NO. 14-112,869-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

CITY OF TOPEKA, KANSAS,

PLAINTIFF/APPELLEE,

and

JAYHAWK RACING PROPERTIES, LLC,

INTERVENOR/APPELLEE

v.

CHRISTOPHER IMMING,

DEFENDANT/APPELLANT

RESPONSE TO PETITION FOR REVIEW

Response to Petition for Review from the Court of Appeals of the State of Kansas
Memorandum Opinion No. 112,869
District Court of Shawnee County, Kansas
Honorable Larry D. Hendricks, Judge
District Court Case No. 2014-CV-1069

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ISSUES RAISED IN IMMING'S PETITION FOR REVIEW

1. Whether City of Topeka Ordinance No. 19915 is subject to a referendum or election under another statute within the meaning of K.S.A. 12-3013(e)(3) where the Ordinance approves an amended project plan authorizing the purchase of a racetrack, where the Ordinance and the amended project plan only authorize the purchase of the racetrack with the proceeds of full faith and credit bonds issued under the STAR bonds financing act ("SBFA"), where the SBFA explicitly provides that the City may issue the full faith credit bonds unless a sufficient ***protest*** petition is filed under K.S.A. 25-3601 *et seq.*, and where Imming concedes that his petition is not a protest petition under K.S.A. 25-3601 *et seq.*?

2. Whether Imming is entitled to a writ of mandamus to require the City of Topeka to act on his petition seeking to repeal City of Topeka Ordinance No. 19915 where the Ordinance authorizes the purchase of a racetrack with the proceeds from the issuance of full faith and credit bonds under the SBFA, where the Ordinance does not authorize the purchase of the racetrack with any other source of funds, and where Imming concedes that his petition is not a protest petition under K.S.A. 25-3601 *et seq.*?

STATEMENT OF ADDITIONAL FACTS

Jayhawk agrees with the Statement of Facts set forth in the Court of Appeals' Opinion.

ARGUMENTS AND AUTHORITIES

I. Kansas case-law clearly distinguishes between initiative petitions and referendums.

In his Petition for Review, Imming suggests that the Supreme Court should grant review because Kansas case-law is unclear as to the distinction between initiative petitions and referendums. *See Petition for Review*, pp. 2-5. He is incorrect.

Review is unnecessary because *Ramcharan-Maharajh v. Gilliland*, 48 Kan.App.2d 137, 286 P.3d 216 (2012), thoroughly describes initiative petitions and referendums and clearly articulates the differences between them.

In *Ramcharan-Maharajh*, the court of appeals wrote as follows:

> A referendum is a public vote—secured by a petition signed by a certain number of voters—approving or rejecting an action already taken (or, in some states, merely proposed) by a governmental body.
>
> There is another process for voter input in government—the initiative process—that's sometimes confused with referendums. the difference is that a referendum is a public vote taken in response to a measure initiated by the government, while in the initiative process citizens develop the proposal that is then placed on the ballot for public approval. [citation omitted].

Ramcharan-Maharajh, 48 Kan.App.2d at 140.

With respect to initiatives and referendums in Kansas, the court of appeals explained more specifically as follows:

> Initiatives in Kansas are authorized by one broad statute, K.S.A. 12-3013. But referendums, brought about by protest petitions, are authorized by about 40 different statutes concerning specific subjects. **Protest Petitions are most commonly used to force a referendum when a city government authorizes** a tax or **a bond issue**. [Citations omitted].

Id. at 141.

II. The transaction authorized by the amended project plan, approved by Ordinance No. 19915, involves the purchase of a racetrack with proceeds from the sale of full faith and credit tax increment bonds issued under the SBFA.

Ordinance No. 19915 authorizes the City to purchase a racetrack with bonds issued under the SBFA. It does not authorize the purchase of the racetrack with funds from any source other than the sale of bonds issued under the SBFA.

Furthermore, Ordinance No. 19915 authorizes the issuance of full faith and credit bonds ***and only*** full faith and credit bonds. Contrary to Imming's suggestions throughout his Petition for Review, neither Ordinance No. 19915 nor any other ordinance passed by the City's Governing Body authorizes the City to purchase the racetrack with funds derived from any other source—*e.g.*, special obligations bonds, additional *ad valorem* taxes, or cuts in City services.

More specifically, the transaction described in the amended project plan, approved by Ordinance No. 19915, is entirely dependent upon the issuance of the full faith and credit bonds. If the bonds are not issued, the transaction does not go forward in any respect. Thus, a successful, ***lawful*** challenge to the issuance of the full faith and credit bonds effectively ends the transaction.

III. A protest petition is the only lawful means by which a citizen may challenge the City's issuance of the full faith and credit bonds, as set forth in the SBFA.

Where a municipality authorizes the issuance of full faith and credit bonds, as opposed to special obligation bonds, the SBFA explicitly allows citizens to force a referendum upon the filing of a sufficient ***protest*** petition. *See* K.S.A. 12-17,169(b)(2)(providing for a protest petition under K.S.A. 25-3601 *et seq.*). Where full faith and credit bonds are involved, the SBFA does not also allow a citizen to force an

election (or repeal) by filing an initiative petition under K.S.A. 12-3013. Indeed, the SBFA does not allow a citizen to force an election by ***any*** means ***other*** than a sufficient protest petition.

In this regard, the SBFA reads, in pertinent part, as follows:

> ... No full faith and credit tax increment bonds shall be issued unless the governing body states in the resolution required by subsection (e) of K.S.A. 2014 Supp. 12-17,166, and amendments thereto, that it may issue such bonds to finance the proposed STAR bond project. The governing body may issue the bonds unless within 60 days following the conclusion of the public hearing on the proposed STAR bond project plan ***a protest petition*** signed by 3% of the qualified voters of the city is filed with the city clerk ***in accordance with the provisions of K.S.A. 25-3601 et seq.***, and amendments thereto. If a ***sufficient petition*** is filed, no full faith and credit tax increment bonds shall be issued until the issuance of the bonds is approved by a majority of the voters voting at an ***election*** thereon. ***Such election shall be called and held in the manner provided by the general bond law.*** The failure of the voters to approve the issuance of full faith and credit tax increment bonds shall not prevent the city from issuing special obligation bonds in accordance with this section. No such election shall be held in the event the board of county commissioners or the board of education determines, as provided in K.S.A. 2014 Supp. 12-17,165, and amendments thereto, that the proposed STAR bond project district will have an adverse effect on the county or school district.

K.S.A. 12-17,169(b)(2)(emphasis added).

Applying familiar rules of statutory construction, one must read these provisions of the SBFA as expressing the Legislature's intent to not allow citizens to force an election by filing an initiative petition under K.S.A. 12-3013. *See, e.g., In re Lietz Const. Co.,* 273 Kan. 890, 911, 47 P.3d 1275 (2002) (recognizing that "when legislative intent is in question, we can presume that when the legislature expressly includes specific terms, it intends to exclude any items not expressly included in the specific list"); *Matter of Marriage of Killman*, 264 Kan. 33, 42-43, 955 P.2d 1228 (1998) (same); *see also State v. Moffit,* 38 Kan.App.2d 414, 420-421 166 P.3d 435 (2007) (concluding that express

inclusion of the anticipatory crime of attempting to unlawfully manufacture a controlled substance in K.S.A. 65-4159(b) "suggests the Legislature specifically excluded any reference to other, unmentioned anticipatory crimes"); *Macray v. Clubs, Inc.*, 32 Kan.App.2d 711, 714, 87 P.3d 989 (2004) (applying the maxim to conclude that express inclusion in Chapter 61 of K.S.A. of certain procedures from article 2 of Chapter 60 reflects a legislative intent to exclude all other Chapter 60 procedures, including the provision relating to the issuance of restraining orders); *State v. Herrman*, 33 Kan.App.2d 46, 99 P.3d 632 (2004) (recognizing that inclusion in K.S.A. 8-1567(a)(1) of K.S.A. 8-1013(f)(1) as "other competent evidence" reflects that the "intent of the legislature was to limit other competent evidence to only paragraph (1) of subsection (f) of K.S.A. 8–1013 and exclude all others").

