



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

September 28, 1987

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 87- 142

Mary S. Martin
Coffeyville City Attorney
7th & Walnut, Box 498
Coffeyville, Kansas 67337

Re: Soldiers, Sailors and Patriotic Emblems--Memorials,
Monuments and Grave Markers--Disposal of Memorial
Building and Land or Diversion of Use of Building,
When

Synopsis: Moneys derived from the issuance of bonds or levy
of a tax under K.S.A. 73-402 constitute a special
fund held in trust for the construction of a
memorial monument. The trust character of such a
special fund is impressed upon a memorial building
produced therefrom, and upon insurance proceeds
realized upon destruction of the memorial.
Accordingly, the procedure for disposal of a
memorial building, set forth in K.S.A. 73-446,
applies to insurance proceeds realized from
destruction of such a building.

In the absence of a charter ordinance adopted
pursuant to Article 12, Section 5 of the Kansas
Constitution, a memorial building constructed
pursuant to K.S.A. 73-401 et seq. may not be
used for a purely commercial enterprise. Cited
herein: K.S.A. 73-401; 73-402; 73-404; 73-407;
73-446.

*

*

*

Dear Ms. Martin:

You request our opinion regarding the use of insurance proceeds from the former Coffeyville Memorial Hall. You have provided the following background regarding this matter:

"The City Clerk's records show that Memorial Hall was built with funds from July 12, 1921, special election bonds. The hall burned in July, 1980, and the remains of the structure were razed. The insurance proceeds were \$715,000.00 and were deposited in a local bank; the funds now total about \$1,137,668.00.

"An April 5, 1983, bond election for a new Memorial Hall was turned down by Coffeyville voters."

Your first question is whether K.S.A. 73-446 applies to insurance proceeds from the Coffeyville Memorial Hall. That statute provides as follows:

"Any city which has a memorial building constructed under the authority of article 4 of chapter 73 of the Kansas Statutes Annotated may:

"(1) Dispose of the building and the land upon which situated, or any part of such land, or

"(2) If no bonds issued therefor are outstanding, may divert the use of said building to a city hall or building for the accommodation of its officers and general business of the city and for such purposes may make such alterations, repairs or changes as may be necessary, in the following manner: The city council or commission shall adopt a resolution setting forth that in its judgment the building is improperly designed to be of use to the community, or that the community no longer needs the building because of conditions to be set forth in the resolution, or that the building is used so little that the cost of maintenance and operation is excessive,

and that the city has an opportunity to sell said building and the land on which situated or a part of such land, for cash at a price to be stated, and that the city will sell such building and the land or a part of the land, according to the terms of the proposition, after a certain date to be stated in said resolution, unless within twenty (20) days after the publication of the resolution a petition addressed to the governing body and signed by not less than fifty-one percent (51%) of the number of qualified electors as shown by the registration books on the day of the publication of the resolution, or in case of a city having no registration, then according to an estimate of the number of qualified electors on the day of publication of the resolution as prepared and certified to by the city clerk, shall be filed with the city clerk requesting that the matter be voted upon at a special election, or at the next regular city election if such election will fall within ninety (90) days after the publication of the resolution.

"If no sufficient petition is filed within the required time, or if a sufficient petition is filed and an election is held and majority of the votes cast are in favor of the proposition, the council or commission may proceed with the disposal of the property or the diversion of the use of the building according to the proposition set out in the resolution. The consideration received for the building and land disposed of under this section shall be applied on the payment of any outstanding bonds issued for the memorial, or, in the event no bonds are outstanding, it shall be transferred to the general fund, or be placed in a special fund for the purchase and construction of another building more appropriate for the use of the city. A special election shall be noticed and held in the same manner and with the same form

of ballot as in the case of bond elections under the provisions of K.S.A. 10-120, or any amendments thereto, the first publication of the notice to be in the week following the determination of the sufficiency of the petition and without further action than said determination."

