

**A statute addressed in this opinion has changed.
Please consult current Florida law.**

April 14, 2006

The Honorable Alana C. Brenner
City Clerk for City of Orlando
400 South Orange Avenue, 2nd Fl
Orlando, Florida 32802-4990

RE: DE 06-05 Municipal Recall; Registration of
and Reporting of Municipal Recall Committees,
Independent Expenditures, Run-off Election,
Registered Voters-Petition Signature-Gathering; §§
100.361, 100.3605, 100.181, 106.011, 106.03,
106.07, 106.071, Florida Statutes

Dear Ms. Brenner:

This is in response to your request in a letter dated November 15, 2005, for an advisory opinion relating to municipal recall elections. Under section 106.23(2), Florida Statutes, the Division of Elections has authority to issue advisory opinions to certain enumerated persons or entities, including a local officer having election-related duties, regarding actions taken or proposed to be taken as relates to any provision or possible violation of the Florida Election Code (constituting Chapters 97-106, Florida Statutes). You are the City Clerk for the City of Orlando; therefore, the Division has authority to issue this opinion to you.

As background, you stated that a committee called the RECALL DYER Committee has recently spearheaded a municipal election effort to recall the re-elected mayor for the City of Orlando, John H. "Buddy" Dyer. A press conference was held on October 31, 2005 and on November 2, 2005, packets began to arrive in the mail to voters in connection with the municipal recall election effort. With the exception of the receipt of executed petitions, the recall committee has not otherwise contacted your office for purposes of registration, reporting or any other reason regarding this petition or the municipal recall election.

Based upon the information above, your questions have been restated as follows:

1. Is a recall committee required to register with the city clerk in accordance with the provisions of Chapter 106, Florida Statutes, specifically relating to registration,

campaign finance reports, and appointment of a treasurer? If the answer is yes, does failure to comply with these requirements require or allow the city clerk to invalidate the petitions and underlying recall effort?

2. Is an expenditure made independent of a municipal recall committee for the purpose of campaigning for or against the recall of a municipal officer required to be reported to the city clerk under Chapter 106, Florida Statutes?
3. Does the city clerk have the authority to schedule a run-off election under section 21-05 of the City of Orlando Code if the electors vote to recall the mayor but none of the successor mayoral candidates receive more than a majority of the votes cast in the municipal recall election?
4. What constitutes a “registered voter” and “preceding municipal election” for purposes of calculating the requisite number of signatures needed for a recall petition?

Question 1

In response to question 1, the brief answer is that a municipal recall committee is required to register with the municipal clerk and is otherwise subject to campaign finance reporting under Chapter 106, Florida Statutes but only when the statutory definition for “political committee” is met and the committee anticipates receiving contributions or making expenditures for the purpose of expressing advocating for the election or defeat of a candidate or the passage or defeat of an issue and those contributions or expenditures exceed \$500 in the aggregate in a single calendar year. However, if a municipal recall committee does not comply with Chapter 106, Florida Statutes, a city clerk has no authority or power to invalidate the recall petition or the recall effort.

The Florida Election Code contains provisions governing the uniform procedures to be used statewide to remove an official of a municipality or charter county (hereinafter “municipality”) from office. See section 100.361, Florida Statutes. The recall “committee” is statutorily designated by default as consisting of those electors who are making the charges circulated in the recall petition and those electors who are signing the petition for the purpose of recalling a specifically named public official based on one or more of the seven statutory grounds for removal. The grounds must be stated in 200 or less words. A person is to be designated as chair to act on behalf of the “committee.” The recall committee must engage in two phases of signature gathering for a recall petition.

A successful recall petition drive can accomplish the goal of municipal officer’s removal in two ways. First, rather than let the matter proceed to an election recall, the municipal officer could choose to resign within 5 days after receiving notice of the requisite signatures in the second round of petition signature-gathering. Second, if the municipal officer does not resign, the municipal officer could be removed by a successful vote in a recall election called by the chief judge of the respective judicial circuit.

