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ATTORNEY GENERAL OPINION NO. 2024-8

Kaitlyn R. Bull-Stewart, General Counsel
Kansas Governmental Ethics Commission
901 S. Kansas Ave.
Topeka, KS 66612

Re: Cities of the Third Class—Government by Mayor and Council and
General Laws Applicable to Cities of the Third Class—General
Provisions; Cities of Third Class

Cities of the Second Class—Government by Mayor and Council and
General Laws Applicable to Cities of the Second Class—General
Provisions; Change in Classification of City from City of Third Class to
City of Second Class

Cities of the First Class—Government by Mayor and Council and
General Laws—General Provisions; Change in Classification of City
from City of Second Class to City of First Class

Synopsis: K.S.A. 15-101, K.S.A. 14-101, and K.S.A. 13-101 do not provide for
reclassifying a city based on a decrease in population. But K.S.A. 14-
901 does allow for a city of the second class to be reclassified as a city
of the third class if the population falls to 1,000 or less and a majority
of voters approve of the reclassification. There is no similar mechanism
for reclassifying a city of the first class to a city of the second class.

We are unaware of any circumstances under which a city might have
become a city of the first class without having attained a population of

15,000. It appears that every existing city of the first class has been determined to have had a population of more than 15,000 at some point in its history.

In appropriate circumstances, an action in mandamus or quo warranto could be brought in the name of the State to challenge a city's classification. In addition, the question of a city's classification could be raised in a declaratory judgment action by a party with standing or in the context of another dispute.

The enactment of K.S.A. 13-101 in 1903 did not require existing cities of the first class to recertify that they had a population of over 15,000 and obtain a new gubernatorial proclamation in order to maintain their status as cities of the first class.

Cited herein: K.S.A. 11-201; 12-345; 13-101; 14-101; 14-901; 15-101; 25-4143; 60-1701.

* * *

Dear Ms. Bull-Stewart:

As General Counsel for the Kansas Governmental Ethics Commission, you ask several questions about the classification of cities based on population. Your questions arise because the Kansas Campaign Finance Act, which the Commission is tasked with enforcing, only applies to certain elections. Specifically, for municipal elections, only elections in cities of the first class are subject to the Act and the Commission's jurisdiction.¹

Statutory Background

Kansas law organizes cities into cities of the third, second, and first classes. K.S.A. 15-101, the statute governing cities of the third class, provides:

All municipal corporations of the territory or state of Kansas, heretofore organized as cities, towns, or villages, containing not more than two thousand inhabitants (and not heretofore organized as cities of the second class), including cities of the third class organized in accordance with the provisions of the act of which this is amendatory, and including also all unincorporated towns (without regard to their population) which

¹ See K.S.A. 25-4143(q).

may now or hereafter be constituted a county seat of any county, shall be cities of the third class

K.S.A. 14-101(a), the statute governing cities of the second class, provides:

All cities now organized and acting as cities of the second class, by virtue of the authority of former acts, and all cities hereafter attaining a population of more than 2,000 and less than 15,000, shall be governed by the provisions of this act. Except as provided by this section, whenever the population of a city exceeds 2,000, the governing body of such city shall certify such fact to the governor. The governor shall declare, by public proclamation, such city subject to the provisions of this act. If the governing body of any city which has attained a population of more than 2,000 and less than 5,000 shall determine by resolution duly adopted that it would be more advantageous for such city to continue to operate as a city of the third class, such governing body shall not be required to so certify the population of such city to the governor and the laws relating to the cities of the third class shall continue to be applicable to such city.

And K.S.A. 13-101, the statute governing cities of the first class, provides:

Whenever it shall have been duly ascertained by any census of enumeration taken under any law of the United States or of the state of Kansas or by any city that any city has attained a population of more than fifteen thousand (15,000), such fact shall thereupon, by the governing body of such city, be certified to the governor of the state, who shall thereupon by public proclamation declare such city to be a city of the first class. If the governing body of any city which has attained a population of more than fifteen thousand (15,000) and less than twenty-five thousand (25,000) shall determine by resolution duly adopted that it would be more advantageous for such city to continue to operate as a city of the second class, such governing body shall not be required to so certify the population of such city to the governor and the laws relating to cities of the second class shall continue to be applicable to such city.

