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ATTORNEY GENERAL OPINION NO. 89- 120

Mr. David L. Hiebert  
Counsel for Oaklawn Improvement District  
Century Plaza Bldg., Suite 920  
111 W. Douglas  
Wichita, Kansas 67202-3922

Re: Counties and County Officers -- Public  
Improvements; Improvement and Services Districts --  
Improvement Districts; Powers

Synopsis: An improvement district incorporated pursuant to  
K.S.A. 19-2753 et seq. may plan and construct  
or purchase public improvements. Pursuant to  
K.S.A. 19-2765(4), (8) and (15), an improvement  
district may expend funds for maintenance of sewage  
disposal systems, improvement district roads or  
improvements that were planned and constructed or  
purchased by the improvement district. Cited  
herein: K.S.A. 19-2753; 19-2755; 19-2765;  
19-2765a; 68-159; 68-160; 80-1605.

\* \* \*

Dear Mr. Hiebert:

As counsel for the Oaklawn Improvement District you request our opinion concerning whether the improvement district may pay for fire hydrant maintenance or street lighting. You state that Oaklawn Improvement District is currently operating solely as a sewer improvement district and was incorporated pursuant to K.S.A. 19-2753 et seq. You specifically ask that we address these questions:

"1. Is it permissible for an improvement district which supplies sewer services to its residents under the facts hereinabove set out, to also provide and pay for street lighting and fire hydrant maintenance?

2. Is it the responsibility of the local township to provide street lighting and fire hydrant maintenance when said residents are not living within an incorporated city, and even though said residents reside in an incorporated improvement district?"

K.S.A. 19-2753 et seq. authorizes the establishment of improvement districts. When deciding whether to create such a district, certain factors are considered such as "the present cost and adequacy of governmental services [and] . . . the need for public improvements in the proposed district. . . ." K.S.A. 19-2755(b)(7) and (8). The need for sewer services apparently led to the organization of Oaklawn Improvement District.

The powers of an improvement district have been previously examined by this office. See Attorney General Opinions No. 88-141 and 83-56 (an improvement district does not have zoning authority); 83-162 (an improvement district cannot enforce a restrictive covenant); 83-40 (an improvement district cannot prohibit nonresidents from using district roads); 81-279 (improvement district inhabitants cannot be required to connect to the sewer system provided by the district); 80-211 (general funds, not special assessments, should be levied in order to pay for the repair and maintenance of improvement district roads, but see K.S.A. 19-2765(a)(8)); and 79-303 (improvement districts have no authority to enter into cable franchise agreements). See also Lakeside Improvement District v. Jefferson County, 237 Kan. 106 (1985). These opinions follow the well established rule that municipal corporations possess only those powers specifically granted by statute or necessarily implied in order to perform the duties of the municipality.

K.S.A. 19-2765 sets forth the general powers and duties of improvement districts created pursuant to K.S.A. 19-2753 et seq. and states in pertinent part that:

"(a) every improvement district incorporated under the terms of this act shall have the power to:

. . . . .

(4) Plan and construct or to purchase public works and improvements necessary for public health, recreation, convenience or welfare within the limits of the improvement district. Also to construct or purchase works outside the limits of the district which may be necessary to secure outlets, disposal, etc., and permit satisfactory performance of the works within the district.

. . . . .

(8) Levy assessments and special taxes, if deemed expedient by the directors, upon all of the real estate in the district that may be benefited by special works and improvements including the improvement and maintenance of roads in the district, which will be conducive to the public health, convenience or welfare.

. . . . .

(15) Do all other acts that may be necessary to carry out and execute the general powers hereinbefore or hereinafter granted, although not hereinbefore specifically enumerated." (Emphasis added).

All improvement districts incorporated pursuant to K.S.A. 19-2753 et seq. possess the powers enumerated under K.S.A. 19-2765 unless otherwise limited by law. While K.S.A. 19-2765 does not specifically discuss fire hydrants or street lights, it permits an improvement district to construct or purchase public improvements which will "be conducive to the public health, convenience or welfare." A "public improvement" is generally understood to mean any permanent improvement upon real property which is owned by a municipality. Western Lion Ltd. v. City of Manhattan, 462 N.E.2d 891 (Ill. 1984). Utility systems, including water mains, are generally

considered public improvements. Cardellini v. Casey, 181 C.A.3d 389 (Cal. 1987). Improvements are defined generally as

"buildings, but may also include any permanent structure or other development, such as a street, sidewalks, sewers, utilities, etc. An expenditure to extend the useful life of an asset or to improve its performance over that of the original asset. Such expenditures are capitalized as part of the asset's cost." Blacks Law Dictionary 682 (5th ed. 1979).

