

CLARK, MIZE & LINVILLE, CHTD.
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Salina, Kansas 67402-0380
Ph: (785) 823-6325/Fax: (785) 823-1868

IN THE DISTRICT COURT OF SALINE COUNTY, KANSAS

CITY OF SALINA, KANSAS, a municipal)	
corporation,)	
)	
Plaintiff,)	
v.)	Case No. 2021-CV-000160-OT
)	
KEVIN KORB,)	
)	
Defendant.)	
)	

(Pursuant to K.S.A. Chapter 60)

RESPONSE TO MOTION TO DISMISS

COMES NOW Plaintiff, the City of Salina, Kansas, (the “City”) by and through its attorneys, Jacob E. Peterson and Greg A. Bengtson of Clark, Mize & Linville, Chartered, and for its response to Mr. Korb’s motion to dismiss, states as follows.

I.

NATURE OF THE MATTER

Mr. Korb has filed a motion to dismiss the City’s Petition for Declaratory Judgment and Injunctive Relief (hereinafter “Petition for Declaratory Judgment”). It alleges 1) that this suit is time-barred due to a 20-day filing deadline associated with “form of the question” challenges to initiative petitions; and alleges 2) that the City has “acquiesced” regarding his proposed ordinance’s “administrative” character by following the dictates of the very statute he invoked by presenting his initiative petition to the City: K.S.A. 12-3013.

Mr. Korb’s arguments are plainly incorrect. The City’s challenges to the Proposed Ordinance are not ones relating to “the form of the question” – they go to the very nature of the

Proposed Ordinance’s constitutionality, its conflict and non-compliance with state law, and its administrative character. Mr. Korb’s time calculation also rests on the erroneous filing of his initiative petition (the “Ordinance Petition”) with the Saline County Clerk and Election Officer, rather than the City Clerk. And finally, the City has not “acquiesced” to the Proposed Ordinance in any sense of that term: it complied with the dictates of law after being presented with an initiative petition while consistently asserting its objections to the Proposed Ordinance. Mr. Korb’s motion should be denied.

II.

ARGUMENTS AND AUTHORITIES

- A. This action is not time-barred – the issues regarding the Proposed Ordinance do not relate to the “form of the question,” and even if they did, the City filed this action less than 20 days after the Ordinance Petition was filed with the City Clerk.**

Mr. Korb asserts that the City’s action is untimely since it was filed more than 20 days after July 23, 2021 – the day that the Ordinance Petition was erroneously filed with the Saline County Clerk and Election Officer. (Motion to Dismiss, paragraph 3-4.) Mr. Korb is incorrect for several reasons.

Initiative petitions are primarily governed by K.S.A. 12-3013, the initiative petition statute relating to cities. That section unequivocally requires that the “ordinance and petition shall be filed with the city clerk.” *See also State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 668, 367 P.3d 282 (2016) (holding an initiative petition void for failure to file with the city clerk).

K.S.A. 25-3601 also applies to initiative petitions and provides a 20-day deadline for filing challenges to “the form of the question... after such petition has been filed with the county election officer.” K.S.A. 25-3601(e). Importantly, however,

(d) When any other statute imposes specific requirements which are different from the requirements imposed by K.S.A. 25-3601 et seq., and amendments thereto, the provisions of the specific statute shall control.

Id. (emphasis added); (*see also* Memorandum in Support of Summary Judgment (“Memorandum,”), Exhibit 1b (i.e., the Ordinance Petition) (citing not only to K.S.A. 25-3601 and K.S.A. 25-3602, but also K.S.A. 12-3013).)

The City’s objections to the Proposed Ordinance do not attack “the form of the question” in the Ordinance Petition. The literal question presented by the Ordinance Petition is, “Shall the following ordinance become effective?” The City is not challenging the phrasing or form of that question. (*See generally* Petition for Declaratory Judgment; Memorandum.) K.S.A. 25-3602 also indicates that the “form of the question” shall be presumed valid and in compliance with Kansas law “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?’” Once again, the City is not challenging whether the Ordinance Petition states the title, number, and exact language of the Proposed Ordinance.

Rather, the City is challenging the Proposed Ordinance’s 1) unconstitutional attempt to strip the City of its Home Rule police powers, 2) its conflict with Kansas statutes, 3) its attempt to surrender legislative powers and bind future City Commissions, 4) the substance and content of its title and subject matter, and 5) its eligibility for adoption considering its administrative characteristics. (*See generally* Memorandum.) Those are questions going to the very substance of the Proposed Ordinance and its subparts and are not issues related to the “form of the question” presented by the Ordinance Petition. SUBSTANCE, Black's Law Dictionary (11th ed. 2019)

(“The essence of something; the essential quality of something, as opposed to its mere form <matter of substance>.”).

What is more, the City filed this lawsuit within 20 days of when the Ordinance Petition was filed with City Clerk. Again, initiative petitions are primarily governed by K.S.A. 12-3013, the initiative petition section relating to cities, which requires Mr. Korb’s petition to be filed with the City Clerk. That did not occur until August 9, 2021. (*See* Memorandum, SOF 3.) The petition initiating this suit was filed on August 27, 2021. (*See* Court file.) Even if the 20-day filing deadline applies here (and it does not), the petition initiating this case was filed within 20 days of filing with the City Clerk.

If Mr. Korb’s interpretation of the 20-day deadline were correct, he could erroneously file an initiative petition with the County Clerk, wait 21 days, then present the City Clerk with a petition immune to “form of the question” challenges. That would be absurd. *N. Nat. Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013) (“[W]e must construe statutes to avoid unreasonable or absurd results....”).

This suit is not time-barred. The City is challenging the substance and essential character of the Proposed Ordinance, and not “the form of the question,” as would trigger the 20-day filing deadline under K.S.A. 25-3601. But even if the 20-day deadline applies, it begins on a different day than Mr. Korb cites – August 9, 2021 – and the City filed this suit within 20 days of that date: August 27, 2021. (*See* Petition for Declaratory Judgment.) Mr. Korb’s motion should be denied for those reasons.

B. The City has not “acquiesced” to “validity” under K.S.A. 12-3013 and has consistently asserted that the Proposed Ordinance is administrative, is unconstitutional, and violates Kansas law.

Mr. Korb also asserts that the City has somehow “acquiesced” to “the validity of the [Ordinance Petition] under the statute” (referring to K.S.A. 12-3013 and the restriction on enacting “administrative” ordinances through that statute). (*See* Motion to Dismiss, paragraph 8.) His position is simply inaccurate and plainly incorrect.

Although the nature of the “acquiescence” legal theory Mr. Korb argues is unclear due to a lack of legal authority or citation (and should be disregarded on that basis alone), “acquiescence” is defined as, “A person's tacit or passive acceptance; implied consent to an act.” ACQUIESCENCE, Black's Law Dictionary (11th ed. 2019); *see also, e.g., State v. Angelo*, 306 Kan. 232, 236, 392 P.3d 556 (2017) (“Simply pressing a point without pertinent authority, or without showing why it is sound despite a lack of supporting authority, is akin to failing to brief an issue.”); *see also Oxy USA, Inc. v. Red Wing Oil, LLC*, 51 Kan. App. 2d 1028, 360 P.3d 457, 464 (2015), *aff'd*, 309 Kan. 1022, 442 P.3d 504 (2019) (“Acquiescence precludes a party from taking a legal position, in this case a claim of ownership, inconsistent with past actions.”). The City has done anything but “tacitly” or “passively” accept the validity of Mr. Korb’s ordinance.

The second paragraph of K.S.A. 12-3013(a) provides that

If the petition accompanying the proposed ordinance is signed by the required number of electors qualified to sign, the governing body shall either (a) pass such ordinance without alteration within 20 days after attachment of the clerk's certificate to the accompanying petition; or (b) if not passed within 20 days, forthwith call a special election, unless a regular city election is to be held within 90 days thereafter, and at such special or regular city election submit the ordinance, without alteration, to the vote of the electors of the city.

(emphasis added). The Saline County Clerk and Election Officer has certified that Mr. Korb has obtained the requisite number of signatures. (Memorandum, SOF 1-3.) Thus, the plain language of the statute provides the City with two alternatives: pass the ordinance or submit it to a vote of the electors. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 662, 367 P.3d 282, 290 (2016) (“This second paragraph of subsection (a) also provides how the governing body must act once certification has occurred. Essentially, the governing body has two choices: either pass the proposed—and unaltered—ordinance or else submit it to public vote....”). Because it did not pass the ordinance, K.S.A. 12-3013 required submission to a vote of the electors.

And while Mr. Korb is correct that K.S.A. 12-3013 “shall not apply” to “administrative ordinances,” the Proposed Ordinance (like most ordinances) has both “legislative” and “administrative” characteristics. (See Memorandum, pp. 26-35.) Determining whether an ordinance is of a sufficiently “administrative” character can be a “difficult,” totality of the circumstances question, and is a call the Court should make. *McAlister v. City of Fairway*, 289 Kan. 391, 401, 403, 212 P.3d 184 (2009) (“Whether a proposed ordinance is legislative or administrative is often a difficult question to answer.... To be sure, our case law in this area fails to give courts a more precise demarcation in the legislative versus administrative tug-of-war.”).

Regardless of statutory requirements, the City had a limited opportunity to submit the Proposed Ordinance to the voters at a general election (resulting in no additional expenditures to the City) that would have been missed if there was any delay in submitting the Proposed Ordinance to a vote. (See Exhibit 3a, p. 4; and Exhibit 3b of Affidavit of JoVonna Rutherford, attached as Exhibit 3, (discussing general election deadlines and potential expenses)). Most assuredly, had

the City refused to submit Ordinance Petition to a vote, supporters would have cried foul about the City's *non-compliance* with the explicit provisions of K.S.A. 12-3013.

The City would have also been faced with arguments that it was shirking its legal duties and ignoring the rights of its citizens, with assertions that it was “gaming the system” by delaying submission of the matter until after the November election, with assertions that that it was wasting taxpayer money by paying for a special election when it had the opportunity to submit it to a general election with no additional cost to the voters, and with potential lawsuits by Mr. Korb or other petitioners in mandamus or another theory. The City should not be inequitably punished for its desire to honor the rights of Mr. Korb and petitioners, its desire to utilize the circumstances presented by the Ordinance Petition and the November general election in the public interest, nor its desire to – quite frankly – follow the law.

