Attorney General Opinions

County Road Related Items

1976-2017

Compiled By
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Local Road Engineer
Kansas Association of Counties
(Revisions to February 19, 2019)

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Introduction

The following index of attorney general opinions are a summary of the information that I have compiled from the Attorney General's web site. Electronic version of all opinions are available on the Attorney General's website from 1993 to current, and they are currently working on electronically listing older opinions. I reviewed each opinion back to 1993 to see if there was anything of interest to county road departments, and I indexed them by subject the way I thought a County Road Supervisor or Engineer would think. So you could use the index below, and also try the word search on the attorney generals web site. The results will not be the same, but I think using both methods you will get good results. Please remember I am an engineer, not an attorney, so this is not legal research. It is possible that I have missed some opinions that might be important, and your county counselor will probably want to do another search to satisfy himself on the completeness of this information. Keep in mind that attorney general opinions are just opinions, and answer a question in general until such matter is established by the courts or laws are changed by the legislature. The opinions are based on state law at the time, and the older the opinion the more likely the law has changed and rendered the opinion obsolete in at least some of the details. Included are some of the opinions from before 1993 that we were aware of, but in general pre-1993 are not complete.

Norm Bowers, L.S. & P.E.
Local Road Engineer KAC
February 21, 2019

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76-120 Bridge Disposition & Width

Mr. Philip E. Winter
Assistant County Attorney
Lyon County Courthouse
Emporia, Kansas 66801
Re: Counties--Bridges--Abandonment

Synopsis: Upon vacation of a road, the county may dispose of the bridge by dismantling the same and salvaging the material therein, or may dispose of the bridge in the same manner as other property of the county, including conveyance to an adjacent landowner.

Dear Mr. Winter:
You inquire whether, when a county government vacates a road whereon there is a bridge, and a single landowner owns land on both sides of the vacated road and bridge, the county may turn the bridge over to the landowner.

There appears to be no statutory provision providing for the abandonment of bridges. In the absence of any controlling statutory provision, it is appropriate for the board of county commissioners to enact authorizing legislation in the exercise of its local legislative powers under K.S.A. 19-101a(b). The bridge may constitute valuable property of the county. For example, it may contain substantial amounts of
salvageable material which could be used elsewhere by the county or which the county might choose to dispose of. If the county chooses not to remove the bridge and use its material elsewhere, and chooses instead to dispose of it otherwise, it must be disposed of in accordance with K.S.A. 19-212. *I.e.*, if the value of the bridge, which may very well be only for salvage purposes, exceeds $5,000, the required public notice must be given and a unanimous vote of the county commissioners is required. If the bridge has a lesser value, the commissioners may dispose of it on such terms as it
deems appropriate. Depending upon the value of the material
in the bridge and the costs of removal, the board may find it in the interests of the county to convey the bridge to the landowner for a nominal consideration.

You ask what might be the liability of the county concerning the bridge on the vacated road if it is turned over to the landowner. Presumptively, if title to the vacated road vests in the adjacent landowner, and title to the bridge vests in the landowner as a result of conveyance by the county, it has no further liability. However, because of the totally unforeseeable circumstances under which possible claims of liability may arise, it is virtually impossible for us to furnish any definitive opinion that the county may have no exposure to liability whatever as a result of some injury or damage which might occur at a later date.

You inquire, also, concerning possible liability of the county concerning bridges which are structurally sound but which are narrower than those prescribed by law, as is the case of a numberof the older bridges in the county on county roads. Bridge widthsare prescribed by K.S.A. 1975 Supp. 68-1109. In *Sell v. McPherson Township,* 152 Kan. 731, 107 P.2d 670 (1940), the court stated thus:

> "It should be kept in mind that the only basis for imposing liability on a township for an accident happening on a township road is the township's failure to conform to the statutory requirements for their construction and maintenance. Liability is not imposed as for commonlaw negligence. And whether a public road is defective within the meaning of the statute . . . is a question of law, when, as here, there is no controversy over the facts."

In *Martin v. State Highway Commission,* 213 Kan. 877, 518 P.2d 437(1974), the court stated thus:

> "[R]egardless of the source of the condition claimed to constitute a defect, liability for such condition has always been predicated on either (1) the failure to comply with a specific legislative mandate, or (2) the existence of a condition creating actual peril to persons using the highway with due care." 213 Kan. At 882.

If the bridge was constructed in accordance with width requirements in force at the time of its construction, and any signs required by the manual for a uniform system of traffic control devices promulgated by Secretary of Transportation are posted and maintained respecting narrow bridges, there would appear to be little basis for liability.
Yours very truly,
CURT T. SCHNEIDER
Attorney General

76- 293 Limiting Height of Vehicles

Mr. Philip E. Winter
Assistant County Attorney
Lyon County Courthouse
Emporia, Kansas 66801

Re: Highways--Motor Vehicles--Height Restrictions

Synopsis: Local authorities may regulate the size, including the height of vehicles operated on roads under their jurisdiction by the posting of appropriate signs.

Dear Mr. Winter:
You inquire whether the board of county commissioners may limit the height of loads carried on vehicles using bridges on secondary roads in the county.

K.S.A. 8-1904(a) states thus:
"No vehicle including any load thereon shall exceed a height of thirteen (13) feet six inches."

K.S.A. 8-1901 (b) states thus:
"Except as otherwise specifically provided in this act, the provisions of this article governing size, weight and load shall not apply to fire apparatus, road machinery, farm tractors or to implements of husbandry temporarily moved upon a highway, or to a vehicle operated under the term of a special permit issued as herein provided."

Otherwise, however, the "maximum height and size of vehicles specified [in article 19, chapter 8] . . . shall be lawful throughout the state, and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this article."

K.S.A. 8-1912(c) provides that local authorities may, with respect to highways under their jurisdiction, by ordinance or resolution impose limitations on the weight or size of trucks or other commercial vehicles, which limitations shall be designated by appropriate signs placed on such highways. You ask whether the board of county commissioners may order a beam to be placed across the top of a bridge at a designated height, so as to prohibit the use by trucks in excess of that height from crossing the bridge. The act permits local authorities to enforce such limitations by signs, but it does not provide for the erection of such barriers as you propose.

Thus, to recapitulate, the regulation of height of vehicles may be accomplished under K.S.A. 8-1912, by the posting of appropriate signs. Under K.S.A. 8-1912(b), the board of county commissioners may impose size limitations only on trucks and other commercial vehicles. The barrier which has been proposed would necessarily apply to fire apparatus, road machinery, farm tractors and other farm equipment, against which the county may not enforce its supplementary size limitations. Thus, while appropriate signing is permitted, the artificial barrier is not authorized by K.S.A. 8-1912(b).

Yours, very truly,
CURT T. SCHNEIDER
Attorney General

78-59 Original Legal Descriptions-Surveyors

February 8, 1978

***1 Re: Professional Engineers' License Act—Land Surveying—Definitions.**

Synopsis: 'Original description', as that term is used in K.S.A. 1977 Supp. 26a–128, refers to that description which first delineates the boundaries of a specific parcel of land, as opposed to pre-existing descriptions of land areas of which the specified parcel is a part.

Mrs. Charlotte Olander
Executive Secretary
Kansas State Board of Technical Professions
Suite 1105
535 Kansas Avenue
Topeka, Kansas 66603

Dear Mrs. Olander:
You have asked for a definition of the term 'original description' as it is used in K.S.A. 1977 Supp. 26a–128. That statute provides in part:
The term land surveying shall include the measurement and calculation of land areas; the preparation of the original descriptions of real property for conveyance or recording; and the preparation of maps or certificates of survey thereof. (Emphasis supplied.)

You inquire concerning the underscored language.

As applied to entire sections of land, 'original description' would logically refer to the description in the patents issued by the United States government to the State of Kansas or to an individual at the time the subject land was first conveyed out of the possession of the U. S. government. Some land is still held by the original recipient of title from the United States. However, most Kansas land has changed hands one or more times since that original conveyance. Many times it is conveyed in parcels that are not complete sections. Parcels of land are often conveyed by deeds describing them in general terms taken from the deed of the last previous grantor—for example, 'the Northwest Quarter of the Southwest Quarter of Section 15, Township 29 South, Range 5 West, Balderdash County, Kansas.' However, if at some point a detailed description is required, wherein markers are referenced and appropriate distances noted, a survey would be required if there were none already on file, and the resulting description used for conveyance or recording would be an 'original description' as the term is used in 26a–128. City lots are commonly conveyed by title documents describing them by lot number, street, and subdivision. However, subdivision plats must be recorded with the register of deeds in that county, and the plat is required to show locations of monuments; bearings and distances between mouments; closure calculations; and all horizontal lot calculations and street calculations. (K.S.A. 50–2004.) The plat thus constitutes an 'original description for conveyance or recording' within the meaning of 26a–128. If the subdivision constituted one section of land, the section could have been described, perhaps, by reference measurements from the triangulation stations established by the United States Coast and Geodetic Survey of Kansas made in 1865, or from some subsequent survey and market placement. But carving lots from a section previously conveyed only as a whole obviously requires that the exact location and measurement of the lots be determined; thus, as to the subdivision, the required survey would result in an 'original description' despite the pre-existence of an accurate description of the section as a whole.

***2** In the final analysis, it appears that an 'original description', as that term relates to any particular parcel of land, is that description which first delineates that parcels in detail, in contrast to pre-existing descriptions of larger areas of which the specified parcel is a part, or descriptions derived therefrom. Whether or not a particular description is an 'original description for conveyance or recording' will be determined by the use of the description.
Very truly yours,

Curt T. Schneider
Attorney General

78-316 Gates on Roads

Re: Highways and Roads—County Commissioners—Gates
Synopsis: A county commission has authority under K.S.A. 68–126 to permit a gate and fence to be placed over and across certain public roads but such authority does not authorize the locking of a gate so as to prohibit general public access from such a road.

Mr. William L. Navis
Republic County Attorney

Dear Mr. Navis:

As county attorney for Republic County you inquire concerning the authority of County Commissioners acting under the authority of K.S.A. 68–126, to permit construction and maintenance of a gate over and across public highways. You further inquire whether such a gate may be permitted to be locked so as to deny general public access to the public road.

K.S.A. 68–126 provides in part:

> 'The county commissioners of any county are hereby empowered, where lands are used largely as pasture lands and wherever in their judgment the convenience of the traveling public will not be materially affected thereby, to authorize and permit the construction and maintenance of fences across public highways under their jurisdiction. Wherever such fences are permitted the board of county commissioners shall require and it shall be the duty of the person constructing or maintaining such fences to construct and maintain therein sufficient gates to accommodate travel, which gates shall be either swinging on hinges or gates that may be opened by the driver of a vehicle without alighting therefrom, or the ordinary wire gate, as the county commissioners may require.'

The statute clearly allows county commissioners considerable discretion in allowing authorization of such gates in areas used largely for pasture lands. The key limitation in the use of this provision is that the rights and convenience of the traveling public shall not be materially affected. If public access is not materially affected, then there is an express legislative authorization to permit such a gate.

The statute further provides for a county commission procedure in regulation of such a gate:

> 'All orders allowing the construction of such fences and requiring the gates herein provided shall be entered upon the journal of the board of county commissioners. The said board may, in its discretion, order and direct that any gates shall remain open during certain portions of the year, the time to be fixed by said board, or in its discretion and where there is a reasonable necessity therefor and the convenience of the traveling public would not be materially affected thereby, it may order such gate or gates to be kept closed during the entire year.'

The overriding legislative concern, as expressed by the tenor of the statute, is to not materially inconvenience the traveling public on public roads. That concern should be contrasted with the legal authority of a county commission in vacating or abandoning a public road under the provisions of K.S.A. 68–102 *et seq.*

***2** This statute must also be construed in light of the common law rule stating that any unauthorized obstruction of a public highway which materially impedes or interferes with its use by the public for travel and transportation is a public nuisance. The necessary corollary to the general rule is stated at 39 *Am.Jur.2d Highways, Streets, and Bridges* § 276, where the writer states in pertinent part:

> 'Subject to constitutional limitations upon the invasion of property rights, the legislature may authorize obstructions in streets or other highways which would otherwise be nuisances. As a rule, any obstruction or structure which is authorized by a statute enacted within the scope of legislative power cannot be a nuisance, but legislative authority permitting such obstructions or encroachments should be express or clearly implied, and strictly construed.'

The statute in question K.S.A. 60–126, is, in my judgment an express legislative delegation of authority allowing county commissioners to permit erection of a gate over and across a certain type of public road. That authority, where reasonably and judiciously used, must be strictly construed and cannot be allowed to outweigh or interfere with the rights of the public in unfettered travel upon public roads. Therefore, it is my opinion that K.S.A. 60–126 does not allow county commissioners of any county to permit the locking of any duly authorized gate over and across such public roads.

A locking of such a gate would materially interfere with the public right of travel upon public roads. If a particular public road is judged to be unfit for or not maintainable in the public interest, then county commissioners may proceed to act to abandon or vacate such a road under the provisions of K.S.A. 68–102 *et seq.* I can find no legal authority, however, for the total prohibition of public access from a public road while that road remains a public road.

Yours truly,
Curt T. Schneider
Attorney General

80-98 Consolidation of duties of county engineer.

Synopsis: A county commission may, by home rule, create a position of road supervisor and combine it with the county engineer position and then abolish the county engineer position. However, if the road supervisor is not an engineer, the county must by some other means, still meet the engineering duties of the law.

81-242 Use of Seismographic Equipment on County Roads.

October 14, 1981

Re: Roads and Bridges—County and Township Roads—Use of Seismographic Equipment on County Roads
Synopsis: A county may not permit private companies to operate seismographic equipment on county roads unless the county owns the road in fee. An easement for a public road grants the right to use the property for public travel, but does not impair other rights retained by the landowner. Cited herein: K.S.A. 1980 Supp. 19–101a, K.S.A. 19–212.

Mr. John Shirley
Scott County Attorney

Dear Mr. Shirley:

You have asked whether the board of county commissioners may enter into a contract with a private company to permit said company to conduct private seismographic operations from county roads. The operations apparently consist of stringing cables along the roads and mechanically thumping the ground to create vibrations. As we understand the procedure, these vibrations provide data to the company regarding the underground land formations of adjoining properties, thereby enabling the company to better determine which properties are more likely to have oil under them. You state that the seismographic company is willing to pay the county a certain amount of money for each mile of road the company uses in its operations, and that such use will not unreasonably interfere with the traffic on the road.

To answer your questions, it is first necessary to determine who owns the roads involved, since it is the owner of real property who has the right to sell or dispose of an interest in his property. See, Central Kansas Power Co. v. State Corporation Commission, 221 Kan. 505, 515 (1977); 63 Am.Jur.2d Property §§ 32,35. In Kansas, public roads may be acquired by purchase, prescription, dedication or condemnation. Kratina v. Board of Commissioners, 219 Kan. 499 (1976). Generally, a county will acquire only an easement in the property for purposes of establishing a public road [Luttgen v. Ergenbright, 161 Kan. 183 (1946)], but the county may also hold the land in fee, depending upon the terms of the acquisition [Regier v. Ameranda Petroleum Corp., 139 Kan. 177 (1936)]. Hence, the facts of each case, i.e., the county's ownership of the roadway, portions thereof, or interest therein, will determine which rule of law is applicable.

If the county owns the property upon which the roads are located in fee simple, the board of county commissioners would have the power to establish procedures for use of the roads pursuant to K.S.A. 19–212, First, which gives the board the power '[t]o make such orders concerning the property belonging to the county as they may deem expedient, including the establishing of requlations, by resolution, as to the use of such property and to prescribe penalties for violations thereof.' Since there are apparently no uniformly applicable state laws which address the use of seismic thumpers on county roads, the county would also have the authority to regulate the use of this equipment in the county by virtue of its home rule powers granted in K.S.A. 1980 Supp. 19–101a. We find nothing which would prohibit the county from collecting a fee in conjunction with such regulation.

***2** If the county does not own the property upon which the road is located in fee but merely has an easement, a different conclusion must be reached. The Kansas Supreme Court adopted the language of the Restatement of Property, Servitudes, § 450, p. 2901, in Smith v. Harris, 181 Kan. 237, 246 (1957) to define an easement thus:

> 'An easement is an interest in land in the possession of another which
>
> > '(a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
> >
> > '(b) entitles him to protection as against third persons from interference in such use or enjoyment;
> >
> > '(c) is not subject to the will of the possessor of the land;
> >
> > '(d) is not a normal incident of the possession of any land possessed by the owner of the interest, and
> >
> > '(e) is capable of creation by conveyance.' (Emphasis in original omitted. New emphasis added.)

The county's easement exists for the purpose of providing a public road for public travel. Thus, the county is permitted to use or authorize the use of its easement in the property only for the purpose for which the easement was acquired.

We do not believe that an easement granted for purposes of public travel can logically be extended to include seismographic operations within the permitted use. In State v. Greene, 5 Kan. App. 2d 698 (1981), the Kansas Court of Appeals was asked to determine whether protesters at an anti-nuclear demonstration who were standing on a county road intersection containing a railroad crossing easement could properly remain there. The protesters argued that they could stand in the intersection even though they were blocking the railroad tracks because they were on a public road. The court disagreed, stating:

> 'The public's right to use a public highway is the right to use it for purposes of travel. It does not encompass a right to deliberately deprive another person of the use of his property.' Id. at Syl. ¶5.

Conducting seismic operations on a public road does not constitute travel. The seismographic company would have no greater right to use the road for purposes other than travel than any other member of the public. Therefore, the county cannot authorize the use of seismic thumpers upon county roads in which the county has only an easement for a public road because such use is not for purposes of travel. The landowner of the property would retain the power to authorize or refuse

to authorize the seismographic company to use his property for its operations. See, Attorney General Opinion No. 79–234.

However, because seismic operations may impair or interfere with the flow of traffic on county roads, the county may exercise its police power to enact regulations necessary to protect the public safety.

Very truly yours,
Robert T. Stephan
Attorney General of Kansas
Brenda L. Hoyt
Assistant Attorney General

81-256 Bridges; Conveyance of Unsafe Bridge.

> November 23, 1981
>
> Re: Roads and Bridges--Bridges; General Provisions--Conveyance of
> Unsafe Bridge
>
> Synopsis: A bridge located on a vacated county road in which the county had held only an easement for a public road reverts to the adjoining landowners at the time of vacation. If the bridge was declared unsafe prior to vacation of the road, the provisions of > K.S.A. 68-1123 must be honored. However, once a road and bridge have been vacated and have reverted to the adjoining landowners, the county has no continuing exposure to tort liability for injuries caused to persons injured while using such vacated roadways and bridges. Cited herein: > K.S.A. 68-1126, K.S.A. 1980 Supp. 75-6101, 75-6103.
> Asked and answered by the AG in Opinion No. 81-256 November 23, 1981
>
> Mr. Leonard L. Buddenbohm
> Atchison County Counselor
> 109 North Sixth Street
> Atchison, Kansas 66002
>
> Dear Mr. Buddenbohm:
>
> You state that Atchison County has closed a bridge pursuant to > K.S.A. 68-1126, declaring said bridge to be unsafe. You advise that subsequently the road leading up to the bridge was vacated by the county and ownership of the road has reverted to a landowner. You ask whether the county may convey the bridge to the landowner in its unsafe condition and what liability might the county incur if the bridge, after such conveyance, were to collapse while being used by a citizen.
>
> We first note that your inquiry assumes that the ownership of the bridge has remained in the county, even though the road on both approaches to the bridge has been vacated. Since the

road has reverted to the landowner, we may assume the county had previously acquired only an easement in the property rather than title in fee. See generally Attorney General Opinion No. 79-234. While there is apparently little case law which specifically addresses the ownership of a bridge upon vacation of the road or highway of which the bridge is part, there is a Wisconsin case which does so. In > Carpenter et al. v. Town of Spring Green, 285 N.W. 409 (1939), a highway containing a bridge which had originally belonged to the town of Spring Green had been made part of the state highway system, then part of the U.S. highway system. The United States relocated the highway, abandoning the portion in > Spring Green with ownership reverting to the town. The town subsequently discontinued the highway and contracted to sell the bridge materials. The court held that when the highway was discontinued, the bridge structure became the property of the adjoining landowners since the highway did so pursuant to statute. The court, in rejecting the notion that the bridge belonged to the town, said:
>
> 'By virtue of the provisions of sec. 80.32(3), at the moment when the highway in question became effectively discontinued, it belonged to the owners of the adjoining lands. In order to uphold the judgment of the circuit court [which had ruled in favor of the town] we should have to say that whenever a highway is discontinued it should be broken up into its component parts,--land, grading and bridges--, and hold that only the land and grading belong to the adjoining owners and that the bridges, which immediately theretofore were a part of the highway, belong to the town. We cannot read out of the plain words of the statute of such a construction.' > Id. at 411.
>
> > Kansas has no such statute but does have case law concluding that a bridge is part of a road. See, > Noblit v. Board of County Commissioners, 190 Kan. 586 (1962) (defects in roadbed and guardrail of bridge constituted a defect in a highway for purposes of recoveri> ng damages); > Dubourdieu v. Delaware Township, 106 Kan. 650 (1920) (statute regarding defects in bridges, culverts and highways held to contain only one subject and therefore, constitutional because a bridge is part of a highway). The Wisconsin and Kansas cases are consistent with the generally accepted common law rule that a bridge is a part of a highway. 11 C.J.S. Bridges § 3 (1938); 39 Am.Jur.2d Highways, Streets and Bridges, § 11 (1968). We believe the Wisconsin decision is reasonable and that the Kansas courts would also conclude the adjoining landowner is already the owner of the now-vacated bridge; therefore, no conveyance from the county is necessary.
>
> Assuming that you are concerned with determining the potential tort liability to the county should the bridge collapse, causing injury to third parties who may subsequently attempt to use the bridge, we look to the Kansas Tort Claims Act, K.S.A. 1980 Supp. 75-6101 et seq. Said act states the circumstances under which a governmental entity may be held liable in tort. K.S.A. 1980 Supp. 75-6103 states in pertinent part:
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> 'Suject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state.'
>

> For a private person to be liable in tort, a plaintiff must suffer an injury which arises from the individual's breach of a duty owed to the plaintiff. 74 Am.Jur.2d Torts § 9 (1974). See also, > Murray v. Modoc State Bank, 181 Kan. 642 (1957). If no duty is breached, no liability can arise. The owner of property has certain duties to others regarding the use of his property. 57 Am.Jur.2d Negligence § 37 (1971). In our opinion, once the ownership of the road reverts to the adjoining landowners, the duties regarding the property would also revert to the landowners and the county's duties would generally be extinguished. The county's duty to the landowners would be to inform them of the condition of the bridge at the time the title passed to the landowners, i.e., at the time the vacation proceedings are completed. 65 C.J.S. Negligence § 93 (1960). Once that has been done, the county will have no further duty to third parties regarding the use of the bridge, and will not, therefore, be subject to liability for subsequent injuries resulting from said use.
>
> > K.S.A. 68-1126 requires the county engineer to take certain actions regarding an unsafe bridge located on a county or township road. If the bridge was condemned prior to the vacation of the road, as we have assumed, the county engineer must have already acted in accordance with the provisions of > K.S.A. 68-1126, a statute requiring the posting of notices of the unsafe conditions. However, if the road is vacated prior to determination of the safety of the bridge, the bridge becomes private property and 68-1126 is no longer applicable. We find no Kansas cases which impose continuing duties on the county regarding vacated roads or bridges.
>
> For purposes of public safety, we would advise the county to remove all county signs from the road and bridge. In addition, the county should post signs where the now private road intersects with public roads informing the public that the county no longer maintains said road. Likewise, the landowner would be well-advised to post conspicuous signs at each end of the bridge warning third persons that the bridge is unsafe for travel. 65 C.J.S. Negligence § 93 (1966).
>
> > In summary, it is our opinion that a bridge located on a vacated county road in which the county had held only an easement fr a public road reverts to the adjoining landowners at the time of vacation. If the bridge was declared unsafe prior to vacation of the road, the provisions of > K.S.A. 68-1126 must be honored. However, once a road and bridge have been vacated and have reverted to the adjoining lan> downers, the county has no continuing exposure to tort liability for injuries caused to persons injured while using such vacated roadways and bridges.
>
> Very truly yours,
>
> Robert T. Stephan
> Attorney General of Kansas
> > Brenda L. Hoyt
> Assistant Attorney General

82-27 Laying of Pipelines and other Public Utility Uses of Roadways.

Synopsis: Oil and gas pipeline companies and public utility companies have the authority to construct and maintain lines over, upon and under public roads by virtue of their statutorily-granted powers of eminent domain. However, such use may not interfere with the use of the road for highway purposes. Cited herein: K.S.A. 17–618, K.S.A. 1980 Supp. 17–4604.

Mr. John V. Black
Pratt County Counselor

Dear Mr. Black:

You request an opinion regarding whether a board of county commissioners has the authority to permit the laying or burying of telephone wires, gas lines along county roads or otherwise using the roads for public utility purposes. You ask your question in light of Attorney General Opinion No. 81–242, which concluded that a board of county commissioners does not have the authority to permit seismographic equipment (used by oil exploration companies to locate subterranean oil deposits) to operate on the county roads in which the county has merely an easement, without permission of the abutting landowners. That conclusion was based on the rationale that such a use does not constitute public travel and is, therefore, beyond the scope of the easement acquired by the county in the road.

K.S.A. 17–618 grants the power of eminent domain to certain corporations, including telegraph and telephone corporations and electric and pipeline companies. Other statutes grant specific power to certain utility corporations to construct utility lines along and under public roads. See, e.g., K.S.A. 1980 Supp. 17–4604. Thus, utility companies are permitted to lay or erect their lines along public roadways by virtue of specific statutory authority, and not because such use may be deemed within the scope of 'public travel' or by virtue of permission of the county commission. This power is not absolute, as was stated in Mall v. C. & W. Rural Electric Cooperative Ass'n., 168 Kan. 518 (1950), citing State, ex rel. Bartlett v. Weber, 88 Kan. 175, Syl. ¶2, as follows:

> 'A person may build and maintain such a line on a rural highway without having obtained a franchise or special license from any officer, providing it is done in a way that it will not seriously impede or endanger public travel or unnecessarily interfere with the reasonable use of the highway by other members of the public and there is no invasion of the rights of the owners of abutting lands.' (Emphasis omitted.) Id. at 521.

A board of county commissioners would retain the right to invoke the police power to prohibit a utility company from using a county road in a manner which would interfere with the public safety when the public was attempting to use the road for travel, although the board has no authority otherwise to permit or deny a utility company the right to utilize the roadway for utility purposes.

***2** In our opinion, the fact that Kansas permits additional uses of public roads beyond that of public travel in no way invalidates the conclusion reached in Attorney General Opinion No. 81–242. The Kansas Supreme Court also stated in Mall v. C. & W. Rural Electric Cooperative Ass'n., 168 Kan. 518 (1950), as follows:

> 'Under our law there are additional uses of the right of way available to certain public utilities where the use is for the public interest.' (Emphasis added.) Id. at 522.

Oil exploration companies do not have eminent domain power, nor may they be deemed to be quasi-public corporations acting for a public purpose. Although the state may ultimately derive some economic benefit from the discovery of additional oil within the state, these companies are pursuing a private purpose for private gain and, therefore, may not be said to be pursuing the same end as public utility corporations.

In conclusion, oil and gas pipeline companies and public utility companies have the authority to construct and maintain lines over, upon and under public roads by virtue of their statutorily-granted powers of eminent domain. However, such use may not interfere with the use of the road for highway purposes.

Very truly yours,
Robert T. Stephan
Attorney General of Kansas

Brenda L. Hoyt
Assistant Attorney General

82-205 Damage Caused by Illegal Acts

Synopsis: In order to prevent damage to roads under its jurisdiction, a county may, pursuant to K.S.A. 8–1912, prohibit the use of, or impose limits upon the weight of vehicles using, such roads during certain periods when weather conditions would cause such use to inflict damage. Such limits become effective upon the passing of a resolution by the board of county commissioners and the posting of signs stating the limits or prohibitions, violations of which can result in a civil action to recover damages. In that any common law right of a county to bring an action for damages caused by negligent use of county roads has been superseded by statute, only acts which are illegal may give rise to a suit for damages. Cited herein: K.S.A. 8–5,123 (repealed L. 1974, ch. 33), 8–1912, 8–1913.

Ivan D. Krug
Attorney at Law
711 Main Street
LaCrosse, Kansas 67548
Dear Mr. Krug:
As Rush County Counselor, you request the opinion of this office on a question involving the use of county roads by large vehicles. Specifically, you inquire whether the use of county roads by such vehicles may be limited or prohibited, during periods of rainy or snowy weather, in that they cause significant damage in the form of ruts and potholes. You also inquire as to the liability of the owners or operators of such vehicles in the event damage occurs.

It is clear from Kansas statutory and case law that the use of public roads may be regulated by local governments. The current legislative pronouncement on this subject is found at K.S.A. 8–1912, which states in pertinent part [at subsection (a)]:
'Local authorities with respect to highways under their jurisdiction may prohibit, by ordinance or resolution, the operation of vehicles upon any such highway or impose restrictions as to the weight of vehicles to be operated upon any such highway, for a total period of not to exceed ninety (90) days in any one (1) calendar year, whenever any said highway by reason of deterioration, rain, snow or other claimatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon is prohibited or the permissible weights thereof reduced.' (Emphasis added.)
It may be noted that, in its original form (K.S.A. 8–5, 123), the statute provided only for the regulation and not the prohibition of vehicular traffic, a fact which led to the striking down of at least one local attempt at prohibition. Ash v. Gibson, 146 Kan. 756 (1937). However, such deficiencies were remedied in 1955, when local authorities were given the express power to prohibit certain types of traffic altogether on designated highways (L. 1955, ch. 59, § 1). The reasonable use of this power has been approved in recent opinions of this office. Attorney General Opinion Nos. 76–293; 80–20; 81–197. Such restrictions are imposed by means of signs which provide notice of the restriction or prohibition and which are posted at either end of that portion of the road which has been so designated [K.S.A. 8–1912(b)]. The resolution or ordinance is not effective until such notice is posted.
*2 In the event that such notices are posted, K.S.A. 8–1913 provides that:
'(a) Any person driving any vehicle, object or contrivance upon any highway or highway structure shall be liable for all damage which said highway or structure may sustain as a result of any illegal operation, driving or moving of such vehicle, object or contrivance, or as a result of operating, driving or moving any vehicle, object or contrivance weighing in excess of the maximum weight in this act but authorized by a special permit issued as provided in this article.
'(b) Whenever such driver is not the owner of such vehicle, object or contrivance, but is so operating, driving or moving the same with the express or implied permission of said owner, then said owner and driver shall be jointly and severally liable for any such damage.'
In our opinion, while Rush County is authorized to proceed against individuals or companies who cause road damage under these statutes, it does not have a right to do so apart from them. This result was reached by the court in the case of State Highway Comm. v. Stadler, 158 Kan. 289 (1944), where the prior statute (K.S.A. 8–5,124) was applied in a case where a county bridge had been damaged by a truck violating the posted weight limit. In limiting the county's right to recover, the court held:
'We have no difficulty in concluding that the present statute was intended to be all-inclusive and embraces within its terms all the acts for which the driver or owner of a vehicle might be civilly liable to the commission in the event while driving on the highway he damages a highway or highway structure. The common law right of action has been superseded by the statutory one and so far as acts of negligence are concerned the commission's right of action is limited to such negligent acts as amount to illegal acts under the provisions of the Uniform Act Regulating Traffic on the highways. Common law negligence may now give rise to the statutory cause of action if the act relied on is illegal but it no longer gives appellant the right to rely upon a common law cause of action for negligence.' 158 Kan. at 293–94.
In conclusion, in order to prevent damage to roads under its jurisdiction, a county may, pursuant to K.S.A. 8–1912, prohibit the use of, or impose limits upon the weight of vehicles using, such

roads during certain periods when weather conditions would cause such use to inflict damage. Such limits become effective upon the passing of a resolution by the board of county commissioners and the posting of signs stating the limits or prohibitions, violations of which can result in a civil action to recover damages. In that any common law right of a county to bring an action for damages caused by negligent use of county roads has been superseded by statute, only acts which are illegal may give rise to a suit for damages.
Very truly yours,
Robert T. Stephan
Attorney General of Kansas
Jeffrey S. Southard
Assistant Attorney General

82-219 Maintenance of County-Owned Park Roads

*1 September 30, 1982

Synopsis: County road and bridge fund moneys may be expended to maintain roads only if such roads have been designated ‘county roads' and satisfy applicable statutory and regulatory requirements and specifications. If a road within a county park does not qualify as a ‘county road,’ the expense of maintaining the road should be paid from the county park fund. Cited herein: K.S.A. 63–101, 68–5,101, 79–1947, 79–2934, Kan. Const., Art. 11, § 5.

Michael E. Cleary
Assistant County Attorney
Harvey County Courthouse
Newton, Kansas 67114–0687

Dear Mr. Cleary:

You have requested an opinion from this office regarding whether moneys in the county road and bridge fund may be utilized to pay the costs of repairing and maintaining county-owned park roads. Presently, Harvey County levies a tax pursuant to K.S.A. 68–5,101 and limited by K.S.A. 79–1947 to provide moneys for the county road and bridge fund. We believe that the resolution of your inquiry turns on whether the subject roads are part of the county's road system intended to be maintained from the moneys raised by the tax levy authorized by K.S.A. 68–5,101.

K.S.A. 68–101(3) states:
‘The term ‘county roads' shall mean all roads designated as such by the board of county commissioners, including roads on the county secondary road system and class A roads in county road unit counties.’

K.S.A. 68–101(3) is silent regarding the precise procedure by which a board of county commissioners designates a road as a ‘county road.’ However, at a minimum, the records of the board of county commissioners should reflect either that the statutory procedure specified at

K.S.A. 68–102 et seq., for laying out a road has been satisfied or that some other affirmative action has been taken which recognizes an identifiable segment of road as a 'county road.' Moreover, any road so designated must, ab initio, satisfy all statutory or regulatory requirements and specifications. (See: e.g., K.S.A. 68–116 which prescribes minimum and maximum widths of county roads.) The mere presence of a road within a county park does not, per se, qualify same as a 'county road' as that term is defined and utilized in K.S.A. 68–101 et seq. Therefore, if a road within a county park is not a 'county road,' moneys from the county road and bridge fund may not be used to maintain such road.

It is our considered opinion that this conclusion is required because of the limitation imposed by Article 11, Section 5 of the Kansas Constitution, which states:
'No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such tax shall be applied.' (Emphasis added.)

The purpose of this constitutional provision is to 'prevent the misapplication of all taxes levied in pursuance of law.' The State v. City of Emporia, 57 Kan. 710, 713 (1897). See, also: Smith v. Haney, 73 Kan. 506, 509 (1906), Trust Co. v. Grant County, 111 Kan. 104, 105 (1922), Grecian v. Hill City, 123 Kan. 542, 547 (1927), State, ex rel., v. Saline County Comm'rs, 128 Kan. 427 (1929), State ex rel., v. Kansas City, 140 Kan. 471, 480 (1934), State, ex rel., v. Bunton, 141 Kan. 103, 105 (1935), School District v. Clark County Comm'rs, 155 Kan. 636, 639 (1942) and, Redevelopment Authority of the City of Kansas City v. State Corp. Comm., 171 Kan. 581, 583 (1951).

*2 In State, ex rel., v. Saline County Comm'rs, supra, the Court, citing the Constitution of the State of Kansas, Art. 11, § 5, held unconstitutional a resolution of the county commission which authorized a loan from the county road fund to the state highway commission for improvements in the state highway system. The Court stated that the subject constitutional restriction.
'is an insuperable barrier to the loaning of the funds named or to their application to the building of state highways. The taxes were levied in pursuance of law for specific purposes, and the funds derived from those levies must be exclusively applied to those purposes. Each of the funds is distinct from the others and it is beyond the power of the commissioners or others to divert funds raised by taxation for one purpose and apply them to another. It would be a violation of the constitution to apply the bond fund to the building of county roads or to apply the sinking fund to the building of county bridges.'

Furthermore, use of the county road and bridge fund to maintain roads other than 'county roads' would violate the so-called Budget Law (K.S.A. 79–2934), which states in relevant part:
'The budget as approved and filed with the county clerk for each year shall constitute and shall hereafter be declared to be an appropriation for each fund, and the appropriation thus made shall not be used for any other purpose.
. . ..
'No part of any fund shall be diverted to any other fund, whether before or after the distribution of taxes by the county treasurer, except as provided by law.'

The purpose of the county road and bridge fund is, inter alia, to maintain 'county roads.' In contrast, the purpose of the county park fund is, inter alia, to maintain the county's park grounds

and roads therein which are not ‘county roads.’ The above-cited constitutional provision and Budget Law would preclude any diversion of moneys from one fund to another.

In conclusion, county road and bridge fund moneys may only be expended to repair and maintain roads which have been designated ‘county roads' and which satisfy applicable statutory and regulatory requirements and specifications. If a road within a county park does not qualify as a ‘county road,’ the expense of maintaining such road should be paid from the county park fund.

Very truly yours,

Robert T. Stephan
Attorney General of Kansas
Robert Vinson Eye
Assistant Attorney General

82-228 Authority to Grant easements Along Township Roads.

October 21, 1982

Re: Roads and Bridges—Establishment—Authority to Grant Easements Along Township Roads
Synopsis: The board of county commissioners is empowered by statute to lay out all public roads in a county, even if the road is termed a township road for purposes of maintenance. If the land underlying a township road was taken by eminent domain, the county acquires only an easement for road purposes, leaving the authority to grant additional easements vested in the owners of the land abutting the road, i.e. the fee holders of the servient estate. Such rights are limited, however, in that any conveyance by the fee holders may not interfere with public use of the road. Cited herein: K.S.A. 12–309, 19–212, 68–106, 68–114, 68–115, 68–502, 68–518c, 68–526.

R. Scott McQuin
Barber County Attorney

Dear Mr. McQuin:

As County Attorney for Barber County, you request our opinion on a question involving the authority of the board of county commissioners to grant an easement along a township road. Your question is prompted by a request from the City of Kiowa that it be allowed to install a water pipeline along 15 to 20 miles of township roads. The pipeline, which was made necessary by contamination of the city's water wells, is to be placed along the right of way. As the townships involved have refused permission, the city has requested the county's approval.

It would be our intial conclusion that the authority to grant such easements rests with the fee owner of the land. As the facts you present do not indicate how or by whom the roads in question were established, we will confine this opinion to setting forth the potential rights of the parties, once it is determined who holds fee title.

In Kansas, public roads may be established by purchase, condemnation or dedication. Kratina v. Board of Commissioners, 219 Kan. 499, 502 (1976). The authority of a governmental body to establish public roads and the nature of the government's resulting interest in such roads is governed by statute. See, e.g., State, ex rel., Mitchell v. State Highway Commission, 163 Kan. 187, 196 (1947). Reading together the various provisions of Chapter 68, Kansas Statutes Annotated, it appears that only the board of county commissioners has authority to establish roads in the county. Additionally, K.S.A. 19–212, Ninth, empowers county commissioners to 'lay out, alter or discontinue any road running through one or more townships.' Under K.S.A. 68–106, the board is to determine whether to establish a road and to condemn such land as is needed. If the board establishes a road, the township board thereafter has the duty to open and maintain it and to construct such drains and ditches as are necessary for its safety under K.S.A. 68–115, in compliance with specifications and regulations prepared by the county engineer. K.S.A. 68–526, 68–502(4).

Townships are granted general authority over all township roads in counties not adopting the county road unit system, as in the present case, under K.S.A. 68–526. The township board is to have charge and supervision over all township roads, and is authorized to levy taxes for road purposes under K.S.A. 68–518c, and is also responsible for opening and maintaining township roads under K.S.A. 68–115. However, while a county has the power of eminent domain to establish a township road, the township has no such authority. Balliet v. Clay County Comm'rs, 115 Kan. 99, 101 (1924).

***2** While it is clear from the above that only the county may grant easements along township roads, the actual power to do so is dependent upon the method by which the land was acquired, as less than fee ownership may have been acquired. As noted above, a county is empowered to acquire land by eminent domain for road purposes. K.S.A. 68–106, 68–114. When altering or changing a road, the county also is authorized to acquire land by purchase or donation. The distinction between eminent domain and other methods of land acquisition determines the nature of the interest conveyed. Elder v. Franklin County Comm., 42 Kan. 652 (1889), J. & S. Bldg. Co. v. Columbian Title & Trust Co., 1 Kan.App.2d 228 (1977). As fee owner, the county would have absolute ownership and could convey or grant any easement as it wishes.

In condemnation, however, 'an owner parts with his property involuntarily and the condemnor secures no greater title or right than that permitted by the authorizing statute.' Isley v. Bogart, 338 F.2d 33, 35 (10th Cir. 1964). As there is no statutory authority in Chapter 68 of the statutes which allows acquisition of a fee title, the prevailing rule permits the condemning authority to acquire only an easement. Carpenter v. Fager, 188 Kan. 234, 235 (1961), Mall v. C. & W. Rural Cooperative Ass'n., 168 Kan. 518, 521 (1950). As the legislature has the power to determine the nature of the title acquired by eminent domain, the taking is limited to an easement 'sufficient for the public use intended rather than a fee title.' Carpenter v. Fager, supra at 235. See, also, State, ex rel., Mitchell v. State Highway Commission, supra at 196.

If, as is usually the case, the road in question was established by eminent domain, in our opinion the county acquired only an easement, with the underlying fee remaining in the owners of the servient estate, the abutting landowners. In Potter v. Northern Natural Gas Co., 201 Kan. 528, 530–

31 (1968), the Kansas Supreme Court defined an easement as 'an interest which one person has in the land of another . . . [T]he land [from which the easement issues] constitutes the servient tenement and the easement a dominant tenement.' The owner of the servient estate remains the 'owner of the fee and holder of the ultimate title . . . [A]s owner, he may still continue to use the property for any purpose which does not frustrate the public use for which the property was condemned.' Carpenter v. Fager, supra at 236. See also, Aladdin Petroleum Corp. v. Gold Crown Properties, Inc., 221 Kan. 579 (1977). Of course, the abutting landowner's interest passes to his grantee or other successor in interest. Carpenter v. Fager, supra at 237–238.

Accordingly, if the county possesses only an easement, it has only the right to maintain the road for public use. The abutting landowners, as fee holders of the servient estate, would have the right to use any part of the affected land in any manner not inconsistent with the public's use of the highway. Therefore, they, not the county, have the right to grant, sell or convey such additional easements as they wish, as long as the use of the road is not interfered with. However, the city does possess the authority, if necessary, to acquire such easements by condemnation. K.S.A. 12–809.

***3** In conclusion, the board of county commissioners is empowered by statute to lay out all public roads in a county, even if the road is termed a township road for purposes of maintenance. If the land underlying a township road was taken by eminent domain, the county acquires only an easement for road purposes, leaving the authority to grant additional easements vested in the owners of the land abutting the road, i.e., the fee holders of the servient estate. Such rights are limited, however, in that any conveyance by the fee holders may not interfere with public use of the road.

Very truly yours,
Robert T. Stephan
Attorney General of Kansas

Jeffrey S. Southard
Assistant Attorney General

88-183 Utility Relocation Costs

Mr. Steven L. Boyce
Coffey County Attorney
514 Neosho
P.O. Box 452
Burlington, Kansas 66839

Dear Mr. Boyce:

You request our opinion regarding responsibility for expenses to be incurred in relocating poles and transmission lines of an electric cooperative. You advise that said poles and lines are located within the right of way of a county road, and must be moved in order to improve (widen) the road. You indicate that the poles and lines have been continually maintained in their present

location for over 15 years, but that the cooperative, which is operating under authority of K.S.A. 17–4601 et seq., has no easement granting authority to construct and maintain the same. However, you advise that the minutes of a 1939 Coffey County Board of Commissioners meeting state as follows: 'L. J. Pilcher requested and received permission for the Rural Electrification Assn. to set poles for their lines on roads, where necessary to do so . . ..'

You advise that the electric cooperative denies liability for relocation expenses, and you specifically request our opinion as to the following questions:
1.Is K.S.A. 17–4627 applicable to public bodies and land that is dedicated as a public road, and can a cooperative thereby acquire statutory rights that would require relocation of lines to be at the expense of a public body where the electric lines have been maintained on county road right of way property without the grant of an easement?
2. Does the excerpt from the board of commissioner's meeting shown above constitute a binding agreement that the
R.E.C. may locate its lines on county rights of way where it is, to quote the minutes, 'necessary to do so,' and if so, is the county then financially responsible if it becomes necessary to use the county road area where the lines are situated?'

In regard to your first question, K.S.A. 17–4627 establishes a two-year statute of limitation when an electric cooperative places transmission lines on real property. Specifically, the statute provides as follows:
'No action or suit may be brought against a cooperative doing business in this state pursuant to this act, or against any agent, servant or employee thereof, by reason of the maintenance of electric transmission or distribution lines on any real property after the expiration of a period of two years of continuous maintenance of such lines without the consent of the person or persons legally entitled to object to such maintenance.'

***2** The above-quoted provision does not specifically exclude the right of way of a county road from its operation. However, subsection (i) of K.S.A. 17–4604 grants an electric cooperative the power 'to construct, maintain and operate electric transmission and distribution lines along, upon, under and across publicly owned lands and public thoroughfares, roads, highways, streets, alleys, bridges and causeways in conformity with the laws of the state of Kansas.'
K.S.A. 17–4604 and 17–4627 deal with the same subject matter, and, therefore, must be construed together as statutes in pari materia. See Gnadt v. Durr, 208 Kan. 783 (1972). Applying this principle, it appears that the right of a cooperative to locate its lines on a public highway emanate from the specific provisions of K.S.A. 17–4604(i), and that the provisions of K.S.A. 17–4627 were not intended to apply where transmission lines are maintained on such a highway. Also, it should be noted that the Kansas Supreme Court has not countenanced claims based upon adverse possession or laches in highway cases. Specifically, in City of Emporia v. Humphrey, 132 Kan. 682 (1931), the court stated as follows:
'As was said in Eble v. The State, supra: "This court is already committed to the doctrine that a private individual cannot obtain title to a public highway by adverse possession; that lapse of time will not bar the remedy of the state against encroachments upon a highway; that an obstruction to the public use of a highway is a continuing nuisance; and that no equities in favor of a person committing such a nuisance can be founded upon the acquiescence of the highway or other officials, or upon their laches in taking steps to punish or abate it. (McAlpine v. Railway

Co., 68 Kan. 207, 75 Pac., 73, 64 L.R.A. 85; Webb v. Comm'rs of Butler Co., 52 Kan. 375, 34 Pac. 973, and cases cited in those opinions.)' (p. 184.)' 132 Kan. at 693.

In accordance with the above authorities, it is our opinion that K.S.A. 17–4627 does not bar an action or lawsuit by a county against an electric cooperative for relocation of transmission lines and poles located within the right of way of a county road, where the board of county commissioners has determined that it is necessary to widen the road, and such poles and lines must be moved to accomplish the same.

In regard to your second question, the Kansas Supreme Court has held that a property right is not created by city approval of the location of a transmission line of a utility holding a franchise to maintain power lines in public places, and that no negotiated compensation or condemnation is required when relocation of such a line is necessitated by public improvements. City of Wichita v. Kansas Gas & Electric Co., 204 Kan. 546, 556 (1970). In the last-cited case, the Court noted with approval the following general rule regarding responsibility for expenses incurred for relocating utility facilities maintained on a public way:

***3** 'Charters, franchises, statutory grants and permits affording the use of public ways to utility locations are subservient, expressly or by implication, in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or ways are at utility expense, a common law liability unless abrogated by the clear import of the language used in a particular statute.' (Footnotes omitted.) [Emphasis added.] Nichols, Eminent Domain (Revised Third Edition) § 15.22.

Additionally, in the same case, the Court cited with approval, regarding the obligation of utilities to relocate at their own expense, the case of Port of N.Y. Auth. v. Hackensack Water Co., 195 A.2d 1 (N.J. Sup. Ct., 1963). Id. at 556. In said case, it was held that the utility's obligation to relocate at its expense existed even in the absence of a delegation of authority over relocation from the state to the subdivision thereof which undertook the improvement which required relocation. 195 A.2d at 4.

Although the City of Wichita case, supra, concerned a utility holding a franchise to occupy city streets, we discern no reason why the principles enunciated therein would not be equally applicable to an electric cooperative which maintains transmission lines on a county road pursuant to the provisions of K.S.A. 17–4604(i). In this regard, we are unaware of any Kansas case which considers the obligation of a utility to relocate lines located on a county road, but at least one other jurisdiction has held that the same implied obligation to relocate, which exists under a franchise agreement, also applies where facilities are located on a county road pursuant to statutory authorization. See County of Contra Costa v. Central Contra Costa Sanitary Dist., 225 C.A.2d 701 (Cal., C.A. 1st Dist., 1964). In our judgment, this rule would be followed by Kansas courts.

In accordance with the above-cited authorities, it is our opinion that county approval of the location (upon the right of way of a county road) of transmission lines and poles of an electric cooperative does not obligate the county to bear the cost of any future relocation of the lines, if the same becomes necessary. In our judgment, if such lines and poles must be relocated upon the right of way easement of the county road, in order to improve the road, the electric cooperative is liable for expenses associated with the relocation.

Very truly yours,
Robert T. Stephan
Attorney General of Kansas
Terrence R. Hearshman
Assistant Attorney General

86-47 Duties of Township Trustee

Michael P. Herrell
Gypsum Township Trustee
Rt. #1, Box 189-3
Derby, Kansas 67037

Re: Townships and Township Officers—Township Trustee--Powers and Duties Generally

Roads and Bridges--Roads; County and Township Roads--Duties of Township Board; Plans, Materials and Equipment

Synopsis: In all counties not operating under the county road unit system, the maintenance of township roads and the purchase of equipment necessary to perform such maintenance, is the duty of the township board. K.S.A. 68-526. For this purpose, the township board consists of the trustee, the treasurer and the clerk. Because these are township board functions, no one officer acting alone may substitute his authority for that reserved to the board. To the extent the language of K.S.A. 68-526 conflicts with the general duties delegated to the trustee pursuant to K.S.A. 80-301, the earlier language of K.S.A. 80-301 must be deemed to be repealed by implication. Cited herein: K.S.A. 68-101; 68-526; 68-530; 80-301; 80-401; 80-501.

Dear Mr. Herrell:
As Trustee of Gypsum Township, Sedgwick County, Kansas, you request our opinion regarding the duties and powers of the township trustee in township road maintenance and other areas. Specifically, you question whether the trustee may make decisions regarding purchase of road equipment and take charge of construction and maintenance without conferring with the other township board members, i.e. the township treasurer and clerk.
K.S.A. 80-301 defines the township trustee's duties in general as follows:
"The duties of the township trustee. Shall be.

"First. To divide his or her township into convenient road districts, and make such alterations in the same as may be necessary.

"Second. To fill all vacancies in the office of road overseer in his or her township.

"Third. To see to a proper application of all moneys belonging to his or her township for road or other purposes.

"Fourth. To have the care and management of all property, real and personal, belonging to his or her township, and to superintend the various interests thereof.

"Fifth. To cause a record to be made accurately defining the boundaries and number of each road district, as well as the alterations made in such district or districts in his or her township, and the number of road overseers in each township.

"Sixth. Shall have power to administer all oaths in the necessary discharge of the duties of his or her office.

"Seventh. Shall superintend all the pecuniary concerns of his or her township, and shall at the July session of the board of county commissioners, annually, with the advice and concurrence of said board levy a tax on the property in said township for township road and other purposes, and report the same to the county clerk, who shall enter the same on the proper tax roll in a separate column or columns, and the treasurer shall collect the same as other taxes are collected; but in a failure of such trustee and commissioners to concur, then the board of county commissioners shall levy such township road and other taxes.

"Eighth. He or she shall discharge such other duties as may be imposed by law."

By the terms of this statute alone, it might appear that the trustee of a township has sole discretion as to what work is to be done on township roads and what purchases must be made to accomplish that work.
However, K.S.A. 68-526 provides as follows:
"In all counties not operating under the county road unit system the township board shall have the general charge and supervision of all township roads and township culverts in their respective townships, and shall procure machinery, implements, tools, drain tile, stone, gravel, and any other material or equipment required, for the construction or repair thereof. All work shall be done in accordance with plans and specifications and the general regulations to be prepared and furnished by the county engineer. . . ." (Emphasis added.)

"Township board" is defined at K.S.A. 68-101(1) as "the governing body of the township composed of the township trustee, the township clerk and the township treasurer." Thus the duty of supervising township roads, their construction and maintenance, is a township board function. This office has held previously that "[s]uch functions are to be performed by the board and no one officer acting alone has the power to substitute his or her own authority for that reserved to the board." Attorney General Opinion No. 81-141. See also, 87 C.J.S. Towns §79.

The problem of potentially conflicting language between two statutes (here K.S.A. 68-526 and 80-301) is also discussed in Attorney General Opinion No. 81-141:
"Because the legislature has changed the management authority of the township officers over the years, conflicting statutory language may delegate the same or similar duties to an individual officer and to the township board. Under principles of statutory construction, earlier language is impliedly repealed to the extent that it conflicts with later statutory language dealing specifically with the same subject matter. The rule so stated by the Kansas Supreme Court in Arkansas City v. Turner, 116 Kan. 407, 409 (1924) is:
'It is an elementary rule of statutory construction that where a manifest conflict between two statutes cannot be reconciled so as to give reasonable operative effect to both, the later

enactment, as the last expression of the legislative will, controls, and the earlier enactment is deemed to have been repealed by implication.'
"Thus, duties defined in the more recent statutes control in cases of irreconcilable conflict."
K.S.A. 80-301 was enacted in 1868, as were the statutes which describe the principal duties of the township treasurer and township clerk (K.S.A. 80-401 and 80-501). K.S.A. 68-526 was enacted in 1917. Thus, under accepted rules of statutory construction, the language of K.S.A. 80-301 must be deemed to be impliedly repealed to the extent that it conflicts with K.S.A. 68-526.

We note further that in certain circumstances, the township trustee may act as township road overseer or patrolman, but only in townships having a population of 500 or less, and the trustee must be designated to act as such by unanimous vote of the township board. K.S.A. 68-530. Otherwise, the township board, with the consent of the county engineer, is to appoint a "competent experienced road builder for road overseer," (K.S.A. 68-530) and "the trustee, acting alone under K.S.A. 80- 301, Second, has no such authority." Attorney General Opinion No. 78-147.

In conclusion, in all counties not operating under the county road unit system, the maintenance of township roads and the purchase of equipment necessary to perform such maintenance, is the duty of the township board. K.S.A. 68-526. For this purpose, the township board consists of the trustee, the treasurer and the clerk. Because these are township board functions, no one officer acting alone may substitute his authority for that reserved to the board. To the extent the language of K.S.A. 68-526 conflicts with the general duties delegated to the trustee pursuant to K.S.A. 80-301, the earlier language of K.S.A. 80-301 must be deemed to be repealed by implication.

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Julene L. Miler
Assistant Attorney General

87-22 County can repair township roads

February 5, 1987

Re: Roads and Bridges -- County and Township Roads --Maintenance of Township Road Located on State Line
Synopsis: Kansas law allows for and encourages agreements between the townships and counties for maintenance of the roads. If, however, no agreement can be reached, the county can take over maintenance in the event the township neglects proper care. Cited herein: *K.S.A. 68-124*, *K.S.A. 1986 Supp. 68-506*, *K.S.A. 68-516a*; *K.S.A. 1986 Supp. 68-560*; *K.S.A. 68-561*; *68-572*; *68-591*.

Request By: Steve Kraushaar

Marshall County Counselor
P.O. Box 107
Marysville, Kansas 66508
Opinion By: ROBERT T. STEPHAN, Attorney General of Kansas; Julene L. Miller, Deputy Attorney General

Opinion
As Marshall County Counselor, you request our opinion concerning the maintenance of a particular township road. Specifically you ask whether the county, which does not operate under the county road unit system, may undertake the repair of a township road which is no longer maintained by the township and charge the expense of such repair to the township.
K.S.A. 1986 Supp. 68-506(a)(3) provides that a township road in a non-county road unity system county is one not designated by the county commissioners for inclusion in the secondary **[*2]** road system or as a county minor collector road or highway. The Kansas Supreme Court has stated: ²A township, having the exclusive care and control of a street or road, has a duty to maintain that road or street for the safe passage of persons and property. Other governmental entities cannot be held liable for failure to maintain that road safely.² *Finkbiner v. Clay County, 238 Kan. 857, 861 (1986),* citing *City of Eudora v. Miller, 30 Kan. 494 (1883).* Despite this protection from liability, a county may desire to take over maintenance of a neglected township road, and the law provides ways for this to occur. Two statutes pertain to counties desiring to maintain non-county road unit system status. *K.S.A. 1986 Supp. 68-560* states: ²In any county not operating under the county road unit system, any township in such county may, with consent of the county commissioners, elect to turn over the maintenance, repair and construction of township roads to the counties as provided by this subsection.² *K.S.A. 68-572* allows for agreements between townships and counties for the maintenance of roads. You inform us that the township in question has not turned over maintenance of the **[*3]** township roads to the county pursuant to *K.S.A. 68-560* and *68-561* and we assume that no agreement has been reached as provided in *K.S.A. 68-572*. There is, however, a statute which permits a county to repair a township road and charge the township for the cost of such repair. *K.S.A. 68-124* states: ²Where under the laws of the state of Kansas, now in existence, or that may hereafter be enacted, any road or highway that is not a county road has been declared to be a public road or highway, it shall be the duty of the board of highway commissioners of the township in which such road is located to repair, place and keep in condition for travel such roads (sic) or highway. If such board of highway commissioners shall neglect, refuse or fail to comply with the provisions of this act, the board of county commissioners of the county may repair and put in good condition for travel such road or highway, and shall charge the expenses therefor to the township in which such road is located.² See*Stock Farm Co. v. Pottawatomie County, 116 Kan. 315, 319 (1924).* It would appear that this statute applies to the circumstances you describe. The road in question is a township road, not a **[*4]** county road, and it is a public rather than private road which has been publicly maintained for many years. If the township board of highway commissioners (the board of trustees) fails to repair and maintain the road, the board of county commissioners may do so and charge the expense to the township in which the road is located. In taking over maintenance, however, liability for negligence in maintaining the road may fall upon the county.

Office of the Attorney General
State of Kansas

87–124 Responsibility to Accept Abandoned State Highways

*1 August 21, 1987

Synopsis: K.S.A. 68 406 gives the secretary of transportation the power to remove from the state highway system roads which have little or no state-wide significance. The statute by implication therefore requires counties to accept legal responsibility for abandoned state highways. However, a board of county commissioners is empowered to vacate any abandoned highway for which it has accepted responsibility, if the commissioners determine that the cost of maintenance exceeds any practical use in retaining the highway under its jurisdiction. Cited herein: K.S.A. 68–102; 68–102a; 68–107; 68–406.

Philip E. Winter
Lyon County Counselor
County Courthouse
Emporia, Kansas 66801

Dear Mr. Winter:

As county counselor for Lyon County, you ask our opinion as to whether counties must accept abandoned state highways from the state.

This question was addressed in VI Opinions of the Attorney General 513 in 1970. Based upon the provisions of K.S.A. 68–406, the Attorney General opined that a local unit of government has a legal responsibility to accept a highway which has been abandoned by the state. The opinion went on to state, however, that:
"If the county or the township determines that the cost of maintenance exceeds any practical use in retaining the highway under its jurisdiction, it can be vacated under the provisions of K.S.A. 68–102 to 68–107." p. 514.

Thus, the opinion concluded that a local unit of government which accepts an abandoned state highway is not necessarily precluded from vacating that road. We concur with this conclusion.

In support of this result, we note that K.S.A. 68–406(a) provides:
"The secretary of transportation shall designate, adopt and establish and may lay out, open, relocate, alter, vacate, remove, redesignate and reestablish highways in every county in the state, the total mileage of which shall not exceed 10,000 miles.... The secretary of transportation shall make such revisions, classifications or reclassifications in the state highway system as are found on the basis of engineering and traffic study to be necessary, and such revisions, classifications or reclassifications may include, after due public hearing, removal from the system of roads which have little or no state-wide significance, ... changes may be made in the state highway

system when the public safety, convenience, economy, classification or reclassification require such change." (Emphasis added).

It is significant that the statute gives the secretary of transportation the power to make revisions, classifications or reclassifications in the state highway system, which may include removal from the system of roads which have little or no state-wide significance.

*2 While K.S.A. 68–406 has been amended numerous times since 1970, we believe the statute in its present form still requires counties to accept abandoned state highways from the state. Clearly, the secretary of transportation has the statutory authority to remove a road from the state highway system. Once such action is taken, responsibility for maintenance of that road must fall upon the county in which the road is located. However, the board of county commissioners of the county is empowered to vacate said road.

K.S.A. 68–102 authorizes a board of county commissioners to vacate any county road upon presentation of a petition signed by at least twelve householders of the county residing in the vicinity where said road is to be vacated, or without petition, in a county having a population between 1,200 and 90,000 inhabitants, if said road is no longer a public utility. Further, under K.S.A. 68–102a, a board of county commissioners may vacate a road without the presentation of a petition for vacation, provided notice of the proposed vacation is given once in the official county newspaper and to each owner of property adjoining the road.

In light of these provisions, it is our opinion that a board of county commissioners is empowered to vacate any abandoned highway for which it has accepted responsibility, if the commissioners determine that the cost of maintenance exceeds any practical use in retaining the highway under its jurisdiction.

Should the secretary of transportation remove a highway from the state highway system, there is no statute which requires the Kansas Department of Transportation (K.D.O.T.) to repair the vacated highway before transferring it to the jurisdiction of a county. However, K.D.O.T. adopted a policy for maintenance prior to such a transfer in an internal memorandum dated June 27, 1984, entitled "Transferring Road Maintenance to the County/City," Subject No. 3230.00/03. The memorandum provides:
"[A] roadway being transferred to a city or county responsibility [must] be in a good state of maintenance at the time of the transfer." (p. 1, No. 2)

The specific procedure the state must follow in repairing a highway is spelled out in the memorandum at p. 1, No. 5. The state has a responsibility to ensure the highway is in a good state of repair at the time of the transfer. Provided the road is repaired to the K.D.O.T. standard level of maintenance, and subsequent to the transfer, the accepting county is responsible for maintaining the highway until such time as the road may be vacated by the board of county commissioners.

In summary, K.S.A. 68–406 gives the secretary of transportation the power to remove from the state highway system roads which have little or no state-wide significance. The statute by implication therefore requires counties to accept legal responsibility for abandoned state

highways. However, a board of county commissioners is empowered to vacate any abandoned highway for which it has accepted responsibility, if the commissioners determine that the cost of maintenance exceeds any practical use in retaining the highway under its jurisdiction.

Very truly yours,

*3 Robert T. Stephan
Attorney General of Kansas

Barbara P. Allen
Assistant Attorney General

87–173 Restricting Use of Highways

Synopsis:Pursuant to Kansas law, counties may impose limitations as to the size and weight of vehicles on certain roads. Constitutional restrictions apply to such regulations and require that every classification be reasonable and rest upon a rational basis which serves a valid governmental purpose. The proposed regulation restricting weight on county roads should apply equally to all vehicles under the same circumstances and conditions. Cited herein: K.S.A. 19–101 Fifth; K.S.A. 1986 Supp. 19–101a; K.S.A. 8–1912; K.S.A. 8–2002(f); U.S. Const. Fourteenth Amend.

Philip E. Winter
Lyon County Counselor
Lyon County Courthouse
Emporia, Kansas 66801

Dear Mr. Winter:

As Lyon County Counselor you request our opinion on a proposed county resolution restricting vehicle weight on certain Lyon county roads. You specifically inquire as to the legalities of the resolution in accordance with the laws of Kansas and the Constitution.

K.S.A. 19–101 Fifth enables each county "to exercise the powers of home rule to determine their local affairs and government authorized under the provisions of K.S.A. 19–101a." K.S.A.1986 Supp. 19–101a grants counties the authority to "transact all county business and perform all powers of local legislation and administration it deems appropriate," subject to certain enumerated limitations. K.S.A. 8–2002(7) permits local authorities to restrict the use of highways as authorized in K.S.A. 8–1912. Under subsection (f) of K.S.A. 8–1912 local authorities "may prohibit the operation of trucks or other commercial vehicles, or may impose limitations as to the weight or size thereof, on designated highways". Prohibitions and limitations must be designated by appropriate road signs and there must be a satisfactory alternate route provided when the restrictions apply to a street connecting with the state highway system.

Thus, provided procedural dictates are followed, the proposed regulation by Lyon County appears to be authorized by state law. However, state or local legislation cannot abuse federal constitutional rights. Harris v. Anderson, 194 Kan. 302, cert. denied, 382 U.S. 894 (1965). U.S. Const., amend. XIV.

The proposed resolution states in pertinent part:
"F.A.S. Route 151, commonly known as the Olpe/Hartford Road; shall have the following weight restrictions; No vehicle or combination of vehicles shall be moved or operated upon any of the beforementioned roads when the gross weight is in excess of 40,000 pounds.
"EXCEPT THAT a vehicle or combination of vehicles may be moved or operated on the above-mentioned roads when the gross weight does not exceed 85,000 pounds.
"So long as no such vehicle so loaded or operated as authorized by this subsection shall travel more distance than 25 miles from the City limits of the City of Emporia, County seat of Lyon County, Kansas."

*2 The resolution makes a distinction between vehicles having Emporia as their termini and those that do not. The distinction results in a different classification and treatment for vehicles with the same weight. Dual treatment of vehicles based solely on the distance traveled from a city raises an equal protection question.
"The prohibition against denial of equal protection does not preclude a state or municipality from resorting to classification for purposes of legislation or regulation, and confining such provisions to a certain class or classes. Moreover, the classifications may validly prescribe different sets of rules for different classes, or discriminate in favor of, or against, a certain class. The general rule is, however, subject to the qualification that the classification or discrimination be reasonable, rather than arbitrary, and rest on a real and substantial difference or distinction which bears a just, reasonable, or substantial relation to the legislation or the subject or object thereof. Furthermore, in order for a classification to satisfy the dictates of equal protection, the legislation must operate equally, uniformly, and impartially on all persons or property within the same class. As viewed from a different perspective, only those classifications which are invidious, arbitrary, or irrational offend the equal protection clause." 16B C.J.S. Constitutional Law § 780 (1985).

