



STATE OF KANSAS

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April 22, 1986

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ATTORNEY GENERAL OPINION NO. 86- 60

The Honorable Wint Winter, Jr.  
State Senator, Second District  
Capitol Building, Room 120-S  
Topeka, Kansas 66612

Re: Corporations -- Miscellaneous Provisions --  
Reservation of Exclusive Right to Corporate Name;  
Reservation of the Name "Kansas, Inc."

Synopsis: Reservation of the name "Kansas, Inc." for a corporate name does not preclude the legislature from using this name in 1986 House Bill No. 2960. K.S.A. 17-7402 prevents other corporations from registering with the Secretary of State under names that have been reserved. The fact that Kansas, Inc. has been reserved as the official name of a future corporation is of no consequence because the entity created by H.B. 2960 is in fact an agency of the state and is not required to register as a corporation. In addition, corporate name reservation does not prevent another entity from using that name outside its official registration. Furthermore, the right to the name "Kansas," used alone without any descriptive words, belongs to the people of the state. A private corporation, therefore, cannot adopt the name "Kansas, Inc." as such use would be in derogation of existing public rights to that name. Cited herein: K.S.A. 1985 Supp. 17-6002; K.S.A. 17-7402.

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Dear Senator Winter:

You have requested our opinion regarding the reservation of the exclusive right to the proposed corporate name "Kansas, Inc." You ask whether the attempt to reserve this name for a future corporation precludes the use of that name by the Kansas Legislature in 1986 House Bill No. 2960.

K.S.A. 17-7402 provides, in pertinent part, as follows:

"The exclusive right to the use of a corporate name may be reserved by: (a) Any person intending to organize a corporation under this act;

. . . .

"The reservation shall be made by filing with the secretary of state an application to reserve a specific corporate name, executed by the applicant. If the secretary of state finds that the name is available for corporate use, he shall reserve the same for the exclusive use of the applicant for a period of one hundred twenty (120) days.

"The right to exclusive use of a specified corporate name, so reserved, may be transferred to any other person or corporation by filing in the office of the secretary of state, a notice of such transfer, executed by the applicant for whom the name was reserved, and specifying the name and address of the transferee."

You inform us that on April 1, 1986, a member of the Kansas House of Representatives filed an application with the Secretary of State reserving the name "Kansas, Inc." The state representative, an attorney, apparently made the filing on behalf of a client.

Introduced on February 12, 1986, House Bill No. 2960 is one among several pieces of legislation concerning economic development still pending before the legislature. This bill is presently in a conference committee. House Bill No. 2960 was first amended by the House Committee on Ways and Means to

reflect the recommendations of the Joint Legislative Commission on Economic Development to create an entity to replace the existing advisory commission to the Department of Economic Development. The entity created by the proposed legislation is to be "a body politic and corporate." (1986 H.B. 2960, Sec. 2.) The bill also states that the entity constitutes "a public instrumentality and the exercise of the authority and powers confined by this act shall be deemed and held to be the performance of an essential governmental function." (1986 H.B. 2960, Sec. 2.)

According to the Legislative Research Department, the intent of the Joint Commission was to create a quasi-public corporation similar to the Kansas Turnpike Authority. The name of the entity was originally proposed as "Kansas, Inc.," but was changed by amendment of the Senate on final action when it was learned that the name had been reserved for use as a corporate name.

The Kansas statutes governing formation of a corporation, including corporate name reservation, are patterned after the Model Business Corporations Act. 1 Model Business Corporations Act Annotated §1.01, p. 5 (3rd ed. 1985). When an application for reservation of a particular name is filed pursuant to K.S.A. 17-7402, the applicant has the right to exclusive use of that name for 120 days, provided that the secretary of state determines that the name is available for corporate use. The duty imposed on the secretary of state is ministerial in nature; if no other corporate entity is registered by the submitted name, the applicant is automatically granted exclusive use of that name. 18A Am.Jur.2d Corporations §281, p. 194. "Exclusive use" means that for that time period no other entity can register under the name reserved by the applicant. The purpose of allowing a proposed corporation to reserve a name has been stated as follows:

"The 'reservation; of a corporate name is basically a device to simplify the formation of a new corporation . . . . By reserving a name, the persons considering the formation . . . of [a] corporation can order stationery, prepare documents, etc. on the assumption that the reserved name will be available." 1 Model Business Corporations Act Annotated §4.02, p. 259 (3d ed. 1985).

The articles of incorporation of a proposed corporation must include the information specified in K.S.A. 1985 Supp. 17-6002. This statute imposes two requirements on the selection of a corporate name: (1) the name must include one of the words listed under the subsection, and (2) the name must be distinguishable from the names of other corporations and partnerships organized, reserved, or registered with the state. K.S.A. 1985 Supp. 17-6002(a)(1).

The requirement under the Model Act and K.S.A. 1985 Supp. 17-6002(a)(1) that the name of the corporation stated in the articles of incorporation be sufficiently distinctive is only to ensure that the new corporation can be distinguished from other corporations upon the records of the Secretary of State. The corporation code, therefore, does not affect common law rights to the use of the name.

