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M E M O R A N D U M

TO: Alachua County Charter Review Commission
FROM: Wade C. Vose, Esq., General Counsel
DATE: April 8, 2020
SUBJECT: Legal Analysis and Initial Ballot and Charter Language – Alternatives to Rights of Nature Proposals

Pursuant to the Charter Review Commission's request, this office has evaluated and prepared draft ballot and charter language for potential alternatives to Proposal 37 (Rights of Nature), advanced for legal review at the CRC's January 8, 2020 meeting, and Proposal 41 (Santa Fe River Bill of Rights), advanced for legal review at the CRC's February 12, 2020 meeting.

As I have advised you in greater detail at a number of your meetings, I had the opportunity to review both proposals, and the legal premises of the Rights of Nature movement, at great length, including the opportunity to ask questions of the out-of-state attorney advocating for the adoption of the Santa Fe River Bill of Rights. After this review, I came to the abiding conclusion that the proposals, while seemingly well meaning, ran so far afield and so utterly ignored the existing structure and restrictions of Florida and federal environmental law, local government law, and constitutional law in so many ways, that I could not anticipate any reasonable outcome other than their invalidation upon challenge, along with not accomplishing anything significant for the effort.

Nevertheless, the CRC expressed a keen interest in exploring some alternative potential charter amendments that seek to address, at least in part, some of the problems the Rights of Nature proposals sought to solve. To this end, the CRC asked that I prepare some potential alternatives for CRC consideration.

I would note that there was some objection raised among the CRC membership to such a broad directive – an objection with which I can frankly sympathize. As we discussed when I first began working with you, you are the policymakers, not me or this office. As such, please understand that the potential charter amendments presented herein are intended solely as tools and potential starting points to help facilitate the CRC's thinking.

This memorandum contains two sets of ballot and charter language, both intended to address specific concerns I heard voiced by multiple members of the CRC.

The first potential amendment would grant standing to residents of Alachua County to bring suit against violators for violations of Alachua County's environmental regulations protecting water resources, water quality, wetlands, groundwater, stormwater, and surface waters. The ballot and charter language for this potential amendment are attached as Exhibit "A", and the potential amendment is discussed further below.

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The second potential amendment would provide that county environmental regulations protecting water resources, including protections for water quality, wetlands, groundwater, stormwater, and surface waters, may not be amended to be less stringent except by a unanimous vote of the entire County Commission, unless mandated by state or federal law. This amendment is intended to primarily address concerns expressed that shifting majorities of future County Commissions may elect to weaken environmental protections within the County. The ballot and charter language for this potential amendment are attached as Exhibit “B”, and the potential amendment is otherwise generally self-explanatory.

Key Features – Charter Amendment Granting Standing to County Residents to Sue Violators for Violations of County Environmental Regulations Protecting Water Resources

Addressing the potential amendment at Exhibit “A”, Section 1.8, Subsection A creates a private right of action and grants standing to each resident of Alachua County to bring an action against a violator for violations of the environmental regulations of the County relating to water resources, including but not limited to those regulations providing protections for water quality, wetlands, groundwater, stormwater, and surface waters. Rather than relying on a court to imply that this grant of standing does not require a resident to demonstrate a “special injury” from the violation, as the court did in *Herbits v. City of Miami*, 207 So.3d 274, 286 (Fla. 3d DCA 2016) (permitting a citizen of Miami-Dade County to bring suit pursuant to a right granted in that county’s charter), this provision explicitly states that a resident need not demonstrate a special injury to bring an action.

Subsection B addresses the available forms of relief, including injunctive relief to require remediation of the effects of a violation, damages payable to the County in an amount equal to the sum necessary to remediate the effects of a violation, to the extent the violator cannot accomplish remediation, and punitive damages, payable to the County, in the event the plaintiff can satisfy the statutory and procedural requirements to plead and prove entitlement to recovery of punitive damages for “intentional misconduct” and “gross negligence” as defined in Sec. 768.72, Fla. Stat.

Subsection C provides for an almost one-sided recovery of attorney’s fees and costs. An Alachua County resident bringing an action under this provision, who is a prevailing party in the action, would be entitled to recover his or her attorney’s fees and costs from a violator. However, an alleged violator who is a prevailing party would not be entitled to the recovery of his, her, or its attorney’s fees, unless some other provision of law would allow such recovery. The subsection references the most likely candidate for this recovery, Sec. 57.105(1) through (6), Fla. Stat., which provides for recovery of attorney’s fees from parties (and their attorneys) raising, in effect, frivolous claims.

Subsection D contains language that I have implemented in a number of the CRC’s potential amendments to satisfy the requirements of Section 4.2(D) of the Charter, added in 2010 to shield the County’s municipalities from the effect of certain charter amendments, unless the residents of that municipality also approved the amendment by a majority vote, or “the amendment expressly declares that it be effective county-wide and the proposing charter review commission, board of

county commissioners or citizen initiative petition sponsor has determined that the county-wide amendment fulfills an important county purpose.”

