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ATTORNEY GENERAL OPINION NO. 81-252

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Re: Cities and Municipalities -- Ordinances of Cities --
Applicability of Initiative and Referendum Ordinances
to Flood Control

Synopsis: The initial determination, by a city, to adopt one of two alternative flood control projects, is legislative in nature, and is a proper subject of an initiative petition under the provisions of K.S.A. 1980 Supp. 12-3013, as amended by Section 31 of Chapter 173 of the 1981 Session Laws of Kansas. However, a proposed ordinance, which is submitted to a city governing body under the initiative and referendum statute, may not include provisions which are administrative in nature, or provisions which conflict with applicable state statutes. Where a proposed ordinance contains such provisions, it is not subject to the initiative and referendum process. Cited herein: K.S.A. 12-635, 12-636, 12-644, 12-645, 12-3013; L. 1981, Ch. 173, Section 31; Kan. Const., Art. 12, Section 5(c).

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Dear Mr. Suelter:

You request our opinion as to whether a proposed ordinance concerning flood control in the city of Great Bend is a proper subject of an initiative petition. The proposed ordinance, a copy of which is attached hereto as Exhibit "A," specifies that "it should be the policy of the city of Great Bend to protect the city and all public and private property located therein from damage by overflow" of certain water courses,

and that "the city of Great Bend and public and private property located therein can best be protected from floods and damage from overflow of the . . . water courses by a comprehensive flood protection and control plan."

The proposed ordinance quotes extensively from K.S.A. 12-635 et seq. in granting certain authority to the city governing body, and section 3 thereof authorizes "the construction of flood control and protection works as proposed by the United States Army Corp of Engineers in its Great Bend Local Protection Project." Section 4 of the proposed ordinance provides that the city "shall pass a resolution declaring it necessary for the public good and convenience that all property in the city be protected from the overflow" of the described water-courses. Said section also states that the governing body

"shall require a competent engineer to make the survey and perform the acts and functions required by K.S.A. 12-636, and upon the filing of the engineer's report in duplicate with the City Clerk as required by law, the governing body shall approve said report and immediately cause a copy thereof to be filed with the Corporation Commission of the state of Kansas."

Section 6 of the proposed ordinance prescribes that, in order to provide for the payment of the costs of the described flood control improvements and damages occasioned by reason thereof, the governing body of the city "shall issue general obligation internal improvement bonds of the city as provided in K.S.A. 12-644."

Section 7 of the subject ordinance provides as follows:

"It is hereby found and determined that the flood protection and control improvements authorized by this ordinance are for the general benefit of the city of Great Bend. Therefore, the cost of such improvements shall be assessed against the city generally, and payment of the bonds herein authorized and the interest thereon shall be by levy of a general tax on all of the taxable property within the city."

Section 9 of the ordinance directs and authorizes the officers and employees of the city "to initiate and carry out the policies and directives" contained in the ordinance, and to "perform all acts and take all actions required by K.S.A. 12-635 et seq. in order to implement them."

A determination of whether the above described ordinance is a proper subject of an initiative petition requires consideration of the concepts of initiative and referendum, which are set forth in K.S.A. 12-3013, as amended by section 31 of Chapter 173 of the 1981 Session Laws of Kansas. This statute provides a procedure whereby a city's electors may initiate by petition any proposed ordinance, except administrative ordinances, ordinances relating to a public improvement to be paid wholly or in part by the levy of special assessments, and ordinances subject to referendum or election under another statute. The exception for administrative ordinances leaves with the electors the power to initiate ordinances that are legislative in character, so long as such legislative ordinances do not fall within the latter two classes of ordinances set forth above, where the provisions of initiative and referendum are not available.

The legislative-administrative dichotomy is perhaps the strongest of the several tests applied by the Kansas Supreme Court in determining the appropriateness of initiative. It should be noted that the Court has taken a conservative approach in applying these tests, which fact was specifically recognized in City of Lawrence v. McArdle, 214 Kan. 862, 870 (1974). To more fully understand the Court's approach to this issue, a review of its pertinent decisions is appropriate.

