

MEMORANDUM

TO: McPherson City Commission
FROM: Jeffrey A. Houston, City Attorney
DATE: April 16, 2018
RE: Possible Change to Municipal Government

You have asked me to conduct a preliminary legal analysis of the way that the City of McPherson, Kansas is organized and the possibilities including some of the advantages and disadvantages of altering the current structure of McPherson municipal government.

BACKGROUND INFORMATION.¹

A report of the Advisory Commission on Intergovernmental Relations noted that “a basic fact about local governments in the United States is their great diversity with respect to such matters as legal nature, size, area, functions, and organizations, both within and among states.” (State and local roles in the federal system, ACIR, April, 1982 at 227). Kansas ranked fifth among the states in the number of local units, with 3,826 units identified by the Bureau of the Census in 2012. *See* 2012 Census of Governments, Bureau of the Census, 2012. The average number of local governments per state in 2012 was about half of the Kansas total. Only California, Illinois, Pennsylvania and Texas, all states with much larger populations, have more local governments than Kansas. Consequently, Kansas ranked eighth among the 50 States in terms of the number of state and local elected officials in 1992. *See* 1992 Census of Governments, Popularly Elected Officials, Bureau of the Census, 1992, Vol. 1, No. 2, Pg. 3, Table 3. There is not a lack of possible models to review.

In Kansas there are 627 cities, 105 counties and 286 school districts. However as noted throughout, comparing cities with each other often yields very misleading comparisons

¹ The majority of this background information was taken from Chapter 1, Local Government Organization; Structure; Functions, Kansas Local Government Law, 5th Edition, 2014, and 6th Edition, 2018 published by the League of Kansas Municipalities.

because of the various populations and governmental sizes allowed to the various cities in addition to the broad ability to alter state statutory schemes through the use of a City's Home Rule power. Of the 627 cities, only 123 had a population of 2,000 or more. The scope of their budgets in 2012 range from the City of Wichita with a budget of over \$641 million to the City of Freeport with a budget of approximately \$15,000.

CLASSES OF CITIES

Cities in Kansas are divided into first, second or third Class cities by state law. (25 cities of the first class, 98 cities of the second class and 502 cities of the third class.) McPherson is currently a city of the second class. Cities of the second class generally have populations between 2,000 and 15,000. The Governor must proclaim a city to be of the second class upon certification of the city's population. K.S.A. 14-101. However, the Governor has no authority to rescind a proclamation declaring a city to be a city of the second class if its population shrinks. A city may become a city of the first class when it reaches a population of 15,000 and must be designated as a city of the first class if it reaches a population of 25,000. See K.S.A. 13-101. However, the city has the option of remaining a city of the second class between 15,000 and 25,000. As a result of the three classes of cities, it is important to be very careful when looking at state law to determine whether the particular statute is applicable to the class of city in question. In general, Chapter 12 of the Kansas Statutes Annotated applies to cities of all classes and Chapter 14 applies to cities of the second class. There are some scattered exceptions. In addition, as a result of the City Home Rule Amendment to the Kansas Constitution, the legal class of a city is not as important as it was in earlier years. Because most non-uniform laws are subject to charter ordinances by the cities, cities can opt-out or change many state laws with a charter ordinance thereby making each city unique.

FORMS OF CITIES

In addition to the class of city, there are three basic forms of city government available to Kansas although there are twelve separate legislative acts providing for variations on these forms. Only the most common or popular forms will be discussed below. Keep in mind, that Home Rule also allows modifications of all of these variants so that no two city structures are actually the same.

Mayor-Council Form. The mayor-council form of city government is the oldest and most common form in Kansas with 555 of the 625 (58 of which are cities of the second class) cities in the state operating under this form in 2017. Until 1907, it was actually the only authorized form. Cities of the second class operate under the mayor-council form are governed by K.S.A. 14-101 *et seq.* The size of the city council depends upon the population and may range from 4 to 12 members. The term of the mayor, who is elected at large, and the council members are all elected from wards, is two years. See K.S.A. 14-103 and 14-109. Under K.S.A. 14-301 mayors have the ability to cast a tie-breaking vote, but, generally,

do not vote absent special circumstances. The powers of the mayor would include the power to appoint various city officials subject to council approval, supervise all officers and affairs of the city, have responsibility for enforcement of all laws and to remit fines and forfeitures for city ordinances with council approval.

