



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

December 1, 1983

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 83- 177

The Honorable Jack H. Brier
Secretary of State
Second Floor, Capitol
Topeka, Kansas 66612

Re: Cities -- Home Rule -- Authority to Hold Non-Binding Advisory Elections

Elections -- City Elections -- Non-Binding Advisory Elections; Supervision by County Election Officer

Synopsis: The governing body of a city may, pursuant to the home rule authority granted by Article 12, Section 5 of the Kansas Constitution, call and hold an advisory election, provided that such election is for a public purpose and is not an unauthorized delegation of legislative authority. Because of its non-binding nature, an advisory election is not included within the term "question submitted election" or any other category of city election under K.S.A. 25-2101 et seq. Accordingly, advisory elections may not be supervised by county election officials. Cited herein: K.S.A. 12-184, 12-682, 12-809, 12-811, 12-1220, 12-2001, 12-2104, 13-1024a, 25-605a, 25-2104, 25-2110, 25-2810, Kan. Const. Art. 12, §5.

*

*

*

Dear Secretary Brier:

In your role as the chief election officer of the State of Kansas, you request our opinion on two questions concerning advisory elections held by cities. First, you inquire whether such advisory elections may in fact be held by means of a city ordinance and the subsequent submission of the question to the voters. Second, you wish to know whether the administration of such an election is within the duties of the county election officer.

A response to your first question must begin with the provisions of the Kansas Constitution which give cities home rule authority over numerous local matters. Article 12, Section 5 of the state constitution states in pertinent part:

"(b) 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." (Emphasis added.)

In the context of advisory elections, at least one prior opinion of this office has determined that a city's home rule power is sufficient to authorize the holding of a non-binding election, even in the absence of specific statutory authority. Attorney General Opinion No. 74-351. The opinion noted that the city commission could not delegate legislative authority which it possessed to the voters through such an election, but instead could "authorize the holding of an election, purely advisory in nature, at which a question of public concern is submitted for the expression of the wishes of the people." We concur with the opinion's reasoning and the result reached therein, but note that the question of how such an election should be conducted was not raised or discussed.

It should also be noted that the language of subsection (b) quoted above makes reference to the holding of "referendums only in such cases as prescribed by the legislature." The referendum is a device whereby a measure which has been approved by a legislative governing body does not go into effect until it is also approved by a specified proportion

of the voters in an election. A. Ranney, Referendums: A Comparative Study of Practice and Theory, p. 67 (1978). Charter ordinances, for example, must be submitted to the voters if, within 60 days after their passage by the city commission, a petition containing the requisite number of signatures is filed. Kan. Const., Art. 12, §5(c)(3). The decision of the voters is binding, and if the resolution is not approved, it is of no effect. One commentator has explained the limitation in subsection (b) of Article 12, §5 regarding referendums in general as an attempt to prevent city commissions from delegating legislative authority which they possess to the voters, and so "pass the buck." A. Martin, "Home Rule for Kansas Cities," 10 Kan. L. Rev., 501, 504 (1962).

Although the term "referendum" is not used in the statutes which concern elections, a similar concept appears in the concept of a "question submitted election." K.S.A. 25-2104(a). That statute provides that such an election involves the submission to the voters of a special question dealing with a particular issue. As a matter of law, such questions are phrased in such a way as to present the voter with a choice, either for or against, a specific proposition. See K.S.A. 25-605a and Kimsey v. Board of Education, Unified School Dist. No. 273, 211 Kan. 618 (1973). A number of statutes require the holding of a question submitted election before a measure approved by a governmental body may go into effect. See, e.g., K.S.A. 12-184 (change in form of city government), K.S.A. 12-811 (purchase of utility plants), and various statutes authorizing issuance of bonds, such as K.S.A. 13-1024a (public improvements), K.S.A. 12-809 (waterworks), and K.S.A. 12-682 (street improvements). Others require such elections upon the filing of valid protest petitions following certain actions by the governing body of the city. K.S.A. 12-1220 (establishment of library), K.S.A. 12-2001 (grant of franchise), and K.S.A. 12-2104 (trash collection expenses). These are the types of questions in which a city may legitimately hold a "referendum" of the kind referred to in the home rule section of the constitution.

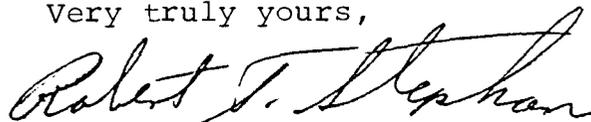
When compared to a question submitted election, an advisory election is different in two important respects. First, it is held only at the discretion of the city commission or council, and not in response to the commands of any statute. Second, the results of such an election are no more binding upon the governing body than would be the outcome of a public opinion poll which was conducted on a particular issue. In our opinion, these differences go to the very heart of what constitutes an "election" within the meaning of K.S.A. 25-2101 et seq. When a voter casts his or her ballot on a question submitted in a special election, they are participating in a legislative activity by which an ordinance will stand or fall. The choice they face is a real one, as are the consequences of the electorate's decision. 25 Am.Jur.2d

Elections, §1, citing Nelson v. Robinson, 301 A.2d 508 (Fla. App. 1974). In contrast, an advisory election is the result of an administrative decision by the city council or commission (i.e., to seek public input through a more elaborate method than through public comment or an opinion poll), and the choice presented to the voters is an illusory one. Unlike a general, primary or question submitted election, where each person's vote can be decisive, no one's vote in an advisory election carries any legal import whatsoever.

In view of these essential differences, in our opinion advisory elections are not included by implication within the categories of elections set forth in K.S.A. 25-2101 et seq. The only statute which they could conceivably fall under [K.S.A. 25-2104(a)] concerns question submitted elections, and, as demonstrated above, advisory election resemble them only superficially. While the county election officer is empowered to conduct city elections [K.S.A. 25-2104(b), 25-2110, 25-2810], such officer's authority is limited to the supervision of only those elections authorized by statute, and no others. 25 Am.Jur.2d Elections, §44, 29 C.J.S. Elections, §67, p. 158. Accordingly, if a city desires to hold an advisory election, it cannot rely upon the county election officer to supervise the proceedings, for such action would be in excess of that officer's authority. Our reasoning and conclusions herein are consistent with Kansas Attorney General Opinion No. 79-44 regarding the home rule powers of counties to conduct advisory elections.

In conclusion, the governing body of a city may, pursuant to the home rule authority granted by Article 12, Section 5 of the Kansas Constitution, call and hold an advisory election, provided that such election is for a public purpose and is not an unauthorized delegation of legislative authority. Because of its non-binding nature, an advisory election is not included within the term "question submitted election" or any other category of city election under K.S.A. 25-2101 et seq. Accordingly, advisory elections may not be supervised by county election officials.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General