

**A PRIMER ON
KANSAS LAWS ON CITY AND
COUNTY LAWMAKING POWERS**

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A. INTRODUCTION: PURPOSE AND SCOPE OF THIS PRIMER

1. This primer is intended to help citizens who are interested in knowing the extent to which, and how, city and county governments can play a role in regulating the use of tobacco products. It has been updated to take into account the June 2007 decision of the Kansas Supreme Court in *Steffes v. City of Lawrence* which upheld a challenged city ordinance regulating smoking, and confirmed the legal authority of local governments to adopt antismoking regulations which go so far as to prohibit smoking in public places and places of employment.
2. The following materials cover, in a greatly abbreviated fashion, the following subjects:
 - a. Section B covers the legal authority Kansas cities and counties have to regulate people and conduct. Emphasis is upon the authority to regulate on matters affecting public health (e.g., smoking), and the sources of that authority. The full range of the Home Rule powers of cities and counties to pass laws to protect public health is addressed very briefly, and only to the extent immediately relevant to this primer. The *Steffes v. City of Lawrence* decision is discussed here. That decision concerns both a city's Home Rule powers and its powers under the State's statutes regulating smoking in public places.
 - b. The state laws on the subject of smoking in public places (K.S.A. 21-4009:4013) are discussed in Section C, with emphasis on the State's recognition of the authority of any city or county to adopt laws on smoking in public places (K.S.A. 21-4013).
 - c. Section D outlines how city ordinances and county resolutions are passed into law, with discussion as to the procedural steps that must be followed.
 - d. Section E addresses the Kansas Initiative and Referendum Law – the state law that allows for citizens themselves to initiate city laws – either to put a new law on the books, or to amend or repeal an existing city law. This initiative law affects only cities – neither counties nor the state have similar laws for citizen-initiated legislation.

B. LEGAL AUTHORITY TO ACT

1. Both cities and counties have to have a source of legal authority for any action they take. That authority must come from the State, either via the

Kansas Constitution or by laws passed by the Kansas legislature – Kansas statutes.

2. Both cities and counties are what are known as political subdivisions, or creatures, of the State. As such they are dependent upon the State for their existence, structure and scope of powers. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).
3. The Kansas legislature holds great power over cities and counties, and can expand or limit the powers cities and counties have. The legislature created cities and counties and can eliminate them. The extent of the power of the legislature over cities and counties is limited only by the restrictions the legislature has imposed upon itself, and also by restrictions found in the Kansas Constitution that restrict the legislature's powers over cities.
4. Home Rule is the single most important source of a city's or county's legal authority to act. Home Rule is a broad grant of power whereby cities and counties can govern themselves by enacting and administering laws concerning local matters. The Home Rule powers of cities (Article 12, Section 5 of the Kansas Constitution) is particularly broad and powerful, as it comes via vote of the people, i.e., a state constitutional amendment. By contrast, County Home Rule (K.S.A. 19-101a *et seq.*) was created by act of the Kansas legislature, so it can be narrowed or even removed, whenever the legislature chooses to do so.
5. Prior to adoption of constitutional Home Rule for cities (1960) and statutory Home Rule for counties (1974), local governments were totally dependent upon the state legislature to pass laws to authorize them to act on a particular subject in a particular way.
6. In addition to Home Rule, cities and counties may find legal authority to take action – such as adopting local laws regarding use of tobacco – from state laws known as enabling legislation or enabling acts. Those laws are Kansas statutes, cited as K.S.A. or Kansas Statutes Annotated. In short, in addition to anything that can be lawfully done by Home Rule, a city or county can do anything it is authorized, or enabled, to do by Kansas statute. Of relevance to this primer, K.S.A. 41-4013 of the State's smoking regulation law is enabling legislation authorizing cities and counties to adopt local laws “more stringent” than the State's laws.
7. The powers exercised by cities and counties can be classified into several general categories, such as the power to tax, to acquire property by eminent domain, or to undertake public improvements. The power to protect public health, for example by regulating use of tobacco, is known as the police power.

8. The police power is a very broad power of city and county government, encompassing health and sanitation regulations, public safety, land use regulations and public offenses (i.e., crimes). The police power is so broad a concept that it defies a precise definition, but the U.S. Supreme Court in 1954 said:

An attempt to define its reach or trace its outer limits is fruitless... Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power...

