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ATTORNEY GENERAL OPINION NO. 83- 6

Buford M. Watson, Jr.
City Manager
City Offices
P.O. Box 708
Lawrence, KS 66044

Re: Cities, First Class -- Board of Commissioners --
Changing of Quorum Requirements

State Departments; Public Officers, Employees --
Open Meetings Act -- Uniform Application to Cities

Synopsis: The Kansas Open Meetings Act is uniformly applicable to all cities and may not be circumvented by a charter ordinance. However, the quorum requirements of K.S.A. 13-1810 are provisions of an enactment of the legislature which is not uniformly applicable and may be changed by charter ordinance. Such charter ordinance will be subject to the "protest" style election authorized by Article 12, Section 5(c)(3) of the Kansas Constitution. "Majority," as the term is used in K.S.A. 13-1810, means the number one greater than half the number of members of the governing body and may not be changed by ordinary city ordinance. Cited herein: K.S.A. 12-1001, 12-1017, 12-1020, K.S.A. 1981 Supp. 12-10a01, 12-10a02, K.S.A. 13-1410, 13-1810, 14-111, 14-1308, 15-106, 15-1409, 75-4317, 75-4317a, K.S.A. 1981 Supp. 75-4318, K.S.A. 77-201 Second, Kan. Const. Art. 12, §5.

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Dear Mr. Watson:

On behalf of the City Commission of Lawrence you inquire regarding the powers of the city commission to alter the statutory quorum requirements for first class cities having a commission form of government. You ask three questions which we shall answer separately.

First, you ask if K.S.A. 13-1810 applies uniformly to all cities such that cities may not exercise their constitutional powers of "home rule" to establish a different quorum requirement. We note that the city of Lawrence operates a commission-manager form of government pursuant to K.S.A. 12-1001 et seq. Previously, the city operated under a mayor-council plan, and therefore the provisions of both K.S.A. 12-1017 and K.S.A. 12-1020 apply. These sections make applicable to each city operating a commission form of government pursuant to K.S.A. 12-1001 et seq., other acts of the legislature governing city commissions of the same class. We presume that it is upon this basis that the city of Lawrence operates in accordance with K.S.A. 13-1810.

Your inquiry concerns the exercise of municipal authority under the "home rule" provision of the Kansas Constitution, which authorizes cities "to determine their local affairs and government." Kan. Const., Art. 12, §5. Pursuant to Article 12, Section 5, "cities are not dependent upon the state legislature for their authority to determine their local affairs and government." Clafin v. Walsh, 212 Kan. 1, Syl. ¶1 (1973). However, the home rule power of the cities is not without limitation. As stated in Clafin, supra:

"It is subject to the power of the legislature to act in certain areas -- exclusively in some, optionally in others . . . Section 5(a) of [Article 12] . . . vests absolute and exclusive power in the legislature in regard to the procedure for incorporating cities, the methods of altering boundaries, the methods by which cities may be merged or consolidated, and the methods by which cities may be dissolved. Statutory enactments in these areas are not subject to the exercise of home rule by charter ordinance.

"The optional powers of the legislature are set forth in Section 5(b) as limitations or exceptions to the exercise of home rule power by cities . . .

"(1) Enactments of statewide concern which are applicable uniformly to all cities.

"(2) Other enactments of the legislature applicable uniformly to all cities.

"(3) Enactments applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction.

"(4) Enactments of the legislature prescribing limits of indebtedness." Id. at 7.

The legislative act in question is K.S.A. 13-1810 which provides that a majority of a board of city commissioners "shall constitute a quorum for the transaction of business." Applying the Clafin analysis to this statute, we readily conclude that an effort by a first class city to change the statutory quorum requirement would not alter or effect the procedure for incorporating cities, the methods of altering boundaries, the methods by which cities may be merged or consolidated, or the methods by which cities may be dissolved, and hence, Section 5(a) of Article 12 is inapplicable. Likewise, such a charter ordinance would not levy a tax or excise, etc., or change the limits of indebtedness, thus parts 3 and 4, noted above, of Article 12, Section 5(b) are not applicable. What remains for our consideration is whether the act requiring a "majority" of a board or council for a "quorum" is "uniformly applicable" within the meaning of Article 12, Section 5(b)(1) or (2).

