

Approved: March 8, 1996  
date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on March 5, 1996 in Room 123-S of the Capitol.

Members present: Senators Salisbury, Burke, Feleciano, Gooch, Harris, Hensley, Jordan, Petty, Ranson, Reynolds, Steffes and Vidricksen.

Committee staff present: Lynne Holt, Legislative Research Department  
Jerry Donaldson, Legislative Research Department  
Bob Nugent, Revisor of Statutes  
Betty Bomar, Committee Secretary

Conferees appearing before the committee:  
William F. Caton, President, Kansas Development Finance Authority  
Mary Faye LaFaver, Director, Community Development Division, Department of  
Commerce and Housing

Others attending: See attached list

Upon motion by Senator Steffes, seconded by Senator Harris, the Minutes of the February 27, 1996 meeting were unanimously approved.

**HB 2686: Tort claims immunity for kansas development finance authority**

William F. Caton, President, Kansas Development Finance Authority (KDFA), appeared before the Committee in support of HB 2686. Mr. Caton stated HB 2686 ratifies in statute that the KDFA and any subsidiaries are provided coverage under the Kansas Tort Claims Act. HB 2686 provides a clarification resulting from KDFA board investigation of liability issues. KDFA's board, in efforts to obtain Public Officials Liability insurance, requested Attorney General Robert Stephan to review liability issues. He issued a negative opinion regarding the Kansas Tort Claims act causing considerable concern to the KDFA board members, who serve without compensation. KDFA retained independent counsel regarding the liability concerns of board members, officers and staff. Independent counsel disagreed with Attorney General Stephan's opinion and suggested a request for reconsideration and review. A new opinion was requested of Attorney General Stovall which contradicted the former opinion; however, KDFA's counsel recommended statutory clarification. This bill clears up any legal issues relating to liability insurance carried by KDFA board members, officers and staff. Attachment 1

Senator Burke moved, seconded by Senator Feleciano, that **HB 2686** be recommended favorable for passage. The recorded vote was unanimous in favor of the motion.

**HB 2719: Repealing a portion of the enterprise zone law**

Bob Nugent, Revisor of Statutes, stated HB 2719 repeals the statute that allows a taxpayer to claim a job expansion and investment credit even if the qualified business facility was in an area not yet declared to be an enterprise zone.

Senator Feleciano moved, seconded by Senator Petty, that **HB 2719** be recommended favorable for passage. The recorded vote was unanimous in favor of the motion.

**HB 3040: Strategic planning assistance extended an additional year**

Mary Faye LaFaver, Director, Community Development Division, appeared in support of HB 3040. Ms. LaFaver stated HB 3040 provides for the expiration of non-metropolitan and metropolitan counties Strategic Planning Program grants on July 1, 1997. Presently the non-metropolitan counties program is scheduled to expire on July 1, 1996; and the metropolitan counties program is scheduled to expire on July 1, 1998.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m. on March 5, 1996.

Ms. LaFaver stated in order for the Community Development Division to achieve its mission to plan for the future, assess strengths and weaknesses, and develop and implement strategies to preserve and enhance the livability of Kansas communities, it is necessary for the Division to re-examine the planning process. The Division is requesting passage of HB 3040 to allow it to commence an assessment and re-examination of both the Strategic Planning Program and the Action Grant Program. Attachment 2

The Committee requested Ms. LaFaver provide it with information from both metropolitan counties and non-metropolitan counties regarding strategic planning programs, including any efforts to regionalize planning efforts. The Committee further requested additional information regarding Division's assessment of programs.

The meeting adjourned at 8:45 a.m

The next meeting is scheduled for March 6, 1996.

