

1843(1), 1843(6)

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ARIZONA CORPORATION COMMISSION

SECURITIES DIVISION  
(602) 542-4242

October 3, 1990

44-1843(1)  
44-1843(6)

Kent G. Nunn, Esq.  
Stinson, Mac & Fizzell  
The Mast Building  
7500 West 110th Street  
Overland Park, Kansas 66210-2329

RE: Kansas City Municipal Assistance Corporation

Dear Mr. Nunn:

On the basis of the facts set forth in your letters of August 24, and 31, 1990, and in reliance upon your opinion as counsel, the Securities Division will not recommend enforcement action for violation of the Securities Act of Arizona should the transaction take place as set forth in your letters.

As this position is premised upon the facts set forth in your letters, it should not be relied on for any other set of facts or by any other person. Please also note that this position applies only to the registration requirements of the Act; the anti-fraud provisions of the Act continue to be applicable.

We have enclosed photocopies of your letters. By doing this we are able to avoid having to recite or summarize the facts set forth therein.

Very truly yours,

DEE RIDDELL HARRIS  
Director of Securities

DRH:KR:ww

Enclosures

# STINSON, MAG & FIZZELL

THE MAST BUILDING

7500 WEST 110TH STREET

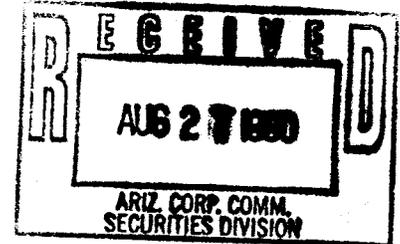
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August 24, 1990



VIA FEDERAL EXPRESS

Arizona Corporation Commission  
Securities Division  
1200 West Washington Street, 2nd Floor  
Phoenix, Arizona 85007  
Attn: Katrina Rogers, Esq.  
General Counsel

Re: Kansas City Municipal Assistance Corporation

\$45,990,204.65\* Leasehold Refunding and  
Improvement Revenue Bonds, Series 1990B-1  
(H. Roe Bartle Convention Center Project)

\$5,640,000.00\* Leasehold Refunding and Revenue  
Bonds, Series 1990B-2 (H. Roe Bartle  
Convention Center Project)

Ladies and Gentlemen:

Request is hereby made for a no action letter under the Securities Act of Arizona (the "Act") regarding the availability of an exemption from registration pursuant to Section 44-1843(1) or Section 44-1843(6), or both such sections, of the Act for the above-referenced bonds (the "Bonds"). Enclosed for your review and reference is a draft of the Preliminary Official Statement relating to the Bonds.

It is our understanding that no consent to service of process by the issuer will be required if an exemption from registration is available under the Act. We would appreciate your confirmation of such understanding. Our firm's check in the amount of \$200.00 is enclosed to cover the fee for the no action letter.

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\* Preliminary, subject to change

The offering of the Bonds is scheduled to commence on Friday, August 31, 1990. We would appreciate a response on or prior to such date, if possible.

## I. LEGAL ISSUES

1. Whether the Kansas City Municipal Assistance Corporation (the "Issuer") is an "agency or corporate or other instrumentality" of the City of Kansas City, Missouri (the "City"), a political subdivision of the State of Missouri, for purposes of the exemption set forth in Section 44-1843(1) of the Act.

2. Whether a revenue bond is included in the exemptions for "securities" set forth in Sections 44-1843(1) and 44-1843(6) of the Act.

