STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

September 12, 1984

ATTORNEY GENERAL OPINION NO. 84- 95

Honorable Francis Gordon
State Senator, First District
Box 63
Highland, Kansas 66035

Re: Cities and Municipalities--Ordinances of Cities--
Petition for Proposed Ordinance

Synopsis: A proposed ordinance which would abolish the office of city administrator in a city of the second class operating under the commission form of government is an administrative ordinance, and is not a proper subject of an initiative petition under the provisions of K.S.A. 12-3013. Cited herein: K.S.A. 12-3013, 14-1501.

* * *

Dear Senator Gordon:

You request our opinion as to whether a proposed ordinance to abolish the office of city administrator in a city of the second class operating under the commission form of government is a proper subject of an initiative petition. We are advised that your inquiry relates to an effort by certain individuals in the City of Horton to abolish the office of Horton City Administrator, which office was created by Ordinance No. 850 of the City of Horton.

A determination of your inquiry necessarily involves consideration of the concepts of initiative and referendum, which are codified in K.S.A. 12-3013. This statute "provides a procedure whereby a city's electors may initiate by petition any proposed ordinance

'except an administrative ordinance' [(and except certain other types of ordinances not relevant here])." City of Lawrence v. McArdle, 214 Kan. 862, 863 (1974). The exception for administrative ordinances leaves the electors with the power to initiate ordinances that are legislative in character.

The legislative-administrative dichotomy is perhaps the strongest of the several tests applied by the Kansas Supreme Court in determining the appropriateness of initiative. The court has tended to view repealing ordinances as being of the same character as the ordinance repealed [Lewis v. City of South Hutchinson, 162 Kan. 104, 125 (1946)], and has taken a conservative approach in construing the operation of the initiative and referendum statute. See City of Lawrence v. McArdle, supra at 870. To more fully understand the court's approach to this issue, a review of its pertinent decisions is appropriate.

In Rauh v. City of Hutchinson, 223 Kan. 514 (1978), the court reaffirmed the principles set forth in McArdle, quoting at length from the syllabus of the prior decision, including:

> "'1. The operation of the initiative and referendum statute is to be confined with a considerable degree of strictness to measures which are quite clearly and fully legislative and not principally executive or administrative.
>
> "'2. One crucial test for determining that an ordinance is administrative or legislative is whether the ordinance is one making a new law or one executing a law already in existence. Permanency and generality of application are two additional key features of a legislative ordinance." (Emphasis added.) 223 Kan. at 519.

Further insight is gained from State ex rel. Frank v. Salome, 167 Kan. 766 (1949), wherein the court quoted with approval from 43 C.J. Municipal Corporations 585 as follows:

> "'Actions which relate to subjects of a permanent or general character are considered to be legislative, while those which are temporary in operation and effect are not. Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for

> the exercise of legislative power. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence.'" (Emphasis added.) 167 Kan. at 774.

The last-quoted rule as to the scope of the initiative and referendum statute is pertinent in considering this question. In cities of the second class operating under the commission form of government, the legislature has prescribed that the governing body shall appoint certain specific city officers "and such other officers . . . as they may deem necessary for the best interests of the city." K.S.A. 14-1501. Accordingly, action by the governing body creating the office of Horton City Administrator is, in our judgment, administrative in nature, since it involved "execution of a law already in existence," and was an act which "devolved upon" the governing body "by the organic law of its existence." This being the case, it is our opinion that a proposed ordinance which would repeal the ordinance creating said office is also administrative in character, (Lewis v. City of South Hutchinson, supra), and not a proper subject of an initiative petition under the provisions of K.S.A. 12-3013.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Terrence R. Hearshman

Terrence R. Hearshman
Assistant Attorney General

RTS:JSS:TRH:jm