



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider,
Attorney General

July 15, 1976

ATTORNEY GENERAL OPINION NO. 76- 218

Mr. D. W. Wheeler
City Attorney
Post Office Box A
Marion, Kansas 66861

Re: Water--Flood Protection--Agricultural Areas

Synopsis: K.S.A. 82a-928(2) does not authorize a requirement that a flood protection project provide protection so as to reduce the flood risk in agricultural areas to a chance of occurrence in any one year of greater than ten percent or less. A levee which provides protection so as to reduce flood risk to a chance of occurrence in any one year of five percent or less for agricultural areas satisfies the general goals and objectives of the State of Kansas for flood protection purposes as enumerated in K.S.A. 82a-928(a)(2).

* * *

Dear Mr. Wheeler:

As city attorney for the City of Marion, you inquire concerning certain requirements which must be met by the flood protection project of the City of Marion, which it has undertaken pursuant to K.S.A. 12-635 *et seq.*

The project consists of a levee surrounding the area of the city which is subject to flood, and a diversion channel to carry flood waters from Clear Creek and Mud Creek to the Cottonwood River. During normal flows, the present channels will continue to carry the water.

By agreement with the U.S. Corps of Army Engineers, it is the obligation of the city to provide all rights-of-way, including

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a 50-year flowage easement upon lands outside the levee which will be subject to increased flooding as a result of the project. The chief engineer of the Division of Water Resources has approved the engineer's report of the proposed Marion Flood Control Project "with the understanding and on the condition that adequate rights-of-way are acquired on all of the private properties which would be inundated by the occurrence [*sic*] of the 100-year flood, with the project completed." [Letter, dated August 5, 1975, from Guy Gibson, Chief Engineer, to Jack Regnier, Mayor of the City of Marion, Kansas] This approval, with the condition stated above, was given pursuant to K.S.A. 12-638.

You advise that prior to receiving this stipulation, the city had been informed by the Corps, and the private engineering firm which had been retained by the city, that easements for a 50-year flood would be sufficient. Proceeding on that basis, engineering projections, plans and plats of each ownership tract were prepared by the city's engineers, providing the city data as to the extent of a 50-year flood and its depth, both with and without the project. The city retained a professional real estate appraiser to assess damages based upon this engineering work, and the city has made settlements with nearly all of the affected landowners. A revision of the flowage area to the 100-year flood profile would require additional engineering studies and damage assessments, with further negotiations with both new landowners and those already affected, at additional cost to the city.

The 100-year flowage easement requirement imposed by the Division, you understand, derives from its interpretation of K.S.A. 82a-928, a provision of a 1965 enactment which sets forth the long-range goals and objective of the State of Kansas for flood control and conservation, development and utilization and disposal of the waters of the state. K.S.A. 82a-928 states in pertinent part thus:

"The general goals and objectives of the state of Kansas that are deemed desirable for the achievement of the purposes set forth in section 1, and that shall serve as guides for all agencies of the state relative to their responsibilities with respect to the water resources of the state whenever physical and economic conditions permit, are hereby declared to be:

* * *

(2) the design of proposed levees and dikes so as to reduce flood risks in agricultural areas

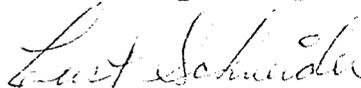
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to a chance of occurrence in any one year
of 10 percent or less;

(3) the design of proposed levees and
dikes so as to reduce flood risks in urban
areas to a chance of occurrence in any one
year of one percent or less"

This provision thus requires differing degrees of flood protection, depending upon whether the area is agricultural or urban in character. You advise, and it is apparently undisputed, that the entire project, including the levee, is designed to reduce the risk of flood in the urban area, including the entire City of Marion and any adjacent suburban areas, to a chance of occurrence in any one year of one percent or less. The project, including its levee, is designed to reduce the risk of flood in agricultural areas, including the rural area to the west of the levee, to a chance of occurrence in any one year of ten percent or less. The design of the project for urban area protection conforms to that required by K.S.A. 82a-928(3), and exceeds that degree of protection which is required for agricultural areas, providing protection against a 50-year flood, as contrasted against the protection against a ten-year flood required by K.S.A. 82a-928(2). We agree with you that there is no authority under K.S.A. 82a-928(2) for requiring flood protection for agricultural areas in excess of that necessary to reduce flood risks in such agricultural areas to a chance of occurrence of in any one year of ten percent or less.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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