KANSAS TREE AND SHRUBBERY LAW

The Kansas tree and shrubbery law, K.S.A. 12-3201 et seq., gives cities jurisdiction over trees and shrubberies upon all streets, public right-of-ways and alleys with that city. K.S.A. 12-3204 allows cities limited jurisdiction over trees and shrubs on private property within that city. (Please note that a utility easement is not considered a public right-of-way, see Attorney General's Opinion 2003-28 at the end of this document.)

Before a city can exercise jurisdiction over trees or shrubs on private property within the city, the city must determine, based upon a laboratory test or other supporting evidence, that trees or tree materials or shrubs located upon private property are infected or infested with or harbour any tree or plant disease or insect pest or larvae, which, if uncontrolled, may constitute a hazard to or result in the damage or destruction of other trees or shrubs in the community.

The city may request competent state or federal authority to provide such evidence. KDA Plant Protection and Weed Control Program may be contacted to conduct an inspection pursuant to K.S.A. 12-3204 at (785) 862-2180. If the city requests an inspection by KDA, the city should be prepared to provide specialized equipment necessary to conduct the inspection such as a ladder or bucket truck to reach the canopy of tall trees.

The following copy of selected statutes is being made available by the Kansas Department of Agriculture for the convenience of the public and is meant to be used only as a reference. While the Kansas Department of Agriculture has made every effort to reproduce accurately these statutes, they are not the official statutes of the State. The Kansas Statutes Annotated (K.S.A.), published by the Revisor of Kansas Statutes, should be consulted for the text of the official statutes of the State.

KANSAS TREE AND SHRUBBERY LAW

K.S.A. 12-3201 *et seq.*

12-3201. Trees and shrubbery on streets and alleys; regulation; costs, special assessment. The governing body of any city is hereby authorized to regulate, by ordinance, the planting, maintenance, treatment and removal of trees and shrubbery upon all streets, alleys, avenues, boulevards and public rights-of-way within such city. Upon the failure of the owner of property abutting streets, alleys, avenues, boulevards and public rights-of-way to comply with such regulations, and after reasonable notice the city may trim and maintain or, where necessary, remove such trees and shrubbery and assess the costs of such work against the abutting property as a special assessment. History: L. 1961, ch. 72, sec. 1; L. 1984, ch. 77, sec. 1; July 1.

12-3202. Same; municipal function; authority vested in park commissioners, when. The governing body of any city may provide for the planting, maintenance, treatment or removal of trees and shrubbery upon all streets, alleys, avenues, boulevards and public rights-of-way of the city as a municipal function. In any city which now has, or may hereafter have a board of park commissioners, the governing body may vest such authority in the board of park commissioners. History: L. 1961, ch. 72, sec. 2; L. 1984, ch. 77, sec. 2; July 1.

12-3203. Repealed 1975.

12-3204. Treatment or removal of shrubbery, trees and materials in cities; payment of costs; notice. Whenever any competent city authority, or competent state or federal authority when requested by the governing body of the city, shall file with the governing body a statement

in writing based upon a laboratory test or other supporting evidence that trees or tree materials or shrubs located upon private property within such city are infected or infested with or harbours any tree or plant disease or insect pest or larvae, the uncontrolled presence of which may constitute a hazard to or result in the damage or destruction of other trees or shrubs in the community, describing the same and where located, said governing body shall direct the city clerk to forthwith issue notice requiring the owner or agent of the owner of the premises to treat or remove any such designated tree, tree material or shrub within a time specified in such notice; said notice shall be served by registered or certified mail or personal service may be made by the city marshal or other police officer, by delivering a copy thereof to the owner, or agent of such property. If the property is unoccupied and the owner a nonresident, then the city clerk shall notify the owner by mailing a copy of the notice to the owner's last known address by registered or certified mail.

If the owner or agent shall fail to comply with the requirements of said notice within the time specified in the notice, then the city forester, street superintendent or other designated officer shall proceed to have the designated tree, tree material or shrub treated or removed and report the cost thereof to the city clerk, and the cost of such treatment or removal shall be paid by the owner of the property or shall be assessed and charged against the lot or parcel of ground on which the tree, tree material or shrub was located. The city clerk shall at the time of certifying other city taxes to the county clerk, certify the unpaid costs and the county clerk shall extend the same on the tax roll of the county against said lot or parcel of ground. The cost of such work shall, except as hereinafter provided, be paid from the general fund or other proper fund of the city or from moneys derived from the levy authorized by K.S.A. 12-3203 and such fund shall be reimbursed when payments therefor are received or when such assessments are collected and received by the city. History: L. 1961, ch. 72, sec. 4; L. 1974, ch. 67, sec. 1; July 1.

