



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

ATTORNEY GENERAL OPINION NO. 90- 106

David Heger
Miami County Counselor
P.O. Box 403
133 S. Pearl
Paola, Kansas 66071

Re: Counties and County Officers -- Public
Improvements; Improvement and Service Districts --
Disorganization of Districts; Lack of Improvement
District Board of Directors

Synopsis: As discussed in K.S.A. 19-2786g, a board of county commissioners may order disorganization of an improvement district within the county if the improvement district does not elect officers at a statutorily required election time and if the improvement district has failed to operate or function for at least one year following such election time. Whether such failures have occurred are fact questions. Once an improvement district has been disorganized pursuant to K.S.A. 19-2786g, bonds are not affected and must be paid according to the procedures set forth in the statute. Cited herein: K.S.A. 19-2753; 19-2759; 19-2760; 19-2761; 19-2763; 19-2765; 19-2766; 19-2766a; 19-2786g.

* * *

Dear Mr. Heger:

As Miami county counselor, you request our opinion concerning an improvement district within Miami county. You foresee the

possibility of an improvement district which has only one individual willing to act as a candidate for or serve on the improvement district board. There is currently a lack of candidates seeking election to the board. Although you recognize and hope to utilize the appointment procedures set forth at K.S.A. 19-2761, you note that a situation may arise whereby only one individual will agree to appointment to the improvement district board of directors. You therefore ask whether K.S.A. 19-2786g will permit disorganization of the improvement district and whether the county will be forced to assume responsibility for the operation of the improvement district and its outstanding bonds.

K.S.A. 19-2753 et seq. discuss the creation, organization, duties and powers of an improvement district. K.S.A. 19-2759 sets forth the procedures for election of the first board of directors. Subsequent elections or appointments to the improvement district board are provided for by K.S.A. 19-2760 et seq. The powers and duties exercised by the improvement district board of directors are generally discussed at K.S.A. 19-2763 and 19-2765. While the county treasurer has certain ongoing duties connected with improvement district funds, see K.S.A. 19-2763, the board of county commissioners ceases to control or direct the activities of the improvement district once the board of directors for the improvement district assumes powers: "[A]ll powers granted to improvement districts incorporated under the provisions of this act shall be exercised by the board of directors elected under the provisions of this act." K.S.A. 19-2766. Thus, without a duly elected or appointed board of directors, there is no entity authorized to act on behalf of the improvement district.

You indicate that at least one person may consider serving on the improvement district board of directors. Thus, an issue becomes whether one individual can act on behalf of the improvement district.

"So far as the powers of a municipal corporation are legislative they rest in the discretion and judgment of the municipal body entrusted with them, and the general rule is that that body cannot delegate or refer the exercise of such powers to the judgment of a committee of the council, or to an administrative board or officer of the city, or to arbitrators under an agreement for binding

arbitration. If the legislature confers power on a municipal corporation, the exercise of discretion by the governing body of the municipality cannot be delegated to a municipal officer or other person or body. . . ." 2 McQuillin, Municipal Corporations, § 10.40 (1988).

"Public improvements can be legally provided for only by the officers, boards or departments duly empowered. . . . Frequently the body or department designated to perform these functions with respect to public improvements is the city council, board or department or commissioners of public works, or a street commissioner.

"A slight departure or an immaterial irregularity or failure to observe mere directory provisions will not invalidate the proceedings, as the law has in view substance rather than form. However, omission to follow mandatory requirements may render the action void, for example, where the controlling law in express terms requires the concurrence of two or more officers, boards or departments to do or authorize the doing of the particular thing, which is often the case in providing for specified public improvements." 13 McQuillin, Municipal Corporations, § 37.08 (1987).

K.S.A. 19-2766 vests the three member improvement district board of directors with the authority to act on behalf of the improvement district. Unless specifically altered by statute, action by majority of a public body is required in order to bind that body. Water Company v. City of Wichita, 98 Kan. 256 (1916). See also Clark v. North Bay Village, 54 So.2d 240, 241 (Fla. 1951); Heiskell v. City of Baltimore, 4 A. 116 (Md. 1886). Thus, in many instances one member of a three member improvement district board cannot legally bind or act on behalf of the improvement district.

If only one individual is elected or appointed to the improvement district board, the improvement district cannot continue to function. This brings us to the primary issue of

what happens to the existence of the improvement district when only one individual is elected or willing to serve on an improvement district board of directors.

K.S.A. 19-2786g discusses disorganization of improvement districts when an improvement district has not elected officers:

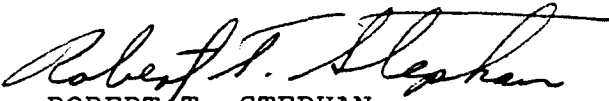
"Any improvement district organized under the act of which this act is amendatory which has not elected officers at its last statutorily required election time and has not operated or functioned as an improvement district for a period of at least one (1) year from such statutory election time, may be disorganized by an order of the board of county commissioners of the county in which such improvement district is located. Notice of such proposed action shall be given by publication in the official county paper once a week for three (3) consecutive weeks. Such disorganization of any improvement district shall in no way affect any outstanding bonds issued for payment of the cost of improvements made by such disorganized improvement district, and the county clerk and county treasurer shall continue to provide for and collect all taxes necessary to pay off any outstanding bonds and the interest thereon as they mature. Any money remaining in any fund of said improvement district after the payment of all bonds and interest and all debts of such district shall be credited to the general fund of the county in which such improvement district was located." (Emphasis added).

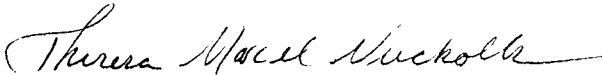
The statute discusses election of officers, not the singular officer. If this act applies to the improvement district in question and officers are not elected at the required time, the provisions of K.S.A. 19-2786g become applicable. In compliance with the criteria set forth in K.S.A. 19-2786g, the county board of commissioners may discretionarily order the disorganization of an improvement district located within the county. These criteria include not only a failure to elect officers at the statutorily required election time, but also

the failure to operate or function as an improvement district for at least one year following that statutory election time. This one year may give the improvement district time to appoint officers, and thus, despite a failure to elect officers, the improvement district may continue to function and operate as an improvement district. Whether a failure to operate or function for at least a year has actually occurred is a fact question which must be examined on a case by case basis.

K.S.A. 19-2786g allows disorganization of an improvement district which is subject to this act if there is a failure to elect officers which is followed by a year during which the improvement district does not function or operate. As previously discussed, K.S.A. 19-2766 vests the authority to act on behalf of the improvement district with the board of directors. Without such a board, the improvement district will, in many situations, automatically cease to operate or function. Thus, it is our opinion that, subject to the payment of any existing bond indebtedness, as discussed by K.S.A. 19-2786g, a county board of county commissioners may order an improvement district disorganized following a failure to elect officers at a statutorily required election time and the failure to operate or function for at least one year following such a statutory election time. Upon disorganization of an improvement district, K.S.A. 19-2786g requires the county clerk and county treasurer to continue to provide for and collect all taxes necessary to pay off any outstanding bonds and interest thereon as they mature.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Theresa Marcel Nuckolls
Assistant Attorney General

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