# SENATE COMMERCE COMMITTEE GUEST LIST

DATE: March 5, 1996

NAME	REPRESENTING
Bill Caton	KDFW
Mary Jay Latham	KDOCH
Roger Franzel	FFC
Bernie Koch	Wichita Area Chamber of Commerce
Gene M. Scoble	KTLA



# KANSAS

KANSAS DEVELOPMENT FINANCE AUTHORITY

Bill Graves  
Governor

Wm. F. Caton  
President

**TESTIMONY**  
**SENATE COMMERCE COMMITTEE**  
**HOUSE BILL No. 2686**  
**by BILL CATON**  
**MARCH 5, 1996**

Thank you for the opportunity to testify before you today. I intend to be very brief as this bill is very straight forward. It simply ratifies in statute that the Kansas Development Finance Authority ("KDFA") and any subsidiaries are provided coverage under the Kansas Tort Claims Act.

This request for statutory clarification arose out of KDFA board investigation of liability issues regarding KDFA and any subsidiaries, specifically the Kansas Equity Fund which was authorized by the 1994 Legislature to enhance the delivery of federal Low Income Housing Tax Credits issued by the U.S. Treasury and allocated by the Kansas Department of Commerce and Housing. KDFA's board, in efforts to obtain Public Officials Liability insurance, requested Attorney General Robert Stephan to review liability issues. His negative opinion regarding the Kansas Tort Claims Act came as quite a surprise and caused considerable concern by KDFA board members, who serve without compensation of any kind.

KDFA then retained independent counsel to address the serious concerns regarding liability of KDFA board members, officers and staff. Independent counsel disagreed with Attorney General Stephan's opinion and suggested we ask for review and re-consideration. A new opinion was requested of Attorney General Carla Stoval. Her opinion was favorable and gave the board some relief and comfort. However, KDFA's counsel recommended that statutory clarification would clear up the matter unequivocally, which is what you have before you in HB 2686. For your information, I have provided both Attorney Generals' opinions and other pertinent correspondence. The highlighted synopsis of both opinions indicate the basis for the conflicting opinions.

Not only does this bill clear up any legal issues and potential confusion caused by the contradicting Attorney General opinions, it provides additional comfort to KDFA board members, who provide a great public service and donate their talents and expertise to KDFA and the State. It also clarifies issues raised by our liability insurance carrier.

I respectfully request that you act favorably on House Bill 2686. I will be happy to answer any questions.

*Senate Commerce Committee*  
*March 5, 1996*



# KANSAS

KANSAS DEVELOPMENT FINANCE AUTHORITY

Joan Finney  
Governor

Wm. F. Caton  
President

September 27, 1994

Robert T. Stephan, Attorney General  
Judicial Center  
301 SW 10th, 2nd floor  
Topeka, Kansas 66603

Dear Bob:

The Kansas Development Finance Authority (K DFA) Board has directed me to contact you relating to liability exposure of the directors, officers and employees of K DFA. More specifically, the Board is concerned whether the statutes governing K DFA adequately protect the Board from personal liability arising out of their volunteer service as directors. The specific statute addressing the legislative protection is K.S.A. 74-8910 which was amended by the 1994 Session. I have enclosed a copy of the 1994 Session Laws for your convenience.

One specific question the Board has is whether the directors are covered under the Tort Claims Act. As you know, K DFA is a body politic and not a full fledged State agency. All Board members are appointed by the Governor with the exception of the Secretary of Commerce and Housing, who is a statutory member.

Your opinion on this subject will help the Board determine if there is any real value in purchasing Directors and Officers Legal Liability coverage, which I might add is very expensive and limited in coverage. Possibly you or one of your assistants has dealt with this subject and it would not be difficult to focus on how this subject applies specifically to K DFA.

Your earliest response will be greatly appreciated. A letter addressed to the K DFA Board would be appropriate. Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Wm. F. Caton".

Wm. F. Caton  
President

and empowered to enter into agreements with, to grant, convey, lease or otherwise transfer any property to, or to otherwise transact business with the authority, shall have the same authorization and power to engage in these activities with each subsidiary corporation of the authority.

One or more such subsidiary corporation may be formed for purposes of establishing state tax credit equity funds to assist in the development of low-income and middle-income housing and obtain financing through participation in the program established in section 42 of the federal internal revenue code.

Actions of the authority or any subsidiary corporation relating to housing pursuant to this subsection (v) shall be carried out in accordance with any terms, conditions and limitations relating to policy issues regarding housing, as established by the secretary of commerce and housing.

Sec. 2. K.S.A. 74-8910 is hereby amended to read as follows: 74-8910. No director, employee or officer of the authority shall be liable personally for any reason arising from the issuance of bonds hereunder service of such person as a director, employee or officer of the authority or any subsidiary corporations created pursuant to this act unless such person acted with willfull willful, wanton or fraudulent misconduct or intentionally tortuous conduct.

Sec. 3. K.S.A. 74-8904 and 74-8910 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 14, 1994.

CHAPTER 224  
HOUSE BILL No. 2786

AN ACT relating to health care decisions; concerning durable power of attorney for health care decisions; relating to immunity standards for disposition of dead bodies; natural death act, requirements for making declaration; amending K.S.A. 65-28.103 and K.S.A. 1993 Supp. 58-629 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1993 Supp. 58-629 is hereby amended to read as follows: 58-629. (a) A durable power of attorney for health care decisions may convey to the agent the authority to:

(1) Consent, refuse consent, or withdraw consent to any care, treatment, service or procedure to maintain, diagnose or treat a physical or mental condition, and to make decisions about organ donation, autopsy, and disposition of the body;

(2) make all necessary arrangements for care in a hospital, psychiatric hospital or nursing home or similar institution; and  
care personnel to include dentists, nurses, therapists certified, or otherwise authorized by the state to administer health care for the physical, mental and

(3) request, receive and review, regarding the principal's health including medical records and releases of other documents, such information.

(b) The powers of attorney set out in writing in the decisions, and shall not in any way modify or supersede any previously existing declaration of the natural death act. No power of attorney created pursuant to this section shall be effective in the event of the principal's inability or incapacity, as defined in subsection (a), unless the duration of the power of attorney is specifically provided in the instrument construed as prohibiting the use of any other legal means through practice of medical care and health care services and practices of any other health care provider if the principal is a member.

(c) In exercising the power of attorney for health care decisions, the agent shall act in accordance with the expressed desires of the principal.

(d) Neither the treating physician nor any other employee of the treating hospital or health care facility, director or officer of a health care facility, shall be liable for decisions under a durable power of attorney unless:

(1) Related to the principal's health care; and  
(2) the principal or another person who are both authorized to act for or assist in the conduct



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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

ROBERT T. STEPHAN  
ATTORNEY GENERAL

October 25, 1994

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

ATTORNEY GENERAL OPINION No. 94-140

William F. Caton  
Kansas Development Finance Authority  
700 S.W. Jackson, Ste. 1000  
Topeka, Kansas 66603

Re: State Boards, Commissions and Authorities --  
Development Finance Authority -- Exemption from  
Liability of Directors and Officers of Authority

State Departments; Public Officers and Employees --  
Kansas Tort Claims Act -- Liability of Governmental  
Entities for Damages Caused by Employee Acts

Synopsis: The provisions of K.S.A. 74-8910, as amended by L. 1994, ch. 223, § 2, will protect the directors, employees and officers of the Kansas development finance authority from personal liability for conduct arising out of their service to the authority, as long as it is not willful or intentionally tortuous. The directors of the authority are not, however, protected under the tort claims act. Cited herein: K.S.A. 40-4403, repealed, L. 1994, ch. 32, § 2; 40-4405 repealed, L. 1994, ch. 32, § 2; 74-8903; 74-8910, as amended by L. 1994, ch. 223, § 2; K.S.A. 1993 Supp. 75-6102, as amended by L. 1994, ch. 343, § 1; K.S.A. 75-6103; L. 1994, ch. 223, § 2; K.S.A. 74-8910 (Furse 1992).

\* \* \*

Dear Mr. Caton:

You have requested our opinion regarding what personal liability limitations are available for the directors, officers and employees of the Kansas finance development authority.

First you ask what effect the 1994 amendments of chapter 223, § 2, will have upon the liability of the officers and directors of the authority. In 1994, K.S.A. 74-8910 was amended to read as follows:

"No director, employee or officer of the authority shall be liable personally for any reason arising from the service of such person as a director, employee or officer of the authority or any subsidiary corporations created pursuant to this act unless such person acted with willful, wanton or fraudulent misconduct or intentionally tortuous conduct."

It is clear that the intent of the legislature is for the Kansas development finance authority's directors, officers and employees to be protected from personal liability. However, the statute is not clear as to how far this coverage extends.

When the meaning of a statute is not clear, the legislative history should be reviewed. Koch v. Shell Oil Co., 820 F.Supp. 1336 (D.Kan. 1993). The extent of each of the authority's directors', officers' and employees' coverage can be derived from the recent changes made to the statute. Any changes and additions to existing statutes raise a presumption that a change in meaning and effect was intended. Moore v. City of Lawrence, 232 Kan. 353(1982). In this case, the statute was broadened in two ways.

First, the statute was expanded to include more individuals under its protection. Originally, the statute only protected "directors or officers." K.S.A. 74-8910 (Furse 1992). "Employees" were included by the 1994 legislature. L. 1994, ch 223, § 2.

Secondly, the statute expanded the areas over which it protected the individuals listed above. Pursuant to the amendment, the above individuals are now protected from personal liability arising from "service of such" individual



as a "director, employee or officer of the authority or any subsidiary corporations created pursuant to this act. . . ." Id . Originally the statute only protected directors and officers from personal liability in the "issuance of bonds." K.S.A. 74-8910 (Furse 1992).

In addition to the inference drawn from these changes on their face, the legislature's intent can be derived from looking at the purpose for the changes. To determine legislative intent, it is proper to review the circumstances attending the passage of the statute and the purpose intended to be accomplished. West v. Collins, 251 Kan. 657 (1992). When this amendment was introduced, the purpose was "to give increased protection for KDFA's board and staff from potential liability created by this legislation." Minutes, Senate Committee on Financial Institutions and Insurance, March 17, 1994.

After reviewing the legislative history and giving the statutory language its plain and ordinary meaning, we opine that this statute has been expanded to protect directors, officers and employees of the authority from personal liability for conduct arising from their service as such. However, the statute does not protect conduct which is willful, fraudulent or intentionally tortuous.

Your second question is whether or not the directors of the authority are covered under the tort claims act. K.S.A. 75-6103 imposes liability on governmental entities for negligent and wrongful acts of employees of those entities when they are acting within the scope of their employment. The definitions of "governmental entity" and "employee" are set forth in K.S.A. 1993 Supp. 75-6102, as amended by L. 1994, ch. 343, § 1:

"As used in K.S.A. 75-6101 through 75-6118, and amendments thereto, unless the context clearly requires otherwise:

"(a) 'State' means the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof.

. . . .

"(c) 'governmental entity' means state or municipality.

"(d) 'Employee means any officer, employee, servant or member of a board, commission, . . . . of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation. . . ." Id.

This definition of employee is expansive enough to include the directors of the authority, if the authority is considered to be a governmental entity.

This office has previously opined that members of the boards of directors of the Kansas healthy kids corporation (KHKC), the corporation for change, the technical enterprise corporation (KTEC) and the information network of Kansas (INK) are covered by the tort claims act. Attorney General Opinions No. 86-155, 92-104, 93-62. In determining that the KHKC and corporation for change directors were covered by the tort claims act, we noted that the statutes creating those entities were virtually identical to those statutes creating the KTEC and the INK. Attorney General Opinion No. 93-62. The statute creating the KHKC provided that:

"(a) There is hereby created a body politic and corporate to be known as the Kansas healthy kids corporation. The Kansas healthy kids corporation is hereby constituted a public instrumentality and the exercises of the authority and powers conferred by this act shall be deemed and held to be the performance of an essential governmental function." K.S.A. 1993 Supp. 40-4403, repealed L. 1994, ch.32, § 2. (Emphasis added).

