Charter amendments, citizens' initiatives, referendum

Number: INFORMAL

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Mr. Kirk S. Warren
Davenport City Attorney
Post Office Box 151
Lakeland, Florida 33802-0151

Dear Mr. Warren:

On behalf of the Davenport City Council, you have asked this office's opinion on the propriety or impropriety of amending a city charter to permit citizen initiatives or referendum on issues relating to the budget, capital programs, appropriations, taxes, and the salaries of municipal officers and employees.

While this office has generally declined in the past to specifically address the validity of the language of a proposed charter amendment,[1] the following informal comments are offered in an effort to be of assistance.

Section 166.021, Florida Statutes, seeks to implement the broad home rule powers granted by Article VIII, section 2(b) of the Florida Constitution, by providing that "municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law." As stated in subsection (4) of that statute, "[i]t is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter[.]"

Thus, municipalities may legislate concurrently in areas that are not expressly preempted by the state provided that a municipality's concurrent legislation does not conflict with state law. As the Florida Supreme Court in *Rinzler v. Carson*,[2] stated: "[a] municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden." Conflict, however, does not exist merely because a local regulation is more stringent than the statute or regulates an area not covered by the statute. Rather, legislative provisions are inconsistent if, in order to comply with one provision, a violation of the other is required.[3] Conflict may exist regardless of whether a charter or ordinance was passed by the governing body or initiated by a citizens' initiative.

In Attorney General Opinion 82-101, this office determined whether a municipal charter could be amended to limit or restrict the exercise of specific corporate, legislative, and governmental powers. In that opinion, citizens objected to a city's practice of transferring revenues from water and sewer operations to the city's general fund to be used for general municipal operating purposes. This office concluded that the charter could be amended to prohibit the transfer of any utility revenues to the general fund, thereby limiting the city's power.

In Attorney General Opinion 90-38, this office stated that a city's charter could be amended to require referendum approval for the issuance of all municipal bonds. In Attorney General Opinion 86-89, this office concluded that a municipality may not amend its charter to provide that no ad valorem tax on real property or tangible personal property may be levied without referendum approval, since such a charter amendment limits the authority of the municipality's governing body to levy such tax. Such a conclusion, however, was based on the language of section 195.207, Florida Statutes, which specifically provides:

"No municipal charter may prohibit or limit the authority of the governing body to levy ad valorem taxes . . . . Any word, sentence, phrase, or provision, of any special act, municipal charter, or other law, that prohibits or limits a municipality from levying ad valorem taxes within the millage limits fixed by s. 9, Art. VII of the State Constitution, . . . is hereby nullified and repealed."

More recently, in Attorney General Opinion 01-04, this office concluded that a county charter could not be amended to place a cap on the annual increase in the county's operating budget, even if the cap could be waived by an affirmative vote of at least six of the seven members of the board of county commissioners. In reaching such a conclusion, this office recognized that Florida courts consistently have struck down local provisions that seek to limit a county commission's discretion in setting an annual budget and millage rate as being in conflict with Chapters 129 and 200, Florida Statutes, which set forth the statutory framework by which counties are to establish budgets and millage rates.

For example, in *Board of County Commissioners of Dade County v. Wilson*,[4] the Florida Supreme Court held that a proposed voter initiative to set a county millage rate for Dade County was unconstitutional as being inconsistent with general law, stating that Chapter 200, Florida Statutes, granted authority to a county's governing body to set millage rates and comprised the exclusive manner by which to set countywide millage rates. As the district court concluded in *Ellis v. Burk*,[5] "[u]nder our state constitution and statutory scheme, the power to limit a county commission's ability to raise revenue for the county's operating needs by way of ad valorem taxation is effectively and exclusively lodged in the legislature." Under the statutory framework set forth in Chapters 129 and 200, Florida Statutes, by which counties are to establish budgets and millage rates, it is the county commission which sets the budgets and millage rates.[6]

While the statutes governing the adoption of a budget for a municipality are not as extensive as those provided in Chapter 129, Florida Statutes, section 166.241, Florida Statutes, provides that the governing body of each municipality shall adopt a budget each fiscal year.[7] The statute further addresses when amendments to the budget may be made.[8] Moreover, the provisions of section 200.065, Florida Statutes, require the governing body of a taxing authority to provide notice of its intent to adopt a millage rate and provide an opportunity for its citizenry to be heard. Section 200.065(2)(d) provides in part:

"Within 15 days after the meeting adopting the tentative budget, the taxing authority shall advertise in a newspaper of general circulation in the county as provided in subsection (3), its intent to finally adopt a millage rate and budget. A public hearing to finalize the budget and adopt a millage rate shall be held not less than 2 days nor more than 5 days after the day that the advertisement is first published. During the hearing, the *governing body of the taxing authority shall amend the adopted tentative budget as it sees fit, adopt a final budget, and adopt a*

resolution or ordinance stating the millage rate to be levied." (e.s.)

Accordingly, the rationale of the courts in the above cases relating to counties would be applicable to municipalities as well.

This office is not aware of any prohibition that would generally prohibit a charter provision which permits citizens' initiatives regarding the salaries of the city officials and employees as such salaries are not generally addressed by general law. Whether a charter provision, however, may permit a citizens' initiative to propose capital projects or to require referendum approval for such projects may depend upon the particular project in question and the general laws, if any, providing for such project. While this office is not aware of, nor have you brought to this office's attention, any prohibition that would generally prohibit a charter provision permitting a citizens' initiative to propose such projects or to require referendum approval, in the absence of additional information, this office must decline to comment on this matter.

I hope that the above informal comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/t

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[1] *See, e.g.*, Op. Att'y Gen. Fla. 95-32 (1995).

[2] 262 So. 2d 661, 668 (Fla. 1972).

[3] *See City of Kissimmee v. Florida Retail Federation, Inc.*, 915 So. 2d 205 (Fla. 5th DCA 2005) (generally the fact that local legislation imposes additional requirements on a person or business is not evidence of conflict); *Jordan Chapel Freewill Baptist Church v. Dade County*, 334 So. 2d 661, 664 (Fla. 3rd DCA 1976); *F.Y.I. Adventures v. City of Ocala*, 698 So. 2d 583 (Fla. 5th DCA 1997) (if no issue of preemption, conflict with state statute is given a very strict and limited meaning; they must contradict each other in the sense that both legislative provisions cannot co-exist, *i.e.*, in order to comply with one, a violation of the other is required). *And see* s.166.031(1), Fla. Stat., allowing a municipality to amend its charter except that part of the charter describing the boundaries of the municipality. *Cf.* s. 2(c), Art. VIII, Fla. Const. (municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities is governed by general or special law), and s. 166.021(3)(a), Fla. Stat. (municipality may not enact legislation concerning annexation, merger, and the exercise of extra-territorial power, which requires general or special law pursuant to s. 2[c], Art. VIII, State Const.).

[4] 386 So. 2d 556 (Fla. 1980). *And see Charlotte County Board of County Commissioners v. Taylor*, 650 So. 2d 146 (Fla. 2nd DCA 1995) (tax cap amendment inconsistent with general laws requiring county commission, not electors, to establish budget and levy ad valorem taxes).

[5] 866 So. 2d 1236, 1237 (Fla. 5th DCA 2004), *review denied*, 879 So. 2d 621 (Fla. 2004).

[6] *See Board of County Commissioners of Marion County v. McKeever*, 436 So. 2d 299 (Fla. 5th DCA 1983), *review denied*, 446 So. 2d 99 (Fla. 1984) (Ch. 129, Fla. Stat., mandates county commission prepare, approve, adopt and execute for each fiscal year an annual budget and Ch. 200, Fla. Stat., requires governing body of taxing authority to set millage rate).

[7] Section 166.241(2), Fla. Stat. provides:

"The governing body of each municipality shall adopt a budget each fiscal year. The budget must be adopted by ordinance or resolution unless otherwise specified in the respective municipality's charter. The amount available from taxation and other sources, including amounts carried over from prior fiscal years, must equal the total appropriations for expenditures and reserves. The budget must regulate expenditures of the municipality, and it is unlawful for any officer of a municipal government to expend or contract for expenditures in any fiscal year except in pursuance of budgeted appropriations."

[8] *See* s. 166.241(3), Fla. Stat., authorizing such amendments as set forth therein provided that the total of the appropriations of the fund is not changed.