Modified Mayor-Council Form. The modified mayor-council form allowed by K.S.A. 12-10a01 *et seq.* applies to any class of city and provides for the election of a mayor and three council members at large and four council members by district all for four year terms. The mayor has veto power and has the authority to establish various departments and appoint the department heads subject to council approval. Again, the mayor does not vote on matters before the council.

Commission Form. The commission form of city government was authorized for cities of the second class in 1909. The commission form of government was hailed by local government reformers as a way to bring a business-like corporate boards to city hall. The pure commission form reached its peak of popularity in 1915 with 45 cities but the number has declined to 10 by 2012. Eight cities of the second class had commission forms of government in 2015. Most cities operating under the commission form elect a mayor and two commissioners are at large, all of whom have combined administrative and legislative powers. City commissioners generally serve 4-year terms. *See* K.S.A. 14-1204 and 15-1302. The overall control and supervision of the city is vested in the commission not in the individual commissioners. *See* K.S.A. 14-307 and 15-1407. In other words, the commission as a whole binds the city to a decision and not individual commissioners. The mayor is the head of the city and has the right to vote on all ordinances but has no veto power. In effect, the mayor has little more power than any of the other commissioners. *See e.g.* 14-1401 *et seq.*

ADMINISTRATION

There are variations upon the above forms of government depending on whether there is a city manager, city administrator or city superintendent. The differences in the three variations are in the responsibility of the governing body. Under a commission-manager plan, the city manager is responsible for the administration of all affairs of the city and the manager has power to appoint and remove all heads of department and all subordinate officers and employees. *See* K.S.A. 12-1014. Annually, the commission chooses a chairman, who has the title of mayor under K.S.A. 12-1007. A special statute applies to any city of the second class operating under the commission plan and authorizes these cities to adopt the commission-manager plan. *See* K.S.A. 12-1037. The city commission, under the commission-manager plan is a policymaking and legislative body. Commissioners have no administrative function. There were 37 cities which operated under the commission-manager plan in 2017. While there are other variants, mayor-council-manager plan or council-manager plan, both are limited in use and beyond the scope of this report.

As an alternative to city manager, many cities have created the position of city administrator by charter ordinance under their constitutional home rule powers and conferred the general management responsibilities of the city on this position. There were 99 cities in 2017 which had appointed city administrators. McPherson has a city administrator model. A city administrator, instead of running the city as an unelected position like a city manager, has the following criteria:

1. It must be an officer position, created by ordinance;
2. It should be appointed by the governing body and/or be responsible to the governing body, to distinguish it from a mayor's executive assistant;
3. It must have either supervisory or coordinative authority over all or most department heads and functions;
4. It must have major responsibility for preparation of the budget;
5. It must exercise major responsibility for or influence over personnel practices and the appointment of key administrative officials; and
6. It should have policy formation responsibilities, and be recognized by the governing body as the appointed, executive leader of the city. In administrator cities, in contrast to manager cities, the statutory administrative powers of the mayor are typically left unchanged.

Finally, forty-one cities have created a city superintendent which is considered to be a position which has coordination and management authority over the so-called outside activities of the city, including the public works and utility functions of the city. The city superintendent reports directly to the mayor or city governing body. The inside or city hall activities are normally performed by the city clerk.

CURRENT STRUCTURE

Currently, the City of McPherson is a city of the second class and organized with a three-person pure commission form of government and a city administrator. Pursuant to Charter Ordinance, the City Commission currently has a Mayor, Commissioner of Streets and Utilities, and Commissioner of Public Facilities and Lands. Each member of the governing body is elected city-wide and is directly over specific City Departments as shown on the attached Exhibit A.

The Board of Public Utilities of the City of McPherson is a separate wholly owned entity of the City and is not part of the commission form of government except for one commissioner on a rotating basis sitting as an *ex officio* non-voting member on the Board of Public Utilities. This Memorandum will not discuss reorganization of the BPU.

The commissioners are department heads and charged with the oversight of their departments. However, for the governing body to act, such action must be taken in a public meeting and with a majority vote.

There has been some discussion regarding what city governance might look like under a five-person governing body. However, I have heard no conversations regarding whether this involves a five-person city commission or a five-person city council. Language is often mixed as the distinction between the two is not widely understood.

All of the above can be changed within legal parameters, if directed. Generally, there has been vague and undefined discussion regarding increasing the size of the governing body from three to five. As with all the available choices, there are general advantages and disadvantages.

GENERAL ADVANTAGES OF FIVE-PERSON GOVERNING BODY

Diversity of Voices. One of the advantages of increasing the size of the governing body from three to five members would be an extra two voices bringing a diversity of ideas and experiences before the commission. With a five person commission, normal matters would require three of the five commissioners voting in favor of an ordinance. Those things requiring super majorities that require a two-thirds or 75% majority would necessitate four of the five commissioners voting in favor. Under the current three-man structure, super majority votes can be obtained with two votes in the affirmative just like simple majorities. Depending upon the issue this can be seen as a strength or a weakness.

Implicit within this criteria could be a belief that various voices either are not or perceived to have not been heard. Instead of restructuring the city government, alternative measures to ensure varieties of opinions are considered could be entertained.

GENERAL DISADVANTAGES OF FIVE-PERSON GOVERNING BODY

Efficiency. As the counterbalance to the diversity of voices being a strength, increasing the “cooks in the kitchen” could also decrease efficiency. As the above analysis indicated, comparing various cities between each other’s is fraught with incomplete and misleading comparisons. While the “normal” city government in Kansas is not a three-person commission, it is the base structure and common for the class and type of city government that McPherson currently maintains. As another only partially helpful way to look at the issue, there are 105 counties in Kansas with 91 of them or 87% having three-person commissions. Counties are inherently broader in scope and size than the cities that they contain and have predominantly worked with a three-person structure for years.

Lines of Authority. Another issue that will need to be watched, but is certainly surmountable, is to ensure that department heads do not have conflicting lines of reporting to various commissioners. Administratively it would be very inefficient for a

single department head to report to multiple commissioners. In this, the commission would need to figure out how to divide up various departments that substantively made sense to go together and so that the workload made sense.

Voting Precincts. Depending upon the type of city government that any change could entail, there is a distinct possibility of voting precincts. In other words, specific geographic portions of the city would elect specific commissioners. The commissioners would then be responsible for representing their Ward. While this may increase the perceived voice of geographic areas, it then inherently creates a situation where commissioners are trying to get their dollar for their Ward. Currently, all city elections are city-wide so every commissioner is representing every citizen and does not have a geographic bias built in.

Cost. Currently, the city commissioners, including the mayor are each paid \$11,570 per year and provided the opportunity for health care at a cost of up to \$13,920 per year. If the size of the commission/council were to increase by two members, the city would either have to decide to decrease the salary and benefits to each member to make it a budget-neutral move or incur the extra expense. (approximately \$100,000 /position/4-year term). Decreasing the salary and benefits may decrease the incentive to serve and increasing the costs may be counterproductive to maintaining fiscal responsibility in the city.

Transparency. What is most likely an unrecognized and unintended consequence of moving the governing body from three to five members would be an increased likelihood in the lack of transparency required under Kansas law. Currently, with a three-person commission, any time two commissioners are together or may be together at an event, a public meeting is announced. Whether it is commission meetings or study sessions or outside events, the public has a right to be present to hear the discussion. While not always engaging or entertaining, it ensures that two commissioners cannot meet together and discuss city business. However, with an increase from three to five city commissioners, two commissioners privately meeting together no longer constitutes a quorum and therefore the Kansas Open Meetings Act is not violated. In other words, commissioners can have closed door, non-public meetings on city business and not be required to be as transparent.