The law does not require the recall committee to register prior to or during the recall petition signature-gathering process except when its activities trigger the provisions of Chapter 106, Florida Statutes. See

DE 81-06 (November 19, 1981). Subsection (7) of section 100.361, Florida Statutes, provides, in part, that

OFFENSES RELATING TO PETITIONS.—

. . . No expenditures for campaigning for or against an officer being recalled shall be made until the date on which the recall election is to be held is publicly announced. *The committee and the officer being recalled shall be subject to chapter 106.* No person shall employ or pay another to accept employment or payment for circulating or witnessing a recall petition. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor of the second degree and shall, upon conviction, be punished as provided by law. [italics added for emphasis]

Chapter 106, Florida Statutes, imposes certain registration and reporting requirements on persons and entities for expenditures made and contributions received in connection with political activities. The definition for a “political committee” and the statutory thresholds for reporting under this chapter have undergone significant legislative changes over the years without substantive commensurate changes to the municipal recall provisions in section 100.361, Florida Statutes. In 2002, the term “political committee” was more narrowly redefined as activities associated with *express advocacy* (i.e., using terminology such as “vote for,” and “vote against,”) in support or defeat of a candidate or the passage or defeat of an issue’. See ch. 2002-197, Laws of Florida. Section 106.011(1), Florida Statutes, currently defines a “political committee” as:

1. A combination of two or more individuals, or a person other than an individual, that, in an aggregate amount in excess of \$500 during a single calendar year:
 - a. Accepts contributions for the purpose of making contributions to any candidate, political committee, committee of continuous existence, or political party;
 - b. Accepts contributions for the purpose of *expressly advocating* the election or defeat of a candidate or the passage or defeat of an issue;
 - c. Makes expenditures that *expressly advocate* the election or defeat of a candidate or the passage or defeat of an issue; or
 - d. Makes contributions to a common fund, other than a joint checking account between spouses, from which contributions are made to any candidate, political committee, committee of continuous existence, or political party;
2. The sponsor of a proposed constitutional amendment by initiative who intends to seek the signatures of registered electors.

[emphasis added]

The term “issue” is further defined in section 106.011(7), Florida Statutes, to include “any proposition for which a petition is circulated in order to have such proposition placed on the ballot at any election.”

Note that in 2004, the Florida Legislature again revised the definition for political committee to add reference to “electioneering communications” (defined in section 106.011(18), F.S.) in order to subject to registration, reporting and sponsor disclaimer requirements those paid activities associated with *non-*

express advocacy made in a communications medium and in connection with a non-referendum issue of public interest or that included a reference to or likeness of a candidate, without outright expressed support or opposition to an issue or candidate.

It does not appear that the Florida Legislature intended to require a municipal recall committee to register and report prior to initiating a recall effort or necessarily during the recall petition signature-gathering process unless or until the committee met the registration and reporting requirements of chapter 106, Florida Statutes. First, under section 106.03(1), Florida Statutes, a political committee (which is defined in association with activities of ‘express advocacy’ in support or opposition to a candidate or issue) is required to register *when* it anticipates receiving contributions or making expenditures in excess of the aggregate amount of \$500, or *when* it is seeking the signatures of registered electors in support of an initiative. The Florida Legislature added the initiative language in 1979 but made no reference to petition signature-gathering activities associated with other types of public measures such as local referendum petition or a municipal recall petition. *See* ch. 79-366, Laws of Florida. The Florida Legislature also has not made any commensurate substantive changes to section 100.361, Florida Statutes, to conform to the changes in Chapter 106, Florida Statutes.

