

DE 78-32 - August 11, 1978

**Special Districts; Water And Sewer District; Road And Bridge Tax District, Application Of
Election Code To General Law;
Elector Qualifications; Candidate Qualifications Procedures; Canvassing
ss. 97.021, 99.061, 99.095, 102.141, 153.50, 155.52, 153.53, 336.61, 336.62, F.S. (1977); ch. 106, F.
S. (1977); ch. 77-175, Laws Of Florida**

*To: Honorable Mary E. Morgan, Supervisor of Elections, Pasco County Courthouse, Dade City,
Florida 33525*

Prepared by: Division of Elections

By your recent letter, an advisory opinion of this office was requested in answer to substantially the following question:

What is the effect of the 1977 election code revision on the election provisions of chapters 153 and 336, F.S., relating to water and sewer districts and road and bridge tax districts, respectively?

The "County Water and Sewer District Law" was originally enacted by the legislature in 1959. In recognition of a statewide concern for public health and to insure an adequate water supply, the establishment of special tax districts to build and maintain certain facilities was authorized and procedures for the establishment thereof provided, ss. 153.50 et seq., F.S. The election of commissioners of the district is also provided, s. 153.53, F.S. To finance projects the district has the authority to issue revenue, general obligation, and assessment bonds secured by, among others, assessments or ad valorem taxes levied against benefited property lying within the district. See ss. 153.52(8), (10), & (11), F.S.

A district may be created by one of two methods. The board of county commissioners may in its discretion establish one or more districts within the county, s. 153.53(1), F.S. An alternative method is by a petition signed by persons owning not less than 10 percent of the property within the boundaries of the proposed district. This petition is filed with the county property appraiser, and, if valid, shall result in an election being called by the board of county commissioners to determine if the district shall be created, s. 150.53(2), F.S.

At the same time this election is held, the county commission may also call for the election of three (3) persons to serve as commissioners of the district, if created, s. 153.53(3)(a), F.S. In order to qualify as a candidate for district commissioner, a petition signed by not less than the owners of 10 percent of the property within the district must be filed with the board of county commissioners not less than 14 days prior to the election together with a \$25 qualifying fee. Id.

The supervisor of elections is to assist the county property appraiser and the board of county

commissioners with regard to the conduct of the election, s. 153.53(3)(c), F.S. The board of county commissioners constitutes the canvassing board. Id.

Voting is done by persons owning property in the district in person or by proxy, s. 153.53(3)(e), F.S. The district is created if the owners of 50 percent or more of the property within the district vote their approval, s. 153.53(3)(d), F.S.

Commissioners of the district must be the owners of property within the district and registered electors in Florida, s. 153.53(3)(g), F.S. At least one commissioner shall reside in the county containing the district and an adjoining county. Id. The term of office is 4 years and commissioners are elected at the regular general election to take office on the first Tuesday after the first Monday in January, s. 153.53(4), F.S.

Similar provisions are found in Part III, Chapter 336, F.S. relating to the establishment of road and bridge tax districts and the election of district commissioners, ss. 336.61 and 336.62, F.S. The terms "person" "voter", and "elector" are all defined as:

". . .any entity owning legal title to real property within the district, whether residing within the district or not, and any person residing within the district who is eligible to vote in any general or special election." s. 336.61(1), F.S.

A referendum may be called to determine if such a district is to be created by the same procedures as outlined above for water and sewer districts, s. 336.62(1), F.S. Likewise, the election of the first commissioners of the district may take place at this election, s. 336.62(2), F.S.

In order to attain ballot position, a candidate for district commissioner must file a petition with the county commission signed by persons having not less than 25 percent of the votes, i.e., property, within the district. The petition is filed not less than 14 days prior to the election, and is accompanied by a \$250 qualifying fee. s. 336.62(2)(a), F.S.

The election is called and conducted in much the same manner as outlined above for water districts. Write-in votes are permitted, s. 336.62(2)(c), F.S. Voting may be done in person or by proxy, s. 336.62(2)(e), F.S. A 75 percent favorable vote is required to establish the district, s. 336.62(2)(d), F.S.

Qualified electors of the district are statutorily defined and their vote weighted as follows:

". . .qualified electors shall be persons who reside within the district that are qualified to vote in any general or special election or who are owners of land within the district, whether said owners reside within the district or not. Owners of land shall be entitled to cast one vote for each lot or fractional part thereof belonging to such owner. . . ." s. 336.62(2)(e), F.S. (e.s.).

The voting is clearly weighted so as to give the voting strength to property owners. This intent is clearly stated:

". . .it is intended that all persons either directly or indirectly affected by any tax and improvements derived therefrom be granted a voice." Id.

