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Question Submitted by: The Honorable Skye McNeil, State Representative, District 29

2012 OK AG 20

Decided: 12/12/2012

Oklahoma Attorney General Opinions

Cite as: 2012 OK AG 20, __ __

¶0 This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

- 1. Do all trustees of a town with a statutory town board of trustees form of government have equal authority to consult on legal matters pertaining to town business with the town attorney?**
- 2. If the answer to question 1 is "yes," does the majority of the town board have the authority to limit, by vote, which board members may consult with the town attorney on town business?**
- 3. Does the mayor of a town with a statutory town board of trustees form of government, absent an ordinance granting such authority, have the authority to conduct town business such as entering into contracts, signing and writing letters that imply the town's position on negotiations, and conducting any other town business, other than the ceremonial functions as described in 11 O.S.2011, § 12-205, without consent of a majority vote of the town's trustees?**
- 4. Is the town prosecutor required to be present during all sessions of court in a town with a statutory town board of trustees form of government that has a municipal court not of record?**

Introduction

¶1 Article XVIII, Section 1 of the Oklahoma Constitution authorizes the Legislature to "provide for the incorporation and organization of cities and towns and the classification of same in proportion to population, subject to the provisions of [Article XVIII]." *Id.* Pursuant to this constitutional grant of authority, the Legislature has enacted statutes providing for a number of forms of municipal government.

¶2 Your questions involve the authority granted by the Legislature to the trustees of a town board of trustees under a statutory town board of trustees form of municipal government. Title 11 O.S.2011, §§ 12-101 through 12-114 govern this form of municipal government and establish the town board of trustees as the governing body. *Id.* § 12-102.

¶3 We answer your questions applying the basic law applicable to municipalities as expressed by the Oklahoma Supreme Court in *Development Industries, Inc. v. City of Norman*, 412 P.2d 953, 956 (Okla. 1966), that "[a] municipal corporation possesses and can exercise only those powers granted in express words, those necessarily or fairly implied or incidental to the powers expressly granted, and those essential to the declared objects and purposes of the corporation."

Authority of Trustees of a Town Board of Trustees To Confer with the Town Attorney

¶4 You first ask whether all trustees of a town board of trustees have equal authority to consult on legal matters pertaining to town business with the town attorney. To answer your first question, we look to the statutes governing the statutory town board of trustees form of government set forth at 11 O.S.2011, §§ 12-101 through 12-114.

¶5 Under Section 12-102, a town board of trustees shall consist of either three or five trustees depending upon the will of the town's voters expressed in an election held to vote upon the question of whether the town board will consist of three or five trustees. Section 12-106 provides in pertinent part, that the "**powers of a statutory town board of trustees town**, including the determination of matters of policy, **shall be vested in the board of trustees.**" *Id.* (emphasis added). Those powers so vested in the board include, among others, the power to "[a]ppoint and remove, and confirm appointments of, designated town officers and employees as provided by law or ordinance[.]" *Id.* § 12-106(1). Those powers also include the power to "[c]reate, change and abolish offices, departments or agencies, other than those created by law; assign additional functions and duties to offices, departments and agencies established by [11 O.S.2011, §§ 12-101 - 12-114]; and define the duties, powers and privileges of all officers which are not defined by these statutes[.]" *Id.* § 12-106(6). These statutes demonstrate that the town board of trustees is the governing body of the town.

¶6 The provisions governing the statutory town board of trustee form of government are silent as to any relationship or communications between a statutory town board of trustees and its attorney. See 11 O.S.2011, §§ 12-101 - 12-114.¹ However, it follows from the statutes that the members of the town's statutory board of trustees as co-equals in the powers, rights, privileges and duties of a trustee are each co-equal in the right to consult on legal matters involving town business with the town's attorney on an equal basis. *Id.* § 12-106. We conclude, therefore, that all trustees of a town board of trustees form of government have equal right to consult with the town's attorney.

Authority of a Majority of the Trustees of a Town Board of Trustees to Determine Which Trustees May Consult with the Town Attorney

¶7 Because the answer to your first question was in the affirmative, we now determine, as you ask in your second question, whether a majority of the town board of trustees may vote to limit which trustees have the authority to consult with the town attorney on legal matters related to town business. The legal authority for the answer to your first question, 11 O.S.2011, §§ 12-101 through 12-114, also guides our answer to your second question. These statutes provide no authority for a majority of the town board of trustees to vote to limit which trustees of their co-equal co-trustees have the authority to consult with the town attorney on the town's legal matters. *Id.* § 12-106.

