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ATTORNEY GENERAL OPINION NO. 89-95

Mr. Tom Crossan
Attorney at Law
Rural Water District No. 1
Montgomery County
P.O. Box 987
Independence, Kansas 67301

Re: Waters and Watercourses -- Water Districts; Rural
Water Districts -- Powers of Rural Water Districts;
Contract with City for Purchase of Water

Synopsis: Pursuant to K.S.A. 66-104, a municipally owned and
operated water company, which supplies a rural
water district with surplus water pursuant to a
contract, is not a public utility subject to the
control of the state. Kansas law does not require
city owned water companies to extend existing water
services to new consumers residing in rural water
districts. Therefore, pursuant to a contract with
a rural water district, a city may limit the
availability of services to new consumers residing
outside the city. Cited herein: K.S.A. 1988 Supp.
12-519; K.S.A. 12-707; K.S.A. 1988 Supp. 12-715b;
K.S.A. 12-801; 12-808; K.S.A. 1988 Supp. 12-2001;
65-162a; 66-104; 66-131a; 66-133, 82a-612; 82a-619;
82a-625.

* * *

Dear Mr. Crossan:

As legal counsel for Rural Water District (RWD) No. 1, Montgomery County, created pursuant to K.S.A. 82a-612 et seq., you request our opinion concerning the city of Independence and its water supply policy as it relates to areas outside the city limits. You state that "the city is apparently attempting to impose zoning laws upon the rural water districts which are supplied with water from the city. The city has proclaimed that no new water users will be supplied water, even if they are in the district, for any property of less than 15 acres." You maintain that this is being done in an attempt to require builders to build within the city limits. You specifically ask that we address the following questions posed by the secretary of the RWD:

"1. Can a city that has been providing water for thirty years to a rural water district contractually limit the number of acres associated with new benefit units within the water district?

2. Does such a contract imply zoning control outside the city limits?

3. When a city limits acreage, is there a possible infringement upon the civil rights of the property owners who own less than fifteen acres and who desire water?

4. Can one assume that the city water department becomes a public utility when a contract to supply water to a rural water district outside the city limits has been signed?

5. If such a contract does imply that the city water department is a public utility, are there certain responsibilities and/or rights and privileges that the city has in relationship to the water district and/or to the individuals in the water district?

6. What power does the state have in such a situation?"

A public utility is generally defined as "a business or service which is engaged in regularly supplying the public with some commodity or service of public consequence, such as electricity, gas, water, transportation, or telephone or telegraph service." 64 Am.Jur.2d Public Utilities § 1 (1972). See also 56 Am.Jur.2d Municipal Corporations § 561 (1971); 73B C.J.S. Public Utilities §§ 2-4 (1983). However, where a business might otherwise be defined and qualify as a public utility, its nature and regulation affecting its operation may be altered by statute. K.S.A. 66-104 defines public utilities subject to supervision by the state of Kansas:

"The term 'public utility' shall also include that portion of every municipally owned or operated electric or gas utility located outside of and more than three (3) miles from the corporate limits of such municipality, but nothing in this act shall apply to a municipally owned or operated utility, or portion thereof, located within the corporate limits of such municipality or located outside of such corporate limits but within three (3) miles thereof except as provided in K.S.A. 66-131a.

Except as herein provided, the power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, shall be vested exclusively in such city, subject only to the right to apply for relief to the corporation commission as hereinafter provided in K.S.A. 66-133 and to the provisions of K.S.A. 66-131a." (Emphasis added).

K.S.A. 66-131a concerns heat loss standards and energy efficient ratios and K.S.A. 66-133 discusses extension and additions to public utilities and rates for those utilities.