Five commissioners are elected at the general election for terms of four years beginning the first Tuesday after the first Monday in January, s. 336.62(3), F.S. Each commissioner shall be a registered elector in Florida, and at least two shall reside in the county containing the district or an adjacent county, s. 336.62(2)(g), F.S.

In that the statutory provisions for both types of districts are virtually identical as to the procedures for creation of the district and election of commissioners, the two will be considered together.

There has been no direct judicial determination of the constitutionality of the district creation procedures. However, the Attorney General has opined that the procedures are constitutional in light of several Florida and federal court decisions. Op. Atty. Gen. Fla. 073-260 (July 17, 1973).

It was there concluded that permitting nonresident property owners to vote and to weight the voting on the basis of property was permissible under both the Florida and U.S. Constitutions. See Lake Howell Water and Reclamation District v. State, 268 So.2d 897 (Fla. 1972); Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 93 So.Ct. 1224, 36 L.Ed.2d 659 (1973). Rather than reexamine the entire question here, suffice it to say after careful consideration that the opinion of the attorney general appears eminently correct and is hereby accepted by the division. For your review a copy of AGO 073-260 is attached. Accordingly, the division cannot find fault with the procedures outlined in chapters 153 and 336 for the establishment of the districts.

Questions remain relating to the validity of the qualifications to be a commissioner and election procedures. Based on preceding division opinions, it appears that the property ownership requirement for commissioners can stand, pending a judicial construction to the contrary, and the procedures for qualifying and conducting the elections are controlled by the general election law.

With regard to the property ownership requirement (i.e. freeholder) in order to be a district commissioner, it should be noted that a previous opinion of this office found a freeholder requirement for a port authority commissioner to be invalid. DE 78-22 (April 28, 1978). However, upon careful examination, that opinion can be distinguished from the instant district at issue here.

The landmark judicial decision upholding certain property ownership preconditions or advantages in Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 93 S.Ct. 1224, 35 L. Ed.2d 659 (1973). The U.S. Supreme Court in an opinion by Justice Rehnquist held that by reason of the water storage district's limited purpose and the disproportionate effect of its activities on landowners as a group, the California statutes did not violate the equal protection clause (14th Amendment, U.S. Const.) by limiting the vote to district landowners and denying the vote to nonlandowner residents, even though they may be lessees, or by weighting votes according to the assessed valuation of the land. The court distinguished Salyer from a long line of apportionment cases by determining the district did "not exercise what might be thought of as 'normal governmental' authority;" and its actions "disproportionately affect landowners." Id. at 729, 93 S.Ct. at 1230, 35 L.

Ed.2d at 667. See Tron v. Condello, 427 F.Supp. 1175, 1190-1191 (S.D. N.Y. 1976).

Prior to Salyer voting cases were viewed with a so-called "strict scrutiny" to determine if "one-man, one-vote" standards were met. Id. at 1191. The court had previously held that this standard was enunciated in Reynolds v. Sims, 337 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), applies to "units of local government having general governmental powers over the entire geographic area served by the body." Avery v. Midland County, 300 U.S. 474, 485, 88 S.Ct. 1114, 1120, 20 L.Ed.2d 45 (1968) (e. s.); even when these general purpose bodies hold special elections. Cipirano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (property qualification impermissible for voters in election regarding issuance of bonds for municipally-owned utility). This has been extended to local school boards Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), and a junior college district with substantial governmental powers in its area. Hadley v. Junior College District, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970).

Elected local units of government having "general governmental powers" (Avery, supra) require an apportionment that "does not deprive any voter of his right to have his own vote given as much weight, as far as its practicable, as that of any other voter in the district." Hadley, supra, at 52, 90 S.Ct. at 793. This holding in Hadley was not changed by Salyer supra, "which deals with an exception to the rule of Hadley." Cantwell v. Hudnut, 419 F. Supp. 1301, 1310 (S.D. Ind. 1976).

The basic question to be answered with regard to road and bridge tax districts and the water and sewer districts is whether they are units of government having general responsibility (the Avery test), or whether they are special purpose units which may be treated differently (the Salyer test).

The port authority considered in DE 78-22 was determined to satisfy the Avery test. It possesses a wide range of powers and responsibilities such that it is in many respects "the" government within the district. Based on that determination, this office was of the opinion that it was a general purpose governmental unit and could not restrict candidates to those individuals owning property. See Anderson v. City of Belle Glade, 337 F.Supp. 1353 (S.D. Fla. 1971); Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970).

In the Turner case, the Supreme Court struck a Georgia freeholder requirement to be a school board member. The court concluded:

"Without excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding could survive constitutional scrutiny, we cannot say.. that the present freeholder requirement for membership on the county board of education amounts to anything more than invidious discrimination." Id., at 364, 90 S.Ct. at 542.

