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ATTORNEY GENERAL OPINION NO. 90- 69

Mr. Charles F. Bennett
Neosho County Attorney
222 W. Main
Chanute, Kansas 66720

Re: Drainage and Levees--Levees--Powers of County
Commissioners

Synopsis: A levee district organized pursuant to K.S.A. 24-801 et seq. has the implied power of dissolution using the same standard for its creation; pursuant to statute, only the board of county commissioners is authorized to affect the levee district's existence; it is within the board's discretion to allow reimbursements to landowners who repaired the levee; short of charging fraud against the county, a landowner cannot withdraw from a levee district because he feels he is not benefiting; meetings of a levee district are subject to the Kansas open meetings act requiring the county board to provide notice of meetings to anyone requesting it. Cited herein: K.S.A. 24-801 et seq.

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Dear Mr. Bennett:

As Neosho county attorney you make several inquiries regarding the dissolution of the Davis levee district. As background, you indicate that Neosho county is the only county within the state that has a levee district created pursuant to K.S.A. 24-801 et seq. The Neosho county

commissioners established the district in 1902. The levee was recently repaired; the costs exceeded \$30,000 and prompted this opinion request.

Your first question is whether the levee district can be dissolved and how. A levee district, being a creature of statute, derives its powers from the statutes under which the district was created. Atchison, T. & S.F. Rly. Co. v. Drainage District, 133 K. 587 (1931) (the law applicable to the dissolution of a drainage district is the one under which it was organized). The Davis levee district was created pursuant to K.S.A. 24-801 et seq. which authorize the board of county commissioners (board) to construct a levee (K.S.A. 24-801), exercise eminent domain (K.S.A. 24-802), accept bids and contract (K.S.A. 24-809), assess costs (K.S.A. 24-810), hire a supervisor to order repairs (K.S.A. 24-811), and make reasonable orders necessary to the protection and maintenance of such levee (K.S.A. 24-813). The act even provides the authority to construct a levee and have it constitute a drainage district (K.S.A. 24-816) or have it constitute a levee drainage district (K.S.A. 24-819). While clearly the board has specific powers to create and maintain the levee district, the statutes do not specifically address dissolution of the district.

The board's powers regarding the levee district are limited to those expressly granted by statute and those necessarily implied or incidental to the powers expressly granted. Shoner v. Jefferson County, 94 Kan. 220 (1915) citing Brown v. The State, 73 Kan. 69 (1906), 28 C.J.S. Drains 12 (1941). Thus the issue is whether the power to dissolve the levee district is a power necessarily implied or incidental to the power to create the district. The Davis levee district was organized by the board of county commissioners who pursuant to K.S.A. 24-801 determined that the organization of a levee district was a benefit or promoted the public health. If the levee district is no longer a benefit or no longer promotes the public health, convenience or welfare, a reasonable view of the statutory powers compels us to conclude that the county board has the implied power to dissolve the district. Accordingly, it is our opinion that the statutory benefit standard used to create the district can be used to dissolve the district pursuant to K.S.A. 24-801, dissolution being necessarily implied in the power to create. See Gilbert v. Graddock, 67 Kan. 346 (1903); Atchison, T. & S.F. Rly. Co. v. Drainage District, 133 Kan. 586, 591 (1931).

The second part of your first question is what procedure is to be used to dissolve the district. The powers both granted and implied by K.S.A. 24-801 et seq. lie with the board of county commissioners. For this reason it is our opinion that subject to the provisions of K.S.A. 19-201 et seq. (powers of county commissioners) the dissolution of the district can be accomplished in the normal course of business by adopting a resolution to that effect.

We note that the questions regarding whether and how the physical structures should be demolished are not legal in nature and should more appropriately be addressed to the Kansas Water Resources Division of the Department of Agriculture. See K.S.A. 24-126.

