Approved: February 16, 1999

MINUTES OF THE HOUSE COMMITTEE ON LOCAL GOVERNMENT

The meeting was called to order by Chairman Carlos Mayans at 3:30 p.m. on February 11, 1999 in Room 521-S of the State Capitol.

All members were present except: Representative Ethel Peterson - excused
Representative John Toplikar - excused

Committee staff present: Michael Heim, Legislative Research Department
Dennis Hodgins, Legislative Research Department
Theresa Kiernan, Office of the Revisor of Statutes
Lois Hedrick, Committee Secretary

Conferees appearing before the committee:
Representative Tom Sloan
Charles Wright, Trustee, Lecompton Township
Charles Rutter, Legal Intern, Kansas Association of Counties

Others attending: See Guest List (Attachment 1)

The Chairman indicated that **HB 2338** (Cities; incorporation; areas within five miles of existing city); **HB 2339** (Planning and zoning; planning commission); and **HB 2390** (County officers; execution and duties of office) have been assigned to this committee.

Chairman Mayans opened the hearing on **HB 2182** (Townships; power of eminent domain). Representative Tom Sloan, the bill's sponsor, testified in support of the bill which will allow a township to acquire up to five acres of land for its use and the issuance of general obligation bonds (through an election) to finance acquisition and construction costs associated with the purchased land. (See written testimony, Attachment 2.) Members questioned why the Lecompton Township board was having difficulty in acquiring land. Mr. Wright replied that no landowner is willing to sell to the township, perhaps because of greed. Representative Sloan stated that in writing this bill he has written in checks and balances at the local level to allow fair consideration of the issue of eminent domain. Representative Horst asked if he would accept an amendment to reduce the percent of township voters needed to petition for an election to challenge the land acquisition from 10 to 5%. Representative Sloan indicated he would accept that.

The Chairman asked about the provisions for public notice, and Theresa Kiernan indicated the provisions were written in a "shorthand" manner to include the requirements of K.S.A. 10-120 which spells out the notice requirements.

Charles Wright, Lecompton Township Trustee, testified in support of **HB 2182**, describing the difficulty the township has encountered in acquiring another site for its shop (see Attachment 3). The Chairman asked if the board had sufficient funds on hand to purchase land; why more funds are needed, and why not repair the building they have? Mr. Wright answered that the building is beyond economic repair and there is not sufficient space to house equipment and supplies. With growing population, the responsibilities increase. Mr. Wright stated when serving as Topeka's Mayor he was not in favor of eminent domain, but in Lecompton is faced with a situation that cannot be resolved without it. Representative Dahl asked if the county commissioners had been approached to take action. Mr. Wright replied the county counselor has stated the county cannot provide any help. Representative Sloan stated that the county administrator has advised it will take legislative action.

Representative Palmer asked if it has been considered to utilize no-fund warrants, and Mr. Wright answered the township board preferred not to use them and indicated that eminent domain would be a last resort for the board. The Chairman asked how close Mr. Wright lives to the present facility–perhaps he could sell some land for the new site. Mr. Wright responded that would be replete with conflict of interest and he wanted no part of that.

Charles Rutter, Legal Intern for the Kansas Association of Counties, testified in support of **HB 2182**. He described the reasons the association supports the bill and recommended its passage (see Attachment 4).

There being no others present to testify, the hearing on **HB 2182** was closed.

Chairman Mayans then asked if the committee was ready to act on some of the bills assigned the committee. On **HB 2064** (Powers of board of county commissioners; resolving statutory conflicts), Theresa Kiernan indicated other bills have been introduced on the subject and thus no action is warranted on the bill. With respect to **HB 2063** (Retailers' sales tax; resolving statutory conflict), she will review it and report back as to its relevance.

Theresa Kiernan distributed a suggested balloon amendment to **HB 2073** (Cities and counties; storm water drainage improvements) to authorize, by ordinance, that a city may construct storm drainage improvements in another city upon approval by resolution of the other city. The costs of construction could be shared between cities. (See amendment, Attachment 5.)

Upon motion of Representative Huff, seconded by Representative Jeff Peterson, the amendment to **HB 2073** was adopted as was the passage of the bill, as amended. Representative Huff will carry the bill on the floor of the House.

Chairman Mayans stated the committee will meet on Tuesday and Thursday next week when hearings on some of the assigned bills will be heard, as well as to take possible action on bills previously heard. Theresa Kiernan distributed suggested balloon amendments to **HB 2040** (Amusement rides; liability insurance and inspection). (See Attachment 6.)

The Chairman noted the written testimony of Kurt Harper (an Attorney who represents the Wichita area Builders Association) on **HB 2203** (Cities and counties; planning and zoning) which had been distributed to the members. (See Attachment 7.)

The meeting was adjourned at 4:30 p.m.

The next meeting is scheduled for February 16, 1999.

HOUSE COMMITTEE ON LOCAL GOVERNMENT
GUEST LIST
FEBRUARY 11, 1999

NAME	REPRESENTING
Charles Wright	Lecompton Township
Charles D. Rutt	Ks. Assoc. of Counties
Opie O M Rutter	
Rep. Tom Sloan	
Tom Schaefer	City of Lenexa
Don Moler	League of KS Munis
Janet Stubbs	KBIA

STATE OF KANSAS

TOM SLOAN
REPRESENTATIVE, 45TH DISTRICT
DOUGLAS COUNTY

STATE CAPITOL BUILDING
ROOM 446-N
TOPEKA, KANSAS 66612-1504
(785) 296-7677
1-800-432-3924

772 HWY 40
LAWRENCE, KANSAS 66049-4174
(785) 841-1526

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: UTILITIES
MEMBER: ENVIRONMENT
KANSAS 2000

Testimony to House Local Government Committee on HB 2182 – February 11, 1999

Mr. Chairman, Members of the Committee, thank you for the opportunity to present an issue of importance to a township in my legislative district, though the issue is not confined to just the Lecompton Township.

As I mentioned when I requested introduction of HB 2182 by this Committee, Lecompton Township has its offices in a decrepit building which is totally inadequate for storage of township equipment and fails to meet health and safety codes. Township Trustees will provide more graphic details about their facilities and unsuccessful efforts to obtain a suitable site for construction of an appropriate and necessary building.

Attached to my testimony is the current statute that specifies the only circumstances under which townships may utilize the power of eminent domain. You will note that it permits only the condemnation of ground within a cemetery. HB 2182 seeks to narrowly expand that authority. Even though township governments are very close and accessible to the people they represent, HB 2182 has been crafted to ensure that Trustees have only limited additional powers to condemn property. The use of eminent domain or condemnation proceedings are never lightly undertaken, it is the choice of last resort. However, sometimes it is the only viable option open. It then is our responsibility as legislators to provide the appropriate safeguards.

The bill specifies that:

- A maximum of 5 acres may be condemned and only for specific uses related to office space and equipment storage.
- 10 percent of the township's voters may petition for an election to challenge the land condemnation/purchase or use thereof.
- Voters must approve through an election any use of bonds to finance the project.
- HB 2182 enables township trustees to appropriately conduct necessary business to serve their constituents AND those same citizens may halt the proceedings at several points (a responsible system of checks and balances).

Thank you for your attention and consideration of HB 2182. Lecompton Township's Trustees need assistance so that they can serve their constituents. I hope that after hearing their testimony, you will recommend HB 2182 favorable for passage.

History: L. 1917, ch. 84, § 1; L. 1919, ch. 105, § 1. R.S. 1923, 80-916; L. 1982, ch. 72, § 14; July 1.

Cross References to Related Sections:
Title vesting in township, see 80-934.
Care of by counties, see 19-3106, 19-3107.

Attorney General's Opinions:
Township cemetery districts; inclusion of abandoned cemeteries. 83-168.
Eminent domain; procedure act; human remains; compensation. 88-73.
Unmarked burial site distinguished with cemetery. 95-88.

80-917. Cemetery chapel. Any township in the state of Kansas owning or operating as trustees a cemetery is authorized and empowered to procure, acquire and control a building to be used as a chapel in connection with such cemetery in which to hold burial or funeral services and such other devotional or religious exercises as the board may, from time to time, allow: *Provided*, That the title to such chapel shall be vested in the township maintaining such cemetery.

History: L. 1921, ch. 91, § 1; Feb. 27; R.S. 1923, 80-917.

80-918. Same; petition. The township board shall not acquire, secure nor operate a chapel as provided in K.S.A. 80-917 except upon the application so to do through a petition presented to it signed by at least twenty-five percent of the resident taxpayers of the township.

History: L. 1921, ch. 91, § 2; Feb. 27; R.S. 1923, 80-918.

80-919. Same; election; site; erection; tax levy, limitation. Upon the receipt of such petition the township board shall call an election at which the question of the acquiring of a site for and the building of a chapel as provided hereinbefore shall be submitted to the electors of the township, at which election the proposition submitted shall be "Shall the township build and maintain a chapel in connection with the township cemetery at an initial cost of _____ dollars?" If the majority of the votes cast at said election shall favor such proposition to construct and operate a chapel the township board shall proceed to procure a site for such chapel adjacent to the cemetery not exceeding one acre in area and to build and maintain a suitable building for a chapel thereon. The mode of acquiring the site shall be by purchase, donation and contribution, condemnation, or gift. The board of township commissioners is authorized and empowered to levy a tax sufficient to pay for the site and erect the building thereon: *Provided*, That in no event shall the combined cost of the site and the building exceed the amount of money to be raised by an annual levy of two mills on every dollar of taxable property in the township for a period of five (5) years.

History: L. 1921, ch. 91, § 3; Feb. 27; R.S. 1923, 80-919.

80-920, 80-921.

History: L. 1935, ch. 318, §§ 1, 2; Repealed, L. 1969, ch. 470, § 1; July 1.

80-922.

History: L. 1937, ch. 384, § 1; Repealed, L. 1947, ch. 480, § 1; June 30.

Source or prior law:
L. 1935, ch. 317, § 1.

