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September 7, 2023

ATTORNEY GENERAL OPINION NO. 2023-8

The Honorable John R. Eplee
State Representative, 63rd District
State Capitol, Room 352-S
Topeka, Kansas 66612

Re: Taxation—Miscellaneous Provisions—Budgets of Taxing Subdivision—
Tax Levy; Approval to Exceed Revenue Neutral Rate by Taxing
Subdivisions; Requirements; Notices and Contents

Synopsis: K.S.A. 79-2988(b)(2)'s use of "shall" is mandatory. As a result, a
governing body of a taxing subdivision may not levy a tax rate in
excess of the revenue neutral rate where the county clerk fails to
timely send out the required notice to the taxpayers pursuant to K.S.A.
79-2988(b)(2). Cited herein: K.S.A. 79-2988.

* * *

Dear Representative Eplee:

As the Representative of the 63rd District, you ask whether taxing subdivisions may levy a tax rate in excess of the revenue neutral rate per K.S.A. 79-2988 if the county clerk fails to timely send the required notice pursuant to K.S.A. 79-2988(b)(2). Considering the plain language of the statute and utilizing the rules of statutory construction, the answer is no. Doing so would violate the mandatory procedures in subsection (b). K.S.A. 79-2988(b) states that "[n]o tax rate in excess of the revenue neutral rate shall be levied by the governing body of any taxing subdivision" unless the specific procedures of subsection (b) are followed. Among those procedures is that "the county clerk shall notify each taxpayer with property in the taxing subdivision of the [proposal] to exceed the revenue neutral rate at

least 10 days” before a statutorily required public hearing.¹ So, the county clerk’s timely notification is necessary for a taxing subdivision to exceed the revenue neutral rate. And any governing body that did so anyway would have to refund the money taken in excess of the revenue neutral rate.²

Answering your question requires construing K.S.A. 79-2988. Statutory interpretation begins with the text of the statute, giving words their ordinary, everyday meanings. Only when the language is ambiguous are canons of statutory construction, legislative history, or other background information employed to discern the statute’s meaning.³

The statute states the governing body of a taxing subdivision shall not levy a tax rate in excess of the revenue neutral rate unless a resolution or ordinance is approved by the governing body after following specific procedures.⁴ Subsection (b)(2) requires the governing body to notify the county clerk of its proposed intent to exceed the revenue neutral rate and the date, time, and location of the public hearing and the proposed tax rate.⁵ Then subsection (b)(2) directs: “For all tax years commencing after December 31, 2021, the county clerk shall notify each taxpayer with property in the taxing subdivision, by mail directed to the taxpayer’s last known address, of the proposed intent to exceed the revenue neutral rate at least 10 days in advance of the public hearing.”⁶ The public hearing is required to be held between August 20 and September 20.⁷

Thus, the crux of your question depends on the meaning of “shall” as used in subsection (b)(2). Mandatory words impose a duty while permissive words grant discretion. “The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive.”⁸ In Kansas, “[t]he word shall ordinarily connotes an obligatory meaning, although courts sometimes treat the word as directory when the context suggests as much.”⁹

Because “shall” lacks a plain meaning, statutory construction is required.¹⁰ The context of the statutory scheme and case law is ultimately determinative.”¹¹ “Shall”

¹ K.S.A. 79-2988(b)(2).

² K.S.A. 79-2988(c)(1)-(2).

³ *Nauheim v. City of Topeka*, 309 Kan. 145, 149-50, 432 P.3d 647 (2019).

⁴ K.S.A. 79-2988(b).

⁵ K.S.A. 79-2988(b)(2).

⁶ *Id.*

⁷ K.S.A. 79-2988(b)(3).

⁸ Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 112 (2012).

⁹ *Walker v. Brizendine*, No. 114,776, 2016 WL 5012505, at *2 (Kan. App. 2016) (unpublished opinion) (citing *Ambrosier v. Brownback*, 304 Kan. 907, 912-15 [2016]; *Hawley v. Kansas Dept of Agriculture*, 281 Kan. 603, 618 [2006]; Scalia & Garner, *supra*, at 112-15); see *State v. Raschke*, 289 Kan. 911, 914-15, 219 P.3d 481 (2009).

¹⁰ *Raschke*, 289 Kan. at 914-15.

¹¹ *Id.* at 920.

provisions affecting a party's rights are more likely to be construed as mandatory.¹² Statutory provisions dealing with form or procedure may be considered mandatory if "accompanied by negative words importing that the acts required shall not be done in any other manner or time that that designated."¹³ Statutes containing a penalty provision or other consequence of noncompliance are considered mandatory.¹⁴

"[W]hen the word *shall* can reasonably be read as mandatory, it ought to be so read."¹⁵ And here, given the context, that is indeed the best reading. The Legislature used "shall" throughout the text, but it also uses "may" to refer to other functions, showing that the Legislature differentiated between mandatory and discretionary duties in K.S.A. 79-2988. K.S.A. 79-2988(b)(2) goes on to provide: "Alternatively, the county clerk *may* transmit the notice to the taxpayer by electronic means at least 10 days in advance of the public hearing, if such taxpayer and county clerk have consented in writing to service by electronic means" (emphasis added). In other words, while the county clerk "shall" notify the taxpayer, the statute gives discretion to send the notification electronically, given certain conditions are met. Additionally, while K.S.A. 79-2988(b)(3) states when a public hearing shall be conducted and that taxpayers must be given the opportunity to present oral testimony, the provision also provides that the public hearing "may" be conducted in conjunction with the proposed budget hearing if the governing body otherwise complies with all requirements of the section. In other words, the Legislature knew how to differentiate between mandatory and discretionary duties in K.S.A. 79-2988.

The statute also contains a consequence/penalty for the governing body of a taxing subdivision that does not comply with subsection (b), stating the governing body "shall refund to taxpayers any property taxes over-collected based on the amount of the levy that was in excess of the revenue neutral rate."¹⁶ But if subsection (b) was entirely discretionary, it's hard to see what the point of that penalty would be.

Other canons of construction point in this direction too. Applicable here, "statutes that impose the tax are to be construed strictly in favor of the taxpayer."¹⁷ Under this rule of thumb, the use of "shall" in K.S.A. 79-2988 should be construed in favor of the taxpayer. This means reading "shall" as mandatory, rather than discretionary, because failure to comply would run in the taxpayer's favor under the disgorgement requirement of subsection (c)(1).

¹² *Id.*

¹³ *Shriver v. Bd. of Cty. Comm'rs*, 189 Kan. 548, 556, 370 P.2d 124 (1962).

¹⁴ *Paul v. City of Manhattan*, 212 Kan. 381, Syl. ¶ 2, 511 P.2d 244 (1973).

¹⁵ Scalia & Garner, *supra*, at 114.

¹⁶ K.S.A. 79-2988(c)(1).

¹⁷ *In re BHCMC, L.L.C.*, 307 Kan. 154, 161 (2017).

Thus, the statutory context and the canon requiring statutes imposing taxes to be strictly construed in favor of the taxpayer both point to the notice requirement as mandatory. Because it is mandatory, the failure by the county clerk to provide statutorily sufficient notice results in the failure of all the procedures in subsection (b) being met. A governing body cannot exceed the revenue neutral rate unless subsection (b) is satisfied.¹⁸ Thus, a county clerk's failure to send out the required notice prevents a jurisdiction from exceeding the revenue-neutral tax rate.

Sincerely,

/s/ Kris Kobach
Kris W. Kobach
Kansas Attorney General

/s/ Ryan J. Ott
Ryan J. Ott
Assistant Solicitor General

¹⁸ K.S.A. 79-2988(b).