**Questions One and Two:
Reclassification Based on Population Decline**

These statutes clearly provide a procedure by which a city of the third class may be reclassified as a city of the second class and a city of the second class reclassified as a city of the first class based on an increase in population. Your first two questions ask whether a city either “may” or “must” be reclassified under these statutes based on a population decline. For instance, if the population of a city of the first class

falls below 15,000, do these statutes provide for its reclassification as a city of the second class? We believe the answer is no, for two reasons.

First, the text of K.S.A. 14-101 and K.S.A. 13-101 provides specific procedures by which a city of the third class may be reclassified as a city of the second class and by which a city of the second class may be reclassified as a city of the first class, but these statutes provide no similar procedures for reclassification in the event of a population decline. Specifically, K.S.A. 14-101 states that whenever the population of a city of the third class “exceeds” 2,000, the governing body shall certify the fact to the Governor, who shall then proclaim the city to be a city of the second class, except that if the city has a population of less than 5,000, it may “continue to operate as a city of the third class.” Likewise, K.S.A. 13-101 states that when a city of the second class attains a population of “more than” 15,000, the governing body shall certify the fact to the Governor, who shall proclaim the city to be a city of the first class, except that if the city has a population of less than 25,000, it may “continue to operate as a city of the second class.” The use of the word “continue” in both instances implies upward movement, from third to second class and from second to first class. The fact that the Legislature provided specific procedures for reclassification due to population gain but not population loss indicates that these statutes do not allow for such downward reclassification.

Second, a separate statute, K.S.A. 14-901, *does* establish a procedure by which a city of the second class may be reclassified as a city of the third class based on population decline. It provides:

Whenever any city of the second class organized under the laws of the state of Kansas has been reduced in population to one thousand or less, as shown by the last returns of the assessor taking the enumeration of said city,² the mayor of such city of the second class or the president of the council, if there is no acting mayor, may by proclamation call an election within such city for the purpose of determining whether said city shall be set back into a city of the third class.

....

A majority of the votes cast at such election shall decide the proposition and if a majority of the votes cast are for the affirmative, . . . such city shall be a city of the third class.

² The reference to the returns of the assessor appears to have been superseded by K.S.A. 11-201, which now provides that population is to be determined by the “most recent population figures available from the United States bureau of the census as certified to the secretary of state by the division of the budget on July 1 of each year.”

Statutes relating to the same matter must be read *in pari materia* to bring the provisions into workable harmony if possible.³ Construing K.S.A. 15-101 as allowing or requiring a city of the second class to be reclassified as a city of the third class whenever its population falls below 2,000 would be inconsistent with K.S.A. 14-901, which allows for reclassification only if the population falls to 1,000 or less, and even then only if the mayor calls for an election and a majority of voters agree.

There is no statute similar to K.S.A. 14-901 that provides a method by which a city of the first class may be reclassified as a city of the second class. The fact that the Legislature specifically provided for the reclassification of cities of the second class as cities of the third class but did not adopt a similar statute for cities of the first class indicates that Kansas statutes do not allow for the reclassification of cities of the first class based on a population decline.

**Question Three:
Classification as a City of the First Class without
Having Attained a Population of 15,000**

Your next question is under what circumstances, if any, would a city that has never been certified by a census to have a population greater than 15,000 be classified as a city of the first class. We are unaware of any circumstances under which that might be the case. The first statute referencing cities of the first class was enacted in 1868,⁴ and the population threshold for cities of the first class was 15,000 under that statute, as it continues to be today.

We note, however, that the population threshold need not have been established based on the decennial U.S. Census. K.S.A. 13-101 refers to a “census of enumeration taken under any law of the United States *or of the state of Kansas or*

³ *State v. Strong*, 317 Kan. 197, 203, 527 P.3d 548 (2023); *State v. Newman-Caddell*, 317 Kan. 251, 259, 527 P.3d 911 (2023).

