STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 81-208

The Honorable Gerald L. Karr
State Senator, Seventeenth District
R.R. 2, P. O. Box 101
Emporia, Kansas 66801

Re: Counties and County Officers -- County Commissioners -- Expending Public Funds for Lobbying; Public Purpose

Synopsis: Kansas counties may, in the exercise of "home rule" powers, expend public funds for the purpose of "lobbying," so long as such activities are for a "public purpose" and are not conducted for the benefit of private individuals. Lobbying activities of the Legislative Policy Group would be for a public purpose where the goal of the counties comprising said group is to affect pending legislation which could adversely impact the financial interests of their county governments. All "lobbyists" representing individual counties or associations of counties are required to register with the Secretary of State pursuant to K.S.A. 1980 Supp. 46-265 and report expenditures pursuant to K.S.A. 1980 Supp. 46-268. Cited herein: K.S.A. 1980 Supp. 12-1610c, 19-101a, K.S.A. 19-101c, K.S.A. 1980 Supp. 19-2690, K.S.A. 1980 Supp. 46-215 to 280, as amended by L. 1981, ch. 171 and ch. 208, K.S.A. 72-5326.

* * *

Dear Senator Karr:

You inquire of this office "whether a county commission can legally spend taxpayers' funds to lobby the legislature, or hire legislative lobbyists, on broad political questions such as the mineral production tax." You do not advise of any constitutional or statutory provision or judicial doctrine

you believe is violated by such practice, nor are we aware of any constitutional or statutory provisions which specifically preclude lobbying by local units of government.

We note, however, that older cases from Kansas held even private contracts for "lobbying" to be void and unenforceable as against public policy. See, e.g., Usher v. McBratney, 3 F. Cas. 385, (8th Cir. 1874)(No. 16,805). This judicial doctrine was founded on the illegality of contingent fee arrangements contained in such "lobbying" contracts (now prohibited by K.S.A. 1980 Supp. 46-267), and a definition of lobbying which encompassed "influence peddling" and other improper and illegal activities. See, Marshall v. Baltimore & Ohio R.R., 57 U.S. 366, 14 L.Ed. 953 (1853) (cited in Usher, supra), and Rose v. Truax, 21 Barb. 361 (N.Y. 1855). However, the Kansas Supreme Court soon distinguished between proper and improper "lobbying." In Kansas Pacific Rly Co. v. McCoy, 8 Kan. 538, 543 (1871), the Court observed: "The use of money to influence legislation is not always wrong. It depends altogether on the manner of its use." See also, McBratney v. Chandler, 22 Kan. 692 (1879).

The judicial ban on "lobbying" contracts as considered in the above cited cases cannot be regarded as applicable to present-day lobbying practices permitted and regulated by statute. K.S.A. 1980 Supp. 46-215 to 46-280, as amended by L. 1981, ch. 171 and ch. 208. Today, the Kansas legislature defines "lobbying" as follows:

> "(a) 'Lobbying' means promoting or opposing in any manner (1) action or non-action by the legislature on any legislative matter or (2) the adoption or non-adoption of any rule and regulation by any state agency.
>
> "(b) Lobbying also means entertaining any state officer of employee except that bona fide personal or business entertaining does not constitute 'lobbying', or giving any gift, honorarium or payment to a state officer or employee in an aggregate value of $100 or more within any calendar year, if at any time during such year the person supplying the entertainment, gifts, honoraria or payments has a case before the state agency in which such state officer or employee serves, or if such person is the attorney for or representative of a person having such a case.
>
> "(c) 'Lobbying' does not include any expenditure from amounts appropriated by the legislature for official hospitality.

> "(d) 'Lobbying' does not include representation of a claimant on a claim filed by the claimant under K.S.A. 1980 Supp. 46-907 and 46-912 to 46-919, inclusive, in proceedings before the joint committee on special claims against the state." K.S.A. 1980 Supp. 46-225, as amended by L. 1981, ch. 171, §43.

All "lobbyists," as defined by K.S.A. 1980 Supp. 46-222, are required to file with the Secretary of State an employment and expenditures form pursuant to K.S.A. 1980 Supp. 46-268. K.S.A. 1980 Supp. 46-269 requires such report to disclose the "full name and address of each person who has paid compensation for lobbying to the lobbyist or has paid for expenses of lobbying by the lobbyist." "Person" is defined by K.S.A. 1980 Supp. 46-223 to specifically include any "governmental unit, or subdivision." Hence, the Kansas lobbying disclosure statutes clearly contemplate that local governmental bodies might employ lobbyists and that a record of such employment will be publicly filed.