## II. THE BONDS

1. Structure of the Financing. The Bonds are being issued by the Issuer pursuant to, and will be secured by, a Master Indenture of Trust dated as of September 1, 1990, as supplemented by a First Supplemental Indenture of Trust dated as of September 1, 1990. The proceeds of the Bonds will be used to finance in part the cost of expanding the City's convention center (such expansion being hereinafter referred to as the "Project") and to refinance bonds currently outstanding that were issued in connection with previous convention center related projects. Specifically, the Series 1990B-1 Bonds are being issued to (1) refund \$13,500,000 principal amount of outstanding Series 1985 Bonds, (2) finance a portion of the costs the Project, and (3) pay a portion of the bond insurance premium, if any, and certain costs of issuance of the Bonds. The Series 1990B-2 Bonds are being issued (1) to refund \$5,140,000 principal amount of outstanding Series 1984 Bonds, and (2) to pay a portion of the bond insurance premium, if any, and certain costs of issuance of the Bonds. A description of the Project is set forth at page 18 of the Preliminary Official Statement.

The real estate on which the Project will be located is or will be owned by the City. Under a Base Lease dated as of September 1, 1990, between the City and Issuer, the City will lease the existing convention center, together with the real estate on which the Project is or will be located, to the Issuer for a term extending to ten years beyond the final "Stated Maturity" of the Bonds, subject to earlier termination on the date the Bonds are deemed to be paid in accordance with the provisions of the Master Indenture. The Issuer will use the proceeds of the

Bonds to pay a portion of the costs of the Project, including the acquisition of additional real estate to be acquired by the Issuer on behalf of the City. The Project will be leased back to the City by the Issuer under a Master Lease Purchase Agreement dated as of September 1, 1990 (the "Master Lease Purchase Agreement"). Under the Master Lease Purchase Agreement, the City will be obligated, subject to annual appropriations by the City Council, to pay to the Issuer each year the amounts which, together with other funds available for such purpose, will be sufficient to pay when due the principal of, premium, if any, and interest on the Bonds and additional amounts required for other payments, fees and expenses.

2. Security for the Bonds. The Bonds are special, limited obligations of the Issuer, payable by the Issuer solely from rental payments to be made by the City under the Master Lease Purchase Agreement, as described above. The Issuer will pledge and assign such payments under the Master Lease Purchase Agreement to the Bond Trustee to secure the payment of the Bonds. The Bonds shall not constitute a debt or liability of the City or of the State of Missouri or of any other political subdivision of the State within the meaning of any constitutional or statutory debt limitation or restriction, and shall not constitute a pledge of the full faith and credit of the City or of the State or of any political subdivision thereof. The issuance of the Bonds shall not directly, indirectly, or contingently obligate the City or the State of Missouri or any political subdivision thereof to levy any form of taxation therefor. The Issuer has no taxing power.

The Series 1990B-1 Bonds are issuable as both Current Interest Bonds and Capital Appreciation Bonds. The Capital Appreciation Bonds do not pay current interest but accrete in value in lieu thereof. The Series 1990B-2 Bonds are issuable as Current Interest Bonds. Interest on the Current Interest Bonds will be payable on April 15 and October 15, beginning on April 15, 1991. Capital Appreciation Bonds will accrete in value from their delivery date and the accreted value will compound semiannually on April 15 and October 15, beginning on April 15, 1991. The Bonds are issuable only as fully registered bonds without coupons and, when issued, will be registered in the name of the nominee of the securities depository. Individual purchase of beneficial ownership interests in the Bonds will be made in book-entry form only. It is expected that payment of the principal of and interest on the Current Interest Bonds and the maturity value of the Capital Appreciation Bonds when due (exclusive of payments pursuant to optional redemption or acceleration provisions) will be insured by a municipal bond insurance policy to be issued simultaneously with the delivery of the Bonds by a bond insurance company of suffi-

ent national standing to cause the Bonds to be rated in the highest rating category of both Standard and Poors Corporation and Moody's Investor Service, Inc. However, it may be determined not to obtain such bond insurance policy.

**III. FACTUAL INFORMATION CONCERNING THE ISSUER AND ITS RELATIONSHIP WITH THE CITY.**

In addition to the foregoing description of the transactions, the following factual elements are relevant in determining whether the exemptions afforded by Section 44-1843(1) or Section 44-1843(6) of the Act, or both, are applicable to the Bonds.

