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August 11, 2022

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***Re: Review of Proposed 2022 Charter Amendments***

Dear Ms. Schverak:

We have reviewed six charter amendments proposed by the Brevard County Charter Review Commission.

Our review was performed in accordance with the requirements of Subsection 1 of Section 7.4.1 of the Brevard County Charter regarding whether each proposed amendment and its ballot language embrace one subject only and are consistent with the Florida Constitution, general law and the Brevard County Charter.

This letter provides a summary of the review standards in the Brevard County Charter concerning embracing only "one subject" and the consistency of a charter amendment with the Florida Constitution, general law and the Brevard County Charter. It then provides an outline and analysis of each proposed charter amendment reviewed against such standards.

In sum, the proposed charter amendment requiring a supermajority vote to amend the Charter does not qualify for placement on the ballot. We cannot provide assurance regarding whether the proposed charter amendment providing for the recall of school board members qualifies for placement on the ballot. The other four proposed charter amendments do qualify.

**Review Standards for the Proposed Charter Amendments**

- 1. Requirement for the proposed charter amendment to embrace only one subject.** The Florida Supreme Court has explained that the essence of the one-subject requirement is whether the proposal "may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme."<sup>1</sup> The single-subject rule prevents logrolling, where separate issues are rolled into a single initiative in order to

<sup>1</sup> *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984) (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318 (Fla. 1944)).

Christine M. Schverak, Esq.  
August 11, 2022  
Page | 2

aggregate votes and secure approval of an otherwise unpopular issue.<sup>2</sup> The “one subject only” requirement for a proposed charter amendment is a requirement that the Brevard County electors have chosen to apply to proposed charter amendments.<sup>3</sup>

- 2. Requirement for the proposed charter amendment to be consistent with the Florida Constitution.** Subsection 1(g) of Article VIII of the Florida Constitution provides broad home rule powers to charter counties:

*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 governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances. [Emphasis added].*

- 3. Requirement for the proposed charter amendment to be consistent with general law.** Subsection 101.161(1) of the Florida Statutes requires a summary of the charter amendment to be printed on the ballot in clear and unambiguous language followed by the word “yes” and “no,” styled in such a manner that a “yes” vote will indicate approval of the proposal and a “no” vote will indicate rejection. The ballot summary must be embodied in the enabling resolution and shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.

And, as stated above, Subsection 1(g) of Article VIII of the Florida Constitution requires the proposed amendment to be “not inconsistent with general law. . . .”

- 4. Requirement for the proposed charter amendment to be consistent with the Brevard County Charter.** The language for each proposed charter amendment must be reviewed and analyzed in light of the existing provisions in the Brevard County Charter.

### **Analysis of the Proposed Charter Amendments**

#### ***1. CRC Resolution No. 2022-001***

***Ballot title:*** BREVARD COUNTY CHARTER AMENDMENT PROPOSAL NO. 1 --  
ATTORNEY REVIEW PANEL

***Ballot summary:*** The County Charter does not say what will be done when the Charter’s attorney review panel determines that a proposed Charter amendment is inconsistent with the

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<sup>2</sup> *In re Advisory Op. to Att’y Gen. -- Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994); *Advisory Op. to Att’y Gen. re Limited Casinos*, 644 So. 2d 71 (Fla. 1994).

<sup>3</sup> Generally county charter amendments proposed by a charter review commission are not subject to a statutory or constitutional single-subject requirement. *Charter Review Comm’n of Orange Cty. v. Scott*, 647 So. 2d 835 (Fla. 1994).

Christine M. Schverak, Esq.  
August 11, 2022  
Page | 3

Florida Constitution, general law, and existing charter. Shall the Charter be amended to provide that proposals found to be inconsistent with the Florida Constitution, general law, or the existing Charter be returned to the County Commission or Charter Review Commission for further action if any is to be done?

**Analysis:** The proposed charter amendment qualifies for placement on the ballot. The proposed amendment and ballot language embraces one subject only and is consistent with the Florida Constitution, general law and the Brevard County Charter. The proposed amendment adds further clarification and requirements to an already established process set forth in Sec. 7.4.1 of the County's Charter.

However it is important to note that the Charter Review Commission has proposed another amendment to Sec. 7.4.1 of the County's Charter in CRC Resolution No. 2022-004. If the proposed amendments in both resolutions 2022-001 and 2022-004 are presented to the electors and both amendments are passed, there will then be inconsistencies in the resulting language in Sec. 7.4.1.

Specifically, the amendment in 2022-001 provide that if two members of the attorney-review panel find a proposed amendment is not consistent with the Florida Constitution, general law, or the Charter, that the proposal is rejected and is returned *to the county commission or the charter review commission* for further action if any is to be done. The amendment in 2022-004 provides that if a proposed amendment is rejected, that it will be returned *to the charter review commission* for a reasonable opportunity to cure any defect.

## 2. CRC Resolution No. 2022-002

**Ballot title:** PROPOSAL NO. 2 - APPROVAL BY 60% OF VOTERS VOTING ON AMENDMENT

**Ballot summary:** Shall the Charter be amended to require a vote of at least sixty percent of those voters voting on a proposed amendment be required to adopt the proposal? The Brevard County Charter currently requires amendments be approved by a simple majority.

**Analysis:** The proposed charter amendment does *not* qualify for placement on the ballot. It is not consistent with the Florida Constitution.

As explained in *Citizens for Term Limits & Accountability, Inc., v. Lyons*, the Florida Constitution specifies a simple majority vote as both necessary and sufficient to amend county charters. Subsection 1(c) of Article VIII of the Florida Constitution provides in part that county charters be “adopted, amended or repealed only upon vote of the electors of the county. . . .” This must be read *in pari materia* with subsection 12(d) of Article X of the Florida Constitution which defines “vote of the electors” to mean “the vote of the majority of those voting on the matter in an election, general or special, in which those participating are limited to the electors of

Christine M. Schverak, Esq.  
August 11, 2022  
Page | 4

the governmental unit referred to in the text.” Accordingly a simple majority is what is necessary and required by the Florida Constitution to amend Brevard County’s Charter.<sup>4</sup>

### 3. CRC Resolution No. 2022-003

**Ballot title:** PROPOSAL NO. 3 - RECALL OF COUNTY OFFICERS AND SCHOOL BOARD MEMBERS

**Ballot summary:** The County Charter allows for the recall election and replacement of the Clerk of Court, Property Appraiser, Supervisor of Elections, Tax Collector, and Sheriff, in the manner provided for by state law for recall of County Commissioners. Shall the Charter be amended to add School Board Members to this list who may face recall election and replacement in the manner provided by state law for recall of County Commissioners?

**Analysis:** Whether this proposed charter amendment qualifies for placement on the ballot is not certain. For the reasons below, we are not able to advise the Charter Review Commission on the amendment.

Currently the Charter provides in part in Sec. 4.1.2 that “Each County officer shall be subject to removal as prescribed by the State Constitution and general law for such officers in noncharter counties.” The County officers included in Sec. 4.1 of the Charter are the sheriff, property appraiser, tax collector, clerk of the circuit court, and supervisor of elections. These County officers are constitutional officers which exist by and are defined in Subsection 1(d) of Article VIII of the Florida Constitution.

The proposed amendment, if approved by the electors, will clarify that the statute governing a potential recall of the sheriff, property appraiser, tax collector, clerk of the circuit court, and supervisor of elections is Section 100.361 of the Florida Statutes. Section 100.361 of the Florida Statutes sets out the process for recall of a county commissioner or city council member. The Charter was amended in 2010 to subject the Brevard constitutional officers to the recall statute.<sup>5</sup>

The substantive change in this amendment, if approved, will be subjecting members of the Brevard County School Board to recall under Section 100.361.

It is simply not possible to determine whether the proposed amendment is “not inconsistent” with the Florida Constitution, general law and the Brevard County Charter. Recall of school board members is not addressed, either expressly or impliedly, in the Florida Constitution, in general

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<sup>4</sup> *Citizens For Term Limits & Accountability, Inc., v. Lyons*, 995 So. 2d 1051 (Fla. 1st DCA 2008).

<sup>5</sup> Whether the existing Charter provision subjecting the Brevard County constitutional officers to the recall process in Section 100.361 is legally valid is not clear. In 2018 Subsection 1(d) of Article VIII of the Florida Constitution was amended to *prohibit* county charters from altering such constitutional officers in numerous respects. Whether that 2018 amendment affected the legal validity of the 2010 Charter change for recall of Brevard constitutional officers is not certain. Regardless, the issue is beyond the scope of our review.

Christine M. Schverak, Esq.  
August 11, 2022  
Page | 5

law, or in the current Charter. No court has addressed the issue. We simply cannot assure the Charter Review Commission that the amendment would be valid, if approved. Likewise, we cannot assure the Charter Review Commission that the amendment would be invalid.

If and when a court takes it up, there are arguments on both sides of the issue.

The argument *for* the validity of school-board-member recall is based largely on charter county home-rule powers. The argument is ably made by the Commission's legal counsel, Paul Gougelman, in the May 12 request by the Commission for an opinion of the Attorney General of Florida.

The argument *against* validity is one of the boundaries of county home-rule powers. Home rule grants charter counties "all powers of local self-government." Art. VIII, § 1(g), Fla. Const. Non-charter counties have "such power of self-government as is provided by general special law."

The argument, we believe, will be that "all powers of local self-government" has an inherent boundary: the power extends to, but not beyond, *county* government. As the Supreme Court of Florida explained, when describing the "statutory" home rule enjoyed by non-charter counties:

... Section 125.01(1), Florida Statutes, (1975) grants to the governing body of a county the full power *to carry on county government*. Unless the Legislature has pre-empted a particular subject *relating to county government* ... the county government ... has full authority to act through the exercise of home rule power. [Emphasis added.]<sup>6</sup>

In other words, it will be argued, home-rule power has a boundary. Home rule does not grant power to a charter county to undertake activity or functions or purposes that are not part of the governing of a Florida county, as the political subdivision of state government.

The argument will assert that county school boards are established by the state constitution and by state law as governmental entities, operations, and purposes separate from, not part of, Florida's 67 political subdivisions known as counties. Counties and their constitutional officers are established and governed by Article VIII of the Florida Constitution, school districts and school boards by Article IX. County commissions levy taxes and provide funding and facilities for constitutional officers and have a modicum of approval authority over their respective budgets.

None of that is true for school districts. School boards, not boards of county commissioners, levy school district taxes, approve school district budgets, locate and construct district schools and other facilities, and so forth. Boards of county commissioners have no role to play in the governance of school districts. Consequently, an attempt to subject school board members to

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<sup>6</sup> *Speer v. Olson*, 367 So.2d 207, 211 (Fla. 1978).

Christine M. Schverak, Esq.  
August 11, 2022  
Page | 6

recall by county-charter amendment should not be upheld by the courts – or so the argument will go.

In summary, we reluctantly advise the Brevard County Charter Review Commission that we can provide no assurance of the validity of Proposed Amendment No. 3, should it be placed on the ballot and approved by Brevard County voters.