In examining the constitutionality of any charter ordinance, it is important to note that Article 12, Section 5(d) requires "a liberal construction of the powers and authority granted [to cities] for the purpose of giving cities the largest measure of self government." City of Junction City v. Griffin, 227 Kan. 332 (1980); Clafin v. Walsh, supra at Syl. ¶3. Moreover, in regard to Article 12, Section 5(b)'s "uniformly applicable" limitation on city home rule power, the court has said:

"Regardless of whether an enactment of the state legislature addresses a matter of state-wide or a matter of local concern, a city may in either case act by charter ordinance to exempt itself from all or part of the enactment unless the state enactment applies uniformly to all cities. Kan. Const. Art. 12, §5(c)(1). The legislature may foreclose municipal legislative action only by an enactment of uniform application to all cities." Griffin, supra at 337.

As noted in the opinion request, K.S.A. 13-1810 covers cities of the first class having a commission form of government and provides "[t]he majority of said board shall constitute a quorum for the transaction of business." Identical requirements are found in other Kansas statutes for all three classes of cities and for both commission and council forms of government. See K.S.A. 13-1810 (1st class/commission); K.S.A. 13-1410 (1st class/council); K.S.A. 14-1308 (2nd class/commission); K.S.A. 14-111 (2nd class/council); K.S.A. 15-1409 (3rd class/commission); and K.S.A. 15-106 (3rd class/council).

K.S.A. 13-1810, however, is a section of an enactment which, by its very terms, is not uniformly applicable to all cities. See L. 1907, ch. 114, §1. Both sections 1 and 26 of that Act, now found at K.S.A. 13-1501 and 13-1810, respectively, have remained unchanged.

In Griffin, supra, the Court considered a section of the Kansas Code of Procedure for Municipal Courts, in connection with the "nonuniformity" issue arising from Article 12, Section 5. There, the Court observed:

"[T]his section is one of the sections included in L. 1973, ch. 61. It is clearly one of the sections comprising the enactment. The division into chapter, article and sections in the Kansas Statutes Annotated does not have the effect of making separate enactments of a single bill passed by the legislature of the State of Kansas. Marks v. Frantz, 179 Kan. 638, 298 P.2d 316 (1956)." Id. at 335, 336.

In this case, the single bill passed by the legislature in 1907 and containing the quorum requirements now found at K.S.A. 13-1810 applies only to one class of cities. It clearly was not, and is not, uniformly applicable to all Kansas cities.

It may be argued in light of the similar quorum requirements of other statutes that the legislature intended a quorum to be a majority of the members of the governing body for all Kansas cities, thus preempting the exercise of municipal authority. We, however, do not believe a Kansas court would adopt such argument for the following reasons: First, legislative intent to occupy a particular field of law or preempt local action is alone insufficient to foreclose the exercise of "home rule" powers. In Griffin, supra, the Court observed:

"Legislative intent to preempt a field is alone insufficient. It is now necessary to examine the provisions of the state enactment to determine whether the constitutional standard of uniform application to cities has been met. If not uniform, legislative intent as expressed within the enactment will not overcome the constitutional requirement for uniform application. Clark v. City of Overland Park, 226 Kan. 609, 602 P.2d 1292 (1979). The Legislature may preempt the constitutional powers of cities only in the manner prescribed in the constitution." Id. at 336.

Thus, having examined the enactment of which K.S.A. 13-1810 was a part and finding it to be non-uniform, we do not believe that other enactments may be strung together in pari materia to make a uniform enactment, even if that were the legislative intent.

