinion, there is no longer any basis for interpreting Article 13 as applying only to banks of circulation.

This conclusion is further supported by the Report of the Citizens' Committee on Constitutional Revision, which was submitted to the governor and legislature in February, 1969.

The recommendations of the Citizens' Committee as to the needed revisions in Article 13 were essentially embodied in 1980 Senate Concurrent Resolution No. 1655, the passage of which resulted in the proposition submitted to and approved by the state's electors at the last general election. At page 106 of the Citizens' Committee's Report, there is the following statement:

> "In Pape v. Capitol Bank, 20 Kan. 440 (1878) and in The State v. Dietrich, 117 Kan. 105 (1924), the supreme court of the state of Kansas ruled that the present article of the constitution applied to banks issuing their own currency. Since the federal government now regulates all currency, it would appear that all nine sections of Article 13 are now obsolete and could be eliminated from the constitution without impairing its effectiveness."

Even though the Citizens' Committee recognized the obsolesence of the then existing Article 13, it recommended retention of section 1 as a "bare statement of public policy that all banks be organized under general banking laws as opposed to special legislation" (Id. at 103), with the insertion of additional language to provide "that banks will be operated only as corporations, as opposed to 'private' banks, to insure continuity and stability." Id. Such recommendation was reflected by the revision of Article 13 proposed by Senate Concurrent Resolution No. 1655 as originally introduced, but the legislature amended the resolution to provide for the retention of then existing section 5 thereof, which now appears as section 2 of the revised article. See 1980 Journal of the Senate, p. 876.

In our judgment, the mere fact of revision indicates an intent to effect a change in this article, and the fact the revision effected substantially embodies the recommendations of the Citizens' Committee indicates the legislature's comprehension of the need for revision, i.e., that the then existing Article 13, which applied only to banks of circulation, was of no force and effect. Thus, we believe it clear that the purpose of the revision was to make Article 13 applicable to all banks.

As revised, section 1 of Article 13 requires that all banks must be corporations and be established under a general banking law, while section 2 thereof prohibits the state from

becoming a stockholder in any banking institution. Thus, the Public Bank of Kansas proposed by 1981 House Bill No. 2026 must be measured against these requirements to determine its constitutional validity; and in our judgment, it would fail to satisfy these requirements.

Specifically, it is our opinion that, if enacted, House Bill No. 2026 would not constitute a general banking law. A general law is "one which applies to and operates uniformly on all members of a class." Parmelee v. Ziegler, 181 Kan. 703, 707 (1957); Board of County Commissioners v. Robb, 166 Kan. 122, 132 (1948). Therefore, a general banking law can be said to be one which applies to and operates uniformly on all banks. Thus, assuming arguendo that the entity proposed to be created by House Bill No. 2026 is a bank, it is clear that said bill only applies to one special bank, the Public Bank of Kansas. The bill has application to no other bank. Therefore, the enactment of House Bill No. 2026 would not constitute a general banking law within the meaning of Section 1 of Article 13 of the Kansas Constitution.

Moreover, we believe the entity created by the bill in question would not operate pursuant to a general banking law. Even though section 4(b) of said bill authorizes the Public Bank of Kansas "to engage in the business of banking as authorized by law," such authorization is granted "[n]otwithstanding any provisions of article 9 of the Kansas Statutes Annotated to the contrary." Said Article 9, of course, contains the state banking code and other general laws applying to banks. But it is clear from a reading of House Bill No. 2026 in its entirety that the Public Bank of Kansas is intended to operate in derogation of general banking laws, and its only real purpose for existence is the investment of certain assets of the State of Kansas. For example, subsection (c) of section 4 of the bill states, in part:

> "The assets of the bank shall consist solely of the employee and employer contributions, investments, moneys and other assets transferred from the Kansas public employees retirement system to the bank, moneys paid to the bank from the state general fund pursuant to the appropriations made by section 16, and income from investments made by the bank."

