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April 23, 1980

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ATTORNEY GENERAL OPINION NO. 80-95

Mr. Thomas H. Sullivan
Phillips County Attorney
Phillips County Courthouse
Phillipsburg, Kansas 67661

Re: Cities and Municipalities--Port Authorities--Inclusion of Railroad Facilities

Synopsis: K.S.A. 12-3401, et seq., as amended by 1980 Senate Bill 824, authorizes counties to form a port authority for the purpose of acquiring railroad facilities. Said authority does not violate Article 11, Section 9 of the Kansas Constitution. Cited herein: K.S.A. 12-3401, K.S.A. 1979 Supp. 12-3402, K.S.A. 12-3406 (as amended by sections 3, 4, and 5, respectively, of 1980 Senate Bill No. 824), K.S.A. 12-3405, Kansas Constitution, Article 11, Section 9.

Dear Mr. Sullivan:

You inquire concerning the legality of the formation of a port authority, pursuant to K.S.A. 12-3401, et seq., as amended by 1980 Senate Bill No. 824, by Phillips and other counties, for the purpose of acquiring portions of the Rock Island Railroad which runs through several of the counties in the state.

The port authority statutes prior to the 1980 session provided a broad authority to an individual county or several counties acting in concert to form port authorities for the general purpose of acquiring and improving various forms of transportation facilities. Several sections of this act were amended by 1980 Senate Bill No. 824, which took effect on April 15, 1980, upon its publication in the official state paper.

The general powers of a port authority can be found in K.S.A. 12-3406, as amended, which provides in relevant part:

"A port authority established by K.S.A. 12-3402, and amendments thereto, shall have full power and authority to:

"(a) Purchase, construct, sell, lease, and operate docks, wharves, warehouses, piers, and other port, terminal, transportation facilities, or railroad facilities within its jurisdiction, consistent with the purposes of the port authority" (Emphasis added.)

Further definition of the port authority can be found in K.S.A. 12-3401(f), as amended, which reads:

"'Port' means water port, airport, land transportation facility, or railroad facility."

The jurisdiction of a port authority provided for by these statutes is found in K.S.A. 12-3405, which reads in part:

"The area of jurisdiction of the port authority created in accordance with K.S.A. 12-3402 shall include all of the territory of the city or county, or combination thereof, creating it, together with any other property outside thereof conveyed to it"

In viewing K.S.A. 12-3401, et seq., as amended by 1980 Senate Bill No. 824, as a whole, it is obvious the legislature has granted cities and counties broad authority to deal with local transportation problems. The legislative history of the original enactment of the Port Authority Act in 1969 indicates it was primarily intended to allow cities and counties to take advantage of available federal funding to improve local airport and waterport facilities. The addition of the words "railroad facility" to the above-cited sections by the 1980 Legislature makes it clear the legislature intended the use of this act be expanded to include railroad facilities such as stations, sidings, tracks, switches, and other railroad facilities. The plain language of the act would now allow a port authority to acquire portions of the Rock Island Railroad, so long as the acquisitions were consistent with the declared purposes of the port authority.

An examination of the rail transportation situation at the time of the 1980 amendments to the Port Authority Act supports this conclusion. At the time, the Rock Island Railroad had been ordered liquidated by the Bankruptcy Court and all other railroads interested in acquiring any segment of the Rock Island were required by the Federal Railroad Administration to make a declaration of the same. However, no railroad had expressed an interest in acquiring large segments of the Rock Island in Kansas¹ and temporary service had been discontinued on all but the Liberal to Kansas City line. The governor sent a

¹ Particularly, the segment from Kanorado to Belleville then north into Nebraska, the segment from Belleville to MacFarland, and the Topeka to Troy branch. In doubt was the offer of the M-K-T railroad to acquire the line from Herington to Caldwell.

special message to the legislature requesting the amendments to the Port Authority Act. (See Special Message on Rock Island Railroad, dated March 18, 1980.) Representative Marvin Littlejohn of Phillipsburg presented the amendments to the House Local Government Committee and the House Committee of the Whole upon the representation that several of the counties in his district and other counties in northern Kansas were intent upon the formation of a port authority for the purpose of acquiring portions of the Rock Island to insure continued essential rail service in their communities, citing several examples of the disastrous consequences of the abandonment of these rail lines.

Given the economic and political events of the moment and the plain language of the amended act, it is our opinion that K.S.A. 12-3401, et seq., authorize Phillips and other counties to form a port authority for the purpose of acquiring portions of the Rock Island Railroad. As concerns your inquiry as to the validity of this enactment, the only apparent question of constitutionality is whether this act, as amended, violates Article 11, Section 9 of the Kansas Constitution, which provides:

"The state shall never be a party in carrying on any work of internal improvement except that: (1) It may adopt, construct, reconstruct and maintain a state system of highways, but no general property tax shall ever be laid nor general obligation bonds issued by the state for such highways; (2) it may be a party to flood control works and works for the conservation or development of water resources."

The constitutional prohibition against state participation in works of internal improvement has been with us since statehood. The current exceptions to its proscriptions were added to allow limited state participation in highway development and flood control. And, over the years it has been interpreted and applied in numerous instances, so that today its broad restraint of legislative action is more readily discernible.

