

Approved January 30, 1991
Date

MINUTES OF THE House COMMITTEE ON Local Government

The meeting was called to order by Representative M. J. Johnson at
Chairperson

1:30 a.~~xx~~/p.m. on January 24, 1991 in room 521-S of the Capit

All members were present except:
Representative Gomez, excused

Committee staff present:
Mike Heim, Legislative Research Dept.
Theresa Kiernan, Revisor of Statutes Office
Connie Smith, Committee Secretary

Conferees appearing before the committee:

Ernie Mosher, League of Kansas Municipalities
Beverly Bradley, Kansas Association of Counties

Chairman Johnson informed the committee the last day to request committee bills is on February 25.

Ernie Mosher appeared before the committee to request introduction of a bill dealing with vacancies in the office of mayor in cities of the third class. (Attachment 1)

A motion was made by Representative Holmes to introduce the above legislation. Seconded by Representative Harder. The motion carried.

Mike Heim, staff, gave an overview of Proposal No. 25 - Township Roads which was an interim study. HB 2015 is a result of this interim study. The proposal calls for a review of issues involved in the county maintenance of township roads, including the adequacy of the current law and is the result of legislation (SB 728) introduced during the 1990 Session. It was requested by the Board of County Commissioners of Decatur County. Mr. Heim stated the issuance of this bill adds a few lines to the current law and clarifies it has to be a written agreement and the agreement has to specify the term. (Attachment 2)

Chairman called for a hearing on HB 2015.

HB 2015 - Act concerning counties and townships; relating to township roads;

Beverly Bradley, Kansas Association of Counties, testified in support of HB 2015. (Attachment 3) Ms Bradley stated this bill would clarify this statute. Ms Bradley answered questions from the committee.

Beverly Bradley asked for a definition of the word "term" if it means "time". Staff stated that was their intention for term to mean time.

Chairman Johnson called the committee's attention to a faxed copy of a letter submitted by Ralph D. Unger, County Commissioner in Decatur County, in support of HB 2015. (Attachment 4)

No opponents on HB 2015.

Chairman closed the hearing on HB 2015.

Chairman Johnson entertained a motion to approve the minutes of January 17, 1991. A motion was made by Representative Watson; seconded by Representative Holmes to approve the minutes of January 17, 1991. The motion carried.

Meeting was adjourned at 1:57 p.m.

**Vacancies In the Office of Mayor and Councilmember,
Cities of the Third Class**

A bill submitted by the League of Kansas Municipalities

K.S.A. Supp. 15-311, last amended in 1988, applies to 509 mayor-council cities of the third class. It contains some confusing language, contradictory to the provisions of K.S.A. 15-201. Further, because of certain changes made to K.S.A. Supp. 15-311 in 1988, it has been interpreted to mean that a council president, in the temporary absence of the mayor, may make appointments to fill council vacancies.

K.S.A. 15-201 (last sentence) now provides:

"In case of a vacancy in the office of mayor, the president of the council shall become mayor until the next regular election for that office and a vacancy shall occur in the office of the councilmember becoming mayor."

However, K.S.A. Supp. 15-311, as now written, implies that the president of the council exercises the powers and duties of the mayor, but does not become mayor, when the office of mayor becomes vacant--a provision inconsistent with the last sentence of K.S.A. 15-201 quoted above.

In addition, the amendment made to K.S.A. Supp. 15-311 in 1988 has been interpreted by the Attorney General (A.G.O. No. 90-85) that, since the council president is only prevented from appointing city officials (e.g. city clerk, treasurer) when the mayor is temporarily absent, then the president does have authority to make appointments to fill council vacancies when the mayor is temporarily absent. However, K.S.A. 15-201 provides that when a council office is vacant, it is the mayor who makes the appointment, "by and with the advice and consent of the remaining councilmembers".

The bill below:

- (1) cross-references in K.S.A. Supp. 15-311 the provisions in K.S.A. 15-201 relating to filling vacancies in the office of mayor;
- (2) clarifies that when the mayor is temporarily absent, the president of the council exercises the powers and duties of the office of mayor; and further,
- (3) specifies that appointments to fill vacancies on the council (which must be approved by the council) may only be done by the mayor.

LH
Attach. I
1-24-91

HOUSE BILL No. _____

By Committee on Local Government

AN ACT concerning vacancies in the office of mayor in cities of the third class, amending K.S.A. 1990 Supp. 15-311 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1990 Supp. 15-311 is hereby amended to read as follows: K.S.A. 15-311. When any vacancy shall ~~happen~~ occur in the office of mayor, by death, resignation, removal from the city, removal from office, refusal to qualify, or otherwise, the vacancy shall be filled as provided by K.S.A. 15-201. In the case of the temporary absence of the mayor, the president of the council for the time being shall exercise the office of mayor, with all the rights, privileges and jurisdiction of the mayor, other than the appointment of councilmembers or officers pursuant to K.S.A. 15-201 and 15-204 and amendments thereto, until such vacancy be filled, or such disability be removed, or in case of temporary absence, until the mayor shall return.

Sec. 2. K.S.A. 1990 Supp. 15-311 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

RE: PROPOSAL NO. 25 -- TOWNSHIP ROADS*

Proposal No. 25 calls for a review of issues involved in the county maintenance of township roads, including the adequacy of the current law.