Further, no city has the ability to render an invalid or void ordinance valid by virtue of submitting it to the electors. *See State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 662, 367 P.3d 282 (2016) (holding an initiative petition passed by the electors of the City of Wichita to be void because of non-compliance with K.S.A. 12-3013). Municipal legislation cannot conflict with the Kansas Constitution, Kansas statute, or exceed legislative authority, and this Proposed Ordinance certainly does all of those things. (*See generally* Memorandum.) It would be wholly inconsistent and illogical to conclude that the Proposed Ordinance could be indirectly declared valid, constitutional, and compliant with Kansas law by virtue of “acquiescence,” when that same outcome cannot be achieved directly through enactment of legislation. *See, e.g., Gannon v. State*, 303 Kan. 682, 744, 368 P.3d 1024 (2016) (“An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal

contemplation, as inoperative as though it had never been passed.” (internal citations and quotation marks omitted)); *cf. Johnson v. Johnson*, 26 Kan. App. 2d 321, 321, Syl. 4, 988 P.2d 244 (1999) (“What may not legally be done directly may not be accomplished indirectly.”).

The City has consistently asserted the Proposed Ordinance’s administrative defects, its title and one-subject defects, and, most importantly, its attempt to strip the City Commission of its constitutional Home Rule police powers. (*See generally* Memorandum.) It identified those issues before not one, but *two* public meetings regarding the Proposed Ordinance and adopted a resolution citing those very problems. (*See* Memorandum, Exhibit 1c; *see also* Affidavit of JoVonna Rutherford, attached as Exhibit 3). Those were objections made explicit, and they voice anything *but* acceptance of the Proposed Ordinance.

The City has acquiesced to nothing. It followed mandatory obligations imposed by Kansas law, did so in a way that fulfilled its duties to petitioners and the electors, and consistently maintained its objections to the Proposed Ordinance. The Court should deny Mr. Korb’s motion on that basis, as well.

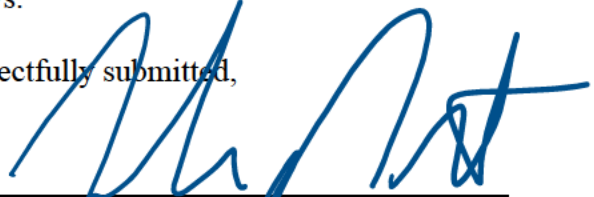
III.

CONCLUSION

Mr. Korb’s motion should be denied. This suit is not time barred. It does not raise issues regarding the “form of the question” to which the 20-day deadline would apply, and even if it did, the Petition for Declaratory Judgment was filed within 20 days of when Mr. Korb’s initiative petition was filed with the City Clerk. And the City has not acquiesced regarding the Proposed Ordinance’s administrative character by following Kansas law, acting in the public (and the

initiative petitioners') interest, or consistently asserting its objections regarding the Proposed Ordinances' deep constitutional and statutory flaws.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'JEP' followed by a stylized flourish.

Jacob E. Peterson, KS #27534

Greg A. Bengtson, KS #10695

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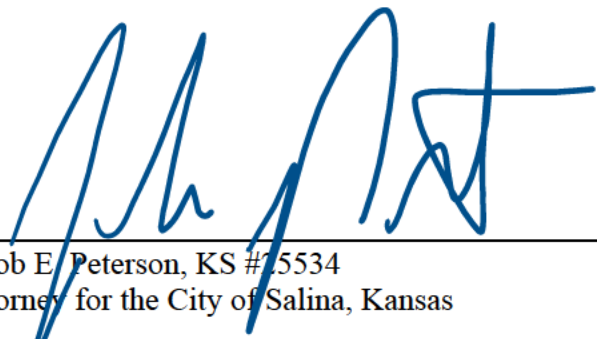
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of September 2021, I presented the foregoing to the clerk of the court for filing and uploading to the e-flex electronic court filing system which will send a notice of electronic filing to all counsel of record, and provided a copy via regular mail and email to:

Kevin Korb
600 Upper Mill Heights Dr.
Salina, KS 67401
kkorb78@gmail.com

And a chambers' copy via email to:

Hon. Paul J. Hickman
District Court Judge
rita.mclain@saline.org



Jacob E. Peterson, KS #75534
Attorney for the City of Salina, Kansas

EXHIBIT 3

CITY OF SALINA, KANSAS, a municipal
corporation,
Plaintiff,
v.
KEVIN KORB,
Defendant.

(Pursuant to K.S.A. Chapter 60)

[illegible]

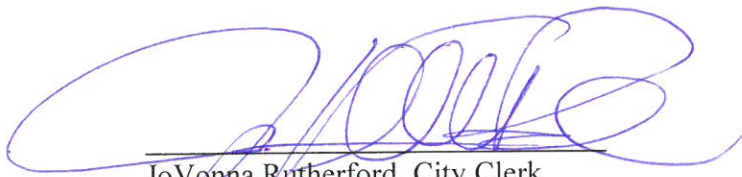
1. I am currently the City Clerk for the City of Salina, Kansas (“City of Salina”) and have held that position at all times discussed below.

3. A complete, true, and accurate copy of items provided to the City Commission and made publicly available in association with item 7.4 of the City Commission meeting agenda for August 16, 2021 is attached to this affidavit as Exhibit 3a.

4. A complete, true, and accurate copy of items provided to the City Commission and

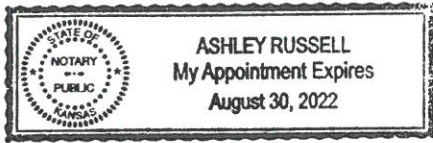
made publicly available in association with item 7.10 of the City Commission meeting agenda for August 23, 2021 is attached to this affidavit as Exhibit 3b.

Further affiant saith not.



JoVonna Rutherford, City Clerk
City of Salina, Kansas

On this 15 day of September, 2021, before me, the undersigned, a notary public in and for the county and state aforesaid, personally appeared JoVonna Rutherford, City Clerk of the City of Salina, Kansas, known to me to be the person who executed the within instrument in writing and acknowledged to me that she executed the same for the purposes therein stated.



Ashley Russell
Notary Public

My appointment expires:


Aug 30, 2022

EXHIBIT 3a

CITY OF SALINA
REQUEST FOR CITY COMMISSION ACTION

DATE
8/16/2021

TIME
4:00 P.M.

AGENDA SECTION NO: 7	ORIGINATING DEPARTMENT: City Legal Counsel	FISCAL APPROVAL: BY:
ITEM NO: 4 Page 1	BY: Greg Bengtson	FINAL APPROVAL: BY: 

ITEM: Consideration of Initiative and Referendum Petition – Ordinance No. 21-11075, Resolution No. 21-7979, and Ordinance No. 21-11076

Staff has prepared the following three documents for the Governing Body's consideration in fulfillment of the statutory requirements resulting from the initiative and referendum petition certified by the Saline County Clerk/Saline County Election Official as having been signed by the required number of electors qualified to sign.

Consideration of Ordinance No. 21-11075 – An Ordinance Limiting the Power of the City of Salina Governing Body to Impose Restrictions on Businesses and Citizens Relating to a State of Emergency Declared at the County or State Level;

Consideration of Resolution No. 21-7979 authorizing the City's legal counsel to file suit in the Saline County District Court seeking declaratory judgment regarding the validity and status of the petition and proposed ordinance; and

Consideration of Ordinance No. 21-11076 submitting to the vote of the electors of the City of Salina, Kansas, at the November 2, 2021 general city election in accordance with the initiative and referendum statute (K.S.A. 12-3013) – An Ordinance Limiting the Power of the City of Salina Governing Body to Impose Restrictions on Businesses and Citizens Relating to a State of Emergency Declared at the County or State Level.

BACKGROUND:

Kansas law provides a means for citizens to initiate local legislation by petition (K.S.A. 12-3013), commonly referred to as the "initiative and referendum" statute. A proposed ordinance may be submitted to the governing body of any city accompanied by a petition. In cities of the first class (Salina is a city of the first class) electors equal in number to at least 25% of those who voted in the last preceding city election must sign the petition. If the petition accompanying the proposed ordinance is signed by the required number of electors qualified to sign, the governing body shall either (a) pass such ordinance without alteration within 20 days after attachment of the clerk's certificate to the accompanying petition; or (b) if not passed within 20 days, forthwith call a special election, unless a regular city election is to be held within 90 days thereafter, and at such special or regular city election submit the ordinance, without alteration, to the vote of the electors of the city (K.S.A. 12-3013(a)).

Any ordinance proposed by a petition under the initiative and referendum statute and passed by the governing body or adopted by a vote of the electors, shall not be repealed or amended except (1) by a vote of the electors, or (2) by the governing body, if the ordinance has been in effect for 10 years from the date of publication, if passed by the governing body, or from the date of the election, if adopted by a vote of the electors.

CITY OF SALINA
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DATE
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AGENDA SECTION NO:	ORIGINATING DEPARTMENT: City Legal Counsel BY: Greg Bengtson	FISCAL APPROVAL: BY:
ITEM NO: Page 2		FINAL APPROVAL: BY:

The initiative and referendum process cannot be utilized for (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 subject to referendum or election under another statute (K.S.A. 12-3013(e)).

The initiative and referendum petition is subject to the general requirements of Article 36 (Sufficiency of Petitions), Chapter 25 (Elections) of the Kansas Statutes Annotated. When any other statute (such as K.S.A. 12-3013) imposes specific requirements which are different from those general requirements, the provisions of the specific statute control (K.S.A. 25-3601(d)).

