



STATE OF KANSAS

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October 27, 1992

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ATTORNEY GENERAL OPINION NO. 92- 136

Douglas D. Depew  
Cherryvale City Attorney  
620 Main Street  
P.O. Box 313  
Neodesha, Kansas 66757

Re: Cities of Second Class; Commission Government--  
Commission Form of Government--Abandonment of  
Organization Under Act; Petition; Time of Election;  
Number of Wards

Elections--Sufficiency of Petitions--Petition  
Documents; Recital of Circulator; Constitutional or  
Statutory Authority; Error in Petition

Synopsis: Documents circulated by electors of the city of  
Cherryvale seeking to bring about a change in the  
form of city government and the number of wards in  
the city constitute two separate petitions. Each  
petition must be able to stand on its own in  
meeting the requirements for a sufficient  
petition. A recital of the circulator must be  
included in each petition. A question regarding  
abandonment of the commission form of government is  
to be submitted to the qualified electors of the  
city at the next city or state general or primary  
election following by not less than 60 days the  
certification of the petition. A petition  
requesting that the question be submitted at an  
election held at any other time is a nullity.  
Division of the city into wards is essentially an  
administrative function, and is not subject to  
initiative and referendum. A petition requesting a  
change in the number of wards of a city is

therefore of no legal consequence. Cited herein:  
K.S.A. 12-184; 12-3013; 14-103; 14-1807; K.S.A.  
1991 Supp. 25-3601, as amended by L. 1992, ch.  
194, § 2; 25-3602, as amended by L. 1992, ch.  
194, § 3.

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Dear Mr. Depew:

As attorney for the city of Cherryvale, Kansas, you request our opinion regarding the legality and sufficiency of a petition seeking to bring to an election a question concerning abandonment of the present form of government for Cherryvale. Specifically, you ask the following:

1. Whether the question regarding abandonment of the present form of government for the city of Cherryvale may be submitted to the electors on November 3, 1992. If the question may not be submitted to the electors on November 3, 1992, you ask whether the fact that the petition expressly requests an election on that date will operate to invalidate the petition;
2. Whether the petition pertains to more than a single issue or proposition;
3. Whether a change in the number of wards of a city is a proper subject of a petition and, if so, whether the petition must contain the recital set forth in K.S.A. 1991 Supp. 25-3602, as amended by L. 1992, ch. 194, § 3; and
4. Whether the petition must be submitted to the county attorney prior to its circulation for an opinion of the county attorney regarding the legality of the form of the question submitted.

The city of Cherryvale is a city of the second class with the commission form of government. Certain electors of Cherryvale are attempting by petition to bring to an election a question regarding abandonment of the commission form of government. Based upon information contained in a September 23, 1992, letter of the Montgomery county clerk, it appears that 32 documents were filed with the county election officer. Sixteen of the documents are titled "PETITION TO BRING AN ELECTION TO ABANDON COMMISSION FORM OF GOVERNMENT." These pages then provide:

"I, the undersigned, do hereby call for an election to be held at the November, 1992 general election for the purpose of voting on a question to abandon the commission form of government for the city of Cherryvale, Kansas; that the following proposition be submitted to the qualified electors of Cherryvale, Kansas;

"'Shall the city of Cherryvale, Kansas abandon its organization under Chapter 82 of the Laws of 1909, and the Acts Amendatory thereto, and become a city under the general law governing cities of like population?'

"I have personally signed this petition. I am a registered elector of the state of Kansas and of Cherryvale, Montgomery County, Kansas, and my residence address is correctly written after my name."

The remaining documents are titled "PETITION" and contain the following:

"I, the undersigned, being an elector of the city of Cherryvale, Montgomery County, Kansas, and a duly registered voter hereby request that in the event the present commission form of government is abandoned by a vote of the electors of the city of Cherryvale, then the number of wards in the city of Cherryvale be reduced from four (4) to two (2) by an Ordinance adopted in the city commission as soon as is practicable following the November, 1992 election.

"I have personally signed this petition and my residence address is correctly written after my name."

A recital in the following form accompanies the documents.

AFFIDAVIT OF QUALIFIED ELECTOR

State of Kansas            )  
                                  ) ss:  
County of Montgomery )

\_\_\_\_\_, being duly sworn, says that he or she is a qualified elector residing in the city of Cherryvale, Montgomery County, State of Kansas, duly registered to vote; that he or she personally witnessed the signing of the petition by each person whose name appears thereon on the accompanying \_\_\_\_\_ pages.

\_\_\_\_\_ [Signature]

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 1992.