Berman v. Parker,
348 U.S. 26, 32 (1954)

9. Any exercise of the police power is subject to constitutional and statutory restrictions upon how, when and why the power is exercised by a unit of government. One restriction comes from the U.S. Constitution's prohibition that a government cannot "deprive any person of life, liberty, or property, without due process of law." Another is the U.S. Constitution's "Takings" clause, which prohibits governments from taking private property for public use in certain situations without the payment of just compensation. Another constitutional standard is Equal Protection, which prohibits local governments from certain discriminatory actions.
10. Another test any exercise of the police power must pass is the test of reasonableness. In brief, this means police power regulations must not be oppressive, unreasonable or unnecessarily interfere with common rights. Part of the test for whether a law is reasonable is whether there is some logical means-end relationship, i.e., does the regulation (the means) bear some rational relationship to the stated objective (the end)?
11. Prior to Home Rule, the Kansas legislature passed numerous laws to empower cities and counties to act to promote public health. For example, K.S.A. 19-212 authorizes counties to enter into contracts for the protection and promotion of public health. K.S.A. 14-401 empowered cities to pass laws "...for...the health of the inhabitants thereof." That latter statute, and many others like it, became obsolete upon the adoption of Home Rule, and has been accordingly repealed. Currently cities and counties have ample authority under Home Rule to adopt reasonable laws on the subject or protection of public health. However, laws passed under the authority of Home Rule must not conflict with state laws on the same subject.
12. *Steffes v. City of Lawrence*, 284 Kan. 380 (2007): The Kansas Supreme Court upheld a city ordinance against challenges that the city had no authority to adopt the ordinance, and that the ordinance was

unconstitutionally vague. This 2007 decision is of importance because it so definitively expressed the extent of local government power to regulate – even prohibit – smoking.

- a. In 2004 the City of Lawrence passed Ordinance No. 7782 which prohibited smoking in public places and places of employment. The ordinance placed certain duties on any “person having control of” buildings or other places “where smoking is prohibited.”
- b. Steffes, the owner of several bars in Lawrence, challenged the ordinance (1) as being “preempted” by the state law’s regulation of smoking in public places, and (2) as unconstitutional because the terms of the ordinance were vague.
- c. Steffes’ preemption argument was that because K.S.A. 21-4010(b) authorizes business proprietors to designate smoking areas, a city is preempted from adopting an ordinance which totally bans smoking in areas in a business establishment. In a nutshell, Steffes argued that a city ordinance cannot prohibit an activity authorized by state law. Steffes acknowledged that K.S.A. 21-4013 empowers cities to adopt smoking regulations more stringent than the State’s law – but argued that an absolute prohibition goes beyond being “more stringent,” as allowed by K.S.A. 21-4013, and is therefore preempted by the state law.
- d. The Supreme Court had little difficulty disposing of Steffes’ preemption argument. The Court held:

We primarily reject Steffes’ conflict-based preemption argument because of the plain language in K.S.A. 21-4010(b). In allowing a proprietor to designate smoking areas “except in...any...place in which smoking is prohibited by...ordinance,” the legislature impliedly acknowledges that through an ordinance, a city can prohibit smoking in public places. With ordinance No. 7782, the City has done precisely that.

We conclude that under this statute [K.S.A. 21-4013], the legislature has invited cities to regulate smoking in public places to the maximum extent possible, *e.g.*, “the more stringent local regulation shall control to the extent of any inconsistency between such regulation and this act.” K.S.A. 21-4013. In our view, “stringent regulation” can certainly include “absolute prohibition,” *i.e.*, the most stringent regulation of all. Stated another way, the legislature has set a floor, but not a ceiling, for how much a

city should regulate smoking... We further reject Steffes' attempt to limit the legislature's use of "stringent" by excluding "prohibition" because his interpretation would certainly contradict the legislature's acknowledgement of the cities' authority contained in K.S.A. 21-4010: prohibition of smoking by ordinance.

- e. In short the Kansas Supreme Court in the *Steffes* case simply applied longstanding Home Rule caselaw to the subject of state-local regulation of smoking, and concluded, as the Court has consistently held since 1975 in the *Junction City v Lee* case, that where both a local law and the statute are prohibitory and the local law goes further in its prohibition but not counter to the state prohibition, there is no conflict.
- f. Steffes also challenged the constitutionality of the Lawrence ordinance on vagueness grounds. He argued that the ordinance failed to require "intent" on the part of a business owner to allow smoking to occur in violation of the ordinance. Also, Steffes argued the ordinance was vague because it failed to specify what conduct by the business owner is prohibited.
- g. In an analysis too detailed to set forth here, the Court came down firmly on the side of the wording of the Lawrence ordinance:

We conclude that Steffes' vagueness argument fails. The City's ordinance conveys sufficient definite warning and fair notice as to the prohibited conduct in light of common understanding: allowing smoking in prohibited places by knowledge that it is occurring and acquiescence to it as determined under the totality of the circumstances. The ordinance also conveys sufficient clarity to those who apply its standards to protect against arbitrary and discriminatory enforcement.

