STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

CURT T. SCHNEIDER
ATTORNEY GENERAL

January 5, 1979

MAIN PHONE (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 79-11

Mr. Stephen W. Boyda
Marshall County Attorney
Post Office Box 207
Marysville, Kansas 66508

Re: Counties--Benefit Districts--Assessments

Synopsis: In creating a benefit district for the improvement of a road commonly known as thirty-fourth street, the assessments therefor could lawfully be assessed only under K.S.A. 68-704. Alteration of the petition, to change a reference from K.S.A. 68-701 *et seq.*, to K.S.A. 68-728, does not authorize the assessment of the costs therefor under the latter statute, because it applies to improvements to roads in circumstances in which at least fifty percent of the abutting property is platted, and none of the abutting property in this instance was platted. Failure of landowners in the benefit district to assume the entire costs of the project, contrary to representations which they may have made to the board of county commissioners at the outset in seeking the improvement, does not affect the validity of assessments for the project pursuant to K.S.A. 68-704 upon property outside the improvement district.

* * *

Dear Mr. Boyda:

You inquire concerning a benefit district which was created by the Marshall County board of county commissioners for the improvement of a portion of a road commonly known as Thirty-fourth Street.

The proceeding was begun by a petition which was filed September 22, 1975. It recites the strip of road to be improved, that the proposed benefit district should include the adjacent lands on the east and west of the road to a depth of 200 feet, that the improvement sought is a "hot mix road" 24 feet wide and 5 inches in depth, and that the

> "undersigned petitioners, pursuant to K.S.A. 68-701, represent more than Fifty-one Percent (51%) of the resident landowners owning more than Thirty-five Percent (35%) of the total frontage feet of said benefit district"

The initial prefatory paragraph of the petition recited, in the original, that it was filed pursuant to K.S.A. 68-728, and you advise that the landowners represented their willingness to contract with the County for full payment. You further state that "[s]omewhere in the proceedings the original petition was altered to show the statutory provision of K.S.A. 68-728 and no action was taken to secure contractual payment from the landowners for the improvements." Although we have only a photocopy of the petition, there does appear to have been some alteration in the recital of statutory authority in the initial.

Thereafter, the board adopted a resolution reciting the filing of the petition "pursuant to K.S.A. 68-728 *et seq.*" and stating that the "County is authorized to take such action through K.S.A. 68-701 *et seq.* and 68-728 *et seq.*" In that resolution, the board set a public hearing for July 26, 1976, prescribed that ten days' notice be given by publication, ordered the improvement to be undertaken, and specified that

> "pursuant to K.S.A. 68-728, the full cost incurred hereby is to be apportioned equally per front foot on all land abutting on or affronting on the street to be so improved,"

the cost to be assessed by special levy divided into twenty annual assessments

> "on all lots as platted, and on any unplatted land abutting on or affronting said street a distance back therefrom of One Hundred Fifty (150) feet."

On July 8, 1976, there was published in the *Marysville Advocate* a legal notice advising that in compliance with K.S.A. 68-701 *et seq.*, the board of county commissioners had designated the described property a benefit district for the improvement of the road. However, in describing the nature of the improvement, a hot mix road, and curbing and guttering on a portion thereof along a cemetery, the notice recited that the work was to be done "pursuant to K.S.A. 68-701 *et seq.* and K.S.A. 68-728 *et seq.*" Notice was further given that no action to restrain the improvement or the levy of taxes and assessments therefor, except within thirty days from the notice. On the same date, a notice was also published in the same newspaper, giving public notice that pursuant to K.S.A. 68-704 *et seq.*, that bids to undertake the work would be received by the board for the work.

On December 19, 1977, the board of county commissioners adopted a resolution authorizing the issuance of bonds in the amount of $44,640.16 to pay the costs of the improvement. The resolution recites the various procedural steps leading to authorization of the improvement, and recites that each was taken under K.S.A. 68-701 *et seq.* In November of that year, notices were sent to the affected landowners notifying them of assessments against their property for the improvement, and setting a hearing thereon on November 28, 1977.

In a notice to landowners in the benefit district dated May 17, 1978, by the chairman of the board of county commissioners and yourself, the landowners were told, in pertinent part, thus:

> "At this time, according to statute, only 15% of the costs have been assessed against the individual land owners. The County believes that there is a moral obligation on your part to pay the full 100% of your prorata share of the expense as was represented to the Board. We would invite and appreciate your making arrangements with the County to pay the same."

You request our opinion "as to the potential civil recovery from the land owners and/or the liabilities of the parties involved."

In the creation of a benefit district for the improvement of the road involved here, the board of county commissioners acted solely in the exercise of express statutory authority. The petition, the resolution creating the district, all public notices, and the resolution authorizing the issuance of bonds all purported to be based upon the statutory authority recited therein. The resulting benefit district is, thus, solely a creature of statute, and the powers of the board of county commissioners in conducting the improvement and assessing costs therefor are strictly statutory, in this instance.

