October 5, 2018 CAAK Meeting

You Say Governmental Function, They Say Proprietary Function:
Navigating the Governmental Exception to Kansas' Statutes of Limitation

Chris Grunewald
Deputy City Attorney, City of Olathe, Kansas[1]

Say you represent a municipality where, unfortunately, some defective construction was discovered but not acted on for more than three years. You have a great set of facts for breach of contract, but you're outside the statute of limitations (K.S.A. 60-512). Are you dead in the water? Well, it just might depend on whether it involves water. And even then, what the water is for.

As a governmental entity, municipalities enjoy some protections and advantages in litigation, and one of them is embodied at K.S.A. 60-521:

> As to any cause of action accruing to the state, any political subdivision, or any other public body, which cause of action arises out of any proprietary function or activity, the limitations prescribed in this article shall apply to actions brought in the name or for the benefit of such public body in the same manner as to actions by private parties, except in (1) actions for the recovery of real property or any interest therein, or (2) actions to recover from any former officer or employee for his or her own wrongdoing or default in the performance of his or her duties.

The plain language makes clear that governmental entities will be treated like private parties – with two minor listed exceptions – for "proprietary functions." But this provision has a very advantageous flip side. "[B]y negative implication, K.S.A. 60–521 'retains governmental immunity from the statute of limitations for causes of action arising out of a governmental function.'"[2]

Enacted in 1963, and not amended since, this provision was explained four years later in this way: "It recognizes the distinction between proprietary and governmental functions and codifies the prior case law that causes of action arising out of the proprietary function are subject to statutes of limitation."[3] The phrase "codifies the prior case law" might, to the unsuspecting eye, suggest that things were clear before. It might also suggest that things would be clear going forward. Actual case law tells a different story.

---

[1] Obligatory caveat: the opinions expressed here are my own, and not those of the City of Olathe or the Olathe City Attorney's Office.

[2] *Newman Mem'l Hosp. v. Walton Const. Co.*, 37 Kan. App. 2d 46, 60, 149 P.3d 525, 535 (2007) (quoting *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 384, 22 P.3d 124 (2001), internal citations omitted).

[3] Vernon's Kansas C. Civ. Proc. § 60–521 (1967). *See also* Kansas Code of Civil Procedure Annotated 3d, Vol. 1, Spencer A. Gard and Robert C. Casad, Sec. 60-521 (1997) ("The case law was in accord with this provision except possibly the want of case precedent with respect to claims against public employees arising from breach of duty.").

Historical Background

Let me break in here to point out that the seminal Kansas Supreme Court case on K.S.A. 60-521 is *Kansas Public Employees Retirements System v. Reimer & Koger Associates, Inc.*, 262 Kan. 635 (1997). The case summarizes and interprets all of the major Kansas cases on the governmental/proprietary distinction for both immunity and statutes of limitations. It provides a great historical background to the doctrine, and I have borrowed mercilessly from it here. Pages 648-669 are worth the read if you are at all interested in the Kansas roots of this distinction regarding either immunity or limitations. It does not, sadly, provide the final answer on where to draw the dividing line.

There is a long, tortured history of courts attempting to sort out the distinction between a governmental function and a proprietary function. The distinction arose primarily in the context of sovereign immunity (or governmental immunity) from suit. Sovereign immunity is the ancient concept that "the king can do no wrong".[4] As an absolute rule, that doctrine can lead to harsh consequences to persons harmed as a result of government action or inaction.

American courts have long been uncomfortable with that approach and instead began allowing for recovery against governmental entities in many tort situations, while continuing to protect them in regulatory situations.[5]

A 1948 Kansas Supreme Court opinion holding the City of Hutchison liable for floodwater damages caused by a city dike captures well both the history and the discomfort with a treatise quote:

> In 38 Am.Jur. 266, 267, § 573, it is said: 'Notwithstanding the force of precedent, dissatisfaction with the rule of governmental immunity soon caused the courts to make a distinction between governmental functions and activities deemed to be proprietary, and in the latter case to charge municipal corporations with liability for torts the same as private corporations or individuals. The modern tendency is to restrict rather than extend the doctrine of municipal immunity. The courts and law writers are coming more and more to feel the injustice of the entire doctrine.'[6]

[4] *Rex non potest peccare*, for those of you needing a dose of Latin. *KPERS v. Koger & Reimer Assoc., Inc.*, 262 Kan. at 648 (citing Black's Law Dictionary, 6th Ed. 1990).
[5] An early example of protection is *Edson v. City of Olathe*, 81 Kan. 328, 105 P. 521 (1909), where the court protected the city from a claim for damages based on adoption and enforcement of an ordinance repealing an interurban railway franchise. Those actions "were purely governmental measures taken by the city as the agent of the state for the promotion of the public good, and had no private corporate aspect whatever." *Id.*, 105 P. at 522.
[6] *Krantz v. City of Hutchinson*, 165 Kan. 449, 456, 196 P.2d 227, 232 (1948).