80-923. Board of trustees of joint township parks or cemeteries; tax levies. Where two or more townships in the state of Kansas combine, and purchase or acquire or act as trustee for grounds for a park or parks, or cemetery or cemeteries, the township board of each of such combined townships shall constitute a board of trustees, having full power and control of said parks and cemeteries and shall annually determine the tax to be levied by every such township to comply with the provisions and limitations of K.S.A. 80-907.

History: L. 1937, ch. 385, § 1; March 29.

80-924 to 80-930.

History: L. 1937, ch. 376, §§ 1 to 7; Repealed, L. 1947, ch. 480, § 1; June 30.

80-931.

History: L. 1941, ch. 398, § 1; L. 1947, ch. 478, § 1; Repealed, L. 1968, ch. 317, § 1; July 1.

80-932. Tax levy for care and maintenance of certain cemeteries. The township board of any township is hereby authorized and empowered to levy an annual tax in an amount not to exceed the limitation prescribed by K.S.A. 79-1962, on all taxable tangible property in such townships, including such property of cities of the third class, for the purpose of providing funds to be used for the care and maintenance of cemeteries in such townships for which no provision is made by law for the levying of taxes for such care and maintenance, or said township board may expend a sum not to exceed fifty dollars ($50) per year from the general fund of the township in lieu of said levy. The tax levy herein authorized shall

Mr irman and members of the Committee:

I am Charles Wright, currently Trustee of the Lecompton Township in Douglas County.

Thirty years ago I had the responsibility as Mayor of Topeka to appear many times before these legislative sessions, so I am not a virgin when it comes to doing that.

In 1966 Mrs. Wright and I inherited the 70 acres we now live on just northwest of Lecompton. Seven years later we sold our home in Topeka and moved to Lecompton Township where we planned to spend the rest of our lives living quietly, and most certainly out of public office.

However, two years ago my Township neighbors, because of my previous public experiences in Topeka, prevailed on me to become a candidate for our Township Trustee. The filing fee was only $1 and I had no opposition., and I was elected.

When I was elected I was instantly concerned about the condition of our Township's equipment, its roads, and most certainly our Township Shop. You have in your hands a four-color folder our Township has prepared to vividly show the problems we are now facing.

We have 52 miles of gravel roads to maintain. If and when we get a heavy snow, we are only able to plow the roads, leaving road surfaces on hills unsanded and untreated chemically because we do not have a truck to do this. We would like to buy such a truck, but we have no place to safely store it, so we thus are unable to meet such an emergency.

In addition, we have no security of any kind in our present shop. This has caused us to waste thousands of tax dollars to replace tools and equipment stolen by vandals.

I call your attention to photo number 8 on the inside of the folder. I shudder to think what would happen if OSHA were to descend on us about the health and safety we are providing for our employees and others. Like the folder says, "As a governmental facility it is a disgrace!"

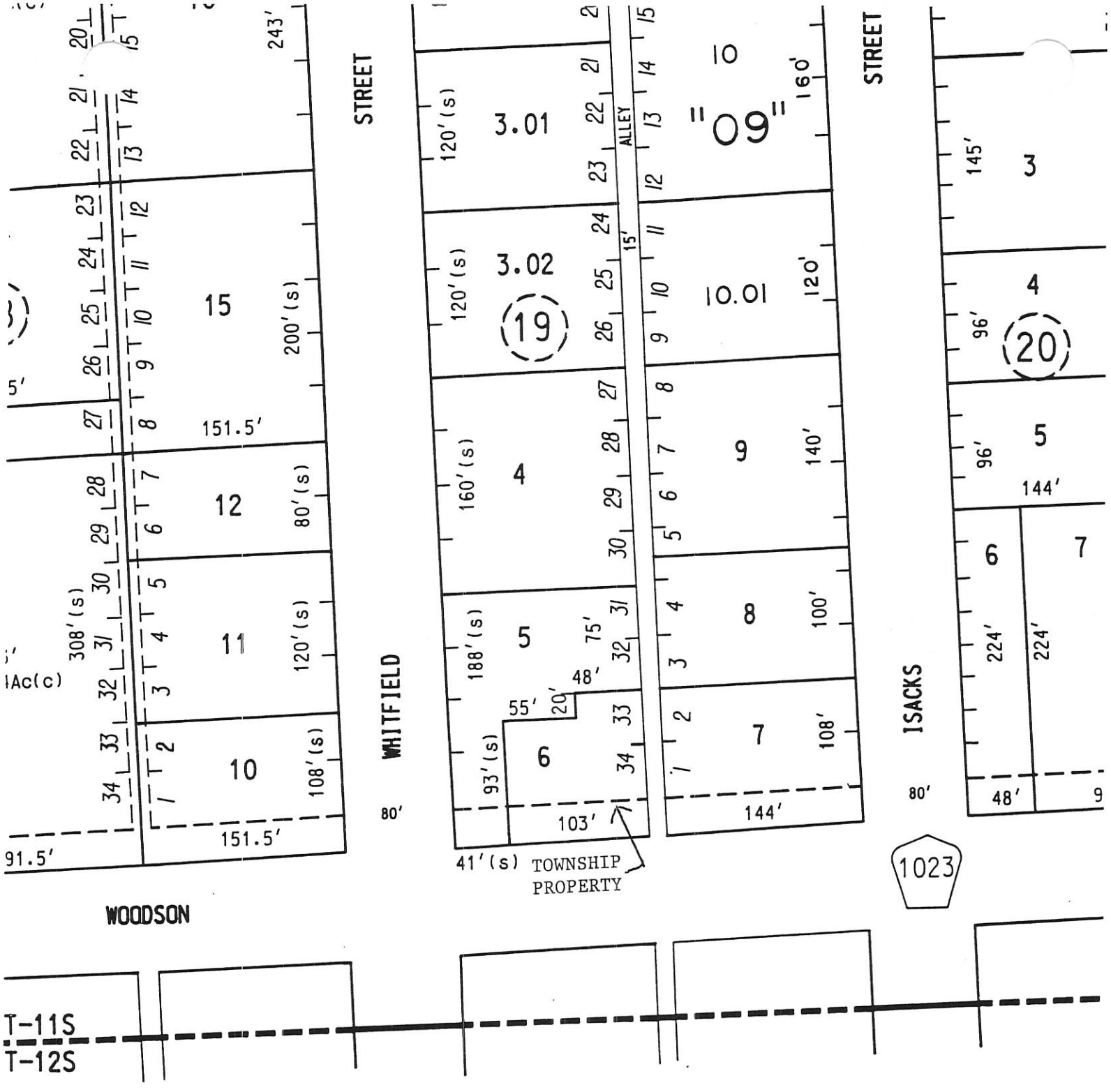
As the folder states, we have been unable to purchase land for construction of a new shop building. Property owners either have refused to sell their land to us, or even discuss the possibility.

Therefore, this is why we have asked our Representative, Mr. Sloan, to come to our rescue by introducing House Bill 2182.

We respectfully request your approval of it, and I will be happy to answer any questions the Committee might have.

Thank you very much.

HOUSE LOCAL GOVERNMENT
Attachment 3-1
2-11-99



052-03-10

ME	PLAT BOOK	PLAT PAGE	SUBD. CODE
	13	51	0867

LEGEND

TOWNSHIP & RANGE ——— AREA FROM DEED

COUNTY LINE — — — AREA CALCULATED

CORPORATION LINE — — — — DIMENSION FROM DEED

KANSAS
ASSOCIATION OF
COUNTIES

TESTIMONY
concerning House Bill No. 2182
Township Board Duties
Presented by Charles Rutter
House Local Government Committee
February 11, 1999

Chairman Mayans and members of the Committee, my name is Charles Rutter, Legal Intern to the General Counsel of the Kansas Association of Counties. I appreciate the opportunity to comment on House Bill 2182, concerning the powers of township boards.

From our understanding, HB 2182 arises out of a specific need expressed by a township in Douglas County. However, the bill is general in application and would provide additional flexibility to townships around the state. The bill would grant townships 1) the additional power to acquire by eminent domain real estate not to exceed five acres for the construction of township buildings thereon; and 2) the authority to issue general obligation bonds, subject to a majority vote of township voters, for the purpose of constructing township buildings.

The Kansas Association of Counties supports HB 2182, as it 1) grants certain powers to township boards which are already granted to boards of county commissioners; 2) provides a way for township boards to exercise their discretion to provide services in ways determined by the needs of township residents; and 3) does not conflict with the role or purpose of county government.

Thank you for the opportunity to offer testimony on this bill. I am available to answer any questions you might have.

The Kansas Association of Counties, an instrumentality of member counties under K.S.A. 19-2690, provides legislative representation, educational and technical services and a wide range of informational services to its members. Inquiries concerning this testimony can be directed to the KAC by calling (785) 233-2271.

700 SW Jackson
Suite 805
Topeka KS 66603
785•233•2271
Fax 785•233•4830
email kac@ink.org

Session of 1999

HOUSE BILL No. 2073

By Committee on Local Government

1-21

AN ACT concerning cities and counties; relating to storm drainage improvements; amending K.S.A. 12-631r and 12-631s and repealing the existing sections

Be it enacted by the Legislature of the State of Kansas

Section 1. K.S.A. 12-631r is hereby amended to read as follows: 12-631r. *(a)* Whenever ~~it shall be the judgment of~~ the governing body of any city ~~that~~ *determines* it is necessary to ~~build and~~ construct storm sewers, *channels, retention basins* or drains for the purpose of ~~carrying off storm water from the streets, avenues and alleys~~ *managing the storm drainage areas of all or any portion* of such city ~~it shall, by ordinance, order and provide~~ *for and in the unincorporated areas outside of but within three miles of the corporate limits of such city, the governing body may authorize the construction of* such storm sewers, *channels, retention basins* or drains ~~to be constructed, and it shall in~~ *Such construction shall be authorized by ordinance.* Such ordinance *shall* designate where such storm sewers, *channels, retention basins* or drains shall ~~commence and outline the same to the point or points of outlet or escape~~ *be located. Construction of such improvements located outside the corporate limits of a city shall not commence unless such construction is approved by a resolution adopted by the board of county commissioners of the county in which such improvements are to be located.*

(b) Whenever the board of county commissioners of any county ~~determining~~ it is necessary to construct storm sewers, retention basins, channels or drains for the purpose of managing the storm drainage areas of all or any portion of such county, the board may authorize construction of such storm sewers, retention basins, channels or drains. Such construction shall be authorized by resolution. Such resolution shall designate where such storm sewers, retention basins, channels or drains shall be located. Construction of improvements located within the corporate limits of a city shall not commence unless such construction is approved by resolution adopted by the governing body of the city in which such improvements are to be located.

