



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

November 8, 1990

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 90- 128

R. Douglas Sebelius
Norton County Attorney
105 S. Norton St., P.O. Box 10
Norton, Kansas 67654

Re: Criminal Procedure -- Procedure After Arrest --
Provisions of Diversion Agreement; Diversion Fee
When County Has Created a Property Crime
Compensation Board

Synopsis: K.S.A. 1989 Supp. 22-2909, as amended by L. 1990,
ch. 321, § 15, permits a county or district
attorney, in a county that has created a local fund
under the property crime restitution and
compensation act, to require payment of an
additional diversion fee, not to exceed \$100. This
specifically authorized and additional diversion
fee does not replace or negate other permissibly
included diversion fees or terms authorized by the
general terms of K.S.A. 1989 Supp. 22-2909, as
amended. Cited herein: K.S.A. 22-2906; 22-2907;
K.S.A. 1989 Supp. 22-2909, as amended by L. 1990,
ch. 321, § 15.

* * *

Dear Mr. Sebelius:

As Norton County Attorney you request our opinion on K.S.A.
1989 Supp. 22-2909, as amended by L. 1990, ch. 321, § 15.
You ask whether all diversion fees collected pursuant to a
diversion agreement must be paid into the county crime

compensation fund if the county commissioners elect to create a county property crime compensation board, or whether diversion fees may also be properly used for other county purposes such as the replacement of equipment within the county or district attorney's office. You also ask if such a diversion fee is limited to \$100 if a local property crime compensation fund is created.

K.S.A. 1989 Supp. 22-2909, as amended by L. 1990, ch. 321, § 15, states:

"On and after January 1, 1991, K.S.A. 1989 Supp. 22-2909 is hereby amended to read as follows: 22-2909. (A) A diversion agreement shall provide that if the defendant fulfills the obligations of the program described therein, as determined by the county or district attorney, the county or district attorney shall act to have the criminal charges against the defendant dismissed with prejudice. The diversion agreement shall include specifically the waiver of all rights under the law or the constitution of Kansas or of the United States to a speedy arraignment, preliminary examinations and hearings, and a speedy trial, and in the case of diversion under subsection (c) waiver of the right to rights to counsel and trial by jury. The diversion agreement may include, but is not limited to, provisions concerning payment of restitution, including court costs and diversion costs, residence in a specified facility, maintenance of gainful employment, and participation in programs offering medical, educational, vocational, social and psychological services, corrective and preventive guidance and other rehabilitative services. If a county creates a local fund under the property crime restitution and compensation act, a county or district attorney may require in all diversion agreements as a condition of diversion the payment of a diversion fee in an amount not to exceed \$100. Such fees shall be deposited into the local fund and

disbursed pursuant to recommendations of the local board under the property crime restitution and victims compensation act." (Emphasis indicates new language).

A diversion agreement is defined in K.S.A. 22-2906 as "the specification of formal terms and conditions which a defendant must fulfill in order to have the charges against him or her dismissed." K.S.A. 22-2907 authorizes a district or county attorney to propose a diversion agreement to certain defendants and requires the terms of each diversion agreement to be established in accordance with K.S.A. 1989 Supp. 22-2909. K.S.A. 1989 Supp. 22-2909, as amended, generally provides that:

"The diversion agreement may include, but is not limited to provisions concerning payment of restitution, including court costs and diversion costs, residence in a specified facility, maintenance of gainful employment, and participation in programs offering medical, educational, vocational, social and psychological services, corrective and preventive guidance and other rehabilitative services." (Emphasis added).

Thus, there is general authority to include the terms of diversion. L. 1990, ch. 321, § 15 specifically authorizes collection of a diversion fee in counties creating a local fund under the property crime restitution and compensation act. Under the rule of "ejusdem generis", specific words control over general provisions in statutes unless a contrary legislative intent clearly appears. Stephens v. Van Arsdale, 227 Kan. 676 (1980). It is the duty of the court to reconcile different statutory provisions so as to make them consistent, harmonious and sensible. General and specific statutes should be read together and harmonized whenever possible, but to the extent a conflict between them exists, special statutes will prevail over general unless it appears that the legislature intended to make the general statute controlling. Kansas Racing Management, Inc. v. Kansas Racing Commission, 244 Kan. 343 (1989). Thus, we must determine whether the specific language in the 1990 amendment to K.S.A. 1989 Supp. 22-2909 augments or conflicts with the general authority in the same statute.