Citizen Control. If a city manager form of government is elected intentionally or by default after being forced by a petition, the net effect of the city's administrative and managerial control will shift from elected officials to an appointed official (the city manager). Responsiveness considerations could become important in that arena.

SIMPLEST POSSIBLE PLAN

The intent of this memorandum is to discuss the technical legal possibilities, along with the potential advantages and disadvantages of any possible reorganization of City government. As discussed, there are an infinite variety of changes that could be made to the governing structure, each with unique challenges. As merely an example of one of the

simplest possible, but specific changes, McPherson could stay a pure commission form of government, but increase the size of the governing body from three to five members, elected at-large from the City.

Mayor	Admin/Finance/CVB
Comm 1	Vice Mayor/Public Safety (Police, Fire, Health)
Comm 2	Public Works
Comm 3	Land and Facilities
Comm 4	Utilities (Waste Water, Storm Water, BPU Liaison)

The election cycle can be structured such that elections are held every year or every two years depending on the merits between election cost and influx of new blood to commission.

In addition to the general disadvantages discussed elsewhere, possible challenges to this model would also include:

1. The public works director ("PWD") would report to 2 commissioners (Public Works and Utilities) since the PWD is over Public Works, Waste Water and Storm Water. A new Director level for Storm Water, with corresponding cost, could separate the dual reporting, but coordination would have to be carefully monitored.
2. Storm Water and Streets are very hard from a practical standpoint to separate. Rebuilding or building streets always involves storm water drainage issues.
3. If an emergency occurred, the Vice Mayor as head of Public Safety would have the lead and not the Mayor. Emergency ordinances and plans can be rewritten, but public education would also need to be a priority.
4. Only one member of the governing body would be familiar with BPU operations instead of the current rotation. The incredible working relationship between BPU and the City could be weakened.

The quickest this plan could be implemented would be as follows:

- City election to increase size of Commission – August 2018 Primary
- Changes to Charter Ordinances and Ordinary Ordinances to Accommodate (See Ex B for 4 Charter Ordinances and Ex. C for 14 Ordinary Ordinances that will need to be modified. I anticipate others will be found)

- Note since the Charter Ordinances must have a protest period before becoming active, temporary Resolutions would also need to be passed for the period between the General Election and the Charter Ordinances being effective.
- Election of two additional Commissioners – November '18
- There would be numerous policies and procedures that would also need to be adjusted that are beyond the scope of this report.

The above plan is legally “doable”, but I cannot over-emphasize too much that although this is the simplest change, it will come with significant amounts of change and work for all City departments. Whether the benefits of the change outweigh the costs of the change is a policy decision.

BASIC LEGAL STEPS NECESSARY FOR TRANSITION

The process for how to make a change in the structure of City government has various factors:

1. What change is the City trying to make?
2. What variations from the base model will be made?
3. How was the process initiated?
4. What is the timing of the change?
5. What is legally “clear” and what is not entirely clear?

Basic rule: Cities may adopt, by ordinance, any form of government. The basic statute is K.S.A. 12-184b. (This is a new law, passed only in 2015). Under this statute, a city may adopt, **by ordinance**, any of the “standard” forms of government (commission; mayor-council; commission-manager; mayor-council-manager; council-manager). There is also a catchall provision, under which “any city may adopt by ordinance . . . any . . . form of government authorized by law or by ordinance or charter ordinance of the city.” K.S.A. 12-184b(a)(6). The last provision appears to authorize cities great flexibility in crafting various forms of government.

Exception when city has had its present form of government for at least four years. Notwithstanding the general rule that only an ordinance is necessary, an election is sometimes required to “abandon [the] form and adopt a different form of government.” K.S.A. 12-184b(b). This rule applies for “[a]ny city which has operated four or more years under a form of government[.]” K.S.A. 12-184b(b). This rule would apply to McPherson.

