



## Memo

To: Rights of the Wekiva River and Econlockhatchee Rivers Subcommittee

From: Patrick Brackins

CC: Katie Smith and Cliff Shepard

Re: Vagueness – Generally and as Raised by The Orange County Farm Bureau

Date: November 7, 2019

At the October 17, 2019 Rights of the Wekiva and Econlockhatchee Rivers Subcommittee meeting, I was tasked with reviewing concerns raised by the Orange County Farm Bureau (the “Bureau”) in its October 9, 2019 correspondence to Mayor Demings and the Board.<sup>1</sup> The Bureau raised concerns similar to those raised in the Lake Erie Bill of Rights litigation now proceeding in the Northern District of Ohio, *Drewes Farm Partnership v. City of Toledo*, No. 3:19-cv-434 (N.D. OH. Feb. 27, 2019), such as vagueness, equal protection, standing, and state and federal preemption. Since it is not possible to address all potential causes of action or claims that may arise from the provisions of a draft charter amendment which is still in the initial drafting stage, this memorandum addresses vagueness standards generally and as applied to the current draft at a high level. It is not intended to address all potential vagueness issues that may be raised, but highlights threshold areas that may be of concern to the subcommittee and the Commission. Equal protection, standing, and state and federal preemption issues may be addressed in separate memorandums based on direction from the subcommittee at its next meeting on November 7, 2019.

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<sup>1</sup> The October 9, 2019 correspondence is attached hereto as Exhibit A.

I. Vagueness – Basic Principles.

The United States Supreme Court has long recognized that vague laws are void because they violate substantive due process rights.<sup>2</sup> In *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982), the Court succinctly held:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

*Id.* (emphasis added). Thus, laws must be drafted in such a manner that a “person of ordinary intelligence” can reasonably know what he, she or it shall not do, and laws must also provide “explicit standards” explaining how an enforcement agency or court shall apply them. If a law or ordinance fails either of those standards, then it is void for vagueness.

Similarly, the Fifth District Court of Appeal, in reviewing a mandatory injunction issued pursuant to a Putnam County zoning ordinance, held:

Terms used in an ordinance must make reference to determinable criteria and provide context in which a court can determine [whether] a particular regulation is reasonable. No legislative body (County Commission) can delegate to an administrator arbitrary discretion to determine the meaning of a zoning code. If such standards or criteria do not exist, the zoning provision is a nullity.

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<sup>2</sup> Courts in Florida analyze state substantive due process standards in the same manner as federal courts applying federal substantive due process standards.

*Henry v. Bd of County Comm'rs*, 509 So. 2d 1221, 1222 (Fla. 5th DCA 1987). See also *Everett v. City of Tallahassee*, 840 F. Supp. 1528, 1546 (N.D. Fla. 1992) (applying Florida law and holding “[a]n ordinance which lacks sufficient standards against which the zoning authority’s actions may be measured vests unreviewable discretion in the zoning authority and is void for vagueness.”).

II. Application.

As a threshold matter, the text of the October 2, 2019 draft is missing a critical element. It provides: definitions; a statement of rights; a description of who may bring suit to enforce the rights created therein; an obligation on the County to protect and defend the charter provision; a prohibition on the County issuing or entering into any permit, license, contract, or other agreement with anyone who violates the charter provision; and a pre-suit notice procedure. However, the current draft lacks a clause stating with particularity what conduct constitutes a violation of the charter. While it defines pollutant, pollute, and pollution, there is no provision telling a person or entity precisely what it shall not do. For example, the draft lacks the following: “It shall be unlawful and a violation of this provision for any person or entity to knowingly or intentionally (insert what conduct is prohibited here with particularity). Any person or entity who knowingly or intentionally violates this provision may be subject to (insert penalties here with particularity).” The precise language in the above example does not need to be utilized, but it is recommended that the subcommittee consider adding language explaining exactly what is prohibited and what the penalty or penalties for engaging in such conduct shall be.

Explicit standards for determining whether a violation has occurred and explicit standards governing available remedies should be considered. For example, as we discussed at the past meeting, if it is the intent of the subcommittee to permit courts to enter mandatory injunctions requiring violators to “Restore” the “Waters,” as that term is defined in the current draft, then not only should the charter provision expressly include “Restore” as a remedy for violations, but there should be detailed and precise instructions explaining to a court and an alleged violator exactly what the remedy of “Restore” means and standards for determining whether it is achievable or has been achieved.

If a court orders Company A to “Restore” a body of water, Company A must know how to fulfill that order and a court must be able to explain how to do so based on the terms of the charter provision. Likewise, if a plaintiff wants to challenge whether Company A has, in fact, complied with the Court’s order, there must be an explicit standard answering the question. If the standards are not set forth in the charter

provision and a Court, County, plaintiff, defendant, or some other body or person is able to set the standard arbitrarily, then there is a substantial risk the charter provision may be subject to a successful vagueness challenge.

While this memorandum addresses threshold vagueness issues, if the subcommittee would like further analysis with respect to any particular section, term or condition of the draft charter provision, we will promptly provide it.