



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 81-232

Otis W. Morrow
City Attorney
P. O. Box 1146
Arkansas City, Kansas 67005

Re: State Departments; Public Officers, Employees --
Tort Claims Act -- Exemptions from Liability

Synopsis: The Kansas Tort Claims Act exempts a city and its employees from tort liability in the exercise of a discretionary legislative determination regarding participation in a voluntary federal flood insurance program. Cited herein: K.S.A. 1980 Supp. 75-6101, 75-6103, 75-6104, as amended by L. 1981, chs. 357, 358, 359, 42 U.S.C.A. §§4001 et seq.

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Dear Mr. Morrow:

As city attorney for Arkansas City, Kansas you request the opinion of this office regarding potential tort liability of the city in adopting or refusing to adopt a federally sponsored flood insurance program. The federal program is created and governed by the National Flood Insurance Act of 1968, 42 U.S.C.A. §§4001 et seq., as amended by the Flood Disaster Protection Act of 1973, P.L. No. 93-234, 87 Stat. 975; and the Housing and Community Development Act of 1977, P.L. No. 95-125, 91 Stat. 111. In upholding the constitutionality of the federal act, the United States District Court for the District of Columbia described the program as follows:

"[T]he National Flood Insurance Program is a carrot and stick scheme [T]he program is one which offers certain inducements for state participation, rather than one which . . . mandates local compliance with a discretionless federal enactment." (Citations omitted.)

Tex. Landowners Rights Ass'n. v. Harris, 453 F. Supp. 1025, 1030 (D.C.D.C. 1978), aff'd 598 F.2d 311, cert. denied 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 184.

In further highlighting the voluntary character of this program, the court observed:

"The federal government traditionally obtains state cooperation and participation in federal regulatory programs by offering the states a sufficiently attractive incentive or by threatening to withdraw a federal benefit they are presently receiving.' This is precisely how Congress has chosen to proceed in providing national flood insurance for the general welfare of the Nation." (Emphasis by the Court.)
Id. at 1031.

We are not aware of any state statute which compels cities, such as Arkansas City, to join the federal program. Hence, the decisions of the city governing body whether to make building restrictions within the city in order to qualify for direct federal aid or insurance are matters within the sound discretion of the city commission.

The law governing the tort liability of Kansas cities is contained in K.S.A. 1980 Supp. 75-6101 et seq., as amended by L. 1981, chs. 357, 358, 359, commonly known as the Kansas Tort Claims Act. K.S.A. 1980 Supp. 75-6103 provides generally for liability for damages caused by negligent or wrongful acts or omissions where the governmental entity, if a private person, would be liable. However, as you have already advised, K.S.A. 1980 Supp. 75-6104, as amended, provides a list of exceptions from such exposure. In pertinent part, that section states:

"A governmental entity or an employee acting within the scope of his or her employment shall not be liable for damages resulting from: (a) Legislative functions, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution;

. . . .

"(d) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the

part of a governmental entity or employee,
whether or not the discretion be abused;

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"(k) snow or ice conditions or other temporary
or natural conditions on any public way or
other public place due to weather conditions,
unless the condition is affirmatively caused
by the negligent act of the governmental en-
tity;

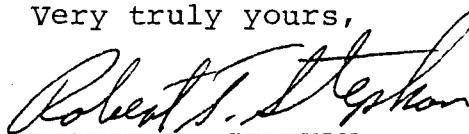
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"The enumeration of exceptions to liability
in this section shall not be construed to be
exclusive nor as legislative intent to waive
immunity from liability in the performance or
failure to perform any other act or function
of a discretionary nature."

As we noted in Kansas Attorney General Opinion No. 79-259,
exposure to tort liability is often a matter to be determined
on the facts of each case. However, the decision of a muni-
cipal governing body to join a federal program or make local
land use restrictions prerequisite to participation in such
plan is clearly a matter of local legislation as the term is
used in the Kansas Tort Claims Act. Moreover, it is clearly
a discretionary judgment of the type exempted from liability
under the Act.

Therefore, we concur in your advice to the city commission,
that the Kansas Tort Claims Act, as amended, would exempt
the city and its employees from tort liability for the exer-
cise of a discretionary legislative determination regarding
participation in a voluntary federal flood insurance program.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General