Municipal officer--holding over

Number: INFORMAL

Date: June 11, 2010

Mr. Clifford M. Ables, III
202 West Main Street
Suite 103
Wauchula, Florida 33873

Dear Mr. Ables:

As City Attorney for the City of Wauchula, Florida, and based on the facts set out below, you have asked for assistance in resolving substantially the following questions:

1. Whether a city commissioner for the City of Wauchula, serving beyond the expiration of his term of office, is required to reimburse the city for salary and benefits received by him while he was "holding over" as a city commissioner?

2. Whether the City of Wauchula is required to re-examine votes cast by a city commissioner for the City of Wauchula, when that commissioner has continued to serve beyond the expiration of his term of office, to determine the validity of those votes?

3. Since no candidate qualified or was elected for that city commission seat, can the city commission now declare a vacancy and appoint the "hold-over" city commissioner to that commission seat, and if so, should that appointment be *nunc pro tunc* to the date the election for the commission seat should have been held?

4. Whether the "hold-over" city commissioner is entitled to continue to serve as a "de facto" city commissioner until he or his successor is duly qualified for the remainder of the term of the commission seat following the general election in 2010?

Because this office is not authorized to resolve complex questions of law and fact and our authority is limited to interpreting state law, not local legislation,[1] my response to your questions will be of a general nature. I would also suggest that, since this matter involves the significant matter of voter rights and the potential for challenges to official actions taken over a number of years by the city commission, a definitive judicial resolution may be preferable to an advisory opinion from this office. However, in an effort to provide you with some direction, I offer the following informal comments.

You have provided the following statement of facts:

"During the November 2004 General Election John Baxter was elected City of Wauchula District 7 Commissioner. His term was to expire in 2008; however, he resigned the District 7 Commission seat on June 13, 2005. On August 1, 2005, Commissioner Jerry Conerly was appointed to fill the District 7 Commission seat. During the next regularly scheduled election,

November 7, 2006, Commissioner Conerly was elected to serve the remainder of the District 7 Commission seat term.

Commissioner Conerly should have been required to seek re-election when the District 7 Commission term expired in 2008; however, due to an oversight by the City of Wauchula Clerk, no election was declared for the District 7 Commission seat in 2008. Commissioner Conerly has remained the District 7 Commissioner without interruption since his appointment on August 1, 2005, and subsequent election on November 7, 2006."[2]

My research indicates that the Code of Ordinances, City of Wauchula, Florida, includes the following language:

"Elected or appointed officers shall continue to hold their offices and discharge the duties hereof until their successors are elected, or appointed as provided for in this Amended Charter."[3]

Further, the charter has contained, since 2004, a provision which states that "[a]t all general elections *after Fall 2004*, each city commission member shall be elected to serve for four (4) year terms."[4] (e.s.)

Thus, this office would suggest that an election held in 2006 for a city commission seat may be controlled by the four-year term of office described in the ordinance above, depending on the original term of office of the District 7 commissioner. If this is the case, the term of Commissioner Conerly would run until the general election in 2010. This would obviate the necessity for considering whether Commissioner Conerly is serving as a *de facto* commissioner; whether repayment of salary and benefits is necessary; whether any votes cast by Commissioner Conerly may be subject to challenge; and the term of succeeding commissioners.

Because this office cannot weigh the facts of this case and apply the ordinances of the City of Wauchula to resolve this matter and because of the substantial governmental concerns implicated, it is strongly suggested that the city seek a judicial resolution of these issues.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH:tsh

---

[1] *See* Department of Legal Affairs Statement Concerning Attorney General Opinions, and s. 16.01(3), Fla. Stat.

[2] Letter from Clifford M. Ables, III, dated May 18, 2010.

[3] *See* Ord. No. 2004-06, Code of Ordinances, City of Wauchula, Florida, 6-14-04.

[4] *Id.*