S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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November 5, 2008

Opinion No. 08-171

Petition for Popular Election on County "Wheel Tax"

QUESTIONS

1. Is a local governing body required to direct the county election commission to call an election for the purpose of approving or rejecting the "wheel tax" under Tenn. Code Ann. § 5-8-102(c)(3) if a valid petition is filed or does the local governing body have the option to do nothing?

2. If the local governing body does not take action, what happens to the resolution that authorized the "wheel tax" or increase in such tax?

3. Is there a time limit for the local governing body to call for an election under Tenn. Code Ann. § 5-8-102(c)(3)?

OPINIONS

1. The county legislative body has no role in calling an election for the purpose of approving or rejecting a motor vehicle privilege tax (commonly referred to as a "wheel tax") in response to a voter petition following approval of the tax by that body. Tenn. Code Ann. § 5-8-102(c)(1) establishes two methods of approving a wheel tax: (1) by a two-thirds vote of the county legislative body at two consecutive, regularly scheduled meetings, or (2) by a majority of voters in an election on the question of whether or not the tax should be levied. If a wheel tax is approved by the first method, i.e., by a two-thirds vote of the county legislative body, Tenn. Code Ann. § 5-8-102(c)(2) gives voters in the county the ability to petition the county election commission for an election on the question of whether or not the wheel tax should be levied. If, within thirty days of the county legislative body's final approval of a wheel tax, the county election commission receives a petition signed by ten percent of the number of voters in the last gubernatorial election, the county election commission must call an election on the question of imposing the wheel tax, without being directed to do so by the county legislative body. Tenn. Code Ann. § 5-8-102(c)(3) applies only to the second method of approving a wheel tax by direct, popular election. Under this method, the county legislative body may by simple majority vote put the issue of a wheel tax to the voters, rather than imposing it by its own two-thirds vote.

2. If a wheel tax is approved by a two-thirds vote of the county legislative body at two consecutive, regularly scheduled meetings, the tax then takes effect in accordance with the

resolution imposing it, unless a proper petition by registered voters is filed within thirty days. If a petition signed by ten percent of the number of voters in the last gubernatorial election is filed with the county election commission within thirty days, the county election commission must call an election on the wheel tax resolution.

3. Under Tenn. Code Ann. § 5-8-102(c)(3), the county legislative body is free at any time by a simple majority vote to direct the county election commission to call for a referendum on the question of whether a wheel tax should be imposed. If the county legislative body chooses to let the voters decide the wheel tax issue directly, its resolution directing the county election commission to call an election should specify whether the referendum is to be held in a regular election or in a special election, pursuant to Tenn. Code Ann. § 5-8-102(c)(3). If the election on the wheel tax is to be held in a regular election, the resolution requiring the election must be filed with the county election commission not less than sixty (60) days prior to the regular election. *See* Tenn. Code Ann. § 2-3-204(b). If the election on the wheel tax is to be held in a special election, the county election commission shall set the date of the election, but the date of the election must not be less than forty-five (45) days nor more than sixty (60) days after the county election commission is directed to hold the election. *See* Tenn. Code Ann. § 2-3-204(a).

ANALYSIS

Tenn. Code Ann. § 5-8-102(b) empowers each Tennessee county "to levy for county purposes by action of its governing body a motor vehicle privilege tax as a condition precedent to the operation of a motor vehicle within the county." Tenn. Code Ann. § 5-8-102(c)(1) describes two methods by which a motor vehicle privilege tax can be approved:

> No resolution authorizing such motor vehicle privilege tax shall take effect unless it is approved by a two-thirds (2/3) vote of the county legislative body at two (2) consecutive, regularly scheduled meetings or unless it is approved by a majority of the number of qualified voters of the county voting in an election on the question of whether or not the tax should be levied.

