ELECTRONICALLY FILED
2020 Aug 28 PM 3:09
CLERK OF THE SEDGWICK COUNTY DISTRICT COURT
CASE NUMBER: 2020-CV-001217-OT

ERIC A. COMMER
JUDGE
Division 28

Phone: (316) 660-5628
Fax: (316) 660-5784
http://www.dc18.org

DISTRICT COURT
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY COURTHOUSE
525 NORTH MAIN, 4th FLOOR
WICHITA, KANSAS 67203

CIVIL LAW DEPARTMENT

CITY OF WICHITA, KANSAS a Municipal Corporation, Plaintiff, **vs.** **KARL PETERJOHN,** **And CELESTE RACETTE** Individually and as Representatives of **"SAVE CENTURY 2 COMMITTEE"** Defendant(s).	))))))))))	**Case No.: 2020 CV 1217**

MEMORANDUM DECISION and ORDER
On Plaintiff's Petition for Declaratory Judgment

ON THE 17th Day of August, 2020, a hearing for evidence and argument on the City's Petition for Declaratory Judgment and the Defendants' Motion to Dismiss was held before this District Court Judge in the Sedgwick County Courthouse. The Plaintiff, City of Wichita, Kansas, appeared by Chief Deputy City Attorney, Sharon L. Dickgraffe. The Defendants appeared by their attorneys, Windell Snow and Christopher Snow and in person by Karl Peterjohn and Celeste Racette.

I. BACKGROUND OF THE CASE.

Fifty-one years ago, in 1969, on prominent downtown Arkansas River bank land near the city center, Wichita opened a new performing arts and convention center. The building predominates one of Wichita's main streets, marking the historic Chisholm Trail. In the later 1800s, ranchers drove cattle on the Chisholm from pastures as far south as Texas to the railway.[1] As the Kansas metropolis entered its second century of life, Wichita aptly named the building Century II.

The prime river bank land was available because the city's prior, more than fifty year old, convention center and exposition hall, the Forum, had been demolished. The Forum was showing its age and did not have adequate facilities for the variety of entertainment in a single venue that a new building could provide.

John Hickman and Roy Varenhorst, two architect former apprentices of the famous Frank Lloyd Wright, designed the building. They explained the design of Century II ("C2" or "CII") – as sand buff colored cement exterior columns, representing fields of wheat, supporting a shallow domed blue roof, representing the limitless Kansas sky.

The 200,000 square foot building has long been the home of Wichita Music Theatre, the Wichita Symphony Orchestra, the Wichita Garden Show, Music Theatre for Young People and Wichita Youth Symphony. Century II was also the backdrop for events of the annual 9 day, 50 year old Wichita River Festival.

[1] The Court has taken judicial notice of these facts in part by virtue of Chisholm Trail street signs which the City has placed on poles at intersections from the Delano District west of the Arkansas River to a portion of Douglas Avenue extending into the major downtown portion of the City on the east side of the river.

By underground construction, for shared utilities, CII is connected to a glass and concrete building built in "Brutalist" style about the same time. That building was home to the Wichita Public Library for 51 years. Recently, the library moved to new quarters on the other bank of the Arkansas River. Now, in an era made more uncertain by a deadly pandemic that currently demands "social distancing" and universal mask wear to reduce transmission of a virus, winds of change are blowing.

In 2019, the Defendant Racette learned of an event for a public and private partnership named the River Front Legacy Master Plan. The event presented five (5) proposed development plans ranging in estimated costs from $970 million to $1.5 billion. All but one of the plans included the demolition of Century II.

Concerned by that forecast, Defendants Peterjohn and Racette helped organize the "Save Century II" campaign. Beginning January of 2020, "Save Century II Committee" collected 17,265 signatures to a voter initiative petition. That number is reportedly 34.5% of the total number of votes in the recent 2019 citywide election.[2] The Committee's name implies the voter initiative petition seeks to save Century II and the former Public Library from demolition.

However, the proposed ordinance extends protection beyond CII and the former library. Defendants' initiative would apply to any "prominent city owned building of historical importance or architectural significance" which the City, in the future, may plan to demolish, replace "or otherwise adversely affect". The petition would mandate a binding, public vote of approval before any adverse action.

[2] The efforts of Ms. Racette, Mr. Peterjohn and approximately 400 solicitors supporting the Defendants initiative Petition must be acknowledged as a major accomplishment by citizen action.

At this point, it seems appropriate to define two terms, which are commonly misunderstood.

Here, "**Initiative**" means, "an electoral process by which a percentage of voters can propose legislation (*city ordinance*) and compel a vote on it by the governing body (*city council*) or by the full voting electorate". Black's Law Dictionary, 7th Edition, 1999 (*supplemented*). The vote in an "initiative" is generally considered to be binding.

"**Referendum**" means, "1. The process of referring a state (*or city*) legislative act, a state constitutional amendment or an important public issue to the people for final approval by popular vote." Black's Law Dictionary, 7th Edition, 1999 (*supplemented*). Sometimes, use of the word "referendum" means a non-binding polling.

In Kansas, the distinction between an "initiative" and a "referendum" was somewhat recently explained in the case of *Bissessarnath Ramcharan-Maharajh v. Gilliland*, 48 Kan. App. 2d 137, 286 P.3d 216 (2012).

> "There is another process for voter input in government—the initiative process—that's sometimes confused with referendums. The difference is that a referendum is a public vote taken in response to a measure initiated by the government, while in the initiative process citizens develop the proposal that is then placed on the ballot for public approval. See generally Eskridge, Frickey & Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy, pp. 523–24 (4th ed. 2007)."
> *Bissessarnath Ramcharan-Maharajh v. Gilliland*, 48 Kan. App. 2d at 140.

The Defendants filed their signed initiative for a new city ordinance with the Clerk of the City of Wichita on July 10, 2020. On July 17, 2020, the Clerk delivered

the several foot tall stack of pages to the Sedgwick County Election Commissioner for verification of the voting status of all the signers.

Twelve days later, the City of Wichita timely filed this lawsuit for a Declaratory Judgment asking the Court to declare the Defendants' initiative invalid, void or unconstitutional for any one of seven reasons. The City will prevail if they prove at least one of the seven.

THE COURT, in advance of the hearing, had received and reviewed:

City's Petition for Declaratory Judgment;
City's Memo in Support of Declaratory Judgment;
Defendants' Memo in Opposition to Declaratory Judgment;
Defendants' Answer;
Defendants' Motion to Dismiss;
City's Response to Motion to Dismiss;
Defendants' Motion for Leave to File Reply and proposed Reply attached;
The attachments to these pleadings including most significantly:
The Petition to the Governing Body of the City of Wichita,
requesting a public vote before any prominent city owned building
of historical importance or architectural significance...
be demolished, replaced or otherwise adversely affected";
Kansas Constitution, Article 12, Section 5 – Cities' Powers of Home Rule;
K.S.A. 12-101 *et seq.*;
K.S.A. 12-3013;
K.S.A. 12-1301, 12-1773, and 12-17,104;
K.S.A. 25-601 *et seq.* including 25-605a, 25-620, 25-622, and 25-623;
K.S.A. 25-3601 *et seq.*, including 25-3604, 25-3607, and 25-3608;
K.S.A. 60-1701 *et seq.* – all sections;
Selected Opinions of the Attorney Generals between 1991 & 2007 cited by counsel; and
Selected cases of the at least 21 cited by counsel in the filed pleadings.

The City presented testimony by City Clerk Karen Sublett, City Communications Manager Megan Lovely, and Interim Public Works Director Benjamin C. Nelson. The Defendants twice presented testimony from the Defendant, Celeste Racette. The City obtained admission of City Exhibits A-E

inclusive. The Defendants obtained admission of Defendant Exhibits 1, 2, 3, 4, 6, 8, 9, 10 and 11. Defendants' exhibit 5 was admitted except for paragraphs 7 and 16-21 inclusive. Thereafter, counsel for each of the parties presented argument and responded to questions from the Court.

At the conclusion of oral argument on the Defendants' Motion to Dismiss, the Court DENIED the Defendants' Motion to Dismiss. The Court's analysis, rationale and ruling denying the Defendants' Motion to Dismiss is more fully set forth after the Court's analysis and ruling on the more substantive issues raised by the City's Petition for a Declaratory Judgment.

