



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

CURT T. SCHNEIDER
Attorney General

March 28, 1975

Opinion No. 75- 136

Mr. James G. Kahler
Rice County Attorney
Lyons, Kansas 67554

Dear Mr. Kahler:

You request our interpretation of K.S.A. 24-126. This statute reads in pertinent part:

"It shall be unlawful for any person, corporation, drainage or levee district, county, city, town or township, without first obtaining the approval of plans for the same by the chief engineer of the division of water resources, to construct, cause to be constructed, maintain or cause to be maintained, any levee or other such improvement on, along or near any stream of this state which is subject to floods, freshets or overflows, so as to control, regulate or otherwise change the flood waters of such stream; and any person, corporation, county, city, town, township or district violating any provision of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail for a period of not more than one (1) year, or by both such fine and imprisonment, and each day any structure is maintained or caused to be maintained shall constitute a separate offense." (Emphasis supplied.)

Specifically, you inquire whether a county road whose roadbed is raised above the surrounding land comes within the meaning of the phrase "or other such improvement". We recognize that certain flood conditions may cause such a road to affect overflowing water in much the same manner as a levee.

The phrase "or other such improvement" is nowhere defined within the act. Kansas case law yields no clear definition. The term must draw meaning from the preceding noun, levee. Levee is likewise defined neither within this statute or by statutes in pari materia. It follows that the sort of improvement governed by the statute is one which shares the nature of a levee as that term is generally and commonly accepted in everyday parlance. K.S.A. 1974 Supp. 77-201 Second; Terrill v. City of Lawrence, 193 Kan. 229 (1964).

The ordinary meaning of levee, provided by Webster, is "an embankment to prevent flooding". The statute materializes this definition through the twin touchstones of location and effect. The improvement must be located "on, along or near any stream of this state which is subject to floods, freshets or overflows". Additionally, it must perform the function of a levee; its effect must be "to control, regulate or otherwise change the floodwaters of such stream." When a structure, no matter how denominated, satisfies these dual criteria, it falls within the purview of the statute.

In Reeder v. Board of County Commissioners, 193 Kan. 182 (1964), the Kansas Supreme Court suggested that the interpretation of this act required that its language be broadly read and that the effect of the improvement on floodwaters be recognized. Reeder was an appeal by owners of damaged land from a district court order sustaining a demurrer. In the original action, the land owners had sought injunctive and other relief against a county and individuals for the allegedly unlawful construction of a channel change which caused the entire flow of a sinuous stream to pour down a straight ditch. Plaintiffs claimed, inter alia, that this change had not received the prior approval of the chief engineer. The court, liberally construing the allegations to determine whether the petition presented a cause of action, apparently relied on location and function to determine that the channel change constituted an improvement within the ambit of K.S.A. 24-126. Since the statute is broad enough to embrace an excavated channel change, surely it must also include a county road which may resemble a levee not only in location and effect but in physical nature as well.

It is the opinion of this office that a county road which satisfies the two criteria discussed above is subject to 24-126. To interpret the statute otherwise would do injury to logic as well as case law, and would allow an artful appellation to frustrate the plain meaning of the statute. When a county desires to maintain or construct a county road whose location and effect bring it within the scope of the act, it must first obtain approval of the plans from the chief engineer of the division of water resources. In uncertain situations, the county should confer with the chief engineer to determine whether approval is required for the proposed activity.

Mr. James G. Kahler
Page Three
March 28, 1975

If we may be of further assistance, please feel free to contact us.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Curt Schneider".

CURT T. SCHNEIDER
Attorney General

CTS:TFW:sas