Approved: March 16, 2009
Date

MINUTES OF THE SENATE LOCAL GOVERNMENT COMMITTEE

The meeting was called to order by Chairman Roger Reitz at 9:30 a.m. on March 10, 2009, in Room 446-N of the Capitol. Senator Ostmeyer moved to accept the minutes of March 2nd and March 3rd. Senator Wagle seconded the motion. The motion carried.

All Committee members were present.

Committee staff present:
Mike Heim, Office of the Revisor of Statutes
Ken Wilke, Office of the Revisor of Statutes
Martha Dorsey, Kansas Legislative Research Department
Reed Holwegner, Kansas Legislative Research Department
Noell Memmott, Committee Assistant

Conferees appearing before the Committee:

Others attending:

The hearing continued on **SB 271 - Counties; certain contracts; bidding threshold increased**.

Clancy Holeman, Riley County Counselor, spoke if favor of the bill. He thinks the proposed amendment is necessary because, under the existing statutory language, any *repair* of a county building is arguably subject to mandatory competitive bidding requirements, if such *repair* exceeds $25,000. He contends it is reasonable to offer counties assurance of the fact in, at least, the limited circumstance of repairs to a building or repair or replacement of that building's equipment in a declared public emergency based upon public health, safety and welfare. (Attachment 1)

Eric Stafford , Associated General Contractors of Kansas, Inc. AGC maintains a strong position that in order to protect the public trust and keep a fair, open and objective process, the design-bid-build or "low bid" procurement method should be the first method for publicly financed projects. AGC feels with changes that were made last year, there is enough flexibility for counties to choose the proper procurement method for a project.

Will Larsen, General Counsel, Associated General Contractors of Kansas. Testified in opposition of **SB 271**. He referred to two court cases that addresses this issue. (Attachment 2)

Melissa Wangemann, General Counsel, Kansas Association of Counties, provided written testimony in opposition to the bill. (Attachment 3)

Discussion followed the testimony. It was the consensus of the committee to request an opinion from the Attorney General on **SB 271 - Counties; certain contracts; bidding threshold increased**.

The hearing opened on **HB 2157 - Topeka/Shawnee County Riverfront Authority**. Mike Heim introduced the bill. He explained the bill would amend the state law to allow the Topeka/Shawnee County Riverfront Authority to meet quarterly, or more often if called by the chairperson, rather than monthly as is required under current law.

Whitney Damron, P.A., On behalf of the City of Topeka, spoke in favor of the bill. (Attachment 4)

Senator Ostmeyer moved to pass the **HB 2157** out of committee. Senator Petersen seconded the motion. The motion carried.

The hearing opened on **SB 245 - Allowing publication of a summary of a city ordinance**. Mike Heim explained the bill would allow a summary of an ordinance in lieu of full publication under certain guidelines.

Kim Winn, Director of Policy Development & Communications, League of Kansas Municipalities, spoke as a proponent to the bill. She cited the following reasons: It saves taxpayer dollars; It applies only to ordinances; 44 states allow for summary publication; It would enhance notice to the public; It is optional. (Attachment 5)

Eric Sartorius, City of Overland Park. He testified in favor of **SB 245** citing it would allow cities to publish summaries of their ordinances, it would save funds while ensuring the public is informed of actions taken by cities. (Attachment 6)

Minutes of the Senate Local Government Committee at 9:30 a.m. on March 10, 2009, in Room 446-N of the Capitol.

Written testimony in favor of **SB 245** was submitted by:
Rob Chestnut, Vice-Mayor, City of Lawrence (Attachment 7)
Matt Shatto, Assistant City Administrator, Lenexa, Kansas (Attachment 8)
Mike Taylor, Public Relations Director, Unified Government Public Relations, Wyandotte County, Kansas City, Kansas (Attachment 9)

Doug Anstaett, Kansas Press Association, Inc. He testified as an opponent to **SB 245**. He thinks the cost-saving is minuscule, it is important to inform the public in print, and he sees this as an intent to eventually have everything on the internet. He does not want public access to information limited. Government should not be given the power to control information. (Attachment 10)

The hearing was closed.

The next meeting is scheduled for March 16, 2009.

The meeting was adjourned at 10:30 a.m.

RILEY COUNTY

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March 10, 2009

The Honorable Roger Reitz, Chairman
Senate Committee on Local Governments
Statehouse, Room 446-N
Topeka, KS 66612

RE: S.B. 271

Dear Mr. Chairman and Members of the Committee:

I appreciate the opportunity to provide testimony in support of S.B. 271, on behalf of my client, the Board of Riley County Commissioners.

This bill proposes to amend K.S.A. 2008 Supp. 19-214. Our proposed amendment is necessary because, under the existing statutory language, any *repair* of a county building is arguably subject to mandatory competitive bidding requirements, if such *repair* exceeds $25,000. If a tornado does significant damage to my client's jail (knocking down a wall or two) my client cannot lawfully make immediate emergency non-bid *repairs* exceeding $25,000 to that jail, even to protect public safety. Instead, my client would be forced to let that *repair* project for competitive bidding. Proceeding with non-bid *repair* of our damaged jail would expose my client to a potentially successful lawsuit from any contractor who believed they should have had the opportunity to bid for that $25,000-plus *repair* work, under the current terms of K.S.A. 2008 Supp. 19-214.

It is true the term "repair" does not appear within the text of K.S.A. 2008 Supp. 19-214. Instead, that statute refers to "construction" of "any county building." However, the circumstances of its 2008 amendment strongly suggest a district court, faced with the above lawsuit brought by the disappointed contractor, would likely interpret the term "construction" to include the emergency $25,000-plus *repair* of Riley County's jail. Established rules governing judicial interpretation of statutory provisions suggest Riley County would then be on the "losing end" of the contractor's lawsuit.

Prior to the July 1, 2008 enactment of "Substitute for Senate Bill No. 485," (See Attachment "A") it was defensible to argue "construction" within K.S.A. 2007 Supp. 19-214 did not include "repair" of any "county building." That argument was available to counties because no statutory definition of K.S.A. 2007 Supp. 19-214's "construction" of a "county building" existed. But with the 2008 legislature's *simultaneous* enactment (Attachment "A")of the "county alternative project delivery *building construction* procurement act" (emphasis added, new K.S.A. 2008 Supp. 19-216b through and including K.S.A. 2008 Supp. 19-216g), the "unified school district alternative project delivery *building construction* procurement act" (emphasis added, new K.S.A. 2008 Supp. 6760c through and including K.S.A. 2008 Supp. 72-6760h) and Attachment "A's" simultaneous amendment of both K.S.A. 2007 Supp. 19-214 and K.S.A. 2007 Supp. 68-521, that defensible argument evaporated, in my opinion. Both the two new "procurement acts" (county and school district) and K.S.A. 2008 Supp. 19-214

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Attachment 1

deal with the same subject matter—*building construction*. However, the two new "procurement acts" are very *specific* and *detailed* in their respective definitions of the "building construction" each act governs. In both new "procurement acts," "building construction" is explicitly defined to include *repair* of buildings. (See Attachment "A," Sections 2(f) and 9(h).) In both new "procurement acts" "construction services" is explicitly defined to include the *repair* of "any structure or appurtenance." (See Attachment "A," Sections 1(i) and 9(h))In stark contrast to such statutory *specificity* and detail, K.S.A. 2008 Supp. 19-214 is very *general* regarding the meaning of the term "construction" as it applies to any "county building" and provides no definition of the term whatsoever. Thus, while each of these 3 2008 statutes spring from the same 2008 legislative enactment (Attachment "A"), and all 3 concern the same subject of building construction, the two "procurement" acts are the more *specific* enactments providing a detailed definition of "building construction." I submit there is nothing in the text of any of the foregoing 3 acts suggesting the legislature intended to view county building "construction" projects covered by the bidding requirements of K.S.A. 2008 Supp. 19-214 differently from the type of "building construction" projects covered by the new county and school district "procurement acts." In fact, both new "procurement acts" require public letting of bids for "building construction" and "construction services" projects, just as does K.S.A. 2008 Supp. 19-214. It therefore would have been inconsistent for the 2008 legislature to have purposely exempted building *repair* projects only from the definition of "construction" as it appears within K.S.A. 2008 while mandating competitive bidding requirements on any *repair* projects undertaken on the authority of the two new "procurement acts."

In my opinion, there are two statutory construction principles which apply to the legislative history surrounding K.S.A. 2008, Supp. 19-214. First, statutes enacted during the same legislative session and given the same effective date are to be interpreted together with one another. State v. Bradley, 215 Kan. 642., syl. 5, 527 P.2d 988 (1974). Second, when a court is faced with a general and a specific statute governing the same circumstances, the court should attempt to harmonize them both—but if it cannot the specific statute should control, unless the legislature intended to make the general statute controlling. In re K.M.H., 285 Kan. 53, 82, 169 P. 3d (2007). See also Alliance Mortgage v. Pastine, 281 Kan. 1266, syl. 4, 136 P. 3d (2006).

In the lawsuit I describe above, Riley County's likely defense would be its emergency repairs to the jail walls were not the "construction" of a "county building." The disappointed contractor would counter even the *repair* of a "county building" exceeding $25,000 is included within the K.S.A. 2008 Supp. 19-214 definition of "construction." Using the foregoing two statutory construction principles, the Court hearing this lawsuit would first see all 3 statutes on building "construction" were part of "Substitute for Senate Bill No. 485" (Attachment "A"), were given the same effective date, and therefore should be interpreted in harmony with one another. State v. Bradley, *supra*. With no explicit definition of "construction" at K.S.A. 2008 Supp. 19-214, the Court would likely resort to examination of the two new "procurement statutes" for counties and school districts covering "building construction" and "construction services," concluding each of those two statutes cover the same subject matter as K.S.A. 2008 Supp. 19-214, government building construction. In my opinion, that court would find it logically inconsistent to interpret "construction" within K.S.A. 19-214 to exclude *repair* when the more specific "procurement statutes" on the same subject do include *repair*. Therefore, the Court could easily conclude those two more specific statutory definitions should control the undefined term of "construction" within K.SA. 2008 Supp. 19-214. Application of these two distinct statutory construction principles could easily lead the Court to find the term "construction" within K.S.A. 2008 19-214 includes "repair" of "any county building" and thereby grant judgment in favor of our disappointed contractor and against my client.

I submit my client (and other counties) should not be forced to merely hope, under the current terms of K.S.A. 2008 Supp. 19-214, their *repair* of a county building, such as a jail, which exceeds $25,000 in cost, need not be let for public bids. I submit it is reasonable to offer counties assurance of that fact in at least the limited circumstance of repairs to a building or repair or replacement of

that building's equipment in a declared public emergency based upon public health, safety and welfare.

Thank you for allowing me this opportunity to speak on behalf of my client, in support of S.B. 271. I encourage the committee to pass the bill as amended in the "balloon" we have requested the Revisor prepare.

Sincerely,

Clancy Holeman
Riley County Counselor

cc: Riley County Commission:
Alvan Johnson, Chairman
Mike Kearns, Member
Karen McCulloh, Member

Substitute for SENATE BILL No. 485

AN ACT concerning certain municipalities; relating to buildings and other construction projects; amending K.S.A. 19-214 and K.S.A. 2007 Supp. 68-521 and repealing the existing sections.

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

New Section 1. Sections 2 through 6, and amendments thereto, shall be known and may be cited as the county alternative project delivery building construction procurement act.

New Sec. 2. (a) "Alternative project delivery" means an integrated comprehensive building design and construction process, including all procedures, actions, sequences of events, contractual relations, obligations, interrelations and various forms of agreement all aimed at the successful completion of the design and construction of buildings and other structures whereby a construction manager or general contractor or building design-build team is selected based on a qualifications and best value approach.

(b) "Ancillary technical services" include, but shall not be limited to, geology services and other soil or subsurface investigation and testing services, surveying, adjusting and balancing air conditioning, ventilating, heating and other mechanical building systems and testing and consultant services that are determined by the agency to be required for the project.

(c) "Architectural services" means those services described by subsection (e) of K.S.A. 74-7003, and amendments thereto.

(d) "Best value selection" means a selection based upon objective criteria related to price, features, functions, life-cycle costs and other factors.

(e) "Board" means the board of county commissioners or its designees.

(f) "Building construction" means furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building or structure. Building construction does not include highways, roads, bridges, dams, turnpikes or related structures, or stand-alone parking lots.

(g) "Building design-build" means a project for which the design and construction services are furnished under one contract.

(h) "Building design-build contract" means a contract between the county and a design-builder to furnish the architecture or engineering and related design services required for a given public facilities construction project and to furnish the labor, materials and other construction services for such public project.

(i) "Construction services" means the process of planning, acquiring, building, equipping, altering, repairing, improving, or demolishing any structure or appurtenance thereto, including facilities, utilities or other improvements to any real property, excluding highways, roads, bridges, dams or related structures, or stand-alone parking lots.

