



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

February 23, 1978

ATTORNEY GENERAL OPINION NO. 78- 92

Ms. Shelley D. G. Bloomer
Osborne County Attorney
202 West Main Street
Osborne, Kansas 67473

Re: Counties--Fire Districts--Detachment of Territory

Synopsis: In acting under K.S.A. 19-3631 upon a petition for detachment of territory from a fire district organized under K.S.A. 19-3624, the board of county commissioners may exercise its discretion in approving or disapproving any proposed detachment of territory from said district.

* * *

Dear Ms. Bloomer:

You advise that in July, 1977, a rural fire district was formed by the board of county commissioners of Osborne County, pursuant to K.S.A. 19-3624. The territory of the district includes land in two counties. Since that time, a petition has been filed for detachment of certain territory, pursuant to K.S.A. 19-3631, which states in pertinent part thus:

"Territory which is a part of a fire district organized in accordance with . . . K.S.A. 19-3624 to 19-3630, . . . may be detached therefrom as herein provided. Upon presentation of a petition to the governing body of the fire district, setting forth the boundaries of an area within the district which desires to be detached from said fire district, signed by not less than fifty-one

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percent (51%) of the qualified electors of such area . . . , the governing body of such fire district may, at its next regular meeting, if it finds the petition is regular with at least the requisite number of signatures, enter an order detaching such territory from the fire district, such order to be effective on January 1 of the succeeding year." [Emphasis supplied.]

Thus, under this provision, the board may, upon the filing of a sufficient petition, authorize the detachment of territory requested therein. You inquire whether the board is required to enter the requisite order detaching territory upon the filing of a sufficient petition, or whether it has discretion to decline to approve the proposed detachment of territory. In *State ex rel. Jackson v. School District No. 1*, 80 Kan. 667 (1909), the court stated thus:

"Primarily and as ordinarily used in a statute the word 'may' is permissive rather than pre-emptory. It is sometimes regarded as synonymous with must, as for instance 'where public authorities are authorized to perform an act for the benefit of the public, or for an individual who has a right to its performance.' . . . It should be given its ordinary meaning, however, unless the terms and provisions of the statute compel the other view. As was said in *In re McCort, Petitioner*, 52 Kan. 18, 'the sense in which the word is used must always be determined from the context of the act.'" 80 Kan. at 669.

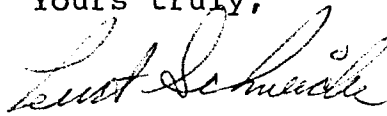
The word "may," though merely permissive in its ordinary significance, may be used to describe what is in fact a mandatory duty. See, e.g., *Phelps v. Lodge*, 60 Kan. 122 (1899). Likewise, "the use of the word 'shall' does not prevent a statute from being construed as requiring a discretionary act." *Curless v. Board of County Commissioners*, 197 Kan. 580, 419 P.2d 876 (1966).

The word "may" as used in this instance should be deemed to have been used in its ordinary sense, i.e.. to describe a permissive or discretionary duty, unless the context clearly warrants a

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contrary construction. Nothing in K.S.A. 19-3631 suggests that the term was used in other than its ordinary sense. Under K.S.A. 19-3624, upon the filing of a sufficient petition, it "shall be the duty of the board of county commissioners . . . to establish such fire district. . . ." Thus, the board has no discretion to refuse to establish a district when duly requested to do so by a sufficient petition. Once established, however, the board becomes the governing body of the district, K.S.A. 19-3625, and must act in that capacity in its best interests. Thus, under K.S.A. 19-3629, when a petition for attachment of territory is filed, the board may order the attachment if it "finds it to be the best interest of the district" to do so. Nothing suggests that the board should not and does not enjoy similar discretion in passing upon a petition for detachment of certain territory. In acting upon petition for detachment of territory, the board obviously must consider, in my judgment, the effect of any such requested detachment upon the ability of the district to continue to provide adequate fire protection to the remaining territory of the district if the detachment were approved. In my judgment, the term "may" as used in K.S.A. 19-3631 is clearly used in its permissive sense, and the board does in fact have discretion to approve or disapprove a proposed detachment of territory from the fire district of which it is the governing body.

Yours truly,



CURT T. SCHNEIDER
Attorney General

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