IV. A protest petition is not interchangeable with an initiative petition.

As described in *Ramcharan-Maharajh*, a protest petition has consequences that are fundamentally different from an initiative petition. For example, Imming's petition asks the City's Governing Body either to adopt his initiative ordinance repealing Ordinance No. 19915 or submit to the electors a ballot question whether to adopt Imming's proposed repealer ordinance. As an initiative ordinance, if adopted, Imming's proposed repealer ordinance cannot itself be repealed or amended except by a vote of the Governing Body or the electors after it has been in effect for 10 years. *See* K.S.A. 12-3013(c). An adverse vote by the electors in response to a protest petition has no such decade-long effect.

V. Ordinance No. 19915 is an ordinance subject to referendum or election under another statute; therefore, Imming's initiative petition is invalid and ineffective.

K.S.A. 12-3013 provides for initiative petitions, and it is the authority under which Imming circulated his petition. However, K.S.A. 12-3013 is explicitly limited in scope. K.S.A. 12-3013(e)(3) reads as follows:

> (e) The provisions of this section shall not apply to:
>
> (1) Administrative ordinances;
> (2) ordinances relating to a public improvement to be paid wholly or in part by the levy of special assessments; or
> (3) **ordinances subject to referendum or election under another statute.**

K.S.A. 12-3013(e)(3)(emphasis added).

In this case, the City passed Ordinance No. 19915 on August 12, 2014, immediately following the conclusion of a public hearing on the proposed amended STAR bond project plan. The Ordinance adopted the amended project plan, which provides for the purchase of a racetrack (HPT), exclusively financed from the proceeds of the issuance of full faith and credit STAR bonds.

Accordingly, the Ordinance was subject to a sufficient "protest petition" under K.S.A. 12-17,169(b)(2). In the event a sufficient petition had been filed, the City currently would not have the authority to issue full faith and credit STAR bonds "until the issuance of the bonds is approved by a majority of the voters voting at an election thereon." K.S.A. 12-17,169(b)(2). Moreover, unlike the election authorized by K.S.A. 12-3013, "[s]uch election shall be called and held in the manner provided by the general bond law." *Id.*

Because K.S.A. 12-3013(e)(3) expressly provides that "[t]he provisions of this section shall not apply to . . . . ordinances subject to referendum or election under another statute," the Court of Appeals correctly determined that Imming's petition is invalid and ineffective require the City to take any action of any kind—either to call an action on whether to repeal Ordinance No. 19915 or to repeal the Ordinance in the first instance.

In addition to authorizing only full faith and credit bonds, the issuance of which may only be challenged by a protest petition, *see supra* Secs. II, III, the plain language of Ordinance No. 19915 unequivocally states that the City may issue the bonds unless "within sixty (60) days following August 12, 2014, the date of the public hearing on the proposed amendment, a ***protest petition*** signed by three percent ("3%") of the qualified voters of the City is filed with the City Clerk in accordance with the provisions of KSA 25-3601, *et seq.* and amendments thereto." *See* Ordinance No. 19915, § 13. Thus, by its own terms, Ordinance No. 19915 is an "ordinance[] subject to referendum or election under another statute."

VI. Imming's initiative petition is invalid and ineffective to compel the City to take any action of any kind.

Ordinance No. 19915 was subject to election or referendum under the SBFA, which the Ordinance itself acknowledges. It could have been contested by a timely and sufficient protest petition under K.S.A. 25-3601 *et seq*. As Imming himself concedes, he chose to circulate and file an initiative petition instead of a protest petition.

However, as the Court of Appeals correctly recognized, an initiative petition "shall not apply to...ordinances subject to referendum or election under another statute." *See* K.S.A. 12-3013(e)(3). Given the plain language of the SBFA, Imming's initiative petition does not apply to Ordinance No. 19915. *See* K.S.A. 12-3013(e)(3).

As a result, Imming's initiative petition has no legal effect on the City's ability to exercise authority conferred by Ordinance No. 19915. And, his petition cannot fairly be viewed as creating any duty upon the City, much less imposing a clearly defined duty not involving the exercise of discretion.

Mandamus is "a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law." K.S.A. 60-801. The Supreme Court has explained as follows:

> ...the remedy of mandamus is available only for the purpose of compelling the performance of a clearly defined duty...its purpose is to require one to whom the writ or order is issued to perform some act which the law specifically enjoins as a duty resulting from an office, trust, or station...mandamus may not be invoked to control discretion and neither does it lie to enforce a right which is in substantial dispute...the remedy may be had only when the party invoking it is clearly entitled to the order which he seeks.

Arney v. Director, Kansas State Penitentiary, 234 Kan. 257, 260-61, 671 P.2d 559 (1983).

"The Kansas Constitution gives broad home-rule powers to cities, but the home-rule provision in the Kansas Constitution provides for 'referendums only in such cases as prescribed by the legislature.'" *Ramcharan-Maharajh*, 48 Kan.App.2d at 140 (citing Kan.Const. art. 12, sec. 5(b)). In this case, the legislature has prescribed for a referendum on Ordinance No. 19915 as set forth in the SBFA, K.S.A. 12-17,1659(b)(2). Indeed, given that it has prescribed for a referendum in the SBFA, the legislature has specifically disavowed the use of an initiative petition, as attempted by Imming. See K.S.A. 12-3013(e)(3).

Thus, not only is the City not required to act on Imming's initiative petition, under the Kansas constitution, it is specifically forbidden to do so. Accordingly, in light of the interplay between the SBFA, K.S.A. 12-17,169(b)(2), and the initiative petition statute, K.S.A. 12-3013(e)(3), the Court of Appeals correctly determined that "Imming is not entitled to a writ of mandamus because the Council is not legally required to repeal Ordinance No. 19915 or hold a referendum election." *Petition for Review*, Appendix (Opinion, p. 22).

CONCLUSION

For the above and foregoing reasons, the Supreme Court should deny Imming's Petition for review and direct the clerk to issue mandate forthwith.

DATED: APRIL 23, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of April, 2015, two (2) genuine copies of the above and foregoing document were served as provided by Rule 6.09 by depositing the same in the United States mail, first class postage prepaid, properly addressed to counsel for the parties as follows:

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APPENDIX

1. Memorandum Decision and Order, No. 2014-CV-1069

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

CITY OF TOPEKA, KANSAS,	
Plaintiff,	Case No. 2014 CV 1069 ~~14-CV-958~~
and	
JAYHAWK RACING PROPERTIES, LLC,	
Intervenor	
vs.	
CHRISTOPHER IMMING,	
Defendant.	

MEMORANDUM DECISION AND ORDER

The above captioned matter comes before the Court upon the competing Motions for Summary Judgment filed in this matter by Plaintiff City of Topeka ("the City"), Intervenor Jayhawk Racing Properties, LLC ("Jayhawk"), and Defendant Christopher Imming ("Imming"), along with the Motion to Dismiss filed by Imming. The Court also takes note of the numerous responses to these Motions and the subsequent replies to the responses to these Motions. The Court heard oral arguments on these matters on November 6, 2014. Finding these matters fully briefed and argued, and after due and careful consideration, the Court finds and concludes as follows:

NATURE OF THE CASE

This case initially arose under the City's Petition, filed on October 22, 2014. In it, the City articulated a legal challenge to a petition filed by Imming on October 8, 2014 (the "Imming

Petition"), attacking the sufficiency and form of the Imming Petition. Specifically, the City sought declaratory judgment on the following issues:

1. "The Imming Petition is invalid as an initiative petition or as a protest petition because the certification recital carried by each petition circulator does not comply with the statutory requirements of K.S.A. 25-3602(b)(4)."
2. "The Imming Petition is invalid as an initiative petition or as a protest petition because it includes more than a single issue."
3. "The Imming Petition is invalid as a protest petition under the STAR Bonds Referendum Statute because it fails to comply with the mandatory requirements of K.S.A. 25-3601(c)."
4. "The Imming Petition is invalid as an initiative petition because it seeks to use the Initiative Statute to require an election on an administrative ordinance."
5. "Even if Ordinance No. 19915 is not an administrative ordinance, because it is subject to referendum under the STAR Bonds Referendum Statute, a protest petition under the STAR Bonds Referendum Statute is the exclusive remedy for contesting Ordinance No. 19915 by election, and because no valid protest petition was filed within the required period, Ordinance No. 19915 is not subject to contest and is in full force and effect."

