



MEMORANDUM

Office of the City Attorney

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TO: Audit, Finance and Legislative Committee **DATE:** October 16, 2012
FROM: Nicolle M. Shalley, City Attorney *NMS*
SUBJECT: Placing a non-binding referendum on a city ballot

Background

At its meeting on October 2, 2012, the Audit, Finance and Legislative Committee Meeting discussed whether to adopt a resolution or place a non-binding referendum on the City's March 2013 ballot related to issues raised by the 2010 U.S. Supreme Court decision in the Citizens United v. Federal Election Commission case. While a particular draft referendum question was not provided to, nor developed by the Committee, it could be reasonably inferred from the back-up information and the discussion at the Committee meeting that the question would address a proposed federal constitutional amendment that seeks to declare that corporations are not people and that money is not speech, thereby nullifying the effect of the Citizens United case. For more information on the Citizens United case, you may refer to the informational memo dated March 14, 2012 from this Office to the City Commission titled "Campaign Finance and Political Contributions" which summarizes recent case law and responses to same, including the proposed federal constitutional amendment and resolutions passed by local governing boards.

During the Committee discussion on October 2nd, this Office provided a verbal outline of legal concerns to the Committee that this Office recommends be considered by the Committee and the Commission, when considering taking action on this matter. In accordance with the direction of the Committee, these legal concerns are analyzed and discussed in more detail below. It should be noted, this Memorandum is not specific to the Citizens United matter, but rather is intended to provide guidance whenever the Commission is considering whether to adopt a resolution or conduct a non-binding ballot referendum on a matter that is not the direct business of the City.

Questions and Short Answers

1. Q: Can the City Commission adopt a resolution in support of or opposition to a proposed federal constitutional amendment or other matter that is not the direct business of the City?

A: Yes, pursuant to Sec. 2.07 of the City Code of Ordinances (the “Code”) and Section 166.041, Florida Statutes, the City Commission can adopt a resolution concerning an “expression of a temporary character.”

2. Q: Can the City Commission conduct a non-binding referendum regarding a proposed federal constitutional amendment or other matter that is not the direct business of the City?

A: It is likely the City Commission can do so pursuant to its home rule authority; however, Florida statutes and local and federal case law raise issues that should be carefully considered by the City Commission. If the Commission were to move forward with a non-binding referendum, it is recommended that the Commission: 1) develop reasonable standards/guidelines to receive, evaluate and process this request and future requests in light of statutory requirements, First Amendment and Equal Protection concerns, taking into account the time deadlines for ballot preparation and printing; 2) make clear findings as to the municipal purpose for the referendum before expending City funds to place same on the City ballot; 3) word the ballot language in a neutral manner, being careful not to advocate a particular position with respect to the ballot question; and 4) avoid spending public funds on an advocacy campaign relative to the ballot question.

Discussion of the Issues

Adopting a Resolution

Pursuant to and subject to the limitations and procedural requirements contained in Sec. 2.07 of the Code and Section 166.041, Florida Statutes, the City Commission may adopt a resolution concerning an “expression of a temporary character.” The City has much discretion in the content of such resolution. Such a “resolution is adopted when approved by the votes of four or more members of the commission.” The City Commission has adopted many resolutions that express the Commission’s position on state or federal issues or legislation, these resolutions frequently direct the Clerk of the Commission or the City Manager to forward copies of the resolution to the appropriate decision-makers (such as our state or federal legislative delegation).

Placing a Non-Binding Referendum on a City Election Ballot

Counties in Florida have specific statutory authority to place questions on a ballot so as to “obtain an expression of elector sentiment with respect to matters of substantial concern within the county” as set forth in Section 125.01(1)(y), Florida Statutes. In fact, the Alachua County Commission directed the County Attorney to prepare a resolution placing the Citizens United issue on the 2012 November ballot; however, the County Commission did not approve the resolution. A copy of the draft resolution is attached to this Memorandum as Attachment “A.”

No similar statutory authority exists for municipalities, nor does the City Charter or Code appear to address city ballot initiatives, except for initiatives to amend the Charter (refer to Sec. 5.01 of the Charter and to Secs. 9-16 through 9-18 of the Code). Absent express authority, it is likely that the City has such authority under its home rule power. A local trial court opinion issued on March 12, 2002 in the case of Scharps v. Alachua County, Case No. 2000-CA-3127 (discussed in more detail below) concerning Section 125.01(1)(y), Florida Statutes, recognized that “counties probably already enjoyed the power to hold ‘straw votes’” under their home rule power and that the “law was proposed partly in response to Attorney General opinions holding that straw votes were not valid county purposes and therefore would be an improper exercise of county power”.

