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ATTORNEY GENERAL OPINION NO. 90- 75

Vernon L. Steerman
Osborne County Attorney
Courthouse, 2nd Floor
Osborne, Kansas 67473

Re: Counties and County Officers -- Fire Protection;
Districts in Any County -- Organization of Fire
Districts; Governing Body of Fire District; Powers;
Exclusion of Territory from Fire District;
Extraterritorial Services; Fees

Synopsis: It is our opinion that K.S.A. 19-3604 does not create a right to or dictate detachment from a fire district, but rather, the statute permits the board of county commissioners to discretionarily adopt a resolution detaching land. Fire protection services to property located outside the boundaries of a fire district is not statutorily required and cannot be provided absent express or necessarily implied authority. Fees charged pursuant to an implied contract for requested fire protection responses or services to extraterritorial property may be based upon the actual cost of providing requested responses or services and, in specific instances, such costs may be equal to the taxes that would have been paid had the property been included in the fire district. Cited herein: K.S.A. 19-3601; 19-3601a; 19-3601b; 19-3602; 19-3603; 19-3604; 19-3609; 19-3612.

* * *

Dear Mr. Steerman:

As Osborne county attorney you request our opinion concerning the provision of services to property owners excluded from the boundaries of a fire district and charging of fees therefore. You ask for our opinion in light of landowners' petitions requesting exclusion from an existing fire district, and the expectation that such landowners will nevertheless request provision of fire protection services without the burden of paying taxes for such services. You specifically ask that we address the following:

"1. Are Board's of Commission vested with absolute discretion in determining whether or not they will 'adopt and publish a resolution' in response to perfected petitions for detachment by owners of land situated within organized FDs?

2. If Board opts to exclude petitioning landowners from organized FD what statutory duty, if any, does FD have for responding to and providing fire fighting services which are requested by detached landowners?

3. If a FD does respond and provides fire fighting assistance to requesting detached by petitioned landowner, is FD entitled to charge a fee for responding and to charge for services rendered and if unpaid, to enforce collection by litigation?

4. If a FD is entitled to charge a response fee and services rendered charge would the following proposed methodology for establishing such fee and services charge be reasonable and enforceable if promulgated by Resolution?

a. FD during calendar year 1990 responds one or more times to detached's request for fire fighting assistance and 89 tax year mill levy for FD is 3.5 mills and FD charges a response fee and service charge premised on the basis of total taxes the detached landowner would have paid if not detached. *

b. FD during calendar year 199[1] responds one or more times to detached's request and the total 89 and 90 mill levy is 7 mills and FD charges response fee and service charge equating to total taxes detached landowner would have paid if not detached.

c. FD during calendar year 1992 responds one or more times to detached request and total 89, 90 and 91 is 10.5 mills and Fire District charges a response fee and service charge premised on the basis of total taxes the landowner would have paid if not detached.

d. FD response fee and service charges are capped during calendar year 1993 and thereafter at C rate, supra.

* Under this proposed methodology, the Response fee would be as proposed in A-D, respectively, regardless of whether or not fire fighting services were required to be provided by responding FD. Correspondingly, the proposed combined response fees and firefighting services charges in any one calendar year as to each excluded landowner would not exceed proposed methodology as set forth in a through d, inclusively."

Alteration of an existing fire district's boundaries must occur pursuant to K.S.A. 19-3604:

"(b) Subject to the provisions of K.S.A. 1986 Supp. 19-270 [concerning creation or enlargement of a special benefit district], the territory of any organized fire district may be subsequently altered by the inclusion of new lands or by the exclusion of lands therein upon a petition to the board of county commissioners signed by the owners of at least 10% of the area of the lands sought to be included or excluded, which petition shall conform, as near as may be possible, to the petition required for the organization of a fire district. If the board of county commissioners finds the petition is sufficient, the board may adopt and publish a resolution attaching or detaching the lands described in the petition to or from the district. The resolution shall be published.

"If within 30 days after the last publication of the resolution and map, a petition protesting the inclusion or detachment of such lands, signed by the owners, whether residents of the county or

not, of more than 19% of the area of the lands sought to be included in or excluded from the fire district is filed with the county clerk, the resolution shall have no force or effect. If such a protest petition shall not be filed within such time, the resolution shall become final, and the lands shall thereupon be deemed attached to or detached from the fire district. In any case where lands are included in or excluded from a fire district as provided herein, the board shall declare the new boundary of the district by the adoption and publication of a resolution in like manner as the boundaries were declared at the time of the original organization thereof."
(Emphasis added).