The petition for the proposed ordinance was filed in the office of the Saline County Clerk/County Election Officer on July 23, 2021. Copies of the proposed ordinance and sample form of each page of the petition as filed are attached. By the attached letter dated July 28, 2021, the Saline County Clerk/County Election Officer certified the sufficiency of the signatures on the petition. K.S.A. 12-3013(a) provides that: "Such ordinance and petition shall be filed with the city clerk." On August 6, 2021, Kevin Korb submitted the attached letter to the Saline County Clerk/County Election Officer. On August 9, 2021, a certified copy of the petition and Mr. Korb's letter were hand-delivered to the Salina City Clerk by the Saline County Clerk/County Election Officer with her attached cover letter dated August 9, 2021.

ISSUES PRESENTED

The petition and proposed ordinance present a number of issues for consideration by the Governing Body.

"Home rule." Under Article 12, Section 5 of the *Kansas Constitution*, cities in Kansas have been granted "home rule" powers since July 1, 1961, following approval by voters at the November 1960 general election. Because the petitioned ordinance limits the ability of the current and future governing bodies of the City of Salina in the exercise of the City's constitutional home rule authority to act in the interest of the public health, safety, and welfare of its citizens, the issue is raised of whether the petitioned ordinance is unconstitutional under the *Kansas Constitution*.

Administrative aspect. Section 2 of the petitioned ordinance first prohibits restrictions on businesses or citizens in response to any state of emergency declared at the County or State level. The second paragraph of Section 2 provides: "The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County." Because that provision regulates the City's operation of its own property and facilities, it raises the issue of whether the petitioned ordinance is administrative in nature, thus disqualifying the ordinance from consideration under the initiative and referendum process.

Single subject and title. Two separate and distinct statutes speak to the number of subjects and the title of the petition. First, Kansas law (K.S.A. 12-3004) provides, in part: "No ordinance shall contain

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ITEM NO: Page 3	BY: Greg Bengtson	FINAL APPROVAL: BY:

more than one subject, which shall be clearly expressed in its title; . . .” Second, and specifically in the initiative and referendum context, the “sufficiency of petitions” statute (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 subjects included under Section 2 of the petitioned ordinance and the exclusion of any reference in the title of the petitioned ordinance to the limitations placed upon the City in relation to the operation of its publicly owned and operated facilities raises the issue of whether the petitioned ordinance complies with K.S.A. 12-3004 and K.S.A. 25-3602(a).

Other matters. As a general category of matters relating to the requirements of the “sufficiency of petitions” statutes and the more specific provisions of the “initiative and referendum” statute, the following issues are also raised.

1. Whether the proposed ordinance and petition have been properly filed in compliance with K.S.A. 12-3013(a). As described above and at the recommendation of the County Counselor, the County Clerk’s delivery of a certified copy of the full petition and ordinance to the City Clerk at the written request of the petitioner was the suggested remedy.
2. K.S.A. 12-3013(a) indicates 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 petition does not include that request, but appears to have been drafted with an eye towards submission to the Governing Body to consider or reject.
3. K.S.A. 25-3602(b)(2) provides that each petition shall name the taxing subdivision or other political subdivision in which an election is sought to be held. The petition does not specifically name the City of Salina, Kansas as the political subdivision in which an election is sought to be held, although other references to the City of Salina are made in the petition.
4. K.S.A. 12-3013(b), as the more specific statute, provides that: “Each proposed ordinance set forth in full or submitted by title generally descriptive of the contents thereof shall be preceded by the words, “Shall the following be adopted?” The more general statute, K.S.A. 25-3601, refers to the title of the petition as “Shall the following ordinance, or resolution become effective?” The petition is titled with the phrase “Shall the following ordinance become effective.”

If the Governing Body wishes to pursue these others matters, staff believes further discussion in executive session would be warranted.

CITY OF SALINA
REQUEST FOR CITY COMMISSION ACTION

DATE
8/16/2021

TIME
4:00 P.M.

AGENDA SECTION NO:	ORIGINATING DEPARTMENT: City Legal Counsel	FISCAL APPROVAL: BY:
ITEM NO: Page 4	BY: Greg Bengtson	FINAL APPROVAL: BY:

COMMISSION ACTION

Step 1. Consideration of Ordinance No. 21-11075. The City Clerk has prepared the attached Ordinance No. 21-11075 to include the unaltered content of the ordinance submitted by petition. If the Governing Body chooses, it may consider Ordinance No. 21-11075 under its normal procedures. Consideration of the ordinance on first and second reading on the same day (based upon a compelling public purpose finding) would be in order as the basis for fully enacting the ordinance within 20 days of the County Election Officer's July 28, 2021 initial certification of the sufficiency of the signatures on the petition (August 17, 2021). If Ordinance No. 21-11075 is enacted, no further action is necessary.

Step 2. Consideration of Resolution No. 21-7979. The attached draft Resolution No. 21-7979 authorizes the City's legal counsel to pursue declaratory judgment in the Saline County District Court regarding the validity and status of the petition and proposed ordinance. The draft resolution includes reference to all of the issues outlined above for the purpose of enabling the Governing Body to provide direction on particular issues to either be pursued or not under the declaratory judgment proceeding.

Step 3. Consideration of Ordinance No. 21-11076.

If the Governing Body does not enact Ordinance No. 21-11075, the initiative and referendum statute requires that the Governing Body "forthwith call a special election, unless a regular city election is to be held within 90 days thereafter, and at such special or regular city election submit the ordinance, without alteration, to the vote of the electors of the city. The regular city election to occur November 2, 2021 falls within the 90-day window. Staff has confirmed with the Saline County Election Officer that if the Governing Body acts to submit the petitioned ordinance before September 1, it can be included in the regular city election. Consequently the attached ordinance qualifies for submission for the upcoming regular city election. The attached draft Ordinance No. 21-11076 has been prepared for that purpose. The current draft does not anticipate the adoption of Resolution No. 21-7979. If Resolution No. 21-7979 is adopted, Ordinance No. 21-11076 should be amended to refer to Resolution No. 21-7979 as having been adopted. There is precedent for an initiative and referendum ordinance approved by the electors being overturned as the result of a successful legal challenge.

Governing bodies of other municipalities have chosen not to advance a petitioned ordinance to either a special or general city election on the basis of objection to the validity of the petitioned ordinance; however, that approach leaves the city's inaction open for a judicial challenge. The availability of the upcoming regular city election results in no cost to the City for conducting the election on the petitioned ordinance, compared with the cost of conducting a special election sometime in the future.

FISCAL NOTE:

The potential financial cost factors associated with this matter include (a) the legal fees associated with a judicial challenge of the petitioned ordinance, (b) the cost associated with a special election if the petitioned ordinance is not placed on the ballot as part of the upcoming regular city election, and (c) the legal fees associated with a legal defense if no action is taken and the City must defend itself in response to a legal challenge.

CITY OF SALINA
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AGENDA SECTION NO:	ORIGINATING DEPARTMENT: City Legal Counsel	FISCAL APPROVAL: BY:
ITEM NO: Page 5	BY: Greg Bengtson	FINAL APPROVAL: BY:

COMMISSION OPTIONS:

Staff has identified the following options for the City Commission's consideration:

- 1.) Approve Ordinance No. 21-11075 enacting the proposed ordinance on first and second reading;
- 2.) Adopt Resolution No. 21-7979 authorizing pursuit of a declaratory judgement
- 3.) Adopt Ordinance No. 21-11076 submitting the ordinance to a vote of the electors on first or first and second reading;
- 4.) Adopt Ordinance No. 21-11076 submitting the proposed ordinance to a vote of the electors on first and second reading and adopt Resolution No. 21-7979 authorizing pursuit of a declaratory judgement; or
- 5.) Take No action.

Attachments:

Copies of the proposed ordinance and sample form of each page of the petition
Copy of letter from Saline County Clerk/County Election Officer to City Clerk dated July 28, 2021
Copy of letter from Kevin Korb to Saline County Clerk/County Election Officer dated August 6, 2021
Copy of letter from Saline County Clerk/County Election Officer to City Clerk dated August 9, 2021
Draft Ordinance No. 21-11075
Draft Resolution No. 21-7979
Draft Resolution No. 21-11076

CC: Kevin Korb

Shall the following ordinance become effective?

Summary of the proposed ordinance:

This ordinance prevents the City of Salina Governing Body from enacting any ordinance, in response to a public emergency, that imposes restrictions on businesses or citizens, leaving that responsibility to Saline County and subject to the Kansas Emergency Management Act.

Complete Text of the proposed ordinance:

AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SALINA, KANSAS:

Section 1. Definitions

“Business” means any organization or entity, whether open to the public or a private entity operating within the city limits of the City of Salina, Kansas.

“Citizen” for the purpose of this ordinance means any person residing in, or being present in the city at any time.

“Restriction” means any limitations on movement, behavior, business operation or general liberty that is imposed on businesses or citizens and is or would be reasonably perceived as a reaction to an “emergency state” that is declared at the State of Kansas or Saline County level

“Governing Body” means the City Commission of the City of Salina, Kansas

Section 2. Limitations on power of Governing Body to impose restrictions during emergency.

The Governing Body of the City of Salina shall not impose any restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful in response to any state of emergency declared at the County or State level. Examples of restrictions include but are not limited to: Limitations on business capacity, Limitations on business hours, Forcing a business to close, Restricting what may be bought or sold, Restrictions on citizens leaving their residence, Restrictions on citizens being in public places, Curfews applying to citizens, Forced medical treatment of any kind such as mandatory vaccines or the mandatory wearing of face coverings or other medical protective equipment.

The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County.

The purpose of this ordinance is to defer any such restrictions to Saline County to impose at its discretion and subject to the framework of the “Kansas Emergency Management Act” (Kansas Statutes Annotated, Chapter 48, Article 9)

Section 4. Effective This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

This ordinance prevents the City of Salina Governing Body from enacting any ordinance in response to a public emergency that imposes restrictions on businesses or citizens, leaving that responsibility to the county and subject to the Kansas Emergency Management Act. A complete copy of the ordinance can be found at www.salina-ks.gov or in the office of the City Clerk, 300 W. Ash, free of charge.

Instructions for petition signers and circulators:

You must be a registered voter and reside in Salina, KS in order to sign this petition

The petition must be signed in the presence of the circulator

You must not sign the petition more than once

You cannot sign for another person

A circulator cannot sign the same petition they carry

Print clearly using ink and make sure all information is accurate and that the address you write matches your voter registration

If you make a mistake, cross out the entire line and complete a new line

Each circulator must attest to each copy of the petition in the presence of a notary. Once attested, no additional signatures may be added to that copy.

