

DE 89-10 - December 19, 1989

Municipal Recall
Section 100.361(1)(A), (B), (C), (D), (E), F.S.

To: Mr. Charles Ian Nash, City Attorney, City of Sebastian, 930 South Harbor City Boulevard, Suite 505, Melbourne, Florida 32901

Prepared by: Division of Elections

This is in response to your request for an advisory opinion. Under Section 106.23(2), Florida Statutes, the Division of Elections has authority to issue advisory opinions to any local officer having election-related duties.

You asked the following question on behalf of the city council and the city clerk of the City of Sebastian:

Whether a city clerk has the discretion to refuse to accept the tender of a recall petition which is facially not in compliance with the requirements of Section 100.361, Florida Statutes (1987)?

Prior to the 1989 Legislature amending Section 100.361, Florida Statutes, the Second District Court of Appeal had considered this matter in an opinion filed March 29, 1989. See Jividen v. McDonald, 14 FLW 803 (Fla. 2d DCA 1989).

In that case, appellant Jividen, the City Clerk for the City of St. Petersburg, appealed a final judgment in which the trial court had held that a city clerk has no authority to determine the legal sufficiency of municipal recall petitions. The district court affirmed the lower court's opinion and in its opinion stated:

The procedure for a municipal recall is contained in section 100.361, Florida Statutes (1987). A petition for recall must name the person sought to be recalled and include a statement of the grounds for recall in not more than 200 words. S. 100.361(1)(a), Fla. Stat. (1987). The grounds for removal are limited to seven specific enumerated reasons. S. 100.361(1)(b), Fla. Stat. (1987).... The following statutory provision directs the next step in the procedure:

The petition shall be filed with the city auditor or clerk, or his equivalent, by the person designated as chairman of the [recall] committee, and, when the petition is filed, the city auditor or clerk, or his equivalent, shall submit such petition to the county supervisor of elections who shall, within a period of not more than 30 days, determine whether the petition contains the required valid signatures....

Section 100.361(1)(c), Fla. Stat. (1987). If the petition does not contain the required signatures, the clerk certifies that fact to the governing body and files the petition without taking further

action. Section 100.361(1)(e), Fla. Stat. (1987)....

The municipal clerk did not forward the petitions to the supervisor of elections as one of the council members in the recall effort had filed suit to enjoin the clerk and others from progressing further. The municipal clerk filed a counter-claim and cross-claim seeking a declaratory judgment from the court.

The Second District Court of Appeal opined that the legislature had not directed the city clerk, the supervisor of elections or the chief judge of the circuit court to determine the legal sufficiency of such petitions.

The court noted an earlier decision of the Florida Supreme Court which limited the duty of a city clerk regarding recall petitions. State ex rel. Landis v. Tedder, 106 Fla. 140, 143 So. 148 (1932). The court opined that this opinion was "instructive to the resolution of the issue in this appeal." In the Landis v. Tedder decision, the court found:

The only duty of the city clerk is to certify on the recall petitions whether the same were signed by the required number of registered voters. He is invested with no judicial powers to determine the sufficiency of the recall petitions, nor do anything other than comply with the statute.

Landis v. Tedder, 143 So. at 150.

In summary, the court opined "we still must agree with the trial court that the city clerk's function is ministerial only. Any change in the recall procedure must rest with the legislature."

However, with the 1989 Legislature changes, effective January 1, 1990, and subsequent to the Jividen v. McDonald case, Section 100.361(1)(d), Florida Statutes, reads, in pertinent part:

If it is determined by the clerk that the petition does not meet the requirement of s. 100.361(1) (b) and therefore is not facially valid, the clerk shall so notify the governing body of the municipality or charter county and take no further action. The petition cannot be amended after it is filed with the clerk.

Therefore, unless and until legislatively or judicially determined otherwise, after January 1, 1990, if the municipal clerk determines that the petition does not meet the requirements of Section 100.361(1) (b), Florida Statutes, and therefore, is not facially valid, the clerk shall so notify the governing body of the municipality or charter county and take no further action.

SUMMARY

Based upon the decision by the Second District Court of Appeal in Jividen v. McDonald, we find that at the present time a municipal clerk does not have the authority to refuse to accept the tender of a recall petition which is facially not in compliance with the requirements of Section 100.361, Florida Statutes (1987). However, effective January 1, 1990, unless and until legislatively or judicially determined otherwise if the municipal clerk determines that the petition does not meet the

requirements of Section 100.361(1)(b), Florida Statutes, and, therefore, is not facially valid, the clerk shall so notify the governing body of the municipality or charter county and take no further action.