The Plaintiff simultaneously filed a Motion for Summary Judgment and accompanying Memorandum in Support.

A scheduling hearing, presided over by Judge Wilson, was held on October 23, 2014. At this hearing, all parties agreed that, pursuant to K.S.A. 25-3601(e), this Court would be required to render an opinion on the matter by November 11, 2014, or 20 days from the date the City filed

its Petition.[1] In order to comply with this deadline, Judge Wilson adopted an expedited litigation timetable, and the parties were tasked with journalizing this timetable in a case management order. The parties have disagreed considerably over the contents and specifics of this order, and, consequently, it has not been filed. Nevertheless, this Court has made it clear that Judge Wilson's orders will stand, and the parties are held to the schedule set out orally at the October 23, 2014 hearing.

Imming filed his Motion to Dismiss on October 24. In it, he alleged, *inter alia*, that the Topeka City Manager did not have the authority to file this lawsuit and that the Topeka City Council, as the "governing body" of the City, never authorized the lawsuit. The City responded to this Motion on November 4, 2014.

On October 27, 2014, Jayhawk filed a Motion to Intervene in this matter both as a matter of right and as a matter of the Court's permission. Imming filed a response to this Motion on October 29, 2014. Hours later, the Court held a hearing on this Motion, at which point the Court granted Jayhawk's request for intervention as a matter of right upon finding that Jayhawk's Motion was filed timely, articulated a substantial interest in the subject matter of the litigation, and demonstrated a lack of adequate representation of the intervenor's interests. The Court also granted intervention as a matter of permission pursuant to K.S.A. 60-224(b)(1)(B). The Intervention Order was journalized and filed on November 3, 2014.

The parties conducted depositions on October 30, 2014. On October 31, Imming filed an Answer and Counterclaim against the City, in which he sought a writ of mandamus to compel the City to "take action" on the Imming Petition pursuant to K.S.A. 12-3013(a). That same day,

[1] Because November 11 is Veteran's Day—a legal holiday—all parties now agree that the Court's opinion must be filed by the following day, November 12, 2014. This conclusion stems from K.S.A. 60-206(a)(1)(C).

Jayhawk simultaneously filed a Motion for Summary Judgment and Memorandum in Support of the same. Imming filed his Motion for Summary Judgment on November 3, 2014, and on November 4, Imming filed his Response to the Motions for Summary Judgment of both the City and Jayhawk. On November 5, the City filed an Answer to Imming's Counterclaim and a Reply in Support of its Motion for Summary Judgment, Imming filed an Answer to Jayhawk's Petition in Intervention, and Jayhawk filed a Reply to Imming's Response to the Plaintiff's Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment. Finally, at 12:54 A.M. on November 6, the City filed a Memorandum in Opposition to Imming's Motion for Summary Judgment.

The parties argued the case on November 6, at which time Imming's Counsel advanced an oral Motion to Strike the City's final Memorandum in Opposition as untimely.

FINDINGS OF FACTS

1. On August 12, 2014, the Topeka City Council, Topeka's duly-elected governing body, voted 9-1 in favor of passing Ordinance No. 19915,[2] thus approving the ordinance by at least a two-thirds majority. The ordinance was signed by the Mayor.
2. Ordinance No. 19915 became effective on August 18, 2014.
3. Ordinance No. 19915 contains 16 sections which add additional area to the Heartland Park Redevelopment district, amend the Heartland Park Redevelopment Project Plan, and approve a request to the Secretary of Commerce of the State of Kansas for authority to issue additional sales tax and revenue ("Star") bonds in excess of the amount previously approved, all pursuant to K.S.A. 12-17, 160 *et seq.*, as amended.

[2]The precise language of Ordinance No. 19915 is properly before the Court in exhibit form, and need not be repeated here.

4. The ordinance contains a map of the existing and new district.

5. The ordinance delegates to the City Manager the task of making applications to the Secretary of Commerce.

6. Defendant, Chris Imming on August 21, 2014, requested a written advisory opinion as to the legality of the form of the question on his proposed petition.

7. On August 21, 2014, Richard V. Eckert, Shawnee County Counselor, provided Defendant Imming with "a written advisory opinion as to the legality of the form of the question contained on the petition that was delivered to his office via email on August 21, 2014."

8. On October 8, 2014, Imming filed a petition purportedly pursuant to K.S.A. 12-3013 with the Topeka City Clerk styled "A Petition for a New City of Topeka, Kansas Ordinance relating to Heartland Park Topeka Redevelopment District and Additional Bond Authority."

9. The Imming Petition, which proposes an ordinance that explicitly repeals Ordinance No. 1995, in part states:

"Shall the following Ordinance become effective?"

A PETITION FOR A NEW CITY OF TOPEKA, KANSAS ORDINANCE RELATING TO HEARTLAND PARK TOPEKA REDEVELOPMENT DISTRICT AND ADDITIONAL BOND AUTHORITY

We the undersigned qualified and registered voters in the City of Topeka, Kansas, are in favor of the following Ordinance. We request, pursuant to K.S.A. 12-3013, that the Governing Body of the City of Topeka, Kansas, pass this Ordinance within 20 days, without alteration, or call a special election to submit the Ordinance, without alteration to the vote of the electors of the City of Topeka, Kansas. If the proposed ordinance is submitted to a vote of the electors, the question to submit shall be:

Shall the following be adopted?

ORDINANCE NUMBER:_____

An ordinance of the City of Topeka, Kansas repealing Ordinance 19915 which was titled "introduced by City Manager Jim Colson adding additional area to the Heartland Park Redevelopment District, a major motorsports complex and redevelopment area, amending the Heartland Park Redevelopment Project Plan, and approving a request to the Secretary of Commerce of the State of Kansas for authority to issue additional sales tax and revenue ("STAR") bonds in excess of the amount previously approved, all pursuant to K.S.A. 12-17,160 et seq., as amended.", passed by the Governing Body of Topeka, Kansas on August 12, 2014, to be effective on August 18, 2014.

BE IT ORDAINED by the Governing Body of Topeka, Kansas:
Section 1- Ordinance Number 19915 of the City of Topeka, Kansas is repealed.

Section 2- This Ordinance shall be in full force and effect after its adoption by the Governing Body of the City of Topeka, Kansas, or after approval of a majority of the qualified voters of the City of Topeka, Kansas.

10. The Imming Petition includes a recital of certification at the end of each set of documents carried by each petition circulator that reads as follows:

CERTIFICATION: State of Kansas; County of Shawnee, ss:

I am the circulator of the Petition and resident of the State of Kansas and possess the qualifications of an elector of the State of Kansas. I have personally witnessed the signing of the petition by each person whose name appears thereon. I believe the statements herein are true and that each signature to this Petition is the genuine signature of the person whose name it purports to be.

11. The Imming Petition uses the certification set forth at the legislative website, but not the most current certification stated in K.S.A. 25-3602 as amended by laws 2014, Ch. 98 § 5. In effect May 15, 2014.

12. Separate questions are stated in different portions of the Imming Petition. They are "Shall the following Ordinance become effective?" and "Shall the following be adopted?"

13. The Shawnee County Election Commissioner has determined that there are 3,587 valid signatures appended to the Imming Petition.

14. The Petition instituting this action was filed October 22, 2014.

15. The City Manager for the City of Topeka authorized the filing of the instant Petition.

16. The City Manager's duties are outlined in the City of Topeka Charter Ordinance.

17. The City Manager stated he had authority to file this action obtained from the Charter Ordinance and the Rules of the Council.

18. On October 15, 2014, the City Manager publicly announced his decision to file the Petition at a news conference.

19. On October 21, 2014, the Topeka City Council met to discuss, *inter alia*, the Imming Petition. A preliminary transcript of the minutes of this meeting has been offered to—and considered by—the Court.[3]

STANDARD OF REVIEW

I. MOTION TO DISMISS

Though not cited by Imming, a Motion to Dismiss for lack of standing—which is a component of subject matter jurisdiction—is governed by K.S.A. 60-212(b)(1).[4] *Cf. State v. Ernesti*, 291 Kan. 54, 60, 239 P.3d 40 (2010) (noting that "standing is a component of subject matter jurisdiction . . ."). In adjudicating questions of subject matter jurisdiction, it is important to keep the following principles in mind:

[3] The contents of the minutes need not be repeated here in full, though the Court will reference them in adjudicating this matter.

[4] The Court notes that, in certain other instances, motions to dismiss for lack of standing have been brought under K.S.A. 60-212(b)(6), which the City's Memorandum in Opposition refers to frequently. See, e.g., *Bd. of Cnty. Commissioners of Sumner Cnty. v. Bremby*, 286 Kan. 745, 757, 189 P.3d 494 (2008) ("The district court dismissed the petition under K.S.A. 60–212(b)(6), ruling that FACT lacked standing to sue.").

> Subject matter jurisdiction is vested by statute or constitution and establishes the court's authority to hear and decide a particular type of action. Parties cannot confer subject matter jurisdiction upon the courts by consent, waiver, or estoppel. Parties cannot confer subject matter jurisdiction by failing to object to the court's lack of jurisdiction. If a trial court determines that it lacks subject matter jurisdiction, it has absolutely no authority to reach the merits of the case and is required as a matter of law to dismiss it.

Chelf v. State, 46 Kan. App. 2d 522, 529, 263 P.3d 852 (2011). The Kansas Court of Appeals has noted that, "Typically, the party asserting subject matter jurisdiction bears the burden of proof." *Purdum v. Purdum*, 48 Kan. App. 2d 938, 994, 301 P.3d 718 (2013). If the Court determines that it lacks subject matter jurisdiction, the Court must dismiss the action. K.S.A. 60-212(g)(3).

II. MOTIONS FOR SUMMARY JUDGMENT

The familiar Kansas rules regarding summary judgment are well known. A court may enter summary judgment "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Thoroughbred Associates, L.L.C. v. Kansas City Royalty Co., L.L.C.*, 297 Kan. 1193, 1204, 308 P.3d 1238 (2013) (quoting *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009)). Before granting summary judgment, a court must "resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought." *Thoroughbred Associates*, 297 Kan. at 1204 (quoting *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. at 900). To stave off a motion for summary judgment, the nonmoving party must present evidence to establish a dispute as to a material fact; the facts involved in this dispute "must be material to the conclusive issues in the case." 297 Kan. at 1204 (quoting 289 Kan. at 900). In other words, the nonmoving party "cannot evade summary

judgment on the mere hope that some thing may develop at trial." *Essmiller v. Southwestern Bell Tel. Co.*, 215 Kan. 74, 77, 524 P.2d 767 (1974).

Summary judgment must be denied, however, where reasonable minds could differ as to the conclusions drawn from the evidence. *Thoroughbred Associates*, 297 Kan. at 1204. That said, when the nonmoving party fails to

> make a showing sufficient to establish the existence of an element essential to that party's case . . . there can be 'no genuine issue as to any material fact,' because a 'complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'

Eudora Dev. Co. of Kansas v. City of Eudora, 276 Kan. 626, 631–32, 78 P.3d 437 (2003) (quoting the district court decision in the instant case) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

CONCLUSIONS OF LAW

I. MOTION TO DISMISS

In this Motion, Imming claims that, because only the "governing body" of the City of Topeka has the power to sue and be sued, and because the "governing body" has taken no action to institute or authorize the institution of this lawsuit, the City has no standing to bring suit before this Court. Because the question of standing is a jurisdictional issue—and, if determined adversely to the City, would warrant dismissal of its Petition—the Court will address this matter first. Essentially, the parties have raised three issues for the Court's consideration: 1) whether the City Council—as the statutory "governing body"—took any action to authorize or institute this lawsuit, 2) whether, if no authorization was given, the City Council subsequently ratified[5] the

[5] At oral arguments, Imming's Counsel conceded that the City Council's ratification would cure any deficiency in the initial authorization of the lawsuit, although he vociferously denied that any such ratification had occurred.

filing of the lawsuit, and 3) whether the filing of Imming's Counterclaim against the City renders this Motion moot. The Court will address each issue in turn.

A. The City Council's Initial Authorization

For his first premise, Imming asserts that the City Council—which, he claims, was the entity with the sole statutory authority to institute suit on the part of the City—never acted to authorize the filing of the lawsuit in the instant action. There appears to be no factual dispute that the City Manager, rather than the City Council, authorized the filing of this lawsuit on the City's behalf, rather than the Governing Body. The City contends, however, that under its form of government, the City Manager is authorized by law to file actions on behalf of the City—particularly when filing an action that seeks to "execute and enforce all laws and ordinances and policies of the Council[.]

Whether or not the City Manager may file a lawsuit on the City's behalf, absent authorization from the City Council, is a question of law. Imming cites K.S.A. 12-101, 12-103, and 12-104, collectively, for the proposition that only the City Council could authorize the filing of a lawsuit. The City points to Topeka Charter Ordinance No. 94 and the rules of the City Council for support of its position that the City Manager was authorized to file suit in the City's name. This issue is one of first impression under the case law of our state. Accordingly, resolution of the question will necessarily turn on a reconciliation of the general statutes cited by Imming with the Charter Ordinance enacted by the City.

K.S.A. 12-101 provides that "Each city being a body corporate and politic, may among other powers -- *First.* Sue and be sued. . . ." K.S.A. 12-103 states that "The powers hereby

granted shall be exercised by the governing body of such city." K.S.A. 12-104 defines "governing body" as:

> In acts granting or limiting executive or administrative powers to city governments, or prescribing procedure, the designation of "the governing body" shall be held to include mayor and council, mayor and commissioners and board of commissioners, as the status of cities affected may require; and the commission to revise the statutes is authorized to substitute the words, "the governing body" for the terms mayor and council, mayor and commissioners or board of commissioners in all acts.

K.S.A. 12-104 has remained unchanged since at least 1923.

The City argues that K.S.A. 12-1028 and K.S.A. 12-1035 authorize a city to abandon the council-city manager plan and adopt its own modified form of power-sharing. The City further argues that it, in fact, did so when it adopted Charter Ordinance No. 94. The City points to Section A2-55 of Charter Ordinance No. 94, which provides, *inter alia*: "The City Manager shall have the power and it shall be his or her duty: (a) To execute and enforce all laws and ordinances and policies of the Council and to administer the affairs of the city. . . ." The City also points out that the City Manager appoints and supervises the City Attorney, which, it claims, "[reinforces] the City Manager's power and control over legal matters."

The crux of the City's argument, in essence, is that:

> Ordinance No. 19915 was adopted by the Governing Body. The City Manager has the duty to execute and enforce Ordinance No. 19915. As part of that duty, the City Manager not only has the authority to seek legal advice as to the validity of the petition which purports to protest or repeal Ordinance No. 19915, but also a duty to do so.

It is unclear, however, just how the City Manager was "enforcing" or "executing" City Ordinance No. 19915 when he filed suit to challenge the legal sufficiency of a citizen petition that sought a *vote* to repeal said ordinance. The outcome of the Imming Petition, if put to a vote, could have been the enactment of another city ordinance—which the City Manager would have

been tasked with enforcing and executing. By taking legal action against the Imming Petition, the City Manager, in effect, declared a preference for Ordinance No. 19915 over an ordinance which would repeal No. 19915. While it is unquestionably within the City Manager's purview to enforce the law, it is not his duty to assess which laws should or should not be passed.

Accordingly, the Court cannot find that the City Manager was "authorized" to challenge the Imming Petition under the auspices of "enforcing" and "executing" City Ordinance No. 19915. The Court, having found in this instance that the City Manager did not have the authority to challenge the Imming Petition, does not need to address the broader question of whether the City Manager *ever* has the authority to file a lawsuit independent of Council approval, and declines to do so at this time.

