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ATTORNEY GENERAL OPINION NO. 90- 113

The Honorable Nancy Brown
State Representative, 27th District
15429 Overbrook Lane
Stanley, Kansas 66224-9744

Re: Roads and Bridges; Roads -- County and Township
Roads; General Provisions -- Maintenance of
Township Roads; Agreement With County; Termination
of Agreement; Duties and Liabilities

State Departments; Public Officers and Employees --
Kansas Tort Claims Act -- Claims to Which Act
Applicable; Negligent Maintenance of Township Roads
by a County

Synopsis: Pursuant to case law permitting termination of
agreements that irrevocably delegated discretionary
governmental authority, a county may terminate or
renegotiate an agreement to maintain a township
road under K.S.A. 1989 Supp. 68-560. However, if
a county assumes responsibility for maintenance of
a township road, it undertakes to perform a duty
which may give rise to liability for negligent
performance of that duty. Cited herein: K.S.A.
12-2901; K.S.A. 1989 Supp. 12-2904; K.S.A.
68-124; 68-515a; 68-517; 68-518c; 68-526; K.S.A.
1989 Supp. 68-560; K.S.A. 68-561; K.S.A. 1989
Supp. 68-572; K.S.A. 75-6101; 75-6104.

* * *

Dear Representative Brown:

As chairperson of the legislative special committee on local
government, you request our opinion on issues involving

maintenance of township roads by a county. You cite K.S.A. 1989 Supp. 68-560 and ask that we address two questions: (1) whether an agreement entered into pursuant to K.S.A. 1989 Supp. 68-560 is binding in perpetuity upon the county, or if such an agreement may be terminated or the terms renegotiated, and (2) whether the county or township would be liable for injuries caused from negligent maintenance of township roads. You note that these issues arise out of the failure of some townships to make an adequate mill levy in order to cover the full costs incurred by a county in maintaining township roads. As an example of an agreement by a county to maintain township roads, you attach a 1962 agreement between Decatur county and Oberlin township. We note that this agreement does not cite K.S.A. 1989 Supp. 68-560 and does not speak to termination or renegotiation of the agreement.

K.S.A. 1989 Supp. 68-560 was enacted in 1941 and essentially remains in its original form:

"In any county not operating under the county road unit system, any township in such county, with consent of county commissioners, may elect to turn over the maintenance, repair and construction of township roads to the counties as provided by this subsection. The question of turning over the maintenance, repair and construction of the township roads to the county shall be submitted to a vote of the qualified electors of the township at the general election whenever there shall have been submitted to the board of county commissioners at least 60 days prior to the date of such general election a petition signed by 10% of the qualified electors of such township or a resolution of the township board calling for such election.

"(b) Any township which has adopted the provisions of this act may abandon the provisions of this act, and take over the maintenance, repair and construction of township roads, as provided by this subsection. The question of abandoning the adoption of the provisions of this act shall be submitted to a vote of the qualified electors of the township at any general election after the date such township has adopted the provisions of

this act, whenever there shall have been submitted to the board of county commissioners at least 60 days prior to the date of any such general election, a petition signed by at least 20% of the qualified electors of such township." (Emphasis added).

K.S.A. 68-561 discusses reimbursement of expenses to the county for costs incurred in maintaining a township road:

"Whenever any township has petitioned or voted to turn over the maintenance, repair and construction of the township roads to the county, as hereinbefore provided, the township board of such township is hereby authorized and directed to pay over to the board of county commissioners of such county any and all unused road money or funds or surplus funds and all other moneys received by such township for road purposes and in the hands of such township board and any road machinery or equipment owned by such township, to be used by the board of county commissioners for road work on the township roads in the township. The township board shall each year certify to the board of county commissioners, as is now prescribed by law, the aggregate amount to be raised by taxation for township road purposes within such township for the year next ensuing, and the board of county commissioners shall determine the rate of levy, and levy such rates as are now provided by law. Such taxes and all other moneys received by such township board for road purposes shall be placed by the county treasurer in a separate fund to be used by the county commissioners only for road work and improvement on township roads within the township: Provided, That the county shall not be obligated to spend on the roads and highways of such townships more money than is credited to said separate fund. . . ." (Emphasis added).

Thus, a county may discretionarily agree to assume certain duties with respect to maintenance of township roads, and the township remains liable for the expense of such maintenance.

Alternative arrangements for county maintenance of township roads include: K.S.A. 1989 Supp. 68-572, mutual assistance with respect to machinery and crew; K.S.A. 12-2901 et seq., interlocal cooperation agreements, see Attorney General Opinion No. 85-172; K.S.A. 68-124, non-consensual maintenance by county with the costs being charged to the township, see Attorney General Opinion No. 87-22; and, K.S.A. 68-515b et seq., a county road unit system whereby the county assumes responsibility for all township roads, see Attorney General Opinion No. 85-57. Some of these alternative provisions generally discuss termination of the county's agreement to assume maintenance of township roads. See e.g., K.S.A. 68-517 and K.S.A. 1989 Supp. 12-2904(c)(5). K.S.A. 1989 Supp. 68-560 allows a township to "abandon the provisions of this act," however, the act does not specifically address whether a county may also terminate such an agreement.

The assumption of township road maintenance duties by a county pursuant to K.S.A. 1989 Supp. 68-560 appears to be a discretionary decision. This statute does not require a county to assume such duties. We have thus far not found general authority requiring a county to continue assumption of a duty that is not otherwise statutorily required. Rather, where an action is discretionary on the part of a governmental entity, there is a general reluctance to permit complete contractual elimination of all future governmental exercise of that discretion. See State v. Topeka, 176 Kan. 240 (1954); Landau v. City of Leawood, 214 Kan. 104, 108 (1974); 63 C.J.S. Municipal Corporations, § 987 (1950). This case law largely concerns a contract between a governmental entity and a private individual or corporation. However, we believe the reluctance of the court to hold a governmental entity perpetually bound to a discretionary decision would apply equally to agreements entered into between two governmental entities. Thus, it is our opinion that, despite the lack of specific authority in K.S.A. 1989 Supp. 68-560, a county may choose to renegotiate terms or discontinue maintenance of a township road it is maintaining pursuant to that provision. However, legislative authorization on this point would clarify such authority and codify Kansas case law concerning termination of agreements involving discretionary decisions by a governmental entity.

Your second issue concerns liability for negligent maintenance of township roads. Generally, a township having exclusive care and control of a street or road has a duty to maintain that road or street for the safe passage of persons or property. Other governmental entities cannot be held liable for failure to maintain a township road for which and over

which that other governmental entity has no authority or duty. Finkbiner v. Clay County, 238 Kan. 857, 861 (1986), citing City of Eudora v. Miller, 30 Kan. 494 (1883). See also Attorney General Opinion No. 87-22. In order to hold a township liable for defects in a public road, there must be evidence to show that it is a township road. Irvin v. Garden City Township, 111 Kan. 336 (1922). If there is no duty, there can be no breach of duty, and thus no liability for failure to exercise reasonable due care. Hanna v. Huer, 233 Kan. 206 (1983). A county may be held liable if it assumes certain duties. One who undertakes to render services to another, which he should recognize as necessary for the protection of a third party, is liable to a third party for harm resulting from failure to exercise reasonable due care. For example, in Schmeck v. City of Shawnee, 232 Kan. 11 (1982), a firm rendering traffic engineering services by contract was held to assume some duty with regard to those using the public streets.

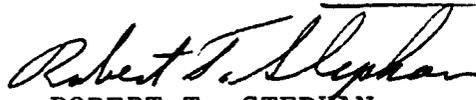
The extent of duty assumed may limit the extent of duty owed. See Thomas v. Board of Trustees of Salem Township, 224 Kan. 539 (1978). Townships generally have the duty to maintain township roads, however, should a county consensually share that duty with a township, the county may also be assuming potential liability for negligent performance of such a duty. K.S.A. 68-124 and 68-561 clearly permit a county to turn to a township for repayment of costs incurred for maintenance of township roads. Townships are authorized by K.S.A. 68-518c to levy taxes for road maintenance purposes. See also K.S.A. 68-526 and Attorney General Opinion No. 82-228. However, when a township cannot or will not levy sufficient funds for road maintenance purposes, and if a county only expends those funds available from the township, there is a fear that lack of maintenance may result in liability for breach of reasonable due care. We believe that this fear is well founded. The reasonableness of the care given will ultimately be a fact question, and the county or township may raise lack of funding as a defense. However, whether such a defense is reasonable under the circumstances must be determined on a case by case basis.

K.S.A. 75-6101 et seq., the Kansas tort claims act (KCTA), permits individuals to seek damages from municipalities for negligent acts or omissions. Exceptions to the KCTA are set forth at K.S.A. 75-6104 and do not include negligent performance of road maintenance due to lack of funding or road maintenance discretionarily undertaken for the benefit of a separate governmental municipality. "[D]uty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in

negligence cases, the duty is always the same - to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty." Prosser and Keeton on Torts, § 53 (5th ed. 1984). Once a county has voluntarily accepted or undertaken the duty of township road repair or maintenance, the county may be held to the same standard of care expected of the township. There may be some apportionment of damages, with both the township and county as tort-feasors, or an agreement by the township to indemnify the county for any proportionate share of fault found against the county. A township cannot escape responsibility or liability for roads that remain township townships. However, although the county may ultimately look to the township with regard to costs incurred for maintenance of township roads, persons injured on a township road may seek recovery from any entity that has a duty to repair and maintain such a road. Which entity has such a duty is a fact question and liability must be determined on a case by case basis.

In summary, despite the lack of specific statutory authority, it is our opinion that a county may terminate or renegotiate the terms of an agreement to maintain a township road entered into pursuant to K.S.A. 1989 Supp. 68-560. We would support legislative codification of such authority. If a county voluntarily assumes responsibility for maintenance of a township road, it undertakes performance of a duty which may give rise to potential liability for negligent performance of that duty.

Very truly yours,



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ATTORNEY GENERAL OF KANSAS



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