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May 7, 2010

Via Electronic Mail

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

Re: Efficacy of Charter Commissioners

Ladies and Gentlemen:

You have asked about the constitutionality of Question 4, a proposed charter amendment abolishing the board of county commissioners and transferring all its powers, duties and functions to a board of charter commissioners. Additionally, you have asked about the constitutionality of Questions 5 (non-partisan election of charter commissioners) and Question 6 (requiring the charter commissioners to set their salaries by ordinance), both of which rely on the charter commissioner concept and may take effect only if Question 4 is also approved.

CHARTER COMMISSIONERS: QUESTION 4

The creation of charter commissioners has been proposed in Question 4 in hopes that it provides a stronger legal basis of support for charter amendments that provide non-partisan elections of members of the Board of County Commissioners and require the Board of County Commissioners to set their own salaries by ordinance. The charter commissioner approach was suggested in response to our correspondences of January 15, 2010, opining that the constitution prohibits charters from requiring non-partisan elections of the members of a board of county commissioners and from allowing county officer salaries to be set by ordinance. The threshold issue raised with Question 4, 5 and 6, is whether the constitution allows a charter to provide for a governing body of the county to be anything other than a board of county commissioners.

There are no appellate court decision considering the constitutionality of another form of governing body, such as charter commissioners. If question 4 were litigated, it would present a question of first impression to the judiciary. The court would be bound to construe the constitutional provisions and apply them to the Alachua County charter

amendment. Thus, our analysis focuses on the language in the relevant provisions of the Constitution.

The Constitution allows for the establishment or creation of a charter form of government pursuant to either special act or general law:

(c) GOVERNMENT. Pursuant to general or special law, a county government may be established by charter which shall be adopted, amended or repealed only upon vote of the electors of the county in a special election called for that purpose.

Art VIII, Sec. 1(c), Fla. Const.

Although charter must be established pursuant to general or special law, the subsection allows the charter to be “amended . . . upon vote of the electors of the county” The term “establish” means “create” or “start”, and does not imply ceaseless control. Notably, the constitutional subsection does not expressly limit charter amendments to only those expressly authorized by general or special law, but appears to allow charter amendments that are not directly authorized by general law. Thus, it is only the establishment of a charter county that must conform to general or special law, not a subsequent amendment thereto.

Article VIII, section 1(e), Florida Constitution, provides 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.

This subsection requires the governing body of a county to be a board of county commissioners, *unless otherwise provided by county charter*. This section seems to allow for a different type of governing body, such as a board of charter commissioners as suggested in Question 4, when it is otherwise provided by charter.

At least one county—Volusia County—has a county *council* consisting of seven council members, all elected in non-partisan elections with five elected in single member districts and two elected at large, one of whom is designated the county chair.

Articles III and IX, Volusia County Charter adopted pursuant to ch. 70-966, Laws of Florida (Sp. Acts). This council was created by special act of the Legislature and approved by the voters. This special act creation of a county council was adopted almost contemporaneously with the legislative authorization and voter approval of the authority to create county charters in Article VIII, section 1. It demonstrates legislative intent that such section 1(e) does not require all county governing bodies to be boards of county commissioners. Rather the subsection expressly allows for flexibility regarding the type of governing body in a charter county.

The other constitutional provision relevant here is Article VIII, section 1(g), which provides 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.

This provision allows a charter county to have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. A governing body with a form different than a board of county commissioners is not prohibited by this constitutional provision. But, the constitutional provision suggests that a different type of governing body would be unconstitutional if it were inconsistent with general law.

There are two general law statutes authorizing the creation of charter counties: Parts II and IV of chapter 125, Florida Statutes. Part IV requires that the governing body of a charter county be an elected board of county commissioners. See, e.g., sections 125.86, Florida Statutes. Part II does not specify the type or name of the governing body. Neither of these two parts of chapter 125, nor any other provision of general law, prohibit charter amendments that abolish the board of county commissioners created pursuant to general law and transfer the powers, duties and functions to another type of governing body, such as a board of charter commissioners. Thus, a charter amendment that does so would not violate the requirement that the county charter not be inconsistent with general law.

Because none of the relevant provisions of the constitution prohibit charter amendments that change the governing body of a charter county from a board of county commissioners into a board of charter commissioners, the creation of charter

commissioners in Question 4 appears to be lawfully within the power of the CRC to propose.

NON-PARTISAN ELECTION OF CHARTER COMMISSIONERS: QUESTION 5

In our January 15, 2010 correspondence, we had expressed the opinion that the charter could not require county commissioners to be elected in nonpartisan elections. We reached our conclusion based on analysis of three constitutional provisions and the appellate court decisions construing and applying them. We revisit that analysis here and apply it to charter commissioners.

First, we had considered the requirement in Section 1(e) that county commissioners “be elected as provided by law.” But the charter amendment in Question 4 proposes to abolish county commissioners and replace them with charter commissioners. The constitution’s requirement that commissioners be elected as provided by law does not apply to charter commissioners as created by county charter.