Similar results occurred on subjects like municipal airports[7] and municipal hospitals[8]. Ultimately, in 1979, Kansas adopted the Kansas Tort Claims Act, making liability the rule and immunity the exception for the State and cities alike.[9]

Early Kansas cases also referred to the common law rule supporting K.S.A. 60-521. That rule stems from the equally ancient idea that "time does not run against the king."[10] The Kansas Supreme Court recognized that this principle applied to cities in a 1908 case affirming the City of Osawotomie's right to seek payment from Miami County for allegedly wrongfully withheld taxes.[11] The court endorsed this description of the rule: "in all cases wherein the corporation represents the public at large, or the state, or is seeking to enforce a right pertaining to sovereignty, then the statute of limitations, as such, cannot be made applicable."[12]

Unfortunately, whether applying common law, or because of statutory terms like "governmental" and "proprietary", courts have faced the same unsolvable problem of defining those terms in the context of governmental conduct, functions, and facilities. Indeed, the governmental/proprietary distinction has been taking shots from commentators and courts for a long time.[13] Some of my favorites:

> The division of municipal functions into public and governmental on the one hand and private and corporate on the other is **not well defined but is vague and indefinite**. – Illinois Supreme Court, 1928[14]

---

[7] *Wendler v. City of Great Bend*, 181 Kan. 753, 758, 316 P.2d 265 (1957) (holding city not immune from action for loss of airplane from fire at municipal airport hangar because city operated airport in "proprietary capacity").

[8] *Stolp v. Arkansas City*, 180 Kan. 197, 204, 303 P.2d 123, 128 (1956), *adhered to on reh'g sub nom. Stolp v. City of Arkansas City*, 181 Kan. 225, 310 P.2d 888 (1957) (holding no immunity from personal injury action based on negligence of municipal hospital employees).

[9] K.S.A. 75-6101 *et seq.*

[10] *Nullum tempus occurrit regi*, for your final dose of Latin. *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 652, 941 P.2d 1321, 1333 (1997) (citing Black's Law Dictionary, 6th Ed. 1990).

[11] *City of Osawatomie v. Bd. of Comm'rs of Miami Cty.*, 78 Kan. 270, 96 P. 670 (1908). Weirdly, these two entities ended up fighting again 33 years later about failure of the county to pay the city as well as application of the statute of limitations, so if you actually go searching for this case beware you don't hit the later one instead: *City of Osawatomie v. Bd. of Comm'rs of Miami Cty.*, 153 Kan. 332, 110 P.2d 748 (1941). The county lost that one too.

[12] *Osawatomie*, 96 P. at 671 (internal quotation marks and citation omitted).

[13] Here are a couple of the most thorough discussions about the distinction, primarily from the immunity perspective: Janice C. Griffith, Local Government Contracts: Escaping from the Governmental/proprietary Maze, 75 Iowa L. Rev. 277 (1990); Hugh D. Spitzer, Realigning the Governmental/proprietary Distinction in Municipal Law, 40 Seattle U. L. Rev. 173 (2016).

[14] *Roumbos v. City of Chicago*, 332 Ill. 70, 74, 163 N.E. 361, 363 (1928).

> The rules sought to be established are **as logical as those governing French irregular verbs**. – Law Review Commentator, 1936[15]
>
> So we decide enough when we reject limitations upon the taxing power of Congress derived from **such untenable criteria as 'proprietary' against 'governmental' activities of the States** . . . . – United States Supreme Court, 1946[16]
>
> **Because the proprietary/governmental distinction is murky and unhelpful** in resolving disputes of this kind, we do not view it as an appropriate factor in determining whether a state law relates to a matter of "statewide or purely local interest." – Arizona Supreme Court, 2017[17]

Lessons from *KPERS v. Reimer & Koger Associates, Inc.*

In the seminal 1997 case, *KPERS v. Reimer & Koger Associates, Inc.*, the issue was whether the State's retirement system was time-barred from seeking recovery from various individuals and firms for investment losses. Two important public themes surface in the opinion. First is the important public good served by the pension: "A pension to be received upon retirement is a prime inducement in securing qualified workers and avoiding the expense of a high turnover rate."[18] Second is that the State and other public entities participating in the plan "have an unequivocal constitutional, statutory, and contractual obligation to ensure that KPERS has sufficient funds to pay the defined benefits."[19] While investments generally are commercial in character, these investments were "necessary to promote the public welfare generally and satisfy the contractual obligations of the State of Kansas, the school districts, the municipalities, and the other governmental entities to their employees."[20] The court then made the final connection to a firmly governmental power: taxes. "KPERS [was] seeking to recover millions of dollars which the public will otherwise be forced to pay in higher taxes."[21]

I think that *KPERS* provides us a few pointers for framing a successful argument invoking K.S.A. 60-521.

#1 – Statute of limitations cases should guide more than immunity cases.[22] The Kansas Supreme Court has explained this before, and the *KPERS* court made sure to point that out: "The

---

[15] Murray Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test, 22 U. Va. L. Rev. 910 (1936) (reprinted at 53 U. Cin. L. Rev. 469, 493 (1984))
[16] *State of New York v. United States*, 326 U.S. 572, 583, 66 S. Ct. 310, 315, 90 L. Ed. 326 (1946) (Blackmun, J.).
[17] *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 603, 399 P.3d 663, 678 (2017), *as amended* (Aug. 17, 2017).
[18] *KPERS v. Koger & Reimer Assoc., Inc.*, 262 Kan. at 646.
[19] *Id.* at 647.
[20] *Id.* at 666.
[21] *Id.* at 667.
[22] *Id.* at 666.

