

DE 95-05 - October 2, 1995

Municipal Elections

**§§ 97.021(6), 100.271, 101.62, 101.635, 101.64, 101.65, 101.67, 101.68, 101.69, 101.694, 101.011(6)
AND 166.021, F.S.; AGO 90-11; DE 77-37; and Chap. 95-178, Laws of Fla.**

*TO: The Honorable Harry Sawyer, Supervisor of Elections, Monroe County, 500 Whitehead Street
(Rear), Key West, Florida 33040-6547*

Prepared by: Division of Elections

This is in response to your request for an advisory opinion regarding a city and county election. You are the Monroe County Supervisor of Elections and, pursuant to Section 106.23(2), Florida Statutes, the Division has authority to issue this opinion to you.

You ask the following questions:

1. May the City of Key West canvass a county election?
2. Is the County Canvassing Board authorized to canvass a municipal election?
3. If the answer to question 2 is no, what is the status of municipal referendums certified by the County Canvassing Board in past county elections?
4. Are both canvassing boards required to certify the election?
5. Do we know of any other procedure which you have not considered?

According to your letter, the city election at issue is a regularly scheduled election which will be conducted by the County Supervisor of Elections as has been the custom for many years. The county has decided to include a countywide school board issue on the same ballot. Thus, what started as a city election has now become a county election with a city election "piggybacking" on the county ballot.

The prominent issues raised in your request for an advisory opinion appear to center around the extent to which the state election code applies to "competing" city and county elections appearing on a single ballot.

At the outset, it is important to note that the Florida Elections Code (Chapters 97 through 106, Florida Statutes) does not apply to municipal elections unless expressly provided therein. Op.Div.Elect.77-37 (Dec., 20, 1977); See also, Informal Opinion from Phyllis Slater to Supervisor of Elections (June 10, 1989) (Florida Elections Code applies primarily to county, state and national elections).¹ Therefore, if a city chooses to conduct its own elections without assistance from the County Supervisor of Elections or the County Commission, it is free to do so. Since there is no conflicting statutory provision, a city is

also free to establish any canvassing procedure that is consistent with its charter.²

For example, there currently is nothing to prohibit a city from requesting that the county canvassing board canvass a city election, provided that the county and city agree and provided that there is no inconsistent provision in the city's charter. If the county consents to conduct an election for a city and no county election appears on the ballot, then the city and county would be free to reach an agreement that the city canvass the ballot.

Notwithstanding the foregoing, Chapters 101 and 102, Florida Statutes, prescribe certain duties and responsibilities of county canvassing boards, not the least of which is the duty to maintain control, custody and security of absentee ballots. §101.68, Fla. Stat. (imposing a duty on the supervisors of elections to safely keep absentee ballots). Moreover, the elections code makes it abundantly clear that the county supervisor of elections and the county canvassing board have exclusive custody and control of absentee ballots and the absentee voting process with respect to county elections. *See*, §§ 101.62; 101.635; 101.64; 101.65; 101.67; 101.68; 101.69 and 101.694, Fla. Stat. Since the county canvassing board has exclusive responsibility for canvassing county elections, where a city and county election appear on the same ballot, only the county canvassing board may canvass the election.

Based upon the foregoing, the Division could not approve of a procedure whereby a county canvassing board abandons its canvassing duties to a city in a countywide election. In short, it is the Division's opinion that a city canvassing board may not canvass a county election.

It should be noted, however, that effective January 1, 1996, the Florida Elections Code will control all aspects of municipal elections unless the municipality has adopted a charter or ordinance to the contrary. Chapter 95-178, Laws of Florida. Even where a municipality chooses to "opt out" of the elections code, it will continue to be bound by those provisions of the code that expressly apply to municipalities.

Accordingly, your questions are answered in the order in which they were asked as follows:

1. No. A city may not canvass a county election.
2. Yes. A county canvassing board may canvass a city election. However, cities are free to conduct their own election and, where they choose to do so, may provide their own canvassing procedures.
3. Since the answer to question 2 above is "Yes," there is no need to respond to this question. Moreover, questions concerning the validity of an election are subjects for judicial determination.
4. No. Only a county canvassing board can certify a county election. Where a city and county election appear on the same ballot, the county canvassing board is the only appropriate certifying authority. Where a county agrees to conduct a stand alone city election, the appropriate certifying authority is the one agreed upon by the city and county unless the city's charter or ordinances provide for a city canvassing authority.

5. No. The Division is not aware of any alternative procedures. We do note, however, that representatives of the city are permitted to observe the canvassing of an election by the county canvassing board so long as they do not interfere with the canvassing.

SUMMARY

The City of Key West may not canvass a county election despite the fact that a citywide election also appears on the ballot. Under limited circumstances, the county may canvass a city election. Any challenge to an election is a matter for judicial determination. When a county election is being conducted and a city election is on the same ballot, it is neither necessary nor required that both canvassing boards certify the election since the county canvassing board is the exclusive canvassing authority in such cases. However, in such cases the city may observe the canvass and protest any procedure used by the county as provided by law.

¹ It also follows from the foregoing authority that where the legislature has specifically provided that the state elections code applies to cities, state law prevails over any contrary city charter or ordinance. See, § 106.011(6), Fla. Stat. (Chapter 106, Florida Statutes is made expressly applicable to cities); Compare, § 97.021(6), Fla. Stat. which excludes cities from Chapters 97 through 105, Florida Statutes, except where the context indicates otherwise; See also, City of Hialeah v. Martinez, 401 So.2d 602 (Fla. 3rd DCA 1981) (State "resign-to-run" law preempts city resign-to-run charter provision); § 100.271, Fla. Stat. (city bond referendum must be canvassed by the governing authority calling the referendum).

² §§ 166.021, Fla. Stat. (cities can exercise any power, including the power to provide for their own elections, unless the legislature has specifically prohibited the exercise of particular powers). For example, section 166.021(4), Florida Statutes, provides that a city may not adopt a charter provision which affects the manner in which city officers are elected without approval of the city electorate. See also, Op. Atty. Gen. 94-31 (April 11, 1994) (City may not amend its charter with respect to the term of an elected mayor without approval by referendum); Op. Atty. Gen. 90-11 (April 11, 1990) (City may not amend its charter to provide a change in election date where such change affects a term of office with referendum approval). On the other hand, beginning January 1, 1996 election dates, qualifying dates, and changes in the term of office as a result of changing either qualifying dates or election dates, can be accomplished without a referendum. Chap. 95-178, Laws of Florida.