(j) "Construction management at-risk services" means the services provided by a firm which has entered into a contract with the county to be the construction manager or general contractor for the value and schedule of the contract for a project, which is to hold the trade contracts and execute the work for a project in a manner similar to a general contractor, and which is required to solicit competitive bids for the trade packages developed for the project and to enter into the trade contracts for a project with the lowest responsible bidder therefor. Construction management at-risk services may include, but are not limited to, scheduling, value analysis, system analysis, constructability reviews, progress document reviews, subcontractor involvement and prequalification, subcontractor bonding policy, budgeting and price guarantees and construction coordination.

(k) "Construction management at-risk contract" means the contract whereby the county acquires from a construction manager or general contractor a series of preconstruction services and an at-risk financial obligation to carry out construction under a specified cost agreement.

(l) "Construction manager or general contractor" means any individual, partnership, joint venture, corporation or other legal entity who is a member of the integrated project team with the county, design professional and other consultants that may be required for the project, who utilizes skill and knowledge of general contracting to perform preconstruction services and competitively procures and contracts with specialty contractors assuming the responsibility and the risk for construction de-

ATTACHMENT A

livery within a specified cost and schedule terms including a guaranteed maximum price.

(m) "Design-builder" means any individual, partnership, joint venture, corporation or other legal entity that furnishes the architectural or engineering services and construction services, whether by itself or through subcontracts.

(n) "Design criteria consultant" means a person, corporation, partnership or other legal entity duly registered and authorized to practice architecture or professional engineering in this state pursuant to K.S.A. 74-7003, and amendments thereto, and who is employed by contract to the county to provide professional design and administrative services in connection with the preparation of the design criteria package.

(o) "Design criteria package" means performance-oriented specifications for the public construction project sufficient to permit a design-builder to prepare a response to the county's request for proposals for a building design-build project.

(p) "Engineering services" means those services described by subsection (i) of K.S.A. 74-7003, and amendments thereto.

(q) "Guaranteed maximum price" means the cost of the work as defined in the contract.

(r) "Parking lot" means a designated area or parking structure for parking motor vehicles. A parking lot included as part of a building construction project shall be subject to the provisions of this act. A parking lot designed and constructed as a stand-alone project shall not be subject to the provisions of this act.

(s) "Preconstruction services" means a series of services that can include, but are not necessarily limited to: Design review, scheduling, cost control, value engineering, constructability evaluation and preparation and coordination of bid packages.

(t) "Project services" means architectural, engineering services, land surveying, construction management at-risk services, ancillary technical services or other construction-related services determined by the county to be required by the project.

(u) "Public construction project" means the process of designing, constructing, reconstructing, altering or renovating a public building or other structure. Public construction project does not include the process of designing, constructing, altering or repairing a public highway, road, bridge, dam, turnpike or related structure.

(v) "Stipend" means an amount paid to the unsuccessful and responsive proposers to defray the cost of submission of phase II of the building design-build proposal.

New Sec. 3. (a) Notwithstanding any other provision of the law to the contrary, the board of county commissioners is hereby authorized to institute an alternative project delivery program whereby construction management at-risk or building design-build procurement processes may be utilized on public projects pursuant to this act. This authorization for construction management at-risk and building design-build procurement shall be for the sole and exclusive use of planning, acquiring, designing, building, equipping, altering, repairing, improving or demolishing any structure or appurtenance thereto, including facilities, utilities or other improvements to any real property, but shall not include highways, roads, bridges, dams or related structures or stand-alone parking lots.

(b) The board may only approve those projects or programs for which the use of alternative project delivery procurement process is appropriate. In making such determination, the board may consider the following factors:

(1) The likelihood that the alternative project delivery method of procurement selected will serve the public interest by providing substantial savings of time or money over the traditional design-bid-build delivery process.

(2) The ability to overlap design and construction phases is required to meet the needs of the end user.

(3) The use of an accelerated schedule is required to make repairs resulting from an emergency situation.

(4) The project presents significant phasing or technical complexities, or both, requiring the use of an integrated team of designers and con-

structors to solve project challenges during the design or preconstruction phase.

(5) The use of an alternative project delivery method will not encourage favoritism in awarding the public contract or substantially diminish competition for the public contract.

(c) When a request is made for alternative delivery procurement by the county, the county shall publish a notice in the official county newspaper that the board will be holding a public meeting with the opportunity for comment on such request. Notice shall be published at least 15 days prior to the hearing.

(d) If the board finds that the project does not qualify for the alternative project delivery methods included under this act, then the construction services for such project shall be obtained pursuant to statute or to the procedures permitted by law.

New Sec. 4. Construction management at-risk project delivery procedures shall be conducted as follows:

(a) The board shall determine the scope and level of detail required to permit qualified construction manager or general contractors to submit construction management at-risk proposals in accordance with the request for proposals given the nature of the project.

(b) Prior to completion of the construction documents, or as early as the initiation of the project, the construction manager or general contractor shall be selected. The project design professional may be employed or retained by the board to assist in the selection process.

(c) The county shall publish a notice of the request for qualifications and proposals for the required project services at least 15 days prior to the commencement of such requests in the official county newspaper and in such other appropriate manner as may be determined by the county.

(d) The board shall solicit proposals in a three stage qualifications based selection process. Phase I shall be the solicitation of qualifications and prequalifying a short list of construction managers or general contractors to advance to phase II. Phase II shall be the solicitation of a request for proposal for the project, and phase III shall include an interview with each proposer to present their qualifications and answer questions.

(1) Phase I shall require all proposers to submit a statement of qualifications which shall include, but not be limited to:

(A) Similar project experience;

(B) experience in this type of project delivery system;

(C) references from design professionals and owners from previous projects;

(D) description of the construction manager or general contractor's project management approach;

(E) financial statements; and

(F) bonding capacity. Firms submitting a statement of qualifications shall be capable of providing a public works bond in accordance with K.S.A. 60-1111, and amendments thereto, and shall present evidence of such bonding capacity to the board with their statement of qualifications. If a firm fails to present such evidence, such firm shall be deemed unqualified for selection under this subsection.

(2) The board shall evaluate the qualifications of all proposers in accordance with the instructions of the request for qualifications. The board shall prepare a short list containing a minimum of three and maximum of five qualified firms, which have the best and most relevant qualifications to perform the services required of the project, to participate in phase II of the selection process. If the board receives qualifications from less than four proposers, all proposers shall be invited to participate in phase II of the selection process. The board shall have discretion to disqualify any proposer that, in the board's opinion, lacks the minimal qualifications required to perform the work.

(3) Phase II of the process shall be conducted as follows:

(A) Prequalified firms selected in phase I shall be given a request for proposal. The request for proposal shall require all proposers to submit a more in depth response including, but not be limited to:

(i) Company overview;

(ii) experience or references, or both, relative to the project under question;

(iii) resumes of proposed project personnel;

(iv) overview of preconstruction services;

(v) overview of construction planning;

(vi) proposed safety plan;

(vii) fees, including fees for preconstruction services, fees for general conditions, fees for overhead and profit and fees for self-performed work, if any.

(4) Phase III shall be conducted as follows:

(A) Once all proposals have been submitted, the board shall interview all of the proposers. Interview presentation scores shall not account for more than 50% of the total possible score.

(B) The board shall select the firm providing the best value based on the proposal criteria and weighting factors utilized to emphasize important elements of each project. All scoring criteria and weighting factors shall be identified by the board in the request for proposal instructions to proposers. The board shall proceed to negotiate with and attempt to enter into contract with the firm receiving the best total score to serve as the construction manager or general contractor for the project.

(C) If the board determines, that it is not in the best interest of the county to proceed with the project pursuant to the proposals offered, the board shall reject all proposals. If all proposals are rejected, the board may solicit new proposals using different design criteria, budget constraints or qualifications.

(D) The contract to perform construction management at-risk services will typically be awarded in phases; preconstruction followed by one or more amendments for construction. The contract form will be a cost plus guaranteed maximum price contract. All savings under the guaranteed maximum price may return to the county as defined in the request for proposal.

(E) The board or construction manager at-risk, at the board's discretion, shall publish a construction services bid notice as may be determined by the county. Each construction services bid notice shall include the request for bids and other bidding information prepared by the construction manager or general contractor and the county. The county may allow the construction manager or general contractor to self-perform construction services provided the construction manager or general contractor submits a bid proposal under the same conditions as all other competing firms. At the time for opening the bids, the construction manager or general contractor shall evaluate the bids and shall determine the lowest responsible bidder except in the case of self-performed work for which the county shall determine the lowest responsible bidder. The construction manager or general contractor shall enter into a contract with each firm performing the construction services for the project. All bids will be available for public view.

New Sec. 5. Building design-build project delivery procedures shall be conducted as follows:

(a) The board shall determine the scope and level of detail required to permit qualified persons to submit building design-build qualifications and proposals in accordance with the county requirements given the nature of the project.

(b) The board shall solicit proposals in a three-stage process. Phase I shall be the solicitation of qualifications of the building design-build team. Phase II shall be the solicitation of a technical proposal including conceptual design for the project. Phase III shall be the proposal of the construction cost.

(1) The board shall review the submittals of the proposers and assign points to each proposal as prescribed in the instructions of the request for proposal.

(2) Notice of requests for qualifications shall be advertised and published in the official county newspaper. Notification to include a description of the project and the procedures for submittal.

(3) The board shall establish in the request for qualifications a time, place and other specific instructions for the receipt of qualifications. Qualifications not submitted in strict accordance with such instructions shall be subject to rejection.

(4) A request for qualifications shall be prepared for each building design-build contract containing at minimum the procedures to be fol-

lowed for each of the three phases in the process for submitting proposals, the criteria for evaluation of proposals and their relative weight and the procedures for making awards.

(c) Phase I shall require all proposers to submit a statement of qualifications which shall include, but not be limited to, the following:

(1) Demonstrated ability to perform projects comparable in design, scope and complexity.

(2) References of owners for whom building design-build projects have been performed.

(3) Qualifications of personnel who will manage the design and construction aspects of the project.

(4) The names and qualifications of the primary design consultants and contractors with whom the building design-builder proposes to subcontract. The building design-builder may not replace an identified subcontractor or subconsultant without the written approval of the board.

(5) Firms submitting a statement of qualifications shall be capable of providing a public works bond in accordance with K.S.A. 60-1111, and amendments thereto, and shall present evidence of such bonding capability to the board with their statement of qualifications. If a firm fails to present such evidence, such firm shall be deemed unqualified for selection under this subsection.

(d) The board shall evaluate the qualifications of all proposers in accordance with the instructions prescribed in the request for qualifications. A short list of qualified proposers selected by the evaluation team may proceed to phase II of the selection process. Proposers lacking the necessary qualifications to perform the work shall be disqualified and shall not proceed to phase II of the process. Under no circumstances shall price or fees be considered as a part of the prequalification criteria. Points assigned in the phase I evaluation process shall not carry forward to phase II of the process. All qualified proposers shall be ranked on points given in phases II and III only. The two-phase evaluation and scoring process shall be combined to determine the greatest value to the county.

(e) The board shall prepare a short list containing a minimum of three, but no more than the top five qualified proposers to participate in phase II of the process. If less than four proposers respond, all proposers shall be invited to participate in phase II of the selection process.

(f) Phase II of the process shall be conducted as follows:

(1) The remaining project requirements will be provided to the short listed proposer to include the following:

(A) The terms and conditions for the building design-build contract.

(B) The design criteria package.

(C) A description of the drawings, specifications or other information to be submitted with the proposal, with guidance as to the form and level of completeness of the drawings, specifications or other information that will be acceptable.

(D) A schedule for planned commencement and completion of the building design-build contract.

(E) Budget limits for the building design-build contract, if any.

(F) Requirements, including any available ratings for performance bonds, payment bonds and insurance.

(G) Any other information that the county at its discretion chooses to supply, including without limitation, surveys, soil reports, drawings of existing structures, environmental studies, photographs or references to public records.

(2) Proposers shall submit their design for the project to the level of detail required in the request for proposal. The design proposal should demonstrate compliance with the requirements set out in the request for proposal.

(3) The technical proposal may contain certain limited references to specific elements of the cost.

(4) The technical submittals shall be evaluated and assigned points in accordance with the requirements of the request for proposal.

(g) Phase III shall be conducted as follows:

(1) The phase III proposal shall provide a firm fixed cost of design and construction. The proposal shall be accompanied by bid security and any other submittals as required by the request for proposal.

(2) The proposed contract time, in calendar days, for completing a project as designed by a proposer may be considered as an element of

evaluation in phase III. In the event the request for proposal shall establish the assignment of value of contract time in the selection process.

(3) Phase III proposals shall be submitted in accordance with the instructions of the request for proposal. Failure to submit a cost proposal on time shall be cause to reject the proposal.

(h) Proposals for phase II and III shall be submitted concurrently at the time and place specified in the request for proposal. The phase III cost proposals shall be opened only after the phase II technical proposals have been evaluated and assigned points.

(i) Phase III cost and schedule, which shall prescribe the number of calendar days, proposals shall be opened and read aloud at the time and place specified in the request for proposal. At the same time and place, the evaluation team shall make public its scoring of phase II. Phase III shall be evaluated in accordance with the requirements of the request for proposal. In evaluating the proposals and determining the successful proposer, each proposers' score shall be determined in a quantifiable and objective manner described in the request for proposal in combination of the points earned in both phase II and phase III.

