

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT**

CITY OF PRAIRIE VILLAGE, KANSAS)	
a municipal corporation,)	
)	
Plaintiff,)	Case No. 23CV04487
)	Chapter 60; Division 4
v.)	
)	
)	
PV UNITED, INC., and,)	
REX SHARP,)	
Defendants.)	

AMENDED MEMORANDUM DECISION

On August 18, 2023, Plaintiff filed its Petition for Declaratory Judgment requesting Defendants’ three initiative petitions be declared legally insufficient for failing to comply with state statutes and therefore excluded from any ballot before the electors of Prairie Village on November 7, 2023. Oral argument was set for hearing on August 30, 2023. On August 28, 2023, Plaintiff filed a Pre-Hearing Brief and Defendants filed an Answer to the Petition. Defendants also filed a Motion to Dismiss and Brief on Abandon and Adopt Petitions the same day. Defendants then filed a Brief on its Rezoning Petition August 31, 2023. Oral arguments were heard in person on August 30th and 31st, 2023. Plaintiff appeared by and through its counsel, Joseph Hatley and David E. Waters. Defendants appeared by and through its counsel, Rex Sharp. After oral argument, the Court took the matter under advisement.

On September 6, 2023, the Court issued an oral ruling that the Rezoning Petition and Adoption Petition were not eligible to be submitted to a vote before the electors of Prairie Village, Kansas, while the Abandonment Petition was. Later that same day the Court issued a

written decision which reversed its oral ruling regarding the Adoption Petition and Abandonment Petition.

Immediately after the filing of the Courts written decision, Plaintiffs filed a Motion to Amend or Correct Memorandum Decision requesting the Court to reinstate its initial oral decision. Defendant PV United, Inc's filed an Opposition to Plaintiff's motion and requested the Court's oral decision regarding the Adoption Petition and its decision in the written memorandum regarding the Adoption Petition remain in effect. The Court heard oral arguments on the motions September 7, 2023. The Court took the matter under advisement.

After consideration of all arguments, the Court reinstates its initial oral decision. As pointed out during the September 7, 2023 hearing, the Court was under time limitations pursuant to K.S.A. 25-3601(e) and attempted to meet deadlines from the Johnson County Election Office. Those deadlines are no longer at issue. Considering the complexity of the issues, this Court stated it would consider amending any prior orders if deemed necessary. To that end, the Court is persuaded by Plaintiff's Motion to Amend or Correct Memorandum and reinstates its oral decision rendering the Rezoning Petition and Adoption Petition not eligible to be submitted to a vote before the electors of Prairie Village, Kansas and the Abandonment Petition may be submitted.

I. The Rezoning Petition is Administrative

Defendants, PV United and Rex Sharp, are proposing a rezoning ordinance that limits PVCC's ability to rezone single family lots to allow accessory dwelling units or more than one family on a lot at a time. Plaintiff challenges the form of the question, the form, substance, and legality of Defendant's Initiative Rezoning Petition and argues it should not be placed on the ballot for consideration by voters. Defendants disagree with Plaintiff and believe their petition

meets all the requirements of the above statute. In reviewing all pleadings, the Court finds that the substance of the petition to be of most importance and therefore will address it.

K.S.A. 12-3013 sets out the requirements for petitions that propose ordinances. K.S.A. 12-3013(e)(1) excludes administrative ordinances from the initiative-and-referendum process. Kansas Courts have interpreted this provision to signify that an initiative petition can only be used to advance policies that are “legislative” in nature, not for policies that are “principally executive or administrative.” *City of Wichita v. Peterjohn*, 62 Kan.App. 2d 750, 522 P.3d 385 (2022).

This Court must determine whether Defendants’ Initiative Rezoning Petition to limit rezoning by the Prairie Village City Council (PVCC) is legislative and must be placed on the ballot for voters to consider or administrative and governed by PVCC. Plaintiff argues that under K.S.A. 12-3013(e)(1) Defendants’ rezoning petition proposes an administrative ordinance and therefore is governed by the PV City Council and not appropriate to be placed on a ballot. Defendants argue the Petition is legislative.