Background

Proposal No. 25 is the result of legislation (S.B. 728) introduced during the 1990 Session. S.B. 728 was requested by the Board of County Commissioners of Decatur County. The bill was an attempt to address concerns of the board relevant to the maintenance of township roads by the county engineer. Township trustees sometimes enter into agreements with the board of county commissioners to turn over maintenance of township roads to the county. Present law (K.S.A. 68-561) requires the township to annually certify to the board of county commissioners the aggregate amount to be raised by taxation needed to reimburse the county for the maintenance of township roads. In the case of Decatur County, the board expressed concern that some townships did not levy sufficient funds to provide for maintenance, thus placing the county in the position of either using county tax dollars to maintain township roads or, in the alternative, only spending the amount of money raised by the township levy and perhaps exposing the county to a claim of negligence in the maintenance of those roads. To address these concerns, the county attorney of Decatur County suggested changing the language in K.S.A. 68-561 to require the county commissioners to determine the road levy. The bill was introduced by the Senate Committee on Local Government and set for hearings on March 2, 1990. The bill eventually died in Committee on June 1, 1990. The subject matter of S.B. 728 was recommended for interim study and subsequently was approved by the Legislative Coordinating Council.

Current Statutes Relating to Township and County Roads

Townships and Road Maintenance

At one time, road maintenance outside cities was the responsibility of townships. However, the number of townships actually involved in highway maintenance has declined. The reduced number of townships involved in road maintenance has resulted principally from the growth of the county unit highway system and, to a lesser extent, the general county rural highway system, as well as the consolidation of townships.

The principal state laws applicable to township roads are found in Article 5 of K.S.A. Chapter 68. K.S.A. 68-523 provides that the township board constitutes the "township board of highway commissioners." The township trustee is authorized by K.S.A. 80-301 to divide the township into road districts, to define and to record the boundaries and number of road districts, and to levy a tax for township road purposes. While cities of the third class are within townships (K.S.A. 15-104), township road levies do not apply to property within cities (K.S.A. 68-518c), nor do townships maintain streets within cities. This same statute authorizes townships to levy a tax for road purposes not to exceed the 5 mill limitation set out in K.S.A. 79-1962. A township board may, by resolution, levy an annual tax exceeding the limits prescribed by K.S.A. 79-1962 not to exceed 8 mills. The resolution is subject to a protest petition by 10 percent of township voters. In addition, K.S.A. 80-1413 allows any township board, upon resolution adopted by the majority of the board, to submit to the electors of the township, who reside outside of the corporate limit of a city, the question of levying a special road tax of not to exceed 10 mills. Such tax would be for a specified number of years. In counties not operating under the county road unit system, the proceeds of the levy are used by the township board for grading, sanding, graveling, or otherwise improving township roads. The proceeds must be used first on township roads which are mail routes and on roads leading from mail routes to schools and cemeteries in the township. In counties operating under the county road unit

* H.B. 2015 accompanies this report.

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Attach. 2
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system, the county treasurer places the proceeds of the levy in a special fund to be used by the board of county commissioners for the sole purpose of grading, sanding, graveling, or improving roads in the township voting such levy. The proceeds must be used first on roads which are mail routes and on roads leading from mail routes to schools and cemeteries in the township.

Turnover of Township Roads to County. K.S.A. 1989 Supp. 68-560 provides for the turnover of township roads in noncounty unit systems to the county, with the consent of the board of county commissioners. The question of turning over the maintenance, repair, or construction of township roads to the county requires approval of the township voters whenever a petition is presented signed by 10 percent of electors of the township or upon passage of a resolution of the township board calling for an election. Property taxes and other moneys received by the township board for road purposes are placed in a separate fund of the county to be used for work and improvements on the applicable township roads.

County Road Administration

County highway administration in Kansas is of three types: (1) the county-township road system, (2) the county road unit system, and (3) the general county rural highway system. Each of these arrangements is discussed below.

County-Township Road System. Under this system, both the county government and township governments are involved in the construction and maintenance of roads. This form is used in all the unincorporated areas of Kansas except where the county road unit system or the general county rural highway system has been adopted. There are 36 counties which have this system. Under the county-township road system, separate property tax levies are made for road purposes by the county and by townships. Generally, the county levy for road purposes applies to all property within the county and the township road levies apply only to properties within the township, except for territory within cities of the third class. Provisions for the classification of roads for counties with this system are found in K.S.A. 1989 Supp. 68-506. The roads are classified as secondary roads or highways, county minor collectors, and township or local service roads. The purpose of the designation and classification is to provide for a network of roads for funding and other purposes. The Federal Highway Administration of the United States Department of Transportation requires such designation and classification.

County Road Unit System. Under the county road unit system, townships no longer have a highway function. The maintenance of all former township roads is turned over to the county. At present, 69 counties have adopted the county unit road system.

The procedure for the adoption of the county unit road system is found in K.S.A. 68-515b. The system is established by resolution of the county board, at its discretion or upon a petition signed by 10 percent of the qualified electors. The resolution must be published for three consecutive weeks and does not take effect for 90 days. During this period, a countywide referendum may be mandated by the petition of 10 percent of the electors.

Under this system all roads are classified as county secondary, minor collector, or local service roads. These designations and classifications are required by the federal regulation 23 CFR, Part 470. All roads within the county's jurisdiction, notwithstanding its classification, are financed by countywide taxes. Generally, former township roads are classified as local service roads and taxes levied to service those roads are levied on property within both cities and townships.