(j) The successful responsive proposer shall be awarded the contract. If the board determines, that it is not in the best interest of the county to proceed with the project pursuant to the proposal offered by the successful proposer the board shall reject all proposals. If the determination to reject all proposals is made for the convenience of the board, the successful and responsive proposer shall receive twice the stipend pursuant to subsection (g)(8) of this section and amendments thereto, of this act, and all other responsive proposers shall receive an amount equal to such stipend. If the determination is made to reject all proposals as a result of proposals exceeding the budget published in the request for proposals or otherwise not complying with the request for proposal, the board need not remit a stipend to the proposers.

(k) If all proposals are rejected, the board may solicit new proposals using different design criteria, budget constraints or qualifications.

(l) As an inducement to qualified proposers, the board shall pay a stipend, the amount of which shall be established in the request for proposal, to each prequalified building design-builder whose proposal is responsive but not accepted. Upon payment of the stipend to any unsuccessful building design-build proposer, the county shall acquire a nonexclusive right to use the design submitted by the proposer, and the proposer shall have no further liability for its use by the county in any manner. If the building design-build proposer desires to retain all rights and interest in the design proposed, the proposer shall forfeit the stipend.

New Sec. 6. Every proposal received from each phase of procurement, including total scores and total rankings shall, after award or letting of the contract, be subject to public inspection upon request.

Sec. 7. K.S.A. 19-214 is hereby amended to read as follows: 19-214. (a) Except as provided in subsection (b) ~~and~~, in K.S.A. 19-216a, *and amendments thereto*, all contracts for the expenditure of county moneys for the construction of any courthouse, jail or other county building, or the construction of any bridge, *highway, road, dam, turnpike or related structures or stand-alone parking lots* in excess of ~~$10,000~~ *$25,000*, shall be awarded, on a public letting, to the lowest and best bid. The person, firm or corporation to whom the contract may be awarded shall give and file with the board of county commissioners a good and sufficient surety bond by a surety company authorized to do business in the state of Kansas, to be approved by the county attorney or county counselor, in the amount of the contract, and conditioned for the faithful performance of the contract.

(b) The provisions of subsection (a) shall not apply: (1) To the expenditure of county funds for professional services; (2) to the provisions of K.S.A. 68-521, and amendments thereto; or (3) to the purchase of contracts of insurance.

Sec. 8. K.S.A. 2007 Supp. 68-521 is hereby amended to read as follows: 68-521. (a) The board of county commissioners before awarding any contract for the construction, surfacing, repairing or maintaining of any road as provided in K.S.A. 68-520, and amendments thereto, when the county engineer's estimated cost of such improvement is more than ~~$10,000~~ *$25,000*, shall have the approved plans and specifications which

have been adopted by order of the board for such work filed in the county clerk's office or in some other county office designated by the board at least 20 days prior to the time of the letting.

The county clerk or some other county officer designated by the board shall give not less than 20 days' notice of the letting by publication in at least two consecutive weekly issues of the official county paper, the first publication of such notice to be not less than 20 days prior to such letting. The notice shall specify with reasonable minuteness the character of the improvement contemplated, where it is located, the kind of material to be used, the hour, date and place of letting of such contract, when the work is to be completed, and invite sealed proposals for the same. Such other notice may be given as the board may deem proper. All bids shall be made on the proposal blanks furnished by the county, signed by the bidder, sealed and delivered, or sent by mail, by the bidder, or the agent or attorney thereof, to the county clerk or to some other county officer designated by the board. The letting of all contracts shall be conducted in such manner as to give free, open competition, and all qualified bidders, shall be given an equal opportunity to bid upon the plans and specifications on file. Each bidder shall be required to accompany the submitted bid with a bid surety in an amount equal to 5% of the bid amount in the form prescribed by the board as a guarantee that, if the contract is awarded to the bidder, the bidder will enter into the contract with the board. If a bidder fails to enter into the contract when awarded to the bidder, the bid surety shall become the property of the county as its liquidated damages and shall be paid to the county treasurer for credit to the general fund of the county, and the board may award the contract to the next lowest responsible bidder. The bids shall be opened publicly by the board or a designee thereof at the place, date and hour named in the advertising notice, and all bids shall be considered, and accepted or rejected.

In case the work is let at such public letting or thereafter, the contract shall be awarded to the lowest responsible bidder, or the board, if it deems the proposals too high, may reject all bids, and readvertise the work as before. No such contract shall be let at an amount exceeding 110% of the county engineer's estimated cost of the work. No such contract shall be considered as awarded unless the contractor shall within 21 days after the letting enter into contract and shall give the bond required by K.S.A. 60-1111, and amendments thereto, and a performance bond to the county in a penal sum equal to the amount of the contract price, conditioned upon the faithful performance of the contract, payable to the county upon failure to comply with the terms of the contract. The contractor shall file with the county clerk the bonds, which shall be approved by the chairperson of the board and the county attorney by their signatures indorsed thereon.

(b) The provisions of subsection (a) shall not apply to contracts for the expenditure of county moneys for the reconstruction or repair of a road if:

(1) The road has been damaged or destroyed as a result of a disaster;

(2) the governor has declared the county, or that part of the county in which the road is located, a disaster area;

(3) the board of county commissioners finds that a hardship would result if the road is not immediately reconstructed or repaired;

(4) the board of county commissioners has obtained an estimate of the cost of the reconstruction or repair of the road from the county engineer. If there is no county engineer, the board shall obtain such estimate from the Kansas department of transportation; and

(5) the contract for the reconstruction or repair of the road is awarded within 60 days of the governor's declaration required by paragraph (2).

(c) The county attorney or county counselor shall meet with and advise the board of county commissioners in all matters pertaining to letting and making of all contracts under this act. The board may make partial payments, on the written estimate of its county engineer, upon any contract work as the same progresses, but not more than 95% of the estimate of the materials furnished and work done, or of the contract price, shall be paid in advance of the full and satisfactory completion of the contract. Final payment shall not be made on any such contract until the county engineer has inspected the work and certified in writing that it has been properly done and completed in accordance with the contract, plans and

specifications, and the county engineer's certificate to that effect has been filed in the office of the county clerk or some other county officer designated by the board.

New Sec. 9. Sections 9 through 14, and amendments thereto, shall be known and may be cited as the Kansas unified school district alternative project delivery building construction procurement act.

New Sec. 10. As used in the Kansas unified school district alternative project delivery construction procurement act, unless the context expressly provides otherwise:

(a) "Act" means the Kansas unified school district alternative project delivery building construction procurement act.

(b) "Board" means board of education of every unified school district in Kansas, as defined in K.S.A. 72-8201, and amendments thereto, with the authority to award public contracts for building design and construction.

(c) "Alternative project delivery" means an integrated comprehensive building design and construction process, including all procedures, actions, sequences of events, contractual relations, obligations, interrelations and various forms of agreement all aimed at the successful completion of the design and construction of buildings and other structures whereby a construction manager or general contractor is selected based on a qualifications and best value approach.

(d) "Ancillary technical services" include, but shall not be limited to, geology services and other soil or subsurface investigation and testing services, surveying, adjusting and balancing air conditioning, ventilating, heating and other mechanical building systems and testing and consultant services that are determined by the board to be required for the project.

(e) "Architectural services" means those services described by subsection (e) of K.S.A. 74-7003, and amendments thereto.

(f) "Best value selection" means a selection based upon project cost, qualifications and other factors.

(g) "Building construction" means furnishing labor, equipment, material or supplies used or consumed for the design, construction, alteration, renovation, repair or maintenance of a building or structure. Building construction does not include highways, roads, bridges, dams, turnpikes or related structures or stand-alone parking lots.

(h) "Construction services" means the process of planning, acquiring, building, equipping, altering, repairing, improving or demolishing any structure or appurtenance thereto, including facilities, utilities or other improvements to any real property, excluding stand-alone parking lots.

(i) "Construction management at-risk services" means the services provided by a firm which has entered into a contract with the board to be the construction manager or general contractor for the value and schedule of the contract for a project, which is to hold the trade contracts and execute the work for a project in a manner similar to a general contractor, and which is required to solicit competitive bids for the trade packages developed for the project and to enter into the trade contracts for a project with the lowest responsible bidder therefor. Construction management at-risk services may include, but are not limited to scheduling, value analysis, system analysis, constructability reviews, progress document reviews, subcontractor involvement and prequalification, subcontractor bonding policy, budgeting and price guarantees and construction coordination.

(j) "Construction management at-risk contract" means the contract whereby the board acquires from a construction manager or general contractor a series of preconstruction services and an at-risk financial obligation to carry out construction under a specified cost agreement.

(k) "Construction manager or general contractor" means any individual, partnership, joint venture, corporation, or other legal entity who is a member of the integrated project team with the board, design professional and other consultants that may be required for the project, who utilizes skill and knowledge of general contracting to perform preconstruction services and competitively procures and contracts with specialty contractors assuming the responsibility and the risk for construction delivery within a specified cost and schedule terms including a guaranteed maximum price.

(l) "Cost plus guaranteed maximum price contract" means a cost-

plus-a-fee contract with a guaranteed maximum price. This includes the sum of the construction manager's fee, the construction manager's contingency, the construction manager's general conditions, all the subcontracts, plus an estimate for unbid subcontracts. The construction manager agrees to pay for costs that exceed the guaranteed maximum price and are not a result of changes in the contract documents.

(m) "Engineering services" means those services described by subsection (i) of K.S.A. 74-7003, and amendments thereto.

(n) "Guaranteed maximum price" means the cost of the work as defined in the contract.

(o) "Selection recommendation committee" means school board or a committee appointed by the school board.

(p) "Parking lot" means a designated area constructed on the ground surface for parking motor vehicles. A parking lot included as part of a building construction project shall be subject to the provisions of this act. A parking lot designed and constructed as a stand-alone project shall not be subject to the provisions of this act.

(q) "Preconstruction services" means a series of services that can include, but are not necessarily limited to: Design review, scheduling, cost control, value engineering, constructability evaluation and preparation and coordination of bid packages.

(r) "Project services" means architectural, engineering services, land surveying, construction management at-risk services, ancillary technical services or other construction-related services determined by the board to be required by the project.

(s) "Public construction project" means the process of designing, constructing, reconstructing, altering or renovating a unified school district building or other structure. Public construction project does not include the process of designing, constructing, altering or repairing a public highway, road, bridge, dam, turnpike or related structure.

New Sec. 11. (a) Notwithstanding any other provision of the law to the contrary, the board is hereby authorized to institute an alternative project delivery program whereby construction management at-risk procurement processes may be utilized on public projects pursuant to this act. This authorization for construction management at-risk procurement shall be for the sole and exclusive use of planning, acquiring, designing, building, equipping, altering, repairing, improving or demolishing any structure or appurtenance thereto, including facilities, utilities or other improvements to any real property, but shall not include stand-alone parking lots.

(b) The board may only approve those projects for which the use of the alternative project delivery procurement process is appropriate. In making such determination, the board shall consider the following factors:

(1) The likelihood that the alternative project delivery method of procurement selected will serve the public interest by providing substantial savings of time or money over the traditional design-bid-build delivery process.

(2) The ability to overlap design and construction phases is required to meet the needs of the end user.

(3) The use of an accelerated schedule is required to make repairs resulting from an emergency situation.

(4) The project presents significant phasing or technical complexities, or both, requiring the use of an integrated team of designers and constructors to solve project challenges during the design or preconstruction phase.

(5) The use of an alternative project delivery method will not encourage favoritism in awarding the public contract or substantially diminish competition for the public contract.

(c) When a board intends to utilize an alternative project delivery method, the board shall allow public comment on this intention at a school board meeting. Notice of this intention shall be clearly stated on the board agenda and in the official newspaper of the school district. Public comment on this intention at a board meeting shall occur before the selection process set forth in this statute may commence.

(d) Notwithstanding the provisions of K.S.A. 72-6760, and amendments thereto, if the board deems that the project does not qualify for the alternative project delivery method included under this act, then the

construction services for such project shall be obtained pursuant to competitive bids and all contracts for construction services shall be awarded to the lowest responsible bidder consistent with the provisions of K.S.A 72-6760, and amendments thereto.

New Sec. 12. Construction management at-risk project delivery procedures shall be conducted as follows:

(a) The board shall determine the scope and level of detail required to permit a qualified construction manager or general contractor to submit construction management at-risk proposals in accordance with the request for proposals given the nature of the project.

(b) Prior to completion of the construction documents, or as early as during the initiation of the project, the construction manager or general contractor shall be selected. The project design professional may be employed or retained by the board to assist in the selection process.

(c) The board shall publish a notice of the request for qualifications and proposals for the required project services at least 15 days prior to the commencement of such requests in the official newspaper of the school district and with a statewide school board or construction industry association website in accordance with K.S.A. 64-101, and amendments thereto, and in such other appropriate manner as may be determined by the board.