While K.S.A. 12-3013 states administrative ordinances are excluded from being placed on a ballot, it fails to state how to determine whether an ordinance is legislative or administrative. In *McAlister v. City of Fairway*, 289 Kan. 391 (2009) the Supreme Court of Kansas provided guidelines to be considered in conjunction with K.S.A. 12-3013(e)(1). The *McAlister* court noted that the characteristics of the ordinance should be weighed and utilized with the McArdle guidelines to determine whether the case at issue was legislative or administrative in nature. *City of Lawrence v. McArdle*, 214 Kan. 862 (1974) (determining whether an ordinance was administrative in nature and therefore not subject to KSA 12-3013).

“ 1. An ordinance that makes new law is legislative; while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance. 214 Kan. 862, Syl. 2, 522 P.2d 420.

2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative. 214 Kan. 862, Syl. 3, 522 P.2d 420.

3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of policy. 214 Kan. 862, Syl. 4, 522 P.2d 420.”

Additionally, the *McAlister* court added a fourth guideline following the decision set out in *Rauh v. City of Hutchinson*, 223 Kan. 514, 519–20, 575 P.2d 517 (1978) (holding that administrative action was not subject to KSA 12-3013 and that determination is based on the factual situation in each case), stating:

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

The Court heavily relies on *McAlister's* commercial development petition which addressed very similar issues to the present case. In determining whether Defendants' petition is legislative or administrative. In *McAlister*, plaintiffs filed a petition for declaratory judgment against the City of Fairway on whether its two initiative petitions, including the commercial petition, were legislative and therefore met the requirements of K.S.A. 12-3013 to be placed on a ballot. The city argued the commercial petition was administrative because it attempted to restrict the City's authority to rezone property. The Court ultimately finds guideline 2, is not helpful to the analysis of whether the Petition is substantially legislative or administrative and

therefore unnecessary to address in this opinion. However, under guidelines 1, 3, and 4 the Court finds the Rezoning Petition to be overwhelmingly administrative in nature and therefore deems the Petition to be administrative.

Guideline 1

In analyzing the first guideline, Defendants argue the proposed ordinance is new law because current PV City Code has no law defining rezoning and the Code does not address rezoning of R-1 city-wide. The Court disagrees with Defendants and finds the proposed ordinance is not new law. In *McAlister* the plaintiffs' commercial petition sought to propose an ordinance restricting the city from rezoning residential property into commercial, business, apartment, condominium or mixed-use sites. There the plaintiffs argued the ordinance was new law because no current city ordinance or policy restricted residential property in this way. Under the first guideline the Court considered the city's development plan and existing law and opined that the proposed ordinance would impact a portion of the city's then existing plans and ordinances. In this case, the City approved Ordinance No. 2433 adopting and approving its Planning Commission's Vision 2.0, A Revised Comprehensive Plan for the City of Prairie Village, Kansas. The intent of the plan is to provide guidance for future action within the community, regarding both public and private investments. To support the desires of the community at-large to guide the evolution of Prairie Village while maintaining the high quality of life enjoyed by existing residents. (Comprehensive. Plan Pg. 2). It also discusses the current percentage of single-family lots and the need to broaden the variety of housing types to enable a broader range of price points that will expand housing access and economic mobility in the community. Despite the absence of a definition for rezoning in the City Code, it is clear from the PV's Comprehensive Plan that it is the intention of the City to broaden housing types. Both

Plaintiffs and Defendants acknowledge that the City is essentially landlocked and a large percentage of land is zoned for single-family lots. If Defendants' proposed rezoning petition were adopted, it would impact a large percentage of the City's current policy to diversify and broaden housing types. Zoning issues cannot be considered in isolation but must be considered within an overall plan. *McAlister* at 414. As a result, Defendants' proposed Petition is not new law, but is related to existing policies and laws.

