COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL
FRANKFORT

ROBERT F. STEPHENS
ATTORNEY GENERAL

May 18, 1976

Harold Stumbo, Esquire
Floyd County Attorney
Floyd County Courthouse
Prestonsburg, Kentucky 41653

OAG 76 285

Dear Mr. Stumbo:

This is in reply to your letters concerning the David Water District and the Beaver Elkhorn Water District. You have enclosed a letter from John M. Rosenberg, Esq., of the Appalachian Research and Defense Fund raising four questions concerning these water districts along with other materials involving the water districts in question.

The factual situation is somewhat involved but perhaps we can summarize the pertinent material or at least the pertinent material which we have been furnished. On September 11, 1970 the Public Service Commission held a hearing in regard to the preliminary application for the creation of the David Water District (Case No. 5364-p). The Commission in a subsequent order gave its approval to the petitioners to petition the County Court for the establishment of a water district. The Floyd County Court entered an order on November 12, 1970 creating the David Water District and apparently all requirements except the notice requirement set forth in KRS 65.005 have been satisfied.

While the David Water District held at least one commissioners' meeting the district was unable to obtain the necessary financing and the water system was never

built. The commissioners' terms expired and were not filled and the district has transacted no business since the organizing procedures were completed.

The Beaver Elkhorn Water District, adjacent to David Water District, apparently assumed that David Water District was not in existence and proceeded to "annex" additional territory much of which constituted the territory of the David Water District. The February 1975 order of the Floyd County Court approved of the "annexation" citing KRS 74.110 but no mention was made of the David Water District. The Beaver Elkhorn Water District then contracted with various persons in the "annexed" area to provide them with water service. Financing the water system was accomplished in part by a grant from A.R.C. and of the amount received $286,000.00 was in the form of a grant funnelled through the Floyd County Fiscal Court. The Fiscal Court has contracted with Beaver Elkhorn Water District for construction of a water system in the David area.

Your question is whether the David Water District is still considered to be in existence since the water district never operated a water system and because the original commissioners had either died or left the area and had never been replaced.

In Louisville Extension Water Dist. v. Diehl Pump & Supply Co., Inc., Ky., 246 S.W.2d 585 (1952), the Court said that a water district created pursuant to KRS Chapter 74 is a "political subdivision." In OAG 63-666, copy enclosed, we said that a water district is a quasi municipal corporation and the same general principles of law apply to it as govern municipal corporations. Dissolution of a municipal corporation is dependent upon legislative

authorization and since 1966 KRS 74.367, concerning the discontinuance of a water district, has been in effect. Note the procedure contained in the statute pertaining to discontinuance of a water district and in our opinion discontinuance of a water district may be accomplished only when the statutory provisions are satisfied. However, see also Valla v. Preston Street Road Water Dist. #1, Ky., 395 S.W.2d 772 (1965), decided prior to the effective date of KRS 74.367, where the court said that under a reasonable construction of KRS 74.110 the county court has statutory power to dissolve a water district.

We shall now attempt to answer the questions raised by Mr. Rosenberg although not in the same order in which they were presented. One of his questions is as follows: "What the result of the annexation ordered by the fiscal court was, considering the existence of the David Water District."

The Floyd County Court in its order authorizing Beaver Elkhorn Water District to annex territory apparently did not refer to David Water District but did cite KRS 74.110 concerning enlarging or diminishing an established water district. We again direct your attention to OAG 63-666 where we said in part as follows:

> "Regarding the acquisition by a water district of an existing water district, KRS 74.110 provides that the territorial limits of an established water district may be enlarged by annexation according to the procedure set out in the statute. However, there it is not expressly provided that a water district may annex

> the territory of another district and thus absorb it. It is our opinion that the general authority to annex additional territory set out in KRS 74.110 cannot be construed to extend and apply to the territory of another water district. . . ."

However, in City of Cold Spring v. Campbell County Water District, Ky., 334 S.W.2d 269 (1960), which did not consider the issue being discussed here and was overruled by City of Georgetown v. Public Service Commission, Ky., 516 S.W.2d 842 (1974), the court did state that a water district does not have the exclusive right to furnish service within its confines. The Cold Spring case, however, involved a water district and a city water company which had statutory authority to operate beyond the city limits, as opposed to a situation involving two water districts having in part the same geographical area.