(d) The board shall solicit proposals in a three stage qualifications based selection process. Phase I shall be the solicitation of qualifications and prequalifying a minimum of three but no more than five construction manager or general contractors to advance to phase II. Phase II shall be the solicitation of a request for proposal for the project, and phase III shall include an interview with each proposer to present their qualifications and answer questions.

(1) Phase I shall require all proposers to submit a statement of qualifications which shall include, but not be limited to:

(A) Similar project experience;

(B) experience in this type of project delivery system;

(C) references from design professionals and owners from previous projects;

(D) description of the construction manager or general contractor's project management approach; and

(E) bonding capacity. Firms submitting a statement of qualifications shall be capable of providing a public works bond in accordance with K.S.A. 60-1111, and amendments thereto, and shall present evidence of such bonding capacity to the board with their statement or qualifications. If a firm fails to present such evidence, such firm shall be deemed unqualified for selection under this subsection.

(2) The board shall evaluate the qualifications of all proposers in accordance with the instructions of the request for qualifications. The board shall prepare a short list containing a minimum of three and maximum of five qualified firms, which have the best and most relevant qualifications to perform the services required of the project, to participate in phase II of the selection process. If the board receives qualifications from less than four proposers, all proposers shall be invited to participate in phase II of the selection process. The board shall have discretion to disqualify any proposer that, in the board's opinion, lacks the minimal qualifications required to perform the work.

(3) Phase II of the process shall be conducted as follows:

(A) Prequalified firms selected in phase I shall be given a request for proposal. The request for proposal shall require all proposers to submit a more in depth response including, but not be limited to:

(i) Company overview;

(ii) experience or references, or both, relative to the project under question;

(iii) resumes of proposed project personnel;

(iv) overview of preconstruction services;

(v) overview of construction planning;

(vi) proposed safety plan;

(vii) fees, including fees for preconstruction services, fees for general conditions, fees for overhead and profit.

(4) Phase III shall be conducted as follows:

(A) Once all proposals have been submitted, the selection recom-

mendation committee shall interview all of the proposers, allowing the competing firms to present their proposed team members, qualifications, project plan and to answer questions. Interview scores shall not account for more than 50% of the total possible score.

(B) The selection recommendation committee shall select the firm providing the best value based on the proposal criteria and weighting factors utilized to emphasize important elements of each project for approval by the board. All scoring criteria and weighting factors shall be identified by the board in the request for proposal instructions to proposers. The selection recommendation committee shall proceed to negotiate with and attempt to enter into contract with the firm receiving the best total score to serve as the construction manager or general contractor for the project. Should the selection recommendation committee be unable to negotiate a satisfactory contract with the firm scoring the best total score, negotiations with that firm shall be terminated, and the committee shall undertake negotiations with the firm with the next best total score, in accordance with this act.

(C) If the selection recommendation committee determines, that it is not in the best interest of the board to proceed with the project pursuant to the proposals offered, the selection recommendation committee shall reject all proposals. If all proposals are rejected, the board may solicit new proposals using different design criteria, budget constraints or qualifications.

(D) The contract to perform construction management at-risk services for a project shall be prepared by the board and entered into between the board and the firm performing such construction management at-risk services. A construction management at-risk contract utilizing a cost plus guaranteed maximum price contract value shall return all savings under the guaranteed maximum price to the school district.

(E) The board or the construction manager at-risk, at the board's discretion shall publish a construction services bid notice in the official newspaper of the school district and website of a statewide school board association or construction industry association and in such other appropriate manner for the construction manager or general contractor as may be determined by the board. Each construction services bid notice shall include the request for bids and other bidding information prepared by the construction manager or general contractor and the board. The board may allow the construction manager or general contractor to self-perform construction services provided the construction manager or general contractor submits a sealed bid proposal under the same conditions as all other competing firms. At the time for opening the bids, the construction manager or general contractor shall evaluate the bids and shall determine the lowest responsible bidder except in the case of self-performed work for which the board shall determine the lowest responsible bidder. The construction manager or general contractor shall enter into a contract with each firm performing the construction services for the project and make a public announcement of each firm selected at the first school board meeting following the selection.

New Sec. 13. Every bid proposal conforming to the terms of the advertisement, together with the name of the proposer, shall be recorded, and all such records with the name of the successful proposer indicated thereon shall, after award or letting of the contract, be subject to public inspection upon request. The board shall, within five days after award or letting of the contract, publish the name of the successful proposer. The public notice on public display shall show the phase II and III scores and the adjusted final score. The board shall, within five days after award or letting of the contract, have the names of all proposers whose bid proposals were not selected, together with phase II and III scores and the final adjusted score for each, available for public review.

New Sec. 14. The provisions of the Kansas unified school district alternative project delivery building construction procurement act shall not apply to the process of designing, constructing, altering or repairing stand-alone parking lots.

Sec. 15. K.S.A. 19-214 and K.S.A. 2007 Supp. 68-521 are hereby repealed.

Sec. 16. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

_____

SENATE adopted
Conference Committee Report _____

_____
President of the Senate.

_____
Secretary of the Senate.

Passed the HOUSE
as amended _____

HOUSE adopted
Conference Committee Report _____

_____
Speaker of the House.

_____
Chief Clerk of the House.

APPROVED _____

_____
Governor.

18 Kan. App. 2d 657, *; 856 P.2d 1360, **;
1993 Kan. App. LEXIS 90, ***

2 of 2 DOCUMENTS

Warning
As of: Mar 08, 2009

State of Kansas, Appellant, v. Robert L. Sodders, Appellee

No. 68,931

Court of Appeals of Kansas

18 Kan. App. 2d 657*; *856 P.2d 1360*; *1993 Kan. App. LEXIS 90

August 6, 1993, Opinion Filed

SUBSEQUENT HISTORY: *Aff'd 254 Kan. 79, 872 P.2d 736 (1993).*

PRIOR HISTORY: [***1] Appeal from Johnson District Court; Robert G. Jones, Judge.

DISPOSITION: Appeal denied.

CASE SUMMARY:

PROCEDURAL POSTURE: State challenged an order from the Johnson District Court (Kansas), which suppressed evidence obtained in the search of an apartment on the ground that the detectives who conducted the search acted outside their jurisdiction.

OVERVIEW: Police detectives in one city obtained a warrant to search an apartment in a second city. Before executing the warrant, the detectives told a police sergeant in the second city that they were going to execute the warrant and requested assistance. Uniformed officers from the second city provided security at the apartment while it was searched by the detectives of the city that issued the warrant. The district court sustained defendant's motion to suppress the evidence obtained in the search, and on appeal, the court affirmed. The court concluded that *Kan. Stat. Ann. § 22-2401a* was a clear geographical limitation to *Kan. Stat.*

Ann. § 22-2505, which provided for the issuance of a warrant. *Kan. Stat. Ann. § 22-2401a*, which was enacted after *Kan. Stat. Ann. § 22-2505*, showed a clear legislative intent to limit the authority of the police detectives to exercise their powers within the geographical limits of the city that employed them. Thus, under *Kan. Stat. Ann. § 22-2401a*, the police detectives acted outside their jurisdiction when they searched an apartment in the second city.

OUTCOME: The court denied the State's appeal.

CORE TERMS: law enforcement officers, search warrant, detectives, apartment, execute, police officers, persuasive, pursuit, fresh, property owned, private persons, geographic, anywhere, execute a warrant, specifically named, statutory authority, arrest warrant, unambiguous, common-law, executing, searching, authorizes, placement, arrested

LexisNexis(R) Headnotes

Criminal Law & Procedure > Search & Seizure > Search Warrants > Jurisdiction
[HN1] See *Kan. Stat. Ann. § 22-2505*.

Governments > Local Governments > Duties & Powers
Governments > Local Governments > Police Power
[HN2] See *Kan. Stat. Ann. § 22-2401a*.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Jurisdiction
[HN3] *Kan. Stat. Ann. § 22-2505* requires that a warrant be directed to all law enforcement officers or to specifically named law enforcement officers. It thus modifies the common-law rule requiring that a search warrant be directed to a particular person and be executed only by that person. The statute places no limitation upon the territory in which an officer may operate.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Jurisdiction
[HN4] *Kan. Stat. Ann. § 22-2505* makes clear that search warrants must be executed by law enforcement officers; the statute does not purport to establish where an officer may execute a warrant.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Jurisdiction
Governments > Legislation > Interpretation

[HN5] Even if *Kan. Stat. Ann. §§ 22-2505* and *22-2401a* are understood to be in conflict, then the latest legislative expression controls.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Jurisdiction
[HN6] *Kan. Stat. Ann. § 22-2401a* reveals a clear intent by the legislature to limit the jurisdiction of certain law enforcement officers.

Governments > Legislation > Interpretation
[HN7] When a statute is plain and unambiguous, the court must give effect to the expressed legislative intent.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Jurisdiction
[HN8] The language of *Kan. Stat. Ann. § 22-2505* cannot be read as an exception to the clear geographic limitation set forth in *Kan. Stat. Ann. § 22-2401a.*

Governments > Local Governments > Police Power
[HN9] A sheriff may exercise his powers outside the county where he holds office in only two instances: (1) where he is in "fresh pursuit" of a person, or (2) where a request for assistance has been made by law enforcement officers from the area for which such assistance is requested.

Governments > Legislation > Interpretation
[HN10] The placement of a law in a particular location in the statutes by the Revisor of Statutes is not persuasive as to the intent of the legislature which enacted it.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Jurisdiction
Governments > Legislation > Interpretation
[HN11] The placement of *Kan. Stat. Ann. § 22-2401a* provides no basis for placing a qualification on the plain, unambiguous statutory language which delineates where officers may "exercise their powers."

Governments > Local Governments > Duties & Powers
Governments > Local Governments > Police Power
[HN12] *Kan. Stat. Ann. § 22-2401a(2)* authorizes law enforcement officers employed by a city to exercise their powers outside the city: (1) on property owned or controlled by the

city; (2) where they are in "fresh pursuit" of a person; or (3) where a request for assistance has been made by law enforcement officers from the place for which assistance is requested.

SYLLABUS

SYLLABUS BY THE COURT

1. STATUTES -- *Construction -- Latest Legislative Expression Controls*. Where there is a conflict between two statutes, the latest legislative expression controls.

2. POLICE AND SHERIFFS -- *City Law Enforcement Officer's Exercise of Power outside City Limits -- Statutory Authority*. *K.S.A. 22-2401a(2)* authorizes city law enforcement officers to exercise their powers outside the city limits of the city employing them (1) on property owned or controlled by the city; (2) where they are in "fresh pursuit" of a person; or (3) where a request for assistance has been made by law enforcement officers from the place for which assistance is requested.

3. POLICE AND SHERIFFS -- *Search Warrant -- Execution of Warrant by Overland Park Law Enforcement Officer at Apartment in Lenexa -- No Statutory Authority for Such Search Warrant Execution*. *K.S.A. 22-2401a(4)*, authorizing law enforcement officials of any jurisdiction within a county designated an urban area to execute a valid arrest warrant anywhere within the county, has no application to the execution of a search warrant by Overland Park detectives at an apartment located in Lenexa.

COUNSEL: *Stephen M. Howe*, assistant district attorney, *Paul J. Morrison*, district attorney, and *Robert T. Stephan*, attorney general, for appellant.

Michael J. Bartee, assistant district defender, for appellee.

JUDGES: Lewis, P.J., Royse, J., and C. Fred Lorentz, District Judge, assigned.

OPINION BY: ROYSE

OPINION

[*657] **[**1362]** This is an interlocutory **[***2]** appeal by the State from a district court order suppressing evidence. The appeal concerns a search warrant obtained by Overland Park police detectives for an apartment in Lenexa. Before executing the warrant, the Overland Park detectives went to the Lenexa Police Department, told a Lenexa police sergeant that they were going to execute a search warrant in Lenexa, and requested assistance. The Lenexa Police Department dispatched three uniformed officers to provide security at the apartment.

One of the Overland Park detectives obtained a key from the apartment manager and used it to enter the residence. All five **[*658]** officers entered the apartment. The two Overland Park detectives conducted the search. The Lenexa officers did not participate in the search of the premises.

The defendant filed a motion to suppress the evidence obtained in the search of the apartment. The district court sustained the motion, contending that the Overland Park detectives acted outside their jurisdiction in searching the Lenexa apartment.

This case involves the interpretation of two statutes. First, *K.S.A. 22-2505* states: [HN1] "A search warrant shall be issued in duplicate and shall be directed for execution to all **[***3]** law enforcement officers of the state, or to any law enforcement officer specifically named therein." The second statute involved is *K.S.A. 22-2401a*, which provides in pertinent part:

[HN2] "(2) Law enforcement officers employed by any city may exercise their powers as law enforcement officers:

"(a) Anywhere within the city limits of the city employing them and outside of such city when on property owned or under the control of such city; and

"(b) in any other place where a request for assistance has been made by law enforcement officers from that place or when in fresh pursuit of a person."

