



3-3-69

Opinion Letter No. 124

Honorable Lawrence J. Lee  
Senator - Third District  
Capitol Building  
Jefferson City, Missouri 65101

Dear Senator Lee:

This letter is in response to your request of January 31, 1969, relative to a proposed bill you intended to offer, captioned "An Act Relating to Industrial Development Assistance".

It would appear from reading your proposal that while the agencies contemplated are to be nonprofit, they do not appear to be public corporate bodies. Therefore, such private bodies are always open to special scrutiny under Article III, Section 38(a), Constitution of Missouri 1945.

This discussion is directed to the general question you outlined, to wit:

"Would the bill, as proposed, be constitutional if passed by the General Assembly?"

The portion of the proposed bill which could involve a constitutional conflict is in the authorization clauses of Section 4 and Section 4(2) wherein is contemplated the disbursal of funds by the Division of Commerce and Industrial Development on a matching fund basis:

"Section 4. The Division of Commerce and Industrial Development is hereby authorized to make grants to recognized industrial development agencies, to assist such agencies in the financing of their operational costs for the purposes of making studies, surveys and investigations, the compilation of data

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and statistics and in the carrying out of planning and promotional programs . . . .

"Section 4(2). The Division of Commerce and Industrial Development after review of the application, if satisfied that the program of the industrial development agency appears to be in accord with the purposes of this act, may authorize the making of a matching grant to such industrial development agency equal to funds of the agency allocated by it to the program described in its application . . . ."

In view of a contemplated grant of state monies, immediate consideration must be given to Article III, Section 38(a), Constitution of Missouri 1945, which states:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."  
(Emphasis added)

The Supreme Court of Missouri has given the term "grant" definitional content in State ex rel Kelly, et al. v. Hackmann, 205 SW 161 (1918) by holding that the constitutional restriction is upon gratuitous grants of public money. Under consideration in that case was the demand upon the State Auditor to sign and deliver a warrant, agreed upon to be in the amount of \$20,000, payable to the partnership of Kelly and Kelly, which had been authorized by the following appropriation act of the General Assembly:

". . . There is hereby appropriated out of the state treasury chargeable to the capitol building fund that the sum of twenty-five

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thousand dollars for the relief of Kelly & Kelly of Kansas City, Missouri, in full payment of the plan submitted to the board of fund commissioners for the sale of state capitol bonds . . . "

The court, in holding that a peremptory writ of mandamus must issue to the State Auditor to pay the warrant, stated, at l.c. 165:

"The language in which the General Assembly made the appropriation answers the contention that it was a grant of public money within the inhibition of article 4, § 46, of the Constitution [present, article 3, section 38(a)]. The appropriation purports to be made to pay a claim of relators against the state for a plan submitted to the board of fund commissioners to sell the bonds; that is, to pay for a service rendered the state, and one for which, so far as the last-cited section of the Constitution is concerned, the Legislature might pay as lawfully as any other. The restriction of the Constitution is laid upon gratuitous grants of public money . . ." (Emphasis added)

In Jasper County Farm Bureau vs. Jasper County, 286 SW 381 (1926), the procedure under attack was the action by which the County Court could appropriate funds for the use of the farm bureau, a voluntary association. The Supreme Court of Missouri held that no "grant" of public money was involved, stating l.c. 384:

" . . . Nor are the appropriations provided for under the Farm Bureau Act gifts or grants of public money to private associations or societies, but are rather appropriations in payment for expenditures in carrying out the work of a public county institution. . . "

Another case in which the Supreme Court has given content to the term "grant" is State v. Southwestern Bell Telephone Co., Banc, 92 SW 2d 612 (1938). That action was a proceeding in quo warranto to prohibit Southwestern Bell from maintaining its poles and conduits on, over, and under certain highways, the privilege for which Southwestern Bell paid nothing to the state. Commenting on the statute which conferred this privilege on Southwestern Bell, the court, in failing to find a "grant", stated, l.c. 164:

" . . . The respondent is a public utility engaged in furnishing telephone service to the general public. The General Assembly no doubt

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considered that the benefit of the general public arising from the promotion of the extension of such service justified the granting of the privilege of the use of highways. While the benefit may not be said to be a formal consideration, as that term is generally understood, yet it is that benefit and that consideration which takes this grant out of the class of grants prohibited by the Constitution."

The posture of the foregoing cases would thus lead to the conclusion that the term "grant" imports the granting of public money for which the state does not receive a quid pro quo.

Another instance in which the Supreme Court of Missouri has upheld an appropriation by the General Assembly to a private corporation is State ex rel. S. S. Kresge vs. Howard, 208 SW 2d 247 (1947). Relator brought a mandamus proceeding to compel the State Auditor to issue a warrant for repayment of an allegedly illegally exacted domestication tax. Defense was made that such a refund would be in contravention of Section 38 of Article III, Constitution 1945, Mo. R.S.A. The court, in holding that the warrant should issue found the tax had been illegally exacted and stated, l.c. 250:

"This prohibition does not apply to the appropriation to relator because it was in payment of a valid public obligation, and was not a grant or gift of public money."

Thus, if a valid legal obligation to pay may be found as it was in Kresge, the grant will not come within the constitutional prohibition of "grant".

