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May 17, 1985

ATTORNEY GENERAL OPINION NO. 85- 54

Gerald Woolwine
Clark County Attorney
120 West 7th Street
P.O. Box 565
Ashland, Kansas 67831

Re: Fences -- Legal Enclosures -- Legal and Sufficient
Fences

Synopsis: Kansas fence laws designate the board of county commissioners of each county as "fence viewers." When acting as fence viewers the board of county commissioners has the authority to declare legally sufficient all constructions which in their judgment are equivalent to sufficient fences as described by statute. The fence viewers possess the authority to deem electric fences legally sufficient if, in their judgment, the fence is equivalent to other legally sufficient fences. Cited herein: K.S.A. 29-101; 29-102; 29-104.

* * *

Dear Mr. Woolwine:

As Clark County Attorney, you have requested our opinion regarding the designation of legally sufficient fences under the Kansas statutes pertaining to fences, K.S.A. 29-101 et seq.

You inform us that the Board of Clark County Commissioners are considering adopting a resolution which would deem electric fences meeting certain specifications to be legally sufficient

fences. You inquire as to the authority of the Board to adopt such a resolution, and ask whether an electric fence is of a type which may be deemed equivalent to the fences specified by statute as legally sufficient.

As you are aware, K.S.A. 29-102 contains certain specifications for sufficient fences and states that "all such fences shall be substantially built and sufficiently close to prevent stock from going through." It also provides that all hedge fences shall be of such height and thickness as will protect the field or enclosure, presumably from wandering livestock. The Kansas Court of Appeals has noted that one of the purpose of the fence laws is to prevent damage to property and crops by fencing animals out. See Lindsay v. Cobb, 6 Kan.App.2d 171, 173 (1981). The Kansas statute and the Lindsay case are in accord with the common law definition of a sufficient fence as one which will turn ordinary stock. See 36A C.J.S., Fences §14, 35 Am.Jur.2d, Fences §17.

The Kansas fence laws designate the county commissioners of each county as fence viewers. As fence viewers, the commissioners serve as a tribunal of limited jurisdiction within the confines of the statutes prescribing their functions. K.S.A. 29-104 addresses the role of the fence viewers in determining what is a legally sufficient fence and provides:

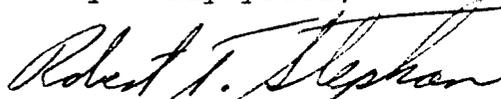
"Fences of the material and of the height and sufficiency aforesaid, and all brooks, rivers, creeks, ditches and constructions which shall be equivalent thereto, in the judgment of the fence viewers within whose jurisdiction the same may be, shall be deemed legal and sufficient fences." (Emphasis added.)

In our opinion, this statute grants the discretionary authority to determine the factual question of whether a fence is sufficient "to prevent stock from going through" to a board of county commissioners, acting in their capacity as fence viewers. Thus, we can perceive no barrier to the board of county commissioners, acting as fence viewers, declaring that an electric fence of a prescribed type is an equivalent "construction" to those described in K.S.A. 29-102. In passing, we note that 1985 House Bill No. 2148 amends K.S.A. 29-104 to specifically grant fence viewers the authority to declare electric fences equivalent to sufficient fences. That bill, however, was not reported out of the House Committee on Agriculture and Small Business during the 1985 legislative session. Nevertheless, it appears that the authority to declare

electric fences as equivalent constructions exists in the statute as it presently reads.

We note, however, that the authority to declare certain constructions equivalent to statutorily prescribed "sufficient fences" belongs to the fence viewers. Thus, it appears that any exercise of that authority should be in the form of an order issued by the fence viewers and rather than an ordinary resolution of the board of county commissioners.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Mary F. Carson
Assistant Attorney General

RTS:JSS:MFC:crw