Second, the Florida Legislature statutorily curtailed the extent to which a recall committee could spend during the petition-signature gathering process of the municipal recall petition effort in several ways. Section 100.361(7), Florida Statutes, states no “expenditures for campaigning for or against an officer being recalled shall be made until the date on which the recall election is to be held is publicly announced.” A recall election is only called by the chief judge of the respective judicial circuit after the requisite number of signatures was gathered during the second phase of signature-gathering and if the municipal officer does not resign in response to notice of the requisite signatures obtained. Moreover, a recall committee is prohibited from expending any funds to hire or pay someone for circulating or witnessing a recall petition.

Third, even the statutory terms “contribution” and “expenditure” under sections 106.011(3), and 106.011(4)(a), Florida Statutes, respectively, are defined in part within the context of monies for the purpose of influencing the results of an election:

. . . (3) “Contribution” means:

- (a) 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* or making an electioneering communication.
- (b) A transfer of funds between political committees, between committees of continuous existence, or between a political committee and a committee of continuous existence.
- (c) The payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to a candidate or political committee without charge to the candidate or committee for such services.

(d) The transfer of funds by a campaign treasurer or deputy campaign treasurer between a primary depository and a separate interest-bearing account or certificate of deposit, and the term includes any interest earned on such account or certificate. . .

. . . (4)(a) “*Expenditure*” means a purchase, payment, distribution, loan, advance, transfer of funds by a campaign treasurer or deputy campaign treasurer between a primary depository and a separate interest-bearing account or certificate of deposit, or gift of money or anything of value made for the purpose of influencing the results of an election or making an electioneering communication. . . .

[emphasis added].

Therefore, a municipal recall committee is not required to register before the committee initiates a recall petition drive or expends monies or accepts contributions in support of signing the municipal recall petition during the recall petition gathering process. The activities associated with obtaining signatures for a petition are not deemed *express advocacy* for the support or defeat of an issue until the recall election is actually called. The municipal recall committee is required to register with the municipal clerk pursuant to section 106.03(2)(c), Florida Statutes, if it accepts contributions in anticipation of influencing the outcome of a recall election if one were to be called even though statutorily those contributions could not be expended until the election is actually called based on section 100.361(7), Florida Statutes. The activity of influencing the outcome of a recall election then could constitute *express advocacy*. Once a recall election is called, the municipal recall committee would have to register as a political committee just as any other person, group or organization if the committee’s expenditures or contributions exceeded the aggregate amount of \$500, and would also have to satisfy all reporting and other requirements under chapter 106, Florida Statutes.

Nonetheless, the city clerk has no statutory duty or authority to invalidate the recall petition or the recall effort if a municipal recall committee does not register with the clerk or otherwise comply with the requirements of Chapter 106, Florida Statutes. The city clerk’s duties under section 100.361, Florida Statutes, are solely ministerial and are enumerated specifically in subsection (1) of that section. In addition, no provision exists in Chapter 106, Florida Statutes, to invalidate a recall petition or a recall petition effort for failure of a recall committee to comply with the registration and reporting requirements of that chapter.

However, an interested party may seek recourse by bringing suit to challenge any part of the recall process, including whether the recall committee has violated the prohibition against certain expenditures during the recall petition gathering process under section 100.361, Florida Statutes, or has failed to properly register and report expenditures under Chapter 106, Florida Statutes.. See e.g., *Jividen v. McDonald*, 541 So.2d 1276 (Fla. 2nd DCA 1989)(municipal clerk has no authority or power to determine the legal sufficiency of a recall petition which is a matter for courts upon the application of an interested party.) Additionally, the Florida Elections Commission has authority to investigate violations and assess civil fines and other penalties under section 106.25, Florida Statutes, if prompted by the receipt of a sworn complaint by any person including a municipal clerk, or any information reported to it by the Division of Elections.

Question 2

In response to question 2, the short answer is that a person who makes an expenditure independent of a municipal recall committee is required to report such expenditure to the city clerk if the \$100 monetary threshold is met under section 106.071, Florida Statutes.

