



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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November 26, 1986

ATTORNEY GENERAL OPINION NO. 86-165

Arthur H. Griggs  
Acting Secretary of Administration  
Department of Administration  
Room 263-E, State Capitol Building  
Topeka, Kansas 66612

Re: State Departments; Public Officers and  
Employees--Department of Administration; State  
Buildings and Grounds--Custody and Care of Certain  
State-Owned Buildings and Grounds; Fountain of  
Justice

State Departments; Public Officers and  
Employees--State Capitol--Capitol Area Plaza  
Authority; Powers and Duties

Synopsis: The Secretary of Administration has the authority  
to enter into an agreement with a non-profit  
corporation whereby that corporation, at its own  
expense, will plan and construct a Fountain of  
Justice, dependent upon the Secretary's approval,  
on state-owned property. The Secretary may  
further agree to maintain such fountain, provided  
the agreement complies with relevant budget laws.  
Cited herein: K.S.A. 75-1203; 75-1254, as amended  
by L. 1986, ch. 317, §1; K.S.A. 75-2236; K.S.A.  
1985 Supp. 75-3717; K.S.A. 75-3741; 75-3762;  
75-3763; 75-3764.

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Dear Mr. Griggs:

As Acting Secretary of the Department of Administration, you request our opinion regarding the authority of certain state officials to enter into an agreement with a nonprofit corporation for the construction, dedication and maintenance of a Fountain of Justice on state-owned land. In your request letter you indicate that the construction of this fountain is to be at the sole expense of Future Heritage of Topeka, Inc., the nonprofit corporation, and the state's monetary commitment is to be limited to maintaining the fountain, subject to the availability of sufficient funds appropriated for such purpose.

According to your letter, the agreement between Heritage and the state is to be set up as follows:

"Heritage proposes to raise the funds necessary for the promotion, construction and dedication of a fountain to be called the "Fountain of Justice," on the north side of the Kansas Supreme Court Building (Kansas Judicial Center). Heritage will be responsible for the employment of its own architect, Kiene and Bradley, Topeka, Kansas, who will obtain the approval of the Director of the Division of Architectural Services of the Department of Administration for the final plans and specifications, as well as any change thereto after construction commences. Heritage will be responsible for the employment of its own contractor for construction of said Fountain. Construction will not be commenced until all funds for architectural fees, engineering fees, construction and dedication expenses are on deposit with Heritage, and all contracts will require performance and lien bonds. There will be no expense to the State of Kansas with respect to the promotion, construction and dedication of the Fountain of Justice.

"The contract between Heritage and Department of Administration shall, in

general but not in haec verba, contain appropriate provisions found in Form DA-146a (Rev. 1/81), Contractual Provisions Attachment.

. . . .

"Present estimates are that such an undertaking will involve the sum of \$150,000 to \$175,000 to complete."

Attached is a copy of the proposed agreement.

It is your position that statutory authority exists for the Department of Administration to enter into this contract with Heritage. You cite K.S.A. 75-3762 and 75-3763 as authority for this belief. Alternatively, should we disagree with your position, you inquire whether the Capitol Area Plaza Authority, created pursuant to K.S.A. 75-2236 et seq., is authorized to enter into this agreement.

The statutes you cite as authority for the Department of Administration to enter into the agreement in question provide, in pertinent part, as follows:

"Subject to K.S.A. 75-3763, 75-3764 and 75-3765, and amendments threto [sic], and other related provisions of this act, the secretary of administration shall have the charge, care, management and control of the statehouse, the state office building, the Kansas technical institute . . . the office building at 801 Harrison, Topeka, Shawnee county, Kansas, the memorial hall, the governor's mansion, and any and all grounds, walks, parks, gardens, statuary, and auxiliary buildings pertaining to or used in connection with any of such buildings; and further, any and all other buildings or grounds now or hereafter owned or to be owned by the state in Shawnee county, the custody of which buildings or grounds is not assigned by law to some other state agency." K.S.A. 75-3762. (Emphasis added.);

and

"The secretary of administration shall be responsible for the maintenance, repair and upkeep of any buildings, the charge, care, management and control of which is conferred by law upon the secretary. . . ." K.S.A. 75-3763.