Vehicles weighing in excess of 40,000 pounds belong to the same class. The classification made by the proposed regulation rests upon the distance traveled from Emporia. Classifications are valid when rationally related to a legitimate governmental interest or purpose. Manhattan Buildings, Inc., v. Hurley, 231 Kan. 20, 30 (1982). Several courts have declared laws unconstitutional when the maximum weight limits did not apply to every vehicle. See Lossing v. Hughes, 244 S.W. 556 (C.A.Tex 1922); State ex rel. Parker v. Frick, 7 So.2d 152 (Fla.1942); Richter Concrete Corp. v. City of Reading, 136 N.E.2d 422 (Ohio 1956); see also 16C C.J.S. Constitutional Law § 906 (1985).

Lyon county officials must have a rationale basis for why this regulation serves a valid governmental purpose. The Richter court objected to distinctions based on a vehicle's local origins because "the mere fact of traffic having its termini outside of the municipality is not a valid basis of classification." Richter at 425. In pursuance of valid governmental purposes communities may protect the safety and welfare of their area. This includes protection of the roads contained therein. Brown v. City of Abilene, 93 Kan. 737 (1915). However, regulations

concerning weight of vehicles must not be unreasonable, arbitrary, or discriminatory. 7A Am.Jur.2d Automobiles and Highways § 197 (1980).

If the purpose of the regulation is to protect roads from excessive weight, the distinction made between vehicles traveling no further from Emporia than twenty-five miles and all other vehicles has no apparent rationale basis. The roads will still be subjected to a weight deemed excessive. If there is another valid governmental purpose that can be accomplished through this distinction, the classification might survive a constitutional challenge. However, it is our opinion that the proposed regulation would not be able to withstand judicial scrutiny as to its constitutionality and therefore weight restrictions should apply equally to all vehicles under the same circumstances and conditions.

Very truly yours,

*3 Robert T. Stephan
Attorney General of Kansas
Theresa Marcel Nuckolls
Assistant Attorney General

90-91: Machinery & Equipment—Authority to rent for Private Use.

Synopsis: the board of county commissioners or the board of township trustees is prohibited from renting or hiring machinery or equipment for private use except when that use is for road clearing purposes. Cited herein: K.S.A. 68-141a, 68-141b, 68-141c. July 31, 1990.

93-1 **Authority to Contract with Private Individuals for Road Work**

The Honorable Don Sallee
State Senator, First District
Rt. 2
Troy, Kansas 66087

Counties and County Officers--County Commissioners--Powers and Duties;

Roads and Bridges--General Provisions; Machinery and Equipment--Renting or Hiring of Machinery and Equipment Prohibited

Synopsis:

A county may contract with a school or a private individual for the purpose of having the county perform road, street or driveway work only if those services promote a public purpose of the county. Cited herein: K.S.A. 19-212; 68-141a.

* * *

Dear Senator Sallee:

As senator for the first district, you request our opinion as to whether private individuals and schools can contract with the county for road, street and driveway work.

We will assume from your letter that the private individuals or schools are wanting the county to use county personnel and equipment for this work and that the individuals and schools are not seeking to rent or hire the machinery or equipment. As stated in Attorney General Opinion No. 90-91:

"K.S.A. 68-141a prohibits a board of county commissioners or board of township trustees from renting or hiring machinery or equipment for private use except when that use is for road clearing purposes."

Attorney General Opinion No. 73-96 discussed whether the city could install asphalt surfacing on property owned by public school and religious organizations. Citing *State ex rel. Mellott v. Mason*, 126 Kan. 43 (1928); *State ex rel. Smith v. Hiawatha*, 127 Kan. 183 (1928); *State ex rel. Logan v. Allen*, 133 Kan. 376 (1931); and *Glen W. Dickinson Theatres, Inc. v. Lambert*, 136 Kan. 498 (1932), the opinion held that:

"installation of asphaltic paving by the city on private property was tantamount to a commercial enterprise which was prohibited to municipal operations."

"Certainly, it may be urged that providing such a service to a unified school district or to non-profit religious or charitable groups serves a public purpose. In a very broad and general sense, this may be so. However, the 'public' purpose to be served must be that of the city itself. It is not sufficient that an undertaking of the city may benefit another political subdivision or governmental entity, such as here by providing and installing low-cost surfacing materials, if that undertaking remains essentially a commercial activity. In my view, the city would be acting in the role of a commercial entrepreneur in extending the services of its hot-mix plant and equipment to other consumers, whether public governmental entities or private persons and businesses on a cost-plus basis."

The objection to having a government entity do private street and road work is based on the premise that:

"While [a municipality] is vested with full power to do everything necessarily incident to a proper discharge of those public functions, no right to do more can ever be implied. In the absence of express legislative sanction, it has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals." McQuillin, Municipal Corporations, § 36.02 (1986).

A board of county commissioners has the authority to expend funds on private entities if the expenditure is deemed to serve a public purpose. K.S.A. 19-212. See also Ullrich v. Board of Thomas County Commissioners, 234 Kan. 782 (1984). However, absent statutory authority or a public purpose we opine that the county may not contract with private individuals and/or schools for the purposes of securing road, street and driveway work.

Very truly yours,
Robert T. Stephan
Attorney General of Kansas
Mary Jane Stattelman
Assistant Attorney General

March 17, 1993

93-37 Classification of Roads in Noncounty Unit Road System

Barry L. Arbuckle
Valley Center City Attorney
707 N. Waco, Suite 101
Wichita, Kansas 67203-3937

Roads and Bridges; Roads--County and Township Roads; General Provisions--

Synopsis:

Based upon the facts provided, Main street in Valley Center as it proceeds west from Meridian street to the city limits is part of the county secondary road system and consequently the Sedgwick county board of county commissioners is required to maintain and improve it. Cited herein: K.S.A. 68-101; 68-506; 68-506; 68-506f; 68-1701; 68-1702; 68-1703; 68-1704.

* * *

Dear Mr. Arbuckle:

As city attorney for Valley Center, you inquire whether the Sedgwick board of county commissioners is responsible for the maintenance of Main street in Valley Center by virtue of its status as a "connecting link" in the Sedgwick county road system pursuant to K.S.A. 68-506f. You also inquire concerning the interpretation of "maintenance" in a road context.

K.S.A. 68-506f states, in relevant part, as follows:

"The board of county commissioners of any county and the governing body of any city having a population of less than 5,000 which is located within such county are hereby authorized to enter into agreements for the maintenance of streets within such cities which form connecting links in the system of county roads and highways included in the secondary road system pursuant to

article 17 of chapter 68 of the Kansas statutes annotated. . . . In the absence of agreement between the county and such cities regarding the maintenance of such connecting links it shall be the duty of the county to maintain all such connecting links in the county road and highway system."

It is the opinion of this office that Main street as it extends to the western limits of the city is not a connecting link because it is included in the secondary road system and, consequently, the Sedgwick county commissioners are responsible for its maintenance and improvement pursuant to K.S.A. 68-506(b) which states, in relevant part, as follows:

"Whenever any county secondary road or highway . . . is located partly within and partly without a city . . . by and with the consent of the governing body the *board of county commissioners is hereby given power and authority and required to designate such public road or highway as part of the county road or highway system*, and it shall be improved and maintained as other parts of the county road system, except that the governing body of such city may aid in the construction, maintenance and improvement of such road or highway as it would were the road or highway wholly within the corporate limits of the city. . . ." (Emphasis added).

This opinion is based upon certain facts, culled from Sedgwick county engineer, David Spears and Kansas department of transportation bureau chief, Larry Emig, regarding Main street as it extends west from Meridian street in Valley Center to the city limits.

Meridian street enters Valley Center from the south. On the Sedgwick county highway map, it is designated as eligible for the receipt of federal highway funds and is denominated FAS 304 (federal-aid-secondary). Main street is an east-west street and proceeds west from Meridian. According to county engineer Spears, Main street has been designated by the county as eligible for receipt of federal highway funds and the official county highway map indicates that the FAS 304 designation proceeds south on Meridian and follows Main street as it continues to the western city limits where FAS 304 then proceeds north.

Sedgwick county has not adopted the county unit road system and, therefore, K.S.A. 68-506 applies. With these facts in mind, it is necessary to review state and federal highway legislation to provide a background for application of K.S.A. 68-506(b).

The inception of the federal aid highway program came in 1916 with the enactment of the federal aid road act which appropriated $5,000,000.00 to assist states in the construction of rural post roads. Chapter 264 of the Laws of 1917, the predecessor to K.S.A. 68-506, was enacted to create the state highway commission which served as the conduit for receipt of federal funds. The act of 1917 inaugurated a new system for the control and maintenance of public highways giving the state highway commission and state highway engineer considerable supervisory power. The boards of county commissioners and county engineers were required to classify and designate the roads in their counties, none being excepted. All the roads that were not designated to be county roads were declared to be township roads. Restrictions were imposed as to mileage of roads that might be designated as county roads and also provided limitations based on the assessed valuation of counties, thus evidencing an intent to bring all roads into a single system and within the scope of the act. *Irvin v. Finney County,* 106 Kan. 171 (1920). A county road was

defined as a "main traveled highway which connects the cities and principal market centers of each county with each other." Section 15 of chapter 264 provided that whenever a main traveled highway was located partly within and partly without a city, the board of county commissioners was given the authority - although not required - to designate the highway as part of the county road system and when so designated was required to improve and maintain it. In 1925, the Kansas legislature amended K.S.A. 68-506 to *require* county commissioners to designate those main traveled highways located partly within and partly without a city as part of the county road system.

The federal aid highway act of 1944 (Public Law 521) amended the act of 1917 and created a secondary road system which was defined as "roads in rural areas, including farm to market roads, rural mail routes and school bus routes. . . ." $150,000,000.00 was allocated for projects in the secondary road system including those aforementioned roads which lay either outside or inside of municipalities of less than 5,000 population. The funds were to be expended on a system of roads selected by the state highway department in cooperation with the county commissioners. U.S. Code Congressional Service, 78th Congress, 2d Session 1944. [In 1958, Congress revised and consolidated 40 separate laws on the subject of federal aid to roads and enacted 23 U.S.C. 103 *et seq.* 23 U.S.C. 103(c)(1) established the federal aid secondary system which provided that state highway departments and local road officials would select roads that would be eligible for the receipt of federal funds. In making those selections, farm to market routes, rural mail routes, and public school bus routes could be included.]

With the inauguration of the secondary road system established by Congress in 1944, the Kansas legislature enacted chapter 272, the predecessor to K.S.A. 68-1701, which established a secondary road system consisting of the same roads enumerated in the federal act. Except for minor changes, K.S.A. 68-1701 *et seq.* remains virtually unchanged from its enactment in 1945.

K.S.A. 68-1701 states as follows:

"There shall be designated in the state of Kansas a system of roads which, for the purposes of this act, shall be known as the secondary road system, including farm to market roads selected in accordance with the provisions of this act, rural mail routes and school bus routes not on the state highway system, the construction, reconstruction and maintenance of *which shall be under the jurisdiction of the board of county commissioners of each county*." (Emphasis added.)

In 1986, K.S.A. 68-506(b) was amended to replace "main traveled highways" with "county secondary roads or highways or county minor collector roads or highways". Chapter 252, section 2 required that county commissioners classify and designate highways within three classes: secondary roads or highways which includes all county roads and highways designated for inclusion in the secondary roads system in accordance with K.S.A. 68-1701, county minor collector roads or highways, and township or local service roads. K.S.A. 68-101(3) defines a county road as all roads designated as such by the county commissioners including roads on the secondary road system.

It is the opinion of this office, based upon information from Sedgwick county engineer Spears and KDOT engineer Emig that Main street as it proceeds west from Meridian has been

designated by the Sedgwick county commissioners as eligible for federal highway funds and, consequently, is part of the secondary road system in this state. K.S.A. 68-506(b) provides that a secondary road located partly within and partly without a city - which is the situation here - is required to be designated by the county commissioners as part of the county road system and that it is the commissioners duty to keep it "improved and maintained as other parts of the county road system."

There are no Kansas cases interpreting "maintenance" or "improvement" in a road context. "Maintain" is synonymous with repair. *Thompson v. Bracken County*, 294 S.W.2d 943, 946 (Ky. 1956). It means to hold or keep in a particular state. *Thompson*. "Improvement" means to make better the original status; to enhance in value or quality. *Builders Land Company v. Martens*, 112 N.W.2d 189, 190 (Ia. 1963).

The secondary road system, codified in federal law at 23 U.S.C. 103(c)(1), was repealed by the intermodal surface transportation efficiency act of 1991 (ISTEA) (P.L. 102-240). Instead of a secondary road system, ISTEA requires each state to reclassify roads and streets in accordance with guidelines promulgated by the secretary of transportation in order to become eligible for federal funding. According to both Sedgwick county engineer Spears and Kansas department of transportation Emig the route formally designated as FAS 304 has been reclassified as a "major collector" under ISTEA provisions and, if approved, will be eligible for federal funds. Its present designation under ISTEA is "rural secondary 304".

Since K.S.A. 68-506 and 68-1701 *et seq.* have not been amended since the enactment of ISTEA, the secondary road system as it exists in this state is still intact and since Main street is part of the secondary road system, the Sedgwick county commissioners have a duty to improve and maintain it.

In light of the history of federal and state road legislation, it is reasonable to speculate that should those statutes be amended, the amendments will conform and compliment ISTEA so that all roads currently designated as eligible for federal funds (such as FAS 304) will continue that status under the new legislation.

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Mary Feighny
Assistant Attorney General

April 5, 1993

93-46 Irrigation Districts -- Duty to Rebuild, Repair or Maintain Bridges

Mr. Darrell E. Miller
Jewell County Attorney
208 N. Commercial
P.O. Box 344
Mankato, Kansas 66956

Synopsis:

The owner or proprietor of a canal, ditch or other conduit used principally for irrigation or power purposes must provide bridges for public crossing without regard to who has maintained existing bridges. Cited herein: K.S.A. 42-349; 42-350; 42-351.

* * *

Dear Mr. Miller:

As Jewell county attorney, you request our opinion as to who is responsible for replacement of the bridges located in Jewell county. You inform us that a number of bridges across the canal were constructed by the Kansas Bostwick irrigation district in 1970 or 1971. You further state that the county has maintained the bridges in accordance with an agreement with the district.

K.S.A. 42-349 in pertinent part provides:

"It shall be the duty of the proprietors or owners of any canal, ditch or other conduit constructed for the conveyance ofwater used principally for irrigation purposes to provide and construct all necessary bridges and viaducts for the use of the public in crossing the same. . . .

"All such bridges and viaducts, when constructed shall be and become a part of the public highway, and shall be maintained and kept in repair by the authorities having charge of such highways: Provided, . . ."

K.S.A. 42-350 in pertinent part provides:

"It shall be the duty of any person, firm or corporation who are the owners and proprietors of any canal, ditch or other conduit constructed for the conveyance of water, or other opening through or across a public highway or street, which are used principally for power purposes, to restore such highway to passable condition, and to build, rebuild, maintain and keep in repair at such proprietor's or owner's expense, a good and sufficient bridge or viaduct over and across the same, of the size and kind required by law of the highway authorities in charge of such highway or bridge."

K.S.A. 42-351 in part provides:

"The provisions of this act shall apply to canals, ditches, conduits and other openings through the public highways of the state, which are already built over and across the same, whether built and maintained by the public authorities or the owner and proprietors of such ditches, canals, conduits and other openings, and when it shall become necessary to build, rebuild, repair or

maintain bridges and viaducts already existing over canals, ditches, conduits and other openings through a public highway as set out in K.S.A. 42-350, such duty shall devolve upon the owner and proprietor thereof without regard to who has performed such duty heretofore: Provided, that in case said bridges or viaducts become in a dangerous condition for travel and the owner or proprietor of said canal, ditch or conduit shall fail or refuse to repair or reconstruct said bridge or viaduct the highway officials having jurisdiction over said bridge or viaduct may repair or reconstruct the same and certify the cost to the county clerk who shall enter the same against the property of said owner or proprietor on the tax rolls for collection the same as other taxes."

According to the facts provided in your letter of inquiry, the bridges in question were constructed with untreated wood and can no longer be repaired. Nine of those bridges have been condemned for any travel and need to be completely replaced. You also inform us that Jewell county has maintained the bridges based on the agreement with the irrigation district.

The statutes impose a duty to construct, to build, rebuild, maintain and keep in repair on the owners and proprietors of canals. K.S.A. 42-351 makes it clear that it is irrelevant who has maintained the bridges. Therefore, the critical issue is who is the owner and proprietor of the canal. We are not provided with information as to who is the owner and proprietor of the canal on which the bridges were constructed. The agreement between the county and the district may have provisions concerning the ownership and proprietorship of the canal.

We conclude that whoever owns the canal over which the bridges should be rebuilt must rebuild the bridges.

Very truly yours,
ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS
Nobuko K. Folmsbee
Assistant Attorney General

April 26, 1993

93-57 Practice of Land Surveying; Scope

The Honorable Michael R. O'Neal
State Representative, One Hundred Fourth District
Box 2977
Hutchinson, Kansas 67504

Synopsis:

A land description constitutes an original land description when it involves a division of land requiring the technical skill and knowledge within the purview of a licensed land surveyor as described herein. A division of land involving a measured part of a parcel (such as a metes and bounds description) results in an original land description of an exact quantity of land. This type

of division is exclusively within the purview of a licensed land surveyor. A division of land that divides a parcel into a fractional section of land (a division by aliquot parts) does not result in an original description of land. Cited herein: K.S.A. 26a-101 (Weeks, repealed 1978); K.S.A. 1977 Supp. 26a-128 (Weeks, repealed 1978); K.S.A. 58-2004; K.S.A. 74-7003; Kan. Const., art. 3, sec. 1 43 U.S.C. sec. 52.

* * *

Dear Representative O'Neal:

As representative for the one hundred fourth district you inquire whether K.S.A. 74-7003(k)(3), the definition of thepractice of land surveying, creates an exclusive right in land surveyors to prepare original descriptions.

In pertinent part the practice of land surveying is defined to include:

"(3) the preparation of the original descriptions of real property for the conveyance of or recording thereof and the preparation of maps, plats and field note records that represent these surveys; . . ."

You indicate that a constituent has contacted you about a title company which has construed this provision to mean that land surveyors are the *only* individuals now allowed to create original land descriptions. You are concerned that this interpretation would make it unlawful for a farmer, for example, to deed part of his property to a son or daughter, where the deed contains a description of the property conveyed which is "new," if he prepares the deed himself, or has an attorney or other agent do so without engaging a land surveyor.

At issue is whether any original division of land (that has previously existed as one unit) results in an original description which must be prepared by a licensed land surveyor.

The term "original description" was interpreted in Attorney General Opinion No. 78-59 issued in 1978 under the prior administration of Curt T. Schneider. The opinion interprets K.S.A. 1977 Supp. 26a-128, the predecessor to the statute in question. *See* L. 1978, ch. 326, sec. 28 and L. 1968, ch. 158, sec. 3 (the statutory language is the same). We concur with Attorney General Opinion No. 78-59, but with explanation.

The opinion makes a distinction between two general categories of division of property: a fractional division and a measured division. A fractional division of a parcel is one that *can* be described fractionally, such as "the Northwest Quarter of the Southwest Quarter of Section 15, Township 29 South, Range 5 West, Balderdash County, Kansas". *See* 43 U.S.C. sec. 52; *see* Kagey, *Land Survey and Land Titles*, 1908. A measured division is one that involves a description where markers are referenced and appropriate distances are noted, such as a metes and bounds description. Measured divisions of property involve technical expertise within the purview of a licensed land surveyor and for this reason result in original descriptions of real property. *See* Attorney General Opinion No. 82-118 (licensed land surveyors are exclusively licensed to practice land surveying). *See* generally *Rivers v. Lozeau*, 539 So.2d 1147 (Fla.App. 5 Dist. 1989).

Attorney General Opinion No. 78-59 uses subdivision plats and city lots as examples of these two general categories of division of land. Subdivision plats are required by K.S.A. 58-2004 to show location of monuments, closure calculations, all horizontal lot calculations and street calculations. Thus a division of a parcel of land into subdivision plats requires the use of a licensed land surveyor because the division results in parcels that must be described with a measured description. *See* Attorney General Opinion No. 84-48 (recordation of instruments affecting real estate). City lots, on the other hand, are generally described by lot number, street and subdivision and do not result in "original descriptions" because they are not required to show any measured distances and other technical information. *See* Attorney General Opinion No. 83-42 (a real estate broker need not be licensed as a land surveyor in order to prepare a description of real property by lot number, subdivision and city.)

In summation we concur with the analysis in Attorney General Opinion 78-59. The opinion, however, concludes that whether a particular description is an "original description for conveyance or recording" is to be determined by the use of the description. We find this conclusion, at best, confusing and at worst, ambiguous. For this reason we concur with the opinion's analysis and synopsis, its conclusion notwithstanding. In our opinion an original division of land and its resulting land description does not always constitute an original land description. An original land description as that term is used in K.S.A. 74-7003(k) does not make it unlawful for a farmer to deed part of his property so long as the division of land is described as a fractional part of the whole and not as a measured part of the whole. Additionally a farmer may have an attorney prepare a deed or an instrument of conveyance without regard to the statute in question so long as the instrument involves the practice of law and not the practice of land surveying. *See* generally, Clark, *Surveying and Boundaries* (6th ed.) 1992 (the professions may overlap). [The definition in question cannot be construed to limit or define the practice law. *See* Kan. Const., art. 3, sec. 1; *State v. Schumacher*, 214 Kan. 1, 9 (1974) (the exercise of judicial power includes the supreme court's inherent right to define and control the practice of law)]. *See* generally, *Land Surveys: A Guide for Lawyers*, ABA, 1989. K.S.A. 74-7003(k) thus creates an exclusive right in land surveyors to prepare "original descriptions" as that term is interpreted herein.

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Guen Easley
Assistant Attorney General

June 1, 1993

93-76 Conservation Easement

The Honorable Sheila Frahm
State Senator, Fortieth District
985 S. Range
Colby, Kansas 67701

Synopsis:

A watershed district organized pursuant to K.S.A. 24-1201 *et seq*. has specific statutory authority under K.S.A. 1992 Supp. 58-3810 *et seq*. to destroy or substantially interfere with an existing conservation easement provided to an agency upon property which a watershed flood prevention structure is to be located. Cited herein: K.S.A. 24-1201; 24-1208; K.S.A. 1992 Supp. 32-807; 58-3810; 58-3814; 58-3816.

* * *

Dear Senator Frahm:

As senator for the fortieth district and on behalf of the Kansas association of conservation districts you inquire whether a governmental entity can take rights to lands that are presently under an easement to another state agency. You indicate that a watershed district, organized pursuant to K.S.A. 24-1201 *et seq.*, wants to condemn property under an easement to the Kansas department of wildlife and parks, pursuant to K.S.A. 1992 Supp. 32-807.

A watershed district is authorized to exercise the right of eminent domain in general terms. K.S.A. 24-1209. However this general right of eminent domain does not authorize the condemnation of property already devoted to public use if such condemnation will destroy or substantially interfere with the present public use. 29A C.J.S. *Eminent Domain* sec. 62 Easements (1965); McQuillin Municipal Corporations sec. 32.67 (3d ed., 1991). In other words, generally, property devoted to a public use is subject to eminent domain, provided the second public use does not interfere with or is not inconsistent with the first use.

The watershed district proposes to condemn the property in question in order to build a flood prevention structure. This second public use will not only be inconsistent with, but will destroy the property's current use. The watershed district cannot under its general eminent domain powers destroy the property's existing use. The power to destroy an existing public use must be found in specific legislative authorization. *City of Norton v. Lowden*, 84 F.2d 663, 665 (10th Cir. 1936). McQuillin, Municipal Corporations *supra*.; *see also* Attorney General Opinion No. 91-51. In order to determine whether the watershed district has specific statutory authorization to destroy the existing public use by condemning the property in question, we must first examine the nature of the existing public use.

The existing public use of the property involves an easement granted to the Kansas department of wildlife and parks on June 16, 1992. This state agency holds the easement pursuant to K.S.A. 1992 Supp. 32-807. The deed of easement authorizes the department to acquire the property interest for the purpose of wildlife management and preservation of natural areas. It was granted with the intent that the property be retained forever in its natural condition and to prevent any use of the property that would significantly impair or interfere with the natural values of the property. (A "Grant of Natural Area Protection Easement Deed" pp. 1-2).

Easements granted for the protection of natural areas are governed by the uniform conservation easement act K.S.A. 1992 Supp. 58-3810 *et seq. See* K.S.A. 1992 Supp. 58-3810(a). The act applies to any interest created after the act's effective date which complies with the act regardless

of whether the property interest is designated a conservation easement or covenant, equitable servitude, restriction, easement or otherwise. K.S.A. 1992 Supp. 58-3814(a). The act is also applicable to any interest created *before* its effective date if enforceable after its effective date, so long as retroactive application of the act does not contravene the constitution or laws of this state or the United States. K.S.A. 1992 Supp. 58-3814(b). In compliance with the act and enforceable after the act's effective date, the easement in question is governed by the act, as retroactive application does not contravene the constitution or laws of the State or the United States.

The uniform conservation easement act gives precedence to the rights of a watershed district over easement rights upon property that watershed structures are to be located. K.S.A. 1992 Supp. 58-3816 states:

"*Nothing in this act shall be construed* so as to impair the rights of a public utility or city with respect to the acquisition of rights-of-way, easements or other property rights, *whether through voluntary conveyance or eminent domain*, upon which facilities, plants, systems or other improvements of a public utility or city are located or are to be located *or so as to impair the rights of a watershed district under K.S.A. 24-1201 et seq. and amendments thereto with respect to rights-of-way, easements or other property rights upon which watershed structures are located or are to be located*." (Emphasis added).

The statute above provides the specific statutory authorization and evidences a clear legislative intent to give precedence to the utilization of water resources by a watershed district. *See* 26 Am.Jur.2d *Eminent Domain* sec. 132 (1966) (questions of public policy are legislative not judicial). Accordingly, it is our opinion that the watershed district has specific statutory authority to substantially interfere with or destroy the existing public use of a conservation easement provided to an agency over property upon which watershed structures are to be located. We note that the easement's termination as a constitutional matter raises the question of compensation to the holder. This question is, however, beyond the scope of this opinion. *See* 3 Powell on Real Property *Conservation Easements* sec. 430.7(2) (1993); *City of Wichita v. Unified School District No. 259*, 201 Kan. 110, 114 (1968); *see also* 26 Am.Jur.2d *Eminent Domain* sec. 178 (1966).

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Guen Easley
Assistant Attorney General

June 7, 1993

93-77 Private Use of Publicly Owned Vehicles

William L. Frost
Manhattan City Attorney

1101 Poyntz
Manhattan, Kansas 66502-5460

Synopsis:

As a general rule, publicly owned vehicles may not be used for private purposes. However, city employees whose job responsibilities require them to be available 24 hours a day are not in violation of K.S.A. 8-301 *et seq.* when they use a city owned vehicle for personal uses (which are described in this opinion) because these uses are merely incidental to the primary purpose of the city which is to keep these employees accessible and responsive to city demands around the clock. Cited herein: K.S.A. 1992 Supp. 8-126; K.S.A. 8-301; 8-306; 8-307.

* * *

Dear Mr. Frost:

As city attorney for Manhattan, you request our opinion on K.S.A. 8-301 *et seq.* which prohibit local government employees from using publicly owned vehicles for personal use. Evidently, the city provides some of its employees with city owned vehicles so that they can respond to situations which occur during and after business hours and which require their immediate attention. These employees have responsibilities that require them to be available 24 hours a day and the city provides these employees with communication equipment that can be carried in these vehicles so that the employee can respond directly from his or her residence to the location needing attention, without the necessity of reporting first to some city facility to obtain a city vehicle. You are concerned with whether these employees have violated K.S.A. 8-301 under the following circumstances:

"a. An employee, while proceeding to and from his residence in a city owned vehicle stops off at the grocery store or drops off one of his children at school.

"b. An employee, during his lunch hour, drives his city owned vehicle to a restaurant for lunch.

"c. An employee, during the business day, leaves his office and drives his city owned vehicle to a doctor's appointment.

"d. An employee drives his city owned vehicle out of town to an overnight meeting related to city business, and while in the other city operates the vehicle in the evening to go out to dinner or to some form of entertainment."

K.S.A. 8-301 provides in relevant part as follows:

"No person or employee of the state or county or any governmental subdivision shall operate or drive or cause to be operated or driven any state, county or other publicly owned automobile . . . or other motor vehicle *for private use or for private business or for pleasure*." (Emphasis added).

K.S.A. 8-306 provides in relevant part as follow:

"Any officer or employee of any political subdivision . . . who violates any of the . . . provisions of this act *shall be deemed guilty of malfeasance in office and shall be subject to removal from office or employment*." (Emphasis added).

K.S.A. 8-307 provides in relevant part as follows:

"*No officer or employee of . . . a political subdivision shall use any vehicle for any personal use whatsoever. Any officer or employee who shall violate any of the provisions of this act . . . shall be deemed guilty of a misdemeanor*, and upon conviction thereof, shall be fined not less than $100 nor more than $500 for each offense. Nothing contained in this section shall be construed as making it unlawful for any officer or employee with the consent of the head of the state agency or political subdivision of which he or she is an officer or employee, to drive such vehicle to and from, and keep the same at his or her place of residence, if such place of residence is located within a reasonable distance of his or her official headquarters as an officer or employee of such state agency." (Emphasis added).

These statutes were enacted in 1933 and were amended last in 1972. "Private use" and "private business" as used in K.S.A. 8-301 and "personal use" as used in K.S.A. 8-307 are not defined and there is no case law or a record of any legislative proceedings which would illuminate legislative intentions. During the 1993 legislative session, a bill which would have amended K.S.A. 8-301 and 8-307 to exempt city and county law enforcement officers failed to make it out of committee. 1993 S.B. No. 390.

It is our opinion that whether the statutes in question are violated depends on the facts which will vary from case to case. However, we have concluded in two prior opinions, which are enclosed, that based upon the facts presented, an employee who is "on call" and who is required to respond when called is not in violation of the statutes even though he or she uses the vehicle for personal use -- the rationale being that the use is merely incidental to the overall city purpose. VII Attorney General Opinions 27; non-published letter opinion dated March 24, 1988.

In the four scenarios that you describe, it is our opinion that these employees are not violating the statutes in question because these personal uses are merely incidental to

the primary purpose of the city which is to keep these employees accessible and responsive to city demands 24 hours a day.

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Mary Feighny
Assistant Attorney General

August 4, 1993

93-104 Solid Waste Fees for tax exempt

John J. Gillett
Wilson County Attorney
Office 201 Courthouse
600 Madison
Fredonia, Kansas 66736

Re:

Public Health -- Solid and Hazardous Waste; Solid Waste -- Cities or Counties Authorized to Provide for Collection and Disposal of Solid Wastes or Contract Therefor; Fees; Adoption of Regulations and Standards; Ability to Charge Schools and Churches

Synopsis:

Wilson county may assess a solid waste fee against owners of tax exempt property who receive the service, as long as the fee is to cover the costs of the service and is not to subsidize the operation of the county in general. Cited herein: K.S.A. 65-3410.

* * *

Dear Mr. Gillett:

As Wilson county attorney, you request our opinion as to whether Wilson county may levy a solid waste fee against real property that is exempt from real property taxes such as property used exclusively for religious or educational purposes.

K.S.A. 65-3410 authorizes counties to levy "fees and charges upon persons receiving [solid waste] service." The statuteauthorizes the county to "establish a schedule of fees to be imposed on real property within any solid waste service area. . . . The fees *may* be established, billed and collected on a monthly, quarterly, or yearly basis. Fees collected on a yearly basis *may* be billed on the ad valorem tax statement.

Although the fee may be added to the ad valorem tax bill this does not automatically convert the fee into a tax. "Municipal taxes are those taxes imposed by a municipality, under constitutional or statutory authority delegated to it, on persons or property within the corporate limits, to support the local government to pay its debts and liabilities, and they are usually its principal source of revenue. . . . What a tax really is is determined from its nature and not its name." McQuillan, Taxation sec. 44.02 Definitions and Distinctions.

"Taxes are burdens of a pecuniary nature imposed generally upon individuals or property for defraying the cost of governmental functions payable into the general fund while fees are a visitation of the costs of special services upon the one who derives a benefit from them and are imposed to defray or help defray the cost of particular services." *Joslin v. Regan*, 406 NYS2d 938 (1983).

In a solid waste case in North Carolina, the appeals court held that "the landfill fees, like sewer service charges, are neither taxes nor assessments, but are tolls or rents for benefits received by the use of the landfill." *Barnhill Sanitation Service v. Gaston*, 362 S.E.2d 161 (N.C. App. 1987). However, an Alabama court held that when a city imposed a garbage collection and disposal fee that clearly exceeded the cost of such service and was being used to provide general revenue for the town that such a fee was in reality a tax. *Town of Eclectic v. Mays*, 547 So.2d 96 (Ala. 1989).

Therefore, if Wilson county is charging owners of property used for religious or educational purposes a fee pursuant to K.S.A. 65-3410 based on their use of the service this would not rise to the level of a tax. The statute authorizes billing such fees on the ad valorem tax statement but does not preclude other means of collecting the fee.

In conclusion, it is this office's opinion that Wilson county may charge a solid waste fee against owners of tax exempt property who receive the service, as long as the fee is to cover the costs of the service and is not to subsidize the operation of the county in general.

Very truly yours,
ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS
Mary Jane Stattelman
Assistant Attorney General

August 27, 1993

93-117 Zoning requirements for Street Improvements

The Honorable Joann Flower
State Representative, Forty-Seventh District
Rt. 2, Box 5
Oskaloosa, Kansas 66066

Re:

Roads and Bridges; Roads--General Provisions; Laying Out and Opening Roads--Requirement that Roads be Accepted by County

Cities and Municipalities--Planning and Zoning; Planning, Zoning and Subdivision Regulations in Cities and Counties--Subdivision Regulations; Requirements for Street Improvements.

Synopsis:

A county road is established upon recording the survey and plat of the same. The degree of improvement or maintenance of county roads is discretionary with the county. A county may have a cause of action against a developer for failure to build subdivision roads in compliance

with county requirements. Cited herein: K.S.A. 12-749; 12-762; 19-2918, repealed L. 1991, ch. 56, sec. 28; 19-2918c, repealed L. 1991, ch. 56, sec. 28; 68-102; 68-701; 68-728.

* * *

Dear Representative Flower:

You request our opinion regarding the ownership of roads in the Bateman subdivision in Jefferson county. Essentially your question is whether the county is liable for maintenance of the roads within that subdivision. We are unable to provide a definitive answer to these questions in the absence of certain facts, but we provide the following legal analysis to which the relevant facts may be applied.

The information you have provided indicates that the plat for the Bateman subdivision was approved by Jefferson county in 1989. At that time the pertinent statutes dealing with county zoning and subdivision regulations were K.S.A. 19-2914 *et seq.* K.S.A. 19-2918, as amended by L. 1970, ch. 71, sec. 8 (repealed, L. 1991, ch. 56, sec. 28) provided in part:

"The planning board may adopt regulations governing the subdivision of land within that portion of the unincorporated area of the county . . . when the same shall have been designated by resolution of the board of county commissioners for that purpose. No such regulations or changes or amendments thereto adopted by a county planning board shall become effective unless and until the same has been submitted to and approved by the board of county commissioners . . . . Such regulations may provide for the location and width of streets . . . . Such regulations may also, as a condition to the approval of any plat, require and fix the extent to which and the manner in which streets shall be graded and improved . . . to protect public health and general welfare. Such regulations may provide that in lieu of the completion of such work and installation previous to the final approval of the plat, the planning board may accept, on behalf of the county, a corporate surety bond, cashier's check, escrow account or other like security in an amount to be approved by the board of county commissioners conditioned upon the actual construction of such improvements and utilities within a specified period, in accordance with such regulations, and the board of county commissioners are hereby empowered to enforce such bond by all legal and equitable remedies. Such regulations shall be adopted, changed, or amended only after a public hearing has been held thereon . . . ."

Pursuant to K.S.A. 19-2918c, as amended by L. 1965, ch. 178, sec. 7 (repealed, L. 1991, ch. 56, sec. 28), the county was to approve all plats submitted to it as being in conformance with the provisions of the subdivision regulations before such could be filed of record with the county register of deeds. Included in the information you provided is a copy of a document entitled Subdivision Regulations for Jefferson County Kansas. This document purports to have been adopted under the authority of the General Statutes of 1949, sections 19-2914 through 19-2926. *See* Regulations, Sec. 10.3. Presumably these were the regulations in effect for the subdivision in question in 1989. (While K.S.A. 19-2914 *et seq.* were repealed in 1991, the provisions in question were essentially recodified at K.S.A. 12-749 and 12-752. K.S.A. 12-762 provides for the continued viability of consistent regulations adopted prior to the effective date of the new act, L. 1991, ch. 56.) Two sections of the subdivision regulations pertain to streets. Section 30.2 deals generally with the arrangement, width and grade of streets. Section 60.4 provides as follows:

"Streets shall be graded and improved to conform to requirements established by the governing body."

Resolution No. 2, adopted October 10, 1975 and rescinded September 1, 1989, provided additional requirements for roads and streets in subdivisions in the county, including a base thickness of 2 to 4 inches of "asphaltic concrete." Resolution No. 2 was replaced by Resolution No. 89-14, adopted September 1, 1989 and rescinded October 4, 1991, which required 2 to 3 inches of "asphaltic concrete" (as determined by the county engineer) and a 6 inch total surface. It is unclear which resolution is applicable to the roads in the Bateman subdivision, or whether the current resolution, No. 91-34, adopted October 4, 1991 (which includes an option for 6 inches of "asphaltic concrete"), would apply for roads which have yet to be built. In any event, the county apparently approved the plat, or at least the sale of certain lots and the allowance of building permits on other lots, conditioned on the building of a road meeting the specifications for a rock road. Minutes, Meeting of the Jefferson County Planning Commission, May 23, 1989; Special Covenants and Restrictions to accompany Plat of Batemans Subdivision, Jefferson County, Kansas, page 1. You have presented no evidence that the county required a bond or other security in lieu of and to guarantee the completion of the street improvements per specifications of the regulations as authorized by K.S.A. 19-2918 and section 60.1 of the Subdivision Regulations. However, section 60.1-1 of the Subdivision Regulations does state that "nothing in these regulations shall prevent the development and improvement of fractional parts of subdivisions providing all buildings are properly served by utilities and improvements as recommended by the Planning Commission and approved by the governing body." Based upon the information provided, as set forth above, it appears that the county approved the plat and allowed the development of the subdivision to progress without requiring a guarantee that the roads within it meet county resolutions regarding pavement. We now look to whether the county is required to accept such roads and maintain them as county roads.

K.S.A. 68-102 *et seq*. provide generally for the laying out and opening of roads. Whether a particular road is laid out appears to be discretionary with the county, in view of the public utility and expense involved. K.S.A. 68-106. However, once a county road is laid out or established, it becomes the duty of the county engineer to open it or cause it to be opened. K.S.A. 68-115. Thus once a survey and plat of the roads in a subdivision are recorded pursuant to K.S.A. 68-102 *et seq.* the action necessary for establishing roads, those roads become county roads. *See Gehlenberg v. Saline County*, 100 Kan. 487, 491 (1917); Attorney General Opinions No. 91-163, 91-140. The county's "acceptance" of the roads occurs at the time the survey and plat are so recorded. We do not have the necessary facts to determine whether this has occurred for the roads in question.

Determining that roads are county roads does not necessarily resolve the issue. We have found nothing that requires the county to make certain improvements or to maintain county roads in a particular way. K.S.A. 68-701, 68-728, 68-731 and 68-735 set out procedures for petitioning the county for specified road improvements in certain benefit districts or in circumstances where land is platted and/or laid off into lots and blocks within the county but outside the limits of any incorporated city. These provisions do not necessarily apply in this instance, but are significant in that the decision to improve the roads in subdivisions in those situations is purely discretionary with the board of county commissioners "whenever it deems the same necessary."

Id. The degree of maintenance would also appear to be discretionary with the board. The board may, however, have a cause of action against the developer for failure to build the roads in conformance with the pertinent subdivision regulations and county resolutions.

In conclusion, a county road is established upon recording the survey and plat of the same. The degree of improvement or maintenance of county roads is discretionary with the county. A county may have a cause of action against a developer for failure to build subdivision roads in compliance with county requirements.

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Julene L. Miller
Deputy Attorney General

October 6, 1993

93-131 Establishing speed limits

William Frost
Manhattan City Attorney
1101 Poyntz
Manhattan, Kansas 66502-5460

Re:

Automobiles and Other Vehicles--Uniform Act Regulating Traffic; Powers of State and Local Authorities--Power of Municipalities to Regulate Speed in Residential Districts and Establish Traffic Control Devices

Synopsis:

Cities do not have the authority to promulgate ordinances which alter the state prescribed speed limit of 30 miles per hour in a residential district. Cities do have the authority to place and maintain traffic control devices as long as they conform to the uniform traffic control manual. However, the manual itself establishes only a minimum standard of safety and is merely a guideline for professional engineers and is not a substitute for their judgment. Cited herein: K.S.A. 8-124, repealed, L. 1937, ch. 283, sec. 135; 8-532, repealed, L. 1974, ch. 33, sec. 8-2205; 8-533, repealed, L. 1974, ch. 33, sec. 8-2205; 8-1336; 8-1338; 8-2001; 8-2002; 8-2003; 8-2005; 8-2204, as amended by L. 1993, ch. 259, sec. 9; K.S.A. 1992 Supp. 75-6104.

* * *

Dear Mr. Frost:

You request our opinion concerning the city's ability to establish maximum speed limits of less than 30 miles per hour in a residential district and whether the city may establish traffic control devices where the guidelines set forth in the uniform traffic control manual do not warrant such a placement. The speed limit issue is of considerable importance because according to the league of Kansas municipalities there are at least 100 cities which have ordinances establishing speed limits of less than 30 miles per hour in residential districts. Consequently, a review of the statutes in this area is necessary.

K.S.A. 8-1336(a)(2) provides, in relevant part, as follows:

"Except when a special hazard exists that requires lower speed for compliance with K.S.A. 8-1335, . . . the limits specified in this section or established as hereinafter authorized shall be maximum lawful speeds, and no person shall drive a vehicle at a speed in excess of such maximum limits;

"(2) In any residence district, 30 miles per hour. . . ."

K.S.A. 8-2002(a)(10) and (d) allow local authorities to alter or establish speed limits as authorized in K.S.A. 8-1338.

K.S.A. 8-1338(a) provides, in relevant part, as follows:

"Whenever local authorities in their respective jurisdictions determine on the basis of engineering and traffic investigation that any maximum speed permitted under this act is greater or less than is reasonable and safe under the conditions found to exist upon a highway or part of a highway, the local authority may determine and declare a reasonable and safe maximum limit thereon which:

"(1) decreases the limit at intersections. . . ."

K.S.A. 8-2001 provides, as follows:

"The provisions of this act shall be applicable and uniform throughout this state and in all cities and other political subdivisions therein, and *no local authorities shall enact or enforce any ordinance in conflict with the provisions of this act unless expressly authorized*; however, local authorities may adopt additional traffic regulations which are not in conflict with the provisions of this act." (Emphasis added).

Both K.S.A. 8-1336 and 8-1338 are part of the uniform act regulating traffic. K.S.A. 8-2204, as amended by L. 1993, ch. 259, sec. 9.

The legislative history of speed limits in residential districts begins in 1935 when K.S.A. 8-124 allowed cities to regulate the speeds of automobiles within the corporate limits. However, in 1937, chapter 283 was enacted which repealed K.S.A. 8-124. Chapter 283 was modeled upon the uniform vehicle code - its object being to provide a uniform regulation of vehicular traffic throughout the state. *Ash v. Gibson*, 146 Kan. 756, 762 (1937).

"By the enactment of chapter 283 the legislature evinced an intention to cover the field of traffic regulation throughout the state. The broad and general powers delegated by statutes to municipalities to exercise control over streets are subject to the limitation that the ordinances must not be inconsistent with the laws of the state or in contravention of the declared policy of the state as found in its statutes." *Ash* at p. 764.

Section 32 of chapter 283 (K.S.A. 8-532, repealed by L. 1974, ch. 33, sec. 8-2205) established a limit of 20 miles per hour in a business district and 25 miles per hour in a residential district. The speed limit in residential districts was increased to 30 miles per hour in 1938. (L. 1938, ch. 58, sec. 2.) Section 33 of chapter 283 (K.S.A. 8-533 repealed by L. 1974, ch. 33, sec. 8-2205) gave local authorities the power to lower the speed limit at intersections if an engineering and traffic investigation so warranted. In *Harshaw v. Kansas City Public Service Company*, 154 Kan. 481 (1941) the supreme court concluded that a city ordinance regulating speed at 35 miles per hour on boulevards was abrogated by chapter 283 - citing section 7 of chapter 283 which is the uniform provision found at K.S.A. 8-2001.

K.S.A. 8-532 and 8-533 remained unchanged until 1957 when K.S.A. 8-533 was amended to give cities the authority to alter speed limits in business and residential districts if warranted by an engineering and traffic study. (L. 1957, ch. 62, sec. 2). However, in 1974 the legislature revamped the uniform code in order to bring Kansas in fuller conformity with the uniform vehicle code. *Report on Kansas Legislative Interim Studies to the 1973 Legislature*, December 1972, p. 552; *Reports of Special Committees to the 1974 Kansas Legislature*, part II, p. 103-8 and 103-9. K.S.A. 8-532 and 8-533 were repealed and replaced with the current provisions which are found at K.S.A. 8-1336 and 8-1338. (L. 1974, ch. 29, secs. 3 and 5).

After reviewing this legislative history and the plain meaning of K.S.A. 8-2001, it is clear that the legislature has preempted the field of speed limits in residential areas and any city ordinance which prescribes a speed limit of less than 30 miles per hour in a residential district conflicts with state law and is void. Furthermore, the statutes are uniformly applicable to all cities and therefore the latter may not use home rule powers to charter out of K.S.A. 8-1336.

Addressing your query concerning whether local authorities have the power to place traffic control devices - in this case, four-way stop signs at intersections - we review the applicable statutes.

K.S.A. 8-2003 provides in relevant part as follows:

"The secretary of transportation shall adopt a manual and specifications for a uniform system of traffic-control and traffic-control devices consistent with the provisions of this act for use upon highways within this state."

K.S.A. 8-2005 provides in relevant part as follows:

"(a) Local authorities in their respective jurisdictions shall place and maintain such traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this act or local traffic ordinances or to regulate, warn or guide

traffic. *All such traffic-controlled devices hereinafter erected shall conform to the state manual and specifications*." (Emphasis added).

K.S.A. 8-2002(a) provides, in relevant part as follows:

"The provisions of this act shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

"(1) Regulating or prohibiting stopping . . .

"(2) Regulating traffic by means of . . . official traffic-controlled devices."

The language in section (a) of K.S.A. 8-2005 has remained unchanged since it was enacted in 1937 as part of the uniform act regulating traffic. (L. 1937, ch. 283, sec. 12). Consequently, it is our opinion that the legislature intended to give local authorities the power to place and maintain traffic control devices as long as the placement of the devices conforms to the manual on uniform traffic control devices (manual). The Supreme Court has rejected the notion that the manual only comes into play after local authorities make the decision to place a traffic control device. *Force v. City of Lawrence*, 17 Kan.App.2d 90, 94 (1992). The problem which the city of Manhattan faces is that the manual does not mandate the placement of four-way stop signs. Rather, the manual establishes three conditions which *may* warrant such a placement. [Manual on Traffic Control Devices, section 2B-6 (1988 ed.).] Consequently, the city engineers did not recommend such a placement. A neighborhood group is adamant that the city establish such signs because two children have been killed in recent months and some area residents believe that a four-way stop will solve the problem. The governing body is concerned that if a four-way stop is placed at the intersection contrary to the advice of the city engineers that it will open the city to liability in the event of an accident because the plaintiff may argue that the signs were not required by the manual. The question then becomes what liability may exist where the manual makes the placement of traffic signals discretionary. We will analyze this issue in the context of the four-way stop situation. The following excerpts are from the manual:

Section 1A-1. *Purposes of traffic control devices*.

"The purpose of traffic control devices and warrants for their use is to help insure highway safety by providing for the orderly and predictable movement of all traffic . . . and to provide such guidance and warnings as are needed to insure the safe and uniform operation of individual elements of the traffic stream."

Section 1A-4. *Engineering study required*.

"*The decision to use a particular device at a particular location should be made on the basis of an engineering study of a location. Thus, while this Manual provides standards for design and application for traffic control devices, the Manual is not a substitute for engineering judgment. It is the intent of the provisions of this Manual to be standards for traffic control devices installation, but not a legal requirement for installation*." (Emphasis added).

Section 1A-5. *Meanings of "shall", "should" and "may"*.

"In the Manual sections dealing with the design and application of traffic control devices, the words 'shall', 'should' and 'may' are used to describe specific conditions concerning these devices to clarify the meanings in this Manual by the use of these words, the following definitions apply:

"1. SHALL - a *mandatory* condition. Where certain requirements in the design or application of the device are described with the "shall" stipulation, it is mandatory when an installation is made that these requirements be met.

"2. SHOULD - an *advisory* condition. Where the word "should" is used, it is considered to be advisable usage, recommended but not mandatory.

"3. MAY - a *permissive* condition. No requirement for design or application is intended."

Section 2A-1. *Functions of signs*.

"Signs should be used only where warranted by facts and field studies. Signs are essential where special regulations apply at specific places or specific times only, or where hazards are not self-evident. . . ."

Section 2B-5. *Warrants for stop signs*.

"Because STOP signs cause a substantial inconvenience to motorists, it should be used only where warranted."

Section 2B-6. *Multi-way stop signs*.

"The "Multi-way Stop" installation is useful as a safety measure at some locations. It should ordinarily be used only where the volume of traffic on the intersecting roads is approximately equal. A traffic control signal is more satisfactory for an intersection with a heavy volume of traffic."

"Any of the following conditions *may warrant* a multi-way STOP sign installation:

"1. Where traffic signals are warranted and urgently needed, the multi-way stop is an interim measure that can be installed quickly to control traffic while arrangements are being made for the signal installation.

"2. An accident problem, as indicated by five or more reported accidents of a type susceptible of correction by a multi-way stop installation in a twelve-month period. . . .

"3. Minimum traffic volumes:

"(a) the total vehicular volume entering the intersection from all approaches must average at least 500 vehicles per hour for any 8 hours of an average day, and

"(b) the combined vehicular and pedestrian volume from the minor street or highway must average at least 200 units per hour for the same 8 hours, with an average delay to minor street vehicular traffic of at least 30 seconds per vehicle during the maximum hour, but

"(c) when the 85-percentile approach speed of the major street traffic exceeds 40 miles per hour, the minimum vehicular volume warrant is 70% of the above requirements."

The Kansas tort claims act (KTCA) creates an exemption from liability for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty whether or not the discretion is abused. K.S.A. 1992 Supp. 75-6104(e). K.S.A. 1992 Supp. 75-6104(h) exempts governmental entities in placing any traffic signal when the placement is a result of a discretionary act.

In *Schaeffer v. Kansas Department of Transportation (KDOT)*, 227 Kan. 509 (1980), (a pre-KTCA case) plaintiff argued that the department of transportation (KDOT) should have placed a curve sign on a highway. KDOT's position was that the specific conditions in the manual for placement of a curve sign were not fulfilled, and, therefore, it had no liability. The court pointed to several sections in the manual which indicated that warning signs were necessary to warn of hazardous conditions and affirmed the trial court's ruling that a highway defect existed under the (now repealed) highway defect act. (K.S.A. 68-419).

"KDOT argues repeatedly that if the physical configuration of the highway is such that the warrants for warning signs do not mandate a warning sign then there could be no liability for failure to install one even though a hazardous or perilous condition may in fact exist. We do not construe the statutes and the manual so narrowly. It appears obvious that both vest in KDOT the discretion and obligation to maintain adequate warning signs if, in fact, a hazard does exist. In our opinion the manual merely establishes minimum, not maximum, standards for safety. To hold otherwise would place form over substance and would negate the actual objectives of the statutes and manual of effecting uniform traffic control with a maximum amount of protection for the motoring public." *Schaeffer* at p. 515.

Carpenter v. Johnson, 231 Kan. 783 (1982) is another failure to sign case, decided after the KTCA was enacted where the court construed the two KTCA exemptions previously cited. Citing various portions of the manual the court concluded that whether or not the placement of the sign is discretionary or mandatory depends upon the totality of circumstances involved and may not be determined as a matter of law. *Toumberlin v. Haas*, 236 Kan. 138, 142 (1984); *Finkbiner v. Clay County*, 238 Kan. 856 (1986). In *Haas* the court dismissed plaintiff's case when he failed to establish through engineering testimony that the placement of any type of sign was warranted or required by the manual.

It is our opinion that the manual establishes a minimum standard of safety and, by its own terms, serves merely as a guideline for professional engineers. It is not a substitute for their judgment. In the Manhattan situation, while the manual does not mandate the placement of a four-way stop, if, in the judgment of the city traffic engineers, a four-way stop is necessary to insure safety at that intersection, then the city may install such a device. If the engineers believe that a four-way stop is not necessary then the city is under no duty to place such signs. If a law suit occurs and

one of the issues is the placement of the sign or the failure to sign, it will be up to the fact-finder to determine whether the decision to place or not place the sign was discretionary or mandatory based upon the totality of circumstances.

Summarizing our opinion, cities do not have the authority to promulgate ordinances which alter the state prescribed speed limit of 30 miles per hour in a residential district. Furthermore, cities do have the authority to place and maintain traffic control devices as long as they conform to the manual. However, the manual itself is merely a guideline for professional engineers and is not a substitute for their judgment.

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Mary Feighny
Assistant Attorney Gene

November 12, 1993

93-146 Board of Education authority to pave and maintain roads

Mr. Calvin Rider
Unified School District No. 266
201 South Park
Maize, Kansas 67101

Re:

Schools--Organization, Powers and Finances of Boards of Education--Boards of Education; Authority to Pave and Maintain Roads

Synopsis:

A school district does not have the authority to pave county roads or to install traffic signals at an intersection of county roads. A school district likewise does not possess the authority to make a voluntary annual payment to a city, the purpose of which is to provide for the maintenance of streets, utilities, services, easements and rights of way. Cited herein: K.S.A. 72-6761, as amended by L. 1993, ch. 39, sec. 1; 72-8212.

* * *

Dear Mr. Rider:

As attorney for unified school district no. 266 (U.S.D. 266), you request our opinion regarding the authority of a local board of education to enter into an agreement which would obligate the school district to: (1) "install, or cause to be installed, according to the design standards of the

City, a forty-one (41) foot back to back paved street with curb and gutter . . . ;" (2) "install, or cause to be installed, a sequencing three colored traffic control light with turn arrows . . . ;" and (3) "pay the City an annual fee of $4,000for the maintenance of streets, utilities, services, easements and right of ways." The roads to be paved and the intersection at which the traffic signal is to be installed abut a site purchased by the school district and are presently county roads.

According to the facts presented, the electors of U.S.D. 266 recently authorized the issuance of "general obligation bonds in an amount not to exceed $20,000,000, to pay the costs to purchase and improve a site or sites, to construct, equip and furnish a new grade 9-12 High School and a new grade 2-4 Elementary School in the District and all other necessary appurtenances thereto . . . ." The school district has purchased a 160-acre site which adjoins the city of Maize but is not presently within the city limits. The school district has requested that the area be annexed by the city of Maize. The city has requested that the school district enter into a "developers agreement" with the city, agreeing to perform the activities set forth above regarding road construction and maintenance. The city has indicated that if the school district does not enter into such an agreement the city will not approve the plat or annex the area.

School districts and other subdivisions of the state have only such powers as are conferred upon them by statute, specifically or by clear implication, and any reasonable doubt as to the existence of such power should be resolved against its existence. *Hobart v. U.S.D. No. 309*, 230 Kan. 375, 383 (1981). Pursuant to K.S.A. 72-6761, as amended by L. 1993, ch. 39, sec. 1, a unified school district may, upon following the proper procedures, issue general obligation bonds, the proceeds of which may be used to "purchase or improve a site or sites, or to acquire, construct, equip, furnish, repair, remodel or make additions to any building or buildings used for school district purposes, including housing and boarding pupils enrolled in an area vocational school operated under the board . . . ." However, such improvements, constructions, or repairs funded through the issuance of general obligation bonds may be undertaken only in light of the school board's authority as set forth in K.S.A. 72-8212.

"K.S.A. 72-8212, in relevant part, provides: 'The board shall have title to . . . all school buildings *and other property belonging to the district*.' (Emphasis added.) By virtue of this clear and unambiguous legislative pronouncement, we are of the opinion that such a board, subject only to statutory limitations, has complete control over and full legal ownership of all property belonging to the district, including all legal rights, titles and interests accruing by, or incidental to such ownership. However, we think it is equally clear that such a board has no authority to exert control over or exercise rights of ownership in any property other than property belonging to the district or in which the district has a legal property interest. We, therefore, are of the opinion that a board lacks authority to expend any of the district's funds for improvements to any property other than property belonging to said district or in which the district has a property interest." Attorney General Opinion No. 79-82.

Based upon the authority conferred under K.S.A. 72-8212, it was determined in Attorney General Opinion No. 79-82 that a school district does not possess the authority to expend school district funds for the purpose of constructing and maintaining diagonal parking facilities on property owned by a city. Because the school district held a vested property right of access to

and from existing public streets, the school district could expend funds to provide entrances from a public street to a school parking lot.

In Attorney General Opinion No. 93-129, it was determined that a school district has the authority to acquire and maintain equipment, buildings, or other recreational facilities and make capital improvements on real property, title to which is held by a recreation commission. The authority to undertake such activities on property not owned by a school district is conferred upon a school district by state statute. *See* K.S.A. 12-1924. No similar statute regarding the authority of a school district to pave county roads or install traffic signals exists. Therefore, as there is an absence of statutory authority allowing such action, a school district does not have the authority to pave county roads or to install traffic signals at an intersection of county roads.

In Attorney General Opinion No. 77-129, the issue of whether a school district could make a voluntary payment to a city for the purpose of defraying the costs of a sewage treatment and disposal system was addressed. Given the rule expressed in *State ex rel. McAnarney v. Rural High School District No. 7*, 171 Kan. 437 (1951), a precursor of *Hobart, supra*, regarding the authority of a school district, it was determined that absent express statutory authority, a school district "has no generalized residue of implied power which would permit it to make the requested payments." We believe this analysis is applicable to the annual payment being requested in the "developers agreement" presented by the city of Maize. We find that U.S.D. 266 does not possess the authority to make a voluntary annual payment to the city of Maize, the purpose of which is to provide for the maintenance of streets, utilities, services, easements and rights of way.

Very truly yours,
Robert T. Stephan
Attorney General of Kansas
Richard D. Smith
Assistant Attorney General

December 13, 1993

93-157 Technical professions practice by county employees

Steven W. Hirsch
County Attorney
Decatur County Courthouse
P.O. Box 296
Oberlin, Kansas 67749

Re:

State Boards, Commissions and Authorities--State Board of Technical Professions--Act Not Applicable to Certain Practices and Persons; County Employees

Synopsis:

County officers and employees are not exempt from the provisions of K.S.A. 74-7001 *et seq.* The technical professions act applies to county officers and employees who perform work that falls under the definitions in the act and who are not otherwise exempt. Furthermore, it is our opinion that the term "corporations" as used in K.S.A. 74-7035(d), does not include municipal corporations such as counties and cities. Cited herein: K.S.A. 74-7001; 74-7003; 74-7031; 74-7032; 74-7034; 74-7035; 74-7038.

* * *

Dear Mr. Hirsch:

As county attorney you request our opinion regarding K.S.A. 74-7001 *et seq.* which require licensure for the technical professions (architecture, landscape architecture, engineering, land surveying) and application of the statutes to county officers and employees who may fall within the scope of the activities that require licensure. You indicate that the board of technical professions, which is charged with administering the act, is requiring that counties use the services of a licensed technical professional for any road, bridge, building or survey being utilized by the public unless specifically exempted by the statute.

K.S.A. 74-7001 requires any person practicing any "technical profession" to be licensed. "Technical professions" includes engineering, land surveying, architecture, and landscape architecture which are defined at K.S.A. 74-7003. In 1978, section 27 of senate bill no. 419 created a laundry list of exemptions from the licensure requirement. Those exemptions included "the practice of officers and employees of any federal, state, county or city governmental agency . . . while engaged in the performance of their official duties." The house committee as a whole deleted this provision and instead exempted only certain governmental agencies in certain specified professions. For example, K.S.A. 74-7031(f) (repealed L. 1992, ch. 240, sec. 20) exempted only federal governmental employees engaged in the practice of architecture, K.S.A. 74-7032(d) (repealed L. 1992, ch. 240, sec. 21) exempted only federal and state officers and employees engaged in the practice of landscape architecture, and K.S.A. 74-7034(f) (repealed L. 1992, ch. 240, sec. 23) created an exemption for county officers and employees who engaged in land surveying.

At the request of the board of technical professions, all of these governmental exemptions were repealed in 1992. However, the legislature adopted the league of Kansas municipalities' suggestion for an amendment that is found at K.S.A. 74-7035(i) which exempts public officers and employees who provide information pertinent to or review the sufficiency of technical submissions, or who inspect property or buildings for compliance with requirements safeguarding life, health or property. In addition, K.S.A. 74-7038 grants immunity to public officials who approve technical submissions or issue building permits contrary to the act.

In light of the legislative history it is our opinion that county officers and employees are no longer automatically exempt from the provisions of K.S.A. 74-7001 *et seq.* by virtue of their public employment. Consequently, it is incumbent upon counties to ensure that any officers or

employees who perform work that falls under the definition of the "technical professions" and who are not otherwise exempt under K.S.A. 74-7031 - 74-7035 be licensed professionals.

Finally, you inquire whether the exemption found at K.S.A. 74-7035(d) for "the practice of persons who are employees of any . . . corporation . . . and who do not offer to the public their services in the technical professions" could be applied to county officers and employees - the argument being that a county is a "corporate body". K.S.A. 19-101.

As previously discussed, K.S.A. 74-7035 contains a laundry list of exemptions from the act - one of which is the exemption at issue here. When K.S.A. 74-7035 was initially being considered by the 1978 legislature it included an exemption for federal, state, county and city agencies as well as the current exemption for employees of a corporation not offering their services to the public. The exemption for government officers and employees was removed and placed under selected provisions of the act thereby limiting the exemptions to specific categories as opposed to a general exemption from the entire act. It is obvious that the 1978 legislature rejected the idea of exempting all governmental agencies from the act and instead chose to exempt only certain selected governmental agencies from the ambit of specifically designated professions. It is also clear that the 1978 legislature would have defeated its purpose if "corporations" as used in K.S.A. 74-7035(d) included municipal corporations. In any event in 1992, all of the governmental exemptions that were enacted in 1978 were repealed. Consequently, it is our opinion that the term "corporations," as used in K.S.A. 74-7035(d), does not include municipal corporations such as counties and cities. In Attorney General Opinion No. 80-91, we concluded that "corporation" as used in K.S.A. 74-7035(d) included the state parks and resources authority which by law is a "corporate" body, however, in light of the legislative changes and to the extent that Attorney General Opinion No. 80-91 differs from this conclusion, it is hereby withdrawn.

Summarizing, it is our opinion that county officers and employees are not exempt from the provisions of K.S.A. 74-7001 *et seq.* The act applies to county officers and employees who perform services that fall under the definitions in the act and who are not otherwise exempt. Furthermore, the term "corporations," as used in K.S.A. 74-7035(d), does not include municipal corporations such as counties and cities and to the extent that Attorney General Opinion No. 80-91 differs from this conclusion, it is hereby withdrawn.

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Mary Feighny
Assistant Attorney General

March 4, 2004

94-28 Legal representation of county employees

James R. Campbell
Coffey County Attorney
P.O. Box 310
Burlington, Kansas 66839

Re:

Counties and County Officers -- General Provisions -- Expenditure of Money for Legal Representation of County Official or Employee Who Has Been Indicted on Criminal Charges

Synopsis:

The board of Coffey county commissioners may consider on a case-by-case basis whether county officials are entitled to the payment of attorney fees for their defense in a criminal action. Cited herein: K.S.A. 1993 Supp. 19-101a; K.S.A. 19-212; 19-229.

* * *

Dear Mr. Campbell:

As Coffey county attorney, you request our opinion as to whether the board of Coffey county commissioners may consider the payment of attorney fees to county officials implicated by a grand jury in a criminal prosecution.

We have stated in our earlier opinions that there is no case law in Kansas relevant to this issue, and other states have followed different approaches to the issue of reimbursement of attorney fees to a public officer in defense of a criminal prosecution.

One approach is that public officers assume the risk of defending themselves against an unfounded accusation at their own expense, and therefore, it is not the duty of the public to defend or aid in the defense of one charged with official misconduct. *Chapman v. City of New York*, 61 N.E. 108 (N.Y. App. 1901). However, several other states have taken a different approach: If the public officers acted reasonably with good faith and the crimes charged were committed during discharge of official duties, they may be reimbursed for attorney fees for their defense. Attorney General Opinion No. 92-130.

There is no statute prohibiting the county from reimbursing the attorney fees in a criminal action against county officials. We believe that the board of county commissioners may review the factual circumstances of the charges and decide whether to reimburse attorney fees.

We note that the official misconduct statute, K.S.A. 21-3902, has recently been held unconstitutional by the Kansas Supreme Court. *State v. Adams*, (No. 68,636, January 24, 1994.) We do not believe that this ruling has changed our analysis of the present issue found in our earlier opinions, Attorney General Opinions No. 92-87 and 92-130.

