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ATTORNEY GENERAL OPINION NO. 81-233

Mr. Lauren V. Gray  
Chairman  
Saline County-City-Board of  
Education Building Authority  
303 West Ash, Room 209  
Salina, Kansas 67401

Re: Cities and Municipalities -- Interlocal Cooperation -- Establishment of Joint Fund for Future Repairs

Synopsis: Where several governmental entities have constructed a building for their joint use under an interlocal agreement, and each such entity has authority to establish its own building fund to provide for the replacement of the roof on such building, the agreement may be amended to establish a joint building fund for such purpose. However, where each party to the agreement has discretionary investment powers regarding moneys in its own fund which differ from those of the other parties, the creation of a joint fund and the investment of moneys therein may constitute an improper delegation of each party's separate authority. Such problem may be avoided if each party establishes its own building fund and the interlocal agreement amended to require that moneys in these respective funds be turned over to the administrative entity created by the agreement when needed. Cited herein: K.S.A. 12-1675, 12-1736, 12-1737 (as amended by L. 1981, ch. 173, §23), 12-2901, K.S.A. 1980 Supp. 12-2904, K.S.A. 19-15,114, 19-15,115, K.S.A. 1980 Supp. 19-15,116, K.S.A. 72-8801 (as amended by L. 1981, ch. 286, §2), 72-8804 (as amended by L. 1981, ch. 286, §23), 79-2934.

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Dear Mr. Gray:

In a letter to this office you explain that, in 1965, the Board of County Commissioners of Saline County, the governing body of the City of Salina, and the Board of Education of U.S.D. No. 305 entered into an interlocal agreement under the authority of K.S.A. 12-2901 et seq. for the purposes of acquiring a site for constructing, equipping and maintaining a building to be utilized jointly by the participating political subdivisions. Pursuant to this agreement, a building was constructed and is in use as contemplated in said agreement. We note that an administrative entity was created by the agreement to hold and maintain the building according to the terms of said agreement. The question has arisen, however, whether each of the political subdivisions may contribute a sum of money annually to be placed in a separate fund, which, eventually, will be used to replace the roof on the building. You explain that the purpose for such action would be to avoid the necessity of imposing a large assessment at the time the roof needed major repair or replacement.

K.S.A. 1980 Supp. 12-2904(c) specifies the requirements for an interlocal agreement and provides in pertinent part:

"Any such agreement shall specify the following:

. . . .

"(4) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor.

. . . .

"(6) Any other necessary and proper matters."

The interlocal agreement in question grants the following powers to the board of directors of the Authority in paragraph No. 3:

"(b) To provide for the acquisition of the necessary site and the construction, equipping, operation and maintenance of the aforesaid improvements [the building], and any subsequent additions or alterations thereto.

"(c) To prepare the annual budget of the Authority."

Paragraph No. 7 provides, in pertinent part:

"[T]he entire cost of additions, improvements, fixtures or capital outlays acquired or installed for the common use and benefit . . . shall be jointly borne . . . ."

The Interlocal Cooperation Act permits local governmental entities to cooperate and jointly exercise their powers for mutual benefit; however, it grants no new powers to any entity. K.S.A. 1980 Supp. 12-2904(b). See, also, 8th Biennial Report of the Kansas Commission on Interstate Cooperation, 117 (1957). Each cooperating entity must already possess the power or authority sought to be exercised before such power may be exercised jointly. Thus, even though there is nothing in K.S.A. 12-2901 et seq. or in the agreement itself which would prohibit the establishment of a fund for roof replacement, to determine whether such fund may be established, we must first determine whether each contracting entity has the authority to establish such a fund for itself.

Counties are granted authority to make capital outlays for building, financing, improving and maintaining county public buildings by K.S.A. 19-15,115 and K.S.A. 1980 Supp. 19-15,116. Subsection (d) of the latter specifically provides the manner in which a building fund may be established and authorizes counties to invest any portion of a special building fund not currently needed. K.S.A. 19-15,114(b) defines "improve" to include "alteration, repair, reconstruction, remodeling, furnishing, equipping, extending, adding to, enlarging or any other work which will enhance, extend or restore the value or utility of the public building." Since we believe roof replacement or repair falls within this definition, the county has the authority to create a fund for roof repair or replacement pursuant to 19-15,115.

K.S.A. 12-1736 and K.S.A. 12-1737, as amended by L. 1981, ch. 173, §23, grant similar authority to cities for purposes of constructing and improving public buildings.

The board of education is given capital outlay powers in K.S.A. 72-8801, as amended by L. 1981, ch. 286, §2. This statute requires all moneys levied by school districts for capital outlay to be deposited in the capital outlay fund and to be invested until needed.

Thus, in our judgment, each entity has the authority to establish a building fund of its own for capital improvements and, therefore, apparently has the authority to establish such a fund cooperatively, assuming each entity contributed to the building fund only in accordance with its own powers. However, the existing interlocal agreement does not specifically authorize such fund and would have to be amended to permit

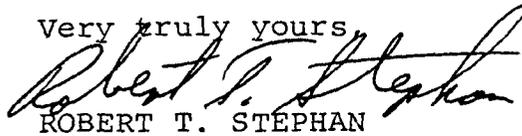
the establishment of such a joint fund, pursuant to K.S.A. 12-2901 et seq.

In addition, each governmental unit which establishes its own building fund must comply with K.S.A. 79-2934. That statute requires an appropriation to be expended only for the purpose for which it was appropriated and any balance remaining in any fund to be carried forward to the credit of said fund. To comply with the requirements of 79-2934, it will be necessary for each party to designate a specified amount to be appropriated to a building fund.

Even if the foregoing prerequisites to establishing a joint fund were satisfied, we believe it would be more appropriate for each governmental unit to establish its own building fund, rather than creating a joint fund. From this fund each such unit could provide its proportionate share of moneys to the entity in charge of administering the interlocal agreement at the time the new roof is needed. Although each governmental unit has the power to invest moneys in their respective building funds until such time as these moneys are needed, these investment powers differ, and all involve discretionary decisions regarding investments. See, K.S.A. 12-1675, 12-1737 (as amended by L. 1981, ch. 173, §23), K.S.A. 1980 Supp. 19-15,116 and K.S.A. 72-8804 (as amended by L. 1981, ch. 286, §3). As a consequence, if a joint building fund were established, and the power to invest the moneys therein until needed to replace the roof were given to the Authority created by the interlocal agreement, such action might constitute an improper delegation of each governmental unit's separate authority to the Authority. Thus, we believe consideration should be given to avoiding this problem by each entity establishing a separate building fund of its own.

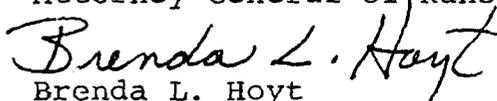
Therefore, we conclude that while the interlocal agreement may be amended to permit the establishment of a jointly created and maintained building fund for the repair or replacement of the roof on a joint city, county, school district building, it would be more appropriate for each entity to establish its own building fund and to amend the interlocal agreement to require that the moneys in these respective funds be turned over to the interlocal administrative entity when needed.

Very truly yours,



ROBERT T. STEPHAN

Attorney General of Kansas



Brenda L. Hoyt

Assistant Attorney General