Sec. 2. K.S.A. 12-631s is hereby amended to read as follows: 12-631s. For the purpose of ~~making such~~ *constructing* improvements *authorized*

Whenever the governing body of any city determines it is necessary to construct storm sewers, retention basins, channels or drains for the purpose of managing the storm drainage areas of all or any portion of which are located within another city, the governing body may authorize construction of such storm sewers, retention basins, channels or drains. Such construction shall be authorized by ordinance. Such ordinance shall designate where such storm sewers, retention basins, channels or drains shall be located. Construction of improvements located within the corporate limits of another city shall not commence unless such construction is approved by a resolution adopted by the governing body of the city in which such improvements are to be located.

determines

a

by K.S.A. 12-631r, and amendments thereto, the governing body of ~~said cities~~ *the city and the board of county commissioners of the county* shall be the sole judge of the ~~expediency of making said improvements provided for herein, and in the issuance of said~~ *necessity for such improvements and the issuance of general obligation* bonds in payment therefor.

Sec. 3. K.S.A. 12-631r and 12-631s are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

constructing such improvements

5-2

HOUSE BILL No. 2040

By Representatives Sloan, Benlon, Bethell, Compton, Feuerborn, Findley, Freeborn, Huff, E. Peterson, Stone and Vickrey

1-15

AN ACT concerning amusement rides; relating to inspection and regulation thereof; prohibiting certain acts and providing penalties and remedies for violations.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act:

(a) (1) "Amusement ride" means any mechanical or electrical device that carries or conveys passengers along, around or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, pleasure, thrills or excitement and shall include but not be limited to:

(A) Rides commonly known as ferris wheels, carousels, parachute towers, bungee jumping, reverse bungee jumping, tunnels of love and roller coasters;

(B) equipment generally associated with winter activities, such as ski lifts, ski tows, j-bars, t-bars, chair lifts and aerial tramways; and

(C) equipment not originally designed to be used as an amusement ride, such as cranes or other lifting devices, when used as part of an amusement ride.

(2) "Amusement ride" does not include:

(A) Games, concessions and associated structures;

(B) any single passenger coin-operated ride that: (i) Is manually, mechanically or electrically operated; (ii) is customarily placed in a public location; and (iii) does not normally require the supervision or services of an operator; ~~or~~

(C) nonmechanized playground equipment, including, but not limited to, swings, seesaws, stationary spring-mounted animal features, rider-propelled merry-go-rounds, climbers, slides, trampolines, moon walks and other inflatable equipment and physical fitness devices; or (D) any nonprofit amusement ride owned by a political subdivision of the state

(b) "Certificate of inspection" means a certificate, signed and dated by a qualified inspector, showing that an amusement ride has satisfactorily passed inspection by such inspector.

~~(c) "Department" means the department of human resources.~~ strike as marked and reletter subsections (d) through (j)

(d) "Nondestructive testing" means the development and application

of technical methods such as radiographic, magnetic particle, ultrasonic, liquid penetrant, electromagnetic, neutron radiographic, acoustic emission, visual and leak testing to:

(1) Examine materials or components in ways that do not impair the future usefulness and serviceability in order to detect, locate, measure and evaluate discontinuities, defects and other imperfections;

(2) assess integrity, properties and composition; and

(3) measure geometrical characters.

(e) "Operator" means a person actually engaged in or directly controlling the operations of an amusement ride.

(f) "Owner" means a person who owns, leases, controls or manages the operations of an amusement ride and may include the state or any political subdivision of the state.

(g) "Parent or guardian" means any parent, guardian or custodian responsible for the control, safety, training or education of a minor or a disabled person, as defined by K.S.A. 59-3002 and amendments thereto.

(h) (1) "Patron" means any individual who is:

(A) Waiting in the immediate vicinity of an amusement ride to get on the ride;

(B) getting on an amusement ride;

(C) using an amusement ride;

(D) getting off an amusement ride; or

(E) leaving an amusement ride and still in the immediate vicinity of the ride.

(2) "Patron" does not include employees, agents or servants of the owner while engaged in the duties of their employment.

(i) "Person" means any individual, association, partnership, corporation, limited liability company, government or other entity.

(j) "Qualified inspector" means a person who holds a current certification or other evidence of qualification to inspect amusement rides, issued by a program specified by rules and regulations adopted under section 3.

~~(k) "Secretary" means the secretary of human resources.~~ — strike as marked and reletter subsections (d) through (j)

(l) "Serious injury" means an injury that results in:

(1) Death, dismemberment, significant disfigurement or permanent loss of the use of a body organ, member, function or system;

(2) a compound fracture; or

(3) other significant injury or illness that requires immediate admission and overnight hospitalization and observation by a licensed physician.

(m) "Sign" means any symbol or language reasonably calculated to communicate information to patrons or their parents or guardians, including placards, prerecorded messages, live public address, stickers, pictures, pictograms, guide books, brochures, videos, verbal information and

6-2

visual signals.

Sec. 2. (a) No amusement ride shall be operated in this state unless at the time of operation the owner has in effect an insurance policy, written by an insurance company authorized to do business in Kansas, insuring the owner and operator against liability for bodily injury to persons arising out of the operation of the amusement ride. Such insurance policy shall:

(1) Provide for coverage in an amount not less than $1,000,000 per occurrence and not less than $2,000,000 in the annual aggregate; and

(2) name as an additional insured any person contracting with the owner for the amusement ride's operation.

(b) An insurance policy required by this section shall provide that the insurer may not cancel or refuse to renew the policy without 30 days' written notice to the following unless inspection reveals the ride is unsafe and appropriate repairs cannot or will not be made, in which case coverage may be canceled immediately to force closure of the ride:

(1) The insured; and

(2) the department.

(c) A copy of the insurance policy required by this section shall be available for inspection by any person contracting with the owner for the amusement ride's operation.

Sec. 3. ~~(a) The secretary shall adopt rules and regulations specifying programs that issue certification or other evidence of qualification to inspect amusement rides and that the secretary determines require education, experience and training at least equivalent to those required on the effective date of this act for a level 1 certification by the national association of amusement ride safety officials.~~

~~(b)~~ No amusement ride shall be operated in this state unless such ride has a valid certificate of inspection. An amusement ride erected at a permanent location in this state shall be inspected by a qualified inspector at least every 12 months. An amusement ride erected at a temporary location in this state shall have been inspected by a qualified inspector ~~within the preceding 30 days~~. The certificate of an inspection required by this subsection shall be signed and dated by the inspector and shall be available to any person contracting with the owner for the amusement ride's operation. In addition, a visible inspection decal or other evidence of inspection shall be posted in plain view on or near the amusement ride, in a location where it can easily be seen.

Sec. 4. The owner of an amusement ride shall retain at all times current maintenance and inspection records for such ride. Such records shall be available to any person contracting with the owner for the amusement ride's operation.

Sec. 5. No amusement ride shall be operated in this state unless non-

strike as marked

by a person with at least a level 1 certification by the national association of amusement ride officials

before it is first operated in this state

6-3

destructive testing of the ride has been conducted in accordance with th recommendations of the manufacturer of the ride and in conformanc with standards at least equivalent to those of the American society fo testing and materials that are in effect on the effective date of this act.

Sec. 6. (a) No amusement ride shall be operated in this state unles the operator has satisfactorily completed training that includes, at minimum:

(1) Instruction on operating procedures for the ride, the specific du ties of the operator, general safety procedures and emergenc procedures;

(2) demonstration of physical operation of the ride; and

(3) supervised observation of the operator's physical operation of th ride.

(b) No amusement ride shall be operated in this state unless the nam of each operator trained to operate the ride and the certificate of eac such operator's satisfactory completion of such training, signed and date by the trainer, is available to any person contracting with the owner fo the amusement ride's operation on the premises where the amusemen ride is operated, during the hours of operation of the ride.

Sec. 7. No amusement ride shall be operated in this state unles there is posted in plain view on or near the ride, in a location where the can be easily read, ~~all~~ safety instructions for the ride. ← strike as marked

Sec. 8. (a) Each patron of an amusement ride, by participation, ac cepts the risks inherent in such participation of which an ordinary pruden person is or should be aware.

(b) Each patron of an amusement ride has a duty to:

(1) Exercise the judgment and act in the manner of an ordinary pru dent person while participating in an amusement ride;

(2) obey all instructions and warnings, written or oral, prior to an during participation in an amusement ride;

(3) refrain from participation in an amusement ride while under th influence of alcohol or drugs;

(4) engage all safety devices that are provided;

(5) refrain from disconnecting or disabling any safety device excep at the express direction of the owner's agent or employee; and

(6) refrain from extending arms and legs beyond the carrier or seatin area except at the express direction of the owner's agent or employee.

(c) (1) A patron, or a patron's parent or guardian on a patron's behal shall report in writing to the owner any injury sustained on an amusemen ride before leaving the premises, including:

(A) The name, address and phone number of the injured person;

(B) a full description of the incident, the injuries claimed, any treat ment received and the location, date and time of the injury;

(C) the cause of the injury, if known; and

(D) the names, addresses and phone numbers of any witnesses to the incident.

(2) If a patron, or a patron's parent or guardian on a patron's behalf, is unable to file a report because ~~of the severity~~ of the patron's injuries, the patron or the patron's parent or guardian on the patron's behalf shall file the report as soon as reasonably possible.

strike as marked

(3) The failure of a patron, or the patron's parent or guardian on a patron's behalf, to report an injury under this subsection shall have no effect on the patron's right to commence a civil action.

~~(d) Any parent or guardian of a patron shall have a duty to reasonably ensure that the patron complies with all provisions of this act.~~

strike as marked

Sec. 9. Any person contracting with an owner for the amusement ride's operation shall ensure that:

(a) Inspection certificates required by section 3 and amendments thereto are available;

(b) maintenance and inspection records required by section 4 and amendments thereto are available; and

(c) safety instructions for the ride are posted as required by section 7 and amendments thereto.

Sec. 10. Whenever a serious injury results from the operation of an amusement ride:

(a) Operation of the ride shall immediately be discontinued;

(b) operation of the ride shall not be resumed until it has been inspected and the qualified inspector has approved resumption of operation; and

(c) the owner, within 30 days after the injury, shall notify the manufacturer of the ride, if the manufacturer is known and in existence at the time of the injury.

Sec. 11. (a) It is a class B misdemeanor for an owner or operator of an amusement ride knowingly to operate, or cause or permit to be operated, any amusement ride in violation of this act.

(b) It is a class C misdemeanor knowingly to violate the provisions of section 9 and amendments thereto.

(c) Each day a violation continues shall constitute a separate offense.

Sec. 12. The attorney general, or the county or district attorney in a county in which an amusement ride is located or operated, may apply to the district court for an order enjoining operation of any amusement ride operated in violation of this act.

Sec. 13. The governing body of any city or county may establish and enforce safety standards for amusement rides in addition to, but not in conflict with, the standards established by this act.

6-5

SHERWOOD & HARPER
ATTORNEYS AT LAW
RIVERFRONT PLACE - 833 N. WACO
P. O. BOX 830
WICHITA, KANSAS 67201

ROGER SHERWOOD
KURT A. HARPER

TELEPHONE (316) 267-1281
TELECOPIER (316) 267-4086

Of Counsel
WILLIAM E. JAHAN

February 11, 1999

The Honorable Carlos Mayans
Kansas State Representative
State House
Topeka, KS 66612

Dear Representative Mayans:

We provide representation from time to time to the Wichita Area Builders Association and various members of the organization. We have had occasion to review current statutes involving both revenue raising measures and zoning measures requiring a "super-majority" vote by city councils or commissioners. Currently before your Committee is HB 2203, which would serve to change some of the voting rules with respect to the method of counting votes where a super-majority is required.

The Association has indicated its opposition to this measure. It is our position that existing statutes adequately deal with the method of determining the necessary votes, and that it would not represent sound policy to change the voting rights of elected officials as the same may be defined either in other statutes or in the ordinances of the individual cities. We therefore discourage the Committee from recommending passage of this bill.

We thank you for your consideration in this matter.

Respectfully yours,

SHERWOOD & HARPER

Kurt A. Harper

KAH/sms

HOUSE LOCAL GOVERNMENT
Attachment 7-1
2-11-99

SHERWOOD & HARPER
ATTORNEYS AT LAW
RIVERFRONT PLACE - 833 N. WACO
P. O. BOX 830
WICHITA, KANSAS 67201

ROGER SHERWOOD
KURT A. HARPER

TELEPHONE (316) 267-1281
TELECOPIER (316) 267-4086

Of Counsel
WILLIAM E. DARAN

February 10, 1999

Mr. Wess Galyon
Wichita Area Builders Association
730 North Main, Suite 1
Wichita, KS 67203

Re: *Wichita Area Builders Association, et al. v. City of Derby, Kansas*
Case No. 98 C 3343, Sedgwick County District Court

Dear Wess:

Enclosed please find the Attorney General opinions and Supreme Court cases which we have used in connection with the matter involving the City of Derby and its excise tax. The same may provide some additional insight on the effect and advisability of HB 2203 which Janet Stubbs is evaluating for you.

Sincerely yours,

SHERWOOD & HARPER

Kurt A. Harper

KAH/mac
Enclosures

*1813 Kan. Atty. Gen. Op. No. 92-41
Office of the Attorney General
State of Kansas

Opinion No. 92-41
March 23, 1992

Re: Cities and Municipalities--Planning and Zoning; Planning, Zoning and Subdivision Regulations in Cities and Counties--Protest Petitions; Mayor in Mayor-Council Form of Government Not a Voting Member

Synopsis: A mayor in a mayor-council form of municipal government may not vote on any matters before the council pursuant to K.S.A. 12-10a02. Therefore, only the votes of the council should be considered in determining the 3/4 vote of all of the members of the governing body which is required to override a protest petition, pursuant to K.S.A. 12-757(e). Cited herein: K.S.A. 12-742; 12-757; 12-10a01; 12-10a02.

Vernon Jarboe
City Attorney
215 E. 7th Street
Topeka, Kansas 66603-3979

Elsbeth D. Schafer
Assistant City Attorney
215 E. 7th Street
Topeka, Kansas 66603-3979

Dear *Mr. Jarboe and Ms. Schafer:*

As attorneys for the city of Topeka, you have requested our opinion regarding K.S.A. 12-757(e). Specifically, you ask whether the language in K.S.A. 12-757(e) grants a vote to the mayor in a *mayor-council form of municipal government.*

Pursuant to K.S.A. 12-757(e), "a 3/4 vote of all of the members of the governing body" is required to adopt a zoning amendment when a protest petition has been filed against it. A governing body is defined under this act as "the governing body of a city in the case of cities...." K.S.A. 12-742.

When a city operates under a mayor-council form of government, it is governed by the provisions of K.S.A. 12-10a01 et seq. See K.S.A. 12-10a01. Pursuant to K.S.A. 12-10a02, the governing body is defined as follows:

"The governing body shall consist of a mayor and three (3) members of the council elected at large and four (4) members of the council elected by districts.

....

"Any action taken by the city council shall be by a majority vote of the members of the council serving on the council unless a greater number of votes are *specifically required by another* provision of law. The mayor may submit proposals for the consideration of the council, but *may not vote on* any matter before the council. (Emphasis added).

Thus, while K.S.A. 12-757(e) requires a 3/4 vote by "all of the members of the governing body," K.S.A. 12-10a02 *specifically forbids* the mayor from voting on any matters before the council. K.S.A. 12-757 does not specifically preempt K.S.A. 12-10a01, so the two statutes must be read to give effect to both if possible. Kansas Racing *Management, Inc.*, v. Kansas Racing Commission, 244 Kan. 343, 353 (1989). In our opinion K.S.A. 12-757(e) can be *read to require 3/4 vote* of only the council members in a mayor-council form of city government. Therefore, the mayor should not be included in the 3/4 vote.

In conclusion, K.S.A. 12-10a02 governs that a mayor in a mayor-council form of municipal government may not vote *on any matters before the* council. Therefore, K.S.A. 12-757(e) does not grant a mayor voting power only the council members will constitute the 3/4 vote required to adopt a zoning amendment when a protest petition has been filed.

Very truly yours,

Robert T. Stephan

Attorney General of Kansas

Julene L. Miller

Deputy Attorney General

*4065 Kan. Atty. Gen. Op. No. 85-126
Office of the Attorney General
State of Kansas

Opinion No. 85-126
September 18, 1985

Re: *Cities and Municipalities--Ordinances* of Cities--Vote by Yeas and Nays; Majority of Members-Elect Required

Synopsis: Under the provisions of K.S.A. 12-3002, *an abstention* should not be recorded and counted as acquiescence in the will of the majority voting on an ordinance. Thus, *where the vote on a proposed* ordinance by a 6 member council is 3 members in favor and two members against, with one member abstaining, and the mayor does not exercise the power to cast a deciding vote in favor of the *ordinance*, the ordinance fails. Cited herein: K.S.A. 12-3002, 14-111

Mr. David H. Heilman
City Attorney
200 West Main
Council Grove, Kansas 66846

Dear Mr. Heilman:

You request our opinion as to the validity of an ordinance vacating a portion of a street in the City *of Council Grove*. Specifically, you advise that the city council is comprised of 6 members, and that the vote on the ordinance was 3 members in favor and 2 members against, with one member abstaining. Additionally, you indicate that the mayor did not cast a vote on the ordinance.

Under the common law, a majority of a body, such as a municipal council, *constitutes a quorum, and* the vote of a majority of those present, providing they comprise a quorum, is legally sufficient to constitute valid action by the body. See Kansas Attorney General Opinion Nos. 77-391 and 82-43. *Additionally, in cases where* the common law requirement of a majority of a quorum was in effect, the rule evolved that abstention from voting by a member of the body would generally be regarded as acquiescence in action which is favored by a majority of those who do vote with respect to the matter. Id.

While the common law rule has been followed as to the transaction of city 'business' [see K.S.A. *14-111*], *it has been displaced* by K.S.A. 12-3002 in regard to the adoption of ordinances. That statute provides as follows:

'The vote on any ordinance, except as otherwise provided herein, shall be by yeas and nays, which shall be entered on the journal by the clerk. No *ordinance shall be valid* unless a majority of all the members-elect of the council of council cities or mayor and other *commissioners of commission* cities vote in favor thereof: Provided, That in council cities where the number of favorable votes is one less than required, the mayor shall have power to cast the deciding vote in favor of the *ordinance*.' *(Emphasis added.)*

Under the above-quoted statute, *an ordinance is* not valid unless it receives the affirmative vote of a majority of the full membership of a city council, or the affirmative vote of one less than a majority and the affirmative vote of the mayor. In such *circumstances, the weight of authority* holds that an abstention will not be regarded as an affirmative vote aligned with the majority. See Kansas *Attorney* General Opinion No. 77-391.

Accordingly, in our opinion under the provisions of K.S.A. 12-3002, an abstention should not be recorded and counted as acquiescence in the will of the majority voting on an *ordinance. Thus, where* the vote on a proposed ordinance by a 6 member council is 3 members in favor and two members against, with one member abstaining, and the mayor does not exercise the power to cast a deciding vote *in favor of the ordinance*, the ordinance fails.