Pursuant to K.S.A. 66-104, and in accordance with discussions with legal counsel for the Kansas Corporation Commission (KCC) (the state agency given regulatory authority over public utilities), unless a rate dispute is involved or the

city has entered into individual contracts with private entities outside the city, a municipally owned and operated public utility is not subject to the control and supervision of the state. See also Shawnee Hills Mobile Homes, Inc. v. Rural Water District No. 6, 217 Kan. 421 (1975); Kansas Gas and Electric Company v. City of McPherson, 146 Kan. 614 (1937); Kansas Public Service Company v. State Corporation Commission, 199 Kan. 736 (1967); Holton Creamery Company v. Brown, 137 Kan. 418 (1933). Since the RWD is not a private entity, state agency control over the specific situation presented is limited to any possible applicability of K.S.A. 66-131a or 66-133. The issues presented do not appear to implicate state authority. It therefore becomes a matter subject to control by local authorities and review by the court.

Pursuant to K.S.A. 12-801 et seq., a municipality may provide water to the inhabitants of that municipality. A city may establish, operate and own a water company. A city may alternatively give an exclusive franchise to a privately owned company, thus allowing that company the sole privilege of providing water to a city's inhabitants. K.S.A. 12-2001 et seq. If exclusivity is not established, an area may be served by privately owned water companies. See K.S.A. 65-161a et seq.

K.S.A. 82a-612 et seq. authorizes a rural water district to supply inhabitants of that district with water and permit a RWD to construct and operate its own water supply facility and to contract in order to carry out the purposes of the RWD. See also K.S.A. 82a-619(a)(5), 82a-619(a)(3), and 82a-625.

Pursuant to K.S.A. 12-808, cities may sell surplus water to other public entities or individuals. We assume that this is the authority employed by Independence in selling surplus water to the RWD. In City of Strong v. Rural Water District No. 1, 6 Kan.App.2d 859 (1981) the appellate court concluded that courts have no supervisory power over the legislative function of a municipality involved in selling surplus water to a rural water district and establishing water rates charged to that RWD. The court recognized that a city's authority to sell water to a RWD is found at K.S.A. 12-808 and concluded that:

"Courts can only interfere to curb action which is ultra vires because of some constitutional impediment, or lack of

valid legislative authority, or unlawful acts under a valid statute, or because action under a valid statute is so arbitrary, capricious, unreasonable and subversive of private rights as to indicate a clear abuse rather than a bona fide exercise of power." Schulenberg v. City of Reading, 196 Kan. 43, 52 (1966). (Emphasis added).

The issue thus becomes whether the city's refusal to sell water to new users under the facts and circumstances provided violates a duty imposed upon the city by state or federal law or is arbitrary, capricious, unreasonable or subversive of private rights.

As a general rule, the furnishing of public services rests within the discretion of the governing municipal authorities and, unless controlled by positive law, courts will not undertake to control or interfere with the exercise of such a discretionary decision in the absence of bad faith or abuse. 56 Am.Jur.2d Municipal Corporations, § 560 (1971). State or federal law does not mandate that Kansas cities provide water to individuals residing outside city limits. Therefore, no positive duty exists requiring cities to furnish surplus water to residents outside the city or to a RWD supplying those residents. Thus, we must determine whether refusal to extend services to new users occupying less than 15 acres evidences bad faith or abuse.

The proposed action by the city does not seek to terminate water service to those currently using city water. Such termination of current users would be subject to constitutional notice and hearing requirements as discussed in Donnelly v. City of Eureka, 399 F.Supp. 64 (1975), and Dedeke v. Rural Water District No. 5, 229 Kan. 242 (1981). Rather, the city seeks to establish new contract terms by which it will agree to supply new users of city water residing in the RWD. A city cannot generally be compelled to supply water in an area outside its limits where it has not previously placed itself by contract or conduct in the position of a public utility subject to regulation:

"Likewise, a city cannot be compelled to supply water to anyone outside its limits, even if it is already engaged in doing so in a given extraterritorial area, where it has made merely limited and special

contracts to do so with particular parties and has not placed itself by contract or conduct in the position of a public utility subject to regulation, and subject, therefore, to a duty to supply all in like position to that of others being served. It would seem that in situations where a city cannot be compelled to serve new consumers as a general proposition, a fortiori it cannot be compelled to extend its system in order to serve a new consumer." Annot., 48 A.L.R.2d 1222, 1230 (1956).