Secondly, although six different types of city governments are required to operate under the six different statutes in an identical fashion (i.e., a quorum shall mean a majority of the members of the governing body), at least one type of city government seems to have no such statutory requirement. K.S.A. 1981 Supp. 12-10a01, et seq., authorizes the implementation of a modified mayor-council form of municipal government. These provisions do not contain any quorum requirement and instead only provide that "any action" by the council must "be by a majority vote of the members of the council." See K.S.A. 1981 Supp. 12-10a02. We are advised by the League of Kansas Municipalities that only the city of Greensburg operates pursuant to these sections. In Claflin v. Walsh, supra at 9, the court said: "In order for a statute to be applicable uniformly to all cities there must be no exceptions." See also Kan. Att'y Gen. Op. No. 82-206. Hence, even if the series of statutes establishing a quorum requirement for the six most common types of city government were to be construed as a single enactment, there remains the seventh type to which a statutory quorum requirement does not apply. Therefore, we are constrained to conclude that K.S.A. 13-1810 is part of an enactment of the legislature which is not uniformly applicable to all cities. That statute is subject to the exercise of a charter ordinance pursuant to Article 12, Section 5. We note that Article 12, Section 5 of the Kansas Constitution authorizes the electors of the city to petition for an election to submit to the voters the issue of the adoption of the proposed charter ordinance.

You next inquire whether the term "majority" as used in K.S.A. 13-1810 means a specific number, i.e., one more than half, or any number greater than half. While the term "majority" is not specifically defined by statute, and there are no Kansas judicial decisions specifying the meaning of the term, K.S.A. 77-201 Second provides that "[w]ords and phrases shall be construed according to the context and the approved usage of the language." Hence, although Webster's New Collegiate Dictionary [1975] defines "majority" to mean "the quality or state of being greater," or "a number greater than half of a total," it remains imperative that we consider "majority" as it is used in the context of K.S.A. 13-1810.

We are unable to locate any decisions of Kansas courts concerning the precise question at issue in this opinion; however a similar question was considered in another jurisdiction in the early case of Heiskell v. City of Baltimore, 4 A.

116 (Md. 1886). In that case, the City of Baltimore adopted a "rule of procedure" providing that two-thirds of the city council members were needed to constitute a quorum for the transaction of business. The Maryland court noted that the common law (in effect in the state) provided that a "majority" was needed to constitute a quorum, and concluded that the city's attempt to set a "two-thirds" requirement was in derogation of the "majority" rule, hence altering the common law and, therefore, being beyond the power of the city. Thus, the Court in interpreting the common law "majority" rule, found that "majority" meant the number one greater than half of the total, as opposed to any number greater than half of the total. In reaching its conclusion, the Court noted in pertinent part:

"Indeed, the appellant [city] concedes . . . that a majority of any body consisting of a definite number is necessary to constitute a quorum; but he insists that a majority when so organized, may make more than a majority necessary to constitute a legal body. But if we concede, as we must do, . . . that the common law fixes the majority as the legal body, the case of the appellant is at end. For the body itself to attempt to fix a greater number is for the body to attempt to change a rule of the common law. It is tantamount to saying that although a majority of a city council is a legal body . . . that such majority can be shorn of its rights and powers, and rendered powerless to act" Id. at 119. (Emphasis added.)

See also, Clark v. North Bay Village, 54 So.2d 240, 241 (Fla. 1951), wherein the Court noted "[i]t is axiomatic that the majority of five is three." Frankly, we also find it axiomatic that a majority of a five-member city governing body is three members. Indeed, we have no doubt but that the city of Lawrence has been operating on that assumption since the adoption of its current form of government. Thus, we must conclude that "majority," as used in K.S.A. 13-1810, is intended to be the number which is one greater than half of the total. It follows that in a city with five commissioners, three of the commissioners constitute a quorum for the transaction of business.

The import of our opinion on this question, when read in conjunction with our conclusion on the first question, is that although an "ordinary ordinance" passed by the city of Lawrence, which attempts to raise or lower the "majority" necessary to conduct business is void because it directly conflicts with K.S.A. 13-1810, all or any part of K.S.A. 13-1810 is subject to change pursuant to a charter ordinance since it is not uniformly applicable to all cities.