Election may be set by resolution or petition. When an election is necessary to change the form of city government, the election may be called either by a resolution of the city’s governing body or by a duly-certified petition “signed by qualified electors of the city equal in number to not less than ten percent (10%) of the qualified electors of the city.” K.S.A. 12-184(a)(1),(2). On December 28, 2017, there were 7833 qualified electors in the

City, so a petition would need 784 valid signatures. (Source County Clerk). That number may, of course, change. After the resolution has been adopted or the petition certified, the question is to be submitted to the voters at the next city or state general or primary election that is at least 60 days after the adoption of the resolution or the certifying of the petition. K.S.A. 12-184(b).

Special governance rules that may be adopted by ordinance. Under the final part of K.S.A. 12-184b, a city's governing body may establish by ordinance a number of rules that concern the city's form of government. These include:

- "the powers and duties of the governing body, including the mayor and other elected officials (K.S.A. 12-184b(c)(1)).
- the "terms of office of members of the governing body, including the mayor and other elected officials of either two, three or four years." (K.S.A. 12-184b(c)(2)).
- the "election by ward or district of members of the governing body if applicable." (K.S.A. 12-184b(c)(3)).
- the "powers and duties of the city manager, if applicable." (K.S.A. 12-184b(c)(4)).
- "[O]ther matters deemed appropriate by the governing body." (K.S.A. 12-184b(c)(6)).

12-184b does **not** say that these questions may be decided by election, whether called by resolution or by petition. The only adoption method mentioned in this section is an ordinance.

The boundary, or the extent of the overlap, between ordinance matters and election matters under this statute is less than clear.

Special statutory provisions on abandonment of pure commission form (KSA 14-1807). There are special statutory provisions on the abandonment of the pure commission form of city government. McPherson has had a pure commission form for over a century. When a city has had the pure commission form for more than four years, the special statute says that the form may be abandoned by "vote of the qualified electors of the city[.]" K.S.A. 14-1807.

The abandonment question may be submitted to the voters upon the resolution of the governing body or upon the certification of a petition signed by at least ten percent (10%) of the qualified electors of the city. K.S.A. 14-1807; K.S.A. 12-184. Fortunately, this standard matches K.S.A. 12-184(b) and there should not be a conflict.

Under 14-1807, the question to be submitted to the voters is to read as follows: "'Shall the city of (name of city) abandon its organization under chapter 82 of the Laws of 1909 and

the acts amendatory thereto, and become a city under the general law governing cities of like population?" K.S.A. 14-1807.

K.S.A. 14-1807 does not, on its face, allow the voters to be asked, together with the abandonment question, what the city's new form of government is to be. Under this statute, if the "pure commission" form is abandoned, the only option is for the city to become "a city under the general law governing cities of like population."

It appears that, with respect to a second-class city such as McPherson, "the general law governing cities of like population" would establish a mayor-council form of government.

Possible application of 12-184b to "pure commission" special statutes. It is not entirely clear what effect the 2015 Act (which includes 12-184b) may have on the "pure commission" special statutes.

- 12-184b(a) says that its provisions are "[s]ubject to . . . K.S.A. 2017 Supp. 12-1039, and amendments thereto[.]" (12-1039 pertains to the three manager forms.) There is no comparable exception for the "pure commission" form (governed by 14-1807 et al.). The failure of 12-184b to except "pure commission" statutes may mean that the legislature intended for 12-184b to apply to "pure commission" cities.
- In turn, this would presumably mean that the 12-184b procedure could be used even for cities that have long had the "pure commission" form. The vote on the abandonment question could then be combined on the ballot with a vote to choose which new form of city government should be adopted.
- But an "abandonment-only" election under 14-1807 would still presumably be a permissible alternative. After a 14-1807 abandonment, the post-abandonment form would by default be mayor-council.
- If a pure abandonment-only election is held, I would strongly suggest a series of charter and ordinary ordinances be based contingent on the outcome of the election unless the default is desired.