As a side note, Defendants also argues that the Rezoning Petition, unlike the commercial petition in *McAlister*, does not bar City initiated rezonings or touch upon the comprehensive plan, does not involve eminent domain by the City or third parties, does not restrict commercial development, does not indirectly choose a location for City Hall, does not touch upon state-wide concerns, and is not contrary to any statute. Although the Court has already determined that the Rezoning Petition impacts existing policy and law, it will briefly address Defendants' allegations on the relevant issues above. While the Rezoning Petition does not bar initiated rezonings by the City of single-family lots, under Section 2 of the Petition the City is only allowed to initiate rezoning of a single-family lot one lot at a time and only with the written consent of all owners of the lot. The Rezoning Petition on its face does not appear to bar the City from initiating to rezone a single-family lot, but upon further review it is a constructive bar to the City's ability to rezone. If a lot owner(s) refuses to provide written consent or simply ignores the City's request to rezone, the City cannot move forward with rezoning. The Rezoning Petition does not provide any alternatives for the City to rezone nor does it contemplate projects by the City in which one lot owner gives written consent while another does not. The restrictions of the Rezoning Petition and the possible chaos that could unfold equates to a bar. The same would hold true if the City wanted to rezone the single-family lot to allow commercial development. The Court understands

Defendants' argument to mean the City can rezone current commercial lots, however if a single-family lot is being considered for any type of rezoning and a lot owner does not consent, rezoning as a whole is restricted. The Rezoning Petition does not address eminent domain, however, again if a lot owner does not consent, the City's eminent domain power is impacted.

Last, under guideline one, the Rezoning Petition would be permanent and therefore considered legislative. However, it seeks to impact a select portion of the City's overall Comprehensive Plan which ultimately makes it administrative.

Guideline 3

Defendants argue the Rezoning Petition does not require "particularized" knowledge about the City operations in that it does not address space requirements, public safety, regulatory issues, or fiscal affairs. In the Pre-Hearing Brief of the City of PV, it attached as Exhibit A, the City's Village Vision 2.0 Comprehensive Plan. The City's Planning Commission retained Gould Evens- Studio for City Design to assist in updating its Comprehensive Plan by providing factual information and analysis and facilitating public engagement. The plan is comprised of approximately 78 pages and includes maps of both public and residential property, price points of homes, and plans to broaden and diversify housing types among a number of other plans to promote growth in residents and jobs in the City. It is clear to the Court in reviewing the Comprehensive Plan that specialized knowledge and expertise is required in addressing the City's need to rezone and thus attract new residents, create public engagement spaces, and foster commercial development.

It is equally clear that specialized training and knowledge is required when attempting to rezone. As pointed out in Exhibit G of Plaintiffs Petition for Declaratory Judgment, Declaration and letter from Chris Brewster, President of Multistudio. Mr. Brewster has 22 years of

experience consulting with municipalities on planning and rezoning matters. In a seven-page letter, Mr. Brewster points out the unintended results that would occur if the Rezoning Petition were to pass. Among the many problems, the definition of “rezoning” only refers to a change from a more restrictive zone to less restrictive zones. The Petition references only R-1 districts, but the definition of rezoning would apply city wide. There is also a proposal for a new section of 19.52.006 in Chapter 52 of PV’s ordinances. The title of the Rezoning Petition mentions accessory dwelling units, however nothing in the body of the Petition makes any reference to these. The Petition’s language is ambiguous. It is clear that expertise knowledge and planning are required when setting forth a rezoning petition as it impacts other portions of city planning.

Furthermore, the Court considers the Rezoning Petition language, which states “The City of Prairie Village, Kansas has been completely zoned and built out for decades, with over 90% of all the land being in a single-family residential zoning district.” Similar to *McAlister*, the practical effect of the Rezoning Petition would potentially lock the City into its current zoning plan . Implementation of the City’s Comprehensive plan is speculative at best, as the Rezoning Petition, if adopted, would impact the overall plan.

Guideline 4

Finally, in analyzing the last guideline, the Court finds the Rezoning Petition is of statewide concern and therefore administrative. Pursuant to K.S.A. 12-741, the state legislature authorizes cities to enact planning and zoning laws for the protection of public health, safety, and welfare. When the legislature has delegated decision-making power to a “local council or board as the state’s designated agent for local implementation of state policy,” it tends to show that the actions are administrative. *City of Wichita v. Peterjohn*, 62 Kan.App.2d 750, 522 P.3d 385 (2022) citing *Rauh v. City of Hutchinson*, 223 Kan. 514, 575 P.2d 517(1978). Here, the Rezoning

Petition only allows the City to rezone single family lots one at a time and with the written consent of the lot owner. These requirements would restrict the City's ability to rezone and gives complete authority to the lot owner. This is not in line with K.S.A. 12-741 and becomes a statewide concern as it impedes on the authority given by the legislature to the City. Had the legislature intended electors and lot owners the complete right to rezone their property, it would have said so.

