Approved: 2-21-95
Date

MINUTES OF THE HOUSE COMMITTEE ON LOCAL GOVERNMENT.

The meeting was called to order by Chairperson Kent Glasscock at 1:30 p.m. on February 16, 1995 in Room 521-S of the Capitol.

All members were present except: Representative Gary Hayzlett - Excused
Representative John Toplikar - Excused
Representative Broderick Henderson - Excused

Committee staff present: Mike Heim, Legislative Research Department
Theresa Kiernan, Revisor of Statutes
Fulva Seufert, Committee Secretary

Conferees appearing before the committee: Cindy Harmison, Deputy City Attorney-Lenexa, Kansas
Don Moler, General Counsel, Kansas League of Municipalities
Representative Gary Haulmark
Kirk Lowry, Kansas Trial Lawyer s Association
Ron Smith, General Counsel-Kansas Bar Association
Representative Richard Reinhardt
Lisa R. Wetzler, Assistant County Counselor for Johnson County (Written Only)
Maurice J. Ryan, Assistant City Attorney, Legal Department of Kansas City, Kansas (Written Only)

Others attending: See attached list

Chairman Glasscock called the meeting to order at 1:30 p.m. The minutes of the February 14, 1995 meeting were distributed. Representative Feuerborn moved that the minutes be approved and Representative Powers seconded. Motion passed.

The Chairman opened the public hearing for **HB 2189.**

HB 2189: Tort claims act, exemption, GIS information

Chairman Glasscock introduced Cindy Harmison, Deputy City Attorney from Lenexa, Kansas, who appeared as a proponent of **HB 2189.** She explained that the City of Lenexa originally contacted Representative Gary Haulmark and indicated the need for this type of bill. She provided some background information on a geographic information system (GIS). She explained that GIS is a tool whereby interactive graphics and plotting capabilities are used to generate and maintain map sets, and that GIS databases will permit governmental entities to do such things as identify and display all roads of a specified age and size; or identify the location of all man holes or streetlights in the city. (Attachment 1).

Chairman Glasscock introduced the second conferee, Don Moler, General Counsel, Kansas League of Municipalities, who also spoke in support of **HB 2189.** He stated that the League believes this is a helpful enumeration of a newly developing technology and needs to have its own place in the exemption section of the Kansas Tort Claims Act. (Attachment 2).

Written Testimony was provided by Lisa R. Wetzler, Assistant County Counselor for Johnson County in support of **HB 2189**, pertaining to an amendment to the Kansas Tort Claims Act. The testimony said that the proposed amendment would serve as the sole source of protection a government would have in the event of lawsuits and large damage awards. (Attachment 3).

The Chairman announced that the public hearing for **HB 2189** was closed.

Chairman Glasscock opened the public hearing on **HB 2190.**

HB 2190 - Municipalities, uniform payment of claims, notice of claim

Cindy Harmison was again introduced, and she spoke in favor of **HB 2190.** She said that the intent of this type of bill is really two-fold. First, requiring notice to the municipalities within 90 days of the occurrence would provide municipalities the prompt notice they need to make the necessary repairs to avoid future incidents and injuries without compromising an injured party's right to seek relief. Second, this bill would assist municipalities in defending themselves against claims for defective conditions by encouraging the municipality to repair defective or dangerous conditions while still preserving evidentiary matters. (Attachment 4).

The Chairman called attention to written testimony submitted by Maurice J. Ryan, Assistant City Attorney for the Legal Department of Kansas City, Kansas requesting endorsement and passage of **HB 2190**. He also suggested an amendment to this bill. He proposed a 90 day statute of limitations for providing a Notice of Claim to the municipality for any action growing out of a "road defect." Another proposed amendment was that a copy of the N notice of Claim be attached to the Petition. (Attachment 5).

The Chairman introduced Don Moler, who testified in support of **HB 2190**, which would amend the Uniform Procedure for Payment of Claims Act found at K.S.A. 12-105b. He said that it provides that no action can be maintained against a municipality for damages growing out of a defect in the condition of any bridge, boulevard, street, sidewalk, or thoroughfare in the municipality, unless notice has been given in writing to the clerk or governing body of the municipality within 90 days of the occurrence in which such damage is claimed. (Attachment 6).

Representative Haulmark briefly addressed the committee by saying that he strongly supports **HB 2190,** and that he would say "ditto" to all the previous testimony.

Chairman Glasscock next introduced Kirk Lowry, Kansas Trial Lawyers Association, who opposed **HB 2190** because he thinks it is probably unconstitutional, unfair, and not needed. He believes it is unconstitutional because it denies due process of law and equal protection of the law. (Attachment 7).