Therefore, if there is a decision to change the form of government, it would require:

1. Resolution or valid petition;
2. Ballot Question 1 – to abandon the pure commission form;
3. Possible Ballot Question 2 – to adopt any form of government other than the default mayor-council form of government;
4. Multiple new ordinances adopting selected special governance rules under K.S.A. 12-184b;

5. Amendment of existing charter ordinances to conform (see Ex B);
6. Amendment of existing city code (See Ex C);
7. Alignment of various internal policies and procedures.

MERITS

This memo, although detailed, is still a high level summary and is not intended to express any opinion or the merits of changing the City governance or an actionable plan, but is intended to guide the governing body in the legal implications of any change.

City of McPherson Organizational Chart

Feb-18

VOTERS

COMMISSION

COMMISSIONER OF
PUBLIC LANDS AND
FACILITIES

Public Lands Director
Golf Course Head Professional
Cemetery Sexton
Park Supervisor
Community Building
Municipal Building
Water Park

MAYOR

City Administrator
City Clerk
City Treasurer/Finance Director
City Attorney
City Prosecutor
Municipal Judge
Board of Public Utilities
Library Board
Park Board
Planning Commission
Board of Zoning Appeals
Drug and Alcohol Abuse Board
Recreation Commission
City/County Airport Board
Board of Health
Tree Board
Cemetery Advisory Board
Golf Advisory Board

Fire Chief
Police Chief
CVB Director
EMS
Emerg. Mngmt.

COMMISSIONER OF
STREETS AND UTILITIES

Director of Public Works/City Eng.
Street Superintendent
Waste Water Treatment Super.
Zoning Administrator
City Building Inspector
City Sanitarian/Code Enfor. Off.

EXHIBIT

A

5219983

EXHIBIT B

CHARTER ORDINANCES

Ordinance No.	Subject	Needed
No. 4	Describes make-up, number and terms for Commission	New Charter Ordinance
No. 9	Park Board – Mayor appoints	Change if duties change
No. 27	CVB – Mayor appoints	Change if duties change
No. 36	City Administrator	If manager option – Mayor appoints

Note: In general, the process for a Charter Ordinance requires the City Commission to pass the Charter Ordinance by a 2/3 vote. The Ordinance is published in full once each week for two consecutive weeks. A 60-day waiting period after the date of the first publication is required before the Charter Ordinance can become effective. However, if a valid protest petition is filed signed by 10% of those who voted in the last regular city election ($3,638 \times .1 = 364$), then the Charter Ordinance must be approved by a majority vote of the citizens to become effective.

EXHIBIT C

CITY CODE

Section	Subject	Needed
2-1	Commission Form	Change if Council adopted
2-31	Compensation	Change if Council adopted
2-184	Reserve PD	Change if Mayor is not over MPD
2-186	Reserve PD	Change if Mayor is not over MPD
2-302	Planning	Change if Mayor not to appoint to PC
2-333	Land Bank Board	Change to new structure
18-32	Building Trades	Change if Commissioner of Streets and Utilities is not over Code
18-51	Building Inspection Dept.	Change if Commissioner of Streets and Utilities is not over Building Inspection Dept.
26-1	City Government	Must be redone if structure changes
30-1	Emergency Powers of Mayor	May change
30-34	Emergency Interim Successors	Must change
38-405	Taxi	May change if Commission duties change
50-32	Health Nuisances	May change if Commission duties change
90-31	Tree Board	May change if Commission duties change

EXHIBIT C (CONT'D)

Note 1: In general, to change a Code provision, a normal ordinance must be passed by a majority of the Commission and an approved summary published. Each section would be a separate ordinance. The City cannot do an omnibus ordinance of selected subsections.

Note 2: I did not look at the changes that would be required by a change from City Administrator to City Manager. It would be much more extensive

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