



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

April 5, 1988

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

ATTORNEY GENERAL OPINION NO. 88- 48

Douglas F. Martin
Shawnee County Counselor
Shawnee County Courthouse
200 E. 7th, Room 203
Topeka, Kansas 66603-3922

Re: Agriculture -- State and Other Agricultural
Societies and Fairs; Shawnee County Fair
Association -- Board of Directors

State Departments; Public Officers and Employees --
Public Officers and Employees; Open Public Meetings
-- Meetings of State and Subdivisions Open to
Public; County Fair Association

State Departments; Public Officers and Employees --
Kansas Tort Claims Act -- Definitions; Exceptions

Synopsis: The Shawnee county fair association is not an agency of the county. However, it is a governmental entity subject to the Kansas tort claims act and the Kansas open meetings act. In order to qualify for the discretionary recognition granted by the state board of agriculture, the Shawnee county fair association must fulfill the remaining requirements under K.S.A. 2-125 et seq. that are not specifically excepted pursuant to K.S.A. 1987 Supp. 2-158. Cited herein: K.S.A. 2-125; 2-127; 2-132; 2-133; K.S.A. 1987 Supp. 2-158; K.S.A. 75-4317 et seq.; 75-6101; K.S.A. 1987 Supp. 75-6102; 1987 House Bill No. 2360.

* * *

Dear Mr. Martin:

As Shawnee County Counselor you request our opinion on K.S.A. 1987 Supp. 2-158 et seq. Specifically, you ask the following: (1) Is the Shawnee county fair association an agency of the Shawnee county board of county commissioners; (2) if not, is it covered by the Kansas tort claims act; (3) must the state board of agriculture recognize the Shawnee county fair association pursuant to K.S.A. 1987 Supp. 2-158, or are there other requirements for such recognition; and (4) is the Shawnee county fair association and its executive board subject to the Kansas open meetings act.

A county fair association is a non-profit corporation which is recognized by the state, operated pursuant to statutory procedures and purposes, and allowed to receive tax moneys and other public funds under K.S.A. 2-125 et seq. The board of county commissioners does not establish the fair association nor does it appoint fair board directors; official recognition comes from the state board of agriculture and the fair board directors are elected. The county fair association is not subject to the direction or control of the board of county commissioners. (But see K.S.A. 2-132, K.S.A. 2-133 and Attorney General Opinion No. 81-1 discussing alternative type of county free fair that is managed by the board of county commissioners). Therefore, it is our opinion that the Shawnee county fair association is not an agency of the county or its board of commissioners, but rather, is an independent entity.

Your second question concerns the nature of county fair associations and the applicability of the Kansas tort claims act to such entities. The Kansas tort claims act, K.S.A. 75-6101 et seq., provides that, subject to limitations, each governmental entity is liable for certain damages caused by its employees while acting within the scope of employment. As defined by K.S.A. 1987 Supp. 75-6102, both the state and municipalities are governmental entities within the scope of the tort claims act. See generally Attorney General Opinions No. 87-13, 86-18; 86-32; 86-31; 86-45; 86-61; 86-109; 86-155; 86-177; 84-56; 84-88; 82-213; 82-215; 82-157; 80-73; and 80-203. Previous Attorney General opinions discuss the applicability of the tort claims act to different types of political subdivisions, e.g., rural water districts (86-31), county extension councils (84-56), and certain non-profit recipient corporations (82-183).

Attorney General Opinion No. 86-31 sets forth various considerations used to determine whether an independent entity can be considered a governmental entity or a quasi-municipal corporation. These considerations include the exercise of governmental powers or functions, statutory recognition or creation, purposes that specifically promote public benefit and not private commercial interests, and relationships with other governmental entities. Previous Attorney General opinions have recognized that, although a county fair association remains an independent entity, it is incorporated and governed pursuant to K.S.A. 2-125 et seq. See Attorney General Opinions No. 81-1, 86-10, 84-56, 86-31 and 87-97. Under K.S.A. 2-125 et seq., the Shawnee county fair association is statutorily allowed recognition by the state board of agriculture, it may receive public moneys collected pursuant to tax levies, it may use publicly owned buildings and facilities, it may use public moneys to give prizes or awards, it is managed by an elected board of directors and it is statutorily obligated to serve a public purpose. Thus, a county fair association operates as a recognized county fair association based solely upon statutory authority. The enumerated powers, procedures and purposes of a county fair association are indicative of and consistent with those of a governmental entity. It is therefore our opinion that once it is properly created, recognized and operated pursuant to statute, the Shawnee county fair association is a governmental entity within the scope of the Kansas tort claims act.

Your third question is whether K.S.A. 1987 Supp. 2-158 mandates recognition of the Shawnee county fair association by the state board of agriculture or whether there are other requirements for such recognition. Attorney General Opinion No. 86-10 stated that the then existing Shawnee county 4-H fair could not be recognized by the state board of agriculture because that fair did not meet the requirements contained in K.S.A. 2-125 et seq. 1987 House Bill No. 2360 (K.S.A. 1987 Supp. 2-158) provided the vehicle to replace the provisions dealing with the Shawnee county 4-H fair with provisions for establishment of the Shawnee county fair association. The legislative history of House Bill No. 2360 indicates that proponents asked for this legislation so as to provide for a more structured Shawnee county fair association. See Minutes, House Committee on Local Government, February 24, 1987.

K.S.A. 1987 Supp. 2-158 states:

"The fair association established under the provisions of this act shall be given recognition by the state board of agriculture without having lands or buildings of an appraised value of at least \$5,000 or without paid-up stock subscriptions in its treasury in the amount of \$5,000 appropriated to the purchase of lands or buildings or both."
(Emphasis added).

Thus, this statute allows establishment of the Shawnee county fair association under the provisions contained in the act with specified exceptions.

K.S.A. 2-127(a) provides:

"To become a county fair association, 25 or more qualified electors representing the majority of the townships of the county shall have been incorporated as a nonprofit corporation with a paid-up capital of not less than \$5,000, and have received recognition as the
county fair association from the state board of agriculture. The state board of agriculture shall not give official recognition to any fair association until the fair association has submitted satisfactory evidence that it owns land or buildings of an appraised value of at least \$5,000 or has paid-up stock subscriptions in its treasury to this amount appropriated to the purchase of land or buildings or both." (Emphasis added).

Monetary considerations mandated under K.S.A. 2-127(a) are thus legislatively exempted, pursuant to K.S.A. 1987 Supp. 2-158. Moreover, the election requirements of K.S.A. 1987 Supp. 2-158 deviate from the provisions of the general law contained under K.S.A. 2-125 et seq. Beyond those deviations, K.S.A. 2-125 et seq. requirements remain applicable. Once the specific election procedures of K.S.A. 1987 Supp. 2-158 and other non-excepted requirements of K.S.A. 2-125 et seq. are fulfilled, recognition by the state board of agriculture remains the only hurdle.

The last sentence of K.S.A. 2-127 provides that "the state board of agriculture shall not recognize more than one fair association in each county, except where such recognition has already been accorded." K.S.A. 2-132 allows the state board to alternatively recognize a fair as a county free fair once certain determinations are made and requirements are met. Thus, these and other provisions indicate that the state board of agriculture recognizes county fair associations pursuant to discretionary authority. K.S.A. 1987 Supp. 2-158 states that "the fair association established under the provisions of this act shall be given recognition by the state board of agriculture." (Emphasis added). The issue becomes whether this provision mandates recognition by the state board of agriculture of the Shawnee county fair association or whether that recognition remains discretionary.

Use of the word "shall" does not necessarily indicate that an action is mandatory. City of Kansas City v. Board of County Comm'rs of Wyandotte County, 213 Kan. 777, 783 (1974). "Shall" may be read as "may" where the context requires. Paul v. City of Manhattan, 212 Kan. 381 (1973).

It is clear from legislative history that K.S.A. 1987 Supp. 2-158 was enacted to facilitate recognition of the Shawnee county fair association and, to that end, certain standard requirements were eliminated as to that specific fair association. However, K.S.A. 2-125 et seq. in its entirety governs county fair associations and allows the state board of agriculture much discretion in recognizing county fair associations. K.S.A. 2-125 et seq. contains evidence that the board not only may exercise discretion in recognizing county fair associations, but that in some circumstances it must obligatorily deny recognition; e.g., when there is already an existing county fair association or when statutory requirements are not fulfilled. While K.S.A. 1987 Supp. 2-158 allows recognition of the Shawnee county fair association without fulfillment of certain otherwise required conditions under K.S.A. 2-125 et seq., it does not specifically preempt or alter the discretion of the state board of agriculture by mandating that recognition. Thus, that state agency remains authorized to recognize a county fair that qualifies without being obligated to recognize every county fair that qualifies. It is therefore our opinion that once the few remaining requirements of K.S.A. 2-125 et seq. are met, the Shawnee county fair association qualifies for the discretionary recognition given by the state board of agriculture.

Your final question is whether the Shawnee county fair association and its executive board are subject to the Kansas open meetings act, K.S.A. 75-4317 et seq. K.S.A. 1987 Supp. 75-4318 defines the scope of this act:

"All meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public. . . ."

This language establishes a two part test to determine whether a body is included within the provisions of the act: (1) the body is a legislative or administrative agency of the state or one of its political or taxing subdivisions, or is subordinate to such a body; and (2) the body receives, expends, or is supported in whole or in part by public funds, or, in the case of subordinate groups, has a parent or controlling body which is so supported. (See generally, Attorney General Opinions No. 85-49, 85-175, 86-38, 86-84, 86-92).

A county fair association is created, organized, operated and recognized pursuant to statutory authority. Without statutory compliance such an association remains a privately operated independent association that does not qualify for statutorily recognized existence. Once such recognition is given, that association becomes a statutory entity rising to the level of a public body. This public entity administrates its activities pursuant to statute and its directors are subordinate to the state law regulating such associations. Thus, the first requirement under K.S.A. 1987 Supp. 75-4318 is met.

The second requirement concerns the use of public funds. Under K.S.A. 2-125 et seq., a properly organized and recognized county fair association qualifies to receive tax moneys, public moneys to pay for premiums and rewards, and the use of public grounds and facilities. The receipt, expenditure or use of these public funds by a county fair association meets the second prong of the test under K.S.A. 1987 Supp. 75-4318.

It is therefore our opinion that, if properly organized, operated and recognized, the Shawnee county fair association must conduct its meetings pursuant to requirements and exceptions set forth under K.S.A. 75-4317 et seq.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General

RTS:JLM:TMN:bas