1. The City caused the Issuer to be incorporated. The City, a constitutional charter city with home rule powers and a political subdivision of the State of Missouri, caused the formation of the Issuer, the Kansas City Municipal Assistance Corporation, in 1984, pursuant to The General Not-for-Profit Corporation Law, Chapter 355 of the Missouri Revised Statutes, 1986, as amended.

2. The Issuer is organized exclusively for charitable purposes and is operated for the benefit of the City and its residents. As stated in its Articles of Incorporation ("Charter"), the Issuer was organized exclusively for charitable purposes within the meaning of Section 201(c)(3) of the Internal Revenue Code. As further stated in its Charter, the Issuer can only be operated for the exclusive benefit of the City. The Issuer was formed for the purpose of acquiring, establishing, developing, constructing, owning, operating, maintaining and leasing equipment, real property and improvements thereon and facilities in the City for the purpose of promoting the economic, social, industrial, cultural and commercial growth and for the general welfare and benefit of the City and its residents.

The Issuer has been formed in compliance with Internal Revenue Service Revenue Ruling 63-20, and for the purposes of such revenue ruling, the Bonds are being issued by the Issuer on behalf of the City. The City, by resolution and/or by ordinance, approves all financings of the issuer.

3. The net assets of the Issuer are to be distributed to the City in the event of the dissolution of the Issuer. The Issuer's Charter requires that in the event of the dissolution of the Issuer, after payment of all of its debts and satisfaction of all of its liabilities and obligations, any remaining assets of the Issuer shall be disposed of exclusively for the charitable

purposes of the Issuer by distributing such assets to the City (or, if the City is not then in existence, then to such organization or organizations organized and operated under Section 501(c)(3) of the Internal Revenue Code).

4. Changes in Bylaws of the Issuer. The Issuer's Bylaws may not be changed without the consent and approval of the City Council of the City.

5. No earnings inure to private persons. Issuer's Charter further provides that no part of the net earnings or other assets of the Issuer shall inure to the benefit of any director, officer, contributor or other private individual having directly or indirectly any personal or private interest in the activities of the Issuer.

6. Representatives of the City participate in Issuer meetings and activities. The Issuer has a Board of Directors which manages the property, affairs and activities of the Issuer. The initial board of directors and incorporators of the Issuer were the City Manager, the City's Director of Finance and the City Attorney. Subsequently, the board of directors was expanded to seven members. Three of the board members are required to be the City Manager, the Director of Finance and the City Attorney. The remaining four board positions voted upon by the City Manager, the Director of Finance and the City Attorney from nominations made by the City Manager. Thereafter, only those persons nominated by the City Manager are eligible to be selected as successor board members for the remaining four positions. Successor board members are voted upon from such nominations by a majority of the then board of directors. In addition to its representatives on the Issuer's board of directors, the City, by resolution and/or ordinance, approves all financings of the Issuer. Therefore, as a result of the City's representation on the board of directors of the Issuer and its oversight of the financings of the Issuer, the City meaningfully participates in the decision making process of the Issuer.

#### IV. DISCUSSION

The information provided above is intended to address the factors germane to the determination of whether the exemptions from registration set forth in Section 44-1843(1) and Section 44-1843(6) of the Act are available for the Bonds. Based upon the foregoing factual elements, we believe that the Issuer should be construed as an instrumentality or agent through which one or more functions of the City are carried out. Thus, the Issuer should be construed as an "agency or corporate or other instrumentality" of

the City for purposes of Section 44-1843(1) of the Act. The Issuer is organized exclusively for charitable purposes and is operated solely for the benefit of the City. The term "security" is broadly defined in Section 44-1801(22) and includes ". . . any . . . bond . . ." Thus, the term "securities" as used in Section 44-1483(1) and Section 44-1843(6) should include revenue obligations such as the Bonds.

#### V. CONCLUSION

The Issuer is an "agency or corporate or other instrumentality" of the City of Kansas City, Missouri, for purposes of the Act, and the Bonds are "securities" as that term is used in such section. Thus, the exemption contained in said Section 44-1843(1) is available with respect to the Bonds.