K.S.A. 73-402 provides for a petition and election on the question of issuing bonds or levying a tax for the construction of a military monument, which monument may consist of a building (K.S.A. 73-401). If a majority of the voters are in favor of the erection of a memorial, it is provided that bonds shall be issued or a tax levied, and the memorial shall be constructed by the city governing body. K.S.A. 73-402, 73-404.

It is generally held that a fund raised by a municipality for a special purpose is a trust fund, and that the municipality may not use or divert such a fund for other than the special purpose for which it was collected. 15 McQuillin, Municipal Corporations §39.45 (3d ed.); 56 Am.Jur.2d Municipal Corporations §582. In accordance with this rule, and subject to the provisions of K.S.A. 73-446, it is our opinion that moneys derived from the issuance of bonds or levy of a tax under K.S.A. 73-402 constitute a special fund held in trust for the construction of a memorial monument. Additionally, in our judgment, the trust character of such a special fund is impressed upon a memorial building produced therefrom, and upon insurance proceeds realized upon destruction of the memorial. 65 A.L.R. 1124. Accordingly, the procedure for disposal of a memorial building, set forth in K.S.A. 73-446, applies to insurance proceeds realized from destruction of such a building.

Your second question is whether the incidental use of a memorial hall for conventions or display shows (such as car and boat shows) is permissible under the provisions of K.S.A. 73-401 et seq. In this regard, K.S.A. 73-407 prescribes that the management and control of a city memorial building shall be vested in a board of three trustees appointed by the mayor, and grants the following authority to said trustees:

"The board of trustees shall have full authority to lease all or any part of said building for hire to any person or persons desiring to lease the same for a term not to exceed one year at a time and fix the

rate and terms upon which the charge shall be made and collected therefor."

The Kansas Supreme Court has construed the above-quoted statutory provision as not authorizing the lease of a memorial building for the conduct of a purely commercial enterprise:

"We note, first, that the entire statute providing for the erection and maintenance of these memorials is not a statute designed in any sense as a money making scheme. The purpose of the statute was to give the people an opportunity to express in some substantial, tangible way their great appreciation of the patriotism of those who, by special service, gave so much in time, energy and talent to our country in its times of need, and the legislature was careful to provide in the statute that not only the cost of constructing the memorial, but the cost of its maintenance, even though special taxes for maintenance were necessary, should be borne by the public. The thoughts which prompted it were the opposite of those involved in commercial enterprise for gain.

. . . .

"We conclude that the amendment to the statute in 1929 authorizing the trustees to lease the auditorium, or a part thereof, for not more than one year did not authorize the lease of the building, or any part thereof, for the conduct of a purely commercial enterprise, and if the statute were so construed as to grant such authority it would be void as against the public policy of this state."


Glen W. Dickinson Theaters v. Lambert, 136 Kan. 498, 501, 502 (1932).

In accordance with the ruling in the Lambert case, it is our opinion that in the absence of a charter ordinance adopted pursuant to article 12, section 5 of the Kansas Constitution, a memorial building constructed pursuant to K.S.A. 73-401 et

seg. may not be used for a purely commercial enterprise. It would seem that the use of a memorial hall for conventions or display shows would fall within the category of a "purely commercial enterprise."

In passing, we note that K.S.A. 73-401 is subject to charter ordinance. Claflin v. Walsh, 212 Kan. 1 (1973). Additionally, it should be noted that dicta in the Lambert case, to the effect that the public policy of this state prohibits the use a memorial building for a purely commercial enterprise, no longer retains its efficacy. See Attorney General Opinion No. 61-302 (copy enclosed).

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:JLM:TRH:jm

the monies in their general funds in securities, perhaps it is not out of order to suggest that the best policy to pursue, in the absence of standards for investments set by the legislature, is to invest in sound governmental issues.

