



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 88

Richard E. Jones  
Deputy City Attorney  
Legal Department  
City Building  
125 East 7th Street  
Topeka, Kansas 66603

Re: Cities and Municipalities -- Investment of Idle  
Funds -- Deferred Compensation Plan

Synopsis: Moneys withheld from employees' salaries for purposes of an approved deferred compensation plan sponsored by a city are "public moneys" within the meaning of K.S.A. 1981 Supp. 9-701. Such moneys, however, are not "idle funds" which are subject to investment under K.S.A. 1981 Supp. 12-1675. Cited herein: K.S.A. 1981 Supp. 9-701, 12-1675, 26 U.S.C.A. 457.

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Dear Mr. Jones:

On behalf of the Topeka City Attorney you have requested the Attorney General's opinion concerning city participation in a deferred compensation plan for the benefit of city employees. In your letter you note that: "The governing body of the City of Topeka has decided that it would be desirable to permit city employees to participate in a deferred compensation program." Such a program has been offered by the International City Management Association (ICMA) Retirement Corporation. In regard to the propriety of the City's participation in the plan, the following are essentially the questions you ask:

1. Is the money which is deferred by the city's employees "public money" as that term is defined in K.S.A. 1981 Supp. 9-701?

2. If the deferred money is public money, is the city bound by the five investments listed in K.S.A. 1981 Supp. 12-1675?
3. Is there some "more enlightened" way of looking at the money which is deferred by the employees which would permit the city to turn the money over to ICMA?
4. What is the legality of the city officials entering into an arrangement by which ICMA administers the deferred compensation program, and where would liability lie in the most unlikely event that ICMA (or any other carrier) is unable to return the employees' deferred compensation?

Apparently ICMA offers a "qualified deferred compensation plan" pursuant to 26 U.S.C.A. §457, and we agree with your conclusion that in order for the plan to qualify for tax exemption under 26 U.S.C.A. §457, the compensation which is deferred must belong to the City of Topeka.

K.S.A. 1981 Supp. 9-701(1) defines "public money" as "all money coming into the custody of any officer of any municipal corporation . . . pursuant to any provision of law authorizing any such official to collect or receive the same." From the foregoing definition of "public money," we have little difficulty in determining that the deferred compensation being retained by, and in the custody of the City of Topeka, would be "public money."

In response to your second question, we note the pertinent language contained in K.S.A. 1981 Supp. 12-1675 which provides:

"The governing body of any . . . city . . . in the state of Kansas having authority to receive, hold and expend public moneys or funds may invest any moneys which are not immediately required for the purposes for which the moneys were collected or received . . . ." (Emphasis added.)

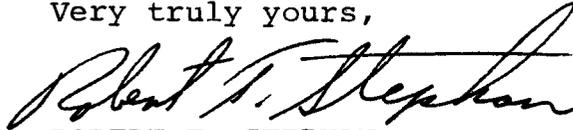
For purposes of your question, we assume that the moneys in question are "public moneys" within the meaning of the above-cited statute. Notably, however, K.S.A. 1981 Supp. 12-1675 only applies to idle moneys or moneys "not immediately required for the purposes" for which they were collected. The funds retained by the City of Topeka as deferred compensation for its employees are immediately required to fund the deferred compensation plan or in the alternative the funds would be due and owing immediately as wages or salary to the

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employees, but in either case these funds are "immediately required" for their stated purpose. Hence, we find the provisions of K.S.A. 1981 Supp. 12-1675 inapplicable to funds belonging to the City as part of a qualified deferred compensation plan. Because of our conclusion in response to your second inquiry, the third question need not be answered.

Finally, in response to your last question, we are unaware of any law or court ruling which would legally preclude the City from participating in a deferred compensation plan administered by a private entity. However, it is impossible to speculate on possible liabilities for the city should the city's agent default on its contractual obligations. The resolution of this question depends upon a number of unknown factual considerations including the terms of the contract with ICMA.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Bradley J. Smoot  
Deputy Attorney General

RTS:BJS:hle