\_\_\_\_\_ [Signature]  
Notary Public

My Commission Expires:

\_\_\_\_\_

[Stamp]

Through correspondence dated September 23, 1992, the Montgomery county clerk certifies receipt on September 9, 1992, of the documents and states that "[t]he petition to abandon [the] commission form of government for the city of Cherryvale contained . . . a total of 204 valid signatures" and "[t]he petition to reduce form [sic] four to two wards in the city of Cherryvale contained . . . a total of 202 valid signatures." The documents were apparently never submitted to the county attorney for a written opinion regarding the legality of the form of the question. For purposes of clarity and brevity, the first half of the documents will be referred to hereinafter as the government petition; the remaining portions will be referred to as the ward petition.

K.S.A. 1991 Supp 25-3602, as amended by L. 1992, ch. 194, § 3, provides in part that "[e]ach petition shall consist of one or more documents pertaining to a single issue or proposition under one distinctive title." Pursuant to 12-184, the documents are to be filed with the county election officer, and "[t]he filing shall be made at one time all in

one group." K.S.A. 1991 Supp. 25-3602, as amended. In the present situation, 32 documents were filed, with half of the documents titled as a petition to abandon the commission form of government and half titled only as a petition. Several persons who signed the government petition also signed the ward petition. At least one person who signed the government petition did not sign the ward petition. Based upon these facts, it is our view that the documents constitute two separate petitions which happened to be filed at the same time. The government petition and the ward petition each pertain to a single issue. Therefore, neither petition violates the single issue or proposition requirement of K.S.A. 1991 Supp. 25-3602, as amended.

The provisions of K.S.A. 25-3601 et seq. are mandatory, and are not mere formalities that can be disregarded at will. Attorney General Opinions No. 90-64; 90-71. Any substantial departure from the statutory form will render a petition invalid. Attorney General Opinion No. 90-71. At the same time, a petition should not be invalidated by unimportant irregularities or defects if it is in substantial compliance with statutory requisites. Id. Among the requirements set forth in subsection (b) of K.S.A. 1991 Supp. 25-3602, as amended, is the requirement that:

"Each petition shall, unless otherwise specifically required:

. . . .

"(4) contain the following recital, at the end of each set of documents carried by each circulator: 'I am the circulator of this petition. I have personally witnessed the signing of the petition by each person whose name appears thereon. I am a registered elector of the state of Kansas and of (here insert name of political or taxing subdivision), the political or taxing subdivision in which the election is sought to be held.

\_\_\_\_\_  
(Signature of circulator)

\_\_\_\_\_  
(Circulator's residence address)

"The recital of the circulator of each petition shall be verified upon oath or affirmation before a notarial officer in the manner prescribed by K.S.A. 1991 Supp. 53-301 et seq. and amendments thereto."  
(Emphasis added.)

Pursuant to subsection (a) of K.S.A. 1991 Supp. 25-3602, as amended, filing of the documents comprising a petition "shall be made at one time all in one group." Each petition must be able to stand on its own. As noted above, two separate petitions were filed with the county election officer but only one circulator's recital was included with the documents comprising the government petition and the ward petition. One of the petitions, therefore, lacks the required circulator's recital and is clearly invalid. Because we do not have information regarding the precise manner in which the petitions were filed, it is impossible for us to determine whether the circulator's recital is included in the government petition or the ward petition. However, as each petition contains other defects affecting its validity, it is not necessary for us to determine which petition includes the circulator's recital.

"When under the laws of this state a petition is required or authorized as a part of the procedure applicable to . . . any . . . city, . . . the provisions of [K.S.A. 25-3601 et seq.] shall apply, except as is otherwise specifically provided in the statute providing for such petition." K.S.A. 1991 Supp. 25-3601, as amended by L. 1992, ch. 194, § 2. K.S.A. 14-1807 states in part:

"Any city which shall have operated for more than four (4) years under the provisions of this act may abandon such organization thereunder and accept the provisions of the general law of the state then applicable to the cities of its population, by submission, in the manner provided by K.S.A. 12-184, to a vote of the qualified electors of the city, of the following proposition: 'Shall the city of (name of city) abandon its organization under chapter 82 of the Laws of 1909, and the acts amendatory thereto, and become a city under the general law governing cities of like population?'"

K.S.A. 12-184 provides that a question regarding the abandonment of any form of city government may be submitted to the electors of the city following certification of a petition signed by not less than 10% of the qualified electors of the city. The question "shall be submitted to the qualified electors of the city at the next city or state general or primary election following by not less than sixty (60) days . . . the certification of such petition." K.S.A. 12-184 (emphasis added).

