ATTORNEY GENERAL OPINION NO. 78–94

Mr. John Dekker
Director of Law
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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."
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
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 "there-
after." 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 forth-
with, i.e., within 90 days following expiration of the 20 days
within which the commission could pass the ordinance itself with-
out an election, on the ground that the statute directs the call-
ing 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 legis-
lative action, and that the popular will, reflected in the peti-
tion process, should not be thwarted or frustrated by delay.
In my judgment, the quoted language above requires that the spe-
cial election be held within 110 days after the date of the certif-
icate of the clerk.
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