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January 22, 2014

ATTORNEY GENERAL OPINION NO. 2014- 04

The Honorable Lance Kinzer
State Representative, 30th District
State Capitol, Room 165-W
Topeka, KS 66612

Re: Elections—Voting Places and Materials Therefor—Voting Places, Equipping and Supplying; Instructions, Books and Other Materials; Question Submitted Election; Posting or Providing Explanatory Statements

Synopsis: The governing body of a municipality, such as a city, county, or unified school district, may develop a neutral or impartial explanatory statement on a question it has submitted to the electorate. The explanatory statement may be posted on the municipality's website and provided to constituents at the office of the county election officer, until such time as the office of the county election officer becomes a polling place. Whether a city may provide for the posting at polling places and the distribution at polling places or with advance voting ballots of explanatory statements regarding a question that is submitted to the electorate cannot be definitively determined. A county, a local board of education and other municipalities lack authority to provide for the posting and distribution of such a statement at polling places and with advance voting ballots. Cited herein: K.S.A. 12-101; 12-1761; 12-1767; K.S.A. 2013 Supp. 19-101a; K.S.A. 19-101c; 19-3419; 19-3422; 19-3423; 19-3424; 19-3507a; 19-3517; 19-3521a; 25-431; K.S.A. 2013 Supp. 25-433; K.S.A. 25-1121; 25-1122; K.S.A. 2013 Supp. 25-1123; K.S.A. 25-2007; 25-2010; 25-2104; 25-2110; 25-2209; 25-2303; 25-2504; K.S.A. 2013 Supp. 2430; K.S.A. 25-2701; 25-2703; K.S.A. 2013 Supp. 25-2706; K.S.A. 25-2801; 25-2810; 25-2902; 42-721; K.S.A. 2013 Supp. 72-8205; K.S.A. 2013 Supp. 75-6102; 75-6705; Kan. Const., Art. 6, § 5; Kan. Const., Art. 12, § 5; Kan. Const., Art. 14, § 1.

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Dear Representative Kinzer:

As chair of the 2012 Special Committee on Elections,¹ former Senator Terrie Huntington requested our opinion regarding whether a municipality² may under current law develop an explanatory statement for a question that is being submitted by the municipality to the electorate. The Committee sought the opinion to determine whether legislation is needed to alleviate voter confusion. The request was tabled while the Legislature considered 2013 House Bill No. 2162.³ You ask that the request be revived.

The City of Wichita submitted to its electors a question that sought approval of a charter ordinance. While a proposition seeking amendment of the Kansas Constitution is accompanied by "a brief nontechnical statement expressing the intent or purpose of the proposition and the effect of a vote for or against the proposition,"⁴ neither Section 5 of Article 12 of the Kansas Constitution, through which cities are granted home rule authority, nor any statute provides for inclusion of a similar statement when a city submits to its electors a question seeking adoption of a charter ordinance. Therefore, following the requirements of that section of the Kansas Constitution,⁵ the question submitted to the electors of the City of Wichita stated:

Shall charter ordinance 216 entitled: "A charter ordinance amending and repealing section 1 of charter ordinance No. 213, of the city of Wichita, Kansas, which amended and repealed section 1 of charter ordinance No. 183 of the city of Wichita, which amended and repealed section 1 of charter ordinance No. 174 of the city of Wichita, Kansas pertaining to the application of revenues from the transient guest tax" take effect?

YES

NO

No further explanation or information was presented to voters at voting places. Attachments to the Special Committee's request for an opinion indicate voters in

¹ The Committee, now defunct, was charged with the responsibility of studying the advisability of ballot language statements. See Minutes, 2012 Special Committee on Elections, October 16, 2012.

² The applicable definition of "municipality" is provided in K.S.A. 2013 Supp. 75-6102, which defined "municipality" as "any county, township, city, school district or other political or taxing subdivision of this state, or any agency, authority, institution or other instrumentality thereof."

³ 2013 House Bill No. 2162, as introduced, provided statutory authority for the distribution and posting at polling places of ballot language statements regarding questions submitted by municipalities. The bill, however, was extensively amended by conference committee. See 2013 Senate Journal 928 (May 17, 2013); 2013 House Journal 1013-14 (May 21, 2013). The adopted legislation, codified at K.S.A. 2013 Supp. 75-6705, deals with use of money appropriated by the Legislature.

⁴ Kan. Const., Art. 14, § 1.

⁵ "The proposition shall be: 'Shall charter ordinance No. _____, entitled (title of ordinance) take effect?'" Kan. Const., Art. 12, § 5(c)(3).

Hutchinson and Salina encountered similarly worded questions in elections seeking approval of charter ordinances.

Proposed legislation that was enclosed with the opinion request would have granted express statutory authority to the county election officer to request the preparation of an explanatory statement that would not be placed on the ballot but instead would be posted on the municipality's website, made available at the office of the county election officer, and distributed to electors at polling places and with advance voting ballots.⁶ You ask whether municipalities are currently authorized to take such actions to inform their electorates in the absence of such legislation.

The Municipality's Website and the Office of the County Election Officer

In Attorney General Opinions No. 93-33 and 93-125, it was determined that public officials of a municipality may educate and inform electors on matters to be voted on by the electors of the municipality and expend public moneys for such purposes. The authority to do so is not derived from specific statutory authorization, but arises from the general authority of a municipality.⁷ The information provided by the municipality may not be in such form as to "persuade nor to convey favoritism, partisanship, partiality, approval or disapproval . . . of any issue, worthy as it may be;"⁸ rather, it must be presented in a semblance of neutrality. A neutral or impartial explanatory statement regarding a question being voted on by the electors of a municipality would serve the function of educating and informing the electorate. Means of providing access to such neutral or explanatory statement would likely include posting it on the municipality's website and providing copies of it at the office of the county election officer. A municipality, exercising its general authority, may post on the municipality's website and make available at the office of the county election officer a neutral or impartial explanatory statement regarding a question submitted to the electorate. If the office of the county election officer becomes a polling place, other factors must be considered.

The Polling Places and Advance Voting Ballots

Whether an explanatory statement may be posted and distributed at polling places and with advance voting ballots requires review of statutes governing the conduct of elections. Historically, local units of government were responsible for conducting their elections pursuant to state statutes. Over the years, such authority was transferred to

⁶ See fn. 3.

⁷ See Attorney General Opinion No. 93-33 ("Although the courts of Kansas have not expressly addressed the authority of a school district to participate in or undertake campaigns, it appears the court has recognized that a school district, as a public body, is under an obligation to educate the electorate regarding an issue subject to election").

⁸ Attorney General Opinion No. 93-125, quoting *Stern v. Kramarsky*, 375 N.Y.S.2d 235, 239 (1975). See also K.S.A. 2013 Supp. 25-2430 ("[E]xhibiting or distributing . . . signs, posters, stickers or other materials that clearly . . . indicate support or opposition to a question submitted election within any polling place on election day or advance voting site during the time period allowed by law for casting a ballot" constitutes electioneering).

county clerks and county election commissioners.⁹ Since 1968, it has been the sole responsibility of the county election officer to conduct city, county and school district elections.¹⁰ In most areas of the state, the county clerk functions as the county election officer.¹¹ In counties having a population exceeding 130,000, a county election commissioner is appointed¹² and serves as the county election officer.¹³

State law confers upon the county election officer the authority to designate voting places¹⁴ and to appoint and supervise the election board judges and clerks for each voting place.¹⁵ The county election officer is required to "arrange for voting places to be warmed, lighted, and furnished with proper supplies and conveniences"¹⁶ and furnish at every voting place: (a) printed instructions to voters; (b) a list of voters' rights and responsibilities; (c) a sample ballot; (d) notification of the date of the election; and (e) the polling place hours.¹⁷ When printed paper ballots are used, each polling place is to have posted thereon a notice stating that torn, defaced, or wrongfully marked ballots are to be returned to the election board and exchanged for a new set of ballots.¹⁸ If a question is submitted to the electorate pursuant to the Mail Ballot Election Act,¹⁹ the county election officer is directed to "mail all official ballots with a return identification envelope and instructions sufficient to describe the voting process to each elector entitled to vote in the election. . . ." ²⁰ Advance voting ballots are likewise to include printed instructions and ballot envelopes.²¹ State law does not provide for the posting or distribution of other materials or statements at the voting place or with advance voting ballots. Therefore, a municipality lacks statutory authority to post and distribute at polling places an explanatory statement regarding a question the municipality is submitting to the electorate.

The absence of statutory authority to post and distribute an explanatory statement does not necessarily end the inquiry. Three types of municipalities – cities, counties and unified school districts – possess home rule authority.

⁹ See, e.g., L. 1947, Ch. 203, § 4, codified at K.S.A. 19-3422.

¹⁰ See L. 1968, Ch. 59; Ch. 274; 406.

¹¹ K.S.A. 25-2007; 25-2104; 25-2504.

¹² K.S.A. 19-3419.

¹³ K.S.A. 25-2007; 25-2104; 25-2504. See also K.S.A. 19-3422; 19-3423; 19-3424.

¹⁴ K.S.A. 25-2701; 25-2703.

¹⁵ K.S.A. 25-2801; 25-2810.

¹⁶ K.S.A. 25-2703.

¹⁷ K.S.A. 2013 Supp. 25-2706(c). The Secretary of State is responsible for specifying the form and contents of instructions to voters, list of voters' rights and responsibilities, and instructions to election boards. K.S.A. 2013 Supp. 25-2706(d).

¹⁸ K.S.A. 25-2902(c).

¹⁹ K.S.A. 25-431 *et seq.*

²⁰ K.S.A. 2013 Supp. 25-433.

²¹ K.S.A. 2013 Supp. 25-1123. The Secretary of State determines the form of the printed instructions. K.S.A. 25-1121.

Cities

Section 5(b) of Article 12 of the Kansas Constitution states:

Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class: *Provided*, That the legislature may establish not to exceed four classes of cities for the purpose of imposing all such limitations or prohibitions. Cities shall exercise such determination by ordinance passed by the governing body with referendums only in such cases as prescribed by the legislature, subject only to enactments of the legislature of statewide concern applicable uniformly to all cities, to other enactments of the legislature applicable uniformly to all cities, to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction and to enactments of the legislature prescribing limits of indebtedness.²²

"The Kansas Constitution gives broad home-rule powers to cities"²³ and such authority is to be "liberally construed for the purpose of giving cities the largest measure of self-government."²⁴

The legislature may preempt the constitutional authority of cities only in the manner prescribed by the Home Rule Amendment to the Kansas Constitution, Article 12, § 5. While the Home Rule Amendment empowered cities to determine local affairs, the home rule power does not authorize cities to act where the state legislature has precluded municipal action by preempting the field with a uniformly applicable enactment. As long as the legislature has not preempted a subject area with a uniformly applicable enactment, cities may exercise their home rule power by: (1) enacting a charter ordinance to exempt the city from a nonuniform legislative enactment or (2) enacting an "ordinary" or noncharter ordinance if there is no conflicting legislative enactment.²⁵

For purposes of determining uniformity under the Home Rule Amendment, the court reviews not only the individual state statute at issue, but rather considers whether the entire enactment of which the statute is a part is uniformly applicable.²⁶ Even when confronted with a uniformly applicable enactment, a city possesses the authority to

²² Kan. Const., Art. 12, § 5(b).

²³ *Ramcharan-Maharajh v. Gilliland*, 48 Kan.App.2d 137, 140 (2012).

²⁴ Kan. Const., Art. 12, § 5(d).

²⁵ *State v. Jenkins*, 295 Kan. 431, 437 (2012) (internal quotation marks and citations omitted).

²⁶ *Farha v. City of Wichita*, 284 Kan. 507, 518 (2007).

supplement the enactment, provided the enactment does not include a clear statement of preemption and the city's action does not conflict with the enactment.²⁷

While current statutes that address the manner of supplying polling places and posting of statements at polling places, as well as the manner for providing advance voting ballots, are on their faces uniformly applicable, they have been included in enactments that are not uniformly applicable.²⁸ Under normal circumstances, the statutes would likely be deemed subject to city home rule, thereby allowing a city to provide for the posting and distribution at polling places and through advance voting ballots explanatory statements regarding a question that is being submitted to the electorate by the city. However, because any attempt by a city to provide for the posting and distribution of explanatory statements would direct the actions of officials over whom the city has no authority and could impact other municipalities, the authority to exercise home rule is clouded.

Any election regarding a charter ordinance is to be called by the governing body of the city and "shall be conducted as elections for officers and by the officers handling such elections."²⁹ Such an election is conducted by the county election officer,³⁰ the same officer who is responsible for conducting elections for the state, county, school districts and other municipalities located in the county. There is no limit on the number of charter ordinances that may be presented at an election.³¹ When the question is submitted at an election held in conjunction with elections in which "every registered voter in the county is authorized to vote at one election or another," the costs associated with conducting the question submitted election are borne by the county.³² If several questions are submitted at one election, the posting and distribution of explanatory statements could become onerous and affect the conduct of elections of other

²⁷ See *Farha*, 284 Kan. at 517 ("[C]ities possess the authority to adopt ordinances of any type on subjects not addressed by the legislature"); *Garten Enterprises, Inc. v. Kansas City*, 219 Kan. 620, 625 (1976) ("[T]he fact the state has enacted legislation on a subject does not necessarily deprive a city of the power to deal with the same subject by ordinance; a field can be the subject of concurrent concern and legislation. A municipality may legislate on the same subject so long as the municipal ordinance does not conflict with the state law"); *McCarthy v. City of Leawood*, 257 Kan. 566, 570 (1995), quoting *Clafflin v. Walsh*, 212 Kan. 1, 7 (1993) ("Where the legislature has acted in some area a city's power to act in the same area should be upheld unless the legislature has clearly preempted the field so as to preclude city action. Unless there is actual conflict between a municipal ordinance and a statute, the city ordinance should be permitted to stand").

²⁸ See L. 2004, Ch. 25, §§ 4, 11 (amendment of K.S.A. 2003 Supp. 25-2706; included amendment of K.S.A. 2003 Supp. 25-1122 which authorized designation by county election commissioner of satellite advance voting sites in counties having a population exceeding 250,000); L. 1983, Ch. 125, §§ 1, 12 (enactment of Mail Ballot Election Act; included amendment of K.S.A. 25-2303 which provided for appointment of city clerk of first and second classes as deputy county election commissioner); L. 1968, Ch. 406, §§ 25, 54 (enactment of K.S.A. 25-2902; included amendment of K.S.A. 19-3422 which transferred to the county election commissioner in counties having a population in excess of 100,000 authority to supervise and control elections).

²⁹ Kan. Const., Art. 12, § 5(c)(3).

³⁰ See K.S.A. 25-2110(g); 25-2110a(g).

³¹ Compare Kan. Const., Art. 12, § 5 and K.S.A. 12-101 *et seq.* with Kan. Const., Art. 14, § 1.

³² K.S.A. 25-2201.

municipalities. An attempt by a city to provide for the posting and distribution of explanatory statements could, under those circumstances, be viewed as going beyond the city's constitutional authority to determine its "local affairs and government." Further, the city would in some localities be directing the actions of an official who "shall have full and complete power and authority over all elections in the county and shall see that such elections are conducted according to law."³³

"[T]he court should also be wary of ordinances which may not 'conflict' with statutory law but which have a substantial impact on interests outside the boundaries of the municipality. After all, these interests may not be represented in city legislative deliberations, and municipal parochialism should not, in the name of home rule, be allowed to trample over adversaries unable to protect themselves."³⁴

The courts have not been consistent in analyzing home rule authority.³⁵ While we believe that the Legislature has preempted the field regarding the conduct of elections, thereby precluding a city's ability to provide for the posting and distribution of explanatory statements, such an outcome is not a certainty. Clarity from the Legislature regarding the exercise of home rule authority by a city in such matters would alleviate any concerns regarding such authority.

Counties

A board of county commissioners is authorized to "transact all county business and perform all powers of local legislation and administration it deems appropriate," subject to the limitations listed in subsections (a)(1) through (a)(39) of K.S.A. 2013 Supp. 19-101a. Subsection (a)(6) of the statute provides that "[c]ounties shall be subject to all acts of the legislature concerning elections, election commissioners and officers and their duties as such officers and the election of county officers."³⁶ While the statutory home rule powers are to be "liberally construed for the purpose of giving to counties the largest measure of self-government,"³⁷ such construction is tempered by the restriction in subsection (a)(6). "Counties may only hold binding elections in accordance with statutory authority set out by the legislature."³⁸ A county may not through home rule effect changes in state statutes concerning elections and the duties of the county election officer.³⁹ Therefore, a county does not have authority to post and distribute explanatory statements at polling places and with advance voting ballots.