C. KANSAS LAWS ON SMOKING

- 1. Since 1987 Kansas has had a handful of laws on the books that regulate smoking in public places. Those statutes are found at K.S.A. 21-4009:4013.
- 2. In brief, state law prohibits smoking in a public place or at a public meeting except in designated smoking areas. Designation is by a proprietor or other person in charge of a public place.

3. Certain areas cannot be designated as smoking areas, such as elevators, or mass transit vehicles and other places prohibited by the state fire marshal or by other state, federal or local law.
4. Definitions are, of course, essential to understanding the scope of the state's laws. Among the terms defined in the State's law are:
 - a. **Public place** means enclosed indoor areas open to the public or used by the general public including but not limited to: restaurants, retail stores, public means of mass transportation, passenger elevators, health care institutions or any other place where health care services are provided to the public, educational facilities, libraries, courtrooms, state, county or municipal buildings, restrooms, grocery stores, school buses, museums, theaters, auditoriums, arenas and recreational facilities.
 - b. **Public meeting** includes all meetings open to the public.
 - c. **Smoking** means possession of a lighted cigarette, cigar, pipe or any other lighted smoking equipment.
5. Where smoking areas are designated "...existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent nonsmoking areas."
6. Proprietors or others in charge of public places are required to post signs showing where smoking is prohibited and where, if at all, it is allowed. State law does not limit the percentage of area in a public place that can be designated as a smoking area.
7. For cities and counties the most important provision in these state statutes is K.S.A. 21-4013 which provides:

Nothing in this act shall prevent any city or county from regulating smoking within its boundaries, so long as such regulation is at least as stringent as that imposed by this act. In such cases the more stringent local regulation shall control to the extent of any inconsistency between such regulation and this act.

This Kansas statute eliminates any question as to the authority of cities and counties to pass laws on the subject of smoking in public places. Without it an argument could be raised that such local lawmaking authority had been preempted by the State's lawmaking, and consequently only the Kansas legislature could pass laws on this

subject. The significance of K.S.A. 21-4013 was spelled out by the 2007 Kansas Supreme Court decision in *Steffes v. City of Lawrence*.

D. THE ADOPTION OF LOCAL LAWS

1. As explained in Section B, above, whenever cities or counties pass a law, they must have not only the legal authority to pass that law, the law itself must be able to survive challenges to its reasonableness, and must meet constitutional standards of Equal Protection, Compensable Takings, etc. In addition, to be valid and enforceable, any law passed by a city or county must follow the statutorily-established *procedures* for adoption of laws. Generally, those procedures are all found in the Kansas statutes, although a given city or county may have adopted additional procedural rules which it must follow. In short – to be a valid, enforceable law, a local law must have been lawfully adopted.
2. Laws passed by elected city governing bodies (city councils or city commissions) are *ordinances*. Laws passed by the elected boards of county commissioners are *resolutions*. City governing bodies sometimes adopt resolutions as well, however; with limited exceptions city resolutions have no force of law. Whenever “resolution” is used in this document, it means a county-adopted resolution. “Ordinance” always means a city-passed law.
3. Obviously local laws can only be passed by the locally-elected governing bodies. No other local body or official can adopt laws. This is true even with respect to the Initiative and Referendum Law because, as explained in Part E below, laws cannot be adopted under that procedure without action by the city governing body. Ordinances (with exceptions not relevant to the subject of public health) apply only to people, property and activities within the city’s corporate limits (the incorporated area). While counties do have some authority to adopt health-related codes countywide, generally counties limit the applicability of their resolutions to people, property and activities outside the corporate limits of cities (the unincorporated area).
4. Ordinances remain in effect until amended or repealed by another ordinance, and county resolutions likewise are in effect until amended or repealed by another resolution. A city ordinance cannot be amended or repealed by a resolution or by a simple motion. A county resolution, likewise, cannot be amended or repealed by a simple motion. To amend a city ordinance requires passage of another ordinance. To amend a county resolution requires passage of another resolution.