The purpose of Article 11, Section 9 of the Kansas Constitution is to defend the state treasury from insolvency, "logrolling," and involvement in commercial enterprise. See State v. Kelly, 71 Kan. 811 (1905); State ex rel., v. Board of Regents, 167 Kan. 587 (1949).

It has long been recognized the constitutional prohibition on state investment in internal improvements does not extend to the political subdivisions of the state. The legislature may create such political subdivisions and grant them such authority as it deems reasonable for carrying out the public purpose for which they were created. In the case of Leavenworth County v. Miller, 7 Kan. 479 (1871), Chief Justice Valentine declared:

"(T)he constitution means just what it says. It says the State shall never be a party in carrying on any works of internal improvement, and it means the State, and not Leavenworth County; and to hold that this restriction upon the State is also a restriction upon counties, cities, etc., is to put words in the constitution which its framers omitted, and to overturn a well-settled rule of constitutional and statutory construction: Expressio unius est exclusio alterius." (Emphasis by the Court.) Id. at 497.

The question raised in the Leavenworth County case was whether a statute which authorized counties to subscribe to the stock of a railroad company and issue bonds for that purpose to aid in the construction of a railroad violated Article 11, Section 9 of the Constitution. The question was settled in favor of the statute and was subsequently upheld on the same theory. Railroad Co. v. Nation, 82 Kan. 345 (1910). We find no significant difference between the situations in the Leavenworth County case, supra, and the current situation and the approach of the Legislature in dealing with them. As the Legislature over a hundred years ago provided localities with a means of aiding themselves, so the 1980 Legislature has provided cities and counties, impacted by the liquidation of the Rock Island Railroad, with a means to aid themselves in maintaining essential rail services.

The Port Authority Act provides for the formation of a quasi-municipal corporation. K.S.A. 1979 Supp. 12-3402, as amended, provides:

"(a) There is hereby authorized to be established in each city and in each county of the state, a public body corporate and politic which if established shall be an agency of the state of Kansas . . . A port authority created hereunder shall be a body corporate and politic which may sue and be sued, plead and be impleaded, and shall have the powers and jurisdiction enumerated in K.S.A. 12-3401 to 12-3414, inclusive, and amendments thereto. The exercise by such port authority of the powers conferred upon it shall be deemed to be essential governmental functions of the state of Kansas . . ."

As Chief Justice Valentine recognized in Leavenworth Co. v. Miller, supra:

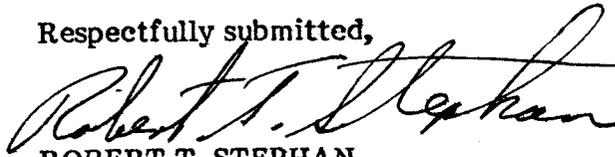
"(T)here is no constitutional restriction upon constructing works of internal improvement through the agency of subordinate public corporations, such as counties, cities, towns, and villages. Hence it logically follows that the State may, through the agency of such subordinate public corporations construct, own, and operate all the railroads within her territorial boundaries. It will also be admitted that the State may construct railroads through the

agency of private corporations, or of private individuals. Now, if the construction of a railroad is a public duty which the State may either cause to be done entirely through the agency of public corporations, and at the public expense, or entirely through the agency of private corporations or private individuals, it seems to follow as a logical consequence that such a work may be done partly through the agency of a public corporation or of private individuals. If private enterprise will take hold of such public improvements and construct them, all experience has shown that it is better to let private enterprise do it. But if private enterprise will only perform a part, is it not better to let private enterprise perform that part, and the public perform the other part, than that the public shall be entirely deprived of all the benefits of such necessary and valuable improvements?" 7 Kan. at 513, 514.

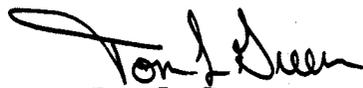
The distinction enjoyed by a port authority, created pursuant to the act, is that it becomes a totally independent public and political entity upon its creation. The counties which might create a port authority lose control of the functions of the authority once it is created (except the power to dissolve the authority) and the state has no control of the operation or function of the authority. The state never becomes a party to the operation of the port authority by way of creation, funding, regulation, or any other means. A port authority, therefore, appears to be one of those types of public corporations which the Supreme Court makes reference to in its 1871 opinion in Leavenworth County v. Miller, supra. Nothing in current rulings would alter the conclusion that a port authority would be sufficiently independent of state involvement so as to make the proscriptions of Article 11, Section 9 of the Kansas Constitution inapplicable to its formation and operation.

Therefore, in our judgment, K.S.A. 12-3401, et seq., as amended by 1980 Senate Bill No. 824, allows cities and counties to form joint port authorities for the purpose of acquiring railroad facilities, such as those portions of the Rock Island currently for sale under a liquidation plan. Additionally, the prohibitions of Article 11, Section 9 of the Kansas Constitution would not extend to a port authority created for the purpose stated above.

Respectfully submitted,



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RTS:BEM:TLG:MC