Numerous other similar examples of the limited purpose of the Public Bank of Kansas are apparent from the bill's provisions,

but we will avoid burdening this opinion by citing them here. Suffice it to state that, notwithstanding the numerous declarations in the bill that the Public Bank of Kansas is to operate pursuant to the banking laws or the "public bank act," we believe the operation and regulation of said bank would deviate from the operation and regulation of banks governed by general banking laws. In fact, the declaration in section 4(b) of the bill that the Public Bank of Kansas shall be "authorized to engage in the business of banking as authorized by law" appears to be meaningless. Engaging in the business of banking is defined for the purpose of the state banking code in K.S.A. 9-702, as follows:

> "Any individual, firm or corporation, except a national bank, who shall receive money on deposit, whether on certificates or subject to check, or any individual, firm or corporation, except railroad, transoceanic steamship, air transport, telegraph or Morris plan companies, or building and savings and loan associations, or national banks, or express companies engaged in an international financial and travel business or credit unions, which shall receive money for which it issues its check, draft, bill of exchange, or other evidence of indebtedness for which it charges a fee, shall be considered as doing a banking business, and shall be amenable to all the provisions of this act: Provided, That promissory notes issued for money received on deposit shall be held to be certificates of deposit for the purposes of this act."

It would appear that the limited assets and limited purposes prescribed for the Public Bank of Kansas by House Bill No. 2026 might preclude it from either receiving deposits or issuing for a fee any instrument evidencing its indebtedness, as contemplated by K.S.A. 9-702. Thus, it is questionable whether the Public Bank of Kansas would be, in fact, a bank under our state banking laws.

You have advised that one of the purposes of denominating the entity created in House Bill No. 2026 as a "bank" is to enable it to become a member of the Federal Reserve System, thereby increasing the "bank's" investment opportunities. However, in order to become a part of the Federal Reserve

System, the Public Bank of Kansas would necessarily have to be a "state member bank," which the definition thereof in 12 U.S.C. §264(c)(2) limits to "state banks." A "state bank" is defined in pertinent part by 12 U.S.C. §264(c)(1) as "any bank, banking association, trust company, savings bank, or other banking institution which is engaged in the business of receiving deposits and which is incorporated under the laws of any State." (Emphasis added.)

While it is not essential to a resolution of your inquiry, we note that, even though section 4(a) of House Bill No. 2026 would create the Public Bank of Kansas as "a body politic and corporate," we are skeptical, as noted above, that said bank would be "engaged in the business of receiving deposits" as required by the foregoing definition of "state bank." As previously indicated, the assets of the proposed bank are severely limited, but even if the receipt and investment of these assets can be construed as placing the proposed bank in the posture of engaging "in the business of receiving deposits," thereby qualifying the proposed bank for membership in the Federal Reserve System, such membership would create additional constitutional difficulties.

Section 4(a) of the pending bill also delcares the proposed bank to be a "public instrumentality," and it further provides that "the exercise of the powers, duties and functions imposed and conferred by this act shall be deemed to be the performance of an essential governmental function." With these proposed declarations of legislative intent in mind, we note that application for membership in the Federal Reserve System necessitates a state bank making application to the Board of Governors of the Federal Reserve System for the right to subscribe to the stock of the federal reserve bank organized within the district in which the bank is located. 12 U.S.C. §321. As a consequence, upon acceptance of the state bank into the Federal Reserve System by the Board of Governors, the bank becomes a stockholder of such federal reserve bank. Thus, since the Public Bank of Kansas is intended to perform an "essential governmental function" as an "instrumentality" of the State of Kansas, we must conclude that the proposed bank's acquisition of stock in a federal reserve bank would make the state a stockholder in a banking institution, which would contravene Article 13, Section 2 of the Kansas Constitution.

The dilemma is thus apparent. If the Public Bank of Kansas is a "state bank" eligible for membership in the Federal

Reserve System, such membership would result in a contravention of the constitutional prohibition against the state becoming a stockholder in a banking institution. On the other hand, if the proposed bank is not really a bank under our state laws, it is not eligible for membership in the Federal Reserve System, thereby negating the purpose of denominating it as a bank. Although we previously noted that a consideration of this problem is not necessary to a resolution of your inquiry, the foregoing discussion raises serious questions as to whether the Public Bank of Kansas would be a bank, except in name only.

In summary, it is our opinion that, if enacted, 1981 House Bill No. 2026, which proposes to establish the Public Bank of Kansas, would not constitute a general banking law. Thus, if the Public Bank of Kansas would be, in fact, a bank, the enactment of this bill would contravene the requirements of Article 13, Section 1 of the Kansas Constitution.

Very truly yours,

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