It appears that the proceeding was begun by a petition which apparently recited K.S.A. 68-701 *et seq.*, as the authority therefor, when filed, and was thereafter altered to refer to K.S.A. 68-728, although one reference to K.S.A. 68-701 was unaltered. We have no information whatever concerning the circumstances of this apparent alteration. Whatever those circumstances may be, they are of no legal significance, in my judgment, so far as concerns the liability of landowners for the assessment of the costs of the improvement. K.S.A. 68-728 is simply inapplicable to this project, for it applies only when at least fifty percent of the abutting property is platted. None of the property abutting the improved portion of this road is platted, I understand. Thus, K.S.A. 68-728 provides no authority for the statement in the resolution that the full costs of the improvement shall be apportioned equally per front foot on the abutting property. Assessment of the costs of the improvement may be made only as authorized by an applicable statute, and K.S.A. 68-728 is no authority for the assessment of the costs of this improvement.

One public notice published July 8, 1976, respecting the improvement district referred to both K.S.A. 68-701 and to -728. The accompanying notice of the letting of the contract referred only to the former act. The bond resolution referred only to K.S.A. 68-701 *et seq.* and thereafter, I assume, when the assessments were apportioned, they were done according to K.S.A. 68-701 *et seq.*, and specifically, -704 of that act. Notices were given to the affected landowners, and an opportunity to be heard thereon. Those assessments are now final, and were made pursuant to the applicable statutory authority, K.S.A. 68-704, of which the landowners had public notice.

You indicate that in seeking the improvement, the landowners of the benefit district expressed their willingness to assume all of the costs incurred for the improvement. The file you have

sent to us includes, apparently, all the pertinent documents, and it contains no written description of that generous offer. You advise that no action was taken to secure a written contractual agreement from the landowners for the improvement. Whatever willingness the landowners may have expressed, it was never reduced to a written agreement. Certainly, K.S.A. 68-708 authorizes a board of county commissioners to receive subscriptions and donations which may be applied in the construction or improvement of the road. For whatever reasons, the alleged willingness of the landowners to bear the entire cost of the project did not result in contributions sufficient to meet those costs. Whatever the circumstances surrounding that alleged willingness, or even an alleged agreement, the legislative power of the board of county commissioners remained intact and unimpaired to levy assessments for the project in the manner authorized by statute. Stated otherwise, even *assuming* that the landowners in the improvement district had entered into an express verbal contract with the board of county commissioners to assume the costs of the project, once those funds were not forthcoming, the board was and is legally entitled to assess the costs of the project as authorized by law, and those whose property is lawfully subject to such assessments under the applicable statutes have no valid legal objection, in my judgment, to those assessments based merely upon the failure of the landowners in the improvement district to abide by their initial offer. Thus, whatever the circumstances surrounding the alleged willingness or even agreement by the landowners in the improvement district, that willingness or agreement, if it existed, does not impair the authority of the board to levy the assessments under K.S.A. 68-704, as the board appears in fact to have done.

As you point out, the resolution adopted by the board cited both K.S.A. 68-701 *et seq.*, and K.S.A. 68-728, the two references being to acts which provide for differing methods of assessment of the costs. The latter reference was inapplicable, and accordingly, the board had no alternative in the subsequent assessment of costs but to follow the applicable statute, K.S.A. 68-704.

In my judgment, in imposing assessments for the project, the board of county commissioners had no alternative but to follow K.S.A. 68-704 in doing so. Landowners residing in the township but outside the improvement have no valid legal objection to those assessments, in my judgment, based merely upon the failure of landowners within the improvement district to assume voluntarily the costs of the project as they may have initially offered to do. Likewise, to reiterate, the apparent alteration of the petition has no bearing upon the validity of the assessments made subsequent to creation

of the district and completion of the improvement, because whatever alterations were in fact made, the board had no authority to levy the assessments except in accordance with the only applicable statute, K.S.A. 68-704, which was in fact recited in the organic resolution creating the district.

In sum, in my judgment, the board had no choice but to follow K.S.A. 68-704 in levying assessments for the project, and those assessments are not invalid for any of the objections thereto which have been discussed herein. You inquire concerning a potential civil recovery from the landowners. It is important to be mindful that any civil liability must depend, necessarily, upon an evidentiary showing of facts upon which liability may be based. We have no knowledge regarding the precise circumstances in which the landowners in the improvement district may have expressed a willingness to assume the costs of the project. Thus, we have no knowledge whether there are indeed the elements necessary to support a contractual claim by the county against them, *i.e.*, offer, acceptance, consideration and performance. Certainly, I have no basis for concluding, as a matter of law, that there is contractual liability.

I hope that the foregoing may be helpful in resolving this controversy in your county.

Yours truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

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