



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

March 22, 1978

ATTORNEY GENERAL OPINION NO. 78- 126

The Honorable Robert H. Miller
State Representative
3rd Floor - State Capitol
Topeka, Kansas 66612

Re: Historic Preservation Act--James Woods Green Sculpture--
-Removal

Synopsis: The determination by the state historical preservation officer that removal of the sculpture of James Woods Green would damage the historic property entered in the National Register of Historic Places bars removal of the sculpture to the site of the new law school on the campus of the University of Kansas unless and until the governor determines that there is "no feasible and prudent alternative" to the removal of the sculpture.

* * *

Dear Representative Miller:

You inquire concerning the proposed removal of the sculpture of James Woods Green from its present location to a new site adjoining the new law school on the campus of the University of Kansas at Lawrence. In particular, you inquire whether the state historical preservation officer has complied fully with K.S.A. 75-2715 *et seq.* in his response to the proposal as set out in his letter of March 20, 1978, to Dr. Max Lucas, Director of Facilities Planning for the University of Kansas.

We understand that the sculpture is part of an entry in the National Register of Historic Places, which was approved on July 15, 1974. Apparently, by letter dated February 17, 1978, Dr. Lucas notified Mr. Snell, who as secretary of the State Historical Society serves

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as state historical preservation officer, of the intention of the University to remove the sculpture from its present location to the site of the new law school on the Lawrence campus. This notice was given, apparently, pursuant to K.S.A. 75-2724, which commences thus:

"The state . . . shall not undertake any project which will encroach upon, damage or destroy any historic property included in the national register of historic places or the environs of such property until the state historic preservation officer has been given notice and an opportunity to investigate and comment upon the proposed project."

In his letter of March 20, 1978, Mr. Snell, responding to the prior notification, set out a careful and thoughtful assessment of the historic importance of the sculpture and, of particular importance, its location. He concluded that the "proposed removal of the sculpture from its present location would damage the National Register property." This finding is fully within the authority of the state historical preservation officer under K.S.A. 75-2724, which further states thus:

"If the state historic preservation officer determines that such proposed project will encroach upon, damage or destroy any historic site, such project shall not proceed until:
(a) The governor, in the case of a project of the state or an instrumentality thereof . . . has made a determination, based on a consideration of all relevant factors, that there is no feasible and prudent alternative to the proposal and that the program includes all possible planning to minimize harm to such historic site resulting from such use and (b) five days notice of such determination has been given, by restricted mail, to the state historic preservation officer."

Unfortunately, Mr. Snell continued in his letter to disclaim opposition to the proposed removal thus:

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"While we believe that the proposed removal of the sculpture is not in the best interest of historic preservation we recognize that the retroactive nature of the state preservation law places the University in a difficult position, since the removal of the sculpture has been planned for some time -- certainly, since long before passage of the state act. The intent of the law, we believe, was to promote *good planning*, not to promote surprise attacks on those who have been acting in good faith. Therefore, while we have strongly urged the University to reconsider its plans, we will not oppose the removal of the sculpture to the new building." [Emphasis by the writer.]

This disclaimer of opposition is entirely without any legal effect whatever. Once, as here, the state historical preservation officer determines that a proposed project will damage an historic site, the project may not proceed unless and until the governor determines that "there is no feasible and prudent alternative," and that there has been "all possible planning to minimize harm to such historic site" Mr. Snell's conclusion that removal of the sculpture would damage the historic site acts by operation of law as a bar to the proposed removal. Having made that determination, the state historical preservation officer has no further authority to acquiesce in the proposed project unless and until the governor makes the findings described above.

One further matter merits attention. K.S.A. 75-2724 provides in part thus:

"The state historic preservation officer shall solicit the advice and recommendations of the historic sites board of review with respect to such project and may direct that a public hearing or hearings be held thereon."

I understand that the state historical preservation officer did not obtain a recommendation from the Board of Review concerning the sculpture removal. Without the benefit of its advice and recommendation, he nonetheless determined that the historic site would be damaged by its removal. The question may be raised

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whether consultation with the Board of Review is mandatory, with the result that lack of consultation voids any subsequent determination. The Kansas Supreme Court has often considered whether particular statutory language is directory or mandatory. In *City of Hutchinson v. Ryan*, 154 Kan. 751, 121 P.2d 179 (1942), the court quoted from 25 R.C.L. 769 in part thus:

"In general, statutory provisions directing the mode of proceeding by public officers and intended to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties cannot be injuriously affected, are not regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated"

The role of the board of review under K.S.A. 75-2724 is entirely advisory. Its advice and recommendations are presumptively intended to assist the state historical preservation officer in reaching the determination which is entrusted to that officer alone. Where, as here, the historic preservation officer reaches his own determination that a given project will damage an historic property, and does so without the benefit of the recommendation of the board of review, there is no compelling reason to treat that determination as void. Consultation with the board of review is presumptively intended, so far as the statute discloses, for the benefit of the state historic preservation officer himself. While it is doubtless the better practice to consult the Board, failure to do so does not vitiate his determination here that removal of the sculpture will damage the historic site.

The act involved here, K.S.A. 75-2715 *et seq.*, was enacted in 1977. Planning of the new law school was completed and construction was begun long prior to the date this act became effective, on July 1, 1977. Effective that day, the state was forbidden to "undertake any project which will encroach upon, damage or destroy any historic property" included in the national or state register of historic places except in compliance with the procedures prescribed by K.S.A. 75-2724. The project in this instance is not the completion of the new law school, but the removal of the sculpture of James Woods Green from its location in front of Green Hall to the site of the new law school. Application

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of the act to this project entails no retroactivity. It applies prospectively only, but the prospective application may very well, as here, include projects which were planned but not begun prior to July 1, 1977.

Thus, it is my opinion that the sculpture of James Woods Green may not be removed from its present location unless and until the governor makes the findings described above, that "there is no feasible and prudent alternative" to the proposed removal, and that there has been "all possible planning" to "minimize harm to [the] . . . historic site" Without wishing to intrude upon the determination which is entrusted to the governor, it must be observed that the quoted language prescribes a rather exacting standard which must be satisfied before any project which would damage an historic site may be approved. In this instance, it must be demonstrated, in order for the project to proceed, that there is "no feasible and prudent alternative" to removal of the sculpture from its present site with the resulting damage to the historic site and to the "integrity of the sculpture itself," which Mr. Snell has carefully outlined in his letter. [Emphasis supplied.] Failing some particularly imaginative and compelling arguments which are not readily apparent, to pose the question may be but to answer it.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

cc: The Honorable Robert F. Bennett
Governor of Kansas
2nd Floor - State Capitol
Topeka, Kansas 66612

Mr. Joseph W. Snell
Secretary-Executive Director
Kansas State Historical Society
10th and Jackson Streets
Topeka, Kansas 66612

Mr. Archie R. Dykes
Chancellor
University of Kansas
223 Strong
Lawrence, Kansas 66045

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cc: Mr. Mike Davis
General Counsel
University of Kansas
227 Strong
Lawrence, Kansas 66045

Mr. Martin B. Dickinson, Jr.
Dean - School of Law
University of Kansas
Lawrence, Kansas 66045