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ATTORNEY GENERAL OPINION NO. 81-223

Marvin E. Henry  
Emergency Operations Coordinator  
The Adjutant General  
Division of Emergency Preparedness  
Topeka, Kansas 66601

Re: Militia, Defense and Public Safety -- Emergency  
Preparedness for Disasters -- Duty to Perform;  
City and County Budgets

Synopsis: K.S.A. 48-929 creates a duty on the part of Kansas  
counties and certain Kansas cities to formulate  
plans and assemble agencies capable of providing  
disaster relief. The statute does not state that  
such cities and counties must budget and expend  
moneys for these plans and agencies; however, if  
cities and counties ignore their statutory duty,  
an action for mandamus will lie to compel them to  
establish and maintain emergency preparedness  
plans and agencies, even if compliance with the  
order requires the expenditure of money. Cited  
herein: K.S.A. 48-929, 60-801.

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Dear Mr. Henry:

You inquire of this office whether counties and certain desig-  
nated cities must budget and expend funds for emergency pre-  
paredness activities required by K.S.A. 48-929. That section  
states in pertinent part as follows:

"(a) Each county within this state shall  
establish and maintain a disaster agency re-  
sponsible for emergency preparedness and coor-  
ordination of response to disasters or shall  
participate in an interjurisdictional arrange-  
ment for such purposes under an interjurisdic-  
tional disaster agency . . . .

"(b) The governor shall determine which cities need disaster agencies of their own and, upon such determination, shall require that each such city establish and maintain a disaster agency therefor . . . .

. . . .

"(d) In accordance with the standards and requirements for disaster emergency plans promulgated by the division of emergency preparedness, each county, city and interjurisdictional disaster agency shall prepare and keep current a disaster emergency plan for the area under its jurisdiction . . . ." (Emphasis added.)

That K.S.A. 48-929 was meant to be considered mandatory and as giving rise to a duty in counties and certain cities to establish and maintain emergency preparedness plans and agencies, can perhaps most quickly be discerned from the emphasized language in the above-quoted provisions.

Further, a review of the legislative history of K.S.A. 48-929 lends credence to an interpretation of the act's provisions as giving rise to a statutory duty on the part of cities and counties relative to their establishing and maintaining emergency preparedness plans and agencies. Article 9 of Chapter 8 of the Kansas Statutes Annotated, of which K.S.A. 48-929 is a part, had its genesis in the civil defense laws. Specifically, K.S.A. 48-929 can be traced back to G.S. 1953 Supp., Ch. 48, Art. 9, Civil Defense, §48-909 where the legislature provided that:

"Each city and county of the state may establish a local council of defense by the proclamation of the governing body thereof. Local councils of defense, if and when established, shall cooperate with and assist the council, and shall perform such services as may be requested by it. Local councils may act jointly with such other councils . . . . During the calendar year 1951 the board of county commissioners of any county having a population of more than 175,000 is hereby authorized to issue no-fund warrants for the purpose of providing revenue for carrying out the provisions of this act . . . ."

The above language is considerably less forceful than that now found in K.S.A. 48-929. It merely authorized rather than

required counties and cities to establish and maintain civil defense agencies. Under the prior law, no duty was placed on cities and counties, as it is under K.S.A. 48-929, to establish and maintain such agency; the matter was discretionary. In our judgment, such change is significant. Where an act amends a previous act so as to change either a permissive or imperative verb in the original act to the opposite in the amended act, then the implication is clear the intent of the legislative body has changed. 2A Sutherland Statutory Construction §57.05 (1973) at 419. Such an implication is present here where words such as "shall" and "required" have replaced "may" and "if."

In considering the language of this statute, the Kansas courts have provided some guidance. Notably, there is no absolute test for determining whether a statute is directory or mandatory; each case must stand largely on its own facts, to be determined by an interpretation of the language used. Brown v. Wichita State University, 217 Kan. 279 (1975), vacated in part 219 Kan. 2 (1976). Use of the word "shall" in a statute is not a hard and fast identifying mark which can foretell the mandatory or discretionary character to be assigned to the statutory provision. City of Kansas City v. Board of County Comm'rs of Wyandotte County, 213 Kan. 777 (1974). Where the context requires, the word "shall" can be read to mean "may." Paul v. City of Manhattan, 212 Kan. 381 (1973). On numerous occasions Kansas courts have construed statutes as directory only, where the purpose of the statutory provision was procedural and merely intended to provide order and dispatch of the public business. See e.g., City of Hutchinson v. Ryan, 154 Kan. 751 (1942); Shriver v. Board of County Commissioners, 189 Kan. 548 (1962). However, use of the word "shall" in a statute, though not controlling, is significant as indicating intent that the statute is mandatory in character. Escoe v. Zerbest, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935). Statutes should not be construed as directory only when such construction would result in a serious impairment of the public or private interest sought to be protected (79 L.Ed. at 1569) or where noncompliance would frustrate the legislative intent [Van Keppel v. U.S., 206 F. Supp. 42 (1962), aff'd. 321 F.2d 717 (1963)].

In construing a statute like K.S.A. 48-929, where the legislature has amended a prior law on the same subject to strengthen its commands, and where the law has such an obvious and important public purpose, we are inclined to the view that the statute is mandatory. K.S.A. 48-929 is not a procedural statute. It is a simple, straight forward command, noncompliance with which will certainly frustrate the legislative intent and result in serious impairment of public health, safety and welfare. In our opinion, K.S.A. 48-929 expresses a mandate to the designated governmental entities to establish and maintain emergency preparedness agencies and plans.

