

CITY CHARTER: Amendment:

Sections 82.030 and 125.050, RSMo 1949, prescribing the duties to be performed and the form of ballot to be used by the Board of Election Commissioners in submitting proposals to amend the city charter of that city are mandatory.



September 22, 1952

9/24/52

The Board of Election Commissioners
of Kansas City, Missouri
Jackson County Courthouse
Kansas City, Missouri

Gentlemen:

This will be the opinion you requested by letter from this office as to whether the Board of Election Commissioners of Kansas City, Missouri is required to submit propositions proposed by the City Council of said city for amending the charter of said city, and in the form prescribed for the "constitutional ballot", or, if not so required, does said Board have discretion to place such proposed amendments of said charter upon, and in the form prescribed for the "constitutional ballot". Your letter requesting the opinion states:

"Several charter amendments proposed by the Council of Kansas City are to be submitted to the electors of that city at the ensuing general election, pursuant to section 20, article 6, of the present constitution.

"In the submission of propositions for amending a constitutional city charter, Section 82.030 RSMo 1949, V.A.M.S., provides that 'the form of ballot * * (may be) determined by the board of election commissioners * * in accordance with the election laws of this state applicable to elections held in such cities, as they now are or may hereafter be amended.' Of 'the election laws of this state applicable to elections held in such city' is Section 125.050 RSMo 1949 V.A.M.S. This latter section prescribes a form of the ballot designated as 'constitutional ballot'. Section 125.050 was amended in 1949 (Laws 1949 page 261) by incorporating the following language:

"Every other proposition, including referendum and initiative measures, to be submitted at the

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general election shall be proposed and submitted on the 'Constitutional ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not. * * To vote for any proposed constitutional amendment, propositions, other subjects, measures, including referendum and initiative measures, if any are submitted, the voter shall place an X in the square opposite the word 'For' and if he is opposed to the same, the voter shall place an X in the square opposite the word 'Against.' (Laws 1949 pp 262-263)'

"In view of the foregoing provisions (or any other provisions deemed applicable) is the board required to submit propositions for amending Kansas City's charter upon, and in the form prescribed for the 'constitutional ballot'? If not so required, does the board have discretion to place such propositions upon, and in the form prescribed for, the 'constitutional ballot'?

"Confronted with the immediate necessity of preparing absentee ballots for the ensuing election, the answers to the foregoing questions as soon as may be convenient are respectfully requested."

Section 19 of Article 6 of the 1945 Constitution of Missouri provides that any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of this state, pointing out the procedure to be followed thereat.

Section 20 of Article 6 of our said Constitution provides for amendments of city charters already adopted. Said section 20 so providing and pointing out the procedure to be followed in such amendment, or amendments, reads as follows:

"Amendments of any city charter adopted under the foregoing provisions may be submitted to the electors by a commission as provided for a complete charter. Amendments may also be proposed by the legislative body of the city or by petition of not less than ten per cent of the registered qualified electors of the city, filed with the body or official having charge of the city elections, setting forth the proposed amendment. The legislative body shall at once provide, by ordinance,

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that any amendment so proposed shall be submitted to the electors at the next election held in the city not less than sixty days after its passage, or at a special election held as provided for a charter. Any amendment approved by a majority of the qualified electors voting thereon, shall become a part of the charter at the time and under the conditions fixed in the amendment; and sections or articles may be submitted separately or in the alternative and determined as provided for a complete charter."

The right of a city of more than 10,000 inhabitants to frame and adopt a new charter or to amend its charter is a continuing one.

Our Supreme Court in the case of *Morrow vs. Kansas City*, 186 Mo. 675, speaking of the right under Section 16 of our Constitution of 1875 to adopt a special city charter being a continuing right, the Court, l.c. 689, said:

"Such a grant has again and again been held to be a continuing one in our municipal systems. (*Farrar v. St. Louis*, 80 Mo. 379; *McCormack v. Patchin*, 53 Mo. 36; *Skinker v. Heman*, 148 Mo. 355.)"

The Court further held in the same case, l.c. 689 and 690, that such cities had the power under said Section 16 of the Constitution of 1875 to either adopt a new charter or amend an existing charter as a continuing power, and so holding said:

"But it is urged that the Constitution simply provides for an amendment, and does not contemplate a new freeholders' charter after one has been framed and adopted. We think the section had a twofold object, a plan for creating a new charter and a plan for amending the same. It was left to the cities of over one hundred thousand inhabitants to resort to either, as their necessities might require."

Sections 19 and 20 of Article VI of our present Constitution are the same as were Sections 16 and 17, without substantial change, except population provisions, in the 1875 Constitution of this state.

Section 19 of Article VI provides that cities of qualified population in framing and adopting a charter for their own government must do so consistent with and "subject" to the Constitution and laws

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of the state. This means, our Supreme Court said, in Turner vs. Kansas City, et al., 191 S.W.(2d) 612, quoting from another Missouri Supreme Court decision, l.c. 615, the following:

"Subject to," that is, placed under the authority, the dominion of the constitution and laws of the state." * * *.

The Constitution thus grants to cities of appropriate population the right to frame and adopt a charter, or to amend the same. The State, under its police powers, has basic control over and regulation of proceedings to be observed for holding elections in such cities to adopt or amend charter proposals.

The General Assembly of this State giving authority to such cities to adopt and amend charters, and providing the procedure and details to be followed in elections to adopt or to amend a city charter, and prescribing the form of the ballot to be used to adopt or reject a city charter, or to amend the same, enacted Sections 82.020, 82.030 and 125.050, RSMo 1949, which, respectively, read as follows:

"82.020. Certain cities may adopt or amend constitutional charter, how

"Any city in this state which now has or which may hereafter have a population of more than ten thousand inhabitants according to the last preceding federal decennial census may frame and adopt or amend a charter for its own government by complying with the provisions of sections 19 and 20 of article VI of the constitution of this state, or any amendments thereof."

"82.030. Election, how conducted

"Notices of any election provided in said sections 19 and 20 of article VI of the Constitution of Missouri, or any amendments thereof, may be given and the form of ballot and details of such election determined, by the board of election commissioners or other officials having charge of municipal elections in said cities in accordance with the election laws of this state applicable to elections held in such cities, as they now are or may hereafter be amended."

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"125.050. Vote to be by ballot--form--method of marking

"The vote on a proposition to call a constitutional convention or on the adoption of a new constitution, or on any proposed constitutional amendment, shall be taken by ballot. If a proposition to call a constitutional convention is submitted, each ballot shall have printed thereon the words "Shall there be a convention to revise and amend the constitution?" with 'For' and 'Against' to the left thereof, one above the other. If but one constitutional amendment has been proposed by the general assembly or by the initiative, each official constitutional ballot shall have printed thereon the words 'Constitutional Amendment No. 1' followed by the official ballot title as provided for in sections 125.010 to 125.120, and to the left of the official ballot title, the words 'For' and 'Against' one above the other. But if more than one constitutional amendment has been so proposed, then each ballot shall have printed thereon the words 'Constitutional Amendment No. 1,' and so on, setting out the official ballot title of each proposed amendment thereunder and to the left of the official ballot title the words 'For' and 'Against' one above the other, designating in numerical order each proposed constitutional amendment as arranged by the secretary of state. The official ballot title shall be printed with the number of the proposed constitutional amendment on the official ballot and the words 'For' and 'Against' in bold blackfaced type in capital letters not less than eight point in size nor more than ten point in size. At the left of the word 'For' and the word 'Against' shall be placed a small square, not less than one-fourth of an inch in length. The secretary of state shall certify to the different county clerks or other proper officers the form of the official constitutional ballot, containing the numerical numbers and the official ballot title of all proposed constitutional amendments, as provided for in sections 125.010 to 125.120, which shall be printed upon a separate official ballot to be designated 'Constitutional Ballot.' Ballots not printed or prepared as herein required shall not be counted on the proposition thereby submitted.

