



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

May 18, 1989

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ATTORNEY GENERAL OPINION NO. 89- 61

Thomas A. Glinstra
Municipal Counsel
City of Olathe
P.O. Box 768
Olathe, Kansas 66061

Re: Cities and Municipalities--Ordinances of Cities;
General Provisions--Style or Ordaining Clause

Cities and Municipalities--Ordinances of Cities;
Initiative and Referendum Ordinances--Petition for
Proposed Ordinance; Requirements

Synopsis: K.S.A. 12-3005 prescribes that "[t]he style or ordaining clause of all ordinances shall be: 'Be it ordained by the governing body of the city of _____:'. This requirement is mandatory, and a proposed ordinance submitted under the provisions of K.S.A. 12-3013 must include an ordaining clause. As Ordinance No. 112-A of the city of Olathe contains no such clause, it is our opinion that the "ordinance" is void and unenforceable. Cited herein: K.S.A. 12-3005; 12-3013; Kan. Const., Art. 2, §20.

* * *

Dear Mr. Glinstra:

You pose numerous questions regarding Ordinance No. 112-A of the city of Olathe. For the reasons set forth below, it is our opinion that the ordinance is void and unenforceable, and we will not, therefore, address the questions you pose.

The provision in question was initiated pursuant to the provisions of K.S.A. 12-3013, and a copy of the subject petition is attached hereto as Exhibit A. K.S.A. 12-3013 prescribes a procedure whereby "proposed ordinances" may be submitted to a referendum. It is therefore necessary to examine any petition submitted under K.S.A. 12-3013 to determine whether it includes an "ordinance".

K.S.A. 12-3005 prescribes that "the style or ordaining clause of all ordinances shall be: 'Be it ordained by the governing body of the city of _____:'". The proposition attached hereto as Exhibit A, which was approved by Olathe voters, contains no ordaining clause. In this regard, a 1968 letter opinion of Attorney General Robert C. Londerholm indicates that lack of an ordaining clause is fatal to a petition filed under K.S.A. 12-3013. See 6 Opinions of the Attorney General at pages 104-105.

While the Kansas Supreme Court has not considered whether the ordaining language of K.S.A. 12-3005 is mandatory, it has construed an analogous provision of the Kansas Constitution which prescribes the enacting clause for all bills. In State v. Kearns, 229 Kan. 207, 209 (1981) the Court held that the following language in Article 2, Section 20 of the Kansas Constitution is "clear, unambiguous and incapable of any interpretation other than prescribing mandatory wording for the enactment of a bill into law":

"The enacting clause of all bills shall be 'Be it enacted by the Legislature of the State of Kansas:'. No law shall be enacted except by bill."

In light of the Court's conclusion that the enacting clause prescribed by Article 2, Section 20 of the Kansas Constitution is mandatory, it appears very likely that the Court would hold that the analogous requirement of K.S.A. 12-3005 is also mandatory. In our judgment, there is no basis for distinguishing Article 2, Section 20 of the Kansas Constitution from K.S.A. 12-3005, other than the fact that the state legislates by bill while a city legislates by ordinance. If an enacting clause is mandatory for state legislation, no reason appears why an ordaining clause would not be mandatory for city legislation. This is particularly true where the municipal legislation is penal in nature and accordingly must be strictly construed in favor of persons sought to be subjected to the legislation. City of Kansas City v. Connor, 5 Kan.App.2d 260, 261 (1980).

We are aware that Judge Marion W. Chipman of the Johnson County District Court has ruled that the "proposed ordinance" (Ordinance No. 112-A) is not defective in form. (Memorandum Decision dated March 30, 1988, City of Olathe v. Huggins, Case No. 87 C 11516.) However, Judge Chipman does not mention the requirements of K.S.A. 12-3005 in his decision, and it would appear that he was not briefed as to the provisions of that statute. At any rate, the decision in City of Olathe v. Huggins is not res judicata as to any person who may be charged with violating Ordinance No. 112-A, nor is this office precluded from expressing an opinion which differs from that of Judge Chipman.

