STATE OF KANSAS

Office of the Attorney General

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

Curt T. Schneider
Attorney General

June 7, 1976

ATTORNEY GENERAL OPINION NO. 76- 163

Mr. Harry B. Phelps, Jr.
Logan County Attorney
710 West Second Street
Oakley, Kansas 67748

Re: Counties--Building Funds--Elections

Synopsis: The decision to issue general obligation bonds under K.S.A. 19-15,116 is vested by law with the board of county commissioners, although a purely advisory election may be held upon the question, which is non-binding in any legal fashion. Said election may be authorized by the board of county commissioners in the exercise of county home rule powers under K.S.A. 19-191a(b).

* * *

Dear Mr. Phelps:

You advise that some weeks ago, the Logan County Fair Board submitted a request to the Logan County Board of County Commissioners for funds for the construction of a building on the county fair grounds in Oakley, Kansas. At the time, the fair board had obtained an estimate or bid in the amount of $30,000. Upon receipt of this request, the board of county commissioners adopted a resolution to publish notice of the proposed expenditure and to permit the filing of a petition requesting an election thereon, in accordance with K.S.A. 19-15,116(d).

You have questioned the authority for the calling of any special election, the authority for receipt of protest petitions against the proposed expenditure, and the validity of the expenditure of county moneys for the cost of any election which might be conducted upon the question of the proposed expenditure.

As you point out, under K.S.A. 19-15,116, the board of county commissioners is authorized to authorize the expenditure of county moneys for public buildings, and to do so under several circumstances without an election thereon. For example, under subsection (c) thereof, the board may issue general obligation bonds of the county, except that such bonds may not be issued for any improvement the cost of which exceeds $100,000. Similarly, under subsection (f), the board may use moneys from the general operating fund or other appropriated budgeted fund when such is available, again without an election thereon. An election is required and authorized under this section only when an annual levy is proposed to be extended under subsection (d) or when bonds for an improvement costing in excess of $100,000 is proposed. Neither is the case here, and accordingly, there appears to be no authority for the holding of an election where the proposed expenditure of not to exceed $30,000 is to be made from general obligation bonds issued under the authority of this section.

I enclose a copy of an opinion of the Attorney General dated May 3, 1972, in which, departing from a long-established precedent, it was concluded that there was no legal objection against the holding of an advisory election by a Kansas city, on the ground that the decision whether to hold such an election rested with the city governing body in the exercise of its constitutional home rule powers. A similar view now obtains respecting counties, which now enjoy statutory powers of self-government as described in K.S.A. 19-101a *et seq.*

However, under K.S.A. 19-15,116, the statutory responsibility for the issuance of general obligation bonds for an expenditure of less than $100,000 rests with the board of county commissioners. The board is vested by law with this responsibility, and it may not delegate that responsibility to the result of an election. It may call an advisory election, if it chooses, upon the proposed expenditure, but the authority for such an election would necessarily be based upon a resolution adopted for that purpose under K.S.A. 19-101a(b), and not upon K.S.A. 19-15,116(d). Moreover, such an election would not be legally binding upon the board, for it could not delegate or abdicate its legal responsibility committed to it by the cited statute. The election would be advisory only, and it would remain for the board to make the final decision upon the proposed expenditure.

Yours very truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

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May 3, 1972

Joe L. Levy
City Attorney
Coffeyville, Kansas 67337

Dear Mr. Levy:

You pose two questions, whether or not an urban renewal project may be submitted to a vote of the electorate, and if not, whether the governing body may authorize an advisory referendum upon the question of the commencement of a specific project.

The City has heretofore approved a plan for a project known as Fountain Plaza Project A. In State ex rel. Frizzell v. Paulsen, 204 Kan. 857, 465 P.2d 982 (1970), the court affirmed denial of a writ of mandamus, which had been sought to require submission to the electorate of an ordinance, proposed by petition, to bar all urban renewal activity within the city. Certainly the continuation of this project, now adjudged valid and not susceptible to a referendum vote, may not now be submitted to an election of the people.

The question arises whether the governing body may submit the question of the adoption of a plan for a project not yet commenced, the Plaza B Project, to a vote of the people. Under K.S.A. 17-4746, no municipality may exercise the powers conferred under the urban renewal law unless:

> ". . . its local governing body shall have adopted a resolution finding that: (1) One or more slum or blighted areas exist in such municipality and (2) the rehabilitation, conservation, or redevelopment, or a combination thereof, of such area or areas is necessary in the interest of the public health, safety, morals or welfare of the residents of such municipality."