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The constitutional ballot shall be not less than four inches wide and ten inches long, of the same kind of paper, color and of equal size. Every other proposition, including referendum and initiative measures, to be submitted at the general election shall be proposed and submitted on the 'Constitutional Ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not. The clerk of the county court of each county shall provide for each district in his county, and the election commissioners for each election district in their city, a separate ballot box for the deposit and reception of the constitutional ballots. To vote for any proposed constitutional amendment, propositions, other subjects, measures, including referendum and initiative measures, if any are submitted, the voter shall place an X in the square opposite the word 'For' and if he is opposed to the same, the voter shall place an X in the square opposite the word 'Against.' In all other respects the law governing the printing, distribution of ballots, the number to be distributed, and the manner of voting ballots at a general election shall apply to 'Constitutional Ballots' where not in conflict with sections 125.010 to 125.120."

Your letter advises that several charter amendments proposed by the Council of Kansas City, Missouri are to be submitted to the electors of that city at the ensuing General Election pursuant to Section 20, Article 6 of the present Constitution.

As the basis of the two specific questions submitted to us for our opinion your letter referring to said sections 32.030 and 125.050, states:

"In the submission of propositions for amending a constitutional city charter, Section 82.030 RSMo 1949, V.A.M.S., provides that 'the form of ballot * *(may be) determined by the board of election commissioners* * in accordance with the election laws of this state applicable to elections held in such cities, as they now are or may hereafter be amended.' Of 'the election laws of this state applicable to elections held in such city' is section 125.050 RSMo 1949 V.A.M.S. This latter section prescribes a form of the ballot designated as 'constitutional ballot.' Section 125.050 was amended in 1949 (Laws

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1949 page 261) by incorporating the following language:

"Every other proposition, including referendum and initiative measures, to be submitted at the general election shall be proposed and submitted on the 'Constitutional ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not. * * * To vote for any proposed constitutional amendment, propositions, other subjects, measures, including referendum and initiative measures, if any are submitted, the voter shall place an X in the square opposite the word 'For' and if he is opposed to the same, the voter shall place an X in the square opposite the word 'Against.' (Laws 1949 pp 262-263)"

Sections 82.030 and 125.050 are of "the election laws of this state applicable to elections held in such city" referred to in Section 82.030 itself which must be strictly obeyed in elections "to amend" the city charter of the City of Kansas City.

Pursuant to the provisions of said Sections 82.030 and 125.050, which you quote, in part, you submit the two following questions, to-wit:

"In view of the foregoing provisions (or any other provisions deemed applicable) is the board required to submit propositions for amending Kansas City's charter upon, and in the form prescribed for, the 'constitutional ballot'? If not so required, does the board have discretion to place such propositions upon, and in the form prescribed for, the 'constitutional ballot'?"

Whatever method may be followed under the noted sections of both the Constitution and our statutes authorizing the submission of questions to the electors of adopting or amending a charter of any such city, all such questions, when proposed by the lawful authority, must be submitted to the electors as specified in said Sections 19 and 20 of the Constitution, on the "constitutional ballot" by the Board of Election Commissioners of any such city. Provision is made in Section 125.050, supra, for the submission of other propositions incident to the governmental affairs of such cities on the "constitutional ballot", whether any constitutional amendments are submitted at said election or not. Said Section 125.050 in this behalf provides the following:

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"* * *Every other proposition, including referendum and initiative measures, to be submitted at the general election shall be proposed and submitted on the 'Constitutional Ballot,' as herein provided, if any proposed constitutional amendments are submitted at such election or not. The clerk of the county court of each county shall provide for each district in his county, and the election commissioners for each election district in their city, a separate ballot box for the deposit and reception of the constitutional ballots. To vote for any proposed constitutional amendment, propositions, other subjects, measures, including referendum and initiative measures, if any are submitted, the voter shall place an X in the square opposite the word 'For' and if he is opposed to the same, the voter shall place an X in the square opposite the word 'Against.' * * *."