Very truly yours,

Robert T. Stephan

Attorney General of Kansas

Terrence R. Hearshman

Assistant Attorney General

*3715 Kan. Atty. Gen. Op. No. 86-110
Office of the Attorney General
State of Kansas

Opinion No. 86-110
July 24, 1986

Re: State Departments; Public Officers and Employees--Public Officers and *Employees--Open* Public Meetings; Bodies Subject Thereto; 'Membership of a Body'; Mayor-Council Form of Government

Synopsis: *The intent of the Kansas* statutes authorizing the mayor-council form of municipal government is that the office of mayor is *separate* and distinct from the members of the council. Under the Kansas Open Meetings Act a meeting is defined as a prearranged gathering of a majority of a quorum for the purpose of discussing the business of the governing body. A '*majority of a quorum*' is the smallest number of members of the governing body that can take official action. In accordance with the intent of the Kansas statutes and the purpose of the KOMA, we conclude that the 'membership of *the body*' in a mayor-council form of municipal government does not include the mayor for purposes of determining the *minimum number of persons* that can constitute a meeting. Cited herein: K.S.A. 15-106; 15-201; K.S.A. 1985 Supp. 15-204; K.S.A. 15-301; 15-310; 75-4317; 75-4317a.

Dennis W. Moore
District Attorney
Johnson County Courthouse
P.O. Box 728
6th Floor Tower
Olathe, Kansas 66061

Dear Mr. Moore:

As district attorney for Johnson County, Kansas, you request our opinion on the interpretation of a provision of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq. We are informed that the City of Westwood Hills is a third-class city in Johnson County *with a mayor-council* form of government. You ask whether the mayor is included with the members of the city council to determine the 'membership of a body' for purposes of the KOMA.

The Kansas Open Meetings Act provides that it is 'the policy of this state that meetings for the *conduct* of governmental affairs and the transaction of governmental business be open to the public,' *K.S.A. 75-4317.* A 'meeting' is defined as follows:

'As used in this act, '*meeting*' *means* any prearranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or *agency.*' *K.S.A. 75-4317a.*

The open meetings law is violated if 'a *majority of* a quorum of the membership of a body' hold a private, prearranged meeting to discuss *governmental* business. You ask if the mayor is a member of the body because you are concerned whether the KOMA *is violated if the mayor* meets with city council members to discuss city business.

The statutes governing third-class cities with the mayor-council form of government are found at *K.S.A. 15-101* et seq. *K.S.A. 15-106* states that a majority of councilmen must be present to constitute a quorum to do business. In *Attorney General* Opinion No. 83-6, we stated that a "[m]ajority' . . . means the number one greater than half the number of members of the governing body . . . ." See also Attorney General Opinion No. 83-174. It was also noted in the opinion that since particular quorum requirements are not *uniformly applicable to all* cities, a city may through its home rule powers change the quorum requirements of its governing body by charter ordinance. We are informed that the city of Westwood Hills has not changed the *number required to constitute* a quorum specified in K.S.A. 15-106. It should be noted, however, that an ordinance cannot be enacted unless *a majority of* the entire membership of the city council voted for it. K.S.A. 12-3002.

A third-class city with a mayor-council form of government *must elect a mayor* and five councilmembers. K.S.A. 15-201. If the mayor is to be counted with the council members for purposes of the KOMA, four persons would constitute a quorum (one-half the total number plus one), and three persons would be a majority of the quorum. If *the mayor is not a 'member of the body,'* however, three persons (a majority of five) would constitute a quorum, and a majority of the quorum would be two.

In determining whether a mayor should be considered a member of the governing body of a city to ascertain quorum, *the statutes authorizing* the mayor-council form of government and the purpose of the KOMA must be examined. K.S.A. 15-201 provides for the election of 'a mayor, and five councilmembers.' (Emphasis added.) With the *consent of the council*, the mayor is empowered to appoint city officials and to fill vacancies on the council. If the office of *mayor is vacant*, the president of the council becomes the mayor until the next regular election. K.S.A. 15-201; K.S.A. 1985 Supp. 15-204. 'The city council shall elect one of their own body as 'president of the council" to serve *in the mayor's absence*. (Emphasis added.) K.S.A. 15-310. It is the mayor's duty to preside at council meetings, break a tie vote, and enforce *the laws and* city ordinances. K.S.A. 15-301. The powers of the city council are listed in chapter fifteen, article four, which is entitled 'General Powers of Governing Body.' The intent of these statutes appears to be that the council is the governing body of the city and that the office of mayor *is separate and distinct* from the city council. The statutes authorizing the mayor-council form of government for first-class cities, K.S.A. 13-101 et seq., and second-class cities, K.S.A. 14-101 et seq., are very similar in substance *to the above statutes*. We note that the number of councilmembers of a first or second class city varies according to the number of wards *established in the* city. See K.S.A. 12-304; K.S.A. 14-301.

*3716 Kansas has no case law as to whether a mayor is a member of the governing body of the city. In general, the law has been stated as follows:

'Whether or not the mayor or chief *officer of a* municipal corporation is regarded as a member of the municipal legislative body depends on the terms of the charter or statute under which the corporation is organized. It has been held that he is not a member *of the governing body*, or a branch thereof, unless expressly made such by law.' 62 C.J.S. Municipal Corporations § 388. See Clark v. Mahan, 594 S.W.2d 7 (Ark. 1980) (Statute provided that the mayor was part of the *council.)*; 4 McQuillin, Municipal Corporation, § 13.19, pp. 498-500 (1968). In 56 Am.Jur.2d Municipal *Corporations §§ 163, 165, 176*, it is stated that, even if the mayor is authorized to preside at meetings and vote to break a tie, the mayor is not part of the council and cannot be counted in determining the presence of a quorum unless otherwise specified by statute. See Savage v. City of Atlanta, 251 S.E.2d 248 *(Ga. 1978)* (Power to veto ordinances did not make mayor part of council.)

The intent of the Kansas statutes and the general rule that a *mayor is not part of* the governing body unless specified by statute must be considered with the purpose of the KOMA. The open meetings *law* was designed to prevent public meetings from being a 'rubber-stamp' of agreements made beforehand in *private by members of* the public body. Thus, the term 'majority of a quorum' was chosen to define the number of *persons that could constitute* a meeting as it is the 'smallest group of the particular governmental body that can take official action.' Tacha, 'The Kansas Open Meetings Act: Sunshine on the Sunflower State?', 25 U.Kan.L.Rev. 169, 182 (1977).

The business of the City of Westwood Hills is to be carried out by the council. K.S.A. 15-106. The only situation in which the mayor is involved in binding action is when breaking a tie vote. If the *mayor is included* as a member of the council, a majority of the quorum is three. In this case the mayor could meet privately *with only one council* member to discuss city business without violating the KOMA. Also, there would be no violation of the open meetings laws if two council members met to discuss city business behind closed doors. On the other hand, *if the mayor is not* counted as a member of the body, a majority of the quorum is two. The mayor could meet behind closed doors *with one* council member to discuss city business without violating the open meetings law because the mayor *would not* be considered in figuring a majority of a quorum. Two councilmen, however, could not meet in private to *discuss city business as a* majority of a quorum would be present. (We recognize that the result in this scenerio may be different in the case of a first or second class city with a different number of councilmembers than five.)

When a tie vote is broken, three persons, the mayor and two councilmembers, *are needed to take* binding action. Even if the mayor is not counted as a member of the body in that instance, the purpose of the KOMA is served as the smallest number needed to take binding action is prevented from *meeting privately*. In addition, two members of the council would be prohibited from discussing city business in private. In the case *of a meeting held*

with a bare quorum (three councilmembers), the vote of two would constitute binding action. If the mayor was included as a member of the council, these two persons could meet privately and, in effect, make the decisions of the city behind closed doors. In our opinion, this latter situation would violate the intent and purpose of the KOMA.

In summary, the intent of the Kansas statutes authorizing the mayor-council form of municipal government is that the office of mayor is separate and distinct from the members of the council. Under the Kansas Open Meetings Act, a meeting is defined as a prearranged gathering of a majority of a quorum for the purpose of discussing the business of the governing body. A 'majority of a quorum' is the smallest number of members of the governing body that can take official action. In accordance with the intent of the Kansas statutes and the purpose of the KOMA, we conclude that the 'membership of the body' in a mayor-council form of municipal government does not include the mayor for purposes of determining the minimum number of persons that can constitute a meeting.

Very truly yours,

Robert T. Stephan

Attorney General of Kansas

Rita L. Noll

Assistant Attorney General

*3715 Kan. Atty. Gen. Op. No. 86-110
Office of the Attorney General
State of Kansas

Opinion No. 86-110
July 24, 1986

Re: State Departments; Public Officers and Employees--Public Officers and Employees--Open Public Meetings; Bodies Subject Thereto; *'Membership of a Body'; Mayor-Council Form of* Government

Synopsis: The intent of the Kansas statutes authorizing the mayor-council form of municipal government is that the office of mayor is separate and distinct from the members of the council. Under the Kansas Open Meetings Act a meeting is defined as a prearranged gathering of a majority of a quorum for the purpose of discussing the business of the governing body. A 'majority of a quorum' is the smallest number of members of the governing body that can take official action. In accordance with the intent of the Kansas statutes and the purpose of the KOMA, we conclude that the 'membership of the body' in a mayor-council form of municipal government does not include the mayor for purposes of determining the minimum number of persons that can constitute a meeting. Cited herein: K.S.A. 15-106; 15-201; K.S.A. 1985 Supp. 15-204; K.S.A. 15-301; 15-310; 75-4317; 75-4317a.

