Memo

To: OCCRC Members

From: Cliff Shepard

CC: Katie Smith

Re: Proposed Charter Amendment re: Required Funding for Conservation

Members-

At the January 9, 2020 Charter Review Commission meeting, Member Stoccardo proposed an amendment to the Orange County Charter ("Proposed Amendment") to create permanent funding for a land acquisition program. At the meeting, the Commission tabled discussion and instructed me to conduct legal research on the legality of the Proposed Amendment. This memorandum covers only the legality of the core functions of the Proposed Amendment, and not any other possible improvements.

Ultimately, Florida law governing County budget procedures almost certainly preempts the Proposed Amendment as currently written. Courts have repeatedly held that local laws which prevent county commissioners from exercising discretion over the budget and millage rates conflict with Chapters 129 and 200, *Florida Statutes*. While there may be some method of achieving the basic purpose of the Proposed Amendment, any charter amendment directly addressing the budget and millage process is likely to be held invalid as in conflict with general law. Additionally, due to the state legislature's dominion over eminent domain powers and the Federal government's legal authority to utilize its own condemnation authority, the provision protecting conservation lands from condemnation would only be effective in limited circumstances.

Proposed Amendment

The Proposed Amendment would create Article X of the Orange County Charter. The new Article X would provide as follows:[1]

1. *The Orange County Board of County Commissioners (BCC) shall budget $7,500,000 per year for funding purchases of Environmental Sensitive Lands within Orange County.*

2. *The charter amendment shall become effective upon passage and implemented within the new budget year.*

3. *Environmental Sensitive Lands funding shall be used only for purchasing lands as directed by the Park Land Acquisition for Conservation and Environmental Protections (Green PLACE); appointed citizens committee; managed by Environmental Protection Division.*

4. *Membership of the Citizens Committee shall include (based on availability): local Environmental NGOs, Government personnel with Natural Resource Qualifications, GIS, and up to two interested Orange County citizens. Membership is limited to seven and shall not exceed a two-year term appointment to the Citizens Committee.*

5. *Lands to be acquired include Environmental Sensitive Lands for conservation, passive recreation, and environmental education. Acquisition goals shall include creating viable biological corridors for Flora and Fauna to pass through Orange County.*

6. *These lands shall be preserved forever from development and linear facilities. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private.*

7. *The Environmental Sensitive Lands program shall be renewed by the citizens of Orange County every ten years by simple majority vote of orange county voters.*

If, due to some unforeseen need, the BCC requires a suspension of the program, a supermajority vote of the BCC shall be required. The BCC can do an emergency suspension, but it shall go to the voters within

[1] For the purposes of clarity, the original proposal was edited for grammar and punctuation only but with the intent of making no changes to the intent.

180 days from the BCC suspension vote. Orange county citizens will decide with a 60% vote to continue the Suspension. Suspension shall only be for a period of two years from the date of citizens' vote that will automatically reestablish the program.

The Proposed Amendment then includes definitions for "Environmentally Sensitive Lands (ESL)," "linear facilities" and "Green PLACE," but those definitions are not part of the text revisions.

Legal Background

Preemption

Under the Florida constitution, charter counties have all powers of local self-government not inconsistent with general law. *See* Fla. Const. art. VIII, § 1(g). There are two ways a local regulation may be struck down as inconsistent with state law: (1) if the local regulation conflicts with a specific state statute; or (2) if the legislature has preempted that particular subject area. *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). When evaluating the validity of a charter amendment, courts will presume the amendment to be valid and construe it in harmony with Florida laws if reasonable to do so. *See Charlotte Cnty. Bd. of Cnty. Comm'rs v. Taylor*, 650 So. 2d 146, 148-49 (Fla. 2d DCA 1995).

The Florida legislature can preempt all local laws in a subject area either by express language or by implication. *See Browning*, 28 So. 3d at 886. Preemption is implied when the state legislative scheme is pervasive and the local regulation would present a danger of conflict with that pervasive regulatory scheme. *Id*. In determining whether implied preemption applies, a court must look to the entire law, its objectives and its policy. *Id*.

