



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 91- 75

John B. Klenda
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P.O. Box 1103
McPherson, Kansas 67460

Re: Corporations -- Cemetery Corporations -- Funding By
Counties

Counties and County Officers -- County
Commissioners; Powers and Duties -- Control of
Expenditures; Public Purpose

Synopsis: The board of McPherson county commissioners may
fund a cemetery owned by a corporation based on the
fact that the cemetery is organized for a public
purpose. However, the funds for such an
expenditure must come from an appropriate fund.
Cited herein: K.S.A. 17-1312f; K.S.A. 1990 Supp.
19-101a; K.S.A. 19-212; 19-229; 79-2929a; 79-2934.

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Dear Mr. Klenda:

As McPherson county counselor you ask whether McPherson
county can fund a cemetery that is owned by a corporation, as
defined in K.S.A. 17-1312f.

The following statutes outline the board of county
commissioners control over expenditures:

"K.S.A. 19-212 provides that '[t]he board
of county commissioners of each county

shall have the power, at any meeting: . . .
. . . Second. To examine and settle all accounts of the receipts and expenses of the county, and to examine and settle and allow all accounts chargeable against the county; and when so settled, they may issue county orders therefor, as provided by law. . . .' Through the county's home rule powers, a board of county commissioners is able to 'transact all county business and perform all powers of local legislation and administration it deems appropriate. . . .' with certain exceptions. K.S.A. 1990 Supp. 19-101a. Furthermore, K.S.A. 19-229 gives the county commissioners the 'exclusive control' of county expenditures."
Attorney General Opinion No. 91-53.

Through these statutes and other Kansas law the commissioners have been given broad and sweeping authority to decide how local financial matters will be handled. However, the general rule is that funds must be spent only for a 'public purpose.' Authority discussing the public purpose doctrine includes: Ulrich v. Board of Thomas County Commissioners, 234 Kan. 782, 789 (1984); Duckworth v. City of Kansas City, 243 Kan. 386 (1988); see also Attorney General Opinions No. 80-19, 84-116, 87-164, 88-65. Therefore, it must be determined whether funding a cemetery corporation is a public purpose.

"It is not possible to lay down any hard-and-fast rule by which to determine which purposes are public and which private. Hardly any project of public benefit is without some element of peculiar personal profit to individuals, hardly any private attempt to use the taxing power is without some colorable pretext of public good." McQuillan, Municipal Corporations § 44.35 (3d Ed.).

The Kansas Supreme Court has held that "a cemetery which is open to the public for burial is a public cemetery regardless of the fact that it is privately owned or maintained." State ex rel. Stephan v. Lane, 228 Kan. 379, 386 (1980). The court went on to state "that a cemetery corporation is usually organized for a public rather than private purpose, and the cemetery management is in the nature of a trust." (Lane Supra. p. 386). Along these same lines, the court in Cemetery Assoc. v. Hanslip, 82 Kan. 20 (1910) held that "[the cemetery] lands are relieved from the payment of

taxes on the theory that they are dedicated to a public use." Cemetery Assoc. v. Hanslip, 82 Kan. 20 (1910).

"The government may accomplish a public purpose through the means of a private agency, a private individual or individuals, or a private corporation. It is the ultimate object to be obtained which must determine whether a thing is a public or a private purpose. The ultimate object of the government in granting municipal aid to railroads is to increase the facilities for travel and transportation from one part of the country to the other, which object is, in its nature, a public purpose." Leavenworth County v. Miller, 7 Kan. 479 (1871); see also Ulrich v. Board of Thomas County Comm'rs, 234 Kan. 782, 789 (1984). Because of this type of rationale courts have held that there is a public purpose for the expenditure of public money for such things as the fluoridation of water supply; the collection, removal and disposal of garbage; expenditures for advertising the city; electric light; plants; libraries and reading rooms; parks and playgrounds. McQuillan, Municipal Corporations, § 39.19, 44.35 (3d.Ed.).

The courts will generally defer to the commissioners' determination as to whether or not the expenditure is for a public purpose. The general rule regarding judicial scrutiny regarding whether an expenditure is of a public or a private nature is as follows:

"Each case must be decided in the light of the existing conditions, with respect to the objects sought to be accomplished, the degree and manner in which that object affects the public welfare, and the nature and character of the thing to be done; but the court will give weight to a legislative determination of what is a municipal purpose, as well as widespread opinion and general practice which regard as city purposes some things which may not be such by absolute necessity, or on a narrow interpretation of constitutional provisions. When an appropriation of public funds is primarily for public purposes, it is not necessarily rendered violative of constitutional provisions against gifts and loans of public credit by an incidental result which may be of private benefit. On the other hand, if the result is chiefly that of private benefit, an incidental or even ostensible

public purpose will not save its constitutionality. A purpose may be a public one so as to be within a municipal power to appropriate funds therefor, even though it is not a necessary purpose. It has been laid down as a general rule that the question whether the performance of an act or the accomplishment of a specific purpose constitutes a 'public purpose' for which municipal funds may be lawfully disbursed rests in the judgment of the municipal authorities, and the courts will not assume to substitute their judgment for that of the authorities unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused." Attorney General Opinion No. 82-229. See also Attorney General Opinion No. 91-53; 64 C.J.S. Municipal Corporations, § 18.35 (1950); State ex rel., McClure v. Hagerman, 98 N.E.2d 835 (Ohio 1951).

However, it should be noted that although the board may determine that the expenditure is for a "public purpose," the money for such an expenditure must come from an appropriate fund and cannot be diverted from another inappropriate fund. K.S.A. 79-2934. Also, K.S.A. 79-2929a prohibits changing the budget (i.e. switching money from one fund to another) without going through the budget amendment procedures.

In conclusion, it is the opinion of this office that the object and purpose to be accomplished in funding a cemetery corporation is for the benefit of the public. Although funding will go to a private entity, that entity is serving a public purpose and therefore the expenditure of county funds is appropriate, as long as the money comes from an appropriate fund.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Mary Jane Stattelmann
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