It is a well established rule that time and place are of the substance of an election. Gossard v. Vaught, 10 Kan. 162, 167 (1872); Wycoff v. Board of County Comm'rs, 191 Kan. 658, 665 (1963); 26 Am.Jur.2d Elections § 226 (1966). When the legislature has named a day on which an election is to be held, or has placed bounds within which it must be held, a proclamation naming a day other than that fixed by the statutes is void and the election confers nothing. Gossard, 10 Kan. at 167. K.S.A. 12-184 establishes the bounds within which an election regarding the abandonment of a form of city government must be held. Such an election may not be held during the 60 days immediately following certification of the petition. It is unclear to us whether the government petition was certified on September 9 or September 23, 1992. However, November 3, 1992, falls within 60 days of either date. Because November 3, 1992, falls within 60 days following certification of the government petition, a question regarding abandonment of the form of city government for the city of Cherryvale may not be submitted to the electors on that date. See Attorney General Opinion No. 92-133.

There is no requirement that a petition seeking to bring to an election a question regarding abandonment of the commission form of government expressly identify the election at which the question is to be submitted. However, the petitioners have taken it upon themselves to request that the question be submitted to the electors at the general election to be held November 3, 1992. At the time the government petition was initiated, the request was valid. However, because the government petition was not filed and certified until September, 1992, the question may not be submitted to the electors on November 3, 1992, and identification of that election essentially becomes an error. Officers having charge of the machinery for bringing an initiative or referendum petition to a vote of the electors cannot alter the petition. See 42 Am.Jur.2d Initiative and Referendum § 26 (1969). The officials may not modify the government petition so as to

permit the election to be held at a later date. The government petition requests public officials to undertake an action for which they have no authority. Therefore, the government petition becomes a nullity.

If no constitutional or statutory basis exists for the submission of the question set out in the petition, it should not be accepted by the county election officer or the city clerk when it is presented for filing. Attorney General Opinion No. 84-100. K.S.A. 12-3013 authorizes initiative and referendum for ordinances of a city. A proposed ordinance and accompanying petition must meet the requirements set forth in K.S.A. 12-3013 and 25-3601 et seq. "Such ordinance and petition shall be filed with the city clerk." K.S.A. 12-3013 (emphasis added). Initiative and referendum are not applicable to: (1) administrative ordinances; (2) ordinances relating to a public improvement to be paid wholly or in part by the levy of special assessments; or (3) ordinances subject to referendum or election under another statute. Id. 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. City of Lawrence v. McArdle, 214 Kan. 862, Syl. ¶ 1 (1974).

Guidelines for determining whether an action is legislative or administrative in character are set forth in City of Lawrence v. McArdle, supra. "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." Id. at 862, Syl. ¶ 2. Quoting 5 McQuillin, Municipal Corp., (3rd Ed.) § 16.55, the court in Rauh v. City of Hutchinson, 223 Kan. 514 (1978) stated "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 delegated agent for local implementation of state policy, the action receives an 'administrative' characterization, hence is outside the scope of the initiative and referendum" Id. at 519-20. The court further provided that "[i]f an act carries out an existing policy of a legislative body, it is administrative whether the policy came into existence in an enactment of the body itself, in the organic law creating the body, or in an enactment of a superior legislative body." Id. at 521-22.

K.S.A. 14-103 obligates a city council of a city of the second class to divide the city into wards which are as equal in



population as practicable. Cities having a population exceeding 4,000 but not exceeding 8,000 are to be divided into four wards. K.S.A. 14-103.

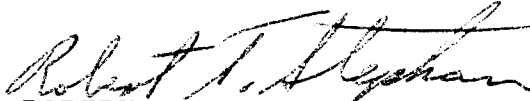
"The city council of any city of the second class having a population of less than 3,000 and having three or more wards may, by ordinance, change and redefine the boundaries of the wards of such city in order to reduce the number of wards to not less than two. . . ." Id.


The state has delegated to the city council of a city of the second class the authority to determine the manner in which the wards of the city are established. An ordinance providing that the city is to be divided into two wards does not establish a new law; rather, it provides for execution of the city council's obligation under K.S.A. 14-103. Such an ordinance is administrative and is not subject to initiative and referendum as authorized in K.S.A. 12-3013. The ward petition is therefore of no legal consequence.

In review, documents circulated by electors of the city of Cherryvale seeking to bring about a change in the form of city government and the number of wards in the city constitute two separate petitions. Each petition must be able to stand on its own in meeting the requirements for a sufficient petition. A recital of the circulator must be included in each petition. A question regarding abandonment of the commission form of government is to be submitted to the qualified electors of the city at the next city or state general or primary election following by not less than 60 days the certification of the petition. A petition requesting that the question be submitted at an election held at any other time is a nullity. Division of the city into wards is essentially an administrative function, and is not subject to initiative and referendum. A petition requesting a change in the number of wards of a city is therefore of no legal consequence. Because it is our view that the government petition and the ward petition are ineffective, it is not necessary for us to determine whether such petitions must be submitted prior to circulation to the county attorney for a

written opinion of the county attorney regarding the form of  
the question.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

  
Richard D. Smith  
Assistant Attorney General

RTS:JLM:RDS:jm