Dennis W. Moore
District Attorney
Johnson County Courthouse
P.O. Box 728
6th Floor Tower
Olathe, Kansas 66061

Dear Mr. Moore:

As district attorney for Johnson County, Kansas, you request our opinion on the interpretation of a provision of the Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 et seq. We are informed that the City of Westwood Hills is a third-class city in Johnson County with a mayor-council form of government. You ask whether the mayor is included with the members of the city council to determine the 'membership of a body' for purposes of the KOMA.

The Kansas Open Meetings Act provides that it is 'the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.' K.S.A. 75-4317. A 'meeting' is defined as follows:

> 'As used in this act, 'meeting' means any prearranged gathering or assembly by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency.' K.S.A. 75-4317a.

The open meetings law is violated if 'a majority of a quorum of the membership of a body' hold a private, prearranged meeting to discuss governmental business. You ask if the mayor is a member of the body because you are concerned whether the KOMA is violated if the mayor meets with city council members to discuss city business.

The statutes governing third-class cities with the mayor-council form of government are found at K.S.A. 15-101 et seq. K.S.A. 15-106 states that a majority of councilmen must be present to constitute a quorum to do business. In Attorney General Opinion No. 83-6, we stated that a "[m]ajority' . . . means the number one greater than half the number of members of the governing body . . . .' See also Attorney General Opinion No. 83-174. It was also noted in the opinion that since particular quorum requirements are not uniformly applicable to all cities, a city may through its home rule powers change the quorum requirements of its governing body by charter ordinance. We are informed that the city of Westwood Hills has not changed the number required to constitute a quorum specified in K.S.A. 15-106. It should be noted, however, that an ordinance cannot be enacted unless a majority of the entire membership of the city council voted for it. K.S.A. 12-3002.

A third-class city with a mayor-council form of government must elect a mayor and five councilmembers. K.S.A. 15-201. If the mayor is to be counted with the council members for purposes of the KOMA, four persons would constitute a quorum (one-half the total number plus one), and three persons would be a majority of the quorum. If the mayor is not a 'member of the body,' however, three persons (a majority of five) would constitute a quorum, and a majority of the quorum would be two.

be allowed to prevent government action by inaction.

7. *STATUTES* ⇐239
361 ---
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k239 Statutes in derogation of common right and common law.
Kan. 1988.
Rule that statutes in derogation of common law should be strictly construed is inapplicable to any general statute which must be liberally *construed*. K.S.A. 77-109.

Syllabus by the Court

1. *Kansas follows the common-law* rule that a member of a public body who abstains from voting is counted as voting with the majority, or at least as acquiescing in its action, unless the common law has been modified by statutory law.

2. K.S.A. 12-3002 provides that no city ordinance shall be valid *unless a majority of all the members-elect* of the council votes in favor thereof and has thereby modified the common law that an abstention counts as an affirmative vote.

Larry A. Bolton, of Gottschalk, Bolton, Kibbe & Whiteman, Hutchinson, was on the brief for appellant.

There was no appearance by appellee.

LOCKETT, Justice:

Appellant, the City of Haven, Kansas, appeals a ruling of the district court of Reno County *holding* Municipal Ordinance No. 457 was invalid because a majority of the city council had failed to vote for its passage as required by K.S.A. 12-3002.

On *September 2, 1987, the chief of police* of the City of Haven, (City) issued a complaint against Donald Gregg for violating Ordinance No. 457, which prohibits the sale or service of alcoholic liquor without obtaining a city license. Gregg entered a plea of no contest and a finding of guilty was entered by the municipal court judge. *144 Gregg appealed to the district court of Reno County*, claiming that because a majority of the elected members of the city council had not voted for the *passage of the ordinance* as required by K.S.A. 12-3002, Ordinance No. 457 was invalid.

During the district court trial, two witnesses testified. The chief of police testified that on the night the city council passed Ordinance No. 457, the mayor was absent and only four of the five elected city councilmen were present. When the ordinance [244 Kan. 118] was approved by the council, only two of the three members voted: two voted in *favor* of the ordinance, one member abstained, and the member acting as mayor did not vote. The city clerk testified that three members voted for passage of the ordinance, but admitted that her minutes of the August 3, 1987, *meeting merely reflected that* the motion to pass the ordinance "carried." As there was no breakdown of the "yeas" and "nays" in the minutes as required by K.S.A. 12-3002, the minutes of the meeting did not reflect an abstention, *nor did the city clerk recall* one. The city clerk also testified that, at the next council meeting, the minutes of the August meeting *were read and* approved without change or correction by the four council members present, three of whom had been present at the August meeting. The ordinance was regularly published in the official city newspaper on *August 20, 1987*.

At the close of the case, defendant moved to dismiss on the basis that Ordinance No. 457 was invalid since it had not been passed by a majority of *the elected city council* members. In a memorandum opinion, the district court determined one council member *had abstained and only two* members of the council had voted in favor of the ordinance. The district court then declared the ordinance invalid because a majority of the members-elect of the city council had failed to vote *for its passage. The City* appeals.

The Kansas Ordinances of Cities Act, K.S.A. 12-3001 *et seq.*, sets out the procedure for consideration of an ordinance by a city governing body and the votes needed for final passage. However, the Act does not address the effect of an *abstention upon the majority* vote required for passage. K.S.A. 12-3002 provides:

"The vote on any ordinance, except as otherwise provided herein, shall be by yeas and nays, which *shall* be entered on the journal by the clerk. No ordinance shall be valid unless a *majority of all the members-elect of the council of council cities* ...

vote in favor thereof: Provided, That in council cities where the number of favorable votes is one less than required, the mayor shall have power to cast the deciding vote in favor of the ordinance." (Emphasis added.)

[1] There is a presumption that a city government has complied with the law in passing an ordinance. In *Truck-Trailer Supply Co. Inc. v. Farmer*, 181 Kan. 396, Syl. ¶ 1, 311 P.2d 1004 (1957), we stated:

"Where an ordinance which has been regularly passed by a city council and [244 Kan. 119] approved by the mayor is offered in evidence, and the validity of such ordinance depends upon the existence of one or more facts at the time of the enactment thereof, the existence, and not the non-existence, of the necessary facts to sustain the validity of the ordinance should be presumed in the absence of evidence to the contrary."

See *State, ex rel., v. City of Atchison*, 92 Kan. 431, 140 P. 873 (1914).

[2] Further, the presumption that a city complied with the law in passing an ordinance must be overcome by clear and convincing evidence. *State, ex rel., v. City of Hutchinson*, 109 Kan. 484, 487, 207 P. 440 (1921). To be clear and convincing, evidence should be clear in the sense that it is certain, plain to the understanding, unambiguous, and convincing in the sense that it is so reasonable and persuasive as to make it believable.

The City argues that the defendant failed to overcome the presumption of regularity which attaches to the council's action and failed to establish by clear and convincing evidence that the passage of the ordinance was invalid. Essentially, the City argues that since the city clerk testified she did *145 not recall a council member abstaining from voting and the minutes of the council meeting reflect that the ordinance "carried," the trial court should have accepted this as conclusive proof of proper passage.

[3] In prior Kansas cases, parties attacking the validity of an ordinance have failed because they presented *no evidence* to overcome the presumption of the validity of the ordinance. Here, there was conflicting evidence. The police chief testified that two of the members voted to pass the ordinance and one member of the council abstained. The city clerk testified that three members of the council voted for passage of the ordinance. After hearing this evidence, the trial court found that only two council members voted to pass the ordinance and one *abstained from voting*.

Factual findings of the trial court will not be disturbed on appeal as long as they are supported by substantial evidence. Substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. *See Williams Telecommunications Co. v. Gragg*, 242 Kan. 675, 676, 750 P.2d 398 (1988). There is substantial competent evidence which supported the trial court's finding. In addition to the chief of police's testimony, the city clerk stated she [244 Kan. 120] failed to properly record the individual votes of the members as required by K.S.A. 12-3002. *Therefore, the minutes* cannot be conclusive proof that the ordinance was validly passed.

Because substantial competent evidence supported the trial court's finding, we now must determine whether the court's finding that the ordinance was invalid because a majority of the council members failed to vote for its passage is correct. The City argues that Kansas follows the common-law rule that an abstention is counted as a vote with the majority or at least as acquiescence in the majority vote and that Kansas has not modified the common-law rule by statute. If we follow the common-law rule which counts an abstention as an affirmative vote, the ordinance would be valid because three of the five elected members to the council would have voted for passage of the ordinance.

The common-law rule regarding abstentions evolved from a rule pertaining to elections announced by Lord Mansfield in *Rex v. Foxcroft*, 2 Burr. 1017, 1021, 97 Eng.Rep. 683 (1760): "Whenever electors are present, and don't vote at all, (as they have done here,) 'They virtually acquiesce in the election made by those who do.' " *Rex v. Foxcroft* concerned the appointment of the town clerk of Nottingham by the mayor, aldermen, and common council. Of the 25 electors, 21 were present, nine voted in favor of the appointment, and 12 refused to vote. Numerous subsequent cases interpreted this language to mean that those who refuse to vote, or abstainers, are to be counted as voting with the majority. See Annot., 63 A.L.R.3d

1064, and cases cited therein. See generally 4 *McQuillin on Municipal Corporations* § 13.32 (3d ed. rev. 1985).

Early Kansas cases demonstrate that we originally followed the common-law rule counting an abstention with the majority. In *Smith v. State*, 64 Kan. 730, 68 P. 641 (1902), the State brought an action to restrain the city of Rosedale from carrying out two ordinances which obligated the city to expend more money than it was authorized to raise for general revenue purposes. This court quoted with approval the following language from *The Rushville Gas Company v. The City of Rushville et al.*, 121 Ind. 206, 208-09, 23 N.E. 72 (1889):

"The rule is that if there is a quorum present and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required; all that is requisite is a majority of the number of members required to [244 Kan. 121] constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution and one had voted against it, or had not voted at all, no one would hesitate to affirm that the resolution was duly passed, and it can make no difference whether four or six members are present, since it is always the vote of the *146 majority of the quorum that is effective. The mere presence of inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence rather than opposition. Their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members."

