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November 8, 1985

ATTORNEY GENERAL OPINION NO. 85- 152

James P. Davidson
Shawnee County Counselor
200 East 7th Street, Room 203
Topeka, Kansas 66603

Re: Cities and Municipalities -- Buildings, Structures
and Grounds -- Public Building Commission; Elections

Constitution of the State of Kansas -- Corporations
-- Cities Power of Home Rule

Synopsis: The board of county commissioners of Shawnee County, in the exercise of its power of home rule, may conduct a non-binding advisory election on the question of whether Shawnee County should enter into the leases necessary to permit the Topeka Public Building Commission to issue revenue bonds under K.S.A. 12-1761. However, no statutory or constitutional authority exists for a board of county commissioners to conduct a binding election in the county on the question of whether a public building commission, established by a city under K.S.A. 12-1757 et seq., may issue revenue bonds. Moreover, a city which has established a public building commission does not have the authority, under constitutional home rule powers, to require or authorize a board of county commissioners to conduct a binding election in the county, as such authorization goes beyond the scope of "local affairs" as that phrase is used in Article 12, Section 5 of the Kansas Constitution. Similarly, a city may not, by home rule charter ordinance, authorize a public building commission to extend the right to vote in a binding election on the issuance of bonds to persons who are not

qualified electors of the city. Thus, the City of Topeka's Charter Ordinance No. 55 operates solely to authorize the Public Building Commission to conduct an election in the city upon the presentation of petitions sufficient under its terms. Cited herein: K.S.A. 12-1757; K.S.A. 1984 Supp. 12-1758; K.S.A. 12-1761; 12-1767; 25-2104; 25-2110; 25-2810; Kan. Const., Art. 12, §5.

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Dear Mr. Davidson:

As Shawnee County Counselor and with the consent of Topeka City Attorney, E. Edward Johnson, you have requested our opinion on a number of issues relating to a resolution of the Topeka Public Building Commission to issue revenue bonds for the construction of a facility to be leased and utilized by Shawnee County as a county jail.

According to your letter the Topeka Public Building Commission (hereinafter "PBC"), established pursuant to K.S.A. 12-1757 et seq., has agreed to utilize its authority to issue revenue bonds to finance the acquisition and construction of a facility to be leased to Shawnee County for use as a jail. The PBC recently published a resolution to issue an additional \$3,988,000.00 in revenue bonds to fund construction of the facility. Petitions bearing approximately 12,000 signatures protesting the proposed issuance have been filed with the Shawnee County Clerk. The petitions bear the signatures of persons who reside within the city limits of Topeka as well as those who reside in Shawnee County but outside the Topeka city limits. The petitions seek to bring the question of the PBC bond issue to a popular vote. A number of questions regarding the conduct of this election have arisen from the language of a home rule charter ordinance enacted by the City of Topeka in 1981.

Charter Ordinance No. 55 utilizes the city's constitutional power of home rule under Article 12, Section 5 of the Kansas Constitution to exempt the city from the provisions of K.S.A. 12-1767. That statute, when read in conjunction with K.S.A. 12-1761, is only applicable to a public building commission established in a city of less than 175,000 or more than 200,000 population. K.S.A. 12-1767 relates to the issuance of revenue bonds by a public building commission in such cities and provides:

"Any revenue bonds authorized by this act shall be issued as provided in K.S.A. 10-1201 et seq. and amendments thereto, except to the extent that such statutes are in conflict with this act. Before any revenue bonds are authorized or issued under the provisions of this act, the public building commission shall adopt a resolution specifying the amount of such bonds and the purpose of the issuance thereof. The resolution shall provide that if within 30 days after the last date of publication of the resolution a petition in opposition to the resolution, signed by not less than 5% of the electors of the city, is filed with the county clerk, the board shall submit the question to the voters at an election called for that purpose or at the next general election. Such resolution shall be published once a week for two consecutive weeks in the official city newspaper." (Emphasis added.)

