DE 80-32 - September 8, 1980

Referendum Election -Error In Legislative Act

To: Honorable David "Spike" McDonald, Supervisor of Elections, Santa Rosa County Courthouse, Milton, Florida 32570

Prepared by: Division of Elections

This is in response to your request for a formal opinion pursuant to Section 106.23(2), F.S. (1979). Your question can be restated:

> When a special legislative act which calls for a referendum election to create the Midway Fire Protection and Rescue District contains a typographical error as to the maximum amount of mileage that may be levied by the special district, may the referendum election be cancelled or enjoined?

Chapter 80-607, Laws of Florida (1980), (herein, the Act) created a special taxing fire protection and rescue service district in Santa Rosa County. The Act shall take effect only when approved by a majority of qualified electors participating in a referendum held and conducted on the first Tuesday next succeeding the first Monday in November, 1980 in the territory proposed to be included in the district.

> Section 5(2) of the Special Act States:
>
> The rate of taxes shall be fixed by a resolution of the board as provided in this subsection; however, . 1 mill is the maximum amount of mileage that may be levied in any one year. (emphasis added)

The .1 mill cap is a typographical error which will restrict the taxing power of the board of commissioners for the tax district if the referendum is passed.[1]

Section 14(1) of the Act states in pertinent part:

> The Supervisor of Elections of Santa Rosa County shall take appropriate action to call, hold and conduct such referendum, canvas the results, and perform all of the duties, incidents or said office in carrying out the referendum and election requirements of this act. (emphasis added)

Notwithstanding the typographical error in the Act, the Supervisor of Elections in Santa Rosa County has a mandatory duty to hold and conduct the referendum election called for in the Act. The Act vests no discretion in the supervisor or any governing body. The duty to place the referendum on the ballot is purely ministerial. In light of the properly enacted legislation requiring a referendum, the authority appointed to call an election on a proposition has no discretion to refuse to call it. OP. ATTY. GEN.

074-69, (March 4,1975). Similarly, the Secretary of State has no authority to judge the validity of a candidacy or proposition which is properly placed on the ballot. Cf. State ex. Rel. Shevin v. Stone 279 So. 2d 17 (1972). With regard to the Secretary of State's responsibility to administer the Resign to Run law, the Supreme Court stated:

> His (Secretary's) charge under the constitution and statute does not extend to the substance or correctness or enforcement of a sworn compliance with the law - with "matters in pais", as it were. Once the candidate states his compliance, under oath, the Secretary's ministerial determination of eligibility for the office is at an end. Any challenge to the correctness of the candidate's statements of compliance is for appropriate judicial determination upon any challenge properly made, as here. Supra at 22.

While this rationale has not been expressly applied by the Courts to a referendum election, I am of the opinion that the Department of State has no authority to judge the validity of a properly enacted special act which calls for a referendum.

Footnote[1]: A "Mill" refers to one one-thousandth of a United States dollar. A tenth of a mill is therefore one ten thousandth of a dollar.

In extremely rare cases the circuit court may enjoin an election. In the Dulaney v. City of Miami Beach 96 So. 2d 550 (3rd D.C.A. 1957). Third District Court of Appeals said:

> A court of equity will not as a general rule restrain the holding of an election but there are some well-known exceptions to this rule. An election held in violation of law or contrary to the well established legal requirements, or one that would result in substantial injury to any suitor or the public generally, the proper showing be enjoined where there is no other legal remedy. Supra at 552.

In Dulaney, taxpayers sought to enjoin an initiative proposition which, they said, would irrevocably harm and injure property owners. Both the lower court and the appeals court refuse to enjoin the election because:

> There is a vast difference between the question of the legality of the election and the validity of the ordinance that might result. It would be true that an election held to pass an ordinance be useless, but it would not follow that such an election was illegal. An election should not be held if an ordinance proposed was clearly invalid on its face. In the instant case such a certainty does not exist. Supra at 552.

Assuming arguendo that the referendum passes, a taxpayer can bring action to contest the election in the circuit court of the county in which the question was submitted for referendum. Section 102.168 and 102.1685, F.S. (1979). However, this challenge is confirmed to the legality of the election returns not the validity of the special Act.

Based upon the foregoing, I am of the opinion that the Supervisor of Elections and Secretary of State

have no authority to cancel or suspend a referendum election which is required by special law. Any question pertaining to the validity of the referendum is a judicial or legislative question.