STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

October 24, 1979

ATTORNEY GENERAL OPINION NO. 79- 244

Mr. William B. Elliott
City Attorney, City of Hill City
205 North Pomeroy
Hill City, Kansas 67642

Re: Waters and Water Courses--Obstructions in Streams--Municipality's Authority

Synopsis: A municipality's power to change the natural drainage course of water passing through it is subject to the consent of the chief engineer of the Division of Water Resources of the State Board of Agriculture. If the municipality proceeds without said consent, an action may lie against the city. Further, even though consent is obtained, the municipality may still be liable for acts of negligence.

* * *

Dear Mr. Elliott:

As city attorney of Hill City, you have asked our opinion on the question of whether a municipality may be liable for its actions in diverting the natural drainage course of water.

Initially, it may be stated that a municipality's power to protect its citizens from floods and high water is set out in K.S.A. 1978 Supp. 12-635. However, this power has been restricted by statute since 1929. The provisions of Chapter 82a, Article 3 of the Kansas Statutes Annotated clearly establish that permission for such action must be obtained from the chief engineer of the Division of Water Resources of the State Board of Agriculture. K.S.A. 1978 Supp. 82a-301 provides:

> "Without the prior written consent or permit of the chief engineer of the division of water resources of the state board of agriculture, it shall be unlawful for any person, partnership, association, corporation or agency or political subdivision of the state government to:
>
> "(a) Construct any dam or other obstruction, (b) make, construct or permit to be made or constructed any change in any dam or other water obstruction, (c) make or permit to be made any change in or addition to any existing water obstruction, or (d) change or diminish the course, current, or cross section of any stream within this state . . . ."

The provisions of K.S.A. 82a-301 et seq. also provide further guidelines that must be followed such as the form of the application to be filed and the type of information that must be provided. It is not within the purview of this opinion to outline such provisions, but rather we defer to the above-cited provisions as well as the chief engineer for such information.

The heart of the question under consideration concerns the municipality's possible liability in this matter. If the municipality fails to obtain the required consent, or violates other provisions of K.S.A. 1978 Supp. 82a-301 et seq., the liability which is possible is outlined in K.S.A. 1978 Supp. 82a-305 as set out below.

> "(a) Any person, partnership, association, corporation or agency or political subdivision of the state government who violates any provision of this act or of any rule and regulation or order issued pursuant thereto shall be deemed guilty of a class C misdemeanor. Each day that any such violation occurs after notice of the original violation is served upon the violator by the chief engineer by restricted mail shall constitute a separate offense.

> "(b) Upon request of the chief engineer, the attorney general shall bring suit in the name of the state of Kansas in any court of competent jurisdiction to enjoin (1) the unlawful construction, modification, operation or maintenance of any dam or other water obstruction, or (2) the unlawful change or diminution of the course, current or cross section of a river or stream. Such court may require the removal or modification of any such dam or other water obstruction by mandatory injunction."

However, compliance with the provisions of K.S.A. 1978 Supp. 82a-301 et seq. does not foreclose further possibility of liability. The city would remain liable for damage done by any water which was impounded upon or diverted to private property as a result of the roadbed and the resulting blockage in normal drainage. This principle was established in the case of Cow Creek Flood Prevention Ass'n v. City of Hutchinson, 166 Kan. 78 (1948), wherein it was stated:

> "This later act (G.S. 1945, Supp., 12-635) gives the city express authority to make and complete any and all necessary work, construction and improvements to protect said city from floods and damage by overflow of natural and artificial watercourses. If surface water is diverted upon the lands of others by the city's acts, the city will be liable to such landowners in an appropriate action to recover therefor if the loss is compensable." 166 Kan. at 83.

See, also, the cases involving the successful attempts of private landowners to recover from the city of Augusta as a result of damages caused by the increased flow of floodwaters across their property due to the erection of levees to protect the town. Loomis v. City of Augusta, 151 Kan. 343 (1940); Foster v. City of Augusta, 165 Kan. 684 (1948); and Foster v. City of Augusta, 174 Kan. 324 (1953). Additionally, it should be noted that the newly-enacted Tort Claims Act, Laws of 1979, ch. 186, p. 883, does not provide any protection to the city in this regard.

Thus, it would be our opinion that a municipality's power to change the natural drainage course of water passing through it is subject to the consent of the chief engineer of the Division of Water Resources of the State Board of Agriculture. If the municipality proceeds without said consent, an action may lie against the city. Further, even though consent is obtained, the municipality may still be liable for acts of negligence.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Jeffrey S. Southard

Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:gk