

STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

February 27, 1978

ATTORNEY GENERAL OPINION NO. 78-94

Mr. John Dekker
Director of Law
Office of Law Department
13th Floor - 455 North Main
Wichita, Kansas 67203

Re: Cities--Initiative--Ordinances

Synopsis: A proposed initiative ordinance of the City of Wichita provides that the "Wichita public water supply shall not be fluoridated without a binding vote of the people." There is no statutory authorization providing specially for any question-submitted election upon the fluoridation of municipal water supplies, and hence, no authority for holding any such election as contemplated by the ordinance. The prohibition against fluoridation remains effective, despite the lack of any legal authority for the condition precedent to future fluoridation, *i.e.*, a "binding vote of the people" thereon. If the initiative ordinance is not enacted by the governing body, a special election thereon must be held within 110 days from the date of the certificate of the clerk referred to in K.S.A. 12-3013. Any proposition to amend or repeal the ordinance, if enacted, may be submitted only at a future general city election.

* * *

Dear Mr. Dekker:

You inquire concerning a proposed ordinance which has been presented by initiative petition pursuant to K.S.A. 12-3013 to the city commission of the City of Wichita for adoption. Section 1 of the ordinance states that "the Wichita public water supply shall not be fluoridated without a binding vote of the people."

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You inquire, first, whether as proposed, the ordinance is in lawful form and is legally enforceable. The ordinance purports to prohibit fluoridation of the city water supply "without a binding vote of the people." There is, of course, no statutory provision for holding an election upon the question of fluoridating municipal water supplies in Kansas. The decision rests with the governing body, which is vested by law with the sole legislative powers of the city. The governing body cannot delegate its legislative power to the electorate at large except when and as specifically authorized to do so. Article 12, § 12(b) of the Kansas Constitution provides in pertinent part thus:

"Cities are hereby empowered to determine their local affairs and government Cities shall exercise such determination by ordinance passed by the governing body with referendums only in such cases as prescribed by the legislature"

There being no specific statutory authorization for committing to a vote of the people the question of fluoridation, there is thus no statutory authority for holding an election contemplated by section 1 of the ordinance. Thus, there is no legal authority for the condition precedent to fluoridation, *i.e.*, a "binding vote of the people," which the ordinance seeks to impose. That condition is necessarily ineffective. Although the condition precedent to fluoridation is legally ineffective, the prohibition against fluoridation remains valid and binding, in my judgment. Lack of any provision for an election upon the question as contemplated by the ordinance means merely that if enacted, the ordinance would prohibit fluoridation absolutely so long as the ordinance is in effect and until it is either amended or repealed.

Secondly, you ask whether, if the city commission does not pass the ordinance as proposed, within what time period must a special election be called and held thereon. K.S.A. 12-3013 provides in pertinent part thus:

"If the petition accompanying the proposed ordinance is signed by the required number of electors qualified to sign, the governing body shall either (a) pass such ordinance without alteration within twenty (20) days

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after attachment of the clerk's certificate to the accompanying petition; or (b) if not passed within said twenty (20) days forthwith call a special election, unless a regular city election is to be held within ninety (90) days thereafter, and at such special or regular city election, if one is held, such ordinance shall be submitted without alteration to the vote of the electors of said city."

If the commission does not pass the ordinance "within twenty (20) days after attachment of the clerk's certificate to the . . . petition," it must "forthwith call a special election" unless a regular city election is to be held within ninety days "thereafter." Thus, if no regular city election is to be held within 90 days after expiration of the 20 days following the date of the clerk's certificate, at which the proposed ordinance may be submitted, the city commission must "forthwith" after expiration of the twenty days following attachment of the clerk's certificate call a special election. However, the period of time within which that special election must be held is not prescribed.

It may be argued, thus, on the one hand, that the city commission must only *call* the election forthwith, but that the election need not be *held* forthwith, and may be held at any fixed date which the commission chooses, even the next regular city election more than one year in the future. On the other hand, it may be argued that the election must not only be called, but must be held forthwith, *i.e.*, within 90 days following expiration of the 20 days within which the commission could pass the ordinance itself without an election, on the ground that the statute directs the calling of a special election if no regular city election is to be held within that period. In my view, the ambiguity concerning the date of the special election should be resolved in accordance with the evident legislative purpose in prescribing with some specificity the period of time within which specific action is to be taken upon initiative-proposed ordinances. The commission *must* pass the ordinance, if it chooses to do so, within twenty days after the clerk's certificate, and a special election *must* be called if no regular city election is to be held within ninety days thereafter. These prescriptions indicate a clear legislative concern that initiative measures receive prompt and specific legislative action, and that the popular will, reflected in the petition process, should not be thwarted or frustrated by delay. In my judgment, the quoted language above requires that the special election be held within 110 days after the date of the certificate of the clerk.

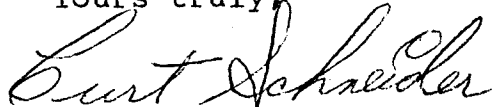
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Lastly, you ask concerning the submission of a proposition to amend or repeal the ordinance. K.S.A. 12-3013 provides in pertinent part thus:

"The governing body may submit a proposition for the repeal of any such ordinance, or for amendments thereto, to be voted upon at any succeeding regular city election"

The term "city election" is defined by K.S.A. 25-2103 as "the election of such city officers as are provided by law to be elected." Thus, any proposition to amend or repeal the ordinance, if enacted, could be submitted only at any succeeding city general election held on the first Tuesday in April.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj