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ATTORNEY GENERAL OPINION NO. 85- 161

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Re: Drainage and Levies -- Watershed Districts -- Meetings of Directors

State Departments; Public Officers and Employees -- Public Officers and Employees -- Meetings Open to Public

Synopsis: Pursuant to K.S.A. 24-1212, a watershed district board is required to have regular meetings once each quarter during the year. While this statute establishes minimum standards which must be met by the board, more frequent regular meetings may be held in that the statute is directory, rather than mandatory, on this point. K.S.A. 24-1212 also requires that all meetings of the board be open, and that no executive sessions be held. In that this language conflicts with the more recent and comprehensive language of the Open Meetings Act, K.S.A. 75-4317 et seq., it has been repealed by implication, as was concluded in Attorney General Opinion No. 82-130. Cited herein: K.S.A. 24-1212; 75-4319.

* * *

Dear Mr. Smith:

As attorney for Pawnee Joint Watershed District No. 81, you request our opinion on two questions involving the operation

of K.S.A. 24-1212. Specifically, you inquire whether that statute requires the district's board of directors to have regular meetings on only a quarterly basis, or whether regular meetings may be held monthly. Second, you ask if language in the statute which prohibits executive sessions can be reconciled with language in the Open Meetings Act (at K.S.A. 75-4319) which permits such closed discussions in certain circumstances.

The statute in question, K.S.A. 24-1212, states as follows:

> "Regular meeting 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 will first address your question concerning the holding of meetings. You inform us that the board wishes to hold regular meetings on a monthly basis, rather than merely once every three months. While authority exists for the calling and holding of special meetings, the monthly meetings are in fact not special in the sense of being unscheduled or in response to an emergency or unforeseen situation. Additionally, the holding of special meetings imposes additional notice requirements that regular meetings do not have.

At the outset, it would be noted that the mere use of the word "shall" in the statute ("Regular meeting[s] of the board of directors shall be held quarterly . . .") is not dispositive of the question. Numerous Kansas decisions have construed statutes containing "shall" as being directory, rather than mandatory, when the context requires it. City of Kansas City v. Wyandotte County Commissioners, 213 Kan. 777 (1974), Spalding v. Price, 210 Kan. 337 (1972), Paul v. City of Manhattan, 212 Kan. 381 (1973). In Paul, the court stated:

> "In determining whether a legislative provision is mandatory or directory, it is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system and dispatch of the public business, the provision is directory." Syl. §1.
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> "Factors which would indicate that a statute or ordinance is mandatory are: (1) the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated, or (2) a provision for a penalty or other consequence of noncompliance." Syl. §2. (Emphasis added.)

In the present situation, there exist no "negative words" which would preclude the use of a lesser time span before holding regular meetings of the district. In our opinion, if the statute required weekly meetings, a different result would be presented. However, the holding of monthly meetings does comply with the standard established by the legislature, for meetings will in fact be held once every quarter, the minimum prescribed.

Your second question has previously been answered by an opinion of this office. Attorney General Opinion No. 82-130 (copy enclosed) was issued in response to an inquiry from Wet Walnut Creek Joint Watershed District No. 58, and concerned the ability of a board to conduct an executive session for the

purpose of discussing certain matters with their counsel. We concluded that the prohibition in K.S.A. 24-1212 against closed sessions was repealed by implication, and stated:

> "While the law does not favor the repeal of a statute in this manner, a former stature 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 stature 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.
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> "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 the 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."

In conclusion, pursuant to K.S.A. 24-1212, a watershed district board is required to have regular meetings once each quarter during the year. While this statute establishes minimum standards which must be met by the board, more frequent regular meetings may be held in that the statute is directory, rather than mandatory, on this point. K.S.A. 24-1212 also requires that all meetings of the board be open, and that no executive sessions be held. In that this language conflicts with the more recent and comprehensive language of the Open Meetings Act, K.S.A. 75-4317 et seq., it has been repealed by implication, as was concluded in Attorney General Opinion No. 82-130.

Very truly yours,

Robert T. Stephan

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