GAF decision also made the important point that '[t]he reasons supporting tort immunity are not the same as those which support an extension of time limitations to the State beyond those limits governing individuals.'"[23]

#2 – Character counts. The court highlighted **three** times this particular statement from the 1908 *Oswawatomie* case: "We think the more vital consideration has relation to the character of the power in exercise of which the demand originates."[24] Claims you can relate to the taxing power, for example, are more likely to be an easy win for a city.

#3 – Bridges, roads, and fire protection qualify. Probably. The *KPERS* court reaffirmed a 1969 decision as "valid precedent for a rule that building bridges, maintaining roads, and preventing fires are all governmental functions to which, under K.S.A. 60–521, the statutes of limitations do not apply. Each of these acts is for the overall benefit of the citizens of our state . . . ."[25] It is worth noting that the *KPERS* court emphasized the overall **statewide** benefit for these three items, which might give us pause in a municipal context. Yet, the court was well aware that the cited decision involved a county rather than a state agency, so cities should be on fairly firm ground.

#4 – Water is messy. As the *KPERS* court noted, prior decisions have held that "the operation of public waterworks had dual purposes, both proprietary and governmental", and the *KPERS* decision did not explicitly disagree with any of them.[26] Water operations related to fire protection are governmental, but everything else might not be.

#5 – There is no definitive list of factors. Despite citing several earlier Kansas Supreme Court and Kansas Court of Appeals decisions interpreting K.S.A. 60-521, the KPERS court refused to endorse any one list or to create a new one.

Three Tests Not Endorsed, But Not Rejected

The *KPERS* court did not endorse any set of definitions for governmental or proprietary, but did cite approvingly the result from the Kansas Court of Appeals decision in *State ex rel. Schneider v. McAfee*.[27] It quoted the *McAfee* court's approach to the distinction:

> Governmental functions are those which are **performed for the general public with respect to the common welfare and for which no compensation or**

[23] *Id.* at 659 (quoting *State ex. rel. Stephan v. GAF Corp.*, 242 Kan. 152, 163, 747 P.2d 1326 (1987)).
[24] *City of Osawatomie v. Bd. of Comm'rs of Miami Cty.*, 78 Kan. 270, 275, 96 P. 670, 672 (1908). Quoted in *KPERS*, 262 Kan. at 653, 654, and 667.
[25] *KPERS*, 262 Kan. at 667 (citing *Board of County Commissioners v. Lewis*, 203 Kan. 188, 453 P.2d 46 (1969)).
[26] *KPERS*, 262 Kan. at 668 (citing the immunity case *Cross v. City of Kansas City*, 230 Kan. 545, 638 P.2d 933 (1982) and the limitations case *City of Attica v. Mull Drilling Co., Inc.*, 9 Kan. App. 2dn 325 (1984)).
[27] *KPERS*, 262 Kan. at 657.

> **particular benefit is received**, while proprietary functions are exercised when an enterprise is commercial in character or is usually carried on by private individuals or is for the profit, benefit or advantage of the governmental unit conducting the activity.[28]

Where city services are concerned, the most problematic part of this test will be the aspect of not receiving compensation. Fee-based services, such as utilities, might not look governmental under that view, especially if they are not provided city-wide.

The *KPERS* court also quoted the Kanas Court of Appeals decision in *International Ass'n of Firefighters v. City of Lawrence*.[29]

> Governmental or legislative powers are exercised **to administer the affairs of the state and promote the public welfare generally**. Proprietary or administrative powers are exercised to accomplish private corporate purposes in which the public is only indirectly concerned and as to which the municipality is regarded as a legal individual.[30]

This test looks more forgiving on the aspect of whether fees are received, but still leaves open the argument that a service is not for the "general" public.

Finally, there is the factor list in the post-*KPERS* opinion of the Kansas Court of Appeals in *Newman Mem'l Hosp. v. Walton Const. Co.* That decision held that the limitations exception was unavailable for a municipal hospital regarding construction defect claims for a medical office building.[31] The court used this list:

> (1) whether the activity is for the state as a whole or special local benefit . . . ;
> (2) whether the activity arises out of a statutory duty or a privilege granted . . .;
> (3) whether the activity is normally done by private entities . . .; and
> (4) whether the entity's actions were commercial in nature . . . .[32]

The first factor regarding statewide or "local" benefit is perhaps the most challenging one to interpret because cities will always be acting locally. Most likely, this factor should be adjusted for cities because cities still "assert[] public rights" and "protect[] property for public use."[33] In addition, the second factor asking about whether there is a statutory duty could leave many municipal services off the list. My main criticism of this list is that these factors primarily come from immunity cases.

---

[28] 2 Kan.App.2d 274, 276, 578 P.2d 281, *rev. denied* 225 Kan. 845 (1978).
[29] *KPERS*, 262 Kan. at 658.
[30] 14 Kan.App.2d 788, Syl. ¶ 3, 798 P.2d 960, *rev. denied*, 248 Kan. 996 (1991).
[31] *Newman Mem'l Hosp. v. Walton Const. Co.*, 37 Kan. App. 2d 46, 64, 149 P.3d 525, 537 (2007).
[32] *Id.*
[33] *Osawatomie*, 96 P. at 671 (internal quotations and citations omitted).