General County Rural Highway System. Under the general county rural highway system, authorized by K.S.A. 68-591 *et seq.*, the county assumes responsibility for all former township roads but property taxes levied by the county for "local service roads" purposes are levied only on property outside of cities. Countywide road and bridge taxes, including taxes on property within cities, continue to be levied, and are set aside for use to finance primary and secondary roads. Under previous state law, only Leavenworth County was eligible

to adopt this system, and did so in 1973. The law was later amended in 1983 to allow any county to adopt the county rural highway system. In 1984, Pottawatomie County also adopted the county rural highway system.

Adoption of the general county rural highway system is comparable to the procedure for adopting the county unit system, except that the petitioners, and the voters in case of a referendum, must reside outside any city.

Intergovernmental Approaches

The above information describes the distribution of Kansas highway responsibilities by type of governmental unit, primarily the legal distribution of authority and responsibility. There are also intergovernmental and cooperative arrangements that counties and townships may enter into. Below is a summary of various state laws which authorize such approaches. The summaries below are in addition to the township road turnover option, discussed above under township roads.

Interlocal Cooperation Statute. Perhaps the single most important general statute on intergovernmental cooperation in Kansas is found in K.S.A. 12-2901 *et seq.* The purpose of the statute is to permit local units to make the most efficient use of their power and resources by enabling them to cooperate with other localities, persons, associations, and corporations to provide services and facilities in a more economical or advantageous manner. The Act allows agreements for a number of purposes, ranging from public improvements, police protection, and flood control to activities regarding the Tort Claims Act. Agreements, however, are not restricted to only those functions listed in the Act. Public agencies enter into these agreements by the passage of an ordinance or resolution by their governing bodies. The agreement must set out its purpose, duration, method of financing, and the nature of any separate legal entity created by it. Agreements, except those regarding the establishment of councils or other organizations of local government, must receive the approval of the Attorney General.

Governmental Organization Statute. A second general state law, passed in 1974, gives counties, townships, cities, and other taxing subdivisions broad authority to consolidate operations, procedures, and functions in the interest of efficiency and effectiveness. It is found in K.S.A. 12-3901 *et seq.*, and is entitled "Governmental Organization." Consolidation under this statute can be effective within a single governmental unit or through joint action of two or more governmental units. The governing body or governing bodies must first find by resolution that duplication exists and that operations, procedures, or functions can be more efficiently and effectively exercised and then designate the office or agency to perform the consolidated function, and the time, form, and manner of implementation of the consolidation. Identical resolutions must be passed by each governing body when more than one governmental unit is involved. An election is also required if a proposed consolidation is protested by a petition signed by 10 percent of the qualified electors.

General Highway Statute. K.S.A. 68-169 permits any county, city, or political subdivision to enter into written agreements with each other or with the Secretary of Transportation with respect to the planning, designing, financing, constructing, reconstructing, maintaining, and acquiring of right-of-way or establishing the controlled access facilities of any existing or proposed highway, road, street, or connecting link, including bridges and traffic control devices. Expenditures made under these agreements are considered proper expenditures of public funds, including state funds, notwithstanding the location of such improvement or facility outside the boundary or jurisdiction of a county, city, or political subdivision. In practice, most agreements are between the Secretary of Transportation and counties. The Secretary's principal use of the statute is to administer federal funds to the counties. Agreement between local units cover a wide variety of road-related work. For example, Rush County has entered into an agreement with bordering counties and townships for the maintenance of boundary roads. In addition, Rush and Barton counties have a joint resolution providing for the maintenance of asphalt boundary roads which were jointly constructed.

Intergovernmental Agreement Statute. K.S.A. 1989 Supp. 68-572 provides broad authority for counties, cities, and townships to enter into intergovernmental agreements for the construction, reconstruction, or maintenance of any roads or streets. The statute also permits mutual cooperation whereby the machinery, equipment, and employees of a county and township may be used for grading township roads.

County Public Works Statutes. K.S.A. 19-4501 *et seq.*, enacted in 1972, grants counties with departments of public works broad powers to provide a variety of public works services to local units within the county, under written agreements. As a practical matter, this statute is not used much insofar as road maintenance is concerned. County engineers tend to apply the statutes found in Chapter 68 to address various road matters when entering into agreements with other local units.

Specific Cooperation Statutes. In addition to the general acts noted above, there are other specific statutes which authorize cooperation and agreements between governmental units in the area of highways. K.S.A. 68-503 and K.S.A. 28-118 allow any county to form a county engineer district and unite with an adjoining county or counties to jointly employ a county engineer, subject to certain limitations. At present, a county engineer district has been established by Gove and Trego counties. Both counties have joined together to hire an engineer.

Another statute, K.S.A. 68-141a *et seq.*, allows any county or any township to rent machinery or equipment to each other or to any city located within the county. Finally, K.S.A. 68-5,103, allows Sedgwick County to issue bonds to make improvements on any existing roads and highways in the county or any streets in any city within the county, subject to certain conditions.

Disorganization and Reorganization of Townships

Consolidation of townships has steadily reduced the number of townships in Kansas. According to the League of Kansas Municipalities, the number of townships has been reduced from 1,540 in 1970 to 1,435 in 1980. In 1989, that number had been further reduced to 1,415. Of this total, 40 townships in nine counties are currently inactive. Townships may be dissolved as a result of township territory being annexed by a municipality, and townships may be disorganized, reorganized, or consolidated as a result of the actions of the board of county commissioners or the township residents. The statutes contain five procedures for the disorganization of townships. See K.S.A. 80-2202; 80-1101 *et seq.*; 80-1105 and 80-1106; 80-1109; and 80-1110 *et seq.*

Committee Activity

The Committee met on August 24 to receive testimony on the township road issue. Appearing before the Committee were persons representing the following: a Decatur County Commissioner; the Kansas Department of Transportation; the Municipal Accounting Section, Department of Administration; the Attorney General's Office; the Kansas County Engineers Association; and the Kansas Association of Counties.