THE COURT having reviewed the pleadings and having heard the testimony of the witnesses and statements of counsel and being duly and fully advised in the premises, the Court **makes the Findings of Fact and enters the Conclusions of Law and issues the Rulings and Orders included hereafter:**

II. LEGAL NATURE OF THE CASE.

Beginning on approximately January 13, 2020, Defendants and the Save Century II Committee obtained 17,265 signatures, or approximately 34.5% of the 49,910 total votes as recorded by the Sedgwick County Election office in the 2019 City of Wichita Municipal Election, in support of their initiative petition.[3]

January 10, 2020, the Office of the Sedgwick County Counselor issued an opinion letter to Defendant Peterjohn, stating "the form of the question in the

[3] Appropriately, none of the parties provided the Court with any of the signed pages of the petition.

petition was legally sufficient." The brief two paragraph letter written also January 10, 2020 includes the following four sentences:

> "...It is my opinion that the form of the question stated on the petition complies with the requirements of K.S.A. 12-3013 and 25-3601, et seq.
>
> "I would note that K.S.A. 25-3601(a) provides that this advisory opinion only establishes a rebuttable presumption of compliance with the requirements of the applicable statutes. Furthermore, the review that the County Counselor's Office has undertaken is limited to the proper form of the question contained within the petition. As a result, this letter is not intended to indicate whether the content of the question is or is not appropriate under Kansas law."

Defendants filed the Petition with the City Clerk on July 10, 2020. On July 17, 2020, the City Clerk delivered the pages of the Petition to the Sedgwick County Election Commissioner by the City Clerk to confirm the necessary signatures.

The Petition reads as follows:

> **"PETITION TO THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS"**
> **"Pursuant to Applicable Kansas Law"**
>
> "Shall the following ordinance become effective:
>
> "BE IT ORDAINED THAT THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS:
>
> "No prominent city owned buildings of historical importance or architectural significance (regardless of historic register status), including Century II and the adjoining former Public Library, shall be demolished, replaced or otherwise adversely affected without a public vote of approval by the qualified voters in the City of Wichita and further, no interest in such city owned buildings, including Century II and the adjoining former Public Library, shall be leased, sold bartered, traded, conveyed or assigned and thereafter demolished, replaced or otherwise adversely affected without a public vote of approval by the qualified voters in the City of Wichita."

On July 29, 2020, the City of Wichita filed with this Court their Petition for Declaratory Judgment and a Memorandum in Support. The Petition and Memorandum were timely filed.

In the Memorandum, the City argues that the Defendants' petition is invalid according to four arguments:

A. **The Petition fails to comply with K.S.A. 12-3013 in several ways.**

B. **The proposed ordinance is administrative in nature and therefore is specifically prohibited by K.S.A. 12-3013(e)(1).**

C. **The proposed ordinance is void because it exceeds the City's legal authority to call for a binding election.**

D. **The proposed ordinance is unconstitutionally vague and overbroad.**

III. THE QUESTION OF LAW FOR THIS COURT.

The Court is not deciding whether Century II and the former Public Library building should be saved from demolition. Neither will this decision determine whether CII and the former Public Library are historically important or architecturally significant buildings.

Here is the question of law that this Court must answer. –

"Is the Defendants' initiative petition valid in accordance with law?"

If the Court finds the Petition to be invalid for any legal reason, the Court must declare it so and the City has no obligation to proceed further in response.

If the Court finds the Petition to be valid, then the Wichita City Council has two options. First, vote to approve the Defendants' ordinance. If not approved, the Wichita City Council must "forthwith call a special election", or add the question to a regular city election if one is scheduled in the 90 days thereafter, and at such "city election submit the ordinance, without alteration, to the vote" of the registered voters of the City of Wichita. KSA 12-3013(a).

The City Council may not alter any of the language of the initiative. Neither is the Court allowed to alter a single stroke of the initiative petition. The validity of the petition lives or dies with the language of the initiative petition as drafted.

IV. SUMMARY OF THE COURT'S RULING IN SIX PARAGRAPHS.

Requirements as to Form of The Initiative Petition

The requirements for the form of an initiative petition are stated in K.S.A. 12-3013 and 25-3601. Defendants drafted their proposed ordinance preceded by the words, "Shall the following become effective?" The preceding words should have been, "Shall the following be adopted?" The City also complains that the Defendants failed to comply with the statutory requirement to pertain to a single issue, because their initiative would mandate multiple elections. And the City critiques the initiative for failing to specify a number and title for the ordinance and for failing to specifically request it be adopted by the Wichita City Council.

After review of the law, the Court finds that form of the initiative "substantially complies" with the requirements of statute. The Court finds that a

"substantial compliance" as to form is sufficient in part because "caution should be used by the courts in ruling out petitions on mere technicalities, which petitions are the result of democracy working at the grassroots level." *City of Prairie Village v. Morrison*, Kan.Ct.ofApp., 264 P.3d 1058 (2011), quoting, 5 McQuillin, Municipal Corporations § 16.67, p. 481 (3d ed. rev.2004). Further, the requirement to specify a number and title applies to referendum petitions protesting an ordinance already approved by a governing body. The Defendants' petition does not do that. Instead, it proposes a new ordinance. The initiative Petition is valid as to form.

Is the Initiative Petition Prohibited Because it Addresses An Administrative Decision?

State law prohibits use of an initiative petition to address decisions of a governing body that are administrative in nature. The initiative has some legislative character because it proposes a new ordinance be adopted. But a decision as to whether a city owned building should be demolished is more significantly administrative because it requires specialized training and experience to analyze costs to remodel and/or maintain, liability risks, long term use and available mechanisms and costs for municipal financing, etc. Further, the initiative involves a matter of statewide concern because it circumvents and violates legislative authority for calling a binding election.

Is the Petition to the City Void Because it Exceeds the City's Authority to Call for a Binding Election?

The call of a single binding election as the result of a qualified voter initiative petition is certainly authorized by the legislature in K.S.A. 12-3013. However, the

Defendants' initiative petition attempts to mandate future binding elections whenever the city wants to demolish a historically or architecturally significant building. Those elections would lack the qualifying percentage of voter signatures to be authorized by K.S.A. 12-3013. Moreover, the city governing board does not have the innate authority to call such a future binding election on their own.

Cities do not have any inherent authority themselves to call a binding election of their citizens. Cities can only implement binding citizen elections under specific authorization from statutes enacted by the Kansas Legislature. As a matter of a statewide policy, the Kansas Legislature has not written any statute that authorizes a city council by a single ordinance or a single voter initiative to establish multiple binding elections.

Is the Defendants' Petition Unconstitutionally Vague or Overbroad?

This Court is not certain that this issue need be addressed. Generally, courts need not decide constitutional challenges where there is a valid alternative ground that resolves the case. *Wilson v. Sebelius*, 276 Kan. 87, 91, 72 P.3d 553 (2003).

Nevertheless, to avoid the potential for a rehearing on this issue alone, the Court finds the words "historically important or architecturally significant" to be unconstitutionally vague. The initiative could have provided a definition or referenced language in the City of Wichita Code sections that create a Historic Preservation Board. But the language of the petition specifically excludes language that would support "historic register status". The Court also finds the words "adversely affected" to be unconstitutionally vague and overbroad.

| | |

V. LEGAL ANALYSIS OF PETITION FOR DECLARATORY JUDGMENT.

A. Does the Petition Comply With the Law As To Form?

When determining the legality of the form of the question in a proposed voter initiative, the Court must examine the requirements of K.S.A. 12-3013 and K.S.A. 25-3601 *et seq*. When applying statutes, several principles of statutory construction guide the Court.

A fundamental rule of statutory construction is that legislative intent governs if that intent can be ascertained. *Nationwide Mutual Ins. Co. v. Briggs*, 298 Kan. 873, 875, 317 P.3d 770 (2014) [quoting *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. 1112, 1123, 307 P.3d 1255 (2013)]. The Court's analysis should seek to interpret the statute in a way that construes various provisions in harmony, if possible. *Friends of Bethany Place, Inc. v. City of Topeka*, 1123, (2013).

The City of Wichita argues to be a valid Petition as to form, "both K.S.A. 12-3013 and K.S.A. 25-3610 must be strictly complied with". The City claims the following language of K.S.A. 25-3601(d) requires this. "When any other statute imposes specific requirements which are different from the requirements imposed by K.S.A. 25-3601 *et seq*., the provisions of the specific statute shall control." The Court however recognizes that statement to be one of general application to the comparison of conflicting statutes, not so strictly to this single statute within itself.

The most obvious application of that guidance in K.S.A. 25-3601 can be found in subsection 25-3601(e). The Court is well aware that when a declaratory

judgment or other civil petition is filed for a significant (Chapter 60) case, K.S.A. 60-212(a) requires that the defendant must file an answer within 20 days after formally receiving the plaintiff's petition.

K.S.A. 25-3601(e) sets a very different schedule for this lawsuit that conflicts with K.S.A. 60-212(a). K.S.A. 25-3601(e) sets a 20 day period from the filing of this lawsuit for the court to issue a decision that essentially the lawsuit. Presumably, if defendants want to file any responsive pleading to the lawsuit challenging their voter initiative petition, they must do it more quickly than 20 days to give the court reasonable opportunity to review their argument. According to K.S.A. 25-3601(e), In 20 days, the district court lawsuit is to be finished.[4]

There are four specific ways the City says the "Century II" question does not meet the strict compliance standard the City claims is applicable to form.

1. K.S.A. 12-3013(a) requires that the petition "shall contain a request that the governing body pass the ordinance or submit the same to a vote of the electors." The City argues this language or similar language is mandated by the statute and the Defendant's initiative petition does not contain such.

2. The statute requires that a voter initiated petition of a **proposed** ordinance be preceded by words "Shall the following be adopted?" K.S.A. 12-3013(b) and 94 Op. Att'y Gen. 95 (1994). Those are not the words used in the Defendants' petition. Instead, the petition asks, "Shall the following become effective?"

[4] As the Court reminded counsel before the start of trial, the 20 day limits of time for the City to file a lawsuit and for the Court to issue decision are both statutory deadlines. And March 18, 2020, the Ks. Sup. Ct. issued an Administrative Order suspending all statutory deadlines. That suspension continues in effect currently per Sup. Ct. Admin. Ord. 2020-PR-058.

3. K.S.A. 25-3602(a) requires that "Each petition shall consist of one or more documents pertaining to a single issue or proposition under one distinctive title. The City accurately asserts that if the Defendants' petition is approved, it could "require separate elections for multiple years regarding any one of the 500 buildings owned by the City of Wichita".

4. The City also claims the Defendants' petition is deficient because it "Fails to specify the number and title of the proposed ordinance contrary to K.S.A. 25-3602(a)."

The Court believes that the reference is in error because nothing in K.S.A. 25-3602(a) makes any similar statement. The Court believes the City's intended statutory reference was to K.S.A. 25-3601(c) which reads as follows:

> "(c) The form of any question in **a petition** requesting an election on or **protesting an ordinance, or resolution**, **adopted by the governing body of any county, city, school district or other municipality** shall be presumed to be valid and in compliance with the requirements of K.S.A. 25-3601 et seq., and amendments thereto, **if such petition states the title, number and exact language of the ordinance, or resolution**, and the title of such petition states:
>
> "Shall the following ordinance, or resolution, become effective?"
>
> **[Emphasis added.]**

However, that subsection is specifically addressing voter referendums. Referendums protest an ordinance or resolution already been approved by the governing body. In that instance, the ordinance being protested has already been given a title and number by a governing body such as: Wichita Ordinance 2020.08.18 – The Demolition of Century II ***(this is a fictitious number and title).***

The Defendants' initiative cannot reference a number and title because it proposes a new ordinance; it does not protest any existing ordinance. The Wichita City Council has not yet passed any ordinance or resolution that provides for the destruction of Century II or the former Public Library building.

The Court finds that the City's critique number 4 as to the form of the question is irrelevant and inapplicable.

Responding to all of the critiques by the City as to the form of the question in the initiative, the Defendants assert that voter initiated petitions should not be required to meet a "strict compliance" standard. They argue instead for a standard of "substantial compliance". And there is justification for such a standard as to technicalities of form rooted in the exercise of citizen initiation.

> "Moreover, as one treatise author has explained in generally discussing the power of initiative and referendum:
>
> > " Courts should interfere with the initiative and referendum only in clear cases of a violation of the law. Judicial notice may be taken by the courts of the difficulty in preparing and circulating a petition against a city ordinance, and, thus, extreme caution should be used by the courts in ruling out petitions on mere technicalities, which petitions are the result of democracy working at the grassroots level." 5 McQuillin, Municipal Corporations § 16.67, p. 481 (3d ed. rev.2004).
>
> *City of Prairie Village v. Morrison*, Kan.Ct.ofApp., 264 P.3d 1058 (2011)

The Defendants assert that the Kansas Supreme Court has not established a precedent for whether "strict compliance" or "substantial compliance" is the appropriate standard. They argue this from the Supreme Court's opinion in *Schmidt v. City of Wichita*, 303 Kan. 650, 367 P.3d 282 (2016). In *Schmidt*, the

petition's advocate had failed to file a copy of the proposed ordinance with the city clerk when they presented the city clerk with the signed petition.

The Defendants assert on page 6 of their Memo in Opposition,

> "A fair reading of *Schmidt*, however, merely demonstrates that in that case, the Kansas Supreme Court held that regardless of whether a strict or substantial compliance standard was applied to the facts before it in that case, the petition advocate's failure to even attempt to file the proposed ordinance with the city clerk satisfied neither standard, and accordingly deprived the electors fair notice of the full substantive content of the ordinance proposed to be acted upon. *See State ex. rel. v. Schmidt v. City of Wichita*, at 667-668."

The Court agrees with that argument. This leads the Court to conclude that **at least** a standard of "substantial compliance" should be applied when a court reviews a voter initiative petition. If a "strict compliance" standard should be applied, this Court will leave it to the Supreme Court to clarify in a future case.

In the unpublished case of: *City of Prairie Village v. Morrison*, 2011 Kan.App. Unpub. LEXIS 1012 at 20, 25, 264 P.3d 1058 (Kan. Ct. App. 2011), the City of Prairie Village challenged a voter petition protesting a Charter Ordinance already passed by the Prairie Village City Council. The petition's advocate who presented the protest petition to the City failed to include the complete text of the opposed Charter Ordinance in the petition so signers could read it. Both the district court and the Court of Appeals agreed failure to include the exact language of the charter ordinance in the protest petition was not "substantial compliance" with the statute.

> "Our courts define substantial compliance to require " " " compliance in respect to the essential matters necessary to assure every reasonable objective of the statute." "[Citation omitted.]" *Dodge City Implement Inc. v. Board of Barber County Comm'rs,* 288 Kan. 619, 639, 205 P.3d 1265 (2009). The determination of substantial compliance with a statutory requirement is

generally a finding of fact. *In re Adoption of X.J.A.,* 284 Kan. 853, 868, 166 P.3d 396 (2007)." [As quoted in *City of Prairie Village v. Morrison,* subsection (b) of the opinion.]

In response to the City's objection number 1 as to form, Defendants cannot dispute that their petition does not include the specific words of K.S.A. 12-3013(a) that the signers "request that the governing body pass the ordinance or submit the same to a vote of the electors". The Defendants instead point out the heading on the Petition conspicuously states: "PETITION TO THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS." And immediately before the proposed Ordinance text, the Petition conspicuously states "BE IT ORDAINED THAT THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS:"

It is true that a specific statement requesting the city council either approve the ordinance or put the ordinance on a voting ballot in a citywide election is not in the Defendants' petition. With the common all capitalized statements included, the Court doubts that the City and its agents didn't know those were the two options available to the City Council. The City of Wichita cites K.S.A. 12-3013 at least 20 times in their Petition for Declaratory Judgment and their supporting Memo.

Considering that, the Court can hardly believe that the City Council through their agent City Attorney's Office was unaware what was being asked of them. And the filing of the Petition for Declaratory Judgment on the 19th day after the City Clerk received the voter initiative petition is further evidence that the City was informed that they had only 20 days to approve the proposal or begin steps to put the Defendants' petition on an election ballot. **The Court will find and rule that**

the Defendants substantially complied with statute to request the city council either adopt its proposed ordinance or put it on a public ballot.

The City's objection number 2 as to form is that the voter initiative used the language "Shall the following ordinance become effective" instead of "Shall the following be adopted" preceding their proposed ordinance, as quoted from K.S.A. 12-3013(b). Determining the correct opening language is understandably confusing from the statutes detailing it. That is because the Kansas statutes use three slightly different phrases for this opening clause of a voter initiative or referendum petition in three separate laws that are not grouped in close proximity.

In K.S.A. 12-3013(b) the opening clause in quotes is **"Shall the following be adopted?"** Other language in K.S.A. 12-3013(b) makes clear that it is **applicable to an initiative – a "proposed ordinance"**. This is the type of ordinance the Defendants submitted. [See also K.S.A. 25-620]

In the **Constitution of the State of Kansas, Article 12, §5(c)(3)**, the designated opening clause for a **petition to oppose a charter ordinance** is **"Shall charter ordinance No. __, entitled (title of ordinance) take effect?** That section of the Constitution is commonly referenced as the Home Rule Amendment (abbreviated HRA).

In K.S.A. 25-3601(c) the designated opening clause in quotes is **"Shall the following ordinance, or resolution, become effective?"** The opening sentence of K.S.A. 25-3601(c) clarifies that it is applicable to a proposed voter referendum

"petition requesting an election on or **protesting an ordinance, or resolution," that has already been "adopted** by the governing body".

Through several days reviewing the law and documents of this case, the Court has come to recognize those distinctions. However, for a citizen untrained in the law, the Court understands how easily those distinctions could be overlooked. The four applicable laws are remotely located apart from each other in the statutes. They are even in three different volumes of the statute books.

Legally trained minds can even overlook these differences. That is demonstrated by the Court's earlier ruling that the City's critique number 4 as to the form of the question was in error. The City's law office apparently overlooked that K.S.A. 25-3601(c) applies only to protest petitions. The Defendants' petition is not a referendum protesting any ordinance already adopted. It is an initiative.

In *City of Prairie Village v. Morrison,* the voter petition advocates were protesting a charter ordinance proposed under the city's powers by virtue of the Home Rule Amendment (HRA) – Constitution of the State of Kansas, Article 12, §5(c)(3). As stated above, pursuant to the HRA, the opening clause should have been "Shall charter ordinance No. __, entitled (title of ordinance) take effect?" Instead, the petition's drafters used the phrase, "Shall the following ordinance or resolution become effective?" That is the opening clause stated in K.S.A. 25-3601(c). As mentioned above, K.S.A. 25-3601 applies to petitions protesting an adopted ordinance, but not to a charter ordinance.

In *City of Prairie Village v. Morrison,* the Court of Appeals found that error did not make the petition "fatally invalid". Instead, the court found the form of the question to be in substantial compliance. The Court stated, "we fail to discern a significant difference in meaning between "become effective" and "take effect".

In the case before this court the difference may be slightly greater. The Defendants used the phrase "Shall the following ordinance become effective?" as stated in K.S.A. 25-3601(c). Because the petition presents a proposed ordinance that has not yet been adopted, the statutes at K.S.A. 12-3013(b) and 25-620 indicate use of the opening words, "Shall the following be adopted?"

The words "be adopted" are more appropriate for a proposed ordinance that has not yet been considered and approved by the governing body. And the words "become effective" raise at least the implication that the ordinance being referenced has already been adopted by the governing body.

Generally, advocates of a proposed initiative desire a "Yes" answer to the question. And generally, advocates of a referendum or protest petition want to elicit a "No" answer. Both questions are answered by a simple "Yes" or "No". The opening clause in a well drafted petition is unlikely to be what confuses voters. The lengthier substantive language of the ordinance is much more likely to confuse.

It would have been better for the Defendants to use the phrase, "Shall the following be adopted?" Nevertheless, this court finds this part of the Defendants' drafting also satisfies "substantial compliance". **The Court will not reject the Defendants' petition based on the City's objection number 2.**

The City's objection number 3 as to form, is that the ordinance does not comply with the first sentence of K.S.A. 25-3602(a). "Each petition shall consist of one or more documents pertaining to a single issue or proposition under one distinctive title." The City complains that the petition does not satisfy addressing "one issue or proposition". Instead the City emphasizes that if the proposed ordinance were approved it would require multiple elections over many years. That is true. But the Court does not find that argument compelling on this point.

As to this objection, Defendants note correctly the City fails to refer the Court to any authoritative reference (appellate case, attorney general opinion, etc.). The Defendants assert that the "single issue or proposition" is whether its proposed ordinance shall "become effective". The Court thinks that analysis is misguided.

The Court reads the single issue to be more accurately summarized as:

> "If the City decides any prominent city owned building of historical importance or architectural significance (regardless of historic register status) should be demolished, replaced or otherwise adversely affected (or leased or transferred to someone else that will do that), should a public vote of approval be required before any adverse action can be taken."

Understood in this manner, the issue is singular and meets that statutory requirement of K.S.A. 25-3602(a). The City's 3rd objection to the form of the initiative petition is overruled. This completes a finding by the Court that the Defendants' petition "substantially complies" with the statutes as to form.[5]

---

[5] Careful readers accessing the City's Memo Supporting the Petition for Declaratory Judgment may notice on page 5 of that document, the City included a 5th objection to the form of the Defendants' petition. The City states: "Lastly, as discussed below, the ordinance is an administrative ordinance not subject to an initiative petition pursuant to K.S.A. 12-3013(e)(1)." The City again addresses this same objection more fully in Section III of their Memo as "The Ordinance is an Administrative Ordinance Which Cannot Be the Subject of an Initiative Petition". The Court will address this criticism of the City only once in Section B of this Court's Memorandum.

That leads directly to the City's remaining critiques of the initiative's subject, earlier labeled as B, C, and D. The opinion of the County Counselor was not required by statute to address the subject of the initiative petition. As he stated, his opinion letter was "not intended to indicate whether the content of the question is or is not appropriate under Kansas law."

But this Court must address the subject of the initiative petition.

B. Is the Defendant's Initiative Petition to the City Invalid Because It Addresses an "Administrative" Decision – K.S.A. 12-3013(e)?

K.S.A. § 12-3013 is one of the statutes of requirements for a voter initiative petition for a proposed ordinance. And the City's Memorandum argument particularly references the very brief subsection (e) of that statute.

> "K.S.A. Section 12-3013. Petition for proposed ordinance; requirements; passage or election; form of ballot; approval, effect; amendment or repeal; publication
> (e) The provisions of this section shall not apply to:
> (1) **Administrative** ordinances;
> (2) ordinances relating to a public improvement to be paid wholly or in part by the levy of special assessments; or
> (3) ordinances related to referendum or election under another statute. **[Emphasis added.]**

The City's argument here focuses on subsection (e)(1). Their briefing included no comment about subsections (e)(2) and (e)(3).

Summarized, K.S.A. 12-3013(e)(1) prohibits an initiative petition, like the Defendants', if it is administrative in character. Somewhat recently, the Court of

Appeals relisted the criteria to determine if an ordinance addresses an administrative decision and is therefore prohibited in a voter initiative. *City of Topeka v. Imming*, 51 Kan. App. 2d 247, 344 P.3d 957 (2015),

The *Imming* court relied on the factors set forth in *McAlister v. City of Fairway*, 289 Kan. 391, 399, 212 P.3d 184 (2009) to determine if an ordinance was administrative in nature.

> "Whether a proposed ordinance is legislative or administrative is often a difficult question to answer. *Lewis v. City of South Hutchinson,* 162 Kan. 104, 124, 174 P.2d 51 (1946). Across the country, courts frequently struggle to classify ordinances as either legislative or administrative."... As this court previously commented:
>
> > "An examination of the cases and legal authorities will disclose that the determination of whether a municipality has acted in its legislative or administrative capacity is indeed difficult and by no means consistent. Each case must be determined on its particular facts and even then there is no unanimity of opinion. Action based on one set of facts will be considered legislative in one jurisdiction while the same or similar action may be considered administrative in a different jurisdiction." *Rauh v. City of Hutchinson*, 223 Kan. at 522, 575 P.2d 517."
>
> "In Kansas, the initiative and referendum process under K.S.A. 12-3013 has long been judged on a more demanding basis than in some other locales. See *City of Lawrence v. McArdle,* 214 Kan. at 870, 522 P.2d 420 – ("[W]e have never adopted a 'liberal' view of the matters which should be subject to initiative and referendum, but quite the contrary."). *State, ex rel., v. City of Kingman*, 123 Kan. 207, 209, 254 P. 397 (1927) ("The tendency seems to be to confine the operation of similar referendum statutes with a considerable degree of strictness to measures which are quite clearly and fully legislative and not principally executive or administrative.").
>
> *McAlister v. Fairway*, at 401.