You Have a Broken City Facility – Will It Qualify for the Limitations Exemption?

Let's get back to the initial situation: you learn of construction defects outside the three-year breach of contract statute of limitations. Which municipal facilities or services are going to fall within the advantage of the governmental function exclusion? Below is a list of the more common ones. They're roughly in order from easiest arguments to make to the toughest.

Police, Fire, Streets, and Bridges: These are good issues for cities based on the *KPERS* decision.

Parks: This issue might be almost as good because parks are open to all and not exclusively a fee-driven service. Although there are no limitations cases on point, a 1967 immunity decision in favor of Manhattan related to its municipal zoo should be helpful. That decision quoted prior decisions about the character of parks, and this example sums it up well: "'The city as a corporation derives no benefit therefrom; but the park is maintained for the benefit of the public without regard to residence.'"[34]

Sanitary Sewer or Wastewater: Although this is also a fee-based service, historically sewer has been characterized differently from other public utilities. The Kansas Supreme Court's 1954 decision in *Western Shale Products Co. v. City of Fort Scott* – endorsed and quoted repeatedly by the *KPERS* court – allowed recovery of sewer damages and favors cities on this issue. *Western Shale* concluded that "The construction and maintenance of a sewer by a city ordinarily is a governmental function as distinguished from ministerial or proprietary."[35] There is also a helpful 1995 Attorney General Opinion that advised collection of old unpaid sewer fees should be exempt from limitations. That opinion relied on this explanation from McQuillin Municipal Corporations: "'The operation and maintenance of a sewage system by a municipality is an exception to the rule that in the operation of a public utility a municipality acts in a proprietary capacity; sewage disposal is a governmental function.'"[36]

Storm Water or Storm Sewer: Probably treated favorably like sanitary sewer. Given that private companies have never historically provided these services, perhaps it is fairly argued that they have never been commercial in character, even if compensation is collected for them.

Recreation: This issue could be trickier because these programs are usually only available for a fee, making it look very commercial. If you are like Olathe, your city's recreation program might be entirely an enterprise fund (fee driven) undertaking. Collecting revenue seems to drive court holdings that a city is engaged in proprietary, commercial-like, activity. Recreation programs could be characterized as competing in the private marketplace, which undercuts the governmental function. And these services, while undoubtedly directed at public health, safety, and welfare, are not mandated services (like education is for the State).

[34] *Grover v. City of Manhattan*, 198 Kan. 307, 311, 424 P.2d 256, 260 (1967) (quoting *Harper v. City of Topeka*, 95 Kan. 11, 15, 139 P. 1018, 1020 (1914)).
[35] 175 Kan. 643, 649, 266 P.2d 327 (1954).
[36] Kan. Atty. Gen. Op. 95-74 (1995) (quoting 11 McQuillin Mun. Corp. § 31.10 (1991)).

Water: It depends. The *KPERS* court recognized Kansas courts have consistently held that public water operations have a dual nature. Fire protection will fall safely onto the governmental side of the distinction. Although non-fire aspects of public water supply have consistently been held to be proprietary, this area seems ripe for reconsideration regarding statutes of limitation. While there may be good policy reasons for denying immunity for water operations (e.g., accountability), the idea of water service is quintessentially public. Clean and available water is a basic human need. Moreover, drinking water is made available not just to paying residential and commercial customers, but in all public places with drinking fountains.

For public water operations, the toughest case to get around is *City of Attica v. Mull Drilling Co, Inc.*, where the Kansas Court of Appeals held that the statute of limitations barred Attica's claims against a drilling company for contaminating the city's water wells.[37] This is a pretty cursory decision on the governmental/proprietary distinction. Plus, it summarily relies on an immunity case for the idea that non-fire protection water operations are proprietary.[38] For those reasons, I think it's vulnerable to criticism for not addressing the public rights at issue regarding contaminated or unavailable drinking water.

Solid Waste: Given the large private marketplace for this service, and the fact that it is limited to fee-paying customers, it seems likely to be proprietary.

Electric, Gas, and Transportation: Most likely proprietary based on immunity cases. The character of these services appears more discretionary than other rate-based utilities such as sanitary sewer, storm sewer, and solid waste.

Airports: Most likely proprietary based on immunity cases.[39]

Hospitals: Proprietary. *See Newman Mem'l Hosp. v. Walton Const. Co.*, described above.

Conclusion

Working through this concept did bring me an appreciation for the difficulty of sorting through the governmental/proprietary distinction. It's unlikely that a replacement test will be arriving soon. Alternative distinctions such as discretionary/mandatory and policy decisions/operational decisions, which have appeared in the immunity context, don't seem any easier to apply. The scarcity of reported decisions on K.S.A. 60-521 provides cities with an opportunity to argue against applying some of the historical immunity decisions. Particularly regarding water, there may be some room to expand what counts as a governmental function by arguing about the character of the service. If you are faced with a potential limitations problem, I encourage you to think creatively about how to explain the public character of the city's claim.

---

[37] *City of Attica v. Mull Drilling Co.*, 9 Kan. App. 2d 325, 330, 676 P.2d 769, 774 (1984).
[38] *Id.* at 327.
[39] *See Exec. Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 428, 845 P.2d 57, 63 (1993) (collecting cases).