The Chairman next introduced Ron Smith, General Counsel of the Kansas Bar Association, who also opposed **HB 2190.** He pointed out that the 90-day period is too short, and that most statutes of limitation for filing civil actions are two years from the accident. He gave the example that in some instances of catastrophic injury, the injured person may still be in the hospital or convalescing. Thus he has no ability to consult an attorney, let alone file the action in that short time.(Attachment 8).

Chairman Glasscock announced that the public hearing for **HB 2190** was closed.

The Chairman opened the public hearing for **HB 2166**.

HB 2166 **An Act concerning cities; relating to certain reports by the treasurer thereof; amending K.S.A. 12-1608 and repealing the existing section.**

Representative Richard R. Reinhardt testified as a proponent for **HB 2166** because it was brought to his attention that small cities with very small budgets are required to publish quarterly financial statements in an official newspaper.(Attachment 9).

Chairman Glasscock introduced Don Moler, General Counsel, League of Kansas Municipalities, who also spoke in favor of **HB 2166.** He urged the Committee to favorably report this bill because it reflects the current status of many of the smaller cities and lessens a mandate placed upon them many years ago.(Attachment 10).

Chairman Glasscock announced that the public hearing for **HB 2166** was closed.

Representative Mays moved that **HB 2166** be passed out favorably, and Representative Tomlinson seconded. Motion passed.

The Chairman then asked the Committee to direct its attention to **HB 2189** having to do with the Tort Claims Act, exemption, and GIS information. Representative Powers moved that **HB 2189** be marked favorable for passage. Representative Thimesch seconded. Motion passed.

The meeting adjourned at 2:40 p.m.

The next meeting is scheduled for February 20, 1995.

LOCAL GOVERNMENT COMMITTEE GUEST LIST

DATE: THURSDAY, FEBRUARY 16, 1995

NAME	REPRESENTING
Whitney Damron	City of KC, KS. Pete Mchill's Assoc
Cindy Kelly	KASB
Rick Miller	KDHE
Kirk Lowry	KTLA
Cindy Harrison	City of Seneca
Wes Hall	Pottawatomie Co. Comm.
Tom Schaefer	City of Seneca
Barbara Butts	Dept of Admin
Don Moler	League of KS Municipalities
Marc Farrar	City of Overland Park

TESTIMONY TO HOUSE
LOCAL GOVERNMENT COMMITTEE

RE: HB 2189
(K.S.A. 75-6104 Immunity Provision)

CYNTHIA L. HARMISON, DEPUTY CITY ATTORNEY
LENEXA, KANSAS

February 16, 1995

Chairman Glasscock and Members of the Committee:

My name is Cindy Harmison and I am Deputy City Attorney with the City of Lenexa, Kansas. Some of my primary responsibilities are advising the planning and public works departments on legal issues and representing the City in litigation matters.

The City appears here today as a proponent of this Bill and we strongly urge the Committee's support of House Bill 2189. The City originally contacted Representative Gary Haulmark and suggested the need for this type of Bill. First, I would like to provide you a little background on what is a geographic information system, also referred to as GIS which is the subject matter of this proposed Bill. GIS is a tool whereby interactive graphics and plotting capabilities are used to generate and maintain map sets. It is primarily a spatial database that is developed using many different information sources such as plat maps; engineering maps; roadway maps; parcel ownership information, etc. GIS databases will permit governmental entities to do such things as identify and display all roads of a specified age and size; or identify the location of all manholes or streetlights in the City. It will permit cities to develop their own fluid zoning map. It will permit displays and tabular summaries of such things as all building permits in the City and their location on a map and the location and frequencies of crimes committed in a City. There is no end to the kinds of information that may

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be developed and accessed through GIS, it is only limited by the databases upon which it is developed.

GIS is a very new concept. It has been used quite extensively in Great Britain, however, it is just emerging in the United States. I recently attended a two day conference in Tempe, Arizona, on Law and Information Policy for Spatial Databases put on by the ASU College of Law's Center for the Study of Law, Science and Technology and the National Center for Geographic Information and Analysis. A main focus of this conference was the access rights of citizens to publicly held information and the potential liability to both governmental units and the private sector in connection with the use, sharing, and distribution of GIS data and analysis results. Unfortunately, no clear legal answer exists for these issues.

The greater the sharing of information, the more valuable the GIS database becomes. Thus, information is tapped from many sources in developing a database. It is very difficult to completely verify the accuracy of all the information maintained in a database. The database will generally contain disclaimer provisions advising the user of the need to independently verify the information, however, we all know that there will be situations where people will take the short cut and rely on the information accessed through the government rather than spend any additional time and money in verifying the information through such means as independent surveys or title searches. Moreover, in this litigious society, persons will make claims for alleged damages they incurred as a result of relying upon the information.

