

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

DATE: August 16, 2010

SUBJECT: Advocacy and the Proposed Charter Amendments

On August 17, 2010, the Board will be considering seven ordinances proposed by the Citizen Charter Review Committee to amend the Leon County Charter. Should the Board adopt any, or all, of the ordinances, a ballot question concerning each of the proposed Charter amendments will then be presented to the Leon County electorate for a vote at the November 2, 2010, election. This memorandum is being provided for the purpose of updating the Board on the present status of the law concerning advocating the passage or defeat of the referenda on the proposed charter amendments.

Section 106.113, Florida Statutes (2009), which was adopted by the Florida Legislature last year, provides in pertinent part as follows:

- (2) A local government or a person acting on behalf of local government may not expend or authorize the expenditure of... public funds for a political advertisement or electioneering communication concerning an issue, referendum, or amendment... that is subject to a vote of the electors. This subsection does not apply to an electioneering communication from a local government or a person acting on behalf of a local government which is limited to factual information.
- (3) With the exception of the prohibitions specified in subsection (2), this section does not preclude an elected official of the local government from expressing an opinion on an issue at any time.

Sections 106.113(2) and (3), Florida Statutes (2009).

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1. Political advertisement.

Section 106.113(2), Florida Statutes, expressly prohibits the County, or a person acting on behalf of the County, from expending, or authorizing the expenditure of, public funds for a political advertisement. "Political advertisement" is defined in Section 106.011(17), Florida Statutes (2009), as a paid expression in any communications media (which would include the internet, radio, television, newspaper, magazine, campaign literature, billboards, direct mail, display, etc.) which expressly advocates the approval or rejection of an issue. (Emphasis supplied.) "Issue" is defined in Section 106.011(7), Florida Statutes (2009), as any proposition to be submitted to the electors for their approval or rejection at an election.

Therefore, pursuant to Section 106.113(2), and the corresponding definitions set forth in Section 106.011, the County may not use public funds to pay for any communications media to expressly advocate either the approval or rejection by the electorate of the proposed Charter amendments. Practically speaking, words that would be examples of express advocacy, and which would be prohibited if paid for by the County, would be "vote for," "vote against," "approve," "reject," "support," or "oppose" a particular Charter amendment.

However, as indicated in Sections 106.113(2) and (3), Florida Statutes, spending public funds to communicate "factual information" would not violate the law. Although "factual information" is not defined by statute, the Florida Department of State, Division of Elections, has recently interpreted this to mean "verifiable actualities," as opposed to subjective or qualitative statements or comments. *Division of Elections Opinion 10-06* at 4, 7 (June 14, 2010).

For example, in the *Division of Elections Opinion 10-06*, the question was posed regarding what type of factual information could be communicated under Section 106.113. The Division of Elections found that the following statement, "The tax will improve public transportation," was subjective and qualitative, and thus inappropriate, whereas the statement, "The new tax will permit the county to purchase 25 buses at a cost of \$100,000 each," would be a verifiable actuality, and thus in line with the provisions of Section 106.113. In other words, any information communicated to the public via media paid for by the County would have to be restricted to, or based on, verifiable facts concerning the proposed Charter amendments.

2. Expression of opinion.

Pursuant to Section 106.113(3), Florida Statutes (2009), unless the prohibitions in Section 106.113(2) apply, elected officials may express an opinion on any issue at any time. In fact, pursuant to Florida Supreme Court's decision in *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373, 1375 (Fla. 1991), "Leaders have both a duty and a right to say which course of action they think best, and to make fair use of their offices for that purpose. The people elect governmental leaders precisely for this purpose."

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Therefore, for example, expressing an opinion regarding a proposed Charter amendment in a media interview would not be a violation of the statute, unless the media coverage was being paid for with public funds.

3. Electioneering communication.

Section 106.113 was adopted by the Legislature prior to a significant ruling by the United States District Court, Northern District of Florida, in the case styled *Broward Coalition of Condominiums, Homeowners Associations and Community Organizations Inc. v. Browning*, 2009 WL 1457972 (N.D. Fla., May 22, 2009). In the *Browning* case, the U.S. District Court held that those portions of Chapter 106, Florida Statutes regulating "electioneering communication" were unconstitutional and thus unenforceable. In fact, the U.S. District Court "permanently enjoined" the enforcement of Florida's electioneering communications laws as referenced in Chapter 106. *Browning* at 8.

As a result of the *Browning* decision, during the 2010 Legislative session the Florida Legislature adopted CS/CS/HB 131 (codified at Chapter 2010-167, Laws of Florida), which, among other things, amended the definition of the term "electioneering communication" to refer only to communications publicly distributed by television station, radio station, cable television, satellite, newspaper, magazine, direct mail, or telephone, that expressly advocates the election or defeat of a particular candidate for office. CS/CS/HB 131 omitted from the definition of "electioneering communication" those communications expressly advocating the passage or defeat of an "issue." Interestingly, however, CS/CS/HB 131 did not amend Section 106.113, Florida Statutes (2009).

Two recent opinions by the Florida Department of State, Division of Elections, have provided guidance with regard to the parameters of the provisions of Section 106.113(2), Florida Statutes, regarding "electioneering communication." Namely, because the Legislature changed the definition of "electioneering communication" to only include communications about candidates, the Division of Elections determined that the reference in Section 106.113(2) to "electioneering communication concerning an issue, referendum, or amendment" was superfluous and meaningless. *Division of Elections Opinion 10-06* at 4 (June 14, 2010); *Division of Elections Opinion 10-07* at 3 (June 14, 2010).

In conclusion, pursuant to Section 106.113(2), Florida Statutes, the County may not expend public funds to expressly advocate via the internet, television, radio, newspaper, magazine, direct mail, billboards, and the like, the passage or defeat of a particular ballot referendum on any one of the proposed Charter amendments. Furthermore, any expressions or statements set forth in communications media paid for by the County on the proposed Charter amendments would have to be based on verifiable facts. Should you have any questions regarding this matter, please contact the County Attorney's Office.

HWAT/PTK/plp

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cc: Parvez Alam, County Administrator
Vince Long, Deputy County Administrator
Shington Lamy, Special Projects Coordinator