

To: Senate Judiciary Committee

From: Amanda L. Stanley, General Counsel

Date: June 3, 2020

RE: Thoughts on Liability Protections from a City Perspective

I want to thank Chairman and the members of the Committee for affording the League of Kansas Municipalities the opportunity to provide testimony on the COVID-Response Bill.

The last eleven weeks have produced numerous challenges for local governments and unfortunately the challenges never seem to end as our state gradually reopens. Right now, things are very uncertain for cities in Kansas. They are learning new federal law, dealing with public health law, trying to open facilities safely, trying to figure out massive budget shortfalls, dealing with the very difficult conversation of race in America in addition to numerous other things that are just part of the day to day. Since March 16th, the League has answered more than 700 legal inquiries from cities. The League holds two-hour long webinars each week just to answer additional questions and have 300 to 500 views each time. Cities are struggling but also persevering and innovating. Even in the midst of a pandemic, they are working tirelessly to provide the services needed by their citizens.

Cities have been living in legal limbo regarding the consecutive Emergency Proclamations for far too long. It is essential that this body ratify the second and third proclamations and provide a mechanism for extending the current proclamation as needed. Modeling the extension off of the animal pandemic in Section 32 makes sense. In the midst of what often feels like chaos, legal certainty regarding the enforcement of the Governor's Executive Orders is essential.

We also strongly support the amendments in Section 24 regarding the Chief Justice's authority under Senate Bill 102. As our response to the pandemic has evolved, and eventual COVID-19 spikes are inevitable, the Chief Justice needs the flexibility to authorize two-way electronic audio-visual communication as needed.

One of the biggest questions the League has received from members in the last few weeks is what liability risks they face if they reopen playgrounds, city hall, municipal court, the pool, golf courses, allow baseball, and the list keeps going. While these will not be easy claims to win, that does not mean that this body should do nothing.

A city's liability is determined under the Kansas Torts Claims Act (KTCA), KSA 75-6102 et seq. The general rule is liability and immunity is the exception. The general framework for determining liability is as follows:

1. Is the injury one which is recognizable as compensable in tort?
2. Did the injury occur under circumstances where the governmental entity, if a private person, would be liable?
3. Was the claimant injured by a governmental person acting within the scope of their employment?
4. Were the employee's actions the proximate cause of the claimant's injury?
5. Does one of the immunity provisions of the KTCA apply?

If a COVID-19 lawsuit is brought, the most common tort is probably going to be negligence. The key to decreasing a city's risk for any negligence suit is to review the Guidelines for Health and Safety to ensure the city is using reasonable care in any particular situation. The problem with that, as articulated by the Kansas Chamber, is that so much is unknown about this virus. The standard of care is constantly evolving and that makes it extremely difficult to provide peace of mind as we move to reopen our state. While these suits may very well not be ultimately successful, defending a lawsuit takes time and it takes money.

The final step in determining liability is whether the KTCA establishes immunity for the particular action. Some of the areas of concern regarding liability are likely going to be covered under the recreational use immunity provision. See KSA 75-6104(o). Other areas of concern, such as duties owed to employees, are unlikely to fit under an immunity provision. Having the additional immunity protections granted by this bill to cities will be extremely helpful.

While there are other portions of the bill that we support these are some of the most crucial issues for cities and we urge you to carefully consider these issues and move this bill favorably for passage.