From a legal perspective, disclaimers will probably only be a valid defense if the allegation brought against the governmental entity is a breach of contract claim. For other types of negligence or "tort" claims, the disclaimer will probably not apply. Thus, the City is requesting that an additional paragraph be added to the tort claims immunity provision which

would clarify the government's immunity for providing, selling or otherwise distributing information generated from GIS.

Several states have recognized the growing use of electronic data and have addressed the host of issues that accompany GIS such as accessing electronic records, liability issues, etc. I have obtained copies of statutes from Alaska, Connecticut, Florida, Iowa, Kentucky, Maine, Minnesota, Oregon, Utah and Wisconsin, as well as the January 1994 Study of Electronic Records Access: Problems and Issues prepared by the Florida Legislature's Joint Committee on Information Technology Resources.

The City is certainly not encouraging the adoption of HB 2189 in order to be sloppy in its development of its GIS database. In fact, quite the contrary - - the more accurate a database is, the more benefit that can be derived from it. However, errors can and will occur when the information is being inputted into the computer. In addition, the City cannot take responsibility for the veracity of the information it receives from other sources such as in Lenexa's case, Johnson County, which will be a main source of our information. The City firmly believes that the language proposed in HB 2189 is the best way to handle the use of GIS in Kansas. The language will promote the widespread sharing of information and encourage access to government information without the chilling effect that potential lawsuits will have on database development and data sharing.

League
of Kansas
Municipalities

LEGAL DEPARTMENT · 112 S.W. 7TH TOPEKA, KS 66603 · TELEPHONE (913) 354-9565 · FAX (913) 354-4186

LEGISLATIVE TESTIMONY

TO: House Local Government Committee

FROM: Don Moler, General Counsel

RE: Support for HB 2189

DATE: February 16, 1995

The League supports HB 2189 which provides a specific exception from liability pursuant to the Kansas Tort Claims Act under K.S.A. Supp. 75-6104 for providing, distributing, or selling information derived from geographic information systems of the city. We believe this is a helpful enumeration of a newly developing technology and needs to have its own place in the exemption section of the Kansas Tort Claims Act. It is arguable that this exemption is already found in the discretionary function found in subsection (e) of the current law, but we believe that a further definition of this specific function, which has come about as a result of the computer age, perhaps needs to be placed into statute in an effort to specifically exempt governmental entities from liability should a problem occur with the information provided.

We respectfully request that the Committee favorably report HB 2189.

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Johnson County
Kansas

February 16, 1995

HOUSE LOCAL GOVERNMENT COMMITTEE

HEARING ON HOUSE BILL 2189

COMMENTS OF LISA R. WETZLER
ASSISTANT COUNTY COUNSELOR FOR JOHNSON COUNTY

Mr. Chairman, members of the Committee, the following comments are being submitted on behalf of the Johnson County Board of Commissioners, in support of HB 2189, pertaining to an amendment to the Kansas Tort Claims Act.

HB 2189 would add a provision to the Tort Claims Act, providing protection for governments in lawsuits involving geographical information systems (GIS). As governments face greater use of their electronic information systems, protection from damage claims becomes increasingly important. Increased demands are being placed on government systems by members of the public, making the need for certain protection in the form of a tort claim defense is now more urgent than ever.

As government is expected to supply data and information in geographical electronic form, the proposed amendment would serve as the sole source of protection a government would have in the event of lawsuits and large damage awards. In order to encourage and permit governments to share the tremendous wealth of information, now accumulated within their geographical information systems, Johnson County urges the Committee to support this legislation protecting governments in activities involving electronic information.

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TESTIMONY TO HOUSE
LOCAL GOVERNMENT COMMITTEE

RE: HB 2190
(90 DAY NOTICE OF CLAIM PROVISIONS)

CYNTHIA L. HARMISON, DEPUTY CITY ATTORNEY
LENEXA, KANSAS

February 16, 1995

Chairman Glasscock and Members of the Committee:

My name is Cindy Harmison and I am Deputy City Attorney with the City of Lenexa, Kansas. In addition to my other job functions, I am responsible for advising various City departments on legal issues and representing the City in litigation matters.

The City appears here today as a proponent of this Bill and we strongly urge the Committee's support of House Bill 2190. The City originally contacted Representative Gary Haulmark and suggested the need for this type of Bill. The draft language for this Bill was drawn from Missouri Revised Statute §82.210. Missouri also has a ninety (90 day) notice of claim statute for injuries arising on public property. The Missouri statute, however, only applies to cities with a population of 100,00 or more persons.