October 5, 2018 CAAK Meeting

You Say Governmental Function, They Say Proprietary Function:
Navigating the Governmental Exception to Kansas' Statutes of Limitation

Chris Grunewald
Deputy City Attorney, City of Olathe, Kansas[1]

Say you represent a municipality where, unfortunately, some defective construction was discovered but not acted on for more than three years. You have a great set of facts for breach of contract, but you're outside the statute of limitations (K.S.A. 60-512). Are you dead in the water? Well, it just might depend on whether it involves water. And even then, what the water is for.

As a governmental entity, municipalities enjoy some protections and advantages in litigation, and one of them is embodied at K.S.A. 60-521:

> As to any cause of action accruing to the state, any political subdivision, or any other public body, which cause of action arises out of any proprietary function or activity, the limitations prescribed in this article shall apply to actions brought in the name or for the benefit of such public body in the same manner as to actions by private parties, except in (1) actions for the recovery of real property or any interest therein, or (2) actions to recover from any former officer or employee for his or her own wrongdoing or default in the performance of his or her duties.

The plain language makes clear that governmental entities will be treated like private parties – with two minor listed exceptions – for "proprietary functions." But this provision has a very advantageous flip side. "[B]y negative implication, K.S.A. 60–521 'retains governmental immunity from the statute of limitations for causes of action arising out of a governmental function.'"[2]

Enacted in 1963, and not amended since, this provision was explained four years later in this way: "It recognizes the distinction between proprietary and governmental functions and codifies the prior case law that causes of action arising out of the proprietary function are subject to statutes of limitation."[3] The phrase "codifies the prior case law" might, to the unsuspecting eye, suggest that things were clear before. It might also suggest that things would be clear going forward. Actual case law tells a different story.

---

[1] Obligatory caveat: the opinions expressed here are my own, and not those of the City of Olathe or the Olathe City Attorney's Office.

[2] *Newman Mem'l Hosp. v. Walton Const. Co.*, 37 Kan. App. 2d 46, 60, 149 P.3d 525, 535 (2007) (quoting *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 384, 22 P.3d 124 (2001), internal citations omitted).

[3] Vernon's Kansas C. Civ. Proc. § 60–521 (1967). *See also* Kansas Code of Civil Procedure Annotated 3d, Vol. 1, Spencer A. Gard and Robert C. Casad, Sec. 60-521 (1997) ("The case law was in accord with this provision except possibly the want of case precedent with respect to claims against public employees arising from breach of duty.").

Historical Background

Let me break in here to point out that the seminal Kansas Supreme Court case on K.S.A. 60-521 is *Kansas Public Employees Retirements System v. Reimer & Koger Associates, Inc.*, 262 Kan. 635 (1997). The case summarizes and interprets all of the major Kansas cases on the governmental/proprietary distinction for both immunity and statutes of limitations. It provides a great historical background to the doctrine, and I have borrowed mercilessly from it here. Pages 648-669 are worth the read if you are at all interested in the Kansas roots of this distinction regarding either immunity or limitations. It does not, sadly, provide the final answer on where to draw the dividing line.

There is a long, tortured history of courts attempting to sort out the distinction between a governmental function and a proprietary function. The distinction arose primarily in the context of sovereign immunity (or governmental immunity) from suit. Sovereign immunity is the ancient concept that "the king can do no wrong".[4] As an absolute rule, that doctrine can lead to harsh consequences to persons harmed as a result of government action or inaction.

American courts have long been uncomfortable with that approach and instead began allowing for recovery against governmental entities in many tort situations, while continuing to protect them in regulatory situations.[5]

A 1948 Kansas Supreme Court opinion holding the City of Hutchison liable for floodwater damages caused by a city dike captures well both the history and the discomfort with a treatise quote:

> In 38 Am.Jur. 266, 267, § 573, it is said: 'Notwithstanding the force of precedent, dissatisfaction with the rule of governmental immunity soon caused the courts to make a distinction between governmental functions and activities deemed to be proprietary, and in the latter case to charge municipal corporations with liability for torts the same as private corporations or individuals. The modern tendency is to restrict rather than extend the doctrine of municipal immunity. The courts and law writers are coming more and more to feel the injustice of the entire doctrine.'[6]

[4] *Rex non potest peccare*, for those of you needing a dose of Latin. *KPERS v. Koger & Reimer Assoc., Inc.*, 262 Kan. at 648 (citing Black's Law Dictionary, 6th Ed. 1990).
[5] An early example of protection is *Edson v. City of Olathe*, 81 Kan. 328, 105 P. 521 (1909), where the court protected the city from a claim for damages based on adoption and enforcement of an ordinance repealing an interurban railway franchise. Those actions "were purely governmental measures taken by the city as the agent of the state for the promotion of the public good, and had no private corporate aspect whatever." *Id.*, 105 P. at 522.
[6] *Krantz v. City of Hutchinson*, 165 Kan. 449, 456, 196 P.2d 227, 232 (1948).