Applicable law:

This petition was prepared in accordance with K.S.A. 12-3013, K.S.A 25-3601 and K.S.A. 25-3602

Summary of the proposed ordinance:

This ordinance prevents the City of Salina Governing Body from enacting any ordinance, in response to a public emergency, that imposes restrictions on businesses or citizens, leaving that responsibility to Saline County and subject to the Kansas Emergency Management Act.

I have personally signed this petition. I am a registered elector of the state of Kansas and of the City of Salina and my residence address is correctly written after my name.

1	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: ____/____/____
2	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: ____/____/____
3	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: ____/____/____
4	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: ____/____/____
5	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: ____/____/____
6	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: ____/____/____
7	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: ____/____/____
8	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: ____/____/____
9	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: ____/____/____
10	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: ____/____/____

AFFIDAVIT OF CIRCULATOR

I am the circulator of this petition and I am qualified to circulate this petition and I personally witnessed the signing of the petition by each person whose name appears thereon.

(Signature of circulator)

(Circulator's residence address)

(SEAL)

STATE OF KANSAS, COUNTY OF SALINE

Subscribed and sworn to before me this

_____ day of _____, 2021
(day) (month)

Signature (and Title) of Official Administering Oath

My Commission Expires: _____

Saline County Clerk/Election Office



Jamie R Doss – County Clerk/Election Officer

Phone: (785) 309-5820

FAX: (785) 309-5826

E-mail: Jamie.Doss@saline.org

www.saline.org

300 W Ash St, Rm 215

P.O. Box 5040

Salina, KS 67402-5040

July 28, 2021

JoVonna Rutherford, Salina City Clerk
City of Salina
300 W. Ash St, Room 206
Salina, KS 67401

Re: Petition for Proposed ordinance limiting the power of the city of Salina governing body to impose restrictions on businesses and citizens related to a state of emergency declared at the county or state level.

Dear JoVonna:

The petition for the proposed ordinance was filed to our office on July 23, 2021. Such petition shall be signed by electors equal in number to at least 25% in cities of the first class of the electors who voted at the last preceding regular city election as shown by the poll books. The 2019 City Election voter turnout was 6,527, which equates to the required signatures of 1,632.

Pursuant to Kansas Statute K.S.A. 12-3013, 25-3602(b)(4), and Notarial Statute 53-501, et. seq., as Saline County Election Officer, I am hereby certifying 1,662 signatures, as placed on the "Petition for the Limitations on power of Governing Body to impose restrictions during emergency.

The circulators registrations and signatures were checked and the proper notarizations were verified.

Sincerely,

Jamie R Doss

Saline County Clerk/County Election Officer



Cc: Mike Schrage
Kevin Korb

8/6/2021

Kevin Korb
600 Upper Mill Heights Dr
Salina, KS 67401

Jamie Doss
Saline County Clerk
301 W Ash St
Salina, KS 67401

Ms Doss:

I am writing to request that you deliver a certified copy of the petition "to limit the emergency powers of the City of Salina" along with the signature pages to the City of Salina Clerk's office as soon as practical.

Thanks,



Kevin Korb

RECEIVED

AUG 06 2021

**SALINE COUNTY
CLERK / ELECTION**

Saline County Clerk/Election Office



Jamie R Doss – County Clerk/Election Officer

Phone: (785) 309-5820

FAX: (785) 309-5826

E-mail: Jamie.Doss@saline.org

www.saline.org

300 W Ash St, Rm 215

P.O. Box 5040

Salina, KS 67402-5040

August 9, 2021

JoVonna Rutherford, Salina City Clerk
City of Salina
300 W. Ash St, Room 206
Salina, KS 67401

Re: Certified Copy of the Petition for Proposed ordinance limiting the power of the city of Salina governing body to impose restrictions on businesses and citizens related to a state of emergency declared at the county or state level.

Dear JoVonna:

The petition for the proposed ordinance was filed to our office on July 23, 2021. Such petition shall be signed by electors equal in number to at least 25% in cities of the first class of the electors who voted at the last preceding regular city election as shown by the poll books. The 2019 City Election voter turnout was 6,527, which equates to the required signatures of 1,632.

Pursuant to Kansas Statute K.S.A. 12-3013, 25-3602(b)(4), and Notarial Statute 53-501, et. seq., as Saline County Election Officer, I am hereby certifying 1,662 signatures, as placed on the "Petition for the Limitations on power of Governing Body to impose restrictions during emergency.

The circulators registrations and signatures were checked and the proper notarizations were verified.

On August 6, 2021, Kevin Korb submitted a letter requesting I send the City of Salina a certified copy of the petition. I am hand delivering the certified copy as well as his letter authorizing me to submit the petition. Please submit a letter or email me a confirmation receipt.

Sincerely,

Jamie R Doss
Saline County Clerk/County Election Officer



ORDINANCE NUMBER 21-11075

AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SALINA, KANSAS:

Section 1. Definitions.

"Business" means any organization or entity, whether open to the public or a private entity operating within the city limits of the City of Salina, Kansas.

"Citizen" for the purpose of this ordinance means any person residing in, or being present in the city at any time.

"Restriction" means any limitations on movement, behavior, business operation or general liberty that is imposed on businesses or citizens and is or would be reasonably perceived as a reaction to an "emergency state" that is declared at the State of Kansas or Saline County level.

"Governing Body" means the City Commission of the City of Salina, Kansas

Section 2. Limitations on power of Governing Body to impose restrictions during emergency.

The Governing Body of the City of Salina shall not impose any restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful in response to any state of emergency declared at the County or State level. Examples of restrictions include but are not limited to: Limitations on business capacity, Limitations on business hours, Forcing a business to close, Restricting what may be bought or sold, Restrictions on citizens leaving their residence, Restrictions on citizens being in public places, Curfews applying to citizens, Forced medical treatment of any kind such as mandatory vaccines or the mandatory wearing of face coverings or other medical protective equipment.

The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County.

The purpose of this ordinance is to defer any such restrictions to Saline County to impose at its discretion and subject to the framework of the "Kansas Emergency Management Act" (Kansas Statutes Annotated, Chapter 48, Article 9).

Section 3. Effective.

This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

Ordinance No. 21-11075 Summary

On August __, 2021, the City Commission passed Ordinance No. 21-11075. The ordinance prevents the City of Salina Governing Body from enacting any ordinance in

response to a public emergency that imposes restrictions on businesses or citizens, leaving that responsibility to the county and subject to the Kansas Emergency Management Act. A complete copy of the ordinance can be found at www.salina-ks.gov or in the office of the City Clerk, 300 W. Ash, free of charge. This summary is certified by the City's legal counsel.

Introduced: August ____, 2021
Passed: August ____, 2021

[SEAL]

Melissa Rose Hodges, Mayor

ATTEST:

JoVonna A. Rutherford, City Clerk

The publication summary set forth above is certified this ____ day of _____, 2021.

Greg A. Bengtson, City Attorney

RESOLUTION NUMBER 21-7979

A RESOLUTION AUTHORIZING THE CITY'S LEGAL COUNSEL TO FILE SUIT IN THE SALINE COUNTY DISTRICT COURT SEEKING DECLARATORY JUDGMENT REGARDING THE VALIDITY AND STATUS OF AN INITIATIVE AND REFERENDUM PETITION AND PROPOSED ORDINANCE.

BE IT RESOLVED by the Governing Body of the City of Salina, Kansas:

Section 1. The Governing Body authorizes the City's legal counsel, the law firm of Clark, Mize & Linville, Chartered ("Legal Counsel"), to file suit in the Saline County District Court seeking declaratory judgment regarding the validity and status of the initiative and referendum petition and proposed ordinance under the title of: "AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL."

Section 2. The declaratory judgment action is intended to address the validity and status of the petition and proposed ordinance based upon the following potential issues:

"Home rule." Under Article 12, Section 5 of the *Kansas Constitution*, cities in Kansas have been granted "home rule" powers since July 1, 1961, following approval by voters at the November 1960 general election. Because the petitioned ordinance limits the ability of the current and future governing bodies of the City of Salina in the exercise of the City's constitutional home rule authority to act in the interest of the public health, safety, and welfare of its citizens, the issue is raised of whether the petitioned ordinance is unconstitutional under the *Kansas Constitution*.

Administrative aspect. Section 2 of the petitioned ordinance first prohibits restrictions on businesses or citizens in response to any state of emergency declared at the County or State level. The second paragraph of Section 2 provides: "The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County." Because that provision regulates the City's operation of its own property and facilities, it raises the issue of whether the petitioned ordinance is administrative in nature, thus disqualifying the ordinance from consideration under the initiative and referendum process.

Single subject and title. Two separate and distinct statutes speak to the number of subjects and the title of the petition. First, Kansas law (K.S.A. 12-3004) provides, in part: “No ordinance shall contain more than one subject, which shall be clearly expressed in its title . . .” Second, and specifically in the initiative and referendum context, the “sufficiency of petitions” statute (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 subjects included under Section 2 of the petitioned ordinance and the exclusion of any reference in the title of the petitioned ordinance to the limitations placed upon the City in relation to the operation of its publicly owned and operated facilities raises the issue of whether the petitioned ordinance complies with K.S.A. 12-3004 and K.S.A. 25-3602(a).

Other matters. As a general category of matters relating to the requirements of the “sufficiency of petitions” statutes and the more specific provisions of the “initiative and referendum” statute, the following issues are also raised.

