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March 11, 1988

ATTORNEY GENERAL OPINION NO. 88- 37

The Honorable Bill Graves  
Secretary of State  
State Capitol, 2nd Floor  
Topeka, Kansas 66612-1594

Re: Cities and Municipalities -- Interlocal  
Cooperation; General -- Interlocal Agreements by  
Public Agencies; Filing

Synopsis: K.S.A. 12-2905 requires filing of all agreements entered into pursuant to the interlocal cooperation act. However, failure to file such an agreement does not render the contract void or unenforceable when the agreement substantially complies with all other requirements contained in the act and has been subsequently acted upon or partially performed by the parties to the agreement. Cited herein: Kan. Const., Art. 12, § 5; K.S.A. 12-101 Fourth; 12-2901; K.S.A. 1987 Supp. 12-2904; K.S.A. 12-2905; K.S.A. 1987 Supp. 12-2908; K.S.A. 12-3001; 19-101 Fourth; K.S.A. 1987 Supp. 19-101a; K.S.A. 19-212 Eleventh; 22-2101; K.S.A. 1987 Supp. 58-3406; K.S.A. 75-4317; 84-3-101.

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Dear Secretary Graves:

As Secretary of State you request our opinion as to the status of an interlocal agreement entered into pursuant to K.S.A. 12-2901 et seq. when such agreement has not been filed

with the local register of deeds or the secretary of state as required by K.S.A. 12-2905.

K.S.A. 12-2905 states:

"Prior to its entry into force, an agreement made pursuant to this act shall be filed with the register of deeds of the county where such political subdivision or agency of the state government is located and with the secretary of state."

This statute does not clearly address the impact of failure to file, and thus does not in and of itself render an otherwise legal contract void for failure to file.

Whether a contract exists often relies on a determination of the parties capacity and intent to contract, which are questions of fact. Augusta Bank & Trust v. Broomfield, 231 Kan. 52 (1982). K.S.A. 12-2901 et seq. supplies governmental entities with a statutory means and thereby capacity to contract. This capacity may also be inherent or otherwise authorized. See generally Kan. Const., Art. 12, § 5; K.S.A. 19-212 Eleventh; 19-101 Fourth; 12-101 Fourth; McQuillans Intergovernmental Relations, § 3A.06 (1987). The mere existence of a document and any subsequent action on the contract evidence an intent to contract. If, however, filing procedures under K.S.A. 12-2905 mandate an express legislative condition precedent, failure to file may completely void the contract.

A condition precedent is something that must happen or be performed before rights can accrue to enforce the main contract. If a condition precedent is not performed, the contract cannot be enforced even though the contract is executed. Wallerius v. Hue, 194 Kan. 408 (1965); Morton Bldgs., Inc. v. Department of Human Resources, 10 Kan. App. 2d 197 (1985). It is not clear from the language of the statute whether the legislature intended to create such a condition precedent pursuant to K.S.A. 12-2905. Thus, some statutory construction is necessary to determine legislative intent.

While K.S.A. 12-2905 states that these agreements "shall" be filed prior to entry into force, this language may be directory rather than mandatory, and thus not an absolute requirement. If statutory filing procedures are viewed as

merely directory, the theory of substantial compliance may be applicable. McQuillins, Intergovernmental Relations, § 3A.10 (1987).

"Shall" is not a hard and fast identifying mark which can foretell the mandatory or directory character of a statute. City of Kansas City v. Board of County Comm'rs of Wyandotte County, 213 Kan. 777, 783 (1974). The word "shall" in a statute is frequently read to mean "may" where the context requires. Paul v. City of Manhattan, 212 Kan. 381 (1973). Questions as to whether language in a statute is mandatory or directory is largely determined on a case by case basis and an important consideration is whether the requirement is essential to preserve the rights of parties. Griffen v. Rogers, 232 Kan. 168 (1982); Unified School District No. 252 v. South Lyon County Teachers Association, 11 Kan. App. 2d 295 (1986). Provisions in a statute intended to secure order, system and dispatch, and by disregard of which parties cannot be injuriously affected, are not regarded as mandatory unless accompanied by negative words indicating that the acts shall not be done in any other manner than that designated. Manhattan v. Ridgeway Bldg. Co., Inc., 215 Kan. 606 (1974). See also City of Hutchinson, Reno County v. Ryan, 154 Kan. 751 (1942).

The filing of documents serves many purposes, depending upon the circumstances and the document to be filed. The word "file" contemplates the deposit of a writing with the proper official. City of Overland Park v. Nikias, 209 Kan. 643 (1972). It means to "layaway and arrange in order, pleadings, motions, instruments, and other papers for preservation and reference. . . ." Blacks Law Dictionary 566 (5th Ed. 1979). Filing provides notification, authentication or ease of access to public documents.

Notice to the public of a proposed interlocal agreement or contract is provided by means other than filing. Public hearing and publication laws give notice of the proposed governmental action before, during and after execution of the agreement. See, e.g., K.S.A. 75-4317 et seq.; K.S.A. 1987 Supp. 19-101a(b); K.S.A. 12-3001 et seq.

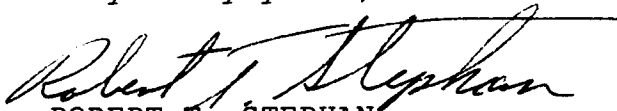
The legislature is presumed to be aware of existing laws concerning the subject matter of a statute. State v. Coley, 236 Kan. 672 (1985). It can therefore be presumed that, being aware of all the notification involved in adopting these agreements, the legislature did not require filing pursuant to K.S.A. 12-2905 merely to give notice. Rather than


provide duplicate notice, the filing may instead be intended to document the authenticity or existence of the filed agreements or to provide public access to them. In certain circumstances recording or filing documentation of an official action may be considered as a mere clerical or ministerial duty that is not essential. Boardman v. Davis, 3 N.W. 2d 608, 611 (Iowa 1942).

Though it can be safely said that the legislature does not intend any statutory provision to be totally disregarded, in determining the consequences of failure to comply with a statute the ultimate object which the legislature sought to serve should be considered. City of Kansas City v. Board of County Comm'rs, 213 Kan 777, 783 (1974). The purpose of the filing requirements contained in K.S.A. 12-2905 appears to be administrative in nature because failure to file does not seriously injure the rights of the parties nor does it deprive the public of notice due to previous notification.

It is therefore our opinion that K.S.A. 12-2905 requires filing of agreements entered into pursuant to that act. However, failure to file such an agreement does not render the contract void or unenforceable, when that agreement substantially complies with all other requirements and has been subsequently acted upon or partially performed by the parties to the agreement.

Very truly yours,

  
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