#### ***4. CRC Resolution No. 2022-004***

***Ballot title:*** PROPOSAL NO. 4 -- CHARTER REVIEW COMMISSION PROPOSED AMENDMENTS

***Ballot summary:*** The Charter requires a panel of three attorneys to review proposed amendments for legality before placing the proposed amendment on the ballot. When the amendment is proposed by the Charter Review Commission, the panel shall be selected by the Charter Review Commission. If the panel finds a Charter Review Commission proposed amendment inconsistent with the law, it shall be returned to the Charter Review Commission for further consideration.

***Analysis:*** The proposed charter amendment qualifies for placement on the ballot. The proposed amendment and ballot language embraces one subject only and is consistent with the Florida Constitution, general law and the Brevard County Charter. The proposed amendment adds further clarification and requirements to an already established process.

However as explained above, the Charter Review Commission has proposed another amendment to Sec. 7.4.1 of the County's Charter in CRC Resolution No. 2022-001. If the proposed amendments in both resolutions 2022-001 and 2022-004 are presented to the electors and both amendments are passed, there will then be inconsistencies in the resulting amendments to Sec. 7.4.1.

#### ***5. CRC Resolution No. 2022-005***

***Ballot title:*** PROPOSAL NO. 5 - FILLING A VACANCY IN THE TERM OF A COUNTY COMMISSIONER

***Ballot summary:*** Revises Section 2.7 of the Charter to be consistent with the Florida Constitution and to provide that vacancies resulting from death, resignation, or removal from office of a County Commissioner with less than twenty-eight months remaining in the term shall be filled by the Governor. Vacancies with twenty-eight months or more remaining in the term will be filled by election by the voters.

Christine M. Schverak, Esq.  
August 11, 2022  
Page | 7

**Analysis:** The proposed charter amendment qualifies for placement on the ballot. The proposed amendment and ballot language embraces one subject only and is consistent with the Florida Constitution, general law and the Brevard County Charter.

**6. CRC Resolution No. 2022-006**

**Ballot title:** PROPOSAL NO. 6 - WORKFORCE AND SUPPORTIVE HOUSING

**Ballot summary:** Creates Section 1.9 of the Charter. The amendment establishes an affordable housing trust fund to assist in establishing affordable housing for renters and homeowners to create and increase workforce housing opportunities throughout the county. The trust fund shall be funded as directed by the county commission.

**Analysis:** The proposed charter amendment qualifies for placement on the ballot. The proposed amendment and ballot language embraces one subject only and is consistent with the Florida Constitution, general law and the Brevard County Charter.

Sincerely,

GrayRobinson, P.A.



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Reply to Tallahassee

August 12, 2022

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Re: Independent Review of Proposed Charter Amendments

Dear Ms. Schverak:

In accordance with the Independent Contractor Professional Services Contract entered into between Brevard County and the law firm of Nabors, Giblin & Nickerson, P.A. on August 3, 2022, I have independently reviewed the six Charter Amendments proposed by the Brevard County Charter Review Commission.

Pursuant to Section 7.4.1 of the Brevard County Charter, a panel of three persons is assembled to review proposed amendments of the Brevard County Charter Review Commission prior to submission to the electors of the County. The substance of that review requires a consideration of "whether the proposed amendment and ballot language embraces one subject only, and is consistent with the Florida Constitution, general law and this Charter."

My review has been based on the following criteria:

**I. Ballot Language**

The question of consistency of ballot language with general law is chiefly controlled by section 101.161(1), Fla. Stat. (2022):

Christine M. Schverak, Esquire  
Interim County Attorney  
August 12, 2022  
Page 2

(1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word “yes” and also by the word “no,” and shall be styled in such a manner that a “yes” vote will indicate approval of the proposal and a “no” vote will indicate rejection. The ballot summary of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. .

..

\* \* \*

The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

...

As to the sufficiency of the ballot title and language, I have only reviewed each of the proposals to determine whether they comply with the word limitations for the ballot title and summary. I find that all of the proposals satisfy the word limitation requirements for the title and ballot summary.

## **II. Single Subject**

The “single subject” restriction on amendments to the Constitution and charters has a twofold purpose. The first is to prevent “logrolling”, a practice where an amendment containing unrelated provisions, some of which electors might support, is proposed to get an otherwise disfavored provision passed. *Advisory Opinion to Att’y Gen. re: Limited Casinos*, 644 So. 2d 71, 73 (Fla. 1994). The second is whether the amendment affects separate functions of the government and other provisions of the charter. *In re Advisory Opinion to Att’y Gen. - Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1020 (Fla. 1994). In determining whether a provision complies with the single subject requirement, the courts generally determine whether there is a natural or logical connection between the provisions. The provisions of Section 7.4.1 of the

Charter of Brevard County requires that the three person panel review each of the proposed amendments to determine whether each embraces one subject.

### **III. Consistency with Constitution**

County charter provisions, as with any legislative act, must be consistent with the express provisions of the Florida Constitution.

### **IV. Consistency with General Laws**

Charter provisions will also be considered invalid if they are “inconsistent with general law” as provided in Article VIII, Section 1(g) of the Florida Constitution. As established by case law, the term “inconsistent” in this context means “contradictory in the sense of legislative provisions which cannot coexist.” *State v. Sarasota County*, 549 So. 2d 659 (Fla. 1989); *Pinellas County v. City of Largo*, 964 So. 2d 847, 854 (Fla. 2d DCA 2007).

Though not applicable to these amendments, not every conflict with a general law renders a charter amendment invalid or “inconsistent”. There are explicit exceptions for charter counties in the annexation statutes (*Pinellas County v. City of Largo*) and in the comprehensive planning statute (§ 163.3171(2), Fla. Stat.: “In the case of chartered counties, the county may exercise such authority over municipalities or districts within its boundaries as is provided for in its charter.”). In other cases, the permitted conflict with general law may be implicit. The Constitution itself may invite a charter provision which deviates from the provisions of general law with respect to noncharter counties. *Chase v. Cowart*, 102 So. 2d 147 (Fla. 1958), decided under the prior Constitution but under similar provisions.

### **V. Consistency with the Charter**

Finally, as set forth in Section 7.4.1, a review of the proposed amendments shall also be conducted to determine whether they are inconsistent with other provisions of the Charter. Similar to the analysis for determining whether a provision is inconsistent with general law, a separate analysis is performed to determine whether the proposed amendment is inconsistent with the other provisions of the Charter. This requires a determination as to whether the proposed amendment and the existing Charter provisions are “contradictory in the sense of legislative provisions that cannot coexist.” *State v. Sarasota County, id.*

Christine M. Schverak, Esquire  
Interim County Attorney  
August 12, 2022  
Page 4

Based on the foregoing criteria, I advise the Charter Review Commission and the Board of County Commissioners as to my opinions on the proposed amendments as set forth below:

**A. RESOLUTION 2022-001 (Proposes the amendment of Section 7.4.1 to clarify what occurs if a proposal is not found by the three person review panel to be consistent with the Florida Constitution, General Law or the Charter)**

**Background:**

Under the Charter of Brevard County, Section 7.4.1 establishes a process for the independent review of proposed Charter amendments. This process utilizes the services of a panel of three persons who independently review the proposed Charter amendments and render an opinion as to whether each amendment “embraces one subject only and is consistent with the Florida Constitution, general law and this Charter.” The purpose of the proposal is to clarify what is to occur in the event a majority of the reviewing panel renders an opinion that the proposal violates one of the criteria.

Under the proposed amendment, if two members of the panel find that the proposal is not consistent with the Florida Constitution, general law or the Charter, then the proposal is considered rejected and it is returned to the County Commission or to the Charter Review Commission that sponsored the amendment on the ballot.

The language contained within the proposed amendment satisfies the single subject requirement as it solely deals with the process for approval of an amendment to the Charter.

Further, it is my opinion the proposed amendment is consistent with the Florida Constitution, general law or the existing provisions of the Charter, as it constitutes a provision that addresses the method by which amendments and revisions to the Charter are to be considered and which is authorized by section 125.64, Florida Statutes.

**Conclusion as to Resolution 2022-001:**

- (1) The text of the proposed amendment does not violate the “single subject” restriction.
- (2) The text of the proposed amendment is consistent with the Constitution of the State of Florida.
- (3) The text of the proposed amendment is consistent with the general laws of Florida.
- (4) The text of the proposed amendment is consistent with the Charter.

**B. RESOLUTION 2022-002 (Proposes an amendment to Section 7.3.3 to require the approval of any Charter amendment by at least 60% of the electors voting)**

**Background:**

The proposed amendment to Section 7.3.3 of the Charter requires that passage of a proposed Charter amendment shall require the approval of the public by a vote of at least 60% of the electors voting on the measure.

Initially, the proposed amendment satisfies the “single subject” requirement as the provision deals solely with the process for approval of an amendment to the Charter. It is also consistent with the provisions of the Florida Constitution.

The provisions of section 125.64, Florida Statutes, set forth the procedures for the adoption of county charters. Under those provisions, once a charter has been proposed, either by the board of county commissioners or by the charter commission, then a special election shall be held to consider the approval of the charter. However, the provisions of section 125.64, Florida Statutes, differentiates between the initial adoption of a charter and subsequent revisions and amendments. As stated in subsection 125.64(2), Florida Statutes:

- (2) If a majority of those voting on the question favor the adoption of the new charter, it shall become effective January 1 of the succeeding year or at such other time as the charter shall provide. Such charter, once adopted by the electors, may be amended only by the electors of the county. The charter shall provide a method for

submitting future charter revisions and amendments to the electors of the county. (Emphasis added)

The language of subsection 125.64(2), Florida Statutes, clearly requires only a majority of those voting to adopt a charter initially. However, the statute provides flexibility as to the method for the approval of future charter revisions and amendments. Based upon a review of this language, it appears that the inclusion of a provision that would require 60% approval by the voters for charter revisions and amendments is consistent with the legislative authorization to provide a method for consideration of future amendments.

**Conclusion as to Resolution 2022-002:**

- (1) The text of the proposed amendment does not violate the “single subject” requirement.
- (2) The text of the proposed amendment is consistent with the Constitution of the State of Florida.
- (3) The text of the proposed amendment is consistent with the general laws of Florida.
- (4) The text of the proposed amendment is consistent with other provisions of the Charter.

**C. RESOLUTION 2022-003 (Proposes an amendment of Section 5.2 to provide for the recall of certain County officers and School Board members)**

**Background:**

Resolution 2022-003 seeks to amend Section 5.2 of the Brevard County Charter to establish that the recall process for certain elected officials shall follow the procedures contained in section 100.361, Florida Statutes. The proposed amendment also provides that recalls under the Charter would also be applicable to any elected County officer named in Section 4.1.1 of the Charter (consisting of the Sheriff, Property Appraiser, Tax Collector, Clerk of the Circuit Court, and Supervisor of Elections), and adds members of the School Board. Finally, the amendment provides that the method by which a vacant position is filled following a recall shall be pursuant to section 100.361, Florida Statutes.

Christine M. Schverak, Esquire  
Interim County Attorney  
August 12, 2022  
Page 7

The proposed amendment has two substantive changes. The first is that it dictates that the application of the recall procedures and the process for the filling of any vacancies would be pursuant to the provisions of section 100.361, Florida Statutes. Further, the proposed amendment expands the offices that are subject to the recall provision to include members of the School Board. All of the proposed amendments deal with the subject of recall and, therefore, satisfy the requirements of the single subject provisions.

