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June 26, 1981

ATTORNEY GENERAL OPINION NO. 81-149

The Honorable Pete Murray
Crawford County Commission
Crawford County Courthouse
Girard, Kansas 66743

Re: Intoxicating Liquors and Beverages -- Local Alcoholic Liquor Fund -- Expenditure for Recreational Services; Public Benefit Required

Synopsis: The use of public money to build even a separate and distinct part of a structure which is to be owned and controlled by a private corporation (even though nonprofit), is an impermissable use of funds under Kansas law. Attorney General Opinion No. 80-182 is reaffirmed. Cited herein: K.S.A. 1980 Supp. 79-41a02

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Dear Commissioner Murray:

As a member of the Crawford County Commission, you request that this office re-examine the conclusion we reached in an opinion of last year, No. 80-182. Therein, we expressed our opinion that it would be an impermissible use of public money for a county to distribute a portion of the local alcoholic liquor fund (pursuant to K.S.A. 1980 Supp. 79-41a02) to the Young Men's Christian Association in Pittsburg. At that time, we were informed the money was to be contributed into the general building fund of the association with no restrictions on how it was to be used. In view of this total lack of control by the commission, we concluded that the private benefit outweighed that which the public received, as the latter's use could be limited or curtailed without any recourse by elected officials.

You now inform us that the association has presented the commission with an alternative plan, namely that the funds

requested ($15,000 over 3 to 5 years) are to be used solely for the construction of a "public games" room. This facility would be a continuation of the present games room which provides pool, ping pong and other indoor diversions for the payment of a nominal fee of 25 cents. The association has stated that the new facility would operate as a "public drop-in area for youth and adults," in a continuation of present policy. In view of these developments, you wish to know whether the result reached in Opinion No. 80-182 would be changed.

While we are sympathetic to the financial needs of non-profit organizations like the YMCA, and cannot fail to note the good works of such an organization, we are unable to conclude that the above change in the association's proposal avoids the basic obstacles to the use of public funds in this manner. As was noted in our earlier opinion, the Court in State ex rel. v. Nemaha County Comm'rs, 7 Kan. 542 (1871) early established that

> "[i]t does not follow, because a state may do a certain work as a public improvement, and for the public use, that it can give of the public funds to a private individual to enable him to do a like work as a private speculation and for personal gain. And this, notwithstanding the general convenience of the community is promoted in one case equally with the other. For, in the one case, the public owns it; the public controls it; it is public. In the other, the individual owns it; the individual controls it; it is private." 7 Kan. at 571.

While we do not doubt the good faith of the association in pledging to use the money it receives from the county only for the public games room, the same difficulties exist as were noted in Opinion No. 80-182 For example, ownership of the facility would be in the name of the YMCA, with the county having at most an equitable interest in the particular room. Public use of the room would still be subject to the association's ultimate control. The setting of the hours of use and the fee required would be totally controlled by it, as would be any subsequent disposition. Given the tangible benefit which the association would receive (i.e., ownership of a new structure) under your stated proposal, such public control would be needed to insure that the primary benefit was in fact to the public. Additionally, in the event of a breach of the agreement, it would be difficult for the county (under the proposed plan) to recover on its investment, as foreclosure would be a practical impossibility.

This is not to say, however, that a contractual arrangement might not be considered whereby space in the facility would be leased by the county for general public use. Alternatively, the parties might attempt a joint project under the Interlocal Cooperation Act, K.S.A. 12-2901 et seq., wherein control of the project is exercised jointly and the County maintains the legal right to control certain aspects of the facility's management. Absent legal arrangements establishing a greater degree of control over the property than is contemplated in your proposal, financial contribution by the county to the Association would continue to be improper.

Therefore, we must conclude that the use of public money to build even a separate and distinct part of a structure which is to be owned and controlled by a private corporation (even though non-profit), is an impermissible use of funds under Kansas law. Attorney General Opinion No. 80-142 is reaffirmed.

Very truly yours,

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