5. Some of the general State laws regarding ordinances are found in K.S.A. 12-3001, *et seq.* And county resolutions in K.S.A. 19-101 *et seq.* Among these are:
 - a. **Numbering.** Local laws are to be assigned a number.
 - b. **Title.** Each law is to have a subject title.
 - c. **Enacting Clause.** An ordinance will have an ordaining clause (e.g., now be it ordained...) and resolutions a resolved clause (e.g., now be it resolved...). The significance of these clauses is that all the text following it is the body of the law. Titles and “whereas” clauses are not part of the local law itself. They provide context and evidence of the purpose and intent of the local law, but are not part of the law proper. To make such clauses and titles part of the law, a common technique is to label them as “findings.”
 - d. **Subject.** All local laws are to have a single subject, as described by the title. Consequently, if the title is broad enough two or more topics can be dealt with under a single law.
 - e. **Sections.** Typically ordinances and resolutions are comprised of sections, to aid in public reading and understanding.
 - f. **Amending Local Laws.** No section or sections of an ordinance or resolution can be amended unless the amending ordinance or resolution contains the entire section or sections amended and repeals the previous section or sections. This legal requirement exists to protect the public from having to unscramble “clever” attempts to amend laws by simply adding or deleting a word or sentence – without giving the public any context by which to understand the significance of the amendment.
 - g. **Signature.** Ordinances will contain a signature block for the mayor and attestation by the city clerk. A resolution will typically have signature blocks for all the county commissioners and attestation by the county clerk. Some cities and counties also have a line for the city/county attorney to sign to show the law is in proper form.
6. To mean anything, a local law that prohibits or restricts certain conduct or activities (e.g., smoking in nonsmoking areas) must provide for a penalty. Without a penalty provision a court has no effective means of enforcing the law. Cities and counties having codes of laws may simply reference a general penalty provision from that code (e.g., “a violation of Ordinance No. 100 is a class A violation under city code section 10-1010”).

Otherwise the specific penalty (i.e., fine or jail time, or both) needs to be specifically set out in the ordinance or resolution itself (e.g., “a violation of Ordinance No. 100 is punishable by a \$500 fine or 30 days in jail, or both.”).

7. As a general rule city ordinances avoid penalties exceeding \$1,000 and/or six months’ jail time. The reason for this is that penalties above that level can trigger a right to trial by jury – which cannot be conducted by municipal (city) courts. Penalties may be imposed on any party who has a duty under an ordinance or whose conduct is regulated by the ordinance; e.g., a city anti-public smoking ordinance may penalize both the smoker and the business owner and/or licensee and/or manager who is placed under a duty to prevent smoking from occurring on the premises.
8. Ordinance violations are first brought before the municipal court, with any violator having the right to appeal the municipal court decision to a state district court. Resolutions, however, are enforced via prosecution directly to the state district courts.
9. Both ordinances and resolutions must be passed at open meetings of city and county governing bodies. Voting must be done in an open fashion (almost always by roll call vote). No secret ballot or other secret voting is allowed.
10. Ordinances and resolutions do not have to be read aloud by the governing body, nor (except in a few instances where such is specifically required by state law) does the governing body have to take public comment or hold a public hearing before acting on a proposed law. For example, no member of the public has a legal right to speak to the city or county governing body as it discusses a proposed ordinance or resolution regulating smoking. While many local governments will by custom or practice allow for public comment on a proposed law, there is no general state law requirement to do so.
11. Cities of the first class with the commission form of government have a “two reading” requirement for all ordinances they consider. This means those cities must act on an ordinance at two separate meetings (i.e., a first and second reading). Otherwise the rule is that a city or county governing body can introduce, consider and adopt a law at the same meeting.
12. Voting on a local law is by yeas and nays, and is recorded by the city or county clerk. Except for passage of Home Rule charter ordinances and charter resolutions, a simple majority vote is required to pass a law. The legal requirement is a majority of the full body – regardless of vacancies or absences. For example in a six-member city council, four yes votes are necessary to pass an ordinance. If one seat is vacant and one

councilmember is absent, all four of the remaining council members must vote for the ordinance (except as noted in following paragraph).

13. In mayor-council cities – which is the form of government used in the great majority of small and medium-sized cities - if the number of favorable votes is one less than required to pass the ordinance, the mayor may cast the deciding vote. For example, in the case of a 3-3 split among councilmembers, the mayor can vote to break the tie.
14. Abstentions are always a matter of concern and confusion. Kansas follows a common law rule that a vote of abstention is counted as voting with the majority, regardless of whether the majority voted for or against the motion voted upon. However, in cases where statutes say a law has to be passed by a majority of the full membership of the body, a vote of abstention cannot be counted as a yes vote. So, the safest reading of the law is that abstentions are not counted towards the statutorily-required majority needed to pass either an ordinance or a resolution. Abstentions from discussion and voting are required in cases where the member has an actual conflict-of-interests, as such is defined in the law. On occasion members will abstain because while there is no actual conflict of interest, there is the public perception, or appearance, of a conflict, and the member wants to preempt controversy or a legal challenge to the vote taken by the body. In yet other cases members may abstain essentially for “political” reasons – they are on the hot seat and cannot make everyone happy regardless of how they vote, so they choose to try to avoid the responsibilities of their office by avoiding the vote. Whether abstention is required in any given situation is a legal issue, and voting members are well-advised to consult the body’s legal counsel for direction.
15. In cities operating under the council form of government, by statute the mayor has some veto powers. Generally the mayor has until the time of the next regular meeting of the city council to sign or veto an ordinance passed at the previous meeting. If the mayor does neither action the ordinance takes effect without the mayor’s signature. A veto of an ordinance can be overridden by a three-fourths vote of the city council.
16. In cities operating under the commission form of government the mayor has no veto power. Likewise no member of a county commission holds veto power.
17. **NOTE: Some cities have adopted forms of government that are not set out by state statute. For example Topeka and Kansas City operate under unique governmental structures adopted under their Home Rule powers. Other cities have “supplemented” the statutory forms of city government with their own unique “fine-tuning,” which may involve exemptions from some of the laws referenced in the above**