12-3205. Same; preventive measures or treatment by city, when; costs. The governing body of any city, when it appears that there is or is likely to be a general infection or infestation of the trees or shrubs within the city by tree or plant disease or insect pest or larvae resulting in damage to or the death of many trees or shrubs, may provide such preventive measures or treatment as may be necessary and may pay the cost from the general fund or other proper fund or from moneys derived from the levy provided in K.S.A. 12-3203 by the issuance of warrants as hereinafter provided. History: L. 1961, ch. 72, sec. 5; April 12.

12-3206. Same; no-fund warrants, when; tax levies. The governing body of any city, in the exercise of the power and authority herein granted for the purposes of carrying out the provisions of K.S.A. 12-3204 and 12-3205, from and after the effective date of this act and prior to the time that moneys may be available from the levy authorized by K.S.A. 12-3203, may issue no-fund warrants in an amount not to exceed the total amount such city could levy in one year under the provisions of K.S.A. 12-3203. History: L. 1961, ch. 72, sec. 6; April 12.

Whenever no-fund warrants are issued under the authority of this act the governing body of such city shall make a tax levy at the first tax levying period for the purpose of paying such warrants and the interest thereon. All such tax levies shall be in addition to all other levies authorized or limited by law and shall not be subject to the aggregate tax levy prescribed in article 19 of chapter 79 of the Kansas Statutes Annotated, and amendments thereto. Such

warrants shall be issued, registered, redeemed and bear interest in the manner and in the form prescribed by K.S.A. 792940, except they shall not bear the notation required by said section and may be issued without the approval of the state board of tax appeals.

12-3207. Same; title to and property in growing trees and shrubs in abutting owners; damage actions; injunctions. The owners of property abutting upon streets, avenues and boulevards in cities shall have such title to and property in growing trees, shrubbery and the parking situated in front of such real estate between the curb line and the property line as to enable the owners, in case of injury to or destruction of such trees, shrubbery and parking, to recover from the person, company or corporation causing said injury or destruction the full damages which the abutting property in front of which they are situated may sustain by reason thereof, and such abutting property owner shall also have the right of action in any court of competent jurisdiction to enjoin injury to or destruction of such trees, shrubbery and parking, except that no recovery or injunction shall be had against the city in the making of public improvements or in any other reasonable exercise of its authority over such streets, alleys, avenues or boulevards or over the trees and shrubbery located thereon. History: L. 1961, ch. 72, sec. 7; April 12.

K.S.A. 12-3201

October 30, 2003

ATTORNEY GENERAL OPINION NO. **2003-28**

The Honorable Karin Brownlee
State Senator, 23rd District
1232 S. Lindenwood Drive
Olathe, Kansas 66062

Re:

Corporations--Telegraph, Telephone and Transmission Lines--Rights, Powers and Liabilities of Telecommunications Service Providers; Occupation of Public Right of Way; Prohibition of Use; Definition of "Public Right-Of-Way"

Synopsis:

K.S.A. 2002 Supp. 17-1902 addresses the rights and duties of cities and telecommunication service providers with respect to "public rights-of-way." A utility easement that has been dedicated to a city is not a "public right-of-way" as that term is defined by K.S.A. 2002 Supp. 17-

1902. Cited herein: K.S.A. 12-406; 12-406a; 12-512a; 12-631v; 12-752; 12-3201; 13-2409a; 17-1901; K.S.A. 2002 Supp. 17-1902; K.S.A. 68-167; 47 U.S.C. § 253.

