



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

March 27, 1979

ATTORNEY GENERAL OPINION NO. 79- 44

The Honorable Jack H. Brier
Secretary of State
State Capitol
Topeka, Kansas 66612

Re: Counties--Home Rule--Advisory Elections

Synopsis: A board of county commissioners may exercise its powers of home rule granted by K.S.A. 1978 Supp. 19-101a to call and hold an advisory election, so long as such election (1) is for a public purpose and (2) is held independently of any election that is constitutionally or statutorily authorized or required.

* * *

Dear Mr. Brier:

In your letter of January 18, 1979, you requested our opinion whether county commissioners may hold an advisory election. The general rule of law relevant to considering your inquiry is stated in 26 Am. Jur. 2d Elections §183, as follows:

"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.)

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This rule has been followed in Kansas and is reiterated in State, ex rel., v. Deck, 106 Kan. 518 (1920). In that case the Kansas Supreme Court was asked to decide if county commissioners were empowered to call a special election concerning the recall of a county commissioner. In deciding that such an election could not be held, the Court stated:

"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." (Emphasis added.) Id. at 522, 523.

It is clear from the foregoing that an election cannot be called and held absent express constitutional or statutory authority therefor. It also is apparent, though, from our understanding of these legal authorities, that this rule has been announced with respect to an election where the qualified electors of a particular governmental unit are given the opportunity to express their will which, when determined by a counting of the ballots, will have binding effect within such governmental unit.

An advisory election is not subject to such constraints, since it is merely an election at which the views of a particular electorate are solicited through the balloting process with respect to a specific issue or question, and the expression of such views has no binding effect upon the governing body soliciting such opinion. Thus, while we concur with the general rule of law that a valid election must be called and held pursuant to specific constitutional or statutory authority, since an advisory election, by definition, is not a valid election, insofar as the results thereof have no binding effect, we do not find that the calling and holding of an advisory election is dependent upon express constitutional or statutory authority therefor.

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However, since the calling and holding of an advisory election necessarily involves the expenditure of public funds of a particular governmental entity, the governing body thereof must have authority to expend such funds. Applied to a board of county commissioners, it is our opinion that the home rule powers granted to counties by K.S.A. 1978 Supp. 19-101a, "to transact all county business and perform such powers of local legislation and administration as they deem appropriate," provides such authority. We have found no constitutional or statutory provisions either authorizing or precluding advisory elections in counties. Thus, by virtue of its statutory powers of home rule, a board of county commissioners may authorize by resolution the holding of an election, purely advisory in nature, at which a question of public moment is submitted to the county electorate for an expression of their views thereon.

There are two qualifications attendant upon this conclusion, however. First, as previously noted, since an advisory election necessarily involves the expenditure of public funds of the county, the purpose of such election must be a public one, i.e., the question submitted at an advisory election must be of public concern and relate to the business of the county. Otherwise, provisions for such election would exceed the county's home rule powers.

Second, an advisory election authorized by a board of county commissioners must be called and held independently of any other statutorily authorized or required election. A county's home rule powers are specifically limited by statute. K.S.A. 1978 Supp. 19-101a sets forth nine broad areas of limitations on such powers. Once such limitation, stated in the seventh clause of this statute, is that "counties shall be subject to all acts of the legislature concerning elections, election commissioners and officers and their duties as such officers and the election of county officers." Statutory election laws encompassed by this provision all relate to elections at which the expression of the will of the people, through the casting of their ballots, has a binding effect. Advisory elections do not have such effect and are not consonant with these election laws.

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Therefore, in our judgment, a question or proposition to be voted on at an advisory election cannot be presented as a "question submitted" at any election called and held pursuant to the constitution or statutes of this state. To find to the contrary would permit a board of county commissioners to exercise its legislative authority so as to impose additional requirements on the calling and holding of elections prescribed by constitutional or statutory authority. This a county cannot do, by virtue of the express limitations of K.S.A. 1978 Supp. 19-101a. We are of the opinion that said limitations evince a clear manifestation of legislative intent that the legislature shall have sole authority over elections where the expression of the will of the people has a binding effect, and a county cannot modify or engraft additional requirements on the statutes governing such elections.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:gk