

# **Election Law In Georgia: What City And County Attorneys Need To Know**

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September 2008

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# **Election Law In Georgia: What City And County Attorneys Need To Know**

Administering elections in Georgia is the responsibility of both state and local governments and requires an intimate knowledge of both state and federal election law. Given the complexity of these laws and procedures, and the timeliness within which many elections decisions must be made, it is critical that city and county attorneys have a thorough working knowledge of election law so they can assist their front-line elections officials and staff.

## **I. Constitutional Provisions**

The beginning point for an understanding of the State's Election Code is both the United States and Georgia Constitutions. The U.S. Constitution provides that members of the House and Senate shall be elected by the "People of the several States." U.S. CONST. art. I, § 2, cl. 1; amend. XVII. However, the regulation of the time, manner, and place of those elections is specifically reserved to the States. U.S. CONST. art. I, § 2, cl. 1. Additionally, while the U.S. Constitution guarantees to the states a republican form of government, it otherwise does not specifically define the right to vote as an individual constitutional right. U.S. CONST. art. IV, § 4. That determination was left to await later case law development.<sup>1</sup> The Georgia Constitution, however, picks up where the U.S. Constitution leaves off. Under the Georgia Constitution there is a specific right for persons to register and to vote by secret ballot. GA. CONST. art. II, § I, ¶¶ I, II. These rights are provided to U.S. citizens who are also Georgia citizens and are at least 18 years

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<sup>1</sup> See, e.g., Duncan v Poythress, 657 F.2d 691, 703 (5th Cir. 1981) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." (citation omitted)).

of age. Id. The General Assembly is specifically given the authority to establish the statutory structure for how persons register to vote. GA. CONST. art. II, § I, ¶ II.

## **II. Elections**

### **1. What is an election?**

An “election” ordinarily means any general or special election. O.C.G.A. § 21-2-2(5). Primaries and special primaries are not included in the definition of election, unless the context in which the terms are used clearly requires that a primary or special primary is included. Id. General or regular elections are elections “recurring at stated intervals fixed by law or by the respective municipal charters.” O.C.G.A. § 21-2-2(8). At a general election, voters elect a candidate to office or approve ballot questions. For partisan candidates, the groundwork for a general election is established during a primary. A “primary” is “any election held for the purpose of electing party officers or nominating candidates for public offices to be voted for at an election.” O.C.G.A. § 21-2-2(29). Georgia has no non-partisan primaries. For non-partisan offices, candidates are elected without the use of any primary at all. See, e.g., O.C.G.A. §§ 21-2-138, 21-2-139.

There are also “special” primaries and elections. O.C.G.A. § 21-2-2(33) & (34). These are discussed in more detail in Section VIII, *infra.*, entitled “Special Elections.”

### **2. Election Schedules**

Primary elections are usually held on the third Tuesday in July in even-numbered years. O.C.G.A. § 21-2-150(a). However, if the primary would occur during the same week of the national convention of the two political parties that received the highest number of votes in the previous Presidential election, then the primary is held on the second Tuesday of July. O.C.G.A. § 21-2-150(b)(1). Likewise, if the general primary is being held in the even-numbered year immediately following the official release of the

U.S. Decennial Census information, then the primary moves to the next-to-last Tuesday in August (i.e., August 21, 2012; August 23, 2022). O.C.G.A. § 21-2-150(b)(2).

Except for general municipal elections, general elections are held on the Tuesday following the *first* Monday in November in each even-numbered year. O.C.G.A. §§ 21-2-2(15), 21-2-541.2. General municipal elections are typically held on the Tuesday following the first Monday in November. O.C.G.A. § 21-2-541.2(4). Terms of office for municipal offices may be designated by local law. O.C.G.A. § 21-2-541.

There are statutory restrictions on when a special election may be held. O.C.G.A. § 21-2-540(c)(1). In odd-numbered years, a special election may be held only on:

- The third Tuesday in March;
- The third Tuesday in June;
- The third Tuesday in September; or
- The Tuesday after the first Monday in November.

O.C.G.A. § 21-2-254(c)(1)(A). The schedule varies slightly during even-numbered years, when general elections are being held:

- The third Tuesday in March or on the date of the Presidential Preference Primary, if held that year;
- The date of the general primary;
- The third Tuesday in September; or
- The Tuesday after the first Monday in November.

O.C.G.A. § 21-2-540(c)(1)(B).

### 3. How do you declare the winner in an election?

A candidate must receive a majority (50% + 1) of the votes in order to be nominated in a primary or elected to office. There may need to be a run-off primary or

election if one candidate fails to receive a majority of the vote. O.C.G.A. § 21-2-501(a). A run-off is actually a continuation of the primary or election, and only persons who were entitled to vote in the primary or election may vote in the run-off. Id.