The intent of this type of Bill is really two-fold. First, when someone is injured on City property they generally have up to two years to make a claim or bring a cause of action against the City. [The statute of limitations for negligent actions in Kansas is 2 years] Depending upon the alleged defective property and its location, the City may not have any knowledge of this defective condition until, if and when, the individual finally makes a claim against the City. Without knowledge of the alleged defective condition, the City is unable to make the necessary repairs to avoid future

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incidents. Although the City prides itself on its park and road maintenance, there are simply not enough employees to be everywhere at all times. Within the City of Lenexa alone we have one City Hall; one police department; four fire stations; three municipal swimming pools; over 23 parks and over 500 lane miles of roadway. Public policy should be to encourage the prompt reporting of defective conditions so that the municipality may take prompt steps to repair or warn of the dangerous or defective condition. A statute requiring notice to the municipalities within 90 days of the occurrence giving rise to the claim would provide municipalities the prompt notice they need to make the necessary repairs to avoid future incidents and injuries without compromising an injured parties right to seek relief. Arguably, there will be certain situations when the City's police department will respond to an accident and, if the accident was a result of a defective condition, they can notify the appropriate City department so that repairs can be made. It has been my experience, however, that all claims do not involve the police...accidents in our City parks is just one example. I have had claims for persons injured on "allegedly defective basketball courts" and "allegedly dangerous playground equipment." Even many claims which involve police response, the allegedly defective condition is not raised when the initial report is taken.

Secondly, this Bill will assist municipalities in defending themselves against claims for defective conditions by encouraging the municipality to repair defective or dangerous conditions while still preserving evidentiary matters. For example, a situation occurred in Lenexa nearly two years ago when a claim was made against the City on the last day of the two year statute of limitations for a defective condition on the unimproved shoulder along a roadway. The individual claimed that they drove into a "low shoulder" during a snowstorm which caused them to lose control of their vehicle and strike another vehicle. To make a long story short, during the preceding two years from the date of the accident to the date the claim was

made, the City completely tore up this roadway and improved it to a "super two" roadway with curbs and gutters. The alleged "low shoulder" no longer existed and other than the testimony of the claimant, the City had no knowledge or evidence as to what this low shoulder looked like on the date in question. Based upon the recollections of the claimant and her witnesses, the City's insurance company paid some pretty substantial sums to settle this claim. In addition, the City has no idea if any other individuals may have experienced this problem prior to commencement of the improvement.

I understand that Kansas previously had a statute similar to this one before you today, however, it was repealed in 1979. Although I am not familiar with the particulars of that statute or the reason for its repeal, I would anticipate that it was a result of the tort claims act which was adopted this same year. The tort claims act, however, does not address the two issues addressed here today. Most importantly, there is no incentive under the tort claims act to promptly notify a city of dangerous or defective conditions. If anything the tort claims act has just the opposite effect, because the 120 day notice provision of K.S.A. 12-105b has the effect of tolling a statute of limitations by the 120 day period in which a City has to consider and either approve or deny a claim.

I don't think the legislature wants to encourage cities to not make improvements to their property because the city is concerned that it may be covering up future potential "evidence" in a lawsuit. Nor does the Legislature want to see innocent persons injured because the City doesn't know a problem exists. Rather, the goal should be to encourage the repair or replacement of defective and dangerous conditions.

LEGAL DEPARTMENT of KANSAS CITY, KANSAS

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Assistants:

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Mary Ann Kancel
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Kenneth J. Moore
Marc D. Conklin

Prosecutors:

Debra D. Brown
Kathleen M. Lynch
Mary Eileen Mallon

February 10, 1995

RE: House Bill 2190

Members of the Local Government Committee:

As an attorney for the City of Kansas City, Kansas, a self insured municipal corporation, I respectfully request your endorsement and passage of House Bill 2190, an act amending K.S.A. 12-105b. At the same time however I would request your consideration of an amendment to this Bill and I would also like to advise you of concerns expressed by the Kansas Court of Appeals.

With respect to the new Section 1 which proposes a ninety (90) day statute of limitations for providing a Notice of Claim to the municipality for any action growing out of a "road defect," although I am unaware of the genesis for this requested change, it does enhance one of the reasons for the Notice of Claim provisions. As a the court stated in Ernest v. Faler, 237 Kan. 125, 132-33 (1985):

> ....[T]he purpose or objective of Notice of Claim provisions fall within four (4) general categories:
>
> (1) Notice of Claim provisions enable the governmental agency to investigate promptly the incident giving rise to the claim thereby facilitating an immediate assessment of potential liability;
>
> (2) Notice of Claim provisions protect against the cost of unnecessary litigation by increasing the likelihood of out-of-court settlements;
>
> (3) Early notice of accidents serves to prevent future accidents by enabling the governmental unit to make any necessary repairs or remedies as quickly as possible; and
>
> (4) Advanced notice of possible liability aids public entities in determining their future taxes and in planning their fiscal budgets.