As we have noted earlier in response to question 1, Chapter 106, Florida Statutes, imposes registration and reporting requirements on campaign expenditures and contributions that exceed a certain threshold. Under section 106.011(5), Florida Statutes, the term “independent expenditure” is defined as:

an expenditure by a person for the purpose of *expressly advocating* the election or defeat of a candidate or the approval or rejection of an issue, which expenditure is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee. An expenditure for such purpose by a person having a contract with the candidate, political committee, or agent of such candidate or committee in a given election period shall not be deemed an independent expenditure. [emphasis added]

The term “issue” is further defined under section 106.011(7), to include “any proposition for which a petition is circulated in order to have such proposition placed on the ballot at any election.”

Under section 106.071, Florida Statutes a person who makes an independent expenditure totaling \$100 or more with respect to any candidate or issue which is not otherwise reported pursuant to Chapter 106, Florida Statutes, must report such expenditures. Therefore, if a person expends \$100 or more for the purpose of expressly advocating the approval or rejection of a recall election issue, such expenditure must be reported. Note that pursuant to section 100.361(7), Florida Statutes, “[n]o expenditures for “campaigning for or against an officer being recalled shall be made until the date on which the recall election is to be held is publicly announced.” This prohibition would apply to independent expenditures as well.

Question 3

In response to question #3, the brief answer is that the statutory municipal recall procedures are to be applied uniformly throughout the state and that would include the run-off procedures set forth in section 100.361(4)(a), Florida Statutes. That section provides that in cases of ties between two or more successor candidates for the same office with no majority vote, the process will be governed by rules governing elections generally which in turn provides that the outcome is determined by drawing lots.

You have stated that section 21-05 of the City of Orlando Code provides, in part, that if there are more than two candidates for any office and none of those candidates receives a majority vote in the municipal election, the two candidates receiving the highest vote in the first election are entitled to run again in a municipal run-off election. While the Division of Elections has no authority to construe a provision of the City of Orlando Code, the Division directs you to section 100.361(8), Florida Statutes, wherein the Florida Legislature expressed its intent that the statutory municipal recall procedures are to be applied uniformly throughout the state and that any municipal charter or special law that exists to the

contrary is repealed. Additionally section 100.3605, Florida Statutes, enacted in 1995, states that the Florida Election Code is to apply to govern the conduct of municipal elections, in the absence of an applicable special act, charter, or ordinance provision. No charter or ordinance can be adopted that conflicts with or exempts a municipality from any provision in the Florida Election Code that otherwise expressly applies to municipalities. Therefore, the procedures for filling vacancies in a municipal recall election pre-empt any local code or ordinance.

Subsection (4)(a) of section 100.361, Florida Statutes, expressly provides a process for filling the vacancies by successor candidates in a recall election:

If an election is held for the recall of members elected only at-large, candidates to succeed them for the unexpired terms shall be voted upon at the same election and shall be elected in the same manner as provided by the appropriate law for the election of candidates at general elections. Candidates shall not be elected to succeed any particular member. If only one member is removed, the candidate receiving the highest number of votes shall be declared elected to fill the vacancy. If more than one member is removed, candidates equal in number to the number of members removed shall be declared elected to fill the vacancies; and, among the successful candidates, those receiving the greatest number of votes shall be declared elected for the longest terms. Cases of ties, and all other matters not herein specially provided for, shall be determined by the rules governing elections generally. [emphasis added]

Section 100.181, Florida Statutes, provides generally that in the case of a tie in any general or special election between two or more persons who receive an equal and highest number of votes for the same office, lots are drawn to determine who shall be elected to the office. No run-off election in a municipal recall election is required or authorized.

QUESTION 4

In response to question 4, the brief answer is that although the city clerk has a duty to certify and report that the requisite signatures have been obtained, the duty to calculate and determine whether the requisite signatures have been obtained based on the number of registered electors as of the preceding municipal election belongs to the supervisor of elections.

Section 100.361, Florida Statutes, specifically provides the methodology for the removal of an elected municipal officer which involves two phases of petition signature-gathering. Although the executed Recall Petitions and the joint Recall Petitions and Defense are filed with the city clerk and the city clerk is responsible for certifying and reporting whether the requisite signatures have been met, it is the supervisor of elections who has the actual and sole responsibility of calculating and determining whether the requisite number of signatures has been obtained. See sections 100.361(1)(d) and (h), Florida Statutes.

For purposes of determining the requisite number of signatures needed from registered electors for a petition drive, the supervisors of elections cannot include names that have been designated as inactive pursuant to registration list maintenance activities. See sections 98.065(4)(c), and section 100.3605, Florida Statutes.

As to what is meant by “preceding municipal election,” the law does not define the term. In the absence of a statutory definition, the words are to be given its plain and ordinary meaning. See *State v. Stewart*, 374 So.2d 1381, at 1382 (Fla. 1979). Therefore, “preceding municipal election” simply means the municipal election which was most recently held for the City of Orlando, regardless of the specific nature of the election.

SUMMARY

Unlike a committee formed to circulate an initiative petition, a municipal recall committee consists, by statutory default, of those electors making the charges in the municipal recall petition and those electors signing the municipal recall petition. The committee is not required to register under chapter 106, Florida Statutes, before it initiates a recall petition drive. A municipal recall committee is also not required to register before it expends or accepts contributions in support of signing the municipal recall petition as such activity does not constitute express advocacy. The recall committee’s ability to expend is already statutorily curtailed during the initial signature-gathering phase in that it cannot employ or pay persons to circulate or witness a recall petition and it cannot expend monies campaigning against or for the defeat of an officer being recalled *until* an election is called. However, a municipal recall committee would be required to register if the committee anticipates or receives contributions *in anticipation of influencing* the outcome of a recall election if one were to be called later and the aggregate amount of those contributions exceeds \$500 during a calendar year. Once a recall election is called, a municipal recall committee would be required to register and report under chapter 106, Florida Statutes, if it had not already, if the committee anticipated making expenditures or actually expended, or anticipated receiving contributions or received contributions that exceed the aggregate amount of \$500 during a calendar year for the purpose of expressing advocating the passage or defeat of an issue on the ballot (i.e., the recall of the named elected municipal officer).

Nevertheless, if a municipal recall committee fails to comply with the requirements of chapter 106, Florida Statutes, the city clerk has no power or authority to invalidate a recall petition. However, an interested party could bring a suit to challenge the recall petition process including the failure of a committee to properly register and report. In addition, the Florida Election Commission may exercise its authority to investigate violations and enforce compliance upon the filing of a sworn complaint or the Division of Elections reporting a violation of Chapter 106, Florida Statutes.

The process for filling vacancies in a municipal recall election as set forth in section 100.361(4)(a), Florida Statutes, pre-empts any local code provision. In the case of a tie between two or more successor candidates for the same office who received an equal and highest number of votes, the person to be elected is determined by drawing lots as governed by section 100.181, Florida Statutes. No run-off election is required or authorized in a municipal recall election.

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A person who makes an expenditure independent of the recall committee that exceeds the aggregate monetary threshold of \$100 or more for the purpose of expressly advocating the election or defeat of a candidate or the approval or rejection of an issue is required to report such expenditure to the city clerk pursuant to section 106.071, Florida Statutes.

Although a city clerk is responsible for certifying that the requisite number of signatures has been obtained during the recall petition process, it is the supervisor of elections who is responsible for calculating and determining the requisite signatures are based on the number of registered electors as of the preceding municipal election which is the last municipal election held regardless of the nature of the election. For purposes of counting the number of signatures of registered electors needed for a successful recall petition, the supervisor of elections cannot count the signatures of inactive voters who have been placed on the inactive list as a result of list maintenance activities under section 98.065, Florida Statutes.

Sincerely,

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