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April XX, 2018

Via U.S. Mail and Email

Benjamin MacConnell  
Lead Organizer  
Justice Matters, Inc.  
820 New York Street  
Lawrence, Kansas 66044  
ben@thedartcenter.org

Re: Petition to Support Mental Health Services in Douglas County

Dear Mr. MacConnell:

I serve as the County Counselor for Douglas County, Kansas. On Monday, April 9, 2018, at approximately 2:00 p.m., you hand-delivered a document entitled: "Petition to Support Mental Health Services in Douglas County" (herein, "Petition"). It is my obligation as the County Counselor to review this Petition pursuant to K.S.A. 25-3601.

**Legal Standards Relevant to K.S.A. 25-3601 Review**

Pursuant to K.S.A. 25-3601(a), the County Counselor must furnish a written advisory opinion as to the legality of the form of the question contained on the Petition. This opinion must be furnished within 5 business days following submission of the Petition.

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As a preliminary matter, please note that I cannot offer legal advice other than my opinion, as Douglas County Counselor, as to whether or not the Petition is in an appropriate legal form. My opinion is only an advisory opinion. This means that whatever conclusions I reach, the Petition and/or the question contained in the Petition may nevertheless be challenged by opponents of the Petition. If I conclude the Petition is in proper legal form, this creates a rebuttable presumption that the form of the question in the Petition is legal. However, my opinion will not be binding on a court considering a challenge to the legality of the Petition or the question stated in the Petition. Therefore, I encourage you to seek independent legal advice on the legalities of the Petition and the petition process.

The Kansas Attorney General has opined that review of a petition conducted pursuant to K.S.A. 25-3601 “should be directed toward the form, rather than the content, of the question the petitioners seek to bring to an election.” Kansas A.G. Op. 1996-78. The opinion should address “whether the question petitioners seek to bring to an election is in the form of a question, appearing as it should upon the ballot, and includes the language set forth in K.S.A. 25-620.” *Id.* Notwithstanding this review, the entity to which the petition is directed—here, the Douglas County Commission—“retains the authority to determine whether the question set forth in the petition . . . is misleading or ambiguous.” *Id.* In other words, my review as County Counselor is directed to the form of the question, whereas the County Commission has authority to determine if the “question set forth in the submitted petition is misleading, improper, vague, or ambiguous.” *Id.*

With that understanding, I have reached the following conclusions regarding the legality of the form of the question contained on the Petition.

### **The Legality of the Form of the Question Contained on the Petition**

The first sentence of the question (following the preamble) states: “Should the following be adopted?” This sentence complies with K.S.A. 25-620 and therefore is proper.

The second sentence of the question states as follows: “Shall Douglas County, Kansas (the ‘County’), be authorized to increase county property tax levy [sic] at the amount of 3.5 mills for the exclusive purpose of constructing or refurbishing and equipping a building to serve as a mental health crisis center, and paying the operating and support service expenses thereof.” This statement is not punctuated with a question mark; nevertheless, I find that it is substantially in the form of a question and therefore compliant in that respect. Please note, however, that any question must be formatted in accordance with the requirements of K.S.A. 25-620, and K.S.A. 25-3601, as discussed in greater detail below.

I turn now to the third sentence in the question portion of the Petition. This sentence states as follows: “The collection of such property taxes will commence on January 1, 2019 and following outcome analysis will be presented for renewal to Douglas County voters during the

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2028 general election, all in accordance with the provisions of K.S.A. 19-117, et seq., and K.S.A. 25-3601, et seq.” This aspect of the question is not in proper legal form, for several reasons.

First, the sentence is not stated in the form of a question. This renders it improper.

Second, the preamble to the question states that, if successful, the Petition will present the question on the November 6, 2018 general election ballot. The third sentence of the question then states that the collection of the property taxes generated by the measure will commence on January 1, 2019, but this is not legally possible. K.S.A. 79-1801 provides that a county must certify its tax levy “on or before August 25.” Therefore, if in fact the measure is approved at the November 6, 2018 general election, the earliest the levy could become effective is January 1, 2020.

Third, this sentence appears to call for a future initiative or referendum election without specifying the particular question to be submitted at that election, in violation of K.S.A. 25-3601(a) and K.S.A. 25-620. Further, any election called pursuant to K.S.A. 19-117 must take place within 90 days after the filing of a petition demanding such election. *See* K.S.A. 19-117(b). It would thus be unlawful to hold an election in 2028 based upon the current Petition.

