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ATTORNEY GENERAL OPINION NO. 89- 77

Barry L. Arbuckle  
Valley Center City Attorney  
707 N. Waco, Suite 101  
Wichita, Kansas 67203-3937

Re: Cities and Municipalities--Buildings, Structures  
and Grounds; Business Improvement  
Districts--Advisory Board; Incompatibility of  
Offices

Synopsis: One individual may not hold a position as member of a business improvement district advisory board and a second office as member of the city governing body, for the two offices are incompatible. Cited herein: K.S.A. 12-1781; 12-1788; 12-1790; 12-1791.

\* \* \*

Dear Mr. Arbuckle:

You inquire whether a member of the city council of a city of the second class may also serve as a member of the advisory board of a business improvement district formed pursuant to K.S.A. 12-1781 et seq.

In accordance with K.S.A. 12-1788 the city of Valley Center has adopted an ordinance which provides that members of the business improvement district advisory board are appointed by the mayor with the advice and consent of the city council. K.S.A. 12-1790 prescribes that the advisory board shall perform such duties as may be prescribed by ordinance, and "shall, not later than May 15 of each year, submit to the governing body a recommended program of services to be

performed or provided within the district during the coming calendar year and a proposed budget to accomplish these objectives." Under K.S.A. 12-1791, after receiving the recommended program of services and proposed budget from the advisory board, the governing body is to levy business improvement service fees for the ensuing year. In accordance with these statutes, while the advisory board has substantial responsibilities in recommending a program of services and proposed budget, its recommendations are subject to review, approval or disapproval by the city governing body.

In Dyche v. Davis, 92 Kan. 971 (1940), the court stated thus:

"Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices." 92 Kan. at 977.

At 63A Am.Jur.2d, Public Officers and Employees, §80 at page 728, the writer states that

"one of the most important tests as to whether offices are incompatible is found in the principal that . . . incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in some degree to the other's revisory power." [Footnote omitted.]

The statutory scheme outlined above clearly contemplates that the decisions of the advisory board are to play an important role in establishing a program and budget for a business improvement district; however, it's decisions are subject to review and approval or disapproval of the governing body. Obviously, a member of the advisory board who sits also as a member of the governing body is placed in the position in the latter capacity of passing upon his or her own decisions in the former capacity. Dual membership between the two bodies defeats the purpose of the statutory scheme in which the initial decisions regarding the business improvement district

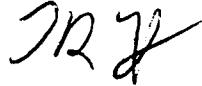
are assigned to the advisory board, subject to review and final action by the governing body.

Two offices are incompatible when one individual, acting in one official capacity, is empowered to pass upon his decisions which were rendered in the other official capacity. That is precisely the result of dual membership on both the business improvement district advisory board and the city governing body, and it is our opinion that the positions are incompatible.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
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RTS:JLM:TRH:jm