Nevertheless, the exercise of home rule authority and the expenditure of funds by a municipality requires a valid municipal or public purpose. What constitutes a municipal purpose is very broad and comprehends “all activities essential to the health, morals, protection and welfare of the municipality” as stated in State v. City of Jacksonville, 50 So.2d 532, 535 (Fla. 1951). The only prohibition is that the action not be expressly prohibited by law. To comply with this requirement, it is recommended that the City Commission make findings as to a municipal purpose before expending funds to place a non-binding referendum on a City ballot.

Generally, if later examined by a Court, the City’s findings of public purpose are presumed valid and considered correct unless patently erroneous. However, the public purpose behind submitting a straw ballot on a subject where the governing body has no direct control over the subject in question was the central issue in the Scharps case. In 2000, Alachua County placed a non-binding referendum on the ballot asking citizens whether they favored legislation to create a system of universal health care in Florida. The argument, among others, made by the plaintiff was that the County did not have the power to place the issue on the ballot because the subject matter of the referendum was something the County had no control over. The County offered evidence that the County was substantially involved in providing health care services both directly and through public-private partnerships and interagency agreements. The trial court found that the referendum was an improper exercise of the County’s power as it sought voter sentiment on an issue that was preempted to the State, and was thus improperly placed on the County ballot. The court declined to reach other issues raised by the Plaintiff.

The argument on the Citizens United referendum would be that the City Commission has no control over or role in the Federal Constitutional amendment process, as that process is preempted to Congress and the State Legislatures.

Alachua County appealed the trial court order and in a decision issued on September 12, 2003 in Alachua County, et al v. Scharps, 855 So2d 195, the First District Court found that Scharps did not have standing to challenge the placement of the referendum question on the ballot because he did not adequately allege a special injury suffered by him and no exception to the requirement for a special injury existed. On that basis, the First District reversed the trial court decision. The

First District did not consider the merits of the trial court decision that the ballot issue was improper because it concerned a subject matter not within the County's jurisdiction.

The Scharps case also raised Constitutional concerns relevant to non-binding referendum, namely Free Speech and Equal Protection, as follows:

- that the “resolution [to place the question on the ballot] improperly promotes a political agenda and, if allowed, creates a limited public forum [pursuant to the First Amendment] removing the Board’s discretion to refuse future citizen requests” for non-binding referenda on any topic; and
- that “[b]ecause Board’s discretion to pick and choose among petitions for referenda has not been circumscribed by adequate guidelines, general equal protection principles” may be violated.

Because the trial court ruled that the County did not have the power to place the referendum on the ballot because it was a matter preempted to the State and not a matter for which the County could develop policy, the trial court did not rule on these constitutional issues. On appeal, the First District briefly discussed these issues in the framework of whether these arguments gave Scharps constitutional standing, but also reached no conclusion on these issues.

It should be noted however, that the First Amendment issue has been litigated in state and federal courts in the context of state-issued license plates that advocate an issue, position or group, such as an anti-abortion license plate that stated “Choose Life” or a Sons of Confederate Veterans license plate that displayed a Confederate battle flag. The issue is whether the “speech” (whether it appears on a government issued license plate or, in this instance, on a government issued electoral ballot) is government speech in a non-public forum, in which case the government can control the message and the content, or whether the “speech” is private speech in a government-created limited public forum, in which case the government cannot regulate or limit based on the message or content. Government limitations on speech in a limited public forum are acceptable provided the limitations on speech are reasonable and not an effort to suppress expression merely because the government officials oppose the speaker's view.

The federal courts are at present split on the issue of whether the license plates are government speech in a non-public forum or private speech in a limited public forum and the U.S. Supreme Court has yet to take up the issue. Given the lack of settled law, if the City Commission were to move forward, it is advisable for the Commission to err on the side of caution and treat citizen requested, non-binding referendum as private speech in a limited public forum. This will require the Commission to develop reasonable standards/guidelines to consider this and future requests. These guidelines may state that, until such time as the law is clarified, the Commission views the ballot as a limited public forum, that the forum is limited to items that constitute a “municipal purpose” as determined by the Commission based on a definition or key factors and should describe how such requests will be processed, evaluated and placed on a ballot.