County Budgeting

Chapters 129 and 200, *Florida Statutes*, set out the procedures by which Florida counties set their budget and millage rates. The final decision on approval of a budget and millage rate ultimately rests with the board of county commissioners. *See* F.S. §§ 129.01(2)(a) ("budget must be prepared, summarized, and approved by the board of county commissioners of each county") *and* 200.001(7) ("Millages shall be fixed only by ordinance or resolution of the governing body of the taxing authority . . ."). On their face, Chapters 129 and 200 address separate topics (budget and millage, respectively), but the two chapters are intertwined because the county budget is the basis for setting the millage rate and the county commission must set the budget as part of the process of setting the millage rate. *See, e.g.,* Fla. Stat. §§ 129.03(1)

("...the figure so certified shall be used as the basis for estimating the millage rate required to be levied") *and* 200.065(2) (discussing hearing requirements to set tentative and final budgets). As such, Florida courts routinely address Chapters 129 and 200 as two parts of a single scheme. *See, e.g., Ellis v. Burk*, 866 So. 2d 1236, 1237-38 (Fla. 5th DCA 2004).

Courts have repeatedly held that county laws limiting their commission's discretion over the millage rate or tax revenue conflict with Chapters 129 and 200.[2] *See Bd. of Cnty. Comm'rs of Dade Cnty. v. Wilson*, 386 So. 2d 556 (Fla. 1980) (declaring invalid voter-initiated ordinance capping millage rate at four mills); *Bd. of Cnty. Comm'rs of Marion Cnty. v. McKeever*, 436 So. 2d 299 (Fla. 5th DCA 1983) (invalidating ordinance which placed millage rate cap on specific trust fund); *Charlotte Cnty. Bd. of Comm'rs v. Taylor*, 650 So. 2d 146 (Fla. 2d DCA 1995) (invalidating charter amendment prohibiting board of commissioners from setting millage rate such that it constituted a greater than 3% increase of ad valorem revenues as compared to the previous year); *Ellis v. Burk*, 866 So. 2d 1236 (Fla. 5th DCA 2004) (invalidating charter amendment prohibiting county from increasing ad valorem tax revenue by greater than 3% or the previous year's CPI).

The reasoning has been the same in each case: Chapters 129 and 200 place discretion over county millage rates and budgeting solely in a county's board of commissioners, and thus any local restriction of board discretion is in conflict with Florida statutes. One line of reasoning is that Section 200.001(7) states that millages "shall be fixed only by ordinance or resolution of the governing body of the taxing authority in the manner specifically provided by general law or special act," and that a voter initiative thus cannot set the millage. *See Wilson*, 386 So. 2d at 561 (citing what was then Section 200.191); *and Taylor*, 650 So. 2d at 149 (reasoning that revenue caps cannot stand because they would interfere with commissioner discretion to set millage rate). Similarly, the court in *McKeever* noted that the setting of the millage rate and budget must occur on an annual basis, and thus they cannot be pre-set by law. *See* 436 So. 2d at 302.

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[2] Note that it does not appear to make any difference whether the regulation comes from a charter or non-charter county. *Compare Ellis*, 866 So. 2d at 1236 (invalidating home rule charter amendment) *with McKeever*, 436 So. 2d at 301 (invalidating non-charter county ordinance). Having the voters approve the regulation also does not change the analysis. *See Taylor*, 650 So. 2d at 149.

Note that while Chapters 129 and 200 have changed since the last court decision adopting this reasoning, the portions which vest discretion in the board of commissioners remain.

While no court has specifically addressed a county regulation of the budget itself, the Attorney General has stated that such a measure would be invalid. In AGO 2001-04, the Attorney General was asked whether Hillsborough County could amend its home rule charter to place a cap on the annual increase in the budget, with the board allowed to override the cap through a supermajority vote. The Attorney General opined the amendment would be invalid as an improper limitation on the county commission's discretion to set the annual budget. In response to the issue of whether the supermajority provision might save the measure, the Attorney General rejected that idea as follows:

> The cases discussed above recognize that the Legislature has specified the manner in which county budgets are to be established and provided the exclusive manner by which countywide millage rates are to be set. Nothing in Chapter 129, Florida Statutes, regarding establishment of a budget, or in Chapter 200, Florida Statutes, regarding the establishment of a millage rate, provides for a cap on the budget that may be overridden by a super-majority vote of county commissioners. To impose such a cap would appear to be contrary to the scheme established by the Legislature in Chapters 129 and 200, Florida Statutes, which places the discretion and decision-making authority in the board of county commissioners. As the court stated in *Charlotte County Board of County Commissioners v. Taylor,* "[i]f the voters are not satisfied with the commissioners' actions in this regard, they have a remedy through the ballot box at the next popular election."