Subsection E requires the Board of County Commissioners to adopt an ordinance implementing this section no later than March 1, 2021. This subsection was added for a particular reason addressed below.

Some Cautionary Notes

Because the CRC gave me great latitude in formulating these initial drafts, I believe it is necessary that I offer some words of caution. First, portions of the potential charter amendment granting standing to Alachua County residents, as drafted, are incredibly stringent. The effectively one-sided recovery of attorney’s fees by plaintiffs, while legal, is a rare (but not unheard-of) provision. The potential recovery of punitive damages (payable to the County), is atypical of Florida environmental enforcement practice, which tends to lean towards fines of set amounts.

It is also notably stringent for what it does not contain. This amendment is not set up to grant standing to residents to sue the County to force it to enforce its own regulations. Rather, it grants residents the ability to bring suit directly against violators for violations. The amendment also does not contain express provisions allowing the County to intervene and take over exclusive enforcement action. This effectively means that the County would no longer have exclusive enforcement discretion over its water quality regulations. That is, even if the County exercised its discretion to decide not to enforce its regulations in a given instance, a resident could nevertheless seek to. This could be seen as a benefit or a detriment, depending on your point of view. As noted above, this amendment is intended to address a concern expressed by some that the County has not diligently enforced its own environmental regulations in the past. Of course, there may be other alternatives to address such a concern, including the Environmental Protection Officer proposal presently under the CRC’s consideration.

In addition, the amendment is much more limited in its application than the Rights of Nature proposals. It is specifically geared toward suits for violations of the County’s water quality regulations, and incorporates with that all of the limitations of those regulations. For example, if a polluter, for lack of a better term, was acting pursuant to a permit lawfully granted by the County, the State, or the federal government, then this amendment would not be of any use to a resident to stop that polluter from doing so. If a polluter’s activities were exempt from the provisions of the County’s water quality regulations, whether by the regulations’ own terms, or by operation of state law (for example, bona fide farm operations on agricultural lands under the Florida Right to Farm Act), then an action under this amendment would also not lie.

Finally, as I mentioned at your March 12, 2020 CRC meeting, it is possible that a court may find that this amendment runs afoul of Section 24 of Senate Bill 712 (2020), which is currently awaiting presentment to the Governor. This section has been commonly described as prohibiting granting Rights of Nature-style rights to the elements of the natural environment, but its wording is actually broader. The relevant provision reads in pertinent part as follows:

(9)(a) A local government regulation, ordinance, code, rule, comprehensive plan, charter, or any other provision of law may not recognize or grant any legal rights to a plant, an animal, a body of water, or any other part of the natural environment that is not a person or political subdivision as defined in s. 1.01(8) or grant such person or political subdivision any specific rights relating to the natural environment not otherwise authorized in general law or specifically granted in the State Constitution. (Emphasis added.)

As indicated by the underlined text, in addition to addressing Rights of Nature concepts, the provision also prohibits a local government charter (or ordinance, comprehensive plan, etc.) from granting a person *or political subdivision* any specific rights relating the natural environment not otherwise authorized in general law or specifically granted in the Florida Constitution. It is notable that this provision lumps together “person[s]” and “political subdivision[s]” in not being able to be granted specific rights relating to the natural environment, unless “otherwise authorized in general law or specifically granted in the State Constitution.” It is unclear whether this language was intended to, or has the effect of, wiping out all county and municipal environmental regulations, except where a general law grants authority for a particular regulation. It is also unclear whether the general law grant of legislative authority to counties found in the first sentence of Sec. 125.01, Fla. Stat., would suffice to give back to counties (or more specifically, the governing bodies of counties) the ability to “grant [to a] person or political subdivision... specific rights relating to the natural environment.”¹

In any event, Subsection E of the potential amendment adds a requirement that the Board of County Commissioners adopt an ordinance implementing the amendment no later than March 1, 2021, to leverage the County Commission’s potential additional general law legislative authority to grant the rights set forth in the amendment.

Indeed, this tactic suggests a potential alternative mode of implementing the grant of standing to Alachua County residents – the County Commission’s adoption of an ordinance implementing such rights, without need to adopt a charter amendment. The CRC may want to consider asking the Board of County Commissioners whether it would be willing adopt such an ordinance.

Alternatively, the potential charter amendment could be revised to grant standing to a County resident solely to compel the County to enforce its own regulations. This would substantially diminish the scope of a County resident’s standing. However, by stepping the power back a level and framing the right as one vis-a-vis the County government, rather than as a right against

¹ As we have generally discussed previously, Sec. 125.01, Fla. Stat., is not the primary source of legislative authority for a charter county, in light of the direct constitutional grant of authority to a charter county of “all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors”, and the direct constitutional grant of authority to charter county governing bodies to “enact county ordinances not inconsistent with general law.” Art. VIII, Sec. 1(g), Fla. Const. However, the peculiar wording of Section 24 of Senate Bill 712 (referring to rights “authorized by general law or *specifically* granted in the State Constitution”) raises the question of whether the *general* grant of home rule authority to charter counties would satisfy the “*specifically* granted in the State Constitution” condition. In contrast, Sec. 125.01, Fla. Stat. is a general law grant of legislative authority to both non-charter and charter counties, and Section 24 of Senate Bill 712’s reference to “authorized by general law” does not contain a “specifically” condition.