Next, we had reviewed the requirement in Article VI, Section 1 of the Constitution that requires that “elections shall . . . be regulated by law.” We relied on Browning, et al. v. Sarasota Alliance for Fair Elections, Inc., 968 So. 2d 637 (Fla. 2d DCA 2007), which held that legislative regulation of elections is so pervasive that it preempts charter regulations. Upon review, after our correspondence was written, the Supreme Court reversed in part the Second District’s ruling and concluded that the legislative regulatory scheme for elections is not so pervasive as to completely preempt charter amendments on election issues in the Election Code:

The Legislature clearly did not deprive local governments of all local power in regard to elections. To the contrary, the Election Code specifically delegates certain responsibilities and powers to local authorities . . . This statutory scheme undoubtedly recognizes that local governments are in the best position to make some decisions for their localities.

Sarasota Alliance for Fair Elections, Inc v. Browning, 28 So. 3d 880 (Fla. 2010).

The Court explained that where a charter amendment does not conflict with the statute, the charter amendment is not unconstitutional. The test of conflict between a local government enactment and state law is “whether one must violate one provision in order to comply with the other. Putting it another way, a conflict exists when two legislative enactments ‘cannot co-exist. . . .’ Concurrent legislation by [local governments] may not conflict with state law. If conflict arises, state law prevails.” Id.

Applying the conflict test, the Supreme Court ruled some of Sarasota charter amendments regarding recount and voter auditing requirements conflicted with the Election Code and were therefore unconstitutional.

The question presented by CRC Question 5 is whether the charter amendment proposing the nonpartisan election of charter commissioners conflicts with the Election Code. Chapter 105, Florida Statutes, provides for the regulation of non-partisan elections. It specifically provides that judicial offices are non-partisan offices. § 105.011(2), Fla. Stat. It does not specify any other offices as non-partisan. The nonpartisan election of charter commissioners or county commissioners are not expressly addressed in the non-partisan statute. In contrast, section 99.061(2), Fla. Stat., provides for the process for qualifying for election “to a county office.” This section contemplates party affiliated elections because it requires candidate to pay the “party assessment, if any has been levied.”

Because there is an established statutory process for conducting nonpartisan elections, and the charter amendment does not change that process, it would appear that the concurrent holding of nonpartisan elections of charter commissioners would not conflict with the Election Code, under the Browning analysis. Consequently, the charter amendment proposing the nonpartisan election of charter commissioner does not appear to violate the constitution.

HB 131

However, the Florida Legislature adopted HB 131 in the recently completed 2010 regular session. Section 1 of the legislation provides as follows:

All matters set forth in chapters 97-105 are preempted to the state, except as otherwise specifically authorized by state or federal law. The conduct of municipal elections shall be governed by s. 100.3605.

The Governor has not yet received the legislation. After he is presented with it, he will have 15 consecutive days to sign it into law, veto it or it becomes law without his signature. We hesitate to speculate on what action the Governor will take.

Legislative staff have informed us that the preemption language was requested by the Division of Elections of the Department of State in direct response to the Supreme Court’s ruling in Browning that the Election Code does not preempt county charter amendments. HB 131’s preemption applies to “all matters set forth in chapter . . . 105,” the nonpartisan regulation chapter. “All matters” is such a broad term that it is

reasonable to conclude that it preempts charter amendments requiring non-partisan elections of charter commissioners, as proposed in Question 4.

After talking with legislative staff, we asked for an informal opinion from the Division of Elections. According to the Gary J. Holland, Assistant General Counsel, it is the view of the Department of State that

[I]f HB 131 becomes law, our opinion is that the matter of partisan/nonpartisan county commissioner candidates would be preempted to the state in the absence of a state or federal law specifically authorizing the office of county commissioner to be made a nonpartisan office. Of course, a court may ultimately disagree with this interpretation.

Holland email (May 7, 2010).

Thus, if HB 131 becomes law it would dissolve a charter amendment's power to require non-partisan elections of charter commissioners.

SALARIES: QUESTION 6

Our January 15, 2010 opinion on county commissioner salaries had concluded that a charter amendment directing the county commissioners to set salaries by ordinance violated the Constitution. We had relied on Article II, section 5(c) that directs: "The powers, duties, compensation and method of payment of county officers shall be fixed by law." The appellate opinions construing this provision led us to determine that county commissioners are "county officers." We concluded, consequently, that the Constitution requires the Legislature to actually fix the salaries of county commissioners and does not allow charter amendments to require county commissioners to set them by ordinances.

The central question with salaries is whether charter commissioners are "county officers" within the meaning of that term in Article II, section 5(c). It is hard to ignore the reach of the term "county officer" in Article II, as applied by the appellate decisions cited in our earlier correspondence. However, no appellate court opinion has addressed an analogous situation where the county commissioners are abolished and all their duties transferred to a new body called "charter commissioners." When Article II was created, the constitution did not contemplate the creation of charter commissioners. And yet, Article II was not amended to provide an exception for officers created by charter, when Article VIII was amended to allow county charters to be established by general or special law.

Alachua County Charter
Review Commission
May 7, 2010
Page 7

Weighing all the arguments, we believe that the abolition of county commissioners and the creation of charter commissioners by charter amendment Question 4 provides a stronger legal basis for supporting Question 6's proposal to require the charter commissioners to set their own salaries by ordinance.

Best regards,

Sarah M. Bleakley

Sarah M. Bleakley

SMB:sib

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