Fourth, it appears that you intend for the tax created by the Petition to be discontinued if not “renewed” by the voters in 2028. If, indeed, that is your intent, the provision is not legally proper. The only way to eliminate a tax created pursuant to K.S.A. 19-117(c) is through amendment or repeal by the board of county commissioners. *See* K.S.A. 19-117(d) (“Any county tax or other revenue measure adopted under the provisions of this section shall continue in effect until amended or repealed by a resolution of the board of county commissioners which has been adopted under the provisions of this section.”).

Finally, please take note that any question that appears on the Petition must be formatted as specified by K.S.A. 25-3602(b)(1). Pursuant to that statute, a petition must “State the question which petitioners seek to bring to an election in the form of a question *as it should appear on the ballot* in accordance with the requirements of K.S.A. 25-620, and K.S.A. 25-3601, and amendments thereto” (emphasis added). K.S.A. 25-620, in turn, prescribes the form in which the question must be presented on the ballot. In particular, the statute provides: “Opposite and after each proposition and question shall be printed two squares, one above the other. To the right of the upper one of the squares shall be printed the word ‘Yes,’ and to the right of the lower one of the squares shall be printed the word ‘No.’” In this sense, the Petition does not comply with K.S.A. 25-3601 and K.S.A. 25-620.

Turning now to the signature blocks beneath the question portion of the Petition, you should include a space for each elector to print her or his name, in addition to signing. This is necessary so that the County Clerk can verify the identity of the person signing the Petition and confirm that the person is a registered voter in the County. You also need to include a space for each person signing to indicate the date that person signed the Petition. K.S.A. 25-3602(b)(3).

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You will also need a notary blank showing the circulator has signed the petition upon oath or affirmation, affirming the statement of the circulator, which you have properly included in your Petition. The following is sufficient:

“Signed and sworn (or affirmed) before me this \_\_\_ day of \_\_\_\_\_,  
2018, by \_\_\_\_\_, the circulator of this Petition.

\_\_\_\_\_  
Notary Public

My appointment expires: \_\_\_\_\_

This concludes my written advisory opinion on the legality of the form of the question presented on the Petition. Please let me know if you have any questions or disagreements concerning the foregoing comments. I would be happy to consider any legal authority or legal argument you would care to present. In addition, if you would like for me to review a revised Petition, you may forward it to me at your convenience.

### **Additional Considerations**

At this point, I could simply close this letter and leave it to you and your legal counsel to evaluate any remaining issues pertaining to the propriety of the Petition or the petition process. However, because we have identified some other potential issues that could affect the viability of your Petition, we feel it is only fair to bring those to your attention now, before you go to the trouble of collecting signatures and potentially submitting the completed Petition to the County for presentation to the voters. Of course, it is up to you to determine the question that will be stated in the Petition and, if the requisite number of signatures is obtained, submitted to the County. But the County would prefer to raise these questions and concerns at this time, rather than wait until you have completed your efforts, only to find that the Petition cannot be submitted to the electorate on the grounds that it is “misleading, improper, vague, or ambiguous” or on account of some other legal defect.

With that in mind, we offer the following questions and comments for your consideration in moving forward with your Petition. You should, of course, consult with your own legal counsel and make your own independent determination regarding each of these matters.

### **Date of Election**

The preamble to the question portion of the Petition states as follows: “We, the undersigned registered voters in Douglas County request that the following question be placed on the ballot for voter consideration at the November 6, 2018 election: . . .” Please note that the timing of the election associated with your Petition will be controlled by provisions of state and federal election law and the timing of future events which, by definition, have not yet occurred.

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Therefore, while it is certainly possible that the election concerning this Petition could take place on November 6, 2018, that is not a certainty. I have consulted with the Douglas County Clerk, who advises that, pursuant to K.S.A. 19-117(b) and other applicable state and federal law, if you wish to have the question presented on the November 6 ballot, you would need to submit the completed Petition with the requisite number of signatures to him sometime between August 8, 2018 and August 24, 2018. This time period is derived from various requirements of state and federal election law, as well as some logistical matters, including securing a resolution to move forward with the election, generating the ballot, etc. The County Clerk can provide more detail about these timing considerations, if you like. The point is to make sure you have this timing in mind so there is at least a possibility of getting the question on the ballot at the time of the November 6, 2018, general election. And, I would add, to the extent the Petition suggests that the question will, in fact—no matter what—be placed on the ballot for the November 6 general election, it could be considered misleading.