Topeka Carter Ordinance No. 55 provides in relevant parts (emphasis added to relevant differences between the ordinance and K.S.A. 12-1767):

"That the governing Body of the City of Topeka, Kansas, by the power invested in it by Article 12, Section 5 of the Constitution of the State of Kansas, hereby elects to and exempts itself from, and makes inapplicable to it, K.S.A. 12-1767, which applies only to cities with less than 175,000 population and cities with more than 200,000 population, and therefore applying to the City of Topeka, and provides substitute and additional provision as hereinafter set forth.

"Section 2.

"Public building commission authorized; revenue bond issues, laws applicable; resolution, protest petition, election. Any such revenue bonds shall be issued as provided in K.S.A. 10-1201 et seq.

except to the extent that such statutes are in conflict with this act; provided, before any revenue bonds shall be authorized or issued under the provisions of this act the public building commission shall adopt a resolution specifying the amount of such bonds, the purpose of the issuance thereof and stating that if within thirty (30) days after the last date of publication of such notice a petition in opposition to the same, signed by not less than seven percent (7%) of the electors of such county within which the city is located, is filed with the county clerk, the board shall submit the question to the voters at an election called for such purpose or at the next general election. Such resolution shall be published once a week for three (3) consecutive weeks in a newspaper having general circulation in such county." (Emphasis added.)

You raise the following questions concerning the election which the charter ordinance purports to authorize: (1) what entity calls the election; (2) who pays for the costs of holding the election; and (3) who votes in the election?

Your first question is the most critical to our response and requires the analysis of a number of complex factors. The question of what entity calls the election presumably raises a choice between the county and the PBC. The question exists because of the somewhat ambiguous nature of the charter ordinance. Charter Ordinance No. 55 provides, as does K.S.A. 12-1767, that "the board" shall submit the question of the issuance of bonds to "the voters."

In both the ordinance and the statute, the term "board" is inconsistent with the terminology employed in the statute as a whole and is, thus, ambiguous. Neither Ordinance No. 55 nor K.S.A. 12-1767 contain any previous references to a "board." Under the statutory scheme the only entities which could conceivably be referred to by the term "board" are the PBC or the city governing body, yet neither normally bears that name. It is clear under the statutes that the PBC, the entity which has resolved to and which will issue the revenue bonds, is required to call the election and submit the question to the voters. Although both K.S.A. 12-1767 and

Ordinance No. 55 fail to specify which voters, it is fully apparent under the statutory scheme that the voters in question are the voters of the city. This conclusion is supported by the fact that the PBC is a municipal corporation created solely by action of the city. See K.S.A. 12-1757 and K.S.A. 1984 Supp. 12-1758. Additionally, K.S.A. 12-1761, which pertains to elections on the issuance of revenue bonds by a PBC created by a city of more than 175,000 but less than 200,000 population, clearly states that such issuance is to be submitted to and approved by a majority of the electors of the city.

This clarifying statutory context, however, is not especially helpful in interpreting Charter Ordinance No. 55. Evidence of the circumstances surrounding the adoption of the charter ordinance indicate that its intent was to permit the question to be submitted to the voters of the county as a whole. The ordinance itself, however, is less than clear on the subject. On one hand, the ordinance does not refer to any entity other than the PBC before it states that the "board" shall submit the question to an election. On the other hand, the ordinance makes such an election conditional upon the submission of petitions signed by electors of the county in which the city is located, thus evidencing an intent that those electors are also those who will vote at the election. [We do not place great reliance on the fact that the petitions are to be filed with the county clerk, as this is standard practice. The county clerk is usually the county election officer and is required by law to conduct city elections as well as county-wide elections. K.S.A. 25-2104(b); 25-2110; 25-2810].

Thus, Charter Ordinance No. 55 is subject to a number of possible interpretations. You argue for what you describe as a "literal" interpretation of "board" to refer to the board of county commissioners because it is the only body conceivably involved in this matter which is usually described as a "board." As noted, it is clearly the desire of those involved that the election be one at which all residents of the county are permitted to vote.