A member of the Board of County Commissioners from Decatur County pointed out that in Decatur County some townships had turned over the road maintenance to the county engineer. In some cases the county must either cease maintaining the roads or continue road maintenance by subsidizing the township's roads from the county's road budget. The Commissioner also raised the question of who was legally liable under these types of arrangements where the township does not raise the sufficient funds and the county maintains only the roads with available funds. It was pointed out that under present statutes the township may discontinue these kinds of arrangements while the county may not. The Commissioner suggested that the Legislature grant the county commissioners the taxing authority

in setting the budget levels; or grant the county some means to modify or terminate the agreement between the township and county.

The representative from the Kansas Department of Transportation appeared before the Committee to explain the three types of road systems used at the county and township level. His testimony explained the existing road systems, *i.e.*, county unit system, county-township system, and the county rural highway system. Also explained were the classification of these roads and the available funding. It was noted that the Department of Transportation has been able to provide funding to local units of government with the existing statutes.

The representative from the Municipal Accounting Section explained the mill levy rate limits for road funds. Prior to the implementation of reappraisal, counties and townships were required to comply with the mill levy rate limits in the statutes. Counties, in addition, had to comply with the aggregate tax levy limitation (tax lid) established in K.S.A. 79-5001 *et seq.* In the reappraisal year (the 1989 tax levy) all fund levy limits were suspended so mill levy rate limits did not apply. It was noted that both the counties and townships had a tax lid and could levy whatever mill rate they wanted in the road funds but the total levies under the tax lid could not exceed the tax lid amount. For the 1991 budget (the 1990 tax levy) the limits were set in 1990 H.B. 2700. All fund levy limits were again suspended but both the counties and townships had a tax lid. The provisions of this legislation applied only to the 1990 tax levy.

The Attorney General's representative explained the Attorney General's role with regard to interlocal agreements. As with all contracts, both entities must agree to the undertaking. It was noted that review by the Attorney General's Office does not include interference with contract decisions on the part of either or both parties. The exact terms of the agreement could be as varied as the number of public parties who utilize the provisions of the Interlocal Cooperation Act.

The President of the Kansas County Engineers Association discussed various state statutes applicable to the maintenance of township roads. He said that a number of counties in Kansas established a county department of public works, which has a division of highways along with other divisions as deemed necessary by the board of county commissioners. These divisions, for example, may include solid waste, noxious weeds, and parks. He added that part of the duties as county engineer is to advise the township officials in counties that have a county/township road system as to the best and appropriate methods of construction, repair, maintenance, and improvements of their roads, drainage facilities, and roadway signing.

The Deputy Director of the Kansas Association of Counties supported the concerns of the Decatur County Commissioners. She said that turning the roads back to a township that does not have the sufficient funds, equipment, or employees did not appear to be an adequate solution.

Conclusion and Recommendations

Based on the testimony received, the Committee believes that there is merit to the recommendation that agreements entered into between a township and county be made more equitable. The Committee believes that this can be accomplished by amending K.S.A. 68-560 to require agreements between a township and county to contain a duration clause. A duration requirement already exists under the Interlocal Cooperation Act. The Committee believes that a similar provision added to K.S.A. 68-560 will bring some measure of fairness to these agreements. To that end, the Committee recommends the introduction of H.B. 2015. H.B. 2015 requires that any agreement between a township and county operating under a noncounty unit road system specifically state the term of the agreement.

The Committee also wishes to note that during its hearings, testimony disclosed that some townships are levying the maximum amount of taxes permitted under state law. The Committee believes that it would be helpful to survey townships operating under the noncounty unit road systems to review the amount of levies being made for township road funds and to determine whether maximum levies are being assessed by the townships. The Committee

recommends that the Municipal Accounting Section of the Division of Accounts and Reports conduct such a review and report its findings to a Local Government standing committee during the 1991 Legislative Session.

Finally, the Committee has requested an Attorney General's opinion regarding the ability of a board of county commissioners to withdraw its consent to maintain township roads. In addition, the Committee asked the Attorney General to respond to the issue of which unit of government would be liable in tort for negligence due to inadequate maintenance of township roads in those instances where the township decides to turn over the road maintenance to the county. The Attorney General opined that a county may terminate or renegotiate an agreement to maintain a township road under K.S.A. 68-560. The Attorney General also noted that, if the county assumes responsibility for maintenance of the road, it undertakes to perform a duty which may give rise to liability for negligent performance of that duty.

HOUSE BILL No. 2015

By Special Committee on Local Government

Re Proposal No. 25

12-28

10 AN ACT concerning counties and townships; relating to township roads; amending K.S.A. 1990 Supp. 68-560
11 and repealing the existing section.

12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. K.S.A. 1990 Supp. 68-560 is hereby amended to read as follows: 68-560. (a) In any county not
14 operating under the county road unit system, any township in such county, ~~with consent of~~ pursuant to a written
15 agreement with the board of county commissioners, may turn over the maintenance, repair and construction of
16 township roads to the ~~counties~~ county as provided by this subsection. *Any such agreement shall specifically state*
17 *the term of such agreement.* The question of turning over the maintenance, repair and construction of the
18 township roads to the county shall be submitted to a vote of the qualified electors of the township at the general
19 election whenever there shall have been submitted to the board of county commissioners at least 60 days prior
20 to the date of such general election a petition signed by 10% of the qualified electors of such township or a
21 resolution of the township board calling for such election.