¶8 Title 11 O.S.2011, § 12-106 provides, in pertinent part, however, that the "powers of a statutory town board of trustees town, **including the determination of matters of policy, shall be vested in the board of trustees.**" *Id.* (emphasis added). Pursuant to this power, a town board of trustees, through a vote of a majority of the trustees on the town board, may adopt a uniform, non-discriminatory policy to limit the town's expenditures on services, including, but not limited to, legal services afforded by the town attorney. Such a policy must recognize the co-equal authority of all members of the board of trustees. Other than through such a policy, the board of trustees may not limit individual member's access to the town attorney.

Authority of a Mayor of a Town with a Town Board of Trustees

¶9 In your third question you ask whether the mayor of a town with a statutory town board of trustees form of government has the power to conduct town business other than the ceremonial powers described in 11 O.S.2011, § 12-105, without the consent of a majority by vote of the town's trustees. In other words, does the mayor have the power to conduct town

business without a vote of the town board voting authorizing the mayor to do so?

¶10 Title 11 O.S.2011, § 12-104 provides, among other things, that the board of trustees shall elect from its members a mayor. Section 12-105 lists the powers, duties and functions of the mayor to include presiding at board meetings, certifying the correct enrollment of all ordinances and resolutions passed by the board, serving as head of the town government for ceremonial purposes and such other powers, duties and functions as may be prescribed by law or ordinance. In addition to possessing those listed duties, "[t]he mayor shall have all the powers, rights, privileges, duties and responsibilities of a trustee, including the right to vote on questions." *Id.*

¶11 An "ordinance" as referenced in Section 12-105 is defined as "a formal legislative act of a municipal governing body which has the force and effect of a continuing regulation and a permanent rule of conduct or government for the municipality[.]" 11 O.S.2011, § 1-102(7). Thus, the trustees of a statutory town board of trustees may prescribe certain powers, duties and functions to the mayor by ordinance. *See id.*² We conclude, that in the absence of an ordinance granting certain powers, duties and functions to the mayor of a town with a statutory town board of trustees, a mayor has no powers, duties and functions prescribed by law beyond those listed in Section 12-105 of the Municipal Code.

Prosecutor's Presence for Each Session of Municipal Court

¶12 Your fourth question relates to a municipal court not of record and inquires if a prosecutor must be present during all sessions of the municipal court. Municipal courts of incorporated towns under Article VII, Section 1 of the Oklahoma Constitution, are "limited in jurisdiction to criminal and traffic proceedings arising out of infractions of the provisions of ordinances of cities and towns or of duly adopted regulations authorized by such ordinances." *Id.* Municipal courts not of record are governed by 11 O.S.2011, §§ 27-101 through 27-132. Section 27-101 provides in pertinent part that "[a] municipality may create a municipal court, as provided in this article, which shall be a court not of record. This court may be created in addition to a municipal criminal court of record." ³

¶13 You ask whether a town prosecutor is required to be present during all sessions of the municipal court. Title 11 O.S.2011, § 27-108 provides as follows:

The ***municipal attorney*** of each municipality where a municipal court is established ***may be the prosecutor of the municipal court. The prosecutor shall have full power to prosecute for the violations of any ordinance of the municipality in the municipal court*** and shall have the power to prosecute and resist appeals and proceedings in error and review from the municipal court.

Id. (emphasis added). This statute establishes: (1) a municipal attorney may also serve as the municipality's prosecutor, or the municipality may have both a municipal attorney and a separate attorney who serve as the municipality's prosecutor; (2) the prosecutor is empowered to prosecute violations of municipal ordinances in the municipal court; and (3) the prosecutor may also "prosecute and resist appeals and proceedings in error and review from the municipal court." *Id.*⁴

¶14 Under 11 O.S.2011, § 27-119, two types of trials are conducted in municipal court. The first type of trial authorized in Section 27-119 is a jury trial that applies in all municipal prosecutions for which the municipality "seeks imposition of a fine of more than Five Hundred Dollars (\$500.00), excluding court costs, or imprisonment, or both such fine and imprisonment." *Id.* The second type of trial authorized in Section 27-119 is for "prosecutions for all other offenses, or in cases wherein a jury trial is waived by the defendant and the municipality." *Id.* These trials shall be to the court. *Id.*

¶15 Whether the town prosecutor is required to be present when court is in session requires an analysis of the function to be performed. For example, while Section 27-119 does not expressly state that the prosecutor must be present during either jury trials or judge trials, the prosecutor's presence is implied in order for the prosecutor to present and respond to pre-trial and trial motions before the court and to present evidence and testimony on behalf of the municipality in jury trials or judge trials. *See id.*

¶16 A prosecutor is not required to be present for arraignments, however, as Section 27-116 provides that either the judge *or* the prosecuting attorney shall, among other things, read the complaint to the defendant and ask the defendant how he pleads to an alleged offense. The provisions of Sections 27-101 through 27-132 thus recognize that certain functions are to be performed by the prosecutor in connection with various proceedings in municipal court. To the extent that such prosecutorial functions are required to be performed in any given court session, the prosecutor's presence is required under Sections 27-101 through 27-132. If there is no prosecutorial function to be performed, the prosecutor's presence in municipal court is not required under Sections 27-101 through 27-132.

