BOARD OF COUNTY COMMISSIONERS

INTER-OFFICE MEMORANDUM

To: Honorable Chairman and Members of the Board of County Commissioners

From: Herbert W.A. Thiele, Esq.
County Attorney's Office

Date: June 16, 2009

Subject: Campaign Finance Reform / State Election Code Preemption

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Pursuant to the Board's direction provided our office at the May 26, 2009 workshop on Citizen Charter Review Committee Policy Issues, this memorandum will outline the State's implied preemption of regulations concerning local campaign finance reform.

Article VI, Section 1 of the Florida Constitution, which is entitled "Regulation of elections," provides that "Registration and elections shall... be regulated by law." This law is set forth by the Florida Legislature in Chapters 97 through 106, Florida Statutes, and is known as "The Florida Election Code." Section 97.011, Florida Statutes (2008). The intent of the Election Code is to "[o]btain and maintain uniformity in the interpretation and implementation of the election laws." Section 97.012(1), Florida Statutes (2008).

Chapter 106 of the Election Code is entitled "Campaign Financing," and Section 106.08 of same sets forth a limit on the dollar amount of contributions allowable in a campaign for elected office. For example, Section 106.08(1)(a), Florida Statutes, provides that:

> Except for political parties, no person, political committee, or committee of continuous existence may, in any election, make contributions in excess of $500 to any candidate for election to or retention in office or to any political committee supporting or opposing one or more candidates.

Pursuant to Article VIII, Section 1(g), Florida Constitution, "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 issue of setting limits to political contributions has been addressed by the United States Supreme Court. For example, in the case of Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976), the U.S. Supreme Court held that provisions of the Federal Election Campaign Act of 1971, as amended, which limited political contributions to candidates for federal elective office, were constitutional despite First Amendment objections. The Court wrote that contribution limits were permissible as long as the state demonstrated a "sufficiently important interest," such as preventing corruption and the appearance of corruption, and employed a "means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25. Several

years later, in the case of Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 120 S.Ct. 897 (2000), the U.S. Supreme Court found that its decision in Buckley v. Valeo was also the authority for a state to set limits on campaign contributions. Since Buckley, the U.S. Supreme Court has consistently upheld contribution limits in other state statutes. Randall v. Sorrell, 548 U.S. 230, 247, 126 S.Ct. 2479 (2006).

However, in a recent case, Randall v. Sorrell, 548 U.S. 230, 126 S.Ct. 2479 (2006), the U.S. Supreme Court found that a Vermont statute set campaign contribution limits "too low," and thus violated the First Amendment's free speech protections. Specifically, the Vermont statute limited the amount an individual, political party, and political committee could contribute to a campaign for governor at $400, state senator at $300, and state representative at $200, per election cycle. These limits were "substantially lower" than the limits previously upheld by the Supreme Court and comparable limits in other states. 548 U.S. at 253. The Court noted that "we must recognize the existence of some lower bound" and that "contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." 548 U.S. at 248-249.

As to the issue of state preemption in the field, there is a recent court case in Florida that addresses the preemption of the Election Code over local government regulations. In Browning v. Sarasota Alliance for Fair Elections, Inc., 968 So. 2d 637 (Fla. 2d DCA 2007), the Second District Court of Appeal reversed the holding of the trial court and found that proposed amendments to Sarasota County's charter were impliedly preempted by the Election Code. The charter amendments, which were proposed by a political action committee, required paper ballots, mandatory audits of the voting system, and certification of elections after the mandatory audit was completed. The Court explained that preemption is implied "when the 'legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.'" 968 So. 2d at 645. (Citations omitted.)

In determining whether or not the Election Code preempted the proposed Sarasota County charter amendments, the Second District Court of Appeal noted that the Election Code's ten chapters of regulations established a "detailed and comprehensive statutory scheme for the regulation of elections in Florida, thereby evidencing the legislature's intent to preempt the field of elections law, except in those limited circumstances where the legislative has granted specific authority to local governments." 968 So. 2d at 646. The Court goes on to state, "[t]his pervasive state control of the election process is a compelling indicator that the legislature did not intend for local governments to enact their own individual election laws," and the "legislature has enacted the Election Code with such detailed depth and breadth that its intent to occupy the entire field is forcefully implied." 968 So. 2d at 647. One of the cases that is cited by the Court is a Maryland case styled County Council for Montgomery County v. Montgomery Association, Inc., 333 A.2d 596 (Md. 1975), which held that the state's election code completely occupied the field of regulation of campaign finances, to the exclusion of any local legislation on the subject.

Therefore, Montgomery County's limits on campaign contributions were found to be invalid. The Second District Court of Appeal also certified a question to the Florida Supreme Court on the matter of the state's preemption in the field of elections law, but there has been no further activity in the case.

In addition, Florida Attorney General Opinion 074-263, rendered in 1974, determined that Chapter 106, Florida Statutes applied to candidates for elective municipal office and that the regulation of campaign contributions was preempted to the state.

It has been pointed out that there are local regulations in Florida that provide for campaign finance reforms, including campaign contribution limits. For example, the Alachua County Charter provides for a $250 limit on campaign contributions. However, it should be noted that the Alachua County regulations were authorized by a special law enacted by the Florida Legislature and were approved by a majority vote of the electors in a general election held November 2, 2004. As these regulations were enacted pursuant to special law of the Florida Legislature, it could be argued that the regulations are not preempted by the Election Code.

In addition, Sarasota County's charter sets campaign contribution limits of $200.00 per contributor. In 1999, the campaign contribution limits and other related issues were the subject of a lawsuit in the Twelfth Judicial Circuit styled Ciaravella v. Board of County Commissioners of Sarasota County, Florida, Case No. 99-4201-CA, in which the Circuit Judge for the Twelfth Circuit held that the campaign contribution limits were constitutional and enforceable. This holding was not appealed. However, a holding in the Twelfth Judicial Circuit would not be binding or authoritative in the Second Judicial Circuit in and for Leon County. Furthermore, in light of the Second District Court of Appeal's more recent holding in Browning v. Sarasota Alliance for Fair Elections, Inc., 968 So. 2d 637 (Fla. 2d DCA 2007), which found that the Election Code did impliedly preempt local regulations in the field of elections, Sarasota County's campaign contribution limits would also likely be found impliedly preempted by the State.

In conclusion, pursuant to the detailed, comprehensive and pervasive regulations set forth in the ten chapters of Florida law constituting the Florida Election Code, including Chapter 106 on campaign financing, it is the opinion of the County Attorney's Office that campaign contribution limits are impliedly preempted by the State of Florida. Should you have further questions concerning this matter, please contact our office.

HWAT/PTK/plp