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ATTORNEY GENERAL OPINION NO. 81-105

The Honorable Mike Hayden, Chairman
House Ways and Means Committee
State Capitol, Room 514-S
Topeka, Kansas 66612

Re: Finance and Taxation -- Internal Improvements --
Kansas Department of Economic Development

Synopsis: Direction and supervision of a private entity by the Kansas Department of Economic Development does not make the state a party to a work internal improvement in violation of Art. 11, Sec. 9 of the Kansas Constitution. Administration of a federal rent subsidy program by KDED is within the provided exception to Art. 11, Sec. 9 allowing the state to expend federal funds for public purpose pursuant to federal law. Cited herein: Kan. Const., Art 11, Sec. 9, 42 U.S.C.A. §1437, 24 C.F.R. 811.

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Dear Representative Hayden:

On behalf of the House Ways and Means Committee you inquire whether certain activities of the Kansas Department of Economic Development (KDED) are in violation of Art. 11, Sec. 9 of the Kansas Constitution. Specifically, you inquire "whether (a) the activities of the Kansas Housing Development Corporation, Inc., because of the involvement of KDED officers and employees in the private, not-for-profit corporation, or (b) the administrative functions performed by KDED as "parent entity" to facilitate the distribution of federal funds and to manage certain housing assistance contracts, are in conflict with the provisions of Article 11, Section 9, of the Kansas Constitution, as amended in November, 1980." You are thus inquiring about two different types of KDED activity, one of which is supervision of a private not for profit corporation, and the other as administrator of a federal rent

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subsidy program. These two different types of KDED activity will be dealt with separately below.

The first type of KDED activity in question here is the agency's alleged involvement in activities of the Kansas Housing Development Corporation, Inc. (KHDC). KHDC is a private, not-for-profit, corporation created for the purpose of financing low income housing pursuant to 42 USCA §1437; and 24 CFR §811. KHDC carries out this financing by originating and selling obligations of the United States pursuant to the above authority. This federal authority creates a relationship between KHDC, known as the "agency or instrumentality public housing agency," and KDED, known as the "parent entity public housing authority." These terms are defined by 24 CFR §811.102 as follows:

"(b) Agency or Instrumentality PHA. A not-for-profit private or public organization that is authorized to engage in or assist in the development or operation of low-income housing and that has the relationship to a parent entity PHA required by this subpart. . . .

"(p) Parent Entity PHA. Any state, county, municipality or other governmental entity or public body that is authorized to engage in or assist in the development or operation of low-income housing and that has the relationship to an agency or instrumentality PHA required by this subpart. . . .

"(q) Public Housing Agency (PHA). Any state, county, municipality, or other government entity or public body (or agency or instrumentality thereof) that is authorized to engage in or assist in the development or operation of low-income housing."

Under this scheme of regulation, assistance is granted for low income housing through the efforts of three separate parties. The federal Department of Housing and Urban Development (HUD) sanctions the operation of parent entity PHAs in the several states, (in Kansas, this agency is the Department of Economic Development) who in turn sanction and coordinate the activities of the agency or instrumentality PHA, in this case KHDC, which is actually the party financing the construction and management of low income housing. The involvement of the parent entity PHA, in this case KDED, in the affairs of the agency or instrumentality PHA is provided for in 24 CFR §811.105(c). This regulation calls for approval by the parent entity PHA of the agency or instrumentality PHA's charter, by laws, indi-

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vidual projects, and each issue of obligations. In addition the parent entity PHA must have access to the books of the agency or instrumentality PHA. This regulation also expressly allows officers of the parent entity PHA to be directors of the agency or instrumentality PHA, as is the case here, though the directors of KHDC need not be KDED officers. KDED officers acting as KHDC directors act in an individual capacity. They do not receive state money for acting in this capacity, and KHDC receives no state money for its operations. This scheme of federal regulation works to separate the functions of the state and the entity actually participating in the work of creating low income housing while allowing the state to retain supervisory and coordinative controls over low income housing assistance. Hence, we must ascertain whether the exercise of this function by the state causes the state to be a party to a work of internal improvement in violation of Art. 11, Sec. 9 of the Kansas Constitution.