Erection and maintenance of waterworks and electric lights constitutes a "public improvement." Bank of Commerce v. Huddleston, 291 SW 422 (1927).

K.S.A. 19-2765(a)(8) permits funds to be expended on maintenance of roads. If street lights on improvement district roads will be conducive to public health, convenience or welfare, maintain improvement district roads, and help prevent crime or promote public safety, K.S.A. 68-159 and K.S.A. 19-2765 permit an improvement district to provide safety lights on improvement district roads.

You also question the appropriateness of using improvement district funds for maintenance of fire hydrants within an improvement district. Maintenance of fire hydrants affects fire protection services, but may also relate to water supply within an area. If organized and operating pursuant to K.S.A. 19-2753 et seq. an improvement district may exercise the powers contained therein. K.S.A. 19-2765(a)(8) specifically discusses and authorizes maintenance of improvement district roads. K.S.A. 19-2765a specifically approves using certain funds for maintenance of the district's sewage disposal system. These appear to be the only sections discussing maintenance of an improvement. However, K.S.A. 19-2765(a)(4) permits improvement districts to plan and construct or purchase public improvements. K.S.A. 19-2765(a)(15) permits the district to "do all acts that may be necessary to carry out and execute the powers hereinbefore specifically enumerated." In order to provide a public improvement that has been constructed or purchased by an improvement district, maintenance becomes necessary. [See Oswald v. City of Blue Springs, 635 S.W.2d 332 (Mo. 1982) (where a municipality has the authority to construct a water treatment plant it may provide for the costs of maintaining such a public

improvement)]. There is no indication that the legislature intended to permit an improvement district the authority to construct or purchase public improvements but then required the improvement district to ignore maintenance of such improvements. It is therefore our opinion that an improvement district may provide for maintenance of public improvements (in addition to roads or sewer systems) if those improvements were validly planned and constructed or purchased by the improvement district.

Your second question concerns whether a township has the duty or authority to provide street lights and fire hydrants within improvement district territory. K.S.A. 68-159, 68-160 and 80-1605 permit townships to take certain actions with regard to lights and fire hydrants and to levy for those purposes. However, as discussed in Attorney General Opinion No. 89-78, statutory authority to levy a tax is not mandatory where funds are not owing or needed. See also 71 Am.Jur.2d State and Local Taxation, § 91 (1973); 84 C.J.S. Taxation, § 361 (1954). Kansas case law evidences acceptance of the general rule that the authority to provide a public service or improvement does not necessarily obligate the municipality to provide such services or improvements. See Davies v. City of Lawrence, 218 Kan. 551 (1976); Board of Education of Unified School and District No. 345, Shawnee County v. Topeka, 214 Kan. 811 (1974); Bock v. Stack, 132 Kan. 533 (1931). Rather, absent an imposition of a specific mandatory duty, the decision whether to provide a particular service or improvement is discretionary. See Huser v. Duck Creek Watershed District No. 59, 234 Kan. 1 (1983); Gronniger v. Board of County Commissioners, Doniphan County, 6 Kan.App.2d, 642 (1981); Paul v. Topeka Township Sewage District, 199 Kan. 394 (1967); Hill v. City of Lawrence, 2 Kan.App.2d 457 (1978). A township may provide authorized improvements or services within an improvement district if, in its discretion, such improvements or services are deemed necessary.

Creation of a new public entity may impact upon another pre-existing public corporation. The legislature has the power to vacate existing townsites either expressly or by clear implication. City v. Eudora v. French, 204 Kan. 258 (1969). For example, K.S.A. 80-1541 provides that upon annexation by a city, property within a fire district is removed from the district. We are unaware of any statute, common law, or general rule divesting a township of all jurisdiction or authority within improvement district boundaries, nor have we located authority declaring an area

within an improvement district to be excluded from an existing township. Authority granted to townships under K.S.A. 68-159 and 80-1605 permit townships to provide for lights or fire hydrants within townships. The fact that the township includes an improvement district within its boundaries does not prohibit the township from proper exercise of its discretionary powers. It is therefore our opinion that a township may discretionarily choose to provide safety lights or fire hydrants pursuant to K.S.A. 68-159, 68-160 and 80-1605.

Very truly yours,



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