II. The Adoption Petition is not Legally Sufficient to be Submitted to a Vote

Kansas statutes plainly outline the procedure for placing a question regarding the adoption of a new form of government on the ballot. Defendants' petition complied with the basics of K.S.A. 25-3601 and K.S.A. 12-184, however its failure to fully comply with K.S.A. 12-1039(b) and (c) is what prevents the Petition from being put forth before the voters.

Plaintiff asserts that the Adoption Petition is unclear in defining membership and terms of office of the governing body as required by K.S.A. 12-1039(b). K.S.A. 12-1039(b) states:

(b)The resolution or the petition shall establish the membership and terms of office of the governing body. Upon the adoption of a resolution or the certification of a petition as provided in this section, the governing body of the city shall submit the proposition at the next primary or general election. Notice thereof shall be published in the manner provided by K.S.A. 25-105, and amendments thereto.

The Adoption Petition states the following:

Pursuant to K.S.A. 12-1039(b), the membership of the Prairie Village City Council under the new mayor-council manager form of government shall be one member from each of the six wards plus an at large Mayor, all with staggered terms as follows: Only the 2023 elected City Council member from each ward shall continue to serve in the new City Council along with the currently elected at large Mayor. Those 2023 elected City Council members from Wards 1,2, and 3 shall serve four year terms, while those 2023 elected City Council members from Wards 4, 5 and 6 as well as the current at large Mayor shall serve two year terms. Thereafter, all wards will elect just one member to the City Council to serve four year terms.

While the term for the current Mayor is set, the term for the future Mayor is not. The omission of the mayor's term of office under the new governing body is a deficiency too great to ignore and does not amount to substantial compliance with the law. "Petitioners must comply with the essential matters necessary to assure every reasonable objective of the statutes has been met." *City of Wichita v. Peterjohn*, 62 Kan. App. 2d 750, 522 P.3d 385, 387 (2022). The law clearly requires the petition establish the membership and terms of office of the governing body. The Defendants failed to do so; therefore, the petition is not valid.

Additionally, K.S.A. 12-1039(c) states in part: If a majority of the votes cast shall be in favor of adopting the commission-manager, mayor-council manager or council manager plan of government, then at the next regular city election the governing body of the city shall be elected as provided in the resolution or petition. The Petition specifically refers to the 2023 elected officials. It attempts to have the officials elected in the November 7, 2023 election serve as the new city council members. The Petition does not provide those elected officials currently serving a term and not on the November 7, 2023, ballot an opportunity run for office in the next election after November 7, 2023. Essentially, The Adoption Petition as written, seeks to adopt a new mayor-council manager government and a new city council at the same time. This is in direct conflict of the statute and therefore fails and should not be submitted for a vote to electors.

III. The Abandonment Petition is Legally Sufficient to be Submitted to a Vote of the Electors

K.S.A. 12-1041 dictates how to abandon the mayor-council form of government. It does so by replacing the words "adoption" or "adopt" with the words "abandonment" and "abandon" in K.S.A. 12-1039. The defendants followed the same procedure in putting forth their abandonment petition. The Abandonment Petition obtained 2,010 qualified elector signatures that were

certified by the Johnson County Election Commissioner, exceeding the required 1,945 qualified elector signatures.

The Petition mimics the language of the Adoption Petition by using the statutory language provided in K.S.A. 12-1039(c). Similarly, the “yes” box is pre-checked. In alignment with *Peterjohn*, the Court finds that this technical deficiency should not prevent the question from being put forth on the ballot as it substantially complies to statute and is consistent with *City of Wichita v. Peterjohn*, 62 Kan. App. 2d 750 (2022)

WHEREFORE the above reasons, the Rezoning Petition and Adoption Petition are not eligible to be submitted for a vote to the electors and the Abandonment Petition substantially complies with statute and is eligible to be submitted for vote to the electors.

IT IS SO ORDERED.

9/15/23

/s/ Rhonda K. Mason
RHONDA K. MASON
District Court Judge, Div. 4

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60-258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e-mail addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served and file a certificate of service for any additional service made.

/s/ Rhonda K. Mason