The statute creating the Kansas development finance authority provides that:

"There is hereby created, with such duties and powers as are hereinafter set forth to carry out the provisions of this act, a public body politic and corporate, with corporate succession, to be an independent instrumentality of this state exercising essential public functions, and to be

known as the Kansas development finance authority." K.S.A. 74-8903.

Though the wording of these statutes is not identical, the language of both are similar. Both the KHKC and the authority are bodies politic and corporate. Id. However, there are several significant differences between the statutes.

First, the KHKC was "held to be an essential governmental function," whereas the authority is "exercising essential public functions." Id. Secondly, the KHKC is a "public instrumentality," whereas the authority is an "independent instrumentality." Id. These differences in wording indicate that the legislature intended the authority to be a different type of body than the KHKC.

Another factor which weighed heavily when the KHKC and the corporation for change were found to fall under the tort claims act was the provisions of K.S.A. 1992 Supp. 40-4405, repealed L. 1994, ch. 32, § 2. Attorney General Opinion No. 93-62. That statute provided in part:

"(a) All employees of Kansas healthy kids corporation shall be considered to be state employees and Kansas health kids corporation shall be considered to be a state agency for purposes of the laws governing payroll accounting . . . .  
K.S.A. 40-4405 (Furse 1992). (Emphasis added).

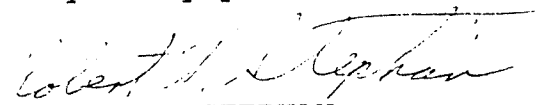
In Attorney General Opinion No. 93-62, we noted that similar language was inserted in statutes covering "employees of the corporation for change . . . Kansas, Inc. and KTEC . . . and those covering INK. . . ." Id. We went on to state that "if these entities, and therefore the employees of the entities while acting within the scope of their employment, are deemed to be performing essential governmental functions, they are entitled to protection under the tort claims act." Id. Similar language does not appear in the statute regarding the Kansas development finance authority.

Additionally, there is strong evidence in the legislative history indicating the authority was not to be considered a state agency. Again, in determining legislative intent it is proper to look at the historical background, circumstances attending the passage of the act and the purpose that was to be accomplished. West v. Collins, supra. When the

legislature was contemplating the creation of the authority, Senator Winter, the chairman of the senate committee on economic development, stated "the Authority is envisioned, in SB 73, to be outside of state government. It would not be a state agency but would be a separate body, created by the state with independent authority and powers." Minutes, Senate Committee on Economic Development, March 5, 1987.

Based upon the comparison between the statutes and the legislative history of the statutes creating the authority, we opine that the Kansas development finance authority is not a "governmental entity" under the tort claims act, and therefore its directors, officers and employees are not covered by that act. However, the directors, employees and officers are protected from personal liability for actions which are performed in the service of the authority under K.S.A. 74-8910, as amended by L. 1994, ch. 223, § 2.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Lawrence J. Logback  
Assistant Attorney General

RTS:JLM:LJL:bas



# KANSAS

KANSAS DEVELOPMENT FINANCE AUTHORITY

Bill Graves  
*Governor*

Wm. F. Caton  
*President*

June 28, 1995

Ms. Carla Stovall, Attorney General  
Judicial Center  
301 S.W. 10th, 2nd Floor  
Topeka, Kansas 66612-1597

Dear Attorney General Stovall:

On October 25, 1994, Attorney General Robert Stephan issued Opinion No. 94-140 regarding Kansas Development Finance Authority ("KDFa") and significant issues relating to the liability of officers and directors who serve KDFa. The KDFa Board has retained independent counsel to address this issue since it has a very significant impact on the board members, officers and employees of KDFa.

We respectfully disagree with Opinion No. 94-140. Attached is a summary paper issued by our outside counsel, who also disagrees with this Opinion. Please refer to the legal analysis of this paper which presents our position very proficiently.