The State relies on *K.S.A. 22-2505* for the proposition the Overland Park detectives were acting within their authority in searching the Lenexa apartment. The State reads *K.S.A. 22-2505* as authority for an officer to execute a warrant anywhere in the state. [HN3] That statute admittedly requires that a warrant be directed to all law enforcement officers or to specifically named law enforcement officers. It thus modifies the common-law rule requiring that a search warrant be directed to a particular person and be executed only by that person. See *U.S. v. Martin, 600 F.2d 1175, 1181 (5th Cir. 1979)*. **[***4]** The statute places no limitation upon the territory in which an officer may operate.

The geographic limitation is contained in *K.S.A. 22-2401a*. That statute, instead of *K.S.A. 22-2505*, is operative here for three reasons. First, *K.S.A. 22-2505* [HN4] makes clear that search warrants must be executed by law enforcement officers; the statute does not purport to establish where **[**1363]** an officer may execute a warrant. Second, [HN5] even if *K.S.A. 22-2505* and *22-2401a* are understood to be in conflict, then the latest legislative expression controls. See **[*659]** *Farmers State Bank & Trust Co. of Hays v. City of Yates Center, 229 Kan. 330, 338, 624 P.2d 971 (1981)*. The 1977 statute, 22-2401a, thus controls the 1970 enactment, 22-2505. Finally, 22-2401a [HN6] reveals a clear intent by the legislature to limit the jurisdiction of certain law enforcement officers. [HN7] When a statute is plain and unambiguous, the court must give effect to the expressed legislative intent. *State v. Sleeth, 8 Kan. App. 2d 652, 655, 664 P.2d 883 (1983)*. [HN8] The language of 22-2505 cannot be read as an exception to the clear geographic limitation set **[***5]** forth in 22-2401a.

State v. Hennessee, 232 Kan. 807, 658 P.2d 1034 (1983), which addressed a similar problem, is instructive. In that case, the Pratt County Sheriff traveled to the Stafford County residence of the defendant and arrested her pursuant to a warrant. The Supreme Court determined that the Pratt County Sheriff acted beyond the statutory authority of *K.S.A. 22-2401a*. The specific limitation of 22-2401a was held to control over the general provision of

K.S.A. 19-812, which requires a sheriff to execute, "according to law, all process, writs, precepts and orders issued or made by lawful authority and to him directed." The Supreme Court concluded:

[HN9] "A sheriff may exercise his powers outside the county where he holds office in only two instances: (1) where he is in "fresh pursuit" of a person, or (2) where a request for assistance has been made by law enforcement officers from the area for which such assistance is requested." *232 Kan. at 807*, Syl. para. 2.

The State urges the adoption of the Illinois rule that police officers may execute a search warrant anywhere in the State, pointing out that **[***6]** *K.S.A. 22-2505* is derived from an Illinois statute. This argument overlooks the fact that the Illinois statute authorizes private persons, as well as law enforcement officers, to execute search warrants. The Illinois courts have emphasized that private persons are not subjected to any geographic limitation in concluding that it would be unreasonable to restrict the authority of law enforcement officers. In addition, in Illinois, police officers had been limited to the territorial boundaries of their city by a common-law rule. *People v. Carnivale, 61 Ill. 2d 57, 329 N.E.2d 193 (1975)*.

The rationale employed by the Illinois courts has no bearing here. *K.S.A. 22-2505* does not include any authorization for private **[*660]** persons to execute search warrants. Moreover, in Kansas, the geographical restriction on the authority of law enforcement officers is statutory, not common law. For these reasons, the Illinois decisions are not persuasive in interpreting the pertinent Kansas statutes.

The State argues that *K.S.A. 22-2401a* is inapplicable to execution of a search warrant because the statute is found in Chapter 22, **Article** 24, an **article** entitled "Arrest." **[***7]** This argument is not persuasive. The State takes a narrow view of **Article** 24, ignoring the sections which address release of persons arrested, *K.S.A. 22-2406*, and crimes committed by corporations, *K.S.A. 22-2409*. In addition, [HN10] the **placement** of a law in a particular location in the statutes by the **Revisor** of Statutes is not persuasive as to the intent of the legislature which enacted it. *Arredondo v. Duckwall Stores, Inc., 227 Kan. 842, 847, 610 P.2d 1107 (1980)*. But most important, [HN11] the statute's **placement** provides no basis for placing a qualification on the plain, unambiguous statutory language which delineates where officers may "exercise their powers."

Alternatively, the State argues that mere participation by the Lenexa police officers should be enough to validate the acts of the Overland Park detectives under 22-2401a. The State cites numerous decisions **[**1364]** from other jurisdictions to support this argument. Those cases are not persuasive; none of them address the combination of statutes involved here. Obviously, had it chosen to do so, the Kansas Legislature could have adopted a rule of unlimited jurisdiction for police officers, or a rule **[***8]** dependent upon notification or presence or participation by local officers. But, instead, the legislature set out a "request for assistance" rule in 22-2401a. This court must give effect to the statute and apply the rule adopted by the legislature.

The State's final argument is that *K.S.A. 22-2401a(4)* provided authority for the search by the Overland Park detectives. That subsection provides "law enforcement officers of any jurisdiction within a county designated an urban area . . . may exercise their powers as law enforcement officers in any area within such county when executing a valid arrest warrant." The State concedes that 22-2401a(4) is limited by its terms to *arrest* warrants. The subsection has no application to the execution of search warrants.

[*661] To sum up, *K.S.A. 22-2401a(2)* [HN12] authorizes law enforcement officers employed by a city to exercise their powers outside the city: (1) on property owned or controlled by the city; (2) where they are in "fresh pursuit" of a person; or (3) where a request for assistance has been made by law enforcement officers from the place for which assistance is requested. This case does not involve property owned or controlled by a city. The State does **[***9]** not argue that a "fresh pursuit" occurred. The record does not show and the State does not argue that the Overland Park detectives received a request for assistance from Lenexa law enforcement officers. The Overland Park detectives acted beyond their statutory authority.

Appeal denied.

227 Kan. 842, *; 610 P.2d 1107, **;
1980 Kan. LEXIS 287, ***

LEXSEE 227 KAN. 842, 847

Positive
As of: Mar 08, 2009

Vincent Anthony Arredondo, Appellant, v. Duckwall Stores, Inc., d/b/a Alco Discount Stores, Appellee

No. 50,965

Supreme Court of Kansas

227 Kan. 842*; *610 P.2d 1107*; *1980 Kan. LEXIS 287

May 10, 1980, Opinion Filed

PRIOR HISTORY: **[***1]** Appeal from Johnson District Court; Janette Howard, Associate Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff purchaser, a minor, citing *Kan. Stat. Ann. § 21-4209*, appealed a judgment of the Johnson District Court (Kansas) denying his motion to strike from defendant merchant's answer a claim that the comparative negligence statute, *Kan. Stat. Ann. § 60-258a*, applied to the purchaser's action seeking damages for injuries received in a hunting accident allegedly caused by the merchant's negligence in selling him gunpowder.

OVERVIEW: The purchaser was injured by the discharge of a shell reloaded with gunpowder sold to him by the merchant. The purchaser contended on appeal that application of comparative negligence would destroy the legislative intent and purpose of *Kan. Stat. Ann. § 21-4209*. The merchant asserted that gunpowder was not an explosive under *§ 21-4209*. The court affirmed the judgment. The court concluded that gunpowder was an

explosive regulated by *§ 21-4209*. The court observed that the primary purpose of *§ 21-4209* was to protect the general public and that an incidental consideration was the protection of the named classes of minors, alcoholics, addicts, and felons. The court noted that it was the state's public policy that parties whose conduct brought about death, injury, or property damage bore responsibility based upon the proportionate fault of each. The court determined that the protective purpose of *§ 21-4209* and similar statutes would not be defeated by the utilization of the comparative negligence statute, noting that not all minors to whom weapons or explosives were sold in violation of statute were members of a class unable to protect themselves and unaware of the dangers.

OUTCOME: The court affirmed the judgment of the trial court denying the purchaser's motion to strike a defense based on comparative negligence from the merchant's answer in the purchaser's negligence action.

CORE TERMS: explosive, firearm, contributory negligence, gunpowder, legislative intent, shotgun, public safety, comparative negligence, gun, felons, narcotic addict, intoxicated, habitual, drunkard, years of age, dangerous weapons, irresponsible, exceptional, hunting, weapon, personal injuries, criminal code, causal negligence, discharged, detonating, protective, convicted, storage, purview, shells

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Elements
Criminal Law & Procedure > Criminal Offenses > Weapons > Trafficking > Elements
Torts > Negligence > Defenses > Comparative Negligence > General Overview
[HN1] *Kan. Stat. Ann. § 21-4209* reads: (1) Unlawful disposal of explosives is knowingly selling, giving or otherwise transferring any explosive or detonating substance to: (a) A person under eighteen (18) years of age; or (b) An habitual drunkard or narcotic addict; or (c) A person who has been convicted of a felony under the laws of this or any other jurisdiction within five years after his release from a penal institution or within five years after his conviction if he has not been imprisoned. (2) Unlawful disposal of explosives is a class A misdemeanor.

Torts > Negligence > Defenses > Comparative Negligence > General Overview
Torts > Negligence > Defenses > Contributory Negligence > General Overview
Torts > Negligence > Proof > Violations of Law > General Overview
[HN2] Actionable negligence occurs when one breaches a duty imposed by a criminal statute and an injury of the type intended to be prevented is proximately caused to another by the violation. Breach of duty, or negligence per se, results from a finding that the statute

was violated. Liability follows if the violation is the proximate cause of injury. In the usual negligence per se case, plaintiff's contributory negligence has been a defense. The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant.

Governments > Legislation > Interpretation
Torts > Negligence > Defenses > Contributory Negligence > Limits on Application > Age
Torts > Transportation Torts > Rail Transportation > Federal Employers' Liability Act
[HN3] There are exceptional statutes which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves. Thus a statute which prohibits the sale of firearms to minors may be clearly intended, among other purposes, to protect them against their own inexperience, lack of judgment, and tendency toward negligence, and to make the seller solely responsible for any harm to them resulting from the sale. In such a case the purpose of the statute would be defeated if the contributory negligence of the minor were permitted to bar his recovery. Courts have found legislative intent to remove contributory negligence as a defense when the statute violated is one of two exceptional types: (1) the statute expressly removes the defense, as in the Federal Employers' Liability Act; and (2) such intent is found in the statute's character, its social purpose, and the background of the social problem and hazard to which it is directed, such as Child Labor laws.

Torts > Damages > General Overview
Torts > Negligence > Defenses > Comparative Negligence > General Overview
Torts > Negligence > Defenses > Contributory Negligence > General Overview
[HN4] The Kansas comparative negligence statute removes contributory negligence as a complete bar to recovery. It reads: (a) The contributory negligence of any party in a civil action shall not bar such party or said party's legal representative from recovering damages for negligence resulting in death, personal injury or property damage, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party. *Kan. Stat. Ann. § 60-258a.* The statute requires a weighing of the causal negligence, if any, of all parties whose conduct brought about the harm, and the consequent imposition of individual liability for damages based upon the proportionate fault of each party to the occurrence. If contributory negligence or an analogous defense would not have been a defense to a claim, the comparative negligence statute does not apply; if contributory negligence would have been a defense, the statute is applicable.

Governments > Legislation > Interpretation
Torts > Negligence > Defenses > Comparative Negligence > General Overview
Torts > Negligence > Defenses > Contributory Negligence > General Overview
[HN5] In determining legislative intent, courts are not limited to a mere consideration of the language used, but look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under the various constructions suggested.

Governments > Legislation > Interpretation
[HN6] Though the heading or title given an act of the legislature forms no part of the statute itself, the language of the title cannot be ignored as an aid in determining legislative intent.

Governments > Legislation > Interpretation
[HN7] The placement of a law in a particular location in the Kansas General Statutes by the compiler is not persuasive as to the intent of the legislature which enacted it.

Governments > Legislation > Interpretation
[HN8] It is not the function of the Supreme Court of Kansas to read into a statute a provision which the legislature, in the exercise of its wisdom, omitted.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Nuisances > General Overview
Criminal Law & Procedure > Criminal Offenses > Weapons > Trafficking > Elements
[HN9] Gunpowder is an explosive, the disposition of which is regulated by *Kan. Stat. Ann. § 21-4209*.

Torts > Negligence > Defenses > Comparative Negligence > General Overview
Torts > Negligence > Proof > Violations of Law > General Overview
[HN10] The primary purpose of *Kan. Stat. Ann. § 21-4209* is to protect the general public. An incidental consideration is the protection of those classes enumerated -- minors, alcoholics, addicts, felons. It is now the declared public policy of the state, speaking through the legislative voice, that the parties whose conduct brings about death, personal injury, or property damage, bear responsibility based upon the proportionate fault of each actor. The protective purpose of *§ 21-4209* and similar statutes will not be defeated by the utilization of the comparative negligence statute.

SYLLABUS

SYLLABUS BY THE COURT

1. STATUTES -- *Legislative Intent.* In determining legislative intent, courts are not limited to a mere consideration of the language used, but look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under the various constructions suggested.

