



STATE OF KANSAS

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April 14, 1986

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ATTORNEY GENERAL OPINION NO. 86- 53

The Honorable Wint Winter, Jr.
State Senator, Second District
Capitol, Room 120-S
Topeka, Kansas 66612

The Honorable Dale Sprague
State Representative, Seventy-Third District
Capitol, Room 112-S
Topeka, Kansas 66612

Re: United States Constitution -- Amendments --
Rights and Immunities of Citizens; Taking of
Property Without Due Process

Synopsis: 1986 Senate Bill No. 696, which would enact the Family Farm Rehabilitation Act, does not constitute a "taking" of property which must be compensated under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A lender's security interest is preserved under the bill, and a farmer seeking to invoke the bill's protection from foreclosure must annually pay an amount which is equivalent to that which the lender would receive if the land were sold at its present fair market value and the proceeds invested at current rates. Given decisions of the United States Supreme Court which permit such action by a state in the exercise of its police powers during a time of distress in the agricultural economy, in our opinion 1986 Senate Bill No. 696 is constitutional. Cited herein: 1986 Senate Bill No. 696; 1986 House Bill No. 2691; U.S. Const., Fourteenth Amend.

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The Honorable Wint Winter, Jr.
The Honorable Dale Sprague
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Dear Senator Winter and Representative Sprague:

You jointly request our opinion on 1986 Senate Bill No. 696, otherwise known as The Family Farm Rehabilitation Act ("the act"). Specifically, you ask whether the act constitutes a "taking" of property in violation of the Fourteenth Amendment of the United States Constitution. Further, you ask whether the payments to lenders required to be made by the act are equivalent to the economic result to lenders in the event the act is not invoked. We note that the essential provisions of the act have been incorporated into another pending measure, 1986 House Bill No. 2691. In that the provisions of the two bills as regards the act are very similar, for simplicity we will refer to both using the senate bill number.

1986 Senate Bill No. 696 would permit, under certain conditions, a stay of execution of judgment resulting from three types of cases: (1) foreclosures of mortgages on agricultural land; (2) cancellations of contracts for the purchase of agricultural land; or (3) repossessions of agricultural property. The act allows an "insolvent" farmer (as that term is defined by the act) to obtain a series of three one-year extensions of the stay, during which time he may keep his land and equipment and remain in business. The stated purpose of the bill is as follows:

"The purpose of this act is to provide a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with forced sales of their farming operations and oppressive debt burdens and to this end the provisions of this act would be liberally construed to provide distressed farmers with the relief authorized under this act."

Economic distress in the agricultural industry is not a new problem to the Kansas legislature. During the 1930s, the Kansas legislature passed a series of bills known as the moratorium acts of 1933, 1934 and 1935 to deal with the depressed farm economy. These acts required both court involvement and the payment of reasonable rental value by the debtor to retain his property in the event of impending foreclosure. The Kansas laws did face constitutional challenges, however, and some were struck down. Kansas City Life Insurance Co. v. Anthony, 142 Kan. 671 (1935) (act of 1935 impermissibly interfered with property rights which had already been adjudicated); Oklahoma State Bank v. Bolin,

141 Kan. 127 (1935) (1934 law constituted unlawful delegation of authority by legislature to governor). At the same time, however, federal relief was also sought to resolve agricultural problems. The legislation which resulted is known as the Frazier-Lemke Act.

The Frazier-Lemke Act initially allowed farmers in default to remain in possession of their land during a five-year stay of foreclosure. During the five-year period of the stay (later amended to three years), the farmer could repurchase the property at its current appraised value. The law was held partially unconstitutional in 1935 in the case of Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 55 S.Ct. 584, 79 L.Ed. 1593 (1936). Frazier-Lemke was amended in 1935 and was found to be constitutional in the 1937 case of Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 57 S.Ct. 556, 81 L.Ed. 736 (1937).

Fortunately for our analysis, the key provisions of the Frazier-Lemke Act are very similar to those of 1986 Senate Bill No. 696. Like Frazier-Lemke, the bill allows farmers in any foreclosure or repossession an opportunity to apply for a stay preventing the lender from conducting a sheriff's sale of land or equipment and implements. As we read the act, such application must be prior to the issuance of any foreclosure order by the district court. This is important, in that one of the earlier Kansas Acts (that of 1935) was struck down as interfering with court orders which were already res judicata.

