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February 16, 2010

Via Electronic Mail

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

Re: Intergovernmental Relationships Among the Cities and the County

Ladies and Gentlemen:

Three proposals seek to change the allocation of powers among the municipalities and the County. Article VIII of the Florida Constitution includes several provisions which authorize the power of both types of local governments and control the allocation of power among them. Understanding them is essential to determining whether a charter proposal may lawfully change the current allocation of powers among the cities and Alachua County.

Power of Municipalities

Constitutionally, municipalities "may exercise any power for municipal purposes, except as otherwise provided by law." Article VIII, section 2 provides for municipal powers as follows:

> SECTION 2. Municipalities.--
>
> (a) ESTABLISHMENT. Municipalities may be established or abolished and their charters amended pursuant to general or special law. When any municipality is abolished, provision shall be made for the protection of its creditors.
>
> (b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for

> municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.
>
> (c) ANNEXATION. Municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities shall be as provided by general or special law.

§2, Art. VIII, Fla. Const. (emphasis supplied).

Municipal Purpose Limit

The constitution limits the expanse of municipal powers by requiring that the exercise of such powers must serve a municipal purposes. Municipal ordinances addressing some subjects do not serve a municipal purpose where there is an inconsistent county ordinance, even in a non-charter county. See City of Ormond Beach v. County of Volusia, 535 So. 2d 302 (Fla. 5th DCA 1988); and Seminole County v. City of Casselberry, 541 So. 2d 666 (Fla. 5th CA 1989).

Power of Counties to Resolve County-Municipal Conflict

Charter counties are constitutionally granted all powers of local self government unless restricted by the legislature. Additionally, the charter is a mechanism to resolve charter county and municipal ordinance conflict, Section 1(g) directs the charter to determine whether a county ordinance or a municipal ordinance prevails on a subject in the event of conflict between them. Section 1(g) provides for charter county powers as follows:

> (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.

§1(g), Art. VIII, Fla. Const. (emphasis supplied).

In contrast, for a non-charter county, there is no local mechanism to resolve conflict between a county ordinance and a municipal ordinance. The constitution

provides in the event of conflict in a non-charter county, the county "ordinance shall not be effective within the municipality to the extent of such conflict. " §1(f), Art. VIII, Fla. Const.

Transfer of Powers or Functions

Section 4 provides a process by which local governments can transfer powers or functions among themselves. It allows a transfer between local governments to be accomplished by resolution of both the transferor and the transferee local government with voter approval of each jurisdiction. Section 4 also authorizes the Legislature to provide another process for a transfer of powers among local governments. The legislative process may be established either by general or special law. Section 4 provides as follows:

> SECTION 4. Transfer of powers.--By law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.

§4, Art. VIII, Fla. Const.

Consolidation

Pursuant to Section 3, consolidation or unification of a county and a municipality requires a special act of the Legislature.

> SECTION 3. Consolidation.--The government of a county and the government of one or more municipalities located therein may be consolidated into a single government which may exercise any and all powers of the county and the several municipalities. The consolidation plan may be proposed only by special law, which shall become effective if approved by vote of the electors of the county, or of the county and municipalities affected, as may be provided in the plan. Consolidation shall not extend the territorial scope of taxation for the payment of pre-existing debt except to

> areas whose residents receive a benefit from the facility or service for which the indebtedness was incurred.

§3, Art. VIII, Fla. Const. (emphasis supplied).

With these constitutional provisions in mind, we now turn to the specific CRC proposals suggesting changes to the relationship between Alachua County and the municipalities within the County.

Proposal: Proposal 09-03 merging the City of Gainesville and the County into one government.

There is one consolidated county/municipal form of government in Florida: Jacksonville-Duval County. Consolidation involves combining two or more governments into a single one. Section 3 of Article VIII, of the Constitution allows consolidation of a county and a city only by special act of the Legislature. Sarasota County v. Longboat Key, 355 So. 2d 1197 (Fla. 1978). Thus, a charter amendment cannot accomplish Proposal 09-03's goal of merging the County and the City of Gainesville into a single unit of government. However, the goal could be achieved by the Legislature through special act with voter approval.