2. STATUTES -- *Legislative Intent -- Heading or Title of Act.* Though the heading or title given an act of the legislature forms no part of the statute itself, the language of the title cannot be ignored as an aid in determining legislative intent.

3. STATUTES -- *Legislative Intent -- Placement of Statutes by Compiler in Particular Location.* The placement of a law in a particular location in the General Statutes by the compiler is not persuasive as to the intent of the legislature which enacted the statute.

4. STATUTES -- *Legislative Intent -- Judicial Council Notes.* The Judicial Council's comments on the various sections of the Kansas Criminal Code, published before the Code was enacted by the **[***2]** legislature, are helpful in determining legislative intent.

5. WORDS AND PHRASES -- *Gunpowder.* Gunpowder is an explosive.

6. CRIMINAL LAW -- *Unlawful Disposal of Explosives -- Purpose of Statute.* The primary purpose of *K.S.A. 21-4209* is to protect the general public.

7. COMPARATIVE NEGLIGENCE -- *Application When Criminal Statute Violated.* In an action where it is claimed that the defendant was negligent in violating *K.S.A. 21-4209*, prohibiting sales of explosives to persons under 18 years of age and to certain others, and that such negligence caused plaintiff's injury, it is *held* that the comparative negligence statute, *K.S.A. 60-258a*, applies.

COUNSEL: *Joel K. Goldman*, of Schnider, Shamberg & May, Chartered, of Fairway, argued the cause and was on the brief for the appellant.

Sally Williamson, of Wallace, Saunders, Austin, Brown & Enochs, of Overland Park, argued the cause, and *Barton Brown*, of the same firm, was with her on the brief for the appellee.

JUDGES: The opinion of the court was delivered by Miller, J. Herd, J., respectfully dissents from the opinion of the majority.

OPINION BY: MILLER

OPINION

[*842] **[**1109]** The issue in this interlocutory **[***3]** appeal is whether the Kansas comparative negligence statute applies in an action for personal injuries where liability is premised upon violation of a statute prohibiting sale of explosives to minors. The trial court denied plaintiff's motion to strike from the answer defendant's **[*843]** claim that the comparative negligence statute applies; plaintiff appeals.

The facts alleged and supported by plaintiff's deposition are these: On October 30, 1977, when plaintiff was 16 years of age, he purchased gunpowder from one of defendant's stores for use in reloading shotgun shells. He reloaded some shells and went duck hunting with friends. One of the shells jammed in plaintiff's shotgun. As plaintiff returned to the car, he was holding the gun by the barrel with his left hand, dragging it along with the stock on the ground behind him, when it discharged and shot him in the side. At the time of injury plaintiff had a Kansas hunting license and a federal duck stamp. Plaintiff claims that his injury was directly caused by defendant's sale of gunpowder in violation of *K.S.A. 21-4209*, which reads:

[HN1] "(1) Unlawful disposal of explosives is knowingly selling, giving or otherwise transferring **[***4]** any explosive or detonating substance to:

"(*a*) A person under eighteen (18) years of age; or

"(*b*) An habitual drunkard or narcotic addict; or

"(*c*) A person who has been convicted of a felony under the laws of this or any other jurisdiction within five (5) years after his release from a penal institution or within five (5) years after his conviction if he has not been imprisoned.

"(2) Unlawful disposal of explosives is a class A misdemeanor."

Plaintiff claims that the comparative negligence statute, *K.S.A. 60-258a*, does not apply because its application would destroy the legislative intent and purpose of *K.S.A. 21-4209*. Plaintiff's cause of action is predicated upon the doctrine that [HN2] actionable negligence occurs when one breaches a duty imposed by a criminal statute and an injury of the type intended to be prevented is proximately caused to another by the violation. *Noland v. Sears, Roebuck & Co., 207 Kan. 72, 483 P.2d 1029 (1971)*; *Denton v. Railway Co., 90 Kan. 51, 133 Pac. 558 (1913)*. Breach of duty, or negligence per se, results from a finding that the statute was violated. Liability follows if the violation is the proximate cause of injury. *Plains* **[***5]** *Transp. of Kan., Inc. v. King, 224 Kan. 17, 25, 578 P.2d 1095 (1978)*; *Kendrick v. Atchison, T. & S. F. Rld. Co., 182 Kan. 249*, Syl. paras. 6 and 7, *320 P.2d 1061 (1958)*. In the usual negligence per se case, plaintiff's contributory negligence has been a defense. *Restatement (Second) of Torts § 483* (1965) reads:

"The plaintiff's contributory negligence bars his recovery for the negligence of the defendant consisting of the violation of a statute, unless the effect of the statute is to place the entire responsibility for such harm as has occurred upon the defendant.

. . . .

[*844] "Comment:

. . . .

"*c.* [HN3] There are, however, exceptional statutes which are intended to place the entire responsibility for the harm which has occurred upon the defendant. A statute may be found to have that purpose particularly where it is enacted in order to protect a certain class of persons against their own inability to protect themselves. Thus a statute which prohibits the

sale of firearms to minors may be clearly intended, among other purposes, to protect them against their own inexperience, lack of judgment, and tendency toward negligence, and to make the seller solely responsible **[***6]** for any harm to them resulting from the sale. In such a case the purpose of the statute would be defeated if the contributory negligence of the minor were permitted to bar his recovery.

"It is not within the scope of this Restatement to state the various types of statutes which have been enacted for **[**1110]** such a purpose, nor the principles of statutory construction by which the purpose of a particular statute is to be determined."

Courts have found legislative intent to remove contributory negligence as a defense when the statute violated is one of two exceptional types: (1) the statute expressly removes the defense, as in the Federal Employers' Liability Act; and (2) such intent is found in the statute's character, its social purpose, and the background of the social problem and hazard to which it is directed, such as Child Labor laws. Prosser, *Contributory Negligence as Defense to Violation of Statute,* 32 Minn. L. Rev. 105, 119 (1948). Plaintiff's argument that *K.S.A. 60-258a* does not apply asserts that *K.S.A. 21-4209* is within the second group of exceptional statutes and that plaintiff is a member of the special group to be protected by the statute such that allowing **[***7]** diminution of recovery based upon plaintiff's conduct would defeat the protective statute's purpose.

[HN4] Our comparative negligence statute removes contributory negligence as a complete bar to recovery. It reads:

"(*a*) The contributory negligence of any party in a civil action shall not bar such party or said party's legal representative from recovering damages for negligence resulting in death, personal injury or property damage, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party." *K.S.A. 60-258a.*

The statute requires a weighing of the causal negligence, if any, **[*845]** of all parties whose conduct brought about the harm, and the consequent imposition of individual liability for damages based upon the proportionate fault of each party to the occurrence. See *Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978).* If contributory **[***8]** negligence or an analogous defense *would not* have been a defense to a claim, the comparative negligence statute does not apply; if contributory negligence *would* have been a defense, the statute is applicable. In order to determine whether *K.S.A. 21-4209* is an exceptional statute, the violation of which was not subject to the defense of contributory negligence and is not now subject to the doctrine of comparative negligence, we must first review the legislative history which may be indicative of legislative intent. In *Brown v. Keill, 224 Kan. at 200*, we said:

[HN5] "In determining legislative intent, courts are not limited to a mere consideration of the language used, but look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under the various constructions suggested."

During the early years of statehood, our statutes dealt with possession or sale of certain firearms, but not with shotguns or explosives. The carrying of pistols or other deadly weapons by intoxicated persons was prohibited and made a misdemeanor by G.S. 1868, ch. 31, § 282. The sale of pistols, revolvers, **[***9]** or other dangerous weapons to minors or persons of unsound mind was forbidden by Laws of 1883, ch. 105, § 1. See G.S. 1949, 38-701. This court held, however, that the legislature did not intend to include shotguns when it used the phrase "other dangerous weapons" in the latter statute. *Parman v. Lemmon, 120 Kan. 370, 244 Pac. 227, 44 A.L.R. 1500 (1926).*

It was not until 1915 that the legislature enacted a statute regulating the sale of explosives. That act, Laws of 1915, ch. 272, is entitled:

"AN ACT providing *for public safety* by regulating the storage handling and disposition of dynamite, giant powder, nitro-glycerine gun cotton and other detonating explosives, providing penalties for violation of this act and repealing all acts in conflict herewith." (Emphasis supplied.)

[1111]** It provided safety regulations for the storage of explosives, required that records be kept of all sales, and prohibited the sale or transfer of explosives to "any intoxicated or irresponsible person." It contained the following proviso: "[T]his act shall not include what is commonly known as black or blasting and gun **[*846]** powder." Parts of the 1915 act, not here material, **[***10]** were found unconstitutional. *State v. Satterlee, 110 Kan. 84, 202 Pac. 636 (1921).* The statute, with the unconstitutional portion deleted, was re-enacted in 1923, and remained in effect until 1969. See R.S. 1923, 21-2444 *et seq.*; G.S. 1935, 21-2444 *et seq.*; G.S. 1949, 21-2444 *et seq.*; and *K.S.A. 21-2444* (Corrick).

[HN6] Though the heading or title given an act of the legislature forms no part of the statute itself, *State v. Logan, 198 Kan. 211, 217, 424 P.2d 565 (1967)*, the language of the title cannot be ignored as an aid in determining legislative intent. *Baker v. Land Co., 62 Kan. 79, 82-83, 61 Pac. 412 (1900)*; *Mitchell v. State, 61 Kan. 779, 784, 60 Pac. 1055 (1900).* The title given the 1915 act as well as the content of the entire enactment lead to the inescapable conclusion that the act was one designed to protect the public safety, not merely to protect handlers of explosives or intoxicated or irresponsible persons.

This statutory prohibition against sale of explosives -- not including gunpowder -- to intoxicated or irresponsible persons continued until our present criminal code was enacted and *K.S.A. 21-2444 to 21-2449* (Corrick) were repealed. Article **[***11]** 42 of chapter 180 of the 1969 Laws, entitled "Crimes Against the Public Safety," includes four sections concerning explosives, §§ 4207, 4208, 4209 and 4210, now *K.S.A. 21-4207* to 4210 inclusive. In addition to § 4209, quoted above, these sections define the offenses of failure

to register sale of explosives (*§ 21-4207*), failure to register receipt of explosives (§ 21-4208), and carrying concealed explosives (§ 21-4210).

The 1969 Kansas Criminal Code, *K.S.A. 21-3101 et seq.,* was a thorough revision of the Kansas criminal statutes, the result of five years of study by the Kansas Judicial Council. The Council's comments on the various sections, originally published in the Judicial Council Bulletin in April, 1968, have been edited by the Revisor of Statutes and are now printed in the Kansas Statutes Annotated. These comments, published before the code was enacted by the legislature, are helpful in determining legislative intent. The Council's comments to *K.S.A. 21-4209* are:

"Former K.S.A. 21-2445 prohibited sales of explosives to any 'intoxicated or irresponsible person.' If sales are to be prohibited in the interests of public safety, it would appear that the class to whom **[***12]** sales are prohibited might properly be enlarged to include narcotic addicts and recent felons, thus paralleling the firearms section."

[*847] Appellant seizes upon the latter portion of this comment, "paralleling the firearms section," to find legislative intent that the explosives acts are primarily intended to be protective of children. He relies upon the placement of the 1883 firearms act in the chapter of the General Statutes devoted to minors to support this claim. However, in the first official General Statutes published after the enactment, the sections were placed in the chapter on Crimes and Punishment. See G.S. 1897, ch. 100, §§ 303, 304. In 1915 the sections appeared for the first time in the official General Statutes in the chapter devoted to minors. See G.S. 1915, ch. 78, §§ 6400, 6401. They remained in that chapter for the next 54 years. As this history illustrates, [HN7] the placement of a law in a particular location in the General Statutes by the compiler is not persuasive as to the intent of the legislature which enacted it.

In 1969, the firearms and explosives sections were grouped together in article 42 of chapter 21 as "Crimes Against the Public Safety." **[***13]** This placement and caption were the result of legislative action. The Judicial Council comment acknowledges the public safety purposes of the act. Sale or transfer of either handguns or explosives to minors, habitual drunkards, narcotic addicts, or recently convicted felons might **[**1112]** result in injury to the purchaser or transferee, but injury to the public seems more probable and is the more logical and compelling reason for the enactment of both the firearms and the explosives acts. We cannot attribute the purpose of protecting minors, habitual drunkards, narcotic addicts, or felons from themselves as the impelling reason for this enactment; the safety of the public -- including minors and the other classes -- is the paramount purpose.

Appellant contends that the legislative prohibition of sales of firearms to minors is evidence of the legislative intent to protect minors from themselves through both firearms and explosives control. *K.S.A. 21-4203*, however, prohibits the sale of *handguns* to minors or to recently convicted felons; it prohibits the sale of *any firearm* to habitual drunkards or narcotics addicts; but it *permits* the sale of shotguns and rifles **[***14]** -- weapons having a barrel over 12 inches in length -- to minors. Likewise, *K.S.A. 21-4204* does not make it unlawful for minors to possess firearms. We are not unaware of the provisions of *18 U.S.C.*

922 § (b)(1) which make it unlawful for licensed dealers to sell any firearm or ammunition -- including gunpowder -- to any person known or believed to **[*848]** be under 18 years of age; but the provisions of that act are not helpful in determining the intent of the Kansas legislature in enacting *K.S.A. 21-4209*.