In the event that there are unopposed candidates in a primary, special primary, general election, or special election, there may not be a need to hold an election at all. O.C.G.A. §§ 21-2-285, 21-2-291. Unless more than one write-in candidate has qualified or unless there are issues to be submitted to the electorate, the unopposed candidate is generally deemed to have voted for himself or herself and may be declared the winner. O.C.G.A. § 21-2-291. The superintendent shall provide notice to inform the affected electorate that no special or general election is to be conducted. The superintendent shall certify the unopposed candidate as elected in the same manner as he or she certifies other candidates as elected. Id. However, should a general primary be held where there is an unopposed candidate whose name appears on the ballot and that candidate fails to receive even a single vote, then the candidate is not nominated and that party will fail to have any nominee for that office. O.C.G.A. § 21-2-158.

#### 4. Who runs an election?

##### a. Superintendents

The official who is responsible for running an election is the “superintendent.” The superintendent can be any one of several people, depending on the election involved. O.C.G.A. § 21-2-2(35)(A-D). For counties or elections run by counties, the “superintendent” can be either the probate judge of the county or a county board. O.C.G.A. § 21-2-2(35)(A); see also O.C.G.A. § 15-9-30(b)(2).

Superintendents have a multitude of duties and responsibilities assigned to them by law. O.C.G.A. § 21-2-70. One of the most important duties is to “call” the election.

“Calling an election,” is when the superintendent takes some affirmative action to set the date for a special or general election and to announce that date to the public. O.C.G.A. § 21-2-2(3). The date of the call of the election is the date of its first publication in a newspaper of appropriate circulation. Id. There must be at least 29 days between the issuance of the call for a special election and the holding of that election. O.C.G.A. § 21-2-540(b). If the special election is held in conjunction with a state-wide general election then the special election must be called at least 60 days prior to the date of such state-wide general election. Id.

Election superintendents also are responsible for setting up and changing voting precincts, determining whether candidates are qualified to run for office, selecting and equipping polling places, appointing and training poll and other officers, receiving election returns and announcing their results, among numerous other duties. Id.

Because of the extensive nature of all of these duties, the superintendent is required to obtain a minimum of 12 hours of training in election law biannually; failure to attend may result in the imposition of penalties by the State Election Board. O.C.G.A. § 21-2-100. By December 31 of the year in which they are appointed, all election superintendents are required to become certified through a certification program approved by the Secretary of State. O.C.G.A. § 21-2-101(a). Any county or municipal election superintendent appointed prior to January 1, 2008, who has not met the certification requirement, must complete a certification program approved by the Secretary of State. O.C.G.A. §§ 21-2-70(14), 21-2-101(b). Such program may include instruction on, and may require the superintendent to demonstrate proficiency in, the operation of Georgia’s statewide electronic voting equipment, including the touch-screen units and electronic poll books, and in state and federal law and procedures

related to elections. A full, partial, or conditional waiver of the certification requirement may be granted by the Secretary of State, where the superintendent is unable to complete the training due to medical disability, providential cause, or other sufficient reason. O.C.G.A. § 21-2-101(c)(1).

Given the sensitive nature of these responsibilities, no one who holds an elective office can be a member of a county board of elections, and an election board member vacates his or her office if he or she qualifies to run for an elective office. O.C.G.A. § 21-2-75(a). Additionally, no one who holds office in a political party is eligible to serve as the chairperson of a county board of elections. O.C.G.A. § 21-2-75(b).

b. Boards

If a county chooses to operate through a “board,” the board may be named the “board of elections,” “board of elections and registration,” “city-county board of elections,” or a “joint city-county board of elections and registration.” O.C.G.A. § 21-2-2(35)(A). The board must then hire an “election supervisor” to carry out the day-to-day operations of the office.

c. Municipal Superintendent

The municipal superintendent shall be a person or committee selected by the governing authority of the municipality. O.C.G.A. § 21-2-70.1(b). A municipality may appoint someone, such as the city clerk, to serve as the election superintendent. O.C.G.A. §§ 21-2-2(35)(D), 21-2-70, 21-2-70.1. For a municipal primary, the “superintendent” is the municipal executive committee of the political party holding the primary. O.C.G.A. § 21-2-2(35)(B). However, if there is no a municipal executive committee, then the county executive committee of the particular political party serves as the superintendent of the municipal primary. Id.

d. Probate Judges

Probate judges hold the unique position of being the only elected officials who can serve as election superintendents. Of course, that means there will be elections for which the probate judge is running as a candidate in a contested election over which he or she has the responsibility to directly supervise. O.C.G.A. §§ 21-2-74, 21-2-76. When such a situation arises, the probate judge must create a special temporary board to act as the election superintendent for that election. O.C.G.A. § 21-2-74. This temporary board is chaired by the probate judge and consists of two electors, one named by the Democratic Party and one by the Republican Party, who then jointly undertake duties of the superintendent. Id. Such an arrangement helps to alleviate any concerns over a “conflict of interest” where the probate judge would otherwise supervise his or her own election.

