



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

September 19, 1975

ATTORNEY GENERAL OPINION NO. 75-369

Mr. Gerald E. Williams
Breyfogle, Gardner, Martin,
Davis & Kreamer
110 South Cherry
Olathe, Kansas 66061

Re: Cities and Municipalities--Sewerage and Drainage--
Tax Assessments

Synopsis: Municipality utilizing K.S.A. 12-618, as amended, to construct sewer improvements may: (1) prior to final assessment of costs therefor amend its initial declared method of computing cost apportionment; and (2) may adopt a mode of apportionment based upon the value of the lots and pieces of ground without the improvements thereon.

* * *

Dear Mr. Williams:

You have inquired at this office as City Attorney of Lenexa whether a municipality may amend its initial declared method of computing cost apportionment for sewer improvements constructed pursuant to Chapter 57, Laws of 1975 (K.S.A. 12-618, as amended). You advise that the city authorized certain sewer improvements several years ago via Ordinance No. 2031 (dated April 16, 1970) and proclaimed "[t]he cost of said sewers shall be assessed equally on a square foot basis, excluding parks, street rights-of-way and cemeteries." However, now that the city has completed the project a re-examination reveals several major problems making such a mode of apportionment "economically unsound" for the city and consequently the members of the benefit district. Thus the city has devised a new plan whereby the costs to be allocated would be computed on the basis of the valuation for each lot or piece of ground alone (not to include the improvements thereon) as opposed to the originally suggested cost per square footage. Whether this plan is permissible under the statute is the issue here presented.

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Initially we note that although the project is complete in the sense that all construction is finished the final assessment for its cost has not been determined or placed on the tax rolls. Some question has arisen whether the city once it has formally declared its intent to construct improvements and assess the costs in a particular manner may at some later date prior to finalizing the assessment alter its mode of apportionment. We concluded in a letter to Lenexa's City Clerk, Ms. Sandra Howell, in April of this year that in view of the presented facts

"the city may alter its method of assessment prior to apportionment providing that it does so in full compliance with the statutes authorizing the project via an amendment to the ordinance."

As will be examined, *infra*, the city does not propose to exercise assessment power beyond that granted by statute, so we feel there is no reason to alter or expand on our previous position, and accordingly conclude that an amendment at this time to the ordinance would be permissible.

Chapter 57, Laws of 1975 provides *inter alia*:

"The governing body of such city shall have power to provide for one or more systems of sewerage, or drainage, or both, for such city, or for any part thereof, with one or more main sewers or drains and sewer or drains outlets, and to build, construct or purchase pumping stations, sewers, sewer service lines and drains by districts or otherwise, as the governing body may determine

* * *

The costs and expenses of constructing or purchasing the said pumping stations, sewers, sewer service lines and drains, except as provided in K.S.A. 1974 Supp. 12-619, shall be assessed against the lots and pieces of ground contained within the district in which the same is situated, and shall be levied and collected as one tax, in addition to the other taxes and

assessments, and shall be certified by the city clerk to the county clerk and be placed by him upon the tax roll for collection, subject to the same penalties, entitled to the same rebates and collected in the same manner as other taxes . . .

* * *

The governing body may in their discretion provide for the payment of the costs thereof by installments, instead of levying the entire tax or special assessment for such cost at one time; and for such installments they may issue improvement bonds of the city in the manner provided by law" [Emphasis supplied.]

It is clear from the above quoted portions of the statute that the Legislature delegated to the city governing body a general authority to assess the costs and expenses for such improvements against the property benefitted. And, it is equally apparent that such a payment proviso constitutes a special assessment. [*Mullins v. City of Eldorado*, 200 Kan. 336, 436 P.2d 837 (1968); See generally 14 McQuillin, *Municipal Corporations*, 38.121.] However, what the statute does not specify is the mode of apportionment for such costs. Consequently it is left to the discretion of the governing body to select whichever method it deems appropriate.

Examining the inherent nature and applicability of special assessments (and particular the statute here concerned) the court observed in *Schulenberg v. City of Reading*, 196 Kan. 43, 49, 410 P.2d 324 (1966) that

"K.S.A. 12-618 provides that the costs and expenses of constructing a sewer system 'shall be assessed against the lots and pieces of ground contained within the district.' Inherent in that requirement is the rule that the assessments so made must be fair, just and equitable, and if palpable injustice results so that it is entirely disproportionate to benefits received courts, will, under their equity power grant relief."

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See *Hurley v. Board of Commissioners*, 188 Kan. 60, 360 P.2d 1110 (1961). Thus, the question evolves to determining whether the proposed apportionment plan satisfies the court's "fair, just and equitable test."

Early the Kansas Supreme Court upon examining the validity of a method of assessment substantially similar to that presented here concluded where a statute authorizes special assessments without prescribing a specific mode of apportionment a city

"would have a right to adopt any mode for the apportionment of the taxes that would be fair and legal; and, as a general rule of apportionment, *the levying of the taxes in proportion to the value of the lots taxed without the improvement thereon, would be fair and legal.*" [Emphasis supplied.] *Gilmore v. Hentig*, 33 Kan. [2d ed.] 156, 5 Pac. 781 (1885).

See also *Newman v. City of Emporia*, 41 Kan. 583, 21 Pac. 593 (1889) wherein the court held that although assessments computed on valuation were not totally proportionate to the benefits conveyed they still represented a "more nearly equal and just" mode of apportionment "by excluding from the valuation the buildings or improvements that may be upon the lots."

The Court has never changed its position relative to this method of apportionment, and, accordingly we are constrained to conclude as the court did in *Mullins, supra*, at 336, 436 P.2d at 837:

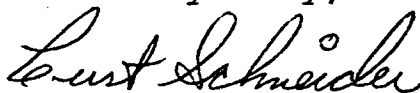
"Although K.S.A. 12-618 does not prescribe a specific method for apportioning the costs of constructing a sewer improvement, the municipality may adopt any plan that is fair and equitable and such that will bring about an assessment in proportion to the benefits accruing; and it is held . . . *the assessment of costs in proportion to the value of the tracts of land without improvements thereon was proper.*" [Latter emphasis supplied.]

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Parenthetically we add that a fundamental precept of special assessments which cannot be ignored requires such assessments to be founded upon an actual or probable benefit to the property being taxed. See generally, 14 McQuillan, *Municipal Corporations*, § 38.183; 70 Am.Jur.2d *Special or Local Assessments*, §§ 82-102. This, of course, is necessarily a factual test based upon substantive principles which is beyond the scope of this opinion.

We trust the foregoing has answered your inquiry, and if we may be of further assistance please feel at liberty to contact us.

Yours very truly,



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CTS:JPS:kj

cc: Ms. Sandra Howell
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