It is my belief and experience that the most important of these is to assist governmental entities in identifying and repairing hazardous road areas in order to prevent future accidents and I assume that this is the main purpose of the bill.

As for the other proposed amendment, that being that a copy of the Notice of Claim

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be attached to the Petition, I see less of a need for this provision but it may be useful nonetheless.

As I indicated earlier I would respectfully suggest another amendment to this statue. As currently written subsection (d) provides in part that:

> Any person having a claim against a municipality which could give rise to action brought under the Tort Claims Act shall file a written notice...before commencing such action.

As you are aware several actions against municipalities occur because of negligent conduct of municipal employees. Often these employees are named in lawsuits. As you are probably further aware, K.S.A. 75-6109 requires a municipality to indemnify their employees against damages proximately caused by an act or omission of an employee while acting within the scope of his or her employment.

I am unaware of any decisions rendered by the Courts specifically ruling on this phrase, however, the court in Murphy v. City of Topeka, 6 Kan. App.2d 488 (1981) considered the applicability of the notice requirements of K.S.A. 12-105 in an bringing action against individual officers and employees of the City. In that case the court cited to Bradford v. Mahan, 219 Kan. 450, 453 (1976) and opined that K.S.A. 12-105 is clearly intended to apply only to a City and not to the individual officers and employees.

As a result of the above there have been several occasions where suits have been filed naming employees without naming the City while at the same time claiming that the employees were acting within the scope of their employment at the time of the tortious conduct. These suits have been filed often on the last day of the statute of limitations without any prior notice to the City and as a result attorneys have been able to avoid enforcement of K.S.A. 12-105b. Therefore, I would respectfully request that this Bill be amended to require that:

> Any person having a claim against a municipality, or its employees which could give rise to an action brought under the Kansas Tort Claims Act shall file a written notice as provided in this subsection before commencing such action.

Finally, the committee may wish to address the concerns of the Court of Appeals as expressed in Martin v. Board of Johnson County Commissioners, 18 Kan. App.2d 149, 155-158 (1993). Essentially stated, K.S.A. 12-105b(d) creates a potential trap when the statute of limitations runs while the Notice of Claim is under consideration. It is suggested by the Court that the legislature provide a "reasonable time" after denial of a claim for a plaintiff to file an action against a municipality. I do not happen to share the court's concern but the legislature may nevertheless want to consider this issue.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Maurice J. Ryan
Assistant City Attorney

League
of Kansas
Municipalities

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LEGISLATIVE TESTIMONY

TO: House Local Government Committee

FROM: Don Moler, General Counsel

RE: Support for HB 2190

DATE: February 16, 1995

The League would like to thank the Committee for allowing us to testify today in support of HB 2190 which would amend the Uniform Procedure for Payment of Claims Act found at K.S.A. 12-105b. Specifically, it provides that no action can be maintained against a municipality for damages growing out of a defect in the condition of any bridge, boulevard, street, sidewalk, or thoroughfare in the municipality, unless notice has been given in writing to the clerk or governing body of the municipality within 90 days of the occurrence in which such damage is claimed. This would then provide that a city could feel free to improve public rights-of-way without the concern that after the public right-of-way had been modified, a lawsuit could be undertaken and there would be no physical evidence left to refute the claim.

We believe this is a reasonable request and would ask the Committee to favorably consider HB 2190.

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KIRK W. LOWRY
KANSAS TRIAL LAWYERS ASSOCIATION
THE HONORABLE REPRESENTATIVE FROM MANHATTAN
KENT GLASSCOCK, CHAIR
HOUSE COMMITTEE ON LOCAL GOVERNMENT
FEBRUARY 16, 1995
HB 2190

I oppose HB 2190 because it is probably unconstitutional, is unfair, and is not needed.

CONSTITUTIONALITY:

HB 2190 is unconstitutional because it denies due process of law and equal protection of the law.

DUE PROCESS:

The purpose of K.S.A. 12-105b, as a notice of claim statute, is to (1) give notice to the municipality; (2) allows the municipality a chance to correct a defect; (3) investigate the incident. In order to satisfy due process requirements the 90-day statute of limitations must bear a rational relationship to the legitimate municipal interests. The 90-day statute of limitations violates due process because it is too short, the injured person could still be in the hospital or unable to exercise their rights, and the injured person may not know the road defect was the cause of their injury.