Under K.S.A. 17-4747 only the governing body may approve or reject an urban renewal plan. No provision is made for delegation of that power by the governing body to the electorate at large. We cannot but conclude that approval or disapproval of a specific urban renewal plan is within the power of the governing body only, and may not be submitted to a vote of the people. There is no authority under the urban renewal law, K.S.A. 17-4742 et seq., for the governing body to submit to an election any

proposition whether to proceed with any specific proposed project plan. Absent statutory authority for such an election under the urban renewal law or otherwise, such an election would be of no force and effect whatever.

Secondly, you inquire whether it is within the power of the city to authorize an advisory referendum or election. This question has been posed before the Attorney General several times in the past. For example, it has been asked whether a question relating to the use of county-owned property may be placed on the ballot. In an opinion dated July 10, 1970, Attorney General Kent Frizzell stated thus:

> "We note in the first instance that the suggested referendum would be purely advisary [sic] and would have no binding effect on the commissioners in an area in which they are bound to exercise their own best judgment. This office has long been of the opinion that the expenditure of public funds is not authorized in such a case. . . .
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> "This view is based on the lack of statutory authority to hold such an election. In The State, ex rel., v. Deck, 106 Kan. 518, 522, 523, 188 P. 238 (1920), our court said:
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> '. . . The Board of County Commissioners is authorized to call special elections on various propositions, but each specific instance is under a special grant of statutory power. . . These instances may not exhaust the list, but in each of such special elections, positive, complete, and specific authority is granted to the Board of County Commissioners. Where such authority is not expressly conferred, it would not exist'."

Insofar as the foregoing applies to advisory elections conducted by the county, we agree fully with the foregoing.

In an earlier opinion, of September 5, 1967, Attorney General Londerholm stated further, regarding a proposed advisory election conducted by a city, that "conducting an election [to] take a straw poll of public opinion on a question where there is not authority to hold the election would be an unlawful expenditure of public funds and. . . it would not in any way bind the governing body of the city."

At 26 Am. Jur. 2d, Elections, § 183, at p. 13, the writer states thus:

> "It is fundamental that a valid election cannot be called and held except by authority of the law. There is no inherent right in the people, whether of the state or of some particular subdivision thereof, to hold an election for any purpose. Accordingly, an election held without affirmative constitutional or statutory authority, or contrary to a material provision of the law, is a nullity, notwithstanding the fact that such election was fairly and honestly conducted." [Footnotes omitted.]

Insofar as the foregoing applies to an election at which the people are called upon to make a legally binding decision, we agree fully. However, broad and liberal powers are granted to Kansas cities under the home rule provision of our Constitution, Article 12, § 5, under which "[c]ities are hereby empowered to determine their local affairs and government. . . " We are aware of no statute prohibiting an advisory election. Of course, such an election would have no legal consequence whatever, and a governing body may not bindingly commit a decision which is reserved to them alone to the result of such an election. To do so would result in an abdication of the responsibilities and duties of the governing body. However, in our opinion, the home rule powers of the governing body of a Kansas city include the power to authorize the holding of an election, purely advisory in nature, at which a question of public moment is submitted for the expression of the will of the people thereon.

Despite the prior position of this office, in our view the expenditure of public funds for such an election is not an unlawful expenditure. The purpose of the election must necessarily be a public one, i.e., to permit the electors of the city to express their views upon a question of municipal importance or public concern. We have stated that an advisory election is merely that, one at which the views of the people are asked to be expressed through the ballot for or against a given proposition or question. It has no legally binding effect whatever. There are a number of means whereby the electors of a city may communicate their views to their elected officials, through petitions, attendance at public hearings, personal contact, and resort to statutory initiative and referendum procedures. Foreseeably, once the public has voted upon a question at an advisory election, the governing body might understandably be reluctant to decide upon the matter contrary to the result of the election, and such a decision would doubtless be construed as an affront to the popular will. Likewise, resort by the governing body to such elections upon questions which they must alone decide, may be misleading to the electorate, who may cast their ballots on the understanding that their decision is at least to be respected, notwithstanding it is not legally binding. It is the responsibility of elected officials to make

the decisions committed by law to them, and not to evade the burden of decision by resorting to public elections, in themselves of no legal consequence whatever, upon questions arising before the governing body.

Nonetheless, we cannot but conclude that it is within the lawful authority of the governing body of the city, under Article 12, § 5 of the Kansas Constitution, to authorize the holding of a purely advisory election upon a question of public importance, including the question of the commencement or undertaking of a projected urban renewal project.

Yours very truly,

VERN MILLER
Attorney General

VM:JRM:sbs