The board of county commissioners is able to "transact all county business and perform all powers of local legislation and administration it deems appropriate. . . ." K.S.A. 1993 Supp. 19-101a. In addition to the county's home rule powers, K.S.A. 19-212 provides that "[t]he board of county commissioners of each county shall have the power, at any meeting: . . . . *Second*. To examine and settle all accounts of the receipts and expenses of the county, and to examine and settle and allow all accounts chargeable against the county; and when so settled, they may issue county orders therefore, as provided by law. . . ." Further, K.S.A. 19-229 gives the county commissioners the "exclusive control" of county expenditures.

The general rule is, however, that county funds must be spent only for a "public purpose." It has been laid down as a general rule that the question of whether the performance of an act or the accomplishment of a specific purpose constitutes a "public purpose" for which municipal funds may be lawfully disbursed rests in the judgment of the municipal authorities, and the courts will not assume to substitute their judgment for that of the authorities unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused. Attorney General Opinions No. 92-87; 91-53; 82-229.

In conclusion, the board of Coffey county commissioners may consider on a case-by-case basis whether county officials are entitled to the payment of attorney fees for their defense in a criminal action.

Very truly yours,
ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS
Nobuko K. Folmsbee
Assistant Attorney General

March 4, 1994

94-29 Work hours and time clock

Laurel D. McClellan
Kingman County Attorney
349 N. Main
Kingman, Kansas 67068

Re:

Counties and County Officers -- Miscellaneous Provisions -- Powers of the Board of County Commissioners; Power to Supervise County Employees' Work Hours; Installment of Time Clock

Synopsis:

The board of county commissioners may adopt rules and regulations on personnel policies for the county's employees. The board of county commissioners may fix hours of operation for the offices of elected or appointed county officers under K.S.A. 19-2601. It is within the board of county commissioners' authority to install time clocks in county offices for use by employees in those offices. Cited herein: K.S.A. 19-2601.

* * *

Dear Mr. McClellan:

As Kingman county attorney, you request our legal opinion concerning the board of county commissioners' authority over county employees. Specifically, your inquiry is whether the board of county commissioners has the power to supervise or manage county employees' work hours in the offices of elected officials and/or appointed department heads. Further, you ask whether they may use time clocks to monitor these work hours.

K.S.A. 19-2601 provides:

"Every county officer shall keep his or her office at the seat of justice of such county, and in the office provided by the county, if any such has been provided; and if there be none established, then at such place as shall be fixed by special provisions of law; or if there be no such provisions, then at such place as the board of county commissioners shall direct, and they shall keep the same open during such days and hours *as shall be fixed by the board of county commissioners*; and all books and papers required to be in their offices shall be open for the examination of any person; and if any of said officers shall neglect to comply with the provisions of this section, such officer shall forfeit, for each day he or she so neglects, the sum of five dollars ($5)." (Emphasis added.)

K.S.A. 19-2601 specifically directs the board of county commissioners to perform functions to establish operating hours for the county's offices and employees. *Whitmer v. House*, 198 Kan. 629, 633 (1967). County officers have the power and authority to make personnel decisions involving their employees, but any personnel action taken by the county officers is subject to the "[p]ersonnel policies and procedures established by the board of county commissioners for all county employees other than elected officials." K.S.A. 19-302(c), 19-503(c), 19-805(d) and 19-1202(c).

The board of county commissioners may adopt hiring, promoting and demoting policies for the county employees. Attorney General Opinion No. 93-64. You have provided us a copy of the Kingman county employment manual, which establishes rules, regulations, and other administrative provisions for personnel administration. According to the manual, department heads are authorized to hire employees subject to the approval of the board of county commissioners with the exception of sheriff. The manual establishes regulations on holidays and leave as well as disciplinary procedure.

We conclude that the board of Kingman county commissioners may establish rules and regulations regarding the work hours for the county employees including installment of time clocks in offices for use by employees of elected and appointed county officials.

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Nobuko K. Folmsbee
Assistant Attorney General

April 13, 1994

94-50 Abandoned cemeteries

William A. Taylor, III
Cowley County Counselor
P.O. Box 731
Winfield, Kansas 67156

Re:

Counties and County Officers -- Cemeteries -- Abandoned or Uncared for Cemeteries or Burial Places; Tax Levy

Synopsis:

An abandoned cemetery transferred to a municipality pursuant to K.S.A. 17-1367 must be cared for and maintained by the municipality using the moneys of the preexisting cemetery corporation. If such funds are insufficient, then maintenance must be funded by the municipality. K.S.A. 19-3106 authorizes the board of county commissioners to make an annual tax levy not to exceed .10 mill for the purpose of funding the support of an abandoned cemetery if it has been abandoned for a period of at least five years and if the county has not reached its levy limit. Cited herein: K.S.A. 17-1366; 17-1367; 19-3106; 79-1947.

* * *

Dear Mr. Taylor:

As Cowley county counselor, you have requested our opinion regarding the ability of Cowley county to obtain funds necessary to support the maintenance of an abandoned cemetery.

As your letter indicates, the Memorial Lawn Cemetery, a private cemetery corporation, was declared abandoned by the district court of Cowley county and was turned over to Cowley county on January 14, 1994, pursuant to K.S.A. 17-1367 (Case No. 93-C39-A). K.S.A. 17-1367 states in relevant part as follows:

"Upon the dissolution of such corporation, title to all property owned by the cemetery corporation shall vest in the municipality in which the cemetery is located, and the permanent maintenance fund . . . shall become the property thereof. *Upon the transfer of such property funds, the governing body of such municipality shall care for and maintain such cemetery with*

any moneys of the cemetery corporation including the principal of and income from the permanent maintenance fund and, if such moneys are insufficient to properly maintain such cemetery, with funds of the municipality. . . ." (Emphasis added).

You inform us that there are insufficient funds in the cemetery's maintenance fund and no income generated by the sale of lots in the cemetery. Therefore, the maintenance of the abandoned cemetery must be funded by the municipality.

K.S.A. 19-3106 provides for one source of revenue for the care of abandoned cemeteries or burial places:

"In any county in this state in which there is located a cemetery or other burial place in which three or more human bodies have been interred, and which cemetery or burial place has been abandoned and not cared for, for a period of at least five years, the board of county commissioners of said county is hereby authorized to provide for the care of such cemetery or burial place. *For the purpose of providing funds for such care . . . the board of county commissioners is authorized to make an annual tax levy not to exceed the limitation prescribed by K.S.A. 1979 Supp. 79-1947, on all taxable property of said county*." (Emphasis added).

K.S.A. 79-1947 provides the authority for the board of commissioners of the county to fix a rate of .10 mill annually for the purpose of funding the maintenance of abandoned cemeteries pursuant to K.S.A. 19-3106. The January 14, 1994 journal entry in case no. 93-C39-A declared the cemetery abandoned pursuant to K.S.A. 17-1367. K.S.A. 17-1366 defines abandoned cemetery, as used in that act, as follows:

"(a) 'Abandoned cemetery' means any cemetery owned by a corporation . . . in which, for a period of at least one year, there has been a failure to cut grass or weeds or care for graves, grave markers, walls, fences, driveways and buildings or for which proper records have not been maintained and annual reports made to the secretary of state. . . ."

K.S.A. 19-3106 requires the cemetery to be abandoned for at least five years, but does not specifically define "abandoned" for the purposes of the act. It is a well recognized rule of statutory construction that ordinarily identical words used in different statutes on a specific subject are interpreted to have the same meaning in the absence of anything that indicates a different meaning was intended. *T-Bone Feeders, Inc. v. Martin*, 236 Kan. 641, 648 (1985). In our opinion the definition may be used for purposes of K.S.A. 19-3106. Therefore, the municipality can issue a .10 mill tax levy to fund the maintenance of the cemetery, if they can show that the cemetery has been abandoned within the meaning of K.S.A. 17-1366 for the past five years and if they have not reached their levy limit.

Another issue arises as to whether K.S.A. 19-3106 operates exclusive of K.S.A. 17-1367. K.S.A. 17-1367 authorizes the transfer of the abandoned cemetery's title to the county, while K.S.A. 19-3106 provides a procedure to fund the maintenance and care of the abandoned cemetery without mentioning transfer of its ownership title. However, there is no indication in the language of K.S.A. 19-3106 which compels us to believe the legislature intended for this funding procedure to be limited in this way. In determining legislative intent, courts may look into causes which

impel the statute's adoption as well as the objective sought to be obtained. *Hughes v. Inland Container Corp.*, 247 Kan. 407, 414 (1990). The purpose behind both statutes is providing maintenance and care to abandoned cemeteries. Therefore, if the abandoned cemetery is transferred to the municipality, pursuant to K.S.A. 17-1367, without a maintenance fund or any means to generate revenue, it seems consistent with this policy to allow the municipality to acquire the necessary funds pursuant to K.S.A. 19-3106.

In conclusion, an abandoned cemetery transferred to a municipality pursuant to K.S.A. 17-1367 must be cared for and maintained by the municipality using the moneys of the preexisting cemetery corporation. If such funds are insufficient, then the funds must be provided by the municipality. K.S.A. 19-3106 authorizes the board of county commissioners to make an annual tax levy not to exceed .10 mill for the purpose of funding the support of an abandoned cemetery, if it has been abandoned for at least five years.

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Nobuko K. Folmsbee
Assistant Attorney General

June 21, 1994

94-83 Railroad obstructing highway

Michael A. Ireland
Jackson County Attorney
Jackson County Courthouse
Room 205
Holton, Kansas 66436

Re:

Public Utilities--Duties and Liabilities of Railroad Companies; Obstruction of Public Highways and Streets--Permitting Trains, Engines or Cars to Stand on Public Highway

Synopsis:

K.S.A. 66-273 imposes a ten minute limitation on the amount of time trains may stand upon any crossing on a street or public road within a half mile of an incorporated or unincorporated city, town or station unless an opening of at least thirty feet in width is allowed in the travel portion. Cited herein: K.S.A. 66-273; 66-274; 66-2,121.

* * *

Dear Mr. Ireland:

As Jackson county attorney you request our opinion regarding the application of K.S.A. 66-273. Specifically, you ask whether the statute applies to public roadways outside the one-half mile statutory provision.

You indicate that there is a train which blocks a railroad crossing for about 45 minutes on a country road located about three miles from the city of Emmett. It is unclear whether K.S.A. 66-273, which places a ten minute limitation on trains standing on public roads and streets, applies. The statute provides:

"Each and every railroad company or any corporation leasing or otherwise operating a railroad in Kansas is hereby prohibited from allowing its trains, engines or cars to stand upon any *public road within one half mile* of any incorporated or unincorporated city or town, station or flag station, or upon any crossing or street, to exceed ten minutes at any one time without leaving an opening in the traveled portion of the public road, street or crossing of at least thirty fee in width."

At issue is whether the legislature intended that the ten minute limitation for blocking a railroad crossing apply only to crossings on public roads within a one half mile of a city or to all crossings and streets. The language of the statute is ambiguous in that it appears to establish three categories to which the ten minute limit applies: any public road within one half mile of a city; any crossing; any street.

The interpretation of a statute is a question of law and we must ascertain legislative intent by applying the rules of statutory construction. The first rule to which all others are subordinate is that the intent of the legislature governs when the intent can be ascertained. *Unified School District No. 279 v. Sec'y of the Kansas Department of Human Resources*, 247 Kan. 519, 524 (1990) citing *U.S.D. No. 352 v. NEA-Goodland*, 246 Kan. 137, 140 (1990). When construing a statute legislative intent is to be determined from consideration of the entire act, rather than a certain isolated part. *Kansas Commission on Civil Rights v. Howard*, 218 Kan. 248, 252 (1975).

Additionally we must consider that the violation of K.S.A. 66-273 results in a misdemeanor punishable by fine. K.S.A. 66-274. As such the statute is penal and subject to strict construction. *State v. Palmer*, 248 Kan. 681 (1991); *State v. Magnes*, 240 Kan. 719 (1987). Strict constriction requires that ambiguities in the statute be construed in favor of persons subject to the statute's operation. The rule of strict construction is however subordinate to the rule that judicial interpretation must be reasonable and sensible to effectuate legislative design and intent. *State v. Fitzgerald*, 240 Kan. 187, 190 (1986), citing *State v. Fowler*, 238 Kan. 213 (1985).

Clearly the statute's purpose is to prevent obstacles to those traveling. *Denton v. Railway Co.*, 90 Kan. 51, 54 (1913). The categories suggested, separating public roads, crossings and streets, are not reasonable; there are no streets except in a town or city, and crossings are, by definition, on public roads. *See* K.S.A. 66-2,121. Had the legislature intended to subject the railroad to the statute's penalty provision found in K.S.A. 66-274 *anytime* it blocked *any* crossing on *any* street or public road it would not have provided the one half mile qualification. This interpretation additionally does not appear to balance the interests of the public to travel with the interests of

the railroad to carry on a business that may necessitate occasionally blocking a crossing. *see generally* 65 Am.Jur.2d *Railroads* sec. 25 (1972).

A strict construction of the statute requires that we construe this penal statute most favorably to the person or entity affected thereby. Accordingly, we must distinguish between railroad crossings (those within one-half mile of a town or city that are heavily traveled) and those crossings that are not heavily traveled where the likelihood of inconvenience resulting from the blocking is lessened. *See* 65 Am.Jur.2d *Railroads* sec. 342 (1972). This distinction effectuates the legislative intent to prevent obstacles to travel in the instances where the most inconvenience to travel is likely and is a reasonable construction of the legislation in accordance with the applicable rules.

In conclusion it is our opinion that K.S.A. 66-273 prohibits a railroad from blocking for more than ten minutes any crossing on a street or public highway when it is within one half mile of an incorporated or unincorporated city or town, station or flag station, unless an opening of at least thirty feet is allowed in the traveled portion.

Very truly yours,
ROBERT T. STEPHAN
Attorney General of Kansas
Guen Easley
Assistant Attorney General

September 9, 1994

94-116 Highways thru pastures, gates

Walter R. Lenkner, Trustee
Medicine Lodge Township Board
P.O. Box 105
Medicine Lodge, Kansas 67104

Re:

Roads and Bridges; Roads -- General Provisions; Laying Out and Opening Roads -- Petition for Laying Out, Viewing, Altering or Vacating Roads; Vacation in Certain Counties without Petition

Road and Bridges; Roads -- General Provisions; Guideposts, Repairs, Detours and Gates -- Highways Through Pastures

Synopsis:

A county commission has the authority to designate an "open range road." Subsequently a township is responsible for the maintenance and repair of the road if the road is a township road. A county commission has the authority to vacate a road. Compensation for township officials

varies with the township and duties of the officials. Cited herein: K.S.A. 68-102; 68-114; 68-128a.

* * *

Dear Mr. Lenkner:

On behalf of the Medicine Lodge township board, you pose two questions concerning roads within a non-county unit road system. You first ask whether the county commission has authority "to declare an open range road." You also ask whether the county commission has authority to close atownship road. In addition you request guidance concerning the appropriate amount of compensation for serving as township officials.

It may be helpful to place your questions within the context of the general statutory framework concerning the relation between a county and townships within that county. For this we quote from Attoney General Opinion No. 82-228:

"In Kansas, public roads may be established by purchase, condemnation or dedication. *Kratina v. Board of Commissioners*, 219 Kan. 499, 502 (1976). The authority of a governmental body to establish public roads and the nature of the government's resulting interest in such roads is governed by statute. See, *e.g., State, ex rel., Mitchell v. State Highway Commission*, 163 Kan. 187, 196 (1947). Reading together the various provisions of Chapter 68, Kansas Statutes Annotated, it appears that only the board of county commissioners has authority to establish roads in the county. Additionally, K.S.A. 19-212, *Ninth*, empowers county commissioners to 'lay out, alter or discontinue any road running through one or more townships.' Under K.S.A. 68-106, the board is to determine whether to establish a road and to condemn such land as is needed. If the board establishes a road, the township board thereafter has the duty to open and maintain it and to construct such drains and ditches as are necessary for its safety under K.S.A. 68-115, in compliance with specifications and regulations prepared by the county engineer. K.S.A. 68-526, 68-502(4).

"Townships are granted general authority over all township roads in counties not adopting the county road unity system, as in the present case, under K.S.A. 68-526. The township board is to have charge and supervision overall township roads, and is authorized to levy taxes for road purposes under K.S.A 68-518c, and is also responsible for opening and maintaining township roads under K.S.A. 68-115. . . ."

Within this context, K.S.A. 68-128a(a) specifically addresses your first question concerning an "open range road":

"Whenever by license or custom the public is permitted to travel through any pasture lands enclosed by fences, and the owner or owners of such land shall give their consent in writing to the designation and laying out of a road across such lands, *the board of county commissioners* may designate such road as a public highway. After such road has been regularly designated or laid out as a public road it shall be improved and maintained in the manner and by use of the funds now provided for improving and maintaining other public roads, and the municipality charged with the improvement and maintenance of such road may construct convenient auto

gates or automobile passes, or both, and pay the cost of maintenance thereof out of road maintenance funds of such municipality." (Emphasis added.)

That statute when read with K.S.A. 68-124 clearly gives the county commission authority to designate an "open range road" and places responsibility for opening, maintenance and repair of the road on the township if the road is a township road.

Turning now to your second question, K.S.A. 68-102 gives the county commission the authority to vacate any road when petitioned by "at least twelve (12) householders of the county residing in the vicintiy where said road is to be . . . vacated." In counties which have a population between 1,200 and 90,000 an alternative procedure to vacate a road is available to county commissioners. In those counties, the commissioners may vacate a road in the absence of a petition if through neglect, nonuse or inconvenience the road has become practically impassable and the necessity for the road does not justify the expenditure of public funds. *See* K.S.A. 68-102 through K.S.A. 68-106 for the full procedure for vacating roads.

Regarding the question of appropriate compensation of township officials, we direct your attention to the enclosed 1985 letter to Representative Nancy Brown. As indicated, there are at least a dozen statutes which concern compensation for different types of townships and different duties of township officials. Accordingly while we are unable to give a precise answer, we hope this letter provides guidance for you.

In conclusion, a county commission has the authority to designate an "open range road." Subsequently a township is responsible for the maintenance and repair of the road if the road is a township road. A county commission has the authority to vacate a road. Compensation for township officials varies with the township and duties of the officials.

Very truly yours,
ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS
Camille Nohe
Assistant Attorney General

RTS:JLM:CN:bas

November 27, 1985

The Honorable Nancy Brown
Representative, Twenty-Seventh District
15429 Cverbrook Lane
Stanley, Kansas 66224-9744

Dear Nancy:

I have received your letter of November 20, 1985, concerning the statutes which provide for the compensation of township officials. Like you, I was somewhat dismayed when I started looking into the statutes and found that there appears to be no one statute which controls. Instead, there are at least a dozen statutes which concern different types of townships and different duties done by township boards.

A list of these statutes follows:

1. K.S.A. 68-132 -- allows a township board to select an inspector for improvements to sidewalks and crossings. The inspector may receive $3 a day for his services.
2. K.S.A. 1984 Supp. 68-525 -- when sitting as the township board of highway commissioners, members of the township board shall receive $15 per day for the time actually and -necessarily spent performing their duties. The statute also hats three special exemptions for certain townships lying in certain counties, or next to first class cities, or of a certain size and valuation. Each situation imposes a different level of compensation.
3. K.S.A. 68-530 -- the township board may create the position of township road overseer. In townships of 500 or less population, the township trustee may serve in this position. Compensation is limited to $1,000 per year.
4. K.S.A. 80-207 -- this statute provides that township officers shall be reimbursed for any expenses incurred while attending to township business. There is no limit placed on what they may receive.
5. K.S.A. 80-302 -- when sitting as the townshio auditing board, township board members may receive $50 per day or, if less than four hours is soent in any one day, $30.
6. K.S.A. 80-1204 -- when involved in the task of prairie dog eradication, township trustees and their assistants may receive a reasonable sum as compensation for the time actually spent. These funds are derived from a special levy imposed by the county.
7. K.S.A. 80-1407 -- this is a very specific statute aimed at only certain townships with water systems. Depending on the type and size of the township, the sum of either $25 or $100 per month may be paid.
8. K.S.A. 80-1421 -- this is a miscellaneous provision applying only to townships which abut a city of the first class, located in counties having a population of at least 150,000 and not more than 180,000. In such townships, $25 per day may be spent for time actually spent on township business. However, a limit of $50 a month is also imposed.
9. K.S.A. 80-1544 -- when sitting as the governing body of a fire district, township board members may receive the sum of $50 for each full day, or $30 on such days in which four hours or less are spent on fire district business.
10. K.S.A. 80-1904 and 80-1917 -- these statutes provide for compensation of the employees of township fire departments, as well as compensation for volunteers to attend to fires. As there is no prohibition on township board members serving as such employees or volunteers, they would be eligible for this compensation, which is not fixed at any particular rate by law.
11. K.S.A. 80-2002 -- if a township board serves as a governing body of a sewage district, they may receive the princely sum of $3.50 per day for time actually and necessarily spent on sewer district business.
12. K.S.A. 80-2510 -- finally, when members of the board serve as a hospital board, they may receive compensation as set by the "qualified electors voting at an annual meeting."

They also may receive compensation for actual and necessary expenses incurred as a member of the board, including mileage. This statute was added in 1984, and provides the most modern treatment of compensation for township officials. However, it is very narrow in its application.

The above list is probably not exhauszive, but contains the statutes which were easily obtained by initial search. I think they provide an accurate picture of the disarray which now exists in the statutes concerning townships, something of which I am sure you are all too aware.

If we can be of any further assistance to you in trying tostraighten this matter out, feel free as always to let me know.

Very truly yours,

OFFICE OF THE ATTORNEY GENERAL
ROBERT T. STEPHAN

Jeffrey S. Southard
Deputy Attorney General

October 14, 1994

94-137 Cleaning and maintaining channels

Sandra L. Jacquot
Shawnee County Counselor
Courthouse
200 SE 7th St., Suite 100
Topeka, Kansas 66603-3932

Re:

Water and Watercourses -- Obstructions in Streams -- Cleaning and Maintaining Banks and Channels by County; Distribution of Proceeds from Sale of Sand Products

Synopsis:

Absent the facts addressed in K.S.A. 82a-310, a board of county commissioners in possession of sand royalty funds received pursuant to K.S.A. 1993 Supp. 82a-309 is not authorized to disburse those funds to a drainage district. The county may use the funds only for the actual cleaning and maintenance of such state streams as provided in the obstruction in streams act. Cited herein: K.S.A. 1993 Supp. 82a-309; K.S.A. 82a-310.

* * *

Dear Ms. Jacquot:

As Shawnee county counselor you request our opinion regarding interpretation of the obstructions in streams act, K.S.A. 82a-301 *et seq*. We are advised that Shawnee county is currently holding a substantial amount of money in its sand royalty fund, disbursed to the county pursuant to the formula set forth in K.S.A. 1993 Supp. 82a-309. We understand that the tri-county drainage district has requested sand royaltyfunds from the county both to retire no-fund warrants and for certain other purposes. In addition, two other drainage districts would like to utilize sand royalty funds for repair and maintenance of tributaries and improvements. The legal questions that you pose are 1) whether the county may disburse the sand royalty fund money to a drainage district, and 2) if it can, then for what purposes the funds may be given to a drainage district.

K.S.A. 1993 Supp. 82a-309 provides:

"One-half of the net proceeds from the sale of sand products, and no other, taken from the bed of any river which is the property of the state of Kansas,shall be returned as follows: Where such river extends into or through any drainage district in this state, organized under any of the drainage district laws thereof, the board of directors of the district from which the sand products were taken shall be entitled to receive two-thirds of the amount returned and the remaining one-third shall be divided among the remaining drainage districts in the county, in proportion to the frontage on such river. Where such river does not extend into or through any drainage district in this state, the proceeds to be returned shall be returned to such counties as have adopted this act and have, prior to July 1 following the adoption of this act, notified the director of taxation of such adoption, and through which such river flows, in proportion to the mileage of such river bank in such county, and this fund shall be used by the board of county commissioners of such county or counties only for the actual cleaning and maintenance of such state streams as is provided for in this act except that: (1) Before the expenditure of any such funds, the board of county commissioners shall submit all contracts, plans, and specifications for the proposed improvements to, and receive the approval of, the chief engineer of the division of water resources; and (2) in counties having a population of not less than 25,000 nor more than 29,000 and an assessed tangible valuation of over $46,500,000, the entire amount allotted to the county shall be paid into the bridge fund of such county."

The tri-county drainage district provides the following background information:

"Tri-county is a drainage district located in Pottawatomie, Wabaunsee and Shawnee counties and was organized under the provisions of K.S.A. 24-601, *et seq.*, in 1944. In addition to Tri-county, there are three other organized drainage districts located along the Kansas River in said counties, North Topeka and Kaw River drainage districts in Shawnee county, and Belvue drainage district in Pottawatomie county. Following its organization, Tri-county built a flood control system consisting primarily of levees and jetties along the Kansas River and two immediate tributaries, Bourbanois Creek and Cross Creek. The purpose of the levees and channelization originally constructed on Bourbanois Creek and Cross Creek was primarily for protection of land along those tributaries from back water of the Kansas River as it would rise during high discharges.

. . . .

"Tri-county drainage district, after unsuccessful efforts to obtain financial assistance from other sources, including the Corps of Engineers in 1992 issued $225,000.00 no fund warrants, which funds were used to rebuild the Bourbanois channel, banks, and levees."

The tri-county drainage district argues that it may receive sand royalty money from the county to pay off the no-fund warrants, because K.S.A. 82a-310, not K.S.A. 1993 Supp. 82a-309, comes into play. K.S.A. 82a-310 provides:

"This act shall not apply to the portions of any stream lying wholly within the boundaries of any organized drainage or levee district: *Provided*, That that portion of such stream is actually improved and maintained by and as a part of the work of said district."

We understand from the facts provided by your letter and attachments, that the tri-county drainage district ends at the north side of the river, and therefore the stream is not wholly within the boundaries of the tri-county drainage district. We conclude that K.S.A. 82a-310 does not apply to the situation before us.

Furthermore, we understand that the sand royalty funds were distributed according to K.S.A. 1993 Supp. 82a-309. If K.S.A. 82a-310 were applicable, money would not be coming to the county under K.S.A. 1993 Supp. 82a-309 because K.S.A. 1993 Supp. 82-309 would be rendered inapplicable by K.S.A. 82a-310. We conclude that Shawnee county is authorized to use this fund "only for the actual cleaning and maintenance of such state streams as is provided for in this act", and that the county is not authorized to disburse this fund to the drainage district under K.S.A. 1993 Supp. 82a-309.

Very truly yours,
ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS
Nobuko K. Folmsbee
Assistant Attorney General

November 1, 1994

94-145 Vacation without petition

Philip E. Winter
Lyon County Counselor
Lyon County Courthouse
Emporia, Kansas 66801

Re:

Roads and Bridges; Roads -- General Provisions -- Petition for Vacating Roads; Vacation in Certain Counties Without Petition

Synopsis:

The board of county commissioners may vacate county roads without the presentation of a petition in accordance with the provisions in K.S.A. 68-102a. Cited herein: K.S.A. 19-101; K.S.A. 68-102; 68-102a.

* * *

Dear Mr. Winter:

As Lyon county counselor you ask our opinion regarding vacation of roads. You inform us that there are two areas in Lyon county which the county commission is considering vacating, one involves roads and a park in Miller, Kansas, which either was an incorporated area but has had no city government for more than 10 years, or was never incorporated, the other involves roads in Plymouth, Kansas, which is a platted area but has never been incorporated.

Specifically, you ask:

"1. Should the streets and alleys be vacated under K.S.A. 58-2613 or K.S.A. 68-102? Lyon county is a county unitsystem as far as county roads are concerned and therefore, the roads would be county roads.

"2. If they are to be vacated under K.S.A. 58-2613, may the Board of County Commissioners file a petition with themselves under K.S.A. 58-2613 or must only adjoining landowners file this petition?

"3. The same question is asked concerning the park which is in Miller, although it would seem that no justification would lie under K.S.A. 68-102 for vacating the park, and would the commission have authority under K.S.A. 58-2613 for such vacation for a park?"

K.S.A 68-102 authorizes a board of county commissioners to vacate any county road upon presentation of a petition signed by at least twelve householders of the county residing in the vicinity where said road is to be vacated, or without petition, in a county having a population between 1,200 and 90,000 inhabitants, if said road is no longer a public utility. Furthermore, K.S.A. 68-102a in pertinent part provides:

"Before any road is vacated without the presentation of a petition for vacation, the county clerk shall give notice of the proposed vacation by publication once in the official county newspaper and by sending notice by certified mail to each owner of property adjoining the road, at the address where the owner's tax statement is sent. The notice shall set forth a description of the road proposed to be vacated."

The board of county commissioners may vacate roads without the presentation of a petition in accordance with the above statute. However, these statutes are inapplicable to a park that the county is contemplating vacating.

We are not provided with sufficient information on this particular park to answer your third question. We require facts such as whether this park is established and maintained according to K.S.A. 19-2801, whether it has been dedicated as a public park in accordance with statute or by common-law dedication, and whether the plat to the land was approved, recorded and filed pursuant to the applicable statutes. Depending on the answers to the above questions, the following statutes may apply: K.S.A. 12-406 (maps and plats sufficient to vest title of lands conveyed for public use in city); 12-406a (fees to certain land held by county transferred to city); 12-504, 12-505, 12-506 (proceedings for petition for vacation of site); 12-512b (vacation of plats and other public reservations); K.S.A. 58-2613 (vacation of certain plats).

Generally, counties have powers to "purchase and hold real and personal estate for the use of the county, . . ., to sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interest of the inhabitants" and "to make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate or administrative powers." K.S.A. 19-101. However, the courts have stated that when real estate is dedicated to public use and a plat is properly certified, filed and recorded, the county holds the property as a mere agent of the public, and in trust for the public use, therefore, those rights, duties and privileges are not ordinarily lost through nonuse, laches, estoppel or adverse possession. *Douglas County v. City of Lawrence*, 102 Kan. 656, 659 (1918); *Cooper v. City of Great Bend*, 200 Kan. 590, 596 (1968).

Additionally, please see Attorney General Opinion No. 88-109 regarding the issue of assessment and taxation of platted parcels of land which have been dedicated for public use, but which cease to be used for such purpose.

Very truly yours,
ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS
Nobuko K. Folmsbee
Assistant Attorney General

December 13, 1994

94-160 Condemnation outside city limits

The Honorable Carl D. Holmes
State Representative, One Hundred Twenty-Fifth District
P.O. Box 2288
Liberal, Kansas 67905

Re:

Eminent Domain--Condemnation in Cities--Authority to Condemn Property Outside City Limits; Authority to Condemn Property Owned by County

Synopsis:

A city of the second class may condemn private property outside of its city limits for the purpose of obtaining an easement to construct a pipeline that will transport water from a point outside the city limits to a point within the city. Furthermore, a city may condemn property owned by a county if the property is either not devoted to a public use or, if it is devoted to such use, the condemnation will not substantially destroy or materially interfere with the original use. Cited herein: K.S.A. 12-809; 12-845; 12-856; 19-3545; 26-201.

* * *

Dear Representative Holmes:

You request an opinion whether a city of the second class may condemn private property outside of the city limits for the purpose of obtaining an easement to construct a pipeline that will transport water from a point outside of the city limits to a point within the city. Additionally, you inquire whether a city may condemn property owned by the county.

In general, a municipality may not condemn private property outside of its corporate limits for a public purpose unless the power has been delegated by the legislature either directly or impliedly. McQuillin Mun. Corp., § 32.66 (3d Ed.); *Evel v. City of Utica,* 103 Kan. 567, 568 (1918).

Kansas statutes are replete with express authority from the legislature granting to cities condemnation powers over private property outside of city limits for the purpose of transporting water to the city. [*See* K.S.A. 19-3545 *et seq*. (wholesale water supply district act); K.S.A. 12-845 (construction of water pipes within five miles of city limits); K.S.A. 12-856 *et seq*. (construction of combined water and sewage system); Attorney General Opinion No. 80-92.]

K.S.A. 12-809 provides, in relevant part, as follows:

"The governing body of any city shall have power and authority to ... condemn and appropriate in the name and for the use of the city any such land or lands located in or out of the corporate limits thereof, as may be necessary for the construction and operation of waterworks...."

In *Evel v. City of Utica, supra,* the court concluded that a city of the third class had the authority to condemn property outside of the city limits on the basis of an 1872 statute that was the predecessor to K.S.A. 12-809.

"No one questions that the power to condemn for a public use embraces the supplying of water, which is indispensable to the health, comfort, and convenience of the people of the city.... The principal power [to condemn] must, of course, be expressly given and there go with it all the necessary instances of that power. As an instance of the power conferred in this case, the city authorities may go where ever it is practicable and necessary to obtain the supply of water for the

people of the city. It is an acknowledged fact that water is obtained in most cities from places outside of the municipal limits, and the legislature, no doubt, had this fact in mind when the power of condemnation was conferred. It is equally well known that purer and better water can be obtained some distance away from the territory occupied by the people of the city. The legislature must therefore have known that in many cities it would be impossible to secure a supply of water within the municipal limits...." *Evel* at 569. *Also see McGinley v. City of Cherryvale*, 141 Kan. 155, 157 (1935); *Collins v. City of Wichita*, 225 F.2d 132, 135 (10th Cir.1955).

Consequently, it is our opinion that a city of the second class may condemn private property outside of its city limits for the purpose of obtaining an easement to construct a pipeline that will transport water from a point outside the city limits to a point within the city.

Your last query inquires whether a city may condemn property owned by a county. K.S.A. 26-201 authorizes cities to condemn *private* property, however, there is no statute that authorizes the condemnation of property owned by another municipality. Attorney General Opinion No. 91-51.

Some jurisdictions have concluded that one municipality may not condemn property owned by another municipality absent legislative authorization. McQuillan, *Mun Corp* sect. 32.74 (3rd. ed.); *Village of Elmwood Park v. Forest Preserve Dist. of Cook County*, 316 N.E.2d. 140 (Ill.1974). However, in *State ex. rel. v. City of Kansas City*, 187 Kan. 286 (1960), the city of Kansas City wanted to condemn a water system owned by a township. The attorney general argued on behalf of the township that property owned by a municipality and devoted to public use is "public property" and, therefore, is not subject to condemnation.

The court acknowledged that the general condemnation statute authorizes condemnation of "private property" so the issue became whether the property was simply being held by the township in its proprietary capacity or whether it was actually devoted to a public use. The court concluded that the property was not devoted to a public use and, therefore, the city could condemn.

The question left unanswered in the *Kansas City* case is what happens when property owned by a municipality is devoted to a public use. We addressed a similar situation in Attorney General Opinion No. 91-51 where we concluded that property in which the state had an interest (*i.e.* an easement) and that was already devoted to one public use could not be condemned if the condemnation would have substantially destroyed or materially interfered with the original use. *City of Norton v. Lowden*, 84 F.2d 663 (10th Cir.1936).

The corollary of that proposition is that property that is devoted to one public use may be condemned if the second use will not substantially destroy or materially interfere with the first use. Consequently, it is our opinion that a city may condemn property owned by a county if the property is either not devoted to a public use or, if it is devoted to such use, the condemnation will not substantially destroy or materially interfere with the original use.

Very truly yours,

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS
Mary Feighny
Assistant Attorney General

January 17, 1995

95-10 Barricading street

L. LaVerne Fiss
Johnson City Attorney
P.O. Box 100
Johnson, Kansas 67855

Re:

Cities and Municipalities--Public Utilities; Control of Streets and Public Grounds--Common Law Right of Access

Synopsis:

A city may barricade a portion of a street without infringing upon certain property owners' rights of access if such property owners continue to have access to streets that abut their property.

* * *

Dear Mr. Fiss:

As city attorney for the city of Johnson City you request our opinion concerning whether the city may barricade a street without infringing upon certain property owners' rights of access. You have provided a map (a copy of which is attached) which shows the location of the properties and the alley and the street in question.

It is our understanding that the city would like to barricade the west end of North Avenue so that persons traveling west on North Avenue would not be able to have access to the north/south running alley that intersects North Avenue. The barricade would be built so as to not impede access through the alley if one were to proceed north or south - rather, it would be built to preclude people from gaining access to the alley by way of North Avenue. The city is concerned whether its actions would infringe on any common law rights of access for property owners located on lots 1 and 2 (orange coded on the map) and lots 9 and 1 (green coded on the map).

The common law right of access to and from an existing public street or highway is one of the incidents of ownership of the land abutting thereon. *Teachers Insurance and Annuity Association of America v. City of Wichita,* 221 Kan. 325, 330 (1977).

"The owner of property which abuts an existing street or highway has two distinct kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the street or highway, and which are not common to the public generally. These private rights include certain easements, or appurtenant easements, such as the rights of access, of view, of light and air, and others. These rights are property of which he may not be deprived without his consent, except on full compensation and by due process of law. *Smith v. State Highway Commission*, 185 Kan. 445, 451 (1959).

A person claiming a common law right of access must establish that he or she owns land abutting the street or highway. *Spurling v. Kansas State Park and Resources Authority*, 6 Kan.App.2d 803 (1981). "Abut" means to "touch". *Spurling* 6 Kan.App.2d at 804. In the *Spurling* case, the court found that the property did not touch or abut the road that the plaintiff sought access to and, therefore, the court concluded that there was no common law right of access.

Applying this principle of law to the facts of this case, there is no right of access to the owners of lots 1 and 2 (see orange coding on map) to North Avenue if the properties do not abut North Avenue. Our understanding is that both lots 1 and 2 will continue to enjoy access to the alley so there appears to be no issue of access as far as the alley is concerned.

Lots 1 and 9 (green coded on the map) appear to abut both North Avenue and the alley thereby triggering a right of access, however, you have indicated that the owners of these lots will continue to enjoy access to both North Avenue and the alley so there should be no access issues for these lots either.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Mary Feighny
Assistant Attorney General

February 23, 1995

95-25 Adverse possession on tax sale property

Philip E. Winter
Lyon County Counselor
Courthouse
Emporia, Kansas 66801

Re:

Taxation--Judicial Foreclosure and Sale of Real Estate by County--Action to Enforce Lien for Unredeemed Real Estate Bid in by County; Conveyance of Land Sold for Taxes; Adverse Possession Claim on Property

Synopsis:

When a valid claim of adverse possession is rendered against a tract of land subsequently sold by the county in a tax sale, the adverse possessor's claim to the tract of land is valid and prevails over the holder of the tax deed. Cited herein: K.S.A. 58-2208; 58-3404(c); 60-503; K.S.A. 1994 Supp. 79-2401a; K.S.A. 79-2604; 79-2804.

* * *

Dear Mr. Winter:

As Lyon county counselor, you request our opinion whether Lyon county is liable to the purchaser of a tract of land from an annual county tax sale for a claim made on the same tract by an alleged adverse possessor.

The doctrine of adverse possession is codified in K.S.A. 60-503 which states in pertinent part:

"No action shall be maintained against any person for the recovery of real propertywho has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years."

Your question assumes that the alleged adverse possessor, now claiming a part of the land sold in the tax sale, satisfied the conditions of K.S.A. 60-503 as to the land in question *prior to its sale*. We will proceed with our discussion upon the same assumption. We note that it is not necessary for an adverse possessor to pay taxes in order to make a successful adverse possession claim. However, the failure to pay taxes for so long a time tends to weaken a claim of ownership by adverse possession. *Stark v. Stanhope*, 206 Kan. 428, 437 (1971); *Finn v. Alexander*, 102 Kan. 607, 610 (1918). Furthermore, the adverse possessor had no duty to redeem the tract of land he claimed because the seizure for non-payment of taxes was an action against the owner of record. K.S.A. 79-2401a(a)(1).

The question presented is whether the adverse possessor has a claim in the real property sold by the county at the tax foreclosure sale. There is nothing in the statutes pertaining to adverse possession requiring that the interest be recorded. Absent such a statutory requirement, " . . . the rule is well-settled that title by adverse possession is not affected by recording statutes--that the adverse title once obtained is good even as against those holding a title recorded as provided by statute or a title derived from a recorded title." L.S. Tellier, Annotation, *Title by Adverse Possession as Affected by Recording Statutes*, 9 A.L.R. 2d, 850-51 (1950). Likewise, the statutes prescribing the procedure for the tax sale do not require all parties with an interest to record that interest. Therefore, the failure of the adverse possessor to record his interest before the tax sale is irrelevant. The adverse possessor, having satisfied the conditions for successful adverse possession is entitled to the full rights, and is burdened by the same responsibilities (including the payment of taxes), of ownership. *See* generally 2 C.J.S. *Nature and Extent of Title or Right in General*, § 249 (1972).

Although there is no case law or Attorney General opinions dealing with the specific issue, it is stated that, "[i]f the adverse possession has continued for such a length of time as to bar the

original owner's right of recovery, the title so acquired is not affected by a forfeiture to the state for taxes since the state takes nothing by such forfeiture." 2 C.J.S. *Sale or Forfeiture for Taxes* § 190 (1972). Under this rationale, the county received nothing from the adverse possessor, assuming his interest had been perfected and therefore the county had nothing to sell to the subsequent purchaser. This view has been followed by at least one neighboring state and seems to us the proper view because of the simple notion that the county cannot convey more than it has a right to. *See Adams v. Parks*, 435 P.2d 122 (Okla. 1967). *See also Palm Orange Groves Inc. v. Yelvington*, 41 So. 2d 883, 885 (Fla. 1949).

A case directly on point comes from the Alaska supreme court. Based on similar facts, the court held that "[t]he city's tax deed thus conveyed all of Bishoff's (the record owner) interest, but this did not, as of the time of the tax foreclosure, include those portions already obtained by Bulavski by adverse possession." *Mount v. Curran*, 631 P.2d 496, 498 (Alaska 1981).

The tax deed held by the purchaser of the land at the tax sale is void as to the tract of land claimed by the adverse possessor. The county did not pass marketable title to the holder of the tax deed because marketable record title is subject to the "rights of any person arising from a period of adverse possession or user, which was in whole or in part subsequent to the effective date of the root of title. . . ." K.S.A. 58-3404(c).

The holder of the tax deed may seek a refund from the county under K.S.A. 79-2804(c) which provides:

"If after the sale of real estate on foreclosure for taxes it shall be adjudged that the sale on foreclosure was invalid or void, the board of county commissioners shall by proper order cause the money paid therefor on the sale, together with such subsequent taxes and charges paid thereon by the purchase or such purchaser's assigns to be refunded, with interest on such amount at the rate prescribed by K.S.A. 79-2004, and amendments thereto, upon the delivery of a quitclaim deed from the party holding under the sheriff's deed, executed to such person or persons as the commissioners shall direct in such order."

Additionally, we note that K.S.A. 58-2208 states:

"Any person claiming title to real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his or her interest therein, in the same manner and with like effect as if he or she was in the actual possession thereof."

"[T]he sole purpose of . . . [this statute] . . . is to abrogate the common-law rule that the conveyance of land held adversely is unlawful, being in effect champertous from its tendency to stir up litigation." *Colver v. McInturff*, 112 Kan. 604, 608 (1923). We do not believe that our conclusion is inconsistent with this statute, because the transaction is not illegal even though there is an adverse possession claim on real estate and the title may not be valid.

In conclusion, the adverse possessor is the true owner of the tract of land in question. The holder of the tax deed has no claim of ownership to the land but may seek a refund from the county for the taxes paid on the land.

Very truly yours,
CARLA J. STOVALL
ATTORNEY GENERAL OF KANSAS
Nobuko K. Folmsbee
Assistant Attorney General

March 3, 1995

95-30 Severance Tax by County

Keith D. Hoffman
Dickinson County Counselor
325 N. Broadway
Abilene, Kansas 67401

RE:

Counties and County Officers -- General Provisions -- Home Rule Powers; Charter Resolutions; Severance Tax

Synopsis:

It is our opinion that county home rule authority may be utilized to impose a severance tax on rock removed from land located in a county. We do not find any uniformly applicable law preempting local legislation of this type and it is therefore our opinion that K.S.A. 1994 Supp. 19-101a allows the county to impose such a tax. Cited herein: K.S.A. 19-101; K.S.A. 1994 Supp. 19-101a; K.S.A. 19-101c; 19-117; 49-601; 49-603; 49-623; 79-201e; 79-310; 79-401; 79-420; K.S.A. 1994 Supp. 79-4216; 79-4217; K.S.A. 82a-301; 82a-305a; 82a-702.

* * *

Dear Mr. Hoffman:

As Dickinson county counselor you request our opinion on whether the board of county commissioners has the authority, under home rule powers, to implement a severance tax on rock removed from the county. For purposes of this opinion, we assume that the proposed tax will be imposed on all rock that is severed, rather than only on rock severed fortransportation and use outside county limits. We thus do not address interstate commerce issues.

You explain that your county has three different quarrying operations wherein rock is removed from the land, processed and sold for construction. The high volume of rock has caused serious deterioration of some roads in the county and the county intends to use moneys from the proposed severance tax to refurbish the affected roads.

A severance tax has been defined generally as a tax "levied on the mining or extraction of some natural resource such as oil or coal. It may be assessed on the value of the product extracted or

on the volume." Blacks Law Dictionary 1308 (5th ed. 1979). K.S.A. 19-101 *fifth* grants Kansas counties home rule power and K.S.A. 1994 Supp. 19-101a further expands upon and explains this power. K.S.A. 19-117 sets forth some limitations upon home rule power and establishes the correct procedures for exercising taxation power. Home rule authority "shall be liberally construed for the purpose of giving counties the largest measure of self government." K.S.A. 19-101c. Thus, such local actions are entitled to a presumption of validity and should not be stricken unless the infringement upon a statute is clear beyond a substantial doubt. *Executive Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421 (1992).

Counties are subject to all acts of the legislature which apply uniformly to all counties. K.S.A. 1994 Supp. 19-101a(a)(1); *Missouri Pacific Rail Road v. Board of County Commissioners*, 231 Kan 225 (1982). Home rule power is available to counties in all areas of local government where it is not prohibited. *Blevins v. Hiebert*, 247 Kan. 1, 5 (1990). Without uniform or preemptive legislation in an area, sovereign powers may be utilized to impose a tax. *See* Callaway v. City of Overland Park, 211 Kan 646, 649 (1973). As recognized in *Executive Aircraft Consulting, supra.*, home rule empowers a city or county to levy any type of exaction unless the legislature preempts the field by uniform enactment. We therefore must determine if there is existing or preemptive legislation in the area of severance taxes or rock quarries.

We have been unable to locate any existing statutes that speak to or impose a severance tax upon the removal of rock in a county. K.S.A. 79-4216 *et seq.* establish a mineral severance tax. However, this tax is imposed only upon the severance and production of coal, oil or gas from the earth or water in the state for sale, transport, storage, profit or commercial use. K.S.A. 79-4217(a). K.S.A. 79-201e exempts from taxation certain reclaimed former mining operation property. K.S.A. 79-301 *et seq.* , K.S.A. 70-401 *et seq.* and K.S.A. 79-420 may permit imposition of personal property tax on the rock and real estate tax upon the land. We understand that the quarries in question are still operating and that the proposed tax is not a property tax. Thus, these property taxing statutes do not appear applicable to the proposed severance tax.

K.S.A. 49-601 *et seq.*, enacted in 1994, created the "surface-mining land conservation and reclamation act." With certain exceptions not pertinent here, this act applies to mines which are defined by K.S.A. 49-603(d) as "any underground or surface mine developed and operated for the purpose of extracting rocks, minerals and industrial materials, other than coal, oil and gas. . . ." The act provides for specific oversight by the state conservation commission, and provides for fees for license renewal, registration and registration renewal. These costs "shall be based on an operator's acres of affected land or the tonnage of materials extracted by the operator during the preceding license year, or a combination thereof." K.S.A. 49-623(c). These fees do not constitute a severance tax.

In Attorney General Opinion No. 95-8 we addressed the use of county home rule power with regard to imposing a severance tax on water being exported out of the county. It was our opinion that such a tax was preempted by uniform state-wide legislative enactment in the field, specifically the provisions of K.S.A. 82a-702. Pursuant to the 1994 enactment of K.S.A. 49-601 *et seq.*, there now exists a state-wide legislative scheme controlling the operation of many rock quarries. We must therefore determine if this new act preempts the field to the point of prohibiting a local severance tax.

K.S.A. 49-601 *et seq.* do not speak to a tax by any entity. Moreover, unlike water, removal of rock from one county does not directly impact upon the natural resources of another county. It does not appear that the provisions and impact of K.S.A. 49-601 *et seq.* will be affected if the county enacts a local severance tax on rock taken out of land in the county. Thus, we believe that the situation now addressed differs from that in Attorney General Opinion No. 95-8. We find nothing in the language of K.S.A. 49-601 *et seq.* that evidences an intent to preempt a county severance tax on the rock removed from local mines.

In summary, it is our opinion that county home rule authority may be utilized to impose a severance tax on rock removed from land located in a county. The procedures, imposition, and use of the money realized from the tax must comport with other laws such as those imposed by home rule procedures, budgetary or tax law, and constitutional considerations. We do not find any uniformly applicable law preempting local legislation of this type and it is therefore our opinion that K.S.A. 1994 Supp. 19-101a allows the county to impose such a severance tax.

Very truly yours,
CARLA J. STOVALL
ATTORNEY GENERAL OF KANSAS
Theresa Marcel Nuckolls
Assistant Attorney General

March 24, 1995

95-37 Road personnel to fight fires

Leonard Dix
Rooks County Attorney
3rd Floor, Rooks County Courthouse
Stockton, Kansas 67669-0545

Re:

Cities and Municipalities -- Miscellaneous Provisions -- Municipal Policies Regarding the Provision of Assistance During Times of Disaster; Use of County Road Personnel and Equipment to Fight Fires

Counties and County Officers -- General Provisions -- Home Rule Powers; Limitations, Restrictions and Prohibitions; Use of County Road Personnel and Equipment to Fight Fires

Synopsis:

In the absence of any general statutory impediment prohibiting use of county employees and road equipment for the public purpose of fighting fires, it is a discretionary decision of the county under its home rule authority. Cited herein: K.S.A. 1994 Supp. 12-16,117; K.S.A. 12-

2901; K.S.A. 1994 Supp. 19-101a; K.S.A. 19-212; 31-158; 68-141a; 68-536; 75-3137; 79-2925; 80-1516; 80-1517; 80-1904.

* * *

Dear Mr. Dix:

You request our opinion on the use of county road personnel and equipment to combat fires within Rooks county. You cite K.S.A. 12-16,117 and ask us to address whether road crew personnel (who are not trained to fight fires) and road equipment (inventoried to the county road and bridge department) may be used to assist in fire fighting.

If the county is considering providing fire fighting assistance to another entity, K.S.A. 1994 Supp. 12-16,117 may be one appropriate source of authority. K.S.A. 1994 Supp. 12-16,117 concerns the provision of disaster assistance to other entities and it states in part: "The governing body of a municipality may establish a policy regarding the provision of assistance to other municipalities and public safety agencies located in other municipalities located within or without the state of Kansas." K.S.A. 1994 Supp. 12-16,117(a) defines a municipality as a county, city or township, and a public safety agency to include fire protection associations. According to the definitions in this statute, a disaster may be a fire. However, the definition of "disaster" limits this authority to those situations in which there is an "imminent threat of widespread or severe damage, injury or loss of life or property." Thus, this statute allows a county to provide fire fighting assistance to other municipalities or public safety agencies in certain circumstances. This assistance occurs pursuant to an ordinance or resolution which sets forth the procedure to be followed. An interlocal agreement under K.S.A. 12-2901 *et seq.* may also be used to assist other entities in matters where the contracting entities have the requisite authorities to act. Likewise, K.S.A. 80-1517 permits the governing body of a fire district to assist and enter into similar contracts. However, none of these statutes speak specifically to use of county road crew and equipment to fight fires.

Your main concern appears to be whether this use of county road personnel and equipment is permissible. K.S.A. 1994 Supp. 19-101a grants the board of county commissioners the authority to transact all county business, and perform all powers of local legislation and administration it deems appropriate subject only to the prohibitions set forth in that statute. One such prohibition concerns the ability of the county to alter acts of the legislature that apply uniformly to all counties. K.S.A. 1994 Supp. 19-101a(a)(1). If there is no prohibition or uniform state enactment on a subject, the board of county county commissioners may exercise the authority granted under K.S.A. 19-212 to make such orders concerning property belonging to the county "as they may deem expedient. . . ." We must therefore determine if there is any applicable law that prohibits or limits the proposed use of county equipment and personnel.

K.S.A. 31-158 requires that fire fighting clothing and equipment *sold* in the state meet certain standards, and subsection (b) states that "no fire department *shall purchase* in this state any item of clothing or equipment intended to protect firefighters from death or injury while fighting fires unless the item of clothing or equipment meets or exceeds the minimum standards. . . ." (Emphasis added). However, the statute addresses sale to and purchase by a fire department. It

does not specifically speak to use of existing equipment or require that a county road crew use certain fire fighting equipment.

Budgetary and tax law considerations may constrain the use of certain moneys to fight fires if those funds were formally allocated for other uses. *See e.g.* K.S.A. 68-536 and K.S.A. 79-2925 *et seq.* K.S.A. 68-141a contains a prohibition against using county road equipment for private purposes. However, fighting fires almost always serves a public purpose. We find no state prohibition against using county road equipment for a valid public purpose such as fighting fires. The suitability for such use is a fact question that may need to be raised with fire fighting experts.

The second issue concerns use of county road personnel to fight fires. The state fire marshal assists in establishing training for fire fighters. *See* K.S.A. 75-3137. In an effort to avoid injuries and to insure that actual assistance is given, local public entities usually require or establish some training for those persons who engage in fire fighting duties. However, it appears that the state does not require that all persons fighting fires receive some minimum amount of training. K.S.A. 1994 Supp. 12-16,117(c) specifically recognizes some immunity from liability when the municipality is providing assistance. This is perhaps in recognition of the fact that local entities sometimes rely upon part-time or volunteer fire fighters. *See* K.S.A. 80-1516 (fire districts); K.S.A. 80-1904 (township).

If Rooks county has adopted an employee policy dictating or limiting the duties of road employees, that county policy may need to be amended before the county can require road employees to fight fires. Moreover, issues surrounding workers' compensation, funding, and training should be considered in any situation involving county provision of fire fighting services. However, there appear to be no uniformly applicable state laws prohibiting the county from using county road personnel or equipment for the purpose of fighting fires. Absent authority to the contrary, the permissible use of equipment or duties of employees is a discretionary decision determined by the local governing body.

Very truly yours,
CARLA J. STOVALL
KANSAS ATTORNEY GENERAL
Theresa Marcel Nuckolls
Assistant Attorney General

April 20, 1995

95-43 Solid waste fee collection

The Honorable Janice L. Hardenburger
State Senator, 21st District
State Capitol, Room 143-N
Topeka, Kansas 66612

Re:

Public Health--Solid and Hazardous Waste; Solid Waste--Collection and Disposal by County; Assessment and Collection of Fees

Synopsis:

The solid waste collection fee established by Washington county for the months of May through December, 1994 was not properly imposed, because the authorizing resolution was not adopted prior to July 1, 1994. The resolution timely established a monthly solid waste collection fee on a prospective basis effective January, 1995. The county's classification of real property within the solid waste service area does not comply with K.S.A. 65-3410(a), which requires adoption of a fee schedule that reasonably relates the amount of the solid waste fee to the relevant characteristics of the real property on which it is imposed. The method set forth in the resolution for collecting delinquent fees is consistent with the exclusive method set forth in K.S.A. 65-3210(a)(1)-(4). Cited herein: K.S.A. 65-3401; 65-3410.

* * *

Dear Senator Hardenburger:

You have requested our opinion on three specific questions pertaining to the solid waste fees imposed by Washington county pursuant to K.S.A. 65-3410(a). In Attorney General Opinion No. 95-21, issued at your request, we addressed the legality of the mandatory solid waste user's fees assessed by Washington county pursuant to Resolution No. 24-94, as amended by Resolution No. 31-94. While we concluded that the county could prospectively establish a mandatory solid waste user's fee for calendar year 1995, we determined that the resolution was invalid insofar as it imposed monthly solid waste user's fees for the period May, 1994 through January, 1995 inclusive. We also determined it was permissible for the county to designate the county solid waste management department to collect the solid waste user's fee in the first instance, rather than the county treasurer.

You have specifically asked us to address the following issues, which were not raised in your previous inquiry:

1. the legality of the fee imposed by Washington county for solid waste collection services;
2. the reasonableness of the property classification system adopted by the county; and
3. the legality of the method adopted by the county for collecting delinquent fees.

A monthly fee for solid waste collection services is established by paragraph 3(b) of Resolution No. 24-94, as amended by Resolution No. 31-94. For occupied residences and businesses located within the boundaries of any incorporated city in the county, the monthly solid waste collection fee is fixed at $5.25. Businesses and residences located outside the boundaries of any incorporated city, that receive waste collection or trash hauling services provided by the company with which the county contracts, are required to pay a monthly fee established by the contractor, which may not be less than $5.25. The resolution provides for the collection of such monthly fees for the months of May through December, 1994, and all months thereafter.

Based upon the information available to us, the monthly fee for solid waste collection services was established for the first time by the county on December 27, 1994, when Resolution No. 24-94 was adopted. Under the solid waste management plan adopted by the county in 1974, solid waste collection fees were previously established by ordinance in each of the incorporated cities within Washington county.

As we noted in Attorney General Opinion No. 95-21, the statute requires that the resolution establishing solid waste fees must be adopted on or before July 1 of the calendar year for which they are imposed. This requirement applies to both the mandatory collection fee or tax imposed on property within the boundaries of incorporated cities, as well as the collection fee imposed on property located outside city boundaries for which collection services are provided at the election of the property owner or user. Therefore, to the extent that Washington county Resolution No. 24-94, as amended, establishes solid waste collection fees retroactively for months in calendar year 1994, it is invalid under K.S.A. 65-3410(a). However, the resolution timely imposes solid waste collection fees on a prospective basis for months *after* December 1994, since it was adopted prior to July 1, 1995.

Your second inquiry is whether the property classification system adopted by the county pursuant to K.S.A. 65-3410(a) is reasonable. The statute explicitly requires a county electing to establish solid waste fees to devise a classification system for the real property within its solid waste service area. K.S.A. 65-3410(a) reads in pertinent part as follows:

"In establishing the schedule of fees, the board of county commissioners shall classify the real property within the county solid waste service area based upon the various uses to which the real property is put, the volume of waste occurring from the different land uses and any other factors that the board determines would reasonably relate the waste disposal fee to the real property upon which it would be imposed."

Resolution No. 24-94 divides all real property into two classes: (1) all residences and dwelling units, and (2) all businesses. However, mandatory fees assessed for solid waste collection and disposal for real property within the boundaries of any incorporated city are the same for each classification. An annual fee of $75.90 is charged for the solid waste user's fee, and a monthly fee of $5.25 is fixed for solid waste collection. Solid waste collection fees imposed on property located outside any incorporated city, for which collection services are provided, are determined by separate agreement, but may not be less than $5.25 per month.

The statute gives the county considerable discretion in determining the factors to be employed in relating the amount of the solid waste fee to the real property on which it is imposed. However, the statute *requires* such property to be classified on the basis of the various uses to which the property is put and the volume of waste occurring from the different land uses. The board of county commissioners in Washington county has nevertheless determined by adoption of Resolution No. 24-94, as amended, that the mandatory fees should be the same for each residential unit or business without regard to the volume of waste generated.

In *Zerr v. Tilton*, 224 Kan. 394 (1978), the Kansas Supreme Court considered a challenge to a Gove county resolution imposing fees for the collection of solid waste. The resolution

established a fee schedule under which single family residences were assessed the lowest fee, and properties used for commercial, industrial, governmental, or institutional purposes were assessed differing fees depending upon the volume of solid waste generated. The plaintiffs argued that the classifications established in the resolution violated equal protection principles. 224 Kan. at 396. Adopting in full the opinion of the district court in a *per curiam* opinion, the Kansas Supreme Court upheld the resolution, reasoning that equal protection does not preclude the drawing of distinctions between different groups as long as persons similarly situated with respect to the legitimate purpose of the law receive like treatment. *Id.* at 397-98. The court held that the resolution's distinctions between categories of property were reasonably related to the disposition of solid waste for the protection of public health. *Id.*

Attorney General Opinion No. 84-97 addressed a Rawlins county resolution imposing solid waste disposal fees. The resolution established several classifications for residences and businesses. The lowest fee was set for rural residences, with progressively increasing amounts for city residences and for small, medium, and large businesses. Attorney General Stephan determined that the classification system represented a valid attempt to distinguish property based upon the volume of waste generated.

While the Kansas solid waste management act, K.S.A. 65-3401 *et seq.*, delegates broad authority to the county to develop a solid waste management plan, the exercise of that authority is subject to certain statutory restrictions. If the county elects to establish fees to finance all or part of its solid waste management system, it must do so in the manner provided by statute. Among other things, the statute requires the board of county commissioners to classify real property within the solid waste service area on the basis of the manner in which the property is used *and* the amount of solid waste generated. The Washington county resolution classifies real property depending upon whether it is used for residential or business purposes, but it imposes flat mandatory fees for each dwelling unit or business, notwithstanding the amount of waste produced. Consequently, it is our opinion that the Washington county resolution fails to reasonably classify the real property on which the solid waste fees are imposed, as required by K.S.A. 65-3410(a).

Your final question is whether the method set forth in the resolution for collecting delinquent fees is permissible. Paragraph 11 of Resolution No. 24-94 is virtually identical to the provisions of the third paragraph of K.S.A. 65-3410(a) and subsections (1) - (4), which set forth the procedures to be followed for collecting delinquent fees. In *Uhl v. Ness City, Kansas*, 590 F.2d 839 (10th Cir. 1979), the tenth circuit court of appeals held that the method set forth in the statute was the exclusive method contemplated by the Kansas legislature for collecting delinquent solid waste charges. *Id.* at 844; *see also* Attorney General Opinions No. 84-97, 95-21. The method established in the resolution for collecting delinquent fees is consistent with the statute and its interpretation by the courts.

In summary, the solid waste collection fee established by Washington county for the months of May through December, 1994 was not properly imposed, because the authorizing resolution was not adopted prior to July 1, 1994. However, the resolution properly established a monthly solid waste collection fee on a prospective basis effective January, 1995. The county's classification of real property within the solid waste service area does not comply with K.S.A. 65-3410(a), which requires adoption of a fee schedule that reasonably relates the amount of the solid waste fee to

the relevant characteristics of the real property on which it is imposed. Finally, the method set forth in the resolution for collecting delinquent fees is consistent with the exclusive method set forth in K.S.A. 65-3210(a)(1)-(4).

Very truly yours,
CARLA J. STOVALL
ATTORNEY GENERAL OF KANSAS
J. Lyn Entrikin Goering
Assistant Attorney General

August 15, 1995

95-87 Landfill tipping fees

The Honorable Tim Shallenburger
Speaker of the House of Representatives
State Capitol, Room 380-W
Topeka, Kansas 66612

Re:

Public Health--Solid and Hazardous Waste; Solid Waste--Assessment and Collection of Fees; Authority of County or Regional Solid Waste Management Entity to Assess and Expend Landfill Tipping Fees

Synopsis:

Counties are authorized by statute to impose landfill tipping fees calculated on the basis of the volume of solid waste disposed of at county- operated landfills or other solid waste disposal areas. Fee receipts must be deposited in a separate fund for each solid waste disposal area, and may be expended only for costs associated with closure, postclosure actions, and contamination remediation activities associated with the particular disposal area from which the fees were generated. Counties may not impose such fees on solid waste disposed of in landfills operated by cities or private entities.

A county's authority to impose landfill tipping fees may be delegated to a regional solid waste management entity by the procedure set forth in the interlocal cooperation act. However, fee receipts from each landfill operated by the regional entity must be deposited in a separate fund and may be expended only for specified costs associated with closing the landfill. Cited herein: K.S.A. 12-2901; 12-2903; 12-2904; 19-101; K.S.A. 1994 Supp. 19-101a; K.S.A. 19-117; 65-3401; K.S.A. 1994 Supp. 65-3402, as amended by L. 1995, ch. 221, § 1; K.S.A. 65-3405; 65-3410; K.S.A. 1994 Supp. 65-3415a, as amended by L. 1995, ch. 221, § 3; 65-3415b, as amended by L. 1995, ch. 221, § 5; K.S.A. 65-3415d (repealed 1993); K.S.A. 1994 Supp. 65-3415f.

* * *

Dear Representative Shallenburger:

You have requested our opinion concerning the authority of counties or regional solid waste management entities to assess and expend landfill "tipping fees." As we understand the term, a "tipping fee" is collected from persons who dispose of solid waste at the landfill site, and is calculated on the basis of the volume of solid waste disposed of at the landfill. "Tipping fees" are to be distinguished from solid waste disposal fees authorized by K.S.A. 65-3410(a), which may be assessed against real property within a solid waste service area whether or not the landowner uses any of the solid waste collection and disposal services provided by the county. **See Zerr v. Tilton**, 224 Kan. 394, 400 (1978); Attorney General Opinions No. 95-21, 95-43, 95-82.

Your specific questions are as follows:

1. May a county commission assess a landfill tipping fee on solid waste disposed of at landfills owned and operated by the county, assuming fee receipts are deposited in a separate account to be used exclusively for financing the county's solid waste management plan?

2. If so, does the county's authority to assess landfill tipping fees extend to landfills located within the county that are owned or operated by a private entity or city?

3. If a county is a member of a regional solid waste management entity established under K.S.A. 65-3405(a) and the interlocal cooperation act, K.S.A. 12-2901 **et seq.**, may the county authorize the regional entity to impose and collect landfill tipping fees, provided that receipts are held in aseparate account and used exclusively for financing the regional solid waste management plan?

4. If so, may a regional entity use the fee revenues to finance expenses incurred for the benefit of all member counties, such as salaries and other operating costs associated with implementing the solid waste management plan, and matching state grant funds for solid waste management planning?

We initially note that under the home rule powers conferred by K.S.A. 19-101 **et seq.**, a county may levy any type of tax, fee, excise, charge, or other exactment unless the legislature has preempted the field by uniform enactment. **See** K.S.A. 19-101a(1), 19-117; **Executive Aircraft Consulting, Inc. v. City of Newton**, 252 Kan. 421, 424 (1993).

Since 1992, all operators of solid waste disposal areas are required to pay a **state** solid waste tonnage fee on each ton or equivalent volume of solid waste disposed of at the site. **See** K.S.A. 1994 Supp. 65-3415b, as amended by L. 1995, ch. 221, § 5. The term "solid waste disposal area" is broadly defined to mean "any area used for the disposal of solid waste from more than one residential premise, or one or more commercial, industrial, manufacturing or municipal operations," and therefore includes landfills. **See** K.S.A. 1994 Supp. 65-3402(d), as amended by L. 1995, ch. 221, § 1. Revenues from state solid waste tonnage fees are collected by the department of health and environment and deposited in the state solid waste management fund. K.S.A. 1994 Supp. 65-3415a(a), (b)(1), as amended by L. 1995, ch. 221, § 3. Moneys in the fund may be expended solely for state grants to local entities for solid waste management planning activities, state monitoring and investigation of local solid waste management plans, and other

specified state expenses associated with solid waste management functions, including postclosure monitoring and cleanup costs under certain circumstances. **See** K.S.A. 1994 Supp. 65-3415a(c)(1)-(11), (g), as amended by L. 1995, ch. 221, § 3.

In 1994, the legislature enacted a separate statute authorizing **counties** to impose solid waste tonnage fees. K.S.A. 1994 Supp. 65-3415f(b) generally authorizes any county to impose a solid waste tonnage fee for each ton or equivalent volume of solid waste disposed of at any solid waste disposal area operated by the county. We note, however, that several significant categories of solid waste listed in the statute are specifically exempt from application of both state and locally assessed solid waste tonnage fees. **See** K.S.A. 1994 Supp. 65-3415b(c)(1)-(6), as amended by L. 1995, ch. 221, § 5; K.S.A. 1994 Supp. 65-3415f(b)(1)-(6).

Solid waste tonnage fees imposed by a county must be collected and deposited in a special fund in the county treasury, and if fees are imposed at more than one disposal area a separate fund must be maintained for receipts from each disposal area. K.S.A. 1994 Supp. 65-3415f(c). The statute restricts the expenditure of county solid waste tonnage fee receipts as follows:

"Money in the fund shall be used only for payment of costs of closure, postclosure actions and contamination remediation associated with the solid waste disposal area until the secretary [of health and environment] determines that all requirements for closure, postclosure actions and contamination remediation associated with the disposal area have been met." K.S.A. 1994 Supp. 65-3415f(c).

Furthermore, transfer or expenditure of such moneys for any other purpose is a criminal offense and is grounds for forfeiture of public office. K.S.A. 1994 Supp. 65-3415f(e).

Previous opinions issued by this office have interpreted the solid waste management act, K.S.A. 65-3401 **et seq.**, to be uniformly applicable to all counties, and consequently a county may not exercise its home rule powers to exempt itself from the requirements of the act. **See** Attorney General Opinions No. 80-65, 80-221, 84-97. On the other hand, Attorney General Stephan concluded that the statutory authority of counties to assess solid waste disposal fees against real property in the manner set forth in K.S.A. 65-3410 does not preclude a county from exercising its home rule powers to assess an ad valorem tax to finance the costs of its solid waste collection system. **See** Attorney General Opinion No. 80-221.

In **Blevins v. Hiebert**, 247 Kan. 1 (1990), a majority of the Kansas Supreme Court held that enabling legislation is uniformly applicable if it authorizes all cities or counties to perform certain acts, and such statutes implicitly preempt the field of their application absent express exceptions in the statutes or unless the statutes pertain to police power regulations. **Id.** at 11. In a recent case involving the exercise of city home rule powers to adopt impact fees as a supplemental financing mechanism for highway improvements, the court acknowledged that legislative intent to preempt a particular field should be clearly evident before a municipality's right to exercise home rule is determined to be legislatively precluded. **See McCarthy v. City of Leawood**, 257 Kan. 566, Syl. ¶ 1-2 (1995). In determining whether the legislature intends to preclude home rule action to adopt alternative financing mechanisms, one statute cannot be considered in isolation, but must be considered in conjunction with other related statutes within

the same legislative scheme. **See id.** at 577-78; **see also Blevins**, 247 Kan. at 9 (whether state has preempted field depends on language of statutes as well as the purpose and scope of the legislative scheme); **Claflin v. Walsh**, 212 Kan. 1, 8 (1973) (statutes relating to same subject matter, even if enacted at different times, are **in pari materia** and should be construed together in determining whether they are uniformly applicable).

In our opinion, K.S.A. 1994 Supp. 65-3415f is an enabling statute and is uniformly applicable to all counties to the same extent as K.S.A. 65-3401 **et seq.** As such, the authorizing legislation preempts the field with regard to the general category of solid waste tonnage fees, including landfill "tipping fees." The legislature has explicitly limited the types of solid waste subject to both state and county-imposed solid waste tonnage fees. Further, the transfer or expenditure of fee revenues generated by county- operated solid waste disposal areas for any purpose not specified in statute constitutes a criminal offense and is grounds for forfeiture of public office. K.S.A. 1994 Supp. 65-3415f(e). Similarly, state-imposed solid waste tonnage fees must be deposited in the state solid waste management fund and are to be spent only for specified purposes, and revenues to the fund are to be held intact and inviolate for those purposes. K.S.A. 1994 Supp. 65-3415a(g), as amended by L. 1995, ch. 221, § 3. We think the legislature, by the use of such restrictive language, has clearly expressed its intent that neither the state nor its political subdivisions may impose solid waste tonnage fees except in strict compliance with these statutes. We therefore conclude that the legislature has preempted the area of state and county-imposed solid waste tonnage fees by enacting uniformly applicable enabling statutes, and counties therefore may not exercise their home rule powers to impose landfill tipping fees other than as explicitly authorized and limited by K.S.A. 1994 Supp. 65-3415f.

To summarize our response to your first question, a county is statutorily authorized to impose a "tipping fee" based on the volume of solid waste disposed of at a county-operated landfill. However, receipts must be deposited in a separate fund for each landfill, and expenditures from the fund are statutorily restricted to costs associated with closure, postclosure actions, and contamination remediation associated with that landfill. Consequently, landfill tipping fee revenues may not be expended for the general costs associated with implementing the county's solid waste management plan in compliance with K.S.A. 65-3405.

Your second question is whether the county's authority to assess landfill tipping fees extends to landfills located within the county, but which are operated by a private entity or by a city. The authority conferred by K.S.A. 1994 Supp. 65-3415f(b) explicitly authorizes the imposition of such fees only at "any solid waste disposal area **operated by such county.**" (Emphasis added.) In contrast, K.S.A. 1994 Supp. 65-3415b, as amended by L. 1995, ch. 221, § 5, authorizes the state to impose solid waste tonnage fees at "any solid waste disposal area in this state," including landfills operated by private entities and cities. Furthermore, prior to its repeal in 1993, K.S.A. 65-3415d provided for the imposition of a county solid waste tonnage fee on waste generated outside the state and disposed of at solid waste disposal areas "located in such county." Attorney General Stephan concluded in Attorney General Opinion No. 92-111 that K.S.A. 65-3415d was unconstitutional. The legislature repealed K.S.A. 65-3415d in 1993 and later enacted K.S.A. 1994 Supp. 65-3415f, which limited the authority of a county electing to impose solid waste tonnage fees to disposal areas "operated by such county."

We think the difference in the wording of the latter two statutes is significant and indicates that the legislature intended to preclude a county from imposing landfill tipping fees at landfills located within the county but operated by a city or private entity. **See Boatright v. Kansas Racing Commission**, 251 Kan. 240, 245-46 (1992) (it is presumed that legislature intended a different meaning when different language is used in the same connection in different parts of a statute). Consequently, we conclude that a particular county may impose solid waste tonnage fees, including landfill tipping fees, only at solid waste disposal areas operated by that county.

Your third question asks whether the county's power to impose such fees may be delegated to a regional solid waste entity established under the interlocal cooperation act, with receipts held in a separate account of the regional solid waste authority and used for purposes of carrying out the regional solid waste management plan. We note that K.S.A. 1994 Supp. 65-3415f(f) specifically provides that two or more counties jointly operating a solid waste disposal area may impose a tonnage fee if the majority of the board of county commissioners of each participating county votes to impose such a fee. However, we assume from the wording of your question that the regional entity you have in mind is not simply a joint effort to operate a particular landfill on a multi-county basis, but rather a separate legal entity established by interlocal agreement to operate the landfill.

Under the interlocal cooperation act, any "public agency," defined by K.S.A. 12-2903 to include any county, may agree with another public agency to jointly or cooperatively carry out their respective functions relating to refuse disposal. **See** K.S.A. 12-2904(a), (b); K.S.A. 65-3405(a). Such an agreement may create a separate legal or administrative entity for the purpose of carrying out the joint undertaking, such as a regional solid waste entity, subject to the specific approval of the agreement by this office. K.S.A. 12-2904(c)(2), (f). In that event, a county's statutory power to impose landfill tipping fees at county-operated landfills may thereby be delegated to and exercised by the regional solid waste entity, if the interlocal agreement specifically provides that the participating county or counties are delegating such powers. **See** K.S.A. 12-2904(c)(2).

Your fourth and final question is whether a regional solid waste entity may expend landfill tipping fees for general expenses associated with developing and implementing the regional solid waste management plan. The statutory restrictions limiting a county's use of landfill tipping fees apply with equal force to a regional entity created by interlocal agreement. Therefore, the moneys collected from landfill tipping fees could not be used for general expenditures associated with implementing the regional solid waste management plan, because the regional entity would have no more power than the participating local public agencies to use the fee revenues for purposes other than those set forth in K.S.A. 1994 Supp. 65-3415f(c). We conclude that a regional solid waste management entity under the circumstances you describe would not have the power to expend such moneys for staff salaries, office space, equipment, matching grant funds, or any other related expense other than those specifically set forth in K.S.A. 1994 Supp. 65-3415f(c).

Very truly yours,
CARLA J. STOVALL
ATTORNEY GENERAL OF KANSAS

J. Lyn Entrikin Goering
Assistant Attorney General

November 21, 1995

95-113 Township officers reimbursement

Nola Foulston
Sedgwick County District Attorney
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Re:

Townships and Township Officers--Township Officers--Salaries; Reimbursement for Expenses

Synopsis:

Township board members may be compensated only for the positions which they are statutorily authorized to hold and only in the amount specified by statute. A monthly "salary" may not be paid in lieu of the specified amounts. Cited herein: K.S.A. 68-101; 68-132; 68-523; 68-525; 68-530, as amended by L. 1995, ch. 232, § 3; 80-207; 80-302; 80-1204; 80-1407; 80-1421; 80-1542; 80-1544; 80-1904; 80-1917; 80-2002; 80-2510.

* * *

Dear Ms. Foulston and Mr. Fairchild:

You each have requested this office to issue an opinion concerning permissible compensation for members of townshipboards in Kansas. For the sake of clarity and convenience, we will respond to both requests in one opinion.

K.S.A. 68-101(1) defines a township board as "the governing body of the township composed of the township trustee, the township clerk and the township treasurer." Three statutes authorize payment to these officials for work done with respect to these offices. K.S.A. 80-207 allows all townships to reimburse township officers for expenses incurred while attending to township business. A statutory limit is not established on the amount that can be received pursuant to this expense reimbursement statute. K.S.A. 80-1204 allows trustees in townships located in counties

infested with prairie dogs to receive "reasonable" compensation for work done in connection with prairie dog eradication. A statutory limit is not established on the amount that can be received pursuant to this compensation statute. K.S.A 80-1421 allows township officers in townships abutting a city of the first class located in counties having a population of 150,000 to 180,000 to receive $25 per day for each day actually spent on township business. The amount received pursuant to this compensation statute is limited to $50 per calendar month.

Township officers are also statutorily authorized to hold other positions for which they may be compensated in addition to the compensation received in their capacity as township board members as described above. **See** VII Opinions of the Attorney General 795; Attorney General Opinion No. 81-288. By specific statutory authorization, members of a township board may serve as township highway commissioners (K.S.A. 68-523), the township auditing board (K.S.A. 80-302), water system supervisors (K.S.A. 80-1407), the fire district governing body (K.S.A. 80-1542), and the sewage district governing body (K.S.A. 80-2002). Authorized compensation for work done in these capacities varies.

K.S.A. 68-525 authorizes $15 per day, up to a maximum of $480 per year, when the individual is working as a highway commissioner. However this statute identifies three specific situations which differ from this general provision. In a township with a population of 5,000 to 8,000 and a valuation of at least $7,000,000 the trustee and the clerk may receive a maximum of $200 per year and the treasurer may receive a maximum of $100 per year under this statute. If the township is adjacent to a city of the first class, board members serving as highway commissioners may receive $600 per year in lieu of the $15 per diem amount. In townships in counties with a population of less than 16,000, members of the township board may receive up to $3,000 as reasonable compensation for the performance of road and bridge maintenance.

K.S.A. 80-302 allows all township board members to receive $50 per day ($30 if less than four hours) spent in performance of the duties of the township auditing board. A statutory limit is not established for the amount that may be received pursuant to this statute.

K.S.A. 80-1407 allows for compensation of township officers who are serving as supervisors of the water system. However specific requirements are established. In a township with a population of 80,000 to 170,000 and more than 500 water customers, each township officer may be paid $25 per month. In a township with a population greater than 125,000 and at least 1,500 water customers, each township officer may be paid $100 per month.

K.S.A. 80-1544 allows township board members to be paid $50 per day ($30 if less than four hours) for work done as the governing body of the fire district. There is a $100 per month limit on the amount that may be received in this capacity. This statute also allows township board members to receive $25 per day ($15 if less than four hours) for work done as the auditing board of the fire district. The amount received under this provision is limited to $50 per month.

K.S.A. 80-2002 allows township board members to receive $3.50 per day when serving as the governing body of the sewage district. There is no statutory limit on the total amount that may be received pursuant to this statute.

In order to be complete on the question of compensation for township board members, we must address four other statutes. These provisions do not specifically authorize nor prohibit township board members holding these positions. Thus, each provision must be analyzed under the common law doctrine of incompatibility of offices.

"Offices are incompatible when the performance of duties of one in some way interferes with the performance of duties of the other. . . . It is an inconsistency in the functions of the two offices." **Dyche v. Davis**, 92 Kan. 971 (1914).

This doctrine has not been restricted to **offices**, but includes public employment as well. Attorney General Opinion No. 81-88; **Dyche, supra**, 63A Am.Jur.2d, **Public Officers and Employees** § 65. Thus, a township board member, as a public office holder, may not hold any position which would be inconsistent with his duties as a board member. In Attorney General Opinion No. 81-88, former Attorney General Stephan discussed this concept of inconsistent positions. Further, general authorities provide assistance in determining when the nature and duties of two offices are inconsistent, so as to render them incompatible. For example:

"[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office or has the power to remove the incumbent of the other to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts." 67 C.J.S. **Officers**, sec. 27.

K.S.A. 68-530 allows the township board to appoint a road overseer. This statute specifically provides that in townships of less than 500, the trustee may, by unanimous vote, be appointed to serve as the township road overseer. This provision has previously been interpreted to mean that in townships with a population over 500 the trustee and other members of the township board may not hold this position. First, it may create an incompatibility to allow township board members to appoint themselves to the position of road overseer and then pay themselves a reasonable compensation for the work. Second, the provision that allows for the trustee to hold the position of road overseer in townships of less than 500 persons operates as a prohibition against the same occurrence in townships of greater than 500 persons. II Opinions of the Attorney General 310; Attorney General Opinion No. 82-248. [It should be noted, however, that it has also been opined that the doctrine of incompatibility did not prevent the appointment of a township board member as an assistant to the township road overseer. Attorney General Opinion No. 79-242.] Thus, it is our opinion that, except in townships with a population under 500, persons may not simultaneously hold the positions of township board member and township road overseer.

K.S.A. 68-132 allows for the appointment of an inspector for sidewalks and crossings. As with the previous statute, this position is appointed by the township board. Again, this may cause an incompatibility problem if the board appoints a board member and compensates the inspector with public funds. Thus, it is our opinion that a person may not simultaneously hold the positions of township board member and inspector for sidewalks and crossings of the inspector is paid

from public funds and the board has the power to remove or punish the individual and regulate the amount of compensation.

K.S.A. 80-2510 allows for the compensation of a township hospital board. K.S.A. 80-2508 allows for four different methods for the selection of hospital board members. Whether an individual may serve simultaneously as a township board member and as a member of a hospital board is a factual matter that must be determined on a case-by-case basis. If, based on the specific facts involved, holding the two offices would not violate the doctrine of incompatibility of offices, compensation would be determined according to K.S.A. 80-2510.

K.S.A. 80-1904 and 80-1917 allow for the compensation of volunteer members of township fire departments at a rate specified by the township board when attending fires. The doctrine of incompatibility may preclude a township board member from serving as a member of the township fire department because board members and firefighters are compensated from public funds. If the township board has the power to appoint and remove the members of the fire department and regulates their compensation, the positions may be incompatible.

We have been asked to opine on the maximum amount that an individual township board member may receive in compensation. Clearly, too many variables exist to address that question generally. We hope that the above detail concerning possible sources of compensation for township board members will be a useful guide in answering that question on a case-by-case basis. Township boards are creatures of statute, and as such cannot act outside the bounds specifically authorized by statute. We have located no statute which allows for the compensation of township officers beyond the limits previously enumerated. Thus, township boards may not establish a "salary" in lieu of the amounts specified in the authorizing statutes.

Other than K.S.A. 80-2510 which requires an itemization of expenses as part of the public record for hospital boards, we can find no statutory provision which dictates the type of documentation that must be presented in order for township board members to receive their compensation. However, because most of the authorized compensation is in the form of a "per diem," it logically follows that township board members must provide some form of time log to indicate the hours spent with respect to each office held. We note that most of the above listed statutes require that time spent on township business be "actual" and "necessary."

In conclusion, township board members may be compensated only for the positions that they are statutorily authorized to hold and only in the amount specified by statute. A monthly "salary" may not be paid in lieu of the statutorily specified amounts.

Very truly yours,
CARLA J. STOVALL
ATTORNEY GENERAL FOR KANSAS
Camille Nohe
Assistant Attorney General

CJS:JLM:CN:jm

February 14, 1996

96-9 County employee running for elective office

Laurel D. McClellan
Kingman County Attorney
349 N. Main
P.O. Box 113
Kingman, Kansas 67068

Re:

Counties and County Officers--County Commissioners--Powers of Board of Commissioners; Control Over County Employees; Employees Running for County Office

Synopsis:

A county may adopt a general employee policy requiring that certain non-elected employees of a county take an unpaid leave of absence during the time they are a candidate running for county office. Such a policy can only be imposed upon those employees subject to the personnel policy authority of the board of county commissioners, should be drawn as narrowly as possible and must rationally promote a legitimate government interest. Cited herein: K.S.A. 19-101a; 19-212; 19-302; 19-503; 19-805; 19-1202; 44-714; 75-3925; 5 U.S.C.A., § 1501; U.S. Const., amends. I, V.

* * *

Dear Mr. McClellan:

As Kingman county attorney you request our opinion on the legality of a county employee policy which applies to certain non-elected employees of Kingman county.

The county policy in question states:

"All employees of Kingman county have the right to vote and discuss politics and are encouraged to do so. No non-elected county employees shall be permitted to actively seek election to an elected county office unless that employee takes an unpaid leave of absence from his/her county employment. Such leave of absence shall be required at the time said non-elected employee files for said office or from the time said non-elected employee announces his/her candidacy or openly campaigns for said office. Said employee may be reinstated to his/her original employment only after the completion of the contested election and only upon the consent of the County Commissioners and the department head of the employee's former department. This provision shall not apply to non-elected employees seeking a county office in which no incumbent is seeking election. 'Incumbent' is defined as a person holding an elected county office, whether the office was obtained by election or appointment."

K.S.A. 19-101a and 19-212 allow a county board of commissioners to adopt county policies that do not otherwise violate or conflict with the law. K.S.A. 19-302(c), K.S.A. 19-503(c), K.S.A. 19-805(d), and K.S.A. 19-1202(c) allow the board of county commissioners to adopt general county employee policies applicable to specific county employees. ***See*** Attorney General Opinions No. 93-64; 92-160; 91-98; 89-131; and 81-140. The board of county commissioners' authority over personnel policies and persons employed by county officials does not extend to certain employees. ***See*** Attorney General Opinion No. 93-64. Thus, we assume that the county policy in question applies only to those county employees who are subject to the personnel policy authority vested in the county commission. Moreover, we note that the rehire procedure of the current policy may exceed the personnel policy power of the board if such decisions are ordinarily vested in another elected official.

You inform us that there are presently two county employees who wish to run for an elected office other than the one in which they are now employed. You ask that we address whether the county policy in question violates any constitutional rights, specifically the rights to due process and freedom of speech. We note that the state has a similar restriction on certain of its employees seeking elective office. K.S.A. 75-3925.

Due process of law is guaranteed under the fifth amendment to the United States constitution: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." Constitutional due process rights attach if a governmental action impacts upon a protected right or interest. Kansas courts have held that the essence of due process is protection against arbitrary government action. ***Baker v. List and Clark Construction Co.***, 222 Kan. 127, 134 (1977). The test for whether due process has been afforded is whether the legislation has a real and substantial relation to the objective sought, whether it is reasonable in relation to the subject, and whether it was adopted in the interest of the community. ***State ex rel Stephan v. Smith***, 242 Kan. 336, 362 (1987). However, candidacy is not usually considered a fundamental right that requires departure from traditional principles under which state law classifications need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. ***Clements v. Fashing***, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). Office holding is a political privilege, and the matter of appointment to office is not affected by the fourteenth amendment or other provisions of the federal constitution. ***Leek v. Theis***, 217 Kan. 784 (1975).

"A general guide was furnished by the *Roth* court which characterized the type of property interest encompassed within the due process clause as follows: '. . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' . . . Kansas law clearly establishes the incumbent to a public office enjoys no *property* or *vested interest* in public office. " ***Id.*** at 811.

It follows that if an incumbent possesses no property or vested interest in his or her office, neither would a prospective candidate for the same position. In ***Clements*** the Supreme Court found that the "resign-to-run" provision of the Texas constitution (which required that holders of certain offices automatically resign their positions if they became candidates for any elected office unless the unexpired portion of their current term less than one year) did not violate the United State's constitution and could be upheld. Thus, the government may place some

restrictions upon persons who currently work for the government and wish to run for an elected position, if such restrictions reasonably serve a legitimate governmental interest.

Courts have upheld some fairly severe limitations upon political activity by public employees. ***United States Civil Service Commission v. National Association of Letter Carriers***, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) is a premier case. In this case, federal employees challenged the validity of the Hatch act, 5 U.S.C.A., § 1501 ***et seq***. This act precludes certain federal employees from engaging in specific political behaviors, including running for elective office. The ***Letter Carrier*** court reviewed ***United Public Workers v. Mitchell***, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) and found that federal employees can be prevented from seeking a party office, working at the polls, and acting as party paymaster for other party workers. It is now the rule that Congress may:

"[C]onstitutionally forbid federal employees from engaging in plainly identifiable acts of political management and political campaigning, such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate, or proxy to a political party convention." ***Clements, supra*** at 2885.

Based on the above-cited authorities, we do not believe the county policy in question violates the due process clause.

You also question whether the county policy violates free speech rights. The first amendment to the United States constitution prohibits abridging freedom of speech. An overbroad statute making conduct punishable that is constitutionally protected may be struck down, however, the government may regulate free speech with narrow specificity. ***City of Wichita v. Huges***, 12 Kan.App.2d 621 (1988). In ***Pickering v. Board of Education***, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968), the Court held that the government has an interest in regulating the conduct and "the speech of its employees that differ(s) significantly from those it possesses in connection with regulation of the speech of the citizenry in general." ***See also Rosario v. Rockefeller***, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); ***Dunn v. Blumstein***, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972); ***Bullock v. Carter***, 405 U.S. 134, 140-141, 92 S.Ct. 849, 854-855, 31 L.Ed.2d 92 (1972); ***Jenness v. Fortson***, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971); ***Williams v. Rhodes***, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10-11, 21 L.Ed.2d 24 (1968).

"Not all public employee speech is protected . . . . Only that speech which both lies within the general protection of the first amendment (***e.g***., is not obscene) and is 'upon a matter of public concern' may be entitled to that particular protection . . . . Public employee speech not on matters of 'public concern' simply enjoys no protection against public employer disciplinary action. . . . As to such speech, the state's interest as public employer in managing its personnel and internal operations is sufficiently weighty that the public employee's first amendment rights in the speech

are no greater than would be those of a private employee." ***Berger v. Battaglia***, 779 F.2d 992, 998 (4th Cir.1985), ***cert. denied***, 476 U.S. 1159, 106 S.Ct. 2278, 90 L.Ed.2d 720 (1986).

Thus, governmental employers may place some restrictions upon employees speech. ***See also Waters v. Churchill***, 511 U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994); ***Connick v. Myers***, 461 U.S. at 147, 148, 103 S.Ct. at 1690, 75 L.Ed.2d 708 (1983); ***Rankin v. McPherson***, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); ***Eberhardt v. O'Malley***, 17 F.3d 1023, 1027 (7th Cir.1994).

However, there are limits upon a governmental employer's ability to restrict political activities and speech by their employees. A number of jurisdictions have held as unconstitutionally overbroad provisions which restrict nonpartisan as well as partisan political activity. ***See*** 51 A.L.R. 4th 702, 741 (1987). ***See also Morial v. Judiciary Comm'n of State of Louisiana***, 565 F.2d 295, 303 n. 8 (C.A.5 La.1977), ***cert. denied***, 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed.2d 395 (1978). However, restrictions on nonpartisan political activity of designated public employees may be upheld, provided a significant governmental interest is served by the restrictions. ***See Magill v. Lynch***, 560 F.2d 22 (1st Cir. 1977), ***cert. denied***, 434 U.S. 1063, 98 S.Ct. 1236, 55 L.Ed.2d 763 (1978) (fire fighters of city barred from nonpartisan candidacy for city office; "nonpartisan" elections still had strong partisan overtones, and the prohibition helped to prevent political oppression of public employees and situations in which subordinate city employee runs against employee's supervisor). The fifth circuit court of appeals found that provisions of a municipal charter prohibiting city employees from circulating petitions or soliciting contributions for city council candidates was not rendered unconstitutional in violation of the city employees' first amendment rights merely because the elections were structured as nonpartisan. ***Waschman v. City of Dallas***, 704 F.2d 160 (5th Cir. 1983). Thus, while government employers may legally restrict certain political activities by their employees, such restrictions are more likely to be upheld as constitutional if they apply to partisan races and if the policies are narrowly drawn to address a legitimate interest.

The Kingman county policy in question does not prohibit employees from discussing politics. In fact, it encourages interest in such matters. Rather, the policy requires that county employees who wish to run for a contested county office conduct their political campaigns while in the private sector. This county restriction appears to only apply if an employee chooses to run in a partisan race. Thus we do not believe it unconstitutionally deprives county employees of their free speech rights.

The county resolution in question does not prohibit Kingman county employees from speaking about political matters or running for elective office. Rather, the policy in question requires that such employee candidates take an unpaid leave of absence. The employee may be reinstated when the election is over. The policy is inapplicable if the election in question does not involve an incumbent. Current office holders are not subject to this policy, (perhaps because county board of commissioners' lack of personnel policy authority over the person of another elected county officer). You do not state what purpose the policy in question seeks to promote or what community good is furthered by these restrictions. However, it is not difficult to articulate the possible intent of the county.

We believe this personnel policy may be defensible if it promotes a legitimate public interest in as narrow a manner as possible. The federal Hatch act requires that certain federal employees either refrain from running for elective office or resign from employment. Likewise K.S.A. 75-3925 imposes a similar requirement upon specific Kansas state employees.

Thus, in keeping with case law concerning similar types of restrictions by other governmental employers, it is our opinion that the county policy in question does not violate county employees' due process or free speech rights. A county may adopt a general employee policy that applies to certain non-elected employees of a county and requires that they take an unpaid leave of absence during the time they are a candidate running for county office. Such a policy can only be imposed upon those employees subject to the personnel policy authority of a county board of commissioners, should be as narrowly drawn as possible and must rationally promote a legitimate government interest.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Theresa Marcel Nuckolls
Assistant Attorney General

March 11, 1996

96-22 Regulation of advertising signs

The Honorable Dick Bond
State Senator, 8th District
State Capitol, Room 128-S
Topeka, Kansas 66612

Re:

Roads and Bridges; Miscellaneous--Highway Beautification; Highway Advertising Control Act of 1972--Highway Advertising Control; Sign Standards; Local Zoning

Synopsis:

A city may regulate the size and spacing of signs and billboards located on private property. Such regulation may not conflict with 12 U.S.C. § 131 and K.S.A. 68-2231 ***et seq.***, however, both laws recognize a city's regulatory authority over the erection, maintenance, size, spacing and lighting of signs in commercial and industrial areas. Cited herein: K.S.A. 68-2231; 68-2233; 68-2234; 23 U.S.C. § 131.

* * *

Dear Senator Bond:

You request our opinion concerning whether a city may regulate the size and spacing of commercial advertising signs that are located on private property and, if so, whether such regulations must conform to state and federal laws.

The answer to your first question is in the affirmative. Billboards and other forms of advertising may be regulated by a city under its police power in order to promote aesthetic considerations, traffic safety and the preservation of property values. Such regulation includes the size and shape of signs. ***Linmark Associates, Inc. v. Willingboro***, 431 U.S. 85, 52 L.Ed.2d 155, 97 S.Ct. 1614 (1977); ***Metromedia v. San Diego***, 453 U.S. 490, 69 L.Ed.2d 800, 100 S.Ct. 2882 (1981); ***City Council v. Taxpayers for Vincent***, 466 U.S. 789, 80 L.Ed.2d 772, 104 S.Ct. 2118 (1984); ***National Advertising Co. v. City and County of Denver***, 912 F.2d 405 (10th Cir. 1990); ***Robert Rieke Bldg. Co. v. City of Overland Park***, 232 Kan. 634 (1983).

One limitation on a city's exercise of its police power is that the regulation of the size and spacing of advertising signs must be reasonable and bear a fair relationship to the object sought to be obtained. ***Hearn v. City of Overland Park***, 244 Kan. 638, 645 (1989); ***Robert Rieke Bldg. Co***. 232 Kan. at 641. Whether an exercise of the police power bears a real and substantial relation to the public health, safety, morals or general welfare of the public, and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on the these questions appear to be clearly erroneous, the courts will not invalidate them. ***City of Douglass v. Tri-Co Fertiziler, Inc.***, 214 Kan. 154, 160 (1974).

Your second query concerns whether sign size and spacing regulations must conform to state and federal law. Those laws are found at 23 U.S.C § 131 and K.S.A. 68-2231 ***et seq.*** which address commercial signs that are located within 660 feet of an interstate highway.

The federal law provides for a reduction of federal aid highway funds to any state which has not established "effective control" of outdoor advertising signs within 660 feet of an interstate or primary system highway. Basically, all signs within 660 feet of federal interstate highways and primary highways (***i.e.*** any highway on the national highway system) are limited to official and directional signs, signs advertising property for sale/lease, on-site advertising, landmark signs and signs advertising free coffee. 23 U.S.C. § 131(c). States may impose stricter limitations with respect to signs than federal law requires. 23 U.S.C. § 131(k). Subsection (d) of 23 U.S.C. § 131 allows outdoor advertising signs within 660 feet of interstate and primary highways if the area is zoned commercial or industrial under state laws and the size, lighting and spacing regulations are the subject of an agreement between the state and the federal secretary of transportation. If the agreement permits control by local zoning authorities, those regulations will govern and such regulation may be either more restrictive or less restrictive than the criteria in the agreement unless state law requires equivalent or more restrictive control. 23 C.F.R. § 750.706(c).

In order to avoid the loss of federal funds the Kansas legislature adopted the highway advertising control act (K.S.A. 68-2231 ***et seq.***) which, with certain exceptions, prohibits the erection or maintenance of outdoor commercial advertising signs within 660 feet of interstate or primary highways. ***Roberts Enterprises Inc. v. Secretary of Transportation***, 237 Kan. 276 (1985). One of the exceptions is for signs erected in commercial or industrial areas. K.S.A. 68-2233. Such

signs are subject to statutory size, spacing and lighting requirements. K.S.A. 68-2234. However, subsection (e) of K.S.A. 68-2234 authorizes cities and counties to regulate the erection, maintenance, size, spacing and lighting of signs by adopting standards which may be consistent with, or more or less restrictive than state law.

The short answer to your question is that city regulation of outdoor commercial advertising within 660 feet of a federal or primary system highway may not conflict with 12 U.S.C. § 131 and K.S.A. 68-2231 et seq. However, both the federal and state law recognize a city's authority to regulate in commercial and industrial areas. In fact, several courts have concluded that neither 12 U.S.C. § 131 or state statutes regulating outdoor commercial advertising preempt cities from regulating outdoor advertising because of the deference paid to local governmental entities. ***Ackerley Communications v. City of Seattle***, 602 P.2d 1177 (Wash. 1979); ***Fort Collins v. Root Outdoor Advertising***, 788 P.2d 149 (Co. 1990); ***In re Columbus Outdoor Advertising Co.,*** 367 N.E.2d 920 (Ohio 1977); ***Scadron v. City of Des Plaines***, 606 N.E.2d 1154 (Ill. 1994); ***Lamar-Olando, Etc. v. City of Ormond Beach***, 415 So.2d 1313 (Fl. App. 1982); T ***and S Signs Inc. v. Village of Wadsworth***, 634 N.E.2d 306 (Ill. App. 1994); **Sign Supplies of Texas v. McConn**, 517 F.Supp. 778 (Tx. 1980).

There may circumstances where a city sign regulation may conflict with either the federal or the state statute and if a court determines that such conflict exists, the city ordinance will fail. However, given the great deference paid by both the federal and state government to a city's regulatory authority over the erection, maintenance, size, spacing and lighting of signs in commercial and industrial areas, it may difficult to establish such a conflict.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Mary Feighny
Assistant Attorney General

October 16, 1996

96-80 Soil Erosion

Mr. Wilmer Freund, Chairman
Board of Supervisors
Sedgwick County Conservation District
9505 West Central Suite 103
Wichita, Kansas 67212

Re:

Agriculture--Soil Erosion Caused by Wind--Duty of Landowner--Duties of County Commissioners

Synopsis:

The prevention of soil erosion caused by wind is governed primarily by K.S.A. 2-2001 ***et seq.*** which places the duty to prevent erosion on the landowner and the duty to enforce the statutes, on public and private land, on the board of county commissioners in each county. The authority to prevent soil erosion is also provided to conservation districts created pursuant to K.S.A. 2-1901 ***et seq.***; however, that authority extends only over public lands as it affects the land use practices under their jurisdiction. A conservation district does not have the authority to prevent soil erosion on private land without the landowner's consent. Cited herein: K.S.A. 2-1901; 2-1902; K.S.A. 1995 Supp. 2-1907; K.S.A. 2-1908; 2-1914; 2-2001; 2-2002; 2-2003; 2-2004; 2-2005; 2-2006; 2-2007; 2-2008; 32-807; 32-827; 76-425d; 82a-928.

* * *

Dear Mr. Freund:

As chairman of the board of supervisors of the Sedgwick county conservation district you inquire about the law pertaining to the prevention of soil loss through wind erosion. You indicate that your questions are directed at determining what legislative changes will better effect the prevention of soil erosion by wind.

Your first question is inquiring about remedies available under current law. The prevention of soil erosion caused by wind is governed primarily by K.S.A. 2-2001 ***et seq.*** The remedies available under current law depend on the circumstances. The act places various duties on different entities and individuals. A landowner has a duty to prevent soil erosion by planting grasses, trees, shrubs and by cultivating the soil. K.S.A. 2-2002. The department of agriculture is responsible for collecting information about soil erosion and disseminating the information regarding the practical methods of preventing or minimizing it in different parts of the state by planting or cultivating the soil. K.S.A. 2-2003.

The board of county commissioners of each county is authorized to enforce, prevent and redress actions in regard to soil erosion. In short, the county has a ***remedy over*** the landowner whose action or failure to act results in the damage. The county commissioners are authorized and directed to inspect land upon being advised that the land is eroding and, if anything can be done, may order when and what work is to be done to prevent the erosion after conferring with the landowner. In this instance the board may order the land be "disced [sic], listed, chiseled, cultivated, chopped or worked" or may order some other remedy approved by the board. However before ordering the work to be done, the county commissioners must give the landowner the opportunity to do the work they have concluded is necessary. K.S.A. 2-2004. In the event it is impracticable to contact the owner, K.S.A. 2-2004 authorizes the county to issue county warrants to pay the actual costs from a "soil drifting fund" authorized to be established by K.S.A. 2-2007.

Another remedy available in terms of prevention involves the compilation of a survey of lands. The act requires the county commissioners in each county to make or cause to be made a survey which shows what lands were blowing, the climatic conditions, what was done to prevent the problem and what result was produced by the action taken. The survey must be filed with the

county clerk and a copy sent to the department of agriculture who must compile and publish a summary of such reports by December 1, of each year and distribute the same to the county officials, members of the legislature, the governor, and upon request to the owners of the land reported to have been affected. K.S.A. 2-2005.

In the event that the report discloses certain land in the county to be a repeated problem, the board of county commissioners has the duty to conduct a hearing, after notice to the landowner, to determine a permanent treatment of the land to prevent its blowing. The commissioners may order the work to be done if the landowner has not complied with the orders resulting from the hearing. K.S.A. 2-2006. When the work on the land has been done by the county it may, by order, levy a special assessment against the land if after notice the landowner is unable to show why the land should not be assessed. The levy may not exceed $3 per acre for each acre on which work is done for any one year, unless the county commissioners determine that this amount is not adequate to cover the cost of the work. The amount of the assessment may be collected in installments not exceeding $3 or an amount fixed by the board. The county may, for good cause shown, share the costs with the landowner and credit the money collected to the soil drifting fund. The landowner, if aggrieved at the amount of the assessment, may bring an action in the district court of the county in which the land is located within 30 days after the assessment is made to either challenge the validity of the assessment or to enjoin its collection. K.S.A. 2-2008.

Your second question is which governmental entity is responsible for discovering and reporting wind erosion violations. Although the board of county commissioners in accordance with K.S.A. 2-2004 does not have the affirmative duty to discover wind erosion violators, they do have a duty to take action upon knowing or being advised that "dust, any plant or weed is blowing from any particular land." Additionally, as discussed earlier in reference to your first question, the county commissioners have a duty to report wind erosion as part of the survey required by K.S.A. 2-2005.

Your third question is which governmental entity is empowered to enforce compliance. The board of county commissioners is charged with enforcing compliance by any of the methods available pursuant to K.S.A. 2-2004, 2-2006, and 2-2008.

Your fourth question is whether we know of any specific instances of enforcement. The board of county commissioners for each county in the state has jurisdiction in the matter and may file a report with the county clerk reflecting lands which have been subject to soil erosion prevention and whether the action taken was effective. Additionally, hearings conducted pursuant to K.S.A. 2-2006 as well as district court proceedings under K.S.A. 2-2008 are a matter of public record.

There are other statutes which address soil erosion generally. ***See*** K.S.A. 32-807, 32-827 (wildlife and parks); 76-425d (erosion on forest lands) and 82a- 928 (the federal reserve program). More specific to the context of your questions is the conservation districts law found at K.S.A. 2-1901 ***et seq.*** addressing the prevention of soil erosion by wind as it affects the land use practices under the jurisdiction of conservation districts, K.S.A. 2-1902; 2-1908. Unlike the act discussed above, however, a conservation district may not take action to prevent soil erosion on an individual's land without the landowner's consent. Publicly owned land, such as county-

owned land within a conservation district's boundaries, is subject to soil conservation practices within the jurisdiction of a conservation district. K.S.A. 2-1914, K.S.A. 1995 Supp. 2-1907.

I trust this explanation of the act concerned specifically with soil erosion caused by wind and how it differs from the authority provided to conservation districts is helpful in determining what legislative change needs to be addressed in order to more effectively prevent the erosion of a precious natural resource in the state.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Guen Easley
Assistant Attorney General

January 2, 1997

97-3 Dissolution of a city of the first class

The Honorable Richard J. Edlund
State Representative, 33rd District
6734 Montana Court
Kansas City, Kansas 66111

Re: Constitution of the State of Kansas--Corporations--Cities' Home Rule Powers; Ability of Electors to Dissolve as a Corporate Body a City of the First Class

Synopsis: In the absence of statutory authority, the residents of a city of the first class have no authority to dissolve as a corporate body that city. Cited herein: K.S.A. 15-111; Kan. Const., art. 12, § 5.

* * *

Dear Representative Edlund:

You request our opinion whether a city of the first class can be dissolved as a corporate body by its residents and, if so, the procedure necessary to accomplish it.

Article 12, section 5 of the Kansas constitution states, in part, as follows:

"The legislature shall provide by general law, applicable to all cities, for the incorporation of cities and ***methods by which*** city boundaries may be altered, cities may be merged or consolidated and ***cities may be dissolved***. . . ." (Emphasis added.)

The only statute which addresses the subject of dissolving a city as a corporate body is K.S.A. 15-111 which provides that electors in a city of the third class may petition the city council to order an election to determine whether the city shall be dissolved as a corporate body and

become part of the township in which the city is located. There are no similar statutes which apply to cities of the first or second class. [***See State, ex rel. Kreamer v. City of Overland Park***, 192 Kan. 654, 656 (1964) and ***State, ex rel. Fatzer v. City of Kansas City, Kansas***, 169 Kan. 702, 720 (1950) which conclude that the legislature has absolute authority to create or disorganize municipal corporations.]

Consequently, it is our opinion that, in the absence of statutory authority, the residents of a city of the first class have no authority to dissolve as a corporate body that city.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Mary Feighny
Assistant Attorney General CJS:JLM:MF:jm

February 5, 1997

97-15 Approval of claims by county attorney

Steven L. Opat
Geary County Counselor
P.O. Box 168
Junction City, Kansas 66441-0168

Re:

Counties and County Officers--County Commissioners; Powers and Duties-- Allowance of Claims Monthly

Counties and County Officers--County Attorney--Claims and Accounts; Duties of County Attorney or Assistant or County Counselor in Certain Counties

Synopsis:

K.S.A. 19-716 requires the county counselor in certain counties, including Geary County, to individually examine and ascertain the correctness of each bill and account presented to the county for payment. The board of county commissioners in such counties is not statutorily required to individually review each bill and account presented for payment to the county, but is required by K.S.A. 19-208 to allow claims on a monthly basis at a meeting of such board of county commissioners. Cited herein: K.S.A. 19-208; 19-716; L. 1984, ch. 99, § 2; L. 1972, ch. 74, § 1.

* * *

Dear Mr. Opat:

On behalf of the Geary County Board of County Commissioners, you request our opinion regarding the legally required procedure that a county must follow when authorizing payment of bills and claims. Specifically, you inquire as to whether K.S.A. 19-208 requires individual review of each claim or bill by a board of county commissioners and by a county counselor before approval of payment.

There is no Kansas case law concerning your questions, however two Kansas statutes address this issue. K.S.A. 19-208, which applies to all counties with more than 8,000 inhabitants, states:

"It shall be the duty of said board of county commissioners to allow monthly, at the meetings of the board of county commissioners, as fixed in K.S.A. 19-206, any and all claims against the county, as is provided by law, including claims for salaries of all county officers."

The other statute concerning allowance of claims by certain counties is K.S.A. 19-716 which provides:

"(a) The county attorney or assistant county attorney of each county of the state which does not have a county auditor and which has a population of less than 70,000 shall meet with the board of county commissioners of such county at each session when bills and accounts are presented for allowance, examine such bills and accounts, ascertain, as far as possible, the correctness of such accounts and give an opinion to the board of county commissioners as to the liability of the county for them. No bill shall be allowed by the board of county commissioners until the county attorney has passed upon it.

"(b) If there is a county counselor of a county which is subject to this section, the county counselor shall perform the duties imposed on the county attorney by this section."

Your question of whether a county counselor is required to individually review each claim or bill is addressed in the duties of a county counselor under K.S.A. 19-716. It is our opinion that in order to meet the procedural requirements of K.S.A. 19-716, a county counselor must individually examine and ascertain the correctness of each bill and account presented to the county before giving an opinion to the board of county commissioners regarding liability for payment.

The next issue is whether a board of county commissioners is required to individually review each bill or claim before approval of payment. Neither K.S.A. 19-716 nor K.S.A. 19-208 expressly requires a board of county commissioners to individually review each claim or bill presented to the county for payment.

The county counselor is required to meet with the board of county commissioners "when bills and accounts are presented for allowance." K.S.A. 19-716. However, the statute does not require a county counselor to individually examine each bill and account with the board of county commissioners. Prior to amendment of K.S.A. 19-716 in 1984, the county counselor was required to:

"[M]eet with the board of county commissioners of such county at each session when bills and accounts are presented for allowance and, examine such bills and accounts and, ascertain, as far as possible, the correctness of such accounts. . . ." See L. 1972, ch. 74, § 1. (Emphasis added.)

The 1984 amendment deleted the word "and" between the requirement to meet with the board and to examine the bills and accounts. See L.1984, ch. 99, § 2. The deletion of the word "and" is construed to mean that examination and ascertainment of correctness are not required to be performed by the county counselor with the board of county commissioners. It is our opinion that K.S.A. 19-716 does not require the involvement of the board of county commissioners when the county counselor examines each bill and ascertains its correctness, nor does K.S.A. 19-208 require a board of county commissioners to individually review each bill or claim. The two requirements of K.S.A. 19-208 are that the commissioners allow claims monthly, and that they do so at a commission meeting. Although it is our opinion that a board of county commissioners is not statutorily required to individually review each bill or claim presented for payment to the county, our opinion in no way implies that a board of county commissioners is prevented from doing so. It is the board's discretion to determine its procedure for reviewing bills and claims presented to the county as long as such is done monthly at a commission meeting.

In summary, it is our opinion that a county counselor is required under K.S.A. 19-716 to individually examine and ascertain the correctness of each bill or claim presented to the county for payment. It is also our opinion that a board of county commissioners is not statutorily required to individually examine or review each bill or claim presented for payment to the county, but is required under K.S.A. 19-208 to allow claims on a monthly basis at a meeting of such board of commissioners.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Donna M. Voth
Assistant Attorney General

March 17, 1997

97-25 County and Township road signs-local authority

Keith W. Sprouse
Marshall County Counselor
1201 Broadway Street
Post Office Drawer No. 69
Marysville, Kansas 66508

Re:

Roads and Bridges; Roads--County and Township Roads--General Provisions

Automobiles and Other Vehicles--Uniform Act Regulating Traffic; Powers of State and Local Authorities--Erection and Maintenance of Stop Signs, Yield Signs and Traffic-Control Devices

State Departments; Public Officers and Employees--Kansas Tort Claims Act--Liability of Governmental Entities; Exception from Liability; Placement of Road Signs

Synopsis:

A county is a "local authority" within the context of the Uniform Act Regulating Traffic and therefore has the responsibility to erect and maintain traffic control signs within its jurisdiction in accordance with the manual and specifications adopted by the Secretary of Transportation. A township does not fall within the definition of "local authority" and therefore has no authority to erect or maintain traffic control signs. Whether there is a duty to place signs and whether the decision to place signs is an exercise of discretion excepted from liability under the Kansas Tort Claims Act are questions of fact for the court to determine based on the totality of the circumstances. Cited herein: K.S.A. 8-1401; 8-1432; 8-2003; 8-2005; 68-526; 75-6101; K.S.A. 1996 Supp. 75-6104.

* * *

Dear Mr. Sprouse:

As Marshall County Counselor you request our opinion on the following questions:

I. Does the Board of County Commissioners have authority to erect stop signs and intersection ahead signs at the intersection of two township roads, when the Township Board has refused to erect and maintain the signs?

II. In the event the Board of County Commissioners has the authority and proceeds to install the aforementioned traffic control signs, who has the responsibility of maintaining the signs?

III. If the intersection in question is not signed what if any liability does the county incur in the event a motorist or pedestrian sustains personal injury and/or property damage as the result of a collision at the intersection?

Your first and second questions concern the authority and responsibility of the county for signing and will be addressed together. We initially review the applicable statutes from the Uniform Act Regulating Traffic, K.S.A. 8-1401 *et seq.*

K.S.A. 8-2003 provides for uniformity in the placement of highway signs:

"The secretary of transportation shall adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of this act for use upon highways within this state. . . ."

K. S.A. 8-2005 addresses the responsibility of local authorities in placing and maintaining signs:

"(a) Local authorities in their respective jurisdictions shall place and maintain such traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this act or local traffic ordinances or to regulate, warn or guide traffic. All such traffic-control devices hereinafter erected shall conform to the state manual and specifications."

K.S.A. 8-1432 defines local authorities as "the Kansas turnpike authority and every city, county and other local board or body having authority to adopt ordinances or regulations relating to vehicular traffic under the constitution and laws of this state." These statutes give local authorities the power and responsibility to place and maintain traffic control devices as long as that placement conforms to the manual and specifications adopted by the Secretary of Transportation.

On two occasions this office has opined that a township is not a "local authority" for purposes of the Uniform Act Regulating Traffic. *See* Attorney General Opinions No. 90-126 and 81-197. While it is still our belief that the decision reached in those opinions is a correct construction of the applicable statutes, we must point out that the Kansas Supreme Court has opined that townships may have the responsibility for posting warning signs on township roads. In ***Finkbiner v. Clay County***, 238 Kan. 856 (1986), an injured driver brought suit against both the

township and the county for failure to post signs warning of the dead end of a township road. In determining who had the duty to post warning signs on the township road the Court did not mention the definition of "local authority" set out in the Uniform Act Regulating Traffic. The township also failed to raise that issue. The Court concluded:

"Since all parties agree that the Township alone was responsible for the township road, the County cannot be liable for failure to place signs warning of a dead end on the township road. A township, having the exclusive care and control of a street or road, has a duty to maintain that road or street for the safe passage of persons and property. Other governmental entities cannot be held liable for failure to maintain that road safely. [Citation omitted]. Therefore, it is a question only as to the Township whether, under the totality of the circumstances, it should have placed a warning sign." 238 Kan. at 861.

The above conclusions appear to be predicated on K.S.A. 68-526 which gives a township board "the general charge and supervision of all township roads." The Court does not make a distinction between the responsibility for maintaining roads and the responsibility for posting and maintaining signs. *See also* ***Collins v. Douglas County***, 249 Kan. 712 (1991) (township had no duty to post warning signs at a bridge on a township road because the responsibility for bridge maintenance is statutorily imposed on the county). The potential conflict between statutory requirements for placing and maintaining signs and concepts of liability as developed in light of the Kansas Tort Claims Act has not been addressed by the Kansas Courts. It is impossible for us to predict how the Court might resolve this conflict, however our opinion that a township may not lawfully erect a traffic control device remains as expressed in our prior opinions. Therefore in response to your first two questions, it is our opinion that the county has the authority to erect and maintain traffic control signs at the intersection of two township roads and that the township does not have the authority to erect or maintain those signs.

Your final question concerns what liability the County might incur if the township roads in question are not signed. Governmental liability is governed by the Kansas Tort Claims Act (KTCA), K.S.A. 75-6101 *et seq.* The KTCA provides exemptions from liability for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee" and for "the act or omission of any governmental entity in placing or removing any . . . signs, signals or warning devices when such placement or removal is the result of a discretionary act of the governmental entity." K.S.A. 1996 Supp. 75-6104.

The construction of statutes and their application to a given situation are matters of law for judicial determination. ***State v. Schlein***, 253 Kan. 305 (1993) citing ***Brookover Feed Yards, Inc. v. Carlton, Commissioner***, 213 Kan. 684 (1974). As such we turn to the Kansas Courts for guidance as to whether the discretionary exemptions apply in the situation you present. In ***Carpenter v. Johnson***, 231 Kan. 783 (1982), the Kansas Supreme Court reversed the trial court's finding that the signing exception to the KTCA constituted an absolute bar as a matter of law for any action for failure to place a traffic sign. The Court concluded:

"Whether or not the placement of a warning sign on the particular curve in controversy herein was discretionary or mandatory depends upon the totality of the circumstances involved and may not be determined as a matter of law with regard thereto." 231 Kan. at 789.

In ***Toumberlin v. Haas***, 236 Kan. 138 (1984), the Court reaffirmed their decision in ***Carpenter*** and further elaborated on the application of the KTCA to an action against a county for failure to place traffic signs as follows:

"[A] duty to maintain the highways remains under the general liability for negligence created by the KTCA. Although the scope of that duty is to be determined on a case-by-case basis and no hard and fast rule can be stated which would cover all possible future factual situations, ***Carpenter*** makes it clear that the Manual on Uniform Traffic Control Devices is to be used as a guide for state and local highway engineers in exercising their professional judgment as to any particular highway problem. However, whether a particular set of facts falls within any of the exceptions created by K.S.A. 1983 Supp. 75-6104 must be determined by considering 'the totality of the circumstances' in the particular case." 236 Kan. at 144.

In ***Toumberlin*** the plaintiffs presented no evidence that signs were required by the Manual on Uniform Traffic Control Devices (MUTCD), and the county engineer testified that in his judgment no signs were justified. The Court decided that under those circumstances, the placement of the signs in question was discretionary and upheld summary judgment for the county. You state in your letter that the Marshall County Engineer, after conducting a traffic study of the intersection in question and considering the criteria in the MUTCD, concluded that certain signs should be installed. In ***Finkbiner***, 238 Kan. 856 (1986), the Court reaffirmed that "[w]hether or not the placement of a warning sign is discretionary or an exercise of professional judgment within established guidelines depends upon the totality of the circumstances involved and may not be determined as a matter of law. . . . This is a question of fact which must be determined by a jury." 238 Kan. at 860-861.

The most recent Kansas Supreme Court case involving the duty to place signs on a township road is ***Collins***, 249 Kan. 712, wherein the Court found no duty to place a warning sign because the kind of sign which the plaintiffs alleged was necessary was not covered by the MUTCD and there were no other guidelines to aid the county engineer in determining whether to place a warning sign at the accident site. The Kansas Court of Appeals in ***Force v. City of Lawrence, Kan.***, 7 Kan.App.2d 90 (1992), considered whether a city was negligent in not installing a protected left turn signal. The Court concluded that the action was barred by the discretionary function exception in the KTCA because the discretion of the city to install or not install such a device was not preempted by any mandatory requirements imposed by the Federal Highway Administration or the Kansas Department of Transportation. The Court stated:

"Discretion in the erection of traffic-control devices exists but under certain specified conditions may be preempted by the MUTCD. If the conditions specified by the MUTCD as warranting the placement of a traffic-control device are satisfied, then the placement of the device is a matter of professional judgment; no discretion is involved." 7 Kan.App.2d at 99.

Whether there is a duty to place signs at the intersection in question and whether the professional judgment of the Marshall County Engineer in this instance falls within the exercise of discretion which is excepted from liability under the KTCA are questions of fact to be determined based on the totality of the circumstances. Therefore, it is impossible for us to reach an opinion on whether Marshall County would incur liability as a result of an accident at the intersection in question if the County does not erect signs as recommended by the Marshall County Engineer. The discussion of cases herein is provided to aid the county in assessing its potential liability.

In summary, a county is a "local authority" within the context of the Uniform Act Regulating Traffic and therefore has the responsibility to erect and maintain traffic signs within its jurisdiction in accordance with the manual and specifications adopted by the Secretary of Transportation. A township does not fall within the definition of "local authority" and therefore has no authority to erect or maintain traffic control signs. Whether there is a duty to place signs and whether the decision to place signs is an exercise of discretion excepted from liability under the Kansas Tort Claims Act are questions of fact for the court to determine based on the totality of the circumstances.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Donna M. Voth
Assistant Attorney General

May 6, 1997

97-45 Navigable waters ownership of stream

Al LeDoux, Director
Kansas Water Office
109 SW Ninth, Suite 300
Topeka, Kansas 66612-1249

Re:

Waters and Watercourses--Navigable Waters--Acquisition by State of New Channel where Stream Altered

Synopsis:

The State's ownership interest in the bed and banks of a navigable river changes as the river gradually moves over time, and thus the State's ownership interest is not fixed. Although many agencies have authority to regulate certain activities that take place within the bed and banks of navigable rivers, there is no entity with authority to exercise any ownership interest, such as providing an easement, other than the State of Kansas which exercises ownership interests through legislative action. Cited herein:

K.S.A. 24-454; K.S.A. 1996 Supp. 70a-102; 70a-105; K.S.A. 70a-106;. 82a-201; 82a-209; 82a-212; 82a-215; K.S.A. 1996 Supp. 82a-217; K.S.A. 82a-307, 82a-307a; 82a-308; K.S.A. 1996 Supp. 82a-309; K.S.A. 82a-311; 82a-325; 82a-327; 82a-405; 82a-410; 82a 518; 82a-529; 82a-701; 82a-901a; 82a-1101; 82a-1201; 16 U.S.C. § 661; 33 U.S.C. § 1344; 44 U.S.C. § 4321; 33 C.F.R. § § 320, 323; 40 C.F.R. § § 230, 231.

* * *

Dear Mr. LeDoux:

You inquire what constitutes state and private ownership along the State's navigable waterways. In addition to this inquiry, you indicate that the Kansas Water Office, as the state's water planning agency, is charged with formulating a state water plan which includes determining access and user rights and responsibility for maintenance and damage to a stream bed, K.S.A. 82a-901a *et seq.*, and as there are several agencies with related statutory duties, you believe a summary of their duties would be helpful to you.

The title to the bed of a navigable river is vested in the State. K.S.A. 70a-106. *See* Attorney General Opinions No. 82-240; 88-35; 89-5. Private ownership in bordering land extends to the river's margin, but if the stream changes through the gradual process of accretion and erosion, the boundary between the land belonging to the state and that of other proprietors follows the movement of the river's boundary. ***Kaw Drainage District v. Attwood***, 229 Kan. 594 (1981); ***State v. Akers***, 92 Kan. 169 (1914); ***Dana v. Hurst***, 86 Kan. 1947 (1912). Thus, when the previously submerged land becomes uncovered by the imperceptible deposit of alluvium or silt on one bank and erosion of the other bank (a process known as accretion) the riparian owner of the accreted side is the beneficiary of title to the surfaced land. ***Murray v. State***, 226 Kan. 26, 33 (1979) citing ***Green v. Ector***, 187 Kan.240 (1960); ***Schaake v. McGrew***, *et al.*, 211 Kan. 842 (1973); ***Rieke v. Olander***, 207 Kan. 510 (1971). If, however, the change in the boundary of a navigable stream is accomplished by means of a sudden eruption of water and a new channel is cut, the State retains ownership of the abandoned riverbed until the land is disposed of by the State. *See* K.S.A. 82a-201 *et seq.* (requiring the Secretary of State to procure for the State fee title to the new channel). The State must acquire title to the new channel by purchase or condemnation; and the riparian owners of the old channel are unaffected by the avulsive change. It is critical to note at this point that whether a river changes boundaries by avulsion or accretion is a question of fact. ***Murray***, 226 Kan at 35. The doctrine of accretion is not only applicable to riparian land owned by the State but also to its political subdivisions, including riparian land owned in fee simple by a drainage district, K.S.A. 24-454 notwithstanding. *See* ***Kaw Drainage District***, 229 Kan. at 598 (where the Court construed K.S.A. 24-453 as vesting the power to *control* the beds, channels, and banks in drainage districts because the statute is a codification of the common law doctrine of avulsion referring to land being abandoned and no longer used as a channel).

In conclusion it is our opinion that what constitutes a state and private ownership interest in the bed and banks of a navigable river changes as the river gradually moves over time, and thus the ownership interests are not fixed.

In regard to your formulation of a water plan, there are several agencies charged with statutory responsibilities involving navigable waterways or streams. On point, K.S.A. 82a-201 *et seq.* authorize the Secretary of State to settle title to abandoned channels of navigable streams when the channel of a stream has been changed by avulsion or flood. The act authorizes the Secretary of State to obtain title to new channels by purchase or condemnation and to dispose of the abandoned channel by sale, conveyance, grant or patent. K.S.A. 82a-209. Various statutes in this act also direct the Secretary of State to grant specific easements, K.S.A. 82a-212 through 82a-215, and to convey by quitclaim deed the title of an abandoned channel to a city, K.S.A. 1996 Supp. 82a- 217. *See also* 1997 Senate Bill No. 275 (grant of easement to Finney County for stream crossing on Arkansas River, enrolled and presented to the Governor, 1997 Senate Journal 348).

Pursuant to K.S.A. 82a-301 through 82a-314, the Division of Water Resources, Kansas Department of Agriculture regulates the construction of dams, the placement of stream obstructions, and changes in course, current or cross section of the river channel. Typical activities regulated involve construction of dams, bridges, low-water crossings, and sand dredging activities. The Division's regulatory powers are intended to protect the public safety.

K.S.A. 82a-307, 82a-307a, and 82a-308 authorize counties to clean and maintain the banks and channels of streams within definitely established banklines. However, prior to engaging in such cleaning, the board of county commissioners must submit information concerning the proposed banklines in order to obtain the approval of the chief engineer of the Division of Water Resources. K.S.A. 1996 Supp. 82a-309 through K.S.A. 82a-311 impose a royalty fee (paid to the Director of Taxation) on the extraction of sand products from the beds of navigable rivers. *See also* K.S.A. 1996 Supp. 70a-102 and 70a-105 (taking material from any river owned by the State). Water development projects are controlled by K.S.A. 82a-325 through 82a-327 which require that the environmental effect of any water development project be considered before a project is permitted. K.S.A. 82a-405 through 82a-410 govern the construction of dams across a dry watercourse or any stream or watercourse by a landowner under certain conditions and allows an exemption from taxes if the landowner maintains the dam in a condition satisfactory to the chief engineer.

Water compacts are governed by K.S.A. 82a 518 through 82a-529. The State of Kansas is a party to the Arkansas River Compact, K.S.A. 82a-520; the Arkansas River Basin Compact, Kansas-Oklahoma, K.S.A 82a-528; and the Kansas Big Blue River Compact, K.S.A. 82a-529. Administered by the Division of Water Resources is the Water Appropriation Act found at K.S.A. 82a-701 *et seq.* under which persons may lawfully divert and use water. Bank stabilization projects, K.S.A 82a-1101 *et seq.*, and pump sites and headgates which withdraw the surface flows of a river, and wells which withdraw water from the alluvium of a river, K.S.A. 82a-1201 *et seq.*, require the approval of the Division of Water Resources. Also requiring the Division's approval are the construction of levees and floodplain fills along streams in the State. K.S.A. 24-126.

More generally, the waters and wetlands throughout the United States are protected under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. A permit is required before one may discharge dredged or fill materials into waters of the United States, Section 404 (e) (1). The

permits are issued on a state, regional or national basis after a determination by the United States Army Corps of Engineers that the activities are similar in nature and capable of causing or already having only a minimal adverse effect on the environment. A permit may be issued if it will avoid unnecessary duplication of regulatory control exercised by another federal, state or local agency and if the circumstances meet the criteria. 33 C.F.R. § 323.2(n)

Where the Corps of Engineers determines the activity will have a significant adverse impact on the human environment, the Corps prepare an Environmental Impact Statement ("EIS") (44 U.S.C. § 4321 *et seq.*) and consult with federal and state wildlife agencies. 16 U.S.C. § 661 *et seq.* The Environmental Protection Agency administrator has veto power over a § 404 permit issued by the Corps of Engineers where it is determined that the discharge will have an unacceptable adverse effect on municipal water supplies, shell fish beds and fishery areas, or wildlife and recreational areas (40 C.F.R. § 231). The guidelines for the Corps of Engineers review are set forth in 40 C.F.R. § 230 and may include consideration of "the economic impact of the site on navigation and anchorage. " § 404(b); 33 C.F.R. § 320.3(f).

In conclusion, while the Division of Water Resources and several other administrative agencies have the jurisdiction and authority to regulate certain activities that take place within the bed and banks of navigable rivers, such as construction of dams, levees, roads, bridges, pumpsites and wells, none of the agencies may exercise any ownership interest in the bed and banks of navigable rivers. Ownership is vested in the State of Kansas and exercised by legislative action. Additionally, the State's interest in the bed and banks of navigable rivers is not fixed but changes as the river gradually moves.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Guen Villarreal Easley
Assistant Attorney General

June 18, 1997

97-53 Sale or disposition of county property

Stan W. Morgan
Myers, Pottroff & Ball
P. O. Box 489
Manhattan, Kansas 66505-0489

Re:

Counties and County Officers--County Commissioners--Powers and Duties; Sale or Disposition of County Property; Public Notice; Election, When

Synopsis:

Riley County should follow the current provisions of K.S.A. 19-211 to sell county property including that authorized for sale by voters in 1984. Pursuant to this statute, a board of county commissioners may exercise its discretion in determining the manner of sale of county property as long as the property is sold publicly to the highest and best bidder as determined by the county. The board should exercise its discretion in determining the specificity of the sale terms and conditions to be included in the notice of sale. K.S.A. 19-211 does not require that the terms and conditions of sale be included on the ballot question. The 1984 notice of special question election in Riley County does not restrict the choice of sale terms allowed by the current provisions of K.S.A. 19-211. Cited herein: K.S.A. 19-211; K.S.A. 1996 Supp. 77-201; L. 1989, Ch. 82, §§ 1, 3; L. 1993, Ch. 198, § 1.

* * *

Dear Mr. Morgan:

As Riley County Counselor you request our opinion regarding the sale of county-owned property. You state that in 1984 the voters of Riley County approved the sale of certain property. The county now wishes to sell that property (Tract A) along with an adjoining tract of land (Tract B). Each tract exceeds $100,000 in value. Because the provisions of K.S.A. 19-211 which govern the sale of county property have changed since 1984, you specifically ask:

1. Is the approval given by the voters in 1984 for the sale of Tract A still valid or will there need to be a new election?
2. Will the current provisions of K.S.A. 19-211 regarding notice of sale and sale procedures apply to both tracts?
3. Does the phrase "in the manner deemed most prudent by the board of commissioners" in K.S.A. 19-211 allow the county to sell both tracts by either public auction or sealed bids?
4. How specifically must the terms of sale be set forth in the notice of sale, or on the ballot if an election is required?
5. Does the notice of election concerning Tract A published on July 1, 1984, restrict the sale terms for Tract A?

K.S.A. 19-211 sets forth procedural requirements for the sale of county property. Prior to April 1989, that statute required that a board of county commissioners submit the question of whether to sell any county property valued over $100,000 to a vote of the electors of the county. The property could only be sold if a majority of the votes cast at that election authorized the sale. You inform us that the voters of Riley County approved the sale of Tract A in 1984, however that tract was never sold by the Board of County Commissioners. In 1989, K.S.A. 19-211 was amended to eliminate the requirement of voter approval unless a protest petition signed by not less than 2% of the qualified electors of the county is filed with the county election officer, and to require a unanimous vote of the county commissioners. L. 1989, Ch. 82, § 1. You enclose a copy of the notice of special question election published in the *Manhattan Mercury* on July 1, 1984, and a copy of the special question ballot from August 7, 1984.

Your first two questions concern whether the approval given by the voters in 1984 for the sale of Tract A is still valid, and whether the current provisions of K.S.A. 19-211 regarding notice of sale and sale procedures apply to both tracts. Our research failed to disclose any Kansas cases or

other legal authority directly on point, however the Kansas Supreme Court in ***State, ex rel., v. Crawford County Commissioners***, 160 Kan. 101 (1945), considered the issue of which statute authorized the board of county commissioners to sell real estate acquired under a judicial tax foreclosure sale. The foreclosure sale was completed by Crawford County in 1942 with the property being deeded to the County. The foreclosure statute in effect at that time authorized the County to sell the property at a reduced price if it remained unsold after six months following the tax foreclosure sale. In 1945, the statute was amended to require that such sale be advertised and made to the lowest bidder. A month after the amended statute took effect, the Crawford County Commissioners decided to sell the property acquired through the 1942 foreclosure action. Prior to the sale being advertised, the plaintiff made a written offer to buy the property. The Board of County Commissioners refused the offer. The plaintiff then filed this mandamus action to compel the sale. The plaintiff argued that because the tax foreclosure took place in 1942, the property should be sold pursuant to the statute then in effect notwithstanding the amendments made in 1945. The Court rejected that argument stating:

"This position cannot be sustained for two reasons: G.S. 1941 Supp. 79-2804f was repealed by House bill No. 340, effective April 1, 1945, and was not in force in May, 1945, when the county reduced its price and Mr. Simion offered to buy. Second, the authority of the county to sell the property in question is a statutory authority. (Citations omitted.) The county has no vested interest in the manner of disposing of the property which the legislature could not change. In May, 1945, House bill No. 340 was in full force and effect and section 7 of that act provided the only method by which the county could sell the property in question. It is stipulated there had been no advertising of the property, as required by that section. Mandamus will not lie to require the board of county commissioners to do something which they are not authorized to do under the law." ***State ex rel., v. Crawford County Commissioners***, 160 Kan. at 103.

We believe this case is applicable to the facts you present. Although the voters of Riley County approved the sale of Tract A in 1984, the County never exercised the authority granted and the property was never sold. The statute under which that election was held was repealed in 1989 without any grandfather provision or exception for counties who had conducted an election under the prior statute. L. 1989, Ch. 82, § 2. The Legislature determined that K.S.A. 19-211, as amended in 1989, should take effect and be in force from and after its publication in the *Kansas Register* on April 20, 1989, and that the amended statute should apply to any county selling property after that date. L. 1989, Ch. 82, § 3. Therefore, in our opinion, the approval given by the voters in 1984 is no longer effective and the county should follow the current provisions of K.S.A. 19-211 for the sale of both Tract A and Tract B.

You next ask whether both tracts may be sold by either public auction or sealed bids. K.S.A. 19-211 provides in pertinent part:

"The property shall be sold or disposed of publicly, in the manner deemed prudent by the board of county commissioners, to the person or entity tendering the highest and best bid as determined by the board. The board of county commissioners shall have the right to reject any or all bids."

Kansas appellate courts have set forth the following guidelines for interpreting statutes:

"[T]he fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statute. In determining legislative intent, courts are not limited to a mere consideration of the language employed but may properly look to the historical background of the enactment, the circumstances attending its passage, the purposes to be accomplished and the effect the statute may have under the various constructions suggested." ***Payton v. State***, 22 Kan.App.2d 843, 844-45 (1996), quoting ***State v. Thompson***, 237 Kan. 562, 563 (1985).

The legislative history of K.S.A. 19-211 indicates that in 1989 the Legislature removed the requirement of voter approval to sell property valued over $100,000. L. 1989, Ch. 82, § 1. In 1993 the Legislature again amended K.S.A. 19-211 to add the following language:

"The property shall be sold or disposed of publicly, in the manner deemed prudent by the board of county commissioners, to the person or entity tendering the highest and best bid as determined by the board." L. 1993, Ch. 198, § 1.

The revisions of 1989 and 1993 broadened the discretion of county commissioners in determining whether to sell property and how to conduct that sale. Legislative committee discussion of the changes quoted above indicate that the legislative intent was to provide more flexibility to the board of county commissioners when selling county property. *See* Minutes, House Committee on Local Government, February 16, 1993; Minutes, Senate Committee on Local Government, March 18, 1993.

When construing a statute, a court will give common words their ordinary and natural meaning. ***State ex. rel. Stephan v. Kansas Racing Commission***, 246 Kan. 708, 719 (1990). The word "prudent" is generally defined as exercising "skill and good judgment" [*Merriam Webster's Collegiate Dictionary* 941 (10th ed. 1996)], and "[p]ractically wise, judicious, careful, discreet, circumspect, sensible." *Black's Law Dictionary* 1227 (6th ed. 1990). Applying the rules of statutory construction to the provision quoted above, it is our opinion that the Board of County Commissioners may exercise its discretion in determining the manner of sale as long as the property is sold publicly to the highest and best bidder. The Board may also use its discretion in determining which bid is the highest and best.

How specifically must the terms of sale be set forth in the notice of sale, or in the ballot for authorization to sell Tract B if such sale is required? The relevant portion of K.S.A. 19-211 provides:

"Such notice shall state the time or date of the sale or disposition or the date after which the property will be offered for sale or disposal, the place of the sale or disposition, and the terms and conditions of the sale or disposition."

The legislative history indicates that the Legislature intended to provide flexibility to boards of county commissioners, and therefore, it is our opinion that the Board should exercise its discretion in determining the specificity of the sale terms and conditions to be included in the notice. The statute does not require that the terms and conditions of sale be included on the ballot

if an election is required, however the Board of County Commissioners could choose to include them.

Finally you ask whether the 1984 notice of special question election for Tract A restricts the choice of sale terms. We find nothing in that notice that refers to any sale terms other than that the property will be sold to the highest bidder. The current provisions of K.S.A. 19-211 still require that the property be sold to the highest and best bidder, therefore, that notice would not restrict the choice of sale terms allowed by the current provisions of K.S.A. 19-211.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Donna M. Voth
Assistant Attorney General

June 20, 1997

97-62 Commercial Drivers License CDL road grader

Ridgeway Township Board
c/o Morris I. Mercer, Treasurer
Rural Route 1
Carbondale, Kansas 66414

Re:

Automobiles and Other Vehicles--Drivers' Licenses; Uniform Commercial Driver's License Act--Definitions; Road Grader Operator Required to Have a Commercial Driver's License

Synopsis:

The operator of a township road grader used on the public roadways for transportation related purposes is required to obtain a commercial drivers' license. Cited herein: K.S.A. 8-2,126; 8-2,127; K.S.A. 1996 Supp. 8-2,128; K.S.A. 8-2,132; 49 U.S.C.A. §§ 31301, 31308; 49 C.F.R. §§ 383.3; 383.5.

* * *

Dear Board Members:

You request our opinion regarding whether the Township's part time road grader operator is required to have a commercial driver's license (CDL). You state that while the grader has a gross weight of 33,000 pounds, it does not haul passengers or property and is not licensed or tagged by the State of Kansas. You believe that under these circumstances the grader is not a commercial motor vehicle as defined by federal law and therefore there is no requirement for obtaining a CDL to operate the grader.

K.S.A. 8-2,132 provides that, with certain exceptions, no person may drive a commercial motor vehicle unless the person has a valid commercial driver's license. Commercial motor vehicle is defined as:

"a motor vehicle designed or used to transport passengers or property, if:

"(1) The vehicle has a gross vehicle weight rating of 26,001 or more pounds or such lesser rating, as determined by rules and regulations adopted by the secretary [of the Department of Revenue], but shall not be more restrictive than the federal regulation;

"(2) the vehicle is designed to transport 16 or more passengers, including the driver; or

"(3) the vehicle is transporting hazardous materials and is required to be placarded in accordance with 49 C.F.R. 172, subpart F, effective January 1, 1991;" K.S.A. 1996 Supp. 8-2,128(f).

A motor vehicle is "every vehicle which is self-propelled, . . . but not operated upon rails, except vehicles moved solely by human power and motorized wheel chairs;" K.S.A. 1996 Supp. 8-2,128(r). These definitions track those found in the federal law regulating commercial motor vehicle operators. 49 U.S.C.A. § 31301(4), (11). *See also* 49 C.F.R. § 383.5. While the terms in question have not been further defined by the State, the United States Department of Transportation, Federal Highway Administration (charged with administering the federal law regarding commercial motor vehicle operators, 49 U.S.C.A. § 31308) has issued interpretations describing the applicability of the federal motor carrier safety regulations to operators of construction equipment such as motor graders. Generally operators of off-road motorized construction equipment are not required to obtain a CDL even if the machinery is operated on a public highway for purposes of moving from one construction site to another. The basis for this conclusion is that such equipment is not designed to operate in traffic. However, when used for snow or leaf removal, the interpretations conclude that operators of such construction equipment are required to obtain a CDL because the equipment is being used on public roads and in furtherance of a transportation purpose, removal of snow or leaves from the road. The basis for the exception would no longer exist if the equipment is being used in traffic for transportation purposes. Regulatory Guidance Part 383--Commercial Driver's License Standards: Requirements and Penalties, Section 383.3--Applicability (Dec. 20, 1995). Further, the Federal Highway Administration has opined that State vehicle registration has no bearing on who is required to obtain a CDL (Regulatory Guidance, Section 383.3) and, with regard to the definitional requirement that a vehicle transport "passengers or property" to be considered a commercial motor vehicle, that "the construction equipment is itself the property being transported as it performs a service such as snowplowing." Regulatory Guidance, Section 383.5--Definitions. These interpretations have not been rescinded or amended and thus appear to be the current view of the Federal Highway Administration. Thus, an operator of a road grader would be required to have a CDL if the grader is used on the public roads for transportation purposes. If the grader is used only for off-road construction purposes, no CDL would be required.

The federal regulations do contain an exception for drivers employed by local units of government operating a commercial motor vehicle within the boundaries of that unit of government for the purpose of removing snow or ice, but only if the State exempts such

individuals from the CDL requirements and only in certain emergency situations. 49 C.F.R. § 383.1(d)(3). The State of Kansas has not chosen to exempt such drivers. *See* K.S.A. 8-2,127.

In conclusion, because the State is obligated to comply with the federal law regarding operators of commercial motor vehicles (49 U.S.C.A. § 31308 and K.S.A. 8-2,126) and the Kansas Director of Motor Vehicles follows the Federal Highway Administration's guidelines in interpreting and enforcing the state CDL law, it is our opinion that the operator of a road grader used on the public roadways for transportation related purposes is required to obtain a CDL.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Julene L. Miller
Deputy Attorney General

August 4, 1997

97-67 Crush rock to Cities and private individuals

The Honorable Ed McKechnie
State Representative, 3rd District
224 West Jefferson
Pittsburg, Kansas 66762

Re:

Counties and County Officers--General Provisions--Home Rule Powers

Counties and County Officers--County Commissioners--Powers and Duties; Providing Crushed Rock to Cities and Private Individuals

Synopsis:

A county may furnish crushed rock for parking lots and streets pursuant to its home rule power if such action fulfills a public purpose and promotes the public welfare. K.S.A. 1996 Supp. 19-101a requires that a county exercise its power of home rule by resolution. Attorney General Opinion No. 73-96 is withdrawn to the extent it conflicts with conclusions reached herein. Cited herein: K.S.A. 19-101; K.S.A. 1996 Supp. 19-101a; Kan. Const., Art. 11, § 9; L. 1974, Ch. 110, §§ 1, 2.

* * *

Dear Representative McKechnie:

You request our opinion on whether Labette County is improperly competing with private enterprise in furnishing crushed rock for paving parking lots in industrial parks and roads in

housing subdivisions. You also ask whether the County has complied with procedural requirements of the home rule statutes and the Kansas Open Meetings Act if there appear to be no minutes, resolution or other documentation of the county commissioners approving the providing of crushed rock to third parties.

You note that in Attorney General Opinion No. 93-1 this office addressed an issue similar to your first question. That opinion concluded that "[a] county may contract with a school or a private individual for the purpose of having the county perform road, street or driveway work only if those services promote a public purpose of the county." The opinion quoted an earlier opinion which held that "installation of asphaltic paving by the City on private property was tantamount to a commercial enterprise which was prohibited to municipal corporations." Attorney General Opinion No. 73-96. However, Opinion No. 73-96 relied on cases decided before 1974 when the Legislature granted counties the power of home rule. L. 1974, Ch. 110, §§ 1, 2. Prior to the grant of home rule power, a county could only do that which it was expressly authorized by statute to do. The controlling issue in the cases relied upon in Attorney General Opinion No. 73-96 was whether the governmental entity had express statutory authority to perform the acts in question. With the advent of home rule powers, counties are no longer limited to performing only such acts as the Legislature expressly authorizes, but enjoy broad power to determine their local affairs. K.S.A. 19-101. K.S.A. 1996 Supp. 19-101a permits a board of county commissioners "to transact all county business and perform all powers of local legislation and administration it deems appropriate," subject only to the limitations, restrictions or prohibitions contained in that statute, none of which prohibit or restrict the furnishing of crushed rock.

The cases cited in Attorney General Opinion No. 73-96 also relied on the constitutional prohibition against the State carrying on any work of internal improvement. Kan. Const. Art. 11, § 9. This provision was interpreted to prohibit any commercial enterprise by the State or any of its political subdivisions. *See* ***State ex rel. Mellott v. Mason***, 126 Kan. 43, 49 (1928). The Kansas Supreme Court has subsequently limited that constitutional prohibition to the State and has specifically found that it does not apply to political subdivisions of the State. ***State ex rel. Tomasic v. City of Kansas City***, 237 Kan. 572, 587 (1985).

Although a county no longer needs express statutory authority to act and is not prohibited from conducting a commercial enterprise by Article 11, Section 9, it does not have unbridled authority. As stated in Attorney General Opinion No. 93-1, public funds may be spent only for a public purpose. This rule was recognized early in Kansas in ***Leavenworth County v. Miller***, 7 Kan. 479 (1871), and has been applied more recently in ***Duckworth v. City of Kansas City***, 243 Kan. 386 (1988). In ***Duckworth*** the Kansas Supreme Court discussed the public purpose doctrine at length and decided that a municipality may appropriate public money to private individuals as long as the appropriation is for a public purpose and promotes the public welfare. 243 Kan. at 388. The Court also noted that "[a]s long as a governmental action is designed to fulfill a public purpose, the wisdom of the governmental action generally is not subject to review by the courts." 243 Kan. at 389. *See also* ***Ullrich v. Board of Thomas County Commissioners***, 234 Kan. 782 (1984). This office has issued numerous opinions that discuss the public purpose doctrine. *See* Attorney General Opinions No. 81-208, 82-191, 82-229, 86-40, 91-53, 91-89, 92-73, 92-87.

Labette County Counselor, Fred W. Johnson, has advised this office that the Labette County Board of Commissioners works in conjunction with the City of Parsons to promote the area for economic development. He stated that the County has provided the City in- kind assistance rather than actual dollars by furnishing rock for streets and parking lots installed by the City in several industrial parks. He also indicated that in an effort to encourage new housing, the County has provided rock to the City to construct streets in housing developments. Based on information provided by Mr. Johnson, it appears that the Labette County Commission has determined that furnishing crushed rock for paving parking lots and streets furthers its public purpose of economic development. In our opinion, Labette County may provide crushed rock for parking lots and streets pursuant to its home rule power if such action fulfills a public purpose and promotes the public welfare. Attorney General Opinion No. 73-96 is withdrawn to the extent it conflicts with conclusions reached herein.

In response to your second question concerning whether the County has complied with home rule statutes and the Kansas Open Meetings Act, we find nothing in either the home rule statutes or the Kansas Open Meetings Act that requires keeping minutes of county commission meetings. Therefore, the lack of minutes indicating the approval by the County Commission to furnish crushed rock is not a violation of either the Kansas Open Meetings Act or home rule statutes.

K.S.A. 1996 Supp. 19-101a provides that "[c]ounties shall apply the powers of local legislation granted in subsection (a) by resolution of the board of county commissioners." The Labette County Counselor states that since the policy of cooperation has been made between the County and the City of Parsons, the City usually makes a request for crushed rock to the County Road and Bridge Supervisor who is then authorized by the County Commission to proceed as requested or to make changes desired by the Commission. Consideration by the County Commission is usually done by consensus during a meeting rather than by a formal resolution. In order to comply with K.S.A. 1996 Supp. 19-101a, the Labette County Commission should exercise its power of home rule by resolution authorizing the furnishing of rock to cities or private individuals.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Donna M. Voth
Assistant Attorney General

CJS:JLM:DMV:jm

March 4, 1998

98-13 Trust agreements

Steven W. Hirsch
Decatur County Attorney
P.O. Box 296
Oberlin, Kansas 67749-0296

Re:

Bonds and Warrants--Cash-Basis Law--Creating Indebtedness in Excess of Funds Unlawful; Exceptions; Trust Agreement for Landfill Closure

Counties and County Officers--General Provisions--County as Corporation; Powers Generally; Power to Bind Future Boards of County Commissioners

Synopsis:

Upon entering into a trust agreement which obligates Decatur County to make payments over a forty-year period, in order to comply with the cash-basis law the County should have on hand in its treasury the entire aggregate amount due over the forty-year period, unless the agreement is authorized by the electors of Decatur County. The current Board of County Commissioners of Decatur County may bind future Boards of County Commissioners by entering into a trust agreement as long as such agreement complies with the cash-basis law and any other applicable laws. Cited herein: K.S.A. 1997 Supp. 10-1101; K.S.A. 10-1113; 10-1116; 10-1116a; 10-1116b; K.S.A. 1997 Supp. 10-1116c; K.A.R. 26-29-98.

* * *

Dear Mr. Hirsch:

As County Attorney for Decatur County, you request our opinion on whether the Board of County Commissioners of Decatur County may enter into a trust agreement to assure funding when needed for closure and post-closure care of the County's landfill. You have provided a proposed trust agreement between Decatur County as landfill owner, the Kansas Department of Health and Environment (KDHE) as the landfill permit grantor, and a bank or trust company as the trustee. You indicate that the County would be required to make annual payments into the trust in the amount of approximately $10,000 for forty years. The agreement may be amended only by written agreement of the parties and is otherwise irrevocable. You ask whether the County, upon entering into the trust agreement, would be creating an encumbrance for the entire aggregate amount due and would, therefore, need to have the funds available to pay the entire aggregate amount upon executing the trust agreement in order to comply with the cash-basis law. You also question whether the present Board of County Commissioners may bind future Boards for such a long time.

K.A.R. 26-29-98 adopts by reference federal requirements for landfill owners to assure that adequate funds will be available when needed for closure, post-closure care and reclamation of a landfill. One of the options available to guarantee those costs is the establishment of a trust fund into which annual payments must be made by the landfill owner.

The cash-basis law provides that it is unlawful for any member of a governing body of a municipality to knowingly vote for any action creating an indebtedness in excess of the amount of funds actually on hand in the treasury. K.S.A. 10-1113. Counties are included within the definition of "municipality," and boards of county commissioners are included in the definition of "governing body." K.S.A. 1997 Supp. 10-1101. The issue at hand is whether the trust

agreement you present creates an indebtedness for the aggregate amount of all the payments required by the trust agreement or whether future payments do not become debts of the County until each payment is due.

The term "indebtedness" is not defined by statute and has not been generally defined by the courts. Rather, each case examining whether a municipality's action creates an indebtedness for which funds must be on hand in the treasury has been decided based on the particular facts presented. We found no Kansas cases on point, however the Kansas Supreme Court has, under certain circumstances, approved long-term contracts by municipalities even though there were insufficient funds on hand when the municipality executed the contract. In ***City of Wichita v. Wyman***, 158 Kan. 709 (1944), the Court concluded that a city could serve as self-insurer of its employees under workers' compensation laws even though the city would be obligated to pay compensation to injured workers in future years. The Court reasoned that until an award and judgment to pay compensation to an injured worker is assessed against the city, its liability is only contingent, and not absolute. Likewise, the Court in ***International Association of Firefighters v. City of Lawrence***, 14 Kan.App.2d 788 (1990), found that a wage proposal which legally obligated the city to make payments over a two-year period did not violate the cash-basis law even though the city did not have enough money for the two-year period on hand when it entered into the agreement. Because the law is clear that compensation for services becomes due only when those services have been rendered, the city did not incur indebtedness or obligation to compensate upon entering the agreement. The Court determined that the obligation to compensate was incurred only at the end of a pay period for work done during that pay period. In both ***Wyman*** and ***International Association of Firefighters***, the cities' future payments were based on a contingency, and the cities would have the funds available to make those payments after the contingency was met.

The trust agreement that Decatur County is considering would require the County to make payments in the future which are not dependant on any contingency. Even though the payments are not due until a future date, the agreement is irrevocable and would create an unconditional, binding obligation on the County for all future payments upon execution of the agreement. Because the agreement would create an indebtedness for the aggregate amount of payments, to comply with the cash-basis law, the County should have the total amount to be paid during the life of the agreement in its treasury when the agreement is entered.

The Legislature has provided exceptions to the cash-basis law for lease-purchase agreements and for other specific circumstances. *See* K.S.A. 10-1116, 10-1116a, 10-1116b, K.S.A. 1997 Supp. 10-1116c. The trust agreement which you ask about does not appear to fall within any of those exceptions; however, K.S.A. 10-1116 allows a municipality to exceed the limits of indebtedness prescribed in the cash-basis law if "payment has been authorized by a vote of the electors of the municipality." Therefore, if Decatur County wishes to proceed with the trust agreement, it could do so without having the funds on hand if the agreement is authorized by the electors of the County.

Because the trust agreement being considered by the County would extend over a forty-year period, you also ask whether the current Board of County Commissioners can lawfully bind

future Boards. The Kansas Supreme Court set out the test to determine if a Board of County Commissioners may bind future Boards as follows:

"[T]he test generally applied is whether the contract at issue, extending beyond the term, is an attempt to bind successors in matters incident to their own administration and responsibilities or whether it is a commitment of a sort reasonably necessary to protection of the public property, interests or affairs being administered. In the former case the contract is generally held to be invalid, and in the latter case valid. [Citations omitted.]" ***State ex rel. Cole v. City of Garnett***, 180 Kan. 405, 409 (1956), quoting ***Edwards County Commissioners v. Simmons***, 159 Kan. 41, 54 (1944).

In ***Verdigris River Drainage Dist. v. State Highway Commission***, 155 Kan. 323 (1942), the Court stated:

"[I]t is clear that if a board of county commissioner [sic] has express power to make a particular contract at any time during its term of office, a contract made by such board, in accordance with the law, a short time before the expiration of its term of office is not contrary to public policy, and, in the absence of fraud, is valid and binding upon an incoming board of commissioners, although it extends far into their term of office. The ground upon which this rule is based is that a board of county commissioners is a continuously existing corporation, and, consequently, while the personnel of its membership changes, the corporation continues unchanged. Its contracts being the contracts of the board and not of its members, it follows that those contracts extending beyond the term of service of its then members are not invalid for that reason." 155 Kan. at 330. (Quoting 7 R.C.L., at page 945, § 21.)

It is clear from these cases that the current Board of County Commissioners of Decatur County may bind future Boards by entering into a trust agreement as long as such agreement is executed in accordance with the cash-basis law as discussed above and any other applicable laws.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Donna M. Voth
Assistant Attorney General

CJS:JLM:DMV:jm

November 18, 1998

98-56 Townships transferring duties to County

Douglas F. Martin
Clay County Attorney

P.O. Box 134
Clay Center, Kansas 67432

Re:

Townships and Township Officers--General Provisions--Transfer of Powers and Duties to County; Procedure

Synopsis:

The elections required by 1998 House Bill No. 2902 may be conducted as special elections or in conjunction with a general election, depending on the timing of the notice of election. The transfer of township assets and property to a board of county commissioners under 1998 House Bill No. 2902 should be accomplished within a reasonable time after approval by the voters. Pursuant to the bill, a board of county commissioners that exercises the powers and duties of a township board is subject to the same levy limitations as the township board, and must follow the procedures set forth in K.S.A. 79-5036 to exempt the taxable property of the township from the levy limits. Bridges on township roads should be constructed and maintained by the county, and the costs of such work should be paid from the bridge fund of the county. When a county takes over the duties of a township under 1998 House Bill No. 2902, the county should pay for road work on township roads from the special fund for the township. Township funds may not be transferred into a county's general fund but must be kept in a special fund that is separate from county funds. Because 1998 House Bill No. 2902 does not address apportionment of costs between a county and any townships a board of county commissioners manages, it is within the board's discretion to determine how to apportion costs. A county that has assumed management of a township is not precluded from adopting a county road unit system if the county follows all statutory requirements for adopting a county road unit system. Cited herein: K.S.A. 10-120; 68-124; 68-515b; 68-526; 68-1104; 79-5021; 79-5036; L. 1998, Ch. 105.

* * *

Dear Mr. Martin:

You request our opinion on several questions concerning 1998 House Bill No. 2902,[(1)] which provides for the transfer of powers, duties and functions of a township board to a board of county commissioners.

First, you ask whether the bill allows for a special election, or whether the required election

must take place at the same time as a general or primary election. The bill refers to an election twice. The first reference requires a vote of the electors of a township to determine whether the powers, duties and functions of the township board should be transferred to the board of county commissioners of the county in which the township is located. The second reference to an election contains the same requirement when the electors of the township present a petition to have the powers, duties and functions previously transferred to the county commissioners returned to the township board. In both instances "[s]uch election shall be called and held in the manner provided by the general bond law."[(2)] The general bond law sets forth the requirements

for publication of the notice of election and requires that the election "be held within 45 days after compliance with the necessary requirements, or within 90 days, should the longer period include the date of a general election."[(3)] The bond statute contemplates a special election unless there is a general election within 90 days.

Your next question is whether there is a certain time after the election that the transfer of township assets and property must take place, or whether the time of transfer is discretionary. The statute does not prescribe a certain time other than "upon approval of the resolution by the voters." Therefore, the transfer may be made at the discretion and agreement of the township and county officials, but should be accomplished within a reasonable time after voter approval. To unduly delay the process would thwart the intent of the law.

You explain that Clay County's road and bridge fund is exempt from the statutory tax levy limitations,[(4)] however the township levies within Clay County are not exempt from those limitations. You ask whether under House Bill No. 2902 a county or township may take steps to exempt its levies from the statutory limitations. The bill states that a county is "subject to the same limitations imposed by law on township boards" when the county levies a tax upon the property of the township after a transfer of township duties to the county. K.S.A. 79-5036 authorizes a county or township to exempt its levies from the statutory limitations. House Bill No. 2902 does not prohibit a county or township from exercising its rights under K.S.A. 79-5036; therefore, a county that has received the powers of a township under House Bill No. 2902 may elect to exempt its levy of the township's property using the procedure set out in K.S.A. 79-5036. In other words, a board of county commissioners steps into the shoes of the township board whose powers have been transferred to the county and is subject to the same limitations as the township board was. If a board of county commissioners wants to create an exemption from the levy limitations for the township when the levy was not previously exempted by the township board, the board of county commissioners must follow the procedures set forth in K.S.A. 79-5036 to exempt the levy limits on the taxable property of the township.

Your next question is whether Clay County may expend funds from the county road and bridge fund to repair and improve township roads and bridges. Attorney General Opinion No. 87-22 addressed the question of whether a county may undertake the repair of a township road. That opinion concluded that if no agreement between the township and county can be reached concerning maintenance, according to K.S.A. 68-124 if the township neglects proper care, the county may take over maintenance of a township road and charge the expenses to the township. The statute clearly contemplates reimbursement by the township to the county for funds expended by the county to repair a township road. Although the township board has the general charge and supervision of all township roads and culverts,[(5)] all county bridges, including those over township roads, shall be constructed, repaired and maintained by the board of county commissioners and the cost of such work shall be paid from the bridge fund of the county.[(6)] Under House Bill No. 2902, when a county takes over the duties of a township, the county would pay for township road work from the special fund created by the county at the time the transfer is made. "The board of county commissioners shall expend the moneys in such special fund for the exercise of the powers, duties and functions imposed by law upon township boards in the township from which it was received."[(7)] The bill further requires the board of county commissioners to budget for the exercise of the powers and duties transferred to the county and

"to levy a tax upon all assessed taxable tangible property of the township sufficient to raise the amount for such expenditures."

Your fifth question is whether a county may transfer money from a special fund for a township to the county general fund or to the county road and bridge fund after a township board has transferred its powers to the county. House Bill No. 2902 states that a township shall pay all of its funds to the county treasurer upon the transfer of township duties to the county, and that the county treasurer shall credit the township funds to a special fund for each township. Further, the board of county commissioners is required to expend the money in the special fund "for the exercise of the powers, duties and functions imposed by law upon township boards in the township from which it was received."(8) Therefore, a board of county commissioners may not transfer township funds into the county's general fund or into any other county fund. Rather, the township funds must be deposited into a special fund and remain separate from other county funds.

You also ask whether a board of county commissioners becomes responsible for any pre-existing and future liabilities of the township whose powers have been transferred to the county. The bill does not address liability, and it is impossible to predict liability issues in the abstract. Liability is ultimately a question of fact to be determined based on the specific facts of a situation. The township may have insurance or bonds that might cover prior acts. The answer to your question may also depend on the county's insurance coverage. Absent a specific factual situation, we cannot provide a definitive answer to this question.

Your question regarding whether a county is required to keep a separate set of books and accounts for each township that transfers its powers to the county is answered by our response to your fifth question above. You also ask how a county should apportion costs for township matters including employee expenses, equipment expenses, insurance for township roads and road material expenses. House Bill No. 2902 does not address apportionment of costs between a county and any townships the board of county commissioners manages. Therefore, it is within the discretion of the board of county commissioners to determine how best to apportion costs.

Your last question is whether the transfer of powers from a township to a county under House Bill No. 2902 precludes the county from adopting a county road unit system with respect to those townships that have transferred their powers to the county. A careful reading of House Bill No. 2902 reveals that it does not provide for the abolishment of a township. Only the board of the township is abolished upon transfer of its powers and duties to the board of county commissioners. Therefore, a transfer of powers under the bill does not automatically transform township roads into county roads, even though both township and county roads would be maintained by the board of county commissioners. Under the county road unit system, townships must relinquish to the county all money and equipment accumulated by the townships for road construction and maintenance purposes, and all roads within the county are reclassified so that township roads no longer exist.(9) In our opinion, the county road unit system statutes do not conflict with the provisions of House Bill No. 2902, and a county would not be precluded from adopting a county road unit system with respect to those townships that have transferred powers to the county as long as the county follows all statutory requirements for adopting a county road unit system.

In conclusion, the elections required by 1998 House Bill No. 2902 may be conducted as special elections or in conjunction with a general election depending on the timing of the notice of election. The transfer of township assets and property to a board of county commissioners under 1998 House Bill No. 2902 should be accomplished within a reasonable time after approval by the voters. A board of county commissioners that exercises the powers and duties of a township board is subject to the same levy limitations as the township board, and must follow the procedures set forth in K.S.A. 79-5036 to exempt the taxable property of the township from the levy limits. Bridges on township roads should be constructed and maintained by the county, and the costs of such work should be paid from the bridge fund of the county. When a county takes over the duties of a township under 1998 House Bill No. 2902, the county should pay for road work on township roads from the special fund for the township. Township funds may not be transferred into a county's general fund but must be kept in a special fund that is separate from county funds. Because 1998 House Bill No. 2902 does not address apportionment of costs between a county and any townships a board of county commissioners manages, it is within the board's discretion to determine how to apportion costs. A county that has assumed management of a township is not precluded from adopting a county road unit system if the county follows all statutory requirements for adopting a county road unit system.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Donna M. Voth
Assistant Attorney General

CJS:JLM:DMV:jm

FOOTNOTES

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

[1.] L. 1998, Ch. 105.

[2.] L. 1998, Ch. 105, § 1(a).

[3.] K.S.A. 10-120.

[4.] K.S.A. 79-5021 *et seq.*

[5.] K.S.A. 68-526.

[6.] K.S.A. 68-1104.

[7.] L. 1998, Ch. 105, § 1(b).

[8.] *Id.*

[9.] K.S.A. 68-515b *et seq.*

March 8, 1999

99-11 Prohibition on holding city office

Michael P. Dreiling
Liberal City Attorney
419 North Kansas
P.O. Box 2619
Liberal, Kansas 67905

Re:

Counties and County Officers--County Commissioners; Powers and Duties--Eligibility to Office of Commissioner; Prohibition on Holding City Office

Synopsis:

The position of Public Works Director of the City of Liberal is not a "city office" for purposes of K.S.A. 1998 Supp. 19-205 and, therefore, K.S.A. 1998 Supp. 19-205 does not preclude a member of the Board of County Commissioners from being employed in that position. Cited herein: K.S.A. 12-1010, 12-1011, 12-1014; K.S.A. 1998 Supp. 19-205.

* * *

Dear Mr. Dreiling:

You request our opinion concerning K.S.A. 1998 Supp. 19-205 which prohibits a county commissioner from holding a city office.[(1)] You indicate that a Seward County Commissioner who has been employed by the City of Liberal since 1997 has been promoted to the position of Public Works Director. You inquire whether such position is a "city office" pursuant to K.S.A. 1998 Supp. 19-205 which provides, in part:

"[No] person holding any . . . city office . . . shall be eligible to the office of county commissioner in any county in this state."

You indicate that the City of Liberal has a Commission-Manager form of government and operates pursuant to K.S.A. 12-1001 *et seq.* The City Commission appoints a manager who "holds office at the pleasure of the board" and attends to the administration of the city's business.[(2)] The City Manager appoints and removes all department heads, including the head of the Public Works Department.[(3)]

If the Public Works Director is a public employee rather than a city officer, K.S.A. 1998 Supp. 19-205 will not apply. If the position is a "city office", then the statute will preclude the Public Works Director from also serving as a County Commissioner.

In *Durflinger v. Artiles*,[(4)] the Kansas Supreme Court reviewed Kansas appellate decisions, statutes and other treatises that address the difference between a public employee and a public officer. The Court concluded that the essential characteristics of public office are: (1) a position created by statute or ordinance; (2) a fixed tenure, and (3) the power to exercise "some portion of [the] sovereign function of government."

"In 63 Am.Jur.2d, Public Officers and Employees § 1 . . . it is commented:

"'A public officer is such an officer as is required by law to be elected or appointed, *who has a designation or title given him by law, and who exercises functions concerning the public, assigned to him by law*. The duties of such officer do not arise out of contract or depend for their duration or extent upon the terms of a contract.'" [(5)](Emphasis added.)

The Court also reviewed the definition of "public office" from Black's Law Dictionary:

"'Essential elements to establish public position as "public office" are: position must be created by constitution, legislature, or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity.'"[(6)]

In *Durflinger*, the Court distinguished between the superintendent of a psychiatric hospital and the staff physicians who served under the superintendent and concluded that while the superintendent was a public officer, the staff physicians were not public officers because, among other things, the staff physicians "were under the control and supervision of the head of the hospital . . . . "

The Court also relied upon *Jagger v. Green*[(7)], which concluded that a "field man" who served under the health commissioner was not a public officer, despite the fact that the ordinance creating the health department provided for the creation of three positions as "field men" who were referred to in the ordinance as "officers" with fixed compensation:

"'The plaintiff [field man] was not one of the officers specifically named in the act of 1907 whom the commissioners were authorized to appoint. He was appointed by virtue of the power given to appoint "such assistants and other officers and servants" as the public interest may require. . . .'

"'[The] health commissioner is the only person connected with the department of public health who holds a position analogous to an office. The field men are merely subordinate employees who work under his direction and supervision and for whose conduct he is responsible. . . [It] is not important that the ordinance uses the term "officers" in one place in speaking of the appointees in the health department. Considering the nature of the service, its relative

importance, its essentially subservient character, and the placing of responsibility for results upon a superior who is given full power of direction, supervision and control, it must be held that the plaintiff was not a city officer within the meaning of the [civil service] statute.'"[8]

Past Attorney General opinions that have addressed the public office vs. public employment issue have concluded that K.S.A. 19-205 does not preclude a county sewer inspector or a city water department employee from serving on a county commission because both positions lack the right to exercise "some definite portion of the sovereign power."[9]

In deciding whether the Public Works Director in the City of Liberal is a public officer or a public employee, we note the following:

1. In a Commission-Manager form of government, such as the City of Liberal, the City Manager is a public officer.[10] The Liberal City Manager appoints and removes department heads such as the Public Works Director.[11]

2. Liberal City Ordinance No. 1-401 creates several departments, one of which is the Public Works Department, but no ordinance creates the position of Public Works Director nor dictates its duties and responsibilities. (The ordinance does create the positions of City Attorney, City Prosecutor, and City Clerk and defines their duties.)

3. The job description for the Public Works Director provides that the Director reports to the City Manager and works under the latter's "guidance and direction."[12]

Since the Public Works Director serves under the direction of the City Manager and is not a position created by statute or ordinance, it is our opinion that the position of Public Works Director is not a "city office" and, therefore, K.S.A. 1998 Supp. 19-205 does not preclude a Seward County Commissioner from being employed in that position.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Mary Feighny
Assistant Attorney General

CJS:JLM:MF:jm

FOOTNOTES

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

1. *State ex rel. Kellogg v. Plymell*, 46 Kan. 294 (1891); *Demaree v. Scates*, 50 Kan. 275 (1893).

2. K.S.A. 12-1010; 12-1011; 12-1014.

3. K.S.A. 12-1014; Liberal City Ordinance No. 1-403; 1-406.

[4.] 234 Kan. 484 (1983).

[5.] 234 Kan. at 503.

[6.] 234 Kan. at 503.

[7.] 90 Kan. 153 (1913).

[8.] 90 Kan. at 158.

[9.] Attorney General Opinions No. 80-158 and 82-111.

[10.] K.S.A. 12-1011; Attorney General Opinion No. 82-174.

[11.] K.S.A. 12-1014; Liberal City Ordinance No. 1-403; 1-406.

[12.] Job Description for Public Works Director.

October 7, 1999

99-53 Regulation of subsurface use of right-of-way

R. Douglas Sebelius
Norton County Attorney
P.O. Box 10
Norton, Kansas 67654

Re:

Roads and Bridges--County and Township Roads--Laying Out and Opening Roads; Petition for Laying Out, Viewing, Altering or Vacating Roads; Authority of County to Regulate Subsurface of Section Line Roads

Roads and Bridges--County and Township Roads--Tunnels Under Roads by Landowners; Authority of County to Regulate Subsurface of Section Line Roads

Synopsis:

Counties have authority to deny a request for use of a section line road right-of-way to bury pipelines, cable or conduit only if the task would impair or frustrate public travel on the road. Being the easement holder itself, a county has no authority to grant an additional easement as a method of regulating the subsurface use of section line roads; thus a county may not require an application for an easement. However, counties may establish reasonable regulations to ensure that use of county easements does not interfere with public travel on county section line roads.

An application for a use permit to allow the county to learn the particular details of an intended project would be a reasonable method of making this assessment. Additionally, permission to use the land for an intended project would need to be obtained from the landowner.

Any depth requirement established by a county for drilling, boring or laying of pipeline, cables, or conduits below the surface of a section line road or ditch must be reasonable in light of the circumstances.

Counties may require abutting landowners who wish to bore under the surface of a section line road to obtain a use permit before proceeding and to comply with reasonable regulations and restrictions aimed at protecting safe public travel on the roads. Regulations or limitations which unduly or unreasonably curtail or restrict the rights of an abutting landowner cannot be sustained. Statutory requirements apply in circumstances where "boring" becomes "tunneling." Cited herein: K.S.A. 68-544.

* * *

Dear Mr. Sebelius:

As Norton County Attorney, you ask a number of questions that relate to Norton County's authority to regulate the subsurface use of county section line roads.

In 1874 the Kansas Legislature declared all section lines in Norton County to be public highways.[(1)] The statute provided upon application of "ten freeholders or householders" who asserted that "public convenience require[d] the opening of such road," that the county commissioners notify the road overseer. The overseer would then open the road "at least fifty feet and not over sixty feet in width, along said sectional line."[(2)] It is the subsurface of these roads within Norton County about which you ask the following questions:

1. Does the County have authority to deny a request for use of its road right-of-way to bury pipelines, cable or conduit?
2. May the County regulate the use of the subsurface of the road right-of-way by requiring application for an easement or permit?
3. May a land owner, who owns the real estate on each side of the center line of a County road, legally bore under the surface of the road without obtaining consent for an easement of the County's Board of Commissioners?
4. Is there a depth below the surface of the County road or ditches within the right-of-way to which the County can lawfully regulate?

Our analysis begins with a Kansas case decided in 1873, one year before section lines were declared public highways in Norton County. The Supreme Court was adamantly clear regarding a county's legal interest in such roads:

"[I]t is fundamental that no man can be divested of his land, or any part or portion thereof, or any interest therein, through the exercise of the power of eminent domain (or in fact through the exercise of any other power,) except under the provisions of express and positive constitutional

or statutory law, and that he cannot be divested through the exercise of such power of any more or greater interest in his land than the constitution or statutes expressly provide for. In this state the statutes provide for the establishment of public roads and highways, (Gen. St. 897, c. 89;) but both the constitution and the statutes are silent as to how much of the land, or what interest therein, shall pass to the public, and how much of the land, or what interest therein, shall remain with the original proprietor. Therefore we would infer that nothing connected with the land passes to the public, except what is actually necessary to make the road a good and sufficient thoroughfare for the public. The public obtains a mere easement to the land. It obtains only so much of the land, soil, trees, etc., as is necessary to make a good road. It obtains the right for persons to pass and repass, and to use the road as a public highway, and nothing more. The fee in the land never passes to the public, but always continues to belong to the original owner. He continues to own the trees, the grass, the hedges, the fences, the buildings, the mines, quarries, springs, water-courses, in fact everything connected with the land over which the road is laid out, which is not necessary for the public use as a highway. He may remove all these things from the road, or use and enjoy them in any other manner he may choose, so long as he does not interfere with the use of the road as a public highway. No other person has any such rights. In fact, the original owner has as complete and absolute dominion over his land, and over everything connected therewith, after the road is laid out upon it as he had before, except only the easement of the public therein."[(3)]

Over the years the Kansas Supreme Court has favorably cited this case numerous times,[(4)] most recently again in reference to section line roads stating:

"The common law of this state, however, has declared for many years that such public highways only grant an easement to the public on the land. The fee title, according to the vintage case of *Comm'rs of Shawnee Co. v. Beckwith*, 10 Kan. 603 (1873), is never "owned " by the government but continues vested in the abutting landowner(s)."[(5)]

In 1982 this office was asked to opine on a question involving the authority of a board of county commissioners to grant an easement along a township road for the purpose of allowing a city to install a water pipeline. The opinion concluded that if the county possessed only an easement, it had "only the right to maintain the road for public use. The abutting landowners, as fee holders of the servient estate, would have the right to use any part of the affected land in any manner not inconsistent with the public's use of the highway. Therefore, they, not the county, have the right to grant, sell or convey such additional easements as they wish, as long as the use of the road is not interfered with."[(6)]

In 1987 this office was again asked to opine on whether a board of county commissioners had authority to permit, without permission of adjacent landowners, seismic testing on county roads for non-profit education purposes in furtherance of a legitimate public purpose. In that situation the county held only an easement to create and maintain a county road for the purpose of public travel. Based on case law relating to easements, we determined that the "public right allows the county to approve any use directly or indirectly advancing that purpose. Permission from the county for any other uses, even for uses advancing other public purposes, improperly extends beyond the character and nature of the easement granted."[(7)] We concluded that the use of seismographic equipment was not a use that directly or indirectly advanced the purpose of public

travel, and thus the county had no authority to grant (or deny, we might now add) permission for the use of seismographic equipment on county roads. It was from the landowner, not the county, that permission was needed.

Ownership interests in relation to a section line road are, therefore, quite clear in this state. The county has an easement to make and maintain a good road for use by the public. [We hasten to add, however, that Kansas courts recognize a distinction between public highways in which the public merely has an easement and those in which the public, through the government, owns fee title. Fee title to public highways in Kansas may or may not be governmentally owned, depending upon the circumstances which established the highway.(8) "Where lands are platted into lots and blocks, and streets and alleys are dedicated to public use, the fee to the streets and alleys is in the county [or city], and a purchaser of a particular lot obtains no interest in the street in front or the alley in the rear of his lot. On the other hand, where a highway is laid out by the county, usually all it secures is a right of use and the landholder retains the fee, subject to the public easement."(9)] The land and everything connected to the land over which the road is laid belongs to the landowner who may use his land in any manner that is not inconsistent with or frustrates the public's use of the road.(10) Therefore it is the landowner, not the county, who has the right to grant, sell or convey such additional easements as long as the use of the road is not compromised.

What has not been specifically decided under Kansas law is a county's authority to regulate the subsurface use of section line roads for which the county holds an easement. However, in addressing an abutting property owner's right of access to a public highway, the Kansas Supreme Court stated:

"The owner of property which abuts an existing street or highway has two distinct kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the street or highway, and which are not common to the public generally.

"The private rights of an abutting property owner on an existing street or highway are subordinate to the right of the public to proper use of the street or highway. Thus, the exercise of the rights of abutting owners is subject to *reasonable regulation and restriction* for the purpose of providing reasonably safe passage for the public, but regulations or limitations cannot be sustained which *unduly or unreasonably curtail or restrict* the rights of the abutting owner."(11)

In an elaboration of this principle (in the context of a city's easement for public sidewalks), the Florida Supreme Court has said:

"The city has the right to require the appellant to procure a permit before making an opening in the sidewalk, and it has the right to see that proper safeguards are thrown about the work, and that in its progress the right of the public to use the sidewalk is not unreasonably interfered with. It may also regulate how the excavation shall be made, and the trapdoors or other appliances for closing the opening constructed; but it may not arbitrarily refuse to grant a permit, nor, under the guise of regulation, place an additional burden upon the abutting owner, or make such

regulations as would in effect deprive him from exercising the rights recognized in this decision."[(12)]

Based on the legal principles discussed, your questions may now be answered.

The County has authority to deny a request for use of a section line road right-of-way to bury pipelines, cable or conduit only if the task would impair or frustrate public travel on the road. Being the easement holder itself, the County has no authority to grant an additional easement as a method of regulating the subsurface use of section line roads; thus the County may not require an application for an easement. However, the County may establish reasonable regulations to ensure that use of its easement does not interfere with public travel on county section line roads. An application for a use permit that would allow the County to learn the particular details of an intended project would, in our opinion, be a reasonable method of making this assessment. Additionally, permission to use the land for an intended project would need to be obtained from the landowner.

One detail that you indicate the County may wish to assess and regulate is the depth below the surface of a section line road or ditch for drilling, boring or laying of pipeline, cables, conduits, etc. This is a very fact specific issue that relates to the particular type of land disruption intended. Thus, we can only say that any depth requirement established by the County must be reasonable in light of the circumstances.

The County may also require an abutting landowner who wishes to bore under the surface of a section line road to obtain a use permit before proceeding and to comply with reasonable regulations and restrictions aimed at protecting safe public travel on the road. We note that this concept has been codified in circumstances where "boring" becomes "tunneling":

"Any person owning land on both sides of the public road may at his own expense tunnel under such road from one side to the other, but he shall construct such tunnel so as not to endanger the public in the use of said road. Before constructing the said tunnel the landowner shall obtain from the officials in charge of such road and county engineer their approval of the place, the kind of tunnel, and the manner of constructing the same. . . ."[(13)]

However, as the Court in *Smith* emphasized, regulations or limitations which unduly or unreasonably curtail or restrict the rights of an abutting landowner cannot be sustained.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Camille Nohe
Assistant Attorney General

CJS:JLM:CN:jm

FOOTNOTES

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

[1.] L. 1874, Ch. 111, § 1.

[2.] *Id.*, § 2.

[3.] *County of Shawnee v. Beckwith*, 10 K. 603, 607-08, 10 Kan. 453, 456-77 (1873) (citations omitted).

[4.] *Martin v. Lown*, 111 Kan. 752 (1922); *Board of Commissioners of Jefferson County*, 127 Kan. 833 (1929); *Strain v. Cities Service Gas Co.*, 148 Kan. 393 (1938); *Mall v. C. & W. Rural Electric Co-operative Association*, 168 Kan. 518 (1950); *Sutton v. Frazier*, 183 Kan. 33 (1958); *J & S Building Co. v. Columbian Title & Trust Co.*, 1 Kan.App.2d 228 (1977); *Southwestern Bell Telephone Co. v. State Corp. Com's of State of Kan.*, 233 Kan. 375 (1983).

[5.] *Southwestern Bell*, *supra* note 4, at 378.

[6.] Attorney General Opinion No. 82-228.

[7.] Attorney General Opinion No. 87-183.

[8.] *Southwestern Bell*, *supra*, note 4.

[9.] *Luttgen v. Ergenbright*, 161 Kan. 183, 191 (1946).

[10.] *Carpenter v. Fager*, 188 Kan. 234, 236 (1961).

[11.] *Smith v. State Highway Commission*, 185 Kan., 445, 451-52 (1959) (emphasis in original).

[12.] *Kress & Co. v. Miami*, 82 So. 775, 777 (1919). *See also* Annot., Right of abutting owner to permanent use of subsurface of street or highway, 7 A.L.R. 646; and 39 AmJur2d, Highways Streets, and Bridges, § 174, Subsurface uses.

[13.] K.S.A. 68-544.

February 22, 2000

2000-10 Removing highways from state system

Curtis E. Watkins
Kingman City Attorney
P. O. Box 475
Kingman, Kansas 67068

Re:

Roads and Bridges--State Highway--Designation of Highways in the State System; Procedure for Removing

Synopsis:

K.S.A. 1999 Supp. 68-406 authorizes the Secretary of Transportation to make changes to the State highway system when the changes are required for public safety, convenience, economy, classification or reclassification, but removal of a road from the State highway system involves a reclassification or revision that requires the Secretary to rely on an engineering and traffic study and conduct a public hearing. Cited herein: K.S.A. 1999 Supp. 68-406.

* * *

Dear Mr. Watkins:

As counsel for the City of Kingman you inquire whether the Secretary of Transportation is required to conduct an engineering and traffic study and conduct a hearing prior to removing a portion of the state highway from the State highway system.

K.S.A. 1999 Supp. 68-406 states that the Secretary "shall designate, adopt and establish, and may lay out, open, relocate, alter, vacate, remove, redesignate and reestablish highways" in every county in the state. In regard to removal, the statute is very specific:

"The secretary of transportation shall make such revisions, classifications or reclassifications in the state highway system *as are found on the basis of engineering and traffic study* to be necessary, *and such revisions, classifications or reclassifications may include, after due public hearing, removal from the system of roads* which have little or no statewide significance, and the addition of roads which have statewide importance and will provide relief for traffic congestion on existing routes on the system. All roads which have been placed upon the state highway system shall be a part of the state highway system, but changes may be made in the state highway system when the public safety, convenience, economy, classification or reclassification require such change. The total mileage of the state highway system shall not be extended except by act of the legislature. Highways designated under this section shall be state highways, and all other highways outside of the city limits of cities shall be either county roads or township roads as provided for by law. The state highway system thus designated shall be constructed, improved, reconstructed and maintained by the secretary of transportation from funds provided by law." (Emphasis added.)

The statute is clear on its face. The Secretary *shall* revise, classify or reclassify a road when the revision is found to be necessary on the basis of an engineering and traffic study. If removal of the road is warranted because the road has little or no statewide significance, removal of the road can be effected only after a public hearing. Additionally the Secretary *may* make changes to the state highway system when the changes are required for public safety, convenience, economy, classification or reclassification, but removal of a road involves a reclassification or revision necessitated by a study and effected by a hearing.

Construction of a statute is a question of law and involves the application of a hierarchy of rules. *State v. Donlay*, 253 Kan. 132 (1993). Primary among these rules is that the intent of the Legislature controls if the intent can be determined from the statute's plain language. *State v. Scherzer*, 254 Kan. 926 (1994). When a statute is clear on its face, the court reviewing the statute must give effect to the intention of the Legislature as expressed, rather than determine what the law should or should not be. *Martindale v. Robert T. Tenny, M.D., PA.*, 250 Kan. 621, 626 (1992). *State v. Haug*, 237 Kan. 390 (1985); *U.S. v. O'Brien*, 686 F.2d 850 (C.A. Kan., 1982); *City of Overland Park v. Nikias*, 209 Kan. 643 (1972). Accordingly, it is our opinion that K.S.A. 1999 Supp. 68-406 authorizes the Secretary of Transportation to make changes to the State highway system when the changes are required for public safety, convenience, economy, classification or reclassification, but removal of a road from the State highway system involves a reclassification or revision that requires the Secretary to rely on an engineering and traffic study and conduct a public hearing.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Guen Easley
Assistant Attorney General

2000-11 Review of survey prior to recording

Gordon B. Stull
Pratt County Counselor
P.O. Box 885
Pratt, Kansas 67124

Re: Personal and Real Property--Land Surveys--Review by County Surveyor Before Recordation; Certification

Synopsis: The term "plat of survey" as used in K.S.A. 1999 Supp. 58-2005 refers to all plats derived from a survey. The term "plat of survey" may include a "subdivision plat" but may also include plats of land that have not been subdivided. While the statute does not require that a county surveyor officially certify a plat, it is clear that the Legislature intended that a county surveyor's review accomplish the same purpose as a contracted land surveyor's review and certification, to assure that the plat complies with statutory requirements. A county may not impose a fee to offset its costs of review of subdivision plats under K.S.A. 1999 Supp. 58-2005. Cited herein: K.S.A. 19-241; 58-2001; 74-7037; K.S.A. 1999 Supp. 58-2005; 74-7003; K.A.R. 66-12-1.

* * *

Dear Mr. Stull:

You request our opinion regarding statutory requirements for review and certification of certain plats before they are recorded by a county register of deeds. Those requirements are set forth in K.S.A. 1999 Supp. 58-2005 as follows:

"Before a subdivision plat or plat of survey may be recorded, it shall be reviewed by the county surveyor. In the absence of the county surveyor, the county engineer may contract with a land surveyor who shall review such subdivision plat or plat of survey and certify the same if in compliance with the requirements of this act."

Although there is a bill pending before the Legislature to repeal this statute,[(1)] we are proceeding with this opinion because it is unknown whether the bill will pass.

You first ask the meaning of the term "plat of survey," and you question whether that term is synonymous with the term "subdivision plat." Neither of those terms is defined by statute; however the term "plat" is defined in a statute concerning the State Board of Technical Professions as follows:

"'Plat' means a diagram drawn to scale showing all essential data pertaining to the boundaries and subdivisions of a tract of land, as determined by survey or protraction. A plat should show all data required for a complete and accurate description of the land which it delineates, including the bearings (or azimuths) and lengths of the boundaries of each subdivision."[(2)]

Black's Law Dictionary defines "plat" as:

"A map of a specific land area such as a town, section, or subdivision showing the location and boundaries of individual parcels of land subdivided into lots, with streets, alleys, easements, etc., usually drawn to a scale."[(3)]

We could find no definition of the term "plat of survey," however that term is used in the Kansas Minimum Standards for Boundary Surveys adopted by the Kansas State Board of Technical Professions.[(4)] The Standards list the items to be included when a survey is conducted and require a surveyor to furnish a client "a *plat of survey* drawn to an appropriate scale" that includes certain enumerated elements. The Standards use the term "plat of survey" as a general term to describe a diagram showing the results of all boundary surveys whether or not the platted land is subdivided.

The fundamental rule of statutory construction is that the intent of the Legislature governs.[(5)] "When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be."[(6)] The fact that the Legislature included the term "plat of survey" in addition to the term "subdivision plat" in K.S.A. 1999 Supp. 58-2005 indicates that it intended to include plats other than subdivision plats. We believe that the terms are not synonymous. It is our opinion that a "plat of survey" is a diagram of land based on a survey. The term "plat of survey" may include a "subdivision plat" but may also include plats of land that have not been subdivided.

Your second question concerns the requirements for review by a county surveyor, or a contracted land surveyor in the absence of a county surveyor. You point out that there are different requirements depending on who conducts the review. The statute requires a county surveyor to only review a plat before it is recorded, but a contracted land surveyor is required to both review *and certify* that the plat complies with statutory requirements. You ask whether a county surveyor has the same duty as a contracted land surveyor notwithstanding this discrepancy. The statute does not explain what is meant by "review" and "certification." Nevertheless, it is evident that the purpose of both is to assure compliance with the requirements of the provisions of K.S.A. 58-2001 *et seq.*[(7)] While the purpose of review and certification may be the same, the statute clearly states that the county surveyor must only review the plat but that a land surveyor with whom the county engineer contracts, must review and certify the plat. Because the statute is plain, we must give effect to the intention of the Legislature as expressed. Therefore, a county surveyor need only review a plat, but a land surveyor with whom a county engineer contracts must review and certify a plat. Although a county surveyor is not required to certify that a plat is in compliance with the statutory requirements, the county surveyor's review would be meaningless without a determination of whether the plat meets statutory requirements. A statute should not be construed to require the performance of a vain or futile act.[(8)] Therefore, while a county surveyor need not officially certify a plat, it is clear that the Legislature intended that a county surveyor's review accomplish the same purpose as a contracted land surveyor's review and certification.

Finally, you inquire whether a county may pass the cost of plat review and certification on to a recording party by adopting a resolution establishing a fee to be paid at the time of recording. K.S.A. 1999 Supp. 58-2005 does not provide for a fee. K.S.A. 19-241 provides in pertinent part:

"It shall be the duty of the board of county commissioners of each county in this state to levy in each year, in addition to the taxes for other purposes, a county tax sufficient to defray *all county charges and expenses* incurred during such year. . . ." (Emphasis added.)

Attorney General Opinion No. 80-248 concluded that a county's costs for the review of subdivision and survey plats required by K.S.A. 58-2005 are charges and expenses within the meaning of K.S.A. 19-241 and should be paid out of the county general fund. Therefore, a county may not impose a fee to offset its costs of complying with the statute.

In summary, the term "plat of survey" as used in K.S.A. 1999 Supp. 58-2005 refers to all plats derived from a survey. The term "plat of survey" may include a "subdivision plat," but may also include plats of land that have not been subdivided. While the statute does not require that a county surveyor officially certify a plat, it is clear that the Legislature intended that a county surveyor's review accomplish the same purpose as a contracted land surveyor's review and certification, to assure that the plat complies with statutory requirements. A county may not impose a fee to offset its costs of review of subdivision plats under K.S.A. 1999 Supp. 58-2005.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas

Donna M. Voth
Assistant Attorney General

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

1. House Bill No. 2750.

2. K.S.A. 1999 Supp. 74-7003(m).

3. Black's Law Dictionary, 1151 (6th Ed. 1990).

4. K.S.A. 74-7037; K.A.R. 66-12-1.

5. *Adams v. St. Francis Regional Med. Ctr.*, 264 Kan. 144, 156 (1998).

6. *Britz v. Williams*, 262 Kan. 769, 774 (1997).

7. *See* Attorney General Opinion No. 80-248.

8. *Board of County Comm'rs of Ness County v. Bankoff Oil Co.*, 265 Kan. 525, 538 (1998).

October 4, 2000

2000-51 Ownership of Navigable waters

The Honorable Tim Tedder
State Representative, 101st District
2406 E. Trail West Road
Hutchinson, Kansas 67501

Re:

Waters and Watercourses--Navigable Waters--Arkansas River; Navigability; Ownership of Bed and Banks

Synopsis:

Title to the bed and banks of a navigable river is vested in the State. The public land extends up to the high water mark, which is the point to which the water usually rises in ordinary seasons of high water. However, where no public access exists, one may need to obtain permission from the adjoining landowner in order to travel on private land to get to the public land. Additionally,

some recreational activity may be restricted by the application of other state laws dealing with bank maintenance or conservation water structures. Cited herein: K.S.A. 24-126; 70a-106; 82a-301; 82a-307.

* * *

Dear Representative Tedder:

You inquire whether a navigable river is public, and what part of the river bed or banks is private land. You indicate that your question arises from a boundary dispute between those driving recreational vehicles on the bed and banks of the Arkansas river and an adjoining land owner who claims they are trespassing.

At issue is what part of the bed and banks of a navigable river constitutes public land for the purpose of recreational use. [Addressed elsewhere is whether the public and private ownership interests are fixed.][(1)]

It is well-settled in Kansas that title to the bed and banks of a navigable river is vested in the State.[(2)] The Kansas Supreme Court has addressed the issue of where the boundary lies between the State and other proprietors on a navigable waterway. In *Siler v. Dreyer*,[(3)] [dealing with an appeal from a district court's determination that on a navigable waterway, the State owned only from the water's edge to the water's edge] the Court interprets older cases[(4)] to hold that the boundary line of the riparian owner (one owning land along a waterway) is the ordinary high-water mark, which is the line to which water rises in time of ordinary high water.[(5)] Although the boundary line between proprietary owners on a navigable river has been conclusively established by *Siler*, it is confusing when current cases, most dealing with how accretion and avulsion affect ownership of adjoining lands, refer to older cases that state that the riparian owner's title extends to the river's banks,[(6)] to the river's margin,[(7)] and to the river's edge.[(8)]

In sum, the high water mark on the bed and banks of the Arkansas River constitutes the boundary between land owned by the State and land owned by the adjoining riparian owner. Thus, the bed and banks, up to the line to which water rises in time of ordinary high water, are public property that can be used by the public for lawful or non-destructive recreational purposes. However, where no public access exists, one may need to obtain permission from the adjoining landowner in order to travel on private land to get to the public land.[(9)] Additionally, some recreational activity may be restricted by the application of other state laws dealing with bank maintenance or conservation water structures.[(10)]

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Guen Easley
Assistant Attorney General

CJS:JLM:GE:jm

FOOTNOTES

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

[1.] *See* Attorney General Opinion No. 97-45 (how the doctrine of accretion affects the public and private property interests on a navigable river).

[2.] K.S.A. 70a-106; *Meek v. Hays*, 246 Kan. 99, 100 (1990); *Murray v. State*, 226 Kan. 26, 37 (1979); *Fowler v. Wood*, 73 Kan. 511 (1906).

[3.] 183 Kan. 419, 423 (1958).

[4.] *Fowler v. Wood*, *supra*; *State, ex rel. v. Akers*, 92 Kan.179 (1914); Cushenbery v. Waite-Phillips Co., 119 Kan. 478 (1925).

[5.] *Siler*, 183 Kan at 423.

[6.] *Meek v. Hays*, 246 Kan. at 100-101 citing *Siler*.

[7.] *Kaw Drainage District v. Atwood*, 229 Kan. 594 (1981).

[8.] *Ibid*, at 597, citing *Fowler v. Wood, supra.*

[9.] 78 Am.Jur.2d Waters § 51 (1999).

[10.] K.S.A. 24-126; 82a-301; 82a-307.

October 24, 2000

2000-53 Regulation of farm ponds by KDHE Clean Water Act

Clyde D. Graeber, Secretary
Kansas Department of Health and Environment
Capitol Tower
400 SW 8th Street, Suite 200
Topeka, Kansas 66603-3930

Re:

Public Health--Secretary of Health and Environment, Activities; Water Supply and Sewage--Prevention of Water Pollution; Permits; Exemptions; Reservoirs and Farm Ponds

Synopsis:

The federal Clean Water Act's water quality standards apply only to "natural ponds" and not to artificially created ponds. K.S.A. 1999 Supp. 65-171d(d), which exempts "reservoirs and farm ponds" from water quality standards (absent discharge or seepage to surface or groundwater, or impairment to the health of persons using the reservoir or farm pond), can be interpreted to apply only to non-natural ponds, thus providing consistency between Kansas law and the Clean Water Act. A duly adopted regulation as proposed herein would clarify that the "reservoirs and farm ponds" to which K.S.A. 1999 Supp. 65-171d(d) refers are not "natural ponds" and therefore not part of "waters of the United States" as defined by the Environmental Protection Agency pursuant to the Clean Water Act. Since nearly all "reservoirs and farm ponds" located on Kansas farms are not "natural ponds," such "reservoirs or farm ponds," whether privately or publicly owned, are not subject to the water quality standards of the Clean Water Act.

The Clean Water Act's water quality standards do apply to lakes and wetlands. Subsection (f) of K.A.R. 28-16-28c, which attempts to exempt lakes and wetlands from water quality standards, is not authorized under Kansas law and thus is void, providing additional consistency between Kansas law and the Clean Water Act.

Finally, Attorney General Opinion No. 87-154 is withdrawn to the extent it is inconsistent with the conclusions reached herein. Cited herein: K.S.A. 1999 Supp. 65-171d; K.A.R. 28-16-28b; K.A.R. 28-26-28c; 33 U.S.C. § 1251; 33 U.S.C. § 1311; 33 U.S.C. § 1363; 33 C.F.R. § 323; 33 C.F.R. §328.3; 40 C.F.R. § 122.2.