The court in *Ellis*, while not addressing the matter directly, did cite this 2001 AGO with approval. *See* 866 So. 2d at 1239.

Eminent Domain

The power of eminent domain is inherent to the state,[3] and the state legislature may delegate that power to local governments, private corporations and state agencies. *See, e.g.,* Fla. Stat. §§ 127.01(1),

[3] Separately, the Federal government has its own powers of eminent domain which may not be circumscribed by state or local law.

166.401(1); *Clark v. Gulf Power Co.,* 198 So. 2d 368, 371 (Fla. 1st DCA 1967). In some cases, Florida statutes empower agencies and corporations to condemn even public lands. *See, e.g.,* Fla. Stat. § 348.759(1) ("[T]he Central Florida Expressway Authority may acquire private or public property and property rights . . . by gift, device, purchase, or condemnation by eminent domain proceedings . . . .").

Analysis

As written, the Proposed Amendment would most likely be invalidated for conflicting with state law by restricting the discretion of the Board of County Commissioners by compelling the board to (1) budget a minimum amount to a specific subject matter; and (2) spend those specific funds as directed on a specific subject (land acquisition). Additionally, the provision protecting conservation lands from being taken would be unenforceable except as applied specifically to municipalities within the County.

Required Funding and Citizens Committee Provisions

A requirement to spend $7.5 million on a specific subject matter probably conflicts with Chapters 129 and 200, *Florida Statutes*. There is little reason to believe that requiring a minimum funding level, even if specific to one subject, would be approved when a maximum funding level would be invalid, as discussed in AGO 2001-04. In both cases, the requirement restricts the ability of the Board to set its desired budget. The requirement would also restrict the Board's ability to set the millage rate, as the Board will need to accommodate for the additional $7.5 million in setting the rate. Nothing in Chapters 129 and 200 or any of the relevant court decisions indicate that a county ordinance or charter amendment may push its commissioners in the direction of spending or taxing more when the opposite has been held to be prohibited.

Courts would likely strike down the requirement that funds be spent as directed by a separate committee for similar reasons. If the board did intend to spend $7.5 million on purchasing environmentally sensitive lands in a given year, nothing prevents it from doing so on an individual project basis, just as Orange County's current budget allocates the parks budget on a park-by-park basis. *See Orange County FY 2019/20 Budget* at p. 266-67. Therefore, because the Proposed Amendment would result in a body other than the Board (the committee) having discretion over where to budget conservation funds, the Proposed Amendment is likely an invalid restriction on the Board's discretion in setting the budget.

The provision allowing the Board to suspend the program by supermajority vote would not save the measure, as discussed in AGO 2001-04. The Proposed Amendment's provision is less defensible than the

one discussed in the AGO, as it subjects the Board's supermajority vote to a referendum of electors—thus depriving the Board of ultimate say over the millage and budget, even when voting by supermajority.

Florida regulations on land purchases by counties may also prevent the intended operation of the Proposed Amendment. Section 125.355, *Florida Statutes*, requires counties to obtain two appraisals for land purchases of over $500,000. If the purchase price exceeds the average of the appraisals, the county may only purchase the property with the extraordinary vote of its governing body. This Section would likely be read to vest discretion over such real property purchases in the County's governing body, and thus could not be placed with a separate committee as provided in the Proposed Amendment.

While there may be some method of achieving the basic purpose of the Proposed Amendment, any charter amendment directly addressing the budget and millage process is likely to be held invalid as conflicting with Chapters 129 and 200, *Florida Statutes*.

Takings Protection Provision

Section 6 of the Proposed Amendment, which seeks to protect conservation lands from takings, would be unenforceable in many scenarios. Any valid condemnation of a public land by a state agency or utility would necessarily be authorized by general or special Florida law, and thus would prevail over the Charter amendment. To the extent the taking is not authorized by statute, Orange County can contest it through existing law, and the Orange County charter amendment would typically not have effect on the matter.

However, the amendment may operate to prevent Orange County municipalities from condemning designated conservation lands, as the County can preempt municipal regulations through its Charter. *See* Fla. Const. art. VIII, § 1(g); *Seminole Cnty. v. City of Winter Springs*, 935 So. 2d 521, 529 (Fla. 5th DCA 2006) (discussing that the Florida constitution allows counties to preempt municipal regulations by single county-wide vote).