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Via Electronic Mail

Alachua County Charter
Review Commission
County Administration Building
12 S.E. 1st Street
Gainesville, Florida 32602

Re: Non-Partisan Election of Members of Board of County Commissioners:
Proposal 1

Ladies and Gentlemen:

This proposal will change the method of electing county commissioners from partisan to non-partisan elections. Among the implications of this amendment are that under Florida law, party affiliation will not appear on the ballot and the candidates' names are presented in alphabetical order. §105.041, Fla. Stat.

Article VIII, section 1(e), Florida Constitution, authorizes counties to be governed by a board of county commissioners.

(e) COMMISSIONERS. Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected as provided by law.

Article VIII, §1(e), Fla. Const. (Emphasis supplied.)

The non-partisan issue presents a grammatical question of whether the phrase in the first sentence "except when otherwise provided by county charter" applies to all of the other sentences. More specifically, does the phrase "except when otherwise provided by county charter" modify the last sentence which reads: "one commissioner residing in each district shall be elected as provided by law." Typically, where the

constitution intends introductory language to apply to everything that follows, the introductory phrase is followed by a colon (:) and then a list of circumstances to which the phrase applies. For example, Article III, section 11(a) states: "There shall be no special law or general law of local application pertaining to" Following this clause is a list of 21 circumstances to which the prohibitions against such laws apply. Another example is Article VI, section 4(b), which provides: "no person may appear on the ballot for re-election to any of the following offices: . . ." This phrase is likewise followed by six types of offices and then a generally applicable condition.

The absence of this type of grammatical structure in section 1(e) leads to the conclusion that the introductory phrase "except when otherwise provided by county charter" does not apply to any sentence but the first sentence. In other words, the introductory clause does not modify the last sentence. The last sentence then cannot be read to say "except when otherwise provided by county charter, one commissioner residing in each district shall be elected as provided by law." Therefore, it is reasonable to conclude that the last sentence requires just what it says: a commissioner shall be elected as provided by law.

In State of Florida v. Grassi, 532 So. 2d 1055 (Fla. 1988), the Supreme Court considered the last sentence of Article VIII, section 1(e) in determining whether it allowed the Legislature to require commissioner residency within the district at the time of qualifying for election. In the course of deciding that the Legislature was powerless to set qualifications for commissioner elections, the Court construed the provision as "delegating to the legislature the task of establishing procedures for election of county commissioners, not the power to set qualifications for that office." In reaching that conclusion, the Court relied on the ballot title of the joint resolution that proposed the language in current section (1)(e):

Provides that county commissioners shall be elected as provided by law, thereby removing the constitutional restriction that county commissioners must be elected at large by the electors of the county, and allows the board of county commissioners to be composed of either five or seven members.

House Joint Resolution 452 (1984). (Emphasis supplied.)

The portion of the Joint Resolution amending Section 1(e) stated as follows:

(e) COMMISSIONERS. Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected as provided by law ~~by the electors of the county.~~

House Joint Resolution 452 (1984). (Words ~~stricken~~ are deletions; words underlined are additions.)

Prior to the adoption of the amendment, the only requirement for a commissioner was that he or she “be elected by the electors of the county.” After the amendment was adopted, that was changed to require that the election of commissioners by “as provided by law.”

The amendment expressly proposed it, the voters approved it, the Supreme Court applied it and the charter cannot deny it: the Legislature has the task of establishing procedures for election of county commissioners.

Bolstering this conclusion is another constitutional provision.

SECTION 1. Regulation of elections.--All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

Article VI, §1, Fla. Const. (Emphasis supplied.) The underscored language expressly directs that elections be regulated by law. Legislative regulation of elections is so

pervasive that it preempts charter regulations.¹ Therefore, only the Legislature may determine whether an office is subject to a partisan election or not.

Under appellate opinions, the power to amend a county charter is controlled in part by Article VIII, section 1(g), which provides:

(g) CHARTER GOVERNMENT. Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Art. VIII, §1(g), Fla. Const.

This section grants charter counties all powers except those inconsistent with general law or special act ratified by the voters. In contrast, Section 1(e) provides that county commissioners shall be elected as provided by law. Certainly, section 1(e)'s edict that a law determine county commissioner elections and the specific directive in Article VI that the Legislature shall regulate elections carries greater weight than the general grant of power to counties to enact ordinances not inconsistent with general law. Where two provisions can be read to address the same issue, one with specificity and the other generally, the specific trumps the general. See, Sarasota County v. Town of Longboat Key, 355 So. 2d 1197 (Fla. 1978). Thus, it is reasonable to conclude that a county charter may not provide for elections of county commissioners; instead a law must determine whether county commission elections can be non-partisan.