Further, in *Equity Investors, Inc. v. Amnest Group, Inc.*, 1 Kan.App.2d 276, 281, 563 P.2d 531, *rev. denied* 225 Kan. 843 (1977), the Court of Appeals found that the provisions of former K.S.A. 17-3101 (Corrick) (repealed), which provided that " '[t]he act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless a *greater number* is required by the articles of incorporation, the bylaws, or by provisions of law,' " were a codification of the common-law rule.

[4] Does K.S.A. 12-3002, which requires a majority of the members-elect of the city council to vote in favor of passage of an ordinance, alter the common-law rule regarding abstentions? *Jurisdictions* which have similar statutes and have considered the issue are divided as to whether a statute had modified the *common-law rule*.

Some states adhere to the common-law rule and count an abstention with the majority. A typical case is *Northwestern Bell T. Co. v. Board of Com'rs of Fargo*, 211 N.W.2d 399 (N.D.1973), where two members of a city council voted affirmatively, one opposed, and two abstained due to a conflict of interest. The district court, refusing to count the abstention as a vote with the majority, ruled the passage of the ordinance invalid. The North Dakota *Supreme Court* reversed, holding an abstention should be counted as a vote with the majority, despite a statute requiring the *majority of "all* members of the governing body" to concur for valid passage of an ordinance. The court declined to adopt the rule disregarding abstentions, stating:

" 'To adopt *such a rule* ... would result in some instances in inaction and one-man rule by a nonacting member of the council. Such *nonvoting* member should be recorded either as "yea" or "nay," for there is no provision in the statute to record or enter the inaction of a member of council who attends [244 Kan. 122] meetings and then refuses to vote. A councilman is elected for the purpose of expressing an opinion. *Action, and not* inaction, is a duty that he assumes with the office.' " 211 N.W.2d at 402 (quoting *Babyak v. Alten*, *106* Ohio App. 191, 154 N.E.2d 14 [1958]

The North Dakota *Supreme Court* reasoned further that a member of a governmental body has a duty to vote and cannot avoid taking a stand because allowance of such action would encourage obstructive inaction. The court carefully restricted *its ruling* to cases in which present members declined to vote, rather than cases where council members were absent, *dead, or disqualified*. A similar result has been reached in additional jurisdictions concurring with the above holding. *Payne v. Petrie*, 419 S.W.2d 761 (Ky.1967); *State ex rel. Young v. Yates*, 19 Mont. 239, 47 P. 1004 (1897); *Babyak v. Alten*, 106 Ohio App. 191, 154 N.E.2d 14 (1958). *See generally* Annot., 63 A.L.R.3d 1064.

Other jurisdictions, however, have ruled that statutes requiring a majority of the total number of members of a municipal governing body to vote in favor of an ordinance mandate an affirmative vote from each member before council action may be deemed valid. These states decline to consider an abstention as an affirmative vote. In *State ex rel. Roberts v. Gruber*, 231 Or. 494, 373 P.2d 657 (1962), a city charter provided that vacancies in city elective offices were to be filled by vote of a majority of the elected members of the city council. The council was composed of six members, of which four attended the meeting in question, three voted in favor of the defendant's appointment to fill the vacancy, and one abstained. The Oregon Supreme Court, affirming the circuit court, held that the common-law rule deeming abstentions as votes "147. for the majority does not apply when the applicable statute requires affirmative action of the entire body.

[5] [6] In Kansas, the common law remains in force, unless modified by constitutional amendment, statutory law, or judicial decision. We recognize the validity of the common-law rule that council members have a duty to vote and should not be allowed to prevent government action by inaction; however, here the governing statute unambiguously requires an affirmative vote of a majority of the entire council.

[7] The common-law rule that statutes in derogation of the common law shall be strictly construed is not applicable to any general statute of this state. All general statutes are to be liberally construed to promote their objective. K.S.A. 77-109. When a [244 Kan. 123] statute conflicts with the common law, the statute controls. *Board of Neosho County Comm'rs v. Central Air Conditioning Co., Inc.*, 235 Kan. 977, 683 P.2d 1282 (1984).

When interpreting 12-3002, the legislative intent is the controlling factor. Accordingly, we must ascertain if the intent of the legislature was to overrule the common law by enacting the statute. K.S.A. 12-3002, which states the voting procedure and the number of members' votes required for passage, provides: "No ordinance shall be valid unless a majority of all the members-elect of the council of council cities ... vote in favor thereof." (Emphasis added.)

The legislative intent is clear. K.S.A. 12-3002 requires that a majority of all the members-elect of the council vote in favor of an ordinance's passage. Here, only two of the five council members of the City of Haven voted for passage of the ordinance. The abstention by one of the elected council members invalidated the ordinance because 12-3002 clearly prohibits counting an abstention or refusal to vote as affirmative action.

AFFIRMED.

*143 766 P.2d 143

244 Kan. 117

CITY OF HAVEN, Kansas, Appellant,
v.
Donald GREGG, Appellee.

No. 62312.
Supreme Court of Kansas.
Dec. 9, 1988.

Defendant challenged validity of city ordinance requiring license to sell or serve alcoholic beverage. The District Court, Reno County, William F. Lyle, Jr., J., invalidated ordinance on ground that majority of city council did not vote for its passage. City appealed. The Supreme Court, Lockett, J., held that statute, which states that no ordinance is valid unless majority of members of city council vote in favor of it, prohibited abstention or refusal to vote from being counted as affirmative action.

Affirmed.

1. MUNICIPAL CORPORATIONS ⇐122.1(2)
268 ----
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k122.1 Evidence
268k122.1(2) Presumptions and burden of proof.

Formerly 268k122(2)
Kan. 1988.
City government presumably complies with law in passing ordinance.

2. MUNICIPAL CORPORATIONS ⇐122.1(2)
268 ----
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k122.1 Evidence
268k122.1(2) Presumptions and burden of proof.

Formerly 268k122(2)
Kan. 1988.
Presumption that city complied with law in passing ordinance must be overcome by clear and convincing evidence.

3. MUNICIPAL CORPORATIONS ⇐22.1(4)
268 ----
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k122.1 Evidence
268k122.1(4) Weight and sufficiency.

Formerly 268k122(4)
Kan. 1988.
Evidence supported conclusion that two city council members voted to pass ordinance, that one abstained, and that ordinance was not passed by majority, even though city clerk testified that three members voted for that ordinance; police chief testified that two members voted to pass and one member abstained. K.S.A. 12-3002.

4. MUNICIPAL CORPORATIONS ⇐97
268 ----
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k97 Number of votes required.
Kan. 1988.
Statute, which states that no ordinance is valid unless majority of members of city council vote in favor of it, prohibited abstention or refusal to vote from being counted as affirmative action and altered common-law rule that abstention was vote with majority. K.S.A. 12-3002.

5. COMMON LAW ⇐11
85 ----
85k10 Adoption and Repeal
85k11 In general.
Kan. 1988.
Common law remains in force, unless modified by constitutional amendment, statutory law or judicial decision.

6. MUNICIPAL CORPORATIONS ⇐94
268 ----
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k93 Right to Vote
268k94 In general.
Kan. 1988.
Council members have duty to vote and should not

be allowed to prevent government action by inaction.

7. STATUTES ⊂⊃239
361 ----
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k239 Statutes in derogation of common right and common law.
Kan. 1988.
Rule that statutes in derogation of *common law* should be strictly construed is inapplicable to any general statute which must be liberally construed. K.S.A. 77-109.

Syllabus by the Court

1. Kansas follows the common-law *rule that* a member of a public body who abstains from voting is counted as voting with the majority, or at least as *acquiescing* in its action, unless the common law has been modified by statutory law.

2. K.S.A. 12-3002 provides that no city ordinance shall be valid unless a majority of all the members-elect of the council votes in favor thereof and has thereby modified the common law that an abstention *counts as an affirmative* vote.

Larry A. Bolton, of Gottschalk, *Bolton, Kibbe &* Whiteman, Hutchinson, was on the brief for appellant.

There was no appearance by appellee.

LOCKETT, Justice:

Appellant, the City of Haven, Kansas, appeals a ruling of the district court of Reno County holding *Municipal Ordinance No. 457 was invalid because a* majority of the city council had failed to vote for its passage as required by *K.S.A. 12-3002.*

On September 2, 1987, the chief of police of the City of Haven, (City) issued a complaint against Donald Gregg for violating Ordinance No. 457, *which* prohibits the sale or service of alcoholic liquor without obtaining a city license. Gregg entered a *plea of no contest and a finding* of guilty was entered by the municipal court judge. *144 Gregg appealed to the district court of Reno County, claiming that because a majority of the elected members of the city council had not voted for the passage of the *ordinance* as required by K.S.A. 12-3002, Ordinance No. 457 was invalid.

During the district court trial, two witnesses testified. The chief of police testified that on the *night the city council* passed Ordinance No. 457, the mayor was absent and only four of the five elected city councilmen were *present. When the ordinance* [244 Kan. 118] was approved by the council, only two of the three members voted: two voted in *favor* of the ordinance, one member abstained and the member acting as mayor did not vote. The city *clerk testified that three* members voted for passage of the ordinance, but admitted that her minutes of the August 3, 1987, meeting *merely reflected* that the motion to pass the ordinance "carried." As there was no breakdown of the "yeas" and "nays" in the minutes as required by K.S.A. 12-3002, the minutes of the meeting did not reflect an abstention, nor did the *city clerk recall one.* The city clerk also testified that, at the next council meeting, the minutes of the August meeting were *read and* approved without change or correction by the four council members present, three of whom had been *present* at the August meeting. The ordinance was regularly published in the official city newspaper on August 20, 1987.