Since cities are given freedom to govern themselves except where specifically restricted by the legislature, and since there is no state law at present which specifically prohibits a city from investing the monies in its general funds in government or other securities, it is the opinion of this office that under the "Home Rule Amendment" cities have power to invest their surplus general fund monies in interest bearing securities; however the investment of such funds in corporate or personal securities would constitute the use of public funds to promote private interests and should not be countenanced.

OPINION (61-302), August 24, 1961, to W. H. Alward, City Attorney,
Herington, Kan.

Re: SAME—Home Rule, Leasing of Municipal Property

QUESTION: May the City of Herington lease to a private corporation for profit a portion of its municipal airport property, a reasonable rental to be charged which will be devoted to operation and improvement of the airport?

ANSWER: Yes.

The City of Herington requests our opinion concerning its authority to lease to a private corporation for profit a portion of the municipal airport property received by the city from the United States. Under the terms of the proposed lease, a reasonable rental will be charged for the property, which will be devoted to operation and improvement of the airport. It has been determined that the airport property sought to be leased is surplus and not necessary to the operation of the airport for the benefit of the public. We understand that you ask no question regarding limitations on such a lease which might arise because of federal statutes or rules.

In the past, this office consistently has been of the opinion that Kansas cities could not lease municipally owned real property to private persons or corporations for use in private enterprises without specific statutory authority. (See *Darby v. Otterman*, 122 Kan. 603; *State, ex rel., v. City of Independence*, 123 Kan. 766; *Electric Theatre Co. v. Darby*, 123 Kan. 225; *State, ex rel., v. City of Coffeyville*, 127 Kan. 663; *Dickinson Theatres v. Lambert*, 136 Kan. 498; Attorney General's Opinion to Mr. C. W. Brenneisen, Jr., City Attorney, Kan-

sas City, Kansas, dated February 7, 1958; Attorney General's Opinion to Mr. Donald Sands, City Attorney, Holton, Kansas, dated April 4, 1956; Attorney General's Opinion to Mr. Marvin Meyer, City Attorney, Oberlin, Kansas, dated April 13, 1961.) The rationale of these opinions was that Kansas cities had only such powers as were specifically granted by the Legislature, with such implied powers as were necessary to implement specifically granted powers. There is no specific statutory authorization for the City of Herington to lease its airport as proposed.

On July 1, 1961, the "Home Rule" amendment to the Kansas Constitution became effective. Under the terms of the amendment, cities "are . . . empowered to determine their local affairs and government . . . subject only to enactments of the legislature . . . applicable uniformly to all cities, or all cities of the same class. (Art. 12, sec. 5b, Kansas Constitution.) As we stated in our Opinion No. 61-279, dated July 21, 1961, this language "can only be interpreted to mean that cities now possess the authority to do all things not specifically restricted or prohibited by the legislature or which contravene public policy."

There is no statutory prohibition effective under the Home Rule amendment which prohibits the City of Herington from leasing municipally owned property. However, in determining the authority of municipalities to lease municipally-owned property to private persons or corporations for use in private business, the Court in the past has construed statutes which would admit of that interpretation as not granting the authority because of the public policy of the State that its governmental units not engage directly or indirectly in private business for profit. In *Dickinson Theatres v. Lambert*, 136 Kan. 498, the trustees of a city memorial building, empowered "to lease all or any part of said building for hire to any person or persons desiring to lease the same for a term not to exceed one year . . ." (Laws of 1929, chapter 252, section 8) were enjoined from leasing the building to a private person for operation for profit as a theatre. "If the statute were so construed as to grant such authority it would be void as against the public policy of this state." (l. c. p. 502.) This policy earlier in the opinion was stated as follows:

"It has been the policy of our government to exalt the individual rather than the state (*State v. Kelly*, 71 Kan. 811, 836, 81 Pac. 450) and to have the various units of our government perform governmental functions, leaving to individuals commercial enterprises for profit." (l. c. p. 502.) See also *State, ex rel., v. Kaw Valley Drainage District*, 126 Kan. 43.

