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August 28, 1992

ATTORNEY GENERAL OPINION NO. 92- 116

Mr. Larry Baer
Attorney for Sand Creek Watershed
Joint District No. 68
713 N. Main, P.O. Box 224
Newton, Kansas 67114

Re: Drainage and Levees--Watershed Districts; Taxation and Bonded Indebtedness--No Fund Warrants for Initial Expenses; Annual Tax Levies for General Fund Expenses; Increased Levies, Procedure; Tax Levies for No Fund Warrants and Bonds; Structure Maintenance Fund

Synopsis: Subsection (c) of K.S.A. 1991 Supp. 24-1219 authorizes the creation of a structure maintenance fund. A watershed district board may create the fund by passing a resolution. The statute authorizes annual deposits of funds; it does not authorize backfunding generally or for years that a structure has been in existence before the creation of the fund. Cited herein: K.S.A. 24-1214; K.S.A. 1991 Supp. 24-1219.

* * *

Dear Mr. Baer:

As counsel for the Sand Creek watershed joint district no. 68 (district) you make several inquiries regarding the establishment of a structure maintenance fund pursuant to K.S.A. 1991 Supp. 24-1219, subsection (c).

You indicate that the district was formed pursuant to K.S.A. 24-1201 et seq. prior to 1976. It has completed construction on seven flood water detention structures, with an eighth near completion and a ninth scheduled for completion in 1993. The district has adequate money in its general fund to permit funding of structure maintenance at the rate of 0.35% of construction cost from the date of construction completion to present date. In 1992, as a line item in its general fund, the district budgeted \$8,000.00 for structure maintenance. The proposed 1993 budget has a \$10,000.00 line item in the general fund for this purpose.

You inquire whether adoption of a resolution is the proper method to establish a structure maintenance fund. K.S.A. 1991 Supp. 24-1219 subsection (c) states:

"(c) There is hereby authorized to be established in the watershed districts of the state a fund which shall be called the structure maintenance fund. The fund shall consist of moneys deposited therein from funds received according to provisions of the watershed district law. The amount of funds that may be deposited annually shall be a maximum of .35% of the construction cost of the structure. Moneys in the structure maintenance fund may be used for the purpose of engineering, reconstruction and other required maintenance and other expenses relating to the maintenance of a structure. The watershed board of directors is hereby authorized to invest any portion of the structure maintenance fund, which is not currently needed, in investments authorized by K.S.A. 12-1675 and amendments thereto. All interest received on any such investment shall be credited to the structure maintenance fund."

The statute authorizes the establishment of a structure maintenance fund in the watershed districts of the state and defines what and how much money may be deposited. Subsection (c) does not however address your question.

Other subsections of the statute provide some assistance. K.S.A. 1991 Supp. 24-1219 deals with how the district is to

pay for the initial organization of a watershed district and specifically authorizes the incorporated district to issue no fund warrants to be paid by the levy of a tax. If a higher tax is necessary, the district is authorized to increase the tax by adoption of a resolution to that effect. In our judgment the statute contemplates this procedural format for accomplishing what is authorized by the statute. See also K.S.A. 24-1214 (by resolution the board shall propose a method of financing the costs of all works contemplated); Barten v. Turkey Creek Watershed Joint District No. 32, 200 Kan. 489 (discussing the proposed method of financing and construing both K.S.A. 24-1214 and 24-1219).

Your second question deals with "back-funding". We will assume for purposes of your question that you are proposing to contribute moneys to the fund for projects completed before the structure maintenance fund was authorized by statute. You inquire whether subsequent to establishment of the fund, it is permissible to "back fund" the maintenance fund to the year that construction was completed. Stated another way, you inquire whether it is permissible to make a contribution of 0.35% of the construction cost of a particular structure for each year that the structure has been in existence.

In our judgment the language of the statute is clear. When the intent of the legislature can be ascertained from the statute that intent governs. Brabander v. Western Co-op Elec., 248 Kan 914 (1991). The statute authorizes annual deposits with a maximum of .35% of the construction cost of the structure. A perusal of the statute's legislative history does not indicate any intent to contribute moneys to the fund for each year that a structure has been in existence. Minutes of the House Committee on Energy and Natural Resources, March 21, 28, 1990. In our opinion the statute does not authorize a contribution of .35% of the construction cost of a structure for each year that the structure has been in existence.

Your third question anticipates our answer to your second question. You inquire whether it would nevertheless be permissible to back fund the maintenance fund from 1991, the date of legislative authority for such fund.

The statute authorizes the fund's creation; the statute has provided this authority since the law's effective date of May 3, 1990 (L. 1990, ch. 119, secs. 1 and 4.) The fund does not, however, exist until it is established by the district in the manner provided by this statute. Therefore while the fund may be funded annually, it cannot be funded until it is

created. Thus in our opinion, unless the district created the fund in 1991, it cannot fund it for that year.

In conclusion K.S.A. 1991 Supp. 24-1219(c) authorizes the creation and amount of funding a structure maintenance fund. In our judgment a resolution by the board may be used to create the fund in accordance with the procedural format to be used for accomplishing what is authorized by the other sections in the statute. Additionally, given that subsection (c) of the statute authorizes the annual depositing of .35% of the construction costs of a structure, the fund cannot be "backfunded" to include moneys for each year that a previously constructed structure has been in existence. And given that the district did not create the fund in 1991, it cannot fund it for that year.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



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