Interpreting statutory language presents a question of law, and it is the function of a court to interpret the statute in a manner that will give it the effect the legislature intended. Director of Taxation, Department of Revenue v. Kansas Krude Oil Reclaiming Company, 236 Kan. 450 (1984); In the Matter of the Marriage of Schoneman, 13 Kan.App.2d 536 Rev. Den. (1989). A fundamental rule of statutory construction is that the purpose and intent of the legislature governs when that intent can be determined from consideration of the entire act. State v. Adee, 241 Kan. 825 (1987). In construing the meaning of a statute, all known definitions and as much of the surrounding facts and circumstances as is possible must be used as aids in construction. Tuggle v. Parker, 159 Kan. 572 (1945). In determining legislative intent, courts are not limited to mere consideration of language used, but may look to historical background of enactment, circumstances attending its passage, purposes to be accomplished, and the affect the statute may have under the various constructions suggested. State v. Johnson County, 233 Kan. 79 (1983). In interpreting a legislative act, the court must give the statute the construction which is consistent with the intent and purpose of the statute, even if that construction is not within the literal meaning of the language contained in the statute. James v. Rowe, 674 F.Supp. 332 (D. Kan. 1987). Statutes in pari materia must be construed together wherever possible with a view towards reconciling and bringing them into workable harmony. In Re Smiths Estate, 183 Kan. 158 (1958).

The general language of K.S.A. 1989 Supp. 22-2909, as amended, permits a diversion agreement to include certain terms, however, the statute recognizes that the terms listed therein are not meant to be all inclusive; "the diversion agreement may include, but is not limited to. . . ." The specific language included in the 1990 amendment to K.S.A. 1989 Supp. 22-2909 authorizes diversion fees in an amount not to exceed \$100. This fee is authorized if the county creates a county property crime compensation board. The amended language goes on to direct the appropriate procedures for depositing and disbursing diversion fees thus collected. While the specific language of the amendment may be read to limit diversion fees collected, it may also be read to expand upon already existing authority.

The statement from the Office of Attorney General before the committee considering the 1990 amendment to K.S.A. 1989 Supp. 22-2909 recognized that "county commissions, county

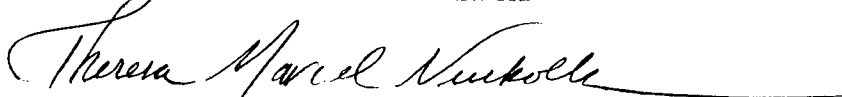
attorneys and administrative judges may consider an additional fee not to exceed \$100 to be assessed on diversion agreements for use in financing for the program." (Emphasis added). To interpret the language of the 1990 amendment to K.S.A. 1989 Supp. 22-2909 in an overly restrictive manner would be to thwart or discourage county participation in the program because counties would fear losing completely or severely restricting previously available funds generated from diversion fees. In urging the passage of this amendment, it was our office's opinion that the specific language in the amendment to K.S.A. 1989 Supp. 29-2909 permitted the inclusion of an additional diversion fee not to exceed \$100. This authority was intended to expand upon or supplement the general authority set forth in K.S.A. 1989 Supp. 22-2909. The language of the statute may be read in harmony and the legislative history surrounding enactment of 1990 amendment to K.S.A. 1989 Supp. 22-2909 does not support a restrictive interpretation of that amendment.

It is our opinion that the specific language of K.S.A. 1989 Supp. 22-2909, as amended by L. 1990, ch. 321, § 15, permits a county or district attorney, in a county that has created a local fund under the property crime restitution and compensation act, to require payment of an additional diversion fee, not to exceed \$100. District and county attorneys may continue to include other diversion fees as permitted by K.S.A. 1989 Supp. 22-2909, as amended, and may expend diversion fees collected pursuant to that authority in any legally permissible manner. The additional specific authority provided for by the 1990 amendment to K.S.A. 1989 Supp. 22-2909 does not negate, but may be read in harmony with the general authority to establish the terms of a diversion agreement pursuant to K.S.A. 1989 Supp. 22-2909.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Theresa Marcel Nuckolls
Assistant Attorney General