### **Effect of Tax Lid Law**

Your question proposes that the County “be authorized to increase county property tax levy [sic] at the amount of 3.5 mills.” From the way you have phrased the question, it is not entirely clear how this tax increase, if implemented, would relate to the tax lid law, K.S.A. 79-2925c. This law places limitations on a County’s ability to increase property taxes. It also prescribes certain procedures that the County must follow before any tax increase may be implemented, including in some instances a vote of the electorate. On this basis, the question is ambiguous. It could be considered confusing and misleading, as well.

### **Use of Property Tax Revenues for an “Exclusive Purpose”**

Your question ostensibly would require the County to use the revenue generated by the 3.5 mill increase “for the *exclusive purpose* of constructing or refurbishing and furnishing and equipping a building to serve as a mental health crisis center, and paying the operating and support service expenses thereof” (emphasis added). However, the authorizing statute for your Petition, K.S.A. 19-117, does not provide that tax revenues generated by petition and subsequent popular vote can be pledged or restricted to a particular purpose. By contrast, K.S.A. 12-187(b)(30) specifically allows revenues derived from an increase to the sales tax in Douglas County to be pledged for specified purposes.

Moreover, there are numerous statutes which regulate the County’s budgeting process, as well as how taxes can be levied, collected, accounted for, and spent. We have not located any authority that would authorize a ballot initiative under K.S.A. 19-117(c) to pledge the property tax revenues for all of the purposes enumerated in your Petition. It is possible that K.S.A. 79-1945 authorizes a County to create a special fund for “mental health programs,” but we are not aware of any statute providing that a petition brought pursuant to K.S.A. 19-117 can require the County to create such a fund. In addition, while K.S.A. 79-1945 could potentially be read to authorize a fund for “mental health programs,” it says nothing about a special fund for construction or other acquisition of buildings or facilities, nor does it expressly authorize a fund

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to acquire the items necessary to equip those facilities. Thus, to the extent the question would purport to limit the use of the funds generated by the levy in a manner inconsistent with state law, the question could be considered illegal, as well as misleading and confusing.

**Effect of Cash Basis Law and Impact on Commencement Date for Development of Mental Health Crisis Center and Provision of Services**

Finally, the proposition as stated could be read to imply that because these tax revenues will be collected starting in January 2019 (which presents other issues, as discussed above), a crisis center will be constructed or otherwise established and placed into operation in 2019. As you know, your Petition does not provide for any debt financing. Of course, you are not required to provide for debt financing in your Petition. The point is that, without debt financing, the cash basis law will require that all funds must be collected before they can be spent. This means that before the County can construct or acquire a facility for the crisis center, sufficient funds will have to be collected and set aside for that purpose. The same is true with respect to furnishing and otherwise equipping the center to perform the enumerated purposes. This may be consistent with your intent; we simply wish to point out that the proposition is potentially ambiguous or misleading to the extent it suggests or implies that the enumerated services will commence in 2019 or on any other particular date. And, as noted, the tax levy could not go into effect until January 1, 2020, and thus the earliest those revenues could be put to use would be after that time and only as they are collected.

**Conclusion**

As noted above, some aspects of the form of the question contained on the Petition are legally proper, while others are not.

In regard to the additional considerations noted above, these are issues that have come to our attention at this point in time. As noted, our purpose in raising them now is to be transparent about these potential issues, so they can be addressed in advance, to the extent possible and to the extent you wish to do so. You may elect to revise your Petition in light of these comments, or perhaps you will choose not to do so. That is entirely up to you. Whatever you decide, the County will process your Petition according to applicable statutes and other governing law. Ultimately, you are responsible for submitting a legally valid petition, and therefore we reiterate that you should consult your own legal counsel and make independent determinations regarding these and any other matters relevant to your Petition and the petition process generally.

In conclusion, please let me know if you have any questions or disagreements regarding the contents of this letter. If you would like for me to review a revised Petition, you may forward it to me at your convenience.

Very Truly Yours,

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Douglas County Counselor