



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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FILE

Subject Counties & County Officers --
General Provisions

Copy to Counties & County Officers --
Economic Development Programs

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ATTORNEY GENERAL OPINION NO. 86- 40

The Honorable Don Montgomery
State Senator, Twenty-First District
Capitol, Room 503-N
Topeka, Kansas 66612

Re: Counties and County Officers -- General Provisions
-- Home Rule; Acquisition of Real Property for
Industrial Sites

Counties and County Officers -- Economic
Development Programs -- Awarding Grants to
Industries as Inducements to Locate in a County

Synopsis: K.S.A. 19-4103 authorizes expenditure of county moneys for programs related to economic development. The buying and selling of real estate for industrial sites is a legitimate exercise of a county's power of home rule as provided in K.S.A. 19-101 and K.S.A. 1985 Supp. 19-101a. Thus, a county which has established an economic development program under K.S.A. 19-4101 et seq. may engage in the buying and selling of real estate for industrial sites for economic development, as long as said expenditure: (1) has a demonstrable relationship to the program, and (2) satisfies the public purpose doctrine. Similarly, a county may award cash grants to industries as inducements to locate in a particular county, as long as the expenditure meets both of the above-mentioned requirements. Finally, a county may exercise the power of eminent domain to acquire lands for industrial sites, insofar as this power

is authorized expressly by K.S.A. 19-3801 or by implication through home rule and K.S.A. 19-4103. Cited herein: K.S.A. 1985 Supp. 12-1741b, 12-1744a, 12-1744b; K.S.A. 19-101; K.S.A. 1985 Supp. 19-101a; K.S.A. 19-3801, 19-3802, 19-3803, 19-4101, 19-4102, 19-4103; 1986 Senate Bill No. 494; 1986 House Bill No. 2769.

* * *

Dear Senator Montgomery:

As chairman of the Senate Local Government Committee, you request our opinion as to whether several proposed uses of public moneys would be proper. These uses are authorized in 1986 Senate Bill No. 494, and identical 1986 House Bill No. 2769. The proposed legislation would expand the purposes for which county public moneys for economic development could be spent. Specifically, you inquire whether it is proper for a county to engage in the buying and selling of real estate for industrial sites for economic development, and whether public moneys can be used to award grants to industries as inducements to locate in that county. Assuming such activities are permissible, a related question is whether a county may exercise the powers of eminent domain without express statutory authority under home rule powers to acquire lands for industrial sites.

Each of your questions will be addressed separately. In Attorney General Opinion No. 85-52 (copy enclosed), we examined the issue of whether the acquisition and development of real property as an industrial site or park is a legitimate exercise of a county's power of local legislation or home rule, as provided in K.S.A. 19-101 and K.S.A. 1985 Supp. 19-101a. In that opinion, we stated that county funds acquired pursuant to K.S.A. 19-4101 et seq. may only be utilized for programs related to economic development. Further, we stated that the acquisition and development of an industrial site or park would appear to be such a program. However, to be authorized any expenditure of public funds must pass a two-part test, i.e. have a demonstrable relationship to a program of economic development and satisfy the public purpose doctrine.

K.S.A. 19-101 deals with the scope of a county's home rule authority, and provides in pertinent part:

"That each organized county within this state . . . shall be empowered for the following purposes: . . . second, to purchase and hold real and personal estate for the use of the county, and lands sold for taxes as provided by law; third, to sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interests of the inhabitants; fourth, to make all contracts and do all other acts in relation of the property and concerns of the county, necessary to the exercise of its corporate or administrative powers"

This section clearly grants a county authority to acquire property and to make any order concerning such property which may be deemed to be in the interests of the county's inhabitants. Such authority, in our opinion, includes the ability to buy and sell real estate for industrial sites in order to encourage the economic growth and development of the county. This power would be specifically codified by the Senate bill (at section 1).

In addition to home rule authority, the Kansas Legislature has provided a county with several alternative methods of seeking to stimulate and promote industrial, and thus economic, growth and development. For example, K.S.A. 12-3801 et seq. enables "local unit[s] of general government," defined as counties and cities [K.S.A. 12-3802(b)], to issue "industrial development bonds," upon making required findings,

"for the purpose of financing the acquisition of land, the acquisition or construction (including reconstruction, improvements, expansion, extension, and enlargement) of buildings and appurtenances, including but not by way of limitation industrial trackage and access roads, the purpose of such financing being primarily to sell or lease the property so financed to a private individual, partnership, or corporation for the conduct of manufacturing, warehousing,

distribution, and/or research and development operations, except municipal stadiums and theaters."