During the last legislative session numerous local governments were represented by registered lobbyists. Most cities were represented by the League of Kansas Municipalities pursuant to K.S.A. 1980 Supp. 12-1610c et seq., school boards were represented by the Kansas Association of School Boards, and all counties were represented by the Kansas Association of Counties pursuant to K.S.A. 1980 Supp. 19-2690. The activities of such groups are funded by dues paid by the local units of government. (See, e.g., dues paid by school districts pursuant to K.S.A. 72-5326.) Various public officers also were represented by professional associations such as the Kansas County and District Attorneys Association and the Kansas Sheriff's Association. However, apparently some local governments desired additional representation in the halls of the Capitol; hence, the following local governments are among those registered as appointing authorities for lobbying purposes: City of Kansas City; City of Merriam; City of Overland Park; City of Prairie Village; Johnson County Board of Commissioners; Mission Fire District No. 1; Sedgwick County; Shawnee County Intergovernmental Council; Shawnee County Sheriff's Department; the Topeka Public Library and Topeka Police Department. Such entities anticipated retaining persons under contract to perform lobbying services or expending public funds to pay salaries and expenses for such activities. See K.S.A. 1980 Supp. 46-269.

The question of whether public funds may be expended by local governments to advance their interests through the use of lobbying efforts has not been specifically considered by the Kansas appellate courts. However, courts of other states

have analyzed this issue with regard to contributions to statewide associations similar to the League of Kansas Municipalities and the Kansas Association of Counties, as well as individual governmental units. There is, unfortunately, no uniformity of opinion. 51 Am.Jur.2d Lobbying, §5 (1970) and 15 McQuillin, Municipal Corporations, §39.23 (3rd Ed. 1970).

However, upon review of numerous cases, four conclusions are easily drawn: 1) where the expenditures have been held unlawful it is because the local governmental unit lacked the requisite statutory authority to participate in such activity; 2) the modern trend is to find such expenditures to be lawful; 3) the authority to expend public funds to communicate with the state legislature is generally within the powers granted under "home rule" provisions; and 4) the expenditure of government funds must be for a "public purpose" and not primarily for private benefit.

1. Throughout the nation, local units of government have attempted to expend public funds to join municipal associations, influence the outcome of legislation and even affect local and statewide elections. Public funds were expended both to retain attorneys and other agents, as well as pay expenses of local officials in attending legislative sessions or Congressional hearings. The most common rationale among the older cases prohibiting the expenditure of public funds in such situations was the lack of specific authority. See, State ex rel., Thomas v. Semple, 112 Ohio St. 559, 148 N.E. 342 (1925), disallowing expenditures for dues to inter-municipal associations. See, also, Inhabitants of Westbrook v. Inhabitants of Deering, 63 Me. 231, (1874); Henderson v. City of Covington, 77 Ky. 312, (1878); County of Colusa v. Welch, 122 Cal. 428, 55 P. 243 (1898); State ex rel., Rice v. Bell, 124 Wash. 647, 215 P. 329 (1923); and Port of Seattle ex rel., Dunbar v. Lamping, 135 Wash. 569, 238 P. 615 (1925), disapproving public expenditures for lobbying purposes.

Courts of other states also disapproved public expenditures for the purpose of affecting public elections where no constitutional, statutory or municipal charter provision granted power to appropriate funds for such activities. Shannon et al. v. City of Huron, 9 S.D. 356, 69 N.W.. 598 (1896); State ex rel., Port of Seattle v. Superior Court, 93 Wash. 267, 160 P. 755 (1916). Mines v. Del Valle, 201 Cal. 273, 257 P. 530 (1927), [distinguished in Powell v. City & County of San Francisco, 62 Cal. App. 2d 291, 144 P.2d 617 (1944)]; Sims v. Moeur, 41 Ariz. 486, 19 P.2d 679 (1933); Cleveland v. Artl, 62 Ohio App. 210, 23 N.E.2d 525 (1939); Porter v. Tiffany, 11 Or. App. 542, 502 P.2d 385 (1972); Anderson v. City of Boston, 376 Mass. 178, 380 N.E.2d 628 (1978). (Note: In the Anderson case, the Massachusetts Supreme Court would have permitted

expenditure under municipal "home rule" but for enactment of comprehensive election financing law which prohibited such expenditures.)

2. Although the earlier cases prohibiting the expenditure of public funds for the purpose of influencing elections seem to have continued vitality (see Porter v. Tiffany, supra), the law involving public support for inter-governmental associations and direct lobbying activities is changing. Indeed, some states authorize such expenditures by statute.