In State v. Land Clearance for Redevelopment Authority, 270 SW 2d 44 (1954), the Supreme Court of Missouri had before it for determination the question of whether the selling of blighted land by the Authority, for a cost less than the cost of acquisition, demolition and improvement, constituted the granting of public money to private persons. The court found no "grant" of public money, stating l.c. 53:

" . . . It would be difficult to imagine a workable law that exacted more from a purchaser than a 'fair value' price. An exaction that the purchaser pay fair value cannot conceivably amount to a grant or subsidy. . . . The great weight of authority is that there is no private grant where land is cleared for the purposes herein contemplated

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and is thereafter sold for a loss, but for its then fair value. (citing cases) In all these cases it is pointed out that the primary purpose of a redevelopment project is a public purpose, and that any benefits to private individuals are merely incidental to the public purpose. . . "

The court in such case upheld a procedure which involved overall monetary loss on resale of the land; attention should, however, be given to the fact that the private purchasers were required to pay a valuable consideration, to the extent of fair market value, as to amount to a quid pro quo in dealing with the Authority. Benefits accruing to private individuals do not fall within the constitutional proscription so long as such benefits "are merely incidental to the public purpose."

Another case which shows the concern of the Supreme Court of Missouri in finding a manifestation of "consideration" in agreements between the State and private persons is State ex rel. Highway Commission v. Eakin, 357 SW 2d 129 (1962). This case was brought by the Highway Commission in an attempt to condemn land to provide a substitute right of way for a common carrier's pipeline, the removal of which was necessitated by interstate highway construction.

The court, in holding that land might be condemned for an alternate right of way, found that no "grant" of public money was involved in light of the formal consideration which passed to the State from the common carrier; to wit: the surrendering to the State of the existing right of way which interfered with the highway.

Reliance in such case was on State v. Southwestern Bell, supra, with the court, however, in this instance, finding a formal consideration passing between the State and the common carrier, l.c. 134:

" . . . Under the record before us a formal consideration passes to the state for the relocation of Phillips' pipe lines; to wit: The surrender of a portion of Phillips' existing private right of way easement interfering with the proposed highway interchange. This involved factors closely connected with the safety and welfare of the traveling public and a right Relator could not compel Phillips to surrender without making some provision therefore . . . " (Emphasis added)

The cases under consideration thus illustrate that the Supreme Court of Missouri will require a finding that a quid pro quo is

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involved in any context in which public monies are appropriated by the General Assembly to be paid to a private person or corporation. If the payment is for services rendered, as in State ex rel Kelly v. Hackman, supra, or if valid legal obligations to pay arise, as in State ex rel S.S. Kresge v. Howard, supra, the court would most probably hold that no Article III, Section 38(a) prohibitions to appropriations are found.

It is, however, when the appropriation must depend on a finding of "formal consideration", as in State ex rel Highway Commission v. Eakin, supra, that the court appears to give closer scrutiny to the relationship between the State and the private person involved.

To avoid the constitutional prohibitions of Article III, Section 38(a), Missouri Constitution 1945, the public monies anticipated to be appropriated by your bill must be found to flow from a status of quid pro quo between the State and the several Industrial Development agencies. Moreover, any benefits which are private must be no more than incidental to the underlying public purpose to be served.

One basis for argument is that the general public welfare is served by the results accomplished by a bill such as you contemplate introducing. It must be remembered, however, that in each of the foregoing cited cases the court looked for some indicia of consideration on which to hold that a benefit of legally recognizable proportions flowed to the public. Abstract speculation on incidental benefits which may arguably accrue to the State would appear to be insufficient.

There is in the bill a section, Section five, which would seem to lead to the conclusion that a contractual relationship is to exist between the individual agencies and the Division of Commerce and Industrial Development, which would contemplate the grant in return for services rendered, to wit:

"Section 5. Upon approval of each application and the making of a grant by the division in accordance therewith, the division shall give notice to the particular industrial development agency of such approval and grant, and shall direct the industrial development agency to proceed with its proposed research and promotional program as described in its application and to use therefrom funds allocated by the industrial development agency for such purpose. Upon the furnishing of satisfactory evidence to the department, on a quarterly basis, that the particular industrial development agency has so proceeded,

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the grant allocated to such industrial agency shall be paid over on such basis to the industrial development agency by the department."  
(Emphasis added)

To a certain extent the emphasized portion could be said to contemplate a service function which is to be carried out by the industrial agencies. By clarification of this portion, however, the agencies could be viewed much as the parties were viewed in State ex rel Kelly v. Hackman, supra. By affirmatively stating some of the types of "evidence" on which the Division of Commerce and Industrial Development would be justified in extending quarterly payments, the entire tenor of the contemplated relationship between the State and the private body could be more easily understood.

Section six of your bill, by which the Division of Commerce and Industrial Development is to have rule-making power, could conceivably contemplate that before a grant is to be issued to an industrial agency the Division will require a form of quid pro quo to exist. The standards by which the Division is to make such a determination are, again, vaguely stated.

A restructuring of these sections setting forth definite standards from which it can be seen that the State will receive some tangible form of formal consideration, for the monies appropriated the industrial agencies, would make the bill less susceptible to constitutional attack.

Section 38(a) does apparently in its ultimate sentence offer an alternative if federal funds are to make up any part of the funds to be held by the industrial agencies; to wit:

" . . . Money or property may also be received from the United States and be redistributed together with public monies of this state for any public purpose designated by the United States."

Thus, if one of the criterion for the Divisions' granting funds were to be the inclusion of federal funds to be redistributed, the bill would be on firmer constitutional ground.

Therefore, we conclude that to the extent your final draft will clearly set out the legal basis of a quid pro quo between the State and an industrial agency it would be on firmer constitutional grounds to be upheld by the Missouri courts. However, on the basis of the draft which has been submitted to us, we feel that the benefits flowing to the public are so vague, uncertain and indefinite that the bill, if passed, might well be held unconstitutional.

Yours very truly,

JOHN C. DANFORTH  
Attorney General