Similar results occurred on subjects like municipal airports[7] and municipal hospitals[8]. Ultimately, in 1979, Kansas adopted the Kansas Tort Claims Act, making liability the rule and immunity the exception for the State and cities alike.[9]

Early Kansas cases also referred to the common law rule supporting K.S.A. 60-521. That rule stems from the equally ancient idea that "time does not run against the king."[10] The Kansas Supreme Court recognized that this principle applied to cities in a 1908 case affirming the City of Osawotomie's right to seek payment from Miami County for allegedly wrongfully withheld taxes.[11] The court endorsed this description of the rule: "in all cases wherein the corporation represents the public at large, or the state, or is seeking to enforce a right pertaining to sovereignty, then the statute of limitations, as such, cannot be made applicable."[12]

Unfortunately, whether applying common law, or because of statutory terms like "governmental" and "proprietary", courts have faced the same unsolvable problem of defining those terms in the context of governmental conduct, functions, and facilities. Indeed, the governmental/proprietary distinction has been taking shots from commentators and courts for a long time.[13] Some of my favorites:

> The division of municipal functions into public and governmental on the one hand and private and corporate on the other is **not well defined but is vague and indefinite**. – Illinois Supreme Court, 1928[14]

---

[7] *Wendler v. City of Great Bend*, 181 Kan. 753, 758, 316 P.2d 265 (1957) (holding city not immune from action for loss of airplane from fire at municipal airport hangar because city operated airport in "proprietary capacity").

[8] *Stolp v. Arkansas City*, 180 Kan. 197, 204, 303 P.2d 123, 128 (1956), *adhered to on reh'g sub nom. Stolp v. City of Arkansas City*, 181 Kan. 225, 310 P.2d 888 (1957) (holding no immunity from personal injury action based on negligence of municipal hospital employees).

[9] K.S.A. 75-6101 *et seq.*

[10] *Nullum tempus occurrit regi*, for your final dose of Latin. *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 652, 941 P.2d 1321, 1333 (1997) (citing Black's Law Dictionary, 6th Ed. 1990).

[11] *City of Osawatomie v. Bd. of Comm'rs of Miami Cty.*, 78 Kan. 270, 96 P. 670 (1908). Weirdly, these two entities ended up fighting again 33 years later about failure of the county to pay the city as well as application of the statute of limitations, so if you actually go searching for this case beware you don't hit the later one instead: *City of Osawatomie v. Bd. of Comm'rs of Miami Cty.*, 153 Kan. 332, 110 P.2d 748 (1941). The county lost that one too.

[12] *Osawatomie*, 96 P. at 671 (internal quotation marks and citation omitted).

[13] Here are a couple of the most thorough discussions about the distinction, primarily from the immunity perspective: Janice C. Griffith, Local Government Contracts: Escaping from the Governmental/proprietary Maze, 75 Iowa L. Rev. 277 (1990); Hugh D. Spitzer, Realigning the Governmental/proprietary Distinction in Municipal Law, 40 Seattle U. L. Rev. 173 (2016).

[14] *Roumbos v. City of Chicago*, 332 Ill. 70, 74, 163 N.E. 361, 363 (1928).

> The rules sought to be established are **as logical as those governing French irregular verbs**. – Law Review Commentator, 1936[15]
>
> So we decide enough when we reject limitations upon the taxing power of Congress derived from **such untenable criteria as 'proprietary' against 'governmental' activities of the States** . . . . – United States Supreme Court, 1946[16]
>
> **Because the proprietary/governmental distinction is murky and unhelpful** in resolving disputes of this kind, we do not view it as an appropriate factor in determining whether a state law relates to a matter of "statewide or purely local interest." – Arizona Supreme Court, 2017[17]

Lessons from *KPERS v. Reimer & Koger Associates, Inc.*

In the seminal 1997 case, *KPERS v. Reimer & Koger Associates, Inc.*, the issue was whether the State's retirement system was time-barred from seeking recovery from various individuals and firms for investment losses. Two important public themes surface in the opinion. First is the important public good served by the pension: "A pension to be received upon retirement is a prime inducement in securing qualified workers and avoiding the expense of a high turnover rate."[18] Second is that the State and other public entities participating in the plan "have an unequivocal constitutional, statutory, and contractual obligation to ensure that KPERS has sufficient funds to pay the defined benefits."[19] While investments generally are commercial in character, these investments were "necessary to promote the public welfare generally and satisfy the contractual obligations of the State of Kansas, the school districts, the municipalities, and the other governmental entities to their employees."[20] The court then made the final connection to a firmly governmental power: taxes. "KPERS [was] seeking to recover millions of dollars which the public will otherwise be forced to pay in higher taxes."[21]

I think that *KPERS* provides us a few pointers for framing a successful argument invoking K.S.A. 60-521.

#1 – Statute of limitations cases should guide more than immunity cases.[22] The Kansas Supreme Court has explained this before, and the *KPERS* court made sure to point that out: "The

---

[15] Murray Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test, 22 U. Va. L. Rev. 910 (1936) (reprinted at 53 U. Cin. L. Rev. 469, 493 (1984))
[16] *State of New York v. United States*, 326 U.S. 572, 583, 66 S. Ct. 310, 315, 90 L. Ed. 326 (1946) (Blackmun, J.).
[17] *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 603, 399 P.3d 663, 678 (2017), *as amended* (Aug. 17, 2017).
[18] *KPERS v. Koger & Reimer Assoc., Inc.*, 262 Kan. at 646.
[19] *Id.* at 647.
[20] *Id.* at 666.
[21] *Id.* at 667.
[22] *Id.* at 666.

