

June 2, 2004

The Honorable Karen Krauss
Supervisor of Elections
Sumter County
220 E. McCollum Avenue
Bushnell, Florida 33513

Re: DE 04-06

Section 99.012, Florida Statutes, "Resign to Run;"
and section 106.011(3), Florida Statutes, In-kind
Contributions

Dear Ms. Krauss:

This is in response to your request for an advisory opinion regarding the "Resign to Run" law, and the definition of an in-kind contribution. You are the Supervisor of Elections for Sumter County, and pursuant to section 106.23(2), Florida Statutes, the Division of Elections has authority to issue an opinion to you.

You ask essentially the following questions:

- (1) Would a person that has pre-filed to run for Supervisor of Elections and is currently holding a Community Development District seat, which was elected by landowners, be required to resign from that office pursuant to section 99.012, Florida Statutes, and, if they do not, what are the consequences?
- (2) Is there a definition for "in-kind" contributions stated in the Law? If not, please advise on the definition and examples of in-kind contributions.

The short answer to your first question is yes. A Community Development District board member must resign in order to run for the office of County Supervisor of Elections. Failure to resign as required by section 99.012, Florida Statutes, is a violation of the Election Code and the person violating the statute may be challenged in court by interested parties with legal standing.

The short answer to your second question is yes. Although the Election Code does not provide a line item defining “in-kind” contribution in section 106.011, Florida Statutes, a definition of sorts is included within the definition of “contribution” in section 106.011(3)(a), Florida Statutes. The definition included in the Election Code, and some examples of what constitutes an “in-kind” contribution are included in this opinion.

In response to your first question, I must first clarify that I am assuming that your reference to a person having “pre-filed” to run for Supervisor of Elections refers to section 106.021(1)(a), Florida Statutes, which requires that a candidate appoint a campaign treasurer and designate a primary depository prior to qualifying for office. However, whether the person has complied with that statutory provision is of no consequence to the main question posed: Is a Community Development District (CDD) board member required to resign in order to run for the office of county supervisor of elections?

Section 99.012, Florida Statutes, sets forth the circumstances whereby an appointed or elected officer or subordinate officer with the authority to exercise sovereign power must resign in order to run for a different office. The section imposes the same prohibition regarding qualifying while holding a public office, whether it be a federal, state, district, county or municipal office, if the terms or any part thereof overlap. It is because of this mandate that all officers or subordinate officers are required to resign from the offices currently held prior to qualifying for a different office¹.

A person is considered an “officer” or “subordinate officer” for the purpose of resign-to-run law if he or she is either elected or appointed and has the authority to exercise the sovereign power of the state or municipality by virtue of the office they hold. Therefore, assuming that the term of office for this CDD board member is at least partly concurrent with the county elected position for which he or she is running for office, the question becomes whether a CDD board member has been delegated sovereign power. Pursuant to Chapter 190, Florida Statutes, a CDD board member is charged with the duty to employ and fix the compensation of a district manager, to sue and be sued, to acquire and dispose of real and personal property, to apply for coverage under the state retirement system for the CDD’s employees, to contract for the services of consultants, to borrow money and accept gifts, to apply for grants or loans of money or property from the United States, the State, or a unit of local government, and to adopt administrative rules, etc. Clearly the duties delegated to each CDD constitute a delegation of governmental sovereign power. Thus, a CDD board member is required to resign his or her position prior to qualifying for the office of supervisor of elections if the terms of the two offices overlap.

If the CDD board member fails to comply with the “resign to run” law, any interested party with legal standing may commence proceedings in court and request appropriate remedies. The court will ultimately determine if a violation of section 99.012, Florida Statutes, has occurred, and if so

¹ Additional Constitutional provisions prohibiting dual office holding may also apply. The Office of the Attorney General is tasked with interpretation of the Florida Constitution.

will prescribe a legal remedy such as striking the ineligible candidate's name from the ballot.² As you note in your letter, the remedy established in section 99.012(4)(f), Florida Statutes, is only applicable to state, county, or municipal officeholders who qualify for federal public office without previously resigning as required by the statute.

As to your second question, two references to the term "in-kind" contribution in Chapter 106, Florida Statutes, can be construed as a definition of the term when read together. Section 106.011(3)(a), Florida Statutes, defines the term contribution as:

A gift, subscription, conveyance, deposit, loan, payment, or distribution of money or anything of value, including contributions in-kind having an attributable monetary value in any form, made for the purpose of influencing the results of an election.

The definition of "contribution" specifically excludes services, such as legal and accounting services, provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee. Therefore, an "in-kind" contribution cannot be money, a service or an independent expenditure as defined in section 106.011(5), Florida Statutes, and it cannot be an endorsement of three or more candidates by political committees or political parties.³ Section 106.055, Florida Statutes, states that:

Any person who makes an in-kind contribution shall, at the time of making such contribution, place a value on such contribution, which valuation shall be the fair market value of such contribution.

Pursuant to the sections cited above, an "in-kind" contribution is anything, and in any form, given for the purpose of influencing an election to which a monetary value may be attributed. The term "in-kind" contribution has been further interpreted in several Division of Elections formal opinions. Specifically, formal opinion DE 78-23 states that the concept of an "in-kind" contribution is the law's way to recognize that a person may desire to give something of value to a campaign rather than give money. Some examples of in-kind contributions are:

- food provided at a fundraiser free of charge to the campaign,
- donated tickets for a dinner or to an event,
- airtime for a television or radio advertisement, or for a printed advertisement in a newspaper free of cost,⁴
- free copies of a newsletter published by a third party, including an editorial endorsing the candidate, and distributed by the campaign to voters.⁵

² Section 99.012(6), Florida Statutes. Orange County v. Gillespie, 239 So.2d 132.

³ See also the 2004 Candidate and Campaign Treasurer Handbook published by the Division of Elections.

⁴ See Division of Elections' formal opinions DE 90-38, 90-08, and 88-33.

⁵ Pasquale v. Florida Elections Commission, 759 So.2d 23 (2000). The District Court of Appeal determined that the copies of the newsletter had value and should have been reported as an in-kind contribution. However, a distinction was made whereby although the copies of the newsletter had value, the editorial endorsement included therein was

An issue that is often brought up is whether a person giving something to a campaign with the expectation of payment, and later determining that the campaign will not be charged, constitutes an “in-kind” contribution. It does not. The key to an “in-kind” contribution is that the contribution given must have been provided to the campaign without expectation of payment at the time it was given.

The valuation of an “in-kind” contribution, according to the statute, should be the fair market value of the contribution. As opined in DE 78-23, the date to be used for the valuation of the “in-kind” contribution is the date on which it is the intent of the contributor to irrevocably turn over the benefit and use of the item to the candidate’s campaign.

Lastly, section 106.011(3), Florida Statutes, requires that all contributions be made or received through the duly appointed campaign treasurer. Therefore, as set forth in DE 78-23, prompt valuation and reporting of the “in-kind” contribution to the campaign treasurer by the donor is necessary to comply with the requirement that all contributions be made or received by the campaign treasurer.

SUMMARY

A Community Development District board member must resign in order to run for the office of county supervisor of elections if the terms of the two offices overlap. An “in-kind” contribution is a gift, subscription, conveyance, deposit, loan, payment, or distribution of anything of value, having an attributable monetary value in any form, made for the purpose of influencing the results of an election.

Sincerely,

Edward C. Kast
Director, Division of Elections

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ECK/MTD/ccm