The Issuer is a not for private profit entity whose purposes fall within those set forth in Section 44-1843(6) of the Act, and the Bonds are "securities" as that term is used in such section. Thus the exemption set forth in said Section 44-1843(6) is available with respect to the Bonds.

Also enclosed is a photocopy of this letter. Please acknowledge your receipt of this letter and the enclosures on the photocopy and return it to us in the self-addressed envelope which is provided.

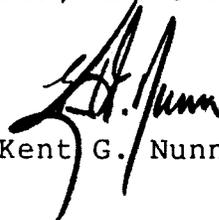
In the event the staff is not inclined to provide concurrence with our views, we respectfully request an opportunity to discuss the matter prior to any final decision thereof.

If you have any questions or comments or require any additional information in connection with this matter, please contact the undersigned.

Very truly yours,

STINSON, MAG & FIZZELL

By

  
Kent G. Nunn

KGN/mad  
Enclosures

# STINSON, MAG & FIZZELL

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August 31, 1990

VIA TELECOPY (602) 542-4111

Arizona Corporation Commission  
Securities Division  
1200 West Washington Street, 2nd Fl.  
Phoenix, Arizona 85007  
Attn: Katrina Rogers, Esq.  
General Counsel

Re: Kansas City Municipal Assistance Corporation  
Leasehold Refunding and Improvement Revenue  
Bonds, Series 1990B-1 (H. Roe Bartle  
Convention Center Project)

Leasehold Refunding Revenue Bonds, Series  
1990B-2 (H. Roe Bartle Convention Center  
Project)

Dear Ms. Rogers:

Pursuant to our telephone conversation of August 29, 1990, this letter is submitted to supplement our letter dated August 24, 1990 requesting a no action letter regarding the availability of exemptions from registration pursuant to Section 44-1843.1 or Section 44-1843.6, or both such sections, of the Securities Act of Arizona (the "Act") for the above-referenced bonds.

Section 44-1843.1 of the Act provides an exemption from the registration requirements for "Securities issued . . . by . . . any state . . . or by any political subdivision of such state . . . or by any agency or instrumentality of one or more of any of the foregoing." The legal issue involved with respect to such exemption is whether the Issuer of the Bonds, Kansas City Municipal Assistance Corporation, is an "agency or instrumentality" of the City of Kansas City, Missouri, for the purpose of the exemption set forth in Section 44-1843.1.

Neither the Act nor the regulations promulgated pursuant thereto provide guidance as to what constitutes an "agency" or "instrumentality." The first significant treatise on Blue Sky law, Loss and Cowett, Blue Sky Law (1958), which analyzes in depth the Uniform Securities Act, is similarly

Katrina Rogers, Esq.  
August 31, 1990  
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silent. Securities commissions in various states which are charged with interpreting the meaning of the governmental obligations exemption, however, have formulated certain factors to be considered when determining whether an entity is an "instrumentality." For example, an extensive list enumerated by the California Corporation Commission is found in Long, Blue Sky Law, Section 4.04[4] (hereinafter "Blue Sky Law"), which itself is found in 12 Securities Law (Clark Boardman 1990). A copy of such factors is enclosed herewith. All of the factors noted in our letter dated August 24, 1990 -- the not-for-profit statute under which the Issuer was incorporated; the fact that the Issuer is a non-profit corporation; that its business is to benefit the City; that no net earnings of the Issuer benefit a private person; that upon liquidation, the net assets of the Issuer are distributed to the City; that the City caused the formation of the Issuer and approved the Issuer's bylaw amendments and proposed financing; that the City is represented on the Issuer's board of directors and participates in its meetings -- were cited in Blue Sky Law as indicia that an entity is an "instrumentality" within the meaning of the governmental obligations exemption found in the Uniform Securities Act. Arizona, at Section 44-1843.1, has adopted the Uniform Securities Act Governmental Obligation exemption. Therefore, the factors discussed by Blue Sky Law should be applicable to such a determination in Arizona.