We have no great difficulty in concluding that this was what was intended when Ordinance No. 55 was adopted. The difficulty arises when we consider whether there is sufficient authority to require such a result. In order to conclude that the board of county commissioners may call the election it is necessary to conclude that a board of county commissioners may derive the authority to conduct a binding election in the county from a city home rule ordinance.

It is a general rule in election law, and one which anyone familiar with the democratic electoral process should regard as 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." 26 Am.Jur.2d Elections §183 (footnotes omitted); Cf. State, ex rel., v. Deck, 106 Kan. 518 (1920).

In the circumstances which prompt this opinion request, the only authority which the county commissioners may rely upon to conduct a county-wide election, the results of which will govern another municipal corporation, i.e. the PBC, is a city home rule ordinance which makes the grant in terms which may only be described as non-specific. We are not aware of any other statutory provisions which authorize the board of county commissioners to call and conduct an election under these circumstances. In the case of State, ex rel., v. Deck, 106 Kan. 518 (1920), the Kansas Supreme Court was asked to decide if county commissioners had the power to call a special election concerning the recall of a county commissioner. Concluding that such an election could not be held, the court said:

"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.

Our concern, therefore, is fundamental: May a board of county commissioners derive the authority to call and

conduct an election in the county from a city home rule charter ordinance? In our opinion, an affirmative answer to this question is not possible given the limitations of city home rule and the general principles of election law discussed earlier in this opinion.

Article 12, Section 5 of the Kansas Constitution is known as the "Home Rule Amendment." It generally empowers cities to determine their "local affairs and government" subject to enactments of the legislature of statewide concern which are uniformly applicable to cities, other uniformly applicable enactments, and enactments prescribing limits of indebtedness. This office has consistently interpreted the Home Rule Amendment in a liberal fashion to insure, in accordance with Art. 12, Section 5(d), that cities be granted the largest measure of self-government. While such liberal construction will continue to be the policy of this office, we do not believe that the home rule legislative authority of a city is sufficiently broad to permit it to authorize or regulate the decision of a distinct political subdivision regarding the conduct of an election.

The home rule amendment empowers cities to determine their "local affairs and government." While we are not of the opinion that this language operates to restrict cities to matters of strictly local concern [City of Junction City v. Griffin, 227 Kan. 332, 337 (1980)], we do believe that the language may be read to limit municipal power in some circumstances. In our opinion, the legislative act which authorizes a separate governmental subdivision to conduct a binding election is beyond the scope of a city's "local affairs."

Previous opinions issued by this office have concluded that both a city and a county may rely upon home rule powers to hold a non-binding advisory election. Attorney General Opinions Nos. 83-177 and 79-44. These conclusions were based upon the fact that an advisory election is not one at which the voters' choice will have a binding effect upon or within a governmental unit. In the case of such binding elections, both opinions make it clear that there is no authority to call such elections absent specific statutory or constitutional authorization.

It follows from these conclusions that city home rule power regarding elections does not extend to authorize a separate political subdivision of the state to hold a binding election. We believe this is an area where the words "local

affairs" as used in Article 5, Section 12, may be read to limit the city's power. In our opinion, permitting a city home rule ordinance to authorize the calling of a binding, countywide election by a board of county commissioners would compromise the general rule of election law discussed above; that is, a binding election may not be held absent specific statutory or constitutional authorization, that is, action by the legislature or the people.

We are faced with similar problems if we conclude that "board" in Charter Ordinance No. 55 refers to the PBC. The first difficulty is, of course, that the PBC is not referred to as a "board" in any other place in the ordinance. Assuming, however, that the PBC is the body intended to call the election, we again must address whether the PBC, an agency created by the city, may derive the authority to conduct a binding county-wide election from an ordinance adopted by the city. To give an affirmative answer to this question requires us to conclude that the city's home rule authority is sufficient to extend the right to vote in an election which will have binding effect upon the conduct of yet another separate municipal corporation to individuals who are not residents of the city. Again, we believe that this exercise of authority goes beyond the scope of "local affairs" and would represent an attempt by the city to utilize home rule authority to give significant extra-territorial effect to its ordinance.

