



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82-130

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

Re: Drainage and Levies -- Watershed Districts --
Open Meetings of Directors; Exception for Attorney-
Client Discussions

Synopsis: Pursuant to K.S.A. 24-1212, a watershed district board may not go into executive session at any time. However, as a watershed district is also governed by the terms of the Open Meetings Act, K.S.A. 75-4317 et seq., a conflict arises between the two enactments, in that the latter permits executive sessions for certain specified purposes. Among these purposes is consultation with an attorney which is privileged under the attorney-client relationship. As the two enactments cannot be reconciled, that portion of K.S.A. 24-1212 prohibiting such executive sessions is repealed by implication. Cited herein: K.S.A. 24-1212, K.S.A. 1981 Supp. 75-4318, 75-4319.

* * *

Dear Mr. Toepfer:

As counsel for Wet Walnut Creek Joint Watershed District No. 58, you request our opinion concerning the ability of the district's board of directors to meet in executive session. Specifically, you inquire whether the effect of K.S.A. 24-1212 is to prevent the board from meeting in such closed session with you, as board attorney, to discuss matters that would otherwise be confidential communications under the attorney-client privilege. You inform us that two lawsuits involving the board which concern a condemnation of land are pending at this time.

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The watershed district in question is organized pursuant to K.S.A. 24-1201 et seq. One of the statutes contained therein which is relevant to your request, K.S.A. 24-1212, states:

"Regular meeting[s] of the board of directors shall be held quarterly at the office of the corporation on such day as is selected by the board of directors. Notice of such meeting shall be mailed to each director at least five (5) days prior to the date thereof, and special meetings may be held at any time upon waiver of notice of such meeting by all directors or may be called by the president or any two directors at any time: Provided, That notice in writing, signed by the persons calling any special meeting, shall be mailed to each director at least two (2) days prior to the time fixed for such special meeting. A majority of the directors shall constitute a quorum for the transaction of business and in the absence of any of the duly elected officers of the district a quorum at any meeting may select a director to act as such officer pro tem. Each meeting of the board, whether regular or special, shall be open to the public and the board shall at no time go into executive session." (Emphasis added.)

We note that this statute was part of the original act of 1953, and has not been amended since that time.

As you indicate in your request, K.S.A. 24-1212 appears to be in conflict with an act passed in 1972, popularly known as the Open Meetings Act, K.S.A. 75-4317 et seq. That act provides [at K.S.A. 1981 Supp. 75-4318(a)] that

"all meetings for the conduct of the affairs of, and the transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds shall be open to the public and no binding action by such bodies shall be by secret ballot, . . . "

However, at K.S.A. 1981 Supp. 75-4319 certain exceptions are made to the general policy set out above. Procedural limitations on executive sessions are set out at subsection (a),

with a list of permitted topics included at subsection (b). One of these exceptions [at paragraph (2)] allows a body to meet behind closed doors for "consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship."

In our opinion, there can be no question that a watershed district, being a taxing subdivision of the state, is a body subject to the Open Meetings Act. This would include the requirements of K.S.A. 1981 Supp. 75-4318(b) concerning notice of regular or special meetings, as well as the requirements of subsections (d) (furnishing of agendas) and (e) (use of cameras and recording devices). The question which remains, however, is whether the provisions of K.S.A. 1981 Supp. 75-4319 which allow executive sessions in certain cases can be reconciled with the clear prohibition against such sessions in K.S.A. 24-1212.

In determining this question, it may initially be noted that, as both of the above statutes relate to the subject of executive sessions, they should be read in pari materia, even though enacted at different times. Bosler v. Zoning Board for Aubry Township, 228 Kan. 6 (1980). If possible, they should be read together and harmonized so that both may be given force and effect. City of Overland Park v. Nikias, 209 Kan. 643 (1972). However, as that is not possible here, in our opinion resort must be had to the concept of repeal by implication. A number of considerations lead us to this conclusion, i.e. that portion of K.S.A. 24-1212 banning executive sessions is repealed by K.S.A. 1981 Supp. 75-4319.

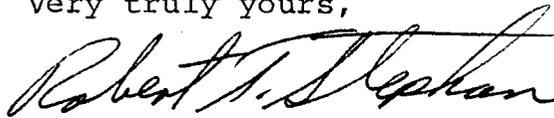
While the law does not favor the repeal of a statute in this manner, a former statute can be so eliminated when a latter enactment is so repugnant to it that both cannot be given force and effect. Matter of Suesz' Estate, 228 Kan. 275 (1980). Furthermore, it is also a well-recognized rule of statutory construction that older statutes must be read in light of later legislative enactments. Thomas v. Board of Trustees of Salem Township, 224 Kan. 539 (1978). While an earlier, more specific statute is not automatically repealed by implication upon the enactment of a later, more general statute dealing with the same subject [Howard v. Hulbert, 63 Kan. 793 (1901)], when it appears that the general act was intended to be of universal application or where the two acts are irreconcilable with each other, the more general will prevail.

In this particular situation, there appears to be no public policy which is served by treating the meetings of a watershed district in a different fashion than the meetings of any other unit of government covered by the Open Meetings Act. Indeed, it would be contrary to public policy for a watershed

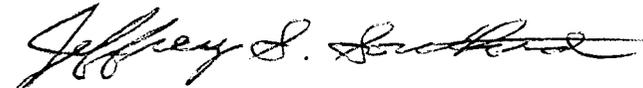
district board to hold all consultations with its attorney concerning a pending lawsuit in public session, as this would give opposing parties a decided advantage. Where, as here, the subject matter of the suit concerns the expenditure of district funds in a condemnation proceeding, the damage to the district could well be measured in dollars if a higher price were asked or a larger award given. In short, to read K.S.A. 24-1212 without reference to the exceptions contained in K.S.A. 1981 Supp. 75-4319(b) would conflict with another publicly stated policy (i.e., private communications with one's attorney are privileged to the extent necessary for him or her to possess the information necessary to do the job professionally), and ignores established rules of statutory construction.

For these reasons, therefore, it is our opinion that that portion of K.S.A. 24-1212 which proscribes any executive session whatsoever must be read together with K.S.A. 1981 75-4319, which is part of a more recent act establishing a uniform open meetings policy for this state. In that the total prohibition of the former cannot be reconciled with the limited exceptions of the latter, that portion of K.S.A. 24-1212 which so states has been repealed by implication, leaving a watershed district board free to meet in executive session for the purposes listed at K.S.A. 1981 Supp. 75-4319(b). Among these purposes is consultation with the board's attorney which would be held privileged by the attorney-client relationship.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General