STATE OF KANSAS

Office of the Attorney General

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Attorney General

September 15, 1976

ATTORNEY GENERAL OPINION NO. 76-288

Mr. Clyde P. Daniel
City Attorney
Post Office Box 499
Garden City, Kansas 67846

Re: Cities and Municipalities--Industrial Revenue Bonds--Financing and Procedure

Synopsis: The industrial revenue bond act permits the issuance of bonds to include an amount sufficient to create a debt service reserve fund.

Industrial revenue bonds may be authorized by an affirmative vote of a majority of the members of the governing body voting thereon, if all members are present. Where two members of a five-member commission abstain, and of the three voting on the question, two are in favor and one is opposed, the issue is duly authorized by binding action of the governing body.

* * *

Dear Mr. Daniel:

Your letter of August 3, 1976, asks our opinion on two questions. You first inquire whether the Industrial Revenue Bond Act permits the issuance of bonds for purposes to include the creation of a debt service reserve fund.

You have drawn our attention to the provisions of K.S.A. 12-1745 which provide:

"In no case in which revenue bonds are issued under and by virtue of this act shall any revenue bonds be issued for the cost of the

> facility, including the site therefor, in excess of the *actual* cost of the same." [Emphasis added.]

We further note the restrictions delineated in K.S.A. 12-1743 which in pertinent part provide thusly:

> ". . . Such bonds may be issued in such amounts as may be necessary to provide sufficient funds to pay all the costs of purchase or construction of such facility, including site, engineering *and other expenses*, together with interest . . . ." [Emphasis added.]

Essentially the question here presented is whether a debt service reserve fund may be considered as an actual cost of the facility which may be financed by the issuance of industrial revenue bonds. We view the above quoted language employed in K.S.A. 12-1745 broadly referring to the "actual cost" of the project as being intrinsically modified by the more explicitly detailed items of cost as provided in K.S.A. 12-1743, which in this case pivots on the phrase "and other expenses."

The debt service reserve fund for industrial revenue bond financing is designed essentially to provide the municipality with at least a modicum of assurance that should a delay occur in receipt of the requisite lease payments, funds are available immediately to meet the debt service requirements during a period for example of releasing or readjustments. And we understand that although such a fund is not mandatory it has become a fundamental requirement for the majority (if not all) industrial revenue bond issues in this state. To this extent and without further elaboration we believe it reasonable to conclude that the cost of establishing a debt service reserve fund may be properly included within the meaning of the phrase "and other expenses" insofar as it is perforce required to secure the sale of the bonds in the first place.

Secondly, you advise that two members of the five-member city commission abstained from voting on the matter, although all were present. Of the three members who did vote, two voted in favor of issuance of a letter of intent and adoption of the necessary resolution, and one voted against. As a result, the measure was not approved by a majority of a quorum, but not by a majority of the full membership.

As you point out, under the common law rule which is followed in a majority of jurisdictions, the majority of a municipal body constitutes a quorum for the transaction of business, and the affirmative vote of a majority of those present and voting is sufficient to constitute binding action. You question, however, whether this rule obtains in Kansas, citing language in *Hartzler v. City of Goodland*, 97 Kan. 129 (1916). That case involved the validity of a resolution passed by a city governing body while a vacancy existed among its membership. The effect of the vacancy was not in issue, so far as appears from the opinion of the court, but it adverted to the possible effect thereof nonetheless:

> "Is it imperative that the functions of local municipal government be suspended in case of a vacancy in the city council? If there are sufficient members of the council remaining in office who vote for and sanction the work to be done or the project to be undertaken to constitute a majority of the entire constituent membership, and not merely a majority of a quorum, it seems that their official action is valid." 97 Kan. at 133.

The court cited decisions from California, Connecticut and Tennessee in support of its statement. It did not discuss the effect of an abstention. As *obiter dicta*, offered in a case in which the question was not raised, the language should not be taken, in my judgment, as reflecting a considered judgment by the court addressing the question raised here. Indeed, the statement appears to be merely an epitomization of the general weight of authority from other jurisdictions.

As such, it clearly does not describe the general rule followed in the majority of jurisdictions. Moreover, in *Paola & Fall River Railway Co. v. Commissioners of Anderson County*, 16 Kan. 302 (1876), the court acknowledged and appeared to acquiesce in that general rule. That case involved the absence of a commissioner from a special county commissioners' meeting. The absent member had not been notified of it, and the court held that the action taken at that meeting was invalid, precisely because the absent member had not been notified thereof and afforded an opportunity to attend and participate. The court stated thus:

> "Again, any other rule would be fraught with danger to the rights of even a majority, as, when legally convened the ordinary rule in

> the absence of special restrictions being that a quorum can act and a majority of the quorum bind the body . . . ."

In an annotation of 63 A.L.R.3d 1064, the writer canvasses at some length many cases involving the effect of abstentions. It would unduly lengthen this opinion to attempt even a limited discussion of particular cases. It is sufficient to point out that in jurisdictions in which the common law rule is followed -- that a majority vote of a quorum constitutes binding action although it is less than a majority of the full membership -- many courts have held that a member of the body may not prevent or impede official action merely by abstention. They have adopted the rule that if a quorum is present, approval by a majority of the votes cast on a question constitutes binding action, notwithstanding the total number of votes cast is less than the number required to constitute a quorum, and even though the number of favorable votes is thus less than a majority of the actual number of members present. This position is premised on a number of considerations, the foremost among them including the view that a member of a body has an affirmative duty to vote, and that an abdication of this duty should not be permitted to bring government to a halt or to impede official action upon the questions presented to the body for its disposition.

A contrary result is not required by K.S.A. 77-201, *Fourth*, which states thus:

> "Words giving a joint authority to three or more public officers or other persons shall be construed as given such authority to a majority of them, unless it be otherwise expressed in the act giving the authority."

In *Leavenworth, Northern & Southern Railway Company v. Otto Meyer*, 58 Kan. 305 (1897), the court stated that this provision was merely declaratory of the common law rule:

> "It declares nothing more than that a majority of a body of three or more actually in existence as members of a tribunal, may determine the action of such tribunal without the concurrence of the others." 58 Kan. at 310.

It does not address the question raised here.

Because this rule is followed in a clear majority of those jurisdictions in which the question is not controlled by special statutory provisions, and is thus supported by the clear weight of authority, it is my judgment that this view would be followed by Kansas courts, and I cannot but conclude, in response to your own inquiry, that in my judgment, the affirmative vote of two of the three members who voted on the question constitutes binding action of the commission. As a result, the letter of intent is duly authorized by binding and valid action of the commission, and the resolution is thus likewise duly authorized.

Yours very truly,

Curt Schneider

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