Therefore, the City accurately asserts Kansas Courts have limited initiative petitions with a significant degree of strictness to subjects that are clearly legislative and not principally executive or administrative. *City of Lawrence v.*

McArdle, 214 Kan. 862, 867, 522 P.2d 420 (1974). In the more recent case of *McAlister v. City of Fairway,* the Supreme Court states four factors to consider:

> 1. An ordinance that **makes new law is legislative**; while an ordinance that **executes an existing law is administrative**. Permanency and generality are key features of a legislative ordinance.
>
> 2. **Acts that declare public purpose** and provide ways and means to accomplish that purpose generally may be classified as **legislative**. **Acts that deal with a small segment of an overall policy question** generally are **administrative**.
>
> 3. **Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative**, even though they may also be said to involve the establishment of policy.
>
> 4. **If the subject is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state's designated agent for local implementation of state policy, the action receives an "administrative" characterization.**
>
> *McAlister v City of Fairway*, 289 Kan. at 403. **[Emphasis Added.]**

<u>The First Factor is whether the initiative would make new law or just execute an existing law</u>. The City admits that the proposed ordinance does create a new law because it requires the City to call for a special election whenever it decides to demolish, replace or adversely affect a public building of "historical importance or architectural significance". The Court would also note that the initiative has an intent of "permanence".

The Second Factor is whether the initiative intends to accomplish a broad public purpose or would only apply a policy to a small segment of a whole.

To the second criteria, the City asserts the initiative does not declare any public purpose. The City also claims though the number is uncertain, the initiative would only concern a small segment of the City's more than 540 buildings[6]. Surely the initiative phrase "of historic importance or architectural significance" would not refer to the overwhelming majority of the City's buildings. Indeed, if the phrase were defined[7] per Ms. Racette's testimonial reference to the City's Historic Preservation Board, then per Defendant's exhibit 10, only 15 structures are listed.

The Court does not completely agree with the City. Indeed, no public purpose is overtly stated in the initiative. But, Ms. Racette's testimony implied otherwise.

The Court asked Ms. Racette what language did supporters of the initiative use to stop citizens on the street for the purpose of gaining signatures to the Petition. She did not answer, "Do you want to Save Century II", as the name of the Defendant Committee would imply. Instead, she testified there was training given to the 400 persons who solicited signatures. The solicitors were specifically trained to begin the conversation by asking, "Would you like to have a voice in whether the City of Wichita demolishes historic buildings like Century II."

| | |
| | |

[6] The testimony and Affidavit of Ben Nelson, Interim Public Works Director, identified the number of 541.
[7] Later in this Memo and Order, this Court rules that the initiative's phrase "historic importance or architectural significance" is not defined. Moreover, what the City of Wichita's Historic Preservation Board (WHPB) lists in its "historic register" cannot control the definition of that phrase. That is due both to the initiative's lack of any reference to the WHPB and because the initiative excludes whether a building has "historic register status".

The Court believes that question at least implies a public policy. The apparent public policy was to gain the electorate a binding voice in a decision to demolish a city owned building of historical import or architectural significance.

As to the second criteria, the Court finds the initiative has both legislative and administrative features – a clear implied policy (legislative) and application to a small segment of the City's more than 540 buildings (administrative).

| | |

The Third Factor is whether the decision is one that requires specialized training, knowledge and experience and is therefore statutorily prohibited from a public vote as an administrative decision. Ben Nelson, Interim Public Works Director for the City identified by testimony and affidavit the many complex factors that the city would weigh in decision to demolish a building.

> "There are a number of complex factors that must be analyzed in determining the useful life of a public building. These factors include: long range plans for use, new potential uses for the facility, programming and space needs, costs to remodel or maintain the structure, available financing mechanisms and costs of such financing.
>
> "In funding and contracting for the construction and maintenance of City facilities, the City is require to comply with a number of statutory provisions, including, but not limited to Kansas Cash Basis law, K.S.A. 10-1101 et seq. and the Kansas Budget Law, K.S.A. 79-2935 (sic).
>
> "The complexity of long-term building maintenance decisions requires significant analysis to determine suitable decision options. The City analyzes building maintenance approaches using a Decision Support Tool comprising nearly 12,000 assets within more than 70 types of building systems. Each asset is assigned one of 29 different asset degradation curves based on current condition. Multiple scenarios spanning 40 years and different maintenance, rehabilitation, and replacement strategies are developed. These scenarios result in a maintenance approach to optimize risk and level of services under the available budget."
>
> City Exh. "E" – Affidavit of Benjamin C. Nelson, July 28, 2020.

The Kansas courts have found several similar ordinances to be administrative and improper for the initiative process.

In *McAlister v. City of Fairway*, 289 Kan. 391, 212 P.3d 184 (2009), citizens of Fairway, by initiative, advanced two proposed city ordinances. The first proposal restricted the City's ability to relocate its city hall to certain areas in the City. The second prohibited use of rezoning, eminent domain and condemnation proceedings in certain city areas. The Supreme Court found both ordinances to be administrative and excluded from use of the initiative process in K.S.A. 12-3013.

In *Wichita v. Kansas Taxpayers Network*, 255 Kan. 534, 874 P.2d 667 (1994), the court held that any ordinance seeking to repeal ordinances establishing a storm water management system were administrative. The court concluded: [T]he operation, management and financing of a city-wide storm management system reasonably fits within the context of decisions that require specialized knowledge and experience with respect to city management.

Courts are not bound by conclusions of attorney general opinions; however, the opinions are persuasive authority to assist courts to properly apply statutory provisions. *See Data Tree v. Meek*, 279 Kan. 445, 455, 109 P.3d 1226 (2005).

In 1999, Attorney General Carla Stovall's office state in a written A.G. opinion, "Determining the location of fire stations and whether to renovate existing fire stations or construct new fire stations to provide the best fire safety for a city involves administrative decisions of the city governing body". 99 Op. Att'y Gen. 59 (1999).

In 2007, Attorney General Paul J. Morrison's office issued the opinion, "a proposed ordinance ... prohibiting the extension of (Mulvane) city services to a casino located in Sumner County" is an administrative decision entrusted by the legislature to local officials and therefore not appropriate for the initiative process.

The City's evidence has established that a decision as to whether to demolish or maintain a building, like Century II has been described, is surely a decision which requires specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice. Therefore, by the third criteria, the initiative's subject is administrative in character.

<u>The Fourth Factor is whether the subject of the initiative is a matter of statewide concern for which the Kansas legislature has delegated decision making power to the local council and not to the local voters</u>.

In the case of *Rauh v. City of Hutchinson*, 223 Kan. 514, 575 P.2d 517 (1978) a citizen filed a lawsuit to stop the City of Hutchinson from issuing industrial revenue bonds to assist Cargill with financing plant improvements and expansion of an existing salt plant that had been recently purchased by Cargill. The salt plant apparently was old and in need of extensive repairs. The Supreme Court's decision in *Rauh* provides understanding of the application of the fourth criteria.

In 1961, the Kansas legislature approved an act intended to allow cities to encourage development of new or expanded business and industry through issuance

of "industrial revenue bonds. The legislature deemed encouragement of business or industry expansion would promote the general welfare of the state's citizens, presumably through opportunities for employment and community development.[8]

The Act authorizing city issuance of industrial revenue bonds places power to issue the bonds squarely on the shoulders of a city's "governing body". K.S.A. 12-1741 concludes by stating, the public or private facility directly benefited must be declared by "the governing body" to be one that "would promote the welfare of the city". K.S.A. 12-1743, states: "All details pertaining to the issuance of the revenue bonds and the terms and conditions thereof shall be determined by ordinance of the city..." Moreover, according to K.S.A. 12-1744, "The governing body of the city by ordinance... or resolution may pledge the facility and the net earnings therefrom to the payment of the revenue bonds and the interest thereon...." [Emphasis added.]

In *Rauh*, the Supreme Court found the Hutchinson City Commission's decision to issue industrial revenue bonds to assist Cargill to be an administrative decision, not subject to challenge by a voter initiative. However, the decision of the Supreme Court in *Rauh*, also provides guidance on this fourth criteria – whether the initiative addresses a matter of statewide concern for which the state legislature delegated decision making power to the city governing board and not voters.

