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ATTORNEY GENERAL OPINION NO. 82-47

Patrick J. Regan, Chairman
Kansas Water Authority
1400 Kansas State Bank Building
125 North Market Street
Wichita, Kansas 67202

Re: State Boards, Commissions and Authorities -- Kansas
Water Office and Kansas Water Authority -- Powers of
Authority's Ex Officio Members.

Synopsis: Ex Officio members of the Kansas Water Authority are precluded by K.S.A. 1981 Supp. 74-2622 from voting on matters considered by the Authority, but such members are entitled to participate fully in that body's deliberations regarding such matters. Participation in the Authority's deliberative process includes the ability to make or second a motion, which is but a formalized expression of proposed action, and is not an integral part of the voting process whereby members of the Authority cast their votes to express approval or disapproval. Cited herein: K.S.A. 1981 Supp. 74-2622.

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Dear Mr. Regan:

You have inquired whether a nonvoting member of the Kansas Water Authority may make or second motions for consideration at meetings of the Authority. Your question is predicated on the provisions of K.S.A. 1981 Supp. 74-2622, concerning the establishment of the Kansas Water Authority and providing in relevant part:

"The state geologist, the chief engineer of the division of water resources of the state board of agriculture, the director of the division of environment of the department of health and environment, the director of the Kansas water office and the director of the agricultural experiment stations of Kansas state university of agriculture and applied sciences shall be nonvoting members of the authority ex officio." (Emphasis added.)

We recognize that the term "ex officio" may generate some confusion. However, simply stated, it means "by virtue of the office." Black's Law Dictionary 661 (Rev. 4th Ed. 1968). In this instance, then, the legislature is prescribing that by virtue of holding certain specified offices, the officers designated in the statute shall also be members of the Kansas Water Authority.

The general rule in regard to the power and authority of ex officio members of a board is that "[e]x officio members of a public body are members for all purposes." (Footnotes omitted.) 1 Am.Jur.2d Administrative Law §61. However, as evidenced by K.S.A. 1981 Supp. 74-2622, this general rule is at times subject to an express legislative direction that the powers of ex officio members be limited. In this instance, the legislature has precluded ex officio members of the Authority from voting.

While we have found no pertinent Kansas decisions addressing the scope of such a limitation, and although there is not an abundance of relevant case law from other jurisdictions, the cases we have reviewed indicate the power and authority of ex officio members of a body should be limited only by those restrictions specified in the pertinent legislation. See, generally, Louisville and Jefferson County Planning Comm. v. Ogden, 210 S.W.2d 771 (1948); Matter of Farrel v. Board of Health, 243 App. Div. 332 (N.Y. 1938). In Farrel, supra, the court noted that "[o]rordinarily a membership on any board or body carries with it a right to vote." Id. at 334. Furthermore, "a restriction upon such power will not be extended beyond the limitation clearly intended to be imposed by the law, rule or order creating the restraint." Id.

Accordingly, we believe that the limitation in 74-2622 on the Authority's ex officio members should not be extended beyond the clearly intended restriction of these members' voting power. Thus, for example, we believe these members are entitled to full participation in the Authority's deliberative process regarding matters under consideration by the

Authority. They are entitled to partake fully in discussions, by suggesting courses of action, indicating their support of or opposition to proposed action and otherwise expressing their opinions on matters before the Authority.

However, even though the restriction on the ex officio members' powers is not to be extended beyond the statutory preclusion of their right to vote, the question arises as to whether the making or formal endorsement of a motion is an integral part of voting. Although we are unaware of any case law precisely pertinent to this issue, we note that "[a] 'motion' is usually a proposal for action by [a] deliberative assembly. Lindahl v. Independent School Dist. No. 306 of Hubbard County, 133 N.W.2d 23, 26, 270 Minn. 164." 27A Words and Phrases (1981 P.P.) 27. It is a formal proposal made to evoke action, and when acted upon it becomes the formal expression of a deliberative body's will. 27A Words and Phrases (1961) 354. It also should be recognized that in parliamentary procedure, a motion proposing action by a body is required in many instances as a condition precedent to the discussion of such proposed action by the body.

Clearly, then, a motion is but a formalized expression of proposed action; and even though a motion is a condition precedent to making a decision upon a proposal, it is not, in our judgment, an integral part of the voting process whereby members of the body cast their votes to express their approval or disapproval. Rather, we believe a motion to be as much a part of the deliberative process as is the ensuing discussion of the motion.

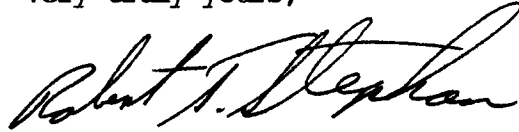
With this in mind, and in recognition of the fact that the legislature has not precluded the ex officio members of the Water Authority from participating in the Authority's deliberative process, we are unable to conclude that the legislature has intended to foreclose such members from formalizing their suggestions or proposals. In our judgment, the legislature has intended only that the Authority's ex officio members be precluded from voting.

In summary, then, it is our opinion that ex officio members of the Kansas Water Authority are precluded by K.S.A. 1981 Supp. 74-2622 from voting on matters considered by the Authority, but such members are entitled to participate fully in that body's deliberations regarding such matters. Participation in the Authority's deliberative process includes the right

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to make or second a motion, which is but a formalized expression of proposed action and is not an integral part of the voting process whereby members of the Authority cast their votes to express approval or disapproval.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
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