Yet, in *State, ex rel., v. City of Pittsburg*, _____ Kan. _____ (No. 42631, Opinion filed August 1, 1961) a case challenging validity of chapter 81, Laws of 1961, which empowers cities to issue revenue bonds, the proceeds of which are to be used to purchase, construct, maintain and equip buildings for agricultural, commercial, industrial and manufacturing facilities and to lease such buildings to any person, firm or corporation, the Court upheld the validity of the statute against an objection that the act was unconstitutional and violated the public policy of the State because revenue bonds could be issued thereunder for other than public purposes. The Court said:

"In section 1 of the act the legislature, in effect, has said that the encouragement of industrial development so as to promote the general welfare of the citizens of the state, is a public purpose and the public policy."

The effect of the Home Rule amendment was not considered by the Court. In *Miller v. Jackson*, 166 Kan. 138, 141, the Court stated that questions of public policy are for legislative determination; in *State v. Brady*, 156 Kan. 831, 843, the Court stated that "Courts are not arbitors of public policy . . . We cannot usurp . . . the legislative power of establishing public policy . . ."; in *Noel v. The Menninger Foundation*, 175 Kan. 751, 763, the Court recognized that public policy of the state is expressed by its constitution.

The Home Rule amendment clearly states that cities are empowered to determine their local affairs. In *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, the Court said:

"A constitution must be interpreted liberally to carry into effect the principles of government which it embodies. It deals broadly with general subjects, and its language should not be interpreted in any narrow, refined or subtle sense, but should be held to mean what the words imply to the common understanding of men. (*State v. Sessions*, 84 Kan. 856, 115 Pac. 641.) The constitution is not to be construed in a technical manner, but in ascertaining its meaning the courts consider the circumstances attending its adoption and what appears to have been the understanding of the people when they adopted it. (Citations omitted.)

"Story was quoted with approval in *State v. Sessions*, supra, as follows:

"'Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understanding. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.' (1 Story on the Constitution, 5th Ed., § 451.)"

In our opinion, the basic policy of the state expressed by the voters in adoption of the Home Rule amendment is to grant cities the power to determine their local affairs, subject only to certain restrictive acts of the legislature. The language of the amendment clearly so states, and we believe is so understood. The question of leasing a portion of your municipally owned airport is a local affair, and we know of no restrictive legislation which prohibits the City of Herington from doing so on such terms as the governing body deems best.

This is not to say that under authority of the Home Rule amendment Kansas cities now may directly engage in what is commonly accepted as private business. In our opinion, the Court would find such activity contrary to our scheme of government, as was found in *State, ex rel., v. Kaw Valley Drainage District*, supra. And perhaps it would be better policy for a city to sell property no longer needed for public purposes, but such local policy questions are for local governing bodies to determine.

It is our opinion that the Home Rule amendment grants the City of Herington authority to lease portions of its existing municipal airport found to be surplus by the governing body to a private person or corporation for a reasonable rental which will be devoted to maintaining the airport facility.

OPINION (62-41), April 5, 1962, to John S. O'Brien, City Attorney,
Independence, Kan.

*Re: SAME—Home Rule, Search Warrants, Authority to Provide
for by Ordinance*

QUESTION: May a city, under authority of the Home Rule Amendment (Kansas Constitution, article 12, section 5), enact an ordinance providing for the issuance of search warrants by the police judge upon the complaint under oath of a city police officer? ANSWER: Yes.

A public offense in Kansas is an act or omission for which a penalty is provided by a *state statute* (G. S. 1949, 62-102) and a police judge has no jurisdiction in violations of state statutes. G. S. 1949, 13-601, 14-801, 15-503; *State v. Davis*, 26 Kan. 205, 207 (1881). Yet, in those instances provided by statute where a search warrant may be issued, a police judge may issue the same. See *e. g.*, G. S. 1949, 62-201, 62-1802. It is thus manifest there is nothing inherently against the public policy of the State in a police judge issuing a search warrant when the proper safeguards are provided.

Formerly the police judge's authority, as a city officer, had to be