The Court quoted 5 McQuillin, Mun. Corp. (3rd Ed.) §16.55, pp. 211-214:

> "§ 16.55 Legislative or administrative measures. The power of initiative or referendum usually is restricted to legislative ordinance, resolutions, or

[8] The Court is aware of the political debate that the issuance of industrial revenue bonds have at times been used to give preferential treatment by governing bodies to one corporate entity over another in the approval of the issuance of industrial revenue bonds. The Court recognizes that could be an unspoken concern of some of the signers of the Defendant's initiative petition. But that issue is far beyond the subject of the case before this Court.

> measures, and is not extended to executive or administrative action.... It has been said, however, **that if the subject is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state's designated agent for local implementation of state policy**, the action receives an 'administrative' characterization, hence is outside the scope of the initiative and referendum." **(Emphasis added.)**

Quoting also from 42 Am.Jur2d, Initiative and Referendum, Sec. 12, the Supreme Court affirmed:

> "If an act carries out an existing policy of a legislative body, it is administrative **whether the policy came into existence** in an enactment of the body itself, in the organic law creating the body, **or in an enactment of a superior legislative body**." **(Emphasis added.)**"

Both of these were true in *Rauh*. First, as this Court noted above, at least twice within the 1961 Act authorizing industrial revenue bonds, the legislature clearly stated issuance of industrial revenue bonds is **a decision for "the governing body"** of the city. In *Rauh*, that was the Hutchinson City Commission. Second, the governing body that set the policy authorizing the issuance of industrial revenue bonds was the "**superior legislative body**" – the Kansas Legislature.

As the Plaintiff's brief states: "Municipal corporations are creations of law and can exercise powers conferred only by law. *Yoder v. City of Hutchinson*, 171, Kan. 1, 8, 228 P.2d 918 (1951). K.S.A. 12-101 expressly states that cities have the power to "purchase ... and hold, real and personal property" and "make all contracts and do all other acts in relation to the property and concerns of the city." The powers of the city are exercised by the governing body of the city, in this case, the mayor and city council. *See:* K.S.A. 12-103, 12-104."

The City's brief is also correct in its assertion on page 10 of its brief:

"The legislature has delegated to ***(the city officers)*** the power to dispose of city property in a manner conducive to the city's interest. *City of Argentine v. State*, 46 Kan. 430, 435***(-436)***, 26 P. 751 (1891). K.S.A. 12-1739 allows cities to sell public buildings "upon such terms and in such manner as the governing body may deem to be in the best interests of the City." *See also*: ***(...)*** K.S.A. 12-1773 (sale of property acquired by a city pursuant to a redevelopment plan); ***(...)*** and K.S.A. 12-17,104 (sale of property upon dissolution of municipal improvement district." (City's Memorandum, p. 10, ***as amended by this Court.***)

At this point, the analysis of this fourth criteria – whether the subject of the voter initiative is administrative and therefore prohibited from challenge by voter initiative – bleeds into the City's argument that the initiative petition is void because it exceeds the City's authority to call for a binding election.

C. Is the Petition to the City Void as exceeding the City's Authority to Call for a Binding Election?

Earlier in finding the initiative petition to meet substantial compliance as to form, the Court found the issue asserted in the petition to "substantially comply" with the requirement that the initiative address only one issue as required by K.S.A. 25-3602(a). To quote this Court from early in this decision,

"The Court reads the single issue to be more accurately summarized as:

> 'If the City decides any prominent city owned building of historical importance or architectural significance (regardless of historic register status) should be demolished, replaced or otherwise adversely affected (or leased or transferred to someone else that will do that) it can't be done unless a public vote approves it.' "

Understood in this manner, the issue of the initiative petition is singular.

However, it is also clear that the Defendants intend by the initiative to mandate that no "historically important or architecturally significant" "city owned building" may be demolished replaced or otherwise adversely affected" without a binding election that will either approve or veto such a decision by the city council.

What the City's third argument asserts is that even if the issue is singular, the implementation of the ordinance will require multiple binding elections. And such future binding elections are not within the city council's authority to call. On this point, the Court agrees with the City.

Article 4 of the Kansas Constitution provides "all elections by the people shall be by ballot or voting device or both **as the legislature shall by law provide**." Art. IV, Kansas Constitution, Section 1. (**Emphasis added**.) With that language, the Constitution restricts the authority for an election must come from the Kansas legislature.

The call of a single binding election as the result of a qualified voter initiative petition is certainly authorized by the legislature in K.S.A. 12-3013. However, the Defendants' initiative petition attempts to mandate future binding elections whenever the city wants to demolish a historically or architecturally significant building. Those elections would involve buildings other than Century II and the former library. And those elections would lack the qualifying percentage of voter' signatures to be authorized by K.S.A. 12-3013. Moreover, the city governing board lacks statutory authority to call such a future binding election on their own.

Cities do not have any inherent authority themselves to call a binding election of their citizens. Cities can only implement binding citizen elections under specific authorization from statutes enacted by the Kansas Legislature.[9]

The City asserted in oral argument that there are less than five circumstances in which the Kansas Legislature has delegated authority to city governing boards to call a binding election. According to the City's Memorandum brief, this issue was most recently addressed by the appellate courts in *Bissessarnath Ramcharan-Maharajh v. Gilliland*, 48 Kan. App. 2d 137, (at 141), 286 P.3d 216 (2012).

> "Initiatives in Kansas are authorized by one broad statute, K.S.A. 12–3013. But referendums, brought about by protest petitions, are authorized by about 40 different statutes concerning specific subjects. Protest petitions are most commonly used to force a referendum when a city government authorizes a tax or a bond issue. See K.S.A. 12–137; Heim, Kansas Local Government Law §§ 5.70, 5.90–5.91(4th ed. 2009). Ramcharan points to no subject-specific statute authorizing a referendum here."

The City asserts a similar result is mandated here. Cities do not have any inherent authority themselves to call a binding election of their citizens. Cities can only implement binding citizen elections under specific authorization from statutes enacted by the Kansas Legislature. And the city council also lacks the authority to adopt an ordinance that would create multiple binding elections where no new voter initiative has obtained sufficient signatures for a new initiative to submit to a

---

[9] This United States and the 50 states are often asserted to be a democracy. The assertion is true. However, there are two types of democracy: direct and representative. In direct democracy, citizens directly deliberate and decide on laws. In a representative democracy, the citizens elect representatives to write the laws. This distinction that the federal government and the 50 states are representative democracies may not be universally understood by citizens.

But were the U.S. not a representative democracy, approval of legislation would likely be slower. Citizens would be inundated by nationwide or statewide elections that would consume life and likely bring national productivity to a complete halt. We can thank the nation's founders that is not the case. Creation of laws in the U.S. is placed with democratically elected representatives. Citizens may be justifiably frustrated by political stalemate or stagnation. But had this nation been a direct democracy, the United States would likely not have survived its birth.

binding election. As a matter of a statewide policy, the Kansas Legislature has not written any statute that authorizes a city council by a single ordinance or a single voter initiative to establish multiple binding elections.

The Court notes that this holding is a little different than the argument made by the City. However the Defendant's Memorandum in Opposition gave no response or argument to dispute the City's claim that the initiative petition is void because it exceeds legislative authority to call a binding election.[10]

Based on the four criteria set forth by the Kansas Courts and opinions of the Kansas Attorney General's Office, this Court rules that the ordinance proposed by the initiative petition addresses an administrative decision and therefore is a prohibited subject for the initiative process set forth in K.S.A. 12-3013.

And this Court further rules that the proposed initiative ordinance is void because it exceeds the city council's authority to approve an ordinance that mandates multiple binding elections. On this matter of statewide concern, the Kansas Legislature has not by statute given cities authority to establish such future elections.

D. Is the Defendants' Petition Unconstitutionally Vague or Overbroad?

This Court is not certain that this issue even need be addressed. The Court has ruled above that the Defendant's initiative petition is invalid under statute

[10] There is a likely and reasonable rationale for this restraint by the Kansas Legislature. Authorization of such a statute could subvert state legislative authority and destroy the constitutional creation of representative democracy in the Constitution of the State of Kansas.

prohibiting a voter initiative from addressing decisions that are administrative in character. And the Court has also ruled that Defendant's initiative petition is void because it would mandate future binding elections without authority from the Kansas Legislature.

