



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

June 30, 1987

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 87-99

The Honorable Francis E. Gordon
State Senator, First District
Box 63
Highland, Kansas 66035

Re: Drainage and Levees -- Watershed Districts; General Powers and Duties of District -- Use of Watershed District Funds

Synopsis: Watershed district general fund revenue may be used to improve and maintain a road only if said work will result in a direct and exclusive benefit to the watershed district, and if responsibility for improving and maintaining the road does not fall upon another governmental entity. Cited herein: K.S.A. 24-1209, Fourth; 24-1219; 68-526; 80-1413; Kan. Const., Art. 11, § 5.

* * *

Dear Senator Gordon:

As you are aware, this office recently issued Attorney General Opinion No. 87-85, which addressed the issue of whether watershed district funds levied under K.S.A. 24-1219 could be spent for the improvement and maintenance of a township road for recreational purposes. We concluded that use of watershed district funds for this purpose was not permissible under the Kansas Constitution or Kansas statutes. Because of continued inquiry regarding this matter, we issue this opinion as a clarification of Opinion No. 87-85.

The question we presently address is whether watershed funds may ever be used to improve and maintain a road. In our opinion, the answer to this question is yes, but only if the work will result in a direct and exclusive benefit to the watershed district, and if responsibility for improving and maintaining the road does not fall upon another governmental subdivision.

You inform us that an alternative to paving the township road exists, whereby the district would purchase a strip of land which lies wholly within the watershed district. The purchase would allow the watershed district to grade and asphalt an access road to the district running directly from a county road to the dam site. Watershed funds would be spent only on property owned by the watershed district.

In our opinion, this option eliminates the obstacles which prohibit the watershed district from improving and maintaining a township road. First, under the alternative presented, the road to be improved and maintained by the district will lie wholly within the watershed district. While we recognize that this in itself is not a determining factor, we feel it is worthy of consideration. Second, said road will serve as a direct access road to the dam site. Thus, the main purpose of the road will be to carry out a specified power of the watershed district, to utilize water. K.S.A. 24-1209, Fourth. Finally, and most importantly, no other governmental subdivision will have responsibility for improving and maintaining the access road.

By comparison, the township road lies outside of the watershed district and is used by the general traveling public. More importantly, another governmental entity, the township board, has a statutory duty to construct and repair the township road. K.S.A. 68-526, which deals with the maintenance of township roads, provides:

"In all counties not operating under the county road unit system the township board shall have the general charge and supervision of all township roads and township culverts in their respective townships, and shall procure machinery, implements, tools, drain tile, stone, gravel, and any other material or equipment required, for the construction or repair thereof." (Emphasis added).

Since Atchison County does not operate under the county road unit system, K.S.A. 68-526 confers responsibility for the general charge and supervision of township roads, including construction and repair, upon the township board. Further, we note the provisions of K.S.A. 80-1413, which state:

"The township board of any township may, upon resolution adopted by a majority of the board, submit to the qualified electors of the township who reside outside of the corporate limits of any city, at any general election or special election called for that purpose as provided by law for bond elections, the question of levying a special tax of not to exceed ten mills for a specified number of years for the purpose of raising funds with which to improve township roads."
(Emphasis added).

Thus, the legislature specifically authorized township boards to propose levying a special tax for the purpose of raising funds with which to improve township roads. In our opinion, K.S.A. 68-526 and K.S.A. 80-1413 plainly indicate legislative intent that Atchison township, as opposed to any other governmental entity, have responsibility for improving and maintaining its roads.

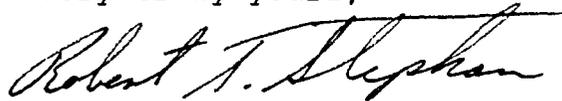
As noted in Attorney General Opinion No. 87-85, the Kansas Constitution, Article 11, §5, requires that funds be spent for the purpose for which they were levied. In Opinion No. 87-85, we opined that in light of this constitutional requirement, funds levied under K.S.A. 24-1219 could not be spent on the improvement and maintenance of a township road. We stand by that conclusion.

While we are aware of the provisions of K.S.A. 24-1209 Fourth, which allow a watershed district "to construct . . . appurtenances as necessary for . . . the development and utilization of water for . . . recreational purposes . . .," we do not feel the situation at hand fits within the meaning of the statute. We believe the legislature intended to authorize a watershed district to finance the construction of appurtenances for the utilization of water for recreational purposes which would directly and exclusively benefit the watershed district. Thus, for example, watershed funds could be used to build a marina or a ski ramp, or to build an access road leading directly to watershed property. However, in our

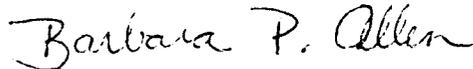
judgment, funding the improvement and maintenance of a township road, which passes by but does not provide direct access to watershed property, would be an unconstitutional and illegal use of watershed funds.

In summary, watershed district general fund revenue may be used to improve and maintain a road only if said work will result in a direct and exclusive benefit to the watershed district, and if responsibility for improving and maintaining the road does not fall upon another governmental entity.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Barbara P. Allen
Assistant Attorney General

RTS:JLM:BPA:bas