K.S.A. 75-3764 provides further:

"Subject to K.S.A. 75-3763 and 75-3765, and amendments thereto, and related provisions of this act, the secretary of administration shall attend to the cleaning, repair, alteration and beautification of all buildings assigned by law to the charge, care, management and control of the secretary, and may enter into necessary contracts and authorize necessary expenditures therefor, such contracts and expenditures to be made in the manner provided by law for other state agencies. . . ." (Emphasis added.)

Based upon the statutes cited above, we support your position that the Secretary of the Department of Administration has the authority to enter into the contract in question. K.S.A. 75-3762 places in the hands of the Secretary of Administration the "charge, care, management and control of . . . any and all other buildings or grounds now or hereafter owned or to be owned by the state in Shawnee county, the custody of which buildings or grounds is not assigned by law to some other agency." The Kansas Judicial Center is not specifically listed in this statute, but it is a building owned by the state in Shawnee county. The Capitol Area Plaza Authority has the authority of establishing and effectuating a long-range plan of development for the area in question, and for that purpose "to improve the . . . beautification of landscaping of grounds in the capitol area," K.S.A. 75-2236, but nowhere does the legislature assign custody of the Judicial Center and its grounds to the Capitol Area Plaza Authority or any other state agency. Thus, the Secretary of Administration has custody pursuant to K.S.A. 75-3762. Finally, since the Judicial Center has been assigned by law to the charge, care, management and control of the Secretary of Administration, the Secretary is charged with attending to its

beautification, and may enter into contracts and authorize expenditures for that purpose. K.S.A. 75-3764.

As mentioned in Attorney General Opinion No. 81-203, "the Secretary of Administration is vested with wide-ranging powers concerning the planning, design and construction of state buildings." The opinion states further:

"Included among the secretary's powers are: the approving of plans and specifications for each project; the letting of bids and the completion of contracts; and the inspection of the project, both while in progress and upon completion prior to final acceptance. (Citations omitted.)

. . . .

"[T]he legislature has clearly placed the responsibility for the planning, design and construction of such projects with the secretary of administration."

Some of the procedures described above and elsewhere in chapter 75 of the Kansas Statutes Annotated will not apply in the planning and construction stages of the project in question simply because the expenses will not be borne by the state. While the state architect may not be required to prepare plans, etc. for the project in question, the clause in the contract requiring the Secretary of Administration's approval of the final plans and specifications and any change orders is desirable and indeed necessary. The state should retain control of the Fountain's structure since it is to be placed on state property and maintained at state expense. This ability to control may save the state future expenses relevant to maintenance and other liabilities.

The provision in the agreement for approval by the Department of Administration of the contractor does not appear to be necessary. The contractor, whoever it may be, will be responsible for complying with the plans and specifications which have been approved by the Secretary of Administration. In addition, the agreement requires the contractor "to provide performance and lien bonds to insure completion of the project in accordance with final plans and specifications," and "to maintain adequate liability and other insurance to protect the State of Kansas from any liability regarding the Fountain of

Justice project." These provisions are sufficient to protect the state's interest without the additional requirement that Heritage's choice of contractor meet the approval of the Director of the Division of Architectural Services of the Department of Administration. Since Heritage is paying for the project, it may be best to let Heritage choose the contractor. However, if a project architect were to provide the architectural services for the project under K.S.A. 75-3741 or 75-1254, or if the Secretary of Administration undertakes to provide all or part of the architectural services, then the Secretary of Administration would be responsible for designating the prime contractor for the project. K.S.A. 75-1254(a), as amended by L. 1986, ch. 317, §1. We have had no indication that this is the case.

The Department of Administration's agreement to maintain the fountain once constructed is authorized by K.S.A. 75-3763 and 75-3764. The stipulation that the Department's agreement to maintain the fountain is subject to the availability of sufficient funds annually appropriated by the Legislature brings this agreement into compliance with K.S.A. 1985 Supp. 75-3717 which requires that state agencies "request" appropriations for the expansion of present services and the addition of new services. In other words, such appropriations are not guaranteed.

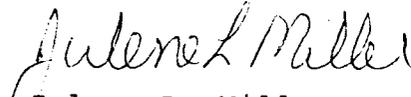
Since it is our opinion that the Secretary of the Department of Administration is authorized to enter into the agreement in question, we need not determine whether the Capitol Area Plaza Authority, pursuant to K.S.A. 75-2236 et seq., would also have this authority. In any event, the Authority, as any other state agency, would have to act within the statutory framework outlined above. See VII Attorney General Opinions 1037, 1038 (1974).