GAF decision also made the important point that '[t]he reasons supporting tort immunity are not the same as those which support an extension of time limitations to the State beyond those limits governing individuals.'"[23]

#2 – Character counts. The court highlighted **three** times this particular statement from the 1908 *Oswawatomie* case: "We think the more vital consideration has relation to the character of the power in exercise of which the demand originates."[24] Claims you can relate to the taxing power, for example, are more likely to be an easy win for a city.

#3 – Bridges, roads, and fire protection qualify. Probably. The *KPERS* court reaffirmed a 1969 decision as "valid precedent for a rule that building bridges, maintaining roads, and preventing fires are all governmental functions to which, under K.S.A. 60–521, the statutes of limitations do not apply. Each of these acts is for the overall benefit of the citizens of our state . . . ."[25] It is worth noting that the *KPERS* court emphasized the overall **statewide** benefit for these three items, which might give us pause in a municipal context. Yet, the court was well aware that the cited decision involved a county rather than a state agency, so cities should be on fairly firm ground.

#4 – Water is messy. As the *KPERS* court noted, prior decisions have held that "the operation of public waterworks had dual purposes, both proprietary and governmental", and the *KPERS* decision did not explicitly disagree with any of them.[26] Water operations related to fire protection are governmental, but everything else might not be.

#5 – There is no definitive list of factors. Despite citing several earlier Kansas Supreme Court and Kansas Court of Appeals decisions interpreting K.S.A. 60-521, the KPERS court refused to endorse any one list or to create a new one.

Three Tests Not Endorsed, But Not Rejected

The *KPERS* court did not endorse any set of definitions for governmental or proprietary, but did cite approvingly the result from the Kansas Court of Appeals decision in *State ex rel. Schneider v. McAfee*.[27] It quoted the *McAfee* court's approach to the distinction:

> Governmental functions are those which are **performed for the general public with respect to the common welfare and for which no compensation or**

[23] *Id.* at 659 (quoting *State ex. rel. Stephan v. GAF Corp.*, 242 Kan. 152, 163, 747 P.2d 1326 (1987)).
[24] *City of Osawatomie v. Bd. of Comm'rs of Miami Cty.*, 78 Kan. 270, 275, 96 P. 670, 672 (1908). Quoted in *KPERS*, 262 Kan. at 653, 654, and 667.
[25] *KPERS*, 262 Kan. at 667 (citing *Board of County Commissioners v. Lewis*, 203 Kan. 188, 453 P.2d 46 (1969)).
[26] *KPERS*, 262 Kan. at 668 (citing the immunity case *Cross v. City of Kansas City*, 230 Kan. 545, 638 P.2d 933 (1982) and the limitations case *City of Attica v. Mull Drilling Co., Inc.*, 9 Kan. App. 2dn 325 (1984)).
[27] *KPERS*, 262 Kan. at 657.

> **particular benefit is received**, while proprietary functions are exercised when an enterprise is commercial in character or is usually carried on by private individuals or is for the profit, benefit or advantage of the governmental unit conducting the activity.[28]

Where city services are concerned, the most problematic part of this test will be the aspect of not receiving compensation. Fee-based services, such as utilities, might not look governmental under that view, especially if they are not provided city-wide.

The *KPERS* court also quoted the Kanas Court of Appeals decision in *International Ass'n of Firefighters v. City of Lawrence*.[29]

> Governmental or legislative powers are exercised **to administer the affairs of the state and promote the public welfare generally**. Proprietary or administrative powers are exercised to accomplish private corporate purposes in which the public is only indirectly concerned and as to which the municipality is regarded as a legal individual.[30]

This test looks more forgiving on the aspect of whether fees are received, but still leaves open the argument that a service is not for the "general" public.

Finally, there is the factor list in the post-*KPERS* opinion of the Kansas Court of Appeals in *Newman Mem'l Hosp. v. Walton Const. Co.* That decision held that the limitations exception was unavailable for a municipal hospital regarding construction defect claims for a medical office building.[31] The court used this list:

> (1) whether the activity is for the state as a whole or special local benefit . . . ;
> (2) whether the activity arises out of a statutory duty or a privilege granted . . .;
> (3) whether the activity is normally done by private entities . . .; and
> (4) whether the entity's actions were commercial in nature . . . .[32]

The first factor regarding statewide or "local" benefit is perhaps the most challenging one to interpret because cities will always be acting locally. Most likely, this factor should be adjusted for cities because cities still "assert[] public rights" and "protect[] property for public use."[33] In addition, the second factor asking about whether there is a statutory duty could leave many municipal services off the list. My main criticism of this list is that these factors primarily come from immunity cases.

---

[28] 2 Kan.App.2d 274, 276, 578 P.2d 281, *rev. denied* 225 Kan. 845 (1978).
[29] *KPERS*, 262 Kan. at 658.
[30] 14 Kan.App.2d 788, Syl. ¶ 3, 798 P.2d 960, *rev. denied*, 248 Kan. 996 (1991).
[31] *Newman Mem'l Hosp. v. Walton Const. Co.*, 37 Kan. App. 2d 46, 64, 149 P.3d 525, 537 (2007).
[32] *Id.*
[33] *Osawatomie*, 96 P. at 671 (internal quotations and citations omitted).

You Have a Broken City Facility – Will It Qualify for the Limitations Exemption?