paragraphs. For example: when abstentions can occur, and what their effect is; mayor’s authority to cast votes and to veto; and necessary majorities to take actions. To know which of the above state law rules regarding the adoption of ordinances apply in cities with Home Rule governments requires a look at that particular city’s code of ordinances.

18. All cities and counties designate an official newspaper. Except for appropriation ordinances, all ordinances have to be published in the official city newspaper before they can take effect. Generally county resolutions do not have to be published to take effect.
19. Typically, an ordinance will provide it takes effect upon publication. Usually the effective date is the first newspaper publication date after passage of the ordinance. A resolution does not usually require publication, so it will take effect upon passage. However calendar dates after publication can be set as the law’s effective date.
20. When local laws are challenged the courts are to give a presumption of lawfulness and validity to them. This means the burden of proving a local law is somehow illegal falls upon the challenger. It also means that all reasonable doubts are to be resolved by the court in favor of the lawfulness of the local law. These rules have the effect that if a court can find any rational basis whereby it can uphold the legality of the ordinance it is to do so.

E. QUESTIONS AND ANSWERS ON THE KANSAS INITIATIVE AND REFERENDUM LAW

The Initiative and Referendum Law, K.S.A. 12-3013, is brief and relatively straightforward. It applies only to cities – neither county governments nor the state are subject to it. Kansans can only initiate the adoption of laws at the city level. As explained in the following section, the Initiative and Referendum Law can be used not only to (1) adopt new city laws, but also to (2) amend existing laws or to (3) repeal them.

What Subject Matter Is and Is Not Appropriate for Adoption Via the Initiative and Referendum Law?

1. K.S.A. 12-3013(e) provides that “administrative” ordinances are not proper subjects for a petition. What are and are not administrative ordinances has been the subject of a number of Kansas court decisions and Kansas Attorney General Opinions (AGOs).
2. For purposes of this primer it should be assumed that a proposed ordinance to restrict or prohibit smoking in some or all public places is not

an administrative ordinance but instead a “legislative” ordinance that can properly be the subject for a petition for a referendum. Likewise a petition proposing a referendum to repeal or amend such an anti-smoking ordinance is a legislative ordinance, not an administrative ordinance, and can therefore be properly adopted via K.S.A. 12-3013.

3. “The initiative and referendum statute, K.S.A. 12-3013, provides a procedure whereby a city’s electors may place legislative action of the city governing body before a vote of the people.” (*Wichita v. Fitzgerald*, 22 Kan.App.2d 428, 430 (1996).) “In order to protect the efficient administration of a city, administrative matters are not subject to initiative and referendum.” (*Fitzgerald*, 22 Kan. App.2d at 431.)

Guidelines for determining whether an ordinance is administrative or legislative were set out in the decision of the Kansas Supreme Court in *City of Wichita v. Kansas Taxpayers Network, Inc.*, 255 Kan. 534 (1994):

“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 the 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 that require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of the city in order to make a rational choice may properly be characterized as administrative, even though they may be also said to involve the establishment of a policy.

“4. No one act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures which are quite clearly and fully legislative and not principally executive or administrative.” (255 Kan. 539)

What Are the Legal Requirements for Petitions for Proposed Ordinances, Petition Signers and Petition Carriers?

