



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN  
ATTORNEY GENERAL

May 29, 1990

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 90- 60

Logan Township Board  
c/o Ronnie Graham, Trustee  
R.R. 1, Box 115  
Atlanta, Kansas 67008

Re: Roads and Bridges; Roads -- General Provisions;  
Laying Out and Opening Roads -- Opening and Repair  
of Road by Township

Synopsis: A township has the exclusive responsibility to maintain township roads and ditches. Liability for injury caused by failure to maintain township roads and ditches rests on the township. An abutting landowner who obstructs the township from performing its duty to maintain township roads and ditches may be prosecuted. No property of value of the abutting landowner may be taken by the township without compensation. Cited herein: K.S.A. 19-212; 68-106; 68-115; 68-502; 68-526.

\* \* \*

Dear Members of the Logan Township Board:

You request our opinion regarding various rights, responsibilities, and liabilities of a township in relation to maintenance of township roads and ditches. Specifically you ask whether the township has the right and/or responsibility to keep the roadways and ditches open, and in connection with that issue you ask whether the township or the abutting landowner is liable for failure to maintain township roads and ditches. You also ask whether the township is required to

reimburse a landowner for wood removed from the roadways during the process of maintenance. You further ask whether, if the landowner has the right to wood and brush on the roadways, the landowner is responsible for maintaining the roadways free from brush and debris or is the landowner responsible for any expenses incurred by the township for removal of such material.

Attorney General Opinion No. 82-228 discussed the establishment, opening and maintenance of township roads thus:

"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. Additionally, 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 is to determine whether to establish a road and to condemn such land as is needed. If the board 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 the specifications and regulations prepared by the county engineer. K.S.A. 68-526, 68-502(4).

"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."

K.S.A. 68-115 provides in part:

"And the county engineer or township trustee respectively shall keep the same (township roads) in repair, and remove or cause to be removed all obstructions that may be found therein; . . . and to enter upon any land adjoining or lying near to said road, to make such drains or ditches

through the same as the county engineer or township trustee may deem necessary for the benefit of the roads, doing as little damage to said lands as the nature of the case and the public good will permit; and the drains and ditches thus made shall be kept open if necessary by the township trustee or county engineer and shall not be obstructed by the owner or occupants of said land or by any other person, under the penalty of being fined not exceeding \$10 per each offense, before any justice of the peace in the county."

The Kansas Supreme Court in Finkbiner v. Clay County, 238 Kan. 857 (1986), held that, "a township, having the exclusive care and control of a street or road, has a duty to maintain that road or street for the safe passage of persons and property. Other governmental entities cannot be held liable for failure to maintain that road safely."

We conclude the township has the responsibility to keep township roads and ditches open. Injury caused by failure to maintain a township road could result in liability for the township. Since the township has the exclusive care and control of a township road, an abutting landowner may not be held liable if the township fails to maintain the road for safe passage. However, an owner who obstructs a township from carrying out its duty to maintain township roads, may be brought to the attention of the county attorney for prosecution under the applicable provision of K.S.A. 68-115.

For the purposes of the rest of this discussion, we are assuming, as is usually the case, the road in question was established by eminent domain, and the county acquired only an easement, with the underlying fee remaining in the owners of the servient estate, the abutting landowners.

K.S.A. 68-115 specifically provides that the township trustee may enter upon any land near or adjoining a township road, to dig and carry away certain specified road building materials which may be necessary to improve or repair the township road and adjoining ditches and drains. Compensation for the removal and use of such road building materials is also provided for in K.S.A. 68-115. However, the statute does not address the removal or compensation of wood and brush on the roadways or in the drains which will not be used for road

improvement or repair. Therefore, we must turn to case law in order to address the question you pose.

Mall v. C & W Rural Electric Cooperative Association, 168 Kan. 518 (1950), addressed the title and rights of the public and an abutting landowner. Although the case arose as the result of certain actions by a public utility, it remains instructive Kansas law relevant to the issue you raise. Initially the court held:

"The abutting landowner owns the fee to a township road, and the public has only the right to use it for highway purposes including uninterrupted travel, highway repairs and improvements, and other such public uses as will not be injurious to the abutting owner's fee nor inconsistent with highway purposes." Mall, Syl. 2.

The court then went on to discuss the applicable law in light of the facts of the case, which were the destruction of the landowner's shade trees by the rural electric cooperation association to make room for the construction of its electric power line:

"The right-of-way of the township road along which the trees in question were located was acquired in the 1870's from appellees predecessors in title. By that "taking," with or without compensation, the public acquired only an easement for its highway purposes and the landowner, his successors and assigns, continued to own the fee to the center line of the township road. Shade trees and shrubs on the right-of-way of a township road to which the fee belongs to the abutting owner, are a part of the fee and cannot be taken for private purposes or without full compensation to the fee owner. . . .

"The highway authorities could have felled or uprooted the trees or otherwise destroyed them if necessary in order to widen the traveled way or in order to construct adequate drainage ditches. Under our law there are additional uses of the right-of-way available to certain


public utilities where the use is for the public interest. We would not alter the rule long established in this state that the use of rural highways for the erection or laying of telephone lines, electric transmission lines, water mains, gas pipes or other public utilities, does not create an additional servitude entitling the fee owner to additional compensation. That rule is too well established to say now that such public utilities must obtain permission of the abutting landowner and pay him for the right to lay or erect its lines along the highway right-of-way. The appellant had the right to erect its poles upon the highway right-of-way, but this right of a public utility does not permit it to damage, take or destroy private property located within the right-of-way and belonging to the abutting owner without paying him for the property so destroyed, damaged or taken. Appellant relies on State ex rel., v. Weber, supra; McCann v. Telephone Co., supra; State v. Natural Gas Co., 71 Kan. 508, 80 Pac. 962; and Empire Natural Gas Co. v. Stone, supra, as holding that public utilities have a right to lay or erect their lines on public highways when not inconsistent with the highway purpose without additional compensation for such additional servitude to persons whose land was taken for the highway right-of-way. These cases and many others do so hold - but to this rule must be added the proviso that no property of the abutting owner may be taken or destroyed, and no unnecessary damage caused him without full compensation." (Emphasis added).


The above statement of Kansas law is consistent with case law from other jurisdictions. The general rule where a county has an easement for road purposes provides that the landowner continues to maintain title to the soil as well as all other materials under or on the land. The exception is for materials necessary for construction or repair of the road, for which the landowner must be reimbursed. The value of any other materials which are taken, damaged, or destroyed during

the construction or maintenance of roads must be reimbursed to the landowner who is the legal owner of such materials. See Annot., 9 A.L.R. 1269 (1920), 39A C.J.S. Highways, §§ 138, 139, and 143 (1976), 40 C.J.S. Highways § 180 (1944), 39 Am.Jur.2d Highways, Streets, and Bridges, § 168 (1968).

Based on the foregoing discussion of applicable law, we conclude the township is required to reimburse the abutting landowner for the wood removed from township roads during the course of maintenance of those roads. As mentioned above, the township has the sole and exclusive responsibility to maintain township roads by keeping them clear of brush and debris. It follows that the landowner is not responsible to keep the roadways clear nor would he be responsible for any expenses incurred by the township for removal of brush, wood or debris.

Very truly yours,

  
ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS

  
Camille Nohe  
Assistant Attorney General

RTS:JLM:CN:bas