The Attorney General's Opinion places too much significance on the statutory language creating KDFa as being intentionally different from other State created entities in that it is an "independent instrumentality" rather than a "public instrumentality". KDFa performs essential public functions and receives all of its authority from the Legislature. The language from KDFa's enabling statutes was formulated very closely after the statute which created the Arkansas Development Finance Authority; the significance of the word "independent" is simply that it was used in the Arkansas statute and was not intended to exclude KDFa from being a governmental entity.

We respectfully request that you immediately re-address this issue at your earliest convenience. A reversal of this Opinion would be in the best interest of KDFa, and, in turn, the State of Kansas. Not only does this issue seriously affect the ability of the Governor to appoint quality board members to KDFa (who serve at no compensation), but it also will have a serious affect on the ability of KDFa to continue to serve the various State agencies and departments for which it provides valuable services that are integral to the efficient operation of State government.

Ms. Carla Stovall, Attorney General  
June 28, 1995  
Page Two

I would be happy to meet with you and your staff if further discussion is needed on this issue. I will make myself available at your earliest convenience. KDFB has a Board meeting on July 7, 1995, and I was hoping to inform them as to when this issue will be re-addressed by your office. Thank you for your attention in this matter.

Sincerely,



Wm. F. Caton  
President

WFC:tmg

Attachment



RECEIVED  
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K D F A

State of Kansas

Office of the Attorney General

301 S.W. 10TH AVENUE, TOPEKA 66612-1597

CARLA J. STOVALL  
ATTORNEY GENERAL

August 3, 1995

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

ATTORNEY GENERAL OPINION NO. 95- 78

William F. Caton  
President  
Kansas Development Finance Authority  
700 S.W. Jackson, Suite 1000  
Topeka, Kansas 66603-3758

Re: State Boards, Commissions and Authorities--  
Development Finance Authority--Exemption From  
Liability of Directors and Officers of Authority;  
Attorney General Opinion No. 94-140

State Departments, Public Officers and  
Employees--Kansas Tort Claims Act--Liability of  
Governmental Entities for Damages Caused by  
Employee Acts; Attorney General Opinion No. 94-140

Synopsis: The Kansas tort claims act applies to the Kansas  
development finance authority because it is an  
authority pursuant to K.S.A. 1994 Supp.  
75-6102(a). Any conclusion to the contrary in  
Attorney General Opinion No. 94-140 is hereby  
withdrawn. Cited herein: K.S.A. 68-2003; 68-2004;  
74-8104; 74-8903, as amended by L. 1995, ch. 241, §  
20; K.S.A. 1994 Supp. 74-8905, as amended by L.  
1995, ch. 125, § 2; 74-8910; 75-6102, as amended by  
L. 1995, ch. 82, § 7; K.S.A. 75-6103; K.S.A. 1994  
Supp. 75-6104, as amended by L. 1995, ch. 56, §  
260; 77-201.

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Dear Mr. Caton:

You request that we revisit the issue of whether the Kansas tort claims act applies to the Kansas development finance authority (authority). In an opinion issued by former Attorney General Robert T. Stephan, it was concluded that the act did not apply. Attorney General Opinion No. 94-140.

The tort claims act provides that "each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment" unless an exception applies which, in that event, would immunize the governmental entity and its employees from liability. K.S.A. 75-6103(a); K.S.A. 1994 Supp. 75-6104, as amended L. 1995, ch. 56, 260.

Governmental entity is defined as "state or municipality." K.S.A. 1994 Supp. 75-6102(c). State is defined as "the state of Kansas and any department or branch of state government, or any agency, *authority*, institution or other *instrumentality* thereof." K.S.A. 1994 Supp. 75-6102(a).

The issue we address is whether the authority constitutes one of the entities listed in the definition of state.

The authority was created in 1987 to be a "state-wide multiple-purpose bond issuing authority" which would provide an alternative means of financing capital improvements for state agencies and economic development projects in the private sector. *Minutes*, Senate Committee on Economic Development, February 11, 1987, Attachment III; February 26, 1987, April 1, 1987, Attachment III.