Like Kansas, Massachusetts authorizes the payment of public funds as dues to certain statewide associations. See, e.g., 1889 Mass. Acts, c. 380, and Connolly v. Beverly, 151 Mass. 437, 24 N.E. 404 (1890), overruling Minot v. West Roxbury, 112 Mass. 1 (1873), and Coolidge v. Brookline, 114 Mass. 592 (1874).

California law is even more explicit in authorizing the expenditure of public funds for both dues to statewide municipal associations and direct lobbying activities which are in the interests of the municipality. Cal. Code §§ 50023;50024. The California statutes have withstood a constitutional attack alleging, among other issues, that the expenditure of public funds to pay dues to a municipal association which conducted lobbying activities constituted an unlawful delegation of authority by the city members. Lehane v. City and County of San Francisco, 30 Cal.App.3d 1051, 106 Cal. Rptr. 918 (1972).

In other states, the authority to join municipal associations or to lobby has long been recognized. See, e.g., Farrel v. Town of Derby, 58 Conn. 234, 20 A. 464 (1889); In re Taxpayers & Freeholders, 50 N.Y.S. 356, 27 A.D. 404 (1898); Meehan v. Parsons, 271 Ill. 546, 111 N.E. 529 (1916); Fitts v. Commission of City of Birmingham, 224 Ala. 600, 141 So. 354 (1932); People v. Bunge Bros. Coal Co., 392 Ill. 153, 64 N.E.2d 635 (1945); Hays v. Kalamazoo, 316 Mich. 443, 25 N.W.2d 787, 169 A.L.R. 1218 (1947); and City Affairs Committee v. Jersey City, 134 N.J.L. 180, 46 A.2d 425 (1945), where the New Jersey Supreme Court stated:

> "The power to take reasonable measures to conserve their own vital interests is incident to the general powers of local government conferred upon the municipalities. The right of advocacy and defense of the communal welfare in the state legislative forum has long been accorded general recognition. If it is the local government's legitimate province to challenge judicially, at public expense, the constitutionality of legislative enactments which

> adversely affect the local interest, and this cannot but be conceded, its right of opposition within reasonable bounds before the event cannot be doubted." (Citations omitted.) Id. at 181.

And in still other jurisdictions, courts have reversed or distinguished the older cases, indicating a more liberal trend. See, Powell v. City & County of San Francisco, 62 Cal.App.2d 291, 144 P.2d 617 (1944), upholding expenditures for lobbying purposes and distinguishing Mines v. Del Valle, supra; City of Glendale v. White, 67 Ariz. 231, 194 P.2d 435 (1948), approving expenditure of dues to municipal league and overruling City of Phoenix v. Michael, 61 Ariz. 238, 148 P.2d 353 (1944); State ex rel., McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835 (1951), overruling Thomas v. Semple, 112 Ohio St. 559, 148 N.E. 342 (1925).

3. Although some states, like Kansas, specifically authorize the expenditure of public funds to support activities of local government associations, authority for such expenditures is found in powers granted by "home rule" provisions. Hays v. Kalamazoo, 316 Mich. 443, 25 N.W.2d 787, 169 A.L.R. 1218 (1947); City of Roseville v. Talley, 55 Cal.App.2d 601, 203 P. 1025 (1942); and State ex rel., McClure v. Hagerman, supra.

The Kansas legislature granted "home rule" powers to county governments in 1974. L. 1974, ch. 110. In pertinent part, K.S.A. 1980 Supp. 19-101a now provides:

> "(a) Counties are hereby enpowered to transact all county business and perform such powers of local legislation and administration as they deem appropriate, subject only to the following limitations, [limitations not applicable] . . . ."

This office has recognized the scope of this statutory grant on numerous occasions. See, e.g., Kansas Attorney General Opinion Nos. 80-89, 80-264, 81-37 and 81-112.

The Kansas appellate courts have not expressed an opinion on the scope of county home rule powers. However, K.S.A. 19-101c, clearly expresses the legislative will that county home rule powers are to "be liberally construed for the purpose of giving to counties the largest measure of self-government."

Based upon the extensive "home rule" powers granted Kansas counties by the state legislature, we are inclined to believe that no further search for specific statutory authority is

required. Where a matter of "local concern" is at issue, absent expressed limitations by the legislature, counties are free to act as their elected county commissioners believe to be in the best interests of the county. Therefore, it is our opinion that so long as there is a "public purpose" to be served, as discussed, infra, Kansas counties may expend public funds for services which include lobbying activities.

