



STATE OF KANSAS

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September 28, 1978

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ATTORNEY GENERAL OPINION NO. 78- 316

Mr. William L. Navis
Republic County Attorney
1836 M Street
Belleville, Kansas 66935

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.

* * *

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

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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.*

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:

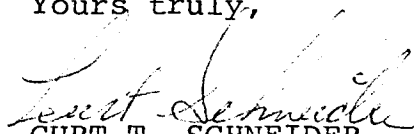
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"Subject to constitutional limitations upon the invasion of property rights, the legislature may authorize obstructions in streets or other highways which would otherwise be nuisances. As a rule, any obstruction or structure which is authorized by 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

CTS:SDT:jm