* * *

Dear Senator Brownlee:

You inquire regarding the actions of the City of Lawrence in assessing administrative fees against a telecommunication service provider for its use of "dedicated public utility easements." You inquire whether such easements fall within the definition of "public right-of-way" as defined by K.S.A. 2002 Supp. 17-1902(a)(1). If so, the City is precluded from assessing fees beyond those listed in the statute.(1)

K.S.A. 2002 Supp. 17-1902 governs the rights and responsibilities of cities and telecommunication service providers with regard to "public rights-of-way." Telecommunication service providers are guaranteed the right to place their equipment "along, across, upon and under any public right-of-way in this state."(2) Cities cannot impose "unreasonable conditions, requirements or barriers for entry into or use of the public rights-of-way"(3) but can impose certain fees enumerated in the statute for a provider's "use and occupancy" of public rights-of-way.(4) Fees, other than those listed in the statute, cannot be imposed on telecommunication service providers for their use of public rights-of-way.(5)

2002 Senate Bill No. 397 (S.B. 397), which defines "public right-of-way,"(6) was the product of a collaborative effort between municipalities and telecommunication service providers spurred by federal telecommunications legislation.(7) 47 U.S.C. § 253 prohibits state and local governments from enacting regulations that "prohibit or have the effect of prohibiting the ability of [an] entity to provide . . . interstate or intrastate telecommunications service." Federal law does, however, allow cities to manage "the public rights-of-way" and assess fees for such use.(8) Unfortunately, this term is not defined in the federal telecommunications statutes or appellate court decisions interpreting those statutes.

Prior to the enactment of S.B. 397, telecommunication service providers in Kansas supported 2001 Substitute for Senate Bill No. 306 (S.B. 306) which, among other things, defined "public right-of-way" to include utility easements.(9) When cities objected on the basis that the bill interfered with their ability to control public rights-of-way,(10) the Legislature required cities and telecommunication service providers to work together on legislation that would accommodate the interests of both groups.

One of the objectives of the Kansas League of Municipalities (League) and the cities that participated in crafting S.B. 397 was to define "public rights-of-way." Once defined, the bill then established parameters for their use by telecommunication service providers. With the support

of the League, various cities and telecommunication service providers, the Legislature enacted S.B. 397 which defines "public right-of-way" as follows:

"'Public right-of-way' means *only* the area of real property in which the city has a *dedicated or acquired right-of-way interest in the real property*. *It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way.* The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service, easements obtained by utilities or private easements in platted subdivisions or tracts." (11)

The definition of "public right-of-way" is unfortunate because it employs the very word that is being defined: "'public right-of-way' means. . . right-of-way interest. . . ."

In property law, a right-of-way is simply a person's legal right to pass through property owned by another.(12) It has been described as an easement to pass or cross lands of another; a servitude with the fee interest remaining in the property owner.(13) However, a right-of-way can also be acquired and held by a city in fee simple through the platting/dedication process,(14) condemnation or contract. In short, how a right-of-way is held by a city (*i.e.* easement or fee simple) is not helpful in determining whether a "dedicated public utility easement" is a "public right-of-way."

The League maintains that "right-of-way" is a term of art that means a public thoroughfare.(15) This interpretation is borne out by the second sentence of the definition that refers to "streets, alleys, avenues, roads, highways, parkways, and boulevards." There are also Kansas appellate court decisions that use the term "right-of-way" to refer to property that is used for public travel.(16)

Sprint's position is that a "dedicated public utility easement" is included in the definition of "public right-of-way" because a utility easement is a property interest that can be dedicated to a city through the platting process in the same way that a developer would dedicate streets and alleys.(17) However, while a city may accept a dedication of a utility easement, this does not mean such easement is a "right-of-way interest." Kansas statutes treat easements and rights-of-way as two distinct creatures with "public rights-of-way" allied with public thoroughfares.(18) In short, while rights-of-way can be easements, not all easements are rights-of-way.

Prior to the 2002 amendment to K.S.A. 17-1902, telecommunication service providers had the right to "set their poles, . . . wires and other fixtures along, upon and across any of the public *roads, streets, and waters of this state* in such manner as not to incommode the public in the use of such roads, streets, and waters."(19) In *City of Shawnee v. A.T.& T. Corp.,*(20) the Court interpreted K.S.A. 17-1901 and 17-1902 to allow telecommunication service providers to lay their cables only on public rights-of-way - not on publically owned land that is not a public right-of-way. Consequently, while a city may acquire property through the dedication process that is

to be used only for public utilities, this acquisition does not transform the property into a right-of-way.

We are also mindful that when the telecommunication service providers, the League, and the cities finally blessed legislation[(21)] that addressed telecommunication franchises and cities' control of rights-of-way, the definition of "public right-of-way" did not specifically include the reference to utility easements that had appeared in the doomed S.B. 306 definition. Also, as indicated previously, the current definition elaborates on the nature of the "dedicated or acquired right-of-way interest" by indicating that this interest "include(s) the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way." Applying the doctrine of *maxim expressio unis est exclusio alterius*,[(22)] it is arguable that when the Legislature included those terms, it intended to exclude utility easements dedicated to a city.

