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ATTORNEY GENERAL OPINION NO. 81-282

The Honorable Fred Rosenau
State Representative, 39th District
3050 South 65th Street
Kansas City, Kansas 66106

Re: Counties and County Officers -- Public Improvements -- Sewer Districts; Territory Subject to Assessment

Synopsis: In determining which property within a sewer district is to be assessed for the costs of constructing district improvements, K.S.A. 1980 Supp. 19-2704a provides that public roads, public parks and public cemeteries shall be exempt, with these being the only exclusions. Under decisions of the Kansas Supreme Court, all other property within the district must be assessed equally, and the county commission is without the power to exclude areas from assessment which are unimproved or which currently do not utilize the sewers, or to agree not to assess such areas until they are developed. Cited herein: K.S.A. 1980 Supp. 19-2704a.

* * *

Dear Representative Rosenau:

As State Representative for the 39th district, which includes portions of Wyandotte and Johnson Counties, you request our opinion on a matter concerning a sewer district located in the northern part of Johnson County. Specifically, you raise several questions concerning the formation of Tooley Creek Sewer District No. 1, the way it was financed, and the way assessments are made to support it. This third inquiry goes both to the amount of territory which has been so assessed, and the effect of the assessment on particular tracts.

A brief description of the district's characteristics and history is appropriate prior to an examination of the specific points you raise. Located on the extreme north edge of Johnson County, the district is roughly in the shape of a dumb-bell, with the ends corresponding to the City of Lake Quivira (on the northwest) and developed portions of the City of Shawnee (on the southeast). The area in-between is not included within any incorporated city at the present time (being located between 51st and 55th streets), is rural in nature and is for the most part comprised of wooded hills. Together with that portion of the City of Shawnee included in the district, this latter area was included in the district as it was originally comprised in 1971. The City of Lake Quivira petitioned for inclusion in 1975 after having previously constructed its own sewer lines. As a result, Lake Quivira is included only in those portions of the district's assessments which go to those projects which benefit territory therein (i.e., treatment facility, pumping station, force main).

Additional information which should be noted includes the fact that the assessments made by the district employ two different methods. For that portion of the project which includes the gravity sewers laid in the original district area, an area equalization method was used whereby all land is assessed equally on a per acre basis. As Lake Quivira is not included in this portion of the project, the remainder of the district bears a cost of $646,771. For the remaining portions of the project, which include Lake Quivira, an assessed valuation method is used which reflects the use to which the property is put, as well as any improvements thereon. Costs for these portions include $896,591 for the treatment facility, and $358,540 for the pumping station and force main. It also should be noted that while substantial federal grants were available for the latter two portions of the project, they were apparently not available for the initial phase.

From your written opinion request and subsequent conversations with this office, your inquiries may be listed as follows:

1) Was land improperly excluded from the district's assessment base when Lake Quivira was added to the district?

2) Has land been improperly excluded from the district, in that two parcels entirely surrounded by the district are not within the district for assessment purposes?

3) Was the assessment method used by the district in the first section of the project (i.e. area equalization) improper as being unreasonable, discriminatory and grossly disproportionate to the benefits received by certain parcels?

While we have examined materials which deal with all three of these points, our opinion which follows deals with only the first query. This is due to an inherent limitation which the opinions of this office carry, i.e., they can deal only with questions of law, and may not determine issues of fact. Such determinations are solely within the province of the courts (or of agencies empowered with quasi-judicial authority). Behrman v. Public Employees Relations Board, 225 Kan. 435 (1979). We are accordingly precluded from rendering an opinion on the second and third portions of your inquiry, as they hinge on issues of reasonableness or arbitrariness which are unresolved. See, e.g., Hurley v. Board of County Commissioners, 188 Kan. 60 (1961) (grossly unfair assessment of farmland on area basis), Snyder Realty v. City of Overland Park, 208 Kan. 273 (1971) (exclusion of isolated tracts from benefit district), Mullins v. City of El Dorado, 200 Kan. 336 (1968) (challenge to assessment made on frontage basis).

As to the first issue, however, there are no such unresolved questions. A copy of the Amended Minutes of the Johnson County Commissioners (sitting as the governing body of Tooley Creek Main Sewer District No. 1), dated March 11, 1975, indicates the method under which the district was enlarged to include Lake Quivira. In addition to findings that a petition containing the requisite number of signatures had been filed and that the proposed inclusion would be practical, proper and in conformity with the district plan, the Board also found that

> "WHEREAS, said petition states that there are located within said enlargement and creation, extensive recreational areas where no sanitary sewer services would be utilized and that for the purpose of assessments to be levied by the main and lateral sewer districts, those portions designated as recreational areas be excluded from assessments with the express understanding that if sanitary sewer services are requested in the future by the then owners of any portion of said recreational areas, such areas will immediately become subject to assessments by the main and lateral sewer districts."