Finally, you ask if the Kansas Open Meetings Act, K.S.A. 75-4317 et seq., is discriminatory and non-uniform since city governing bodies of different sizes are affected differently. K.S.A. 1981 Supp. 75-4318 declares the scope of the Act to include "all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof . . . receiving or expending and supported in whole or in part by public funds." You do not advise of, nor are we aware of, any city in this state which would not fall within the ambit of this language. However, we believe you suggest by your question that since a "majority of a quorum" (as used in the definition of "meetings" in K.S.A. 75-4317a) would be a different number for city governing bodies with five members than for cities having a seven-member governing body, the act should be construed as non-uniform.

We agree that the Act is applicable to any "meetings" of two members of the Lawrence City Commission and would not be applicable to gatherings of two members of the Galena City Council, for example, since the size of that city's governing body is larger than five persons. We do not believe, however, that this fact makes the Act nonuniform in its application to all cities.

First, the KOMA on its face appears to apply to all cities. We are unaware of any city to which the Act does not apply.

Second, while differing size of various public bodies has the effect of permitting two members of some such bodies to confer regarding public business without compliance with the Act while other public officials of smaller member bodies may not, such does not affect the city, as a city. The "majority of a quorum" language was selected by the legislature for use in the KOMA, since that is the smallest number of members of a body or agency which may take official action. See Tacha The Kansas Open Meetings Act: Sunshine on the Sunflower State?, 25 Kan. L. Rev. 169, 182 (1977). Hence, in terms of the exercise of municipal powers, the KOMA comes into play at the same parliamentary point for all cities. To carry your suggestion to its logical conclusion, every statute of the legislature which requires a vote or protest petition based upon a certain uniform percentage of voters would be non-uniform in application since the number of voters in each city necessary to attain the specified and uniform percentage would be different. Likewise, an otherwise uniform statute prescribing an age for the consumption of alcoholic beverages would be nonuniform as between cities which have elected to be "dry" and those that are "wet." The statute would have no impact on the former and considerable impact on the latter. We think the "uniform application" language of the Constitution may not be so tightly construed.

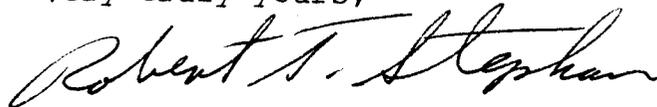
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Third, we call your attention to the case of Clark v. City of Overland Park, 226 Kan. 609 (1979), a case we believe to be most useful. There the Court held the Kansas statute to be nonuniform. While the statute "clearly" brought "all cities within its scope" (Id. at 616), all cities were not uniformly subject to its restrictions. Cities were distinguished from one another depending on prior action regarding the collecting of a local sales tax and the action of the county in which the city was located in collecting such tax. Similar "variables" are not present in the KOMA. The only variation between cities is the size of the governing body, a matter within the discretion of the city itself, depending on which statutory format the city chooses. (See previously cited statutes relating to forms of municipal government.) We do not believe that the question of uniformity in the application of a state statute is to be determined by variety, or lack thereof, of choices exercised by the city itself.

In sum, the KOMA applies to all Kansas cities. It has a uniform impact upon each city, as a city, in the exercise of its municipal powers. That the number of members necessary for a quorum may vary from city to city does not make KOMA non-uniform.

Therefore, it is our opinion that the Kansas Open Meetings Act is uniformly applicable to all cities and may not be circumvented by a charter ordinance. However, the quorum requirements of K.S.A. 13-1810 are provisions of an enactment of the legislature which is not uniformly applicable and may be changed by charter ordinance. Such charter ordinance will be subject to the potential of a "protest" style election authorized by Article 12, Section 5(c)(3) of the Kansas Constitution. "Majority," as the term is used in K.S.A. 13-1810, means the number one greater than half the number of members of the governing body and may not be changed by ordinary city ordinance.

Very truly yours,



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