K.S.A. 19-3604 does not state that the board shall adopt the resolution detaching the land described in the petition, rather, the statute uses the term may. We must determine whether K.S.A. 19-3604 requires the board of county commissioners to adopt a sufficient petition requesting detachment of lands described in the petition. No absolute test exists to determine whether a statute is directory or mandatory. Wilcox v. Billings, 200 Kan. 654 (1968); Griffen v. Rogers, 232 Kan. 168 (1982). The use of the word "may" in a statute generally indicates that the decision is committed to the discretion of the party authorized to take the action. Matzke v. Block, 542 F.Supp. 1107 (D.C. Kan. 1982); West Distributing Company v. Public Service Commission, 58 F.2d 239 (D.C. Kan. 1932); State v. School District 1, Edwards County, 80 Kan. 667 (1909). When construing a statute, "may" means "must" only where the public interest and rights are concerned. Gleason v. Board of County Commissioners of Sedgwick County, 92 Kan. 632 (1914). In a situation where a landowner petitions for detachment from an existing fire district, an individual's interests are involved and not the interests of the public as a whole. There is no obvious statutory intent to require detachment. Rather, it appears that the use of term "may" indicates a permissive discretionary authority. It is our opinion that K.S.A. 19-3604 does not create a right to detachment, but rather, allows a board of county commissioners to discretionarily permit detachment based upon a proper petition. Challenging a decision not to permit detachment

would involve questions concerning abuse of discretion principles.

The remaining issues concern the authority or duty of a fire district to provide or charge for services rendered by a fire district to owners of property previously detached from the fire district. We must determine whether K.S.A. 19-3601 et seq. require or authorize the board to approve provision of services to property located outside a fire district, and if so, whether the district may properly charge fees for such services. As discussed in K.S.A. 19-3601, the board of county commissioners constitutes the governing body of each fire district within the county. When acting as the board of a fire district, a board of county commissioners is only possessed with the authority granted to the fire district. See Attorney General Opinion No. 80-89. The board of a fire district is not vested with the same authority as the board of county commissioners, even in situations wherein the same individuals serve on both boards. In managing the fire district, the board may only do those things which the statutes permit or that which is necessarily implied from the statutory grant of authority to fire districts.

K.S.A. 19-3601a sets forth the powers of the governing body of a fire district:

"Upon the creation of a fire district under the provisions of K.S.A. 19-3601 et seq., the governing body shall have the authority to enter into contracts, to acquire, operate and maintain fire fighting equipment, to acquire and construct buildings to house the same, to buy, sell and dispose of real property, and to do all things necessary to effectuate the purposes of this act. Any such district, when organized, shall have the right of eminent domain." (Emphasis added). (Note: K.S.A. 19-3601b provides authority to issue bonds and K.S.A. 19-3608a, 19-3609 and 19-3612 discuss the ability of a fire district to enter into specific contracts with other fire districts, cities or counties.)

We find no statutory discussion in K.S.A. 19-3601 et seq. addressing the provision of services to private entities or individuals owning property outside the boundaries

of a fire district. The statutes do not expressly require, permit, or prohibit such a practice. Thus, we must determine whether implied authority permits a fire district to provide fire protection services to property located outside the boundaries of the district.

Generally, a fire department cannot extraterritorially provide a governmental function or service without express statutory or charter authorization. 16A McQuillin, Municipal Corporations, § 45.05a (3d ed. 1984). "There may be implied municipal power, however, to respond to occasional outside alarms, when in the discretion of the council such action subserves the municipal welfare." Id. "The rule still prevails in many jurisdictions that a municipal corporation authorized to own and operate a public service utility has no power, in the absence of statutory authority, to furnish services beyond its corporate limits. But there are other jurisdictions in which courts support the contrary view." 56 Am.Jur.2d Municipal Corporations, § 568 (1973). Jefferson County Fiscal Court v. Jefferson County, 129 S.W.2d 554 (Ky. 1939), held a contract void in which a municipality agreed to transmit and extend its fire fighting facilities and services beyond corporate limits to any point in the county where any public property was located. However, statutes may authorize and permit fire departments to go to the aid of other municipalities outside their own territory. 16A McQuillan, Municipal Corporations, § 45.05a (3d ed. 1984). Where a more liberal view of municipal powers is recognized, and surplus product or service may be provided to persons residing outside the municipality, such action must nevertheless be for a public purpose. See Attorney General Opinions No. 81-41 and 76-302; a municipality may not gratuitously donate or use public funds or property. Some public benefit must accrue to the public entity and the actions taken must be within the scope of authority granted to that public entity. See 64 C.J.S. Municipal Corporations, § 1835 (1950).

