



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

September 27, 1979

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

ATTORNEY GENERAL OPINION NO. 79-216

The Honorable David L. Webb
State Representative, 27th District
Box 163
Stillwell, Kansas 66085

Re: Counties and County Officers--Public Improvements--
Constitutionality of K.S.A. 19-2704a

Synopsis: The provision of K.S.A. 19-2704a (dealing with the formation of sewer districts) which requires a petition signed by the owners of fifty-one percent (51%) or more of the acreage in the affected area is constitutional in that it is a legitimate classification which has a substantial and reasonable relation to the subject matter involved.

* * *

Dear Representative Webb:

You have requested our opinion regarding the constitutionality of K.S.A. 19-2704 and K.S.A. 19-2704a which provide for the procedure to petition the board of county commissioners to create a sewer district. You question "the fact that only fifty-one percent (51%) of the landowners had to sign a petition in order to secure the formation of said district." You indicate the belief that petition by fifty-one percent (51%) "of the people of the district" should also be a permissible means of creating a sewer district.

The Honorable David L. Webb
Page Two
September 27, 1979

The statutory scheme you question provides for both preliminary studies regarding the creation of a sewer district (K.S.A. 19-2704) and the creation of a sewer taxing district (K.S.A. 19-2704a) pursuant to the petition signed by the owners of fifty-one percent (51%) of the real estate in the district sought to be created. The issue you raise concerns the statutory classification of the persons who are entitled to petition for preliminary surveys and for sewer districts. However, it is essential to note the differences between the two above-cited statutes prior to analyzing their common element. K.S.A. 19-2704 permits the board of county commissioners to initiate a preliminary survey to gather information for the purpose of creating a sewer district. This section provides in pertinent part,

"[T]he board of county commissioners may at their [sic] discretion and upon presentation to them [sic] of a petition signed by not less than one hundred (100) persons or corporations, who shall be owners of real estate in the district sought to be created, or by owners of at least fifty-one percent (51%) of the acreage of the land in the district sought to be created." (Emphasis added.)

As you can see, petitions by one hundred (100) landowners as well as petitions by owners of fifty-one percent (51%) of the land in the proposed district may be accepted. This, however, is not the case with the actual creation of a sewer district. K.S.A. 19-2704a provides, in part:

"[T]he board of county commissioners . . . may upon presentation of a petition signed by the owners, or others having expressly reserved the right to do so, of fifty-one percent (51%) or more of the acreage in the main sewer districts, lateral or joint sewer districts or taxing districts sought to be created, provide one or more taxing districts in such county or divide such county into such number of taxing districts as it may deem best: . . ."

The Honorable David L. Webb
Page Three
September 27, 1979

As is readily apparent, one hundred (100) landowners may petition for a preliminary sewer survey, but unless such petitioners also own fifty-one percent (51%) of the acreage in the proposed district, such persons may not petition for the creation of a sewer district.

Whether such a result was intended or is a matter of legislative oversight we cannot say. However, it illustrates to the question you present. In the creation of special taxing districts state legislatures rely on a variety of classification schemes to determine which persons are to be voters and petitioners. Kansas law here recognizes two such classifications: one hundred (100) owners of real estate and owners of fifty-one percent (51%) of the real estate. The Kansas Legislature might have chosen two hundred owners or owners of twenty-five percent (25%) of the real estate. Indeed, the legislature in its discretion might have required fifty-one percent (51%) of landowners regardless of acreage, or done as you suggest and authorized a majority of the residents (including non-landowners) to petition for the creation of a sewer district.

For examples of various other types of schemes now in effect in Kansas, see K.S.A. 24-404 (regarding the establishment of drainage districts by two-fifths (2/5) of the taxpayers or by owners of fifty-one percent (51%) of the land); K.S.A. 82a-614 (regarding the establishment of rural water districts which requires fifty percent (50%) of the landowners, with no mention of acreage); and K.S.A. 12-1803 (regarding the construction of sidewalks requiring only 25 owners of land in the affected precinct or ward and only ten (10) owners if the city is of less than first class).

By your inquiry, we presume you feel the existing classification of petitioners is unconstitutional as it discriminates against non-landowners and, thus, is violative of the equal protection provisions of the United States Constitution, Fourteenth Amendment.

We believe your concerns have been answered by the U. S. Supreme Court in Salyer Land Co. v. Tulare Water District, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973), in which the court upheld the constitutionality of a voting franchise limited by the California statute for water storage districts.

The Honorable David L. Webb
Page Four
September 27, 1979

"In a suit before a three-judge United States District Court for the Eastern District of California, landowners, a landowner-lessee, and residents in a California water storage district sought declaratory and injunctive relief against enforcement of California Water Code provisions as denying them equal protection of the laws by permitting only landowners to vote in district general elections and by apportioning votes in the elections according to the assessed valuation of the land. The District Court upheld the validity of the statutes (342 F.Supp.144).

"On direct appeal, the United States Supreme Court affirmed. In an opinion by REHNQUIST, J., expressing the views of six members of the court, it was held that by reason of the district's limited purpose and of the disproportionate effect of its activities on landowners as a group, the California statutes did not violate the equal protection clause by limiting the vote to district landowners and denying the vote to nonlandowner residents, even though they may be farm lessees, or by weighting votes according to the assessed valuation of the land." Id., Summary of Case, 35 L.Ed.2d at 659.

Although there are slight differences in the subject matter of California law (water storage) and the Kansas law (sewer districts), and procedural differences, the former dealing with voting, the latter dealing with petitioning, we find the differences to be inconsequential and the reasoning and conclusions of the Court's opinion in Salyer to be dispositive of the equal protection question.

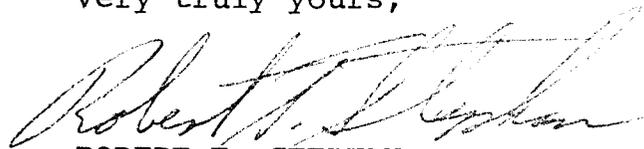
When the constitutionality of a classification system established by the legislature is questioned, the inquiry must be whether the class is a natural and genuine one having a substantial and reasonable relation to the subject matter involved. City of Kansas City v. Robb, 183 Kan. 834, 836 (1958). Only if no set of facts can be conceived that will sustain the classification can it be found arbitrary, and hence invalid. Borden's Co. v. Baldwin, 293 U.S. 194, 209, 79 L.Ed. 281, 55 S.Ct. 187 (1934).

The Honorable David L. Webb
Page Five
September 27, 1979

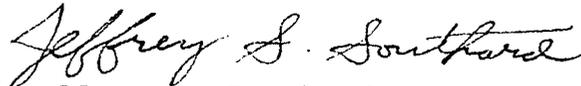
In our opinion, the classification established by K.S.A. 19-2704a does bear a substantial and reasonable relation to the subject matter, i.e., the construction and payment of sewers.

In summary, the provisions of K.S.A. 19-2704 et seq. do not violate the equal protection clause of the Fourteenth Amendment to the U. S. Constitution where owners of fifty-one percent (51%) of the real estate in a proposed sewer district may petition for the creation of a proposed sewer district.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:gk