In its resolution on the question of annexation, the Board accepted the recommended exclusion of the "recreational areas" which were referred to in its findings. These areas, totaling 14 tracts in all, were specifically described in an Exhibit A which was attached to the resolution. As per the terms of

the resolution, such areas were not to be assessed for sewer district charges until such time as they were requested by the then-owners. We are informed that the territory exempted involved property owned by a private, not-for-profit corporation, Quivira, Inc., and included a golf course, a lake and several horse trails and barns.

In our opinion, the above-exclusion of the enumerated recreational areas was beyond the power of the Board of County Commissioners. We base this conclusion on both statutory and case law authority. In examining the statutes under which this district was organized, we find no authorization for this type of exclusion. While K.S.A. 1980 Supp. 19-2704a does contain language creating certain exemptions from assessments, these extend only to "public roads, public parks, and public cemeteries," and so do not speak to the private recreational lands involved here. Again, while the statute also speaks to the removal of land from the effects of any special assessment, this event occurs only when the land is to be platted and streets and roads dedicated for public use, with only the latter capable of being removed. No express power to exempt recreational land is given, nor do we believe, in light of the following case authorities, that such a power can be present by implication.

In examining the underlying concept on which special assessments are levied, the Supreme Court stated in Mullins v. City of El Dorado, supra:

> "The foundation of the power to make a special assessment for a local improvement of any character, including the construction of a sanitary sewer system, is that the property against which the assessment is levied derives some special benefit from the improvement. A special assessment, therefore, is in the nature of a tax levied against property according to the benefits conferred. While the property is made to bear the cost of the improvement, it or its owner suffers no pecuniary loss thereby since, theoretically at least, the property is increased in value by an amount equal to the tax levied against it." 200 Kan. at 341.

The court held further that:

> "It is a matter of common knowledge that a sewer system ordinarily enhances the value of

> the property it is designed to serve. Additionally, in many instances the installation of a sewer greatens the opportunity for development of the property into a higher and better use. While present use may properly be considered in determining benefits, it is not controlling. The property must be considered in its general relation to other properties in the assessment district regardless of present use. The benefit from the improvement is presumed to inure to the property itself rather than to the particular use being made of it at the time. (48 Am.Jur., Special of Local Assessments §23.) Thus, the test is not whether the property is enhanced in value for the particular purpose to which it is devoted at the time of assessment but whether it is enhanced in value for any purpose." (Citation omitted.) (Emphasis added.) 200 Kan. at 345.

The Court applied the principle set forth in Mullins in a rather extreme case in State ex rel. v. City of Topeka, 201 Kan. 729 (1968), where the land used by the state of Kansas for its Reception and Diagnostic Center was held amenable to an assessment for a neighborhood park. The present occupants of the assessed property, accused and convicted felons, clearly would derive little benefit from the presence of a park nearby, and the remoteness of any other use of the property in the foreseeable future was stipulated. These factors were held to be irrelevant; the ground itself was "benefited" by the creation of the park, and this was sufficient to justify an assessment against it.

Also of interest is the case of Board of Education of U.S.D. No. 345 v. City of Topeka, 214 Kan. 811 (1974). There, the school district objected to the inclusion of a 28-acre tract used for school purposes within a lateral sanitary sewer district. Discussing the school district's arguments that the land as presently used could not benefit from the sewer, the court cited Mullins and held that as the land could at some future date be used for residential, motel or commercial use, it should be assessed along with other property in the district. Once again, present use was held irrelevant, given that the land could conceivably be developed in the future.

Yet another applicable decision is that of Snyder Realty Co. v. City of Overland Park, 208 Kan. 273 (1971). There, an apartment complex was assessed for improvements done to streets which were all at least 1/2 mile away. However, a country

club which did front on the streets was not assessed, a fact which led the court to find the levy improper, as being an arbitrary action on the city's part. The court held that if the apartment complex was benefitted, the country club must of necessity also be benefitted, with the existing uses of the two tracts being irrelevant. 208 Kan. at 278.

Given such holdings, it would appear, as a matter of law, that the exclusion of the recreational property within the City of Lake Quivira was improper. Absent a showing that the property could never be developed so as to require the sewer lines, the line of cases cited above requires the property to be included in those portions of the assessment which the rest of Lake Quivira must bear. As the court noted in Johnson County Commissioners v. Robb, 161 Kan. 683 (1946):

> "If [present use] were a test, the owner of real estate which had not been improved, and which had no present need for a sewer connection, would pay nothing. Benefits from installation of a sewer system arise not only from use, but from availability for use. The construction of a sewer benefits real property, just as does paving of streets and the laying of water mains. The property is more valuable because the improvements are made.
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> "We are not aware of any statute which provides that assessments to pay for sewer installation depend on amount of use, or that an assessment is invalid prior to the time the sewer is actually used." 161 Kan. at 694.

In conclusion, in determining which property within a sewer district is to be assessed for the costs of constructing district improvements, K.S.A. 1980 Supp. 19-2704a provides that public roads, public parks and public cemeteries shall be exempt, with these being the only exclusions. Under decisions of the Kansas Supreme Court, all other property within the district must be assessed equally, and the county commission is without the power to exclude areas from assessment which are unimproved or which currently do not utilize the sewers, or to agree not to assess such areas until they are developed.

Very truly yours,

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