22 (b) Any township which has adopted the provisions of this act may abandon the provisions of this act, and
23 take over the maintenance, repair and construction of township roads, as provided by this subsection. The
24 question of abandoning the adoption of the provisions of this act shall be submitted to a vote of the qualified
25 electors of the township at any general election after the date such township has adopted the provisions of this
26 act, whenever there shall have been submitted to the board of county commissioners at least 60 days prior to
27 the date of any such general election, a petition signed by at least 20% of the qualified electors of such township.

28 Sec. 2. K.S.A. 1990 Supp. 68-560 is hereby repealed.

29 Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.
30

A G R E E M E N T

Now, on this 30th day of December, 1980, the County of Decatur and through the Board of County Commissioners, party of the first part and Sherman Township by and through the Township Board, party of the second part, enter into the following agreement.

That whereas, the party of the second part has presented certified petition asking that the township roads of Sherman Township be turned over to the County of Decatur for maintenance, repair and construction in accordance with said petition and whereas the Board of County Commissioners finds that said petition contains more than 51% of the qualified electors of said township and that therefore no election is required.

It is therefore by the Board of County Commissioners of Decatur County, Kansas resolved that said Sherman Township be accepted by the County of Decatur per the petition subject, however, to the following conditions which are agreed to between the parties hereto:

1. That the Caterpillar Motor Grader No. 8T 12 with Serial No. 8T3841 presently owned by Sherman Township will be forthwith appraised in accordance with appraisal provisions set forth in G. S. 1949, 68-516b.

2. That said road grader will be returned to the township of Sherman if, at the next general election, the electors of said township succeed in voting the maintenance back to the township and that said road grader, upon its return to the second party as set forth above, would be in good usable condition similar to its present condition with reasonable wear expected. If, because of some unforeseen occurrence the return of said road grader cannot be made, and the next general election deems that the roads of Sherman Township should be maintained by the township, then the appraisal value of the road grader shall control and the County of Decatur will, from its road and bridge fund, pay over to Sherman Township the amount of said appraisal, by January 1983.

3. That the county of Decatur shall charge the regular rental charge to party of the second part for work done in said township which charges shall be paid from the special account set up from funds obtained from said township.

4. Party of the first part shall be required to maintain said road grader and shall not be liable to said township for said machinery except as provided in this agreement.

Alvin Sloan

Joseph Stuge

Jack Stone
Board of County Commissioners
Decatur County, Kansas

Bart Snyder

Frank R. Witt

Allen M. Humm
Township Board of Sherman Township



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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ROBERT T. STEPHAN
ATTORNEY GENERAL

October 1, 1990

MAIN PHONE: (913) 296-2215
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ATTORNEY GENERAL OPINION NO. 90- 113

The Honorable Nancy Brown
State Representative, 27th District
15429 Overbrook Lane
Stanley, Kansas 66224-9744

Re: Roads and Bridges; Roads -- County and Township
Roads; General Provisions -- Maintenance of
Township Roads; Agreement With County; Termination
of Agreement; Duties and Liabilities

State Departments; Public Officers and Employees --
Kansas Tort Claims Act -- Claims to Which Act
Applicable; Negligent Maintenance of Township Roads
by a County

Synopsis: Pursuant to case law permitting termination of
agreements that irrevocably delegated discretionary
governmental authority, a county may terminate or
renegotiate an agreement to maintain a township
road under K.S.A. 1989 Supp. 68-560. However, if
a county assumes responsibility for maintenance of
a township road, it undertakes to perform a duty
which may give rise to liability for negligent
performance of that duty. Cited herein: K.S.A.
12-2901; K.S.A. 1989 Supp. 12-2904; K.S.A.
68-124; 68-515a; 68-517; 68-518c; 68-526; K.S.A.
1989 Supp. 68-560; K.S.A. 68-561; K.S.A. 1989
Supp. 68-572; K.S.A. 75-6101; 75-6104.

* * *

Dear Representative Brown:

As chairperson of the legislative special committee on local
government, you request our opinion on issues involving

maintenance of township roads by a county. You cite K.S.A. 1989 Supp. 68-560 and ask that we address two questions: (1) whether an agreement entered into pursuant to K.S.A. 1989 Supp. 68-560 is binding in perpetuity upon the county, or if such an agreement may be terminated or the terms renegotiated, and (2) whether the county or township would be liable for injuries caused from negligent maintenance of township roads. You note that these issues arise out of the failure of some townships to make an adequate mill levy in order to cover the full costs incurred by a county in maintaining township roads. As an example of an agreement by a county to maintain township roads, you attach a 1962 agreement between Decatur county and Oberlin township. We note that this agreement does not cite K.S.A. 1989 Supp. 68-560 and does not speak to termination or renegotiation of the agreement.

K.S.A. 1989 Supp. 68-560 was enacted in 1941 and essentially remains in its original form:

"In any county not operating under the county road unit system, any township in such county, with consent of county commissioners, may elect to turn over the maintenance, repair and construction of township roads to the counties as provided by this subsection. The question of turning over the maintenance, repair and construction of the township roads to the county shall be submitted to a vote of the qualified electors of the township at the general election whenever there shall have been submitted to the board of county commissioners at least 60 days prior to the date of such general election a petition signed by 10% of the qualified electors of such township or a resolution of the township board calling for such election.

