

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT**

| | | |
|---------------------------------------------|---|------------------------|
| CITY OF WESTWOOD, KANSAS |) | |
| A municipal corporation, |) | |
| |) | |
| Plaintiff, |) | Case No. 24CV272 |
| |) | Chapter 60; Division 7 |
| v. |) | |
| |) | |
| STATE OF KANSAS ex rel. |) | |
| KRIS W. KOBACH, Attorney General, in his |) | |
| official capacity, and |) | |
| STEPHEN M. HOWE, District Attorney |) | |
| For Johnson County, Kansas, in his official |) | |
| Capacity, |) | |
| |) | |
| Defendants. |) | |

JUDGMENT GRANTING DECLARATORY JUDGMENT

Plaintiff City of Westwood (“the City”) filed an action seeking declaratory judgment regarding petitions protesting the sale of City land. The land is commonly known as “Joe D. Dennis Park” (“the Park”).

The City filed its declaratory petition judgment on Jan. 19, 2024. Doc. 1. Rebecca Brown (“Ms. Brown”) filed a motion to intervene and third-party petition on Feb. 9, 2024. Doc. 4. The City responded to the motion to intervene on Feb. 15, 2024. Doc. 8. The City also filed a memorandum in support of the petition for review on Feb. 15, 2024. Doc. 9.

After considering the parties’ briefs and oral argument, the Court **GRANTS** the City’s petition and denies the motion to intervene. The following are the facts from the record.

FACTUAL HISTORY

1. The City of Westwood owns four parcels of land with common addresses of 5000 and 5010 Rainbow Boulevard.

2. These parcels include lots 1, 2, and 3, Block 1 of the Swatzell Addition, and one lot spanning the rear of these three lots.

3. The 5000 and 5050 property contain the Park.

4. In June of 2023, the City entered into a contract with Karbank Holdings, LLC providing for the sale of the 5000 Property or the 5050 Property.

5. The petition seeks to limit the sale of the Park, specifically the 5000 Rainbow Property, to be put on the ballot in November.

6. The City posted notice of the sale in the official city newspaper on November 7 and 14, 2023.

7. Petitions protesting the sale were circulated in November and early December 2023.

8. The City submitted the petitions to the Johnson County Election Office on December 29, 2023.

9. On January 9, 2024, the Johnson County Election Office accepted 169 of the 220 signatures.

10. Petitioner writers (“Petition writers”, or “Petition Circulators”) failed to include the recital that states “I have personally signed this petition. I am a registered elector of the state of Kansas and of Westwood Kansas and my residence address is correctly written after my name.”

Plf. Pet. ¶57. Plf. Ex. A, Ex. C.

11. The petition lacked the recital that the signatories residence is correctly written after their name. Plf. Pet. ¶60.

12. The petition’s submission failed to state “I have personally signed this petition.” Plf. Pet. ¶ 59.

13. The petition lacks the recital that the petition signor be a “registered elector”. Plf. Pet. ¶ 62
14. The petition merely states that the signatories are “qualified electors”. Plf. Pet. ¶ 62.
15. The petition failed to include the statement “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.” Plf. Pet. ¶ 68.
16. The petition lacks dates for each signature. Plf. Pet. ¶ 65-66. Plf. Ex. A, Ex. C.
17. Some of the notary block reference “State of Kansas, County of Johnson” but are stamped by a Missouri notary. Plf. Pet. ¶ 71.
18. The petition failed to attest that the Petition Circulators agree to submit to jurisdiction of the state. Plf. Ex. A, Ex. C.
19. The City submitted the petitions to the County Counselor to determine the sufficiency of the form of the question on the petition.
20. The form of the question as presented to the County Counselor was “... to place on the ballot the question as to whether the Joe D. Dennis Park shall be sold, traded, or exchanged.” Plf. Ex. B.
21. On January 17, 2024, the County Counselor determined the form of the question that the petitions presented was not valid.
22. On January 17, 2024 the City of Westwood held a special meeting of the governing body and passed Resolution No. 125-2024.
23. The Resolution declared the petition invalid and reserved the City’s rights to challenge the applicability of K.S.A. 12-1301.