1. Whether the proposed ordinance and petition have been properly filed in compliance with K.S.A 12-3013(a). As described above and at the recommendation of the County Counselor, the County Clerk’s delivery of a certified copy of the full petition and ordinance to the City Clerk at the written request of the petitioner was the suggested remedy.
2. K.S.A. 12-3013(a) indicates 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 petition does not include that request, but appears to have been drafted with an eye towards submission to the Governing Body to consider or reject.
3. K.S.A. 25-3602(b)(2) provides that each petition shall name the taxing subdivision or other political subdivision in which an election is sought to be held. The petition does not specifically name the City of Salina, Kansas as the political subdivision in which an election is sought to be held, although other references to the City of Salina are made in the petition.
4. K.S.A. 12-3013(b), as the more specific statute, provides that: “Each proposed ordinance set forth in full or submitted by title generally descriptive of the contents thereof shall be preceded by the words, “Shall the following be adopted?” The more general statute, K.S.A. 25-3601, refers to the title of the petition as “Shall the following ordinance, or resolution become effective?” The petition is titled with the phrase “Shall the following ordinance become effective.”

Section 3. Legal Counsel is authorized to further evaluate the issues outlined above and any others relevant to the validity and status of the petition and proposed ordinance and, based upon that evaluation, to prepare and file appropriate pleadings in the Saline County District Court requesting the

Court's determination of matters deemed in Legal Counsel's discretion to warrant consideration by the Court.

Section 4. This resolution shall be in full force and effect from and after its adoption.

Adopted by the Board of Commissioners and signed by the Mayor this 16th day of August 2021.

(SEAL)

Melissa Rose Hodges, Mayor

ATTEST:

JoVonna A. Rutherford, City Clerk

ORDINANCE NUMBER 21-11076

AN ORDINANCE SUBMITTING TO THE VOTE OF THE ELECTORS OF THE CITY OF SALINA, KANSAS, AT THE NOVEMBER 2, 2021, CITY GENERAL ELECTION A QUESTION PRESENTED PURSUANT TO THE INITIATIVE AND REFERENDUM STATUTE (K.S.A. 12-3013).

WHEREAS, the Saline County Clerk/Saline County Election Officer has certified that a petition and proposed ordinance submitted pursuant to the initiative and referendum statute (K.S.A. 12-3013) under the title of: "AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL" (the "Petitioned Ordinance") is signed by the required number of electors qualified to sign; and

WHEREAS, for the reasons that (a) the Governing Body has not enacted the Petitioned Ordinance without alteration and (b) a regular city election is going to be held within 90 days on November 2, 2021;

THEREFORE, BE IT ORDAINED by the Governing Body of Salina, Kansas:

Section 1. In accordance with K.S.A. 12-3013, the Governing Body submits to the vote of the electors of the City of Salina, Kansas, at the November 2, 2021 city general election the question presented by the Petitioned Ordinance, a copy of which is attached and incorporated herein.

Section 2. The City Clerk is directed to deliver a certified copy of this ordinance to the County Election Officer and to request that the County Election Officer take all steps necessary to include the proposition referred to in Section 1 above on the ballot for the city general election to be held on November 2, 2021.

Section 3. This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

Ordinance No. 21-11076 Summary

On August 16, 2021, the City Commission passed Ordinance No. 21-11076. The Ordinance submits to the vote of the electors of the City of Salina, Kansas at the November 2, 2021 city general election the question presented by a petition and proposed ordinance submitted pursuant to the initiative and referendum statute (K.S.A. 12-3013) under the title of: "AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL." A complete copy of the Ordinance can be found at www.salina-ks.gov or in the office of the City Clerk, 300 W. Ash, free of charge. This summary is certified by the City's legal counsel.

Introduced: August 16, 2021
Passed: August 23, 2021

Melissa Rose Hodges, Mayor

[SEAL]

ATTEST:

JoVonna A. Rutherford, City Clerk

The publication summary set forth above is certified this __ day of August, 2021.

Greg A. Bengtson, City Attorney

Shall the following ordinance become effective?

Summary of the proposed ordinance:

This ordinance prevents the City of Salina Governing Body from enacting any ordinance, in response to a public emergency, that imposes restrictions on businesses or citizens, leaving that responsibility to Saline County and subject to the Kansas Emergency Management Act.

Complete Text of the proposed ordinance:

AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SALINA, KANSAS:

Section 1. Definitions

“Business” means any organization or entity, whether open to the public or a private entity operating within the city limits of the City of Salina, Kansas.

“Citizen” for the purpose of this ordinance means any person residing in, or being present in the city at any time.

“Restriction” means any limitations on movement, behavior, business operation or general liberty that is imposed on businesses or citizens and is or would be reasonably perceived as a reaction to an “emergency state” that is declared at the State of Kansas or Saline County level

“Governing Body” means the City Commission of the City of Salina, Kansas

Section 2. Limitations on power of Governing Body to impose restrictions during emergency.

The Governing Body of the City of Salina shall not impose any restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful in response to any state of emergency declared at the County or State level. Examples of restrictions include but are not limited to: Limitations on business capacity, Limitations on business hours, Forcing a business to close, Restricting what may be bought or sold, Restrictions on citizens leaving their residence, Restrictions on citizens being in public places, Curfews applying to citizens, Forced medical treatment of any kind such as mandatory vaccines or the mandatory wearing of face coverings or other medical protective equipment.

The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County.

The purpose of this ordinance is to defer any such restrictions to Saline County to impose at its discretion and subject to the framework of the “Kansas Emergency Management Act” (Kansas Statutes Annotated, Chapter 48, Article 9)

Section 4. Effective This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

This ordinance prevents the City of Salina Governing Body from enacting any ordinance in response to a public emergency that imposes restrictions on businesses or citizens, leaving that responsibility to the county and subject to the Kansas Emergency Management Act. A complete copy of the ordinance can be found at www.salina-ks.gov or in the office of the City Clerk, 300 W. Ash, free of charge.


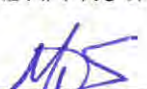
EXHIBIT 3b

CITY OF SALINA

REQUEST FOR CITY COMMISSION ACTION

DATE
8/23/2021

TIME
4:00 P.M.

AGENDA SECTION NO: 7	ORIGINATING DEPARTMENT: City Manager's Office	FISCAL APPROVAL: BY: 
ITEM NO: 10 Page 1	BY: Mike Schrage, City Manager	FINAL APPROVAL: BY: 

ITEM: Initiative and referendum petition follow-up postponed from August 16, 2021

BACKGROUND:

In response to an initiative and referendum petition certified by the Saline County Clerk, the City Commission considered Ordinance No. 21-11075 – An Ordinance Limiting the Power of the City of Salina Governing Body to Impose Restrictions on Businesses and Citizens Relating to State of Emergency Declared at the County or State Level – on August 16, 2021. Due to a lack of a motion, not action was taken on Ordinance No. 21-11075 have the effect of the governing body declining to enact the proposed ordinance. The governing body's consideration of the ordinance and declining to adopt it satisfied the first requirement of K.S.A. 12-3013 which is commonly referred to as the "initiative and referendum" statute.

If a governing body does not pass an initiative and referendum ordinance within 20 days of county clerk certification, the statute goes on to state that the governing body shall "... forthwith call a special election, unless a regular city election is to be held within 90 days thereafter, and at such special or regular city election submit the ordinance, without alteration, to the vote of the electors of the city".

The staff report provided to the City Commission for its August 16, 2021 deliberations is attached. Please, reference it for additional details regarding next steps and options available for the City Commission.

In summary, staff identified 3 remaining options available for the City Commission in the event that the proposed ordinance was not adopted.

- 1.) Pass Ordinance No. 21-11076 submitting to the vote of the electors of the City of Salina, Kansas, at the November 2, 2021, City general election a question presented pursuant to the initiative and referendum statute.
- 2.) Adopt Resolution No. 21-7979 authorizing pursuit of a declaratory judgement thereby challenging the validity of the petition and proposed ordinance.
- 3.) Take no additional action potentially prompting legal action on the part of the petitioners to compel further City action.

It was noted that Options 1 and 2 above could be pursued simultaneously. It was further noted that the County Election Officer's deadline to place an item on the November 2nd ballot was September 1st which made it unlikely that a court determination could be secured prior to the ballot submission deadline. As a result, a possible scenario could be that a court judgment rendering the petition and/or proposed ordinance invalid could be issued after the question had already been voted on by the voters.

As part of its deliberations, the governing body adjourned in to multiple executive sessions to discuss the subject of the legal aspects relating to the proposed initiative and referendum ordinance with legal

CITY OF SALINA
REQUEST FOR CITY COMMISSION ACTION

DATE
8/23/2021

TIME
4:00 P.M.

AGENDA SECTION NO:	ORIGINATING DEPARTMENT: City Manager's Office	FISCAL APPROVAL: BY:
ITEM NO: Page 2	BY: Mike Schrage, City Manager	FINAL APPROVAL: BY:

counsel based upon the need for consultation with an attorney for the public body which would be deemed privileged in the attorney-client relationship, pursuant to K.S.A. 75-7319(b)(2). Ultimately, the City Commission passed a motion to "defer action and instruct staff to provide additional information at the next city commission meeting on August 23, 2021".

The additional information to be provided also relates to legal aspects relating to the proposed initiative and referendum ordinance, prompting the need for further consultation with an attorney for the public body which would be deemed privileged in the attorney-client relationship, pursuant to K.S.A. 75-7319(b)(2). Staff and legal counsel will be prepared to provide information as requested at the direction of the City Commission on August 23rd.

FISCAL NOTE:

Further direction and detail would be needed from the City Commission before any fiscal impacts associated with a chosen action item might be able to be provided.

COMMISSION ACTION OR RECOMMENDED ACTION:

Staff recommends that the City Commission make and motion to recess into executive session for 30 minutes to discuss the subject of the legal aspects relating to the proposed initiative and referendum ordinance with legal counsel based upon the need for consultation with an attorney for the public body which would be deemed privileged in the attorney-client relationship, pursuant to K.S.A. 75-7319(b)(2)

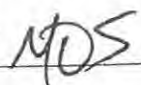
Following additional deliberations, the governing body may consider the options and provide direction as discussed in the attached staff report dated August 23, 2021 as well as additional information provided by legal counsel at the August 23rd meeting.

CC: Kevin Korb

CITY OF SALINA
REQUEST FOR CITY COMMISSION ACTION

DATE
8/16/2021

TIME
4:00 P.M.