Having concluded that compliance on the part of counties and those cities falling within the provisions of K.S.A. 48-929 is mandatory, the remaining issue is whether these same cities and counties must budget money to insure their dutiful performance. K.S.A. 48-929 does not speak directly to the issue of budgeting for either emergency preparedness plans or agencies. Specifically, nowhere in the statute are cities or counties required to budget money for establishing plans or agencies for emergency preparedness activities. However, if volunteer workers do not come forward and city or county employees, equipment and supplies are not otherwise available to perform the duties of emergency preparedness, then, in our opinion, the State of Kansas has a right to seek a court order in mandamus requiring a particular city or county to perform the statutory duties relative to K.S.A. 48-929, even if it means requiring them to budget moneys such as are adequate to such performance. K.S.A. 60-801 provides that a mandamus proceeding will lie where some inferior court, tribunal, board, corporation or person has refused or failed to perform a duty which results from some office, trust or official station of the party to whom the order is directed. As has already been noted, a clear duty on the part of Kansas counties and certain Kansas cities to establish and maintain emergency preparedness agencies has been created under the provisions of K.S.A. 48-929. In our opinion, mandamus will lie for purposes of requiring city and county officials to discharge this obligation, if they fail to comply of their own volition. The case law of this and other states supports this conclusion.

"In a proper case a municipality may be compelled to perform a duty imposed by law." 55 C.J.S. Mandamus §124 (1948) at 211. In accord, the writer in 52 Am.Jur.2d Mandamus §220 states with regard to public works and improvements:

"Mandamus will not lie to control public officers or boards in the exercise of the discretion vested in them as to public works and improvements, and the necessity and character thereof. If the proper authorities have exercised their discretion in good faith, the writ will not issue to compel them to take a different course. On the other hand, it is firmly established that mandamus is an available remedy to enforce performance of plain, imperative duties as to such matters where no other adequate remedy is available." (Footnotes omitted.) Id. at 548, 549.

Moreover, the fact that the issuance of a court order in the nature of mandamus will require the municipality to expend

moneys in carrying out its public duty is no defense to the action in mandamus. See, e.g., State ex rel. Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941).

Kansas has an extended judicial precedent recognizing the power of courts to force local units of government to perform their legal duties. This precedent is nowhere better illustrated than in those cases arising from the duty of the State, its counties, cities and townships to maintain certain roads and bridges. See Douglas County v. Leavenworth County, 98 Kan. 389 (1916); State ex rel. Smith v. Johnson County Comm'rs, 124 Kan. 511 (1927); State ex rel. Smith v. State Highway Comm., 132 Kan. 327 (1931); and State ex rel. Downer v. Kearny County Comm'rs., 146 Kan. 461 (1937). Notably, in all the immediately preceding cases, the Court required that public funds be expended in amounts necessary for the accomplishment of the duty to construct or repair the public roads and bridges.

However, regarding expenditures for emergency preparedness, it is pertinent to add that city and county officials probably will not be compelled to spend any particular amount, as the legislature has apparently left that detail to the sound discretion of local governing bodies. Cities and counties could only be required to formulate emergency preparedness plans and set up agencies capable of putting the plans into effect. How extensive the plans and agencies must be is not indicated beyond the simple statutory mandate set forth in K.S.A. 48-929(d) and the requirement that the plan be drafted in accordance with those standards and requirements set by the state division of emergency preparedness. Obviously, the plan must meet at least the minimum guidelines and standards as set forth by the state division of emergency preparedness. If a question arises as to whether a particular city or county is performing its duties under K.S.A. 48-929, the courts of this state will turn to the facts of each case. They may evaluate the size and wealth of the county, as well as the availability of public funds, employees and other resources. Upon these and other criteria the courts will determine whether mandamus will lie and the specific obligations of local officials in raising and expending funds to accomplish the required tasks under emergency preparedness laws.

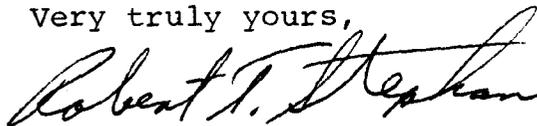
The case of State ex rel. Beck v. Cloud County Comm'rs., 148 Kan. 626 (1938), is most illustrative. There, the Kansas Supreme Court was presented the issue of whether to order Cloud County to increase its social welfare budget in accord with the recommendations of the State Board of Social Welfare. Upon rejecting the petition for mandamus, the Court verbalized the obligation of the state to allege and prove that the amount budgeted for that particular purpose was inadequate, as follows:

"Since there is no claim that the amount budgeted by the county board was to any degree inadequate or deficient, and since it is not claimed that the increased amount demanded by the state board was necessary, how can it be claimed that the state of Kansas has any right to compel the board of county commissioners, by levying upon the taxable property of Cloud county, to raise an amount of money largely in excess of what is claimed to be necessary for the budget period?" Id. at 630.

Hence, based on the reasoning of the Court in the above case, whether any specific appropriation of county funds for emergency preparedness will be deemed adequate, will depend upon the ability of the State to allege and show that an increased amount is necessary. As noted, establishing the necessity sufficient to support an action in mandamus will depend entirely upon the facts of each situation.

In summary, K.S.A. 48-929 creates a duty on the part of Kansas counties and certain Kansas cities to formulate plans and assemble agencies capable of providing disaster relief. The statute does not state that such cities and counties must budget and expend moneys for these plans and agencies; however, if cities and counties ignore their statutory duty, an action for mandamus will lie to compel them to establish and maintain emergency preparedness plans and agencies, even if compliance with the order requires the expenditure of money.

Very truly yours,



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Bradley J. Smoot  
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RTS:BJS:hle