It will be observed that Section 82.030, supra, provides that:

"Notices of any election provided in said sections 19 and 20 of article VI of the Constitution of Missouri, or any amendments thereof, may be given and the form of ballot and details of such election determined, by the board of election commissioners * * * in accordance with the election laws of this state applicable to elections held in such cities, as they now are or may hereafter be amended."

It will be further observed that said Section 125.050 prescribes the form of the "constitutional ballot" to be used by the electors in voting upon other propositions submitted as well as proposed constitutional amendments, if any are submitted.

Section 82.030, supra, provides that notices of any election to adopt or amend a city charter may (emphasis ours) be given and the form of ballot and details of such election determined by the Board of Election Commissioners or other officials in accordance with the election laws of this State applicable to elections held in such cities, as such election laws now exist or may hereafter be amended. The section does not otherwise indicate that the Board has any discretion in the performance of its named duties. The use of the word "may" in this section must be construed to mean "shall" as we shall hereinafter point out because the section is dealing with

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the powers given to public officers, and which concern the public interest.

This section, however, does require the duties imposed upon the Board to be performed in accordance with the election laws of this State applicable to elections held in such cities, present or future.

Section 125.050 is one of the existing election laws of this State applicable to elections in such cities as Kansas City, Missouri, and, as such, is readily identified, because the section is the only election statute specifically setting up the procedure to be followed in constructing the "constitutional ballot form" for the use of the electorate in voting on the adoption or amendment of city charters as directed in said Section 82.030.

This section provides the form of the "constitutional ballot" with exactness and in detail. It uses, in directing how the form of such ballot shall be constructed, the mandatory word "shall".

Mindful of the requirements in Section 82.030, supra, that the form of the ballot is to be made and the details of such election are to be determined by the Board according to the election laws of this State applicable to elections held in such cities as they now are or may hereafter be amended, and keeping before us the fact that in Section 125.050, supra, itself, it is provided that all these steps "shall" be taken to submit any of such "other propositions as are therein specified," we believe, reading both Sections, 82.030 and 125.050 together, it is clear that the duties of the Board of Election Commissioners of Kansas City, Missouri, in this matter, with respect to the notice and the form of the "constitutional ballot" and all other duties connected therewith, imposed upon the Board, are mandatory and must be performed by the Board as required in said Section 125.050 in conjunction with Section 82.030, and that the Board is without discretionary powers in the performance of any of such duties.

Authorities in both text and decision support the construction we give to the statutes here being considered, and are in support of the conclusion reached in this opinion that the performance of the duties of the Board of Election Commissioners of Kansas City, Missouri under the noted statutes on the questions submitted are mandatory and that the Board has no discretionary powers in such matters.

We here cite such of said authorities as we believe apply to these questions and which support our views herein expressed on such questions.

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29 C.J.S. under the title of "Elections", defining the duties of election officers, has this text, l.c. 73:

"* * * Statutes respecting the duties of public officers in preparing for election are mandatory, and substantial obedience may be required by proper proceedings. Where the duties imposed on a board of election commissioners and the manner of their performance are particularly pronounced in the law, they must be followed or the acts of the board are invalid. * * *."

Supporting this text the Supreme Court of Texas, in the case of Ferguson, et al. vs. McCallum, Secretary of State, 53 S.W. 753, construing a statute of that State, in an election contest, requiring the Secretary of State to certify to County Clerks the names of State candidates within a certain time before the ballots could be printed, and which duty the Secretary of State had fully performed, that Court, holding such election statutes mandatory, l.c. 760, said:

"* * * It is clear, we think that these statutes are mandatory, in the sense that the candidate and the citizen have rights to be subserved thereby, which may be enforced, and that the statutes should be obeyed."

In the case of State ex rel. Mayer, et al. vs. Schuffenhauer, et al., 250 N.W. 767, speaking of the duties of the Board of Election Commissioners of the City of Milwaukee, Wisconsin, as defined by the statute of that State being mandatory, the Supreme Court of Wisconsin, l.c. 767, said:

"The power given the board of election commissioners is there plainly set forth. It does not extend beyond that fixed by legislative enactment in the act of its creation. The duties imposed and the manner of their performance being particularly pronounced in the law, they must be followed or the acts of the board cannot be valid. * * *."