Once application is made, the district court shall issue an order which prevents a lender from foreclosing for a period of one year, on condition that the farmer pay into court, within 30 days, a sum of money equal to the market interest rate for one year multiplied by the amount determined by the court to be the current fair market value of the land. In the case of agricultural property (i.e. farm machinery), the amount due represents interest on the fair market value as well as depreciation. In either case, "interest" is defined to be the most recent 52 week treasury bill rate, plus 2%. Upon the payment of such sums into court, the farmer may continue in possession of the land and/or equipment and may obtain up to two additional periods of one year. Each extension is contingent upon the payment of similar amounts by the farmer into court, which amounts are then distributed to the lender(s). At any time before the end of any of the three one-year periods, a farmer has the right to redeem the land and/or equipment by paying the lender an amount equal to the fair market value of the

property determined as of the date of the entry of the original stay order, or at the time of redemption, whichever is greater. (Credit for depreciation already paid for is given in the case of agricultural equipment).

A determination of the constitutional due process issue raised by 1986 Senate Bill No. 696 requires an analysis of the oft-cited U.S. Supreme Court case, Blaisdell v. Home Bldg. and Loan Association, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934), as well as Wright v. Vinton Branch of the Mountain Trust Bank, *supra*. The Court in Blaisdell upheld the constitutionality of a Minnesota mortgage moratorium statute, finding that the state's inherent police powers may be used in times of economic hardship for the protection of the interests of society as a whole. In the case, the court determined that the constitutional prohibition against state laws which impair contract rights must be balanced against the state's need to use its police power to protect the health of society. The relief tailored must be reasonable in light of the emergency. According to Blaisdell, the economic interests of the state may justify the exercise of such protective power, notwithstanding a temporary interference with existing contracts, provided such contracts are not destroyed. 290 U.S. at 439.

In Wright, the Supreme Court upheld the revised Frazier-Lemke Act against an attack that it impaired a lender's security interest. Rejecting this challenge, the Court found that the act, like the present Senate bill, did not impair the lender's lien, which remained on the property until either the debt was paid or foreclosure occurred, and provided for the public sale of the property in the event redemption did not occur. The lender further received a reasonable rent on the property, which remained in the debtor's possession. The Court found no "taking" to occur, and concluded that the on-going supervision of the court protected the lender from a debtor who could not or would not be able to redeem at the end of the three year period. The same safeguards can be found in 1986 Senate Bill No. 696.

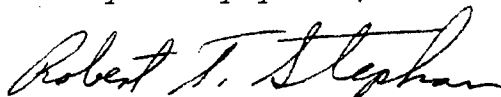
In addressing the specific constitutional issue of whether a "taking" occurs under the bill, it is necessary to determine the position of a lender under the bill's provisions in comparison to its position under the status quo. Pursuant to the provisions of the bill, a farmer may file for a stay of execution upon agricultural land and agricultural property upon payment of a sum which is equivalent to what

would be earned if the the fair market value of that land or property (in dollars) was invested at current rates. As a result, the economic result experienced by a lender foreclosing on agriculture land under the status quo would be very similar, if not identical, to the result under the act, due primarily to the prevailing depressed land values. Today, a lender who chooses to foreclose on agricultural property and sell such property at a judicial sale would receive no more than the present fair market value of the land, which is very likely to be below the price at which the land was purchased and on which the loan was based.

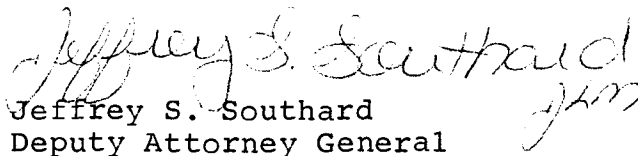
In our opinion, the economic results under 1986 Senate Bill No. 696 and existing law are essentially the same. Under the provisions of the bill, the lender is not at a disadvantage economically compared to a lender foreclosing on land and property outside of the act. Likewise, as the lender retains the right to the property unless it is redeemed (again for the present fair market value), no "taking" occurs.

In conclusion, 1986 Senate Bill No. 696, which would enact the Family Farm Rehabilitation Act, does not constitute a "taking" of property which must be compensated under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A lender's security interest is preserved under the bill, and a farmer seeking to invoke the bill's protection from foreclosure must annually pay an amount which is equivalent to that which the lender would receive if the land were sold at its present fair market value and the proceeds invested at current rates. Given decisions of the United States Supreme Court which permit such action by a state in the exercise of its police powers during a time of distress in the agricultural economy, in our opinion 1986 Senate Bill No. 696 is constitutional.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL



Jeffrey S. Southard
Deputy Attorney General