"The general business corporation statute should not be a partial substitute for a general assumed name, unfair competition, or antifraud statute. As a result, the Model Act does not restrict the power of a corporation to adopt or use an assumed or fictitious name with the same freedom as an individual or impose a requirement that an 'official' name not be 'deceptively similar' to another corporate name . . . . Principles of unfair competition, not the business corporation act, provide the limits on the competitive use of similar names." 1 Model Business Corporations Act Annotated §4.01, p. 242 (3d ed. 1985). (Emphasis added.)

Case law, primarily in the area of trademark law, has firmly established the following principle:

"[I]ncorporation under a specified name in a state does not give the new company the right to use that name in that state or anywhere else, in derogation of the existing rights of other parties." George Gottlieb, "Corporate Name Clearance - Potential Trademark Trouble Spot," The Business Lawyer, Vol. 33 p. 2263, July 1978.

Thus, the fact of incorporation under a given name is not the equivalent of the right to use that name. Reservation of a corporate name only precludes other entities from registering with the state under that name.

1986 House Bill No. 2960, as amended, would create an organization for the purpose of performing "essential governmental function[s]." (1986 H.B. 2960, Sec. 2.) Even though the name has been reserved for corporate use, it is our opinion that the legislature is not precluded from naming the proposed entity "Kansas, Inc." K.S.A. 17-7402 prevents other corporations from registering with the secretary of state under names that have been reserved. The entity created by H.B. 2960 is referred to as a "quasi-public corporation." This proposed entity, however, is not organized pursuant to the corporation statutes but is in fact an agency of the state created by a legislative act. Reservation of the name "Kansas, Inc." is of no consequence as the entity created by H.B. 2960 is not required to be registered with the Secretary of State. Also, name reservation of a proposed corporation does not prevent another entity from using that name, only from registering under it. Furthermore, as will be discussed below, a private corporation cannot use a name in derogation of existing public rights to that name.

In addition to statutory requirements governing incorporation, the courts have recognized common-law restrictions on the selection of a corporate name. For example, it has been held that "a corporation should not be permitted to adopt a name which all citizens are entitled to use . . . ." 18 C.J.S. Corporations §167a, p. 563. In In re We Americans, Inc., 2 N.Y.S.2d 235 (1938), a certificate of incorporation was submitted for approval by six private citizens who wished to incorporate an organization under the name "We Americans, Inc." In disapproving the name, the court stated:

"All the citizens of these United States are entitled to the use of the term 'We Americans' and no group should be permitted to incorporate it as their exclusive designation." Id. at 236.

For the same reasons, the court in Application of Williams, 95 N.Y.S.2d 177 (1950), did not allow the name "Americans against Communism" to be used for a proposed corporation.

All persons part of a large group designated by a broad term such as "Americans" or "Kansas" should have the right to use

that term. Therefore, a corporation formed by one person or a small group of private citizens should not be permitted to adopt the name "Kansas, Inc." as its official designation.

Another recognized common-law restriction is that in adopting a name a corporation cannot "appropriate to its exclusive use geographical words . . . which anyone may lawfully use . . . ." 18 C.J.S. Corporations §167 c(1), p. 564. See 18A Am.Jur.2d Corporations §294, p. 206; 1 Thompson on Corporations §89, pp. 103-04. The word "Kansas" was officially proclaimed 125 years ago to designate a particular geographical area as the thirty-fourth state of the United States. It would follow, then, that the word Kansas should not be appropriated by a private corporation for its exclusive use.

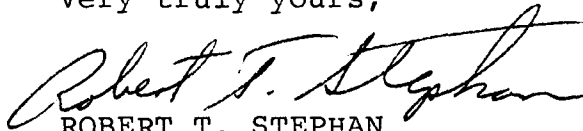
Proposed corporate names have also been disapproved on the basis that the name would cause confusion and mislead the public. For example, in In re New York State Voters League, 157 N.Y.S. 2d 210 (1956), the court refused to approve the name "New York State Voters League, Inc." because the impression was given that the private organization was an official function and arm of the state. See In re World's Fair Information & Service Club, Inc., 297 N.Y.S. 922 (1937).

Many corporations registered in this state contain the word "Kansas" as one of the words in their official corporate name. The other descriptive words in their title distinguishes the particular corporation from others listed in the records of the secretary of state. Used alone, "Kansas" names a state -- a specific governmental unit and particular political subdivision. The right to use the name Kansas is a prior right which belongs to the people of this state and therefore should not be permitted to be used as the official name of a private corporation.

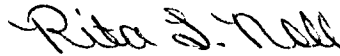
In conclusion, it is our opinion that reservation of the name "Kansas, Inc." for a corporate name does not preclude the legislature from using this name in 1986 House Bill No. 2960. K.S.A. 17-7402 prevents other corporations from registering with the Secretary of State under names that have been reserved. The fact that Kansas, Inc. has been reserved as the official name of a future corporation is of no consequence because the entity created by H.B. 2960 is in fact an agency of the state and is not required to register as a corporation. In addition, corporate name reservation does not prevent another entity from using that name outside its

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Very truly yours,



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