EQUAL PROTECTION:

HB 2190 treats similarly situated citizens of Kansas differently. A person hurt by a municipal road defect is subject to a 90-day statute of limitations, while a person hurt by the state road defect has two years. This distinction is unfair and invidiously discriminatory. If two people traveled from Topeka to Lawrence on the same day and had car wrecks caused by a substantially similar road defect, the person who was paralyzed by the state road defect would have two years, while the person paralyzed on a county road would only have 90 days.

The case of Ernest v. Faler, 237 Kan. 125, 697 P.2d 870 (1985) was a Kansas Supreme Court case that held that a 60-day statute of limitations requiring notification to a county attorney prior to filing a civil action for a negligent pesticide application violated the due process and equal protection requirements of the Kansas Constitution. The 90-day statute of limitations operating as a complete bar is simply too short.

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UNFAIR:

There were no statute of limitations at common law. They are legislative creatures of statute. The public policy of a statute of limitation is to prevent stale claims, preserve evidence and promote repose, security and stability. The two-year statute of limitations has fulfilled those requirements. Statute of limitations are already harsh bars of potentially very meritorious cases. Statute of limitations are by their nature arbitrary, not based in logic or justice, but compromises for the sake of necessity, convenience and expediency. The legislature should not use statute of limitations to cut off valid rights from valid claims.

Since most, if not all, road defect cases are personal injury claims, it would also be difficult for a person to substantially comply with the requirements of K.S.A. 12-105b(d) because they probably could not consult with an expert engineer to get a professional opinion about the defect, nor would their injuries be healed to the point to where they could respond in making a rational claim of monetary damages.

NOT NEEDED:

A 90-day statute of limitations is not needed. Two years has been the cut-off period. There have been no flood of road defect cases. The Kansas Tort Claims Act protects municipalities with the discretionary function exception, signing exception, snow and ice exception, original plan exception and the minimum maintenance road exception. (K.S.A. 75-6104(e)(h)(l)(m)(r).

Finally, HB 2190 has internal conflicts. The new Section 1 sets up a 90-day statute of limitations while the provisions in K.S.A. 12-105(b)(d) retains the requirement that any claims brought pursuant to the Kansas Tort Claims Act be commenced within the time period provided for in the Code of Civil Procedure which would be two years.

For these reasons, HB 2190 is not good law and should not be passed out of Committee.

Respectfully submitted,

Kirk W. Lowry

1882

KANSAS BAR ASSOCIATION

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Memorandum

TO: Rep. Kent Glasscock, Chair
Members, House Local Government

FROM: Ron Smith
General Counsel, KBA

SUBJ: HB 2190

DATE: February 16, 1995

This bill requires as a condition of filing a lawsuit against a "municipality" an artificial notice of the injury and claim. It is an intentional Catch 22 in our law. It is a provision that is intended to put artificial barriers against lawsuits for the sole benefit of "municipalities" and their public works departments.

This legislation essentially changes the law to require that anyone injured by a *"defect in the condition of any bridge, boulevard, street, sidewalk or thoroughfare in the municipality unless notice has been given in writing to the clerk or governing body of the municipality within 90 days of the occurrence for which such damage is claimed."*

This legislature has embraced the concept that it has a mandate from Kansans to provide a system of government requiring greater accountability and responsibility for a person's own actions. Few people can argue with that philosophy. Yet with this bill government itself, namely cities, are seeking legislation which in some instances makes it impossible to file an action for damages. Thus the city avoids the requirement of being "responsible for its actions" that it preaches to everyone else.

This 90-day period is too short. Most statutes of limitation for filing civil actions are two years from the accident. In some instances of catastrophic injury, the injured person may still be in the hospital or convalescing. He has no ability to consult an attorney, let alone file the action in that short time.

The basis of the Kansas Tort Claims Act is, *in certain* instances to make the government liable for negligent injury *on the same basis as individuals would be if they did the same work.* This bill is contrary to that intent.

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If the purpose of this bill is to force persons hurt by negligent maintenance of bridges, streets, sidewalks and thoroughfares to report such defects so the city can fix the problem so other people won't get hurt -- that is a highly laudable reason. But the question is whether that purpose can be accomplished without cutting off a person's right to sue if they do not comply. *I submit that all it takes is a photocopy of relevant police reports of accidents involving roads, sidewalks, and thoroughfares to be sent to the public works department.* If that is incomplete, other ideas can be implemented short of affecting statutes of limitation.