1. The legal requirements for a petition itself, as well as the requirements on those who sign and those who carry it, are a combination of two laws: (a) the Initiative and Referendum law, K.S.A. 12-3013, and (b) the Kansas General Petition Law, K.S.A. 25-3601, *et seq.*

2. The Kansas Attorney General has opined that unless K.S.A. 12-3013 provides otherwise, a petition brought pursuant to K.S.A. 12-3013 must also meet the requirements of the General Petition Law. It should be kept in mind that not all city attorneys, county attorneys and county counselors necessarily agree with the Attorney General on this point. Consequently a petition may be held to one set of legal requirements in one city, and to another in a different city. The following discussion is therefore generally, but not universally, accepted.
3. These petition requirements under K.S.A. 12-3013 should be adhered to by all cities:
 - a. The petition must contain the ballot question, i.e., the proposed ordinance.
 - b. The petition must be signed by electors equal in number to 25% of the voters for cities of the first class, and 40% of the voters for cities of the second or third class. The percentage is of those electors voting at the last preceding city general (not primary) election.
 - c. The petition must be filed with the city clerk.
 - d. The petition must request the city governing body either to (1) pass the ordinance as written and presented or (2) call an election on this question.
 - e. The petition can be made up of multiple papers. Each signer must give his/her name as that name appears on the voter registration rolls, and place of residence (including street number, if any).
 - f. One person must sign each paper giving an oath to a notary public, or any other officer who can administer an oath, that the person believes “the statements therein and that each signature to the paper appended is the genuine signature of the person whose name it purports to be.” K.S.A. 12-3013(a).
4. The requirements of K.S.A. 25-3601 *et seq.*, the General Petition Law, that appear to come into play for Initiative and Referendum petitions are as follows:
 - a. The petition question must be submitted to the appropriate county attorney or district attorney, or county counselor if such an officer exists, for an opinion on the legality of the form of the question. (This requirement is dealt with in greater detail under a separate heading in this primer.) K.S.A. 25-3601(a).

- b. Signatures may be obtained, and a petition filed, prior to obtaining the county's opinion on the legality of the form of the question. K.S.A. 25-3601(a). Common sense says getting the legal opinion before going to the effort of gaining signatures, is the prudent course of action.
- c. A person who challenges the validity of the form of the petition question must file the action in district court within 20 days of the date the petition is filed with the city clerk. The challenger has the burden of proving the question is invalid. The district court must make its decision within 20 days after the date the action is filed with the court. K.S.A. 25-3601(b),(e).
- d. A petition is null and void unless submitted to the city clerk within 180 days of the date of the earliest signature on the petition. K.S.A. 25-3602(d).
- e. A person may withdraw his/her signature by giving written notice to the city clerk no later than the third day following the date the petition is filed. K.S.A. 25-3602(c).
- f. The petition must be filed "at one time all in one group." K.S.A. 25-3602(a). This appears to be a requirement that is for the convenience of the local government, consequently most likely only the city or county government can "enforce" it – if they choose to ignore it, or to waive it, a party opposing the petition most likely would not have the ability to seek a court ruling that such is a legal defect.
- g. The city clerk is to give persons requesting information on the filing of petitions copies of K.S.A. 25-620 (regarding ballot format) and K.S.A. 25-3601, *et seq.* (the General Petition Law). The purpose of this is to help petitioners comply with the statutory requirements.

What Forms Can the Ballot Question Take Under the Initiative and Referendum Law?

- 1. As noted above, K.S.A. 12-3013 specifically requires that the petition contain the ballot question. K.S.A. 12-3013 provides two options for the petitioners to select for the form of the ballot question: either the full text of the ordinance proposed to be adopted, or the title of the ordinance which must be "generally descriptive of the contents thereof." Petition signature pages may be presented to the city clerk attached to either the

full text of the proposed ordinance, or to a general description of it. Attachment may be to each page of signatures or to sets of pages.

2. As explained above, petitioners must get the petition/ballot question approved by the county counselor, county attorney or district attorney (AGO No. 99-59) regardless of whether the petitioners go the “full text” or “generally descriptive” route. There are strategic issues associated with the choice of route. An improperly worded/designed petition/ballot question will be rejected by the county counselor, county attorney or district attorney and not be allowed on the ballot. (See section below on How Is the Petition Question Approved?).

For example, by having the question contain the entirety of the proposed ordinance voters know exactly what they are agreeing to. However, if the question/ordinance is lengthy, voters may be discouraged from reading the language. Conversely, while a general description will likely be shorter and more easily understood, this approach leaves the task of actual drafting of an ordinance to the city – and that may not lead to a desirable outcome in all cases.

3. Petitioners need to remember that K.S.A. 12-3013(a) requires that when the completed petitions are submitted to the city clerk the proposed ordinance must accompany the petitions. It is not a matter of giving a conceptual ordinance to the city and having the city put the ordinance into final form. The choice that is to be made by the petitioners is whether to put the entire proposed ordinance on the ballot, or just a descriptive title.

How Is the Petition Question Approved?

