STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 76-315

Mr. Larry Shoaf
McDonald, Tinker, Skaer,
Quinn & Herrington
Suite 530, R. H. Garvey Building
300 West Douglas Avenue
Wichita, Kansas 67202

Re: Cities--Charter Ordinances--Passage

Synopsis: The mayoral veto power under K.S.A. 12-3003 does not apply to charter ordinances, the requirements for passage of which are fixed by Article 12, § 5 of the Kansas Constitution. If a proposed charter ordinance receives a two-thirds vote of the members-elect of the city governing body, it is duly passed, and the mayor has no power to veto a charter ordinance so as to increase the number of votes required for passage.

A city may not prescribe ownership of real property as a qualification for holding office as a member of its governing body, for such a qualification violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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Dear Mr. Shoaf:

You inquire concerning the validity of a mayoral veto of a charter ordinance. Specifically, you ask whether a charter ordinance is subject to K.S.A. 12-3003, which provides in pertinent part thus:

"The mayor of a council city shall have the power to sign or veto any ordinance passed

> by the council . . . . Any ordinance vetoed by the mayor, may be passed over the veto by a vote of three-fourths (3/4) of the whole number of councilmen elected, notwithstanding the veto: *Provided*, That if the mayor does not sign his or her approval of the ordinance, or return the same with his or her veto, stating his or her objection in writing, on or before the next regular meeting of the council, the ordinance shall take effect without the mayor's signature, such fact to be endorsed by the city clerk on the ordinance and at the end of the ordinance as entered in the 'ordinance book.'"

The procedure for the enactment of charter ordinances is prescribed by Article 12, § 5(c) of the Kansas Constitution. Thereunder, enactment of a charter ordinance requires a "two-thirds vote of the members-elect of the governing body of such city." The legislature, obviously, can neither reduce nor enlarge this requirement.

K.S.A. 12-3003 was part of a 1959 enactment dealing generally with city ordinances. The home rule amendment was not passed upon by the people until the November, 1960, general election. The 1959 statutory enactment contains no reference whatever to charter ordinances, and it was designed, in my judgment, to address the only kind of ordinance then thought to be recognized in Kansas, charter ordinances then being unknown. The requirements for passage for charter ordinances are fixed by the constitution at two-thirds of the members of the governing body. That requirement may not be enlarged by, for example, a statutory provision mandating a three-fourths vote in order to override a mayoral veto.

Under Article 12, § 5(c), upon receiving a two-thirds vote of the membership of the governing body, a proposed charter ordinance is duly passed. In my judgment, that requirement is unchanged by K.S.A. 12-3003, and this latter provision is simply inapplicable to charter ordinances. If a proposed charter ordinance receives a two-thirds vote of the governing body, it is duly passed, whether the mayor votes for or against it, in my judgment, and there exists no veto power over charter ordinances.

It is my understanding that the ordinance which has prompted this question is proposed charter ordinance no. 1-A, which provides, in pertinent part, that "no person shall be eligible to the office of councilman who is not at the time of his election or appointment an actual resident landowner of the ward for which he is elected or appointed." This property qualification for office raises the most

serious constitutional questions. Although you have not inquired concerning this provision in your letter, I cannot overlook the serious potential discrimination which may result if this ordinance is enacted.

The constitutional weakness of this provision is directly analogous to that considered in *Bullock v. Carter*, 405 U.S. 134, 31 L. Ed. 2d 92, 92 S. Ct. 849 (1972) where the Court considered the constitutionality of the Texas filing-fee system, which required filing fees such as $1,424.60 for a county commissioner position and $6,300 for a county judgeship. The question presented there was stated thus:

> "whether a state law that prevents potential candidates for public office from seeking the nomination of their party due to their inability to pay a portion of the cost of conducting the primary election is state action that unlawfully discriminates against the candidates so excluded or the voters who wish to support them." 405 U.S. at 141.

At the outset, the Court questioned what standard of review should be applied to the filing fee requirements, *i.e.*, whether it should be sustained if it were shown to have merely some rational basis, or whether the state must demonstrate that the high fees were reasonably necessary to accomplish some legitimate state object:

> "The threshold question to be resolved is whether the filing-fee system should be sustained if it can be shown to have some rational basis, or whether it must withstand a more rigid standard of review.
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> The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of

> voting rights is subject to a stringent standard of review. . . . Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast. Rather, the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose. The existence of such barriers does not of itself compel close scrutiny. . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." 405 U.S. at 142-143.

Assessing that impact in a realistic light, the Court concluded that the fee system did, indeed, have a "patently exclusionary character." The excessive fees effectively precluded those potential candidates lacking personal wealth or affluent backers from the ballot, and thus had a "real and appreciable impact" on the exercise of the franchise by the voters. Because of this real and direct impact upon the rights of voters, the Court concluded that the state must show that the filing fees were "reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." 405 U.S. at 144. After an extended discussion of the proferred justifications for the state, the Court held it invalid.

The property qualifications sought to be imposed by this ordinance is patently exclusionary. A very substantial proportion of the registered voters of the community are excluded from eligibility for public office of the city because of a qualification based upon wealth, and more particularly, a particular kind of wealth, ownership of real property. Attempts to exclude from the franchise those who do not own property or do not pay taxes on property have consistently sought to be defended on the ground that such persons are more directly affected by governmental actions, and are thus entitled to an especial voice therein. Such a qualification for voting for members of a school board was invalidated in *Kramer v. Union Free School District*, 395 U.S. 621, 23 L. Ed. 2d 583, 89 S. Ct. 1886 (1969). Clearly, if the city sought to impose a property qualification for electors, it would fail under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as completely indefensible. A like qualification, applicable not to voters but to candidates, which has a real and substantial impact upon exercise of the franchise, as is the case

here, is subject to the same constitutional standards of review, and likewise, is completely indefensible.

Yours very truly,

Curt Schneider

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