STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

April 22, 1976

ATTORNEY GENERAL OPINION NO. 76-133

Mr. Dan E. Turner
City Attorney
Legal Department
215 East 7th Street
Topeka, Kansas 66603

Re: Cities--Elections--Form of Government

Synopsis: Submission to the voters of a question for adoption of the modified mayor-council form of government authorized by 1976 Senate Bill No. 662 does not preclude submission of other questions at the same time providing for adoption of one or more of the seven alternative forms of government available to the City of Topeka.

* * *

Dear Mr. Turner:

You inquire concerning submission to the electorate of the City of Topeka of a proposition to adopt the modified mayor-council form of government authorized by 1976 Senate Bill No. 662. Thereunder, the governing body of any city may submit to a vote of the people a proposition to adopt the modified mayor-council form of government described therein, and must do so upon the filing of a sufficient petition therefor.

You inquire, first, whether there is any legal restraint or restriction which prevents the board of city commissioners of the City of Topeka from adopting resolutions which place before the voters two or more alternative forms of government, whether at the same election or by separate special elections held on the same day. You advise that there are now seven separate forms of government available under Kansas law which may be made applicable to the City of Topeka.

The question presented is whether more than one of these alternative forms may be presented to the city electorate at the same election or by separate special elections held on the same day.

At 29 C.J.S. *Elections* § 79, the writer states thus:

> "*When an election is held for a specified particular purpose, no other matters may be submitted at such election.* However, there is no constitutional reason why the legislature may not authorize the submission of two or more propositions to the vote of the people at the same time, but two or more separate and distinct propositions may not be combined into one and submitted to the voters as a single question at an election so as to have one expression of the voters answer all of them." [Footnotes omitted.] [Emphasis supplied.]

A number of decisions of the Kansas Supreme Court deal with the matter of dual propositions. *See, e.g., Jaeger v. City of Holton*, 164 Kan. 533, 190 P.2d 420 (1948); *Thomas v. Covell*, 119 Kan. 684, 240 Pac. 684 (1925); *Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400 (1904).

The question here is not one of dual propositions, but of the submission of separate and independent propositions at the same time, dealing with a common subject matter, *i.e.*, alternative forms of government for the same city.

To cite but one act providing an alternative form of government applicable to the City of Topeka, K.S.A. 12-1036a *et seq.* provides for the adoption of the mayor-council-city manager plan. The initial section of that act is similar in important respects to section 1 of Senate Bill 662. Under both provisions, the governing body of the city may submit the proposition, the language at which is set forth in the act, upon adoption of a resolution. It must submit the question upon the filing of a sufficient petition. Section 1 of the bill states in pertinent part thus:

> "Upon the adoption of a resolution of the certification of a petition as provided in this section, the governing body of the city shall submit the proposition at the next city or state primary or general election, following by not less than

> sixty (60) days such adoption or certification."

K.S.A. 12-1036a specifies the calling of the election thus:

> "If the resolution by the governing body of the city is adopted more than forty (40) days and less than one hundred (100) days before a city election, or if a sufficient petition, is filed more than sixty (60) days and less than one hundred twenty (120) days before a regular city election, the proposition shall be submitted at such regular city election; . . . [I]f a special election is to be held it will be held within sixty (60) days, provided no special election shall be held within one hundred twenty (120) days before or after a regular city election."

Nothing in this or any other act prohibits the calling of a special election under this provision to be held at the time of a state primary or general election, or at the time of another special election.

The underscored portion of the quotation from 29 C.J.S. *Elections* § 79, *supra*, is followed by a footnote referring to two decisions, one of which is based upon the construction of particular statutory language. The second, *Tanner v. Vogel*, 261 S.W.2d 671 (Ky.Ct.App. 1957), is in point here. There, two petitions had been presented to the Henderson County judge, respecting changes in the form of government of Henderson, Kentucky, a city of the third class then operating under a commission form of government. One petition asked that the question whether the commission form of government should be terminated be submitted to the voters at the time of the November 3, 1953, general election. The second petition sought submission at the time of the same election of the question of organization of city government under a city manager. Vogel, the county judge, empowered and required by Kentucky law to call elections upon these petitions, agreed to submit the question of abolishing the commission form, but refused to submit the city manager question. Supporters of the rejected petition sought an order of mandamus directing the judge to submit both questions. The court rejected the petition, stating thus:

> "Under KRS 89.290(1), the question to be submitted is: 'Shall the city of [Henderson] abandon the commission form of government?' The effect of a favorable vote on this question would return the city government to the councilmanic form. KRS 89.290(4). Under KRS 89.410(2) the question to be submitted is: 'Are you in favor of the organization and government of the city of [Henderson] under the city manager form of government?' The effect of a favorable vote on this proposal would result in the continuance from a practical standpoint of the commission form of government with the addition of a city manager. KRS 89.420, 89.430. A 'No' vote on the first proposal would be an approval of the present commission form of government, and it then could be argued that the voters really approved the status quo -- the commission form of government. Or it might be said that they approved both the commission and city manager forms. In case they voted favorable on both proposals, an even more hopelessly confusing situation would ensue. In view of the potential possibilities, there is little reason for believing the voters would not be confused by the presence of the two proposals on the ballot at the same election, and, for that reason, if for no other, we conclude that the submission of the second proposal in point of time -- the city manager proposal -- was properly refused. 18 Am.Jur., *Elections*, §§ 180, 182, 326, 327; 29 C.J.S., *Elections*, §§ 79, 82."

The opinion cites no authority whatever, either decisional precedent or statutory provision, for its conclusion. Nothing in the Kentucky statutes provided that the filing of a petition requiring the submission of one question foreclosed the right of other petitioners to seek submission of another question, although relating to the same subject matter. In effect, by judicial fiat, the court partially disenfranchised signers of the second petition, ousting them from the exercise of a statutory right to compel an initiative election on an entirely incidental basis, the chronological order in which petitions had been filed. Further, the basis for the decision, to prevent confusion, was clearly anticipatory and premature. While all voters were entitled to cast their votes for and against each proposition, as a question submitted separately and independently from the other, hopeless confusion would not have resulted even

if both propositions had received a majority vote, for the commission form of government would have been rejected, and the commission-manager form would have been adopted. Moreover, it is not the function of the courts to prevent the holding of duly authorized and lawful elections; rather, the judicial function is to declare the legal consequences thereof, after the election or elections have been held. Courts are not unaccustomed to resolving conflicts in the expression of the popular will, as was done in *Winter v. Shafter*, 317 Mich. 259, 26 N.W.2d 893 (1947), where the court stated thus:

> "Here, however, we are not confronted with conflicting general and special acts, but with the apparent consistency in the expressed will of the electorate. We must, therefore, ascertain and give effect to the intent of the electorate with due regard to the circumstances and the purposes sought to be accomplished.' 26 N.W.2d at 896.

In *Di Prima v. Wagner*, 27 Misc.2d 380, 215 N.Y.S.2d 687 (Sup.Ct. 1961), the court rejected the position taken in *Tanner*:

> "The argument is made that keeping competing propositions off the ballot will avoid confusion to the electorate. No precedent is shown for such an emasculatory device, which would operate practically against the presently authorized local procedures which are found in the New York City Charter, for example." 215 N.Y.S.2d at 703.

Nothing in 1976 Senate Bill No. 662 provides that the adoption of a resolution by the governing body, or the filing of a sufficient petition, for an election upon the adoption of a modified mayor-council form of government for the city forecloses the city governing body from adopting other resolutions, or other citizens from exercising their statutory petition rights under other enactments, for the submission of questions for the adoption of other forms of government at the same time.

You further inquire whether, if two or more separate propositions were submitted to the voters of the city at the time of the primary election in August, 1974, and no particular proposition received a majority of the votes cast, the City of Topeka were to revert to a mayor-council form of government, whether a runoff election would

be held, or whether the city would revert to its present commissioner form of government. We have not undertaken to consider in detail each of the seven statutory enactments. Purely by way of illustration, however, if the proposition for a modified mayor-council form of government were submitted pursuant to Senate Bill 662, and the proposition specified by K.S.A. 12-1036a, for a mayor-council-city manager plan, were submitted at a special election held at the same time, and neither received a majority of the votes cast at such election or elections, it is my judgment, based upon a reading of the two enactments, that the form of city government would be unchanged from its present commission form. In other words, if each of the propositions submitted for adoption of a different form of government were based upon enactments similar to those discussed above, without presently considering each in further detail, the lack of a majority vote approving any of the questions would constitute in net effect a vote for retention of the present commission form of government.

If further questions should arise as this matter is considered further and with greater specificity, please feel free to call upon us.

Yours very truly,

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj