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January 11, 2024

ATTORNEY GENERAL OPINION NO. 2024-1

The Honorable Ken Corbet
State Representative, 54th District
State Capitol, Room 179-N
Topeka, Kansas 66612

Re: Cities and Municipalities—Planning and Zoning—Planning, Zoning and Subdivision Regulations in Cities and Counties—Same; Subdivision Regulations; Adoption and Amendment

Synopsis: Although the Kansas Legislature may legally permit a city to impose its land subdivision requirements on county residents within three miles of city limits, it should be cautious when granting cities extraterritorial authority. Cited herein: K.S.A. 12-749.

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As the Representative of the 54th District, you inquire about the constitutionality of K.S.A. 12-749, which generally authorizes a city planning commission to enforce land subdivision regulations against properties within three miles of city limits. You question whether a city may lawfully impose these regulations on individuals who cannot elect the city's leaders.

The legality of a similar law was tested in *Holt Civic Club v. City of Tuscaloosa*,[1] where residents of an unincorporated community challenged a city's authority to enforce their police and sanitary regulations on those situated within three miles of city limits.[2] The United States Supreme Court rejected the residents' claim that the law violated the "one person, one vote" mandate of the Equal Protection Clause by

[1] 439 U.S. 60 (1978).
[2] *Id.* at 61-62.

distinguishing the case before it from its prior voting limitation cases.[3] Applying rational basis review, the Court held that in light of the "extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them," the law was reasonably related to legitimate governmental interests.[4]

Your objection appears to be grounded in the Guarantee Clause found in Article IV, Section 4 of the United States Constitution. It provides in part that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government[.]"[5] Although courts typically refuse to entertain challenges based on this provision due to its political character,[6] we, like you, are concerned by K.S.A. 12-749's ability to subject county residents to laws passed by governmental officials whom the residents cannot elect. Indeed, the Supreme Court acknowledged in *Holt Civic Club* that "[g]iven this country's tradition of popular sovereignty, appellants' claimed right to vote in Tuscaloosa elections is not without some logical appeal."[7]

The appeal of such an argument is inherent in our republican form of government. As James Madison put it, "[i]t is *essential* to [a republican form of] government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it."[8] And without the Guarantee Clause, Alexander Hamilton said, "[u]surpation may rear its crest in each State and trample upon the liberties of the people, while the national government could legally do nothing more than behold its encroachments with indignation and regret."[9]

Nevertheless, the Supreme Court has held that the political branches of government—not the courts—must enforce the Guarantee Clause. As such, it is incumbent upon the Kansas Legislature (and/or Congress)[10] to preserve the representative nature of our state government. Before granting municipalities extraterritorial authority, the legislature should carefully consider the effects such laws have on county residents who cannot elect city leaders. And the most expedient way to address the potential unconstitutionality of K.S.A. 12-749 would be for the Kansas Legislature to amend it accordingly.

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[3] *Id.* at 66-70.
[4] *Id.* at 70-75. The Court also rejected a cursory due process claim. *Id.* at 75.
[5] U.S. Const. art. IV, § 4.
[6] *E.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019). The longstanding justification for this position is that the Constitution leaves enforcement of the Guarantee Clause to Congress, meaning if citizens object to their state's form of government, they must appeal to their federal representatives. *See Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).
[7] *Holt Civic Club*, 439 U.S. at 70.
[8] The Federalist No. 39, at 237 (James Madison) (Clinton Rossiter ed., 1961).
[9] The Federalist No. 21, at 135 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
[10] *See* The Federalist No. 43, at 271 (James Madison) (Clinton Rossiter ed., 1961) (explaining that a federalist government "founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations").

Sincerely,

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