⁴ Gen. St. 1868, ch. 18, §§ 1–2. Cities of the second class were addressed in chapter 19. The previous year, the Legislature had enacted a statute classifying cities containing more than 1,000 and less than 15,000 inhabitants as cities of the second class, thus perhaps implicitly recognizing cities of 15,000 inhabitants or more as cities of the first class without using that term. L. 1868, ch. 68. The Legislature enacted a statute providing for the organization of cities of the third class in 1869. L. 1869, ch. 26. And in 1871, the Legislature repealed previous statutes that provided for the incorporation of towns and villages, leaving cities of the third class as the smallest form of municipal corporation. L. 1871, ch. 60.

by any city.”⁵ This language dates to 1903,⁶ but earlier Kansas Supreme Court precedent held that censuses taken under state law provided authoritative population figures for purposes of state statutes. In *Turner v. Board of Commissioners*,⁷ a dispute arose over the population of Neosho County because county superintendents were entitled to an annual salary of \$600 in counties of at least 10,000 and less than 15,000 inhabitants but an annual salary of \$800 in counties of at least 15,000 and less than 20,000 inhabitants. A census taken by the township trustees on March 1, 1880, showed Neosho County had a population of 14,095, while the U.S. census taken on June 1, 1880, recorded a population of 15,125. The Neosho County Superintendent sued, seeking the higher salary, but the Kansas Supreme Court rejected his claim. In an opinion by Justice Brewer, the Court held that when a state statute refers “to a question of population, in the absence of language importing other reference, the proper understanding is that it refers to population as determined and evidenced by state proceedings” and thus “the population as determined by the state census must control as to the salary to be paid under state laws.”⁸

While the historical population of cities of the first class is a question of fact, there are currently 26 cities of the first class in Kansas according to the League of Kansas Municipalities.⁹ Only four of those cities currently have a population less than 15,000: Atchison, Coffeyville, Fort Scott, and Parsons.¹⁰ Of those four, all but Fort Scott at one time had a population of over 15,000 on at least one decennial U.S. Census.¹¹ And all four were proclaimed as cities of the first class by a Kansas Governor based on their having attained a population of over 15,000, with Fort Scott being declared a city of the first class by a proclamation of Governor Martin on May 29, 1888, stating “it has been duly ascertained by a census taken under the laws of the State, that said city has attained a population of over fifteen thousand inhabitants.”¹² In short, it appears that every city of the first class in Kansas has

⁵ Emphasis added. As discussed in *Sickly v. Board of Commissioners*, 83 Kan. 740, 112 P. 621 (1911), early Kansas statutes provided for both annual and decennial enumerations. See also L. 1873, ch. 75, § 1 (“[T]he several township and city assessors . . . shall annually, on or before the 10th day of June, make an enumeration of the persons residing in their respective townships and cities . . .”). Since 1978, however, K.S.A. 11-201 has provided that “the most recent population figures available from the United States bureau of the census . . . shall be used for all purposes in the application of statutes of this state.”

⁶ See L. 1903, ch. 122, § 1.

⁷ 27 Kan. 639 (1882).

⁸ *Id.* at 641–42. K.S.A. 11-201 abrogates this holding today.

⁹ <https://www.lkm.org/page/DirectorySearch>. This includes the Unified Government of Wyandotte County and Kansas City, which is both a county and a city of the first class. See K.S.A. 12-345.

¹⁰ See Kansas Division of the Budget, *Kansas Certified Population* (July 1, 2024), available at <https://perma.cc/A28F-5SFP>.

¹¹ See <https://perma.cc/7ZPE-DT9X>. Atchison had a population over 15,000 in 1900 and 1910, Coffeyville from 1930 through 1980, and Parsons in 1920.

¹² The Fort Scott proclamation is available on the Kansas Historical Society’s website at <https://perma.cc/52GS-MER4>. The same website also contains gubernatorial proclamations for

been determined to have had a population of more than 15,000 at some point in its history.