Regardless of the validity of the county court's order authorizing Beaver Elkhorn Water District to annex territory of the David Water District, the Beaver Elkhorn District will have to satisfy the requirements of KRS 278.020 (obtaining certificate of convenience and necessity from Public Service Commission) before beginning the construction of any plant, equipment, property or facility for furnishing water to the public. That process involves the filing of an application and a public hearing.

Note also the provisions of KRS 74.361 concerning the merger of water districts by the Public Service Commission.

Another question asks:

> "Whether David Water District's failure to file the notice required by KRS 65.005 means

> that it was not a legal entity at the time the territory was annexed by Beaver Elkhorn."

KRS 65.005 provides that no special district (which includes in part a political subdivision) shall be legally created without notifying of its existence in writing in duplicate the clerk of the county court within the jurisdiction of which its principal office shall be located. The governing body of a newly created special district shall submit the required notification at or before its first meeting. Apparently the David Water District did not comply with this provision. While the district should have complied with the terms of KRS 65.005 its failure to do so may not necessarily affect its status as a legal entity.

The statute uses the word "shall" which is mandatory. See KRS 446.010 (29). However, the courts have frequently dealt with whether in fact statutory provisions are mandatory or directory. In Middleton's Adm'x. v. Middleton, 297 Ky. 109, 179 S.W.2d 227, 228 (1944), the Court said:

> "If a provision of a statute respecting procedure is to afford convenience or to accomplish a given end and it may be done without strict observance of the provision and without affecting the real merits of the case, then the provision is to be regarded as directory only. . . ."

In Skaggs v. Fyffe, 266 Ky. 337, 98 S.W.2d 884 (1936), the Court said that every slight departure from mandatory provisions should not vitiate the whole proceeding. Use of the word "shall" is usually indicative that the provision

is mandatory but it will not be so regarded if the legislative intention appears otherwise. See also Clark v. Riehl, 313 Ky. 142, 230 S.W.2d 626 (1950).

The Court in Stanfield v. Willoughby, Ky., 286 S.W.2d 908 (1956) said that "shall" in its ordinary meaning has a compulsory, imperative or mandatory meaning. "When the word is employed in a statute, however, its ultimate significance is to be ascertained from a consideration of the legislative intent and in arriving at that intent the act or statute involved must be examined." Thus, a court might conclude that failure to observe the provisions of KRS 65.005 (notice to county court clerk of the establishment of a political subdivision) does not deprive David Water District of its status as a legal entity.

The other two questions raised are as follows:

> "Whether, assuming the David Water District to be in existence, Beaver Elkhorn Water District could (a) construct and (b) operate the water system in the geographical area composing the David Water District.
>
> "Whether, if Beaver Elkhorn cannot operate the water system in the area, the construction contract with the fiscal court and Beaver Elkhorn would nevertheless be enforceable."

It is somewhat difficult to give specific answers to these questions in that it would depend to some extent upon what actions actually transpired (as opposed to various hypothetical situations) and what decisions are ultimately

reached in regard to the questions previously discussed. Furthermore, the factual situation is so complicated and we may not have all the essential facts, particularly those pertaining to the contract between Beaver Elkhorn Water District and the Floyd County Fiscal Court. In addition, the Public Service Commission has several options open to it such as merging the water districts and granting or denying a certificate of convenience and necessity to Beaver Elkhorn Water District.

As previously indicated OAG 63-666 concluded that a water district cannot annex the territory of another district and thus absorb it. In any event, if Beaver Elkhorn Water District is to operate a water system in the David Water District a certificate of convenience and necessity would have to be obtained from the Public Service Commission pursuant to KRS 278.020. The Commission may thus be able to resolve some of the problems which have arisen.

In regard to the contractual situation involving the Floyd County Fiscal Court and Beaver Elkhorn Water District we can only refer you to Louisville Extension Water Dist. v. Diehl Pump & Supply Co., Inc., Ky., 246 S.W.2d 585 (1952). The Court said that one contracting with a political subdivision does so at his peril unless the contract is executed in the manner provided by statute. Furthermore, "persons who contract with municipal corporations must, at their peril, know the rights and powers of the officers of such municipalities to make contracts and the manner in which they must make them."

Very truly yours,

ROBERT F. STEPHENS
ATTORNEY GENERAL

Thomas R. Emerson

By: Thomas R. Emerson
Assistant Attorney General

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cc: John M. Rosenberg, Esq.