1. According to AGO No. 99-59, a provision in the General Petition Law, found at K.S.A. 25-3602(a), requires the petition/ballot question to be submitted to a county legal officer for an advisory opinion on “the form of the question contained in the petition.” As noted above, petitioners may submit the question before collecting signatures, during the time signatures are being collected, or after signatures are collected.
2. The submission of the petition for this purpose is to the county counselor, or in those counties without a county counselor, to the county or district attorney.
3. Within 5 days of receiving the petition the county’s legal officer is to produce a written advisory opinion on the legality of the form of the petition question. If no opinion is given within the 5-day period the petition question is deemed to be in compliance with the General Petition Law. K.S.A. 25-3601(a). The county’s opinion should be a record subject to public inspection under the Kansas Open Records Act.

4. Any petition question approved by the county legal officer enjoys a rebuttable presumption that it complies with the General Petition Law. This means there is a legally-recognized presumption that it is lawful, but that presumption can be overcome by evidence presented by a challenger.
5. An advisory opinion that concludes that the petition question does not comply with the General Petition Law must state the specific grounds for that opinion.

When Can Initiative and Referenda Elections Be Held?

1. A number of statutory rules govern the timing and frequency of referenda brought under K.S.A. 12-3013.
2. If the petition is found sufficient, the city governing body must within 20 days pass the proposed ordinance “without alteration,” or call an election on the question. The 20-day timeframe begins the day after the city clerk certifies that the petition has sufficient signatures.
3. If there is to be a regular city election within 90 days after the 20-day period has expired, the referendum is to be held at that time. Otherwise a special city election is to be called. (NOTE: Exactly when the 90 days begins is somewhat ambiguous. The most logical reading is that it begins either on the first day after the governing body takes action to not pass the submitted ordinance, or on the first day after the governing body’s “window” of 20 days has closed.)
4. The city must publish the proposed ordinance that will be voted on once a week for two consecutive weeks in the official city newspaper. Publication is not to be more than 20 nor fewer than 5 days before the election.
5. A city is prohibited from conducting more than one K.S.A. 12-3013 special election in any 6-month period. Accordingly, referenda could be held as frequently as three times over 6 months; *i.e.*, city primary and general elections and special election.

Can More Than One Initiative and Referenda Election be Voted on at the Same Time?

1. K.S.A. 12-3013(b) expressly allows for more than one proposed ordinance to be voted on at the same election.
2. K.S.A. 12-3013(c) provides only for simple majority vote approval of any proposed ordinance. The statute does not address the possibility of

“dueling” propositions; *i.e.*, two (or more) incompatible proposed ordinances.

Nothing in K.S.A. 12-3013, caselaw or Attorney General Opinions provides guidance on how a court would unscramble an election where the voters approve two or more incompatible ordinances.

How Does the Timing of the Filing of a Petition Affect the Actions the City Governing Body Can Take?

1. The sequence under the Initiative and Referendum Law is for a petition to be circulated, filed with the city clerk, be verified as sufficient, then taken to the city governing body to either be adopted as an ordinance, or placed on the ballot.
2. However, up until the time the petition is filed with the city clerk, it appears the governing body retains all its usual authority to pass ordinances on the same subject matter as the petition.
3. This means that nothing in state law appears to prevent a governing body from passing laws that would duplicate, supplement, or conflict with a proposed ordinance about to be submitted by a K.S.A. 12-3013 petition. This can obviously result in confusion and, potentially, litigation.

For example, a governing body could, in anticipation of a sufficient petition being filed, attempt to preempt the ordinance being petitioned for by passing an ordinance on the same subject. The “preemption” would be a political one, not necessarily a legal one – *i.e.*, as voters would know there was already a “similar” law on the books, why bother to support or vote for the petitioned-for ordinance?

NOTE: An ordinance passed by a governing body under the above scenario can itself be amended or repealed at any future time, either by another ordinance passed by the governing body, or as the result of a petition brought, or successful referendum held, pursuant to the Initiative and Referendum Law. As explained below, an ordinance approved via the Initiative and Referenda process can be amended or repealed only under certain conditions. However, a “preemptive” ordinance does not enjoy the special status of an Initiative and Referendum ordinance, even though it was passed in anticipation of a petition.

4. More difficult, and less predictable, scenarios that could develop from such last-minute lawmaking by a governing body include:
 - An ordinance that completely duplicates the petitioned-for ordinance. Would such a newly-passed ordinance make the petition moot under

the argument that the Initiative and Referendum Law cannot be used to submit to referendum a law that is already on the books?

- An ordinance that conflicts in part with the proposed ordinance. As the petition question would not contemplate the need to repeal an ordinance that had not existed at the time the petition was drafted, how would these conflicting provisions be resolved? Would the “latest” law, *i.e.*, the one adopted at the referendum, always prevail?
- An ordinance that is wholly in conflict with the proposed ordinance. For example, the governing body would pass an ordinance stating, “The city shall enact no laws regulating... (conduct XYZ).” The proposed ordinance, on the not-as-yet filed petition, says “the city shall enact laws regulating...(conduct XYZ).”