B. The City Council's Subsequent Ratification

Even if the City Manager was not authorized to file suit, however, the City Council could have still ratified his decision to do so. "As to matters within the scope of [a municipal corporation's] powers, the doctrine of estoppel, and that agreements made in [a municipal corporation's] behalf may be ratified by acquiescence and accepting the benefit of them, with knowledge of the facts, is as well settled as it is in the case of natural persons." *City of Chetopa v. Board of Comm'rs of Labette Cnty.*, 156 Kan. 290, 293, 133 P.2d 174 (1943). Imming admits that the City Council's ratification of the City Manager's decision to file this lawsuit would cure any subject matter jurisdictional defect inherent in the City Manager's initial lack of authority to file the suit. He vehemently denies, however, that any such ratification took place. In contrast, the City cites the City Council meeting of October 21, 2014—draft minutes of which are attached to the City's Memorandum in Opposition to the Motion to Dismiss as Exhibit 9—as proof that the City Council ratified the City Manager's decision to file suit.

Whether or not a principal has ratified the unauthorized action of its agent is generally a question of fact. See, e.g., *C. & A. Auto Supply Co. v. Sharpe Bros. Contracting Co.*, 127 Kan. 279, 282, 273 P. 466 (1929); *Smith v. Hutchinson Box Bd. & Paper Co.*, 104 Kan. 732, 734, 180 P. 983 (1919); *Wilson v. Jenkins*, No. 101,797, unpublished opinion filed September 3, 2010, at *5. Factual disputes are generally beyond the purview of motions to dismiss, but, in motions arising under K.S.A. 60-212(b)(1), the Court is empowered to hear evidence and make credibility findings. *Purdum v. Purdum*, 48 Kan. App. 2d at 994. Thus, the party asserting subject matter jurisdiction bears the burden of establishing it by a preponderance of the evidence. See *Lindstrom v. United States*, 510 F.3d 1191, 1193 (10th Cir. 2007).[6] Moreover, "Where a party attacks the factual basis for subject matter jurisdiction, the court does not presume the truthfulness of factual allegations in the complaint, but may consider evidence to resolve disputed jurisdictional facts." *Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004). In other words, even though such a consideration would be improper in a summary judgment motion, the Court may consider even controverted evidence in determining whether it has jurisdiction.

The relevant facts are found at pages 402 through 404 of Exhibit 9 to the City's Memorandum in Opposition to the Motion to Dismiss, which purport to document the minutes of the City Council meeting of October 21, 2014. A review of the minutes demonstrates that Councilmember Chad Manspeaker "moved to suspend the Council rules to add a resolution

[6] Though not binding on Kansas courts, federal court interpretations of Rule 12(b) of the Federal Rules of Civil Procedure—upon which K.S.A. 60-212(b) was patterned—are persuasive in the absence of guiding Kansas authority. The Kansas Supreme Court, has previously looked to the federal courts for guidance in interpreting the proper procedure to apply in adjudicating motions to dismiss under K.S.A. 60-212(b)(2), and there is no reason to suspect that the analytical model would be any different under (b)(1). *Cf. Aeroflex Wichita, Inc. v. Filardo*, 294 Kan. 258, 264, 275 P.3d 869 (2012).

relating to the documents purporting to be a petition and proposed ordinance filed with the City Clerk on October 8, 2014, to the Council agenda." The resolution read, in part:

> NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TOPEKA, KANSAS, that in light of the significant opposition by Topeka residents to the Heartland Park Ordinance, the City Attorney is directed not to pursue any litigation challenging the purported petition and/or proposed ordinance including any declaratory judgment action.

The draft minutes show that the measure was voted down 6 to 3. Although this meeting took place before the actual filing of the City's Petition, the context of the remainder of the meeting minutes contained in Exhibit 9 make it clear that the City Council had been appraised of the essential points and facts of the proposed lawsuit. Moreover, Exhibit E to Imming's Motion to Dismiss demonstrates that the City Manager made public his intention to file a lawsuit on October 15, 2014—approximately a week before the City Council meeting.

Plainly, the City Council knew that the City Manager intended to file a lawsuit challenging the Imming Petition and why he intended to file it. If it had wished to halt such a process, the Council could have done so when Councilmember Manspeaker advanced his motion regarding his proposed resolution. While it is true, as Imming pointed out at oral arguments, that the Council ultimately ruled only on the procedural aspect of Councilmember Manspeaker's request, the Court is satisfied that the 6 to 3 decision against amending the Council's procedural rules to permit discussion of the proposed resolution was sufficient to constitute ratification of the lawsuit's filing as a matter of law—particularly in light of the fact that, immediately thereafter, the Council voted 8 to 1 in favor of amending the procedural rules in order to discuss the Heartland Park project. The remarks made by several Councilmembers during the course of that discussion suggest that they believed the lawsuit should proceed—thus bolstering the

proposition that, by declining to take up a measure which would have forbidden the lawsuit, the Council was, in effect, ratifying the City Manager's decision to file it.

This Court concludes that the City has met its burden of proving, by a preponderance of the evidence, that the City Council ratified the City Manager's decision to initiate the instant lawsuit. Under such circumstances, the City has validly filed suit and is properly before the Court as a party. Thus, the Court finds that it does have subject matter jurisdiction to reach the merits of the case. Imming's Motion to Dismiss is denied.[7]

C. Whether the Motion Has Been Rendered Moot

Even if the City Council had not ratified the City Manager's decision to sue, Imming's Motion to Dismiss was rendered moot by the filing of his Counterclaim against the City. Specifically, due to the tightly compressed procedural schedule necessitated for this action by the Legislature, Imming filed a Counterclaim against the City—seeking a writ of mandamus—before this Court could rule on his Motion to Dismiss. The City filed an Answer to this Counterclaim on November 5, 2014. At oral arguments, Imming's Counsel advised that, were this a standard civil lawsuit filed without the dread specter of a 20-day adjudication schedule looming over the proceedings, he would have waited until the Court ruled on his Motion to Dismiss before filing his Counterclaim. He argued that the Motion to Dismiss was not moot, however, because, if the Court were to grant it, he would dismiss the Motion to Dismiss forthwith, leaving nothing for the Court to consider.[8]

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[7] In denying Imming's Motion to Dismiss, the Court also denies the first ground for relief asserted in his Motion for Summary Judgment.

[8] Imming's Counsel did not suggest that, were this Court to find that it lacked subject matter jurisdiction over the initial lawsuit by virtue of the City's lack of standing, the counterclaim—which does not share the same potential jurisdiction problem—would *also* be subject to mandatory dismissal. Because Imming's Counterclaim sued the City, it suffers none of the potential jurisdictional defects lurking in the main action. In other words, he has brought

The Court is not persuaded by this potential procedural two-step. Once a counterclaim has been filed, a counterclaimant may only voluntarily dismiss it before a responsive pleading has been served. K.S.A. 60-241(c)(1). There is no question that the City has properly answered Imming's Counterclaim, so Imming cannot withdraw his Counterclaim without either the stipulation of the other parties or a court order. K.S.A. 60-241(a)–(b). Ultimately, because Imming's mandamus claim reaches substantially the same issues as the City's Petition, the Court finds that the two matters should be adjudicated together. Moreover, even if the Court had determined that it initially lacked subject matter jurisdiction over the action—which is not the case—Imming's Counterclaim cures any such defect by giving the City standing to defend against Imming's mandamus claim. Thus, even if the Court had determined that the City Council did *not* ratify the City Manager's decision to file suit, Imming's mandamus Counterclaim cures any jurisdictional defect inherent in the City's case. For this independent reason, the Court denies Imming's Motion to Dismiss.

II. MOTIONS FOR SUMMARY JUDGMENT

The Court now turns to the competing motions for summary judgment filed by all parties.

A. The Motions for Summary Judgment Filed by the City and Jayhawk

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the party with the capacity to "sue or be sued" under K.S.A. 12-101 into the Counterclaim, granting this Court subject matter jurisdiction over said Counterclaim. As the Kansas Court of Appeals has said,

> A claim and a counterclaim may be separate and distinct causes of action so that a 54(b) certificate would be proper upon the disposition of either one. However, where the same operative facts control both the claim and the counterclaim, so that a decision on one necessarily involves a decision on the other, they constitute but a single claim for the purposes of K.S.A. 60-254(b) and an order which does not fully dispose of both is interlocutory.