³³ K.S.A. 19-3423.

³⁴ Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 Kan. L. Rev. 631, 677 (1971-72). See also Attorney General Opinions No. 83-30; 81-112; 75-66.

³⁵ See Heim, *Home Rule: A Primer*, Journal of the Kansas Bar Association (January 2005).

³⁶ K.S.A. 2013 Supp. 19-101a(a)(6).

³⁷ K.S.A. 19-101c.

³⁸ *Blevins v. Board of County Commr's of Douglas County*, 251 Kan. 374, 382 (1992). The Kansas Supreme Court recognized in *Blevins* that a county could through home rule conduct an advisory election. *Id.* at 383. The ballot that was distributed to voters included an explanatory statement. *Id.* at 379.

³⁹ Attorney General Opinion No. 75-66.

Unified School Districts

The board of education of a unified school district, likewise, possesses statutory home rule authority.

(1) The board may transact all school district business and adopt policies that the board deems appropriate to perform its constitutional duty to maintain, develop and operate local public schools.

(2) The power granted by this subsection shall not be construed to relieve a board from compliance with state law.

The power granted by this subsection shall not be construed to relieve any other unit of government of its duties and responsibilities which are prescribed by law, nor to create any responsibility on the part of a school district to assume the duties or responsibilities which are required of another unit of government.⁴⁰

Section 5 of Article 6 of the Kansas Constitution places upon a local board of education the duty to maintain, develop and operate local public schools. "The local school board's duties under § 5 of Article 6 are not self-executing but are dependent upon statutory enactments of the legislature."⁴¹ The board of education may supplement state law when performing its duties of maintaining, developing and operating local public schools.⁴² The board may not, however, modify the duties and responsibilities of other units of government. It remains the duty of the county election officer to conduct school elections in accordance with state law. A local board of education may not provide for the posting and distribution at polling places or with advance voting ballots of explanatory statements regarding a question the board is submitting to the electorate.

Other Municipalities

Other municipalities that do not possess any form of home rule authority may, and at times are required to, submit questions to the electorate, with such elections to be conducted by the county election officer.⁴³ These municipalities lack authority to have

⁴⁰ K.S.A. 2013 Supp. 72-8205(e).

⁴¹ *Bd. of Educ. of Unified School District No. 443, Ford County v. Kansas State Bd. of Educ.*, 266 Kan. 75, 77, 82 (1998); *Unified School District No. 380, Marshall County v. McMillen*, 252 Kan. 451, 464 (1993).

⁴² Attorney General Opinion No. 2011-012.

⁴³ See, e.g., K.S.A. 12-1761 (public building commission in cities having population of 175,000 to 200,000; issuance of revenue bonds); 12-1767 (public building commission; issuance of revenue bonds); 19-3507a (water supply and distribution district; construction or acquisition of supply and system; issuance of revenue bonds); 19-3517 (water supply and distribution district; purchase of existing water supply and distribution system); 19-3521a (water supply and distribution district; chlorination and fluoridation of water supply); 42-721 (irrigation district; issuance of bonds); 80-1607 (township board; issuance of full faith and credit bonds).

explanatory statements posted at polling places and distributed to electors at polling places or with advance voting ballots.

Summary

In review, the governing body of a municipality, such as a city, county, or unified school district, may develop a neutral or impartial explanatory statement on a question it has submitted to the electorate. The explanatory statement may be posted on the municipality's website and provided to constituents at the office of the county election officer, until such time as the office of the county election officer becomes a polling place. Whether a city may provide for the posting at polling places and the distribution at polling places or with advance voting ballots of explanatory statements regarding a question that is submitted to the electorate cannot be definitively determined. A county, a local board of education and other municipalities lack authority to provide for the posting and distribution of such a statement at polling places and with advance voting ballots.

Sincerely,

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