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August 12, 1987

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ATTORNEY GENERAL OPINION NO. 87- 118

The Honorable Phil Kline
State Representative, Nineteenth District
7505 West 93rd Street
Overland Park, Kansas 66212-2243

Re: Counties and County Officers -- Public Improvements
-- Storm Drainage Districts in Urban Area Counties;
Powers of Eminent Domain

Synopsis: K.S.A. 19-27,129 et seq., the Act which provides for the creation of storm drainage districts in "urban area" counties, makes no express reference to a drainage district's power of eminent domain. However, the board of county commissioners of "urban area" counties which create storm drainage districts may exercise the power of eminent domain to carry out the purposes of the Act, insofar as this power is authorized by implication through home rule and K.S.A. 19-27,129 and K.S.A. 19-27,130. Cited herein: K.S.A. 19-27,129; 19-27,130; 24-125; 24-467.

Dear Representative Kline:

As State Representative for the Nineteenth District, you request our opinion on Johnson County's eminent domain power under K.S.A. 19-27,129 et seq. Specifically, you ask whether the powers of eminent domain are implied in K.S.A. 19-27,129 et seq., even though they are not expressly stated in the Act.

Unlike the statutes which allow for the creation of drainage districts under Chapter 24, Articles 1 and 4 (K.S.A. 24-125; 24-467), the Act providing for the creation of storm drainage districts in counties designated as "urban areas" makes no

reference to a district's power of eminent domain. However, the Act does give the board of county commissioners the express power to create and maintain a storm drainage district. K.S.A. 19-27,129 provides that the board of county commissioners of any county which has been designated as "urban area" under the Kansas Constitution may provide for the creation of storm drainage districts. Further, K.S.A. 19-27,130 provides:

"The county commissioners shall upon the receipt of a petition by the governing body of any city in which all or a part of any land lying within the proposed drainage district is located provide by resolution for the creation of a storm drainage district. . . ."

Clearly, the board of county commissioners in any "urban area" county has the express statutory authority, and in fact is required, to create a storm drainage district upon receipt of an appropriate petition. The question then arises whether this express grant of authority gives the board of county commissioners the implied authority to exercise the power of eminent domain. The necessity to employ eminent domain by implication could arise if the county concludes that easements or other interests in land are necessary to carry out the purposes of the Act.

K.S.A. 19-27,129 and K.S.A. 19-27,130, by their express grant of authority to create storm drainage districts, carry with them such implied authority as is necessary to effectively exercise the express powers. This principle has long been recognized by Kansas courts. State, ex rel. v. Younkin, 108 Kan. 634, 638 (1921); Edwards County Comm'rs v. Simmons, 159 Kan. 41, 53 (1944). Accordingly, to the extent that the use of the power of eminent domain is required to fulfill the powers conferred by the above statutes, it is our opinion that a board of county commissioners has the implied authority to so act.

We are aware of the line of Kansas cases which state that the power of eminent domain may be exercised only when it is specifically authorized by statute. Dinges v. Board of County Comm'rs of Johnson County, 179 Kan. 35, 41 (1956); Soden v. State Highway Commission, 183 Kan. 33, 39 (1958); Board of Education of U.S.D. 512 v. Vic Regnier Builders, Inc., 6 Kan.App.2d 888, 890 (1982). However, none of these cases have dealt with counties since the advent of county home rule powers. All have either been issued prior to 1974 (the year county home rule was approved by the

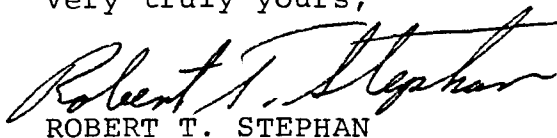
legislature) or deal with units of government which do not possess home rule, and so are limited to the powers conferred on them by statute.

We note in this regard that K.S.A. 19-27,129 and K.S.A. 19-27,130 expressly grant the power to create storm drainage districts to the board of county commissioners of "urban area" counties, as opposed to any other governmental entity. As mentioned previously, counties have had the power of home rule since 1974. Therefore, we are of the opinion that, in the case of the creation of storm drainage districts in "urban area" counties pursuant to K.S.A. 19-27,129 et seq., a board of county commissioners has the implied power to exercise eminent domain authority under its home rule power and K.S.A. 19-27,129 and K.S.A. 19-27,130.

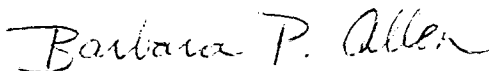
You also ask whether a county or city may condemn and raze residences or business buildings which lie in an area subject to frequent flooding, when the total cost of such eminent domain proceedings will be less than the cost of providing storm water protection for the buildings. The answer to this question is yes, as long as the governmental entity has a public purpose for the proceedings, and it complies with other relevant statutory requirements, such as the Kansas historic preservation laws.

In summary, K.S.A. 19-27,129 et seq., the Act which provides for the creation of storm drainage districts in "urban area" counties, makes no express reference to a drainage district's power of eminent domain. However, the board of county commissioners or "urban area" counties which create storm drainage districts may exercise the power of eminent domain to carry out the purposes of the Act, insofar as this power is authorized by implication through home rule and K.S.A. 19-27,129 and K.S.A. 19-27-130.

Very truly yours,



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