Except with regard to a non-binding advisory election, it is our opinion that, in Kansas, the legislature alone has the authority to provide for calling a binding election and to determine, within constitutional limitations, which voters may exercise the franchise in a particular election. In this case, the legislature clearly provided that the PBC would call an election at which the voters of the city would be entitled to vote. In our opinion, it goes beyond the scope of "local affairs" for the city to attempt to extend the franchise in such an election to persons who are not qualified electors of the city.

We are not unmindful that the equities of this situation call for permitting the voters of Shawnee County to make a decision on this question. It would, however, be contrary and basic democratic principles (as well as future equities) to sanction the expedient result without full consideration of the legal principles involved. To conclude that a city may utilize its home rule legislative power to authorize or require the conduct of an election by a county would, in our opinion,

contravene fundamental principles of law and set a dangerous precedent for the future. Thus, we must reluctantly conclude that Charter Ordinance No. 55 is not sufficient to authorize the board of county commissioners to hold a binding countywide election nor to authorize the PBC to conduct an election at which non-residents of the city are entitled to vote. What the ordinance appears to accomplish is that which is evident on its face. The PBC is bound, under the terms of Charter Ordinance No. 55, to submit the question of the issuance of bonds to the voters of the city upon sufficient petitions signed by electors of the city and the county.

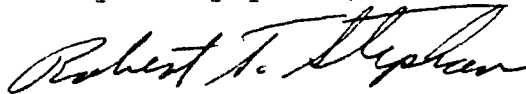
It would appear, however, that another less awkward, although not entirely satisfactory, option exists which would permit voters in the county to express their opinion on this matter. The commendable purpose behind Charter Ordinance 55 was to attempt to provide all the residents of Shawnee County with the opportunity to vote on a question which concerns the county as a whole. Under K.S.A. 12-1761, the PBC's authority to issue revenue bonds is dependent upon the negotiation of a lease between the county and the PBC (in this case) sufficient to provide the revenue to retire and service the bonds. If such a lease is not in place, no bonds may issue. The county's decision to agree to the leases is then a most important precondition to the issuance of bonds under these statutes.

While the county governing body is clearly possessed of authority to agree to the leases without submitting the matter to an election, we are aware of nothing which would prevent the county from exercising its home rule authority as discussed in Attorney General Opinion No. 79-44 to conduct a non-binding advisory election on the question. Although the results of such an election would not bind the county commissioners (i.e. the board would be free to agree or not agree to the leases), it would provide the Shawnee County voters with an opportunity to make their desires known to the commissioners. Such an advisory election would accomplish that result, without doing violence to fundamental concepts of election law.

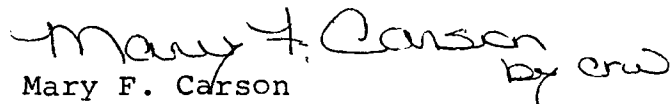
We conclude, therefore, that no statutory or constitutional authority exists for a board of county commissioners to conduct a binding election in the county on the question of whether a public building commission, established by a city under K.S.A. 12-1757 et seq., may issue revenue bonds. Moreover, a city which has established a public building commission does not have the authority, under constitutional

home rule powers, to require or authorize a board of county commissioners to conduct a binding election in the county as such authorization goes beyond the scope of "local affairs" as that phrase is used in Article 12, Section 5 of the Kansas Constitution. Similarly, a city may not, by home rule charter ordinance, authorize a public building commission to extend the right to vote in a binding election on the issuance of bonds to persons who are not qualified electors of the city. Thus, the City of Topeka's Charter Ordinance No. 55 operates solely to authorize the Public Building Commission to conduct an election in the city upon the presentation of petitions sufficient under its terms. To permit the remaining electors of Shawnee County an opportunity to vote, the board of county commissioners may, in the exercise of its home rule powers, conduct an advisory election on the question of whether the county should agree to the leases necessary to authorize the public building commission to issue bonds under K.S.A. 12-1761.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Mary F. Carson
Assistant Attorney General

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