e. Poll Workers

Of course, election superintendents and supervisors cannot conduct elections by themselves. There are a wide range of people who assist in making an election happen. Superintendents are authorized to hire poll managers and poll workers. O.C.G.A. §§ 21-2-90 et seq. In each polling place, there must be a chief poll manager and two assistant managers, plus any clerks. O.C.G.A. § 21-2-90. Poll workers must be “judicious, intelligent, and upright citizens of the United States,” residents of the county or municipality in which they are appointed, over the age of 16, and able to read, write, and speak the English language. O.C.G.A. § 21-2-92. The superintendent must properly train every poll worker to carry out their duties and responsibilities before each election. O.C.G.A. § 21-2-99. Of course, poll workers cannot be candidates for nomination or election in the primary or election for which they are working and cannot currently be

holding a public office. O.C.G.A. § 21-2-92. A poll worker also cannot be the parent, spouse, sibling, or in-law of a candidate on the ballot being voted at the primary or election. Id. Poll workers are charged with the responsibility of confirming that voters are registered, checking voters' identification when they come to vote, and making sure voters receive their proper ballot. O.C.G.A. §§ 21-2-406, 21-2-417.

f. Poll Watchers

Poll watchers are not, nor can they be, involved in the running of an election. Even so, a political party or a political body can designate a total of two poll watchers for each precinct in an election. O.C.G.A. § 21-2-408(a),(b). Independent candidates can also designate one poll watcher for each precinct. O.C.G.A. § 21-2-408(b). Additionally, in statewide elections, political parties, political bodies, and independent candidates can designate up to 25 statewide poll watchers. O.C.G.A. § 21-2-408(b)(2). A candidate cannot be a poll watcher. O.C.G.A. § 21-2-408(e).

While poll watchers are allowed in order to help assure the integrity of the election process, they cannot in any way interfere in the conduct of the election. O.C.G.A. § 21-2-408(d). Poll watchers cannot talk to voters, check electors lists, use photographic or other electronic monitoring or recording devices or cellular telephones, or participate in any form of campaigning in the polling place. Id.

5. Secretary of State

The office of the Secretary of State is created under the Constitution for the State of Georgia, where the General Assembly is given the authority to prescribe the powers and duties of this office. GA. CONST. art. V, § III, para. I.; see also generally O.C.G.A. § 45-13-1 et seq. The General Assembly has empowered the Secretary of State to carry out a wide range of responsibilities in the area of overseeing Georgia's election processes.

O.C.G.A. § 21-2-50(a)(1)-(15). These responsibilities include setting the forms for nomination petitions and ballots, receiving nomination petitions from persons running for state offices, determining whether such candidates are properly qualified, building or programming ballots for local governments using DRE's, and generally facilitating the operation of the State's election system by helping to train and coordinate with the various local elections officials. Op. Att'y Gen. 2005-3. Additionally, the Secretary of State is the "chief election official" who coordinates the State's responsibilities under the National Voter Registration Act of 1993 and serves as the Chairperson of the State Election Board. O.C.G.A. §§ 21-2-30(a) & (d), 21-2-210; Op. Att'y Gen. 2005-3. The Secretary of State is also empowered with numerous other duties and responsibilities as defined throughout Georgia's Election Code, including the review, verification, and certification of Georgia's statewide voting system. O.C.G.A. § 21-2-379.2. As such, local election officials look to the Secretary of State for guidance and coordination on elections questions.

#### 7. State Election Board

The State Election Board (SEB), which the Secretary of State chairs, is also not an "election superintendent" but is the state body that helps devise and enforce overall policies and laws in running elections. O.C.G.A. § 21-2-31. In addition to the Secretary of State, the SEB consists of an elector selected by a majority vote of the House and an elector selected by a majority vote of the Senate, as well as a member appointed by each political party recognized in the State. O.C.G.A. § 21-2-30(a). No member of the General Assembly, though, can be a member of the SEB. See Id.

In order to obtain uniformity in the conduct of Georgia's elections, as well as the legality and purity in all primaries and elections, the SEB has promulgated various rules

and regulations. These rules and regulations may be found through the Secretary of State's website at [http://sos.georgia.gov/rules\\_regs.htm](http://sos.georgia.gov/rules_regs.htm).

The SEB also has the authority to institute or intervene in any action in state or federal court to enforce the State's elections laws. O.C.G.A. § 21-2-32(a). Finally, the SEB has the authority to cite entities or individuals for violations of state election laws and, after proceedings under the Georgia Administrative Procedure Act, to impose sanctions, including monetary penalties of up to \$5,000 for *each violation*. O.C.G.A. §§ 21-2-33, 21-2-33.1. Given this authority, actions by the SEB are not taken lightly nor can they be ignored.

#### 8. Election Contests

An election contest must be done in a specific manner and within a very short time frame. Failure to follow any of the statutory requirements will likely lead to the dismissal of the contest altogether.

At the conclusion of a primary or election, the nomination or election of any candidate for federal, state, county, or municipal office can be challenged or contested by any person who was a candidate in the election or "any aggrieved elector who was entitled to vote for such person or for or against such question." O.C.G.A. § 21-2-521.