As this Office has stated in prior opinions, because subsection (c)(1) is phrased in the disjunctive, a wheel tax can be imposed either (1) by a two-thirds vote of the county legislative body or (2) by approval of the majority of voters in a referendum. *See* Op. Tenn. Att'y Gen. Nos. 90-85 (Sept. 17, 1990) and 83-409 (Dec. 14, 1983).

If the wheel tax is approved by a two-thirds vote of the county legislative body at two consecutive, regularly scheduled meetings, a referendum may still be held if a petition of ten percent of the number of voters in the last gubernatorial election is filed with the county election commission within thirty days of final approval of the wheel tax by the county legislative body. Tenn. Code Ann. § 5-8-102(c)(2) provides:

> (A) Except as provided in subdivision (c)(2)(B), if there is a petition of registered voters amounting to ten percent (10%) of the votes cast in the county in the last gubernatorial election that is

> filed with the county election commission within thirty (30) days of final approval of such resolution by the county legislative body, then the county election commission shall call an election on the question of whether or not the tax should be levied in accordance with the provisions of this section.[1]

Subsection (c)(2) provides a popular check on the taxing power of the county legislative body. *See* Op. Tenn. Att'y Gen. No. 90-85. The trigger for the county election commission to call an election under subsection (c)(2) is the filing of a petition signed by ten percent of the number of voters in the last gubernatorial election within thirty days of the final approval of the wheel tax by a two-thirds vote of the county legislative body. The county election commission's authority to call an election under subsection (c)(2) does not depend upon the county legislative body's direction to do so. If inaction by the county legislative body could prevent the county election commission from calling an election in response to a voter petition following legislative approval of a wheel tax, then the popular check on the county legislative body's taxing power created by subsection (c)(2) would be meaningless. When an election is called by the election commission pursuant to petition of the voters, the election commission must set the date of the election for a day not less than forty-five (45) days nor more than sixty (60) days after the petition is filed with the commission. *See* Tenn. Code Ann. § 2-3-204(a).[2]

Tenn. Code Ann. § 5-8-102(c)(3) provides that "[t]he local governing body shall direct the county election commission to call such election to be held in a regular election or in a special election for the purpose of approving or rejecting such tax levy." This provision applies only to a direct, popular election on the wheel tax; it does not apply to an election held pursuant to a voter petition following adoption of the tax by a two-thirds vote of the county legislative body. As this Office has stated in a prior opinion, subsection (c)(3) allows the county legislative body by a simple majority vote to direct that a resolution for the levying of a wheel tax be placed on the ballot for the approval or disapproval of the voters. *See* Op. Tenn. Att'y Gen. No. 90-85. Under this provision, the resolution of the county legislative body calling for the election should specify whether it is to be held in a regular or a special election. If the election on the wheel tax is to be held in a regular election, the resolution requiring the election must be filed with the county election commission not less than sixty (60) days prior to the regular election. *See* Tenn. Code Ann. § 2-3-204(b). If the election on the wheel tax is to be held in a special election, the county election commission shall set the date of the election for a day not less than forty-five (45) days nor more than sixty (60) days after the county election commission is directed to hold the election. *See* Tenn. Code Ann. § 2-3-204(a). This date is also subject to being altered to coincide with a regular election under Tenn. Code Ann. § 2-3-204(c).

In summary, under Tenn. Code Ann. § 5-8-102, the county legislative body can choose between (1) approving a wheel-tax resolution by two-thirds vote at two consecutive, regularly scheduled meetings, subject to the voters' ability to petition for a referendum on the wheel tax,

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[1] Tenn. Code Ann. § 5-8-102(c)(2)(B) carries a special provision applicable by population bracket to Shelby County, but the procedure it specifies is exactly the same as that for other counties.

[2] The date for such an election may be re-set to coincide with a regular election if it meets the criteria of Tenn. Code Ann. § 2-3-204(c).

or (2) by a simple majority vote directing that the wheel tax issue be decided directly by the voters in an election, rather than by the county legislative body itself.

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