Secondly, the amendments which incorporate the procedures for the recall from section 100.361, Florida Statutes, are both consistent with the Constitution of the State of Florida and general law, as they incorporate state law provisions into the Charter itself. Further, as to that particular provision, there is no inconsistency with the Charter itself.

The issue concerning the incorporation of School Board members as subject to the recall provisions requires further discussion. The fundamental purpose of a county charter is to allow the local community to improve and reorganize county government. (See section 125.63, Florida Statutes). However, the School Board is a separate governmental entity that governs the Brevard County School District.

The Charter provisions have been deemed applicable not only to County Commissioners but also to certain County officers as identified within the Constitution. Article VIII, Section 1(d) of the Florida Constitution identifies county officers as the sheriff, tax collector, property appraiser, supervisor of elections, and clerk of the circuit court. Generally, charter provisions relating to these county officers have been upheld even though they are independent constitutional offices due to their interrelation with the functioning of county government. Further, Section 4.1 of the Charter has preserved those offices as departments of the County as follows:

The offices of Sheriff, Property Appraiser, Tax Collector, Clerk of the Circuit Court, and Supervisor of Elections are expressly preserved as departments of the County Government under this Charter. All of the powers, duties and functions now or hereafter prescribed by the Constitution and general laws of Florida applicable to such officers in non-charter counties are preserved, except as provided by this Charter.

Specifically, as to the applicability of recall provisions to these County officers, the Division of Elections has previously issued an advisory opinion in 1994 addressing whether a county charter may lawfully provide a method for recall of county officers. The opinion of the

Christine M. Schverak, Esquire  
Interim County Attorney  
August 12, 2022  
Page 8

Division of Elections was that a charter could provide that county officers could be subject to recall.

However, the provisions related to school board members are separate and distinct from those county officers identified in Article VIII, Section 1(d) of the Constitution. The establishment of school districts and school boards contained within Article IX, Section 4 of the Florida Constitution provides as follows:

SECTION 4. School districts; school boards.—

(a) Each county shall constitute a school district; provided, two or more contiguous counties, upon vote of the electors of each county pursuant to law, may be combined into one school district. In each school district there shall be a school board composed of five or more members chosen by vote of the electors in a nonpartisan election for appropriately staggered terms of four years, as provided by law.

(b) The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. Two or more school districts may operate and finance joint educational programs.

(Emphasis added).

The school district and the school board are further defined within section 1001.32(1) and (2), Florida Statutes, which states in pertinent part:

1001.32 Management, control, operation, administration, and supervision.—The district school system must be managed, controlled, operated, administered, and supervised as follows:

(1) DISTRICT SYSTEM.—The district school system shall be considered as a part of the state system of public education. All actions of district school officials shall be consistent and in harmony with state laws and with rules and minimum standards of

Christine M. Schverak, Esquire  
Interim County Attorney  
August 12, 2022  
Page 9

the state board. District school officials, however, shall have the authority to provide additional educational opportunities, as desired, which are authorized, but not required, by law or by the district school board.

(2) DISTRICT SCHOOL BOARD.—In accordance with the provisions of s. 4(b), Art. IX of the State Constitution, district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law.

(Emphasis added).

Whether School Board members may be incorporated within the recall provisions of the Brevard County Charter appears to turn on whether they are considered a county officer or a district and/or state officer. There is limited law on this issue and none in the context of recall provisions. The most analogous decision is a Florida Supreme Court advisory opinion, *In re Advisory Opinion to the Governor – Sch. Bd. Member – Suspension Auth.*, 626 So. 2d 684 (Fla. 1993). In that Advisory Opinion, the Court addressed the nature of school board members in the context of the Governor’s suspension authority. The Florida Supreme Court analyzed whether school board members constituted county officers or district officers. The issue in that case was whether the Governor’s suspension authority under Article IV, Section 7 of the Florida Constitution applied to school board members or whether the general provisions of section 112.52, Florida Statutes, applied. The Court phrased the ultimate question to be decided as follows:

The single question presented by these letters is whether a school board member is a “county” officer, in which event he or she may be suspended only under article IV, section 7(a), or a “district” officer, in which event the school board member could be suspended under the statutory authority of section 112.51, Florida Statutes.

The Supreme Court concluded that elected school board members may be suspended by the Governor only under the authority granted in Article IV, Section 7, as they were deemed to be county officers.

Christine M. Schverak, Esquire  
Interim County Attorney  
August 12, 2022  
Page 10

The analysis contained within the Advisory Opinion of the Supreme Court is instructive in this case. For example, the Court noted that under Article VIII, Section 1(d) of the Constitution, county officers are only identified as the sheriff, tax collector, property appraiser and supervisor of elections. However, county commissioners were not included within that provision; rather, they were separately included under Article VIII, Section 1(e) of the Florida Constitution. As a result, the Court concluded that the listing of county officers contained within Article VIII, Section 1(d) was not intended to be exhaustive but that other officers could be deemed county officers, including school board members.

In making this determination, the Supreme Court also noted several factors that weighed heavily in considering school members as county officials. First, they noted that the public perception is that both school board members and county commissioners are county officials who have equivalent power and authority, albeit in different local government spheres. *In re Advisory Opinion to the Governor*, 626 So. 2d at 689. The Court further stated that provisions of Article IX, Section 4 specifically provide that each county shall constitute a school district, lending support to the consideration of school board members as county officers.

There is additional legal authority that addresses the applications of recall and charter provisions relating to county constitutional officers. However, none of it specifically addresses the issue raised in Resolution 2022-003.<sup>1</sup>

Though the issue posed by this amendment is not clearly established in law, it is my opinion, based upon the decision of the Florida Supreme Court in its Advisory Opinion, that the School Board members are County officers similar to the Sheriff, Tax Collector, Property Appraiser, Supervisor of Elections and Clerk of the Circuit Court. Therefore, the provisions of the Charter governing recall can be extended to the School Board.

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<sup>1</sup> There has been a suggestion that the County could include School Board members among the officers subject to recall pursuant to the broad home rule powers granted to charter counties. However, under Article VIII, Section 1(g) of the Constitution, charter counties only have such powers as “not inconsistent with general law, or with special law approved by vote of the electors.” If school board members are not county officers for the purpose of a county charter, then that limitation would be based on the provisions of the Constitution or general law and, therefore, outside the grant of home rule authority possessed by the County.

**Conclusion as to Resolution 2022-003:**

- (1) The text of the proposed amendment does not violate the “single subject” requirement.
- (2) The text of the proposed amendment is consistent with the Constitution of the State of Florida.
- (3) The text of the proposed amendment is consistent with the general laws of Florida.
- (4) The text of the proposed amendment is consistent with the other provisions of the Charter.

**D. RESOLUTION 2022-004 (Proposes the amendment of Section 7.4.1 of the Brevard County Charter relating to the three member review panel)**

**Background:**

The amendment to Section 7.4.1 of the Brevard County Charter provides that when a proposed amendment is sponsored by the Charter Review Commission, the members of the three person panel shall report directly to and maintain a fiduciary duty to the Charter Review Commission. The amendment further provides that the three person panel shall submit its findings for each proposed amendment to the Board of County Commissioners and the Charter Review Commission within fifteen (15) days of receipt and shall include a comprehensive written report containing the panel’s conclusions. The proposed amendment would also require that the comprehensive report provide a rationale for rejecting the proposed language and a suggested manner in which the defects may be resolved.

The proposed language of the Charter amendment satisfies the single subject requirement, as it deals solely with the process for review and approval of amendments. Therefore, it complies with the single subject requirements of Florida law.

As with Resolutions 2022-001 and 2022-002, neither the Florida Constitution nor Florida Statutes specifically set forth the process by which the review of Charter proposals must be accomplished, other than their ultimate approval by the electorate. As previously noted, the provisions of section 125.64, Florida Statutes, grant the authority to establish the method by which revisions and amendments to the Charter shall be considered. The proposal contained in

Christine M. Schverak, Esquire  
Interim County Attorney  
August 12, 2022  
Page 12

Resolution 2022-004 relates to the method by which future amendments will be considered and falls within the authority granted by section 125.64, Florida Statutes. The provision is also consistent with the Florida Constitution, Florida Statutes and the existing Charter.

**Conclusion as to Resolution 2022-004:**

- (1) The text of the proposed amendment does not violate the “single subject” requirement.
- (2) The text of the proposed amendment is consistent with the Constitution of the State of Florida.
- (3) The text of the proposed amendment is consistent with the general laws of Florida.
- (4) The text of the proposed amendment is consistent with the other provisions of the Charter.

**E. RESOLUTION 2022-005 (Proposes an amendment to Section 2.7 of the Brevard County Charter, providing for the filling of vacancies in the office of County Commissioner)**

**Background:**

The proposed amendment to Section 2.7 provides that in the event of a vacancy or suspension in the office of the County Commissioners, it shall be defined and filled as provided by law. Further, the proposed amendment requires that a vacancy created by recall be filled as provided in Section 5.2 of the Charter. Section 5.2 of the Charter provides that the unexpired terms “shall be elected in the manner provided by general law for filling of vacancies in office after recall in charter counties.”

Therefore, the proposed amendment adopts and incorporates the provisions of general law in determining how the vacancies shall be filled.

The subject matter of the proposed amendment is the manner by which vacancies are filled under the Charter. As such, the proposed amendment complies with the single subject requirement.

As the amendment adopts and incorporates the requirements of Florida law for the filling of vacancies in the office of the County Commissioners, it is consistent with the Florida Constitution, general law and the Charter.

**Conclusion as to Resolution 2022-005:**

- (1) The text of the proposed amendment does not violate the “single subject” requirement.
- (2) The text of the proposed amendment is consistent with the Constitution of the State of Florida.
- (3) The text of the proposed amendment is consistent with the general laws of Florida.
- (4) The text of the proposed amendment is consistent with the provisions of the Charter.

**F. RESOLUTION 2022-006 (Proposes the creation of a new Section 1.9 that provides for a Workforce and Supportive Housing Trust Fund and identifies revenue sources for the funding of that Trust Fund)**

**Background:**

The proposed amendment creates a new Section 1.9, which establishes a Brevard County Workforce and Supportive Housing Trust Fund. The purpose of the Trust Fund is to provide continuing non-lapsing funds for Brevard County to address affordable housing within the County. The Trust Fund also shall be used to create sustainable affordable housing throughout Brevard County for renters and homeowners and increase work force housing opportunities. The amendment also designates a revenue source for funding of the Trust Fund, which consists of funds from the sale of County surplus real property that are not otherwise legally committed to other sources, in addition to other sources of revenue as established from time to time by ordinance. The proposed amendment also sets forth the continuing nature of the Trust Fund.

The subject matter of the proposed amendment is the establishment of a Trust Fund for the provision of affordable housing within the County. As such, the proposed amendment concerns a single subject and is in compliance with the single subject requirement of Florida law.