The only defendants in such a contest are:

1. The person whose nomination or election is contested;
2. The person(s) whose eligibility to seek any nomination or office in a run-off primary or election is contested;
3. The election superintendent(s) who conducted the contested primary or election; or
4. The public officer who formally declared the number of votes for and against any question submitted to electors for an election.

O.C.G.A. § 21-2-52(2)(A)-(D). While a copy of any contest petition must be served on the SEB, ***neither the SEB nor the Secretary of State is a proper defendant in most election contests.*** O.C.G.A. § 21-2-542(b).

A contest can be filed on one or more of the following grounds:

1. Misconduct, fraud, or irregularity by any primary or election official(s) sufficient to change or place in doubt the results;
2. Ineligibility of the defendant for the nomination or office in question;
3. The receiving of illegal votes or the rejection of legal votes sufficient to change or place in doubt the result of the election;
4. Any error in counting the votes or declaring the result of the primary or election, if such error would change the result; or
5. For any other cause that shows that another was the person legally nominated, elected, or eligible to compete in a run-off primary or election.

O.C.G.A. § 21-2-522(1) & (5). The standard of review for election contests was succinctly outlined by the Georgia Supreme Court:

We must presume that the results of an election contest are valid. Thus, an election will not be invalidated unless the party contesting the election demonstrates an irregularity or illegality sufficient to change or place in doubt the result. To carry that burden, the challenger must show a specific number of illegal or irregular ballots—and that number must be sufficient to cast doubt on the result of the election. It is not sufficient to show irregularities which simply erode confidence in the outcome of the election. Elections cannot be overturned on the basis of mere speculation or an appearance of impropriety in the election procedures.

Middleton v. Smith, 273 Ga. 202, 203 (2000) (citations omitted). This is a heavy burden for a contestant to carry. A contest petition must be filed within five (5) days of the official consolidation and certification of the election results. O.C.G.A. § 21-2-524(a). The five-day time period *includes* Saturdays, Sundays, and legal holidays. O.C.G.A. § 21-2-14. When the last day to file a contest falls on one of those non-business days, the contest may be filed on the next business day. Id.

Courts will very quickly assign a judge to hear an election contest case and hold an evidentiary hearing. O.C.G.A. §§ 21-2-523, 21-2-525. Courts strictly adhere to the form, timing, and notice requirements of the contest statutes given the expedited nature of the proceedings and the necessity of moving forward with the next stage of the election process or in determining the final results of an election. See Head v. Williams, 269 Ga. 894, 895-96 (1998). For instance, the failure to verify a petition or to serve the SEB could lead to the dismissal of an election contest. There is a right to a trial by jury as to the factual issues in an election contest, but given the expedited nature of such a case, the parties may not find it practical to invoke that right. O.C.G.A. § 21-2-526. The trial court itself has wide-ranging and plenary authority to grant a remedy in an election contest. O.C.G.A. §§ 21-2-525(b), 21-2-527.1. The Georgia Supreme Court has exclusive jurisdiction to hear appeals of election contests. Ga. Const. art. IV, § IV, para. III. Should there be an appeal of the decision, that notice of appeal does not act as a stay or supersedeas. O.C.G.A. § 21-2-528. Instead, a stay must be sought from the court. GA. CONST. art. VI, § VI, para. II (2); O.C.G.A. § 21-2-528.

### **III. VOTER REGISTRATION**

#### **1. County Boards of Registration**

The traditional form of voter registration occurs through the operation of a county board of registrars (“Board”), which consists of between three and five “judicious, intelligent, and upright” persons who are appointed to four-year terms by the superior court judge of the county based upon a recommendation from the grand jury. O.C.G.A. § 21-2-212(a). The county registrars themselves must be registered to vote in Georgia and the county in which they serve as well as able to read, write, and speak the English language. O.C.G.A. § 21-2-214(a). One of the registrars is designated as the

chief registrar who serves as the chief administrative officer of the Board and generally supervises and directs the administration of the registrar office. O.C.G.A. § 21-2-212(a) & (d). Registrars and their designees are generally prohibited from engaging in political activity. O.C.G.A. § 21-2-214(c).

In some larger counties and in municipalities, the governing authorities, rather than a superior court judge, can appoint the registrars. O.C.G.A. § 21-2-212(c) & (e). Municipal registrars, while not required to be electors of the municipality, must meet all the other qualifications required of county registrars. O.C.G.A. § 21-2-214(a).

Boards may appoint deputy registrars or hire staff to carry out their responsibilities. O.C.G.A. § 21-2-213. The deputy registrars must also be registered voters in Georgia, able to read, write, and speak the English language and can never have been convicted of a felony or of any crime involving fraud or moral turpitude. O.C.G.A. § 21-2-214(a). Other persons can be designated as deputy registrars, such as college and university presidents or their designees, who are deputy registrars for registering their students, staff, and faculty. See Rules of the State Election Bd. Rule No. 183-1-6-.05.

