



STATE OF KANSAS

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October 21, 1982

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ATTORNEY GENERAL OPINION NO. 82- 228

R. Scott McQuin
Barber County Attorney
P. O. Box 142
Medicine Lodge, Kansas 67104

Re: Roads and Bridges -- Establishment -- Authority
to Grant Easements Along Township Roads

Synopsis: The board of county commissioners is empowered by statute to lay out all public roads in a county, even if the road is termed a township road for purposes of maintenance. If the land underlying a township road was taken by eminent domain, the county acquires only an easement for road purposes, leaving the authority to grant additional easements vested in the owners of the land abutting the road, i.e. the fee holders of the servient estate. Such rights are limited, however, in that any conveyance by the fee holders may not interfere with public use of the road. Cited herein: K.S.A. 12-309, 19-212, 68-106, 68-114, 68-115, 68-502, 68-518c, 68-526.

* * *

Dear Mr. McQuin:

As County Attorney for Barber County, you request our opinion on a question involving the authority of the board of county commissioners to grant an easement along a township road. Your question is prompted by a request from the City of Kiowa that it be allowed to install a water pipeline along 15 to 20 miles of township roads. The pipeline, which was made necessary by contamination of the city's water wells, is to be placed along the right of way. As the townships involved have refused permission, the city has requested the county's approval.

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It would be our initial conclusion that the authority to grant such easements rests with the fee owner of the land. As the facts you present do not indicate how or by whom the roads in question were established, we will confine this opinion to setting forth the potential rights of the parties, once it is determined who holds fee title.

In Kansas, public roads may be established by purchase, condemnation or dedication. Kratina v. Board of Commissioners, 219 Kan. 499, 502 (1976). The authority of a governmental body to establish public roads and the nature of the government's resulting interest in such roads is governed by statute. See, e.g., State, ex rel., Mitchell v. State Highway Commission, 163 Kan. 187, 196 (1947). 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 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. The township board is to have charge and supervision over all township roads, and is authorized to levy taxes for road purposes under K.S.A. 68-518c, and is also responsible for opening and maintaining township roads under K.S.A. 68-115. However, while a county has the power of eminent domain to establish a township road, the township has no such authority. Balliet v. Clay County Comm'rs, 115 Kan. 99, 101 (1924).

While it is clear from the above that only the county may grant easements along township roads, the actual power to do so is dependent upon the method by which the land was acquired, as less than fee ownership may have been acquired. As noted above, a county is empowered to acquire land by eminent domain for road purposes. K.S.A. 68-106, 68-114. When altering or changing a road, the county also is authorized to acquire land by purchase or donation. The distinction between eminent domain and other methods of land acquisition determines the nature of the interest conveyed. Elder v. Franklin County Comm., 42 Kan. 652 (1889), J. & S. Bldg. Co. v. Columbian Title & Trust Co., 1 Kan.App.2d 228 (1977). As fee owner, the county would have absolute ownership and could convey or grant any easement as it wishes.

In condemnation, however, "an owner parts with his property involuntarily and the condemnor secures no greater title or right than that permitted by the authorizing statute." Isley v. Bogart, 338 F.2d 33, 35 (10th Cir. 1964). As there is no statutory authority in Chapter 68 of the statutes which allows acquisition of a fee title, the prevailing rule permits the condemning authority to acquire only an easement. Carpenter v. Fager, 188 Kan. 234, 235 (1961), Mall v. C. & W. Rural Cooperative Ass'n., 168 Kan. 518, 521 (1950). As the legislature has the power to determine the nature of the title acquired by eminent domain, the taking is limited to an easement "sufficient for the public use intended rather than a fee title." Carpenter v. Fager, *supra* at 235. See, also, State, ex rel., Mitchell v. State Highway Commission, *supra* at 196.

If, as is usually the case, the road in question was established by eminent domain, in our opinion the county acquired only an easement, with the underlying fee remaining in the owners of the servient estate, the abutting landowners. In Potter v. Northern Natural Gas Co., 201 Kan. 528, 530-31 (1968), the Kansas Supreme Court defined an easement as "an interest which one person has in the land of another . . . [T]he land [from which the easement issues] constitutes the servient tenement and the easement a dominant tenement." The owner of the servient estate remains the "owner of the fee and holder of the ultimate title . . . [A]s owner, he may still continue to use the property for any purpose which does not frustrate the public use for which the property was condemned." Carpenter v. Fager, *supra* at 236. See also, Aladdin Petroleum Corp. v. Gold Crown Properties, Inc., 221 Kan. 579 (1977). Of course, the abutting landowner's interest passes to his grantee or other successor in interest. Carpenter v. Fager, *supra* at 237-238.

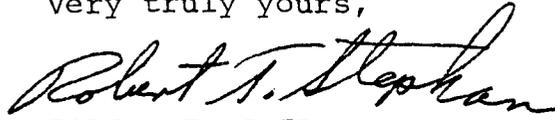
Accordingly, if the county possesses only an easement, it has only the right to maintain the road for public use. The abutting landowners, as fee holders of the servient estate, would have the right to use any part of the affected land in any manner not inconsistent with the public's use of the highway. Therefore, they, not the county, have the right to grant, sell or convey such additional easements as they wish, as long as the use of the road is not interfered with. However, the city does possess the authority, if necessary, to acquire such easements by condemnation. K.S.A. 12-809.

In conclusion, the board of county commissioners is empowered by statute to lay out all public roads in a county, even if the road is termed a township road for purposes of maintenance. If the land underlying a township road was taken by eminent domain, the county acquires only an easement for road purposes, leaving the authority to grant additional easements

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Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJJ:JSS:hle