Christine M. Schverak, Esquire  
Interim County Attorney  
August 12, 2022  
Page 14

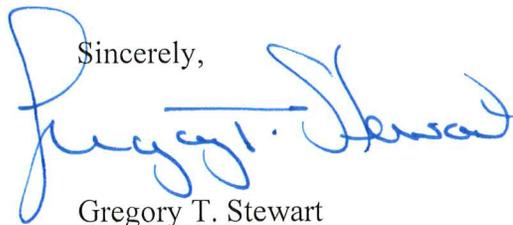
In reviewing the proposed Section 1.9, the use of public funds for purposes of workforce and affordable housing purposes serves a public purpose which has been recognized by the courts in Florida. *State v. Housing Finance Authority*, 506 So. 2d 397 (Fla. 1987). Further, the provisions of the amendment which provide for the funding of the Trust Fund from revenue derived from the sale of surplus property, but excludes those revenues committed for other purposes, avoids a potential issue relating to the impairment of preexisting contract rights. Therefore, the proposed Section 1.9 is not inconsistent with the Florida Constitution, general law or the Brevard County Charter.

**Conclusion as to Resolution 2022-006:**

- (1) The text of the proposed amendment does not violate the “single subject” requirement.
- (2) The text of the proposed amendment is consistent with the Constitution of the State of Florida.
- (3) The text of the proposed amendment is consistent with the general laws of Florida.
- (4) The text of the proposed amendment is consistent with the provisions of the Charter.

Thank you for allowing our Firm to be of assistance to the County and the Charter Review Committee. Should you require any additional information, please feel free to contact me.

Sincerely,



Gregory T. Stewart

GTS:pad

cc: Paul Gougelman  
Jim Liesenfelt



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August 16, 2022

Christine M. Schverak, Esq.  
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**Re: Memoranda related to the proposals submitted by the Brevard County Charter Review Commission**

Dear Ms. Schverak and County Commissioners:

Thank you for the opportunity to review the six proposed County Charter amendments submitted by the Charter Review Commission this cycle. I have drafted a separate memorandum regarding each, detailing the reasons behind my views on the proposals' consistency with the Florida Constitution, general law, and the County Charter.

As is detailed in the memoranda, these views address only legal sufficiency—I do not express an opinion as to the substantive merits of the proposals themselves. I also do not express an opinion as to the proper way to address any of the defects found, though most do appear to be readily curable.

I remain available to assist the County with anything further regarding these proposals or any other matters. I appreciate your trust in including my firm in this process.

Best,

A handwritten signature in blue ink, appearing to read 'J. Dinkins', written over the printed name below.

**CivForge Law, P.A.**  
James C. Dinkins  
Managing Shareholder



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To: Christine M. Schverak, Esq., Interim County Attorney  
From: Jamy Dinkins, CivForge Law, PA  
Date: August 15, 2022  
Re: Charter Review Commission Resolution 2022-001

The foregoing is a review of the Brevard County Charter Review Commission's ("CRC") Resolution number 2022-001, relating to recall elections. The Resolution was adopted by the CRC on August 4, 2022, and is being presented to the County Commission. This memorandum is designed to advise the County Commission on the legality of the proposal, but does not provide policy advice.

### **Overview**

Resolution 2022-001 modifies the independent review provisions of the Charter to accomplish, broadly, the following:

- Specify steps to be taken if two members of the independent review panel for proposed amendments to the county charter by the charter review commission determine the proposal is inconsistent with the Florida Constitution, general law, or the charter; and
- Make stylistic changes for consistency.

The proposed ballot summary references only the proposed requirement that a proposal found inconsistent with the constitution, charter, or general law be returned to the county commission or charter review commission for further action, which appears to be the primary motivation for the proposal.

### **Assumptions and limitations of review**

This memorandum does not pass on the validity of the adoption of the Resolution or subsequent actions of the Brevard County Board of County Commissioners, the Brevard County Supervisor of Elections, or the voters. We assume that all procedural actions taken by any of those bodies are proper, timely, and sufficient to adopt the proposal and incorporate it into the County Charter, and thus only pass on whether the proposal, from a substantive perspective, is consistent with applicable law, including the Florida and Federal Constitutions, applicable statutes, and the County Charter.

### **Procedural matters**

While this memorandum does not address procedural matters generally, it does consider certain formal requirements surrounding ballot questions generally. Pursuant to section

101.161, Florida Statutes, there are certain requirements for ballot language and proposal contents in referenda elections. One such requirement is that the ballot summary be fair and unambiguous, be limited in length, and phrase the question in a particular manner. In addition, there is a requirement that the amendment embrace a single subject.

### *Single subject requirement*

Florida law is replete with single-subject requirements for legislation and constitutional amendment, most prominently in the Constitution's limitation on the power of the legislature to adopt bills that "embrace but one subject and matter properly connected therewith," in article III, section 6, and the limitation on the initiative method to amend the constitution to proposals that "embrace but one subject and matter directly connected therewith." Art. IX, Sec. 3, Fla. Const. Though the difference in these provisions is minor (amounting to a single word), the Florida Supreme Court views the "directly connected" language as more narrow. *Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984).<sup>1</sup> Generally, a proposal embraces one subject if it has "a natural relation . . . as component parts or aspects of a single dominant plan or scheme." *Id.* at 990 (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318 (Fla. 1944)). Essentially, there must be a "oneness of purpose" in order for the proposal to meet the single-subject test, and affects a single function of the existing governmental structure. *Id.*

Resolution 2022-001 addresses a single subject, namely, what happens when an amendment proposed by the charter review commission is determined not to be consistent with the Florida Constitution, general law, or the charter by at least two members of the attorney review panel. The process of government affected is singular: namely, the process of amending the county charter. While the proposal also includes stylistic changes, those do not affect the oneness of purpose found in the proposed amendment.

### *Ballot language*

There are three basic, and one more complex, requirements for a ballot summary. First, the caption of the ballot summary must be fifteen words or fewer. § 101.161(1), Fla. Stat. Second, the body of the ballot summary must be 75 words or fewer. *Id.* Third, the question posed must be phrased such that a "yes" vote indicates approval of the proposal and a "no" vote indicates rejection of the proposal. These three requirements are unquestionably met.

The more complex requirement is that the language be a clear and unambiguous explanatory statement of the chief purpose of the measure. *Id.* While courts have interpreted this requirement using various rules and tests, they can be summarized as an overall requirement that the ballot language fairly advise the voter of the decision to be made sufficiently to enable the voter to intelligently cast their ballot. See *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)(collecting cases). This includes a requirement that the function of government to be affected is fairly identified, *Fine*, 448 So. 2d at 989, and that

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<sup>1</sup> This analysis considers the more narrow view, as the "directly connected" language appears in the Brevard County Charter, albeit in a section not applicable to the CRC process.

the ballot language not be misleading, *Florida Department of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008).

Ballot language can be misleading if it omits material information in such a way that a voter relying on the summary would believe the measure accomplishes something different from what the amendatory language actually does. Thus, an omission was material in a proposed property tax exemption amendment when it would have caused voters to believe it extended eligibility for the exemption where it did not, *Roberts v. Doyle*, 43 So. 3d 654, 659-61 (Fla. 2010), or where the scope of laws to be repealed under a repealer clause was not disclosed, *In re Advisory Opinion to Attorney General*, 632 So. 2d 1018, 1021 (Fla. 1994).

The chief purpose of Resolution 2022-001 is to provide a process for charter review commission proposals that are rejected by the attorney review panel. The question posed in the ballot summary is “Shall the Charter be amended to provide that proposals found to be inconsistent with the Florida Constitution, general law, or the existing Charter be returned to the County Commission or Charter Review Commission for further action if any is to be done?” While the question identifies the chief purpose of the proposal, it may be phrased too broadly. The language of the proposal itself applies *only* to those proposals submitted by the charter review commission. However, there are multiple ways to amend the Brevard County Charter.

Amendment of the charter by petition *also* requires submission of the proposed amendment to an attorney review panel, but that process is not affected by the proposed amendment. In fact, the petition amendment process contains similar language regarding what to do if the attorney review panel determines the proposal to be consistent with the law, and similarly is silent as to the process if the proposal is rejected by the panel. A review of the summary would lead a voter to believe that the new process for rejected proposals applies to *all* charter amendment proposals submitted to the review panel, which is not what Resolution 2022-001 actually does.

While a court must afford deference to the decision of the voters,<sup>2</sup> the ballot summary here is analogous to that rejected by the court in *Roberts*. In *Roberts*, the court rejected a ballot summary where the summary did not include an exception to qualification for a tax exemption (specifically, that a person’s spouse’s status could render them ineligible), among other minor inconsistencies. 43 So. 3d at 660-61. This is similar to the exception omitted from the proposal in Resolution 2022-001, where the voter would not be informed that the new process for panel-rejected proposals applies only to one subset of proposed charter amendments. This is a material omission which may be found by a court to render the ballot summary defective.<sup>3</sup>

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<sup>2</sup> Generally, a ballot summary must be shown to be “clearly and conclusively defective” to warrant a court’s interference with placement on the ballot. *Adv. Op. re 1.35% Property Tax Cap*, 2 So. 3d 968, 971-72 (Fla. 2009).

<sup>3</sup> It is worth noting that the caption must be read together with the ballot summary when performing this analysis, and that the caption is currently short of the maximum word limit. Adding specificity to the caption could likely cure this omission and render the ballot summary sufficient.

### **Consistency with general law**

The referral of certain charter amendment proposals to an independent panel is well within the home-rule authority of a county. Art. VIII, Sec. 1(g), Fla. Const. Thus, it stands to reason that modification of the process associated with that referral is also within the authority of a county. Similarly, there is no limitation on the scope of the authority of the charter review commission to propose this type of amendment.

There is no general law that would operate to prohibit the county from specifying what is to be done with a proposal by a charter review commission that is rejected by an independent review panel. If anything, by allowing an opportunity to correct any errors, the charter expands the rights of the charter review commission.

### **Conclusion**

While Resolution 2022-001 contains a proposal that is consistent with the Florida Constitution, general law, and the Brevard County Charter, the proposed ballot summary is deficient in that it does not adequately inform voters that the proposed amendment applies only to those proposals submitted by the Charter Review Commission, not those submitted by petition.



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To: Christine M. Schverak, Esq., Interim County Attorney  
From: Jamy Dinkins, CivForge Law, PA  
Date: August 15, 2022  
Re: Charter Review Commission Resolution 2022-002

The foregoing is a review of the Brevard County Charter Review Commission's ("CRC") Resolution number 2022-002, relating to charter amendments. The Resolution was adopted by the CRC on August 4, 2022, and is being presented to the County Commission. This memorandum is designed to advise the County Commission on the legality of the proposal, but does not provide policy advice.

### **Overview**

Resolution 2022-002 modifies the amendment provisions of the Charter to accomplish, broadly, the following:

- Increase the number of votes necessary to amend the charter to 60% of the electors voting on the amendment for those amendments proposed by the County Commission and by petition; and
- Make stylistic changes for consistency.

The proposed ballot summary references only the proposed 60% threshold, which appears to be the primary motivation for the proposal.