The main duty of the registrar is acceptance of applications from individuals who wish to register to vote. O.C.G.A. §§ 21-2-215, 21-2-220. Registrars should not seek to influence an applicant's political preference, display any political preference or political party or body allegiance, make any statement to an applicant or take any action the purpose or effect of which is to discourage the applicant from applying to register to vote, or make any statement to an applicant or take any action the purpose or effect of which is to lead the applicant to believe that a decision to apply to register or not to apply to register to vote has any bearing on the availability of services or benefits.

O.C.G.A. § 21-2-222(k). Boards also coordinate the cancellation or transfer of voter registration data between jurisdictions. O.C.G.A. § 21-2-218.

2. Who can register to vote?

Boards must determine whether a person is eligible to register to vote or to remain registered. O.C.G.A § 21-2-226. In order to be qualified to register to vote in Georgia, a person must be a citizen of the United States, a resident of Georgia, and at least 18 years or older by the time of the election. GA. CONST. art. II, § I, para. I, II; see also O.C.G.A. § 21-2-216(a). In questions dealing with residency issues, the General Assembly has provided a series of “rules for determining residence” to which the registrars can look for guidance. O.C.G.A. § 21-2-217. Determining residency for voter registration purposes requires that an individual’s habitation is fixed, without any present intention of leaving the State of Georgia. O.C.G.A. § 21-2-217(a)(1). Registrars consider many factors when determining residency such as: physical presence, mailing address, financial independence, business pursuits, employment, income sources, and leases for personal and real property. O.C.G.A. § 21-2-217(b). One commonly invoked rule is the provision that “the county or municipality, in which a person has declared a homestead exemption, if a homestead exemption has been claimed, shall be deemed the county or municipality of the person’s residence.” O.C.G.A. § 21-2-217(a)(14).

Additionally, to be eligible to register to vote, a person cannot suffer from the legally disqualifying disabilities of a felony conviction involving moral turpitude, except upon completion of the sentence, or be adjudged mentally incompetent, unless that disability has been removed. GA. CONST. art. II, § I, para. III; O.C.G.A. § 21-2-216(b). A person can register to vote before they reach 18 years of age, provided the individual is

at least 17 ½ years old and will be at least 18 years old when casting his/her vote.

O.C.G.A. § 21-2-216(c).

3. Where do you register to vote?

Georgia residents wishing to register to vote can do so at authorized offices that take and process applications for registering electors. O.C.G.A. § 21-2-215. State or local governmental offices such as public libraries, public schools, offices of county and municipal clerks, and government revenue offices are all authorized places for residents of Georgia to register to vote. O.C.G.A. § 21-2-222 (c)(1). In addition to these offices, residents can also register to vote at each office in this state which provides public assistance, state funded services to persons with disabilities, or is a recruitment office of the armed forces of the United States located within this State. O.C.G.A. § 21-2-222(b). The National Voter Registration Act of 1993 which is generally referred to under the shorthand term of “Motor Voter,” provides that anytime a person applies to obtain, renew, or change information on a driver’s license, he or she must be offered the opportunity to register to vote. 42 U.S.C. § 1973gg; see also O.C.G.A. § 21-2-221(a).

4. How do you register to vote?

If a person cannot get to any of these places of registration, he or she can still register to vote through the mail. O.C.G.A. § 21-2-223. The mail-in voter registration application forms are available through governmental and private entities with particular emphasis on making such forms available for organized voter registration programs. O.C.G.A. § 21-2-223(c). Voter registration applications can even be downloaded from the Secretary of State’s website at:

[http://sos.georgia.gov/elections/voter\\_registration/voter\\_reg\\_app.htm](http://sos.georgia.gov/elections/voter_registration/voter_reg_app.htm).

Completed registration applications should be returned to the Secretary of State's office. The application is then forwarded to the appropriate county Board to determine the eligibility of the applicant. If found eligible, the Board adds the applicant's name to the list of electors and places the applicant in the correct precinct and voting districts. See Id. The Secretary of State does not act as a registrar, but instead acts as a clearinghouse and coordinator of registration information and maintains the statewide electors list. O.C.G.A §§ 21-2-222(i), 21-2-223.

#### **IV. Voter Identification**

In addition to being registered to vote, a person must present valid photo identification when casting a ballot in person. Prior to admission to the enclosed space at the polling place, a voter must present proper identification consisting of any one of the following:

1. Any valid state or federal government issued photo ID, including a FREE Voter ID Card issued by the county registrar's office or the Georgia Department of Driver Services;
2. A Georgia Driver's License, even if expired;
3. Valid employee photo ID from any branch, department, agency, or entity of the U.S. Government, Georgia, or any county, municipality, board, authority or other entity of this state;
4. Valid United States Passport;
5. Valid United States military photo ID; or
6. Valid tribal photo ID.

O.C.G.A. 21-2-417. If an elector is unable to produce any of the above-mentioned forms of photo ID, he or she shall be allowed to vote a provisional ballot. O.C.G.A. § 21-2-418. More information is available at the Secretary of State's website at: [www.gaphotoid.com](http://www.gaphotoid.com).

## **V. Statewide Voting System**

### **1. Direct Recording Electronic (DRE) Voting Machines**

In 2002, Georgia took the lead in the national election reform movement by replacing all voting equipment in the state with DRE voting equipment, commonly called “touch-screen” voting machines. The State purchased one DRE unit for each 200 registered voters within a county – more than 19,000 machines – and through an intergovernmental agreement made these machines available to every county for use in all future elections. O.C.G.A. § 21-2-300. County governments were given the option of purchasing additional DRE units if they so desired, and the State’s contract with its vendor Premiere Election Solutions, Inc., contains a negotiated price at which counties may purchase additional units.

Municipalities have historically operated their elections without direct State oversight, and as a result, municipalities are not mandated to use DRE machines for elections. Municipalities may continue to use any voting equipment certified by the State, which includes the “lever” or “Shoup” machine and optical scan balloting systems.

Counties are authorized to contract with municipal governments for the use of DRE machines, but counties may not levy a fee for use of the equipment. O.C.G.A. § 21-2-300(e). Counties may, however, charge a municipality for any actual expenses incurred in making the DRE machines available to the municipality. Id.

## **VI. Recall Elections**

A recall election is essentially a referendum on whether an elected official should remain in office and is authorized under the Georgia Constitution. GA. CONST. art. II, § II, ¶ IV. A recall election may be called by: the Governor, the election superintendent of the county, or the election superintendent of the municipality. O.C.G.A. § 21-4-13.

Every elected public official is subject to being recalled. O.C.G.A. § 21-4-4(a).

Grounds for a recall are:

1. The official has, while holding office, conducted himself or herself in a manner which relates to *and* adversely affects the administration of his or her office and adversely affects the rights and interests of the public; *and*,
2. That official has also:
  - (a) Committed an act or acts of malfeasance while in office;
  - (b) Violated his or her oath of office;
  - (c) Committed an act of misconduct in office;
  - (d) Failed to perform duties prescribed by law; *or*
  - (e) Willfully misused, converted or misappropriated, without authority, public property or public funds entrusted to or associated with the elective office to which the official has been elected or appointed.

See O.C.G.A § 21-4-3(7). The discretionary performance of a lawful act or a prescribed duty cannot be a ground for a recall. Id. An act of “misconduct” in office means an unlawful act committed willfully or a willful violation of the State’s Code of Ethics for Government Service. O.C.G.A. §§ 21-4-4(8), 45-10-1.

In order to have a recall election, a petition process is mandated. This is a two-step process. First, there is a process of making an application to circulate a recall petition. Second, if the application process is successful, there is the actual petition process for the recall election.

An application to circulate a recall petition cannot be made within the first or last 6 months of an official’s term of office. O.C.G.A. § 21-4-5(a). The application form is promulgated by the Secretary of State and must be obtained from the local election

superintendent, who numbers and records it and notifies the official who is the subject of the recall. O.C.G.A. § 21-4-5(b)(2)-(3). When signed, an application must contain specific information as outlined by law. The application must be circulated and filed by sponsors, who are registered to vote, and were eligible to vote in the last election for the office, and live in the electoral district of the official sought to be recalled. O.C.G.A. §§ 21-4-4(9), 21-4-5(a). There must be either a maximum of 100 sponsors for the application or a number equal to at least 10% of the number of electors who were eligible to vote for the office at the last election, whichever number is smaller. O.C.G.A. § 21-4-5(c). Circulators must gather the appropriate number of signatures within fifteen (15) days after receiving the application. O.C.G.A. § 21-4-5(f)(1).

Once these signatures are gathered, the application may be submitted to the election superintendent for verification. O.C.G.A. § 21-4-5(f)(2). It cannot be amended, supplemented, or returned once it has been filed for verification. O.C.G.A. § 21-4-5(g). The superintendent must notify the subject official in writing that the application has been filed. O.C.G.A. § 21-4-5(f)(3). The superintendent then has unrestricted access to election records to verify the information on the application and has five (5) business days to do so. Id. A superior court judge can extend that time for a period not to exceed fifteen (15) days. O.C.G.A. § 21-4-5(f)(3).

In the meantime, within four (4) business days of filing the application, the subject official can file with the superior court for a review of the sufficiency of the grounds of the recall in the application. O.C.G.A. 21-4-6(a). The Recall Act lays out a process for assigning a judge to determine the sole legal issue of the sufficiency of the facts alleged to support a recall. O.C.G.A. § 21-4-6(c),(d),(e),(f). The chairperson of the application drive bears the burden of proof that probable cause exists to show the

grounds alleged, and the court may permit discovery on the issues. O.C.G.A. § 21-4-6(f). During this time, all other recall proceedings are suspended. However, if a recall petition has already been issued, signatures gathered prior to judicial review can still be counted. O.C.G.A. § 21-4-6(g). Either party can seek discretionary appeal of the court's ruling on the sufficiency of the application grounds. Id.