**Question Four:
Mechanisms to Ensure Accurate City Classification**

Your fourth question is what mechanism exists to ensure that a city is in compliance with these statutes. This question may be largely moot given our answers above. But in appropriate circumstances, we believe that an action in mandamus or quo warranto could be brought in the name of the State to challenge a city's classification. For instance, in *State ex rel. Foster v. Faulkner*,¹³ the Saline County Attorney brought an original action in mandamus seeking to compel the Salina City Council to reorganize Salina from a city of the third class into a city of the second class based on a census showing a population of over 2,000 inhabitants. The Kansas Supreme Court held that the county attorney could bring a mandamus action but entered judgment for the defendants because the census in question was not officially authorized.¹⁴

Apart from mandamus and quo warranto, a party with sufficient standing could presumably bring a declaratory judgment action under K.S.A. 60-1701 *et seq.* to determine the correct classification of a city. A question about the classification of a city could also potentially arise in the context of another dispute, similar to the *Turner* case discussed above where a lawsuit over a county superintendent's salary turned on the population of the county.

**Question Five:
Continued Recognition of Cities of the First Class
after the Enactment of K.S.A. 13-101**

Finally, you ask under what circumstances a city that was recognized as a city of the first class at some point prior to the enactment of K.S.A. 13-101 in 1903 would be allowed to continue as a city of the first class after that date without a new census showing a population over 15,000.¹⁵ In our opinion, the 1903 legislation had no effect on the classification of existing cities of the first class. That statute provided:

Atchison in 1881 (<https://perma.cc/8CHW-YYN5>), Coffeyville in 1906 (<https://perma.cc/4CSP-SVUV>), and Parsons in 1906 (<https://perma.cc/FY52-NSUZ>).

¹³ 20 Kan. 541 (1878).

¹⁴ *Id.* at 546–48.

¹⁵ Although the history of K.S.A. 13-101 traces back to L. 1903, ch. 122, § 1, the statute number does not appear to have been assigned until 1923, when the Revised Statutes of Kansas (Annotated) were published.

Whenever it shall have been duly ascertained by any census or enumeration taken under any law of the United States or of the state of Kansas or by any city that any city has attained a population of over fifteen thousand inhabitants, such fact shall thereupon, by the mayor and council of such city, be certified to the governor of the state, who shall thereupon by public proclamation declare such city to be, and the same shall thereupon become, a city of the first class.¹⁶

By its plain language, this law establishes a procedure by which new cities of the first class would be recognized in the future. Nothing in its text suggests that existing cities of the first class are to be stripped of their status and must reestablish themselves as cities of the first class. You note that the bill repealed prior statutes governing cities of the first class, but the Legislature commonly repeals earlier versions of statutes when it amends or replaces them.¹⁷ We do not understand the repeal of prior statutes, absent some additional textual provision, as terminating the classification of existing cities of the first class. This is particularly true given that the 15,000 population threshold dates back to the original statutes establishing cities of the first class in 1868.¹⁸

Sincerely,

/s/ Kris W. Kobach

Kris W. Kobach
Attorney General

/s/ Dwight R. Carswell

Dwight R. Carswell
Deputy Solicitor General

¹⁶ L. 1903, ch. 122, § 1.

¹⁷ For instance, K.S.A. 13-101 was amended in 1953, and the bill repealed the prior statute. *See* L. 1953, ch. 77, § 2. We do not believe this required all existing cities of the first class at the time to reestablish themselves as cities of the first class.

¹⁸ *See* L. 1868, ch. 18, § 1 (“All cities of more than fifteen thousand inhabitants shall be governed by the provisions of this act.”); *id.* at § 2 (“Whenever any city shall hereafter have attained a population of over fifteen thousand inhabitants, and such fact shall have been duly ascertained and certified to the governor, by the mayor and council of such city, [he] shall declare, by public proclamation, such city subject to the provisions of this act.” (brackets in original)). In fact, the 1881 statute uses identical language as the 1903 statute. *See* L. 1881, ch. 37, § 1 (“Whenever it shall have been duly ascertained, by any census or enumeration taken under any law of the United States or of the state of Kansas, or by any city, that any city has attained a population of over fifteen thousand inhabitants, such fact shall thereupon, by the mayor and council of such city, be certified to the governor of the state, who shall thereupon, by public proclamation, declare such city to be, and the same shall thereupon become, a city of the first class.”).