



Memo

To: Orange County Charter Review Commission

From: Clifford B. Shepard

Date: March 9, 2020

Re: Aspirational Funding Directions in the Charter and Amendment 1

I have been asked to answer two questions as a follow-up to our previous memorandum regarding the Green PLACE initiative. In the previous memorandum I explained that any charter amendment that directs the County Commissioners to budget money towards a specific individual item would probably be invalidated for conflicting with Florida statutes. At the following meeting, the Commission instructed me to answer the following two questions:

1. Whether the County may include aspirational, non-binding budget instructions in its Charter?
2. Why Orange County voters cannot amend the Charter to command conservation spending when the Florida voters did that exact thing with Amendment 1 in 2014?

The answer to the first question is yes, an aspirational budget direction in the Charter should be valid. Since the issue with requiring conservation spending in the Charter is restricting the discretion of the Board of County Commissioners, a non-binding amendment that does not restrict the Commissioners would avoid that problem.

The simple answer to the second question is preemption. Under the Florida Constitution, statutes passed by the Florida legislature preempt local government laws, including local government charter provisions. In contrast, the only laws supreme to the Florida Constitution are federal laws, none of which prohibit Amendment 1 or the state's voter initiative procedure.

Aspirational Funding Goals in Charter

As discussed in the previous memo, a county may not include binding budget directions in its charter. This is because charter-based budget and taxing directions have been held to conflict with Chapters 129 and 200, *Florida Statutes*, which vest discretion over the budget and taxing to each county's board of county commissioners.

So long as it's worded carefully, a Charter amendment which sets an aspirational funding goal should be valid. Since the issue is interfering with the Board's discretion over budget and millage, any funding provision which still allows the Board to vote without restriction or directive should be held to be valid. It is also unlikely that anyone would have standing to contest the amendment. Generally, taxpayers do not have standing to contest a government action unless they suffer a special injury, different from the injuries to the rest of the population. *See Solares v. City of Miami*, 166 So. 3d 887 (Fla. 3d DCA 2015). While there is an exception in cases of improper use of taxing and spending powers, a non-binding aspirational amendment which has no legal effect on taxing or spending should not be considered an exercise of such powers.

Authority for 2014's Amendment 1

In contrast with the limitation on charters, the Florida Constitution currently includes an explicit conservation budget directive. Article X, Section 28 of the Constitution, which passed as voter-initiated Amendment 1 in 2014, requires that a certain percentage of excise tax revenues be diverted to a trust fund to be spent only for certain conservation purposes. The authorization for the voter initiative process is set out in Article XI, Section 3 of the Florida Constitution. That Section authorizes Florida voters to initiate an amendment to the Florida Constitution and does not limit which subjects initiatives may address.

Since the Florida Constitution is the supreme law of the state and prevails over any state statute, the only thing preventing a budgetary direction in the Florida Constitution is a properly enacted Federal law. Federal law does not—and likely cannot—prevent a state from placing a budgetary direction in its state constitution. Under the Tenth Amendment to the U.S. Constitution, the states retain all governmental powers not explicitly conferred to the Federal Government. In a recent case, the Supreme Court held that the Federal Government may not directly order state legislatures to act in any particular manner. *See Murphy v. NCAA*, 137 S. Ct. 1461 (2018). Thus, the U.S. Constitution likely prevents the Federal Government from directly ordering state governments how to determine their budgets.