K.S.A. 1985 Supp. 12-1741b authorizes a county to issue revenue bonds, subject to the constraints of K.S.A. 1985 Supp. 12-1744a and 12-1744b, the proceeds of which shall be used:

". . . for the purpose of paying all or part of the cost of purchasing, acquiring, constructing, reconstructing, improving, equipping, furnishing, repairing, enlarging or remodeling of facilities for agricultural, commercial, hospital, industrial, natural resources, recreational development, and manufacturing purposes" (Emphasis added.)

In addition, a board of county commissioners has the power, pursuant to K.S.A. 19-3801 et seq., to incorporate, organize and enlarge industrial districts within a county. This authority, however, is dependent upon the presentation of a proper petition for such organization signed by the owners of 100 or more contiguous acres of land (located outside the limits of any incorporated city) which is by its character and location suitable for industrial development. K.S.A. 19-3802. Once incorporated, such industrial districts have independent authority to levy a tax and issue general obligation bonds, in addition to exercising the other powers specified in K.S.A. 19-3803.

However, in our opinion, none of these alternatives limit or restrict the authority of the county under K.S.A. 19-101 and K.S.A. 1985 Supp. 19-101a. Therefore, we conclude that the acquisition or disposal of real property for the purpose of developing an industrial site is a permissible exercise of county home rule powers.

Given that the county has the power, either under its broad home rule authority or under specific statutes, to buy and sell real estate for industrial sites for economic development, the question becomes whether such expenditure is for a proper public purpose. K.S.A. 19-4103 outlines how moneys raised pursuant to a tax levy (authorized by K.S.A. 19-4102) may be utilized. K.S.A. 19-4103 states:

"Any such county establishing an economic development program under this act may utilize the funds herein authorized to conduct studies and prepare comprehensive plans for its future economic growth and development; to inventory the services, facilities and resources of the entire county; to promote, stimulate, and encourage the growth and development of the agriculture, commerce and industry of the county as a whole, in order to achieve maximum utilization of its human, economic and natural resources and tourist attractions; and to otherwise promote the general economic welfare and prosperity of the area." (Emphasis added.)

These rather broad confines are the only limits on the utilization of the funds authorized by K.S.A. 19-4102. As Attorney General Opinion No. 82-229 concluded:

"K.S.A. 19-4103 authorizes expenditure of county moneys for programs related to economic development. The only constraints in this regard are that such expenditures have a demonstrable relation to programs of economic development and that they satisfy the public purpose doctrine."

Thus, a county which has established an economic development program under K.S.A. 19-4101 et seq. may engage in the buying and selling of real estate for industrial sites, as long as such expenditure has a demonstrable relationship to a program of economic development. In addition, the buying and selling must satisfy the "public purpose" doctrine.

As stated in Attorney General Opinion No. 85-52:

"The public purpose doctrine, discussed at length in Opinion No. 82-229 (copy enclosed), requires a unit of local government, in exercising the powers conferred upon it, to spend funds only for a public purpose. Thus, the funds raised pursuant to K.S.A. 19-4102 may not be

expended by a governmental entity to make a gift or loan to benefit a solely private entity or cause. By the enactment of K.S.A. 19-4101 et seq., however, the Kansas legislature has made a policy determination that government-financed programs to encourage economic development serve a valid public purpose. This should not be construed as a blanket authorization of every expenditure which may be made under the guise of 'economic development,' and the question of whether a specific expenditure serves a public purpose must be determined in light of the specific circumstances. However, in view of the general authority the legislature has granted to counties regarding the promotion of economic and industrial development, it is our opinion that most expenditures for the development of a county industrial site would serve the purpose required by K.S.A. 19-4103 and the public purpose doctrine."

We affirm this result, and conclude that the buying and selling of real estate for economic development would meet the requirements of the public purpose doctrine.