### **Assumptions and limitations of review**

This memorandum does not pass on the validity of the adoption of the Resolution or subsequent actions of the Brevard County Board of County Commissioners, the Brevard County Supervisor of Elections, or the voters. We assume that all procedural actions taken by any of those bodies are proper, timely, and sufficient to adopt the proposal and incorporate it into the County Charter, and thus only pass on whether the proposal, from a substantive perspective, is consistent with applicable law, including the Florida and Federal Constitutions, applicable statutes, and the County Charter.

### **Procedural matters**

While this memorandum does not address procedural matters generally, it does consider certain formal requirements surrounding ballot questions generally. Pursuant to section 101.161, Florida Statutes, there are certain requirements for ballot language and proposal contents in referenda elections. One such requirement is that the ballot summary be fair

and unambiguous, be limited in length, and phrase the question in a particular manner. In addition, there is a requirement that the amendment embrace a single subject.

### *Single subject requirement*

Florida law is replete with single-subject requirements for legislation and constitutional amendment, most prominently in the Constitution's limitation on the power of the legislature to adopt bills that "embrace but one subject and matter properly connected therewith," in article III, section 6, and the limitation on the initiative method to amend the constitution to proposals that "embrace but one subject and matter directly connected therewith." Art. IX, Sec. 3, Fla. Const. Though the difference in these provisions is minor (amounting to a single word), the Florida Supreme Court views the "directly connected" language as more narrow. *Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984).<sup>1</sup> Generally, a proposal embraces one subject if it has "a natural relation . . . as component parts or aspects of a single dominant plan or scheme." *Id.* at 990 (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318 (Fla. 1944)). Essentially, there must be a "oneness of purpose" in order for the proposal to meet the single-subject test, and affects a single function of the existing governmental structure. *Id.*

Resolution 2022-002 addresses a single subject, namely, the number of votes required for adoption of certain charter amendments. The process of government affected is singular: namely, the process of amending the county charter. While the proposal also includes stylistic changes, those do not affect the oneness of purpose found in the proposed amendment.

### *Ballot language*

There are three basic, and one more complex, requirements for a ballot summary. First, the caption of the ballot summary must be fifteen words or fewer. § 101.161(1), Fla. Stat. Second, the body of the ballot summary must be 75 words or fewer. *Id.* Third, the question posed must be phrased such that a "yes" vote indicates approval of the proposal and a "no" vote indicates rejection of the proposal. These three requirements are unquestionably met.

The more complex requirement is that the language be a clear and unambiguous explanatory statement of the chief purpose of the measure. *Id.* While courts have interpreted this requirement using various rules and tests, they can be summarized as an overall requirement that the ballot language fairly advise the voter of the decision to be made sufficiently to enable the voter to intelligently cast their ballot. See *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)(collecting cases). This includes a requirement that the function of government to be affected is fairly identified, *Fine*, 448 So. 2d at 989, and that the ballot language not be misleading, *Florida Department of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008).

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<sup>1</sup> This analysis considers the more narrow view, as the "directly connected" language appears in the Brevard County Charter, albeit in a section not applicable to the CRC process.

Ballot language can be misleading if it omits material information in such a way that a voter relying on the summary would believe the measure accomplishes something different from what the amendatory language actually does. Thus, an omission was material in a proposed property tax exemption amendment when it would have caused voters to believe it extended eligibility for the exemption where it did not, *Roberts v. Doyle*, 43 So. 3d 654, 659-61 (Fla. 2010), or where the scope of laws to be repealed under a repealer clause was not disclosed, *In re Advisory Opinion to Attorney General*, 632 So. 2d 1018, 1021 (Fla. 1994).

The chief purpose of Resolution 2022-002 is increase the number of votes required for adoption of a charter amendment proposed by the County Commission or by petition. The question posed in the ballot summary is “Shall the Charter be amended to require a vote of at least sixty percent of those voters voting on a proposed amendment be required to adopt the proposal?” The question contains a material omission in that a voter is not informed that the threshold is being changed only for County Commission-proposed or petition-proposed amendments, but not for CRC proposals. This actively misleads the voter into thinking that the charter would become harder to amend in all ways, not just the ways that are easier for the voter to access (petition and through the County Commission).

We would specifically note that the express language of the provision in the charter (independent of this amendment) identifies the voting threshold required only for those charter amendments proposed by the County Commission or by petition, not those proposed by the CRC. The authority for submission of CRC proposals to the voters lies in section 7.4 of the charter, while the proposed 7.3.3 language references only section 7.3.1 and 7.3.2. Section 7.4, which is not amended by this proposal, specifies that a majority is required for adoption of a CRC proposal. This is a material omission that renders the ballot summary defective.

### **Consistency with general law**

A county is free to set a threshold higher than a simple majority for approval of charter amendments. While city charters may be restricted from having a threshold other than a majority, see section 166.031(2), Florida Statutes, there is no similar restriction for counties. In fact, the statutes simply provide that the charter must “provide a method for submitting future charter revisions and amendments to the electors of the county.” § 125.64, Fla. Stat. At least one county in Florida, Polk County, has a sixty percent threshold for charter amendments. There are a number of cases which, in dicta, allow for sixty-percent thresholds in certain circumstances. See, e.g., *Mullen v. Bal Harbor Village*, 241 So. 3d 949 (Fla. 3d DCA 2018)(rejecting ballot proposals to increase the threshold for voter approval of certain leases to 60% on other grounds). Similarly, for state constitutional amendments, there is a sixty percent threshold. Art. XI, Sec. 5(e), Fla. Const. Thus, a general sixty percent threshold for charter amendment would appear to be consistent with the Florida Constitution and general law.

It is worth examining, however, whether a higher threshold for citizen-proposed charter amendments than for CRC-proposed amendments is permissible. Polk County’s charter is informative, as it similarly lists the charter review process separately from the petition and

County Commission processes for amendment, and the sixty percent threshold appears in the section describing voting procedure on the latter two. However, there is not a separate provision specifying a majority vote on CRC-proposed amendments in Polk County's charter, and a reasonable interpretation is that the general reference to "a referendum" would follow the same threshold as for other charter amendments. Sec. 8.4, Charter of Polk County, Fla.

An argument could be made that a differential threshold violates the equal protection clauses of the Federal and Florida Constitutions. Amend. XIV, Sec. 1, U.S. Const.; Art. I, Sec. 2, Fla. Const. An equal protection analysis typically uses a rational basis test, unless a suspect class or fundamental right is involved. *Estate of McCall v. U.S.*, 134 So. 3d 894, 901 (Fla. 2014). Citizens generally, as compared to appointed officials of the CRC, are not a suspect class. The right to amend a county charter is not a fundamental right, as not all counties have charters.<sup>2</sup> Thus, a distinction between CRC-proposed amendments and other amendments must simply have a rational basis, that is, it must not be arbitrary and capricious and must bear a rational and reasonable relationship to a legitimate state objective. *McCall*, 134 So. 3d at 901. Given the stated objective of reflecting "the need for greater consensus before changing the County Charter," Charter Review Commission Agenda Report on Proposal 10 – Public Hearing 3 (July 7, 2022), there is a legitimate state objective. Because the CRC includes a deliberative process more stringent than either the County Commission process or petition process for proposing charter amendments, there is a rational relationship between a lower threshold for CRC amendments and the objective of achieving greater consensus. The distinction would, therefore, meet the requirements of the equal protection clauses.

## Conclusion

While Resolution 2022-002 contains a proposal that is consistent with the Florida Constitution, general law, and the Brevard County Charter, the proposed ballot summary is deficient in that it misleads voters into believing that the changed threshold will apply to all proposed charter amendments, not just those proposed by petition or by the County Commission.

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<sup>2</sup> There are fundamental rights associated with county government, such as the right to run for county office. *Bd. of Comm'rs of Sarasota Cnty. v. Gustafson*, 616 So. 2d 1165 (Fla. 1993).



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To: Christine M. Schverak, Esq., Interim County Attorney  
From: Jamy Dinkins, CivForge Law, PA  
Date: August 15, 2022  
Re: Charter Review Commission Resolution 2022-003

The foregoing is a review of the Brevard County Charter Review Commission's ("CRC") Resolution number 2022-003, relating to recall elections. The Resolution was adopted by the CRC on August 4, 2022, and is being presented to the County Commission. This memorandum is designed to advise the County Commission on the legality of the proposal, but does not provide policy advice.

### **Overview**

Resolution 2022-003 modifies the recall provisions of the Charter to accomplish, broadly, the following:

- Correct an erroneous internal reference to the officers subject to recall;
- Specify the "general law" referenced by statute;
- Add school board members to the scope of the recall provision; and
- Make stylistic changes for consistency.

The proposed ballot summary references only the addition of the school board members to the list of officers subject to recall, which appears to be the primary motivation for the proposal.

### **Assumptions and limitations of review**

This memorandum does not pass on the validity of the adoption of the Resolution or subsequent actions of the Brevard County Board of County Commissioners, the Brevard County Supervisor of Elections, or the voters. We assume that all procedural actions taken by any of those bodies are proper, timely, and sufficient to adopt the proposal and incorporate it into the County Charter, and thus only pass on whether the proposal, from a substantive perspective, is consistent with applicable law, including the Florida and Federal Constitutions, applicable statutes, and the County Charter.

### **Procedural matters**

While this memorandum does not address procedural matters generally, it does consider certain formal requirements surrounding ballot questions generally. Pursuant to section 101.161, Florida Statutes, there are certain requirements for ballot language and proposal contents in referenda elections. One such requirement is that the ballot summary be fair

and unambiguous, be limited in length, and phrase the question in a particular manner. In addition, there is a requirement that the amendment embrace a single subject.

### *Single subject requirement*

Florida law is replete with single-subject requirements for legislation and constitutional amendment, most prominently in the Constitution’s limitation on the power of the legislature to adopt bills that “embrace but one subject and matter properly connected therewith,” in article III, section 6, and the limitation on the initiative method to amend the constitution to proposals that “embrace but one subject and matter directly connected therewith.” Art. IX, Sec. 3, Fla. Const. Though the difference in these provisions is minor (amounting to a single word), the Florida Supreme Court views the “directly connected” language as more narrow. *Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984).<sup>1</sup> Generally, a proposal embraces one subject if it has “a natural relation . . . as component parts or aspects of a single dominant plan or scheme.” *Id.* at 990 (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318 (Fla. 1944)). Essentially, there must be a “oneness of purpose” in order for the proposal to meet the single-subject test, and affects a single function of the existing governmental structure. *Id.*

Resolution 2022-003 addresses a single subject, namely, which officers identified in the Brevard County Charter are subject to recall. While the process of recall affects multiple functions of government in that heads of various aspects of county government are affected, the actual process of government affected is singular: namely, the process of removing an elected or appointed government official, regardless of the office they hold. While the proposal also includes stylistic changes, those do not affect the oneness of purpose found in the proposed amendment.

### *Ballot language*

While the bulk of the analysis in this memorandum is complex, the ultimate proposal, and therefore the ballot summary, is not. In short, the proposed ballot summary is sufficient to meet procedural requirements. There are three basic, and one more complex, requirements for a ballot summary. First, the caption of the ballot summary must be fifteen words or fewer. § 101.161(1), Fla. Stat. Second, the body of the ballot summary must be 75 words or fewer. *Id.* Third, the question posed must be phrased such that a “yes” vote indicates approval of the proposal and a “no” vote indicates rejection of the proposal. These three requirements are unquestionably met.