* * *

Dear Secretary Graeber:

As Secretary of the Kansas Department of Health and Environment, you ask whether a provision of Kansas law is consistent with the federal Clean Water Act. The Kansas provision about which you inquire is found within K.S.A. 1999 Supp. 65-171d(d):

"If a freshwater reservoir or farm pond is privately owned and where complete ownership of land bordering the reservoir is under common ownership, such freshwater reservoir or farm pond shall be exempt from water quality standards except as it relates to water discharge or seepage from the reservoir or pond to waters of the state, either surface or groundwater, or as it relates to the public health of persons using the reservoir or pond or waters therefrom."

The fundamental question posed is whether the term "reservoir or farm pond," as used in this Kansas statute, falls within the federal Clean Water Act definition for "waters of the United States." The consequence of the answer is this: If a "reservoir or farm pond" is a "water of the United States," such is covered by the Clean Water Act and water quality standards apply. Alternatively, if a "reservoir or farm pond" is not a "water of the United States," such is not covered by the Clean Water Act and water quality standards do not apply.

The Federal Clean Water Act

Our analysis begins with the federal Clean Water Act (CWA),[(1)] enacted by Congress in 1972. The Congressional objective of this Act was "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."[(2)] To achieve this objective, Congress established several national goals, one of which was to eliminate the discharge of pollutants into the navigable waters.[(3)] The CWA prohibits the discharge of any pollutant by any person "into the navigable waters of the United States, except in compliance with various provisions of the Act."[(4)] The Environmental Protection Agency (EPA) and the Army Corps of Engineers share responsibility for administering and enforcing the CWA.

For purposes of the CWA, "navigable waters" means "waters of the United States, including the territorial seas."[(5)]

"Although the Act prohibits discharges into 'navigable waters,' the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import. In adopting this definition of 'navigable waters,' Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[(6)]

Clearly, Congress intended to create a very broad grant of jurisdiction in the Clean Water Act.[(7)] "Waters of the United States" is an extremely extensive concept covering almost - but not all - surface waters that are geographically located within the United States. As one court stated, "we are confident that the statute Congress enacted excludes *some* waters, . . ."[(8)]

To meet the objective established by Congress, the EPA developed a regulation that specified the meaning of the term "waters of the United States" and the Corps of Engineers adopted a comparable definition. Those regulations, in pertinent part, define "waters of the United States" as:

"(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, prairie potholes, wet meadows, playa lakes, or *natural ponds* the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce . . . .[(9)]

Within this definition, our attention is drawn to the phrase "natural pond." That phrase appears to mean exactly what it says as indicated in a fairly recent 7th Circuit Court case[(10)] that addressed whether the CWA's coverage extended to an artificially constructed retention pond.[(11)] The Circuit Court first acknowledged the United States Supreme Court's construction of the CWA as a broad statute, reaching waters and wetlands that are not navigable or even directly connected to navigable waters. However, the Court went on to say:

"But not even the EPA shares Justice Story's view that the national government has regulatory power over every drop of water. 'It was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it.' . . . *Hoffman Homes, Inc. v. Administrator, EPA*, 999 F.2d 256, 260-61 (7th Cir. 1993), concluded that the EPA did not exceed its power when

promulgating this definition [of "waters of the United States"] but that even a rule with such broad scope did not cover a one-acre wetland 750 feet from a small creek. A six-acre retention pond, farther from a body of surface water, is an easier case. The EPA's definition speaks of 'natural ponds'; Dayton Hudson built an artificial pond."(12)

Subsequently, a federal district court, citing the 7th Circuit Court's decision, noted:

"[P]laintiffs also suggest that the tailings ponds themselves constitute 'navigable waters.' This is wrong. The EPA definition of navigable waters includes only 'natural' ponds, as opposed to manmade collection systems."(13)

An extensive search for other cases addressing the CWA's applicability to artificially constructed ponds has proved fruitless. It appears that ponds in general have rarely been the subject of CWA litigation and that farm ponds in particular never have been.(14) However, the notion that the CWA does not cover non-natural ponds is bolstered by a Corps of Engineers regulation.

Within the context of the CWA, the Corps of Engineers also developed a series of regulations in relation to permits for discharges of dredged or fill material into waters of the United States.(15) In the definition section, the term "waters of the United States" is tied to the primary EPA and Corps of Engineers definition (including the portion quoted above); however, the term "lake" is given a further specific meaning:

"The term lake means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream , or tidal area. As used in this regulation, *the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering*, irrigation, settling basins, cooling, or rice growing."(16)

We understand that the EPA considers a Corps of Engineers regulation persuasive. Further, we note that the Corps' regulation is consistent with the EPA's inclusion only of "natural ponds," as well as with the two federal cases that addressed "ponds." In relation to this issue, we conclude that the EPA's definition of "waters of the United States" includes only "natural ponds" and does not include non-natural ponds.

Kansas Law: Problems and Solutions

(1) K.S.A. 1999 Supp. 171d(d): "Reservoir or Farm Pond"

As discussed previously, "natural ponds" are not excluded from the meaning of "waters of the United States" for purposes of the CWA. The difficulty presented by use of the phrase "reservoir or farm pond" in K.S.A. 1999 Supp. 65-171d(d) is that in the absence of a specified meaning, it is impossible to discern whether "reservoir or farm pond" refers to natural ponds or non-natural ponds. The phrase should be defined to allow a meaningful determination whether a "reservoir or

farm pond," as that term is used in K.S.A. 1999 Supp. 65-171d(d), falls within the jurisdiction of the CWA.

With the adoption of a regulation by the Secretary of Health and Environment that defines "reservoir or farm pond" as follows, a portion of the dilemma would be resolved:

"Reservoir or farm pond," as used in K.S.A. 65-171d(d), means a non-naturally occurring pool of water created by impoundment behind a manmade structure to divert and store streamflow of a stream, creek or overland flow, or by excavation of a pit or basin to store water.

Such a definition would clarify that the "reservoirs or farm ponds" to which K.S.A. 1999 Supp. 65-171d(d) refers are not "natural ponds," and therefore not within the EPA's definition of "waters of the United States." Based on information from the Kansas Department of Health and Environment, the Kansas Water Office and the United States Geological Survey, we understand that nearly all pools of water located on Kansas farms are not natural but rather are the result of manmade construction. Thus upon adoption of the proposed definition, K.S.A. 1999 Supp. 65-171d(d) would be consistent with the Clean Water Act. Additionally, such privately owned "reservoirs and farm ponds," whether privately or publicly owned, would not be subject to CWA water quality standards.[(17)]

(2) The 1987 Attorney General Opinion

In 1987, former Attorney General Robert T. Stephan opined that a "pond or reservoir could theoretically be a navigable water, into which the unpermitted discharge of pollutants is prohibited by federal law" and thus he concluded that "state law is not as broad as federal law in this area."[(18)] However, with our recommended definition of "reservoir or farm pond" in place, a surface body of water as so described would then *not* be a "natural pond" and thus would not be "waters of the United States" under the EPA definition, *i.e.*, "navigable waters" under the CWA.

As indicated previously, the CWA was designed to prohibit the discharge of pollutants *into* navigable waters, *i.e.*, waters of the United States. Accordingly, if a body of water is *not* a water of the United States, the discharge of pollutants *into* it is not prohibited by the CWA.[(19)] Consequently, we would no longer consider the quoted statements from the 1987 Attorney General opinion as relevant because anything flowing *into* such a manmade "reservoir or farm pond" would not be flowing *into* a "water of the United States."

(3) K.A.R. 28-16-28g

The following provision is found within the Kansas surface water quality standards regulations:[(20)]

"Application of standards to privately-owned surface waters. The application of water quality standards to privately owned water bodies shall be subject to the provisions of K.S.A. 65-171d."[(21)]

"Private surface water" means "any lake or wetland that is both located on and completely bordered by land under common private ownership."[(22)] Thus, the quoted regulation actually means that privately owned lakes or wetlands are subject to the provisions of K.S.A. 65-171d and, therefore, exempt from water quality standards.[(23)] This outcome is clearly inconsistent with the EPA definition of "waters of the United States" that specifically includes "lakes" and "wetlands."

The legal problem with this regulation under Kansas law is that in relation to private ownership, K.S.A. 65-171d addresses only "reservoirs and farm ponds" and not lakes or wetlands. Subsection (f) of K.A.R. 28-16-28c is thus not authorized by that statute. To be valid, a regulation must come within the authority conferred by statute, and a regulation which goes beyond that which the Legislature has authorized or which extends the source of its legislative power is void.[(24)] Thus, subsection (f) of K.A.R. 28-16-28c is considered void and as a technical matter should be revoked. The third part of the issue is thus resolved by our determination that a regulation, which has been inconsistent with the EPA definition of "waters of the United States," is void and has no legal effect.

In conclusion, the federal Clean Water Act's water quality standards apply only to "natural ponds" and not to artificially created ponds. While K.S.A. 1999 Supp. 65-171d(d) exempts "reservoirs and farm ponds" from water quality standards (absent discharge or seepage to surface or groundwater, or impairment to the health of persons using the reservoir or farm pond), interpretation of that term as non-natural ponds provides consistency between Kansas law and the Clean Water Act. A duly adopted regulation as proposed herein would clarify that the "reservoirs and farm ponds" to which K.S.A. 1999 Supp. 65-171d(d) refers are not "natural ponds" and therefore not part of"waters of the United States" as defined by the Environmental Protection Agency pursuant to the Clean Water Act. Since nearly all "reservoirs and farm ponds" located on Kansas farms are not "natural ponds," such "reservoirs or farm ponds," whether privately or publicly owned, are not subject to water quality standards of the Clean Water Act.

The Clean Water Act's water quality standards apply to lakes and wetlands. Subsection (f) of K.A.R. 28-16-28c which attempts to exempt lakes and wetlands from water quality standards is not authorized under Kansas law and thus is void. Determination that this subsection, which has been inconsistent with the Environmental Protection Agency's definition of "waters of the United States" is void provides additional consistency between Kansas law and the Clean Water Act.

Finally, Attorney General Opinion No. 87-154 is withdrawn to the extent it is inconsistent with the conclusions reached herein.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Camille Nohe
Assistant Attorney General

CJS:JLM:CN:jm

FOOTNOTES

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

[1.] 33 U.S.C. §§ 1251 *et seq.*

[2.] 33 U.S.C. § 1251(a).

[3.] 33 U.S.C. § 1251 (a)(1).

[4.] 33 U.S.C. § 1311 (a).

[5.] 33 U.S.C. § 1362(7).

[6.] *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 133, 106 S.Ct. 455, 461, 88 L.Ed.2d 419 (1985).

[7.] *See, e.g. U.S. v. Riverside Bayview Homes, supra*, 474 U.S. at 133, 106 S.Ct. at 462 ("Congress intended to define the waters covered by the Act broadly."); *Quivera Mining Co. v. EPA*, 765 P.2d 126, 129 (10th Cir. 1985) ("It is the intent of the clean Water Act to cover, as much as possible, all waters of the United States instead of just some.").

[8.] *Village of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962 (7th Cir. 1994) (emphasis original).

[9.] 40 C.F.R. § 122.2 (EPA). The comparable Corps of Engineers regulation appears at 33 C.F.R. § 328.3(a).

[10.] *Village of Oconomowoc Lake v. Dyaton Hudson Corp*, 24 F.3d 962 (7th Cir. 1994).

[11.] *Id.*, at 965, "Rainwater runoff from the 110-acre site (including 25 acres of paved parking) will collect in a 6-acre artificial pond."

[12.] *Id.*, at 962.

[13.] *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp. 983 (E.D. Washington 1994).

[14.] *E.g.* No cases that address ponds are referenced in "What are 'Navigable Waters' Subject to Federal Water Pollution Control Act?" 160 ALR Fed. 585 (2000), or in prior annotation, "What Are 'Navigable Waters' Subject to the Provisions of the Federal Water Pollution Control Act, as amended (33 USCS §§ 1251 et seq.)?" 52 ALR Fed. 788 (1981).

[15.] 33 C.F.R. §§ 323 *et seq.*

[16.] 33 C.F.R. § 323.2(b).

[17.] Absent discharge or seepage to surface or groundwater, or impairment to the health of persons using such waters.

[18.] Attorney General Opinion No. 87-154.

[19.] Oconomowoc, *supra.*

[20.] K.A.R. 28-16-28b *et seq*.

[21.] K.A.R. 18-16-28c(f).

[22.] K.A.R. 18-16-28b(rr).

[23.] Except, as provided in K.S.A. 1999 Supp. 65-171d(d), in relation to water discharge or seepage to surface or groundwater, or in relation to the public health of persons.

[24.] *In the Matter of the Appeal of Alex R. Masson, Inc., from an Assessment of Retailers' Sales Tax*, 21 Kan.App.2d 863 (1995). *See also Board of Sedgwick County Commissioners v. Action Rent to Own, Inc.*, 266 Kan. 293 (1998).

December 7, 2000

2000-61 Cost of driveway culverts, new and replacements

Craig D. Cox
Harvey County Counselor
P. O. Box 687
Newton, Kansas 67114-0687

Re: Roads and Bridges--County and Township Roads--Culverts Over Ditches in Front of Private Property; Costs by County or City; Additional Culverts or New Entrances; Costs to Owner; Procedures; Penalty

Synopsis: A county is required to maintain indefinitely any culverts constructed pursuant to K.S.A. 68-543 along county roads. Whether a culvert was or should have been installed by a county due to the county making a ditch that obstructed an existing entrance onto a county road is a factual question that must be resolved in order to determine whether the county has an obligation to maintain or replace the culvert. Cited herein: K.S.A. 1999 Supp. 68-115; K.S.A. 68-543; L. 1917, Ch. 264, § 50.

* * *

Dear Mr. Cox:

You ask our opinion regarding a county's responsibility to construct and maintain culverts over ditches that connect a public road with private property. Specifically, you ask whether K.S.A. 68-543 requires a county to perpetually maintain a culvert constructed by the county for a private landowner and whether a county is obligated to maintain or replace existing culverts when there is no record as to who initially installed the culvert.

The provisions of K.S.A. 68-543 in question state:

"Whenever it is necessary to make a ditch along a public road in front of any property at such depth as will in the opinion of the officials in charge of such road obstruct any then existing entrance connecting such property with the public highway, it shall be the duty of the county engineer to cause to be constructed and maintained a substantial culvert over the said ditch, so as to make a good, safe crossing. The county shall pay for such improvement on county roads and the township on township roads."

This statute was enacted in 1917[(1)] with the same language as quoted above except in place of "any then existing entrance" the original statute contained the language "the usual entrance." The statute is clear that an entrance must already be in existence at the time the ditch is made in order to require the county to construct a culvert. The statute has always contained the requirement that a county maintain culverts constructed pursuant to this statute. Your first question is whether the statute requires that a county maintain such culverts forever.

The fundamental rule of statutory construction is that the intent of the Legislature governs. The legislative intent is determined by the language of the statute itself, and where the language is plain, unambiguous and also appropriate to the obvious purpose, the court should follow the intent as expressed by the words used rather than determine what the law should or should not be. Words in common usage should be given their natural and ordinary meaning.[(2)] K.S.A. 68-543 clearly requires that a county maintain a culvert constructed pursuant to that statute. The statute contains no limitation on how long the maintenance is to continue. Thus, a county is required to maintain indefinitely any culverts constructed along a county road pursuant to K.S.A. 68-543. This conclusion is also supported by K.S.A. 1999 Supp. 68-115 which allows a county engineer to make ditches along a county road as the engineer deems necessary for the benefit of the roads, and requires the county to keep the ditches open.

Your second question is whether a county has a statutory obligation to maintain or replace existing culverts when there is no record as to who initially installed the culvert. You explain that Harvey County has no records of which culverts were installed by the County and which culverts were installed by a landowner. K.S.A. 68-543 clearly requires a county to install a culvert when it has made a ditch along a county road in front of any property at such depth as will obstruct any then existing entrance connecting such property with the county road. A county's responsibility does not depend on who installed the culvert initially, but rather on the circumstances surrounding the initial placement of the culvert. If a landowner voluntarily installed a culvert where the county was responsible to do so, the county is still required to maintain the culvert. However, if a landowner installed a culvert where the county did not make a ditch that obstructed the landowner's existing entrance, the county would not be required to maintain the culvert. Whether a culvert was, or should have been, installed by a county due to the county

making a ditch that obstructed an existing entrance onto a county road is a factual question that must be resolved in order to determine whether the county has an obligation to maintain or replace the culvert. Therefore, we cannot reach an opinion on whether Harvey County has a statutory obligation to maintain or replace existing culverts when there is no record as to the circumstances surrounding the initial placement of the culvert.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Donna M. Voth
Assistant Attorney General

CJS:JLM:DMV:jm

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

[1.] L. 1917, Ch. 264, § 50.

[2.] *In re Tax Appeal of Boeing Co.*, 261 Kan. 508, 515 (1997).

December 15, 2000

2000-65 Trains regulation of speeds and blocked crossings

The Honorable Edward W. Pugh
State Senator, 1st District
625 Lincoln Avenue
Wamego, Kansas 66547

Re:

Cities and Municipalities--Miscellaneous Provisions--Railways, Crossings; Regulation of Speed; Local Regulation of Trains

Counties and County Officers--General Provisions--Home Rule Powers; Limitations, Restrictions and Prohibitions; Procedure; Local Regulation of Trains

Public Utilities--Duties and Liabilities of Railroad Companies; Obstruction of Public Highways and Streets--Permitting Trains to Stand on Public Highways; Local Regulation of Trains that Block Grade Crossings

Synopsis:

Local legislation that imposes speed restrictions on trains is preempted by the Federal Railway Safety Authorization Act of 1994. Depending on its terms, local legislation that imposes restrictions on the amount of time that trains can obstruct traffic may offend the Commerce Clause to the United States Constitution and may be preempted by the Federal Railway Safety Authorization Act of 1994. Cited herein: K.S.A. 1999 Supp. 12-1633; 14-434; 15-438; K.S.A. 1999 Supp. 19-101a, as amended by L. 2000, Ch. 159, § 2; K.S.A. 66-273; 66-274; 45 U.S.C.A. § 421; 49 U.S.C.A. § 20101; § 20106.

* * *

Dear Senator Pugh:

You inquire whether a city or county can enact legislation that imposes speed restrictions on trains traveling within the municipality's boundaries and whether municipalities can impose restrictions on the amount of time that trains may obstruct traffic.

Our research has detected no Kansas statutory authority that would affect a county's ability to use its home rule power[(1)] to enact a resolution restricting train speeds provided that such resolution did not conflict with federal law. Unlike counties, however, K.S.A. 1999 Supp. 12-1633 and 15-438 authorize cities to regulate certain aspects of railroads. K.S.A. 1999 Supp. 12-1633 provides:

"*The governing bodies of cities of the first and second class shall have the power* to regulate the crossings of railway and street-railway tracks and provide precautions and adopt ordinances regulating the same; to regulate the running of street railways or cars and to adopt ordinances relating thereto and to govern the speed thereof; *to regulate the running of railway engines and cars, except speed, and to adopt ordinances relating thereto*; and to make other and further provisions, rules and regulations to prevent accidents at crossings and on tracks of railways. . . ."

"From and after the effective date of this act [1988] that part or parts of any rule, regulation or ordinance adopted pursuant to this section regulating the speed of railway engines and cars shall not be of any force or effect, and that part or parts shall be and are hereby declared null and void." (Emphasis added.)

K.S.A. 1999 Supp. 15-438 applies to cities of the third class:

"The council shall have power to . . . provide for the passage of railways through the streets . . . also to *regulate the crossings of railway tracks . . . to regulate the running of railway engines and cars, except speed, and to adopt ordinances relating thereto*; and to make any other and further provisions, rules and restrictions to prevent accidents at crossings and on the tracks of railways . . . ."

"On and after the effective date of this act [1988] that part or parts of any rule, regulation or ordinance adopted pursuant to this section regulating the speed of railway engines and cars shall not be of any force or effect, and that part or parts shall be and are hereby declared null and void." (Emphasis added).[(2)]

Clearly, these statutes do not allow cities to regulate the speed of "railway engines and cars." However, because K.S.A. 1999 Supp. 12-1633 and 15-438 do not uniformly apply to all cities,[3] a city can charter out of the applicable statute and enact an ordinance that regulates train speed, provided that such charter ordinance does not run afoul of federal law.[4]

In *Sisk v. National Railroad Passenger Corp.*,[5] the United States District Court for the District of Kansas concluded that a city ordinance limiting the speed of trains was preempted by the Federal Railroad Safety Act of 1970.[6] Seven years after the *Sisk* decision, the United States Supreme Court opined that federal regulations establishing maximum train speeds preempt state regulation of train speed limits.[7]

The Federal Railroad Safety Act of 1970 (FRSA) was replaced by the Federal Railway Safety Authorization Act of 1994 (FRSAA),[8] the purpose of which is to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents."[9] Like its predecessor, the FRSAA provides that "laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable."[10] In *Burlington Northern and Santa Fe Railway Company v. City of Sedgwick, Kansas*,[11] the United States District Court for the District of Kansas invalidated a city ordinance imposing a train speed limit of 30 miles per hour because the ordinance was preempted by federal regulations governing train speed limits. In addition to *Sisk* and *City of Sedgwick, Kansas*, there are numerous cases from other jurisdictions that conclude that local legislation limiting train speeds are preempted by federal law.[12]

As far as the legality of local legislation limiting the length of time that a train can block a city street, K.S.A. 66-273 provides, in part:

"Each and every railroad company . . . is hereby prohibited from allowing its trains, engines or cars to stand upon any public road within one half mile of any incorporated or unincorporated city or town . . . or upon any crossing or street, to exceed ten minutes at any one time without leaving an opening in the traveled portion of the public road, street or crossing of at least thirty feet in width."

Violation of this statute, enacted in 1923, is a misdemeanor and punishable by a fine.[13] In *Walker v. Missouri Pac. Ry. Co.*,[14] the Kansas Supreme Court concluded that K.S.A. 66-273 does not restrict a city's ability to enact a more restrictive ordinance that prohibits a railroad company from blocking a street for more than five minutes.[15]

However, it is our opinion that local legislation that imposes time limits on trains obstructing traffic is vulnerable to attack on the same grounds as ordinances regulating train speed. In *CSX Transportation, Inc. v. City of Plymouth, Michigan*,[16] the 6th Circuit Court of Appeals concluded that an ordinance prohibiting more than a five minute obstruction of street traffic is related to railroad safety and, therefore, is preempted by the Federal Railway Safety Act:

"The FRSA preempts municipal 'laws, regulations, orders, and standards related to railroad safety.' (citation omitted.) [The] Plymouth ordinance does not, on its face, make 'reference to' railroad safety. Plymouth contends that this ordinance is not preempted because it was enacted to promote the general welfare of its residents, and was not directed towards and does not regulate

any aspect of 'railroad safety.' Neither that purpose nor the lack of a reference to railroad safety precludes a finding that the ordinance is 'related to' railroad safety because the ordinance has a connection with railroad safety. [In] determining whether the Plymouth ordinance has a 'connection with' and is thus related to railroad safety, this court must necessarily look at the terms of the ordinance and what the ordinance requires in terms of compliance. [It] is on the basis of potential safety aspects of compliance with the ordinance that the challenged ordinance relates to railroad safety. Taking the evidence in the light most favorable to Plymouth, it appears that compliance with the challenged ordinance would require shorter or faster trains. [As] the Plymouth ordinance is 'related to railroad safety,' it is expressly preempted by the FRSA."[(17)]

Additionally, such local legislation may also violate the Commerce Clause of the United States Constitution.[(18)] In *Kahn v. Southern Ry. Co.*,[(19)] the 4th Circuit Court of Appeals opined that an ordinance prohibiting a train from obstructing traffic for three minutes violates the Commerce Clause because "the ultimate result would be to unduly shorten trains and thereby impede the free flow of commerce between the states."[(20)] However, there are at least two state appellate courts that have concluded that such regulation does not violate the Commerce Clause.[(21)]

Summarizing, it is our opinion that local legislation that imposes speed restrictions on trains is preempted by the Federal Railway Safety Authorization Act of 1994. Depending on its terms, local legislation that imposes time restrictions on trains obstructing traffic may offend the Commerce Clause to the United States Constitution and may be preempted by the Federal Railway Safety Authorization Act of 1994.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Mary Feighny
Assistant Attorney General

CJS:JLM:MF:jm

FOOTNOTES

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

[1.] K.S.A. 1999 Supp. 19-101a, as amended by L. 2000, Ch. 159, § 2.

[2.] *See, also,* K.S.A. 1999 Supp. 14-434.

[3.] Kan. Const. Art. 12, § 5.

[4.] Attorney General Opinion No. 90-107.

[5.] 647 F. Supp. 861 (D. Kansas, 1986).

[6.] 45 U.S.C.A. § 421 *et seq.*

[7.] *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993).

[8.] 49 U.S.C.A. § 20101 *et seq.*; *Sisk v. National Railroad Passenger Corp.,* 647 F.Supp. 861 (D. Kansas, 1986).

[9.] 49 U.S.C.A. § 20101.

[10.] 49 U.S.C.A. § 20106.

[11.] 1997 WL 807872 (December 30, 1997).

[12.] *CSX Transp., Inc. v. Thorsby*, 741 F. Supp. 889 (M.D. Ala. 1990); *Covington v. Chesapeake and O.R. Co.*, 708 F. Supp. 806 (E.D. Ky. 1989); *Grand T.W. R. Co. v. Merrillville,* 738 F. Supp. 1205 (N.D. Ind. 1989); *CSX Transp., Inc. v. Tullahoma,* 705 F. Supp. 385 (E.D. Tenn. 1988).

[13.] K.S.A. 66-274.

[14.] 95 Kan. 702 (1915).

[15.] *Id.* at 706-707.

[16.] 86 F.3d 626 (6th Cir. 1996).

[17.] *Id*. at 630.

[18.] U.S. Const., Art. I, § 8.

[19.] 202 F.2d. 875 (4th Cir. 1953).

[20.] *See also, CSX Transportation, Inc. v. City of Plymouth,* 92 F.Supp. 2d 643 (E.D. Mich. 2000) and *Ocean View Improvement Corp. v. Norfolk & Western Railway Co.,* 140 S.E.2d 700 (Va. 1965) (state law and ordinances regulating trains stopping on city streets violate the Commerce Clause).

[21.] *City of Lake Charles v. Southern Pacific Transportation Co.,* 310 So.2d 116 (La. 1975); *Commonwealth v. New York Central Railroad Co.*, 216 N.E.2d 870 (Mass. 1966).

March 13, 2001

2001-11 Termination of group health care coverage at age 65

Robert C. Myers
Newton City Attorney

P.O. Box 345
Newton, Kansas 67114

Re:

Cities and Municipalities--Retirement Systems; Group Health Care Benefits for Retirants--Group Health Care Benefits Plan; Availability for Retirants; Coverage, End; Eligibility; Cost of Coverage; Definitions; Cessation of Coverage

Synopsis:

A local government can terminate coverage under its group health care benefits plan when a retired employee turns 65, regardless whether the employee's dependent has also reached the age of 65. Cited herein: K.S.A. 12-5040.

* * *

Dear Mr. Myers:

As City Attorney for the City of Newton, you inquire regarding K.S.A. 12-5040, which requires local governments to make available to certain retired employees and their dependents access to group health care benefits. Specifically, you inquire whether a city can terminate benefits when the retired employee has reached the age of 65 but the employee's dependent [*i.e.* the spouse] has not.

K.S.A. 12-5040 provides:

"(a) Each local government which provides an employer-sponsored group health care benefits plan for the employees of the local government shall make coverage under such group health care benefits program available to retired former employees and their dependents, upon written application filed with the clerk or secretary thereof within 30 days following retirement of the employee, as provided by this section. *Coverage under the employee group health care benefits plan may cease to be made available upon* (1) *the retired employee attaining age 65*, (2) the retired employee failing to make required premium payments on a timely basis, or *(3)* the retired employee becoming covered or becoming eligible to be covered under a plan of another employer.

"(b) [The] local government may pay for all or part of the cost of continuing the employee group health care benefits plan coverage for such *retired former employees and their dependents.*

"(c) As used in this section . . . *'retired' means any employee* who has terminated employment and is receiving a retirement or disability benefit for service with the local government from which they terminated employment." (Emphasis added.)

The primary rule for interpreting a statute is to ascertain legislative intent from the language of the statute itself.[(1)] If the language is clear and unambiguous, a court should derive the intent as expressed by the words.[(2)] Moreover, if the language is clear and unambiguous, the plain

meaning of the language will be conclusive except when a literal application of the statute will produce a result at odds with the intention of its drafters or when the plain meaning would lead to absurd consequences.[(3)]

The provisions of K.S.A. 12-5040 are clear and, therefore, must be given effect according to their plain and obvious meaning.[(4)] Termination of coverage appears to be triggered by something that only the retired employee does *[i.e.* attains 65, fails to make premium payments or becomes covered by another group health care plan]. Subsection (a) of K.S.A. 12-5040 is clear that a local government can terminate coverage when the *retired employee* reaches the age of 65 regardless of the age of the employee's dependent. K.S.A. 12-5040 refers to a *dependent* as distinct from a retired employee. If the Legislature had wanted to provide coverage for dependents after the retired employee turned 65, it could have done so.

Even if the statute was not clear on its face, it is clear from the legislative history that the Legislature was concerned about the difficulties in obtaining adequate health care insurance for retirees under the age of 65 who participated in the Kansas Public Employees Retirement System (KPERS).[(5)] K.S.A. 12-5040 was enacted with the intention of providing for continued participation in group health care plans beyond the 18-month continuation period mandated by the Consolidated Omnibus Budget Reconciliation Act,(COBRA).[(6)] Therefore, it is our opinion that a local government can terminate coverage under its group health care benefits plan when a retired employee turns 65, regardless whether the employee's dependent has reached the age of 65.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Mary Feighny
Assistant Attorney General

CJS:JLM:MF:jm

FOOTNOTES

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

[1.] *Dierksen By and Through Dierksen v. Navistar Intern. Transp. Corp.*, 912 F.Supp. 480 (D. Kan., 1996).

[2.] *Id.* at 486.

[3.] *Nat'l Union Fire Insur. Co. of Pittsburg v. Midland Bancor, Inc.*, 854 F.Supp. 782 (D. Kan., 1994).

[4.] Attorney General Opinion No. 89-122.

[5.] *Report on Kansas Legislative Interim Studies to the 1988 Legislature:* Proposal No. 36 (December, 1987). *See, also,* Attorney General Opinion No. 2000-48, 94-31, and 89-122.

[6.] 29 U.S.C. § 1162.

September 21, 2001

2001-44 County vehicles exempt from weight limits

Keith D. Hoffman
Dickinson County Counselor
325 North Broadway
Abilene, Kansas 67410

Re:

Automobiles and Other Vehicles--Uniform Act Regulating Traffic; Size, Weight and Load of Vehicles--Criminal Penalties for Violation of Size and Weight Laws; Exceptions; Permits for Oversize or Overweight Vehicles

Synopsis:

Vehicles owned and operated by a county for the maintenance of county roads are exempt from weight limits established by article 19 of chapter 8 of the Kansas States Annotated. Cited herein: K.S.A. 2000 Supp. 8-1901; 8-1911, as amended by L. 2001, Ch. 5, § 37; L. 1986, Ch. 43, § 2.

* * *

Dear Mr. Hoffman:

You have asked our opinion regarding whether vehicles owned and operated by Dickinson County for maintenance of county roads are exempt from weight limits established by article 19 of chapter 8 of the Kansas Statutes Annotated. You indicate that it is your opinion that K.S.A. 8-1911 exempts vehicles owned by the County; however, the Kansas Highway Patrol has expressed a different understanding.

K.S.A. 2000 Supp. 8-1901 provides criminal penalties for vehicles that exceed size or weight limitations stated in article 19 of chapter 8 of the Kansas Statutes Annotated. Section (d) of that statute provides in part as follows:

"Except as otherwise specifically provided in this act, the provisions of article 19 of chapter 8 of Kansas Statutes Annotated governing size, weight and load shall not apply to . . . road machinery . . . temporarily moved upon a highway, or to a vehicle operated under the terms of a currently valid special permit issued in accordance with K.S.A. 8-1911, and amendments thereto."

K.S.A. 2000 Supp. 8-1911, as amended by L. 2001, Ch. 5, § 37, authorizes the Secretary of Transportation to issue special permits for the operation of vehicles that exceed weight limitations. The statute creates an exception from the requirement of obtaining a special permit for "vehicles owned by counties, cities and other political subdivisions of the state," except for trucks used exclusively for garbage, refuse or solid waste disposal operations.

In *State v. Moore*,[(1)] two private trash haulers challenged the constitutionality of exempting county-owned trash trucks from the weight limits of K.S.A. 8-1901 *et seq*. The private haulers were convicted of operating overweight vehicles while overweight trucks belonging to the Shawnee County Refuse Department were allowed to proceed. The Kansas Supreme Court noted that K.S.A. 8-1911 grants certain exemptions to the size and weight requirements.

"It should be noted that the statute quoted above [K.S.A. 8-1911] as it existed in October of 1983 . . . provided that vehicles owned by counties, cities, and other political subdivisions of the state were not required to obtain a special permit or comply with the gross weight requirements except after hours of darkness, with a further limitation that such vehicles were not permitted to travel on interstate highways. . . . *The obvious effect of K.S.A. 8-1911 is to exempt vehicles owned by political subdivisions from the size and weight requirements of K.S.A. 1984 Supp. 8-1908*."[(2)]

The Court affirmed the trial court's finding that the exemption of government-owned vehicles from the weight limitations of K.S.A. 8-1901 *et seq*. did not violate equal protection of the laws.

During the legislative session following the *Moore* decision, the Legislature amended the provisions of K.S.A. 8-1911 by adding that the general exemption from the maximum gross weight limitations "shall not exempt trucks owned by counties, cities and other political subdivisions specifically designed and equipped and used exclusively for garbage, refuse or solid waste disposal operations . . . . "[(3)] However, the general exemption for "vehicles owned by counties, cities and other political subdivisions of the state" has not been amended.[(4)]

The exemption for county-owned vehicles (except garbage trucks) from the requirements of obtaining a special permit in K.S.A. 2000 Supp. 8-1911, as amended by L. 2001, Ch. 5, § 37, clearly includes county vehicles used for maintenance of county roads. Additionally, although "road machinery" is not defined, certain county vehicles used for maintenance of county roadways may be included in the exemption for "road machinery" in K.S.A. 2000 Supp. 8-1901. Therefore, it is our opinion that vehicles owned and operated by Dickinson County for the maintenance of county roads are exempt from weight limits established by article 19 of chapter 8 of the Kansas States Annotated.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Donna M. Voth
Assistant Attorney General

CJS:JLM:DMV:jm

FOOTNOTES

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

[1.] 237 Kan. 523 (1985).

[2.] *Id.* at 526 (emphasis added).

[3.] L. 1986, Ch. 43, § 2.

[4.] K.S.A. 2000 Supp. 8-1911, as amended by L. 2001, Ch. 5, § 37.

June 18, 2002

2002-30 Opening roads, minimum maintenance roads

Michael L. Goodrich
Cherokee County Counselor
P.O. Box 174
Columbus, Kansas 66725

Re:

Roads and Bridges--General Provisions--Laying Out, Altering or Vacating Roads; Prescribed Width of County Roads

Roads and Bridges--County and Township Roads--Declaration of Minimum Maintenance Roads

Synopsis:

A board of county commissioners has discretion to determine whether a county road is opened pursuant to K.S.A. 68-101 *et seq*. In laying out and opening a county road, a board of county commissioners must satisfy applicable statutory requirements and specifications, including the width requirements of K.S.A. 68-116. A road used primarily for access through a residential area may be declared a minimum maintenance road. Cited herein: K.S.A. 19-212; 68-101; K.S.A. 2001 Supp. 68-102; 68-102a; K.S.A. 68-104; 68-107; 68-116; 68-5,102.

* * *

Dear Mr. Goodrich:

You have asked our opinion regarding whether Cherokee County may establish a minimum maintenance county road for access through a residential area. You state that approximately thirty citizens of Cherokee County have requested the County to open a twenty-foot wide road in their housing development. You indicate that there has been a private roadway in existence for over thirty years through this residential development, and that the landowners now wish to have a county road opened; however, the proximity of the roadway to their existing homes does not

allow for the minimum sixty-foot wide road prescribed by K.S.A. 68-116. It is your belief that the provisions of K.S.A. 68-116 are mandatory. The Board of County Commissioners are desirous of finding a compromise solution that would allow the opening of a road narrower than sixty feet. The Board wonders whether creating a minimum maintenance road may be a viable alternative solution. You ask the following questions:

1. Is the County required to officially open a county road before that road may be declared a minimum maintenance road?

2. If opening a county road is necessary to declare that road a minimum maintenance road, are easements given by the landowners to the County, or prescriptive use easements acquired by the landowners and subsequently assigned to the County, adequate to allow the County to declare the land within those easements a minimum maintenance road?

3. May a county open a minimum maintenance road for the purpose of maintaining access through a residential area?

4. In opening a minimum maintenance road for access through a residential area, must a county comply with all provisions set forth in Chapter 68 of the Kansas Statutes Annotated for the opening of a county road? If so, which statutory provisions must the county follow and what is the procedure for opening a minimum maintenance road?

A county's authority to establish public roads is governed by statute. K.S.A. 19-212 *Ninth* authorizes a board of county commissioners "[t]o lay out, alter or discontinue any road running through one or more townships in such county, and also to perform such other duties respecting roads as may be provided by law." K.S.A. 68-101 provides that "[t]he term 'county roads' shall mean all roads designated as such by the board of county commissioners. . . ."[(1)] A board of county commissioners may lay out or alter any road upon petition of an adjacent landowner or without a petition "when deemed necessary by the board."[(2)] K.S.A. 68-116 prescribes the width of county roads as follows:

"The width of all county roads shall be determined by the viewers at the time of establishing the same, and shall not be more than one hundred and twenty (120) nor less than sixty (60) feet . . . ."

The statute authorizes a board of county commissioners to increase the prescribed width when necessary for public safety or proper construction of a road; however there is no authority for decreasing the prescribed width. Attorney General Opinion No. 82-219 determined that in order to use county road and bridge fund moneys to maintain a road, the road must be designated a county road and satisfy applicable statutory requirements and specifications including the width requirements of K.S.A. 68-116.

K.S.A. 68-5,102 provides for declaration of a minimum maintenance road and sets forth the following procedure:

"(a) When the board of county commissioners of any county is of the opinion that any road within the county or on the county line is used only occasionally or is used only by a few individuals, the board may commence proceedings to declare the road a 'minimum maintenance road. . . .'

"(b) When a determination is to be made that one or more roads or parts of roads may be declared minimum maintenance roads, the board shall adopt a resolution describing such roads and shall transmit copies thereof to the planning commission of the county for its recommendation.

"(c) When a resolution is adopted under subsection (b) the board of county commissioners shall cause it to be published once in the official county paper together with a statement that a hearing will be held on such determination with the time and place of such hearing specified. Any person wishing to appear at such hearing and give evidence or testimony thereon may do so. At the conclusion of such hearing the board shall determine what roads or parts of roads described in such resolution are to be declared by it minimum maintenance roads.

"(d) Not later than 10 days after any road is declared to be a minimum maintenance road, signs shall be posted thereon by the board of county commissioners stating 'Minimum maintenance, travel at your own risk.' Such signs shall display black letters on a yellow background with the letters being at least two inches high.

. . . .

"(f) Whenever a road has been declared a minimum maintenance road in accordance with this section and signs have been posted thereon as provided in (d), the state, the county and the townships within such county and employees of such governmental entities shall be exempt from liability for any claim by any person under the Kansas tort claims act with respect to such minimum maintenance roads. No such governmental entity or employee thereof shall be liable for damages arising from such roads or their maintenance or condition."

With this statutory framework in mind, we now turn to your specific questions. You ask whether the County is required to officially open a county road before that road may be declared a minimum maintenance road. Attorney General Robert T. Stephan opined that the provisions of K.S.A. 68-5,102 cannot be applied to a road that has not been officially opened by the county.[(3)] That opinion concerned a crossing through a dry river bed created by residents when a bridge over the river was closed. Concerned about potential liability from persons using the river bed crossing that was connected to a county road, the county questioned whether it could declare the river bed crossing a minimum maintenance road in order to avoid liability. The opinion concluded that if an easement through the river bed was granted to the county, "the county could go through the steps of laying out a road across the river bed, applying, if desired, K.S.A. 1981 Supp. 68-5,102 after having done so."

Whether a particular road is laid out appears to be discretionary with a board of county commissioners. The language of K.S.A. 2001 Supp. 68-102 is permissive when a petition requesting a road is received or when a board of county commissioners decides to lay out a road

without a petition. Therefore, in answer to your second question, easements provided by the landowners[4] to Cherokee County may enable the County to lay out a road if the Board of County Commissioners determines that it is in the best interests of the County to do so.

Your next question is whether a road used for access to a residential area may be declared a minimum maintenance road. K.S.A. 68-5,102 permits a board of county commissioners to declare "*any road* within the county"[5] a minimum maintenance road if it is of the opinion that the road "is used only occasionally or is used only by a few individuals." It is our opinion that a road used primarily for access through a residential area may be declared a minimum maintenance road if the requirements of K.S.A. 68-5,102 are met.

Finally, you ask whether the County must comply with all provisions of Chapter 68 of the Kansas Statutes Annotated that are required for opening a county road if it desires to open a minimum maintenance road, and what procedures the County must follow to open a minimum maintenance road.

The Kansas Supreme Court has held that a board of county commissioners must follow the procedures and conditions prescribed by the legislature when establishing a road. The Court found that a county commission was without authority to establish a road pursuant to a petition that did not meet the statutory conditions set forth in K.S.A. 19-117 to establish a road to property without access to a public highway.[6] In reaching its conclusion, the Court stated:

"The statute declares the precise conditions under which a person is *permitted to petition* the board of county commissioners for a road. County commissioners and courts are without authority or power to substitute their own conditions therefore or to read exceptions into the statute. . . ."[7]

Because a road must be officially opened before it can be declared a minimum maintenance road, the County must comply with the provisions of K.S.A. 68-101 *et seq.* for laying out and opening a road. Specifically, K.S.A. 2001 Supp. 68-102 allows the board of county commissioners to open a road upon petition, or without a petition when it deems necessary, and requires the board to provide notice of laying out the road pursuant to K.S.A. 2001 Supp. 68-102a. Additionally, if the board receives a petition, it must follow the provisions of K.S.A. 68-104 through 68-107 regarding the appointment of road viewers, surveying and laying out of the proposed road, the notice by petitioner and the assessment of damages. As previously stated, the County must also comply with the prescribed width requirements stated in K.S.A. 68-116.

In summary, a board of county commissioners has discretion to determine whether a county road is opened pursuant to K.S.A. 68-101 *et seq.* In laying out and opening a county road, a board of county commissioners must satisfy applicable statutory requirements and specifications, including the width requirements of K.S.A. 68-116. A road used primarily for access through a residential area may be declared a minimum maintenance road pursuant to K.S.A. 68-5,102.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas

Donna M. Voth
Assistant Attorney General

CJS:JLM:DMV:jm

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

[1.] K.S.A. 68-101(3).

[2.] K.S.A. 2001 Supp. 68-102(a).

[3.] Attorney General Opinion No. 82-240.

[4.] Certain requirements must be met in order to establish a prescriptive easement. Whether there is sufficient evidence to establish the creation of a prescriptive easement depends on the particular facts and circumstances of each case. *See Stramel v. Bishop*, 28 Kan. App.2d 262 (2000); *Kratina v. Board of Commissioners*, 219 Kan. 499 (1976); *Chinn v. Strait*, 173 Kan. 625 (1952).

[5.] Emphasis added.

[6.] *McCluggage v. Loomis*, 176 Kan. 318 (1954).

[7.] *Id.* at 323 (emphasis in original).

July 16, 2002

2002-33 Classification of roads in county unit system

David J. Harding
Trego County Attorney
216 North Main Street
WaKeeney, Kansas 67672

Re:

Counties and County Officers--General Provisions--Home Rule Powers; Limitations, Restrictions and Prohibitions; Procedure; Designation of Road Classifications and Width

Roads and Bridges--General Provisions--Prescribed Width of County Roads

Roads and Bridges--County and Township Roads; County Road Unit System--Classification of Highways in County Unit Road Counties

Synopsis:

All county roads in a county road unit system are required to be classified pursuant to K.S.A. 68-516. Those classifications and the width requirements of K.S.A. 68-116 apply uniformly to all county roads, including local service roads, and may not be modified by the passage of a charter resolution. Cited herein: K.S.A. 2001 Supp. 19-101a, as amended by L. 2002, Ch. 108, § 9; K.S.A. 19-101b; 68-116; 68-515b; 68-516.

* * *

Dear Mr. Harding:

On behalf of the Board of County Commissioners of Trego County, you request our opinion concerning the classification and width restrictions for roads in a county that has adopted the county road unit system.

Specifically you ask whether all county roads in a county road unit system are required to be classified pursuant to K.S.A. 68-516, and whether a board of county commissioners may create additional road classifications. You also ask whether a local service road as defined in K.S.A. 68-516(a)(3) is subject to the width restrictions set forth in K.S.A. 68-116 and whether a board of county commissioners may adopt a charter resolution modifying those width restrictions.

You indicate that Trego County has adopted the provisions of the county road unit system as set forth in K.S.A. 68-515b. K.S.A. 68-516 requires that all the roads and highways in county unit road counties be classified, constructed and maintained according to the classification system set forth therein. Thus, in response to your first question, all county roads in a county road unit system are required to be classified pursuant to K.S.A. 68-516.

You ask next whether a county may adopt road classifications in addition to those set out in K.S.A. 68-516. A board of county commissioners is authorized to "transact all county business and perform all powers of local legislation and administration it deems appropriate," subject only to th*e* restrictions set forth by the Legislature.[(1)] The first of those restrictions is that "[c]ounties shall be subject to all acts of the legislature which apply uniformly to all counties."[(2)] Additionally, a county may exercise its home rule powers by passing a charter resolution to exempt itself from any legislative act, or part thereof, that is applicable to the particular county but not uniformly applicable to all counties.[(3)] A charter resolution may also include substitute and additional provisions on the same subject.[(4)] Therefore, we must determine if the road classifications enumerated in K.S.A. 68-516 apply uniformly to all counties, or whether Trego County may pass a charter resolution to exempt itself from those classifications and create additional road classifications.

Adoption of the county road unit system is optional in that K.S.A. 68-515b provides that "[b]oards of county commissioners *may adopt* the provisions of the county road unit system. . . ."[(5)] K.S.A. 68-516 requires that *all* the roads and highways in county unit road counties be

classified as provided in the statute.[6] These statutes contain no provisions that specifically treat one or more counties differently than other counties. In *Moore v. City of Lawrence*,[7] the Kansas Supreme Court addressed whether a statute, which was uniformly applicable to cities that opted to create a planning commission, prohibited a city that had created a planning commission from exercising its home rule powers to change the provisions of the statute by passing a charter ordinance. Because county home rule parallels city home rule, the Court has applied the same rationale to issues regarding the exercise of home rule by both cities and counties.[8] The *Moore* decision concluded that even though the statute pertaining to city planning was initially optional, the statute was intended to be uniformly applicable and binding on all cities that elected to adopt the planning commission procedure. Thus, a city that adopted the optional planning commission procedure was bound by a statute uniformly applicable, and the statute could not be opted out of or changed by charter ordinance.[9] Therefore, in response to your second question, it is our opinion that the provisions of K.S.A. 68-516 apply uniformly to all counties, and the Board of County Commissioners of Trego County may not adopt road classifications in addition to those set forth in K.S.A. 68-516.

Your next questions pertain to the width of county roads. You indicate that Trego County has many roads that are used exclusively for access to farm fields and pastures. You state that while these roads are critically important to the County's agricultural-based economy, they require only seasonal maintenance and do not justify a width that is wider than necessary for one farm implement to travel. You ask whether a local service road, as defined in K.S.A. 68-516(a)(3), is subject to the width restrictions set out in K.S.A. 68-116, and whether a board of county commissioners may adopt a charter resolution modifying those width restrictions. K.S.A. 68-516 includes local service roads as one of the road classifications in county road unit systems. Local service roads are defined to include "all public roads not designated for inclusion in the secondary road system and not designated as county minor collector roads or highways."[10] K.S.A. 68-116 prescribes the width of county roads as follows:

"The width of *all county roads* shall be determined by the viewers at the time of establishing the same, and shall not be more than one hundred and twenty (120) nor less than sixty (60) feet. . . ."[11]

The statute authorizes a board of county commissioners to increase the prescribed width when necessary for public safety or proper construction of a road; however there is no authority for decreasing the prescribed width. Attorney General Opinion No. 82-219 determined that in order to use county road and bridge fund moneys to maintain a road, the road must be designated a county road and satisfy applicable statutory requirements and specifications including the width requirements of K.S.A. 68-116. A more recent Attorney General Opinion addressed whether a county could open a minimum maintenance road that was less than sixty feet wide. The opinion confirmed that a board of county commissioners must comply with the width requirements of K.S.A. 68-116 in laying out and opening a county road.[12] We opine that K.S.A. 68-116 applies uniformly to all county roads and, therefore, a local service road as defined in K.S.A. 68-516(a)(3) is subject to the width restrictions set forth therein. Further, a board of county commissioners may not adopt a charter resolution to modify those road width restrictions.

In conclusion, all county roads in a county road unit system are required to be classified pursuant to K.S.A. 68-516. A board of county commissioners may not change or add to those classifications by adopting a charter resolution. The width requirements of K.S.A.68-116 apply uniformly to all county roads, including local service roads, and may not be modified by the passage of a charter resolution.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Donna M. Voth
Assistant Attorney General

CJS:JLM:DMV:jm

FOOTNOTES

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

[1.] K.S.A. 2001 Supp. 19-101a, as amended by L. 2002, Ch. 108, § 9.

[2.] K.S.A. 2001 Supp. 19-101a(a)(1), as amended by L. 2002, Ch. 108, § 9.

[3.] K.S.A. 2001 Supp. 19-101a(b), as amended by L. 2002, Ch. 108, § 9; K.S.A. 19-101b.

[4.] K.S.A. 19-101b.

[5.] Emphasis added.

[6.] Emphasis added.

[7.] 232 Kan. 353 (1982).

[8.] *See Missouri Pacific Railroad v. Greeley County Commissioners*, 231 Kan. 225 (1982); *Blevins v. Hiebert*, 247 Kan. 1 (1990).

[9.] *Moore*, 232 Kan. at 356-357.

[10.] K.S.A. 68-516(a)(3).

[11.] Emphasis added.

[12.] Attorney General Opinion No. 2002-30.

September 12, 2002

2002-40 Obstruction of streams, liability for injury

The Honorable Dan Thimesch
State Representative, 93rd District
30121 W. 63rd Street South
Cheney, Kansas 67025

Re:

Waters and Watercourses--Obstructions in Streams--Conditions to Permits; Liability for Injury

Synopsis:

An upstream landowner has a duty to protect a lower proprietor or downstream landowner from any damage resulting from the upstream landowner's gathering or diversion of water. The Stream Obstructions Act requires that any person, entity, agency or political subdivision of the State obtain a permit from the Division of Water Resources, Kansas Department of Agriculture, before making any change to: (1) Construct any dam or other water obstruction; (2) make, construct, or permit to be made or constructed any change in any dam or other water obstruction; (3) make or permit to be made any change in or addition to any existing water obstruction; or (4) change or diminish the course, current, or cross section of any stream within the State. The permit process in the Stream Obstructions Act is intended to determine if the proposed plan or change creates an unreasonable threat to the public safety or property, generally, but because the Act does not place a statutory duty on the Division of Water Resources to protect a downstream landowner affected by the permitee's (the upper landowner) structure or displacement of water, the Division of Water Resources does not incur liability from the permit process statute they administer. Cited herein: K.S.A. 2001 Supp. 75-6104; K.S.A. 82a-301, 82a-302; 82a-303b, as amended by L. 2002, Ch. 138, § 4.

* * *

Dear Representative Thimesch:

You inquire whether there is any state liability for damage when the Division of Water Resources issues a permit for the construction of a new bridge or other stream obstruction and there is subsequent damage to a downstream landowner as a result of the new bridge.

You indicate that your question arises in the context of a 1996 Kansas Supreme Court case, *Johnson v. Board of County Commissioners of Pratt County*.[(1)] In that case, the plaintiff sued the County and the engineering firm for negligent design and construction of a new bridge seeking recovery for repeated erosion damage from flooding allegedly caused by the new structure. The Court held that the County was liable because, as a landowner, the County has a duty not to cause substantial injury to downstream property when the County replaced the bridge.[(2)]

COUNTY'S TORT CLAIMS DEFENSE

In *Johnson*, the Court noted that the failure to obtain a channel alteration permit was relevant to the applicability of the County's tort claims exemption defense found at K.S.A. 2001 Supp. 75-6104(m)[(3)] dealing with an improvement to public property. A county, as a governmental entity, is subject to the Kansas Tort Claims Act, which imposes liability for damages caused by negligent acts under circumstances where the governmental entity, if a private person, would be liable, unless an exception applies. The exception found at K.S.A. 2001 Supp. 75-6104(m) exempts the plan for the construction of or the design of an improvement to public property if the plan or design is approved in advance of construction or improvement by the governing body "exercising discretionary authority to give such approval" and if the design is prepared "in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared." Because Pratt County did not obtain prior approval[(4)] from the Division of Water Resources, the agency that exercises discretionary authority over channel alterations,[(5)] the Court found that the public improvement exemption defense in the Tort Claims Act did not apply to provide immunity to the County from liability.[(6)]

The case stands for the proposition that an upstream landowner who constructs or replaces a watercourse obstruction has a duty to downstream landowners not to cause damage to downstream property and if the upstream landowner is a governmental agency, the Tort Claims Act requires compliance with the statutory requirements found in the Stream Obstructions Act in order for the public improvement exemption in the Tort Claims Act to have application. The Court did not, however, find that the Division of Water Resources has a duty to a downstream landowner as a result of the permit process. Addressing the permit process, the Court noted that compliance with K.S.A. 82a-301 "may either have prevented or reduced the damages alleged by the Johnsons"[(7)] and stated: "We suggest that appropriate state agencies and governmental subdivisions comply with the statutory permit requirements."[(8)]

The permit process is implicated when any person, partnership, association, corporation, agency or political subdivision makes one or more of four changes. K.S.A. 82a-301, as amended by L. 2002, Ch. 138, § 4, states:

"Without the prior written consent or permit of the chief engineer of the division of water resources of the Kansas department of agriculture, it shall be unlawful for any person, partnership, association, corporation or agency or political subdivision of the state government to: (1) Construct any dam or other water obstruction; (2) make, construct or permit to be made or constructed any change in any dam or other water obstruction; (3) make or permit to be made any change in or addition to any existing water obstruction; or (4) change or diminish the course, current, or cross section of any stream within this state. Any application for any permit or consent shall be made in writing in such form as specified by the chief engineer. Jetties or revetments for the purpose of stabilizing a caving bank which are properly placed shall not be construed as obstructions for the purposes of this section."

The permit process in the statute is intended to determine if the proposed plan or change creates an unreasonable threat to the public safety or property.[(9)] The Stream Obstructions Act does not create a duty on the Division of Water Resources to protect a downstream landowner affected by the permitee's structure or water displacement. The Court in *Johnson* did not find that the Division of Water Resources has any duty outside that which is established by the statute. Thus,

the Court's decision in *Johnson*, in our opinion, does not serve as a basis for imputing liability to the Division of Water Resources for damage to a downstream landowners affected by a change that is subject to the permit process found in K.S.A. 82a-301, as amended. We note that is beyond the scope of this opinion to address the existing case law concerned with liability incurred when an upstream landowner is a governmental agency and argues that a different exemption of the Tort Claims Act applies to immunize the agency from liability.[(10)]

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas
Guen Easley
Assistant Attorney General

CJS:JLM:GE:jm

FOOTNOTES

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

[1.] 259 Kan. 305 (1996).

[2.] *Dougan v. Rossville Drainage District*, 243 Kan. 315, 319 (1988) (citations omitted.) *See also* K.S.A. 24-105 (duty of a landowner or proprietor not to obstruct or collect for discharge surface water to the damage of an adjacent owner or proprietor.)

[3.] 259 Kan. at 324.

[4.] The County sought approval for the bridge three years after it was built. 259 Kan. at 319.

[5.] K.S.A. 82a-301 *et seq.*

[6.] 259 Kan. at 319.

[7.] 259 Kan. at 325.

[8.] *Id.*

[9.] K.S.A. 82a-301a (the legislative intent of the Act is to provide exclusive jurisdiction over stream obstructions for the "protection of public safety"). *See* K.S.A. 82a-302; 82a-303b as amended by L. 2002, Ch. 138, § 4.

[10.] *Dougan v. Rossville*, 270 Kan. 468, 484 (2000) citing *Dougan v. Rossville Drainage District*, 243 Kan. 315, 325 (1988) (when a legal duty is exists, a governmental agency cannot use the discretionary function exception in the Kansas Tort Claims Act to avoid liability.)

September 12, 2002

2002-42 Removal of fence – fence viewers

Richard A. Boeckman
Barton County Counselor
1121 Washington, P.O. Drawer 1586
Great Bend, Kansas 67530

Re:

Fences--Partition Fences--Controversies; Settlement by Fence Viewers

Fences--Miscellaneous Provisions--Removal of Fence Built Upon Land of Another by Mistake; Damages

Synopsis:

A board of county commissioners acting as fence viewers does not have the authority to order that a fence be moved. Cited herein: K.S.A. 29-104; 29-201; 29-301; 29-302; 29-304; 29-401; 29-403; 29-406.

* * *

Dear Mr. Boeckman:

You have asked whether a board of county commissioners has the authority pursuant to fence viewing statutes to order a fence be moved. You state that a dispute has arisen between two adjoining landowners concerning a division fence. One of the landowners asserts that the fence built by the adjoining landowner is not on the division line between the property of the two landowners, and encroaches up to thirty feet onto his property. The landowner who built the fence asserts that there was an agreement between the parties to build the fence in its present location. There is not a dispute as to whether the fence is a properly constructed fence. One of the parties has asked the Board of County Commissioners of Barton County, acting as fence viewers, to order that the fence be moved to the boundary line dividing the properties as determined by a recent survey. You have enclosed for our consideration numerous letters exchanged by the attorneys for the adjoining landowners. It is your opinion that the Board of County Commissioners is not authorized to order a fence be moved even if it believes the fence is not on the proper boundary line.

Kansas fence laws designate the board of county commissioners of each county as the fence viewers for the county.[(1)] As fence viewers, the commissioners' jurisdiction is limited to those duties and functions set forth in the statutes.[(2)] Chapter 29, Article 3 of the Kansas Statutes Annotated addresses partition fences, and includes the following requirement:

"The owners of adjoining lands shall keep up and maintain in good repair all partition fences between them in equal shares, so long as both parties continue to occupy or improve such lands, unless otherwise agreed."[(3)]

A landowner may complain to the fence viewers to determine whether a partition fence "is insufficient."[(4)] If the fence viewers determine that the fence "is insufficient," they shall direct the delinquent occupant of the land "to repair or rebuild the same within such time as they may judge reasonable."[(5)] Fences that meet the statutory construction and composition requirements, or that are determined by the fence viewers to be constructed in a manner that is equivalent to those requirements, "shall be deemed legal and sufficient fences."[(6)] The statutes do not include the placement or location of a fence in the requirements for a "sufficient" fence.

Controversies over the "rights of respective owners in partition fences, or their obligations to keep up and maintain the same in good repair" can be settled by the fence viewers who shall view the fence "and assign to each party, in writing, his equal share or part of such partition fence, to be by him kept up and maintained in good repair. . . ."[(7)] Again, there is no mention of the location of the fence. The fence viewers' authority is limited to making an assignment of each party's share of the fence for maintenance purposes.

Fence viewers are further authorized to appraise and assess damages to the land caused by a landowner's neglect to maintain or repair his portion of a partition fence.[(8)] They may also assess damages resulting from trespassing animals.[(9)] Finally, fence viewers may determine any damage to the soil caused by the removal of a fence "[w]hen a person has made a fence on an enclosure which afterwards, on making division lines, is found to be on lands of another, and the same has occurred through mistake. . . ."[(10)] This statute does not authorize the fence viewers to determine the correct placement of a fence, but rather limits them to determining any damages to the soil "when the parties cannot agree as to the damage."[(11)]

The fundamental rule of statutory construction is that the intent of the Legislature governs when that intent can be determined from the statutes in question. When statutes are plain and unambiguous, courts must give effect to the intent of the Legislature as expressed, rather than determining what the law should or should not be.[(12)]

Our review of the statutes relating to fences and fence viewers reveals no authority for county commissioners acting as fence viewers to determine whether the location of a division fence is on the correct property line. The fence viewers' authority is limited to determining the sufficiency of a fence's construction, to dividing the responsibility for building and maintaining division fences, and to assessing the costs and damages to the property when one party fails to pay its portion of the construction or maintenance costs, or fails to maintain its portion of the fence. Therefore, we concur with your opinion that a board of county commissioners acting as fence viewers does not have the authority to order that a fence be moved.

Very truly yours,
CARLA J. STOVALL
Attorney General of Kansas

Donna M. Voth
Assistant Attorney General

CJS:JLM:DMV:jm

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

[1.] K.S.A. 29-201.

[2.] *See* Attorney General Opinion No. 85-54.

[3.] K.S.A. 29-301.

[4.] K.S.A. 29-302.

[5.] *Id.*

[6.] K.S.A. 29-104.

[7.] K.S.A. 29-304.

[8.] K.S.A. 29-401.

[9.] K.S.A. 29-403.

[10.] K.S.A. 29-406.

[11.] *Id.*

[12.] *State v. Roderick*, 259 Kan. 107, 110 (1996).

June 9, 2003

2003-16 Solid waste fees and requirements

Karen L. Griffiths
Norton City Attorney
P.O. Box 10
Norton, Kansas 67654-0010

R. Douglas Sebelius
Norton County Attorney
P.O. Box 10
Norton, Kansas 67654-0010

Re:

Public Health--Solid and Hazardous Wastes--Solid Waste Tonnage Fees Authorized to be Imposed by Counties; Exceptions; Collection and Disposition of Proceeds; County Authority to Require all County Generated Waste to go to the County Owned and Operated Disposal Facility

Synopsis:

K.S.A. 65-3401 *et seq.* do not authorize a city to unilaterally exempt itself from a properly adopted and approved county-wide solid waste disposal plan. Any alternative city plan providing for disposal of municipally generated solid waste requires approval by the Kansas Department of Health and Environment.

When a county acts as a "market participant" rather than a "market regulator," it does not violate the commerce clause by requiring intra-county municipalities to use the county-owned and operated waste disposal facilities. Cited herein: K.S.A. 12-2110; 12-2123; 19-101a; 19-2677; 65-3401; 65-3402; 65-3405; 65-3407; 65-3409; 65-3410; Kan. Const., Art. 12, § 5; U.S. Const., Art. I, § 8, cl. 3.

* * *

Dear Ms. Griffiths and Mr. Sebelius:

You request our opinion on the following question:

"May the County of Norton require that all solid waste, as defined by K.S.A. 65-3402, generated within Norton County be disposed of exclusively at the solid waste processing facility owned and operated by the County of Norton?"

You explain that the county's solid waste disposal facility has been in continuous operation since 1974,[(1)] and that it is the only facility within the county currently permitted to dispose of all municipally gathered solid waste.[(2)] However, Norton County is presently exploring the possibility of modifying that permit to also operate a solid waste landfill. Two cities within Norton County have, for economic reasons, begun to consider hauling the solid waste generated and collected within their cities to facilities located outside of Norton County. Thus, you ask for our opinion on the authority of a county to require that all solid waste generated within that county be kept within the county, *i.e.* hauled to and processed by the properly permitted county-owned and operated facilities.

Your question raises two primary issues: (1) May a city unilaterally exempt itself from a county-wide solid waste disposal plan adopted and approved pursuant to K.S.A. 65-3401 *et seq.*; and (2) would a county's attempt to restrict the flow of solid waste generated within its boundaries violate the commerce clause of the United States Constitution.

Issue No. 1: *May a city unilaterally exempt itself from a county-wide solid waste disposal plan adopted and approved pursuant to K.S.A. 65-3401 et seq.?*

Kansas statutes provide cities with certain independent authority relating to solid waste disposal.[3] Counties also have specific statutes concerning solid waste disposal matters.[4] In addition to and overlaying these independent statutory authorities, K.S.A. 65-3401 *et seq.* provide a county-wide and cooperative approach to solid waste disposal.[5] The other statutes we have reviewed concerning waste disposal by cities or counties do not appear to be in conflict with K.S.A. 65-3401 *et seq.*[6] However, if there is any conflict between it and other statutes on the same matter, statutory construction rules require that where an irreconcilable conflict exists between statutes, the latest enactment will be held to supersede, repeal or supplant the earlier by implication; the later enactment must prevail.[7]

Cities' and counties' home rule authority[8] is not available to escape solid waste disposal decisions controlled and impacted by K.S.A. 65-3401 *et seq.*,[9] because, as stated by prior Attorney General opinions, this Act is uniformly applicable.[10] Thus, we believe that both cities and counties are subject to and must follow the terms of this Act.

K.S.A. 65-3401 *et seq.* represent a state-wide approach to the disposal of solid waste.[11] We must read and interpret all of the statutes in this Act *in pari materia*.[12] This Act in general contemplates a county-wide plan for solid waste disposal and provides for review and ultimate approval of all plans for disposal by the Kansas Department of Health and Environment (KDHE).[13] No entity, including a city or county, may dispose of solid waste without having a KDHE issued permit to operate in the proposed manner.[14]

K.S.A. 65-3410 discusses the authority of counties and cities to provide for collection and disposal of solid waste generated within their boundaries:

"(a) *Each city or county or combination of such cities and counties may provide for the storage, collection, transportation, processing and disposal of solid wastes generated within its boundaries*; and shall have the power to purchase all necessary equipment, acquire all necessary land, build any necessary buildings, incinerators, transfer stations, or other structures, lease or otherwise acquire the right to use land or equipment and to do all other things necessary for a proper effective solid waste management system including the levying of fees and charges upon persons receiving service. . . .

