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December 10, 1980

ATTORNEY GENERAL OPINION NO. 80- 258

Mr. Larry Winn, III
Leawood City Attorney
Bennett, Lytle, Wetzler, Winn & Martin
P.O. Box 8030
Prairie Village, Kansas 66208

Re: Cities and Municipalities--Public Improvements--
Sanitary Sewer System Easements

Synopsis: Where the area of work for the servicing, repairing and maintaining of a sewer line is not specifically defined in the grant of an easement, the area is such as is reasonably convenient and necessary for the purpose for which the easement was created, and is not unenforceable for lack of specificity.

Construction of a parallel, supplemental line to be affixed to existing main sewer lines constitutes "maintenance" within the meaning of the language of the grant of easement vested in the City of Leawood pursuant to sanitary sewer connection agreements entered into between Leawood landowners and the original developer.

* * *

Dear Mr. Winn:

You have requested our opinion regarding the validity and enforcement of certain easements granted to the City of Leawood for the purpose of repairing and maintaining sanitary sewers in the city. You advise that Leawood obtained a property interest in a sanitary sewer system established in 1954 by the city's original developer, Kroh Brothers, Inc. The developer entered into sanitary sewer connection agreements with the several Leawood property owners, a copy of which standard

agreement you have submitted for our review. The standard agreement provides, inter alia, that the property owner grants and extends to the developer

> "the necessary rights, privileges and easements to go upon the property over, under and across which said sewer mains and laterals are constructed for the purpose of servicing, repairing and maintaining the same." Sanitary Sewer Connection Agreements, p. 4, section (5). (Emphasis added.)

The City of Leawood, pursuant to its agreement with the developer in 1954, is the successor-in-interest to the easements granted to Kroh Brothers, Inc.

You further advise that the city now wishes to proceed with a project to improve the existing sanitary sewer system, which project involves the construction of certain supplemental main sewer lines. You note that in most cases, these lines are to be built directly parallel to the existing system and connected at certain points. You also advise that agreement has been reached with most of the property owners who will be affected by the project, granting their permission for the city to enter upon their property for project purposes. But, a few owners have questioned the validity of the original enabling authority and have questioned whether the proposed project comes within the scope of that authority. In this factual context, you have asked two questions:

> "1. Is the language [of the sanitary sewer connection agreement] cited above too broad in terms of lack of a defined area of work to be enforceable against individual properties?
>
> "2. Does the construction of a supplemental line as described . . . constitute repair and maintenance within the scope of the language cited above?"

Since the questions you have raised involve the construction or interpretation of the grants of easements, it is first appropriate to briefly review some general rules of construction of instruments conveying such interests in property. In 25 Am.Jur.2d, Easements and Licenses, §75, it is stated:

> "In determining the extent and reasonableness of use of an easement claimed under a grant or reservation, the ordinary rules of construction and interpretation of deeds, as applied in connection with the grant or reservation of an easement, have been frequently recognized, directly or by implication. So, it is held that in determining the extent and reasonableness of use, the grant or reservation is to be construed in the light of the situation of the property and the surrounding circumstances, for the purpose of ascertaining and giving effect to the intention of the parties." (Notes omitted.)

In a subsequent section of the same encyclopedic statement, it is stated that "[t]he general principles which govern the rights and obligations of parties to easements apply as well to subsurface rights of way as to those on the surface." 25 Am.Jur.2d, Easements and Licenses, §76. (Emphasis added; notes omitted.)

Your first concern is whether the language of the grant of easement is unenforceable for failure to define with specificity the area of work. You explain that the reason for the lack of specificity in the language of the sewer connection agreements is that the developer constructed the main sewer lines and principal lateral lines well in advance of approval of plats or the construction of residences. In our opinion, the lack of specificity does not make the easement unenforceable. It is clear that the right of way reserved is limited to that property "over, under and across which . . . sewer mains and laterals are constructed," and is further limited in that it may only be used "for the purpose of servicing, repairing and maintaining" said sewer mains and laterals. Further, as stated in the following, a general grant of easement is limited by the rule of "reasonable use."

> "Where the width of a way is not specifically defined in the grant or reservation, the width is such as is reasonably convenient and necessary for the purposes for which the way was created. In such a case, the determination of width becomes basically a matter of the construction of the instrument in the light of the facts and circumstances existing at its date and affecting the property, the intention of the parties being the object of the inquiry.
>
> . . . .

> "Ordinarily, . . . a grant or reservation of a right of way 'over' a particular area, strip or parcel of ground is not to be construed as providing for a way as broad as the ground referred to. A reference in the instrument to the purpose of the way is doubtless of aid in determining the width of the way, although the effect may be the same where the purpose appears other than by mention in the instrument." 25 Am.Jur.2d, Easements and Licenses, §§77, 78. (Emphasis added; notes omitted.) See also, Aladdin Petroleum Corp. v. Gold Crown Properties, Inc., 221 Kan. 579, 584-585 (1977).