To recall a public officer who serves state-wide, there must be a number of valid signatures equal to at least 15% of the number of voters who were registered and qualified to vote for that office at the last preceding election. O.C.G.A. § 21-4-4(a)(1). At least one-fifteenth (1 /15) of each of those numbers of voters must reside in each of Georgia's thirteen (13) congressional districts. Id. For other public officers, the petition must contain a number of signatures equal to at least 30% of the number of electors registered and qualified to vote for any candidate for that office in the last election for that office. O.C.G.A. § 21-4-4(b).

The signers of a recall petition must be registered voters eligible to vote in the recall election and who vote in the electoral district of the official sought to be recalled. O.C.G.A. § 21-4-8(a). It must be signed in the presence of a circulator, who certifies each page of the petition, states the date and the signer's residence and, if it is circulated in more than one county, the county of residence of the signer must also be shown on the face of the petition. O.C.G.A. § 21-4-8(a), (b). The petition cannot be circulated or signed by any person in any location where alcoholic beverages are sold or served. O.C.G.A. § 21-4-8(a).

A recall petition can only be circulated for 90 days in relation to a statewide office, for 45 days for any other office where 5,000 or more signatures are required, or for 30 days for any other office where there are less than 5,000 signatures needed.

O.C.G.A. § 21-4-11(b). The election superintendent then has 30 days to verify the signatures on the petition, or 45 days if there is more than one petition. O.C.G.A. § 21-4-11(a).

If certified as sufficient, the superintendent must issue the call for a recall election generally within ten (10) days and the election generally must be held within thirty (30) to forty-five (45) days. O.C.G.A. § 21-4-13(a). A majority (50% + 1) of the votes in favor of a recall question removes the officer from office. O.C.G.A. § 21-4-13(e)-(f). A special election is then called to fill the vacancy. O.C.G.A. § 21-4-13(g). Should the recall process fail, no further recall petitions can be filed against the same official for at least six (6) months from the date of the denial of an insufficient petition or the date of the unsuccessful recall election. O.C.G.A. § 21-4-14.

## **VII. THE VOTING RIGHTS ACT OF 1964- SECTION 5**

No discussion of election law, practices or procedures in Georgia is complete without addressing Section 5 of the Voting Rights Act of 1964, as amended. 42 U.S.C. § 1973(c). This portion of the Voting Rights Act was enacted by Congress to prevent the restoration of illegal and discriminatory barriers to voting in jurisdictions which had such laws in effect on November 1, 1964. Id. Section 5 mandates that such a “covered jurisdiction” cannot seek to enforce any change in voting, OR standard practice or procedure without receiving approval or preclearance of that change from the federal government. Id.

There are essentially two methods of obtaining “preclearance.” First, a covered jurisdiction May file a declaratory judgment action before a three-judge PANEL in the District Court of the District of Columbia, showing that the change does not have the

purpose and will not have the effect of denying or abridging the right to vote on account of race or color or any right as guaranteed under the Voting Rights Act. Id.

An alternative to filing such a lawsuit – used most often by city and county attorneys – is to submit the proposed change to the Attorney General of the United States, through the Department of Justice (DOJ), for an administrative determination that the change would meet the standards of Section 5. Id. The Attorney General then has sixty (60) days to make a determination whether to interpose an objection to the change, although he or she may ask for additional information and extend this review period. Id.

The DOJ has promulgated rules outlining its jurisdiction and review procedures for Section 5 submissions. See 28 C.F.R. § 51.1 et seq. The rules covering Section 5 submissions explain in detail what information is necessary and optional in making a submission to the DOJ. See 28 C.F.R. §§ 51.20, 51.26-51.28. The rules also provide some examples of changes that should be submitted:

#### Sec. 51.12 Scope of Requirement

Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the section 5 preclearance requirement.

#### Sec. 51.13 Example of changes.

Changes affecting voting include, but are not limited to, the following examples:

- (a) Any change in qualifications or eligibility of voting.
- (b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.

- (c) Any change with respect to the use of a language other than English in any aspect of the electoral process.
- (d) Any change in the boundaries of voting precincts or in the location of polling places.
- (e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from a-large elections).
- (f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).
- (g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or to remain holders of elective offices.
- (h) Any change in the eligibility and qualifications procedures for independent candidates.
- (i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of office).
- (j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.
- (k) Any change affecting the right or ability of persons to participate in political campaigns which is affected by a jurisdiction subject to the requirement of section 5.

28 CFR §§ 51.12, 51.13; see also 28 C.F.R. § 51.61. The setting of any special election where there is any discretion in the selection of the election date is a covered change under Section 5. See 28 C.F.R. § 51.17.

Before a matter can be submitted for preclearance, though, it must be final. See 28 C.F.R. § 51.21. The Attorney General will not review submissions that are considered premature. See 28 C.F.R. § 51.22. If the DOJ determines that the submission is not

timely or premature, it will make no determination on the merits of the request for preclearance. See 28 C.F.R. § 51.35.

The DOJ calculates its 60-day review period as sixty (60) calendar days from when the submission is received, except that the actual day of receipt is not counted. See 28 C.F.R. § 51.9. If for some reason the DOJ should fail to respond to a submission at all during the review period, the submission would stand as precleared. See 28 C.F.R. § 51.42. A complete failure of response by the DOJ would be an unusual circumstance.