In conclusion, it is our opinion that the Secretary of Administration has the authority to enter into an agreement with a non-profit corporation whereby that corporation, at its own expense, will plan and construct a Fountain of Justice, dependent upon the Secretary's approval, on -

state-owned property. The Secretary may further agree to maintain such fountain, provided the agreement complies with relevant budget laws.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
Julene L. Miller  
Deputy Attorney General

RTS:JLM:jm

## AGREEMENT

This Agreement dated this \_\_\_\_\_ day of November, 1986, is by and between Future Heritage Topeka, Inc., a nonprofit Kansas corporation (Heritage), and Department of Administration (Administration).

WITNESSETH:

WHEREAS, Heritage, consistent with its corporate purposes, desires at its sole expense to promote, construct and dedicate to the State of Kansas a fountain to be known as the "Fountain of Justice" (Fountain) on the north entrance to the Kansas Supreme Court Building (Kansas Judicial Center), Tenth Street entrance;

WHEREAS, in accordance with its duties, Administration approves the construction of the Fountain on State property at the sole expense of Heritage, and upon its dedication to the State of Kansas to and in behalf of the State, accept the same and assume the expense and obligation of maintenance of said Fountain of Justice; and

WHEREAS, Heritage and Administration wish to enter into an agreement which defines the responsibility and obligation of each party concerning the promotion, construction, dedication and maintenance of the Fountain.

NOW, THEREFORE, it is agreed by and among the parties hereto, as follows:

1. Covenants of Heritage. Heritage agrees as follows:

a. To raise all money necessary for the promotion, construction, landscaping and dedication of the Fountain of Justice to be located on the north entrance to the Kansas Supreme Court Building (Kansas Judicial Center), Tenth Street entrance.

b. To employ the services of Kiene and Bradley to prepare the final plans and specifications for the Fountain, as well as all engineering and landscaping work related thereto.

c. To secure the written approval of the Director of the Division of Architectural Services of the Department of Administration (State Architect) to said final plans and specifications as prepared by Kiene and Bradley prior to submitting a contract for construction of the Fountain for bids, including all change orders, if any, that might arise to complete the construction.

d. To employ the services of a contractor for the construction of such Fountain in accordance with final plans and specifications, which contractor shall be required to provide performance and lien bonds to insure the completion of the project in accordance with final plans and specifications. Selection of the contractor shall be subject to the approval of the Director of the Division of Architectural Services of the Department of Administration.

e. To have cash on hand in a separate fund (isolated from claims of creditors) designated Future Heritage Topeka, Inc., Fountain of Justice Fund, which money shall be sufficient to meet all expenses of the promotion, architectural and engineering contracts and dedication of the said Fountain, and shall maintain in such account sufficient funds at all times to complete construction thereof. This covenant by Heritage is made to assure Administration that the project can and will be in accordance with final plans and specifications approved by the State Architect at no expense to the State of Kansas.

f. Any contract entered into by Heritage with respect to the Fountain of Justice shall, in general but not in haec verba, contain appropriate provisions found in Form DA-146a (Rev. 1/81), Contractual Provisions Attachment.

g. All contracts will require the contractor to maintain adequate liability and other insurance to protect the State of Kansas from any liability regarding the Fountain of Justice project.

h. Upon completion of construction and landscaping, a formal and legal dedication of such Fountain to the State of Kansas.

2. Covenants of Department of Administration. Administration agrees as follows:

a. To permit and authorize Heritage to construct the Fountain of Justice on the north entrance to the Kansas Supreme Court Building (Kansas Judicial Center), Tenth Street entrance, according and subject to prior performance of the covenants of Heritage as set forth above.

b. Upon dedication of the Fountain to the State of Kansas, to operate and maintain the Fountain of Justice thereafter, subject, however, to the availability of sufficient funds annually appropriated by the Legislature of the State of Kansas.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

FUTURE HERITAGE TOPEKA, INC.

By \_\_\_\_\_  
Bruce D. Woolpert, President

DEPARTMENT OF ADMINISTRATION,  
STATE OF KANSAS

By \_\_\_\_\_  
Arthur H. Griggs  
Acting Secretary of  
Administration