You next inquire whether construction of a supplemental line to be affixed to the existing main sewer lines constitutes repair or maintenance within the meaning of the language of the grant of easement, quoted above. You argue that the word "maintain" has a broad definition and that the contemplated project fairly comes within that broad definition. According to Black's Law Dictionary, "maintain" is variously defined as

> "acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition; bear the expense of; carry on; commence; continue; furnish means for subsistence or existence of; hold; hold or keep in an existing state or condition; hold or preserve in any particular state or condition; keep; keep from change; keep from falling, declining, or ceasing; keep in existence or continuance; keep in force; keep in good repair; keep up; preserve; preserve from lapse, decline, failure, or cessation; provide for; rebuild; repair; replace; supply with means of support; supply with what is needed; support; sustain; uphold." Black's Law Dictionary (Revised Fourth Edition, 1968), p. 1105.

Obviously, the word "maintain" is susceptible of a broad variety of meanings, depending upon the context in which it is used. In Attorney General Opinion No. 80-79, we saw fit to construe the term in its broadest application in our interpretation of a statute pertaining to the operating and maintaining of county hospitals. We noted that

> "[t]he maintaining of a hospital includes more than the sweeping of floors and necessarily includes the repair and replacement of existing equipment. We see no reason why the advent of new equipment necessary for hospital operations would not fall within the term 'maintenance.' In Concordia-Arrow Flying Service Corp. v. City of Concordia, 131 Kan. 247 (1930), the Kansas Supreme Court was instructive in

> upholding the constitutionality of a municipal airport statute. . . . [T]he Court said:
>
> "'To operate an airport is to maintain it in a manner to effect accomplishment of results appropriate to the nature of the enterprise. To maintain an airport is to keep it in a state of efficiency for the furnishing of those facilities and the rendition of those services which air transportation and communications demand.' Id. at 250." Attorney General Opinion No. 80-79, pp. 2-3.

Further, we acknowledged that the definition of "maintain" is not always a broad one, but that the definition must be determined "on a case-by-case basis, in light of the context in which the term is used and the underlying . . . intent which that context conveys." Attorney General Opinion No. 80-79, p. 3.

You have noted that the city is constructing a parallel, supplemental sewer line to provide additional capacity in the system for the disposal of sewage. You suggest that if the city was abandoning the old or existing line and constructing a new, unrelated system, the city's reliance on the word "maintaining" in the easement in question would be unfounded. In this instance, however, it is clear that the city only seeks to maintain, by expanding its sewer capacity, the existing sewer system with the additional sewer line. We agree that the term "maintaining," as it is used in the easement in question, ought to be viewed in its broadest application, for the reasons you have stated, and we are persuaded that the city has authority to make the contemplated improvements or additions to the existing lines pursuant to the easement in question.

Our conclusion is reinforced in consideration of the general principle that the owner of the dominant tenement (the grantee) may make appropriate changes or alterations for the effective use and enjoyment of the easement, "[s]o long as the use of an easement is confined to the purposes under which it was acquired and created without increasing the burden on the servient estate." 28 C.J.S., Easements, §95b. Relying on that general principle, the Court of Appeals of Maryland ruled that a utility company's replacement of a 12-inch gas transmission line with a 16-inch line (which delivered more gas but which had a protective coating which the 12-inch pipe did not have) did not place an additional material burden on the owners of the servient estate. In Reid v. Washington Gas Light Company, 194 A.2d 636 (Md., 1963), the servient estate landowners argued that the terms of the grant of easement in

question in that case did not authorize the appellee utility company, the successor-in-interest to the grantee, to substitute the 16-inch pipe with the 12-inch pipe. The grant permitted the company "'the right to lay, maintain, operate and remove a pipeline for the transmission of gas.'" 194 A.2d at 637. The grant further permitted the grantee the option, within ten years from the date of the grant, to lay additional lines of pipe alongside the original line, at an additional cost, but neither the grantee nor its successor exercised the option.

The court stated:

> "The test to determine the right to make a particular alteration appears to be whether the change is so substantial as to result in the creation and substitution of a different servitude from that which previously existed . . . . In other words, if the alteration is merely one of quality and not substance there will be no resulting surcharge to the servient estate." 194 A.2d at 638.

Applying that test, the Maryland court declared that "the mere replacement of the existing pipe with a larger one in the same line did not entail more trenches . . . . [T]here is involved merely an alteration of the instrumentality of the easement . . . ." 194 A.2d at 639. Accordingly, the Court found in favor of the utility company, affirming the lower court's decision.

We submit that the factual situation upon which your questions are based is analogous. It is our opinion that the proposed Leawood project, involving the laying of a parallel, supplemental line alongside the existing main sewer line is not so substantial an alteration as to result in the creation of a new or different servitude, or to impose an increased burden, on the servient estate landowners. The disruption of the property during the pendency of the project would involve no greater burden for the laying of the parallel pipe than would the burden imposed for the replacement or repair of the existing line, as we understand the situation.

Thus, in summary, we conclude that where the area of work for the servicing, repairing and maintaining of a sewer line is not specifically defined in the grant of an easement, the area is such as is reasonably

convenient and necessary for the purposes for which the easement was created, and is not unenforceable for lack of specificity. Secondly, construction of a parallel, supplemental line to be affixed to existing main sewer lines constitutes "maintenance" within the meaning of the language of the grant of easement vested in the City of Leawood pursuant to sanitary sewer connection agreements entered into between Leawood landowners and the original developer.

Very truly yours,

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RTS:BJS:SC:pf