These other circumstances seem to have been found in the 1973 Salyer decision and its companion case, Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed.2d 675 (1973). This face was recently recognized by the U.S. Fifth Circuit Court of Appeals in these arising out of Florida, when, in striking a city commission freeholder requirement, it remarked:

"We believe that the 'other circumstances' provided by the Supreme Court does not refer to other types of communities, but to other types of public office. Offices of general governmental responsibility can never be limited to freeholders. The exceptions, if any, must be limited to special purpose governments whose impact are limited to real property interests." Woodward v. City of Deerfield Beach, 538 F.2d 1081, 1083 (5th Cir. 1976).

After carefully reviewing the two types of districts under consideration here, it cannot be said that they are not within the confines of the Salyer test and that they do not limit their impact to real property owners. Woodward, supra. In the absence of a clear showing that controlling decisions are applicable, this office is limited to upholding current arguably valid statutory restrictions until a court of competent jurisdiction rules otherwise. Accordingly, the current provision that a district commissioner be an owner of property within the district appears to be a constitutional and, therefore, valid. To the extent as outlined herein, DE 78-22 is distinguished.

As for the candidate qualifying and commissioner election procedures, the reasoning of this office's opinion, DE 78-11 (January 30, 1978) and the Attorney General, Op. Att'y Gen. Fla. 078-38 (March 3, 1978), appear applicable. As stated in the latter:

". . .with the enactment of ch. 77-175, Laws of Florida, the Legislature has broadened the scope of the Election Code to provide procedures for the nomination and election of candidates for special district offices." Id., p. 4.

The Supreme Court of Florida has previously found conflicting special or local laws to have been impliedly repealed by a general revision of the election code. State ex rel. Limpus v. Newell, 85 So.2d 124 (Fla. 1956). In the above referenced opinion the Attorney General followed this reasoning in finding that in the absence of an express repealer the general election law revision impliedly repealed all special acts to the contrary. Op. Att'y Gen., supra, p. 5.

Repeal by implication is not favored, but is recognized on the premise that the last expression of the legislative will ought to control and that the legislature intended to give full effect to its enactments. See 30 Fla. Jur. Statutes, s. 158. The question of whether a new, or more recent, act effects an implied repeal of an existing statute must be answered by looking to the legislative intention in the enactment of the alleged repealing act. In re Wade. 7 So. 2d 797 (Fla. 1942); State ex rel Myers v. Cone, 190 So. 698 (Fla. 1939); 30 Fla. Jur. Statutes, s. 159. If it is clear that the intent of the more recent statute is to supersede another previously enacted, the later should be given effect. Id. As recently stated by a Florida appellate court:

"The Legislature's complete revision of a subject is an implied repeal of earlier acts dealing with the same subject unless a contrary intent is clearly shown. Where an act is intended to cover an entire subject of legislation it operates to repeal all former acts dealing with the same subject. Zedalis v. Foster, 343 So.2d 849 (2d D.C.A. Fla. 1976).

The 1977 election code enactment operates on a total revision of the state's election laws. Its very title

stated it was "prescribing regulations for the qualification of candidates and campaign and election of public officers." ch. 77-175, Laws of Florida. The inclusion of the word "district" in various portions of this enactment clearly shows the legislative desire to bring special districts, such as road and bridge and water and sewer, within the general election laws. See s. 97.021, F.S. (1977).

Therefore, to the extent that the provisions of chapters 153 and 336, F.S., are inconsistent with the Florida Election Code relating to the qualification of candidates for district office and the campaigns and election thereof, the general election law controls. That is to say, candidates for district commissioner will qualify pursuant to the provisions of ch. 99, F.S. (1977), specifically ss. 99.061 and 99.095, F.S. (1977), and must comply with the campaign financing regulations of chapter 106, F.S. (1977), among others. Candidates for these district offices are to be treated in the same manner as candidates for any other public office.

Since the use of write-in votes has been eliminated by the 1977 revision, write-in voting is not permitted in district candidate elections.

Furthermore, the elections are conducted by the supervisor in conjunction with and in the same manner as regular elections. The results of the district commissioner elections are canvassed by the county canvassing board pursuant to s. 102.141, F.S. (1977), rather than the board of county commissioners.

In that this opinion is rendered subsequent to the candidate qualifying period in 1978, it need not be applied retroactively. Those district candidates following the procedures outlined in chapters 153 and 336, F.S., shall be considered properly qualified. However, all records and subsequent responsibility for such elections should be transferred to the appropriate supervisor of elections.

The property ownership requirement in order to be a commissioner of a water and sewer district or a road and bridge tax district is valid until a court decision to the contrary. Weighted voting based on the amount of property owned is likewise valid. Because these are special purpose districts, the restriction to property owners of the right to vote is permissible. The procedures for the qualifying of candidates and the conduct of the campaigns of candidates for district office are controlled by the general election law. The canvassing of the returns of elections for district office is by the county canvassing board. This opinion is not to be applied retroactively.