"[A]n appellate court will not reach a constitutional issue unless it is necessary to dispose of the appeal. Stated differently, "where there is a valid alternative ground for relief, an appellate court need not reach constitutional challenges." *Wilson v. Sebelius*, 276 Kan. 87, 91, 72 P.3d 553 (2003), as cited in *Bryant v. Kansas Department of Revenue*, 416 P.3d 1045 (2018).

In case an appellate court would reverse this Court's decision on the two rulings just mentioned and to avoid a potential rehearing on this constitutional issue, this Court will give its analysis of these constitutional arguments.

This Court would find that the initiative petition is unconstitutionally vague and overbroad as written. Without definition referenced or contained in the language of the initiative, the Court finds the words "historically important or architecturally significant" to be unconstitutionally vague. The Court also finds the words "adversely affected" to be unconstitutionally vague and overbroad.

By testimony of Ms. Racette, the Defendants argued the words "historically important or architecturally significant" would be understood by the City's Historic Preservation Board (HPB) and reasonably defined in the context of City Code § 2.12.1015 et seq. A definition of "historic resource" in Code § 2.12.1016 could have been referenced in the initiative petition and that would have been sufficient.

However, at the time the initiative petition was drafted in January 2020 and when signatures were solicited through early June 2020, neither Century II nor the former Public Library was listed on the Wichita Register of Historic Places or any other register of historic places. Listing on that Register is an act of both the HPB and the City Council according to the same Code section.

Presumably because of that, the initiative's language specifically excludes the HPB definition and listing on the Wichita Register by the parenthetical language "regardless of historic register status". That language would also exclude definition of the phrase and absence of listing in the Kansas or National Registers of Historic Places. By that exclusion the initiative declares that some other unstated definition is meant. What such definition means unfortunately was left purely to conjecture and to the opinions of 17,265 signers of the petition. A court deciding the issue would have no dictionary of reference.

The Petition was presented to the City Clerk on July 10. Three days later on July 13 the HPB nominated Century II and the former Public Library to the Wichita Register of Historic Places. And on August 1, the Kansas Historic Sites Board of Review (KHSBR) followed suit by voting to grant historical status to the two buildings. The Defendant Celeste Racette was one of the proponents of historical status for Century II by the KNSBR.[11]

[11] The efforts of Ms. Racette, Mr. Peterjohn and the approximately 400 solicitors supporting the Defendants initiative Petition must be acknowledged as a major accomplishment by citizen action. On the second day of the trial of this case, the City Council voted to submit demolition of Century II and the former Public Library to a non-binding citywide vote before the City takes any action to demolish those buildings. That result is in no way a hollow victory for the citizen supporters of the Petition. But it is not the binding election of protection that they desired.

Those are significant accomplishments. However, the decisions of both the Wichita HPB and the KHSBR now further confuse definition if an election were now to be called on the Defendant's petition as drafted. And neither this Court nor the City Council has the power or authority to change the language of the initiative petition. K.S.A. 12-3013(a).

Regarding the phrase, "adversely affected" there is no definition included or referenced in the initiative. And the Court was given no reference in oral argument to any other source. The phrase must necessarily mean something less than demolished, but interior remodeling work could potentially be argued to be an adverse affect. For that matter, changing the color of Century II's roof to a different shade of blue could be argued to be an adverse effect. This Court doubts that was intended. But if faced with an argument of the meaning, neither the City nor a Court would have any stable, reliable point of reference.

For these reasons, this Court would rule that the initiative petition is unconstitutionally vague and overbroad, as drafted.

VI. SUMMARY CONCLUSION OF THE COURT'S RULING ON THE CITY'S PETITION FOR A DECLARATORY JUDGMENT.

The Court finds the Defendants' initiative petition to be sufficiently valid as to form.

However, the Court rules the Defendants' initiative petition is invalid and prohibited by K.S.A. 12-3013(e)(1) because it proposes an administrative ordinance.

The Defendants' initiative petition is also void because it exceeds legislative authorization to call for future binding elections in violation of a statewide policy.

And if necessary, the Court would find the Defendants' initiative unconstitutionally vague and overbroad because it fails to give definition to its use of "historically important and architecturally significant" and "adversely affected".

For the reasons stated above, Plaintiff's Petition for a Declaratory Judgment is GRANTED.

The City of Wichita has no obligation to take any further action to respond to the Defendants' initiative petition filed July 10, 2020. This decision has no effect on and cannot deter any subsequent initiative or ordinance approved after that date. Such initiative or ordinance would be subject analysis on its own merit.

| | |
| | |

VII. DEFENDANTS' MOTION TO DISMISS: ANALYSIS & RULING.

As mentioned above, the Court denied the Defendants' Motion to Dismiss orally on the record during the hearing, after hearing related argument by counsel on that issue.

The Motion to Dismiss was the first document filed in this case by the Defendants on August 3, 2020, five days after the City Attorney's Office filed the Petition for Declaratory Judgment on July 29, 2020. The Defendants' Motion to Dismiss argues that the lawsuit filed on behalf of the City was initiated without proper approval of the Wichita City Council.

The power to sue and to be sued is one of the corporate powers specifically granted to cities in Kansas in K.S.A. 12-101, pursuant to cities' powers of home rule established by the Constitution of Kansas, Art. 12, Sec. 5. And as the Defendants assert, a city's power to sue must be exercised by the governing body of the city. The "governing body" of the City of Wichita is the seven member City Council.

The Court finds and rules the City of Wichita has the right to sue. And the Court finds and rules for the purpose of filing a lawsuit or responding to a lawsuit, the City Attorney's office is an appropriate agent of the City to take such action.

The Defendants further argue that the City Attorney, as an agent of the City, filed the lawsuit without authorization or ratification by the city council (the city's governing body). The Defendants assert in the Motion to Dismiss filed August 3, 2020, that no such authorization had been given by the City Council or ratified by the City Council.

> "Municipal government authority in Kansas is exercised by council members voting, in open meetings, on the various ordinances, resolutions, and motions that the issues of the day bring before the council.... While authority to act is often delegated to various agents, their actions cannot bind [51 Kan.App.2d 253] the City to a particular position or action unless the Council has authorized the agent to so act **or has ratified the agent's act after the action has taken place.**
>
> "Generally, in order to constitute ratification, there must be some affirmative action approving the action.... In the law of agency context, which is appropriate here, Black's Law Dictionary 1452 (10th ed. 2014) advises that ratification is "[t]he affirmance of someone's prior act, whereby the act is given the same effect as if it had been done by an agent acting with actual authority." *City of Topeka v Imming*, 51 Kan. App. 2d 247, at 252-253 (2015).

Along with the City's Response to the Motion to Dismiss, the City filed an Affidavit of Karen Sublett, the City Clerk, asserting that at the meeting of the City

Council on August 4, the City Council ratified the filing of this lawsuit. Ms. Sublett has attached to her Affidavit an Exhibit "A", which is a certified copy of item IX recorded in the minutes of the City Council Proceedings of that date. The Court accepts and admits this Affidavit of the City Clerk Karen Sublett and the attached City Exh. "A" as evidence in this hearing.

From Exhibit "A" the Court can clearly discern that the circumstances of the lawsuit were discussed by the council with detail. The minutes further record that Mayor Whipple's motion to ratify the filing of this lawsuit passed by a vote of 7-0. The Court finds and rules that the filing of the lawsuit on July 29, 2020, was ratified by the City Council at its next meeting on August 4, 2020.

The Defendants' argue that ratification had to be taken in an open meeting. The Defendants further assert that the vote or ratification taken on August 4, was not on a published Agenda for that meeting and such was necessary to comply with the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*

The City's Response asserts that the meeting on August 4 was in fact an open meeting. Pursuant to 60-409(a) this Court takes judicial notice that August 4, 2020 was a Tuesday and that it is general knowledge universally known in Wichita that the City Council's regular meetings are every Tuesday (barring a holiday).

In addition, the City also asserts two reasons that the action did not have to be taken at an open meeting. First, if the City's direction to legal counsel had to be placed on a public agenda, that would always require a city to waive its right to the privilege for protected attorney-client communication afforded by K.S.A. 60-426.

KOMA specifically authorizes executive session of the council to confer with legal counsel. K.S.A. 75-4319. The Court finds this argument to be valid as a protection or attorney-client privilege.

Second, that KOMA does not require that all decisions or positions of governing bodies occur during an open meeting. The City's response references the statement in K.S.A. 75-4319(a) "no binding action by such public bodies or agencies shall be by secret ballot".