The language contained in K.S.A. 19-3601a expressly permits a fire district to enter into contracts and to do all things necessary to effectuate the purposes of this act. Thus, a fire district may enter into express contracts, as approved pursuant to statutory authority, and take actions necessary to effectuate the purposes of the act. Implied authority may permit certain extraterritorial contracts or provision of services. However, a fire district is not required by law to provide extraterritorial services. Rather, such services may

only be provided when statutorily approved or in instances which promote the purposes of the fire district.

The purpose of creating a fire district is to provide fire protection to the property within the boundaries of the fire district. Thus, all activities engaged in by a fire district must promote such a purpose. The provision of services to property located outside the boundaries of a fire district should be limited to situations involving protection of property within the district. For example, although outside a fire district's boundaries, assistance in fighting a fire occurring on property which is adjacent to fire district property may in some instances protect property located within the fire district and could therefore effectuate the purposes for which the fire district was created. However, the provision of fire protection response or service to property located outside the boundaries of a fire district is not required and may not be rendered in all circumstances.

The final issue is whether fees may be charged for services properly provided to extraterritorial property. The fee schedule you propose attempts to approximate or recoup the levels of funding that would have resulted from taxes had the property been included within the boundaries of the fire district. This appears to be an effort to impose equal financial burdens upon persons benefiting from the services offered by a fire district irrespective of whether their property is included within the boundaries of a fire district. However, absent an express contractual relationship or statutory authority permitting a public entity to charge for public services, such charges must arise from an implied contract.

Performance of an act which was already promised or is required by law does not ordinarily constitute sufficient consideration to give rise to a contract. 17 Am.Jur.2d Contracts, § 119 (1964). Unless a legal duty exists which requires performance of a service, a promise to pay for performance of a requested service may be raised by implication. Id. at § 126. As previously discussed, a fire district may not provide fire protection services extraterritorially without express or implied authority. Absent an express contract, there is no absolute specific legal duty requiring a fire district to provide extraterritorial protection. Rather, provision of extraterritorial fire protection is a discretionary service which the law does not require, but which may be provided only in specific instances. Thus, persons who reside outside a

fire district may request fire protection services, but must rely upon the discretionary decision of the fire district concerning such services. The fire district is authorized to provide extraterritorial services only when such fire protection service promotes a purpose within the scope of authority granted to the fire district. If the person requesting fire protection wants to ensure a response that the law does not require but which is authorized, the promise to pay for such services or the previously conveyed intent to charge for such requested fire protection services may aid in formation of a legally binding contract.

Absent an express agreement concerning the payment of fees for requested services not otherwise legally owed, the extent of liability implied by law will generally be established pursuant to the equitable doctrine of quantum meruit:

"An equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under those circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract therefor. Essential elements of recovery under quantum meruit are: (1) valuable services were rendered or materials furnished, (2) for person sought to be charged, (3) which services and materials were accepted by person sought to be charged, used and enjoyed by him, and (4) under such circumstances as reasonably notified person sought to be charged that plaintiff, in performing such services, was expected to be paid by person sought to be charged." Blacks Law Dictionary 1119 (5th ed. 1979).


Under the doctrine of quantum meruit, an extraterritorial landowner who requests and receives fire protection response service from a fire district may be charged a reasonable amount for the furnished services. In arriving at the cost of such services, it is appropriate to consider or include those amounts expended in order to provide fire protection. These costs may include moneys expended to maintain the availability of such services. You note that the fee schedule contemplates charging the same for responses or actual fire fighting protection, despite the fact that services may not be required

or utilized. Thus, the fee schedule may be argued to reflect costs in addition to those actually incurred as a result of a specific response or service. However, we believe that a fair argument exists that the cost of responding to a call and for actually providing fire protection services are the same and include the costs of establishing and maintaining a fire district. These costs are paid for from the tax levy permitted for maintenance of a fire district. Without such a levy, there could be no response or fire protection service. The tax levy presumably provides sufficient funds to operate within the boundaries of the fire district. When services are properly provided to property outside the boundaries of the fire district the cost to provide such services may increase in direct relation to the tax levy paid by property owners within the district boundaries. Thus, in our opinion, fees charged pursuant to an implied contract for requested fire protection services, when services are not otherwise mandated by law, may be based upon the cost of providing such requested services. Such fees may be established in amounts equal to the taxes that would have been paid had the property been included in the fire district if that amount reflects the cost of the service actually provided.

As a practical matter we suggest that the board should only respond to private requests for fire protection services when such a response or service protects the property within the district. Moreover, the landowners who seek detachment from an existing fire district should be informed prior to detachment that responses or services will be limited to circumstances involving protection of fire district property and, if such services are discretionarily provided, landowners should be informed in advance of, and if possible, expressly agree to the fees established for that service.

Very truly yours,


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