AGENDA SECTION NO: 7	ORIGINATING DEPARTMENT: City Legal Counsel	FISCAL APPROVAL: BY:
ITEM NO: 4 Page 1	BY: Greg Bengtson	FINAL APPROVAL: BY: 

ITEM: Consideration of Initiative and Referendum Petition – Ordinance No. 21-11075, Resolution No. 21-7979, and Ordinance No. 21-11076

Staff has prepared the following three documents for the Governing Body's consideration in fulfillment of the statutory requirements resulting from the initiative and referendum petition certified by the Saline County Clerk/Saline County Election Official as having been signed by the required number of electors qualified to sign.

Consideration of Ordinance No. 21-11075 – An Ordinance Limiting the Power of the City of Salina Governing Body to Impose Restrictions on Businesses and Citizens Relating to a State of Emergency Declared at the County or State Level;

Consideration of Resolution No. 21-7979 authorizing the City's legal counsel to file suit in the Saline County District Court seeking declaratory judgment regarding the validity and status of the petition and proposed ordinance; and

Consideration of Ordinance No. 21-11076 submitting to the vote of the electors of the City of Salina, Kansas, at the November 2, 2021 general city election in accordance with the initiative and referendum statute (K.S.A. 12-3013) – An Ordinance Limiting the Power of the City of Salina Governing Body to Impose Restrictions on Businesses and Citizens Relating to a State of Emergency Declared at the County or State Level.

BACKGROUND:

Kansas law provides a means for citizens to initiate local legislation by petition (K.S.A. 12-3013), commonly referred to as the "initiative and referendum" statute. A proposed ordinance may be submitted to the governing body of any city accompanied by a petition. In cities of the first class (Salina is a city of the first class) electors equal in number to at least 25% of those who voted in the last preceding city election must sign the petition. If the petition accompanying the proposed ordinance is signed by the required number of electors qualified to sign, the governing body shall either (a) pass such ordinance without alteration within 20 days after attachment of the clerk's certificate to the accompanying petition; or (b) if not passed within 20 days, forthwith call a special election, unless a regular city election is to be held within 90 days thereafter, and at such special or regular city election submit the ordinance, without alteration, to the vote of the electors of the city (K.S.A. 12-3013(a)).

Any ordinance proposed by a petition under the initiative and referendum statute and passed by the governing body or adopted by a vote of the electors, shall not be repealed or amended except (1) by a vote of the electors, or (2) by the governing body, if the ordinance has been in effect for 10 years from the date of publication, if passed by the governing body, or from the date of the election, if adopted by a vote of the electors.

CITY OF SALINA
REQUEST FOR CITY COMMISSION ACTION

DATE
8/16/2021

TIME
4:00 P.M.

AGENDA SECTION NO:	ORIGINATING DEPARTMENT: City Legal Counsel	FISCAL APPROVAL: BY:
ITEM NO: Page 2	BY: Greg Bengtson	FINAL APPROVAL: BY:

The initiative and referendum process cannot be utilized for (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 subject to referendum or election under another statute (K.S.A. 12-3013(e)).

The initiative and referendum petition is subject to the general requirements of Article 36 (Sufficiency of Petitions), Chapter 25 (Elections) of the Kansas Statutes Annotated. When any other statute (such as K.S.A. 12-3013) imposes specific requirements which are different from those general requirements, the provisions of the specific statute control (K.S.A. 25-3601(d)).

The petition for the proposed ordinance was filed in the office of the Saline County Clerk/County Election Officer on July 23, 2021. Copies of the proposed ordinance and sample form of each page of the petition as filed are attached. By the attached letter dated July 28, 2021, the Saline County Clerk/County Election Officer certified the sufficiency of the signatures on the petition. K.S.A. 12-3013(a) provides that: "Such ordinance and petition shall be filed with the city clerk." On August 6, 2021, Kevin Korb submitted the attached letter to the Saline County Clerk/County Election Officer. On August 9, 2021, a certified copy of the petition and Mr. Korb's letter were hand-delivered to the Salina City Clerk by the Saline County Clerk/County Election Officer with her attached cover letter dated August 9, 2021.

ISSUES PRESENTED

The petition and proposed ordinance present a number of issues for consideration by the Governing Body.

"Home rule." Under Article 12, Section 5 of the *Kansas Constitution*, cities in Kansas have been granted "home rule" powers since July 1, 1961, following approval by voters at the November 1960 general election. Because the petitioned ordinance limits the ability of the current and future governing bodies of the City of Salina in the exercise of the City's constitutional home rule authority to act in the interest of the public health, safety, and welfare of its citizens, the issue is raised of whether the petitioned ordinance is unconstitutional under the *Kansas Constitution*.

Administrative aspect. Section 2 of the petitioned ordinance first prohibits restrictions on businesses or citizens in response to any state of emergency declared at the County or State level. The second paragraph of Section 2 provides: "The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County." Because that provision regulates the City's operation of its own property and facilities, it raises the issue of whether the petitioned ordinance is administrative in nature, thus disqualifying the ordinance from consideration under the initiative and referendum process.

Single subject and title. Two separate and distinct statutes speak to the number of subjects and the title of the petition. First, Kansas law (K.S.A. 12-3004) provides, in part: "No ordinance shall contain

CITY OF SALINA
REQUEST FOR CITY COMMISSION ACTION

DATE
8/16/2021

TIME
4:00 P.M.

AGENDA SECTION NO:	ORIGINATING DEPARTMENT: City Legal Counsel	FISCAL APPROVAL: BY:
ITEM NO: Page 3	BY: Greg Bengtson	FINAL APPROVAL: BY:

more than one subject, which shall be clearly expressed in its title;" Second, and specifically in the initiative and referendum context, the "sufficiency of petitions" statute (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 subjects included under Section 2 of the petitioned ordinance and the exclusion of any reference in the title of the petitioned ordinance to the limitations placed upon the City in relation to the operation of its publicly owned and operated facilities raises the issue of whether the petitioned ordinance complies with K.S.A. 12-3004 and K.S.A. 25-3602(a).

Other matters. As a general category of matters relating to the requirements of the "sufficiency of petitions" statutes and the more specific provisions of the "initiative and referendum" statute, the following issues are also raised.

1. Whether the proposed ordinance and petition have been properly filed in compliance with K.S.A. 12-3013(a). As described above and at the recommendation of the County Counselor, the County Clerk's delivery of a certified copy of the full petition and ordinance to the City Clerk at the written request of the petitioner was the suggested remedy.
2. K.S.A. 12-3013(a) indicates 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 petition does not include that request, but appears to have been drafted with an eye towards submission to the Governing Body to consider or reject.
3. K.S.A. 25-3602(b)(2) provides that each petition shall name the taxing subdivision or other political subdivision in which an election is sought to be held. The petition does not specifically name the City of Salina, Kansas as the political subdivision in which an election is sought to be held, although other references to the City of Salina are made in the petition.
4. K.S.A. 12-3013(b), as the more specific statute, provides that: "Each proposed ordinance set forth in full or submitted by title generally descriptive of the contents thereof shall be preceded by the words, "Shall the following be adopted?" The more general statute, K.S.A. 25-3601, refers to the title of the petition as "Shall the following ordinance, or resolution become effective?" The petition is titled with the phrase "Shall the following ordinance become effective."

If the Governing Body wishes to pursue these others matters, staff believes further discussion in executive session would be warranted.

CITY OF SALINA
REQUEST FOR CITY COMMISSION ACTION

DATE
8/16/2021

TIME
4:00 P.M.

AGENDA SECTION NO:	ORIGINATING DEPARTMENT: City Legal Counsel	FISCAL APPROVAL: BY:
ITEM NO: Page 4	BY: Greg Bengtson	FINAL APPROVAL: BY:

COMMISSION ACTION

Step 1. Consideration of Ordinance No. 21-11075. The City Clerk has prepared the attached Ordinance No. 21-11075 to include the unaltered content of the ordinance submitted by petition. If the Governing Body chooses, it may consider Ordinance No. 21-11075 under its normal procedures. Consideration of the ordinance on first and second reading on the same day (based upon a compelling public purpose finding) would be in order as the basis for fully enacting the ordinance within 20 days of the County Election Officer's July 28, 2021 initial certification of the sufficiency of the signatures on the petition (August 17, 2021). If Ordinance No. 21-11075 is enacted, no further action is necessary.

Step 2. Consideration of Resolution No. 21-7979. The attached draft Resolution No. 21-7979 authorizes the City's legal counsel to pursue declaratory judgment in the Saline County District Court regarding the validity and status of the petition and proposed ordinance. The draft resolution includes reference to all of the issues outlined above for the purpose of enabling the Governing Body to provide direction on particular issues to either be pursued or not under the declaratory judgment proceeding.

Step 3. Consideration of Ordinance No. 21-11076.

If the Governing Body does not enact Ordinance No. 21-11075, the initiative and referendum statute requires that the Governing Body "forthwith call a special election, unless a regular city election is to be held within 90 days thereafter, and at such special or regular city election submit the ordinance, without alteration, to the vote of the electors of the city. The regular city election to occur November 2, 2021 falls within the 90-day window. Staff has confirmed with the Saline County Election Officer that if the Governing Body acts to submit the petitioned ordinance before September 1, it can be included in the regular city election. Consequently the attached ordinance qualifies for submission for the upcoming regular city election. The attached draft Ordinance No. 21-11076 has been prepared for that purpose. The current draft does not anticipate the adoption of Resolution No. 21-7979. If Resolution No. 21-7979 is adopted, Ordinance No. 21-11076 should be amended to refer to Resolution No. 21-7979 as having been adopted. There is precedent for an initiative and referendum ordinance approved by the electors being overturned as the result of a successful legal challenge.

Governing bodies of other municipalities have chosen not to advance a petitioned ordinance to either a special or general city election on the basis of objection to the validity of the petitioned ordinance; however, that approach leaves the city's inaction open for a judicial challenge. The availability of the upcoming regular city election results in no cost to the City for conducting the election on the petitioned ordinance, compared with the cost of conducting a special election sometime in the future.

