



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

May 2, 1990

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 90- 55

Keith Collett
Marion County Attorney
Courthouse
Marion, Kansas 66861

Re: Counties and County Officers -- County Attorney --
Duties; Representation of Improvement District;
Enforcement of Resolutions

Counties and County Officers -- Public
Improvements; Improvement and Service Districts;
Improvement Districts -- Enforcement of Resolutions
Adopted by Improvement Districts

Synopsis: K.S.A. 19-2766a provides that prosecution of
violations of improvement district resolutions
"shall be conducted in the manner provided by law
for prosecution of misdemeanor violations of state
law." Such misdemeanor violations are prosecuted
by the county or district attorney. It is
therefore our opinion that a county attorney has
the authority and duty to prosecute violations of
improvement district resolutions. However, such a
duty remains subject to the principle of
prosecutorial discretion. Cited herein: K.S.A.
2-1219; 8-286; K.S.A. 1989 Supp. 9-2014; K.S.A.
12-403; 19-214; 19-618; 19-701; 19-702; 19-703;
19-2688; 19-2753; 19-2765; 19-2766a; 19-2766b;
21-1803; 21-3105; 22-2104; 22-2519; 22-3902;
22a-104; 23-462; 24-120; K.S.A. 1989 Supp. 25-308;
K.S.A. 31-105a; and 75-108.

* * *

Dear Mr. Collett:

As Marion county attorney you request our opinion on whether a county attorney has the duty to prosecute violations of improvement district resolutions. You note that the resolutions in question concern failure to hook up a newly installed sewer system, and failure to empty and back-fill existing septic tanks. We enclose for your information a copy of Attorney General Opinion No. 81-279 which discusses the power of an improvement district to require inhabitants to connect private sewers to the district's sewage system.

K.S.A. 19-2753 et seq. set forth the procedures for creating an improvement district. This office has previously opined that improvement districts created pursuant to this authority are quasi-municipal corporations. See Attorney General Opinion No. 83-40. Unlike a county or city, which possess home rule powers, an improvement district has only that authority which is statutorily given to that entity. Attorney General Opinion No. 88-141 and 89-120. An improvement district, once created, has the power to adopt resolutions pursuant to K.S.A. 19-2765. It is necessary that such resolutions fall within the scope of authority granted to improvement districts.

Enforcement of improvement district resolutions is discussed at K.S.A. 19-2766a which provides:

"The board of directors of an improvement district organized and established pursuant to K.S.A. 19-2753 et seq., and amendments thereto, shall have the power to enforce all resolutions passed pursuant to this act or the act of which this act is amendatory. Such resolutions may be enforced by enjoining violations thereof or by prescribing penalties for violations of such resolutions, either by fine, or by confinement in the county jail, or by both such fine and confinement. The sheriff or the county law enforcement agency of the county in which such district is located shall be responsible for the enforcement of resolutions of such district. Unless otherwise provided by the resolution that defines and makes punishable the violation of such resolution the penalty imposed

shall be in accordance with the penalties established by law for conviction of a class C misdemeanor. In no event shall the penalty imposed for the violation of a resolution exceed the penalties established by law for conviction of a class B misdemeanor. Prosecution for any such violation shall be commenced in the district court in the name of the district and shall be conducted in the manner provided by law for the prosecution of misdemeanor violations of state laws. Writs and process necessary for the prosecution of such violations shall be in the form prescribed by the judge or judges of the courts vested with jurisdiction of such violations by this act, and shall be substantially in the form of writs and process issued for the prosecution of misdemeanor violations of state laws. Each improvement district shall provide all necessary supplies, forms and records at its own expense." (Emphasis added).

In discussing the penalties for violation of improvement district resolutions, K.S.A. 19-2766b provides in part:

"(a) Except as provided in subsection (b), in all actions for the enforcement of resolutions of improvement districts the items allowable as costs shall be the same as in cases for misdemeanor violations of state law and shall be taxed as provided in K.S.A. 22-3801, 22-3802 and 22-3803, and amendments thereto.

.....