"(b) Any township which has adopted the provisions of this act may abandon the provisions of this act, and take over the maintenance, repair and construction of township roads, as provided by this subsection. The question of abandoning the adoption of the provisions of this act shall be submitted to a vote of the qualified electors of the township at any general election after the date such township has adopted the provisions of

this act, whenever there shall have been submitted to the board of county commissioners at least 60 days prior to the date of any such general election, a petition signed by at least 20% of the qualified electors of such township." (Emphasis added).

K.S.A. 68-561 discusses reimbursement of expenses to the county for costs incurred in maintaining a township road:

"Whenever any township has petitioned or voted to turn over the maintenance, repair and construction of the township roads to the county, as hereinbefore provided, the township board of such township is hereby authorized and directed to pay over to the board of county commissioners of such county any and all unused road money or funds or surplus funds and all other moneys received by such township for road purposes and in the hands of such township board and any road machinery or equipment owned by such township, to be used by the board of county commissioners for road work on the township roads in the township. The township board shall each year certify to the board of county commissioners, as is now prescribed by law, the aggregate amount to be raised by taxation for township road purposes within such township for the year next ensuing, and the board of county commissioners shall determine the rate of levy, and levy such rates as are now provided by law. Such taxes and all other moneys received by such township board for road purposes shall be placed by the county treasurer in a separate fund to be used by the county commissioners only for road work and improvement on township roads within the township: Provided, That the county shall not be obligated to spend on the roads and highways of such townships more money than is credited to said separate fund. . . ." (Emphasis added).

Thus, a county may discretionarily agree to assume certain duties with respect to maintenance of township roads, and the township remains liable for the expense of such maintenance.

Alternative arrangements for county maintenance of township roads include: K.S.A. 1989 Supp. 68-572, mutual assistance with respect to machinery and crew; K.S.A. 12-2901 et seq., interlocal cooperation agreements, see Attorney General Opinion No. 85-172; K.S.A. 68-124, non-consensual maintenance by county with the costs being charged to the township, see Attorney General Opinion No. 87-22; and, K.S.A. 68-515b et seq., a county road unit system whereby the county assumes responsibility for all township roads, see Attorney General Opinion No. 85-57. Some of these alternative provisions generally discuss termination of the county's agreement to assume maintenance of township roads. See e.g., K.S.A. 68-517 and K.S.A. 1989 Supp. 12-2904(c)(5). K.S.A. 1989 Supp. 68-560 allows a township to "abandon the provisions of this act," however, the act does not specifically address whether a county may also terminate such an agreement.

The assumption of township road maintenance duties by a county pursuant to K.S.A. 1989 Supp. 68-560 appears to be a discretionary decision. This statute does not require a county to assume such duties. We have thus far not found general authority requiring a county to continue assumption of a duty that is not otherwise statutorily required. Rather, where an action is discretionary on the part of a governmental entity, there is a general reluctance to permit complete contractual elimination of all future governmental exercise of that discretion. See State v. Topeka, 176 Kan. 240 (1954); Landau v. City of Leawood, 214 Kan. 104, 108 (1974); 63 C.J.S. Municipal Corporations, § 987 (1950). This case law largely concerns a contract between a governmental entity and a private individual or corporation. However, we believe the reluctance of the court to hold a governmental entity perpetually bound to a discretionary decision would apply equally to agreements entered into between two governmental entities. Thus, it is our opinion that, despite the lack of specific authority in K.S.A. 1989 Supp. 68-560, a county may choose to renegotiate terms or discontinue maintenance of a township road it is maintaining pursuant to that provision. However, legislative authorization on this point would clarify such authority and codify Kansas case law concerning termination of agreements involving discretionary decisions by a governmental entity.

Your second issue concerns liability for negligent maintenance of township roads. Generally, a township having exclusive care and control of a street or road has a duty to maintain that road or street for the safe passage of persons or property. Other governmental entities cannot be held liable for failure to maintain a township road for which and over

which that other governmental entity has no authority or duty. Finkbiner v. Clay County, 238 Kan. 857, 861 (1986), citing City of Eudora v. Miller, 30 Kan. 494 (1883). See also Attorney General Opinion No. 87-22. In order to hold a township liable for defects in a public road, there must be evidence to show that it is a township road. Irvin v. Garden City Township, 111 Kan. 336 (1922). If there is no duty, there can be no breach of duty, and thus no liability for failure to exercise reasonable due care. Hanna v. Huer, 233 Kan. 206 (1983). A county may be held liable if it assumes certain duties. One who undertakes to render services to another, which he should recognize as necessary for the protection of a third party, is liable to a third party for harm resulting from failure to exercise reasonable due care. For example, in Schmeck v. City of Shawnee, 232 Kan. 11 (1982), a firm rendering traffic engineering services by contract was held to assume some duty with regard to those using the public streets.

