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City Hall

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[www.opkansas.org](http://www.opkansas.org)

Date: February 20, 2017  
To: House Committee on Elections  
From: Michael Koss, Assistant City Attorney  
Re: HB 2310 – Opponent

Thank you Chairman and Committee for allowing me to testify on behalf of the City of Overland Park on HB 2310. The City is currently opposed to this legislation because Section 4 would potentially repeal charter ordinances that maintain long-standing City policies and contain provisions that are essential to the City's transition to November elections and its general operations.

When a non-uniform enactment is made uniform, those charter ordinances opting out of the enactment are effectively repealed.<sup>1</sup> The City is concerned that, because it has relied on the non-uniformity of K.S.A. 25-2110a to charter out of other statutes that were part of the same enactment,<sup>2</sup> HB 2310 will potentially repeal those charter ordinances. The city election statutes have been non-uniform for decades,<sup>3</sup> and the City (and dozens of other cities) has exercised its Home Rule powers during that time to adopt local rules related to elections and other issues.

For example, the City has chosen to create a primary election process where a maximum of two candidates advance to the general election, rather than three candidates as allowed by state statute. The City Council felt the state law unintentionally set dubious election policy because, logically, primaries should reduce the number of general election candidates to two per position. It only takes two viable candidates taking votes from each other to hand the election to a third candidate who may not even receive a majority of the votes. That process may not meet the public's voting intent at the local level. It is our understanding that many other cities have also adopted a two-candidate general election system, and some smaller cities have opted out of primary elections altogether. If the current version of HB 2310 passes, the City (and many others) would potentially lose its local control over its primary elections, and revert back to policy established by statute that is not necessarily representative of good election policy at the city and county level.

However, more troubling are the larger ramifications and timing of HB 2310. To adjust to S Sub for HB 2131 (2015), which moved city elections to the fall (hereafter, the "2015 election law"), the City spent months carefully analyzing its past charter ordinances and the 2015 election law to

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<sup>1</sup> See *Bigs v. City of Wichita*, 271 Kan. 455 (1998).

<sup>2</sup> A statute can be chartered out of if it is part of a non-uniform enactment, or if it relates to the same subject as a non-uniform enactment. See *Farha v. City of Wichita*, 284 Kan. 507 (2007); also see *Clafin v. Walsh*, 212 Kan. 1 (1973).

<sup>3</sup> See L. 1968, ch. 274, sec. 13.

draft one new charter ordinance controlling its election process, terms transitions, its form of government rules, its ward system, and other essential provisions for operating the City. If the non-uniform statute the City was relying upon to pass that charter ordinance is made uniform, that charter ordinance, and the essential provision within it, will potentially be repealed. It is simply not good governance to throw into disarray cities most essential operational rules when those rules are required for an election only months away. These changes would also require significant publication costs (and, for some cities, attorney's fees) to recodify new provisions. In addition, the City will not be in compliance with the 2015 election law, because our charter ordinance also established nonpartisan races and set the nomination petition requirements for the mayoral seat, both of which were required by the law.

Additionally, please consider the significant problems related to the timing of this change. June 1 is the filing deadline for city races, after which county election offices will begin preparing ballots for the August primaries. However, until June 30, Overland Park's charter ordinance (establishing nonpartisan elections, setting the number of wards in the City, and only allowing two candidates to advance to the general election) is controlling law. Then, on July 1 (when HB 2310 would go into effect) the state primary election statute will potentially repeal and override that charter ordinance. Many other cities have taken actions similar to Overland Park, and if those charter ordinances are repealed, city clerks and county election officers across the state will have to try to determine which races are up for election, how many races there are, and whether those races are partisan or nonpartisan.

A less consequential but still significant issue potentially caused by this legislation is that it would reverse the City's decision to charter out of K.S.A. 12-104a. This statute was part of the 2015 election law, and is extremely problematic. First of all, it requires that cities call a special election within 45 days if they haven't filled a vacancy within 60 days. As any county election official will tell you, it is simply not possible to call a special election within 45 days. Secondly, the statute says that, "...the governing body of any municipality where a vacancy exists shall appoint, by a majority vote of the remaining members, a person to fill the vacancy within 60 days of the vacancy." This conflicts with many other statutes speaking to this issue, most of which require the mayor fill the vacancy with the consent of council.<sup>4</sup> City attorneys have struggled with how to resolve this conflict, and for that reason, many have advised their city to charter out of K.S.A. 12-104a. The statute is non-uniform because it incorporates by reference K.S.A. 25-2110a, so making the latter uniform will potentially repeal those charter ordinances opting out of K.S.A. 12-104a, and subject cities to this deeply flawed law.

Finally, the City opposes this legislation because it is really not necessary. The apparent statutory conflict is easily resolved by the rules of statutory construction. As discussed in *City of Salina v. Jagers*, 228 Kan. 155 (1980), when two provisions conflict, the last one is intended to be controlling. Additionally, as discussed in *Redd v. Kansas Truck Center*, 291 Kan. 176 (2010), a

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<sup>4</sup> See K.S.A. 12-10a04 (modified mayor-council form of government); K.S.A. 13-513 (city of the first class, mayor-council form of government); K.S.A. 14-204 (city of the second class, mayor-council form of government); K.S.A. 14-308 (city of the second class, mayor-council form of government); K.S.A. 14-1305 (city of the second class, commission form of government); K.S.A. 15-201 (city of the third class, mayor-council form of government); K.S.A. 15-311 (city of the third class, mayor-council form of government); and K.S.A. 15-1405 (city of the third class, mayor-commission form of government).

more specific provision controls over a more general provision unless it appears that the legislature meant to make the general statute controlling. The 2015 election law established that candidates are to file at the county election office, and that the filing fee is \$20. Those provisions are controlling because they are later in time than the conflicting provisions in K.S.A. 25-2110a, and were intended by the legislature to control. There are no conflicting provisions with the nomination petition requirements in K.S.A. 25-2110a, and therefore those requirements are controlling.

If the Committee thinks more statutory clarity is necessary, the League of Kansas Municipalities has drafted an amendment to HB 2310 that provides that clarity, prevents the effective repeal of hundreds of cities' election ordinances, and doesn't force cities to be subject to problematic state statutes. Like HB 2310, this amendment creates uniform rules for the filing fee and where candidates are to file. However, it also leaves non-uniform provisions for the nomination petition requirements. The result of this amended legislation would be statutory clarity, the continued validity of city charter ordinances, taxpayers avoiding the cost of recodifying new ordinances, and legal certainty heading into the inaugural November city elections.

Most cities have spent the last 18 months undertaking the difficult and tedious process of transitioning to November elections. Hundreds of ordinances and charter ordinances have been passed, dozens of presentations have been given, and numerous articles have been written to help facilitate this transition. Almost all of this guidance has hinged on the assumption that cities could pass charter ordinances to adjust to the 2015 election law. That's why the City respectfully requests that the Committee not undo all of that hard work by passing out HB 2310 in its current form. As an alternative, we ask that Committee either not pass this legislation out of committee, or adopt the amendment drafted by the League of Kansas Municipalities.

Thank you for your consideration.