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October 17, 1979

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ATTORNEY GENERAL OPINION NO. 79-234

Mr. Dan Love
Ford County Attorney
Ford County Courthouse, Box 995
Dodge City, Kansas 67801

Re: Roads and Bridges--Establishment of Roads--
Authority to Grant Easements along Township Roads

Synopsis: Unless the land underlying a township road was acquired by purchase or dedication, the county acquires only an easement for road purposes, and the authority to grant additional easements is vested only in the fee holders of the servient estate, the abutting landowners.

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Dear Mr. Love:

You have requested our opinion as to the authority of either a township board or board of county commissioners to grant an easement along a township road. Your question is prompted by the proposal of a local processing plant to lay a pipeline along such road to a nearby power plant. The county has not adopted the county road unit system, so the road is currently maintained by the township. The Ford County Commissioners and the township board each claim exclusive authority to grant the easement. Additionally, some of the abutting landowners are attempting to sell the easement.

The authority to grant the easement rests ultimately with the fee owner. The facts, as presented, give no clues as to the owner

of the fee underlying the road, and there is no indication as to how or by whom the road was established. Therefore, in this opinion we will attempt to clarify the potential interests of the parties involved for simple resolution of the question you have raised, once it is determined who owns the land in fee simple.

In Kansas, public roads may be established by purchase or condemnation, by prescription or by 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). See, also, Smith v. State Highway Commission, 185 Kan. 445, 453 (1959); Board of Commissioners of Shawnee Co. v. Beckwith, 10 Kan. 603, 607 (1873); Isley v. Bogart, 338 F.2d 33 (1964).

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. The township also is responsible for opening and maintaining township roads under K.S.A. 68-115. We find no statutory or common law authority, however, empowering a township to acquire land for road purposes.

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. 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 of county commissioners is to determine whether to establish a road and to condemn such land as is needed. If the board of county commissioners 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 and K.S.A. 1978 Supp. 68-502(4). Notably, only the board of county commissioners has the power of eminent domain necessary to establish or alter township roads under K.S.A. 68-106 and K.S.A. 1978 Supp. 68-114, respectively. The township board

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has no such authority. See Balliet v. Clay County, 115 Kan. 99, 101 (1924).

Concisely stated, the county is responsible for establishing township roads, and the township for opening and maintaining them. The township has no statutory authority to establish or plan public roads. Neither is there any authority for the township to acquire land for road purposes. It follows, then, that any interest in the road would vest in the board of county commissioners, which has the authority to establish roads and condemn private land for road purposes. However, the county's interest is not necessarily one of exclusive dominion over township roads. The nature of the county's interest is determined by the method in which the land was acquired.

As noted earlier, K.S.A. 68-106 and K.S.A. 1978 Supp. 68-114 authorize the county to acquire land by eminent domain for road purposes. 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. By purchase or donation, the county acquires fee title. See, e.g., Elder v. Franklin County Comm., 42 Kan. 652 (1889). See, also, J. & S. Bldg. Co. v. Columbian Title & Trust Co., 1 Kan. App.2d 228 (1977) (acquisition of fee simple title by statutory dedication). 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, supra at 35. While eminent domain proceedings were once held to convey a fee title [State, ex rel. Mitchell v. State Highway Commission, supra], the prevailing rule is that, absent statutory authority allowing acquisition of fee title, the condemning authority acquires only an easement. Carpenter v. Fager, 188 Kan. 234, 235 (1961); Smith v. State Highway Commission, supra at 455-56; Mall v. C. & W. Rural Cooperative Ass'n, 168 Kan. 518, 521 (1950); State, ex rel. Mitchell v. State Highway Comm., supra at 196. The rationale is that the legislature has the power to determine the nature of the title acquired by eminent domain, and unless clearly

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provided by statute, 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; Board of Commissioners of Shawnee Co. v. Beckwith, supra at 607.

In the instant case, we have no information concerning the mode of acquisition of the road in question and such is determinative. As the existing statute (K.S.A. 68-107) authorizes acquisition of land for the establishment of roads only by eminent domain, it may reasonably be inferred that the interest acquired by the county is limited to an easement for a public road. It is our opinion that, unless the county purchased or received by dedication the land necessary to construct the road in question, the county acquired only an easement, with the underlying fee remaining in the owners of the servient estate, the abutting landowners.

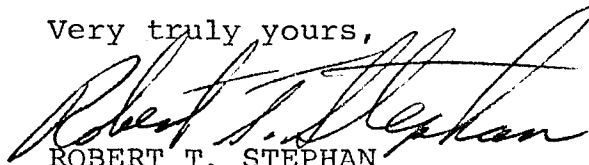
In Potter v. Northern Natural Gas Co., 201 Kan. 528, 530-31 (1968), the Kansas Supreme Court defined an easement as "an interest which one person has in the land of another . . . [T]he land [from which the easement issues] constitutes the servient tenement and the easement a dominant tenement." The owner 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. Accord, Aladdin Petroleum Corp. v. Gold Crown Properties, Inc., 221 Kan. 579 (1977); Board of Comm'rs of Shawnee Co. v. Beckwith, supra; Isley v. Bogart, supra. Of course, the abutting landowner's interest passes to his grantee or other successor in interest. Carpenter v. Fager, supra at 237-238.

Thus, assuming the county possesses only an easement, it would have only the right to maintain the road for public use. The abutting landowners, as fee holders of the servient estate, would accordingly have the right to use any part of the burdened land in any manner not inconsistent with the public's use of the highway. It is our opinion that, assuming the county has an easement, only the abutting landowners would have the right to grant, sell or convey such additional easements as they wish, as long as such easements would not interfere with the use of the road as a public highway.

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In conclusion, unless the county acquired fee title to the land for the road in question by either purchase or by dedication, the county only acquired an easement limited to highway purposes. Accordingly, power to grant an additional easement is vested only in the fee holders of the servient estate, the abutting landowners. Any such conveyance by the fee holders, however, may not interfere with public use of the road. Should it be determined that the county is vested with title to the entire interest in the land, the county would have the authority to grant the easement about which you have inquired.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steven Carr
Assistant Attorney General

RTS:BJS:SC:jm