

TALLAHASSEE  
Suite 200  
1500 Mahan Drive  
Tallahassee, Florida 32308  
(850) 224-4070 Tel  
(850) 224-4073 Fax

Nabors  
Giblin &  
Nickerson P.A.  
ATTORNEYS AT LAW

FORT LAUDERDALE  
208 S.E. Sixth Street  
Fort Lauderdale, Florida 33301  
(954) 525-8000 Tel  
(954) 525-8331 Fax

TAMPA  
Suite 1060  
2502 Rocky Point Drive  
Tampa, Florida 33607  
(813) 281-2222 Tel  
(813) 281-0129 Fax

January 15, 2010

**Via Electronic Mail**

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

Re: Salaries of County Commissioners: Proposals 4, 11 and 13

Ladies and Gentlemen:

Each of these proposals suggest that county commissioner salaries be addressed in the charter. Proposal 4 recommends salaries be capped at the average county income. Proposal 11 advocates salaries be set by the voters. Proposal 13 urges salaries be set by the Board of County Commissioners.

There are no appellate court opinions on the issue of whether a county charter may lawfully regulate salaries of county commissioners. Our analysis of the issue first examines the Constitution to determine if the power is assigned to another body. We next consider whether charter regulation of salaries is inconsistent with general law.

On the issue of compensation, the Constitution directs: "The powers, duties, compensation and method of payment of state and county officers shall be fixed by law." Art. II, §5(a), Fla. Const. The requirement that compensation "shall be fixed by law," as construed long ago by the Supreme Court, means that the power to set salaries for county officers is expressly required of the Legislature. Board of Comm'rs v. Savage, 58 So. 835 (Fla. 1912). Moreover, the Legislature's compensation-setting power cannot be delegated to another entity. State ex rel. Buford v. Spencer, 87 So. 634 (Fla. 1921).

Had the Constitution used the phrase "compensation shall be as provided for by law" instead of as "fixed by law," our opinion would have been that the charter may establish salaries of the county commissioners pursuant to the Florida Statutes

authorizing them. See, Savage at 340, upholding local salary setting for certain officers where the Constitution stated "shall be provided for by law" but struck as unconstitutional local salary setting which the Constitution stated "shall be fixed by law."

By its terms, Article II's fixed-by-law requirement applies to "county officers." Subsection (1)(d) of the Local Government Article, Article VIII is entitled "county officers" and addresses the following officials: sheriff, tax collector, property appraiser, supervisor of elections and clerk of the circuit court. In contrast, subsection (e) is entitled "commissioners" and relates to the board of county commissioners as the governing body of the county. Common rules of construction would generally ascribe different meanings to two different terms used within the same document. However, the term "county officer" is used in so many places in the Constitution that to give "county officers" a meaning that excludes county commissioners would upset the common understanding and application of many provisions. For example, construing "county officer" to exclude county commissioners would mean that the Governor does not have the constitutional power to remove a county commissioner for cause. The Supreme Court has broadly interpreted the term "county officer" under the Governor's constitutional removal powers in consideration as to whether the power extends to district school board members. In In re Advisory Opinion to the Governor - Sch. Bd. Member - Suspension Auth., 626 So. 2d 684 (Fla. 1993), the Supreme Court concluded that the term "county officer" encompasses school board members, thus indicating that the extent of the phrase "county officer" may reach further than simply the officials listed in the Local Government Article, Article VIII, section 1(d).

The charters in eight counties provide for an adjustment to salaries instead of relying on the statutory formulae. There is a single reported district court of appeal opinion upholding a charter salary cap for county commissioners: Citizens for Term Limits & Accountability, Inc. v. Lyons, 995 So. 2d 1051 (Fla. 1st DCA 2008). But the Lyons opinion addresses only the issue of whether the referenda ballot language and title were sufficiently clear to inform the voters of the chief purpose of the charter amendment. The court did not address the issue of whether the constitutional requirement that the Legislature fix county officer salaries applied to county commissioners. Consequently, the Lyons case is not instructive on whether a charter may lawfully establish commissioner salaries.

The second test a salary charter provision must pass is whether establishing salaries by charter is "inconsistent with general law," and therefore contrary to Article VIII, section 1(g). Section 125.83(4), Florida Statutes, provides general provisions for county charters and salaries:

The county charter shall provide that the salaries of all county officers shall be provided by ordinance and shall not be lowered during an officer's term in office.

Chapter 145, Florida Statutes, provides for population-based formulae for all county officials including county commissioners. On the issue of charter officials, section 145.012 states: "This chapter [145] applies to all officials herein designated in all counties of the state, except those officials whose salaries are not subject to being set by the Legislature because of the provisions of a county home rule charter. . . ." More specifically, section 145.031(2) provides:

No member of a governing body of a chartered county or a county with a consolidated form of government shall be deemed to be equivalent of a county commissioner for the purpose of determining the compensation of such member under his or her respective charter.

The Attorney General has opined<sup>1</sup> and a number of local government attorneys agree that section 125.83(4) is unconstitutional in that it violates the constitutional requirement in Article II, section 5(c) that the Legislature fix compensation by law. Other local government lawyers disagree, including George Nickerson who has reasoned that the early cases and the Attorney General opinions were decided under an 1885 constitutional provision that was carried forward in substantially the same form in the 1968 Constitution. He noted that the earlier cited 1912 Spencer case struck down a law allowing county commissioners to fix salaries of other county officers as destroying uniformity contemplated by the constitutional requirement that compensation shall be fixed by law. Mr. Nickerson reasoned: "[c]learly, the concept of uniform county government has been superceded in the 1968 Florida Constitution by the specific recognition of county charters." Letter from George H. Nickerson, Jr., Nabors, Giblin & Nickerson, P.A., Tallahassee, Florida, to the Alachua Charter Review Commission (Feb. 22, 2000).

While we agree that uniformity of county governments is the antithesis of local control, we are not free to overlook the clear constitutional requirement that county officer compensation be fixed by law. The courts have consistently held that a charter provision may not "trump" a constitutional directive unless specifically authorized to do so. For example, in In re Advisory Opinion to Governor, 313 So. 2d 717 (Fla. 1975), the Supreme Court ruled unconstitutional a charter provision for filling a county office

---

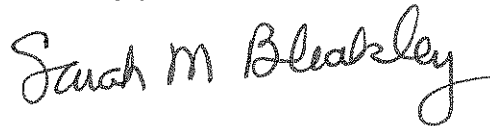
<sup>1</sup> Op. Atty. Gen 77-88 and Op. Atty. Gen. 81-7.

vacancy because Article VIII, section 1(d), which authorizes a charter to provide an alternative to election for selecting a county officer, could not supersede the more specific constitutional grant to the Governor to fill county officer vacancies. The Court reasoned that a charter's power is limited by other, more specific grants in the Constitution. See also, Sarasota County v. Longboat Key, 355 So. 2d 1197 (Fla. 1978) (Art. VIII, sec. 1(g)'s authorization for charter to provide for county ordinances to prevail over municipal ordinances is overcome by Article VIII, section 4's dual referendum requirement for transfers of powers between a municipality and a county).

Consequently, we agree with the Attorney General on this issue and the rationale for supremacy of specific provisions over general ones in the cited Supreme Court opinions and conclude that the charter may not lawfully address county commissioner salaries.

Those desiring county commissioner salary caps can appeal to the Legislature. The Legislature may fix compensation for county commissioners and other county officers in charter counties by general law or special act approved by the County's voters.

Sincerely yours,



Sarah M. Bleakley

SMB:sib