The City further claims the term "binding action" is undefined by KOMA or by any Kansas court case. In support, the City references that an Opinion of the Attorney General defines "binding action" to be an action or decision that is "legally enforceable" and equivalent to a "final action". The City then asserts that the filing of a lawsuit is neither "legally enforceable" nor is it a "final action".

The Court finds to be true that the filing of a lawsuit is not by its nature a "final action". Filing suit could more appropriately be called a "first action". Lawsuits are often resolved without court action by agreement of the parties without need of court approval or even dismissed without a formal response. Per K.S.A. 60-241, a lawsuit can be dismissed by the plaintiff without an order of the court "by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs".

The Defendants' Answer was not filed until August 14, 2020. Even if the Defendants' Memorandum in Opposition to the City's Petition for Declaratory Judgment could be considered as an "answer", the Defendants' Memo was not filed

and served until August 13, 2020." The City's Council's ratification of the filing of the lawsuit occurred on August 4, 2020, nine or ten days earlier. Had the City Council not ratified the lawsuit filing on August 4, 2020, the City could have voluntarily dismissed the lawsuit before the Defendants ever filed their Memo and Answer. This Court regularly approves voluntary dismissals of lawsuits a number of times every week in advance of a defendant filing any answer.

The Court also finds that if approval of the filing of the lawsuit had to occur in a public meeting of the City Council, the 7-0 ratification vote on August 4, 2020 satisfied that requirement.

In their Motion to Dismiss, Defendants assert, "The Declaratory Judgment Petition does not allege that the Wichita City Council affirmatively voted to authorize or approve its filing in an open meeting." The Court is unaware of any requirement that such had to be alleged in the City's Petition.

The City believes that by asserting the lack of a claim of authorization in the Petition, the Defendants are thereby claiming the City of Wichita lacks standing to file this case or that this Court lacks subject matter jurisdiction.

Kansas law provides that in order to have standing, a party must satisfy any statutory standing requirements and meet the traditional test for standing. *Friends of Bethany Place v. City of Topeka*, 297 Kan. 1112, Syl. 2, 307 P.3d 1255 (2013). Generally, to demonstrate common-law or traditional standing, a person suing must show a cognizable injury and establish a causal connection between the

injury and the challenged conduct. *Sierra Club v. Moser*, 298 Kan. 22, 29, 310 P.3d. 360 (2013).

K.S.A. 25-3601(b) establishes that any "person" [including the City] can challenge a petition requesting an election, which the Defendants' Petition does. The City's Petition Memo is easily understood to claim that the Defendants have not complied with the requirements for a "petition for an election" and that if the election goes forward the City could suffer injury by the costs of maintaining buildings regardless of condition, economy and risk without the potential to demolish, replace or adversely affect certain buildings.

Regarding common-law of traditional standing, the Court finds that a case and controversy clearly exists between the parties.

The City of Wichita filed their Petition for Declaratory Judgment on July 29, 2020. The Motion to Dismiss was the first document filed in this case by the Defendants on August 3, 2020, five days later. On Friday, August 14, 2020, three days before this Monday morning hearing, the Defendants filed a Motion for Leave to File Reply to the City's Response to the Motion to Dismiss. The Court notes that the Defendants did not deliver a copy of the Motion for Leave to the Court until 11:57 a.m. on Friday, August 14, 2020. And the Defendants did not obtain from the Court nor include a notice of a time and date for hearing as is required by 18th Judicial District Local Rule 202(a) for pre-trial motions. Nevertheless, the Court reviewed the Motion for Leave to File Reply and the Defendants' Reply brief.

Therein, the Defendants assert:

> "6. Under the City's own Code and specifically with respect to the conduct of its City Council's open or "public meetings," however, the City's "ratification" contention is misplaced. Specifically, under its Code, and so that "the public may be informed as to the matters to be considered and may have an opportunity either to prepare themselves or to be present for such purposes as may be appropriate," all City Council meetings "shall be strictly conducted in accordance with a written agenda" that is to be "made public in advance" of the meeting, **absent "the most unusual circumstances."** See Code of the City of Wichita, § 2.04.230. C -- "Agenda," (emphasis added and in original)...."
>
> "8. The published agenda neither discloses nor otherwise mentions the City Council's purported "ratification" of the City's previously filed Declaratory Judgment Petition as a potential "matter to be considered" during the August 4, 2020 City Council meeting. Nor does it disclose or mention that subject matter generally."

The Court is not certain that these arguments are ripe or that it is necessary for the Court to decide such a claim without time for the City to respond and without adequate time for the Court to examine the issue. The Court believes that if either party lodges an appeal after this ruling of the Court, the Defendants should be permitted to raise this argument if proper under appellate court rules and if this issue needs to be fully addressed.

The Court finds, the circumstances for this hearing are certainly of "the most unusual circumstances". K.S.A. 12-3013(a) limits the City to 20 days to pass a petition for a proposed ordinance or immediately call a special election. Alternatively, pursuant to K.S.A. 25-3601(e) the City can file a lawsuit in district court to challenge the validity of the initiative, within the same 20 days after the initiative is filed. And pursuant to K.S.A. 25-3601, the court is required to render an opinion on the case within 20 days after the suit is filed.

Such an expedited filing and decision process is extremely unusual when compared to statutes of limitation. (K.S.A. 60-501 *et seq.*) Chapter 60 lawsuits (including declaratory judgments) commonly allow a period of at least 20 days just for the filing an answer – a defendant's first action. [K.S.A. 60-212(a)].

> [The Court notes that all pleadings filed in this case fail to refer to Sup. Ct. Adm. Order 2020-PR-058, which is currently valid. That Supreme Court Order provides in Section 1 that "All statutes of limitation and statutory time standards or deadlines applying to the conduct of judicial proceedings are suspended". That order was first initiated on March 18, 2020, in response to the Covid-19 pandemic. The order is still in effect. Therefore, the 20 day time limits stated in statute remain suspended.]

If a ruling by this Court on the Defendants' argument asserted in the Reply is necessary, then the Court rules as follows:

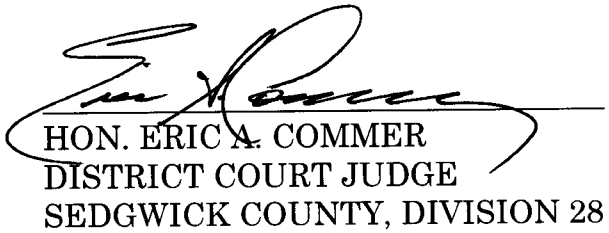
First, the expedited time requirements for the City's response and Court action on lawsuits challenging a voter initiative or referendum certainly satisfy the description of "the most unusual circumstances in Code of the City of Wichita, § 2.04.230. C -- "Agenda,"

Second, the governing body of the City of Wichita should be entitled to the same attorney/client privilege of communication as any other party to a lawsuit. Though the ratification of the lawsuit filing was not listed on a formal city agenda, the City's right of attorney/client privilege should be sufficient to exempt the ratification of a filed lawsuit from a public agenda under these expedited circumstances. The Court considers that such would be a reasonable exemption to KOMA and from any requirement of the City's ordinance requiring inclusion in a written agenda.

As a final point to resolve the Defendants' Motion to Dismiss, the Court notes motions to dismiss are not generally favored under Kansas law. Moreover, decisions on the substantive issues of cases are preferred to decisions decided by technical procedural arguments.

For all the reasons stated above, the Defendants' Motion to Dismiss was DENIED.

IT IS SO ORDERED.



HON. ERIC A. COMMER
DISTRICT COURT JUDGE
SEDGWICK COUNTY, DIVISION 28

CERTIFICATE OF DELIVERY

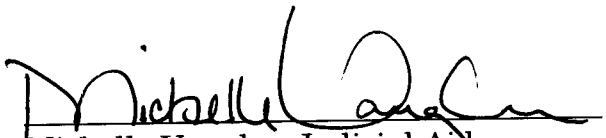
Copies of the Foregoing Memorandum Decision and Order were mailed/emailed on August 28, 2020, to the following persons:

Sharon Dickgraffe
Chief Deputy City Attorney

Karl Peterjohn, Defendant

Christopher Snow
Attorney for Defendants

Celeste Racette, Defendant



Michelle Vaughn, Judicial Aide
Sedgwick County District Court, Division 28