



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

CURT T. SCHNEIDER
Attorney General

September 22, 1975

ATTORNEY GENERAL OPINION NO. 75-375

The Honorable Elwaine F. Pomeroy
State Senator
1415 Topeka Avenue
Topeka, Kansas 66612

Re: Counties--Home Rule Powers--Referenda

Synopsis: The board of county commissioners may elect, upon the filing of a timely and sufficient petition in opposition to a proposed charter resolution, pursuant to K.S.A. 19-101b(c), not to call a referendum election thereon, and in that event, the proposed resolution is deemed abandoned and of no force and effect, without further action by the board. In such circumstances, however, the board remains free to readopt such charter resolution subsequently, absent an express prohibition or limitation on their legislative power to do so, and there is no such prohibition or limitation in the Kansas county home-rule act.

* * *

Dear Senator Pomeroy:

On behalf of the Special Committee on Local Government, you request my opinion concerning questions which have arisen respecting the adoption of charter resolutions pursuant to K.S.A. 19-101a *et seq.*

K.S.A. 19-101b(b) permits the board of county commissioners adopting a charter resolution to determine at the time of its adoption to submit it to a referendum vote of the electors of the county. Alternatively, absent such a determination, it must be adopted by a unanimous vote of the board, and then must be published once each week for two weeks. It becomes effective within sixty days thereafter unless, within that

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period, there is filed in the office of the county election officer a sufficient petition "demanding that such resolution be submitted to a vote of the electors." Then, and in that event, "it shall not take effect until submitted to a referendum and approved by the electors."

The question you pose is whether, once a sufficient and valid petition is filed, an election must be called, or whether the board may choose not to call an election, thus in effect abandoning the resolution. Circumstances may arise in which the board of county commissioners, having passed a charter resolution and facing a request for a referendum by a timely and sufficient petition, may judge that the resolution is so unlikely to be approved by the voters that the board would prefer to abandon the proposed resolution and forego the expense of a county-wide election, the result of which the board believes is all too foreseeable. The question you pose is whether, in these circumstances, the board has discretion not to call the election, and thus, effectively abandon the resolution, or whether the terms of the statute mandate an election upon the filing of a sufficient and valid petition.

K.S.A. 19-101b(c) provides in pertinent part thus:

"If within sixty (60) days of the final publication of a charter resolution . . . [a sufficient petition is filed] demanding that such resolution be submitted to a vote of the electors, it shall not take effect until submitted to a referendum and approved by the electors. An election *if called*, shall be called within thirty (30) days and held within ninety (90) days after the filing of the petition." [Emphasis supplied.]

The underscored language implies, with little subtlety, some discretion in the board to call or not to call an election. If the election is not called, the resolution then fails to become effective. Given this implied discretion in the board to call or not to call a referendum, the question remains whether the implication of such discretion defeats any implicit intent and purpose of the act to commit to the electors the decision on the fate of a resolution after a petition in opposition thereto is filed.

A petition operates somewhat as a tentative veto against the action of the board. Once a sufficient petition is filed, there

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remains the decision whether the resolution shall become effective notwithstanding the opposition of two percent of the electorate. The question at issue is initially vested in the board, i.e., whether a charter resolution shall be adopted is decided in the first instance by the board. The intent of the referendum provision is to afford the voters a check on the action of the board. A construction of the section permitting the board to choose to call or not to call a referendum election after the filing of a petition certainly does not frustrate any expressed or implicit legislative commitment of decisions to the electorate. K.S.A. 19-101b provides that resolutions shall not become effective, after the filing of a sufficient petition, until approved by the electorate. If the board chooses to anticipate the wishes of the voters, and abandon a resolution in the face of popular opposition, as will be most usually the case, it is difficult to conclude that any decision has been wrongfully withheld from the voters upon which the legislature intended that they should have an opportunity to express their voice, for no popular expression of view has been circumvented or frustrated. A decision not to hold a referendum election, and thus to abandon the resolution, is tantamount only to a rescission of a decision made by the board of commissioners in the first instance.

Given language in K.S.A. 19-101b(c) which fairly implies discretion in the board whether to call a referendum election after the filing of a sufficient petition, and the lack of any compelling apparent legislative purpose or public policy to negative that implication, I must conclude that, in my opinion, the board of county commissioners may, upon the filing of a timely and sufficient petition in opposition to a charter resolution, choose not to call a referendum election thereupon.

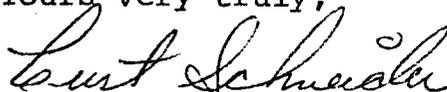
You inquire, secondly, whether, in the event a referendum is not required, a repeal of the charter resolution is necessary, or whether it expires by operation of law for want of a referendum and approval thereby. In my opinion, no repeal or other affirmative action is necessary by the board, for under K.S.A. 19-101b(c), upon the filing of a sufficient petition, "it shall not take effect until submitted to a referendum and approved by the electors." These prerequisites not having been met, it expires by operation of law, in my judgment.

Lastly, you inquire whether there is any limitation on the power of the board to adopt a subsequent and identical charter

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resolution which would require another protest petition to prevent its taking effect. It is a general rule that absent some express limitation, a legislative body may reenact a measure which has been defeated by referendum, and the reenactment itself becomes subject to a referendum petition. See annotation at 33 A.L.R.2d 118 at 1122. Thus, for example, if a charter resolution were defeated at a referendum which was called in response to a petition, the board of commissioners would remain free to adopt again the resolution, thus imposing upon those in opposition the burden of seeking a new petition, if they wished to renew their opposition. Similarly, if the board chooses to abandon a resolution after the filing of a petition, choosing not to call a referendum thereon and permitting the resolution to expire by operation of law, its legislative power to adopt the resolution again remains unimpaired, despite the opposition reflected by the petition filed against the resolution upon its first adoption, absent, of course, some express limitation on that legislative power, and the county home rule statutes contain no such limitation. Thus, it is my further opinion that if no referendum is called in response to a petition therefor, and the resolution in question is thus abandoned, that the board of county commissioners remains free to adopt such resolution once again.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

cc: Mr. Alan Alderson
Office of the Revisor of Statutes
State Capitol Building
Topeka, Kansas 66612