



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 83- 36

Thomas L. Toepfer
111 West 13th
P. O. Box 579
Hays, Kansas 67601

Re: Drainage and Levees -- Watershed Districts --
Powers and Duties; Retention of Counsel for Tax
Planning Matters

Synopsis: A watershed district organized pursuant to K.S.A. 24-1201 et seq. is empowered to execute such contracts as are necessary or convenient to allow it to properly carry out its functions, and to obtain those professional services deemed essential by the board of directors. In acquiring easements by donation from landowners, the board of directors may employ the services of an attorney for the performance of duties relevant to the drafting of the easement. However, apart from acting as a scrivener to complete documents needed for tax purposes, such an attorney should not provide advice to the donor as to the tax considerations involved or represent the donor in proceedings before the Internal Revenue Service, nor should public moneys of the district be expended to compensate the attorney except for these limited services. Cited herein: K.S.A. 7-125, 24-1209.

* * *

Dear Mr. Toepfer:

As attorney for Wet Walnut Creek Watershed District No. 58, you request our opinion concerning the employment of attorneys by the district with respect to the acquisition of easements. Specifically, you inquire as to the extent which counsel retained by the district may render services to private landowners who have donated easements or rights of way to the

Thomas L. Toepfer
Page Two

district. You inform us that the Internal Revenue Service has sometimes challenged the validity of tax deductions which such landowners claim for donating the fair market value of the easement to the district. As the district saves money by not having to pay for the easement, which it is empowered to take by condemnation if necessary (K.S.A. 24-1209, Eighth), this question is more than merely a theoretical exercise.

Among the enumerated powers which are given to a watershed district by K.S.A. 24-1209 are the following:

"Third. To purchase, hold, sell and convey land and personal property and to execute such contracts as may, by its board of directors, be deemed necessary or convenient to enable it to properly carry out the purpose for which organized.

. . . .

"Sixth. To employ such professional services and other assistance as is, by its board of directors, deemed essential. Soil conservation engineering services may be used whenever available.

. . . .

"Eighth. To acquire land and interests in land by gift, purchase, exchange or eminent domain; such power of eminent domain to be exercised within or without the boundaries of the district in like manner as provided by K.S.A. 26-501 to 26-516, inclusive, or any amendments thereto."

Clearly, the board of directors may employ the services of one or more attorneys to assist in conducting district business. As there is considerable legal work required by the transfer of even a single easement, much of the lawyer's time would consist of preparing the necessary documents and performing the necessary searches incidental thereto. Of this much there can be no doubt.

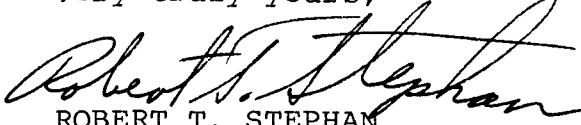
Nor do we believe that it would be improper for the district's counsel to prepare a statement of compilation of relevant information about the transaction which the individual property owner could later use to claim a deduction on his or her taxes. As you note, it is often advantageous for an owner to donate the easement rather than sell it, which is naturally beneficial to the district's budget. The securing of a valid deduction is undoubtedly the major selling point in the district's

favor when it seeks to obtain easements in this manner, rather than by purchase or condemnation. Accordingly, the district would be benefitted when its counsel supplies such information, which makes the expenditure of district fund's for the lawyer's time a permissible use of public money.

However, in our opinion it would not be proper for the district's counsel to provide advice as to tax considerations or represent a landowner directly in proceedings before the IRS. Clearly, the district has a stake in the outcome of any formal proceedings and can direct its attorney to submit documents, pleadings, letters, etc. which detail the transaction. Having said this, it must be remembered that the interests of the district and the private landowner, while closely aligned, may not always be identical, with the latter wishing to take a position (i.e., fair market value of the land) which the former cannot or may not wish to entirely support. The district's full-scale representation of a private landowner before the IRS would go too far into the area that separates the permissible and impermissible use of public funds. See, e.g., Leavenworth County Commr's v. Miller, 7 Kan. 479 (1871), In re Page, 60 Kan. 842 (1899). In addition, potential ethical problems are raised for the district's attorney, who would be cast in the role of advising two separate clients. See K.S.A. 7-125, Rules of Professional Responsibility, DR 5-105.

In conclusion, a watershed district organized pursuant to K.S.A. 24-1201 et seq., is empowered to execute such contracts as are necessary or convenient to allow it to properly carry out its functions, and to obtain those professional services deemed essential by the board of directors. In acquiring easements by donation from landowners, the board of directors may employ the services of an attorney for the performance of duties relevant to the drafting of the easement. However, apart from acting as a scrivener to complete documents needed for tax purposes, such an attorney should not provide advice to the donor as to the tax considerations involved or represent the donor in proceedings before the Internal Revenue Service, nor should public moneys of the district be expended to compensate the attorney except for these limited services.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Jeffrey S. Southard
Assistant Attorney General