K.S.A. 74-8903(a) provides, in relevant part, as follows:

"There is hereby created, with such duties and powers as hereinafter set forth to carry out the provisions of this act, a *public body politic and corporate*, with corporate succession, to be an *independent instrumentality of this state exercising essential public functions*, and to be known as the Kansas development finance authority." (Emphasis added).

The authority is given wide-ranging powers similar to those of the Kansas turnpike authority and the Kansas technology enterprise corporation, both of which are bodies "politic and



corporate" like the authority. K.S.A. 68-2003; 68-2004; 74-8104. The authority issues bonds to finance capital improvement projects authorized by political subdivisions of the state for educational facilities, health care facilities and housing developments and capital improvement projects for state agencies. K.S.A. 74-8905, as amended L. 1995, ch. 125, § 2.

The authority's board of directors consists of the secretary of the department of commerce, and four members appointed by the governor and subject to confirmation by the senate. The governor designates both the chairperson and the vice chairperson as well as the president. K.S.A. 1994 Supp. 74-8903, as amended L. 1995, ch. 241, § 20.

When construing a statute, a court gives words in common usage their natural and ordinary meaning. *Galindo v. City of Coffeyville*, 256 Kan. 455 (1994); K.S.A. 1994 Supp. 77-201 *Second*. The tort claims act applies to an "authority" of the state. K.S.A. 1994 Supp. 75-6102(a). An authority is a public administrative agency or corporation having quasi-governmental power and authorized to administer a revenue-producing public enterprise. Webster's Third New International Dictionary 146 (1986).

It is our opinion that the plain language of K.S.A. 1994 Supp. 75-6102(a) applies to the Kansas development finance authority because it is a public corporation authorized by the legislature to issue bonds to finance, among other things, capital improvement projects authorized for the state and its political subdivisions.

The touchstone of former Attorney General Stephan's prior opinions concerning whether the tort claims act applied to state-created entities having the attributes of a private corporation depended upon whether they were performing "governmental functions." Attorney General Opinion No. 93-62. In Attorney General Opinions No. 86-155, 92-104 and 93-62, Attorney General Stephan concluded that the tort claims act applied to the Kansas healthy kids corporation, the corporation for change, the Kansas technical enterprise corporation (KTEC) and the information network of Kansas (INK) because they perform governmental functions. However, these opinions focused on the status of the entities as state agencies. Attorney General Opinion No. 94-140 never analyzed the issue of the Kansas development finance authority's status under K.S.A. 1994 Supp. 75-6102(a) as an "authority . . . or other instrumentality" of the state.

Attorney General Opinion No. 94-140's conclusion that the tort claims act did not apply to the authority was based on a comparison of the statutes which created the aforementioned public corporations and great emphasis was placed on the fact that the authority is an "independent instrumentality" exercising "essential public functions" as opposed to a "public instrumentality" performing an "essential governmental function."

In determining whether a function is governmental, the test is whether the activity in question is carried on for the use and benefit of the general public. *Shoemaker v. City of Parsons*, 154 Kan. 387, 391 (1941). It is our opinion that the authority performs a governmental function by enabling political subdivisions of the state, and the state itself, to embark on projects that benefit the general public, and the fact that K.S.A. 74-8903(a) indicates that the authority performs "essential public functions" does not negate the fact that the authority performs a governmental function as well.

We also note that K.S.A. 1994 Supp. 74-8910 provides immunity for the directors, employees and officers of the authority "for any reason arising from the service of such person as a director, employee or officer of the authority" unless the person acts with "willful, wanton or fraudulent misconduct or intentionally tortious conduct." Originally, this statute was enacted to protect only the directors and officers from personal liability arising from the issuing of bonds. The tort claims act provides no such specific immunity. In 1994, the coverage was broadened to include employees and provide immunity from personal liability for any reason arising out of the person's service in that capacity.

This amendment may provide the employees, officers and directors of the authority with greater protection from personal liability than the tort claims act can provide due to the limited number of exceptions from immunity in the tort claims act. In any event, we do not interpret K.S.A. 1994 Supp. 74-8910 as negating coverage under the tort claims act because the former statute does not protect the authority as an entity and may provide more protection for the authority's employees, officers and directors.