29 C.J.S., page 245, under the subject of "Elections", stating that compliance must be had with statutes authorizing the submission of questions or propositions, has this text:

"In jurisdictions in which a statutory form for submission of questions or propositions is provided, compliance with such form is essential, * * *."

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The Illinois case of *People ex rel. Sandberg vs. Grabs*, 26 N.E.(2d) 494, was before the Supreme Court of that State, in quo warranto, on appeal, on the question of the usurpation by the respondents of the offices of members of the Board of Fire and Police Commissioners of the City of Chicago Heights. The ballot used in the election creating the Board did not conform to the ballot prescribed by the statute. This point was the basis of the proceeding in quo warranto to oust such officers as members of said Board. The respondents contended that there had been a substantial compliance with the statute in the form of the ballot used. The Supreme Court of Illinois, affirming the judgment of the lower court in holding the election void for failure of the election officials to use the ballot prescribed by the statute and ordering ouster of the respondent officers, l.c. 498, said:

"* * *This court is committed to the rule that where the statute declares the form of the ballot, section 16 of the Ballot law does not apply. The form of the ballot must conform to the statutory mandate, and a failure to observe such provision of the law is a matter of substance and renders the election void. * * *."

The Supreme Court of Missouri has consistently held that the word "may" must be construed to mean "shall" when used in a statute measuring the power given to public officers where the public interest is concerned. The Supreme Court, in the case of *State ex rel. Vernon County vs. King, et al.*, 136 Mo. 309, a case involving the construction of a statute dealing with the right of a public officer to retain certain fees where the word "may" was used in the statute, in deciding the case and holding that in such cases the word "may" means "shall", l.c. 318, 319, said:

"* * *It is also a well recognized rule of construction that the word 'may' should be interpreted to mean 'shall' when referring to a 'power given to public officers, and (which) concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner.' Such an interpretation is demanded 'for the sake of justice and the public good.' * * *."

The *Vernon County* case, supra, is cited and the construction there given the word "may" as meaning "shall" under the conditions existing, was repeated by the Supreme Court in the case of *State vs. Bevins*, 328 Mo. Rep. 1048, where the Court, l.c. 1050, said:

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"* * *The word 'may' is interpreted to mean 'shall' when referring 'to a power given to public officers, and which concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner.' (State ex rel. Vernon County v. King, 136 Mo. 309, 319, 36 S.W. 681 and 38 S.W. 80.) * * *."

It would be difficult to find a situation where a more pointed or specific case of public interest could be more definitely shown than in this set of circumstances where the exercise of the constitutional right of a city to amend its charter for its own government is involved. Such an amendment, or amendments, either to be adopted or rejected, and the election at which the electors of the city may express their will respecting proposals to amend a city charter in governing themselves is of the highest order of public interest. It is the privilege of the City Council of the City of Kansas City, Missouri to propose amendments of the charter of said city pursuant to Section 20 of Article VI of our Constitution to be submitted to the electors of that city at the ensuing General Election. It is the mandatory duty, we believe, of the Board of Election Commissioners to submit all amendments so proposed to the electors of said city under the provisions of Sections 82.030 and 125.050, RSMo 1949.

CONCLUSION

It is, therefore, considering the premises, the opinion of this Department that the Board of Election Commissioners of the City of Kansas City, Missouri is required to submit propositions proposed by the Council of said city to the electors of such city at the ensuing General Election for amending the charter of said city upon and in the form prescribed for the "constitutional ballot" as provided in Sections 82.030 and 125.050, RSMo 1949, and that said Board does not have discretion to place such propositions on the "constitutional ballot". The form of such ballot prescribed by the statute must be used by the Board in submitting such propositions to a vote of the electors of said city.

Respectfully submitted,

APPROVED:


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