At the close of the case, defendant moved to dismiss on the basis that Ordinance No. 457 was invalid since it had not been passed by a majority of the *elected city council* members. In a memorandum opinion, the district court determined one council member had abstained *and only two* members of the council had voted in favor of the ordinance. The district court then declared the ordinance invalid because a majority of the members-elect of the city council had failed to vote for its passage. *The City appeals.*

The Kansas Ordinances of Cities Act, K.S.A. 12-3001 *et seq.*, sets out the procedure for consideration of an ordinance by a city governing *body* and the votes needed for final passage. However, the Act does not address the effect of an abstention upon the *majority vote required* for passage. K.S.A. 12-3002 provides:

"The vote on any ordinance, except as otherwise provided herein, shall be by yeas and nays, which *shall be entered* on the journal by the clerk. No ordinance shall be valid unless a *majority of all the members-elect of the council of council cities* ...

vote in favor thereof: *Provided*, That in council cities where the number of favorable votes is one less than required, the mayor shall have power to cast the deciding vote in favor of the ordinance." (Emphasis added.)

[1] There is a presumption that a city government has complied with the law in passing an ordinance. In *Truck-Trailer Supply Co. Inc. v. Farmer*, 181 Kan. 396, Syl. ¶ 1, 311 P.2d 1004 (1957), we stated:

"Where an ordinance which has been regularly passed by a city council and [244 Kan. 119] approved by the mayor is offered in evidence, and the validity of such ordinance depends upon the existence of one or more facts at the time of the enactment thereof, the existence, and not the non-existence, of the necessary facts to sustain the validity of the ordinance should be presumed in the absence of evidence to the contrary."

See *State, ex rel., v. City of Atchison*, 92 Kan. 431, 140 P. 873 (1914).

[2] Further, the presumption that a city complied with the law in passing an ordinance must be overcome by clear and convincing evidence. *State, ex rel., v. City of Hutchinson*, 109 Kan. 484, 487, 207 P. 440 (1921). To be clear and convincing, evidence should be clear in the sense that it is certain, plain to the understanding, unambiguous, and convincing in the sense that it is so reasonable and persuasive as to make it believable.

The City argues that the defendant failed to overcome the presumption of regularity which attaches to the council's action and failed to establish by clear and convincing evidence that the passage of the ordinance was invalid. Essentially, the City argues that since the city clerk testified she did "145 not recall a council member abstaining from voting and the minutes of the council meeting reflect that the ordinance "carried," the trial court should have accepted this as conclusive proof of proper passage.

[3] In prior Kansas cases, parties attacking the validity of an ordinance have failed because they presented no evidence to overcome the presumption of the validity of the ordinance. Here, there was conflicting evidence. The police chief testified that two of the members voted to pass the ordinance and one member of the council abstained. The city clerk testified that three members of the council voted for passage of the ordinance. After hearing this evidence, the trial court found that only two council members voted to pass the ordinance and one abstained from voting.

Factual findings of the trial court will not be disturbed on appeal as long as they are supported by substantial evidence. Substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. See *Williams Telecommunications Co. v. Gragg*, 242 Kan. 675, 676, 750 P.2d 398 (1988). There is substantial competent evidence which supported the trial court's finding. In addition to the chief of police's testimony, the city clerk stated she [244 Kan. 120] failed to properly record the individual votes of the members as required by K.S.A. 12-3002. Therefore, the minutes cannot be conclusive proof that the ordinance was validly passed.

Because substantial competent evidence supported the trial court's finding, we now must determine whether the court's finding that the ordinance was invalid because a majority of the council members failed to vote for its passage is correct. The City argues that Kansas follows the common-law rule that an abstention is counted as a vote with the majority or at least as acquiescence in the majority vote and that Kansas has not modified the common-law rule by statute. If we follow the common-law rule which counts an abstention as an affirmative vote, the ordinance would be valid because three of the five elected members to the council would have voted for passage of the ordinance.

The common-law rule regarding abstentions evolved from a rule pertaining to elections announced by Lord Mansfield in *Rex v. Foxcroft*, 2 Burr. 1017, 1021, 97 Eng.Rep. 683 (1760): "Whenever electors are present, and don't vote at all, (as they have done here,) 'They virtually acquiesce in the election made by those who do.' " *Rex v. Foxcroft* concerned the appointment of the town clerk of Nottingham by the mayor, alderman, and common council. Of the 25 electors, 21 were present, nine voted in favor of the appointment, and 12 refused to vote. Numerous subsequent cases interpreted this language to mean that those who refuse to vote, or abstainers, are to be counted as voting with the majority. See Annot., 63 A.L.R.3d

1064, and cases cited therein. See generally 4 *McQuillin* on Municipal Corporations § 13.32 (3d ed. rev. 1985).

Early Kansas cases demonstrate that we originally followed the common-law rule counting an abstention with the majority. In *Smith v. State*, 64 Kan. 730, 68 P. 641 (1902), the State brought an action to restrain the city of Rosedale from carrying out two ordinances which obligated the city to expend more money than it was authorized to raise for general revenue purposes. This court quoted with approval the following language from *The Rushville Gas Company v. The City of Rushville et al.*, 121 Ind. 206, 208-09, 23 N.E. 72 (1889):

"The rule is that if there is a quorum present and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required; all that is requisite is a majority of the number of members required to [244 Kan. 121] constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution and one had voted against it, or had not voted at all, no one would hesitate to affirm that the resolution was duly passed, and it can make no difference whether four or six members are present, since it is always the vote of the *146 majority of the quorum that is effective. The mere presence of inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence rather than opposition. Their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members."

Further, in *Equity Investors, Inc. v. Ammest Group, Inc.*, 1 Kan.App.2d 276, 281, 563 P.2d 531, *rev. denied* 225 Kan. 843 (1977), the Court of Appeals found that the provisions of former K.S.A. 17-3101 (Corrick) (repealed), which provided that " '[t]he act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless a greater number is required by the articles of incorporation, the bylaws, or by provisions of law,' " were a codification of the common-law rule.

[4] Does K.S.A. 12-3002, which requires a majority of the members-elect of the city council to vote in favor of passage of an ordinance, alter the common-law rule regarding abstentions? Jurisdictions which have similar statutes and have considered the issue are divided as to whether a statute had modified the common-law rule.

Some states adhere to the common-law rule and count an abstention with the majority. A typical case is *Northwestern Bell T. Co. v. Board of Com'rs of Fargo*, 211 N.W.2d 399 (N.D.1973), where two members of a city council voted affirmatively, one opposed, and two abstained due to a conflict of interest. The district court, refusing to count the abstention as a vote with the majority, ruled the passage of the ordinance invalid. The North Dakota Supreme Court reversed, holding an abstention should be *counted as a vote with the majority*, despite a statute requiring the majority of "all members of the governing body" to concur for valid passage of an ordinance. The court declined to adopt the rule disregarding abstentions, stating:

" 'To adopt such a rule ... would result in some instances in inaction and one-man rule by a nonacting member of the council. Such nonvoting member should be recorded either as "yea" or "nay," for there is no provision in the statute to record or enter the inaction of a member of council who attends [244 Kan. 122] meetings and then refuses to vote. A councilman is elected for the purpose of expressing an opinion. Action, and not inaction, is a duty that he assumes with the office.' " 211 N.W.2d at 402 (quoting *Babyak v. Alten*, 106 Ohio App. 191, 154 N.E.2d 14 [1958]).

The North Dakota Supreme Court reasoned further that a member of a governmental body has a duty to vote and cannot avoid taking a stand because allowance of such action would encourage obstructive inaction. The court carefully restricted its ruling to cases in which present members declined to vote, rather than cases where council members were absent, dead, or disqualified. A similar result has been reached in additional jurisdictions concurring with the above holding. *Payne v. Petrie*, 419 S.W.2d 761 (Ky.1967); *State ex rel. Young v. Yates*, 19 Mont. 239, 47 P. 1004 (1897); *Babyak v. Alten*, 106 Ohio App. 151, 154 N.E.2d 14 (1958). See generally Annot., 63 A.L.R.3d 1064.

Other jurisdictions, however, have ruled that statutes requiring a *majority of the total* number of members of a municipal governing body to vote in favor of an ordinance mandate an *affirmative vote* from each member before council action may be deemed valid. These states decline to consider an abstention *as an affirmative* vote. In *State ex rel. Roberts v. Gruber*, 231 Or. 494, 373 P.2d 657 (1962), a city charter provided that *vacancies in* city elective offices were to be filled by vote of a majority of the elected members of the city council. The council was composed of six members, of which four attended the meeting in question, three voted in favor of the *defendant's* appointment to fill the vacancy, and one abstained. The Oregon Supreme Court, affirming the circuit court, *held that* the common-law rule deeming abstentions as votes **147. for the majority does not apply when the applicable *statute* requires affirmative action of the entire body.

[5] [6] In Kansas, the common law remains in force, unless modified by constitutional amendment, *statutory law*, or *judicial* decision. We recognize the validity of the common-law rule that council members have a *duty to vote and should not* be allowed to prevent government action by inaction; however, here the governing statute unambiguously requires an affirmative vote of a majority of the entire council.

[7] The common-law rule that statutes in derogation of the *common law shall* be strictly construed is not applicable to any general statute of this state. All general statutes are *to be liberally* construed to promote their objective. K.S.A. 77-109. When a [244 Kan. 123] statute conflicts *with the common law*, the statute controls. *Board of Neosho County Comm'rs v. Central Air Conditioning Co., Inc.*, 235 Kan. 977, 683 P.2d 1282 (1984).

When interpreting 12-3002, the legislative *intent is* the controlling factor. Accordingly, we must ascertain if the intent of the legislature was to *overrule the* common law by enacting the statute. K.S.A. 12-3002, which states the voting procedure and the number of *members' votes* required for passage, provides: "No ordinance shall be valid unless a *majority of all the members-elect of the council of council cities ... vote in favor thereof.*" (Emphasis added.)

The legislative intent is clear. K.S.A. 12-3002 requires that a *majority of all the* members-elect of the council vote in favor of an ordinance's passage. Here, only two of the five council *members of the* City of Haven voted for passage of the ordinance. The abstention by one of the elected council *members* invalidated the ordinance because 12-3002 clearly prohibits counting an abstention or refusal to vote as affirmative *action*.

AFFIRMED.