



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 89-93

Dr. Ramon Powers
Executive Director
Kansas State Historical Society
120 N. 10th Street
Topeka, Kansas 66612

Re: State Departments; Public Officers and Employees --
State Historical Society -- State Historical
Society; Powers and Duties; Acquisition of Real
Property by Gift

Synopsis: As trustee for the state, the Kansas State
Historical Society may acquire property if the
executive committee of that state agency deems such
an acquisition to be in the public interest and if
the acquisition promotes purposes for which this
state agency was created. All property acquired by
the Society is held for the state. Acquisitions
must not create an expenditure or incur an expense
in excess of appropriated funds. K.S.A. 1988 Supp.
75-2726 procedures are not required when the
property is acquired by gift and is not listed on
the national register of historic places. Cited
herein: K.S.A. 75-2701; 75-2702; 75-2715; K.S.A.
1988 Supp. 75-2716; 75-2721; 75-2726.

* * *

Dear Dr. Powers:

As Executive Director for the Kansas State Historical Society
(KSHS) you request our opinion concerning acceptance of 160

acres of grass land deeded to KSHS by the heirs of a woman who asked that the property be given to the KSHS. You ask whether KSHS can accept such property without going through the procedures specified in K.S.A. 1988 Supp. 75-2726, and whether such property remains the property of the private society or becomes the property of this state. You indicate that this question is relevant to the way KSHS might treat the operating costs of such property.

KSHS was established in 1879 and the powers and duties of that agency are set forth at K.S.A. 75-2701 et seq. Generally, administrative agencies receive their powers from legislative enactments. 1 Am.Jur.2d Administrative Law, § 23 (1962). The prime object in the construction of laws creating and empowering administrative agencies is to ascertain and carry out the intent of the legislature. Id. at § 37. Administrative agencies are creatures of statute and therefore any exercise of authority by the agency must be expressly or impliedly authorized by statute. Pork Motel, Corp. v. Kansas Department of Health and Environment, 234 Kan. 374, 378 (1983). There is no general or common law power that can be exercised by an administrative agency. Id. at 378.

When powers and duties are expressly conferred upon an office or governmental board, power is implied to take reasonable actions as may be necessary for the effective exercise of those powers expressly conferred. Board of Commissioners of Edwards County v. Simmons, 159 Kan. 41, 53 (1944). In the absence of statutory authority, an administrative agency may not substitute its judgment for that of the legislature or use its sub-legislative powers to modify, alter, or enlarge provisions of the legislative act being administered. Cray v. Kennedy, 230 Kan. 663, 677 (1982). The state is not bound by actions of a state officer, board, department, or functionary when such an entity takes unauthorized actions. 81 C.J.S. States § 124 (1977).

K.S.A. 75-2701 provides in pertinent part:

"(a) The state historical society, heretofore organized under the incorporation laws of the state, shall be the trustee of the state, and as such shall faithfully expend and apply all money received from the state to the uses and purposes directed by law, and shall hold all its present and future

collections of property for the state,
and shall not sell, mortgage, transfer or
dispose of in any manner or remove from
its building or buildings, except for
temporary purposes, any article thereof,
or part of the same, without authority of
law except that this shall not prevent the
sale or exchange by the society of its
publications, duplicate materials, or
materials outside its fields of
collection, that it may have or obtain.
There shall continue to be a board of
directors to consist of as many members as
the society shall determine.

(b) The society may acquire property,
real or personal, by gift, bequest or
otherwise, in any amount, and upon such
conditions as its executive committee may
deem best for its interests. Any such
property so acquired and any state-owned
historic site, structure or property which
has been placed by law under the
jurisdiction and supervision of the
society shall be administered by the
society in the public interest, and the
society is hereby authorized and directed
to provide for the preservation thereof
and to adopt such rules and regulations as
are necessary for the proper use and
enjoyment thereof." (Emphasis added).

This statute directs that a previously incorporated private society "shall become the trustee of the state . . . and shall hold all its present and future collections of property for the state." Therefore, pursuant to the terms of the statute, all property acquired by the KSHS is held for the state, not the private society, and shall be administered by the KSHS in the public interest.

The status of KSHS is similar, if not identical, to the Colorado Historical Society discussed by a federal district court:

"Though first incorporated as a private entity, it was 'adopted' by the state in the early part of this century . . . The Society may receive gifts . . . Title to

any property acquired in any way by the Society, including donations, is vested in the state The Society holds, as trustee for the state, not only funds appropriated to it by the state but also funds and property it receives as donations Unlike typical state agencies, Society is free to strike out on its own to raise funds from private benefactors to meet obligations."
Morrow v. Sudler, 502 F.Supp. 1200, 1203, 1204 (Colo. 1980).

K.S.A. 75-2701(b) permits KSHS to acquire real property by gift or bequest, upon such conditions as the executive committee deems best for its interests. As trustee for the state, KSHS may acquire property if the executive committee deems such an acquisition to be in the public interest and if it promotes the purposes for which this state agency was created. However, pursuant to K.S.A. 75-2702 the committee may not create an expenditure or incur an expense in excess of appropriated funds, "No expenditure shall be made under this act or expense incurred except in pursuance of specific appropriations therefore, and no officer of the society shall pledge the credit of the state in excess of such appropriation."

You also inquire whether acquisition of real property by gift or bequest must be facilitated pursuant to the terms of K.S.A. 75-2715 et seq. Originally enacted in 1977, K.S.A. 75-2715 et seq. declared historic preservation to be among the highest priorities of government and therefore the act authorized a comprehensive historic preservation program to foster and promote the conservation and use of historic property. This enactment followed the passage of the national historic preservation act by Congress in 1966 (16 U.S.C.A. § 470 et seq.) and the subsequent survey and compilation of historical and archeological sites and structures of architectural significance. This survey led to the placement of many of those sites and structures on the national register of historic properties. However, mere placement on such a register did not necessarily protect the sites and structures. Thus, the states moved to provide such protection and provided for state acquisition of such sites and structures when appropriate.

K.S.A. 1988 Supp. 75-2721 sets forth the authority of KSHS with regard to historic preservation powers and duties and

states in pertinent part that the KSHS shall: "within limits of available resources, acquire historic properties by gift, purchase, devise or bequest; preserve, restore and administer such properties; and transfer such properties when authorized by law." K.S.A. 1988 Supp. 75-2726 discusses acquisition of historic property for historic preservation purposes:

"(a) The state of Kansas shall not acquire or make a commitment to acquire by gift, lease, purchase or other means any historic property for purposes of historic preservation of such property unless such property is listed on the national register of historic places and, in any case, until an application for acquisition of historic property is filed with the secretary of the state historical society and the state historic sites board of review has reviewed such application and submitted recommendations in regard to the acquisition of such property to the governor and the legislature in accordance with this section.

. . .

(g) As used in this section, the terms 'historic preservation' and 'historic property' shall have the meanings ascribed to such terms in K.S.A. 75-2716 and amendments thereto." (Emphasis added).

K.S.A. 1988 Supp. 75-2716 defines "historic property" to mean "any building, structure, object, district, area or site that is significant in the history, architecture, archeology or culture of the state of Kansas, its communities, or the nation." "Historic preservation" is defined as "the study, identification, protection, restoration and rehabilitation of buildings, structures, objects, districts, areas and sites significant in the history, architecture, archeology or culture of the state of Kansas, its communities or the nation." K.S.A. 1988 Supp. 75-2716.

K.S.A. 1988 Supp. 75-2726 provides the procedures whereby the state may acquire historic property for historic preservation purposes. This statute specifically dictates that these acquisition procedures apply to property on the national

register of historic places. Property not on the register does not qualify for acquisition pursuant to the procedures outlined by K.S.A. 75-2715 et seq.

It does not appear that the legislature intended to repeal the authority of KSHS to acquire real property or to prohibit acquisition of property not on the national register. General acquisition authority remains in effect pursuant to K.S.A. 75-2701(b) and K.S.A. 1988 Supp. 2721(d). It is our opinion that K.S.A. 1988 Supp. 75-2726 procedures are not required when the property acquired by gift is not listed on the national register of historic places. KSHS, in its capacity as trustee for the state, must act as a responsible fiduciary and undertake only those expenditures made in pursuance of specific appropriations and for the purposes for which KSHS was made a state agency. If the board pledges the credit of the state in excess of appropriations or if it acquires property which does not benefit the public or does not serve the purpose for which KSHS was created, it is acting in violation of its fiduciary duties and capacity and outside the scope of authority granted to KSHS. Thus, KSHS may acquire real property by gift without implementing the procedures set forth at K.S.A. 1988 Supp. 75-2726 if that property is not on the national register of historic places and if the acquisition does not cause the state to incur a debt or expense in excess of appropriated funds. Such property is acquired and held in the name of the state and may only be acquired if the board deems it in the public interest and for the purposes for which KSHS was created.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Theresa Marcel Nuckolls
Assistant Attorney General

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