Filling vacancy in county commission seat

Number: INFORMAL

Date: December 13, 2006

Mr. Ronald A. Labasky
Attorney for Clay County Supervisor of Elections
Post Office Box 1833
Tallahassee, Florida 32302-1833

Dear Mr. Labasky:

This is in response to your request on behalf of The Honorable Barbara Kirkman, Clay County Supervisor of Elections, for assistance in determining whether a district-wide or county-wide election must be held to fill a vacancy in a district seat before the expiration of the seat's current term, when the incumbent was elected by county-wide voting.

You state that effective January 1, 2005, section 2.2(A) of the Clay County Charter provides for the election of one county commissioner from each of the five county districts and that each commissioner will be elected by vote of the electors in the commissioner's own district. Prior to this amendment, the charter provided for one county commissioner from each district with the commissioners elected by county-wide vote.[1] You indicate that all members of the current county commission were elected by county-wide vote. Due to the recent suspension of a sitting commissioner, an election to fill the seat may be necessary for the unexpired term.[2] The question has arisen whether a county-wide vote, as was had for the suspended commissioner, is required for candidates seeking to fill the vacancy.

Section 2.2(F.) of the Clay County Charter provides that "[a] vacancy in the office of County Commissioner shall be defined and filled as provided by general law." Section 114.01(1), Florida Statutes, in pertinent part, provides that a vacancy in office shall occur "[u]pon removal of the officer from office." At this time, you have not indicated that the commissioner has been removed and any comment upon the requirements for an election to fill such a vacancy would be speculative.

Section 5(a), Article VI, of the State Constitution states that a general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective state and county officer whose term expires before the next general election and "except as provided herein, to fill each vacancy in elective office for the unexpired portion of the term." Alternatively, the Governor, unless otherwise provided in the constitution, "shall fill by appointment any vacancy in state or county office for the remainder of the term of an appointive office, and for the remainder of the term of an elective office if less than twenty-eight months, otherwise until the first Tuesday after the first Monday following the next general election."[3]

Section 124.01, Florida Statutes, generally requires that there be five county commissioners' districts in each county, with one commissioner from each district, "who shall be elected by the

qualified electors of the county, as provided in s. 1(e), Art. VIII of the State Constitution."[4] Clay County, however, has chosen the alternate procedure for the election of county commissioners by nomination and election only by the qualified electors who reside in the same county commission district as the commissioner through the amendment of the county's charter by referendum approval pursuant to section 124.011(3), Florida Statutes.[5]

It has been recognized that an amendment modifying the qualifications or duties of an officeholder should unambiguously express its intention to be applied to an existing officeholder.[6] There is nothing in the amendment of the Clay County Charter indicating an intent to affect existing officeholders. Moreover, I would note that section 124.011(11), Florida Statutes, states that "[n]o county commissioner elected prior to or at the election which approves any revision as permitted in this section shall be affected in his or her term of office." This language supports the conclusion that an amendment to the manner of electing county commissioners would not apply during the terms of existing commissioners who, as here, were elected on a county-wide basis at the election approving the charter amendment.

The policy of this state historically has been to interpret the constitution, absent a clear provision otherwise, in favor of retaining the right of the people to select officials of their choice and that vacancies in elective office be filled by the people at the earliest practical date.[7] In keeping with this policy and absent a clear intent otherwise, it would appear consistent to allow the same voters who elected the existing commissioner, i.e., all voters in the county, to choose the commissioner who will serve the remainder of the term.

I trust that these informal comments will be of assistance should the vacancy on the Clay County Commission be filled by election.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] The version of subsection 2.2:A in effect from January 1, 2001, through December 31, 2004, provided:

"A. The County Commission. The governing body of the County shall be a Board of County Commissioners composed of five (5) members serving staggered terms of four (4) years. There shall be pursuant to general law one County Commissioner for each of the five (5) County Commission election districts and each County Commissioner shall be elected on a countywide basis by the electors of the County. Each County Commissioner during the term of office shall reside in the district from which such Commissioner ran for office, provided that any Commissioner who is removed from a district due to redistricting may continue to serve during the balance of the term of office. No person elected for two consecutive full terms as a member of the Board of County Commissioners shall be eligible for election as a member of the Board of

County Commissioners in the next succeeding term. Only Board of County Commission terms commencing on or after the second Tuesday following the November, 2000, general election shall be considered terms for purposes of determining consecutive terms under this Section."

[2] This office has been advised that the qualifying period for the 2006 election for county commissioners runs from noon, July 17th through noon, July 21, 2006. See Florida Department of State, Division of Elections website "http://election.dos.state.fl.us" providing the 2006 Election Qualifying Periods.

[3] Section 1(f), Art. IV, State Const. *See also* s. 114.04, Florida Statutes, stating:

"Except as otherwise provided in the State Constitution, the Governor shall fill by appointment any vacancy in a state, district, or county office, other than a member or officer of the Legislature, for the remainder of the term of an appointive officer and for the remainder of the term of an elective office, if there is less than 28 months remaining in the term; otherwise, until the first Tuesday after the first Monday following the next general election. . . ."

[4] Section 1(e), Art. VIII, State Const., states:

"COMMISSIONERS. Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected as provided by law."

[5] Section 124.011(3), Fla. Stat., provides:

"A proposition calling for single-member representation within the county commission districts of the county shall be submitted to the electors of the county at any primary, general, or otherwise-called special election, in either manner following:
(a) The board of county commissioners may adopt a formal resolution directing an election to be held to place the proposition on the ballot.
(b) The electors of the county may petition to have the proposition placed on the ballot by presenting to the board of county commissioners petitions signed by not less than 10 percent of the duly qualified electors of the county. The number of signatures required shall be determined by the supervisor of elections according to the number of registered electors in the county as of the date the petitioning electors register as a political committee pursuant to subsection (4)."

[6] *See* Op. Att'y Gen. Fla. 03-47 (2003) (duties of mayor may be changed pursuant to a validly enacted charter amendment that, if adopted, would become effective during the mayor's current term; in order to apply an amendment modifying a term or qualification for office to existing officeholders resulting in curtailment of the sitting officeholder's term of office, amendment should unambiguously express that intention) and 04-63 (2004) (Legislature's adoption of amendment modifying the term or qualifications of statutory office should unambiguously express intention to apply to existing officeholders).

[7] *See Spector v. Glisson*, 305 So. 2d 777, 781 (Fla. 1974), citing *Weeks v. Gamble*, 13 Fla. 9 (1870); *Klein v. Schulz*, 87 So. 2d 406 (Fla.1956); *State ex rel. Ayres v. Gray*, 69 So. 2d 187 (Fla.1953); *State ex rel. West v. Gray*, 70 So. 2d 471 (Fla.1954); *Ervin v. Collins*, 85 So. 2d 852 (Fla.1956).