Your second question is whether the county will be liable for the damages caused by flooding if the levee district is dissolved. Dissolution of the district can only be effected by a determination that the reasons for flood-control measures no longer exist. Thus dissolution of the district pursuant to K.S.A. 24-801 (that the levee district is no longer a benefit or promotes public health, convenience or welfare) presumes no flooding will occur. The liability of a governmental subdivision such as a levee district in connection with flood control measures is controlled by two legal principles: 1) that no private property may be taken or damaged for public use without just compensation to the owner; 2) that a person who negligently causes some injury to another's property is accountable for the resulting damages. Therefore without further facts we cannot address the question of general liability for damages caused by flooding.

Your third question involves several landowners in the district that allege an informal meeting dissolved the levee district. You indicate neither the county commissioners nor the levee supervisor were present and you inquire whether the meeting affected the district's existence. The levee district, as a creature of statute, is affected only pursuant to authority conferred thereby. The statutes confer the authority to affect the existence of the district on the board. Thus it is our opinion that the alleged informal meeting among the landowners did not affect the levee district's existence.

Your fourth question involves reimbursement for repairs. You inquire whether there is any procedure for reimbursement of costs to district landowners who have repaired sections of the levees on their land at their expense prior to there being an

active levee supervisor. There is no specific provision for reimbursement in K.S.A. 24-801 et seq. The issue of repairs to levees is entrusted to the levee supervisor who has the authority to order repairs and then present the bill to the board for allowance. K.S.A. 24-811 and 24-812. There is however wide discretion provided to the board under K.S.A. 24-813 that authorizes the board to make and enforce all reasonable orders necessary for the protection and maintenance of the levees. Thus in our opinion, while no specific statute authorizes reimbursements for repairs to levees made by landowners, the board has the discretion under K.S.A. 24-812 to order such allowances.

Your fifth question is whether a landowner in the district can be allowed to withdraw from the levee district if he does not feel he is benefiting. The legal issue however, is not whether the landowner can withdraw but rather whether as a matter of law the landowner's property cannot by any possibility be benefited by any improvements made by the levee district and for which assessments could be levied. The Kansas Supreme Court has found that benefit to landowners is presumed unless there is charge of fraudulent or oppressive conduct being made. Roby v. Drainage District, 77 Kan. 754 (1908); Atchison, T. & S.F. Rly. Co., v. Drainage District supra, 133 Kan. at 588 (1931). Thus it is our opinion short of fraud, a landowner cannot withdraw from a levee district because he feels he is not benefiting. See K.S.A. 24-810 (assessments made on the basis of benefit).

Your last question involves the open meetings act. You inquire whether all interested parties need to be notified of all meetings? The Kansas open meetings act, (KOMA) K.S.A. 75-4317 et seq. provides "all meetings for the conduct of the affairs of and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissioners, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ball, . . ." K.S.A. 75-4318. Meetings of the Davis levee district are subject to KOMA because they meet the two requirements: 1) the body is a political or taxing subdivisions (K.S.A. 19-101 making the county a body corporate and politic and 2) receives public funds (K.S.A. 24-810, authority to tax). Accordingly we opine that notice of a meeting must be provided to those requesting notification. See K.S.A. 75-4318(b) . See also

Attorney General Opinions No. 81-15, 81-22 (oral request is valid); Attorney General Opinion No. 83-173 (notice can be written or oral; posting or publication in newspaper is insufficient; a single notice suffices for regularly scheduled meetings); Attorney General Opinion No. 88-97 (applicability of KOMA to rural water districts).

In conclusion, regarding your questions about the Davis levee district, we opine: a levee district organized pursuant to K.S.A. 24-801 et seq. has the implied power of dissolution using the same standard used for its creation; pursuant to statute only the board of county commissioners is authorized to affect the levee district's existence; it is within the county board's discretion to allow reimbursements to landowners who repaired the levee; short of fraud, a landowner cannot withdraw from a levee district because he feels he is not benefiting; the levee district is subject to the Kansas open meetings act which requires the county board provide notice of meetings to anyone requesting it.

Very truly yours,



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