. . . .

"(b) In carrying out its responsibilities, *any such city or county* may adopt ordinances, resolutions, regulations and standards for the storage, collection, transportation, processing and disposal of solid wastes *which shall be in conformity with the rules, regulations, standards and procedures adopted by the secretary for the storage, collection, transportation, processing and disposal of solid wastes. . . .*

"(c) *Cities or counties* may contract with any person, city, county, other political subdivision or state agency in this or other states to carry out their responsibilities for the collection, transportation, processing and disposal of solid wastes."[15]

K.S.A. 65-3405 discusses how the above actions should be undertaken, and requires each county of the state, *or a designated city*, to submit a workable plan for the management of solid waste within the county.[(16)] This plan includes input from all impacted municipalities; "[t]here shall be established in each county or group of counties cooperating in a regional plan a solid waste management committee."[(17)]

This committee must include representatives from the cities within the county.[(18)] You inform us that a K.S.A. 65-3405 planning committee exists in Norton County, and that the currently approved Norton County solid waste disposal plan was apparently cooperatively adopted by a committee that included representatives from each of the cities within that county. However, what is now being contemplated is a new plan that may not have the full support of all cities within the county. This then leads us to the issue of whether a city must agree to follow the solid waste disposal plan proposed and approved by the county and the committee, and otherwise established under K.S.A. 64-3401 *et seq*.[(19)]

K.S.A. 64-3410 authorizes cities to enter into contracts and take steps for the actual handling of waste generated within their borders. K.S.A. 65-3405(i) clearly establishes the duty, power, and responsibility of the county, designated city, or group of counties to adopt and implement a solid waste management plan, designed to serve all generators of solid waste within the county. Once such a plan has been adopted and approved, K.S.A. 65-3405(p) authorizes and directs the lead county or designated city to implement the provisions contained in the approved plan. If a city wishes to dispose of solid waste in some way that differs from the county-wide cooperative plan submitted to and permitted by KDHE, it would still be required to do so in conformity with KDHE rules and regulations.[(20)] KDHE interprets K.S.A. 3405(b) to allow only one plan per county and believes that the only way a city could obtain approval of its plan would be if it is the official "designated city." We find no statutory or case law basis for disagreeing with the agency's interpretation of the Act. The interpretation of a statute by an administrative agency charged with the responsibility of enforcing a statute is entitled to judicial deference. This is called the "doctrine of operative construction," and deference to an agency's interpretation is particularly appropriate when the agency is one of special competence and experience.[(21)] K.S.A. 65-3401 *et seq.* does not authorize a city to unilaterally exempt itself from a properly adopted and approved county-wide solid waste disposal plan.[(22)]

Issue No. 2: *Can a county-wide disposal plan adopted and approved pursuant to K.S.A. 65-3401 et seq. require that all solid waste generated within a county remain within that county?*

The Constitution of the United States provides that Congress "shall have the power . . . to regulate Commerce with foreign Nations, and among the several States."[(23)] Though phrased as a grant of regulatory power to Congress, this clause has long been understood to have a negative impact upon the powers of States and political subdivisions.[(24)] This so called "dormant commerce clause" provision prevents state or political subdivisions from unjustifiably discriminating or placing burdens upon the interstate flow of commerce.[(25)]

To determine whether a particular regulation or law violates the dormant commerce clause, often requires examination of two separate matters: (1) Is the governmental entity in question regulating the market or simply participating in the market;[(26)] and, if it is regulating the market,

(2) whether the law or local ordinance "regulates even-handedly to effectuate a legitimate local public interest."[(27)]

In *Carbone, Inc. v. Town of Clarkstone*,[(28)] the United States Supreme Court held that the city's ordinance regulating the interstate flow of solid waste violated the dormant commerce clause. However, this case involved restrictions upon the conduct of private entities who were in the business of operating waste disposal systems and businesses. The *Carbone* Court and subsequent case law from federal district courts have distinguished this type of fact situation from instances where the governmental entity in question is itself the entity involved in and operating the waste disposal facilities and services.[(29)] These cases allow controls limiting the flow of solid waste when the regulating governmental entity in question has their own waste disposal facilities, based upon the "market participant" exception to the dormant commerce clause rules. Thus, we must determine if Norton County is a "market participant."

The precise contours of the market participation doctrine have yet to be established.[(30)] However, after issuance of the *Carbone* opinion and other federal cases, the Kansas Supreme Court examined the concept of "market participant" for purposes of the dormant commerce clause, in *Water Dist. No. 1 of Johnson County v. Mission Hills Country Club*.[(31)] The Court held that a Kansas water district, which had exclusive rights to provide pressurized treated water by pipeline within the district's boundaries, did not violate the commerce clause by prohibiting water users within that district from purchasing water from any other water utility.

After finding that state statutes provided the entity with authority to have exclusive rights to provide the service in question, the Court examined the *Carbone* case, distinguished it, and stated in pertinent part:

"The market participation exception to the dormant Commerce Clause applies when a municipality or state participates in a market. In such a situation, a state may favor its own citizens without violating the Commerce Clause. *See White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 208, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983), *Reeves, Inc. v. Stake*, 447 U.S. 429, 435-36, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980); *Hughes v. Alexandria Scrap Corp*., 426 U.S. 794, 810, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976).

. . . .

"Here, the District contends it is a market participant, not a market regulator, and thus is entitled to the exception. We note that the District is not merely favoring in-state buyers or disfavoring out-of-state sellers. Instead, it is requiring in-state interests to patronize it.

. . . .

"Legislative replacement does not discriminate against interstate commerce. In creating the District, Kansas has not favored in-state piped water producers over out-of-state competitors. Nor has the State handicapped other in-state and out-of-state businesses from competing against a group of local proprietors. No one enjoys a monopoly position selling piped water in Johnson County's commercial piped water market because the State has eliminated the market entirely.

Not even the District remains as a seller in the market. Although the District is now the lone provider of piped water in the district, it does so as a local government providing services, not as a business selling to a captive consumer base. The District unilaterally provides service to everyone in the district."

However, the Court does distinguish between selling water and hauling trash:

"A water distribution system is different from a trash hauling system, where public roads are used. The trash, loaded on competing companies' trucks, may traverse the same lines of transit and may even be in transit at the same time. Here, the District provides a municipal service within its boundaries. The Club is therefore trying to purchase a municipal service outside the district, indeed out of state."

Nevertheless, the Court goes on to adopt the principles of "market participation" discussed by federal courts in examining trash hauling issues wherein limits on taking trash out of a locality is allowed when the government is itself providing the disposal service:

"The District, as a quasi-municipal corporation, is providing a governmental service; thus, there is not any 'commerce' to call the Commerce Clause into play. The services due a citizen ('inhabitant' under the Act) from the District, mandated by the legislature and rendered within the boundaries of the District, are not items of commerce."

In the situation you present, the County is the only entity operating a waste disposal facility within Norton County. Acting pursuant to K.S.A. 65-3401 *et seq.*, the County has opted to provide this governmental service. A municipality can require all its residents to use its disposal service; exclusivity in the collection and disposal of refuse is a proper exercise of a municipality's police power.[(32)] While we do not have the benefit of a 10th Circuit or reported Kansas case directly on point, it appears that when a county is a "market participant" rather than a "market regulator" it does not violate the commerce clause. Thus, Norton County may lawfully require that all users of waste disposal systems, acting within the county, use the county-owned and operated waste disposal facilities approved pursuant to K.S.A. 65-3401 *et seq.*

In summary, it is our opinion that the provisions of K.S.A. 65-3401 *et seq.* do not authorize a city to unilaterally exempt itself from a properly adopted and approved county-wide solid waste disposal plan. When a county acts as a "market participant" rather than a "market regulator" it does not violate the commerce clause if it requires that all disposers of waste within the county use the county-owned and operated waste disposal facilities, adopted and approved pursuant to K.S.A. 65-3401 *et seq.*

Very truly yours,
Phill Kline
Attorney General of Kansas
Theresa Marcel Nuckolls
Assistant Attorney General

PK:JLM:TMN:jm

FOOTNOTES

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

[1.] The county has a permit from the Kansas Department of Health and Environment allowing it to operate its solid waste processing facility.

[2.] The Cities of Almena and Lenora maintain Kansas Department of Health permits for burn piles.

[3.] *See also* K.S.A. 12-2110 (a city which provides no refuse or solid waste collection and disposal service may regulate and license garbage or trash collectors, or both, and limit the number of licenses and pass ordinances as authorized by K.S.A. 12-2106 and 65-3410) and 12-2123 (authority of city to acquire and issue bonds to fund sites for disposal of waste).

[4.] *See* K.S.A. 19-2677 (authority of county to grant franchises to persons engaged in the business of operating all or any part of solid waste management systems within counties).

[5.] K.S.A. 65-3401 "it is the policy of the state to: (a) [e]stablish and maintain a cooperative state and local program of planning and technical and financial assistance for comprehensive solid waste management."

[6.] We note that K.S.A. 65-3401 *et seq.* were last amended in 1997.

[7.] *Amundson & Associations, Ltd. v. National Council on Compensation Ins., Inc.*, 26 Kan.App.2d 489 (1999).

[8.] Kan. Const., Art. 12, § 5 ("cities are empowered to determine their local affairs and government . . . powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self government"); K.S.A. 19-101a ["(a) The board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate, subject only to the following limitations, restrictions or prohibitions . . . ."]

[9.] K.S.A. 65-4301 *et seq.*

[10.] Attorney General Opinion No. 95-87. *See also* Attorney General Opinions No. 80-65, 80-221, and 84-97.

[11.] K.S.A. 65-3402(b) defines solid waste management system to mean "the entire process of storage, collection, transportation, processing, and disposal of solid wastes by any person engaging in such process as a business, or by any state agency, city, authority, county or any combination thereof."

[12.] *In re W.H.* ___ Kan. _____, 57 P.3d 1 (2002); *McCraw v. City of Merriam*, 271 Kan. 912 (2001) (in construing statutes and determining legislative intent, several provisions of an act in pari materia must be construed together with a view of reconciling and bringing them into workable harmony if possible).

[13.] K.S.A. 65-3405.

[14.] K.S.A. 65-3407.

[15.] Emphasis added.

[16.] K.S.A. 65-4302(p) defines designated city as ""a city or group of cities which, through interlocal agreement with the county in which they are located, is delegated the responsibility for preparation, adoption or implementation of the county solid waste plan."

[17.] K.S.A. 65-4305(b) allows a county that does not wish to cooperate in a regional plan to designate, by interlocal agreement, a city as the solid waste management planning authority for the county.

[18.] KDHE informs us that there are currently two cities in Kansas which have been designated as the lead entity for purposes of solid waste disposal. Salina is the designated city for Saline county and Emporia is the designated city for a regional plan area.

[19.] Assuming that KDHE would approve the proposed new plan.

[20.] *See* K.S.A. 65-4310(b) ("In carrying out its responsibilities, any such city or county may adopt ordinances, resolutions, regulations and standards for the storage, collection, transportation, processing and disposal of solid wastes which shall be in conformity with the rules, regulations, standards and procedures adopted by the secretary for the storage, collection, transportation, processing and disposal of solid wastes.") and K.S.A. 65-4309 (a)(5) ("It shall be unlawful for any person to: . . . (5) Store, collect, transport, process, or dispose of solid waste contrary to rules and regulations, standards or orders of the secretary. . . .")

[21.] *Hartford Underwriters Ins. Co. v. State Dept. of Human Resources*, ____ Kan. App.2d _____, 32 P.3d 1146 (2001).

[22.] K.S.A. 65-4305(q) allows a *county* party to a regional solid waste disposal plan to withdraw from a plan, but only under certain circumstances. There appears to be no similar provision applicable to cities wishing to unilaterally withdraw from an approved county-wide waste disposal plan.

[23.] U.S. Const. Art. I, § 8, cl. 3.

[24.] *See Blue Circle Cement, Inc. v. Board of County Comm's*, 27 F.3d 1499, note 13 (10th Cir. 1994).

[25.] *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1254 (10th Cir. 2000); *Oregon Waste Sys., Inc. v. Dpt. of Envtl. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994).

[26.] *See USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir. 1995), *cert. denied* 517 U.S. 35, 116 S.Ct. 1419, 134 L.Ed.2d 544 (1996).

[27.] *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Management* Auth., 261 F.3d 245, 252-253 (2d Cir. 2001) *cert. den.* 534 U.S. 1082, 122 S.Ct. 815, 151 L.Ed.2d 699 (2002); See *also Waste Management of Alameda County, Inc. v. Biagini Waste Reduction Systems, Inc*., 63 Cal. App. 4th 1488, 74 Cal. Rptr. 2d 676 (1st Dist. 1998).

[28.] *Carbone, Inc. v. Town of Clarkstone*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994).

[29.] *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied* 116 S.Ct. (1996); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied* 116 S.Ct. 1419 (1996).

[30.] Richard Roddewig & Glenn C. Sechen, "*The Second Circuit Defines the Limits of Carbone*," The Urban Lawyer, Vol. 28, No. 4, 847, 854 (1996); Stanley E. Cox, "*Garbage In, Garbage Out: Court Confusion about the Dormant Commerce Clause*," 50 Okla. L. Rev. 155, 156-58 (1997).

[31.] 265 Kan. 355 (1998).

[32.] *City of Princeton v. Stamper*, 466 S.E.2d 536, 195 W. Va. 685 (1995).

October 30, 2003

2003-28 Public right-of-way occupation by telephone

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).

October 16, 2003

2003-16A Solid waste requirements and cities

Kimberly A. Gulley
Director of Policy Development & Communications
League of Kansas Municipalities
300 S.W. 8th Avenue
Topeka, Kansas 66603

Re:

Public Health--Solid and Hazardous Wastes--Solid Waste Tonnage Fees Authorized to be Imposed by Counties; Exceptions; Collection and Disposition of Proceeds; County Authority to Require all County Generated Waste to go to the County Owned and Operated Disposal Facility

Synopsis:

While K.S.A. 65-3405 requires a county to adopt and implement a solid waste management plan, cities are not statutorily required to comply with a plan provision requiring that all solid waste generated within incorporated cities be disposed of at the county landfill if a city ordinance provides otherwise. Upon consideration of additional factual information provided to us, those portions of Attorney General Opinion No. 2003-16 regarding a city's ability to exempt itself from a solid waste management plan are hereby withdrawn. Cited herein: K.S.A. 65-3402, 65-3405, 65-3409, 65-3410, 65-3419; Kan. Const., Art. 12, § 5.

* * *

Dear Ms. Gulley:

You request that we reconsider Attorney General Opinion No. 2003-16, in which we concluded that a city cannot use its constitutional home rule power to exempt itself from a county solid waste management plan.

At the time we considered the opinion request, we were told only that Norton County was considering a "flow control" mechanism in its county solid waste management plan that would require all solid waste generated in the county to be disposed of at the county landfill. Concerned that some cities would, for economic reasons, want to transport their waste to facilities outside of the county, Norton County and the City of Norton inquired whether cities must comply with a solid waste management plan. After having been provided additional information, we now reconsider our conclusion.

Our understanding is that Norton County is desirous of drafting a new solid waste management plan that would, among other things, require that all solid waste generated within the incorporated cities and the unincorporated parts of the county be transported to and disposed of at the county landfill. The reason for this requirement is to ensure the financial viability of the county landfill through "tipping fees" based upon the amount of solid waste deposited (*i.e.* more trash, more fees).

The problem is that the fees must be sufficient to financially sustain the landfill. Therefore, the County would like to include in its solid waste management plan the aforementioned "flow control" provision. Norton County anticipates objection from some cities that either haul their city-generated solid waste to landfills outside the county or that contract with private trash collectors to haul to facilities other than the county landfill.

Counties are responsible for drafting and implementing a plan for the management of solid waste in the county.(1) A solid waste management committee composed of a variety of individuals, including representatives from the cities,(2) develops the plan which is then adopted by the county commission(3) and submitted to the Kansas Department of Health and Environment (KDHE) for its approval.(4) While K.S.A. 65-3405(i) requires a county to implement the plan, there is no provision in K.S.A. 65-3405 or any of the solid waste management statutes that *requires* cities to comply with a plan that mandates that all solid waste generated within incorporated cities be deposited at the county landfill. There are civil and criminal penalties for

collecting or transporting solid waste in violation of KDHE regulations, but no statutory penalties for non-compliance with a solid waste management plan.[(5)]

The reference in Attorney General Opinion No. 2003-16 to a city's home rule authority to exempt itself from a county solid waste management plan is not the issue. While the solid waste management statutes, including K.S.A. 65-3405, apply uniformly to all cities,[(6)] this simply means that a city cannot use its home rule power to charter out of the solid waste management *statutes*.[(7)] The question you present now is whether an objecting city could simply enact an ordinary home rule ordinance or an ordinance promulgated under the authority of K.S.A. 65-3410 to address solid waste collection and disposal at a facility designated by the city.

K.S.A. 65-3410 authorizes cities to "provide for the . . . collection, transportation . . . and disposal of solid waste generated within its boundaries." To accomplish those ends, a city "may adopt ordinances, . . . regulations and standards for the storage, collection, transportation . . . and disposal of solid wastes" provided such regulations conform with KDHE regulations.[(8)] In short, cities are specifically authorized by K.S.A. 65-3410 to dispose of city-generated solid waste - the only limit being that the ordinance must conform to KDHE regulations, which currently are silent regarding flow control.[(9)]

If a city chose to enact an ordinary home rule ordinance that provides for collection of city-generated solid waste and subsequent disposal in a facility not blessed by the county solid waste management plan, such ordinance would not run afoul of Article 12, Section 5 of the Kansas Constitution because there is no conflict with the solid waste management statutes nor has the State preempted cities from legislating in this area.[(10)]

While our prior opinion indicates that KDHE interprets K.S.A. 64-3405 to mean that only one plan can be approved for each county or group of counties, this assumes that the objecting cities are planning to submit their own plan for approval by KDHE.[(11)] We are now informed that this is not the case. Therefore, while KDHE's interpretation of K.S.A. 65-3405 may be correct, it is not relevant to the issue at hand.

Summarizing, it is our opinion that while K.S.A. 65-3405 requires a county to adopt and implement a solid waste management plan, cities are not statutorily required to comply with a plan provision requiring that all solid waste generated within incorporated cities be disposed of at the county landfill if a city ordinance provides otherwise. Upon consideration of additional factual information provided to us, those portion of Attorney General Opinion No. 2003-16 regarding a city's ability to exempt itself from a solid waste management plan are hereby withdrawn.

Sincerely,
Phill Kline
Attorney General of Kansas
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. 65-3405(a).

2. K.S.A. 65-3405(b).

3. K.S.A. 65-3405(d).

4. K.S.A. 65-3405(l).

5. K.S.A. 65-3409; 65-3419. KDHE regulations can be found at K.A.R. 28-29-21 *et seq.* None speak to flow control.

6. Attorney General Opinion No. 84-97.

7. "Any city may by charter ordinance elect . . . that the whole or any part of any *enactment of the legislature* applying to such city . . . shall not apply to such city." Kan.Const., Art. 12, § 5(c)(1) (emphasis added).

8. K.S.A. 65-3410(b); K.A.R. 28-29-21 *et seq.*

9. Note 5.

10. "City ordinance should be permitted to stand unless actual conflict exists between the ordinance and a *statute*, or unless legislature has clearly preempted the field so as to preclude municipal action. [Legislative] intent to reserve to the state exclusive jurisdiction to regulate an area must be clearly manifested by statute before it can be held that the state has withdrawn from the cities the power to regulate in the field. *McCarthy v. City of Leawood*, 257 Kan. 566, 569 (1995) (emphasis added).

11. A county may delegate to a "designated city" the responsibility for preparing, adopting, and implementing a *county* plan. K.S.A. 65-3405(a); 65-3402(p).

November 6, 2003

2003-30 County Surveyor scope of review

Betty Rose, Executive Director
Kansas State Board of Technical Professions
Landon State Office Building
900 S.W. Jackson Ste. 507
Topeka, Kansas 66612-1257

Re:

Personal and Real Property--Land Surveys--Review by County Surveyor; Scope of Review

Synopsis:

K.S.A. 2002 Supp. 58-2005, which requires county surveyors to certify plats prior to recording, mandates compliance only with the requirements of K.S.A. 58-2001 *et seq.* Cited herein: K.S.A. 58-2001; K.S.A. 2002 Supp. 58-2003; K.S.A 58-2004; K.S.A. 2002 Supp. 58-2005; K.S.A. 74-7037.

* * *

Dear Ms. Rose:

On behalf of the Kansas State Board of Technical Professions (Board), you inquire regarding the scope of a county surveyor's review of plats pursuant to K.S.A. 2002 Supp. 58-2005, which requires county surveyors to review plats before recording. Specifically, you inquire whether the scope of review is limited only to those items contained within K.S.A. 58-2001 *et seq.*

K.S.A. 2002 Supp. 58-2005 provides in part:

"Before a subdivision plat or plat of survey may be recorded, it shall be reviewed by the county surveyor. . . . The county shall be responsible for the enforcement of this act. *The county surveyor . . . shall certify that such plat meets all the requirements of this act.*" (1)

The reference to "this act" in K.S.A. 2002 Supp. 58-2005 means "an act relating to land surveys and platting,"(2) enacted in 1967, and codified at K.S.A. 58-2001 *et seq.* The Act, promulgated to address the problem of "indefinite monumentation of public land surveys" resulting in "an undue hazard to the title of real property,"(3) requires, among other things, the monumentation of corner boundaries of land subdivisions,(4) recording reference measurements for section corners,(5) and the submission of certain information for plats of land subdivisions.(6) In order to assure compliance, K.S.A. 2002 Supp. 58-2005 requires that county surveyors review the plat and "certify that such plat meets all of the requirements of [the] act."

Apparently, the Kansas Society of Land Surveyors (Society), which provided information to this office, is concerned whether a county surveyor is obligated, as part of the statutory review, to determine compliance with the Kansas Minimum Standards for Boundary Surveys and Mortgagee Title Inspections Standards of Practice #1(Minimum Standards).

The Minimum Standards, adopted by the Board in 1992, prescribe minimum standards for boundary surveys, mortgage title inspections and other land surveys.(7) Aside from the fact that the Act makes no reference to the Minimum Standards, the Minimum Standards were not adopted by the Society until eleven years after the enactment of the Act.(8) Even assuming that the Minimum Standards existed in 1967 and that the Legislature intended that county surveyors review plats for compliance with these standards, it would have been incumbent upon the

Legislature to have specifically incorporated by reference such standards in order to avoid challenges for unlawful delegation of legislative authority.[(9)]

For the reasons stated herein, it is our opinion that K.S.A. 2002 Supp. 58-2005 requires that a county surveyor certify compliance only with the requirements of K.S.A. 58-2001 *et seq.*

Very truly yours,
Phill Kline
Attorney General of Kansas
Mary Feighny
Assistant Attorney General

PK:JLM:MF:jm

FOOTNOTES

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

[1.] Emphasis added.

[2.] L. 1967, Ch. 309.

[3.] *Id.*

[4.] K.S.A. 58-2001.

[5.] K.S.A. 2002 Supp. 58-2003.

[6.] K.S.A. 58-2004.

[7.] K.S.A. 74-7037; K.A.R. 66-12-1.

[8.] Preface to Kansas Minimum Standards for Boundary Surveys and Mortgagee Title Inspections Standards of Practice #1.

[9.] *See* Attorney General Opinion No. 89-41.

November 20, 2003

2003-32 Commercial Driver's Act definition of Driver

Charles A. Peckham
Rawlins County Attorney

308 Main, Box 46
Atwood, Kansas 67730

Gary E. Rebenstorf
Director of Law and City Attorney
City Hall, 13th Floor
455 North Main Street
Wichita, Kansas 67202

Re:

Automobiles and Other Vehicles--Uniform Commercial Driver's Act--Definitions; "Driver"

Synopsis:

The term "driver," as used in the Kansas Uniform Commercial Drivers' License Act, means any person who drives, operates or is in physical control of a commercial motor vehicle, in any place open to the general public for purposes of vehicular traffic, or who is required to hold a commercial driver's license; the term does not include a person who merely holds a commercial driver's license but does not otherwise fall within that definition. Diversion for driving under the influence of alcohol offenses is precluded for commercial "drivers," even though a diversion would appear on the driver's record. Plea negotiations or charging amendments that result in convictions for lesser or fewer traffic infractions or offenses than originally charged are not precluded. Cited herein: K.S.A. 8-1013; K.S.A. 2002 Supp. 8-1567, as amended by L. 2003, ch. 100, § 1; K.S.A. 8-2,128, as amended by L. 2003, ch. 42, § 3; L. 2003, ch. 42, § 2 (to be codified at K.S.A. 2003 Supp. 8-2,150); 49 U.S.C. § 31311; 49 C.F.R. part 383; 49 C.F.R. § 383.5, § 384.225, § 383.226.

* * *

Dear Mr. Peckham and Mr. Rebenstorf:

As Rawlins County Attorney and as Director of Law and City Attorney for the City of Wichita, respectively, you pose three questions in relation to L. 2003, ch. 42, § 2(a),[(1)] which will be codified as K.S.A. 2003 Supp. 8-2,150(a). This new statute, which is a part of and supplemental to the Kansas Uniform Commercial Drivers' License Act (Act), provides:

"A driver may not enter into a diversion agreement in lieu of further criminal proceedings that would prevent such driver's conviction for any violation, in any type of motor vehicle, of a state or local traffic control law, except a parking violation, from appearing on the driver's record, whether the driver was convicted for an offense committed in the state where the driver is licensed or another state."

According to testimony of Sheila Walker, Director of Vehicles, this provision, as well as other amendments to the Act, were necessary for the following reason:

"The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, published its Final Rule on Commercial Driver's License Standards, Requirements and Penalties and the Commercial Driver's License (CDL) Program Improvements and Noncommercial Motor Vehicle Violations on July 31, 2002 (49 CFR Parts 350, 383, 384 and 390).

"In order for the State Highway Fund to avoid losing $16 to $18 million the first year and $31 to $33 million the second year, Kansas must pass state laws that mirror these federal regulations. House Bill 2220[(2)] will bring Kansas into compliance with the revised federal rule, which must be implemented by all states to protect highway funds." [(3)]

Driver vs. Holder of Commercial Driver's License

The Act defines the term "driver" as:

"Any person who *drives, operates or is in physical control* of a commercial motor vehicle, in any place open to the general public for purposes of vehicular traffic, or who is *required to hold a commercial driver's license.*" [(4)]

In light of this definition, Mr. Peckham asks whether a person who merely *holds* a commercial driver's license, but who is not *required* to hold a commercial driver's license, and is not driving, operating or in physical control of a commercial motor vehicle at the time of offense, is precluded from entering a diversion agreement for that offense. This situation could arise if a person formerly engaged as a commercial driver is no longer so engaged but has maintained his commercial driver's license.

We note that while Section 2 of L. 2003, chapter 42 is written in terms of a driver's conviction for a violation in "any type of motor vehicle," that phrase nevertheless modifies the word "driver," which statutorily does *not* include a person who holds a commercial driver's license but does not otherwise fall within the definition of "driver." In reaching this conclusion we are mindful of the fundamental rule of statutory construction that the intent of the Legislature governs.[(5)] Legislative intent may best be determined from the plain meaning of the words used in the statute in light of all the experience available to the law-making body.[(6)]

Nevertheless, we are also mindful that the Legislature may not have expressed itself as it may have wished in attempting to mirror the applicable federal regulations. We note, for example, that 49 C.F.R. § 384.225, which requires states to maintain a record of violations, refers to records of "CDL holders," not "drivers" as defined under Kansas law, as well as to "a person required to have a CDL." The Federal Motor Carrier Safety Administration's discussion of comments regarding this federal regulation include:

"Section 202(f) of the MCSIA [Motor Carrier Safety Improvement Act of 1999] requires the States to maintain a driver history record for CDL drivers of all convictions of State or local motor vehicle traffic control laws while operating any type of motor vehicle [49 U.S.C. 31311(a)(18)]." [(7)]

And while "CDL holders" are not specifically defined in the federal regulations, "commercial driver's license (CDL)" is defined as:

"A license issued by a State or other jurisdiction, in accordance with the standards contained in 49 CFR part 383, to an individual which *authorizes* the individual to operate a class of a commercial motor vehicle." (8)

Additionally, a Joint Explanatory Statement issued by Congress in conjunction with the MCSIA made Congressional intent clear regarding this issue:

"The behavior of a CDL holder in operating vehicles other than CMV's is relevant to the CDL holder's fitness to operate a commercial motor vehicle;

. . . .

"Subsection (c) revises 31311(a)(9) of such title to require a State to notify a CDL holder's home State of any violation of traffic laws committed by the CDL holder, not just violations involving a commercial motor vehicle." (9)

These federal regulations and the applicable discussions strongly imply that the definition of "driver" in Kansas' statutory mirroring of federal requirements should include "a person who holds a commercial driver's license" if the State is concerned about the loss of millions of dollars to the State Highway Fund.

Diversions

The second question posed in light of L. 2003, ch. 42, § 2 is whether diversions for driving under the influence of alcohol offenses are precluded by the statute, given that these diversions *do* appear on an individual's driving history.

The fact that a diversion appears on a person's driving history is not the determinative factor. Section 2 prohibits a driver from entering into a diversion agreement "in lieu of further criminal proceedings that would prevent such driver's *conviction* for any violation, of a state or local traffic control law . . . from appearing on the driver's record. . . . " A grant of diversion for driving under the influence would prevent the driver's conviction for driving under the influence from appearing on his driving record.

We are aware that K.S.A. 8-1013 and K.S.A. 2002 Supp. 8-1567(l)(1), as amended by L. 2003, ch. 100, § 1,(10) provide that for the purpose of determining whether an occurrence is a first, second or subsequent offense, an alcohol or drug-related conviction includes entering into a diversion agreement. Based on these statutes alone, a diversion for driving under the influence would not be precluded as such would count as a conviction. In relation to commercial drivers, however, K.S.A. 8-1013 and K.S.A. 2002 Supp. 8-1567(l)(1), as amended by L. 2003, ch. 100, § 1, conflict with L. 2003, ch.42, § 2, which precludes a commercial driver from entering into a diversion agreement. We thus turn to the well settled rule of statutory construction that where an irreconcilable conflict exists between statutes, the latest enactment will be held to supersede,

repeal or supplant the earlier by implication to the extent of the conflict; the later enactment must prevail.[(11)]

K.S.A. 8-1013 was last amended in 1993, and § (l)(1) of K.S.A. 2002 Supp. 8-1567, as amended by L. 2003, ch. 100, § 1, has remained virtually unchanged since 1988 when minor technical amendments were made. L. 2003, ch. 42, § 2 was enacted in 2003 and therefore must prevail over the other two statutes in relation to commercial drivers. Thus, diversion for driving under the influence of alcohol offenses is precluded for commercial drivers.

Plea Negotiations

The third question posed in light of L. 2003, ch. 42, § 2 is whether the statute precludes plea negotiations or charging amendments for traffic infractions and offenses. In that event, convictions for lesser or fewer offenses than those originally charged would appear on a commercial driver's driving record. Again, § 2 prohibits a driver from "enter[ing] into a diversion agreement in lieu of further criminal proceedings that would prevent such driver's conviction for any violation . . . ." Except for the issue of driver-vs.-holder of a commercial driver's license, this statute mirrors 49 C.F.R. § 384.226:

"The State must not mask, defer imposition of judgment, or allow an individual to enter into a diversion program that would prevent a CDL driver's conviction for any violation, in any type of motor vehicle, of a State or local traffic control law (except a parking violation) from appearing on the driver's record, whether the driver was convicted for an offense committed in the State where the driver is licensed or another State."

The Federal Motor Carrier Safety Administration also discussed 49 C.F.R. § 384.226:

"A Joint Explanatory Statement issued by Congress in conjunction with the MCSIA makes clear that this new provision is intended to prohibit States not only from masking convictions, but also from using diversion programs or any other disposition that would defer the listing of a guilty verdict on a CDL driver's record. . . . The FMSCA [Federal Motor Carrier Safety Association] urges State Executive Branch agencies to work with the State Judicial Branch to eliminate the practice of masking. This practice allows unsafe drivers to continue to pose a risk to other motorists by allowing their continued operation on the nation's highways." [(12)]

In our opinion, since Section 2 of L. 2003, chapter 42 is written only in terms of a prohibition against a driver entering a diversion agreement, plea negotiations or amendments that result in convictions for lesser or fewer traffic infractions or offenses than originally charged are not precluded. While such plea negotiations could be considered a form of "masking," 49 C.F.R. § 384.226 does not clearly require States to prohibit plea negotiations and Kansas' L. 2003, ch. 42, § 2 clearly does not prohibit plea negotiations.

In conclusion, the term "driver," as used in the Kansas Uniform Commercial Drivers' License Act, means any person who drives, operates or is in physical control of a commercial motor vehicle, in any place open to the general public for purposes of vehicular traffic, or who is required to hold a commercial driver's license; the term does not include a person who merely

holds a commercial driver's license but does not otherwise fall within that definition. Diversion for driving under the influence of alcohol offenses is precluded for commercial "drivers," even though a diversion would appear on the driver's record. Plea negotiations or charging amendments that result in convictions for lesser or fewer traffic infractions or offenses than originally charged are not precluded.

Sincerely,
Phill Kline
Attorney General of Kansas
Camille Nohe
Assistant Attorney General

PK:JLM:CN:jm

FOOTNOTES

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

[1.] Formerly, 2003 HB 2220 § 2.

[2.] Now L. 2003, Ch. 42, §§ 1 through 9.

[3.] Testimony of Sheila Walker before the House Transportation Committee, February 19, 2003 and before the Senate Transportation Committee, March 18, 2003.

[4.] K.S.A. 8-2,128(k), as amended by L. 2003, Ch. 42, § 3(k) (emphasis added).

[5.] *State v. Vega-Fuentes*, 264 Kan. 10, 14 (1998).

[6.] *In Re Marriage of Comley*, 272 Kan. 202, 207 (2001), citing *Hulme v. Woleslagel*, 208 Kan. 385, 391 (1972).

[7.] 67 Federal Register 49,749 (2002).

[8.] 49 C.F.R. § 383.5.

[9.] 145 Cong.Rec. H12872 (1999).

[10.] Under the 2003 amendments to K.S.A. 8-1567, § (l)(1) has become § (m)(1).

[11.] *Amundson & Associates Art Studio, Ltd. v. National Council on Compensation*, 26 Kan.App.2d 489, 495 (1999), citing *Richards v. Etzen*, 231 Kan. 704, Syl. ¶ 1, (1982).

[12.] 67 Federal Register 49,749-80 (2002).

June 29, 2004

2004-18 Township Board compensation

Jan Satterfield
Butler County Attorney
201 W. Pine, Suite 104
El Dorado, Kansas 67042

Re:

Roads and Bridges--County and Township Roads--Township Board of Highway Commissioners; Compensation

Synopsis:

Township board members can be compensated for providing services to the township provided the services fall within the parameters of "township business" or are identified specifically in the statutes. However, while a township board may be authorized to appoint or employ one of its members to perform services for the township, its members must comply with all state governmental ethics laws. Cited herein: K.S.A. 68-525; K.S.A. 2003 Supp. 68-526; K.S.A. 68-530; 75-4301a, 75-4304; 75-4305; 80-202; 80-207; K.S.A. 2003 Supp. 80-208; K.S.A. 80-301; 80-302; 80-304; 80-401; 80-406; K.S.A. 2003 Supp. 80-410; K.S.A. 80-501; 80-1201; 80-1407; K.S.A. 2003 Supp. 80-1544; K.S.A. 80-2002.

* * *

Dear Ms. Satterfield:

You inquire whether township board members can receive compensation for services provided to the township. Specifically, you indicate that there are concerns about members providing mowing and general labor services on township roads and other township property. While former Attorney General Carla J. Stovall opined on this subject in 1995,[(1)] the laws mentioned in that opinion have since been amended, and, therefore, its value is limited.

We also note that the propriety of a township board or board member's action will depend upon the specific facts of each situation, and, therefore, we offer this opinion only for general guidance.

The governing body of a township is comprised of a township trustee, clerk, and treasurer.[(2)] These officers are entitled to "receive compensation for their services while actually and necessarily conducting township business."[(3)] In the absence of a statutory definition of "township business," or an appellate court decision limiting its scope, the governing body has discretion in determining the parameters of "township business" for which its members will be compensated. Presumably, "township business" would include the statutory duties of a township board and its individual members.[(4)]

K.S.A. 80-207 establishes the procedure for compensating township board members where the total amount of annual compensation per member exceeds $100:

"(c) *The township board, by adoption of a resolution, may fix the amount of compensation to be received by members of the board.* Such resolution shall be published at least once each week for two consecutive weeks in a newspaper of general circulation within the township. If the total amount of compensation to be received annually by each member of the board is $100 or less, such resolution shall not be required to be published and shall be effective upon adoption of the resolution. A resolution providing for an increase in compensation shall not be effective until 30 days following the date of the last publication of the resolution."(5)

In addition to board members being compensated for "township business," there are a variety of statutes that authorize board members to perform specific compensated services for the township. The following is a brief list:

1. A township board, serving as a board of highway commissioners,(6) "may employ one or more . . . [board] members to perform work and labor on the township roads . . . and bridges."(7)

2. A township board may appoint one of its members to serve as the road overseer who is responsible for the "construction and maintenance of all township roads, bridges, and culverts, under the supervision of the township board and the county engineer."(8)

3. A township board serves as an auditing board, which examines and audits all claims against the township for which the member can receive compensation for "attending to the township business."(9)

4. Township board members can receive compensation for their services "in the supervision of the operation" of the township water system,(10) as members of the governing body of a township fire district,(11) and for services as members of the governing body of a township sewage district.(12)

Clearly, township board members can be compensated for providing services to the township provided the services fall within the parameters of "township business" or are identified in the statutes. We also note that state law contemplates the employment of township officers by virtue of K.S.A. 2003 Supp. 80-208 which provides, as follows:

"A township officer *who also is an employee of the township* shall abstain from voting for or participating in any motion of the township board to increase the compensation, salary, or benefits to be paid to such person as an employee of the township."(13)

However, while a township board may be authorized to appoint or employ one of its members to perform services for the township,(14) its members must comply with all state governmental ethics laws, including K.S.A. 75-4304 and 75-4305. K.S.A. 75-4304 prohibits a local governmental officer or employee from making or participating in a contract in which the officer or employee has a "substantial interest."(15) K.S.A. 75-4305 requires a local governmental officer or employee to file a statement of substantial interests with the county election officer before "acting upon any matter which will affect any business in which the officer or employee has a substantial interest."(16) Therefore, depending upon the facts, the member being considered for

appointment or employment should avoid participating, as a board member, in the making of any contract for that purpose, and abstain from taking any action in regard to the matter.(17)

You also query whether a board member can take "unilateral action" to perform a compensated service. This issue was addressed in Attorney General Opinion No. 81-141, which concluded that where a statute requires action by a township board, such action can be taken only by the board - not individual members.(18) Moreover, to the extent there is conflicting statutory language dealing with duties delegated to a township officer and also to the township board, the more recent statute controls.(19) The better practice may be for the township board to take formal action appointing the individual to perform the service and establishing the compensation.(20)

Finally, you inquire regarding the legal propriety of a township board member hiring a relative to perform compensated services for the township. There are no statutes prohibiting nepotism in this instance. As indicated previously, however, the better practice may be for the township board to appoint or employ individuals to perform services for the township.

Additionally, the governmental ethics laws should be consulted in determining whether a township board member is precluded from participating in a contract, as a board member, or acting on any matter involving the board member or the board member's relatives.

Sincerely,
Phill Kline
Attorney General of Kansas
Mary Feighny
Assistant Attorney General

July 7, 2004

2004-19 Authority of county commissioner to hire own employees

James L. Emerson
Crawford County Counselor
2nd Floor, Courthouse
P.O. Box 68
Girard, Kansas 66743

Re:

Counties and County Officers--County Commissioners, Powers and Duties--Powers of Board of Commissioners; Authority of Each Commissioner to Hire Their Own County Road Employees

State Departments; Public Officers and Employees--Public Officers and Employees; Open Public Meetings--Closed or Executive Meetings; Personnel Matters of Nonelected Personnel; Taking Binding Action; Hiring Employees

Synopsis:

As long as the decision to permit such a practice becomes binding upon the county in conformity with the Kansas Open Meetings Act, it is our opinion that K.S.A. 19-212 permits a board of county commissioners to decide how many road supervisors and road crews best serve the interests of the county and that the board may legally decide to delegate such hiring decisions to a single individual, including each of the three commissioners. Cited herein: K.S.A. 19-212, 28-615, 68-503, 68-540, 68-586, 68-588, 75-4317, and 77-201.

* * *

Dear Mr. Emerson:

As Crawford County Counselor, you request our opinion on the process by which individual county commissioners may lawfully hire their "own" road crews and supervisors. You inform us that Crawford County has a long history of maintaining three separate road crews, one for each of the commissioners, with a road supervisor and road crew hired by each commissioner. You also note that although each commissioner reviews and signs payroll records each month for their respective district, but the formal adoption of all warrants and payroll are done at the monthly meeting and require approval of the entire board. This latter practice has been questioned as a possible violation of the Kansas Open Meetings Act.

Our review will not focus upon the advisability of the policy in question.(1) Rather, we only address the legal issue presented: may individual county commissioners independently hire persons to work for the county as road supervisors or crew, and approve their payroll subject only to later ratification by the entire board.

K.S.A. 19-212 sets forth the basic powers and authority of the board of county commissioners.(2) Normally, unless otherwise impacted by specific statutes to the contrary, the powers vested in the board are exercised by a majority vote.(3) Thus, we must determine whether any existing statute requires that the hiring of county road crew supervisors or personnel be approved by a majority of the board of county commissioners, or whether such hiring and payment decisions can be legally delegated to individual commissioners.

K.S.A. 28-615 and 68-503 set forth the processes by which a county hires a county engineer.(4) However, we find no similar statute that dictates the process by which a county road supervisor or road crew must be hired.(5) K.S.A. 68-588 provides that "[t]he county commissioners are hereby authorized to contract, as provided by law, for the supervision of any work performed in the construction of any highway commenced under the provisions of K.S.A. 68-586. . . ." This statute does not dictate that there be only one road supervisor or road crew, per county, or prohibit the entire board from delegating hiring authority to individual commissioners.

K.S.A. 68-540 speaks to some of the duties of a county road supervisor:

"It shall be the duty of the county engineer or *road supervisor* to make a written report to the board of county commissioners of the work accomplished and funds expended upon all the roads and bridges for the current year, which shall close on the thirty-first day of December of each

year. This report shall show which roads of the county and township systems have been completed or partially completed, and credit to such roads shall be shown upon the county road plan not later than April 15, and a copy of the report shall be immediately forwarded to the state transportation engineer upon standard printed forms."[(6)]

The language in question uses the singular in referring to a road supervisor. However, K.S.A. 77-201*Third* establishes a statutory construction rule that states "[w]ords importing the singular number only may be extended to several persons or things, and words importing the plural number only may be applied to one person or thing. . . ." Thus, we cannot conclude that the use of the singular "supervisor" in K.S.A. 68-540 precludes a county from hiring more than one person to serve in that capacity. Nor have we located any statute that requires a majority vote by a county commission any time the county wishes to hire someone to work on a road crew.

K.S.A. 19-212 empowers a county board of commissioners to conduct the affairs of the county. Unless otherwise constrained by law, how that is best done is a judgement and policy decision by the board. We have located no Kansas statutes, or other authority, that prohibit a majority vote by a county board of commissioners delegating to each commissioner the independent authority to hire three separate county road supervisors and road crews.

The final issue raised concerns the Kansas Open Meetings Act[(7)] (KOMA) and how that law impacts the hiring done by a single commissioner. The KOMA prohibits a majority of a quorum of the county commission from secretly taking binding action.[(8)] It does not prohibit the delegation of hiring decisions to a single individual.

Thus, as long as the decision to permit such a practice becomes binding upon the county in conformity with the Kansas Open Meetings Act, it is our opinion that K.S.A. 19-212 permits a Board of County Commissioners to decide how many road supervisors and road crews best serve the interests of the county and that such a board may legally decide to delegate such hiring decisions to a single individual, including one of the three commissioners.

Sincerely,
Phill Kline
Attorney General of Kansas
Theresa Marcel Nuckolls
Assistant Attorney General

FOOTNOTES

[1.] It appears that the practice in question has largely been abandoned by most counties, in favor of a more consolidated county road department. However, the practice itself somewhat resembles the township model set forth in K.S.A. 68-530.

[2.] *E.g.* K.S.A. 19-212 *Sixth* allows county commissioners to "represent the county and have the care of the county property, and the management of the business and concerns of the county, in all cases where no other provision is made by law."

[3.] *See, e.g.,* K.S.A. 19-117 (majority vote needed to impose specific fees); 65-3415f(f) (majority vote on tonnage fees); and K.S.A. 19-270 (majority vote needed to create a benefit district).

[4.] K.S.A. 68-522 establishes the process by which the county pays road work associated bills: "All bills for county road work, tile and tiling, culvert and bridge construction, or for repairs designated by the county engineer, shall be filed in itemized form and certified to as correct by the county engineer before being allowed by the board, and before warrants in payment therefor are drawn."

[5.] K.S.A. 68-520 and 68-521 address letting contracts for county road work, but do not require a specific process by which the county must hire county road supervisors or road crews.

[6.] Emphasis added.

[7.] K.S.A. 75-4317 *et seq.*

[8.] K.S.A. 75-4317 a and 75-4318.

September 13, 2004

2004-25 Purchase and sale for public purposes

Edward S. Dunn
Jackson County Counselor
107 W. 4th P.O. Box 247
Holton, Kansas 66436

Re:

Public Health--Emergency Medical Services--Ambulance Service; Purchasing Ambulance for Use by Private Ambulance Service; Public Purpose Doctrine

Counties and County Officers--County Commissioners--Sale or Disposition of County Property; Sale of Ambulance to Private Ambulance Service

Synopsis:

It is our opinion that K.S.A. 19-211(b), as amended, allows a county to sell county owned property, including an ambulance, valued at more than $50,000, without resorting to a competitive bid process, if the county adopts a resolution containing the required information and if the county follows a procedure that provides for public notice and participation in the decision making process. Cited herein: K.S.A. 19-211, as amended by L. 2004, Ch. 77, § 1.

* * *

Dear Mr. Dunn:

You request our opinion on a proposed arrangement between Jackson County and a private ambulance service operated by the Prairie Band Potawatomi Nation, whereby the County would purchase an ambulance to then be used and, if lawful, ultimately purchased by said Nation over a five year period. You describe the arrangement as a "lease purchase agreement." You indicate that you believe the intended purchase, lease, and ultimate sale serves a valid public purpose.[(1)] You also note that the County intends to make sure the ambulance remains the property of the County until it is properly transferred, and that it is covered by the proper insurance. However, you ask: "At the end of the 5 year period, or whatever period is selected for repayment of the ambulance, under House Bill No. 2600 that amends K.S.A. 19-211, can the County then transfer this ambulance at the end of the 5 year period, or whatever is paid for, to the ambulance service? How can this be done and comply with K.S.A. 19-211?"

Various statutes provide municipalities with authority to obtain and finance the purchase of ambulances.[(2)] These statutory schemes generally contemplate the purchase of such vehicles for use by the municipality in question, rather than by some private entity leasing them from the county. We note that there are often restrictions upon subsequent use of funds raised pursuant to specific statutes. However, because you do not raise the issue or provide pertinent facts, we will not address whether the funds being used to purchase this vehicle are properly expended for the intended purpose. Rather, we assume that the County has and intends to use sufficient funds from appropriate sources and that the funds in question can be lawfully be used for the intended purposes.

K.S.A. 19-211 is the statute that permits county commissioners to sell county owned property and it has been previously addressed in many Attorney General Opinions.[(3)] The procedures described in those opinions have not been legislatively abolished by L. 2004, Ch. 77, § 1 and, where applicable, subsection (a) of that statute still requires a public bid procedure in order to sell county owned property valued at more than $50,000.[(4)] However, the 2004 amendment to K.S.A. 19-211 provides a new alternative methodology for disposing of county owned property exceeding that value:

"(b) (1) In lieu of following the procedures established in subsection (a), a county commission may adopt a resolution establishing an alternate methodology for the disposal of property. Such alternate methodology for the disposal of property shall contain, at a minimum, procedures for:

"(A) Notification of the public of the property to be sold;

"(B) describing the property to be sold; and

"(C) *the method of sale, including*, but not limited to, fixed price, *negotiated bid*, sealed bid, public auction or auction *or any other method of sale which allows public participation.*

"(2) Any methodology for the disposal of property established pursuant to this subsection may contain different procedures for real property and personal property."[(5)]

You ask how a lease agreement, with ultimate transfer of title being completed at the end of the term, may be legally accomplished under K.S.A. 19-211, as amended. The new subsection (b)

appears to allow the counties to adopt procedures that are different than those set forth in subsection (a) and allows an outright sale or lease. We believe that the resolution required by subsection (b) of the new amendment provides counties with the correct process to follow. Counties have now been authorized to create their own process for disposing of county owned property by adopting a regulation that provides for the considerations listed in that subsection and for using "any other method of sale which allows public participation." Thus, in order to comply with the above referenced amendment to K.S.A. 19-211, and before following through with the intended disposition of the property in question, the County must first pass a resolution establishing its alternative methodology for disposing of county owned property. The proposed resolution should, at a minimum, set forth procedures for notifying the public of the property to be sold, describing the property to be sold, and for establishing the method of sale. It should also adopt a procedure that will insure ways of providing the public with means of participation.

This brings us to the question of whether a procedure sufficiently "allows public participation" as set forth in the amendment to K.S.A. 19-211.[(6)] This phrase was discussed in *In Re Petition of Stephan*[(7)] and *McGinnis v. Kansas City Power and Light Co.*[(8)] These cases necessarily reviewed the facts surrounding and leading up to specific governmental decisions. In deciding if sufficient "public participation" was provided, the court looked at whether the processes involved provided "meaningful" opportunity for input by the public. Neither K.S.A. 19-211 itself nor case law interpreting the phrase "public participation" appears to require a competitive bid process. Thus, although the kind of participation required by K.S.A. 19-211 is not specifically set forth, we must presume that the "public participation" language was included to insure that at the very least the public's opinions on the proposed arrangement are sought and, if provided, considered by the County, prior to disposing of County owned property.

In summary, it is our opinion that K.S.A. 19-211(b), as amended by L. 2004, ch. 77, § 1, allows a county to sell county owned property, including an ambulance, valued at more than $50,000, without resorting to a competitive bid process, if the county adopts a resolution containing the required information and if the county follows a procedure that provides for public notice and participation in the decision making process.

Sincerely,
Phill Kline
Attorney General of Kansas
Theresa Marcel Nuckolls
Assistant Attorney General

PK:JLM:TMN:jm

FOOTNOTES

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

[1.] *See General Bldg. Contractors, L.L.C. v. Board of Shawnee County* Commissioners, 275 Kan. 525 (2003) (the taking of private property for industrial or economic development is a valid public purpose).

[2.] *See, e.g.,* K.S.A. 12-110a, 12-110d, and 65-6118.

[3.] *See, e.g.,* Attorney General Opinions No. 97-91, 97-53, 95-44 and 99-11.

[4.] You do not indicate the value of the ambulance or its estimated value when the proposed transfer to the Potawatomie Nation will take place. However, we will assume for purposes of this opinion that in both instances the value will exceed $50,000.

[5.] L. 2004, Ch. 77, § 1 (emphasis added).

[6.] We have not been presented with the process that Jackson County intends to follow in utilizing the new language in K.S.A. 19-211, and thus, cannot address specifics.

[7.] 251 Kan. 597 (1992).

[8.] 231 Kan. 672 (1982).

September 13, 2004

2004-26 Sale of vehicles to county or city, out of state supplier

Steven W. Hirsch
Decatur County Attorney
P.O. Box 296
Oberlin, Kansas 67749

Re:

Automobiles and Other Vehicles--Licensure of Vehicle Sales and Manufacture--Establishment of Additional or Relocation of Existing New Vehicle Dealer; Sale of Vehicles to County or City

Counties and County Officers--General Provisions--County as Corporation; Powers Generally; Home Rule; Purchase of Vehicles from Out-of-State Dealers

Constitution of the State of Kansas--Bill of Rights--Corporations; Cities Powers of Home Rule

Synopsis:

While purchases from out-of-state suppliers who are not licensed in Kansas may create jurisdictional or venue issues should the purchaser later wish to bring some sort of legal action, we find nothing in K.S.A. 8-2401 *et seq*. or other Kansas law that prohibits Kansas cities or counties from purchasing vehicles from out-of-state dealerships. Cited herein: Kan. Const., Art. 12, § 5; K.S.A. 8-2401; 8-2406; 8-2425; 8-2426, as amended by L. 2004, Ch. 145, § 9; 8-2434; 8-2439; 12-1,117; K.S.A. 2003 Supp. 19-101a, as amended by L. 2004, Ch. 185, § 36 and L. 2004, Ch. 180, § 4; K.S.A. 19-212; and 19-2645.

* * *

Dear Mr. Hirsch:

You request our opinion on whether Kansas cities and counties may lawfully purchase vehicles from out-of-state vendors. In connection with your request, you enclose a copy of a letter from the Kansas Department of Revenue (KDOR) indicating that there is a problem with municipalities purchasing vehicles from dealers located out of state. The June 22, 2004 letter informs the Kansas League of Municipalities that K.S.A. 8-2403, 8-2439 and 8-2434 can impact *dealers* who unlawfully sell vehicles *in Kansas* without the proper dealer's license. The KDOR therefore is encouraging Kansas municipalities to insist that persons bidding for sales to those municipalities comply with Kansas laws concerning licensure.[(1)]

K.S.A. 8-2401 *et seq*. regulate sellers of vehicles who conduct business in Kansas. We concur that persons and vehicle dealers who factually fall under the terms of these laws must comply with these statutes. Whether these statutes apply to a specific dealer or transaction is a fact specific issue.[(2)] However, dealers engaged in conduct that falls under the scope of this act, but who do not comply with these laws, may be subject to the penalties therein.[(3)] Nevertheless, the laws in question apply to the *sellers* of vehicles, not to the purchasers of vehicles (be they private individuals or municipalities). Thus, purchase of a vehicle from a dealer who should have a Kansas license, but who does not, does not result in the purchaser being punishable under the dealership laws. Moreover, we have been unable to locate any other legal authority that would punish in-state purchasers who decide to purchase vehicles from out-of-state dealerships.

Kansas counties and cities have much authority with regard to purchasing property, including motor vehicles.[(4)] While purchases from out-of-state suppliers may create jurisdictional or venue issues should the purchaser later wish to bring some sort of legal action, we find nothing in K.S.A. 8-2401 *et seq*. or other Kansas law that prohibits Kansas cities or counties from purchasing vehicles from out-of-state dealerships.[(5)]

Sincerely,
Phill Kline
Attorney General of Kansas
Theresa Marcel Nuckolls
Assistant Attorney General

FOOTNOTES

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

[1.] An August 12, 2004 letter from James Bartle, General Counsel for the Department of Revenue, confirms that the agency does not believe that it is illegal for counties or cities to purchase vehicles from out-of-state dealers. Rather, that agency notes that some out-of-state dealers may be in violation of Kansas dealer licensing laws, by reason of their activities in the state, and thus has requested the cooperation and assistance of Kansas cities and counties with regard to ensuring that such out of state dealers do not violate Kansas dealer licensing laws. Whether cities and counties choose to assist in this manner appears to be a discretionary decision.

[2.] As stated in K.S.A. 8-2439(b), not every sale of vehicles will subject a seller of vehicles to Kansas jurisdiction.

[3.] K.S.A. 8-2434 provides for a misdemeanor penalty and a fine of up to $2,500, assessed against dealers or persons engaging in covered vehicle sales in Kansas without the proper license; K.S.A. 8-2426, as amended by L. 2004, Ch. 143, § 9, provides for a civil penalty of up to $1,000 per violation of K.S.A. 8-2406 or K.S.A. 8-2425.

[4.] *See, e.g.*, Kan. Const., Art. 12, § 5; K.S.A. 12-1,117; K.S.A. 2003 Supp. 19-101a, as amended by L. 2004, Ch. 185, § 36 and L. 2004, Ch. 180, § 4; K.S.A. 19-212 and K.S.A. 19-2645.

[5.] Unless some part of the agreement, purchase or solicitation subjects the supplier to the jurisdiction of Kansas courts , any alleged breach of contract, fraud, or other similar causes of action would necessarily have to be brought in some other state's courts. Moreover, certain protections otherwise provided by Kansas law may not be available when the purchase is made in another state; *e.g.* K.S.A. 8-2419 provides for liability for defects in equipment.

October 13, 2004

2004-30 Mileage from home to work of county employees

William A. Taylor, III
Cowley County Counselor
P.O. Box 731
Winfield, Kansas 67156

Re:

Fees and Salaries--Fees in All Counties and Salaries in Certain Counties -- Allowance of Traveling Expenses and Mileage; County Officials and Employees Driving from Residence to Work

Synopsis:

K.S.A. 28-169 does not require that a county reimburse public officials or employees for the costs of mileage between their place of residence and their place of work. Under K.S.A. 19-101a and K.S.A. 19-212, a board of county commissioners may discretionarily reimburse officials and employees for such costs, if the expenditure is determined to be for a valid public purpose. Cited herein: K.S.A. 19-101a; 19-212; 28-169; L. 1943, Ch. 162, § 14; 29 U.S.C.A. §254(d); 29 C.F.R. § 785.35.

* * *

Dear Mr. Taylor:

As Cowley County Counselor, you request our opinion regarding whether, pursuant to K.S.A. 28-169, the County must compensate its employees and officers (including the county commissioners) for mileage costs incurred in order to drive to and from their place of work and if it is not required, whether such payment is allowed.

K.S.A. 28-169 provides:

"In any county having a population of 80,000 or less, the board of county commissioners shall allow any county officer, deputy or employee his actual and necessary traveling expenses *incurred in the performance of his duties* and shall allow mileage to any such officer, deputy, or employee at the rate prescribed by law for each mile actually and necessarily traveled in a privately owned vehicle *in the performance of his duties*."[(1)]

We note that this statute was enacted in 1943 and remains unaltered from its original version.[(2)] K.S.A. 28-169 was enacted to permit a county of the specified population size to pay employees and officials travel expenses incurred in performing their duties.[(3)] However, as discussed in Attorney General Opinion No. 77-160, the mileage payments authorized by K.S.A. 28-169 do not include travel that is necessary to go from a person's domicile or private office to the place where county business is conducted.[(4)] Rather, the mileage incurred in traveling from a person's home to their place of work is not incurred on behalf of the employer. This result is supported by the language of K.S.A. 28-169 which states that the payments in question are to be "incurred in performance of duties." Traveling between work and a personal residence is generally not considered to be "performing duties" for the employer.

This principle is further illustrated by general wage and compensation laws. The Fair Labor Standards Act (FLSA) establishes the "portal rule," which is an exception to overtime pay rules.[(5)] For purposes of mandatory wage payment laws, traveling between one's residence and place of work is not considered part of the services being performed on behalf of an employer. Thus, it is our opinion that K.S.A. 28-169 does not require that an employer county reimburse an official or employee for travel expenses incurred in commuting between a person's residence and their place of work.

This brings us to your final question of whether a county may choose to pay for such travel or mileage expenses. We believe that this decision falls under the "public purpose doctrine."[(6)] The public purpose doctrine prohibits the appropriation of public money or property for private individuals unless a public purpose is served by such appropriation.[(7)]

Thus, expenditures of county funds is allowed only if there is some articulated and valid public purpose which would be served.

County home rule authority, combined with the budgetary authority granted to county commissioners, allows the board of county commissioners to make most decisions on when or how to expend public funds, as long as the expenditure in some way benefits the general public.[(8)] As this is a factual issue and policy decision best reviewed and decided on a local level, we will not address whether we believe that the County Commissioners can articulate a

sufficiently cogent argument as to how the general public will in some way be served by paying commuting costs of county officials and/or employees.[(9)]

In summary, it is our opinion that K.S.A. 28-169 does not require that a county reimburse public officials or employees for the costs of mileage between their place of residence and their place of work. Under K.S.A. 19-101a and K.S.A. 19-212, a board of county commissioners may discretionarily reimburse officials and employees for such costs, if the expenditure benefits the general public in some way.

Sincerely,
PHILL KLINE
Attorney General of Kansas
Theresa Marcel Nuckolls
Assistant Attorney General

FOOTNOTES

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

[1.] Emphasis added. For purposes of this opinion, we will assume that the population of Cowley county is 80,000 or less, causing it to fall under K.S.A. 28-169.

[2.] K.S.A. 28-169 was enacted pursuant to L. 1943, Ch. 162, §14. Other now repealed portions of that same enactment were K.S.A. 28-158, 28-159, 28-160, etc. These statutes set the salaries for various county officials and employees. *See also* L. 1943, Ch. 164.

[3.] *See* Attorney General Opinion No. 96-16.

[4.] "A county attorney who conducts substantial county business in his private office located several miles from the courthouse, and who travels to the courthouse for meetings with the board of county commissioners and for court appearances and conducts limited county business in his courthouse office, is not required by K.S.A. 28-169 to be allowed actual and necessary expenses or mileage for such travel from his domicile or private office to the courthouse to conduct county business." Attorney General Opinion No. 77-160.

[5.] *See* 29 U.S.C.A. § 254(d) and 29 C.F.R. § 785.35. Under the FLSA, time spent in "ordinary" home-to-work travel by which employees, whether they work at a fixed location or at different job sites, proceed from home to work before their regular workday and return to home at the end of the day, does not count as time worked. Consequently, because the Portal Act affects only preliminary and postliminary activities that were treated as compensable work under the FLSA, time spent in "ordinary" home-to-work travel does not count as time worked under the Portal Act even if an employer agrees to pay for it. Walking, riding, and traveling to or from work are specifically designated as preliminary or postliminary activities by the Portal Act.á Unlike most activities that may be principal activities depending on the circumstances, ordinary home to work travel does not qualify as a principal activity of work under any circumstances. *See also Aiken v. City of Memphis, Tennessee,* 190 F.3d 753 (6th Cir. 1999).

[6.] The seminal cases addressing a municipality's use of public funds for a public purpose are *Ullrich v. Board of County Comm'rs of Thomas County* 234 Kan. 782 (1984) and *Duckworth v. City of Kansas City, Kansas*, 243 Kan. 386 (1988).

[7.] *See* Attorney General Opinions No. 81-208, 82-191, 82-229, 86-40, 91-53, 91-89, 92-73, 92-87, 97- 67, 99-49, 2000-25, 2000-50 and 2001-13.

[8.] K.S.A. 19-101a and K.S.A. 19-212.

[9.] We note that many employers insure that employees can afford commutes to work (and cut down on paper work needed to track actual costs) by merely increasing salaries.

July 21, 2006

2006-15 County surveyor on road vacation procedures

Leonard L. Buddenbohm
Atchison County Counselor
107 North Sixth Street
Atchison, Kansas 66022

Re:

Roads and Bridges--General Provisions--Laying Out and Opening Roads; Viewers; Notice of View; Duties of County Surveyor; Viewing, Surveying, Laying Out, Altering or Vacating Road

Synopsis:

Neither K.S.A. 68-104 nor 68-106 requires a survey or the assistance of a surveyor prior to a county taking action to vacate a county road in every instance. However such a survey may be required if the actual location of the public road being vacated is not known or is at issue, or may discretionarily be performed if a county wishes to provide abutting landowners or the general public with additional or actual notice as to the precise site of the vacated road. Cited herein: K.S.A. 19-212; 19-1420; K.S.A. 2005 Supp. 68-101, as amended by L. 2006, Ch. 76, § 1; K.S.A. 68-102; 68-102a; 68-104; 68-106; 68-116; K.S.A. 2005 Supp. 68-124.

* * *

Dear Mr. Buddenbohm:

As Atchison County Counselor you request our opinion on the question:

"Is a surveyor designated by the county always required to be present at the noticed time and place for viewing pursuant to K.S.A. 68-104 and 68-106 even if the commission/viewers are only considering vacating a road and do not intend to request a survey? If so, is he always required to survey when the commission is simply vacating a road, or is he required to be present

but with the option of doing no survey unless directed to do so at the sole discretion of the commissioners/viewers?"

You indicate that these questions have arisen, in part, because language in K.S.A. 68-106 seems to imply that a survey is not required unless it is directed by the county commission.

K.S.A. 19-212 *Ninth* provides boards of county commissioners with the authority to " lay out, alter or discontinue any road running through one or more townships in such county, and also to perform such other duties respecting roads as may be provided by law."

K.S.A. 68-104 states:

"Upon presentation of any petition for a road, or for the alteration *or vacation of any road*, to the county commissioners, at any regular session of their board, it shall be the duty of said commissioners, if they find the petition to be a legal one, and that the proper bond has been filed, to appoint three disinterested householders of the county as viewers with said commissioners, who may act as viewers of said road, and the county clerk shall give notice by advertisement. . . and by publication. . . .

"They shall also cause a record of such notice to be entered on their journal by the county clerk. *They shall issue an order directing the county surveyor to meet with them at the time and place named in said notice to survey such road.* In case of failure to meet on the day designated, they may meet on the following day, without further notice; and in case of failure to meet within the time herein specified, new notice shall be given as hereinbefore provided; *that in all applications for the location, change and relocation of any road to be located upon or along any section line, and the petition shall so state, and shall specify the section lines to be followed, the place of beginning and the place of ending, the survey may be dispensed with*, and in case the owners of the lands taken agree in writing to the proposed location, relocation, or change, and the commissioners are satisfied that the location, relocation or change prayed for is practicable, and can be made without unreasonable expense, they may dispense with the viewing of such location, relocation or change of road, and shall order the same to be surveyed, platted and opened, and shall also direct the county engineer to note such location, relocation or change of roads upon the road records of his office."[(1)]

K.S.A. 68-106 states:

"It shall be the duty of the commissioners or said viewers or a majority of them, and the county surveyor *to meet at the time and place specified in the notice aforesaid,* or on the following day thereafter, *and they may, if they deem it necessary, take to their assistance two suitable persons as chain carriers and one as marker, and then proceed to view, survey, lay out, alter or vacate the road as prayed for in said petition,* or as nearly so as a good road can be made at a reasonable expense, taking into consideration the utility, convenience and inconvenience, and expense which will result to individuals as well as to the public, *if such road, or any part thereof, shall be established and opened or altered*.