"As to nonresidents to whom a municipality furnishes water, it has been held not to assume the duties of a public service corporation, nor can it be compelled to furnish water to nonresidents. It has been said that to compel a municipality to furnish water service to persons outside its corporate limits and beyond its taxing powers at a loss would violate the due process clauses of both the state and federal constitutions. It has also been said that to hold that a city may be compelled to extend its mains beyond its corporate limits and then, as a natural result, to serve and maintain them, merely because it is operating a municipal water system, could lead to endless difficulties for the city, financial and otherwise, and make it the prey of every unwise or unscrupulous promoter of subdivisions or other enterprises.

"A municipally owned waterworks system supplying water without its corporate limits may, generally, charge more for that service than is charged users of the water service who reside within the corporate limits. The fact that residents of the municipality have borne the cost of establishing or financing the system will justify charging a higher rate to nonresidents."

"Since, as a general proposition, a municipality cannot be compelled to serve consumers outside its limits, it naturally follows that a municipality cannot be compelled to extend facilities it has voluntarily established outside the municipal limits, at least in the absence of contract, or of a course of conduct whereby the city has held itself out as a public utility in a particular area. . . . Thus, limited contracts made by a municipality obligating it to supply water to particular consumers outside the municipal limits, usually executed pursuant to a power to sell excess water outside the corporate limits, will not place it under obligation to extend its system to serve impartially all who seek service. It has been held that after the termination of a general contract to supply, a city can then refuse to extend the existing system to serve new consumers, although an opposite result has been reached where a statute provided that a water system once established in an area beyond the city limits becomes subject to regulation as a public utility." 78 Am.Jur.2nd Waterworks and Water Companies, § 6 and § 22 (1975). See also McQuillan Municipal Corporations, § 35.34 (1986).

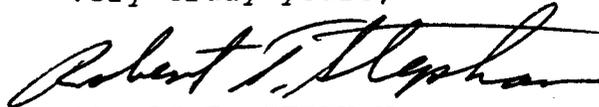
The proposed contract terms specifically limit the availability of water services the city will agree to provide to the RWD and links such services to the size of area to be served. This classifies property owners by the amount of property they own. Classification of water users is not of itself discriminatory. See Usher v. City of Pittsburg, 196 Kan. 86, 89 (1966): "We find no merit in appellant's charge of discrimination. Although this court has not heretofore passed directly on the question, it is a very general rule that a city operating a municipal water plant and serving customers outside the city limits may make a separate classification of customers without the city for rate making purposes. The fact that the rates charged within the city are different than those charged outside the city does not of itself characterize the rates as discriminatory." Id. at 89. We do not have sufficient information to determine the

motives or purposes of the city for such a contract term. If there is a nondiscriminatory purpose for such a requirement, the city may take actions which classify users who reside outside the city.

The final issue posed by counsel for the RWD concerns the zoning authority of a city in areas outside its boundaries. K.S.A. 12-707 et seq. discuss the zoning authority of a city. K.S.A. 1988 Supp. 12-715b gives cities limited authority to adopt zoning regulations affecting land located outside the city, but within three miles of the city. These authorities set forth the procedures whereby a zoning regulation or ordinance may be adopted by a city and thereby affect property uses.

The activity in question does not involve the adoption of a zoning regulation or ordinance. Rather, it involves a contract term or water supply policy which may affect property uses outside the city. Counsel believes this contract term is an attempt to require builders to build individual residences within the city. We note that many decisions by city authorities could have a similar impact; the lack of or location of city roads, industrial sites located near the boundaries of the city, and zoning or uses permitted along the boundaries of the city. We find no mandatory duty imposed upon Kansas cities to encourage or promote the building of individual residences outside city limits. If property owners or residents outside the city wish to obtain the same rights and privileges afforded to persons residing within the city, K.S.A. 12-519 et seq. set forth annexation procedures. Thus, the denial of water services by the city to new RWD consumers residing on less than 15 acres does not rise to the level of an improper exercise of zoning authority outside the city.

Very truly yours,



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