In Rauh v. City of Hutchinson, 223 Kan. 514 (1978), the Court reaffirmed the principles set forth in McArdle, quoting at length from the syllabus of the prior decision, including:

"1. The operation of the initiative and referendum statute is to be confined with a considerable degree of strictness to measures which are quite clearly and fully legislative and not principally executive or administrative.

"2. One crucial test for determining that an ordinance is administrative or legislative is whether the ordinance is one making a new law or one executing a law already in existence. Permanency and generality of application are two additional key features of a legislative ordinance.

"3. Acts constituting a declaration of public purpose and making provisions for ways and means of its accomplishment may be generally classified as calling for the exercise of legislative power. Acts dealing with only a small segment of an overall policy question

are generally of an administrative character.'" 223 Kan. at 519.

Further insight is gained from Rauh, where the Court quotes with approval section 16.55 of 5 McQuillin, Municipal Corporations (3rd Ed.), p. 212, a pertinent portion of which reads as follows:

"'It has been said, however, that if the subject is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state's designated agent for local implementation of state policy, the action receives an 'administrative' characterization, hence is outside the scope of the initiative and referendum.'" (Emphasis added by court.) 223 Kan. at 519.

In the McArdle case, supra at 870, the Court refers to State, ex rel., v. Salome, 167 Kan. 766 (1949), in commenting that "[t]he administrative details of . . . carrying out complex flood control projects are simply not proper subjects for the uninitiated electors to determine." The Salome case involved the question of whether a proposed ordinance repealing a flood control improvement ordinance of the city of Wichita was the proper subject of an initiative petition. The flood control ordinance at issue was adopted by the city of Wichita on June 22, 1948, approved a "Definite Project Report," and provided for financing thereof. The point on which the case turned, however, was that the city of Wichita had previously, by means of a resolution adopted on August 14, 1945, accepted and approved the project plans (said project plans being one of two alternatives, and found to be the most desirable by the city governing body). Under such circumstances, the Court found that the city was bound to the policy set forth in the 1945 resolution, that the later ordinance merely carried into effect the previously adopted policy, and therefore was administrative in nature, and not subject to repeal under the initiative and referendum statute.

As we construe the Salome case, it does not stand for the proposition that all ordinances concerning flood control are administrative, and, therefore, not subject to initiative and referendum. Rather, in our judgment, said case only indicates that once a certain project has been accepted and approved, later ordinances necessary to complete the project are administrative in nature. In our opinion, there is a strong implication in the Salome case that the initial decision to adopt one of two alternative flood control projects is legislative

in nature, and subject to action under the initiative and referendum statute. In this regard, it should be noted, that in a 1974 California case, a California city conceded that the initial resolution approving flood control plans was a legislative act. Valentine v. Town of Ross, 114 Cal. Rptr. 678, 680 (1974). We perceive no reason why the electorate of a city, after public debate and consideration, is not capable of weighing whether a comprehensive flood control project, or a project of a lesser nature, is the best policy to be pursued by a city. However, as our Supreme Court indicated in the McArdle case, supra, the administrative details of carrying out a flood control project are not proper subjects for an initiative petition, and, therefore, may not be submitted to a referendum under the provisions of K.S.A. 1980 Supp. 12-3013 (as amended). In summary, it is our conclusion that a proposed ordinance requiring the adoption of a comprehensive flood control project is a proper subject on an initiative petition, but that the electorate of a city, if it votes to adopt such a flood control policy, must depend upon the good faith and judgment of the city governing body to carry out the administrative actions necessary to proceed with the project.

Having discussed the above cases and authorities, and our conclusions relative thereto, it is now necessary to consider whether the specific ordinance attached hereto as Exhibit "A" is the proper subject of an initiative petition under K.S.A. 1980 Supp. 12-3013 (as amended). Section 4 of the proposed ordinance, which section is quoted (in part) above, deals, in our judgment, with administrative matters which are committed to the city governing body under K.S.A. 12-636. Said statute provides as follows:

"Before making the improvements mentioned in K.S.A. 12-635, the governing body of said city shall, by resolution duly passed, declare it necessary for the public good and convenience that the property in said resolution described be protected from the overflow of said watercourse and shall require a competent engineer to make a survey thereof and file the same with the city clerk of said city with maps and profiles of said survey and a full and complete plan of protecting said property from the overflow or damage by water of said watercourse and also the physical characteristics and location of any right-of-way, roadbed, bridge or bridges, streets and alleys and other property liable to be injured or damaged by the overflow of said watercourse. The said engineer shall also make an estimate of the cost of the

entire work and improvement required to protect said property, showing the several items of the same. Said engineer shall inspect and examine all lots and buildings thereon, rights-of-way, roadbeds, bridges, culverts, depot grounds, grades, streets, and all railroads, telephone and telegraph and other property liable to be injured or damaged by the overflow of said watercourse. Said engineer shall make a report in duplicate and file the same with the city clerk. Upon the approval of said engineer's report by the governing body of said city, the city clerk of said city shall immediately cause one of said copies of said engineer's report to be filed with the corporation commission of the state of Kansas. (Emphasis added.)

As is indicated by the underscored portions of the above quoted statute, the engineer's report involves plans for protecting property and estimates of the cost of the entire work and improvement required to protect said property. Section 4 of the proposed ordinance would require the city governing body to approve the report regardless of any errors or omissions inherent therein. In our judgment, said section of the proposed ordinance attempts to control an administrative discretion committed to the city governing body by the subject statute, and is administrative in character.

Section 7 of the proposed ordinance contains provisions which, in our opinion attempt to exempt the city of Great Bend from the provisions of K.S.A. 12-645, which statute requires an appraisal by three disinterested appraisers, and approval thereof by the city governing body, before the cost of flood control improvements may be assessed against the city generally. Said section 7, as quoted above, asserts that "[i]t is hereby found and determined" that the flood control improvements are for the general benefit of the city of Great Bend, that the cost of said improvements shall be assessed against the city generally, and that payment of the bonds and interest thereon shall be by levy of a general tax on all the taxable property within the city. Since this section would exempt the city of Great Bend from the provisions (relating to appraisal and approval by the city governing body) of K.S.A. 12-645, it constitutes an attempt to adopt a charter ordinance through the initiative and referendum process. This office has previously opined that such a question may not be submitted to the electorate upon an initiatory petition, for the reason that the procedure for the adoption of a charter ordinance is prescribed solely and exclusively by Article 12, Section 5(c) of the Kansas Constitution. See Kansas Attorney General Opinion No. 76-34, attached hereto as Exhibit "B".

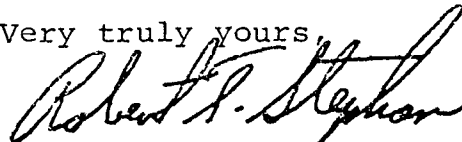
Robert G. Suelter
Page Seven

It also appears that section 7 of the proposed ordinance attempts to control the administrative discretion of the city governing body, in that K.S.A. 12-645 requires the governing body to approve or reject the report of the appraisers, whereas the aforesaid section of the proposed ordinance bypasses both the report of the appraisers and the required approval or rejection by the city governing body.

In passing, and although we do not find it necessary to opine relative thereto at this time, we also believe that there is a question as to whether the proposed ordinance is an "ordinance relating to a public improvement to be paid wholly or in part by the levy of special assessments," and therefore not subject to initiative and referendum under the exclusion set forth in Chapter 173, Section 31(e)(2) of the 1981 Session Laws of Kansas. In the absence of a charter ordinance, as discussed above, K.S.A. 12-645 seems to clearly contemplate at least the possibility of special assessments relating to this type of flood control project. Since a determination of whether special assessments will be levied is contingent upon the steps prescribed by K.S.A. 12-645, it seems that it could not be stated unequivocally that the subject improvement was not to be paid in part by the levy of special assessments until final action by the city governing body under K.S.A. 12-645.

In summary, it is our opinion that because the proposed ordinance relating to flood control in the city of Great Bend contains sections which are administrative in character, and because section 7 thereof may only be adopted by the procedure for adoption of a charter ordinance under article 12, section 5(c) of the Kansas Constitution, it is not a proper subject of an initiative petition under K.S.A. 1980 Supp. 12-3013, as amended by Section 31 of Chapter 173 of the 1981 Session Laws of Kansas, and may not be submitted to a referendum under the provisions of the aforesaid statute.

Very truly yours,



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RTS:BJS:TRH:hle