Henderson v. Hassur, 1 Kan. App. 2d 103, Syl. ¶ 8, 562 P.2d 108 (1977).

1. The Imming Petition Circulator Certification Substantially Complies With K.S.A. 25-3601 et seq.

The City first attacks the language utilized by the Imming Petition's certification statement, which read:

> CERTIFICATION: State of Kansas; County of Shawnee, ss:
>
> I am the circulator of the Petition and resident of the State of Kansas and possess the qualifications of an elector of the State of Kansas. I have personally witnessed the signing of the petition by each person whose name appears thereon. I believe the statements herein are true and that each signature to this Petition is the genuine signature of the person whose name it purports to be.

This mirrors the former language of K.S.A. 25-3602(b)(4), which was modified in 2014 to require the following language: "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." K.S.A. 25-3608—which was passed this year—defines the "qualifications" of a "petition circulator":

> (a) For purposes of this act, "petition circulator" shall mean a person who is:
>
> (1) A United States citizen;
>
> (2) at least 18 years of age; and
>
> (3) has not been convicted of a felony or if convicted of a felony under the law of any state or of the United States, has been pardoned or restored to such person's civil rights.
>
> (b) All petition circulators, whether residents or nonresidents of the state of Kansas, are required to agree to submit to the jurisdiction of the state, including its agencies, political subdivisions and election officials, for purposes of subpoena enforcement regarding the integrity and reliability of the petition process.

The City essentially concedes that the certification used in the Imming Petition complies with the requirements of K.S.A. 25-3602(b)(4) and K.S.A. 25-3608 in every way except one: the Imming Petition certification language does not contain a representation that the petition circulators "submit[ted] to the jurisdiction of the state[.]"

The Court notes, in passing, that, despite the beneficial presumption of validity ascribed to the form of the question contained in the Imming Petition—by virtue of the opinion of the County Counselor—the form of the *petition* is not presumed valid under K.S.A. 25-3601(a). The plain language of the statute makes clear that the presumption of validity is attached *solely* to the form of the question contained in the Imming Petition, which does not include the certification language at issue here.

Plainly, the certification language used in the Imming Petition does not strictly comply with the requirements of K.S.A. 25-3608(b). While the Imming Petition certification language does assert that the signatory circulators are "resident[s] of the State of Kansas," there is no explicit statement that the circulators agree to "submit" to the jurisdiction of the State of Kansas. Viewed under a "strict compliance" standard, the Imming Petition's circulator certification language would be clearly defective.

However, "strict compliance" is not the standard applied when reviewing citizen initiative petitions, as the City admitted at oral arguments. Instead, the Court finds the *Morrison* opinion's position to be persuasive when it found that the Court must review the contents of the Imming Petition for *substantial* compliance with the Legislature's requirements. *Cf. City of Prairie Village v. Morrison*, No. 104,918, unpublished opinion filed Dec. 2, 2011, *rev. denied*, Feb. 4, 2013. While the City admitted that substantial compliance with the language of K.S.A.

25-3608 and K.S.A. 25-3602(b)(4) would suffice, it vigorously denied that the Imming Petition's certification language *was* in substantial compliance with these statutes.

As the Kansas Supreme Court has defined it in other contexts, substantial compliance is "compliance in respect to the essential matters necessary to assure every reasonable objective of the statute." *Fisher v. DeCarvalho*, 298 Kan. 482, 490, 314 P.3d 214 (2013) (quoting *Myers v. Bd. of Cnty. Comm'rs of Jackson Cnty.*, 280 Kan. 869, 874, 127 P.3d 319 (2006)). In the present instance, the Kansas Legislature's objective appears to have been aimed at permitting individuals who are domiciled in other jurisdictions to circulate protest and initiative petitions, rather than limiting petition circulators to Kansas residents only. To that end, the newly-enacted K.S.A. 25-3608(b) clearly states that, "All petition circulators, whether residents or nonresidents of the state of Kansas, are required to agree to submit to the jurisdiction of the state . . . ." The objectives of K.S.A. 25-3608(b) are spelled out within the subsection itself: "for purposes of subpoena enforcement regarding the integrity and reliability of the petition process."

In the present instance, however, the Court notes that *all* Kansas residents "submit to the jurisdiction of the state" by virtue of merely living here. See K.S.A. 60-308(b)(2) ("A person submits to the jurisdiction of the courts of this state for a claim for relief which did not arise in this state if substantial, continuous and systematic contact with this state is established which would support jurisdiction consistent with the constitutions of the United States and of this state."). As one noted commentator has summarized, "General jurisdiction is most often achieved in Kansas if the defendant is domiciled in Kansas[.]" Gard, Casad, and Mulligan, 4 Kansas Law and Practice, Kansas C. Civ. Proc. Annot. § 60-308, p. 423 (5th ed2012). While Kansas law only recently provided for general personal jurisdiction up to the constitutional

maximum, it is clear that any Kansas resident *has* submitted to the jurisdiction of this State—whether or not they explicitly "agreed" to do so.

Thus, Imming Petition certification spells out no explicit agreement to submit to the jurisdiction of the State of Kansas, the very fact that it certifies that each petition circulator was a "resident" of the State of Kansas satisfied the Legislature's objectives in enacting K.S.A. 25-3608: to-wit, every petition circulator is subject to the jurisdiction of this state "for purposes of subpoena enforcement" merely by living here. Because the language contained in the Imming Petition certification satisfies the Legislature's objective, this Court finds the language to be in substantial compliance with K.S.A. 25-3608(b) and K.S.A. 25-3602(b)(4). Thus, on this first basis, the City's Motion for Summary Judgment is denied.

2. *The Imming Petition Involves Only One Issue.*

The City next argues that, because the Imming Petition sets out multiple questions, it does not comply with the requirement in K.S.A. 25-3602(a) that each petition "shall consist of one or more documents pertaining to a single issue or proposition under one distinctive title." Imming again argues that the form of the question was in substantial compliance with the requirements of K.S.A. 25-3601 *et seq.*, noting that only one question was asked by the Imming Petition: "Shall the following Ordinance become effective?"

As a preliminary matter, the Court notes that, because this issue goes to the form of the question contained in the Imming Petition, and because the Shawnee County Counselor opined that the form of the question was valid, the Court applies a rebuttable presumption of validity to this analysis pursuant to K.S.A. 25-3601(a).

Ultimately, however, it is unnecessary to invoke this presumption in adjudicating this issue. As is plainly apparent from the face of the Imming Petition, only one question was

presented to the citizens who signed it: "Shall the following Ordinance become effective?"[9] The question identified by the City as a "second" issue—"Shall the following be adopted?"—is, in fact, nothing more than a statutorily-required component of an initiative petition. K.S.A. 12-3013(b) mandates that any proposed ordinance contained in an initiative petition "shall" be preceded by those words. Moreover, a plain reading of the Imming Petition demonstrates that the "second" question was merely a part of the text to be submitted to the electorate in the event that the City Council declined to pass the enclosed ordinance. These options are contemplated by K.S.A. 12-3013(a), and do not violate the "single issue" requirement of K.S.A. 25-3602(a).

From a plain reading of both the Imming Petition and the relevant statutes, the Court has little difficulty in concluding that only a single issue was at stake in the Imming Petition. Accordingly, the Court denies the City's Motion for Summary Judgment as to this ground.

3. Imming Concedes That the Imming Petition Is Not a Protest Petition.

Initially, the City's pleadings suggested confusion as to whether the Imming Petition purported to be a protest petition or an initiative petition pursuant to K.S.A. 12-3013. Imming has since conceded that the Imming Petition is not a protest petition, limiting the Court's analysis solely to whether or not it survives scrutiny as an initiative petition.