In summary, K.S.A. 12-3005 prescribes that "the style or ordaining clause of all ordinances shall be: 'Be it ordained by the governing body of the city of the _____:'". This requirement is mandatory, and a proposed ordinance submitted under the provisions of K.S.A. 12-3013 must include an ordaining clause. As Ordinance No. 112-A of the city of Olathe contains no such clause, it is our opinion that the "ordinance" is void and unenforceable.

Finally, if the governing body or voters of Olathe initiate new legislation on the subject of conflict of interest, we would hope and expect that such legislation would address the thirteen hypothetical questions set forth in your opinion request. Such clarification would eliminate the need for legal interpretation and reduce the likelihood of future litigation.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:JLM:TRH:jm

EXHIBIT "A"

PETITION REQUESTING SUBMISSION OF QUESTION WHETHER TO ADD THE
ATTACHED ORDINANCE TO THE CITY OF OLATHE, KANSAS MUNICIPAL CODE

The question petitioner's seek to bring to an election is as follows: Shall the City of Olathe, Kansas, adopt an ordinance prohibiting any elective or appointive officer or servant of the City to be a party to any contract, job or piece of work which may be let by the City of Olathe, Kansas, to-wit;

OFFICIALS PECUNIARILY INTERESTED IN CONTRACTS: PROCEEDINGS: PENALTY. It shall be unlawful for any elective or appointive officer or servant of the city to be a party to, or pecuniarily interested in, any contract, job or piece of work which may be let by the city, or any such contract shall be absolutely null and void; and in case any money shall have been paid out on any such contract, it shall be the duty of the city attorney to sue for and recover the amount so paid out from the parties to such contract and from the officer or servant of the city pecuniarily interested in the same. No officer or servant of the city, while holding such position, shall sell any commodity or service of any kind or character to such city.

That any awarded contract in existence at the time of the adoption of this ordinance shall not be affected hereby.

If any officer while in office shall become pecuniarily interested, directly or indirectly, in any contract or agreement in which the city shall be interested, or in any question submitted, or proceedings upon which such officer may be called upon to vote or act officially, with intent to gain, directly or indirectly, pecuniarily, any benefit, profit, or pecuniary advantage, he shall be removed from office, and on conviction shall be deemed guilty of a misdemeanor, and be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year, or both such fine and imprisonment. The proceedings above provided for may be brought in the district court by the city attorney, or, if he fails to act, then the district attorney shall bring such action.

The election is sought to be held in the political subdivision of Olathe, Johnson County, Kansas.

I have personally signed this petition and I am a registered voter in the city of Olathe, Johnson County, state of Kansas. My residence address is correctly written after my name.

SIGNATURE	RESIDENCE ADDRESS	DATE OF SIGNING
<i>Alicia Fitzmaurice</i>	12492 S. Ellsworth	9-15-87
<i>James G. Hunter</i>	15105 Ellsworth	9-15-87
<i>David Lynn</i>	15113 W. Ellsworth Ct	9-15-87
<i>Marilyn Pippin</i>	15113 W. Ellsworth Ct	9-15-87
<i>Laura Johnson</i>	15200 W. Ellsworth Ct	9-15-87
<i>John C. Johnson</i>	15700 W. Ellsworth Ct	9-15-87
<i>Mindy Johns</i>	15200 W. Ellsworth Ct.	9-15-87
<i>David P. Johnson</i>	15106 W. Ellsworth Ct.	9-15-87
<i>Kris Johnson</i>	15106 W. Ellsworth Ct.	9-15-87
<i>Steve Benson</i>	12461 S. Ellsworth	9-15-87
<i>Edward C. Gilligan</i>	12481 Ellsworth	9-15-87
<i>David C. Johnson</i>	12485 Ellsworth	9-15-87