Again, because the petitioners could not foresee the need to add wording to the petition/ballot question to repeal an ordinance that did not exist at the time the petition was drafted, the stage is set for a dispute over conflicting laws.

NOTE: A possible, although not absolute, solution to the above conflict question would be to add to the petitioned-for ordinance wording along the lines of: “...and repealing all city ordinances in conflict with the provisions of this ordinance.”

Can a Referendum under the Initiative and Referendum Law Be Conducted Using the Kansas Mail Ballot Act?

1. Kansas has allowed mail ballot elections for certain state and local elections since 1983. Referenda under K.S.A. 12-3013 meet the criteria for such elections, which criteria are set out at K.S.A. 25-432. Consequently the mail ballot act can be used to conduct a referendum under K.S.A. 12-3013.
2. While petitioners, or their opponents, may request use of the mail ballot law, it appears such is totally within the discretion of the city governing body, and further subject to the Secretary of State approving “a written plan for conduct of the election.” K.S.A. 25-432(b).
3. A number of special provisions regarding mailing of ballots, determining the registration of voters who can receive mail ballots, appointment of a special election board, etc., are set out in K.S.A. 25-431:440.

Can a City Governing Body, By Its Own Initiative, Call for a Binding Election on the Question of Adopting an Ordinance Regulating Smoking?

1. There is no provision under Kansas law for a city governing body to submit a proposed ordinance to the voters for a binding election other than via a valid petition submitted pursuant to the Initiative and Referendum Law. Consequently a governing body cannot by its own initiative call a legally binding election.
2. While outside the scope of this memorandum, city and county governing bodies can hold nonbinding advisory elections. State law recognizes that such elections can be called as an exercise of city or county Home Rule authority. The key point here is that such “advisory” elections are only that. They have no legal effect and cannot force any action by the governing body.

Can the Initiative and Referendum Law Be Used to Amend or Repeal an Ordinance Not Passed Pursuant to the Initiative and Referendum Law?

1. Ordinances passed not as a result of a petition or referendum under K.S.A. 12-3013 but instead under the governing body’s traditional lawmaking power can be amended or repealed via the Initiative and Referendum Law; *i.e.*, Initiative and Referenda is not limited to just passage of new laws – it can be used to amend or repeal existing laws.
2. However, as noted earlier in this primer, only “legislative” ordinances are appropriate for amendment or repeal via the Initiative and Referendum Law. Just as only “legislative” ordinances (versus administrative) are the only type of ordinances proper for passage via Initiative and Referenda, only legislative ordinances can be so amended or repealed.

Can Ordinances Adopted Via the Initiative and Referendum Law Be Repealed or Amended?

1. Generally any city ordinance may be repealed or amended at any time. However, ordinances passed under the Initiative and Referendum Law enjoy some special statutory rules that give them unique status.
2. When the city governing body passes an ordinance proposed by a petition (*i.e.*, it takes the option of passing the petitioned-for ordinance “without alteration,” without first calling for a referendum), that ordinance can be amended or repealed only:
 - a. by a subsequent vote of the city’s electors (either at an election called as a result of a K.S.A. 12-3013 petition or an election called by the governing body as authorized by K.S.A. 12-3013(d)), or

- b. by the governing body, but not until 10 years following the ordinance's date of publication.
3. If the ordinance is one that was adopted by vote of the electors, it can be amended or repealed only:
- a. by another vote of the city's electors (again, either at another K.S.A. 12-3013 referendum or at an election called per K.S.A. 12-3013(d)), or
 - b. by the governing body, but not until 10 years following the date of the election when the first ordinance was adopted.

NOTE: While these statutory rules were probably intended to "protect" ordinances passed via initiative and referendum, one should recognize that these special rules limiting amendments and repeals apply equally to "friendly" as well as "hostile" amendments or repeals. For example, a shortcoming or inadequacy in an ordinance cannot simply be corrected by the governing body (at least for the first 10 years of their life). The above restrictions apply equally to attempts to "improve" ordinances that were poorly drafted, or have become outdated.

4. Even though K.S.A. 12-3013 limits the ability of a governing body to amend or repeal these ordinances during the 10-year period, the statute does specifically authorize the city governing body to initiate an election for the purpose of such amendment or repeal. K.S.A. 12-3013(d) allows the governing body to place on the ballot, at any regular city election after the ordinance has been adopted, the question of amending or repealing an ordinance adopted pursuant to the Initiative and Referendum Law.

The significance of this feature of the law is that it provides a means whereby ordinances approved by the voters – but having defects or other inadequacies – can be "fixed" by the voters. At such an election the vote of a simple majority of those casting votes controls.