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June 8, 2010

Via Electronic Mail

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

Re: Non-Partisan Election of Charter Commissioners (Question 5): Effect of
Election Law Amendments in HB 131.

Ladies and Gentlemen:

As noted in our January 15, 2010 correspondence on non-partisan county commissioners, we had concluded that the Election Code requires county commissioners to be elected in partisan elections because the Legislature has so provided pursuant to Article VIII, section 1(e). But under the proposed change contemplated by Question 4 to charter commissioners, we concluded in our May 7, 2010 correspondence that the elections would not be required to be governed by the Legislature. In that correspondence we cautioned that then pending HB 131's preemption of all election matters to the state may preclude charter commissioners from being elected on a non-partisan basis. In response to your request, we have studied HB 131 now that it has become law and considered the exception it makes for municipal elections. Based on the broad expanse of charter county powers that include all municipal powers, we believe that the Alachua County Charter may lawfully provide for charter commissioners to be elected on a non-partisan basis. Our analysis of the issue begins with HB 131.

HB 131, which is now chapter 2010-167, Laws of Florida, includes the following provision:

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.

Emphasis supplied. The underscored sentence provides a municipal exception to the broad preemption language expressed in the first sentence.

Prior to the bill becoming law and at our request, in an informal opinion, the Division of Elections opined that HB 131 preempts a charter from establishing non-partisan elections for county commissioners. DOE Holland email (May 7, 2010). Accordingly, in our May 7, 2010 correspondence, we opined that if HB 131 becomes law, it would dissolve a charter amendment's power to require non-partisan elections of charter commissioners.

Scope of Charter County Power Includes Municipal Powers

Charter county powers have been broadly granted by the constitution and broadly construed by the courts to include municipal power. "A county has all power of local self government. . . .", pursuant to Article VIII, section 1(g). The "power of local self government" includes municipal power as determined by several Florida Supreme Court opinions dating from 1972. See, e.g., State ex rel. Volusia County v. Dickinson, 259 So. 2d 9 (Fla. 1972) upholding a charter county's power to levy a tax statutorily authorized only for municipalities. As to whether the Legislature intends to limit the effect of a statute to only municipalities and not to charter counties, the rule of law is: "Charter counties . . . have the same powers and authority to implement ordinances as municipalities unless an intention to exclude them is plainly discernable in the statute." See, Palm Beach County v. Bellsouth Telecommunications, Inc., 819 So. 2d 876, 877 (Fla. 4th DCA 2002), upholding a charter county's levy of a municipal gross receipts tax on certain users of the rights of way. Thus, when a statute specifically authorizing an action by a municipality is silent as to a charter county's power, the courts have found a charter county has all the power of a municipality.

The Alachua County Charter, Section 1.1 provides:

Sec. 1.1. Creation and general powers of home rule charter government.

Alachua County shall be a home rule charter county, and, except as may be limited by this home rule charter, **shall have all county and municipal powers of self-government** granted now or in the future by the constitution and laws of the State of Florida.

(Emphasis supplied). This provision clearly authorizes Alachua County to exercise municipal power.

With the backdrop of the charter provision and discussion of the rules of law concerning a charter county's municipal power, we examine the issue of whether HB 131's preemption exception for municipal elections allows the charter to authorize non-partisan elections of charter commissioners and charter officers.

The last sentence of HB 131 provides an exception for the conduct of municipal elections which are governed by section 100.3605. That section provides as follows:

100.3605 Conduct of municipal elections.--

(1) The Florida Election Code, chapters 97-106, shall govern the conduct of a municipality's election **in the absence of an applicable special act, charter, or ordinance provision. No charter or ordinance provision shall be adopted which conflicts with or exempts a municipality from any provision in the Florida Election Code that expressly applies to municipalities.**

(2) The governing body of a municipality may, by ordinance, change the dates for qualifying and for the election of members of the governing body of the municipality and provide for the orderly transition of office resulting from such date changes.

§100.3605, Fla. Stat. (emphasis supplied).

This section allows municipalities to establish election procedures locally by charter when the municipal election procedures do not conflict with, or make exceptions to, state law requirements. In reviewing the Election Code relating to qualifying candidates for office, we found only one specific provision relating to municipal candidates, and that did not concern party affiliated elections but addressed the qualifying fee.

Unlike the Florida constitutional requirement that county commissioner elections be as provided by law, the constitutional requirement for municipal legislative bodies is only that they be elected. Art. VIII, §2, Fla. Const. Thus, it would appear that municipal governments may be elected in non-partisan elections, as indeed many are so elected currently in Florida municipalities. Consequently, non-partisan elections for municipal officials do not violate the Constitution, nor does it violate section 100.3605, Florida Statutes.

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As summarized in the case law discussion above, a charter county may exercise any power authorized to a municipality by statute. HB 131 and section 100.3605, Florida Statutes, allow a municipal charter to provide for municipal elections in any way that does not conflict with the Election Code. Because the Election Code does not prohibit non-partisan municipal elections, it would appear that HB 131 does not preclude a charter amendment requiring non-partisan elections in a charter county. Consequently, the Alachua County Charter may be amended to require the non-partisan elections of charter commissioners.

Best regards,

Sarah M. Bleakley

Sarah M. Bleakley

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