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ATTORNEY GENERAL OPINION NO. 91- 7

Ray D. Siehndel
Secretary
Kansas Department of Human Resources
401 S.W. Topeka Blvd.
Topeka, Kansas 66603-3182

Re: Personal and Real Property--Public
Buildings--Handicapped Accessibility Standards
Responsibility for Enforcement; Injunction to
Restrain Violation of Standards; Violation of
Injunction; Civil Penalty

Synopsis: Mandatory injunctive relief may be sought pursuant
to K.S.A. 1990 Supp. 58-1308 to remedy facilities
built in violation of the Handicapped Accessibility
Standards found in K.S.A. 58-1301 et seq.
Cited herein: K.S.A. 58-1301 et seq.; K.S.A.
1990 Supp. 58-1304; 58-1308; K.S.A. 60-901; K.S.A.
1990 Supp. 60-906.

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Dear Mr. Siehndel:

As secretary of the Kansas department of human resources you ask several questions about K.S.A. 1990 Supp. 58-1308 dealing with injunctive relief for the enforcement of the Kansas Handicapped Accessibility Standards. The act requires new public buildings be built using the 1980 ANSI standards in order to make them accessible to persons with disabilities.

You inquire "1. What does 'injunctive relief' mean in terms of existing facilities which should have been built according to

the 1980 ANSI standards as required by law, but were not?
2. Can a court order certain steps to be taken within a certain time-frame to bring facilities into compliance? 3. If so, who is responsible for paying for the needed alteration? 4. What procedure would be required to seek such relief?"

Your first question concerns the definition of injunctive relief. K.S.A. 60-901 in the Code of Civil Procedure defines an injunction as "an order to do or refrain from doing a particular act. It may be the final judgment in an action, and it may also be allowed as a provisional remedy." When an injunction is issued requiring affirmative action involving a change of existing conditions it is classified as mandatory in form. 42 Am.Jur.2d Injunctions §§ 9, 16, 17 (1969). Thus the issue presented by your questions is whether K.S.A. 1990 Supp. 58-1308 authorizes one to seek mandatory injunctive relief ordering that a building built in violation of this act be made to conform to the standards by providing accessibility to handicapped individuals.

K.S.A. 1990 Supp. 58-1308 provides:

"The attorney general or any person, agency or governing body responsible for the enforcement of K.S.A. 58-1301 to 58-1309, and amendments thereto, may apply in the name of the state of Kansas to the district court for a temporary or permanent injunction restraining any individual, corporation or partnership from violating the standards established by K.S.A. 58-1301, and amendments thereto. Such court shall have jurisdiction upon hearing and for cause shown to grant such injunction."

This statute authorizes the attorney general or any person charged with its enforcement [see K.S.A. 1990 Supp. 58-1304] to apply to the district court for a temporary or permanent injunction to restrain any individual or entity from violating the act. The question becomes one of legislative intent; did the legislature intend the provision to authorize both prohibitory and mandatory injunctive relief?

Similar injunctive power was interpreted by the Supreme Court in State, ex rel., v. Ross, 159 Kan. 199 (1944) to provide for only preventive injunctive relief (as distinct

from mandatory [prohibitory] injunctive relief). However Ross, an appeal from the denial of a mandatory injunction to restore a stream to its unobstructed state, involved an order to require the restoration to a private landowner of what he claimed to have lost by the unauthorized acts of the defendant.

In our instance, the mandatory injunctive relief involves an order to restore to the public generally and to those citizens physically handicapped access to all public buildings and facilities covered by the act. The order would make operative legislative intent found in K.S.A. 58-1303:

"It is intended to make all buildings and facilities covered by this act accessible to, and functional for, the physically handicapped to, through, and within their doors, without loss of function, space or facilities where the general public is concerned."

The circumstances involve a violation of a continuing nature wherein the injury will continue unless otherwise enjoined.

Furthermore, if the legislature had intended that only preventive or prohibitory injunctive relief could be obtained, all an individual would have to do to circumvent the act's application is to violate it. And, the only way those charged with the act's enforcement could seek injunctive relief would be to find out about its intended violation and enjoin it. Thus to find that only preventive or prohibitory injunctive relief was intended would be to render the act meaningless.

Therefore, it is our opinion that K.S.A. 1990 Supp. 58-1308 authorizes those charged with the acts enforcement to seek both prohibitory and mandatory relief from a district court. If the facts of a case clearly favor such a remedy the court, in accordance with principles of equity, may order a public building, built in violation of K.S.A. 58-1301 et seq. be brought into compliance by providing access for the handicapped. See American Carriers, Inc. v. Baytree Investors, Inc., 685 F.Supp. 800, 806 (D.Kan., 1988); 42 Am.Jur.2d Injunctions §§ 2, 16, 23 (1969).

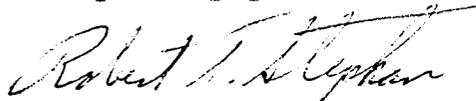
Your third question involves liability. An injunction, be it prohibitory or mandatory in nature, is an equitable remedy, granted or denied in accordance with the justice and equity of each case. U.S.D. No. 503 v. McKinney, 236 Kan. 224,

226 (1984); Wichita Wire Inc. v. Lenox, 11 Kan.App.2d 459 (1986); 42 Am.Jur.2d Injunctions §§ 2, 20, 23, 24 (1969). Thus, the question of who would be responsible or liable for the necessary alterations will depend on how principles of equity apply to the facts of the case. The court will balance the equities and consider the benefit provided to handicapped individuals and the public good against the inconvenience and costs to the defendant. See 42 Am.Jur.2d Injunctions, § 21 (1969).

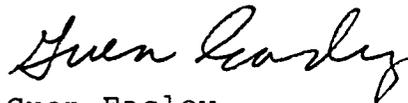
Your last question is what procedure would be required to seek such relief. Those charged with enforcement of the act may apply in the name of the state of Kansas to the district court. See K.S.A. 1990 Supp. 60-906 requirements of form and scope of order. See also K.S.A. 1990 Supp. 58-1308. Actions brought do not require that an aggrieved physically handicapped individual be party to the lawsuit. See K.S.A. 58-1309.

In our judgment, K.S.A. 1990 Supp. 58-1308 authorizes those charged with the act's enforcement to seek mandatory injunctive relief requesting that a public buildings, subject to the act and in violation thereof, be brought into compliance by making it accessible to the handicapped.

Very truly yours,



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