With respect to the exemption provided at Section 44-1843.6. the statute provides that "Securities issued by a corporation organized and operated exclusively for . . . charitable . . . purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any private stockholder or individual . . ." is exempt from registration. The Articles of Incorporation of Kansas City Municipal Assistance Corporation provide "This corporation is a not-for-profit corporation and is organized exclusively for charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1954, as amended, and shall be operated for the benefit of Kansas City, Missouri." The purposes clause of the Issuer's Articles of Incorporation further provide that the Issuer must be operated for the exclusive benefit of the City. The Issuer's "charitable purposes" include acting as a financing vehicle for the citizens of Kansas City, Missouri, easing the administrative burden of the City in connection with the financing of public improvement projects such as the expansion of the City's convention center and promoting the economic, social and cultural growth of the City's residents. The Bonds should qualify for the exemption set forth at Section 44-1843.6 of the Act, because they are securities issued by a corporation organized and operated exclusively for charitable

Katrina Rogers, Esq.  
August 31, 1990  
Page 3

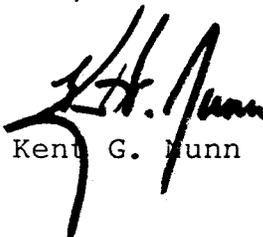
purposes and not for pecuniary profit, and no part of the net earnings of the Issuer inure to the benefit of any private stockholder or individual.

Please contact the undersigned if you have any questions or require any additional information.

Very truly yours,

STINSON, MAG & FIZZELL

By



Kent G. Nunn

KGN/sy  
enclosure

The problem here is determining what entities should be accorded instrumentality status.

[4] What Constitutes an Instrumentality?

Increasingly, nonprofit corporations are being formed, or taken over, to aid state and local governments in providing the services and facilities needed by their citizens. Often, the nonprofit corporation is used to avoid a debt-free clause in a state or local government's constitution or charter, or a debt ceiling placed upon the government. This device has been used to finance construction and operation of municipal buildings, such as hospitals and schools, as well as airports and dock facilities. The bonds issued by these nonprofit corporations do not carry the full faith and credit or the taxing ability of the governmental entity behind them. Instead, bondholders must rely on the revenue generated by the facility or services created through use of the bond money. In this way, they are very similar to an industrial revenue bond. The difference, however, is that an industrial revenue bond is issued by a political subdivision of a state, while the bonds considered here are issued by a nonprofit corporation. As a result, these bonds are not entitled to the government securities exemption unless the nonprofit corporation can be classified as an instrumentality of the governmental unit. Whether these nonprofit corporations should be classified as governmental instrumentalities, and, under what conditions, has presented a major problem over the last thirty years.

~~The problem is illustrated by the Texas Turnpike Company. In the early 1950's, before the advent of the federal interstate highway program, the State of Texas, like many states, established a turnpike authority. The Texas Turnpike Authority was an agency or instrumentality of the State of Texas. At about the same time, the Texas Turnpike Company was organized under a nineteenth century Texas statute authorizing the incorporation of turnpike companies. The company wanted to build a turnpike from Denison, near the Red River on the northern border of Texas through Dallas and Houston to Galveston on the Gulf Coast. To finance the construction of the turnpike, the company wanted to sell revenue bonds. The company entered into a tripartite agreement with the Texas Turnpike Authority and a Texas bank, under which all the revenue~~

~~such things as public beaches, airports, and hospitals, to be instrumentalities of a governmental unit.~~

The Commissioner first began to enumerate specific criteria for instrumentality classification in the California Corporation Commission Interpretative Opinion 74/98C.<sup>29</sup> He indicated that the following factors are to be considered:

- (1) The statute or other law under which a corporation is formed;
- (2) The nonprofit nature of the corporation;
- (3) The net earnings will not inure to any private individual but will be irrevocably dedicated to the political entity;
- (4) Upon dissolution, liquidation, or winding up, assets will be distributed to the political entity;
- (5) The political entity approved the formation, articles of incorporation, bylaws, and officers and directors of the corporation, as well as the proposed method of financing; and
- (6) The political entity will be notified of meetings of the directors or members of the corporation and that represen-

<sup>29</sup> See, e.g., Cal. Corp. Comm'n Interpretative Op. 72/92C, 4 Cal. Corp. Comm'n Official Op. (July 25, 1972) (public beaches); Cal. Corp. Comm'n Interpretative Op. 70/63, 2 Cal. Corp. Comm'n Official Op. (June 22, 1970) (airport); Cal. Corp. Comm'n Interpretative Op. 74/34C, 6 Cal. Corp. Comm'n Official Op. (March 26, 1974), and Cal. Corp. Comm'n Interpretative Op. 74/40C, 6 Cal. Corp. Comm'n Official Op. (April 5, 1974) (hospitals). But see Cal. Corp. Comm'n Policy Letter 92, Cal. Corp. Comm'n Official Op., Policy Letters 1969-1971 (Aug. 17, 1970), holding an Indiana hospital, which had been operating as a private hospital for sixty-five years, not to be an instrumentality, despite the fact that the city and county elected part of the directors and would get the land upon dissolution. Cal. Corp. Comm'n Interpretative Op. 72/8C, 4 Cal. Corp. Comm'n Official Op. (Jan. 25, 1972). Similarly, the Commission refused to hold that a nonprofit corporation established to finance student dormitories at one of the California state colleges was an instrumentality of the state. Cal. Corp. Comm'n Policy Letter 17, Cal. Corp. Comm'n Official Op., Policy Letters 1969-1971 (Aug. 11, 1969). The Commission said: "In our opinion the use of [any agency or corporate or other instrumentality] was not intended to include private corporations among the issuers exempted . . . , even if, as in the case of [the dormitory corporation], they have been formed as an adjunct to and for the purpose of satisfying the needs of, a public entity." *Id.* at 2. The continued validity of this position is in doubt in view of the Commission's 1974 definition of instrumentality. See especially Cal. Corp. Comm'n Interpretative Op. No. 74/98C, 6 Cal. Corp. Comm'n Official Op. (Nov. 26, 1974).

<sup>30</sup> N. 29 *supra*.

tatives of the political unit can attend and make comments at those meetings.

The Commissioner emphasized that these items are cumulative and that the presence or absence of any one or more will not be controlling.

Subsequently, the Commissioner, in California Corporation Commission Interpretative Opinion 76/22C,<sup>21</sup> added four more points to be considered. They are:

- (1) The business of the corporation;
- (2) The political unit must approve any amendments to the articles of incorporation or bylaws as well as any new officers or directors; however, it is sufficient here if the political unit merely has the right to disapprove the changes or the new officers or directors;
- (3) Whether the corporation has received a ruling from the Internal Revenue Service that the interest received on the bonds will be tax exempt; and
- (4) Whether the SEC has taken a no-action position as to the sale of the bonds without registration under the federal securities act (normally, the Commissioner will not issue his opinion unless the SEC has taken a no-action position).

The Commissioner also indicated that in connection with item (6) in the earlier letter, dealing with the attendance and participation by representatives of the political unit at meetings of the directors or members of the corporation, he considers it significant that the attendance and participation is in an official or unofficial capacity, but that it is not significant whether the attendance and participation is formal or informal. The Commissioner concluded:

"Although the presence of one or more of the above factors may not necessarily be determinative and the means by which 'control' over the 'instrumentality' is asserted may vary, it is essential that the political subdivision have, and continue to have, through provisions in its charter documents and/or indenture, control over the management, operations, financing arrangements and future amendments to the charter documents of the issuer. The Commissioner now emphasizes that the absence of provisions assuring the political subdivision

<sup>21</sup> 8 Cal. Corp. Comm'n Official Op. (Dec. 2, 1976)