You next ask whether public moneys may be used for cash grants to industries as an inducement to locate in a particular county. This question can be analyzed in the same manner as your previous inquiry; such expenditure would be permissible only if the funds are utilized for programs related to economic development and serve a public purpose. In our opinion, awarding grants to industries as inducements to locate in a particular county would appear to be such a program. Thus, a county which has established an economic development program under K.S.A. 19-4101 et seq., may use public moneys for cash grants to industries, as long as the expenditure has a demonstrable relationship to said program. The analysis of the public purpose doctrine which appears above would also apply here, and would justify this usage. Again, the proposed amendment to K.S.A. 19-4103 would specifically allow this action.

Finally, you ask whether a county could exercise the power of eminent domain without express statutory authority to acquire land for industrial sites. Initially, we note the language in K.S.A. 19-3801 which provides in relevant part:

"For the purpose of encouraging development in this state, the board of county commissioners of any county shall have the power, upon a proper petition being presented for that purpose, to incorporate, organize and enlarge industrial districts within such county in the manner provided by this act. . . ."
(Emphasis added.)

Thereafter, the statutes expressly give a board of county commissioners the power to form an industrial district within the county for the purpose of encouraging development in the state. Further, K.S.A. 19-3808(5) gives every industrial district (incorporated as provided by this act) the power in such district:

". . . to exercise all the rights and powers of eminent domain within the district in the manner set forth in K.S.A. 26-501 to 26-516, inclusive, and amendments thereto;" (Emphasis added.)

Clearly, the board of county commissioners in any county has express statutory authority to exercise the powers of eminent domain within an industrial district, if the purpose of such action is to encourage economic development. The question then arises whether the express grant of authority under K.S.A. 19-4101 et seq. also gives the county the implied authority to exercise the powers of eminent domain. The necessity to employ eminent domain by implication could conceivably arise if land the county wishes to acquire for an industrial site is not located within an industrial district. Similarly, a county may find it necessary to employ this power either expressly or by implication if an agreement of sale cannot be made with the landowner.

Neither K.S.A. 19-101, which deals with the scope of a county's home rule authority, nor K.S.A. 19-4103, which authorizes the use of county funds to encourage economic development, specifically authorizes the use of eminent domain

authority. However, the statutes, by their express grant of these powers, carry with them such implied authority as is necessary to effectively exercise the express powers. This principle has long been recognized by Kansas courts. State ex rel. v. Younkin, 108 Kan. 634, 638 (1921); Edwards County Comm'rs v. Simmons, 159 Kan. 41, 53 (1944).

Accordingly, to the extent that the use of the power of eminent domain is required to fulfill the powers conferred by the above statutes, it is our opinion that a county has the implied authority to so act.

We are aware of the line of Kansas cases which state that the power of eminent domain may be exercised only when it is specifically authorized by statute. Dinges v. Board of County Comm'rs of Johnson County, 179 Kan. 35, 41 (1956); Soden v. State Highway Commission, 183 Kan. 33, 39 (1958); Board of Education of U.S.D. 512 v. Vic Regnier Builders, Inc., 6 Kan.App.2d 888, 890 (1982). However, we note that none of the cases which contain such a holding have dealt with counties since the advent of home rule for these units of government. All have either been issued prior to 1974 (the year county home rule was approved by the legislature), or deal with units of government such as school districts which do not possess home rule, and so are limited to the powers conferred on them by statute. Therefore, we are of the opinion that, in the case of acquisition of industrial sites pursuant to K.S.A. 19-4103, a county does have the implied power to exercise eminent domain authority under its home rule power and 19-4103.

In conclusion, K.S.A. 19-4103 authorizes expenditure of county moneys for programs related to economic development. The buying and selling of real estate for industrial sites is a legitimate exercise of a county's power of home rule as provided in K.S.A. 19-101 and K.S.A. 1985 Supp. 19-101a. Thus, a county which has established an economic development program under K.S.A. 19-4101 et seq. may engage in the buying and selling of real estate for industrial sites for economic development, as long as said expenditure: (1) has a demonstrable relationship to the program, and (2) satisfies the public purpose doctrine. Similarly, a county may award cash grants to industries as inducements to locate in a particular county, as long as the expenditure meets both of the above-mentioned requirements. Finally, a county may

exercise the power of eminent domain to acquire lands for industrial sites, insofar as this power is authorized expressly by K.S.A. 19-3801 or by implication through home rule and K.S.A. 19-4103.

Very truly yours,

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