Finally, Attorney General Opinion No. 94-140 notes the recorded comments of a state senator during a committee meeting to bolster the opinion's conclusion that the authority is an entity "outside of state government" and "not a state agency." We do not address in this opinion whether the

authority is a state agency because our task is to determine whether the authority is covered under the tort claims act. We conclude that the tort claims act applies to the Kansas development finance authority by virtue of K.S.A. 1994 Supp. 75-6102(a) and any conclusion to the contrary in Attorney General Opinion No. 94-140 is hereby withdrawn.

Very truly yours,



CARLA J. STOVALL  
Attorney General of Kansas



Mary Feighny  
Assistant Attorney General

CJS:JLM:MF:jm

## HOUSE BILL No. 2686

By Committee on Economic Development

1-19

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9 AN ACT concerning the Kansas development finance authority; relating  
10 to the tort liability thereof; amending K.S.A. 1995 Supp. 74-8910 and  
11 repealing the existing section.  
12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. K.S.A. 1995 Supp. 74-8910 is hereby amended to read as  
15 follows: 74-8910. No director, employee or officer of the authority shall  
16 be liable personally for any reason arising from the service of such person  
17 as a director, employee or officer of the authority or any subsidiary cor-  
18 porations created pursuant to this act unless such person acted with will-  
19 ful, wanton or fraudulent misconduct or intentionally tortuous conduct.  
20 *The authority and any subsidiary corporation created pursuant to K.S.A.*  
21 *1995 Supp. 74-8904, and amendments thereto, shall be considered a gov-*  
22 *ernmental entity for purposes of the Kansas tort claims act, K.S.A. 1995*  
23 *Supp. 75-6102, and amendments thereto.*

24 Sec. 2. K.S.A. 1995 Supp. 74-8910 is hereby repealed.

25 Sec. 3. This act shall take effect and be in force from and after its  
26 publication in the statute book.

# KANSAS

DEPARTMENT OF COMMERCE & HOUSING



## TESTIMONY OF

Mary Faye LaFaver, Director  
Community Development Division  
In Support of HB 3040, Strategic Planning

Bill Graves, Governor  
Gary Sherrer, Secretary

Madam Chairperson, and members of the Committee, I am Mary Faye LaFaver Director of the Community Development Division at the Kansas Department of Commerce and Housing, here today in support of HB 3040.

Under existing statute, the Strategic Planning Program for non-metropolitan counties is scheduled to expire on July 1, 1996; the metropolitan counties program is scheduled to expire on July 1, 1998. The Department would like to have both programs expire on July 1, 1997 to avoid confusion in communities and to provide adequate time for us to outline what the planning function within the Community Development Division will be beginning with FY98.

Planning is a critical component for capacity building in communities. The present program outlined in statute has run its course and, I believe, largely accomplished what it was intended to do. We believe the State's role in this planning process has reached a point where it needs to be re-examined.

Of the 105 counties in Kansas, 97 have completed strategic plans. Some of them have done it without the assistance of the State; others have used the planning grants to accomplish the task. Those counties with strategic plans have also started the implementation with the action grant program in existing statute.

To keep the process simple, both the metro and the non-metro programs should expire at the same time, the end of FY97. We should identify the logical continuation of the Division's role in the planning process utilizing the framework established through the work already accomplished at the county level and be prepared to present that to you in January 1997.

*Senate Commerce Committee  
March 5, 1996*

*Attachment 2 thru 2-2*

COMMUNITY DEVELOPMENT DIVISION

The Community Development Division's mission is: to preserve and enhance the livability of Kansas communities by increasing their capacity to meet their needs. The communities of Kansas must plan for the future, assess their strengths and weaknesses, and develop and implement strategies to capitalize on their strengths and correct their weaknesses. These actions, when coupled with financial and technical assistance, allow communities to achieve their objectives.

I respectfully request your support of this legislation to move us forward in our quest to better serve all areas of Kansas.