

City's Public Improvement
Water Extensions
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Sanitation



STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

September 10, 1974

Opinion No. 74- 310

Mr. Robert D. Beall
City Attorney
City of Leavenworth
2205 South Fourth Street
Leavenworth, Kansas 66048

Dear Mr. Beall:

You inquire concerning the Leavenworth waterworks board, created under K.S.A. 13-2412, et seq., and its relationship to the governing body of the City of Leavenworth. Two areas of concern are set out in your letter, one dealing with control of water lines within the public right of way, and size of water mains in the interest of providing adequate fire protection, and the second dealing with fluoridation of water.

You describe thus a controversy which has developed over control of right of way and size of water mains:

"The governing body of the City of Leavenworth has taken the position that they have a responsibility with regard to location of fire hydrants and size of water mains to provide adequate fire protection, and further that the governing body retains control of the right of way and can therefore require relocation of water lines when new pavement, change of grade, etc., requires same, just as is done with the gas lines or electric transmission lines The Water Board has taken the position that the City cannot direct them to relocate lines within public right of way, nor does the City have any control over the size of mains or the location of fire hydrants"

The act under which the waterworks board operates provides virtually no basis upon which to resolve, purely as a matter of statutory interpretation, a jurisdictional dispute such as this. The board is vested with substantially complete and autonomous control of the water system, independent of the city governing body. Members of the board are elected by the city at large. K.S.A. 13-2416. Under K.S.A. 13-2418, the board

"shall have the exclusive control of the water plant and shall be charged with the duty of producing and supplying the city and its inhabitants with water for domestic and industrial purposes and for public use in the city; and may sell and dispose of any surplus outside of the city [; and] for such purposes said board may control lines and give service outside the boundaries of the city."

K.S.A. 13-2428 further clarifies its powers thus:

"In any city which adopts the provisions of this act, the powers, duties, authority and jurisdiction of the commissioner of water and light and of the city commission are hereby transferred to and conferred upon the waterworks board. In the event any city which has adopted the provisions of this act shall adopt the city manager plan of government, the waterworks board shall retain control of the management and operation of the waterworks plant and the city manager shall have no jurisdiction or control over said utility.

In an opinion dated April 5, 1960, Attorney General John Anderson, Jr., pointed out that the water system of the City of Leavenworth was "freed from the control of the governing body of the City." 9 Kan.L.Rev. 101.

Although legislative power remains vested in the city governing body, the exercise of this power is placed ambiguously at the best of the water board under K.S.A. 13-2418:

"It shall be the duty of the governing body of the city when requested by the waterworks board to enact such ordinances as may

Mr. Robert D. Beall
September 10, 1974
Page 3

be deemed necessary for the protection of the water plant, and to institute condemnation proceedings whenever in the judgment of the waterworks board private property should be taken in the name of the city for water plant purposes."

The city governing body does, of course, have major responsibilities for providing fire protection for the city. The waterworks board has a correlative responsibility to supply water "for public use in the city." The control of distribution lines rests with the waterworks board, and on the face of the act, judgments as to size and placement of such lines would, accordingly, fall within its jurisdiction. When such judgments conflict with the exercise of powers of the city governing body over public rights of way, such as in the course of construction or reconstruction of streets or other public improvements, the act provides no precise and specific legal procedure for the resolution of such disputes which cannot be settled by mutual agreement between the two bodies, short of litigation. Necessarily, any such litigation would be based in part upon the particular facts and circumstances of the dispute, and we cannot speculate as to the possible resolution of issues which are presently unforeseeable.

The second area of concern mentioned in your letter is that of fluoridation. We are advised that on March 26, 1974, the Board of City Commissioners adopted Resolution No. B-210, urging that the Board of Directors of the Leavenworth Waterworks Department introduce into the city water supply one part per million of fluoride, and that on April 22, 1974, the Board of Directors of the Waterworks Department adopted Resolution No. 5041, that the Board accept the recommendation. Since that time a petition has been filed, addressed to the city governing body, entitled thus:

"Petition to the Board of Commissioners of the City of Leavenworth, Kansas, to call a Special Election Concurrent with the Forthcoming General Election November 5, 1974, for the Purpose of Voting on the Proposition of Water by the Leavenworth Waterworks Department."

The petition seeks an election

"for the purpose of voting by the qualified electors of the city of Leavenworth, Kansas,

Mr. Robert D. Beall
September 10, 1974
Page 4

on the proposition of fluoridating the water
by the Leavenworth Waterworks Department:
'SHALL LEAVENWORTH FLUORIDE ITS WATER?
YES _____ NO _____'"

K.S.A. 12-3013 provides in pertinent part thus:

"A proposed ordinance, except an administrative ordinance . . . may be submitted to the governing body of any city accompanied by a petition"

According to a copy of the petition furnished to this office by Mr. Fred Urban, president of the Leavenworth City-County Taxpayers Association, enclosed with a letter dated August 29, 1974, the petition does not set forth a proposed ordinance, but merely states a question, "Shall Leavenworth fluoride its water," upon which the voters are asked to express their views. The petition does not, thus, contain the language of a proposed ordinance which, if adopted, would "thereupon become a valid and binding ordinance of the city."

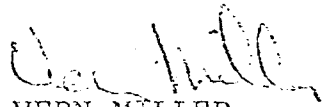
Thus, the petition does not comply with the requirements of K.S.A. 12-3013, setting forth a proposed ordinance upon which the electors of the city may vote.

I enclose a copy of an opinion of the Attorney General dated May 3, 1972, to Mr. Joe Levy, City Attorney of Coffeyville, Kansas, concluding that

"it is within the lawful authority of the governing body of the city, under Article 12, § 5 of the Kansas Constitution, to authorize the holding of a purely advisory election upon a question of public importance"

Thus, although the petition appears not to comply with K.S.A. 12-3013, it remains within the discretion of the city governing body to call an election, purely advisory in nature, upon the question whether fluoridation should be commenced. Such an advisory election would not be legally binding upon the city governing body or upon the waterworks board, and would have no legally binding effect whatever, although it would serve as an expression of the prevailing views of the electors of the city on the question.

Very truly yours,



VERN MILLER
Attorney General

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Enclosure