During the review period, the DOJ may receive comments from interested parties or may affirmatively investigate to find information on the subject of submission. See 28 C.F.R. §§ 51.29, 51.38. A jurisdiction may send in additional information after submitting a change for preclearance, but the voluntary providing of additional material information to the DOJ during the 60-day review period could result in that first review period being restarted. See C.F.R. § 51.39. Additionally, the DOJ itself may request additional information and start a new and final 60-day review period. See 28 C.F.R. § 51.37. A failure to respond to a request for additional information from the DOJ or to otherwise state that the additional information is unavailable could lead to an objection to the proposed change or failure to make any determination on the submission. See 28 C.F.R. §§ 51.35, 51.40. While the DOJ may ask for more information during the second review period, it does not stop the clock from running on that submission. See 28 C.F.R. § 51.37. A jurisdiction can request faster, expedited consideration of a submission, but the granting of that request is discretionary with the DOJ. See 28 C.F.R. § 51.34.

If the DOJ preclears the proposed change, records of preclearance should be kept permanently. It will be necessary for future changes to be able to demonstrate that all past changes have been precleared. Additionally, such information is necessary to show

the jurisdiction's compliance with Section 5 and to foreclose any lawsuits against the jurisdiction claiming a failure to preclear a covered change. It is important to note that even if the change is precleared, preclearance by the DOJ does not preclude future legal action by the Attorney General under other parts of the Voting Rights Act. See 28 C.F.R. § 51.55(b).

If the DOJ interposes an objection to the proposed change, the jurisdiction may request reconsideration of the decision, but otherwise there is no judicial review of the Attorney General's decision. See 28 C.F.R. §§ 51.48, 51.49. The covered jurisdiction can abandon the change, attempt to obtain preclearance for another change, or seek preclearance through a declaratory judgment action.

Contact information on Department of Justice preclearance matters:

U.S. Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, N.W.  
Voting Section, NWB  
Washington, D.C. 20530  
Telephone: 202-307-2932 or 800-253-3931  
Facsimile: 202-307-3961 or 202-307-2569

## **VIII. SPECIAL ELECTIONS**

Special elections and special primaries are called due to some exigency or a special need outside of the usual routine. O.C.G.A. § 21-2-2 (33)-(34). Customarily, these are elections to fill vacancies in public offices, but can also be called for purposes of placing a particular question to the voters. O.C.G.A. § 21-2-540.

City and county attorneys frequently contact the Secretary of State's office for guidance on these special elections. Each of these types of special elections has specific requirements - requirements as to when the election can be held, when and what type of

legal notices must be published, and so forth. The following may help you in determining the proper procedures to be followed in various types of special elections:

<u>Election Type</u>	<u>Code Section</u>
1% Sales and Use Tax	O.C.G.A. § 48-8-85
1% special Purpose Sales Tax	O.C.G.A. § 48-8-111
1% Sales and Use tax for Education Purposes	GA. Const. art. VIII, § VI, ¶ IV; O.C.G.A. § 48-8-142
Liquor Referendum- By Drink	O.C.G.A. §§ 3-4-90, 3-4-91
Liquor Referendum- By Drink (Pkg. Sales not lawful)	O.C.G.A. § 3-4-92
Liquor Referendum- By Package	O.C.G.A. § 3-4-41 (by petition)
Freeport	O.C.G.A. § 48-5-48.2
School Bond	O.C.G.A. §§ 20-2-430, 20-2-437, 20-2-450, 20-2-466, 36-82-1
Regular Bond	O.C.G.A. § 36-82-1
911 Service	O.C.G.A. § 46-5-133
Special Elections	O.C.G.A. § 21-2-540
Soil & Water Conservation	O.C.G.A. § 2-6-30

For all these elections, original copies of election returns should be sent to the Secretary of State's Elections Division. A copy of the consolidated returns should also be sent to the State Department of Revenue for all sales and use tax elections, Freeport elections, and distilled spirits elections.

A special election may also be called to fill an elected office that becomes vacant. These types of special elections present special challenges for the county or city attorney. City attorneys should always consult their city charter first, as this instrument will

control and guide the filling of a vacancy if it addresses the issue. If the city charter does not contain provisions for filling the vacancy, then the Georgia Code will control. County attorneys should be sure to consult local legislation when determining how a vacancy should be filled.

## **IX. CONCLUSION**

City and county attorneys have an important role to play in assuring that fair and impartial elections are held within their local jurisdictions. The laws that cover the field of elections have changed dramatically in recent years – and are changing almost every year the Georgia General Assembly meets. The consequences to cities and counties for a failure on the part of their local elections and registration offices to comply with the law can be severe – including not only the overturning of an election, but the imposition of administrative fines for such failures.

It is therefore critical that city and county attorneys become knowledgeable about all aspects of election law – both state and federal. The Secretary of State’s office is available to help you whenever we can.

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