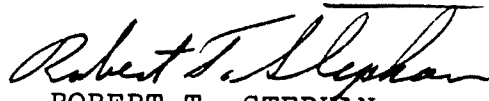
The extent of duty assumed may limit the extent of duty owed. See Thomas v. Board of Trustees of Salem Township, 224 Kan. 539 (1978). Townships generally have the duty to maintain township roads, however, should a county consensually share that duty with a township, the county may also be assuming potential liability for negligent performance of such a duty. K.S.A. 68-124 and 68-561 clearly permit a county to turn to a township for repayment of costs incurred for maintenance of township roads. Townships are authorized by K.S.A. 68-518c to levy taxes for road maintenance purposes. See also K.S.A. 68-526 and Attorney General Opinion No. 82-228. However, when a township cannot or will not levy sufficient funds for road maintenance purposes, and if a county only expends those funds available from the township, there is a fear that lack of maintenance may result in liability for breach of reasonable due care. We believe that this fear is well founded. The reasonableness of the care given will ultimately be a fact question, and the county or township may raise lack of funding as a defense. However, whether such a defense is reasonable under the circumstances must be determined on a case by case basis.

K.S.A. 75-6101 et seq., the Kansas tort claims act (KCTA), permits individuals to seek damages from municipalities for negligent acts or omissions. Exceptions to the KCTA are set forth at K.S.A. 75-6104 and do not include negligent performance of road maintenance due to lack of funding or road maintenance discretionarily undertaken for the benefit of a separate governmental municipality. "[D]uty is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in

negligence cases, the duty is always the same - to conform to the legal standard of reasonable conduct in the light of the apparent risk. What the defendant must do, or must not do, is a question of the standard of conduct required to satisfy the duty." Prosser and Keeton on Torts, § 53 (5th ed. 1984). Once a county has voluntarily accepted or undertaken the duty of township road repair or maintenance, the county may be held to the same standard of care expected of the township. There may be some apportionment of damages, with both the township and county as tort-feasors, or an agreement by the township to indemnify the county for any proportionate share of fault found against the county. A township cannot escape responsibility or liability for roads that remain township townships. However, although the county may ultimately look to the township with regard to costs incurred for maintenance of township roads, persons injured on a township road may seek recovery from any entity that has a duty to repair and maintain such a road. Which entity has such a duty is a fact question and liability must be determined on a case by case basis.

In summary, despite the lack of specific statutory authority, it is our opinion that a county may terminate or renegotiate the terms of an agreement to maintain a township road entered into pursuant to K.S.A. 1989 Supp. 68-560. We would support legislative codification of such authority. If a county voluntarily assumes responsibility for maintenance of a township road, it undertakes performance of a duty which may give rise to potential liability for negligent performance of that duty.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General

RTS:JLM:TMN:bas

Type of Road System and Number of Townships by County

COUNTY	TYPE OF ROAD SYSTEM			NUMBER OF TOWNSHIPS
	COUNTY UNIT ROAD SYSTEM	NON-COUNTY UNIT ROAD SYSTEM	GENERAL RURAL ROAD SYSTEM	
Allen	X			12
Anderson	X			15
Atchison		X		8
Barber		X		18
Barton		X		22
Bourbon	X			11
Brown		X		10
Butler		X		29
Chase	X			9
Chautauqua	X			12
Cherokee	X			14
Cheyenne	X			8
Clark	X			6 *
Clay		X		18
Cloud	X			18
Coffey	X			14
Comanche	X			4
Cowley		X		25
Crawford	X			9
Decatur		X		25
Dickinson		X		24
Doniphan	X			9
Douglas		X		9
Edwards		X		10
Elk	X			10
Ellis	X			9
Ellsworth		X		19
Finney	X			7
Ford		X		14
Franklin	X			16
Geary	X			8
Gove	X			9
Graham	X			13
Grant	X			3 *
Gray	X			7
Greeley	X			3
Greenwood		X		15
Hamilton	X			8 *
Harper	X			6
Harvey		X		15
Haskell	X			3
Hodgeman	X			9
Jackson	X			15
Jefferson	X			12
Jewell	X			25
Johnson	X			9
Kearny	X			7
Kingman		X		23
Kiowa	X			1
Labette	X			16
Lane	X			8
Leav'worth			X	10
Lincoln	X			20 *
Linn	X			11
Logan		X		11

Lyon	X			11
Marion	X			24
Marshall		X		25
McPherson		X		25
Meade		X		9
Miami	X			13
Mitchell		X		20
Montgomery	X			12
Morris	X			11
Morton	X			6
Nemaha		X		20
Neosho	X			12
Ness	X			10
Norton	X			5
Osage		X		16
Osborne		X		23
Ottawa	X			20
Pawnee		X		21
Phillips	X			25
Pot'wa'mie			X	23
Pratt	X			7
Rawlins	X			10
Reno		X		31
Republic	X			20
Rice		X		20
Riley		X		14
Rooks	X			12
Rush	X			12
Russell		X		12
Saline	X			18
Scott	X			7 *
Sedgwick		X		27
Seward	X			3
Shawnee		X		12
Sheridan	X			14
Sherman	X			13
Smith	X			25
Stafford		X		21
Stanton	X			3
Stevens	X			6 *
Sumner		X		30
Thomas		X		13
Trego	X			7
Wabaunsee		X		13
Wallace	X			4
Washington		X		25
Wichita	X			1
Wilson	X			15
Woodson	X			6 *
Wyandotte	X			2 *
TOTAL	67	36	2	1,415

SOURCE: 1989-90 Directory of Kansas Public Officials, League of Kansas Municipalities

NOTES: Clark County -- 3 of the townships are inactive.
Grant County -- all 3 townships are inactive.
Hamilton County -- 5 of the townships are inactive.
Jackson County -- 13 of the townships are inactive.
Lincoln County -- 5 of the townships are inactive.
Scott County -- 3 of the townships are inactive.
Stevens County -- all 6 townships are inactive.
Woodson County -- 1 of the townships is inactive.
Wyandotte County -- 1 of the townships is inactive.