Appellee, on the other hand, contends that the statute is inapplicable here. It asserts that gunpowder is not within the term "explosives." The *Parman* case forms the basis for this claim. In *Parman v. Lemmon, 119 Kan. 323, 244 Pac. 227 (1925)*, a majority of this court held that a shotgun was a "dangerous weapon" as that term was used in R.S. 1923, 38-702. A violation of that statute by the defendant, a father who gave his 14-year-old son a shotgun, resulted in the father's liability for damages to one who was injured by the negligent shooting of the gun by the minor. Upon rehearing, a majority of the court reversed the former opinion, adopted a dissent to the **[***15]** first opinion as the controlling voice of the court, and held that shotguns do not come within the purview of "dangerous weapon," as used in R.S. 1923, 38-702. The injured plaintiff in *Parman* was not the minor to whom the shotgun was transferred; he was a member of the general public.

Parman is not authority for declaring gunpowder outside the purview of the term "explosives." Webster's Third New International Dictionary defines gunpowder as "a black or brown explosive . . . ." In a fire prevention statute, the legislature recognizes gunpowder as an explosive. The state fire marshal is directed to adopt rules and regulations for the safeguarding of life and property from the hazards of explosion, which regulations shall include:

"(1) The keeping, storage, use, sale, handling, transportation or other disposition of . . . explosives, including gunpowder . . . ." *K.S.A. 1979 Supp. 31-133*.

When the present criminal code was enacted, the legislature repealed *K.S.A. 21-2444* (Corrick), which had exempted sales of gunpowder. By repealing and not re-enacting the statutory exemption the legislature must have intended to include gunpowder as a regulated explosive. [HN8] "It is not the **[***16]** function of this court to read into a statute a provision which the legislature, in the exercise of its wisdom, omitted . . . ." *Jackson v. State Corporation Commission, 183 Kan. 246, 250, 326 P.2d 280 (1958)*. We conclude that [HN9] gunpowder is an explosive, the disposition of which is regulated by *K.S.A. 21-4209*.

Cases from other jurisdictions considering defenses to actions **[*849]** predicated upon violations of explosive and firearm statutes are instructive. The statutes vary, however, and the decisions are not consistent as to whether the traditional defenses apply. See Annot., *75 A.L.R.3d 825*.

Perhaps the leading case barring traditional negligence defenses to actions for violation of laws prohibiting the sale of guns or explosives to minors is *Tamiami Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1959)*. The gun shop sold a 30/30 Winchester Model 94 rifle to a 16-year-old, who lost a **[**1113]** thumb when the weapon accidentally discharged. The Florida court found legislative intent to remove the defense of contributory negligence, held the law violated by the gun shop came within the purview of *Restatement (Second) of Torts § 483, Comment c,* and discharged the writ **[***17]** of certiorari.

A contrary holding is that of *Zamora v. J. Korber & Co., 59 N.M. 33, 278 P.2d 569 (1954)*. The plaintiff when 12 1/2 years of age purchased a .22 caliber rifle from the defendant. The sale violated an ordinance of the city of Albuquerque prohibiting sales of firearms to persons under 16. Plaintiff was described as a normal boy in the 8th grade in school. He fired at a rock from a distance of 9 or 10 feet. The bullet hit the rock and rebounded, striking the boy in the left eye causing its loss. The trial court entered a directed verdict in favor of defendant on the issue of contributory negligence. The New Mexico Supreme Court reversed, saying:

"We conclude that it was for the jury, in view of all the pertinent considerations of age, maturity, intelligence, experience, and so forth, to decide, under proper instructions on the law, whether or not the boy was guilty of contributory negligence. [Citations omitted.] The case should have been submitted to the jury, and, therefore, the trial court erred . . . ." (p. 36.)

Other cases following *Tamiami* or *Zamora* could be cited, but they would not aid in determining the matter at hand.

[HN10] The primary purpose **[***18]** of *K.S.A. 21-4209* is to protect the general public. An incidental consideration is the protection of those classes enumerated -- minors, alcoholics, addicts, felons.

It is now the declared public policy of this state, speaking through the legislative voice, that the parties whose conduct brings about death, personal injury, or property damage, bear responsibility based upon the proportionate fault of each actor. The protective purpose of *K.S.A. 21-4209* and similar statutes will **[*850]** not be defeated by the utilization of the comparative negligence statute. Not all minors to whom weapons or explosives are sold in violation of statute are members of a class unable to protect themselves and unaware of the dangers involved. For example, if the injured minor is so young that he or she has *no* appreciation of the danger, no percentage of negligence should be assessed to such a person. On the other hand, if he or she has had special training (the hunting safety course prescribed by K.S.A. 32-401 for those seeking hunting licenses, for example) and if he or she is older, more mature, and has had experience with firearms or explosives, a higher standard of care could well be **[***19]** imposed and a percentage of the causal negligence assigned to such person by the trier of fact.

We have not overlooked other points raised or the many authorities cited by industrious counsel, but we find the points without merit and the authorities unpersuasive.

The judgment is affirmed.

DISSENT BY: HERD

DISSENT

Herd, J.:

I respectfully dissent from the opinion of the majority. For public safety reasons, minors as well as habitual drunkards, narcotics addicts and felons are prohibited from obtaining any explosives or detonating substances by the provisions of *K.S.A. 21-4209*. In addition to public safety reasons, I believe the statute operates to protect a class of persons traditionally protected under the law, namely minors. I find the statute intended to protect minors from "their own inexperience, lack of judgment, and tendency toward negligence" in prohibiting the sale or transfer of explosives to them. *Restatement (Second) of Torts § 483* (1965). The comparative negligence statute should not apply.

KANSAS ASSOCIATION OF COUNTIES

MEMORANDUM

TO: CHAIRMAN ROGER REITZ AND COMMITTEE MEMBERS

FROM: MELISSA WANGEMANN, GENERAL COUNSEL

DATE: 6 MARCH 2009

RE: SB 271 -- CONTRACT BIDDING PROCESS

Chairman Reitz and Committee Members:

KAC was present last week for the hearing on SB 271, a bill requested by Riley County. SB 271 allows a Board of County Commissioners to declare an emergency and suspend the bidding process for contracts. Riley County did not bring this issue to the KAC Legislative Policy Committee for consideration, and thus we did not take a position on the bill.

Senator Kultala asked during the hearing whether KAC could check with its members to determine whether other counties would benefit from this legislation. I sent an inquiry out on our list serve and I had several counties respond saying they support the legislation: Anderson, Atchison, Barber, Douglas, Johnson, Leavenworth, Montgomery, Pottawatomie, and Seward.

In addition, the Kansas Emergency Management Association (a KAC affiliate group) took a formal vote of its governing body and voted in favor of supporting the bill.

Johnson County's Legal Department noted that other statutes, notably Chapter 48, Article 9, address emergency and disaster situations in counties. Although none of these particular statutes would have addressed the Riley County flood situation, their existence indicates precedence for enacting legislation to address emergency situations in Kansas counties.

I apologize that I will be out of town when you work this bill. I hope this information is helpful.

300 SW 8th Avenue
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785•272•2585
Fax 785•272•3585

Senate Local Government
3/10/09

Attachment 3

TESTIMONY

TO: **The Honorable Roger Reitz, Chair**
And Members of the Senate Committee on Local Government

FROM: **Whitney Damron**
On Behalf of the City of Topeka

RE: **HB 2157 - An Act concerning the Topeka/Shawnee County Riverfront Authority.**

DATE: **March 10, 2009**

Good morning Chairman Reitz and Members of the Senate Committee on Local Government. I am Whitney Damron and I appear before you today on behalf of the City of Topeka in support of HB 2157 that would allow the Topeka/Shawnee County Riverfront Authority to transition to quarterly meetings as opposed to monthly meetings as currently required in the Act.

In 2006, the Kansas Legislature gave the City of Topeka and Shawnee County the authority to create a riverfront authority.

Since that time, the City and the County created an authority, made their respective appointments to the authority and much work has occurred leading up to the development of a Kansas Riverfront Master Plan, which was adopted by the Authority in October, 2008.

Under K.S.A. 12-5611 (g), the Authority is required to meet once each calendar month. At the present time, this is excessive, as much of the initial planning work has been completed and the Authority is working towards implementing the Master Plan, including seeking funding through various sources. Accordingly, we have proposed amending this statute to only require meetings to be held quarterly or more often if requested by the Chair.

On behalf of the City of Topeka, we thank the Committee for its consideration of this request and respectfully ask for your favorable consideration of HB 2157

WBD

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Senate Local Government
3/10/09
Attachment 4

LKM
League of Kansas Municipalities

300 SW 8th Avenue
Topeka, Kansas 66603-3912
Phone: (785) 354-9565
Fax: (785) 354-4186

To: Senate Local Government Committee
From: Kim Winn, Director of Policy Development & Communications
Date: March 10, 2009
Re: Support for SB 245

On behalf of the membership of the League of Kansas Municipalities, thank you for considering SB 245. This is a bill that we requested to allow cities the option of publishing a summary of an ordinance, rather than the full text in the official city newspaper. We support this legislation for the following reasons:

- **It saves taxpayer dollars.** K.S.A. 12-3007 requires that all ordinances be published in full in the official city newspaper. In this difficult economy, cities have been challenged to cut costs wherever possible. This bill removes a significant unfunded mandate and would grant needed flexibility to cities.

- **It applies only to ordinances.** This bill is limited in scope and applies only to the publishing requirement for city ordinances. It would have no effect on any pre-action notifications that are required by law (e.g., public hearing notifications, foreclosure notifications, etc.) County resolutions, which are the equivalent of city ordinances, already have no publication requirement in Kansas.

- **44 states allow for summary publication**. We conducted a 50-state review of ordinance publication requirements. I have attached the complete results of this survey. Kansas is one of only six states that require full-text publication of ordinances.

- **It would enhance notice to the public.** Current law requires that the full legal text of ordinances be published in their entirety in the official city newspaper. However, we believe that citizens would be better served by a plain language summary identifying exactly what the ordinance would do and where they could get a copy of it.

- **It is optional.** We understand that there is concern by some newspapers that the lack of public dollars could put them out of business. SB 245 only provides an option for cities, it does not automatically remove the ordinances from publication in the newspaper. That decision would be left to locally elected officials.

For these reasons, we respectfully request your consideration of SB 245 and ask that the Committee report it favorably for passage. I would be happy to stand for questions at the appropriate time. We look forward to working with the Committee on this important issue.

Senate Local Government
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5-2

State	Full Text Required	Summary Allowed	Others	Statute Number
Alabama	X			§ 11 - 45 - 8
Alaska			No publishing requirement; pre-adoption notice of intent	Alaska Stat. § 29.25.020
Arizona	X			39 - 204; 9 - 219; 9-812
Arkansas	X			14 - 55 -206
California		X		369 - 33
Colorado			Title only	31 - 16 - 105
Connecticut		X		Sec. 7-157
Delaware			Notice of intent only	22 - 8 - 812
Florida		X	Title and sub-areas	166.041 (3)(a)
Georgia			Pre-adoption notice of intent	O.C.G.A. § 36-35-3 (b) (1)
Hawaii		X		§ 46-2
Idaho		X	Must include penalities & information concerning real property	50 - 901; 50 - 901A
Illinois			Newspaper or pamphlet available	65 (IOCS) - 5/1-2-4
Indiana			No publishing requirement; available in clerk's office	IC 36-1-5-4
Iowa		X		Title 9; Subtitle 4--362.3
Kansas	X			K.S.A. 12-3007
Kentucky		X		83a.010, 83a.060
Louisiana			No publication requirement	33 - 406(d)(2)
Maine			Pre-adoption notice	30 a § 3003-3004
Maryland		X	Charter amendments only	23a - 15
Massachusetts			Varies: if city opts into charter then if the ordinance exceeds 8 octavo pages of ordinary book print it can be in a pamphlet and not full text	40 - 32A
Michigan		X		Act 279; Section 117.5b
Minnesota		X		331A.01, subdivision 10

Mississippi		X	If summary, can post entire ordinance at city hall and one public place	Miss. Code Ann. § 21-17-19
Missouri			No publication required	71.94
Montana			No publication required	7 - 1 - 4127; 7 - 5 - 103
Nebraska			Newspaper or pamphlet available	§ 15-402, 17 - 613, 16 - 403
Nevada		X	Title and subject matter	NRS 266.115 (3)(b)
New Hampshire		X		RSA 47:18 (2008)
New Jersey			Either	40:49 - 2
New Mexico		X	Post publication requirement in full text or summary	3 - 17 - 3
New York		X		MHR Art. 3 - 20, 25, 27
North Carolina		X	Effects only	N.C. Gen. Stat. § 160A-102
North Dakota		X	Title and penalty clause only	40 - 11 - 06
Ohio		X	Local option in city charter	7 - 705.16
Oklahoma		X	Title included	11 O.S. 14-10
Oregon			No publication required	ORS 221.330
Pennslyvania			Either	Borough --53 P.S. 45101First Class Township Code – 53 P.S. 55101 Second Class Township Code – 53 P.S. 65101 Third Class City Code – 53 P.S. 35101
Rhode Island			No publication required	45-6-7
South Carolina			No publication required	5 -7 -290
South Dakota	X		Exception for amendments to planning and zoning	9 - 19 - 7
Tennessee		X	Notice of any new provisions and penalty	6-54-508 - 509
Texas		X	Summary must include any fines or forfeiture	LGC 52.011 (b)
Utah		X		§ 10-3-711

Vermont		X	Can publish full text or summary	24 V.S.A. 1972(a)
Virginia		X	Title only	§ 15.2-1427 (c)-(F)
Washington		X	Either; local option	RCW 35A.12.160
West Virginia		X	Pre-adoption notice of intent summary--if raising revenue	§ 8 - 11 - 4; § 59-3-1
Wisconsin		X	Summary allowed if no penalties; requires publication if there are penalties	§ 66.0103; § 59.14
Wyoming	X			§ 15 - 1 - 116, 110

The City of
Overland
Park
KANSAS

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Testimony Before The Senate Local Government Committee
Regarding Senate Bill 245
Presented by Erik Sartorius
March 10, 2009

The City of Overland Park appreciates the opportunity to share with the committee its support for Senate Bill 245. Allowing cities to publish summaries of their ordinances would save scarce funds while still ensuring the public is informed of actions taken by cities.