The City has already challenged—and the Court has already addressed—both the certification language used in the Imming Petition and the form of the question. The City further challenges the Imming Petition because it did not include the complete language of Ordinance No. 19915, which it sought to repeal. The City cites the *City of Prairie Village v. Morrison* case for the proposition that failure to include the text of the at-issue ordinance rendered a protest

[9] The Court notes that this language tracks the requirements of K.S.A. 25-3601(c), compliance with which, again, gives rise to yet another presumption of validity as to the form of the question.

petition "fatally defective." No. 104,918, unpublished opinion filed Dec. 2, 2011, *rev. denied*, Feb. 4, 2013, at *10–*11. The City caps its argument with the assertion that "[T]he Imming Petition is invalid to the extent it purports to be a protest petition."

As an initiative petition, the Imming Petition was not required to include the language of the ordinance it sought to repeal—only the ordinance it sought to pass. K.S.A. 12-3013(b); K.S.A. 25-3601(c). To require an initiative petition seeking to pass an ordinance—whose only effect would be the repeal a previous ordinance—to include the text of that previous ordinance would be, essentially, to insert additional language to the statutes. The Court declines to do so. Thus, the Court finds the Imming Petition to be in substantial compliance with K.S.A. 25-3601 *et seq.* as an initiative petition. Moreover, because Imming has conceded this issue, the Court need not further consider whether the Imming Petition is valid as a protest petition. Thus, as to this issue, the City's Motion for Summary Judgment is partially granted and partially denied.

Whether the Imming Petition substantially complies with the requirements of K.S.A. 25-3601 *et seq.*, however, is a separate consideration from the question of whether the Imming Petition is valid *as* an initiative petition under K.S.A. 12-3013(e). The Court next considers this issue.

4. *The Imming Petition Is Invalid Under K.S.A. 12-3013(e)(1) Because It Addresses An Administrative Ordinance.*

Because the Imming Petition is an initiative petition, all parties agree that it is subject to the requirements of K.S.A. 12-3013(e), which excludes certain subject matter from the scope within which initiative petitions are permissible. K.S.A. 12-3013(e)(1) excludes "administrative ordinances" from permissible initiative petition subject matter, while K.S.A. 12-3013(e)(3) excludes "ordinances subject to referendum or election under another statute."

When determining whether an ordinance that seeks to repeal a previous ordinance—in this case, Ordinance No. 19915—is "administrative" or "legislative," the Court must consider whether the previous ordinance was "administrative" or "legislative." *City of Wichita v. Kansas Taxpayers Network, Inc.*, 255 Kan. 534, 539, 874 P.2d 667 (1994) *holding modified on other grounds by McAlister v. City of Fairway*, 289 Kan. 391, 212 P.3d 184 (2009). This is not, however, a simplistic inquiry. As our state supreme court has observed, "[N]o single act of a governing body is ever likely to be solely legislative or solely administrative." *McAlister v. City of Fairway*, 289 Kan. at 402. As a general guideline, the Kansas Supreme Court has held that, "the initiative and referendum statute is only appropriate for measures that are 'quite clearly and fully legislative and not principally executive or administrative.'" *McAlister*, 289 Kan. at 402 (quoting *City of Wichita v. Kansas Taxpayers Network, Inc.*, 255 Kan. at 540.

There is no bright-line, black-and-white test to determine whether an ordinance is "quite clearly and fully legislative" or "principally executive or administrative"; as the Kansas Supreme Court put it, "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." *McAlister*, 289 Kan. at 403. Nevertheless, the Court must apply the principles enumerated by the Kansas Supreme Court to make a determination as to the character of the at-issue ordinance "under the facts of each case[.]" *McAlister*, 289 Kan. at 403. Specifically, these principles provide:

> 1. An ordinance that makes new law is legislative; while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance. [Citations omitted.]
>
> 2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative. [Citations omitted.]

> 3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of policy. [Citations omitted.]

McAlister, 289 Kan. at 403.[10] As a fourth principle:

> [I]f the subject is one of statewide concern in which the legislature has delegated decision-making power, not to the local electors, but to the local council or board as the state's designated agent for local implementation of state policy, the action receives an "administrative" characterization, [and] hence is outside the scope of the initiative and referendum.

McAlister, 289 Kan. at 404 (quoting *Rauh v. City of Hutchinson*, 223 Kan. 514, 519–20, 575 P.2d 517 (1978)). No single guideline is controlling over the others, and the Court may give different weight to each factor based on the particular facts of the case. *McAlister*, 289 Kan. at 405. Moreover, before applying these factors, the Court notes that the Imming Petition enjoys no presumption of validity as to whether or not Ordinance No. 19915 is "administrative" or "legislative."

a. Ordinance No. 19915 Executes Existing Law, But the Acquisition of Heartland Park Raceway Is Primarily Legislative In Nature.

Ordinance No. 19915 expands the boundaries of a previously authorized STAR bonds district—created by virtue of Ordinance Nos. 18515, 18541, and 18580—pursuant to K.S.A. 12-16,160 *et seq.* Section 5 of the ordinance notes that the project plan proposed therein "supplements, but does not replace, the existing Project Plan[.]" Section 6 clarifies that the amended Project Plan now involves "the acquisition of real property and unencumbered

[10] The *McAlister* Court recognized that the fourth principle outlined in *Wichita v. Kansas Taxpayers Network*—"that the initiative and referendum statute should be restricted to measures 'quite clearly and fully legislative and not principally executive or administrative'"—is but "a recitation of the strict construction doctrine discussed above and less helpful as a guideline for determining under the facts in each case whether a proposed ordinance is legislative or administrative." 289 Kan. at 403–04.

interests" which is located "within the existing boundaries of the Redevelopment District[.]" Section 11 authorizes the issuance of $5,000,000.00 in "full faith and credit tax increment bonds" to finance the acquisition of the real property involved, and clarifies that this issuance is made "in accordance with the general bond law[.]" Section 12 contemplates a protest petition identical to that described in K.S.A. 12-17,169. Section 14 authorizes the City Manager to contact the Kansas Secretary of Commerce to seek authority to issue additional STAR bonds "in an amount in excess of the amount previously approved by the Secretary" for the previous project.

Examining Exhibit B-1 to Ordinance No. 19915, it appears that one purpose of the ordinance was to effectuate the purchase of the Heartland Park Raceway, in fee simple, from Jayhawk. Such a purchase would, necessarily, be "permanent" and, as such, the decision to acquire it would be primarily legislative. *Cf. McAlister*, 289 Kan. at 406–07. However, it is also clear that the new feasibility study and proposed plan underlying Ordinance No. 19915 merely updates previous findings, while the mechanisms used to execute the purchase of the Raceway all involve the application of existing law—which lean towards a finding that the ordinance is administrative. Nonetheless, because the centerpiece of Ordinance No. 19915 is the acquisition of the Heartland Park Raceway, the Court concludes that, under the first factor, Ordinance No. 19915 is slightly more legislative than administrative.

b. <u>While Ordinance No. 19915 Does Declare a Public Purpose, It Deals Only With a Small Policy Segment.</u>

Sections 1 and 13 of Ordinance No. 19915 declare that the aforementioned decisions to expand the Redevelopment District and issue STAR bonds are "appropriate, desirable, and necessary to promote, stimulate, and develop the general and economic welfare of the City of

Topeka, and to promote the general welfare of its citizens." Imming argues that these declarations demonstrate the City Council's use of its police powers, which is an inherently legislative act.

The Court is not convinced. It is apparent that, whatever effect the purchase of the Heartland Park Raceway will have, it is only a small portion of the overall policy of furthering the general and economic welfare of the City of Topeka and to promote the general welfare of its citizenry. Moreover, this language merely mirrors that contained in K.S.A. 12-17,160 *et seq.*, which expressed the Kansas Legislature's general policy purpose in passing the law. Because the Heartland Park Raceway is only a small part of a much larger policy question, the Court finds that, under this factor, Ordinance No. 19915 is more administrative than legislative.

c. Ordinance No. 19915 Requires Specialized Knowledge of Municipal Finances.

Under the third factor in the Kansas Supreme Court's test, the Court must consider whether Ordinance No. 19915 intrudes into areas requiring special expertise in municipal government or intimate knowledge of the fiscal and other affairs of the City. If so, an ordinance may be properly characterized as administrative even if it involves the establishment of policy.