"Service to County Government"

212 S.W. 7th Street
Topeka, Kansas 66603
(913) 233-2771
FAX (913) 233-4830

EXECUTIVE BOARD

President
Gary Hayzlett
Kearney County Commissioner
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Lakin, KS 67860
(316) 355-7060

Vice-President
Marjory Scheutler
Edwards County Commissioner
R.R. 1, Box 76
Belpre, KS 67519
(316) 995-3973

Past President
Winitred Kingman
Shawnee County Commissioner
(913) 291-4040
(913) 272-8948

Dixie Rose
Butler County Register of Deeds
(316) 321-5750

Carl Ford
Seward County Appraiser
(316) 624-0211

DIRECTORS

Leonard "Bud" Archer
Phillips County Commissioner
(913) 689-4685

Marion Cox
Wabaunsee County Sheriff
(913) 765-3323

John Delmont
Cherokee County Commissioner
(316) 348-3717

Keith Devenney
Geary County Commissioner
(913) 238-7894

Berneice "Bonnie" Gilmore
Wichita County Clerk
(316) 375-2731

Harry "Skip" Jones III
Smith County Treasurer
(913) 282-6838

Roy Patton
Harvey County Weed Director
(316) 283-4890

Thomas "Tom" Pickford, P.E.
Shawnee County Engineer
(913) 291-4132

NACo Representative
Joe McClure
Wabaunsee County Commissioner
(913) 499-5284

Executive Director
John F. Torbett

January 24, 1991

To: Representative Mary Jane Johnson, Chairperson
Members House Local Government Committee

From: Bev Bradley, Deputy Director
Kansas Association of Counties

Re: HB 2015 Maintenance of Township Roads

We understand this bill is the result of an interim study which addressed the problem of maintenance and construction of township roads by counties and the concern of liability resulting from providing this service. A problem exists in some counties that are not under the county unit road system.

When a township has voted to turn the maintenance, repair and construction of the township roads to the county as provided in KSA 68-560 and 68-561, the statute allows the township board to turn over road equipment and unused road money to the county to provide the maintenance service. The township board then sets the amount for the levy each year. Many times the agreements have been in affect 25 or more years and the township board does not levy enough money to provide adequate maintenance. The county was stuck with providing the maintenance and must spend money levied for other projects to keep the roads in safe condition or face the liability if proper care is not taken.

As we understand this bill the agreements that have been in place would be negated and any new agreements would specifically state the term of such agreement. I have spoken to a Decatur County Commissioner this morning and they think this bill would satisfy their concern. The Kansas Association of Counties is in support of HB-2015.

TSB2015

LH
1-24-91
Attach. 3

County Of Decatur

Israel B. Betts
Jack Noone
Ralph D. Unger
Commissioners
913-475-2522

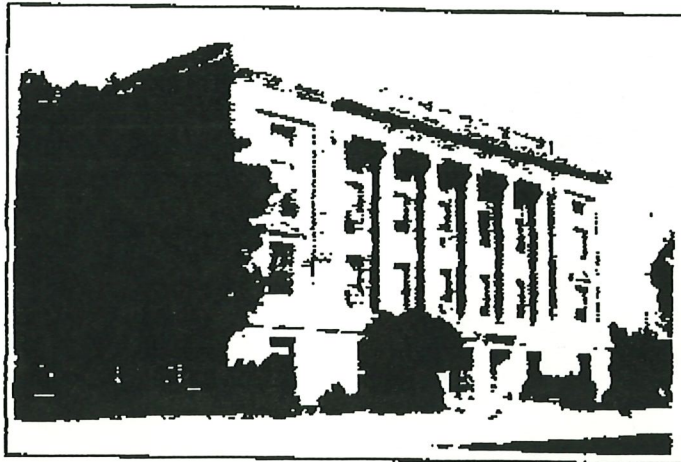
Marilyn Horn
County Clerk
913-475-2132

Pat Fringer
County Treasurer
913-475-2521

Steven W. Hirsch
County Attorney
913-475-3082

Ken Badely
County Sheriff
913-475-3084

Patricia M. Whetzel
Register Of Deeds
913-475-3051



John E. Brem
Magistrate Judge
913-475-3161

Charlotte Mains
Clerk Of The District Court
913-475-2832

Bob Keenan
Road Supervisor
913-475-3061

Charles F. Votapka
County Wood Director
913-475-3064

Eugene W. Wurm
County Appraiser
913-475-2527

Joy V. Haney
County Health Nurse
913-475-3090

P. O. Box 28, Oberlin, Kansas 67749

January 24, 1991

Rep. Mary Jane Johnson, Chr.
Local Government Committee
House of Representatives
Office #426-South
State Capitol
Topeka, Kansas

RE: House Bill 2015

On behalf of the Board of Commissioners of Decatur County we hereby recommend and support the passage of HB 2015 RE Proposal No. 25 of the Special Committee on Local Government. We feel that the changes as proposed in Section 1, should address the major concerns we have been experiencing here in Decatur County.

We urge the passage of HB 2015. Thank you for your consideration.

Sincerely,

Ralph D. Unger, Chairman

ON BEHALF OF THE BOARD OF
COMMISSIONERS OF DECATUR COUNTY

LY
1-24-91
Attach. 4