FISCAL NOTE:

The potential financial cost factors associated with this matter include (a) the legal fees associated with a judicial challenge of the petitioned ordinance, (b) the cost associated with a special election if the petitioned ordinance is not placed on the ballot as part of the upcoming regular city election, and (c) the legal fees associated with a legal defense if no action is taken and the City must defend itself in response to a legal challenge.

CITY OF SALINA
REQUEST FOR CITY COMMISSION ACTION

DATE
8/16/2021

TIME
4:00 P.M.

AGENDA SECTION NO:	ORIGINATING DEPARTMENT: City Legal Counsel	FISCAL APPROVAL: BY:
ITEM NO: Page 5	BY: Greg Bengtson	FINAL APPROVAL: BY:

COMMISSION OPTIONS:

Staff has identified the following options for the City Commission's consideration:

- 1.) Approve Ordinance No. 21-11075 enacting the proposed ordinance on first and second reading;
- 2.) Adopt Resolution No. 21-7979 authorizing pursuit of a declaratory judgement
- 3.) Adopt Ordinance No. 21-11076 submitting the ordinance to a vote of the electors on first or first and second reading;
- 4.) Adopt Ordinance No. 21-11076 submitting the proposed ordinance to a vote of the electors on first and second reading and adopt Resolution No. 21-7979 authorizing pursuit of a declaratory judgement; or
- 5.) Take No action.

Attachments:

Copies of the proposed ordinance and sample form of each page of the petition
Copy of letter from Saline County Clerk/County Election Officer to City Clerk dated July 28, 2021
Copy of letter from Kevin Korb to Saline County Clerk/County Election Officer dated August 6, 2021
Copy of letter from Saline County Clerk/County Election Officer to City Clerk dated August 9, 2021
Draft Ordinance No. 21-11075
Draft Resolution No. 21-7979
Draft Resolution No. 21-11076

CC: Kevin Korb

Shall the following ordinance become effective?

Summary of the proposed ordinance:

This ordinance prevents the City of Salina Governing Body from enacting any ordinance, in response to a public emergency, that imposes restrictions on businesses or citizens, leaving that responsibility to Saline County and subject to the Kansas Emergency Management Act.

Complete Text of the proposed ordinance:

AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SALINA, KANSAS:

Section 1. Definitions

"Business" means any organization or entity, whether open to the public or a private entity operating within the city limits of the City of Salina, Kansas.

"Citizen" for the purpose of this ordinance means any person residing in, or being present in the city at any time.

"Restriction" means any limitations on movement, behavior, business operation or general liberty that is imposed on businesses or citizens and is or would be reasonably perceived as a reaction to an "emergency state" that is declared at the State of Kansas or Saline County level

"Governing Body" means the City Commission of the City of Salina, Kansas

Section 2. Limitations on power of Governing Body to impose restrictions during emergency.

The Governing Body of the City of Salina shall not impose any restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful in response to any state of emergency declared at the County or State level. Examples of restrictions include but are not limited to: Limitations on business capacity, Limitations on business hours, Forcing a business to close, Restricting what may be bought or sold, Restrictions on citizens leaving their residence, Restrictions on citizens being in public places, Curfews applying to citizens, Forced medical treatment of any kind such as mandatory vaccines or the mandatory wearing of face coverings or other medical protective equipment.

The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County.

The purpose of this ordinance is to defer any such restrictions to Saline County to impose at its discretion and subject to the framework of the "Kansas Emergency Management Act" (Kansas Statutes Annotated, Chapter 48, Article 9)

Section 4. Effective This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

This ordinance prevents the City of Salina Governing Body from enacting any ordinance in response to a public emergency that imposes restrictions on businesses or citizens, leaving that responsibility to the county and subject to the Kansas Emergency Management Act. A complete copy of the ordinance can be found at www.salina-ks.gov or in the office of the City Clerk, 300 W. Ash, free of charge.

Instructions for petition signers and circulators:

You must be a registered voter and reside in Salina, KS in order to sign this petition

The petition must be signed in the presence of the circulator

You must not sign the petition more than once

You cannot sign for another person

A circulator cannot sign the same petition they carry

Print clearly using ink and make sure all information is accurate and that the address you write matches your voter registration

If you make a mistake, cross out the entire line and complete a new line

Each circulator must attest to each copy of the petition in the presence of a notary. Once attested, no additional signatures may be added to that copy.

Applicable law:

This petition was prepared in accordance with K.S.A. 12-3013, K.S.A 25-3601 and K.S.A. 25-3602

Summary of the proposed ordinance:

This ordinance prevents the City of Salina Governing Body from enacting any ordinance, in response to a public emergency, that imposes restrictions on businesses or citizens, leaving that responsibility to Saline County and subject to the Kansas Emergency Management Act.

I have personally signed this petition. I am a registered elector of the state of Kansas and of the City of Salina and my residence address is correctly written after my name.

1	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: _____ _/_/___
2	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: _____ _/_/___
3	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: _____ _/_/___
4	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: _____ _/_/___
5	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: _____ _/_/___
6	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: _____ _/_/___
7	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: _____ _/_/___
8	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: _____ _/_/___
9	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: _____ _/_/___
10	Printed Name: _____ Signature: _____	Residence Street Address : _____ City: _____	Date Signed: _____ _/_/___

AFFIDAVIT OF CIRCULATOR

I am the circulator of this petition and I am qualified to circulate this petition and I personally witnessed the signing of the petition by each person whose name appears thereon.

(Signature of circulator)

(Circulator's residence address)

(SEAL)

STATE OF KANSAS, COUNTY OF SALINE

Subscribed and sworn to before me this

_____ day of _____, 2021
(day) (month)

Signature (and Title) of Official Administering Oath

My Commission Expires: _____

Saline County Clerk/Election Office



Jamie R Doss – County Clerk/Election Officer

Phone: (785) 309-5820

300 W Ash St, Rm 215

FAX: (785) 309-5826

P.O. Box 5040

E-mail: Jamie.Doss@saline.org

Salina, KS 67402-5040

www.saline.org

July 28, 2021

JoVonna Rutherford, Salina City Clerk
City of Salina
300 W. Ash St, Room 206
Salina, KS 67401

Re: Petition for Proposed ordinance limiting the power of the city of Salina governing body to impose restrictions on businesses and citizens related to a state of emergency declared at the county or state level.

Dear JoVonna:

The petition for the proposed ordinance was filed to our office on July 23, 2021. Such petition shall be signed by electors equal in number to at least 25% in cities of the first class of the electors who voted at the last preceding regular city election as shown by the poll books. The 2019 City Election voter turnout was 6,527, which equates to the required signatures of 1,632.

Pursuant to Kansas Statute K.S.A. 12-3013, 25-3602(b)(4), and Notarial Statute 53-501, et. seq., as Saline County Election Officer, I am hereby certifying 1,662 signatures, as placed on the "Petition for the Limitations on power of Governing Body to impose restrictions during emergency.

The circulators registrations and signatures were checked and the proper notarizations were verified.

Sincerely,

Jamie R Doss
Saline County Clerk/County Election Officer



Cc: Mike Schrage
Kevin Korb

8/6/2021

Kevin Korb
600 Upper Mill Heights Dr
Salina, KS 67401

Jamie Doss
Saline County Clerk
301 W Ash St
Salina, KS 67401

Ms Doss:

I am writing to request that you deliver a certified copy of the petition "to limit the emergency powers of the City of Salina" along with the signature pages to the City of Salina Clerk's office as soon as practical.

Thanks,



Kevin Korb

RECEIVED

AUG 06 2021

**SALINE COUNTY
CLERK / ELECTION**

Saline County Clerk/Election Office



Jamie R Doss – County Clerk/Election Officer

Phone: (785) 309-5820

FAX: (785) 309-5826

E-mail: Jamie.Doss@usaline.org

www.saline.org

300 W Ash St, Rm 215

P.O. Box 5040

Salina, KS 67402-5040

August 9, 2021

JoVonna Rutherford, Salina City Clerk
City of Salina
300 W. Ash St, Room 206
Salina, KS 67401

Re: Certified Copy of the Petition for Proposed ordinance limiting the power of the city of Salina governing body to impose restrictions on businesses and citizens related to a state of emergency declared at the county or state level.

Dear JoVonna:

The petition for the proposed ordinance was filed to our office on July 23, 2021. Such petition shall be signed by electors equal in number to at least 25% in cities of the first class of the electors who voted at the last preceding regular city election as shown by the poll books. The 2019 City Election voter turnout was 6,527, which equates to the required signatures of 1,632.

Pursuant to Kansas Statute K.S.A. 12-3013, 25-3602(b)(4), and Notarial Statute 53-501, et. seq., as Saline County Election Officer, I am hereby certifying 1,662 signatures, as placed on the "Petition for the Limitations on power of Governing Body to impose restrictions during emergency.

The circulators registrations and signatures were checked and the proper notarizations were verified.

On August 6, 2021, Kevin Korb submitted a letter requesting I send the City of Salina a certified copy of the petition. I am hand delivering the certified copy as well as his letter authorizing me to submit the petition. Please submit a letter or email me a confirmation receipt.

Sincerely,

Jamie R Doss

Saline County Clerk/County Election Officer



ORDINANCE NUMBER 21-11075

AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SALINA, KANSAS:

Section 1. Definitions.

"Business" means any organization or entity, whether open to the public or a private entity operating within the city limits of the City of Salina, Kansas.

"Citizen" for the purpose of this ordinance means any person residing in, or being present in the city at any time.

"Restriction" means any limitations on movement, behavior, business operation or general liberty that is imposed on businesses or citizens and is or would be reasonably perceived as a reaction to an "emergency state" that is declared at the State of Kansas or Saline County level.

"Governing Body" means the City Commission of the City of Salina, Kansas

Section 2. Limitations on power of Governing Body to impose restrictions during emergency.

The Governing Body of the City of Salina shall not impose any restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful in response to any state of emergency declared at the County or State level. Examples of restrictions include but are not limited to: Limitations on business capacity, Limitations on business hours, Forcing a business to close, Restricting what may be bought or sold, Restrictions on citizens leaving their residence, Restrictions on citizens being in public places, Curfews applying to citizens, Forced medical treatment of any kind such as mandatory vaccines or the mandatory wearing of face coverings or other medical protective equipment.