It is apparent that any decision to alter the boundaries of the Redevelopment District—along with the financial knowledge to determine whether or not an expansion of said District would be practical or feasible—requires extensive research on the part of the decision-maker. See K.S.A. 12-17,166(b)(1)–(14).[11] Likewise, the decision to issue STAR bonds to bolster economic development requires a complicated fiscal calculus which, again, necessitates special knowledge or great familiarity with a municipality's finances. By virtue of the expertise required

[11] The Court notes that the Kansas Legislature, apparently recognizing this difficulty, has identified "the city or county"—not the electorate—as the party to determine whether a STAR bonds project is "feasible." K.S.A. 12-17,166(c).

in order to render an informed decision as to Ordinance No. 19915, the Court concludes that, under this third factor, it is significantly more administrative than legislative—despite the fact that Sections 1 and 13 of Ordinance No. 19915 arguably establish policy.

d. The Subject of Ordinance No. 19915 Does Not Primarily Involve Matters of Statewide Concern.

Finally, the Court looks to the question of whether or not Ordinance No. 19915 addresses matters of statewide concern. If not, it may be characterized more closely as a legislative ordinance; if so, and if the Kansas Legislature has delegated decision-making power to the City Council, then it is an administrative ordinance.

The analysis, as a practical matter, mirrors the Court's assessment under the first factor of this overall inquiry: while much of Ordinance No. 19915 is designed to effectuate the STAR Bonds Financing Act, K.S.A 12-17,160 *et seq.*—which is unquestionably a matter of statewide concern—and while the Kansas Legislature clearly delegated authority to make decisions under said Act to the City, a major purpose behind Ordinance No. 19915 is the acquisition of a racetrack. As is reflected in Sections 1 and 13 of Ordinance No. 19915, the overriding purpose of the ordinance is to promote the welfare of the City of Topeka and its citizens—not to further a statewide regulatory scheme. True, a statewide regulatory scheme is the *mechanism* by which this purpose is achieved, and, accordingly, this factor weighs only a little in favor of a finding that Ordinance No. 19915 is legislative; nevertheless, under this factor, that is the necessary conclusion.

e. Summary: Ordinance No. 19915 Is Principally Administrative In Nature.

Weighing these factors in the aggregate, the Court concludes that Ordinance No. 19915 was primarily administrative in nature. As in the *McAlister* case, the primary factor weighing in

favor of an administrative finding is the specialized knowledge of municipal government and finances required to effectively make a decision regarding Ordinance No. 19915. Combined with the fact that Ordinance No. 19915, in large part, executes existing law and existing plans, this determination necessitates the conclusion that the ordinance is principally administrative. Accordingly, the ordinance contained in the Imming Petition—which seeks to repeal Ordinance No. 19915—is also principally administrative. The Imming petition, therefore, is invalid as an initiative petition, and the City is entitled to summary judgment on this issue.

5. *The Imming Petition Is Invalid under K.S.A. 12-3013(e)(3) Because Challenges to the Issuance of Full Faith and Credit STAR Bonds are Legislatively Confined to Protest Petitions Only.*

Finally, the City challenges the Imming Petition as invalid because, pursuant to K.S.A. 12-3013(e)(3), an initiative petition cannot involve "ordinances subject to referendum or election under another statute" from the realm of subject matter for which an initiative petition might be proper. Again, the Court looks to Ordinance No. 19915 to determine whether the ordinance is "subject to referendum or election under another statute."

If citizens disagree with a STAR bond project plan, K.S.A. 12-17,169(b)(2) provides that the proper means to challenge the plan is a "protest petition signed by 3% of the qualified voters of the city . . . in accordance with K.S.A. 25-3601 *et seq.*" Section 11 of Ordinance No. 19915 mirrors this requirement.

Imming argues that "referendum or election" does not refer to protest petitions, but only to initiative petitions; the City, naturally, argues that a protest petition *is* a "referendum or election." The parties cite no case law in support of their positions, and the Legislature has not provided a definition for the word "referendum." Black's Law Dictionary defines "referendum"

as, *inter alia*, "The process of referring . . . an important public issue to the people for final approval by popular vote." Black's Law Dictionary 1307 (8th ed. 2004). This definition appears to encompass protest petitions such as that authorized under K.S.A. 12-17,169(b)(2). Moreover, K.S.A. 12-17,169(b)(2) specifically provides for an *election* following the filing of a "sufficient petition[.]"

Because the issuance of full faith and credit bonds provided for in Section 11 of Ordinance No. 19915 was subject to referendum or election under K.S.A. 12-17,169(b)(2), an initiative petition was an inappropriate mechanism with which to challenge Section 11. The question, then, becomes whether that fatal flaw as to an initiative petition concerning one section of Ordinance No. 19915 dooms the Imming Petition with respect to the remainder of the ordinance. In this, too, the Court answers in the affirmative. The Imming Petition posed a simple question: should an ordinance seeking to repeal the *entirety* of Ordinance No. 19915—with no provision for severability—be adopted? It is impossible to ascertain, at this juncture, how many of the citizen signatories would have still put pen to paper in response to a petition proposing an ordinance to repeal all of Ordinance No. 19915 *but* Section 11. Conversely, it is impossible to determine how many citizens would have signed a protest petition condemning Section 11, specifically.

The Court declines to engage in this sort of speculative guesswork. Even if the Court had determined that the Imming Petition related to an ordinance that was "quite clearly and fully legislative" under the facts of the case, the lurking danger of the election and referendum mechanism contained in K.S.A. 12-17,169(b)(2) would have nevertheless rendered the Imming Petition invalid, as an initiative petition, pursuant to K.S.A. 12-3013(e)(3). Thus, for this reason, as well, the Court finds it proper to grant summary judgment in favor of the City.

In summary, the Court finds that the contents of the Imming Petition substantially comply with the requirements set out in K.S.A. 25-3601 *et seq.* However, because the Court finds that City of Topeka Ordinance No. 19915 is principally administrative, the Imming Petition—which is conceded to be an initiative petition—is invalid under K.S.A. 12-3013(e)(1). Further, the Imming Petition is invalid under K.S.A. 12-3013(e)(3) because challenges to the issuance of full faith and credit STAR bonds are legislatively confined to protest petitions only.

This Court is in agreement with the *City of Prairie Village v. Morrison* appellate court case when it states, "extreme caution should be used by the courts in ruling out petitions on mere technicalities, which petitions are the result of democracy working at the grassroots level." This caution underlies the Court's finding that the Imming Petition substantially complied with the legal requirements as to the form of the petition set out in K.S.A. 25-3601 *et seq.* However, the people's representatives—the Kansas Legislature—have made laws that the Court must follow to determine if an initiative petition is valid. It is not the function of this Court to make law, but rather to interpret and apply the laws made by the Kansas Legislature. In doing so, in this case, the substance of the Imming Petition—which extends beyond the scope contemplated by the Legislature for initiative petitions—must fail.

B. Imming's Motion for Summary Judgment

Of the claims raised in Imming's Motion for Summary Judgment, only his request for writ of mandamus has not been previously addressed in this Memorandum Decision and Order. Because the Court has concluded that the Imming Petition was invalid as an initiative petition, however, it is apparent that Imming's request for writ of mandamus must be denied.

CONCLUSION

For the reasons stated above, the Court GRANTS the City's Motion for Summary

Judgment in part and DENIES it in part. The Court also GRANTS Jayhawk's Motion for Summary Judgment in part and DENIES it in part. The effect of this finding is that the Imming Petition is invalid as a matter of law. The Court furthermore DENIES Imming's Motion to Dismiss and Motion for Summary Judgment. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

IT IS SO ORDERED.

Dated this 12th day of November, 2014.

Hon. Larry D. Hendricks
District Judge

SEAL of the DISTRICT COURT JANUARY 29, 1861 SHAWNEE CO., KANSAS

STATE OF KANSAS, COUNTY OF SHAWNEE, SS.
I hereby certify the above and foregoing to be a true and correct copy, the original of which is filed and entered of record in the court
Dated April 21, 2015
CLERK of the DISTRICT COURT
By _____ DEPUTY

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin this 12th day of November, 2014, to the following:

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