The City of Overland Park values the use of technology in delivering information and services to its citizens. Publishing legal notices on the City's website would create a permanent, searchable record for citizens to access. Removing the requirement that such notices be published in their entirety in a newspaper would at the same time save taxpayers money. In the last three years, the City of Overland Park has spent an average of $74,170 annually to publish legal notices.

The number of individuals using the Internet is rapidly increasing. A survey conducted by the City revealed ninety-two percent (92%) of residents have computers at home, and ninety-eight percent (98%) have access to the Internet in some manner. Overland Park wishes to deliver information to its citizens in a manner sought by them.

As you are well aware, readership for traditional, printed newspapers is declining. Some newspapers will not survive, such as the recently ended *Derby Reporter*. Other newspapers are attempting to adjust their business models, and not surprisingly, many are turning to the internet in hopes of turning things around. In fact, the *Kansas City Kansan* has moved to solely an online presence.

At the same time, the City realizes not every citizen may be comfortable using the Internet or have access to it. As such, the City believes it appropriate to have local governments publish notices in the newspaper directing citizens to the City's website or to City Hall, where copies of legal notices would be available.

The City of Overland Park supports the goal of Senate Bill 245, and asks that the committee report the bill favorably for passage.

Senate Local Government
3|10|09
Attachment 6

City of Lawrence
KANSAS

DAVID L. CORLISS
CITY MANAGER

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CITY COMMISSION

MAYOR
MICHAEL DEVER

COMMISSIONERS
ROBERT CHESTNUT
DENNIS "BOOG" HIGHBERGER
MIKE AMYX
SUE HACK

March 9, 2009

Senator Roger Reitz, Chairperson
Senate Committee on Local Government
State Capitol Building
Topeka, Kansas 66612

Re: Senate Bill 245

Dear Chairperson Reitz and Committee Members:

I am writing on behalf of the Lawrence City Commission to express support for SB 245. This bill will permit cities to publish in the local newspaper an ordinance summary rather than the full text of ordinances passed by our governing body. This will save our City thousands of dollars annually while continuing to provide the public with important information regarding the actions of the City Commission.

Our city, like many across the state, is experiencing severe budget challenges. Our constituents want us to reduce expenditures rather than increase taxes. This bill will help us reduce costs while continuing to provide transparency in government. Please help local units of government in these tough economic times. Please support Senate Bill 245.

Respectfully,

Rob Chestnut
Vice-Mayor

Cc: City Commission
David L. Corliss, City Manager

Senate Local Government
3/10/09

Attachment 7

Lenexa
KANSAS

TESTIMONY IN SUPPORT OF SB 245
(written only)

To: Chairman Reitz
Members of the Local Government Committee

From: Matt Shatto, Assistant City Administrator

Date: March 9, 2009

Thank you for the opportunity to present testimony regarding SB 245. The City of Lenexa understands that this bill was introduced in an effort to allow cities the same flexibility granted to many cities around the country in order to save taxpayer money while at the same time insure that the public has the opportunity to receive appropriate notice related to municipal business. For this fact, we are in support of this bill.

The City spends nearly $30,000 per year on legal publications in newspapers that have limited circulation and that are read by only a small portion of the public. The opportunity to meet publication requirements by posting a summary of the legislation or by utilizing the City's website would not only save residents significant tax dollars, but would allow jurisdictions to provide more detailed information to a larger audience. The search capability of the internet will also allow residents the opportunity to more easily find and view such notices.

Thank you very much for your time and for your willingness to support this bill.

Senate Local Government
3/10/09
Attachment 8

Testimony

Unified Government Public Relations
701 N. 7th Street, Room 620
Kansas City, Kansas 66101

Mike Taylor, Public Relations Director
913.573.5565 mtaylor@wycokck.org

Senate Bill 245
Summary Publications of Legal Notices

Delivered March 10, 2009
Senate Local Government Committee

The Unified Government supports Senate Bill 245. Allowing the Unified Government to publish summary notices in print publications and the full details on its own government website has a double benefit for citizens. It will save taxpayers a significant amount of money and it will improve public access to this information.

In 2008, the Unified Government spent more than $71,000 publishing legal notices. With traditional local government revenues such as the Local Ad Valorem Tax Reduction Fund, Machinery and Equipment "slider" reimbursement, liquor tax and other dollars being stripped away on a regular basis by the Governor and Legislature, communities need to be more efficient and save money. Antiquated mandates such as the current publications law waste taxpayer money. Reducing the cost of publishing legal notices by using more effective and cost efficient local government websites will be a major benefit to taxpayers.

In most budget years, $71,000 may not sound like a significant amount of money in comparison to other budget items. But this year is different. The Unified Government expects to lose as much as $6-million in pledged state funds over the next 18 months. Local governments across Kansas will see more than $150-million in promised funds taken.

But saving taxpayers money is only one benefit of Senate Bill 245. The other is giving the public better access to public information. A citizen interested in reading legal notices in the Kansas City Star and most other newspapers must arm themselves with a magnifying glass and play a game of hide-and-seek on each and every page of the daily paper. These notices are not printed in one easy to find section on any specific day. They are instead scattered randomly throughout all pages of the newspaper and in microscopic print. The notices also appear for a limited number of days. The Unified Government Website (www.wycokck.org) has more visitors a year than all of the newspapers in Wyandotte County combined have subscribers. By the way, one of our local newspapers has quit publishing in print and is only on the internet.

If the Unified Government could post the full notices on its own website, they would be posted in one easy to find spot, in readable type and would be archived for decades instead of disappearing after a day or two. The Unified Government would also advertise this fact on UGTV, the government cable television channel, as well as promote it in our own weekly email newsletter and twice a year hard copy newsletter mailed to 65,000 Wyandotte County households.

The argument against changing the existing, antiquated system used to be about keeping the public informed. Now the strongest argument is that without this massive taxpayer subsidy, many newspapers would go out of business. They are anyway. And while pumping tax dollars into failing businesses is a growing trend in our nation these days, taxpayers in Kansas would be better served if you didn't force local governments to continue doing it. Our citizens would be better informed and save some tax dollars in the process.

Senate Local Government
3/10/09

Attachment 9

Kansas Press Association, Inc.

Dedicated to serving and advancing the interests of Kansas newspapers

5423 SW Seventh Street • Topeka, Kansas 66606 • Phone (785) 271-5304 • Fax (785) 271-7341 • www.kspress.com

March 10, 2009

To: Sen. Roger Reitz, chairman, and members of the Senate Local Government Committee

From: Doug Anstaett, executive director, Kansas Press Association

Re: SB 245

Mr. Chairman and members of the Committee:

I am Doug Anstaett, executive director of the Kansas Press Association. Thank you for the opportunity to discuss our association's opposition to SB 245.

Public notice has been one of the bedrocks of our nation's commitment to open government for more than two centuries. The theory is that government should not be able to dive into major new projects, new ordinances, special elections, annual budgets and the like without oversight from the citizenry.

Why has public notice always appeared in newspapers? It's simple: public notices are meant to be "noticed." If you want them to be noticed, you put them where that is the most likely to occur.

Sure, you could put a piece of paper on the bulletin board at the local laundromat, the local grocery store and outside city hall, but the likelihood of it being seen by those affected would be hit or miss at best.

Notices appear in newspapers for a number of reasons:

(1) Most citizens would agree that government officials can never be allowed to be in control of their own information. Newspapers provide independence from government and, therefore, are reliable as a source of information;

(2) Newspapers are a permanent record that cannot be altered, hidden, manipulated, hacked or changed after the fact. When notice is published in a newspaper, it is guaranteed by the publisher as fact;

(3) Newspaper publication provides a verifiable public record through sworn affidavits of publication that have been accepted for decades as adequate notice in a court of law. If you give notice that a subdivision is going to encroach on neighbors, you certainly don't want to have to revisit this decision at some future date because notice was messed up;

(4) Newspapers ensure that readers will "happen upon" public notices and share that information with each other;

(5) Senior citizens, the poor and the disenfranchised must not be asked to go to City Hall to retrieve the full version of a public notice. Study after study over the past 20 years has concluded that readers want their public notices in newspapers because that's where they are most likely to see them.

Any attempt to reduce the frequency of public notice, to require a trip to City Hall to view them, to require citizens to search for them on the internet or to look for them in a "new" place rather than their local newspaper is simply a roadmap to more closed government, more secrecy, more shenanigans and less public awareness of what is going on in our communities.

Well, our adversaries say, this is really just about money. We're not going to apologize for providing a valued service to our government. Everyone else who provides a service gets paid. The cost of public notice in most cases is such a drop in the bucket as to be laughable that it is even an issue.

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Attachment 10

Is public notice revenue important to the newspapers of Kansas? Yes it is. And local newspapers also are very important to their communities. We have calculated after discussing this issue with out association members that we would — conservatively — stand to lose 50 newspapers in Kansas if public notice income went away.

But that's not the half of it. If public notice went away, and with it many newspapers in Kansas, it would rob the people of Kansas of the information they need to keep an eye on their cities, counties, school districts and other governmental entities.

These kinds of checks and balances keep government on its toes.

There is another argument that we'd like to make today against this legislation, especially since a "summary" is being proposed by the proponents as an effective substitute for publishing the entire city ordinance.

City attorneys would be charged with the responsibility to produce a summary of an ordinance that would stand legal tests should the ordinance later be challenged in a court of law.

These local attorneys are not infallible individuals.

For instance, in Topeka, we are now revisiting our city's charter ordinance because the city's attorneys who wrote it left out one very important clause dealing with the right of the council to override a mayoral veto.

The Kansas Legislature has already this session retroactively approved House Bill 2026 to correct local sales tax elections in Lyon and Rawlins counties because those local governments went beyond their legal authority in approving increased taxes.

Who wrote up those local sales tax questions? County attorneys who apparently didn't understand the limitations or the implications of what they were proposing.

If you plan to entertain such a change in Kansas law, you must make certain that the contents of a "summary" are fairly well-defined in statute and not left up to the discretion of individual city attorneys around the state.

The Kansas Press Association opposes this legislation and asks that the committee reject it if it comes to a vote. It doesn't guarantee an informed citizenry; in fact, it has the potential to close down the communication between communities and those who ultimately pay the bills.

Thank you.

SESSION OF 2009

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2026

As Amended by House Committee of the Whole

Brief*

HB 2026, as amended, would retroactively validate the results of local sales tax elections held in Lyon and Rawlins counties in August, 2008. Voters had approved both ballot questions.

An additional 1.0 percent sales tax would be authorized in Lyon County for purposes of property tax relief and capital outlay, bringing the total rate imposed by the county to 1.5 percent. The new tax would be required to sunset not later than five years after imposition.

An additional 0.75 percent sales tax would be authorized in Rawlins County for financing the costs of a swimming pool, bringing the total rate imposed by the county to 1.75 percent. The new tax would be required to sunset not later than 15 years after imposition.

Background

The original bill dealt with the Lyon County issue. The House Committee amended the bill to include the provisions of HB 2071 relating to Rawlins County; and to remove language requiring that retailers be given 60 days notice prior to imposition. Officials and voters in those counties did not realize that current local sales tax authorization statutes generally limit the maximum rate to 1.0 percent.

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*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at http://www.kslegislature.org

The Department of Revenue testified that if the bill were to be approved by the Legislature by February 6, the new taxes could be implemented on April 1. Otherwise, the law would not allow the taxes to be implemented until at least the start of the next calendar quarter (July 1).

Proponents for both bills included Representatives Hill, Mast, and Faber.

The House Committee of the Whole amendments are technical.