Proposal: Proposal 09-12 unifying fire services currently provided by the County and several municipalities into one.

In determining whether the charter can unify fire services, two constitutional provision come into play. The first is the transfer of powers provision in section 4 of Article VIII. That section provides the exclusive methods by which local governments can transfer services: by resolution of both governing bodies with referenda approval of each or in another manner as specified by law of the Legislature. The other relevant constitutional provision is the ordinance preemption authority in section 1(g) that directs the charter to "provide which shall prevail in the event of conflict between county and municipal ordinances." Two Supreme Court opinions describe the tension between the two constitutional provisions and provide rules for determining whether a charter may provide preemptive power to a county over a municipality or whether the conflict between the local governments may be resolved only by mutual agreement or by the Legislature.

Sarasota County

The first Florida case involving a charter amendment that sought to limit municipal powers is the 1978 Supreme Court decision in Sarasota County. Several municipalities challenged county charter amendments which proposed to transfer from the cities to the county (1) air and water pollution control, (2) parks and recreation, (3) roads and bridges, (4) planning and zoning, and (5) police. The Court described the arguments regarding the breadth of a charter county powers as follows:

> None of the parties seriously disputes the notion that this proceeding really involves a proposed transfer of functions between different units of government. The cities simply claim that the county's [charter] ordinance does not comply with Article VIII, section 4 [transfer of powers] since it was initiated neither "by law" nor by resolution of all affected governments. Sarasota County suggested that charter counties are excluded from Article VIII, section 4 [transfer of powers provision] by reason of Article VIII, section 1(g) [ordinance preemption], or alternately that the transfer requirements of Article VIII, section 4 are met by section 125.86(7), Florida Statutes.

The Court ruled in favor of cities, holding that the transfer of powers provision applies to both non-charter and charter counties, and that the cited statutory provision was not specific enough to initiate the transfer of governmental powers. Thus, in this case of first impression, the Court construed charter county's constitutional power as not broad enough to obstruct a municipality's power.

Transfer of Services Compared to Regulatory Control

Seven years later, the Florida Supreme Court again considered a dispute between a city and a county over proposed charter amendments. This time, the Court focused on the interplay between section 4's transfer of powers provisions and section 1(g)'s ordinance preemption provision. In Broward County v. City of Fort. Lauderdale, 480 So. 2d 631 (Fla. 1985), the issue was whether a charter provision could lawfully provide for handgun control on a countywide basis. The City argued that the transfer of powers provision required a citywide as well as a countywide referendum, contending that the transfer of powers provision requires such a "dual referenda" whenever there is a transfer of any function or power from one governmental entity to another. The Court took jurisdiction of the appeal to answer a question of public importance. It distinguished its earlier opinion in Sarasota County in this way:

> The circumstances of this case are the obverse of those in Sarasota County . . . wherein we rejected the county's attempt to completely preempt five essential government functions under section 1(g) without the dual referenda required by section 4 . . . In the case sub judice, to construe section 4 as having the breadth seemingly dictated by the troublesome adjective "any" [in the transfer of powers provision] would eviscerate section 1(g) [ordinance preemption] and elevate section 4 [transfer of powers] to a dominant position. This we must not do [because of rules of statutory construction requiring courts to find meaning in every constitutional provision] ."

After reviewing the commentary published contemporaneously with the proposed enactment of the two constitutional provisions on transfers of powers and ordinance preemption, the Court explained the power constitutionally granted to charter counties as follows:

> Section 1(g) was intended to specifically give charter counties two powers unavailable to non-charter counties: the power to preempt conflicting municipal ordinances and the power to avoid intervention of the legislature by special laws. The power to preempt is the power to exercise county power to the exclusion of municipal power. Preemption is a transfer of power from exclusive municipal authority or concurrent authority, to exclusive county authority. It is clear . . . [from the history of the Section 1 (g)] that the preemption power was specifically included to eliminate the necessity of most if not all special laws when a charter county sought to preempt city ordinances in such areas as speed limits and other regulatory matters. . . . Section 4, on the other hand, was intended to provide for a more convenient procedure whereby local governments could transfer functions and powers without the cumbersome procedure of seeking a special law or constitutional amendment.
>
> Thus, on the one hand the constitution has a provision intended to expand the power of charter counties, while on the other hand it includes a provision to expand the shared power of governmental units to transfer powers and