"(c) Except as hereinafter provided, all fines and penalties collected in actions for the enforcement of resolutions adopted by improvement districts, as provided in this act and the act of which this act is amendatory, shall be paid over to the county treasurer of the county where they are imposed for deposit in the county general fund. The court, when

imposing fines and penalties for resolution violations, shall identify violations which also constitute a violation of state law. Those fines and penalties derived from the enforcement of any resolution, a violation of which would also constitute a violation of state law, shall be remitted to the state treasurer as provided in K.S.A. 20-2801, and amendments thereto." (Emphasis added). [Subsection (b) of K.S.A. 19-2766b discusses mileage and witness fees.]

K.S.A. 19-2766a clearly imposes enforcement duties upon the county sheriff or law enforcement agency. However, the statute does not specifically discuss the county attorney. Prosecution is to be brought in the name of the improvement district "in the manner provided by law for the prosecution of misdemeanor violations of state laws." Fines and penalties collected do not become improvement district moneys. Rather, the county, and in some instances the state, receives the moneys generated from prosecution of improvement district resolutions. The issue becomes whether these enforcement provisions require a county attorney to prosecute improvement district resolutions, or alternatively, whether the improvement district has been authorized to employ counsel to assist in such prosecutions.

K.S.A. 19-701 et seq. statutorily establish the office of county attorney and set forth the general duties of the county attorney. K.S.A. 19-702 and 19-703 generally require the county attorney to represent the state and the county. As discussed in Attorney General Opinion No. 87-179, other statutory enactments have more specifically set forth additional duties required of a county attorney. See e.g. K.S.A. 2-1219, 8-286, K.S.A. 1989 Supp. 9-2014, K.S.A. 12-403, 19-224, 19-618, 19-2688, 21-1803, 22-2519, 22-3902, 23-462, 24-120, K.S.A. 1989 25-308, and K.S.A. 31-150a.

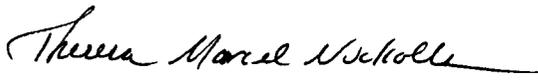
Pursuant to K.S.A. 19-703, the county attorney is required to enforce state law. There may be instances where an improvement resolution mirrors or contains elements of a state law. In such a situation, a county attorney clearly has the authority to enforce state law which may concur with or preempt an improvement district resolution. However, in the absence of an applicable state law which parallels the improvement district resolution, enforcement of an improvement district resolution involves prosecution for violation of an

improvement district "law". K.S.A. 19-2766a provides that the district court proceedings shall be in the manner for prosecution of misdemeanor violations of state law. K.S.A. 21-3105 et seq. set forth the manner of prosecuting a misdemeanor. When a state law has been violated, or when a misdemeanor charge is otherwise brought, the county or district attorney, along with other duly authorized attorneys, has statutory authority to prosecute such violations. See K.S.A. 22-2104, K.S.A. 19-703, 75-108 and 22a-104. Neither the provisions of K.S.A. 21-3105 et seq., 19-703 or K.S.A. 19-2753 et seq. require that a county attorney represent all the legal interests of an improvement district. If the legislature had intended to impose such a duty it could have clearly accomplished such an end by utilization of language similar to that discussing the enforcement authority of the county sheriff. However, while a clear mandate has not been provided, K.S.A. 19-2766a states that prosecution of violations of improvement district resolutions shall be conducted in the same manner as prosecution of misdemeanors of state law. Such misdemeanors are prosecuted by the county attorney. There is an argument that "the manner" referred to in K.S.A. 19-2766a applies to the procedures to be utilized and not to the official utilizing those procedures. However, the county benefits monetarily from enforcement of improvement district resolutions and misdemeanor prosecutions are generally the province of law enforcement officials rather than private legal counsel.

It is our opinion that, pursuant to K.S.A. 19-2766a, the county or district attorney has the authority and duty to enforce resolutions enacted by an improvement district. However, we feel constrained to note that the concept of prosecutorial discretion allows the county attorney to determine the advisability of prosecuting specific violations.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Theresa Marcel Nuckolls
Assistant Attorney General