



STATE OF KANSAS

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January 22, 1980

ATTORNEY GENERAL OPINION NO. 80-19

Robert F. Duncan  
Atchison City Attorney  
515 Kansas Avenue  
Atchison, Kansas 66002

Re: Cities and Municipalities -- Corporate Powers --  
Purchase and Sale of Real Estate

Synopsis: A municipality may not lawfully purchase real estate when the stated intent of the purchase is to make a gift of the real estate to a private enterprise. Property lawfully acquired by a municipality may not be disposed of absent adequate consideration.

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Dear Mr. Duncan:

As City Attorney for the City of Atchison you inquire if the city may lawfully expend community development funds for the purchase of real estate and then give the real estate to a private enterprise for the purpose of constructing thereon housing for elderly residents.

In addressing your inquiry we believe that we must first consider the authority of the city to purchase real estate for the purpose stated. The corporate powers of cities are stated generally in K.S.A. 12-101, which provides:

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"Article 12, section 5 of the constitution of Kansas empowers cities to determine their local affairs and government by ordinance and enables the legislature to enact laws governing cities. Each city being a body corporate and politic, may among other powers --

" First. Sue and be sued.

" Second. Purchase or receive, by bequest or gift, and hold, real and personal property for the use of the city.

" Third. Sell and convey any real or personal estate owned by the city, and make such order respecting the same as may be deemed conducive to the interests of the city, and to provide for the improvement, regulation and government of the same.

" Fourth. Make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers.

" Fifth. Have and use a corporate seal, and alter the same at pleasure.

" Sixth. Exercise such other and further powers as may be conferred by the constitution or statutes of this state."  
(Emphasis supplied.)

From the foregoing statute it is clear that a city may lawfully purchase real estate for the use of the city; however, it is our opinion that the authority granted does not include the power to purchase real estate with the stated intention of making a gift of the real estate to a private enterprise. Support for this conclusion is set out in 63 C.J.S. Municipal Corporations §958, which states:

"A municipality lacks power or authority to purchase or otherwise acquire or hold property for a purpose not within the powers specifically conferred on it or essential to carry out the objects of its creation, and it has been held that an ordinance appropriating property for a public purpose must set out the particular purpose so that the

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courts may judge as to whether or not it is a public purpose within the contemplation of the law. As a rule a municipal corporation cannot purchase property in aid of any private enterprise, however laudable its purpose or useful its encouragement." (Emphasis supplied.)

We find no statutory or decisional law to indicate that the foregoing is not the rule in Kansas. This conclusion is bolstered by the provisions of K.S.A. 12-4901 et seq. which outline an explicit procedure for municipalities in establishing homes for aged. In this statutory scheme the authority to acquire a site and to construct such housing is expressly stated; however, title to the property involved remains in the municipality.

In our opinion, the explicit statutory scheme contained in K.S.A. 12-4901 et seq., when viewed in conjunction with the general rule cited above, effectively prohibits a municipality from purchasing and conveying such real estate to a private enterprise for the purpose of constructing housing for the elderly.

Since it is our opinion that the purchase phase of the transaction you have proposed is not permissible, we do not believe it necessary to consider the disposal phase of the proposed transaction in detail. We would state, however, that the gift of municipally owned real estate to a private enterprise appears to be prohibited.

In State ex rel. v. City of Liberal, 186 K. 694 (1960), the Supreme Court of Kansas considered a transaction wherein the City of Liberal contracted to convey 39.97 acres of land to the board of education for a school building site. Although the court upheld the conveyance, they did so upon a finding that there was adequate consideration provided by the board of education through their agreement to move the golf course, utilities and a softball diamond. The court noted that absent such an agreement the school board would have been required to pay \$1,000 per acre for the site.

Although it is clear that a municipality may dispose of its property, and that there is considerable discretion vested in the governing body in determining the terms of such disposal, it is our opinion that such power does not include the authority to make an outright gift of such property. 63 C.J.S., Municipal Corporation §965 states:

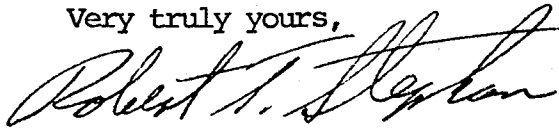
"[A] power of use and disposal of municipal property does not include the power of donation or gratuitous disposition, and it has no power to donate lands or personal property

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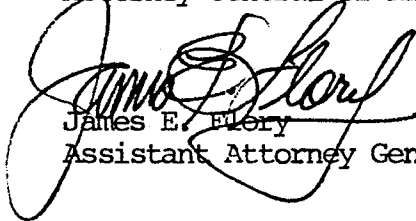
to private uses unless by constitutional authority; and in some states express constitutional provisions prevent such donations even under legislative authority."

For the foregoing reasons it is our opinion that the City of Atchison may not lawfully purchase real estate when the previously stated intention is to convey the real estate by gift to a private enterprise. Even were such acquisition lawful, we believe that disposal of the property without adequate consideration would be prohibited.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



James E. Flory  
Assistant Attorney General

RTS:TDH:JEF:may