> functions. Both were intended to reduce the need for special laws and constitutional amendments. The conflict arises when the expansive power of a charter county collides with the requirements of section 4. But section 4 did not contemplate giving municipalities veto power over a charter county's preemptive power. Rather, section 4 contemplated situations where a law authorized dual referenda or where the city and county mutually desire to shift a function or power of the type which required special law or constitutional amendment under the 1885 constitution.
>
> A line must be drawn between these overlapping provisions. We hold that section 1(g) permits regulatory preemption by counties, while section 4 requires dual referenda to transfer functions or powers relating to services. A charter county may preempt a municipal regulatory power in such areas as handgun sales when county-wide uniformity will best further the ends of government. § 125.86(7), Fla. Stat. (1983). Dual referenda are necessary when the preemption goes beyond regulation and intrudes upon a municipality's provision of services.[1]

Thus, the Court drew a line between functions and power relating to services, which can only be transferred pursuant to section 4 and regulation, which can be preempted by county ordinance if provided in the charter under section 1(g).

Note that the Court cited as its authority the county ordinance preemption section 1(g) of the Constitution, but also relied upon a statute, section 125.86(7), Florida Statutes, as additional authority for holding that a charter county may preempt a municipal regulatory power when countywide uniformity will best further the ends of government. This is the same statute that the Sarasota County Court found inadequate to support charter amendments seeking broad usurpation of municipal power. The statutory section provides as follows:

> 125.86 County charters; legislative responsibilities.--The legislative responsibilities and power of the county shall be assigned to, and vested in, the board of county commissioners and shall consist of the following powers and duties: . . .

[1] (Emphasis supplied.) In 1998 Florida voters approved a Constitutional amendment that restricts the power of a county to regulate the sale of handguns to that specified in Art. VIII, §5(b), Fla. Const.

> (7) Adopt, pursuant to the provisions of the charter, such ordinances of countywide force and effect as are necessary for the health, safety, and welfare of the residents. It is the specific legislative intent to recognize that a county charter may properly determine that certain governmental areas are more conducive to uniform countywide enforcement and may provide the county government powers in relation to those areas as recognized and as may be amended from time to time by the people of that county . . . .

(Emphasis supplied).

In recognition that its ruling in Sarasota County may not have been predictive of its outcome, the Broward County Court emphasized that it was not breaking new ground because Sarasota County and the cases decided previously by the District Court of Appeals on transfer of power or ordinance preemption grounds reflected the underlying principles and distinctions adopted by the Court. The Court described Sarasota County as ruling that the county's charter amendments with their wholesale assumption of the burden of providing what had been municipal services went far beyond regulatory preemption and required dual referenda under section 4.

The Court also cited as consistent with its analysis of the two provisions the decision in City of Coconut Creek v. Broward County Bd. of County Comm'rs, 430 So 2d 959 (Fla. 4th DCA 1983), in which the District Court approved a county charter provision and ordinance permitting county veto of municipally approved land plats and growth management plans. The Court noted that the District Court had relied upon Constitutional section 1(g) and sections 163. 3174(1)(b) and 177.071(1)(a), Florida Statutes, as direct statutory authority in the comprehensive plan and land-platting arena for what the Court called "this narrow exercise of county regulatory preemption."

Broward County's Progeny

Two opinions from the Fifth District Court of Appeals issued subsequent to Broward County add further legal analysis and precedent on the issue of whether charter provisions can lawfully provide for county ordinance preemption of municipal ordinances. The 1988 opinion in City of New Smyrna Beach v. County of Volusia, 518 So. 2d 1379 (Fla. 5th DCA 1988), upheld a charter amendment providing for countywide beach regulation against a city challenge that the referendum had failed within the municipality and thus violated the transfer of powers dual vote requirement. The district

court carefully examined the city's argument and compared it to the rationale for the charter amendment and the extent of county control it afforded:

> The City argues that the operative provisions of . . . [the charter] Amendment impermissibly shift the responsibility of control of beach services from the City to the County. However, the amendment reveals that it is carefully drafted to pertain only to regulatory matters. The expressed intent of the amendment is to guarantee beach access to the public. To effectuate this purpose, section 205.1 mandates the County Council to authorize "as permitted by law" vehicular access in areas of the beach not reasonably accessible from public parking facilities. Section 205.4 gives to the [County] Council exclusive power to impose reasonable vehicular beach access fees and prohibits municipalities from charging any additional fees. Section 205.3 authorizes a comprehensive unified beach code regulating all aspects of the public health, safety, and welfare on and pertaining to the beach. Finally, section 205.6 grants to the County exclusive regulatory jurisdiction over the beaches and approaches. On their face, none of these provisions relate to the provision of services. Rather, they pertain exclusively to the County's regulatory powers over the beaches, an area which the Beach Trust Commission found to be "conducive to uniform countywide enforcement." § 125.86(7), Fla. Stat. (1985). Moreover, section 205.5 expressly disclaims any intent to assume control over services provided by municipalities and prohibits the County from duplicating any services already provided by the City.
>
> The City argues that [Charter] Amendment 4 divests it of functions and powers relating to the beach that it has previously exercised. However, the control to be exercised by the county, i.e., access fees, regulation of traffic, rules pertaining to individual conduct, operation and parking of vehicles on the beach, etc., clearly relates to regulation of those members of the public making use of the beach. These matters, like regulation of firearms, are areas which section 1(g) authorizes the county to regulate on a county-

> wide basis, preempting local governments. Broward County; § 125.86(7), Fla. Stat. (1985).

(Emphasis supplied).

The District Court ruled that the charter amendment authorized countywide control over beach regulation, citing as authority the Supreme Court's opinion in Broward County, and section 125.86(7), the same statute relied upon by the Supreme Court in Broward County. The District Court also relied upon the community's broad-based process used to develop the proposed charter amendment. The process began with a Chamber of Commerce study and recommendation for unified beach management. Then, a beach commission was created by interlocal agreement among the local governments consisting of county and municipal officials. . All the cities with beach access participated, except the City of New Smyrna Beach, The beach commission recommended a uniform regulatory plan for all beaches. Thereafter, a charter review commission ("CRC") was formed for the purpose of studying beach management. The CRC reported that municipal control of beach access resulted in inequities and found that without a countywide uniform access fee and other uniform regulation, "public rights of beach access are in great jeopardy" and that a countywide beach agency was the most effective method of providing such facilities The CRC proposed a charter amendment establishing uniform beach regulation as described in the quoted section of the opinion above. The amendment was approved by a majority of the voters in the County and in every municipality except the City of New Smyrna Beach.

This recognition of the local process in Volusia County and the extensive record of careful examination by the chamber, by all but one of the cities, and by the CRC, together with their finding that the only effective approach was a unified, countywide approach, apparently influenced the outcome of the litigation: A single city's voters could not thwart the will of all of the other county's voters.

Another feature of the "countywide regulation" approved in the City of New Smyrna Beach is that it only affected the beaches, not the entire county. The effect of less than countywide regulation is also evident in the more recent opinion, this one issued 20 years after City of New Smyrna Beach. In Seminole County v. City of Winter Springs, 935 So. 2d 521 (Fla. 5th DCA 2006), the Fifth District considered a charter amendment providing for county land use regulation in a specified rural area of the county. The charter amendment required the county's land use approval for the rural area regardless of whether the land was within the unincorporated area or within an area annexed into a municipality. The charter amendment did not give the county countywide land use power, but land use power only in the eastern, rural area of the

county. The City of Winter Springs had annexed into the rural area and brought the litigation, arguing that the charter provision constituted a transfer of power that was subject to a dual vote. The Fifth District rejected that argument, noting that the land use statutes expressly allowed for county charter provisions to determine which local government was responsible for comprehensive planning within a county. It also determined that land use regulation "was just that, regulation." The District Court ruled that countywide regulation can be the subject of a county preemptive ordinance and the transfer of powers provision does not apply. The court noted that the constitutional power granted to municipalities pursuant to Article VIII, section 2, Florida Constitution "are limited for municipalities in charter counties, where citizens are guaranteed the constitutional right to opt for county preemption of municipal regulatory power. . ., " citing Section 1(g) and Broward County.

Unification of Fire Services

Returning to the Alachua charter proposal to require unified fire services throughout the entire County, the legal questions is whether the unification of fire services in Alachua County is "conducive to unified control" as the rationales for county ordinance preemption approved in City of New Smyrna Beach and legislatively authorized in section 125.86(7), or are fire services "just what the name implies: services" to paraphrase the Supreme Court in Broward County?

In Alachua County, several cities currently provide fire services within their jurisdictions. The municipal taxpayers have invested funds in fire stations and equipment. These cities also employ personnel. Other cities in the County contract with the County to provide fire services. The County provides fire services within the unincorporated area. There has been no study of these various service delivery mechanisms supporting a finding that the services "are conducive to unified control" as was done for unified beach regulation in City of New Smyrna Beach. At this point, absent the type of study, effort, process, support and findings justifying unification of fire services approved in City of New Smyrna Beach, it is difficult to craft an argument that the focus of fire service unification is conducive to unified control or only a regulation which could be accomplished by charter amendment, and not a transfer of services which could only be accomplished pursuant to the transfer of powers dual vote provision.

Consequently, as laudable a goal that unification of fire services may be, it cannot be accomplished by the County charter being amended to prohibit the municipal ordinances that conflict with a countywide fire service provision ordinance.

However, under section 4, the County and the municipalities in reliance on their joint powers pursuant to section 4 can pass resolutions unifying fire services, if the voters approve it under the dual vote requirement. Alternately, the County and one or more cities can unify such services without a referendum under the process authorized in part II of chapter 171, Florida Statutes. There may be other statutory mechanisms available to the County and municipalities to jointly accomplish this goal. Or the Legislatures by general or special law may authorize a different method to accomplish the transfer of fire services to a single government. The charter itself, however, is powerless to accomplish this goal.

Proposal 09-03 County and City, mandating dual referendum to impose requirement on a municipality.

The Alachua League of Cities (the "Alachua League") and every city within the County support a proposal that as expressed by the Alachua League seeks to add the following provision to the Alachua Charter:

> Sec. 4.2. Home Rule Charter Amendments
>
> (D) Any other provision of this County charter notwithstanding, any amendment to this Charter proposed by petition, the charter review commission or the board of county commissioners that, in whole or in part, transfers or limits a service, function, power or authority of a municipality shall be effective within or in regard to a municipality only if the amendment is approved by a majority of the voters of Alachua County voting in a referendum and also approved by a majority of the voters voting in a referendum in that municipality.
>
> **BALLOT LANGUAGE**
>
> REQUIRE BOTH COUNTY AND MUNICIPAL VOTER APPROVAL OF CHARTER AMENDMENTS AFFECTING MUNICIPAL POWER OR FUNCTION
>
> Shall the Alachua County charter be amended to require that Charter Amendments that transfer or limit municipal service, function, power or authority take effect within or in regard to a municipality only if the amendment is approved by a

> majority of Alachua County voters and also approved by a majority of voters in that municipality?

Proposal CRC-09-03.

Alachua County Charter Provision on Ordinance Preemption

Currently, the Alachua County charter provides that municipal ordinances prevail over county ordinances in case of conflict, except for less stringent municipal ordinances regulating air and water pollution which are superseded by a more stringent county ordinance, but a less stringent municipal ordinance can be enforced by the municipality. The relevant Charter section provides:

> Sec. 1.4. Relation to municipal ordinances.
>
> Municipal ordinances shall prevail over county ordinances to the extent of any conflict. Notwithstanding the foregoing, if the county and a municipality enact ordinances establishing different standards for the purpose of protecting the environment by prohibiting or regulating air or water pollution, the ordinances imposing more stringent standards shall prevail to the extent of the difference and be fully enforceable within the boundaries of such municipality; however, the ordinances imposing less stringent standards shall not be deemed to conflict with ordinances imposing more stringent standards and shall also be fully enforceable within the boundaries of such municipality.

§1.4, Alachua County Home Rule Charter.

The question presented with this proposal is whether a charter can require a dual referendum for future charter amendments addressing city powers.

Other Charter Counties Dual Vote Preemption Provisions

Most county charters provide that municipal ordinances prevail in case of conflict or provide specific subjects on which a county ordinance prevails. However, two existing county charters contain a provision similar to that requested by the Alachua League: Palm Beach County and Pinellas County. The charter review commission in Brevard County has proposed a similar charter amendment.

Pinellas County

The Pinellas County provision was proposed by special act of the Legislature and became part of the charter in 1999. Chapter 99-451, Laws of Florida, provides in relevant part:

> Section 6.04 Any other section of the Pinellas County Charter, chapter 80-590, Laws of Florida, notwithstanding, except for any proposed amendments affecting the status, duties, or responsibilities of the county officers referenced in ss. 2.06 and 4.03 of this Charter, charter amendments proposed under s. 6.01 (proposed by Pinellas County Commission), s. 6.02 (proposed by citizens' initiative), or s. 6.03 (proposed by a Charter Review Commission) shall be placed directly on the ballot for approval or rejection by the voters and it shall not be a requirement that any such proposed amendments need to be referred to or approved by the Legislature prior to any such placement on the ballot. <u>However, any charter amendment affecting any change in function, service, power, or regulatory authority of a county, municipality, or special district may be transferred to or performed by another county, municipality, or special district only after approval by vote of the electors of each transferor and approval by vote of the electors of each transferee.</u> Such amendments proposed by the Board of County Commissioners must be approved by ordinance passed by a majority plus one member.

Two years ago, the Pinellas Charter Review Commission proposed to modify the Pinellas County provision. The proposed modification eliminated the requirement for a dual vote on charter amendments authorizing countywide regulatory ordinances. Litigation ensued with the cities arguing that the ballot language was vague and the CRC violated the Sunshine Law which invalidated the CRC action in approving the amendment. Contending that the special act requirement for a dual vote was unconstitutionally broad, the county countered that the Constitution already covered dual voting requirements under section 4's transfer of powers provision and authorized the charter to provide countywide regulatory power to preempt municipal ordinances

under section 1(g) citing Broward County2. The county voters did not approve the CRC's amendment which would have modified the dual voter requirement, but the voters did approve two other amendments adding requirements for municipal annexation of unincorporated area. After the election and court-ordered mediation, the local governments settled out of court, with the county conceding that the special act's dual vote requirement was constitutional and the cities agreeing to abide by the annexation amendments. See City of Pinellas Park v. Supervisor of Elections, 6 Cir. Ct. No. 06-5975-CI-11 (Settlement Agreement May 2, 2007).

Palm Beach County

In November 2008, a similar charter provision was proposed by the local league of cities in Palm Beach County. It is our understanding that previous heated battles over annexation and countywide land use authority and the adoption of charter amendments providing for countywide regulation and mandating annexation regulations had lead to animosity between the county and several municipalities. At the urging of the local league, the Board of County Commissioners proposed the charter amendment and the voters approved it. It is our understanding that the Palm Beach County Attorney was not asked and has not expressed any view on the lawfulness of the charter provision.

The pertinent provision of the Palm Beach County charter now provides as follows:

> Approved charter amendments that transfer or limit a service, function, power or authority of a municipality shall be effective in a municipality only if the amendment is also approved by a majority of voters in that municipality voting in the referendum.

The amendment appears in the Palm Beach Charter section related to home rule charter amendments.

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[2] The Pinellas County local governments launched a very expensive media campaign urging voters to oppose or to approve the modification of the charter provision. See "County, cities brace for a charter fight," www.sptimes.com/2006/09/08/news_tampabay/county_cities_brace_.shtml , (accessed Nov. 13, 2009). This campaign lead ultimately to the enactment of legislation prohibiting expenditures by local government to purchase media to support or oppose any referendum. See, Chapter 2009-125, Laws of Fla.

Brevard County

The Brevard County Charter Review Commission ("CRC"), which is currently convened, has tentatively proposed to put a similarly worded issue on the ballot. The proposal reads as follows:

> Section 1.7.1. Charter amendments affecting municipalities
>
> No provision of this Charter adopted after December 1, 2010, which transfers or limits any function, service, power, or authority of a municipality within Brevard County, shall be effective with regard to a municipality unless the amendment is also approved by a majority of the voters in the municipality voting in the referendum.

Our understanding is that the Brevard CRC counsel has not been asked to opine on the lawfulness of the proposal.

Florida Legislative Consideration of Dual Vote for County Ordinance Preemption

The Florida League of Cities has urged the Legislature to adopt similar dual vote requirements on a statewide basis for all county ordinances providing for countywide land use control. Charter county power was hotly defended by the Association of Counties. One Senate staff analysis questioned the constitutionality of such a provision as violating section 1(g) authorizing charter county ordinances to prevail over municipal ordinances if so provided in the charter.

> [T]o the extent that the bill makes ineffective a county charter, ordinance, or regulation that operates as a regulatory preemption over a municipal charter or ordinance, it may violate article VIII, section 1(g) of the Florida Constitution. In *Broward County v. City of Fort Lauderdale*, the Florida Supreme Court held that "section 1(g) permits *regulatory* preemption by counties."[3]

Although bills were filed in two separate sessions, the Legislature did not adopt either of them.

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[3] Senate Staff Analysis and Economic Impact Statement, by Senate Committee on the Judiciary on CS/SB 1608 (2006) Page 6. (Apr. 16, 2006). Like all Senate Analyses, this one includes a disclaimer: The Senate staff analysis does not reflect the intent or the official position of the bill's introducer or the Florida Senate. Id. at page 9.

Charter and Transfer of Powers and Functions

The Alachua League's proposal requires that a charter amendment may not effect "transfers or limits [on] a service, function, power or authority of a municipality" unless approved by the voters countywide and also within the municipality. A charter amendment cannot constitutionally transfer powers from a city to the county. Sarasota County and Broward County have established the rule that transfers of powers including services cannot be accomplished by charter amendment. Therefore, it is unnecessary and redundant to include in a charter a restriction on future charter amendments that seek to transfer functions, powers or services from a city to the County.

A charter amendment seeking to provide for an alternative to section 4's transfer of powers requirement cannot constitutionally be effective unless the legislature authorizes it. To the extent that the Alachua League's charter amendment proposes a different procedure for transfers of powers or functions which is more or less restrictive than the constitutional protections already guaranteed by section 4, it is unconstitutional. Id.

Notwithstanding Existing Environmental Ordinance Preemption

The Alachua League's proposal states in part: "Any other provision of this County charter notwithstanding . . . [charter amendments affecting municipalities require a dual vote]." The term "notwithstanding" means "in spite of" or "nevertheless" and is used in legal drafting to elevate the new provision as being superior to any other provision. If the Alachua League's provision as drafted were adopted by the voters, a question arises as to the effect of the "notwithstanding" provision on the current charter. Does it trump the charter's existing environmental regulatory ordinance provision so that it will apply only in those municipalities that approved the previous charter amendment authorizing environmental regulatory preemption by the County? Recall, that the courts construe every provision as having some effect instead of elevating one provision over another. If the intent is to modify the existing environmental regulatory preemption provision, it would be wise to specify that effect in the proposal and the ballot language, as the ballot language must inform the voters of what they are voting on. See section 100.161, Florida Statutes, requiring that all public measures be printed in "clear and unambiguous language" and to include a short statement explaining "the chief purpose" of the amendment. The purpose of these requirements is "to provide voters with fair notice of the contents of the proposed initiative so that voters will not be misled as to its purpose." Volusia Citizens' Alliance v. Volusia Home Builders Ass'n., Inc., 887 So. 2d 430, 431 (Fla. 5th DCA 2005). Of course, the proposal can be and should be modified to specifically provide whether it intends to modify the existing charter allowing county

preemption of environmental ordinances over municipal ordinances. The Brevard CRC proposal addresses this issue by using a date certain after which it applies to future charter amendments.

