Opinion Request No. 394 answered by
letter by Howard L. McFadden

October 30, 1962

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Honorable A. J. Anderson
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Mr. Anderson:

This is in response to your letter of October 25, 1962, wherein you enclose a letter from Mr. Carl D. Gum, Jr., City Attorney for the City of Belton, Missouri, requesting an opinion of this office regarding the results of diverting tax money collected under Sections 71.640 and 71.670, RSMo 1959, providing for the establishment of a band concert fund by cities, towns and villages.

We presume that you make this request concerning the duties which may devolve upon your office as Prosecuting Attorney and reply with that presumption in mind.

Although Section 71.670, RSMo 1959, provides, "No voluntary contribution, donation, or diversion into another fund shall be made from this fund in any manner whatsoever." we do not find any penalty provision within that chapter if such a diversion is made. Therefore, we deem that Section 558.260, RSMo 1959, bearing upon fraudulent disbursement of money by certain public officials generally to apply. If there is a fraudulent diversion of the funds as set out in the statutory provision last above mentioned then prosecution would be warranted. However, it must be noted that this penalty provision contains the following proviso:

> "provided, however, that in any case when any money has been or shall have been collected by any city, town or county for any specific use or purpose, and it is or shall have become impossible to use such money for that specific purpose, either by reason of the abandonment or failure of

> such use or purpose, or the satisfaction of such use or purpose, then the members of any such town or city council, and the proper officers of such city, town, county or board herein mentioned, may appropriate such money to any other legitimate use or purpose without becoming liable to any of the aforesaid penalties."

We believe, therefore, that where it can be shown that there has been a legitimate abandonment of the purpose for which the tax money was collected or a failure of the project or if the purpose for which the money has been collected is deemed to be satisfied, then the public officials involved cannot be successfully prosecuted for diverting the remaining funds to some other legitimate public purpose.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

HLM:BJ