24. The City filed this declaratory judgment action on January 18, 2024, naming the District Attorney and the Attorney General as defendants.

25. Count I challenges the form of the question in the petition.

26. Count II challenges other aspects of the petition.

27. Count III requests the Court declare K.S.A. 12-1301 inapplicable to the sale.

CONCLUSIONS OF LAW

Challenges to the Petition

Count I

A petition is valid if it substantially complies with all relevant statutory safeguards. *City of Wichita v. Peterjohn*, 62 Kan. App.2d 750, 522 P.3d 385 (2022). “Courts should exercise extreme caution when rejecting citizens’ initiative or referendum petitions on mere technicalities.” *Id.* at 756, 522 P.3d at 391. “Substantial compliance with a statute requires compliance in respect to the essential matters necessary to assure every reasonable objective of the statute.” *A & S Rental Sols., Inc. v. Kopet*, 31 Kan. App. 2d 979, 979, 76 P.3d 1057, 1057 (2003). Substantial compliance can be attained if there is compliance with “the spirit and intent of the law but not with the absolute letter.” *Id.*

The City states a number of factors supporting a finding that the petition is not substantially compliant with relevant and applicable state petition statutes, K.S.A. 25-3601, K.S.A. 25-3602, and K.S.A. 25-620. K.S.A. 25-3601 has two relevant components for petitions: a procedural component and a time component. The procedural component discusses what is required to bring an adequate petition: (1) the County election officer is to determine the sufficiency of each signature and the number thereof, (2) a copy of the petition shall be submitted to the office of the county or district attorney, (3) the petition shall contain the question to be submitted at the election,

(4) the aforementioned county or district attorney shall furnish a written advisory opinion as to the legality of the form of the question. The time component states that actions that challenge the validity of the form of the question shall be filed in the district court within 20 days after the petition has been filed with the county election officer. K.S.A. 25-3601(e).

The Court will address the procedural component of K.S.A. 25-3601 first.

The first element is that the county election officer was to determine the sufficiency of each signature and number. That element was fulfilled. Though not all of the signatures were accepted, the County election officer accepted a sufficient amount. The second element was also fulfilled. The petition was submitted to the office of the county or district attorney. The City submitted the petition instead of the petition writers, however, K.S.A. 25-3601 does not elicit who is required to submit it, instead merely that it must be submitted. Elements 3 and 4 will be discussed in tandem.

K.S.A 25-3601 (c) states:

The form of any question in a petition requesting an election on or protesting an ordinance, or resolution, adopted by the governing body of any county, city, school district or other municipality shall be presumed to be valid and in compliance with the requirements of K.S.A. 25-3601 et seq., and amendments thereto, if such petition states the title, number and exact language of the ordinance, or resolution, and the title of such petition states:

“Shall the following ordinance, or resolution, become effective?”

The petition is to be submitted to the county counselor, county attorney, or district attorney to furnish a written advisory opinion as to the legality of the form of the question contained on the petition. K.S.A. 5-3601(a). If the opinion is not furnished within five days of submission, the form of the question complies with K.S.A. 5-3601.

The third element concerns the form of the question to be submitted that was submitted to the County Counselor, and the fourth element concerns the County Counselor’s determination, furnished within five days, which found that the form of the question was not valid. The County

Counselor noted, to the petition's detriment, that there is no question stated. Plf. Ex. B. The petition must clearly state the question in which petitioners seek to bring to an election. Kan. A.G. Op. 94-119.

Here, the petition did not state a question that could be submitted to bring an election. The statement the petitioners wanted to submit was "... to place on the ballot the question as to whether the Joe D. Dennis Park shall be sold, traded, or exchanged." Plf. Ex. B. K.S.A 25-3602(b) requires the petition must state the question as it should appear on the ballot. The petition must clearly state the question which petitioners seek to bring. Kan. A.G. Op. 94-119. The petitioners have failed the procedural component of K.S.A. 25-3601 et. seq. regarding the form of the question.