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violators, the grant of standing might not be characterized as a “specific right[] relating to the natural environment”, but merely a right of a resident to force the County government to enforce its “specific rights relating to the natural environment”.

Exhibit “A”

QUESTION #X

Ballot Proposal: The ballot title and ballot summary for Question #X are as follows:

COUNTY CHARTER AMENDMENT
AUTHORIZING COUNTY RESIDENTS TO
ENFORCE COUNTY ENVIRONMENTAL
REGULATIONS PROTECTING WATER
RESOURCES

Shall the Alachua County Charter be amended, effective countywide, to grant standing to County residents to bring suit against violators for violations of County environmental regulations protecting water resources, water quality, wetlands, groundwater, stormwater, and surface waters, and provide for implementing ordinances, injunctive relief against violators to require remediation of violations, recovery of damages and punitive damages payable to the County, and recovery of attorney’s fees and costs by prevailing party residents bringing suit?

___ Yes
___ No

Text Revisions: Upon approval of this question at referendum, the following portions of the Alachua County Charter are amended to read as follows:

Sec. 1.4. - Relation to municipal ordinances.

Except as otherwise provided by this charter, Mmunicipal 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.

...

Sec. 1.8. – Standing of Residents to Enforce County Environmental Regulations Protecting Water Resources.

- (A) Standing, Private Right of Action. Each resident of Alachua County shall have standing to bring an action against a violator for violations of the environmental regulations of the County relating to water resources, including but not limited to those regulations providing protections for water quality, wetlands, groundwater, stormwater, and surface waters. Such a resident need not possess or demonstrate a special injury resulting from a violation of such regulations in order to bring such an action, and lack of such special injury shall not be a defense to such an action. Any such action shall be brought in the county or circuit court, as jurisdiction may lie, in and for Alachua County, or where jurisdiction exists, may be brought in the United States District Court for the Northern District of Florida.
- (B) Remedies. In actions brought pursuant to this section, available remedies shall include:
- (1) injunctive or other equitable relief, including but not limited to mandatory injunctive relief requiring the violator, to the greatest extent possible, to remediate the effects of the violation and restore the effected natural resources to the condition as they existed prior to the violation negatively effecting such natural resources;
 - (2) recovery of damages from a violator, payable to the County, in an amount equal to the sum necessary to remediate the effects of the violation and restore the effected natural resources to the condition as they existed prior to the violation negatively effecting such natural resources, to the extent the violator is unable to fully accomplish such remediation and restoration pursuant to mandatory injunctive relief; and
 - (3) recovery of punitive damages from a violator, payable to the County, consistent with the requirements of Section 768.72, Florida Statutes, and Rule 1.190(f), Florida Rules of Civil Procedure, relating to the pleading and proof of claims for recovery of punitive damages.
- (C) Recovery of Attorney’s Fees and Costs. In actions brought pursuant to this section, an Alachua County resident bringing an action against a violator for violations of the environmental regulations of the County relating to water resources who is the prevailing party in such action shall recover his or her reasonable attorney’s fees and costs, including but not limited to costs of expert witnesses. An alleged violator who is a prevailing party in such an action shall not be entitled to recover its attorney’s fees, except as otherwise provided by law, including Section 57.105(1) through (6), Florida Statutes (2019).

- (D) Pursuant to Section 4.2(D), the charter amendment effectuating this section is expressly declared to be effective county-wide, and the proposing charter review commission has determined that such county-wide amendment fulfills an important county purpose.

- (E) No later than March 1, 2021, the board of county commissioners shall adopt an ordinance implementing this section.

Exhibit “B”

QUESTION #X

Ballot Proposal: The ballot title and ballot summary for Question #X are as follows:

COUNTY CHARTER ENVIRONMENTAL
PROTECTION AMENDMENT

Shall the Alachua County Charter be amended, effective countywide, to provide that County environmental regulations protecting water resources, including protections for water quality, wetlands, groundwater, stormwater, and surface waters, may not be amended to be less stringent except by a unanimous vote of the entire County Commission, unless mandated by state or federal law?

_____ Yes
_____ No

Text Revisions: Upon approval of this question at referendum, the following portions of the Alachua County Charter are amended to read as follows:

Sec. 2.2. - Legislative branch.

...

(I) Environmental regulations protecting water resources. County environmental regulations protecting water resources, including protections for water quality, wetlands, groundwater, stormwater, and surface waters, may not be amended to be less stringent except by a unanimous vote of the entire County Commission, unless mandated by state or federal law. Pursuant to Section 4.2(D), the charter amendment effectuating this subsection is expressly declared to be effective county-wide, and the proposing charter review commission has determined that such county-wide amendment fulfills an important county purpose.