Article 11, Section 9 of the Constitution of Kansas, as amended in November 1980 states as follows:

"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; (3) it may, whenever any work of internal improvement not authorized by (1) or (2) is once authorized by a separate bill passed by the affirmative vote of not less than two-thirds of all members then elected (or appointed) and qualified to each house, expend or distribute funds received from the federal government therefor and may participate with the federal government therein by contributing any state funds appropriated in accordance with law for such purpose in any amount not exceeding the amount received from the federal government for such improvement, but no general property tax shall ever be laid nor general obligation bonds be issued by the state therefor; and (4) it may expend funds received from the federal government for any public purpose in accordance with the federal law authorizing the same."

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In Attorney General Opinion No. 81-47 this office examined activities of the Kansas Department of Transportation regarding the expenditure of federal and local funds for the revitalization of various Kansas railroads. The Kansas Department of Transportation wrote contract specifications, made inspections, and audited the operation. We determined that this limited involvement was not sufficient to make the state of Kansas an unlawful party to the work of internal improvement. Our conclusion contained the following language:

"[T]he state may expend state moneys in its role as coordinator, supervisor and regulator of internal improvement projects without becoming a 'party' to such project in contravention of this section." Attorney General Opinion No. 81-47 at 4.

Attorney General Opinion No. 81-47 relied extensively on State ex rel. Hopkins v. Raub, 106 Kan. 196 (1920), a Kansas case construing Article 11, Section 9 in an earlier version. The court examined the applicability of the provision to activities of the state highway commission in the supervision, coordination and regulation of the construction of local roads paid for from local sources. The court stated that: "The fact that state funds are expended for inspection and regulation does not make the state a party to the business or the work carried on." It follows that activities of an agency, such as KDED, would not be considered as violating Art. 11, Sec. 9 of the Kansas Constitution, where such activities are merely regulatory, supervisory, or for the purpose of coordinating federal activities.

Hence, we do not believe the courts of this state would find Article 11, section 9 to be applicable in this instance. KHDC is a private entity and is not considered a state agency. See Letter from W. Robert Alderson to James H. DeCoursey, Jr., July 1, 1980. (Attached.)

This is true by virtue of its manner of creation and method of funding of KHDC and the degree of control exercised by the state as noted above. In addition, we do not feel the role of KDED officers in the private corporation makes the state a party to a work of internal improvement. While KDED employees may serve as directors of the private corporation, the Charter and Bylaws of KHDC do not so require. Thus, while the connection between the state employees may be practical, it is not a connection mandated by law. Id. at 2 and 3.

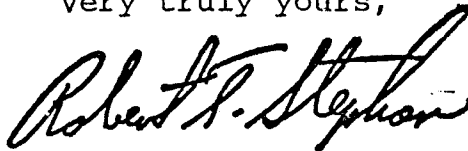
The second type of KDED activity involves administration of a federal rent subsidy program by KDED as a state housing

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agency. You state that KDED administers the federal rent subsidy program by passing on federal funds appropriated from the state treasury and receiving an administrative fee for its management of the annual contributions contract with HUD. Article 11, Sec. 9 of the Kansas Constitution contains four permissible exceptions for state involvement. One of these exceptions, number four, states that the state "may expend funds received from the federal government for any public purpose in accordance with federal law authorizing the same." All of the conditions of this exception are to be found here. The money being spent is federal money appropriated by federal law for this purpose. The funds are being spent for the public purpose of rent assistance to the needy and are appropriated annually by the legislature to KDED for such purpose.

In sum, it is our conclusion that direction and supervision of a private entity by KDED does not make the state a party to a work of internal improvement in violation of Article 11, Section 9 of the Kansas Constitution. Administration of a federal rent subsidy program by KDED is within the provided exception to Art. 11, Sec. 9 allowing the state to expend federal funds for public purpose pursuant to federal law.

Very truly yours,



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RTS:BJS:hle

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