The more complex requirement is that the language be a clear and unambiguous explanatory statement of the chief purpose of the measure. *Id.* While courts have interpreted this requirement using various rules and tests, they can be summarized as an overall requirement that the ballot language fairly advise the voter of the decision to be made sufficiently to enable the voter to intelligently cast their ballot. See *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)(collecting cases). This includes a requirement that the

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<sup>1</sup> This analysis considers the more narrow view, as the “directly connected” language appears in the Brevard County Charter, albeit in a section not applicable to the CRC process.

function of government to be affected is fairly identified, *Fine*, 448 So. 2d at 989, and that the ballot language not be misleading, *Florida Department of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008).

Ballot language can be misleading if it omits material information in such a way that a voter relying on the summary would believe the measure accomplishes something different from what the amendatory language actually does. Thus, an omission was material in a proposed property tax exemption amendment when it would have caused voters to believe it extended eligibility for the exemption where it did not, *Roberts v. Doyle*, 43 So. 3d 654, 659-61 (Fla. 2010), or where the scope of laws to be repealed under a repealer clause was not disclosed, *In re Advisory Opinion to Attorney General*, 632 So. 2d 1018, 1021 (Fla. 1994).

The chief purpose of Resolution 2022-003 is to add school board members to the scope of the recall provision contained in the Brevard County Charter. The question posed in the ballot summary is “Shall the Charter be amended to add School Board Members to this list who may face recall election and replacement . . . ?” This question fairly encompasses the chief purpose of the proposal. It identifies the function of government to be addressed (the recall and replacement of officers) and the officers to which it applies (school board members). The question is also not misleading, as the summary correctly identifies the constitutional officers currently subject to recall and the source of the process for such recall.

The summary omits the fact that county commissioners are currently, and will remain, subject to recall. However, that portion of the recall provision is not being substantively changed by the proposed amendment, and a voter would not be misled into thinking that the proposal either establishes, eliminates, or modifies recall provisions as it relates to county commissioners. The omission is merely from the contextual explanation of the recall process. Accordingly, the omission is not material and is likely not misleading.

The proposed ballot caption and summary in Resolution 2022-003 is a clear, unambiguous, explanatory statement of the chief purpose of the measure and is not misleading. Given the deference a court must afford the decision of the voters,<sup>2</sup> the ballot summary proposed is likely to withstand legal challenge on the grounds that it is misleading or omits material information.

### **Consistency with general law**

The biggest question related to Resolution 2022-003 is whether a charter county may, through its charter, adjust certain defaults relating to composition of the county school board from general law defaults.<sup>3</sup>

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<sup>2</sup> Generally, a ballot summary must be shown to be “clearly and conclusively defective” to warrant a court’s interference with placement on the ballot. *Adv. Op. re 1.35% Property Tax Cap*, 2 So. 3d 968, 971-72 (Fla. 2009).

<sup>3</sup> We recognize that the Brevard County Charter already addresses some of these issues in Article 8. However, we were not asked to opine as to the validity of existing provisions of the county charter.

Analysis of county authority should always begin with an understanding of county home-rule authority as established by article VIII, section 1(g) of the Florida Constitution. Florida takes a broad view of the powers of the county, as recently recognized in this context in *Telli v. Broward County*, 94 So. 3d 504, 513 (Fla. 2012)(“ Interpreting Florida's Constitution to find implied restrictions on powers otherwise authorized is unsound in principle.”) Thus the County may, through its charter, take any action within the scope of its powers that does not conflict with general law.

The first question to answer is whether regulation of the school board is within the scope of authority granted to the County by the Florida Constitution and general law. While it is a close question, we conclude that regulation of the membership of a school board is not within the “powers of local self-government” granted by the Florida Constitution to the counties because it is expressly delegated elsewhere.

Section 125.01, Florida Statutes, generally sets forth the powers of counties. While paragraph (1)(w) of that statute grants the power to “Perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law,” there is no other reference in the county powers to education or schools, and subsection (1) itself specifies that the power granted by statute is to “carry on county government.” In Florida, governance of schools is not considered county government, but rather is dedicated to a “state system of schools” governed by a state Board of Education and with certain authority delegated to the county school boards. §1000.01(3), Fla. Stat. While each school board is associated with the territorial boundaries of a county,<sup>4</sup> it is not subject to the control of the County Commission but operates independently.

This distinction is made clear in various provisions of the Florida Statutes and Constitution. For example, a school board member is not a “county officer” as that term is defined in Article 8, Section 1(d) of the Florida Constitution.<sup>5</sup> Though that term is not always applied strictly, for example in the context of whether the Governor has the power to suspend a school board member or county commissioner, see *In re Advisory Opinion to the Governor*, 626 So. 2d 684, 689 (Fla. 1993), the nature of the use of the term and historical context is highly important. In its Advisory Opinion, the supreme court was clear that the term “county officer” in the governor’s suspension authority provision was broader than the same term used in other contexts, both because of the history of amendment of the constitution and because a narrower interpretation would leave no recourse to suspend an official who misbehaved. *Id.* These factors are not present when looking at a county’s authority to regulate membership on the school board through its charter.

There are various statutory provisions relating to school board membership that grant various specific powers to the board as opposed to other entities. For example, the legislation enabling the constitutional authority to expand a school board’s membership

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<sup>4</sup> In theory, the electors of two or more contiguous counties can form a unified school district. Art. IX, Sec. 4, Fla. Const.

<sup>5</sup> School board members are also listed separately from county officers in the new ethics provisions which will become part of the constitution effective December 31 of this year in new Article II, section 8(f)(1).

beyond five members is found in section 1001.34(2), Florida Statutes. This statute provides for a Resolution of the school board followed by a vote of the electors in order to expand the membership. Similarly, the switch from elected to appointed superintendents is done by either school board Resolution or special act, followed by a vote of the electors.

In summary, all of the constitutional and statutory provisions related to school board membership point to the school board, and not the county charter, as the source of authority to modify a default position on electing members. It stands to reason that, if general law permits recall of school board members, the process for that must be established by the school board itself (subject to a vote of the electors), not by the county charter.

If the county could, by charter, provide for recall of school board members, we would also need to determine whether any general law prohibits the exercise of the authority in the way that has been proposed by Resolution 2022-003. This is, perhaps, a clearer question to answer. There is no express general law prohibition on allowing recall of school board members. However, it could be argued that the express statutory provisions relating to makeup and election of school board members discussed above may constitute field preemption.

Field preemption occurs when there is no explicit conflict between the enactments of a “senior” legislative body (here, the Florida legislature) and a “junior” legislative body (here, the voters amending the county charter), but the senior body’s scheme of regulation of the subject is pervasive and further action by the junior body would present the danger of conflict with the pervasive scheme. *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984)(quoting *Tribune Co. v. Cannella*, 438 So. 2d 516 (Fla. 2d DCA 1983)(Lehan, J., dissenting)). While there are several laws relating to composition of school boards, it is a stretch to argue that the field of regulation is preempted by state statute because such laws do not create a pervasive scheme. At best, they give guidance as to which bodies have the authority to act in the field, but they are not comparable to other instances where field preemption has been acknowledged. A few scattered statutes are not comparable to a regulatory scheme like the Public Employees Relations Commission, as found in *Communications Workers of America v. Indian River County School Board*, 888 So. 2d 96 (Fla. 4th DCA 2004). Thus, if it is determined that the recall provision is within the authority of county government, as a concept it would not be in conflict with general law.

It should be noted, however, that at least one component of the proposed charter amendment is in direct conflict with general law, and likely would be unenforceable if challenged. Section 1001.38, Florida Statutes, provides that all school board vacancies must be filled by gubernatorial appointment. The proposed charter amendment specifies that the successor to the unexpired term would be filled through election as provided in section 100.361, Florida Statutes. The provisions conflict, and the general law requiring gubernatorial appointment would supersede the charter provision requiring election.

## Conclusion

While Resolution 2022-003 contains a procedurally appropriate proposed charter amendment, that amendment would likely be unenforceable if adopted. This is because, first, the exercise of county authority is outside of the scope of what a county charter may encompass, and second, because some specific provisions expressly conflict with state statute.

It should be noted that an example of another county including recall of school board members in its charter was brought to our attention. On further investigation, Duval County includes a school board recall provision, which was adopted by the Florida Legislature in a special act. Given the consolidated city-county government, and the special act, we are hesitant to use that example as a basis for analysis here.



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To: Christine M. Schverak, Esq., Interim County Attorney  
From: Jamy Dinkins, CivForge Law, PA  
Date: August 15, 2022  
Re: Charter Review Commission Resolution 2022-004

The foregoing is a review of the Brevard County Charter Review Commission's ("CRC") Resolution number 2022-004, relating to recall elections. The Resolution was adopted by the CRC on August 6, 2022, and is being presented to the County Commission. This memorandum is designed to advise the County Commission on the legality of the proposal, but does not provide policy advice.

### **Overview**

Resolution 2022-004 modifies the independent review provisions of the Charter to accomplish, broadly, the following:

- Clarify that the members of the attorney review panel are to be selected by, report directly to, and have a fiduciary duty to, the CRC;
- Require that the attorney review panel submit findings within fifteen days of receipt of a proposed amendment;
- Provide an opportunity for the CRC to cure any defect;
- Require that the attorney review panel provide specific reasons for rejection and suggestions for resolving the defect;
- Extend the term of the CRC to allow for cure of defects; and
- Make stylistic changes for consistency.

The proposed ballot summary references the proposed clarification of CRC selection of the attorneys and the return of any defective proposals to the CRC for further action. It does not pose a question to voters.

### **Assumptions and limitations of review**

This memorandum does not pass on the validity of the adoption of the Resolution or subsequent actions of the Brevard County Board of County Commissioners, the Brevard County Supervisor of Elections, or the voters. We assume that all procedural actions taken by any of those bodies are proper, timely, and sufficient to adopt the proposal and incorporate it into the County Charter, and thus only pass on whether the proposal, from a substantive perspective, is consistent with applicable law, including the Florida and Federal Constitutions, applicable statutes, and the County Charter.

## Procedural matters

While this memorandum does not address procedural matters generally, it does consider certain formal requirements surrounding ballot questions generally. Pursuant to section 101.161, Florida Statutes, there are certain requirements for ballot language and proposal contents in referenda elections. One such requirement is that the ballot summary be fair and unambiguous, be limited in length, and phrase the question in a particular manner. In addition, there is a requirement that the amendment embrace a single subject.

### *Single subject requirement*

Florida law is replete with single-subject requirements for legislation and constitutional amendment, most prominently in the Constitution's limitation on the power of the legislature to adopt bills that "embrace but one subject and matter properly connected therewith," in article III, section 6, and the limitation on the initiative method to amend the constitution to proposals that "embrace but one subject and matter directly connected therewith." Art. IX, Sec. 3, Fla. Const. Though the difference in these provisions is minor (amounting to a single word), the Florida Supreme Court views the "directly connected" language as more narrow. *Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984).<sup>1</sup> Generally, a proposal embraces one subject if it has "a natural relation . . . as component parts or aspects of a single dominant plan or scheme." *Id.* at 990 (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318 (Fla. 1944)). Essentially, there must be a "oneness of purpose" in order for the proposal to meet the single-subject test, and affects a single function of the existing governmental structure. *Id.*

Resolution 2022-004 addresses a single subject, namely, the operation of the attorney review panel for CRC charter amendment proposals. The process of government affected is singular: namely, the process of amending the county charter. While the proposal also includes stylistic changes, those do not affect the oneness of purpose found in the proposed amendment.