. . . .

"*If the commissioners or viewers, after viewing such proposed road, shall so direct, the county surveyor shall survey the said road under their direction, and cause the same to be conspicuously marked throughout, noting the courses and distances.*

. . . .

"[T]he said commissioners shall, if they conclude that said road should be established, altered, or vacated, and no legal objections appear against the same, and they are satisfied that such road will be of public utility, *enter an order upon their records that said road, survey and plat be recorded in the office of the county surveyor and from thence forth said road shall be considered a public highway,* and the county surveyor shall issue his order to the trustees of the respective townships in which said road is located, directing them to cause the same to be opened for the public travel at the time and in the manner indicated by him. . . ."[(2)]

A board of county commissioners has discretion to determine whether a county road is opened pursuant to K.S.A. 2005 Supp. 68-101 *et seq.* In laying out and opening a county road, a board of county commissioners must satisfy applicable statutory requirements and specifications, including the width requirements of K.S.A. 68-116.[(3)] A road may be a public road if it has been established and opened pursuant to K.S.A. 68-102 *et seq.*, or if it is declared to be a public road or highway by the board of county commissioners pursuant to K.S.A. 2005 Supp. 68-124.[(4)]

K.S.A. 68-104 and 68-106 provide some of the procedure by which counties may open or close roads. Both statutes were enacted in 1911 and have not been amended since that time. Moreover, it does not appear that the issue of whether the presence of a surveyor or an actual survey is legally required in order to vacate a road has ever been the subject of a reported case. Case law citing to these two statutes and the creation of a new county road generally only mention surveys in connection with laying out or changing the course of a road.[(5)]

K.S.A. 68-106 provides that the commissioners shall order the viewers' report, the survey and the plat to be recorded, and that "from thence forth said road shall be considered a public highway." "This is a legislative declaration, that upon the recording of the report, survey and plat, the road shall be regarded prima facie as legally established. The declaration is unqualified, binds landowners, public officials and the courts, and casts upon any person contesting the road proceedings the burden of establishing their invalidity." [(6)]

Thus, in opening or laying out or even arguing about the actual location of a public road, a survey appears to be necessary and a common practice.

However, vacation of a county road may not always require a survey. While challenges to the process of vacation occur, it does not appear that such challenges have been based upon lack of a survey. Rather, such challenges are typically based upon notice or factual issues.[(7)]

K.S.A. 68-102 authorizes a board of county commissioners to vacate any road within its jurisdiction upon presentation of a petition. Further, under K.S.A. 68-102a, a board of county commissioners may vacate a road without the presentation of a petition for vacation, providing notice is properly given to owners of property adjoining the road. The exercise of the authority to

vacate a road must follow the statutory procedure in order to be valid.[(8)] However, we have located no case law wherein the vacation of a road was judicially reversed because a new survey of the road was not done prior to that vacation. As stated in *Heatherman v. Kingman County Commissioners*, "[w]hen determining whether a road shall be vacated, the board of county commissioners must consider and decide two classes of questions, first, whether there is legal objection, second, how vacation of the road will affect the public welfare. The second question involves matters of policy and expediency. The first question may involve invasion of a private, legally protected interest. The first question is judicial in its nature. The second is legislative."[(9)]

In reading K.S.A. 68-104 and K.S.A. 68-106, together with reported case law citing to the two statutes, it appears that the services of a surveyor are only required for vacating a road when the county commission decides that it is actually necessary to determine (or re-determine) the actual physical location and legal description of the road in question. This is a factual issue which must be determined on a case-by-case basis.

This reading of the two statutes in question is further supported by K.S.A. 19-1420:

"Upon the establishment of any road, the county surveyor shall enter the plat and field notes thereof upon the official road record of the county. He shall, when ordered by the board of county commissioners, make out a complete description of all or any part of the real estate of his county, to be made out and entered in proper rolls furnished by the county clerk for such purpose. *The county surveyor shall, when ordered by the county commissioners*, make complete surveys, plans, specifications and estimates for all bridges, culverts, roads, ditches, or other public works to be constructed under the authority of the board of county commissioners, and shall report the same with his recommendations thereon, and when so ordered he shall superintend the construction of such work, and make reports on the progress of the same to the board of county commissioners as often as they may require: Provided, That the board of county commissioners may employ a civil engineer or architect to act alone or in conjunction with the county surveyor in making plans, specifications and estimates for any bridge, culvert, road, ditch or other public work to be constructed by the county, and in superintending the construction of the same."[(10)]

Taking all this authority into consideration, we find no legal requirement that a surveyor be present, or a survey be conducted, in connection with every vacation of a county road. There may be fact specific circumstances wherein such a survey or the assistance of a surveyor would prove helpful or advisable in connection with vacating a specific public road. However, we have found no legal requirement that imposes a duty upon a county to involve a surveyor in every county road vacation decision or process.

Therefore, It is our opinion that neither K.S.A. 68-104 nor 68-106 requires a survey or the assistance of a surveyor prior to a county taking action to vacate a county road, however, such a survey may be factually required if the actual location of the public road being vacated is not known or is at issue or discretionarily performed if a county wishes to provide abutting landowners or the general public with additional or actual notice as to the actual site of the vacated road.

Sincerely,
Phill Kline
Attorney General of Kansas
Theresa Marcel Bush
Assistant Attorney General

PK:JLM:TMB:jm

October 17, 2006

2006-27 Rails to trails duty of responsible party

Delton M. Gilliland
Osage County Counselor
Osage County Administrator
112 E. 7th Street, P.O. Box 250
Lyndon, Kansas

Re:

Personal and Real Property--Land and Water Recreational Areas--Recreational Trails; Duties of Responsible Party; Authority of County

Counties and County Officers--County Commissioners; Powers and Duties-- Powers of Board of Commissioners; Funding Repair of Privately Owned Bridges; Public Purpose Doctrine; Duties and Powers to Enforce Conditions Involved in Rails-To-Trail Program

Synopsis:

Pursuant to the authority granted in K.S.A. 2005 Supp. 19-101a, as amended, and K.S.A. 19-212, analyzed in light of "the public purpose doctrine," the Osage County Commissioners may expend county funds that are lawfully available for that purpose to construct bridges on rails-to-trails property not owned or operated by the county.

K.S.A. 58-3215, as amended, allows aggrieved adjacent property owners to enforce the provisions of the Rails-to-Trails Act. Cities and counties in which trails are located also have that ability. However, though it may appear appropriate for a city or county to enforce requirements, the statute, as written, clearly makes that decision discretionary with the city or county. Cited herein: K.S.A. 2005 Supp. 19-101a, as amended by L. 2006, Ch. 207, § 4 and Ch. 192, § 4; K.S.A. 19-212; 58-3211; 58-3212; 58-3215, as amended by L. 2006, Ch. 178, § 2; and 16 U.S.C. §1247.

* * *

Dear Mr. Gilliland:

As Osage County Counselor and Administrator, you request our opinion on two issues concerning recreational trails created pursuant to K.S.A. 58-3211 *et seq*. You note that Osage County is considering spending public funds in order to remove old bridges and build two new bridges on these trails, even though the bridges in question would be on property owned by a private entity. This expenditure of public funds is contemplated because the current bridges are in disrepair and need replacing. You indicate that the two new bridges would serve locations where public roads (one county and one township) cross the trail, and would lie entirely in the former railroad right-of-way now being claimed by a private corporation seeking to sponsor the trails. You state that the roads in question are frequently used by the public for general vehicle travel, including that of personal automobiles, farm trucks, farm machinery, and school buses. Thus, the county believes safe construction of these bridges will benefit the public at large, not just those using the recreational trails.

You ask whether the county may commit public funds for construction of bridges not owned by the county.[(1)] You also ask whether the county has a mandatory duty to enforce the conditions imposed upon a "responsible party," pursuant to K.S.A. 58-3211 *et seq*.

This Act makes provision for the "Rails to Trails" program authorized by 16 U.S.C. § 1247. Pursuant to this Act, property that was once owned by a railroad, but that is no longer used for that purpose, reverts to the adjacent property owners, unless an interested party comes forward and volunteers to become the "responsible party."[(2)] A responsible party may obtain title to the property in order to convert it into a recreational trail in accordance with the provisions of applicable federal and state laws. When a private party wishes to create such recreational trails, the public entity authorized to negotiate the conditions for use of the property for that purpose is either a city or a county (depending upon the location of the property in question).

K.S.A. 58-3212(a)(11)(B) requires a recreational trail sponsor (responsible party) to maintain all bridges, roadway intersections and crossings on such trails. The first issue you raise is whether a county may voluntarily assist with paying the costs of such projects.

The powers vested in a board of county commissioners are designed to allow that body to make general business and financial decisions for the county.[(3)] Pursuant to K.S.A. 19-212, county commissioners are generally authorized to make decisions concerning expenditure of public funds:

"The board of county commissioners of each county shall have the power, at any meeting:

. . . .

"Second. To examine and settle all accounts of the receipts and expenses of the county, and to examine and settle and allow all accounts chargeable against the county; and when so settled, they may issue county orders therefor, as provided by law.

. . . .

"Sixth. To represent the county and have the care of the county property, and the management of the business and concerns of the county, in all cases where no other provision is made by law.

. . . .

"Tenth. To enter into contracts with any landowners for the construction and maintenance of underpasses, bridges and drainageways under and across any county road in connection with the locating, opening, laying out, construction or alteration of any county road running across or through such landowner's land, whenever in the judgment of the board of county commissioners such contract is to the best interests of the county. Any such contract entered into by the board of county commissioners shall be binding upon subsequent boards of county commissioners and shall not be terminated without the written consent of said landowner or his heirs or assigns.

"Eleventh. To contract for the protection and promotion of the public health and welfare.

. . . .

"Thirteenth. To perform such other duties as are or may be prescribed by law."

In addition, a board of county commissioners generally may exercise its powers of home rule to determine local affairs in the manner and subject to the limitations provided by the home rule statute and other state laws.[(4)] K.S.A. 2005 Supp. 19-101a[(5)] provides county commissioners with rather broad home rule authority to make decisions that are not otherwise in conflict with state law.

We have reviewed prior Attorney General Opinions concerning bridge repair and construction issues, and found none on point.[(6)] Further, prior Kansas Attorney General Opinions reviewing the Rails to Trails Act do not specifically address the questions you raise.[(7)] We have not located any state statute or federal law specifically prohibiting a county from expending public funds in order to assist in paying for the costs of constructing new bridges over what will become trails operated pursuant to K.S.A. 58-3211 *et seq.*, even if the property in question is not owned by the county.

Courts liberally construe home rule powers to give counties the largest measure of self-government.[(8)] The decision to expend available unencumbered public funds for the purpose of constructing bridges on trails falling under K.S.A. 58-3211 *et seq*. appears to be governed by "public purpose doctrine" common law principles. There is no precise definition of what constitutes a valid public use, for which tax dollars may be spent, and what may be considered a valid public use or purpose changes over time.[(9)] As a general rule, a municipality may authorize appropriation of public money, even for use by for private individuals, as long as appropriation is for public purpose and promotes public welfare.[(10)] Under this principle and line of case law, the Osage County Commissioners may expend public funds not specifically encumbered for other purposes on any project which they rationally believe will provide the general public with some benefit. The articulated reasons for assisting the rails-to-trails sponsor in building new bridges appear to relate to constructing and keeping bridges (that are open to the general public) safe and useable. This use of public funds appears to serve a valid public purpose. Therefore, insofar as

the project promotes a valid public purpose and promotes public welfare, it is our opinion that the Osage County Commissioners may expend lawfully available county funds for the purpose of constructing bridges on rails-to-trails property not owned or operated by the county.

Your second question is whether a county must mandatorily take action if a trail owner does not take proper care of the property . New language was added to K.S.A. 58-3215 in 2006, which sets forth the authority relative to enforcement of the Act.[(11)] The pertinent statutory language now reads:

"If the responsible party fails to comply with the provisions of this act, any adjacent property owner, city or county aggrieved by the noncompliance *may* bring an action in the district court to enforce the provisions of this act. Upon a finding that the responsible party has failed to comply with the provisions of this act, the court may enter an order requiring the responsible party to comply with the provisions of this act."[(12)]

The plain language of the statute indicates that any adjacent property owner, or city or county, *may* bring an action to enforce this Act. The statute does not use the word "must" or "shall." In construing powers vested in statutes as mandatory or discretionary, courts generally consider use of the word "may" to indicate that the decision is committed to the discretion of the party authorized to take the action.[(13)] Even if the statute in question had used the word "shall" instead of "may" that is not always indicative of legislative intent to mandate action in every available situation.[(14)] We find nothing in K.S.A. 58-3215, as amended, that requires any of the named entities to take action in situations where it might be allowed or warranted. Rather, such enforcement action appears to be discretionary on the part of the entity making the decision on whether to enforce the Act.

Thus, it is our opinion that counties are not mandatorily required to enforce the provisions of K.S.A. 58-3211 *et seq.*, but rather may do so when they deem it appropriate and the facts warrant such steps.

Sincerely,
Phill Kline
Attorney General
Theresa Marcel Bush
Assistant Attorney General

June 19, 2007

2007-12 Surveyor tampering with a landmark

Betty L. Rose, Executive Director
Kansas State Board of Technical Professions
Landon State Office Building
900 SW Jackson Street, Suite 507
Topeka, Kansas 66612

Re:

Crimes and Punishment--Kansas Criminal Code; Crimes Against Property; Tampering with a Landmark; Replacing Monumentation

Personal and Real Property--Land Surveys; Monumentation of Corners in Boundaries of Subdivisions; Replacing Monumentation

Synopsis:

The crime of tampering with a landmark requires proof that a person willfully and maliciously removed or altered a monument. A land surveyor does not act with malice when the land surveyor, in an effort to obtain approval of a subdivision plat by the county surveyor, places an existing corner monument in concrete. Given the lack of guidance from the Kansas appellate courts, the dearth of legislative history, and the apparent diversity of opinion in the land surveying community regarding K.S.A. 58-2001, we have no basis upon which to provide an opinion whether this statute requires placing existing corner monuments in concrete. Cited herein: K.S.A. 21-3724; 58-2001; 58-2005.

* * *

Dear Ms. Rose:

You inquire whether a land surveyor who attempts to comply with K.S.A. 58-2001 is violating K.S.A. 21-3724 which prohibits tampering with a landmark.

Land surveyors are required to comply with the statutes relating to land surveys[(1)] in order to be able to record subdivision plats. The county surveyor is responsible for enforcing these statutes and must certify that the plat meets all of the statutory requirements.[(2)] One of those requirements is K.S.A. 58-2001 which provides, as follows:

"All corners in the boundary of a subdivision of land shall be monumented[(3)] prior to recording of the plat. . . . [This] monument shall be a metallic bar or tube set rigidly in a concrete base."

Boundary surveys are surveys performed for the purpose of describing, monumenting, and locating the boundary lines of a parcel of land.[(4)] As the land survey is the basis for ensuring that property titles reflect a correct land description, it is important that the boundary lines be as precise as possible. The role of monumentation in this process is described, as follows:

"Each corner and point of change in the direction of the boundary line, should be clearly monumented by either a natural or manmade monument. If the corners are not located at existing natural monuments, then manmade monuments should be placed by the surveyor. Monuments are generally in the form of an iron rod which is driven into the ground, and is usually tagged by the surveyor with an . . . identifying marker. Unless removed during the construction process or by other action, these monuments will exist for a great period of time and will allow subsequent investigation as to the actual boundary as walked and staked by the surveyor. In the event of

boundary disputes . . . as to the actual on the ground location intended by the parties, these monuments will typically prevail as the best available evidence of their intent."[(5)]

We understand that at least one county surveyor is interpreting K.S.A. 58-2001 to require land surveyors to place *existing* corner monuments in a concrete base if that was not initially done by a prior land survyeor. A land surveyor takes issue with this county surveyor's interpretation and, instead, interprets the statute as requiring monumentation of only *new* corners. This land surveyor is concerned that if he follows the county surveyor's interpretation of K.S.A. 58-2001, he may run afoul of the criminal statute prohibiting tampering with landmarks.

The landmark tampering statute[(6)] provides, in part:

"Tampering with a landmark is *willfully and maliciously*:

"(a) Removing any monument . . . established . . . for the purpose of designating the corner of . . . any legal subdivision thereof; or

"(b) defacing or altering marks upon any tree, post or other monument, made for the purpose of designating any point on such boundary. . . ."[(7)]

Willful conduct is conduct that is purposeful and intentional and not accidental.[(8)] "Malicious" is defined as "willfully doing a wrongful act without just cause or excuse."[(9)]

There are no Kansas appellate decisions addressing either K.S.A. 58-2001 or the landmark tampering statute. However, it is our opinion that a land surveyor would not be acting with malice when a land surveyor, in an effort to obtain approval of a subdivision plat by the county surveyor, places an existing corner monument in a concrete base if that was not done initially.

The larger question is whether K.S.A. 58-2001 applies to existing corner monuments.

Apparently, the land surveyor who prompted this opinion request advises that on a particular subdivision plat, there are two existing corners that are " " rebars with caps, sticking out of the ground about 12"-15" and leaning." He inquires, as follows:

"Do I concrete them and attempt to replace them as found, i.e. 12"-15" out of the ground and leaning? How can I be sure of a correct orientation? If not, do I replace them at ground level (assuming that is possible) at the original cap location, point of ground entry, or some mathematical permutation?"

The county land surveyor's position is that the purpose of survey monuments is to easily locate boundaries of platted property and, therefore, it is necessary to replace or encase old monuments in concrete so they remain upright and permanently affixed in the ground.[(10)]

Alternatively, the Kansas Society of Land Surveyors (Society) has advised that generally accepted land surveying principles include the desirability of preserving original evidence and, therefore, K.S.A. 58-2001 applies only to new corner monuments.[(11)]

Unfortunately, there are no Kansas appellate court decisions or legislative history that illuminate the intent of K.S.A. 58-2001. The Society appears to rely on the first part of K.S.A. 58-2001 - "monumented prior to recording of the plat" - which apparently was done in this case, albeit not in accordance with the statute (*i.e.* no concrete setting). The county land surveyor appears to rely on the second part of the statute - "set rigidly in a concrete base" - and does not believe a plat may be approved until this is done. Given the lack of guidance and the apparent diversity of opinion in the land surveying community, we have no basis upon which to provide a legal opinion. We concur with the Society's suggestion that legislative clarification would be helpful.

Sincerely,
Paul J. Morrison
Attorney General
Mary Feighny
Deputy Attorney General

PJM:MF:jm

FOOTNOTES

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

[1.] K.S.A. 58-2001 *et seq.*

[2.] K.S.A. 58-2005.

[3.] A monument is a physical object that marks the location of a point in a land survey. 11 C.J.S. *Boundaries*, § 5.

[4.] Kansas Minimum Standards for Boundary Surveys. www.accesskansas.org/ksbtp/KAR66-12-1.html

[5.] *Land Surveys: A Guide for Lawyers* (American Bar Association, 1989) at 79, 86.

[6.] K.S.A. 21-3724.

[7.] Emphasis added.

[8.] *State v. Tyler*, 138 P.3d 417 (Kan.App. 2006).

[9.] *State v. Stone*, 253 Kan. 105 (1993).

[10.] Letter from Assistant Johnson County Counselor, Robert A. Ford, April 3, 2007.

[11.] Letter from Douglas A. Farrar, President, Kansas Society of Land Surveyors, May 19, 2007. ("There are many existing corners in Johnson County that were set in the late 1800's and early 1900's. Some of these corners, often stones or square iron bars, were set by the County Surveyor

in the course of his official duties. As surveyors, it is our duty to preserve original evidence, not destroy it unless endangered.")

April 30, 2009

2009-11 Letting of contracts, alternate project delivery

The Honorable Mike Petersen
State Senator, 28th District
State Capitol, Room 242-E
Topeka, Kansas 66612

The Honorable Roger Reitz
State Senator, 22nd District
State Capitol, Room 261-E
Topeka, Kansas 66612

Re:

Counties and County Officers--County Commissioners--Awarding of Certain Contracts; Public Lettings; County Alternative Project Delivery Building Construction Procurement; Definitions; Building Construction

Synopsis:

K.S.A. 2008 Supp. 19-214 which requires public bidding for contracts for the construction of designated county structures in excess of $25,000 includes repairs to existing structures. Cited herein: K.S.A. 2008 Supp. 19-214; 19-216b; 19-216c; 19-216d; 75-37,141.

* * *

Dear Senators Petersen and Reitz:

As Senators for the 28th and 22nd Districts, respectively, you inquire whether, in light of recent legislation, a statute which requires public bidding for the construction of certain county structures in excess of $25,000 includes repairs to those same structures.[(1)]

K.S.A. 2008 Supp. 19-214 provides, in part:

[A]ll contracts for the expenditure of county moneys for the *construction* of any courthouse, jail or other county building, or the construction of any bridge, highway, road, dam . . . in excess of $25,000 shall be awarded, on a public letting, to the lowest and best bid.[(2)]

K.S.A. 19-214, enacted in 1868, has remained essentially unchanged. Although minor adjustments have been made through the years, the underlying principle has remained the same,

expenditures for county structures must be openly bid and awarded. While there are no appellate court decisions addressing whether "construction" includes repairs to existing structures, testimony offered during the 2008 legislative hearings authorizing counties to utilize alternatives to the traditional design-bid-build process affirmed the proposition that when public funds are expended on county structures, including repairs, the process should be conducted openly.[3]

This 2008 legislation - the County Alternative Project Delivery Building Construction Procurement Act (Act) - provides, in part:

[T]he board of county commissioners is . . . authorized to institute an alternative project delivery program whereby construction management at-risk or building design-build procurement processes may be utilized on public projects pursuant to the act. This authorization . . . shall be for the sole and exclusive use of planning . . . designing, building, equipping, altering, *repairing*, improving or demolishing any structure . . . but shall not include highways, roads, bridges, dams or related structures. . . .[4]

While some counties have interpreted K.S.A. 19-214 to include repairs in excess of the statutory amount, your question is whether the Act now resolves the issue because of the circumstances of its enactment.[5]

The Act was introduced in the 2008 legislative session as Senate Bill No. 485 (SB 485) It was modeled after a similar procedure for state construction projects.[6] As initially introduced, the Act contained a provision exempting it from the requirements of K.S.A. 19-214.[7]

Coincidentally, revisions to K.S.A. 19-214 were being considered during the same legislative session in Senate Bill No. 594 (SB 594). That bill proposed the dollar amount threshold be increased from $10,000 to $25,000 for bidding. The proposed changes did not address any alternative construction project methods as envisioned in SB 485 or provide any definitions for the existing language.

Subsequently, SB 485 and 594 were merged in the Senate Ways and Means Committee.[8] The section of SB 485 that excepted the alternative construction process from K.S.A. 19-214 was deleted and the proposed amendments to K.S.A. 19-214 were inserted in its place.

The question you raise concerns the result of this merger. Briefly stated, did the phrase "construction services" as defined in the Act extend to the term "construction" as used in K.S.A. 19-214? The Act defines "Construction services" as "the process of planning, acquiring, building, equipping, altering, *repairing*, improving, or demolishing any structure or appurtenance thereto, including facilities, utilities or other improvements to any real property, excluding highways, road, bridges, dams or related structures, or stand-alone parking lots."[9]

One of the amendments to K.S.A. 19-214 in the 2008 session was to specifically add language to require the bidding process to include those types of projects that were not eligible for the alternative construction methods. The new language of K.S.A. 2008 Supp. 19-214 requires public bidding for: "all contracts for the expenditure of county money for the construction of any courthouse, jail or other county building, or the construction of any bridge, *highway, road, dam*,

turnpike or stand-alone parking lots . . . ."[(10)] This addition to K.S.A. 19-214 provides an indication that the legislature envisioned these bills as establishing a more comprehensive policy for all types of county construction projects.

When analyzing the language of a statute the Kansas Supreme Court has established the following rules:

The fundamental rule of statutory construction is that the intent of the legislature governs, if that intent can be determined. The legislature is presumed to have expressed its intent through the language in the statutory scheme. When a statute is plain and unambiguous, the court must give effect to the legislative intent as it was expressed rather than determine what the law should or should not be. Courts, however, are not limited to examining the language of the statute alone but may also consider the causes that impel the statute's adoption, the state's objective, the historical background, and the effect of the statute under various constructions. In addition to considering the language and circumstance surrounding the enactment of the statute, this court must consider the various provisions of an act together with a view of reconciling and harmonizing the provisions if possible.[(11)]

The Court has also stated that "legislative intent is to be determined from a general consideration of the entire act."[(12)] Additionally, when examining the use of specific terms, the Kansas Supreme Court has held, "[o]rdinarily, when determining legislative intent, identical words or terms used in different statutes on a specific subject are interpreted to have the same meaning absent anything in the context to suggest that a different meaning was intended."[(13)]

Applying these rules of statutory construction, "construction" should be interpreted consistently throughout the enactment as including both original construction and repairs.

This conclusion is supported by the fact that the legislature worked both bills together in what appeared to be an effort to develop a comprehensive approach to county construction projects. This effort resulted in the eventual merger of the bills into one enactment.[(14)]

Therefore, K.S.A. 2008 Supp. 19-214 includes both original construction and repairs to the county structures identified therein where the cost exceeds $25,000.

Sincerely,
Steve Six
Attorney General
Michael J. Smith
Assistant Attorney General

SS:MF:MJS:jm

FOOTNOTES

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

[1.] K.S.A. 2008 Supp. 19-214.

[2.] Emphasis added.

[3.] *Minutes*, Senate Ways and Means Committee, February 12, 2008, attachment 15, written testimony of Randall Allen, Executive Director of the Kansas Association of Counties. The purpose of public bidding laws is "to guard against favoritism, improvidence and corruption." *Interior Contractors, Inc. v. Board of Trustees of Newman County Memorial Hospital,* 185 F.Supp.2d 1216 (D.Kan. 2002) (commenting on K.S.A. 13-1017, the statute that requires bidding for cities of the first class).

[4.] K.S.A. 2008 Supp. 19-216d. Emphasis added.

[5.] Attorney General Opinion No. 81-65 considered the notification requirement of K.S.A. 19-215 and 19-216 for bidding projects that fall within the bidding requirement of K.S.A. 19-214. The project discussed in the opinion was the interior renovation of the county courthouse, not new construction.

[6.] *Minutes*, Senate Committee on Ways and Means, February 12, 2008, attachment 8, citing K.S.A. 2008 Supp. 75-37,141 *et seq.*

[7.] *Id.* at attachment 8-2, citing Section 7 of SB 485.

[8.] *Minutes*, Senate Ways and Means Committee, March 6, 2008.

[9.] K.S.A. 2008 Supp. 19-216c(i). Emphasis added.

[10.] K.S.A. 2008 Supp. 19-214(a) unless exempt pursuant to subsection (b). Emphasis added.

[11.] *Cole v. Mayans*, 276 Kan. 866, 874 (2003) internal citations omitted.

[12.] *Board of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 265 (2003).

[13.] *State v. Bank of America*, 272 Kan. 182, 188 (2001) citing *T-Bone Beeders, Inc. v. Martin*, 236 Kan. 641, 648 (1995).

[14.] 2008 Substitute for Senate Bill 485.

May 5, 2009

2009-12 Road vacation-standing to object

Allen Shelton
Smith County Attorney

205 S. Main
Smith Center, KS 66967

Re:

Roads and Bridges--General Provisions--Laying Out, Altering or Vacating Roads; Standing to Object to Vacation of Road

Roads and Bridges--General Provisions--Separate Certificates of Damages Assessed; Appeal from Award; Notice and Hearing; Appeal

Synopsis:

A board of county commissioners may vacate a county road notwithstanding an objection by a property owner whose property does not adjoin the road. Only a property owner whose property adjoins a road proposed to be vacated is eligible for damages pursuant to K.S.A. 68-102a. Cited herein: K.S.A. 68-102; 68-102a; 68-104; 68-107.

* * *

Dear Mr. Shelton:

You request an opinion whether the Smith County Commissioners may vacate one-half mile of a county road despite a non-adjoining landowner's objection and whether that landowner may request damages if the vacation occurs.

K.S.A. 68-102(b) provides:

The board of county commissioners may vacate any road in the county whenever the board determines such road is not a public utility by reason of neglect, nonuse, or inconvenience or from other cause or causes such road has become practically impassable and the necessity for such road as a public utility does not justify the expenditure of the necessary funds to repair such road or put the same in condition for public travel.

Notably, this provision neither incorporates objecting parties nor gives weight to objections to the vacation. However, K.S.A. 68-102a requires notice to "each owner of property adjoining the road." Similarly, the remedy for objections in this same section is "the award of damages, if any, to the property owners affected by" the vacation.[(1)] Although K.S.A. 68-102a states, "[a]ny person or persons may make written application to the county commissioners for payment *for damage to property* caused by such action," this language refers back to the statute's reference to "each owner of property adjoining the road." Therefore, K.S.A. 68-102 and 68-102a read together indicate 1) the property must adjoin the road proposed to be vacated, and 2) there must be damage to the property in order to apply for an award of damages.

Given the statutory scheme, the board of county commissioners may vacate the one-half mile road you inquire about, notwithstanding any landowner's objection - while duly noted - assuming the board follows other required procedure and makes the determinations set forth by the

legislature.[(2)] But in this instance, it also appears by the facts set forth in your request that this landowner does not have adjoining land, and therefore, cannot have *damage to property* caused by the action.

Your specific question asks whether a non-adjoining landowner has "standing" to make an objection; however, "standing" is a term of art in relation to a court proceeding. Therefore, the question is more appropriately couched in terms of whether a non-adjoining landowner can be "damaged" under this statutory framework.

Based on the analysis of K.S.A. 68-102, 68-102a, and 68-107,[(3)] it is determined that a *non-adjoining* landowner is not "damaged." Only adjacent landowners may sustain "damages" under this statutory framework. Hence, the board can vacate the road assuming all other provisions are followed.

Sincerely,
Steve Six
Attorney General
Teri Canfield-Eye
Assistant Attorney General

SS:MF:TC:jm

FOOTNOTES

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

[1.] K.S.A. 68-102a.

[2.] *See* K.S.A. 68-102(b); 68-102(c); 68-102a; 68-104; 68-107.

[3.] K.S.A. 68-102a only applies if there is no petition submitted for the vacation; under K.S.A. 68-102, said petition may only be submitted to the board by "adjacent landowner[s]." In this case, the adjacent landowners consented but did not initiate the vacation, hence, K.S.A. 68-102a applies. K.S.A. 68-107 requires a claimant to submit a separate certificate in writing of "the amount of damage," which should also be understood as the damage to real property.

End of 2009
None in 2010-2011

2012- 3 Excise Tax v Property Tax

Honorable Scott Schwab State Representative, Forty-Ninth District State Capitol, Room 561-W Topeka, Kansas 66612

Re: Constitution of the State of Kansas—Corporations—Cities' Power of Home Rule

Cities and Municipalities—General Provisions—Countywide and City Retailers' Sales Taxes; City and County Excise Taxes Prohibited

Synopsis: Under the *Executive Aircraft* test, the "transportation utility fee" (TUF) is a tax because it is a forced contribution on the owners of developed real property in the City of Mission levied for the purpose of raising revenue for the maintenance of governmental services offered to the general public, *i.e.*, maintenance of streets. The TUF is not an ad valorem tax because it is imposed by calculating the estimated number of vehicle trips originating from a property using a trip generation model rather than the value of real property. As such, TUF is an excise tax that the City of Mission is specifically, clearly, and uniformly prohibited from levying or imposing under K.S.A. 2011 Supp. 12-194. Cited herein: Kan. Const., Art. 12, Section 5; K.S.A. 2011 Supp. 12-187 *et seq*.; K.S.A. 2011 Supp. 12-194.

* * *

Dear Representative Schwab:

As Representative for the Forty-Ninth District, you ask for an opinion on whether K.S.A. 2011 Supp. 12-194 prohibits the City of Mission from enacting the provisions of Chapter 145 of the Code of the City of Mission, which creates and levies a transportation utility fee that is charged against the owners of all developed real property in the City of Mission. The purpose of the charge is to provide additional revenue to fund the maintenance of the city's streets. In other words, you are requesting an opinion on whether the transportation utility fee is an excise tax prohibited by the provisions of
K.S.A. 2011 Supp. 12-194 or a fee that would not be precluded by the provisions of
K.S.A. 2011 Supp. 12-194.

The City of Mission, Kansas is chartered under Kansas statute as a city of the second class.[1] On August 18, 2010, the Mission City Council adopted Ordinance No. 1332 to establish a Transportation Utility Fee (TUF).[2] The TUF is billed to the owners of all developed real property in the city and is collected annually with ad valorem real estate taxes.[3] The TUF, according to the Ordinance, is based upon "the direct and indirect use of or benefit derived from the use of public streets, bicycle lanes and sidewalks generated by the developed property."[4] Generally, the TUF is calculated by estimating the average number of vehicle trips generated by a property.[5]

The proceeds of the TUF assessments are allocated by the City to a dedicated[6] "Transportation Fund,"[7] and are to be used for "Transportation System Maintenance Items"[8] which includes but is not limited to surfacing and resurfacing, curb and gutter maintenance and repair, bridge

maintenance and repair, sidewalk maintenance and repair, trail maintenance and repair, transit facility maintenance and repair, bicycle lane maintenance and repair, landscape enhancements along the rights-of-way, street tree replacement and street lighting.[9]

With these facts in mind, we turn to your question on whether the TUF is an excise tax prohibited under K.S.A. 2011 Supp. 12-194 or a fee as it is named.[10]

Test to Distinguish a Tax from a Fee

In Kansas, the test to distinguish a tax and a fee was outlined by the Kansas Supreme Court in *Executive Aircraft Consulting v. City of Newton*.[11] In that opinion, the Court clarified the distinction between a tax and a fee as follows:

> A tax is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public. In contrast, a fee is paid in exchange for a special service, benefit, or privilege not

[1] Mission, Kansas Charter Ordinance No. 1 (October 10, 1962); Mission, Kansas Charter Ordinance No. 2 (September 25, 1968).
[2] Mission, Kansas Charter Ordinance No. 1332 (August 18, 2010).
[3] Mission, Kansas, Municipal Code § 145.090 (2010).
[4] Mission, Kansas, Municipal Code § 145.070 (2010).
[5] Mission, Kansas, Municipal Code § 145.080 (2010).
[6] Mission, Kansas, Municipal Code § 145.020 (2010).
[7] Mission, Kansas, Municipal Code § 145.060 (2010).
[8] Mission, Kansas, Municipal Code § 145.020 (2010).
[9] *Id.*
[10] The term used in naming the charge is not always controlling, as it is sometimes used loosely and indiscriminately, and so the language of the ordinance must be reviewed to determine the legislative purpose. *Duff. v. Garden City*, 122 Kan. 391, 393 (1927).
[11] 252 Kan. 421 (1993).

> automatically conferred upon the general public. A fee is not a revenue measure, but a means of compensating the government for the cost of offering and regulating the special service, benefit, or privilege. Payment of a fee is voluntary--an individual can avoid the charge by choosing not to take advantage of the service, benefit, or privilege offered.[12]

Tax or Fee Analysis

Under the *Executive Aircraft* test, a tax is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public.

The TUF is a forced contribution. The Ordinance requires owners of developed real property in the City of Mission to pay the TUF.[13] Although the Ordinance provides for an administrative

appeal, the appeal is limited to challenges to the City Administrator's interpretation of all terms, provisions, and requirements of the Ordinance and to determine the appropriate charges.[14] In other words, a property owner can appeal the land use classification and request a change in the classification, but the Ordinance does not authorize the City Administrator to waive the levying or collection of the TUF.[15]

Additionally, the manner in which the transportation utility fee is billed and collected on an annual basis with ad valorem real estate taxes provides strong support to conclude the TUF is a forced contribution.[16] The City of Mission is authorized by the Transportation Utility Fee Manual created by the City Administrator to utilize a collection procedure that allows it to charge late fees for past due amounts and to place a lien on the property for unpaid amounts due under the transportation utility fee ordinance.[17] With a fee, the refusal to pay or the tardiness of payment results in the loss of the service, benefit, or privilege until the fee is paid. It does not result in the institution of collection proceedings.

The TUF is created as an additional source of revenue for the maintenance of governmental services, *i.e.*, maintenance of public streets in the City of Mission.[18] In its

[12] *Id*. at 427. In *National Cable Television Association, Inc. v. United States*, the United States Supreme Court created a test to distinguish between a tax and a fee. In *National Cable*, the Independent Offices Appropriation Act (Act) authorized federal agencies to impose fees for agency services. A fee would be imposed based upon a determination of "direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." Pursuant to the Act, the Federal Communication Commission imposed a fee upon community antenna television systems. National Cable, a trade association, moved to set aside the fee. The Supreme Court remanded the case, holding that "value to the recipient" is the appropriate determination in assessing a fee because, unlike a tax, a fee "presumably, bestows a benefit on the applicant, not shared by other members of society." "Taxation," according to the U.S. Supreme Court, "is a legislative function."

[13] Mission, Kansas, Municipal Code § 145.070 (2010).

[14] Mission, Kansas, Municipal Code §§ 145.100 and 145.110 (2010).

[15] *See Id.*

[16] Mission, Kansas, Municipal Code § 145.090 (2010).

[17] Mission, Kansas, Transportation Utility Fee Manual, page 21.

[18] Mission, Kansas, Municipal Code § 145.020 (2010).

legislative history section of the Ordinance,[19] the City stated it historically has not had a dedicated funding source for transportation related improvements.[20] These items were paid for by special highway funding and by the County Assistance Road System (CARS) sponsored by Johnson County, Kansas.[21] The monies collected from the TUF, however, are intended to be a source of funding for these transportation related improvements as the funds are dedicated, pursuant to the Ordinance, to "Transportation System Maintenance Items."[22]

Even though the City of Mission considers the maintenance of its streets to be a "proprietary function,"[23] the Kansas Supreme Court held that a city, being duty bound to maintain its streets in reasonable repair for public use, is engaged in a governmental function in the process of their

repair and improvement.[24] The public streets are utilized not only by the owners of real property located within the boundaries of the City of Mission, but also by city inhabitants who do not own developed real property and members of the general public who visit or pass through the City of Mission for various business or personal reasons. It is clear that the maintenance of city streets is a government function undertaken for the benefit of the general public as opposed to bestowing a benefit on an identified group that is not shared by other members of society.

We conclude the TUF is a tax, rather than a fee, because it meets the test set out in *Executive Aircraft*. Having concluded the TUF is a tax, we do not need to engage in the analysis of whether the TUF is a fee. The test for whether the charge is a fee is in direct contrast to a tax—a fee is voluntary whereas a tax is not; a fee is not a revenue measure whereas a tax is; and a fee is assessed to an identified group which obtains the benefit of the fee whereas a tax is levied on the public. As discussed previously, none of the test factors for a fee are applicable in the case of the TUF.

Excise Tax Analysis

It is well settled in Kansas that the power to levy taxes is inherent in the power to govern, but the exercise of that power is dependent upon the existence of legislation designating the kinds of property to be taxed. Nothing is taxable unless clearly within the grant of the power to tax.[25]

Although cities have home rule authority "to determine their local affairs and government" granted by the Constitution of the State of Kansas,[26] the State can

[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *See Foster v. Capital Gas & Electric Co*, 125 Kan. 574 (1928).
[25] *Robbins-Leavenworth Floor Covering, Inc. v. Leavenworth Nat'l Bank & Trust Co.*, 229 Kan. 511, 512, (1981).
[26] Kan. Const., Art. 12, Section 5(b).

preempt cities (and counties) from acting in a particular area by clearly preempting local legislation.[27] One of the ways of doing so is by enacting a uniform law:

> The legislature with some frequency has preempted home rule by passage of uniform laws that also contain preemptive language. Some uniform laws, however, do not need to contain any preemptive language because, by simply prohibiting actions like the levying of certain types of tax or the licensure or regulation of certain activities, they expressly forbid local action in the area.[28]

K.S.A. 2011 Supp. 12-194 is part of a uniform law pertaining to local retailers' sales tax[29] which

specifically and clearly provides, subject to exceptions that do not apply here, "no city or county shall levy or impose an *excise tax or a tax* in the nature of an excise, other than a retailers' sales tax and a compensating use tax…."[30] Therefore, if the TUF is an excise tax or a tax in the nature of an excise, the City of Mission is preempted from using its home rule authority to enact or enforce this tax.

Black's Law Dictionary defines an excise tax as "a tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)."[31] The term "excise tax" means and includes "practically any tax that is not an ad valorem tax."[32] "An ad valorem tax is tax imposed on the basis of the value of the article or thing being taxed. An excise tax is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege."[33]

We already have concluded the TUF is a tax. The facts prove the TUF is not imposed based on the value of real property, but rather is imposed by calculating the estimated number of vehicle trips originating from a property using a trip generation model.[34] Since the TUF does not use value of real property as the basis of its imposition, it cannot be an ad valorem tax and instead must be an excise tax or a tax in the nature of an excise. The TUF is imposed on the performance of an act or the enjoyment of a privilege which is either the act or privilege of owning real property within the boundaries of the City of Mission. As a result, the owner of every developed real property in the

[27] *Zimmerman v. Board of County Comm'r*, 218 P.3d. 400 (2009) (Court rejects argument that state law preemption of a particular field can be implied, preemption must be expressed by clear statement in the law); *See also* Attorney General Opinion 2010-07.

[28] Heim, *Home Rule: A Primer*, 74 J. Kan. Bar Ass'n 26, 31-32 (2005); Heim, *Home Rule Power for Cities and Counties*, 66 J. Kan. Bar Ass'n 26, 35 (1997). *See also McCarthy v. City of Leawood*, 257 Kan. 566, 570 (1995) (Cities are specifically and clearly prohibited from passing any ordinance enacting a tax, excise, fee, charge or other exaction when the levying of that tax, fee, charge or other exaction has been limited or prohibited by a statute passed by the Kansas Legislature which is applicable uniformly to all cities of the same class).

[29] K.S.A. 12-187 *et seq*.

[30] Emphasis added.

[31] Black's Law Dictionary (9th ed. 2009).

[32] *Callaway v. City of Overland Park*, 211 Kan. 646, 651 (1973).

[33] *Id.*

[34] Mission, Kansas, Municipal Code § 145.020 (2010).

City of Mission is required to pay a transportation utility fee for the performance of the act or the enjoyment of the privilege of owning such developed real property in the City of Mission.

We conclude the TUF is an excise tax. The City of Mission is specifically, clearly, and uniformly prohibited from levying or imposing such tax under K.S.A. 2011 Supp. 12-194.

Conclusion

Under the *Executive Aircraft* test, the TUF is a tax because it is a forced contribution on the owners of developed real property in the City of Mission levied for the purpose of raising revenue for the maintenance of governmental services offered to the general public, *i.e.*, the maintenance of public streets. The TUF is not an ad valorem tax because it is imposed by calculating the estimated number of vehicle trips originating from a property using a trip generation model rather than the value of real property. As such, the TUF is an excise tax that the City of Mission is specifically, clearly, and uniformly prohibited from levying or imposing under K.S.A. 2011 Supp. 12-194.

Sincerely Derek Schmidt Attorney Gener*a*l
Athena Andaya Deputy Attorney General

End of 2012
None in 2013-2016

2017-1 Township Powers

Synopsis: A township lacks authority to enact local laws or undertake any action not specifically authorized by statute or the state constitution. Lacking such authority, a township may not adopt a uniform code by reference, nor do the provisions in K.S.A. 12-3301 et seq. for the adoption of such codes apply to townships. Cited herein: K.S.A. 12- 101; 12-3301; 12-3303; K.S.A. 2016 Supp. 19-101a; 80-101; 80-301; 80-401; 80-501; Kan. Const., Art. 5 § 12.
* * *
Dear Mr. Redding, Mr. Goehring, Mr. Rothwell, and Ms. McKee:
On behalf of the Board of Directors of Blue Township, and the Board of County Commissioners of Pottawatomie County, Kansas, each of you has requested an opinion regarding the authority of townships. Blue Township is located in the southwest corner of Pottawatomie County, bordering the City of Manhattan and Riley County. Your question is whether the township board has authority to adopt uniform building, electrical, and plumbing codes. If such authority exists, you also inquire about the applicability of the adoption by reference procedure for cities and counties outlined in K.S.A. 12-3301 et seq. In response to your questions and as explained below, we conclude that as a quasi-municipal corporation, a township may exercise only the authority granted to it by the legislature or the state constitution. Townships are granted limited authority regarding specific local matters, none of which includes the authority to create or adopt laws. As such, townships do not possess the authority to adopt building codes.
Township Authority
It is first necessary to examine what authority townships hold in order to answer your questions. Generally, townships are not considered municipal corporations. "If deemed to be corporations of any kind . . . they are generally quasi-municipal corporations…as specifically provided for by a statute of the state or a provision of the state constitution."2 The Kansas

Legislature chose to empower townships through statute in K.S.A. 2016 Supp. 80-101: Each organized township in this state shall be a body politic and corporate, and in its proper name sue and be sued, and may appoint all necessary agents and attorneys in that behalf, purchase and hold real and personal property for the use of the township, sell, convey and dispose of real and personal property owned by the township, and may make all contracts that may be necessary and convenient for the exercise of its corporate powers.

The legislature also outlined the duties of a township trustee in K.S.A. 80-301 by limiting the trustee to looking after township roads and the taxing mechanisms necessary for the upkeep of such roads. K.S.A. 80-401 and K.S.A. 80-501 respectively, also outline the narrowly defined duties of the township treasurer and clerk regarding finances and the maintenance of the records necessary to the operation of the township. In addition to roads, townships are also given the authority to raise funds for the operation of parks, libraries, fire protection, water supply and other useful public services.3 None of these statutes expand the township's power to encompass the adoption of new laws; rather, they are focused on enforcement or application of laws put in place by other bodies.

By comparison, the grant of authority to enact local laws given to cities and counties is clear. In K.S.A. 12-101, the home rule of cities, as provided for in Article 12, § 5 of the Kansas Constitution, is codified by empowering "cities to determine their local affairs and government by ordinance." K.S.A. 2016 Supp. 19-101a grants the board of county commissioners the authority to "transact all county business and perform all powers of local legislation and administration it deems appropriate." Townships possess no such broad grants of authority by statute or the state constitution.

Adoption of Codes by Reference

In your request, you note that K.S.A. 12-3301 et seq. do not specifically authorize a township to adopt a code by reference. Since no direct authorization for townships is provided, such authority would have to be inferred from elsewhere. However, the definitions section provides evidence that the legislature did not intend this authority to extend to townships. K.S.A. 12-3301(b) defines a municipality as "any county or local unit of government which is authorized to enact local laws under the state law or constitution." As discussed above, a township is not authorized to enact local laws and thus, a township does not meet the statutory definition of a municipality in K.S.A. 12-3301(b). Therefore, the procedures set forth for the adoption of codes by reference do not apply to townships. Further, K.S.A. 12-3301 et seq. also specifically provide procedures for cities and counties in the adoption of codes by reference. In this way, the county has a mechanism to apply the proper codes to townships. K.S.A. 12-3303, which provides the procedure that should be followed by counties when making an adoption by reference, provides that a county may enact codes that apply differently based on geographic location within the county. For example, any "part of a code adopted pursuant . . . to this section may be made applicable, by resolution, either to all unincorporated portions of the county or to any area of the county outside of but within three (3) miles of the nearest point of the corporate limits of any city."4 This distinction indicates that the legislature has considered the need to regulate growth near expanding urban areas without unduly burdening less populated areas of a county.

A township lacks authority to enact local laws or undertake any action not specifically authorized by statute or the state constitution. Lacking such authority, a township may not adopt a uniform code, nor do the provisions in K.S.A. 12-3301 et seq. for the adoption of such

codes by reference apply to townships. When it comes to unincorporated areas of a county, the board of county commissioners is the authorized body to adopt such laws.
Sincerely,
Derek Schmidt
Kansas Attorney General
Kenneth B. Titus
Assistant Attorney General

End of 2017

2018-06 Cemetery Maintenance, Access to Public Highway

Tamara Niles, Legal Counsel
Unified School District No. 470, Cowley County
125 W. 5th Avenue
Arkansas City, Kansas 67005

Re: Corporations—Cemetery Corporations—Definitions; Cemetery Corporation

Roads and Bridges—General Provisions—Access to Public Highway, When; Petition; Payment of Expenses

Township and Township Officers—Public Parks and Cemeteries—Care of Abandoned Cemeteries

Synopsis: A cemetery corporation must be the owner of the abandoned cemetery in order to initiate a proceeding under K.S.A. 2017 Supp. 17-1367. Pursuant to K.S.A. 80–916, a township board is required to provide for the care of any cemetery within its boundaries that is determined to be abandoned. By contrast, a county may provide care for an abandoned or uncared for cemetery pursuant to K.S.A. 19-3106 and 19-3107, respectively. The maintenance, upkeep, and repair of a road opened pursuant to K.S.A. 68117 forever remains the responsibility of the owner or owners, their grantees, successors or assigns, of the land specifically benefited by the establishment of such public road, and such expense or liability never transfers to the township or other municipality in which such road is laid out and established. Cited herein: K.S.A. 2017 Supp. 17-1301c; 17-1366; 171367; K.S.A. 19-3106; 19-3107; 68-117; 75-704; 80-916.

Dear Ms. Niles:

As legal counsel for Unified School District No. 470, Cowley County (U.S.D. 470), you ask the Kansas Attorney General to find that Liberty Cemetery is an abandoned cemetery. Further, you ask us to "establish which entity, if any, has maintenance responsibilities for Liberty Cemetery;" and to "determine which entity, if any, has a legal responsibility to provide public access to Liberty Cemetery."

You state that during unification of school districts in the 1960s, U.S.D. 470 received ownership of a former school property located within Silverdale Township in Cowley County. Also located on this property is Liberty Cemetery, which contains 31 graves. The last burial in Liberty Cemetery is purported to be in 1932. Unfortunately, records regarding the creation of the cemetery have not been located. You describe the cemetery as "an abandoned, landlocked parcel titled in the school district's name that is not accessible by a roadway." U.S.D. 470 has taken no action to maintain this parcel as a cemetery, but the U.S.D. 470 believes that Cowley County has performed some maintenance within the last 20 years by fencing the gravestones.

You also state that "[U.S.D. 470] understand[s] the Cowley County road that previously accessed the cemetery [and] traversed both Liberty Township and Silverdale Township has been informally abandoned and can no longer be driven." The only access to the landlocked cemetery is by foot or four-wheel-drive vehicle, through grassland and/or fields owned by a private citizen. You provided us information that the private citizen/adjacent landowner allows individuals to access the cemetery through his land, so there is no issue of an access easement. Because you state there is no issue of easements, we construe your question to be limited to whether a public entity is legally required to provide public *roadway* access to Liberty Cemetery.

This request raises concerns between the various parties' rights and duties relating to a cemetery. Such an undertaking requires known facts or facts determined by a finder of fact which we have not been given. Therefore, we cannot specifically opine on your questions. However, we can provide you the pertinent statutes to apply once facts become known.

Abandonment

You ask the Attorney General to find that Liberty Cemetery is abandoned. The statutory authority for the Attorney General to determine the existence of an abandoned cemetery is pursuant to the Cemetery Corporations Act (Act).[1]

Under the Act, a cemetery corporation[2] holds title to a cemetery and is responsible for care and maintenance of that cemetery. To ensure perpetual proper care and maintenance of the cemetery, the cemetery corporation is required by statute to maintain a permanent maintenance fund,

[1] K.S.A. 2017 Supp. 17-1301c *et.seq*.

[2] "'Cemetery corporation' means any individual or entity required to maintain permanent maintenance funds under the provisions of K.S.A. 17-1312f, and amendments thereto." K.S.A. 2017 Supp. 17-1301c(c).

among other things.[3] If a cemetery is deemed to be an "abandoned cemetery" under the Act, an appropriate action filed in the district court to dissolve the cemetery corporation shall be instituted by the Attorney General.[4] Upon dissolution of the cemetery corporation, title to the property shall vest in the municipality[5] in which the cemetery is located and any liens against such property shall be immediately quashed, null and void and unenforceable on and after January 1, 2003.[6] All moneys from the permanent maintenance fund or investments shall be transferred to the treasurer of such municipality and shall become the property of the municipality for the care and maintenance of the cemetery.[7]

As used in the Act, "'abandoned cemetery' means:

> (1) Any cemetery owned by a corporation, as defined in K.S.A. 17-1312f, and amendments thereto, in which, for a period of at least one year, there has been a failure to cut grass or weeds or care for graves, grave markers, walls, fences, driveways and buildings; or
>
> (2) any cemetery owned by a corporation, as defined in K.S.A.17-1312f, and amendments thereto, in which for a period of 180 days, proper records have not been maintained and annual or quarterly reports have not been made to the secretary of state, pursuant to the provisions of K.S.A. 17-1312a et seq., and amendments thereto."[8]

In your request letter, you assume that "some sort of cemetery corporation must have owned and maintained the cemetery at one point in history" but you were uncertain when. Ownership of the cemetery is a critical fact because it determines which statute applies.
For example, if the facts establish that a cemetery corporation abandoned the cemetery, K.S.A. 2017 Supp. 17-1367 could be applied and the cemetery property would vest in the municipality, which you state in your correspondence is the County. If the facts established that the term

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[3] "'Permanent maintenance fund' means a certificate of deposit, a business savings account, or an irrevocable trust fund whose proceeds are derived from not less than the funding requirement as defined in subsection (e)." K.S.A. 2017 Supp. 17-1301c(h). Subsection (e) provides, "'[f]unding requirement' means that portion of the purchase price equal to 15% of the purchase price, but not less than $25, of a burial lot; 10% of the purchase price, but not less than $100 per community mausoleum crypt; or 5% of the purchase price, but not less than $50 for each garden mausoleum crypt or niche set aside in the permanent maintenance fund." K.S.A. 2017 Supp. 17-1301c(e).

[4] K.S.A. 2017 Supp. 17-1367.

[5] "'Municipality' means the cemetery district in which all or any portion of an abandoned cemetery is located. If no portion of such cemetery is located within a cemetery district, the term shall mean the city in which all or any portion of an abandoned cemetery is located unless such cemetery is not within the corporate limits of a city, in which case such term shall mean the county in which such cemetery is located." K.S.A. 2017 Supp. 17-1366(b).

[6] K.S.A. 2017 Supp. 17-1367. We note that this statute was found unconstitutional *as applied* in *State ex rel. Six v. Mike W. Graham & Assocs., LLC*, 42 Kan. App. 2d 1030, 1041 (2009). The Court of Appeals found the statute was unconstitutionally applied retroactively to defeat Appellant's preexisting lien rights, thus infringing upon due process of law in the case at bar.

[7] K.S.A. 2017 Supp. 17-1367.

[8] K.S.A. 2017 Supp. 17-1366(a).

"cemetery corporation" is used generically and is actually meant to describe a private township cemetery association organized under the laws of Kansas as a nonprofit corporation, and such "cemetery corporation" abandoned the cemetery, K.S.A. 80-934 could be applied and the cemetery property would vest in the township.[9] If the cemetery is not owned by a cemetery corporation, K.S.A. 2017 Supp. 17-1367 would not apply.

Because a cemetery corporation must be the owner of the abandoned cemetery in order to initiate a proceeding under K.S.A. 2017 Supp. 17-1367, and it is not known whether a cemetery corporation holds the title to Liberty Cemetery, we cannot apply the Act to your first question.

Maintenance

You ask us to establish which entity, if any, has maintenance responsibilities for Liberty Cemetery. You listed U.S.D. 470, Cowley County, Silverdale Township or adjacent landowners as entities that may have maintenance responsibilities for Liberty Cemetery.
U.S.D. 470 is the owner of the land upon which Liberty Cemetery is located. However, we did not find any Kansas statutes imposing a duty of maintenance on a landowner who has no connection to the cemetery other than owning the land. It may be that the deed conveying the land has restrictive covenants in it that imposes a duty of maintenance, but such a review is outside the scope of this written opinion. Also, we did not find any statutes imposing a duty of maintenance on an adjacent landowner who has no connection to the cemetery other than owning the adjacent property.

There is a statute that provides for the expenditure of public moneys for the care of *abandoned* cemeteries by townships. K.S.A. 80-916 *requires* a township board to care for abandoned cemeteries within its boundaries. The statute provides:

> From and after the passage of this act it shall be the duty of the township board of any township within the state of Kansas in which there is situated an abandoned cemetery to provide for the care of such cemetery and to provide for the proper and seasonable cutting of all weeds and grass therein at least twice each year; and for such purposes such township board shall appropriate and expend not more than $500 per year for each such cemetery.

This statute was enacted in 1917 and contained the language imposing the duty of the township board to care for abandoned cemeteries.[10] The statute was amended to change the amount a township board was authorized to spend on the cutting of all weeds and grass.[11] Otherwise, the

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[9] K.S.A. 80-934 provides, "Any private township cemetery association organized under the laws of Kansas as a nonprofit corporation which has failed to operate and maintain its cemetery for a period of more than ten (10) years and which has been maintained by the township under the provisions of K.S.A. 80-916 for a period of at least five (5) years may be declared abandoned and extinct by order of the district court of the county in which the cemetery is located and the title to the cemetery property of such association vested in the township in the manner hereinafter provided."
[10] L. 1917, Ch. 84, §1.
[11] L. 1917, Ch. 84, §1 authorized $10.00 per year; L. 1919, Ch. 105, § 1 authorized $50.00 per year; and L. 1982, Ch. 72, § 14 authorizes $500 per year.

statute has continuously imposed the duty on the township board to care for abandoned cemeteries within the boundaries of the township, up to the statutory amount. This statute does not contain language requiring a finding of ownership of the abandoned cemetery. The Legislature, with the use of plain language, imposed a duty on the township for the basic care of an abandoned cemetery.

There also is a statute that provides for the expenditure of public moneys for the care of abandoned or uncared for cemeteries and burial places by counties. K.S.A. 19-3106 authorizes a county to levy a tax to care for a cemetery or a burial place that has at least 3 human bodies that have been interred and that has been *uncared for and abandoned* for at least 5 years.

Another statute, K.S.A.19-3107, authorizes a county to levy a tax to care for cemetery or burial place that has at least 10 human bodies that have been interred and that has been *uncared for*, for at least 5 years.

Both K.S.A. 19-3106 and 19-3107 *authorize but do not require* the board of county commissioners to levy a tax to provide care for an uncared for or abandoned cemetery in the county. These statutes do not impose a duty on the counties to care for such cemeteries. Therefore, counties cannot be made to expend public moneys on the maintenance of such cemeteries, but counties have discretion to expend public moneys on such cemeteries. These statutes do not contain language requiring a finding of ownership by a cemetery corporation, other corporation, municipality or other entity. The only requirement is a qualifying abandoned or uncared for cemetery that is in need of maintenance.

Whether Liberty Cemetery is "abandoned" under K.S.A. 80-916 or K.S.A. 19-3106, or "uncared for" under K.S.A.19-3107 is a factual matter,[12] so we will not opine on this question. We only opine on questions of law.[13] However, we can conclude that, pursuant to K.S.A. 80–916, a township board is required to provide for the care of any cemetery within its boundaries that is determined to be abandoned; and a county may provide care for an abandoned or uncared for cemetery pursuant to K.S.A. 19-3106 and 19-3107, respectively.

Public Road Access

You ask for the Attorney General's opinion on "whether any public entity has a legal requirement to provide public access, and if so, which entity has a legal responsibility to do so." Because you stated there was no access easement question,[13] we construe your question to be limited to whether a public entity is legally required to provide public *roadway* access to Liberty Cemetery.

[12] *See State ex rel. Stephan v. Lane*, 228 Kan. at 390, 391; *Campbell v. City of Kansas*, 13 S.W. at 901.
[13] *See* K.S.A. 75-704.
[13] Even if there was an issue, it is likely a court would find the existence of an implied easement by necessity that would allow relatives of individuals buried in Liberty Cemetery to access the gravesites. *See Stroda v. Joice Holdings*, 288 Kan. 718, 724–27 (2009).

The general rule for access to a public highway by a landlocked property is found in K.S.A. 68-117. The statute provides that, upon the proper presentation of a petition setting forth the use and purposes of such proposed road, the board of county commissioners "shall proceed in accordance with the provisions of K.S.A. 68-101 to 68-110, both sections inclusive, and K.S.A. 68-115 and 68-116" to lay out such road. Further, K.S.A. 68-117 provides that:

> [T]he owner or owners, their grantees, successors or assigns, of the land specifically benefited by the establishment of such public road, shall forthwith pay all expenses of establishing said road, including all damages, if any should be held or allowed and thereafter forever maintain and keep the same in repair and without any expense or liability to the township or other municipality in which such road is so laid out and established.

Whether the "Cowley County road" that previously accessed the Liberty Cemetery was a road opened pursuant to petition as set forth in K.S.A. 68-117 is a question of fact, so we will not opine on the question. However, we can conclude that the maintenance, upkeep, and repair of a road opened pursuant to K.S.A. 68-117 forever remains the responsibility of the owner or owners, their grantees, successors or assigns, of the land specifically benefited by the establishment of such public road, and such expense or liability never transfers to the township or other municipality in which such road is laid out and established.
Sincerely,
Derek Schmidt, Kansas Attorney General
Athena E. Andaya, Deputy Attorney General

2018- 12 Township Corporate Status, Powers

Georgia Ransone, Trustee
Mark Reed, Treasurer
Marilyn Sommers, Clerk
Silver Lake Township
4100 NW Sunset Lane
Silver Lake, KS 66539

Re: Townships and Township Officers—General Provisions—Townships; Corporate Status; Powers

Synopsis: Townships derive their powers from the legislature. A township may not exercise a power not granted by the legislature. Cited herein: K.S.A. 121928; 12-1683; 12-1691; 19-101; 80-101; 80-104; 80-301; 80-2518; Kan. Const. Art. 12, Sec. 5.

* * *

Dear Ms. Ransone, Mr. Reed, and Ms. Sommers:

As the township officers for Silver Lake Township, you ask our opinion on a matter related to the powers of townships. Specifically, you ask whether a township may solicit and receive donations. For the reasons discussed below, we conclude the answer to your question is "no."

In your letter, you provide background for your question. You describe a water well owned by the township that is experiencing declining production. You explain that the water is not used for municipal drinking water, but rather for maintenance of township equipment and other light industrial and agricultural purposes. After having the well and its related systems inspected, you determined that the well was insufficient to continue serving township needs and that the water it provides should be replaced by a connection to a rural water system, at an estimated cost of $10,000. You note that this would strain the township's budget, and ask for our opinion on whether the township may use donations to finance the cost of this project.[14]

You correctly note that local governments may exercise only those powers specifically granted by the legislature. This is referred to as Dillon's Rule,[15] which provides:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation— not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation.[3]

By constitutional amendment in 1961, Kansans "stood Dillon's Rule on its head by providing a direct source, from the people, of legislative power for cities."[16] The legislature granted home rule to counties in 1974.[17] Townships have not been granted home rule.

The legislature granted townships the power to: sue and be sued; purchase and hold real and personal property; sell, convey and dispose of real and personal property; and "make all contracts that may be necessary and convenient."[6] The legislature has not granted townships the power to accept gifts and donations generally.[18]

However, your letter inquires whether the power to accept gifts could be implied by other powers, such as the duty of the trustee to "superintend all the financial concerns of the

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[14] Georgia Ransone, Mark Reed, and Marilyn Sommers, Correspondence, June 18, 2018.
[15] *See General Bldg. Contractors, L.L.C. v. Bd. of Shawnee Cty. Comm'rs*, 275 Kan. 525, 533-34 (2003).
[3] Dillon, *Municipal Corporations*, § 237 (5th ed. 1911).
[16] Kansas Legislator Briefing Book, Home Rule, at 2 (2015). *See* Kan. Const. Art. 12, Sec. 5.
[17] K.S.A. 19-101.
[6] K.S.A. 80-101.
[18] But *see* K.S.A. 80-104 (township may "accept land in the form of a gift, donation or devise").
[8] K.S.A. 80-301.

township."[8] In order to answer your question, we must turn to a well-known canon of statutory construction.

> The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. We first attempt to ascertain legislative intent by reading the plain language of the statutes and giving common words their ordinary meanings. When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.[19]

The power to "superintend" is the ministerial power "to have or exercise the charge and oversight of."[20] We do not believe it is necessary to imply the power to accept gifts and donations in order for the township trustee to exercise this ministerial power; doing so would require us to read into the statute an additional grant of power not readily found in it. We are also mindful of the fact the legislature *has* granted other municipal corporations the power the accept gifts and donations generally.[21] This creates a fair, reasonable, and substantial doubt that this power is implied in any of the other grants of power to townships. Pursuant to Dillon's Rule, this doubt must be resolved against the township.

In summary, townships have only the powers granted to them by the legislature. The legislature has not granted townships the power to accept gifts and donations generally. The power to accept gifts and donations generally cannot be fairly implied in any of the other powers granted to townships. For these reasons, we opine that a township does not have the power to solicit and accept donations.

Sincerely,
Derek Schmidt, Kansas Attorney General
Craig Paschang, Assistant Attorney General

End of 2018

[19] *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918 (2013), quoting *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 564-65 (2012) (internal citations omitted).
[20] http://www.merriam-webster.com/dictionary/superintend, accessed on August 17, 2018.
[21] *E.g.*, K.S.A. 12-1928 (recreation commission); K.S.A. 12-1683 and 12-1691 (museum boards); K.S.A. 80-2518 (hospital board).