A petition cannot be altered once it has been submitted if it is insufficient after filing. *Duggan v. Emporia*, 84 Kan. 429 (1911). Under K.S.A. 12-1301, the time limit to submit petitions protesting a sale is 30 days from the date of last publication of the notice of intent to sell. The last publication was November 14, 2023, therefore the deadline to submit a valid petition was December 14th, 2023, meaning that the petition is ultimately invalid under the form of the question element under the procedural component of K.S.A. 25-3601.

The time component deals with the Court's timing of actions that challenge the validity of the form of the question, which the statute says shall be filed in the district court within 20 days after the petition has been filed with the county election officer. K.S.A. 25-3601(e). This component is moot, so the Court will not go into great detail into its reasoning. Caselaw under *State v. Raschke* allows the court to take a flexible approach to the strict 20-day deadline as stated in K.S.A. 25-3601(e), suggesting that "shall" is directory. *State v. Raschke*, 289 Kan. 911, 219 P.3d 481 (2009). *Raschke* acknowledges the court's obligation to "first heed a statute's express language, giving ordinary words their ordinary meaning." *Id.* at 914, 219 P.3d at 484. "Should a

statute's meaning not be evident from its plain language, we move from interpretation to construction." *Id.* at 914, 219 P.3d at 484. "[W]hether a statute is directory or mandatory depends on whether the thing directed to be done is of the essence of the thing required or is a mere matter of form." *Id.* at 917, 219 P.3d at 486. Since the court has interpreted the word "shall" as mandatory or directory depending on the context, its meaning is not plain, and construction is required. *Id.* at 914-915, 219 P.3d at 484.

The court gave factors to determine whether the legislature's use of the word "shall" makes a particular provision mandatory or directory: 1) legislative history; 2) substantive effect on a party's rights versus merely form or procedural effect; 3) the existence or nonexistence of consequences for noncompliance; and 4) the subject matter of the statutory provision. Factors 2, 3, and 4 all suggest that the meaning of the word "shall" is directory, while the first factor did not point affirmatively either way. Thus, the time component does not and continues to not apply to the Court and is merely directory.

The protest petition does not have a sufficient form of the question to be put on the ballot, as determined by the County Counselor, failing a crucial and required element of 25-3601.

Plaintiff's Count I is **GRANTED**.

Count II

As noted above, substantial compliance requires compliance with respect to essential matters. *A & S Rental Sols., Inc. v. Kopet*, 31 Kan. App. 2d 979, 979, 76 P.3d 1057 (2003). There must be compliance with the spirit and intent of the law, though it must not be to the absolute letter. *Id.* A petition should not be invalidated simply because there are unimportant irregularities or defects, so long as it is substantially compliant. *City of Peterjohn*, 62 Kan. App. 2d 750, 756-57 (2022). A proper petition is required for the governing body to take the action requested in the

petition. *Id.* at 750, 755. The county election officer is charged with determining the sufficiency of the signatures on the petition. K.S.A. 25-3601(a). The county counselor determines the form. *Id.*

The City argues that the petition writers failed to attain substantial compliance with their petition. The protest petition made attempts to substantially comply, but there were also numerous issues. The petition writers did not submit the petition to either the Johnson County Counselor's office, or the County Counselor, but instead the City submitted it to the proper authorities. Whether the petition writers themselves must submit the petition, or if it must merely be submitted, is not abundantly clear in prior caselaw. Filing with incorrect administrators, such as the city clerk instead of the board commissioners, could be considered substantial compliance. *State v. Jacobs*, 135 Kan. 513, 11 P.2d 739 (1932). Simply not filing with a city clerk, or with a county counselor would go against substantial compliance. *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 367 P.3d 282; (2016). *Reed v. Seeman*, 26 Kan. App 2d 561, 564, 990 P.2d 1238, 1240 (1999). It is true that the petition did get submitted to the correct officials in this case, but the City pushed the petition through some of those administrative hurdles.

