



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 89

Brad L. Jones  
Coffey County Attorney  
P.O. Box 310  
Burlington, Kansas 66839

Re: Counties and County Officers -- Economic  
Development Programs -- Economic Development  
Program; Financing; Tax Levy, Use of Proceeds;  
Financial Assistance to a Radio Station

Counties and County Officers -- General Provisions  
-- Home Rule Powers; Economic Development; Radio  
Station Funding

Synopsis: A grant of economic development monies by a county  
to a local radio station, while remaining a  
discretionary decision, is not prohibited by first  
amendment constitutional principles and is  
permissible if such a grant furthers a valid public  
purpose. It is our opinion that funding a local  
radio station may promote a valid public purpose,  
however, the county must ultimately make that  
determination based upon the facts before it.  
Cited herein: K.S.A. 12-1740; K.S.A. 1990 Supp.  
19-101a; K.S.A. 19-4101; 19-4103; 75-4905; U.S.  
Const., Amend. I.

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Dear Mr. Jones:

As Coffey county attorney you request our opinion on whether any federal or state authority prohibits a county from providing financial assistance to a radio station pursuant to an economic development program. You inform us that Coffey county has a program to promote economic development in the public interest, however, you do not indicate under which statutory authority this economic development program operates. You indicate that a Coffey county citizen has opposed county funding of a radio station through its economic development program because of possible first amendment or SBA (Small Business Association) policy questions or prohibitions.

The freedom of speech and press guarantees encompassed by the first amendment to the federal constitution embrace the liberty to discuss publicly and truthfully all matters of public concern without prior restraint or fear of subsequent punishment. See 16B C.J.S. Constitutional Law, § 539 et seq. (1985). We understand that economic development monies may be seen as an attempt to impose restraints or imply punishment. However, we have no information that would lead us to believe that Coffey county intends to use prior restraints or to punish the radio station for editorials and it appears that the choice of editorial content will remain vested in those individuals owning or operating the radio station in question. If the county's actual actions violate constitutional rights, by imposing prior restraints on free speech or punishing for free speech, such matters can be pursued by the individual whose rights are allegedly violated. However, we find no constitutional authority prohibiting investment of public monies in telecommunications based upon a fear that the media will be less aggressive or that first amendment rights may be violated.

Under its power to regulate interstate commerce, Congress has enacted legislation creating the federal communications commission (FCC). See 47 U.S.C.A. § 301 et seq. This federal agency licenses and regulates broadcasting stations and it should be contacted by the radio station concerning any federal financial interest policies or laws that prohibit a radio station from soliciting or accepting monies from a public entity such as a county. See also, 16B C.J.S. Constitutional Law, § 573 (1985); 74 Am.Jur.2d Telecommunications, § 147 et seq. (1974). We have thus far found no state or federal law per se prohibiting

a county from giving county economic development funds to a radio station. While the SBA may have such a policy with regard to its funding of small businesses, such a policy does not prohibit other entities, whether federal or local, from such expenditures of public funds.

The remaining issue is whether a county may expend funds for the purpose in question. K.S.A. 75-4905 et seq. establish the public broadcasting commission and advisory committees. This act declares it to be in the public interest of the state to encourage expansion of noncommercial public television and radio broadcasting. You do not indicate whether the radio station in question is public (noncommercial) or private. However, noncommercial radio stations have been legislatively declared to serve a public purpose. Thus, contributions by a public entity to such a noncommercial enterprise appear to clearly promote a public purpose as declared by the state legislature. See also McQuillan, Municipal Corporations, Ownership of Public Utilities, § 35.06 (1986).

Public support of a private enterprise raises other questions. Gratuitous donation of public funds to a private entity is prohibited. See Attorney General Opinions No. 81-41, 87-164 and 88-14. The general rule is that public funds may be spent only for public purposes. See Ulrich v. Board of Thomas County Commissioners, 234 Kan. 782, 789 (1984); Duckworth v. City of Kansas City, 243 Kan. 386 (1988); 63 Am.Jur.2d Public Funds § 59 (1984); 56 Am.Jur.2d Municipal Corporations, § 210 (1973). K.S.A. 1990 Supp. 19-101a permits the board of county commissioners to transact all county business and perform all powers of local legislation and administration it deems appropriate, subject only to the limitations, restrictions or prohibitions contained in that statute. This home rule authority permits the board of county commissioners to engage in local legislation which is not contrary to any act of the state legislature. We find no state enactment prohibiting or regulating county expenditure of economic development funds for the purpose of supporting a local radio station. K.S.A. 19-4101 et seq. permit a county to levy a tax in order to finance economic development within the county. Such economic development purposes include efforts to "promote, stimulate and encourage the growth and development of the agriculture, commerce and industry of the county as a whole. . . ." K.S.A. 19-4103. Other statutory authority permits issuance of revenue bonds for similar purposes. K.S.A. 12-1740 et seq. Whether a specific use of public monies

will promote growth and development within the county is a fact question within the province of the board of county commissioners. The courts give much deference to such decisions. Kansas case law indicates that the definition of public purpose may shift with the times:

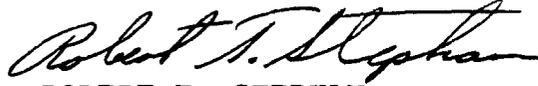
"As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, and necessitates the expenditure of tax funds for purposes which were not classified as public." Ulrich, 234 Kan. 782, 789 (1984).

The Kansas supreme court has approved grants and low interests loans to private developers for rehabilitation of privately owned commercial property, Duckworth, 234 Kan. 386 (1988), and upheld a property tax exemption for a General Motors plant, Tomasic v. City of Kansas City, 237 Kan. 572 (1985). Attorney General Opinion No. 79-9 concluded that K.S.A. 19-15,114 authorized a county to acquire a site for, construct and equip a television translator station. The fact that a private business is used as an instrumentality to achieve the public good and that a private business also happens to be benefited at the same time will not automatically invalidate the public purpose of a legislative scheme.

We are unable to conclusively determine whether Coffey county could in fact obtain a public benefit from the proposed expenditure of public funds to support a radio station. We believe that a public benefit could conceivably result from operation of a local radio station. K.S.A. 19-4101 et seq. recognize a public purpose is served by investing public monies in local industries. K.S.A. 75-4905 et seq. recognizes that a public purpose is served by public broadcasting stations, and encourages public support of such stations. It is our opinion that a grant of economic development monies by a county for purposes of supporting a local privately owned radio station, while a discretionary decision on the part of the county, may serve a valid public purpose and is not a per se prohibited expenditure. However, the county must ultimately decide whether funds are available for such a purpose and whether such an expenditure is warranted. We do not believe that the first amendment to the United States Constitution prohibits such expenditures nor

have we found any state or federal law prohibiting a county  
from granting economic development funds to a radio station.

Very truly yours,

  
ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS

  
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