### *Ballot language*

There are three basic, and one more complex, requirements for a ballot summary. First, the caption of the ballot summary must be fifteen words or fewer. § 101.161(1), Fla. Stat. Second, the body of the ballot summary must be 75 words or fewer. *Id.* Third, the question posed must be phrased such that a "yes" vote indicates approval of the proposal and a "no" vote indicates rejection of the proposal. The word limitations are unquestionably met. However, the ballot question does not pose a question at all—there is no question mark, and no sentence is structured other than in a declarative format.

The language of the statute does not explicitly require a question. Rather, the requirement is that the "ballot summary of such amendment . . . shall be printed in clear and unambiguous language on the ballot . . . and shall be styled in such a manner that a 'yes'

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<sup>1</sup> This analysis considers the more narrow view, as the "directly connected" language appears in the Brevard County Charter, albeit in a section not applicable to the CRC process.

vote will indicate approval of the proposal and a ‘no’ vote will indicate rejection.” *Id.* The Florida Supreme Court, in other contexts, has allowed ballot summaries not framed in the form of a question. See *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000)(rejecting language for other reasons). When not framed as a question, however, the language must clearly indicate what the changes will be, in order to satisfy the “clear and unambiguous” portion.

The more complex requirement is that the language be a clear and unambiguous explanatory statement of the chief purpose of the measure. *Id.* While courts have interpreted this requirement using various rules and tests, they can be summarized as an overall requirement that the ballot language fairly advise the voter of the decision to be made sufficiently to enable the voter to intelligently cast their ballot. See *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)(collecting cases). This includes a requirement that the function of government to be affected is fairly identified, *Fine*, 448 So. 2d at 989, and that the ballot language not be misleading, *Florida Department of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008).

Ballot language can be misleading if it omits material information in such a way that a voter relying on the summary would believe the measure accomplishes something different from what the amendatory language actually does. Thus, an omission was material in a proposed property tax exemption amendment when it would have caused voters to believe it extended eligibility for the exemption where it did not, *Roberts v. Doyle*, 43 So. 3d 654, 659-61 (Fla. 2010), or where the scope of laws to be repealed under a repealer clause was not disclosed, *In re Advisory Opinion to Attorney General*, 632 So. 2d 1018, 1021 (Fla. 1994).

The chief purpose of Resolution 2022-004 is to clarify the attorney review panel procedure, vesting more authority in the CRC and specifying timeframes and alternatives for the panel’s deliberation and conclusions. The ballot summary consists of three distinct sentences. First, “The Charter requires a panel of three attorneys to review proposed amendments for legality before placing the proposed amendment on the ballot.” This is a statement of *current* fact. That is, it represents a statement as to what the current charter provides, rather than a statement of what the amendment would accomplish. By itself, the statement is not completely accurate—the three attorney panel is employed only for petition- and CRC-proposed amendments, not for County Commission-proposed amendments. However, the summary must be read *in pari materia* with the caption, which expressly refers to CRC-proposed amendments. Thus, read together, the statement is not inaccurate.

Second, the summary reads “When the amendment is proposed by the Charter Review Commission, the panel shall be selected by the Charter Review Commission.” This is a statement of what the charter would provide if the provision is adopted. Similarly, the third sentence is “If the panel finds a Charter Review Commission proposed amendment inconsistent with the law, it shall be returned to the Charter Review Commission for further consideration.” This, too, represents what the charter would provide if the amendment is adopted.

The combination of declarative sentences without a distinction between the current state (first sentence) and the proposed state (second and third sentences) is confusing. Without an understanding of the existing provisions of the charter, a voter would have no way to identify what change they are being asked to approve or reject. They may, reasonably, believe they are being asked to approve or reject all three sentences; they might also, reasonably, believe they are being asked to approve or reject any one or any two of the three sentences. The presence of the word “shall” in the second and third sentences does not cure this confusion, because it is also unclear whether “shall” refers to the proposed amendment to the charter or to the conditions stated in the first clauses of the second and third sentences.

By contrast, in cases where declaratory sentences, rather than questions, were tacitly approved by the courts, those sentences were entirely prescriptive, that is, contained no statements of the current situation and only described the changes/new rules. See, e.g., *Armstrong*, 773 So. 2d at 16 (“Proposing an amendment . . .”; “Requires construction . . .”; “Prohibits reduction . . .”). While the *Armstrong* court ultimately rejected the ballot language, it did so because it was unclear what was being changed, as opposed to simply being added—much like the ballot language proposed here.

Because a voter would not be sure what they are being asked to approve or reject, the ballot summary is misleading.

It may also be that the ballot summary does not capture the chief purpose of the amendment. The summary is silent as to the clarification that the attorney panel reports to, is directed by, and has fiduciary responsibility to the CRC rather than the County Commission. At least arguably, the chief purpose of the amendment is to shift the authority for control of the attorney review panel from the County Commission to the CRC. While the summary does indicate the CRC would select the panel, it does not clarify that the CRC would direct the panel or that the panel would have fiduciary responsibilities to the CRC. This omission is material and may be interpreted as misleading.

Ultimately, the ballot summary does not adequately capture the chief purpose of the proposed amendment and is phrased in such a way that a voter would be confused about the change they are being asked to approve.

### **Consistency with general law**

The referral of certain charter amendment proposals to an independent panel is well within the home-rule authority of a county. Art. VIII, Sec. 1(g), Fla. Const. Thus, it stands to reason that modification of the process associated with that referral is also within the authority of a county. Similarly, there is no limitation on the scope of the authority of the charter review commission to propose this type of amendment.

There is no general law specification of how a review process is to operate, what opportunities must be given for correction of defects, who selects review panelists, or how their reports must be delivered. There are general laws governing the responsibilities of lawyers to their clients, and while those laws and ethical rules would impact how each

panelist represents and advises the CRC (with particular attention paid to rules surrounding representation of a client paid for by a third party), they do not pose any challenge to the enforceability or practicability of the proposed amendment.

### **Conclusion**

While Resolution 2022-004 contains a proposal that is consistent with the Florida Constitution, general law, and the Brevard County Charter, the proposed ballot summary is deficient in that it does not provide the voter with a clear statement of what they are to decide, and because it omits a chief purpose of the proposed amendment.



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To: Christine M. Schverak, Esq., Interim County Attorney  
From: Jamy Dinkins, CivForge Law, PA  
Date: August 15, 2022  
Re: Charter Review Commission Resolution 2022-005

The foregoing is a review of the Brevard County Charter Review Commission's ("CRC") Resolution number 2022-005, relating to filling vacancies in the office of County Commissioner. The Resolution was adopted by the CRC on August 6, 2022, and is being presented to the County Commission. This memorandum is designed to advise the County Commission on the legality of the proposal, but does not provide policy advice.

### **Overview**

Resolution 2022-005 modifies the vacancy provisions of the Charter to accomplish, broadly, the following:

- Conform provisions for vacancy in the office of County Commissioner to state law;
- Clarify that the vacancy provisions apply to suspensions from office; and
- Make stylistic changes for consistency.

The proposed ballot summary references only the proposed conformation, which appears to be the primary motivation for the proposal.

### **Assumptions and limitations of review**

This memorandum does not pass on the validity of the adoption of the Resolution or subsequent actions of the Brevard County Board of County Commissioners, the Brevard County Supervisor of Elections, or the voters. We assume that all procedural actions taken by any of those bodies are proper, timely, and sufficient to adopt the proposal and incorporate it into the County Charter, and thus only pass on whether the proposal, from a substantive perspective, is consistent with applicable law, including the Florida and Federal Constitutions, applicable statutes, and the County Charter.

### **Procedural matters**

While this memorandum does not address procedural matters generally, it does consider certain formal requirements surrounding ballot questions generally. Pursuant to section 101.161, Florida Statutes, there are certain requirements for ballot language and proposal contents in referenda elections. One such requirement is that the ballot summary be fair and unambiguous, be limited in length, and phrase the question in a particular manner. In addition, there is a requirement that the amendment embrace a single subject.

*Single subject requirement*

Florida law is replete with single-subject requirements for legislation and constitutional amendment, most prominently in the Constitution’s limitation on the power of the legislature to adopt bills that “embrace but one subject and matter properly connected therewith,” in article III, section 6, and the limitation on the initiative method to amend the constitution to proposals that “embrace but one subject and matter directly connected therewith.” Art. IX, Sec. 3, Fla. Const. Though the difference in these provisions is minor (amounting to a single word), the Florida Supreme Court views the “directly connected” language as more narrow. *Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984).<sup>1</sup> Generally, a proposal embraces one subject if it has “a natural relation . . . as component parts or aspects of a single dominant plan or scheme.” *Id.* at 990 (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318 (Fla. 1944)). Essentially, there must be a “oneness of purpose” in order for the proposal to meet the single-subject test, and affects a single function of the existing governmental structure. *Id.*

Resolution 2022-005 addresses a single subject, namely, the process for filling vacancies in the office of County Commissioner. The process of government affected is singular: namely, what happens when a County Commissioner vacates an office. While the proposal also includes stylistic changes, those do not affect the oneness of purpose found in the proposed amendment. Similarly, the expansion of the provision to cover suspensions<sup>2</sup> does not affect the unifying purpose of the proposal.

*Ballot language*

There are three basic, and one more complex, requirements for a ballot summary. First, the caption of the ballot summary must be fifteen words or fewer. § 101.161(1), Fla. Stat. Second, the body of the ballot summary must be 75 words or fewer. *Id.* Third, the question posed must be phrased such that a “yes” vote indicates approval of the proposal and a “no” vote indicates rejection of the proposal. The word limitations are unquestionably met. While the ballot summary does not phrase the proposal in the form of a question, it is clear what the voter is intended to decide and a “yes” vote indicates approval, while a “no” vote indicates rejection.

The language of the statute does not explicitly require a question. Rather, the requirement is that the “ballot summary of such amendment . . . shall be printed in clear and unambiguous language on the ballot . . . and shall be styled in such a manner that a ‘yes’ vote will indicate approval of the proposal and a ‘no’ vote will indicate rejection.” *Id.* The Florida Supreme Court, in other contexts, has allowed ballot summaries not framed in the form of a question. See *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000)(rejecting language

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<sup>1</sup> This analysis considers the more narrow view, as the “directly connected” language appears in the Brevard County Charter, albeit in a section not applicable to the CRC process.

<sup>2</sup> In Florida, suspension from office is a precursor to removal, which must be accomplished by the Florida Senate. If the Senate does not vote to remove the suspended official from office, that official is reinstated regardless of whether an interim appointment has been made. Art. IV, Sec. 7, Fla. Const.

for other reasons). When not framed as a question, however, the language must clearly indicate what the changes will be, in order to satisfy the “clear and unambiguous” portion.