In light of the legislative history of K.S.A. 2002 Supp. 17-1902 and the fact that the definition of "public right-of-way" appears to be limited to public thoroughfares, it is our opinion that the definition does not include a public utility easement that has been dedicated by a property owner to a city.

Sincerely,

Phill Kline
Attorney General

Mary Feighny
Assistant Attorney General

PK:JLM:MF:jm

FOOTNOTES
Click footnote number to return to corresponding location in the text.

1. K.S.A. 2002 Supp. 17-1902(o).

2. K.S.A. 2002 Supp. 17-1902(b).

3. K.S.A. 2002 Supp. 17-1902(m).

4. K.S.A. 2002 Supp. 17-1902(n).

5. K.S.A. 2002 Supp. 17-1902(o).

6. 2002 S.B. 397, § 2 [codified at K.S.A. 2002 Supp. 17-1902(a)(1)].

[7.] 47 U.S.C. § 253.

[8.] 47 U.S.C. § 253(c).

[9.] "'Public right-of-way' means the area on, below, along or above a public roadway, highway, street, public sidewalk, alley, waterway or *utility easement in which a city has an interest*. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other nonwire telecommunications or broadcast service or easements obtained by utilities or private easements in platted subdivisions or tracts." 2001 Substitute for S.B. No. 306, § 3(g) (emphasis added).

[10.] *Minutes,* Senate Commerce Committee, February 16, 2001.

[11.] K.S.A. 2002 Supp. 17-1902(a)(1) (emphasis added).

[12.] Black's Law Dictionary 1326 (7th Ed. 1999).

[13.] *Lee v. Missouri Pacific R. Co.,* 134 Kan. 225 (1931); *Spurling v. Kansas State Park & Resources Authority*, 6 Kan.App.2d 803 (1981).

[14.] K.S.A. 12-406, 12-406a, 12-752.

[15.] July 28, 2003 letter from Kimberly Gulley, Director of Policy Development & Communications for the League of Kansas Municipalities.

[16.] *State v. Deines,* 268 Kan. 432 (2000) (road); *Holmes v. Sprint United Telephone of Kansas,* 29 Kan.App.2d 1019 (2001) (alley).

[17.] June 30, 2003 letter from Lisa Creighton Hendricks, Senior Attorney for Sprint.

[18.] *See* K.S.A. 12-631v ("[t]he governing body of any city shall have the power to condemn . . . lands for the construction of sewage disposal plants and . . . *any easements therein or rights-of-way* necessary for the construction . . . of sewers. . ."); K.S.A. 12-512a ("[a]ny city . . . in vacating . . . any street . . . may reserve to the city and public utilities *such rights-of-way and easements* as in the judgment of the governing body of the city are necessary. . . "); K.S.A. 12-752(f) ("[s]uch [subdivision] regulation shall contain a procedure for issuance of building permits . . .which shall take into account the need for adequate street *rights-of-way, easements*, improvement of public facilities, and zoning regulations. . ."); K.S.A. 13-2409a ([a]ll water lines located in or on *public rights-of-way, roads, streets, lands, or easements* . . . shall be subject to regulation by the governing body of such city"); K.S.A. 68-167 (unlawful for a person to erect within 50 feet of a right-of-way on a federal or state highway a flashing red light unless the light was placed on the "*road, street, highway or public right-of-way*"); K.S.A. 12-3201 (city may regulate the planting and removal of shrubbery "upon all *streets, alleys, avenues, boulevards and public rights-of-way* within such city") (emphasis added).

[19.] K.S.A. 17-1901; 17-1902; *United Telephone Co. of Kansas v. City of Hill City*, 258 Kan. 208 (1995). *See Holmes v. Sprint United Telephone of Kansas*, 29 Kan.App.2d 1019 (2001).

[20.] 910 F.Supp. 1546 (D.Kan. 1995).

[21.] 2002 S.B. 397.

[22.] *State Dept. of Admin. v. Public Employees Relations Board Bd.*, 257 Kan. 275 (1995) (when legislative intent is in question, the Court can presume that when the Legislature expressly

includes specific terms, it intends to exclude any items not expressly included in that specific list).