The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County.

The purpose of this ordinance is to defer any such restrictions to Saline County to impose at its discretion and subject to the framework of the "Kansas Emergency Management Act" (Kansas Statutes Annotated, Chapter 48, Article 9).

Section 3. Effective.

This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

Ordinance No. 21-11075 Summary

On August __, 2021, the City Commission passed Ordinance No. 21-11075. The ordinance prevents the City of Salina Governing Body from enacting any ordinance in

response to a public emergency that imposes restrictions on businesses or citizens, leaving that responsibility to the county and subject to the Kansas Emergency Management Act. A complete copy of the ordinance can be found at www.salina-ks.gov or in the office of the City Clerk, 300 W. Ash, free of charge. This summary is certified by the City's legal counsel.

Introduced: August ____, 2021
Passed: August ____, 2021

[SEAL]

Melissa Rose Hodges, Mayor

ATTEST:

JoVonna A. Rutherford, City Clerk

The publication summary set forth above is certified this ____ day of _____, 2021..

Greg A. Bengtson, City Attorney

RESOLUTION NUMBER 21-7979

A RESOLUTION AUTHORIZING THE CITY'S LEGAL COUNSEL TO FILE SUIT IN THE SALINE COUNTY DISTRICT COURT SEEKING DECLARATORY JUDGMENT REGARDING THE VALIDITY AND STATUS OF AN INITIATIVE AND REFERENDUM PETITION AND PROPOSED ORDINANCE.

BE IT RESOLVED by the Governing Body of the City of Salina, Kansas:

Section 1. The Governing Body authorizes the City's legal counsel, the law firm of Clark, Mize & Linville, Chartered ("Legal Counsel"), to file suit in the Saline County District Court seeking declaratory judgment regarding the validity and status of the initiative and referendum petition and proposed ordinance under the title of: "AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL."

Section 2. The declaratory judgment action is intended to address the validity and status of the petition and proposed ordinance based upon the following potential issues:

"Home rule." Under Article 12, Section 5 of the *Kansas Constitution*, cities in Kansas have been granted "home rule" powers since July 1, 1961, following approval by voters at the November 1960 general election. Because the petitioned ordinance limits the ability of the current and future governing bodies of the City of Salina in the exercise of the City's constitutional home rule authority to act in the interest of the public health, safety, and welfare of its citizens, the issue is raised of whether the petitioned ordinance is unconstitutional under the *Kansas Constitution*.

Administrative aspect. Section 2 of the petitioned ordinance first prohibits restrictions on businesses or citizens in response to any state of emergency declared at the County or State level. The second paragraph of Section 2 provides: "The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County." Because that provision regulates the City's operation of its own property and facilities, it raises the issue of whether the petitioned ordinance is administrative in nature, thus disqualifying the ordinance from consideration under the initiative and referendum process.

Single subject and title. Two separate and distinct statutes speak to the number of subjects and the title of the petition. First, Kansas law (K.S.A. 12-3004) provides, in part: "No ordinance shall contain more than one subject, which shall be clearly expressed in its title . . ." Second, and specifically in the initiative and referendum context, the "sufficiency of petitions" statute (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 subjects included under Section 2 of the petitioned ordinance and the exclusion of any reference in the title of the petitioned ordinance to the limitations placed upon the City in relation to the operation of its publicly owned and operated facilities raises the issue of whether the petitioned ordinance complies with K.S.A. 12-3004 and K.S.A. 25-3602(a).

Other matters. As a general category of matters relating to the requirements of the "sufficiency of petitions" statutes and the more specific provisions of the "initiative and referendum" statute, the following issues are also raised.

1. Whether the proposed ordinance and petition have been properly filed in compliance with K.S.A. 12-3013(a). As described above and at the recommendation of the County Counselor, the County Clerk's delivery of a certified copy of the full petition and ordinance to the City Clerk at the written request of the petitioner was the suggested remedy.
2. K.S.A. 12-3013(a) indicates 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 petition does not include that request, but appears to have been drafted with an eye towards submission to the Governing Body to consider or reject.
3. K.S.A. 25-3602(b)(2) provides that each petition shall name the taxing subdivision or other political subdivision in which an election is sought to be held. The petition does not specifically name the City of Salina, Kansas as the political subdivision in which an election is sought to be held, although other references to the City of Salina are made in the petition.
4. K.S.A. 12-3013(b), as the more specific statute, provides that: "Each proposed ordinance set forth in full or submitted by title generally descriptive of the contents thereof shall be preceded by the words, "Shall the following be adopted?" The more general statute, K.S.A. 25-3601, refers to the title of the petition as "Shall the following ordinance, or resolution become effective?" The petition is titled with the phrase "Shall the following ordinance become effective."

Section 3. Legal Counsel is authorized to further evaluate the issues outlined above and any others relevant to the validity and status of the petition and proposed ordinance and, based upon that evaluation, to prepare and file appropriate pleadings in the Saline County District Court requesting the

Court's determination of matters deemed in Legal Counsel's discretion to warrant consideration by the Court.

Section 4. This resolution shall be in full force and effect from and after its adoption.

Adopted by the Board of Commissioners and signed by the Mayor this 16th day of August 2021.

(SEAL)

Melissa Rose Hodges, Mayor

ATTEST:

JoVonna A. Rutherford, City Clerk

ORDINANCE NUMBER 21-11076

AN ORDINANCE SUBMITTING TO THE VOTE OF THE ELECTORS OF THE CITY OF SALINA, KANSAS, AT THE NOVEMBER 2, 2021, CITY GENERAL ELECTION A QUESTION PRESENTED PURSUANT TO THE INITIATIVE AND REFERENDUM STATUTE (K.S.A. 12-3013).

WHEREAS, the Saline County Clerk/Saline County Election Officer has certified that a petition and proposed ordinance submitted pursuant to the initiative and referendum statute (K.S.A. 12-3013) under the title of: "AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL" (the "Petitioned Ordinance") is signed by the required number of electors qualified to sign; and

WHEREAS, for the reasons that (a) the Governing Body has not enacted the Petitioned Ordinance without alteration and (b) a regular city election is going to be held within 90 days on November 2, 2021;

THEREFORE, BE IT ORDAINED by the Governing Body of Salina, Kansas:

Section 1. In accordance with K.S.A. 12-3013, the Governing Body submits to the vote of the electors of the City of Salina, Kansas, at the November 2, 2021 city general election the question presented by the Petitioned Ordinance, a copy of which is attached and incorporated herein.

Section 2. The City Clerk is directed to deliver a certified copy of this ordinance to the County Election Officer and to request that the County Election Officer take all steps necessary to include the proposition referred to in Section 1 above on the ballot for the city general election to be held on November 2, 2021.

Section 3. This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

Ordinance No. 21-11076 Summary

On August 16, 2021, the City Commission passed Ordinance No. 21-11076. The Ordinance submits to the vote of the electors of the City of Salina, Kansas at the November 2, 2021 city general election the question presented by a petition and proposed ordinance submitted pursuant to the initiative and referendum statute (K.S.A. 12-3013) under the title of: "AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL." A complete copy of the Ordinance can be found at www.salina-ks.gov or in the office of the City Clerk, 300 W. Ash, free of charge. This summary is certified by the City's legal counsel.

Introduced: August 16, 2021
Passed: August 23, 2021

Melissa Rose Hodges, Mayor

[SEAL]

ATTEST:

JoVonna A. Rutherford, City Clerk

The publication summary set forth above is certified this __ day of August, 2021.

Greg A. Bengtson, City Attorney

Shall the following ordinance become effective?

Summary of the proposed ordinance:

This ordinance prevents the City of Salina Governing Body from enacting any ordinance, in response to a public emergency, that imposes restrictions on businesses or citizens, leaving that responsibility to Saline County and subject to the Kansas Emergency Management Act.

Complete Text of the proposed ordinance:

AN ORDINANCE LIMITING THE POWER OF THE CITY OF SALINA GOVERNING BODY TO IMPOSE RESTRICTIONS ON BUSINESSES AND CITIZENS RELATED TO A STATE OF EMERGENCY DECLARED AT THE COUNTY OR STATE LEVEL

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SALINA, KANSAS:

Section 1. Definitions

"Business" means any organization or entity, whether open to the public or a private entity operating within the city limits of the City of Salina, Kansas.

"Citizen" for the purpose of this ordinance means any person residing in, or being present in the city at any time.

"Restriction" means any limitations on movement, behavior, business operation or general liberty that is imposed on businesses or citizens and is or would be reasonably perceived as a reaction to an "emergency state" that is declared at the State of Kansas or Saline County level

"Governing Body" means the City Commission of the City of Salina, Kansas

Section 2. Limitations on power of Governing Body to impose restrictions during emergency.

The Governing Body of the City of Salina shall not impose any restrictions on businesses or citizens of the City of Salina on activities that are otherwise lawful in response to any state of emergency declared at the County or State level. Examples of restrictions include but are not limited to: Limitations on business capacity, Limitations on business hours, Forcing a business to close, Restricting what may be bought or sold, Restrictions on citizens leaving their residence, Restrictions on citizens being in public places, Curfews applying to citizens, Forced medical treatment of any kind such as mandatory vaccines or the mandatory wearing of face coverings or other medical protective equipment.

The wearing of face coverings or other medical protective equipment may not be required on any public owned property, such as parks and other facilities operated by the City of Salina unless a health order mandating the same is in effect for Saline County.

The purpose of this ordinance is to defer any such restrictions to Saline County to impose at its discretion and subject to the framework of the "Kansas Emergency Management Act" (Kansas Statutes Annotated, Chapter 48, Article 9)

Section 4. Effective This ordinance shall be in full force and effect from and after its adoption and publication once in the official city newspaper by the following summary:

This ordinance prevents the City of Salina Governing Body from enacting any ordinance in response to a public emergency that imposes restrictions on businesses or citizens, leaving that responsibility to the county and subject to the Kansas Emergency Management Act. A complete copy of the ordinance can be found at www.salina-ks.gov or in the office of the City Clerk, 300 W. Ash, free of charge.