The more complex requirement is that the language be a clear and unambiguous explanatory statement of the chief purpose of the measure. *Id.* While courts have interpreted this requirement using various rules and tests, they can be summarized as an overall requirement that the ballot language fairly advise the voter of the decision to be made sufficiently to enable the voter to intelligently cast their ballot. See *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)(collecting cases). This includes a requirement that the function of government to be affected is fairly identified, *Fine*, 448 So. 2d at 989, and that the ballot language not be misleading, *Florida Department of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008).

Ballot language can be misleading if it omits material information in such a way that a voter relying on the summary would believe the measure accomplishes something different from what the amendatory language actually does. Thus, an omission was material in a proposed property tax exemption amendment when it would have caused voters to believe it extended eligibility for the exemption where it did not, *Roberts v. Doyle*, 43 So. 3d 654, 659-61 (Fla. 2010), or where the scope of laws to be repealed under a repealer clause was not disclosed, *In re Advisory Opinion to Attorney General*, 632 So. 2d 1018, 1021 (Fla. 1994).

The chief purpose of Resolution 2022-005 is to conform the vacancy provisions for County Commissioners in the charter to the requirements of general law. This purpose is adequately captured in the summary, which outlines not just the wording of the changes but also the impact these changes will have on which vacancies are subject to gubernatorial appointment, and which are subject to election.

Like in cases where declaratory sentences, rather than questions, were tacitly approved by the courts, the sentences are entirely prescriptive, that is, they contain no statements of the current situation and only describe the changes/new rules. See, e.g., *Armstrong*, 773 So. 2d at 16 (“Proposing an amendment . . .”; “Requires construction . . .”; “Prohibits reduction . . .”). The *Armstrong* court ultimately rejected the ballot language because it was unclear what was being changed, as opposed to simply being added. That defect is not present in the summary found in Resolution 2022-005.

The proposed amendment would also specify that an interim vacancy created by suspension would be filled in the same manner as a permanent vacancy, again consistent with general law. While this is omitted from the ballot summary, it is not a material omission. The common-sense approach to the term “vacancy” includes vacancies created by suspension pending removal, and the language simply conforms to general law that would be applied regardless of the charter language. The omission does not obfuscate what the proposed amendment would accomplish if adopted, and it does not mislead the voter in what the chief purpose of the amendment is.

Ultimately, the ballot summary is sufficient as a clear and unambiguous statement of the proposed amendment.

### **Consistency with general law**

Currently, the Brevard County Charter specifies a procedure for filling vacancies in the office of County Commission that are not consistent with general law. This proposal corrects that error and simply refers to general law as the authority for filling vacancies. Accordingly, there is no inconsistency with constitutional provisions, general law, or the Charter.

### **Conclusion**

Resolution 2022-005 is consistent with applicable law and is fairly and adequately summarized in the proposed ballot language.



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To: Christine M. Schverak, Esq., Interim County Attorney  
From: Jamy Dinkins, CivForge Law, PA  
Date: August 15, 2022  
Re: Charter Review Commission Resolution 2022-006

The foregoing is a review of the Brevard County Charter Review Commission’s (“CRC”) Resolution number 2022-006, relating to the establishment of a Workforce and Supportive Housing Trust Fund. The Resolution was adopted by the CRC on August 6, 2022, and is being presented to the County Commission. This memorandum is designed to advise the County Commission on the legality of the proposal, but does not provide policy advice.

### **Overview**

Resolution 2022-006 creates section 1.9 of the Charter to accomplish, broadly, the following:

- Create a trust fund for workforce and supportive housing;
- Establish revenue sources for the trust fund;
- Establish a purpose for the trust fund;
- Segregate trust fund monies from the general fund; and
- Delegate implementing ordinance authority and direction to the County Commission.

The proposed ballot summary describes the establishment and purpose of the trust fund and identifies that funding will be directed by the County Commission.

### **Assumptions and limitations of review**

This memorandum does not pass on the validity of the adoption of the Resolution or subsequent actions of the Brevard County Board of County Commissioners, the Brevard County Supervisor of Elections, or the voters. We assume that all procedural actions taken by any of those bodies are proper, timely, and sufficient to adopt the proposal and incorporate it into the County Charter, and thus only pass on whether the proposal, from a substantive perspective, is consistent with applicable law, including the Florida and Federal Constitutions, applicable statutes, and the County Charter.

### **Procedural matters**

While this memorandum does not address procedural matters generally, it does consider certain formal requirements surrounding ballot questions generally. Pursuant to section 101.161, Florida Statutes, there are certain requirements for ballot language and proposal

contents in referenda elections. One such requirement is that the ballot summary be fair and unambiguous, be limited in length, and phrase the question in a particular manner. In addition, there is a requirement that the amendment embrace a single subject.

### *Single subject requirement*

Florida law is replete with single-subject requirements for legislation and constitutional amendment, most prominently in the Constitution's limitation on the power of the legislature to adopt bills that "embrace but one subject and matter properly connected therewith," in article III, section 6, and the limitation on the initiative method to amend the constitution to proposals that "embrace but one subject and matter directly connected therewith." Art. IX, Sec. 3, Fla. Const. Though the difference in these provisions is minor (amounting to a single word), the Florida Supreme Court views the "directly connected" language as more narrow. *Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984).<sup>1</sup> Generally, a proposal embraces one subject if it has "a natural relation . . . as component parts or aspects of a single dominant plan or scheme." *Id.* at 990 (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318 (Fla. 1944)). Essentially, there must be a "oneness of purpose" in order for the proposal to meet the single-subject test, and affects a single function of the existing governmental structure. *Id.*

Resolution 2022-006 addresses a single subject, namely, the establishment of a workforce and supportive housing trust fund. The process of government affected is singular: namely, creation of a special-purpose fund separate from general county funds. While the proposal is necessarily detailed, all of the language is specifically related to a single trust fund, including its purpose, permissible sources of funding, and segregation from the county's general fund.

### *Ballot language*

There are three basic, and one more complex, requirements for a ballot summary. First, the caption of the ballot summary must be fifteen words or fewer. § 101.161(1), Fla. Stat. Second, the body of the ballot summary must be 75 words or fewer. *Id.* Third, the question posed must be phrased such that a "yes" vote indicates approval of the proposal and a "no" vote indicates rejection of the proposal. The word limitations are unquestionably met. While the ballot summary does not phrase the proposal in the form of a question, it is clear what the voter is intended to decide and a "yes" vote indicates approval, while a "no" vote indicates rejection.

The language of the statute does not explicitly require a question. Rather, the requirement is that the "ballot summary of such amendment . . . shall be printed in clear and unambiguous language on the ballot . . . and shall be styled in such a manner that a 'yes' vote will indicate approval of the proposal and a 'no' vote will indicate rejection." *Id.* The Florida Supreme Court, in other contexts, has allowed ballot summaries not framed in the form of a question. See *Armstrong v. Harris*, 773 So. 2d 7, 16 (Fla. 2000)(rejecting language

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<sup>1</sup> This analysis considers the more narrow view, as the "directly connected" language appears in the Brevard County Charter, albeit in a section not applicable to the CRC process.

for other reasons). When not framed as a question, however, the language must clearly indicate what the changes will be, in order to satisfy the “clear and unambiguous” portion.

The more complex requirement is that the language be a clear and unambiguous explanatory statement of the chief purpose of the measure. *Id.* While courts have interpreted this requirement using various rules and tests, they can be summarized as an overall requirement that the ballot language fairly advise the voter of the decision to be made sufficiently to enable the voter to intelligently cast their ballot. See *Askew v. Firestone*, 421 So. 2d 151, 155 (Fla. 1982)(collecting cases). This includes a requirement that the function of government to be affected is fairly identified, *Fine*, 448 So. 2d at 989, and that the ballot language not be misleading, *Florida Department of State v. Slough*, 992 So. 2d 142, 147 (Fla. 2008).

Ballot language can be misleading if it omits material information in such a way that a voter relying on the summary would believe the measure accomplishes something different from what the amendatory language actually does. Thus, an omission was material in a proposed property tax exemption amendment when it would have caused voters to believe it extended eligibility for the exemption where it did not, *Roberts v. Doyle*, 43 So. 3d 654, 659-61 (Fla. 2010), or where the scope of laws to be repealed under a repealer clause was not disclosed, *In re Advisory Opinion to Attorney General*, 632 So. 2d 1018, 1021 (Fla. 1994).

The chief purpose of Resolution 2022-006 is to create a workforce and supportive housing trust fund. This purpose is adequately captured in the summary, which specifies the establishment, purpose, and funding of the proposed fund. While the language of the proposed amendment is necessarily lengthier than the ballot summary, the details are adequately captured in the summary and the voter will understand what they are being asked to decide. None of the simplifications or omissions are material in that they would change the meaning of what the voter is deciding if disclosed.

Like in cases where declaratory sentences, rather than questions, were tacitly approved by the courts, the sentences are entirely prescriptive, that is, they contain no statements of the current situation and only describe the changes/new rules. See, e.g., *Armstrong*, 773 So. 2d at 16 (“Proposing an amendment . . .”; “Requires construction . . .”; “Prohibits reduction . . .”). The *Armstrong* court ultimately rejected the ballot language because it was unclear what was being changed, as opposed to simply being added. That defect is not present in the summary found in Resolution 2022-006.

Ultimately, the ballot summary is sufficient as a clear and unambiguous statement of the proposed amendment.

### **Consistency with general law**

This is a proposed new section of the Brevard County Charter. Currently, while the charter includes limitations on borrowing and taxation, there is no provision that would operate to prevent the establishment of a fund for workforce housing alone. Because the proposal defers to the County Commission to establish sources of funding (providing mere suggestions that surplus land sales be used, in part), the borrowing and taxation provisions

are not implicated. The County Commission, of course, must keep these provisions in mind when allocating funds to the trust fund, should the amendment be adopted by the voters.

Generally, a county may segregate its monies into separate funds for accounting purposes, and may establish trust funds for specific purposes that isolate monies deposited therein for limited purposes. See *generally* § 125.01, Fla. Stat. This occurs regularly with, for example, monies used for redevelopment or as revenues to pay for debt service on a bond or other obligation. Prior to appropriating any money to the redevelopment trust fund, the County Commission should ensure that segregation of such monies does not violate other agreements or requirements (as with the use of pledged revenues for a debt obligation or an impact fee fund). However, those considerations are downstream of the simple establishment of the fund which is the subject matter of Resolution 2022-006.

Similarly, the County Commission should ensure that projects funded with monies of the proposed trust fund are for a valid public purpose, as with any other expenditure. When reviewing housing expenditures, care must be taken to ensure that there is no unconstitutional pledge of credit. Art. VII, Sec. 10, Fla. Const. Again, these expenditure decisions are far downstream of the question of whether it is lawful to establish the proposed fund.

In short, the proposal establishes a dry fund—there is no guaranteed or specified source of funding, and no guaranteed or specified expenditure. The segregation of funds in the manner described is well within the County’s home-rule power, and does not conflict with any general or special law or the County Charter. While there may be legal considerations once sources of funding and expenditures are identified, those are not yet ripe for review.

## **Conclusion**

Resolution 2022-006 is consistent with applicable law and is fairly and adequately summarized in the proposed ballot language.