The Supreme Court has considered the power of a county to require non-partisan elections of county commissioners. In Dade County v. Young Democratic Club, 104 So. 2d 636 (Fla. 1958), the Court considered the authority of Dade County to provide for non-partisan elections of county commissioners. At the time, as now, general election law required partisan elections. Pursuant to Article VIII, section 11 of the Constitution of 1885, the voters of Dade County were authorized to adopt a county

¹ Browning, et al. v. Sarasota Alliance for Fair Elections, Inc., 968 So. 2d 637 (Fla. 2d DCA 2007) [rev. pending Sarasota Alliance for Fair Elections, Inc., etc., et al. v. Browning, etc., et al., SC07-2074 (Mar. 10, 2009 Fla.)].

charter.² The constitutional authorization included Section 1(a) which provided the following:

The charter . . . shall fix the boundaries of each county commission district, provide a method for changing them from time to time, and fix the number, terms and compensation of the commissioners, and their method of election.

The Court ruled that the power of the Dade charter to fix “the method of election” for county commissioners, included the power to provide for non-partisan elections.

In contrast to Dade County’s specific grant of power to determine the method of election, compare the other charter counties general authorization in section 1(e) to enact ordinances not inconsistent with law. When constitutional framers intended to allow county charters to address the election of county commissioners, they have done so expressly. And they have not done so for the charter counties other than Dade’s.

Assuming for the sake of argument that Section 1(e) does not limit counties and their charters from allowing non-partisan elections of county commissioners, the other issue presented by this charter proposal is whether a charter provision requiring non-partisan elections is inconsistent with general law. Where the Legislature intends to require an office to be partisan, it so specifies. For example, section 105.01(2), Florida Statutes, provides:

A judicial office is a nonpartisan office, and a candidate for election or retention thereto is prohibited from campaigning or qualifying for such an office based on party affiliation.

The rules of statutory construction require that where a portion of a group is given special consideration, the consideration does not apply to the entire group. The balance of general law suggests all offices are partisan unless expressly provided otherwise. In applying that law, the practice through-out the state is that county commissioners are subject to partisan elections, Here again, it seems reasonable to conclude that the office of county commissioner is subject to partisan elections as that is the state law default, and that non-partisan offices are to be specifically designated by law. Because the legislation in the area of elections is so extensive, the weight and

² This provision of the 1885 constitution has been carried forward without change to the 1968 constitution pursuant to Article VIII, section 6(e).

practice of it requiring partisan elections, and the fact the Legislature only designated judicial races as non-partisan, it is reasonable to conclude that the Charter is preempted in the area of elections.

The view that a charter cannot address non-partisan elections of county commissioners is not universally shared. Five county charters provide for non-partisan elections, plus Miami-Dade County, which has express power to provide a method for electing county commissioners. Some local government lawyers disagree with this view, including Mr. Nickerson in his February 22, 2000 opinion to the Alachua County Charter Review Commission.

After acknowledging that no reported appellate court cases specifically addressed the issue, Mr. Nickerson reviewed two cases upholding non-partisan elections of school board members. In the first case, School Board of Palm Beach County v. Winchester, 565 So. 2d 1350 (Fla. 1990), the Supreme Court was faced with a challenge to a special act providing for a non-partisan school board election in Palm Beach County, a charter county. The Court addressed the applicability of Article III, section 11(a)(1), which provides as follows:

There shall be no special law or general law of local application pertaining to: (1) election, jurisdiction or duties of officers, except officers of municipalities, chartered counties, special districts of local governmental agencies.

The Court ruled that the prohibition against special acts contained in Article III, section 11(a)(1) did not apply to a charter county and upheld the special act. The other case relied upon the Winchester opinion in upholding a special act requiring Volusia County school board members to be elected in non-partisan elections. See, County of Volusia v. Quinn, 700 So. 2d 474 (Fla. 5th DCA 1997).

In his analysis, Mr. Nickerson emphasized that the two cases could be distinguished because the courts were determining the power of a special act on non-partisan elections, instead of a charter provisions alone. He concluded:

if a county charter can direct the non-partisan election of school board members, surely it can direct the non-partisan election of county commissioners.

There are two problem with the basis of the conclusion. First, the Legislature specifically has the power to adopt election laws by special act for charter counties.

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That is the rule established by the Supreme Court in the Winchester because the power is expressed in Article VIII, Section 1, Florida Constitution. Second, the general proposition that charter counties have the same power to enact charter provisions or ordinances as the Legislature has to enact special act has been rejected by the courts. See, Sarasota County v. Town of Longboat Key, 355 So. 2d 1197 (Fla. 1978).

For the reasons expressed in detail here, we are of the opinion that a charter may not require non-partisan elections of county commissioners. However, a special act ratified by the electors could accomplish this goal.

Sincerely yours,

A handwritten signature in black ink that reads "Sarah M. Bleakley". The signature is written in a cursive style with a large, looping "S" and a long, sweeping "y".

Sarah M. Bleakley

SMB:sib