



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 81-269

Douglas B. Westerhaus
Marion County Attorney
Marion County Courthouse
P. O. Box 126
Marion, Kansas 66861

Re: Roads and Bridges -- Roads; General Provisions --
Duty of County Commissioners to View Road

Synopsis: A board of county commissioners has statutory duty to view or cause to be viewed a previously vacated road upon presentation of a proper petition to re-open said road. However, a district court may refuse to issue an order in mandamus for the performance of such duty if its performance would constitute a useless or futile act or an act of no public benefit. Cited herein: K.S.A. 68-104.

* * *

Dear Mr. Westerhaus:

You have requested an opinion regarding the duty of the board of county commissioners to appoint viewers to view a road pursuant to K.S.A. 68-104 under a particular set of facts.

You state that a certain county road was vacated in 1978 by the board of county commissioners, in accordance with the procedures set forth in K.S.A. 68-104, after receiving a petition requesting said vacation and after public hearings were held. In an action seeking a temporary restraining order and permanent injunction to prevent the vacation, the district court held that the vacation procedures were legally insufficient because the legal description of the road was not entirely correct in the petition. Helbach v. Board of County Commissioners of Marion County, District Court of Marion County, Kansas, Case No. 78 C 98 (1978).

In 1979, the board of county commissioners set aside the original proceedings and vacated the same road again, acting upon its own motion. This second vacation order was appealed to the district court on the theory that the action of the board to vacate was quasi-judicial and, therefore, appealable to the district court. Both the district court and the Kansas Court of Appeals affirmed the action of the county commission on the grounds that such order was administrative and, therefore, was not reviewable by a court absent a specific statutory provision authorizing an appeal. Both courts also ruled that, even if the order was quasi-judicial and thus appealable to the courts, the board had not acted arbitrarily or capriciously. In addition, the board was found to have acted on sufficient evidence and had not denied anyone affected by the vacation a right to be heard. In re Helbach, District Court of Marion County, Kansas, No. 79 C 65 (1979); 6 Kan.App. 2d 39 (1981).

One month after the appellate court rendered its opinion, a person who testified against the vacation in the original public hearing and who has been a landowner affected by the vacation throughout the entire period, filed a petition to reopen the same road. You ask whether the board of county commissioners are required by K.S.A. 68-104 to reconsider, ad infinitum, the opening or closing of this road.

We assume from the tenor of your question that the board of county commissioners has already concluded there has been no material change in facts or issues regarding this particular road since the decision to vacate was made which might change the board's decision. We also assume that the board has concluded that complying with reviewing procedures would be a mere formality and would be a waste of the county's time and money. Thus, we will respond to the question raised within the framework of these assumptions.

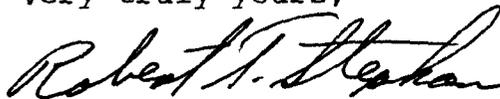
K.S.A. 68-104 states in pertinent part:

"Upon presentation of any petition for a road, or for the alteration or vacation of any road, to the county commissioners, at any regular session of their board, it shall be the duty of said commissioners, if they find the petition to be a legal one, and that the proper bond has been filed, to appoint three disinterested householders of the county as viewers with said county commissioners, who may act as viewers of said road, . . . [who] will proceed to view the said road, and give all parties a hearing." (Emphasis added.)

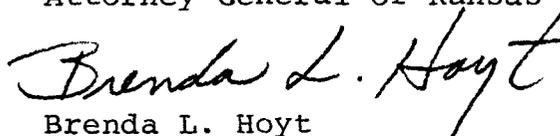
We find no Kansas cases interpreting this particular aspect of the act in question, nor do we find Kansas case law interpreting similar language elsewhere. Thus, we turn to the rules of statutory construction.

In construing a statute, the fundamental rule of construction is that legislative intent shall govern when that intent can be ascertained from the statute, and when the statute is plain and unambiguous, the intent as expressed must be carried out. Johnson v. McArthur, 226 Kan. 128, 135 (1979). From the plain language of K.S.A. 68-104, we ascertain that the legislature intended to impose an absolute duty upon the board of county commissioners to appoint viewers or to act as viewers themselves whenever any legally sufficient petition is presented and an adequate bond is posted. There is no language which indicates any intent to permit the board any discretion in deciding whether viewers should be appointed in a particular circumstance. If the board of county commissioners fails to perform its statutorily imposed duty to appoint viewers, the petitioners could seek a writ of mandamus, asking the court to compel the board to perform said duty. See 52 Am.Jur.2d Mandamus §4. However, because the court may exercise discretion in determining whether a writ of mandamus should issue, the court may refuse to issue such a writ if the issuance would compel a useless or futile act or one of no public benefit. State ex rel. Caster v. Flannery, 96 Kan. 833, 838 (1916). Since the board of county commissioners possesses the power to determine whether the road shall be reopened and it has already concluded that it will not reopen said road, the court may refuse to compel the appointment of viewers.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Brenda L. Hoyt
Assistant Attorney General