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July 3, 1980

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ATTORNEY GENERAL OPINION NO. 80- 142

Mr. Michael L. Baughn  
Mayor  
City of Brewster  
Box 147  
Brewster, Kansas 67732

Re: Elections--Recall of Elected Officials--Grounds  
for Recall

Synopsis: In the absence of any statutory provision requiring council members of cities of the third class to vote in proceedings before the council, a council member who is present may abstain from voting on a particular matter. Additionally, a council member need not state a reason for withholding his or her consent to appointments made by the mayor (to fill vacant positions on the council), and the wisdom or prudence of any failure to confirm a mayoral appointment is not likely to be "second-guessed" by Kansas courts. Cited herein: K.S.A. 15-108, 15-201, K.S.A. 17-4758, K.S.A. 1979 Supp. 25-4302, K.S.A. 60-1205, K.S.A. 75-4304, and Kan. Const. Art. 12, §5.

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Dear Mayor Baughn:

You request our opinion as to the following questions:

- "1. For what reason(s) may an elected official, in this instance a City Councilman, abstain

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from voting? Are there any statutes or laws governing the casting of votes by elected officials?

- "2. Is it lawful for a City Council, arbitrarily and capriciously, without stated reason, to reject the appointment of the Mayor to fill a vacancy on the Council?
- "3. Would sufficient reason for recall exist if a Councilman, with no clear conflict of interest: a) abstains from voting, or b) rejects the appointment of the Mayor without sufficient reason?"

In addressing these questions, this opinion is based upon the assumption that there are no ordinances (charter or otherwise) of the City of Brewster which have any application to the issues presented, and that the provisions of Chapter 15 of Kansas Statutes Annotated (relating to cities of the third class) and other statutes cited herein are fully controlling. It should be recognized, however, that cities possess extensive home rule powers pursuant to Article 12, Section 5 of the Kansas Constitution.

We now consider your questions in the order that they were presented.

- "1. For what reason(s) may an elected official, in this instance a City Councilman, abstain from voting? Are there any statutes or laws governing the casting of votes by elected officials?"

A city council member is required to abstain from voting in certain circumstances where a conflict of interest exists. See K.S.A. 17-4758 and 75-4304. Apart from these statutory provisions, it can be said that a council member is disqualified from voting where he or she has an interest or bias in regard to the subject matter being considered. See 56 Am.Jur.2d Municipal Corporations, §172.

As to other circumstances where a council member may abstain from voting, there are no statutory provisions which provide any guidance. K.S.A. 15-108 (repealed, L. 1959, ch. 64, §17) formerly required, with regard to cities of the third class, that a vote be taken by yeas and neas, on the passage of any ordinance,

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and entered on the journal by the city clerk. Such a statutory provision in another state has been held to infer that a member must vote. Northwestern Bell T. Co. v. Board of Comm'rs of Fargo (N.D.), 211 N.W.2d 399, 402 (1973). Likewise, at least one state requires (by statute) that every member of a governmental board who is present at any meeting of such board must vote in its proceedings. See City of Hallandale v. Rayel Corporation (Fla.), 313 So.2d 113, 116 (1975). Also, it has been said that there is a "duty to vote" if the member is present. Northwestern Bell T. Co. v. Board of Comm'rs of Fargo, supra; Babyak v. Alten (Ohio), 154 N.E.2d 14, 18 (1958). However, we are unaware of any statutory provision of the state of Kansas which requires a member (who is present) to vote, nor do we know of any decision of a court of this state which refers to a "common law" voting requirement. In the absence of any such authority, we must conclude that a city council member may abstain from voting on a particular matter.

Also, it should be noted that, with regard to the effect of such an abstention (in non-conflict of interest situations), the common law and Kansas rule is that an abstainer is counted as voting with the majority. See Equity Investors, Inc. v. Amnest Group, Inc., 1 K.A.2d 276, 281 (1977); Smith v. State, 64 Kan. 730, 733 (1902); 63 A.L.R.3d 1072. However, as was stated in Attorney General Opinion No. 78-143, the common law and Kansas rule regarding abstentions is of no assistance in breaking stalemates caused by a tie vote of the governing body, which vote results from one or more members refusing to vote.

"2. Is it lawful for a City Council, arbitrarily and capriciously, without stated reason, to reject the appointment of the Mayor to fill a vacancy on the Council?"

K.S.A. 15-201 prescribes the procedure for filling vacancies in the city council (of third class cities) and provides, in part, as follows:

"In case of a vacancy in the council occurring by reason of resignation, death, or removal from office or from the city, the mayor, by and with the advice and consent of the remaining councilmen, shall appoint some suitable elector to fill the vacancy until the next election for that office. In case any person elected as a councilman neglects or refuses to qualify within thirty

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(30) days after his or her election, he or she shall be deemed to have refused to accept such office and a vacancy shall exist, and thereupon the mayor may, with the consent of the remaining councilmen, appoint some suitable elector to fill said vacancy."  
(Emphasis added.)

In Attorney General Opinion No. 79-109, we had occasion to construe the provisions of a charter ordinance of the City of Great Bend which provided for the appointment of the city attorney by the mayor, with the consent of the city council. One of the cases cited in that opinion, State, ex rel., v. Lander, 87 Kan. 474, (1912), specifically states that council members need not state a reason for withholding their consent to appointments by the mayor. Although the Lander case also implies that an extended pattern of unreasonable rejections of mayoral appointments might justify ouster under K.S.A. 60-1205(a), we concluded as follows in the above-cited opinion:

"It must be emphasized that the conferring or withholding of consent by the city council is a discretionary act, not a ministerial act. The wisdom or prudence in the exercise of such authority is not likely to be 'second-guessed' by Kansas courts. The vote of any individual council member simply will not be compelled by the judiciary."

In our judgment, the conclusions (relative to a council's refusal to confirm the mayor's appointment of a city attorney) set forth in Attorney General Opinion No. 79-109 are equally applicable to the refusal of a council member to consent to the mayor's appointment (pursuant to K.S.A. 15-201) to fill a vacancy occurring on the council.

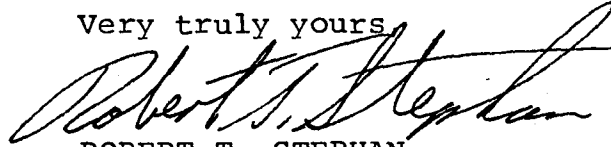
"3. Would sufficient reason for recall exist if a Councilman, with no clear conflict of interest: a) abstains from voting, or b) rejects the appointment of the Mayor without sufficient reason?"

As was stated above, we are unaware of any statutory provision of this state which requires a council member (who is present) to vote, nor do we know of any decision of a court of this state which refers to a "common law" voting requirement. Likewise, with regard to a vote rejecting the appointment of the mayor

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to fill a position on the council, the council member is simply performing a discretionary function and need not state a reason for the negative vote. See Attorney General Opinion No. 79-109. Therefore, in our judgment, none of the grounds for recall of a public official, which grounds are set forth in K.S.A. 1979 Supp. 25-4302, would be applicable to the circumstances which you describe.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General

RTS:BJS:TRH:jm