

From: Alan B. Kaufman [mailto:alan.kaufman@azbar.org]
Sent: Friday, September 25, 2009 11:13 AM
To: Stockwell, Brent
Subject: Charter Review Task Force / Constitutional Issues re Votes vs. Ballots

Brent:

As you know, there was discussion at the last Task Force meeting about whether the ruling in Maxwell v. Fleming, 64 Ariz. 125, 166 P.2d 831 (1946) required that the number of **ballots** cast at a consolidated election necessarily determines the number of **votes** needed to calculate a majority for municipal races which are also included in that consolidated election ballot. Based on the reasoning set out below, I do not believe that is the necessary or even the most logical conclusion in these circumstances but, rather, that the Scottsdale City Charter could be amended as proposed in our pending Option B to provide for election through "a majority of **votes** cast in that candidate's race" rather than through a majority of the **ballots** cast at the consolidated election which may include many other "races" as well.

The Maxwell case held only *"that to entitle a candidate to be elected at the primary, he must receive a majority of all the **legal votes** cast at the primary election"* (emphasis added). But this is a thoroughly unremarkable statement that simply begs the correct question, which is "what is a '**legal vote**' cast at an election"? Although the Maxwell court neglected to cite the controlling provision in its opaque opinion, that standard is surely no surprise since Article 7 §7 of the Arizona Constitution itself provides explicitly *that "[i]n **all elections** held by the people in this state, the person, or persons, receiving the highest number of **legal votes** shall be declared elected"* (emphasis added). But that key term ("legal votes") is not defined either in the Constitution or in state statute, nor did Maxwell even pretend to do that. Instead, Maxwell simply wrote that "[i]t is our opinion that a ballot cast which was properly counted for any candidate at the primary, should be included in the total of votes cast," which merely restates the question to be "what is a **properly counted** ballot in a primary election for a candidate's race"? But Maxwell didn't even try to answer that question, either, so it isn't particularly persuasive authority on this point.

If the decisional terms "legal votes" and "properly counted" are not defined anywhere in the Constitution or in statute, then even Maxwell itself had to acknowledge that *"[i]n the absence of a constitutional or lawful restriction, the legislature has full power to act, and the same is true of the people under a home rule city charter" "[s]ince the constitution is merely a restriction on what the legislature or the people may provide in a home rule charter."* Thus, since there is no apparent constitutional impediment or statutory infirmity prohibiting the people of Scottsdale from adopting the effective definition of "legal votes" for the purposes of our municipal elections as votes cast for the specific "race" or "office" at issue, as the language proposed in Option B does, I believe that alternative can indeed be made available to the city's voters for their decision by this Task Force should it choose to do that.

I have attached copies of the only relevant Arizona cases I can find implicitly construing the controlling constitutional term "legal votes" in this context. In Tellez v. Superior Court, 104 Ariz. 169, 450 P.2d 106 (1969), the Arizona Supreme Court ruled that votes cast for an

incumbent candidate for a county office (in fact, it happened to be for county treasurer, but we don't need to go there for this project ☺) who died a few weeks before the election but whose name remained on the ballot should be counted for the purpose of determining the total number of votes cast for that office at the election even though that deceased candidate obviously could not serve if elected. Note, though, that the court only dealt with **votes cast for that specific treasurer's office** rather than with **all ballots cast at the primary election**, which we can reasonably infer also included other positions in addition to county treasurer (perhaps staff or the City Clerk can investigate the scope of the matters that were included in that primary election for us). Thus, in a case which specifically referenced Article 7 §7 of the Constitution and its requirement for counting only "legal votes," the court in fact counted only votes cast for that particular county office and **not** the larger number of ballots that may have been cast for all offices included in the primary election. And in Huggins v. Superior Court, 163 Ariz. 348, 788 P.2d 81 (1990), the second case attached to this email, the Arizona Supreme Court overturned prior precedent and ruled that "illegal votes" (i.e., those cast in a partisan primary election by voters who were not registered members of that political party) should be deducted from the candidate totals on a proportional and prorated precinct-by-precinct basis rather than from the overall totals and rather than directing a second election because of those nullified "illegal votes." The key from our present perspective, of course, is that the court again cited the express "legal vote" language of Article 7 §7 of the Constitution but **only counted the votes actually cast for the office at issue, not all of the ballots that were cast in the primary election itself**. The Tellez and Huggins cases, while not dispositive, certainly appear to be more useful for our purposes than Maxwell, which really didn't discuss or analyze the critical constitutional issue of "legal votes" at all.

So under the constitutional provisions dealing with elections and charter cities, it would seem that the voters of Scottsdale could decide to define the term "legal vote" for Mayor and Council as an actual vote for identified candidates for those municipal offices regardless of whether or not the voter also cast other votes for other elections on the ballot. The method of calculating successful candidates in municipal elections should not vary with the arbitrary and irrelevant factor of whether the election happens to be for only one local office or instead takes place on a consolidated election date and therefore includes ballots for many other federal, state, county and local offices and propositions as well. In the absence of a definitive prohibition against amending the City Charter to provide for such a method of counting the majority of votes cast for a municipal office, which has yet to be explicitly identified in applicable Arizona law, the people of Scottsdale should have the right to decide for themselves whether or not ballots cast at consolidated elections which did not include votes for municipal races at issue in those elections should be counted as "legal votes" for the purposes of those municipal races and how the "legal votes" cast for those offices will be calculated. Thus, I propose that the Task Force consider recommending Option B and, to be consistent, perhaps change the term "valid votes" in that draft to the constitutional term "legal votes" and use that proper term in all three subsections of that Option.

Please distribute these materials to the Task Force and to such appropriate city staff and others as you best see fit. Thanks.

Alan B. Kaufman

A.B. KAUFMAN & ASSOCIATES, P.L.L.C.

8711 East Pinnacle Peak Road #241

Scottsdale, Arizona 85255-3517

tel: 480/585-0430

fax: 480/585-8452

email: Alan.Kaufman@azbar.org

<<Tellez v. Superior Court, 104 Ariz 169, 450 P.2d 106 [1969].pdf (30 KB)>>

<<Huggins v. Superior Court, 163 Ariz 348, 788 P.2d 81 [1990].pdf (43 KB)>>