Notwithstanding All Future Charter Amendments

In addition to the issue posed above about the effect on the existing county ordinance environmental regulatory preemption in the current Alachua Charter, the use of the phrase "any other provision of this charter notwithstanding" in the Alachua League's proposal suggests that its intent is to require a dual vote on all future charter amendments affecting municipal regulatory powers. The issue of limiting future charter amendments in this manner has not been directly addressed by any appellate court. Under the Florida Constitution, charter amendments are subject to approval by the electors of the county pursuant to Article VIII, section 1(c). "Vote of the electors" is defined in Article X, section 12 to mean "the vote of the majority of those voting on the matter in an election, general or special, in which those participating are limited to the electors of the governmental unit referred to in the text." Therefore, a charter amendment need only be approved by voters on a countywide basis and not in any individual municipality. A charter amendment may not change a constitutional voting requirement for future charter amendments. See, Citizens for Term Limits & Accountability, Inc. v. Lyons, 995 So. 2d 1051 (Fla. 1st DCA 2008), rev. denied, 2009 Fla. Lexis 1032 (Fla. 2009) (60 percent requirement for future amendments ruled unconstitutional), and State v. City of St. Augustine, 235 So. 2d 1 (Fla. 1970) (charter requirement limiting qualified voters to those who own property ruled unconstitutional). Had the constitutional framers intended to require or authorize a dual vote for passage of charter amendments, it would have done so, as it did for section 4 transfers of powers which require a dual vote. A charter amendment may not take away the constitutionally guaranteed right to amend a charter by countywide vote by imposing additional conditions on it. Nor can it take away the right to determine by countywide vote the power to decide pursuant to section 1(g) whether a county ordinance or a municipal ordinance prevails in the event of conflict. As stated by the District Court in Seminole County, the "Constitution expressly grants the electorate a right to determine by charter which government they desire to vest with preemptive regulatory power." Consequently, the Alachua League's proposal calling for future charter amendments being effective within a municipality only where the voters in that municipality approve them violates the countywide vote requirement of section 1(c) and section 1(g)'s constitutional directive for the charter to provide whether a county ordinance or municipal ordinance prevail in case of conflict.

Conflicting Ordinance Alternative

There is an alternate way to reach part of the goal of limiting the effect of the County's power over municipalities by focusing not on future charter amendments, the vote for which cannot constitutionally be changed by the charter, but on the constitutional power of the charter to determine which prevail in case of conflict, a county or a municipal ordinance. Attachment A lists the Alachua League's examples of subjects that may be included in future charter amendments authorizing the County to adopt preemptive ordinances over conflicting municipal ordinances. Part of the Alachua League's goal could be accomplished by a charter amendment that focuses on which controls in case of conflict: a county ordinance or a municipal ordinance. A charter amendment could provide that a municipal ordinance on any or all regulatory subjects listed in Attachment A control over conflicting county ordinances. If the charter amendment is approved in a countywide vote, the municipalities would have such power. Future charter amendments could modify the municipal ordinance superiority provision with approval in a countywide vote, as section 1(c) requires. Given that the Alachua County Charter already provides that municipal ordinances prevail over conflicting county ordinances except on certain environmental regulatory issues, we provide no opinion or comment on the wisdom of this alternative proposal.

Sincerely yours,

Sarah M. Bleakley

Sarah M. Bleakley

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Alachua League of Cities
Examples of what Dual Vote could impact

- Community appearance
  - Whole community
    - Architectural guidelines
    - Building height requirements or limits
    - Building set-backs
    - City density
    - Green Space
    - Redevelopment
  - Businesses
    - Big box bans
    - Billboard regulations
    - Sign codes
  - Neighborhoods
    - Parking regulations
    - Boats/Trucks/Recreational vehicles
    - Historic preservation
    - Livestock regulations
  - Nuts and Bolds
    - Building codes
    - Planning/land use/zoning
    - Landscaping in right of ways
    - Use of alternative street services like brick
- Police and Fire Service Standards
    - Number of personnel on duty
    - Staffing per vehicle
    - Number of stations
    - Allowable distance between stations
    - Equipment Regulation
- Life style
  - Alcohol/Open beverage laws
  - Hours of operation of outdoor patios of restaurants and bars
  - Adult business regulation
  - Charitable solicitation
  - Noise regulations
  - Hours of operation for parks, libraries, recreational facilities
  - Pet leash laws
  - Park regulations