If the purpose of this bill is something other than the above, the laudable purpose for this new law evaporates.

Is the city going to constantly remind its taxpayers of this 90-day requirement? The vast majority of people do not go to attorneys within 90 days of the accident. They often are reluctant to sue in the first place. By waiting and going to attorneys only at the last minute, they are caught in this Catch 22.

The types of cases this bill would impact are the following:

1. Taxpayer swerves to avoid hitting a pothole [later described by residents as a "crater"] and runs into a city public works truck whose employees were fixing the pothole/crater. Taxpayer elects not to file suit. A year later, the city files an action against the taxpayer for damages to its truck that the taxpayer's insurance carrier refuses to pay. The City has a two-year statute of limitation for its cause of action concerning the truck, and is not subject to a 90-day notice. However, if the taxpayer counter claims that the city's negligence caused the accident and wants to show it, the city interposes the fact the taxpayer has not filed a notice under Section 1. City can sue, but the taxpayer cannot.

2. Taxpayer is injured in automobile accident where the taxpayer had to swerve to avoid an oncoming car which, itself, had swerved to avoid hitting a large pothole. The taxpayer may have a lawsuit against the other driver for negligence. The other driver under comparative negligence principles will claim the city's failure to maintain the road was the cause of the accident. Defendant interpleads the City as a codefendant. The city argues that since the taxpayer did not file a notice of claim within ninety days, it has no liability. The defendant driver can pay only such driver's proportionate negligence. The jury finds the defendant 10% at fault, and the city 90% at fault. Taxpayer's injuries are $100,000. Taxpayer recovers nothing from the city and only $10,000 from the other driver.

3. Business "A" has a valuable employee who is driving on a business errand and is involved in the "swerve to miss pothole" scenario above. Since this accident occurred on the job, employer pays $25,000 in workers compensation benefits.

Employee files suit a year later against Defendant. Employer has subrogation rights. Defendant interpleads the city. Same result -- $100,000 verdict, 10%/90% liability determination. $10,000 recovery. Employer has an inadequate verdict on which to subrogate worker's compensation benefits. Employer, thus subsidizes this law because he pays workers comp insurance for an accident that may have been the city's fault.

Sometimes, but not often, government employees are negligent and cause harm to people. In days past when insurance did not exist and cities and counties were far less sophisticated and their staffs were not professional managers, nor were city workers well trained, the doctrine of Governmental Immunity applied. Even under Governmental Immunity, however, the legislature made cities and counties responsible by statute for defective road conditions. The Kansas Tort Claims Act contains a discretionary function exception patterned after the discretionary function exception in the Federal Tort Claims Act. 28 U.S.C. 2680(a). The Kansas exception, at K.S.A.1981 Supp. 75-6104, provides:

"A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

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"(d) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion be abused."

The KTCA contains a further specific "signing exception" immunity for discretionary decisions whether to put up traffic signs that is patterned after the Oklahoma Political Subdivision Tort Claims Act, Okla.Stat.Ann. tit. 51, s 151 et seq. (West 1981 Supp.), specifically[231 Kan. 786] at s 155(15). The Federal Tort Claims Act contains no parallel provision. K.S.A.1981 Supp. 75-6104(g) provides exemption from liability resulting from:

"(T)he malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction or removal. Nothing herein shall give rise to liability arising from the act or omission of any governmental entity in placing or removing any of the above signs, signals or warning devices when such placement or removal is the result of a discretionary act of the governmental entity."

In addition, K.S.A.1981 Supp. 75-6104 contains a catch-all provision which provides:

"The enumeration of exceptions to liability in this section shall not be construed to be exclusive nor as legislative intent to waive immunity from liability in the performance or failure to perform any other act or function

of a discretionary nature."

My point is it is not enough just for the city or its employees to be negligent. Certain types of negligence are already immune from liability. This bill makes all negligence immune from liability if 90 days passes without a notice being filed. All the equities already reside with the city without granting further exceptions.

In 1976, the Kansas Supreme Court reviewed the Governmental Immunity doctrine and held it was a judge-made doctrine part of the common law, and therefore the *judges* took it upon themselves to abolish a doctrine they felt had outlived its usefulness. They invited the legislature to create a Tort Claims Act setting forth when liability should attach to the cities. In 1976 and 1977 the legislature did *not* elect to shorten statutes of limitation, since it was the legislature's apparent consideration that *in those instances when the government should be held liable, the statute of limitations should be the same as that imposed on individuals by the Code of Civil Procedure.* As was held in a December, 1994 case:[1]

> The history surrounding the enactment of the KTCA does not clearly reveal the legislature's intent as to the applicable statute of limitations for claims brought under the KTCA. All discussions regarding a limitations period, however, referred to a two-year period. *** As noted above, instead of specifying which limitations period applied to claims brought under the Act, the final version of the statute adopted by the legislature simply states that all claims are subject to the Kansas Code of Civil Procedure.