¶17 It is, therefore, the official Opinion of the Attorney General that:

- 1. Title 11 O.S.2011, § 12-106 provides, in pertinent part, that the "powers of a statutory town board of trustees town, including the determination of matters of policy, shall be vested in the board of trustees." *Id.* Accordingly, all trustees of a statutory town board of trustees have equal authority to consult with the town attorney on legal matters pertaining to town business.**
- 2. All trustees of a town board of trustees share co-equal authority and there is no authority in 11 O.S.2011, §§ 12-101 through 12-114, for a majority of the town board of trustees to vote to limit which trustee or trustees may consult with the town attorney on the town's legal matters. However, a statutory town board of trustees may, as a matter of policy pursuant to their power to determine matters of policy in 11 O.S.2011, § 12-106, adopt a uniform, non-discriminatory procedure to limit the town's expenditures for services, including but not limited to, legal services afforded by the town's attorney, through a majority vote of the town's trustees. Such a policy must recognize the co-equal authority of the trustees.**
- 3. Title 11 O.S.2011, § 12-105 lists the powers, duties and functions of the mayor to include presiding at board meetings, certifying the correct enrollment of all ordinances and resolutions passed by the board, serving as head of the town government for ceremonial purposes and such other powers, duties and functions as may be prescribed by law or ordinance. In addition to possessing those listed duties, the mayor has all of the powers, rights, privileges, duties and responsibilities of a trustee, including the right to vote on questions. *Id.* In the absence of a law or ordinance granting additional powers, duties or functions to the mayor, a mayor has no powers, duties and functions beyond those listed in 11 O.S.2011, § 12-105.**
- 4. There is no requirement that a prosecutor be present during all sessions of municipal court in a court not of record. To the extent 11 O.S.2011, §§ 27-101 through 27-132 require that certain functions be performed by the prosecutor, such as the presentation of evidence, the prosecutor's presence is required. If there is no prosecutorial function to be performed, the prosecutor's presence in municipal court is not required. *Id.***

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FOOTNOTES

¹ The Oklahoma Open Meeting Act, 25 O.S.2011, §§ 301 - 314, recognizes a means for a public body to engage in communications between the public body and its attorney concerning a pending investigation, claim or action. See *id.* § 307(B)(4).

² This authorization is limited by 11 O.S.2011, § 14-101 to "ordinances, rules and regulations not inconsistent with the Constitution and laws of Oklahoma for any purpose mentioned in Title 11 of the Oklahoma Statutes or for carrying out their municipal functions." *Id.*

³ The sentence quoted above authorizing criminal courts of record applies to cities only and to only those cities having a population of more than "sixty-five thousand (65,000) inhabitants, as determined by the latest federal census." 11 O.S.2011, § 28-101(A).

⁴ Such appeals are taken by being filed in the district court under 11 O.S.2011, § 27-129(A).

Citationizer[®] Summary of Documents Citing This Document

Cite Name Level

None Found.

Citationizer: Table of Authority

Cite Name

Level

Oklahoma Supreme Court Cases

Cite	Name	Level
<u>1966 OK 59, 412 P.2d 953,</u>	<u>DEVELOPMENT INDUSTRIES, INC. v. CITY OF NORMAN</u>	Cited

Title 11. Cities and Towns

Cite	Name	Level
<u>11 O.S. 1-102,</u>	<u>Definitions</u>	Cited
<u>11 O.S. 12-101,</u>	<u>Statutory Town Board of Trustees Form of Government</u>	Discussed at Length
<u>11 O.S. 12-104,</u>	<u>Election of Mayor</u>	Cited
<u>11 O.S. 12-105,</u>	<u>Duties of the Mayor - Acting Mayor</u>	Discussed at Length
<u>11 O.S. 12-106,</u>	<u>Powers Vested in Board of Trustees - Designated powers</u>	Discussed at Length
<u>11 O.S. 14-101,</u>	<u>Municipal Ordinances - Authority</u>	Cited
<u>11 O.S. 27-101,</u>	<u>Creation of Municipal Court Not of Record</u>	Discussed
<u>11 O.S. 27-108,</u>	<u>Municipal Attorney as Prosecuting Officer</u>	Cited
<u>11 O.S. 27-119,</u>	<u>Jury Trials - Qualifications of Jurors</u>	Cited
<u>11 O.S. 27-129,</u>	<u>Appeals</u>	Cited

<u>11 O.S. 28-101,</u>	<u>Municipal Criminal Courts of Record - Cities Over 65,000</u>	Cited
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Title 25. Definitions and General Provisions

Cite	Name	Level
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<u>25 O.S. 301,</u>	<u>Short Title</u>	Cited
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