Let's get back to the initial situation: you learn of construction defects outside the three-year breach of contract statute of limitations. Which municipal facilities or services are going to fall within the advantage of the governmental function exclusion? Below is a list of the more common ones. They're roughly in order from easiest arguments to make to the toughest.

Police, Fire, Streets, and Bridges: These are good issues for cities based on the *KPERS* decision.

Parks: This issue might be almost as good because parks are open to all and not exclusively a fee-driven service. Although there are no limitations cases on point, a 1967 immunity decision in favor of Manhattan related to its municipal zoo should be helpful. That decision quoted prior decisions about the character of parks, and this example sums it up well: "'The city as a corporation derives no benefit therefrom; but the park is maintained for the benefit of the public without regard to residence.'"[34]

Sanitary Sewer or Wastewater: Although this is also a fee-based service, historically sewer has been characterized differently from other public utilities. The Kansas Supreme Court's 1954 decision in *Western Shale Products Co. v. City of Fort Scott* – endorsed and quoted repeatedly by the *KPERS* court – allowed recovery of sewer damages and favors cities on this issue. *Western Shale* concluded that "The construction and maintenance of a sewer by a city ordinarily is a governmental function as distinguished from ministerial or proprietary."[35] There is also a helpful 1995 Attorney General Opinion that advised collection of old unpaid sewer fees should be exempt from limitations. That opinion relied on this explanation from McQuillin Municipal Corporations: "'The operation and maintenance of a sewage system by a municipality is an exception to the rule that in the operation of a public utility a municipality acts in a proprietary capacity; sewage disposal is a governmental function.'"[36]

Storm Water or Storm Sewer: Probably treated favorably like sanitary sewer. Given that private companies have never historically provided these services, perhaps it is fairly argued that they have never been commercial in character, even if compensation is collected for them.

Recreation: This issue could be trickier because these programs are usually only available for a fee, making it look very commercial. If you are like Olathe, your city's recreation program might be entirely an enterprise fund (fee driven) undertaking. Collecting revenue seems to drive court holdings that a city is engaged in proprietary, commercial-like, activity. Recreation programs could be characterized as competing in the private marketplace, which undercuts the governmental function. And these services, while undoubtedly directed at public health, safety, and welfare, are not mandated services (like education is for the State).

[34] *Grover v. City of Manhattan*, 198 Kan. 307, 311, 424 P.2d 256, 260 (1967) (quoting *Harper v. City of Topeka*, 95 Kan. 11, 15, 139 P. 1018, 1020 (1914)).
[35] 175 Kan. 643, 649, 266 P.2d 327 (1954).
[36] Kan. Atty. Gen. Op. 95-74 (1995) (quoting 11 McQuillin Mun. Corp. § 31.10 (1991)).

Water: It depends. The *KPERS* court recognized Kansas courts have consistently held that public water operations have a dual nature. Fire protection will fall safely onto the governmental side of the distinction. Although non-fire aspects of public water supply have consistently been held to be proprietary, this area seems ripe for reconsideration regarding statutes of limitation. While there may be good policy reasons for denying immunity for water operations (e.g., accountability), the idea of water service is quintessentially public. Clean and available water is a basic human need. Moreover, drinking water is made available not just to paying residential and commercial customers, but in all public places with drinking fountains.

For public water operations, the toughest case to get around is *City of Attica v. Mull Drilling Co, Inc.*, where the Kansas Court of Appeals held that the statute of limitations barred Attica's claims against a drilling company for contaminating the city's water wells.[37] This is a pretty cursory decision on the governmental/proprietary distinction. Plus, it summarily relies on an immunity case for the idea that non-fire protection water operations are proprietary.[38] For those reasons, I think it's vulnerable to criticism for not addressing the public rights at issue regarding contaminated or unavailable drinking water.

Solid Waste: Given the large private marketplace for this service, and the fact that it is limited to fee-paying customers, it seems likely to be proprietary.

Electric, Gas, and Transportation: Most likely proprietary based on immunity cases. The character of these services appears more discretionary than other rate-based utilities such as sanitary sewer, storm sewer, and solid waste.

Airports: Most likely proprietary based on immunity cases.[39]

Hospitals: Proprietary. *See Newman Mem'l Hosp. v. Walton Const. Co.*, described above.

Conclusion

Working through this concept did bring me an appreciation for the difficulty of sorting through the governmental/proprietary distinction. It's unlikely that a replacement test will be arriving soon. Alternative distinctions such as discretionary/mandatory and policy decisions/operational decisions, which have appeared in the immunity context, don't seem any easier to apply. The scarcity of reported decisions on K.S.A. 60-521 provides cities with an opportunity to argue against applying some of the historical immunity decisions. Particularly regarding water, there may be some room to expand what counts as a governmental function by arguing about the character of the service. If you are faced with a potential limitations problem, I encourage you to think creatively about how to explain the public character of the city's claim.

---

[37] *City of Attica v. Mull Drilling Co.*, 9 Kan. App. 2d 325, 330, 676 P.2d 769, 774 (1984).
[38] *Id.* at 327.
[39] *See Exec. Aircraft Consulting, Inc. v. City of Newton*, 252 Kan. 421, 428, 845 P.2d 57, 63 (1993) (collecting cases).