4. Even where lobbying activities of local governments are permitted, as in the case of counties exercising home rule powers, the purpose of the lobbying effort still must be "public" rather than "private" in nature. This conclusion is founded on the judge-made "public purpose" doctrine which, in substance, precludes the use of public funds for private purposes. 64 C.J.S. Municipal Corporations, §1835 (1950). The doctrine is not well-defined but is relied upon in various jurisdictions to prevent a wide range of activities. Id. and 16 McQuillin, Mun. Corp. §44.35 (3rd Ed. 1979). The "public purpose" doctrine is recognized in Kansas, Leavenworth Co. v. Miller, 7 Kan. 298 (1871), and has been applied in a number of cases. See, State ex rel., Griffith v. Osawkee Township, 14 Kan. 322 (1874); Savings and Loan Assoc. v. Topeka, 87 U.S. 655, 22 L.Ed 455 (1875); and State ex rel., Ferguson v. City of Pittsburg, 188 Kan. 612 (1961).

In our opinion, the public purpose doctrine would preclude the use of the public moneys for lobbying the legislature where the purpose of the lobbying effort was primarily for private benefit. In 64 C.J.S. Municipal Corporations, §1835 (1950), the general law governing judicial scrutiny in the application of the "public purpose" doctrine is stated thus:

> "Each case must be decided in the light of the existing conditions, with respect to the objects sought to be accomplished, the degree and manner in which that object affects the public welfare, and the nature and character of the thing to be done; but the court will give weight to a legislative determination of what is a municipal purpose, as well as widespread opinion and general practice which regard as city purposes some things which may not be such by absolute necessity, or on a narrow interpretation of constitutional provisions. Where an appropriation of public funds is primarily for public purposes, it is not necessarily rendered violative of constitutional provisions against gifts and loans of public credit by an incidental result which may be of private benefit. On the other hand, if the result is chiefly that of private benefit, an

> incidental or even ostensible public purpose will not save its constitutionality. A purpose may be a public one so as to be within a municipal power to appropriate funds therefor, even though it is not a necessary purpose. It has been laid down as a general rule that the question whether the performance of an act or the accomplishment of a specific purpose constitutes a 'public purpose' for which municipal funds may be lawfully disbursed rests in the judgment of the municipal authorities, and the courts will not assume to substitute their judgment for that of the authorities unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused." (Footnotes omitted.) pp. 334-335. [Excerpt relied upon by the Supreme Court of Ohio in State ex rel., McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835 (1951).]

You do not advise as to the objective of the lobbying effort regarding the mineral production tax supported by the Legislative Policy Group, the organization funded by the counties about which you inquire. Certainly, there are public purposes for which such a lobbying effort could be maintained. For example, if the mineral production tax, commonly referred to as the severance tax, is enacted as a tax in lieu of the property tax, generally relied upon by Kansas counties for support of county government, mineral producing counties may suffer a significant erosion of their tax base. If the goal of the Legislative Policy Group is to see that such erosion does not occur, said group might either oppose the severance tax or seek the inclusion of the necessary provisions to protect the counties' interests. We are unable to conclude that such is not a public purpose.

We note that courts are not disposed to substitute their judgment for that of legislative bodies. The Kansas Supreme Court adopted a policy of self-restraint in State ex rel., Ferguson v. City of Pittsburg, 188 Kan. 612 (1961), in upholding a statute authorizing the sale of industrial revenue bonds by cities for the development of agricultural, commercial, industrial and manufacturing facilities. There, the Court said:

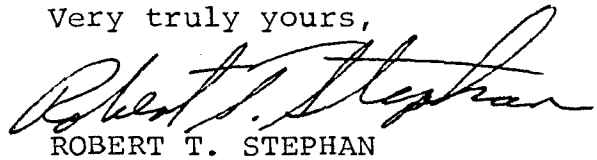
> "From a purely legal standpoint, the rule in this state, as elsewhere, is that courts are concerned only with the power to enact statutes and cannot concern themselves with the wisdom of legislative acts. Courts neither approve nor condemn legislative policy, and

> their sole function is to determine the validity of a challenged act when measured by applicable constitutional provisions. For the removal of unwise laws from the statute books, appeal lies not to the courts but to the ballot and to the processes of democratic government." (Citations omitted.) Id. at 623.

Likewise, we believe the Kansas courts would be hesitant to substitute their judgment for that of local governing bodies.

Therefore, it is our opinion that Kansas counties may, in the exercise of "home rule" powers, expend public funds for the purpose of "lobbying," so long as such activities are for a "public purpose" and are not conducted for the benefit of private individuals. Lobbying activities of the Legislative Policy Group would be for a public purpose where the goal of the counties comprising said group is to affect pending legislation which could adversely impact the financial interests of their county governments. All "lobbyists" representing individual counties or associations of counties are required to register with the Secretary of State pursuant to K.S.A. 1980 Supp. 46-265 and report expenditures pursuant to K.S.A. 1980 Supp. 46-268.

Very truly yours,



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