Finally, in this modern day of self-insurance pools and ready availability of liability insurance for cities and counties, the protectionism in Section 1 of this bill is unnecessary.

I am aware that Kansas Tort Claims Act is an act of grace by the legislature. But there is an unwritten rule of conduct between government and the governed. If the government wants respect from its citizens, it should not attempt to obtain advantages in disputes with its citizens that it does not grant to them. By giving municipalities a 90 day statute for liability when the city may be at fault but a 2-year statute when the city may want to sue taxpayers, that is an unequal standard that -- regardless of constitutionality -- will not be considered to be wise legislation. If Government is not perceived as being fair, why do they expect good citizenship from its taxpayers?

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[1] *Gehring v. Kansas Department of Transportation,* ___ *Kan.App.2d* __, ___ *P.2d.* ___, 1994 WL 685859 No. 71,282. (Dec. 1994); (See proposal No. 11--Tort Claims Act for Local Government, Report on Kansas Legislative Interim Studies to the 1979 Legislature-Special Committees, 269, 276 (1978) (Kansas Trial Lawyers Association suggested two-year limitations period for filing a claim, as found in the Federal Tort Claims Act); Kansas Tort Liability Act Proposed, 65 Kansas Gov't J., 36, 37 (January 1979) (attachment to Minutes of the Senate Judiciary Committee, January 18, 1979) (injured party would have two years to file an action for damages under KTCA); League of Kansas Municipalities Special City Legislative Bulletin No. 12, p. 3 (1979) (attachment to Minutes of the House Judiciary Committee, March 20, 1979) (injured party presumably would have up to two years to file action for damages under the Code of Civil Procedure).

KBA'S POSITION on these sorts of changes in statutes of limitations is that we oppose such change unless the public genuinely understands the change and the public approves of such change. We think neither condition applies. I doubt if the city proponents of this legislation have *fully informed* their voters as to what this bill does and polled their reaction.

The KBA Board of Governors opposes this bill. We hope you'll reject it. Thank you.

8-5

STATE OF KANSAS

ICHARD R. REINHARDT
REPRESENTATIVE, 8TH DISTRICT
MOST OF NEOSHO COUNTY
ND PART OF ALLEN COUNTY
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ERIE, KANSAS 66733

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: AGRICULTURE
APPROPRIATIONS
LEGISLATIVE EDUCATIONAL PLANNING COMM.

TO: HOUSE LOCAL GOVERNMENT COMMITTEE

FROM: REP. RICHARD R. REINHARDT

RE: HOUSE BILL 2166

It was brought to my attention that small cities with very small budgets are required to publish quarterly financial statements in an official newspaper.

I have also been told that few small towns comply with this law and it would seem to me to be an unnecessary expenditure.

Although this may be appropriate for larger cities, I would think in the case of small cities the financial statements published annually would be sufficient.

I thank you for your favorable consideration. I will be happy to answer any questions.

House Local Government
2-16-95
Attachment 9

League
of Kansas
Municipalities

LEGAL DEPARTMENT · 112 S.W. 7TH TOPEKA, KS 66603 · TELEPHONE (913) 354-9565 · FAX (913) 354-4186

LEGISLATIVE TESTIMONY

TO: House Local Government Committee

FROM: Don Moler, General Counsel

RE: Support for HB 2166

DATE: February 16, 1995

We would like to thank the Committee for allowing us to appear today in support of HB 2166. This bill recognizes the simple truth that cities of the third class are by their very nature typically smaller than those of the second or first class, have limited staff and limited resources and perhaps should not be held to the same standard as a city with a large, highly profession staff. W support HB 2166 because it allows for yearly rather than quarterly filing of certain financial statements by cities of the third class. This will not only save significant amounts of money for small cities which have to publish this information in the newspaper, but it will place less of a burden on city treasurers in cities of the third class whose primary function is to sign checks issued by the city. We believe that this statute, and its recent interpretation in a single county, is not well served by holding cities of the third class to a quarterly publishing requirement. We further believe that since all of the information contained in this published report is an open record that a citizen of a city can obtain it at any time, simply by making a request of the city.

We would therefore urge the Committee to favorably report HB 2166 in realization that it reflects the current status of many of our smaller cities and lessens a mandate placed upon them many years ago.

House Local Government
2-16-95
Attachment 10