Nonetheless, petition submission is merely the first compliance issue. The petition failed to include the recital required from K.S.A. 5-3602(b)(3). "I have personally signed this petition. I am a registered elector of the state of Kansas and of Westwood Kansas and my residence address is correctly written after my name." Factual History, ¶ 10. Failure to include a recital is considered a substantial irregularity. Kan. A.G. Op. 84-41; *City of Prairie Village v. Morrison*, 264 P.3d 1058 (Table), 2011 WL 6310196, *4 (Kan. App. 2011). The petition lacked necessary recitals that the signatories' residence is correctly written after their name. Factual History, ¶ 11. The petition's submission failed to state "I have personally signed this petition." Factual History, ¶ 12. The recital

that the signor of the petition be a “registered elector” is required, but the petition merely states that the signatories are “qualified electors”. Factual History, ¶ 13-14. The petition failed to include the statement “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.” Factual History, ¶ 15. The circulation recital is required and a substantial irregularity if not included. Kan. A.G. Op 86-51; Kan. A.G. Op 90-64. The petition must include dates for each signature, which the petition is lacking, as is required by K.S.A. 25-3602(b)(3). Factual History, ¶ 16. Some of the notary block reference “State of Kansas, County of Johnson” are stamped by a Missouri notary. Finally, the petition failed to attest that the Petitions’ circulators agree to submit to jurisdiction of the state.

The petition has glaring issues that ultimately fall short of what could be considered substantial compliance. While the Court recognizes the concerns of the petition participants, there must be substantial compliance. That guidance is provided in both caselaw and attorney general opinions. Attorney general opinions are not binding law. *Willis v. Kansas Highway Patrol*, 273 Kan. 123, 130, 41 P.3d 824 (2002). However, the opinions offer guidance on matters that are not always the subject of court opinions.

The City pushed the petition over administrative hurdles to get the petition to this point. A petition does not have to be perfect so that a lawyer could examine every minute detail. Effectively, that would nullify the purpose of a protest petition, for example, if a single recital was missing, or a signature block had some issues. Ultimately, however, there must be a significant attempt to comply with the statutory requirements which, if nothing else, is to prevent fraud. There are procedural safeguards to prevent misuse or abuse of the protest system. But there must be an attempt to comply beyond what occurred here.

Plaintiff's Count II is **GRANTED**.

Count III

Count III is different than the other two counts. Here, the City asserts that that K.S.A. 12-1301 is not applicable to the sale of the 5000 Property and/or the 5050 Property because the property was not legally dedicated as a park, and that the City has fee simple absolute and home rule authority.

If the City's assertion is correct, then K.S.A. 12-1301 would not apply although the statute does not explicitly state that it requires that the land must be legally designated as a public park. The statute refers to land "to be used as a public park for the use and benefit of the people of said city." K.S.A. 12-1301.

According to the City of Westwood's website, the property has been used as a park for decades.¹ The park contains a fountain, benches, playground, tennis court, and an open field. These features are available to the people of Westwood to use. They are features that show the land is treated like a park.

As to the use of home rule authority issue, a city may exercise home rule authority to enact ordinances without enabling legislation or become exempt from state legislation through charter ordinances. K.S.A. Const. Art. 12, § 5(b, c).

However, the City publicized its notice of intent to sell under the authority of K.S.A. 12-1301. It also seeks to uphold to the K.S.A. 12-1301 deadline imposition. These actions are indicative that K.S.A. 12-1301 does apply.

The Court otherwise would need more evidence to provide declaratory relief on Count III. A further evidentiary hearing is necessary to proceed further although the City suggested to the

¹ <https://www.westwoodks.org/parks-recreation/page/joe-d-dennis-park>. (accessed Feb. 22, 2024).

Court that favorable rulings on Counts I and II were all that were necessary to proceed if a ballot question was required. Accordingly, the Court sustains the Declaratory Judgment petition on Counts I and II for the reasons outlined above. It further finds that the motion to intervene is moot.

The petition for Declaratory Judgment on Counts I and II is **GRANTED**.

The petition for Declaratory Judgment on Count III is **DENIED**.

IT IS SO ORDERED.

2/23/24

DATE

/s/ David W. Hauber

DISTRICT COURT JUDGE, DIV. 7

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60-258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e-mail addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served and file a certificate of service for any additional service made.

/s/ DWH