The process created should also contemplate completion in time for the ballot language to be submitted to the Supervisor of Elections for inclusion on the printed ballot. By way of example, if a newly created process for non-binding referenda were to mirror the existing City process for a Charter amendment referendum as set forth in Section 5.01 of the Charter, it would require notice and two readings of an ordinance adopted by four-fifths vote of the City Commission. The ordinance would have to be adopted prior to Friday, February 1, 2013 (the end of qualifying). This would require the ordinance to be placed on the regular City Commission agendas no later than January 3, 2013 for first reading and January 17, 2013 for second reading.

In addition, the Commission should consider Section 106.113, Florida Statutes, which prohibits the City from expending public funds for any communication which advocates for any item to be voted on by the electorate. Exceptions to the statute allow the advocacy for issues by direct spoken words and communications that are purely factual. The Commission is familiar with this statute in the context of conducting referenda for involuntary annexations. In order to comply with the statute, the City must word the ballot language in a neutral manner, avoiding advocacy for one position or another, and the City is prohibited from spending public funds on an advocacy campaign related to the ballot question.

In the research and inquiry conducted by this Office, we did find that several Florida cities, including South Miami, Cutler Bay, Tampa and Key West, have adopted resolutions expressing their opinion on the proposed federal constitutional amendment. However, we did not find any city in Florida that has placed a non-binding referendum on this issue on a City ballot. Referenda have been placed on ballots in the cities of Missoula, Montana; Boulder, Colorado; and Madison, Wisconsin.

ALACHUA COUNTY
BOARD OF COUNTY COMMISSIONERS

RESOLUTION 2012-__

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, ORDERING AND PROVIDING FOR A NONBINDING REFERENDUM TO BE HELD AS PART OF THE GENERAL ELECTION ON NOVEMBER 6, 2012, FOR THE PURPOSE OF DETERMINING ELECTOR SENTIMENT ON A MATTER OF SUBSTANTIAL CONCERN WITHIN THE COUNTY; PROVIDING AN EFFECTIVE DATE.

WHEREAS, Subsection 125.01 (1)(y), Florida Statutes, provides that the Board of County Commissioners, by a majority vote of the total membership of the governing body, may place questions on a ballot at a general election so as to obtain an expression of elector sentiment with respect to matters of substantial concern within the county; and

WHEREAS, several Alachua County residents have appeared at recent Board meetings to express concerns to the Board pertaining to the United States Supreme Court decision in Citizens United v. Federal Election Commission (Citizens United) that corporations have the same protections of free speech under the First Amendment to the United States Constitution as natural persons and that local governments cannot limit corporate expenditures to influence elections during political campaigns; and

WHEREAS, free and fair elections are essential to democracy and effective self government; and

WHEREAS, the Board of County Commissioners, with the approval of a majority of the electors voting in the 2002 general election, amended the County Charter to limit campaign contributions to \$250.00 per election to candidates for county charter officer positions; and

WHEREAS, corporations, labor unions, and other artificial entities can exist in perpetuity and exist solely through the legal charter approved by the government; and

WHEREAS, the recent United States Supreme Court decision in Citizens United allows corporations, labor unions, and other artificial entities to make unlimited expenditures in the political campaigns; and

WHEREAS, the effect of the Citizens United may be to create an unequal playing field that allows unlimited corporate spending to influence candidate selection and election; and

1 WHEREAS, the Alachua County Board of County Commissioners has determined that
2 the constitutional rights of corporations, labor unions, and other artificial entities, including
3 rights under the First Amendment of the United States Constitution, are matters of substantial
4 concern within the County and wishes to determine electorate sentiment on this matter.
5

6 BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF ALACHUA
7 COUNTY FLORIDA:
8

9 1. Authority For Resolution. This resolution is adopted pursuant to the Alachua
10 County Home Rule Charter, Subsection 125.01(1)(y), Florida Statutes, Article VIII, Section 1,
11 Florida Constitution and other applicable provisions of law.
12

13 2. Findings. The findings set forth in the preamble of this resolution are true and
14 correct and are incorporated herein. The Board further finds and determines that it would benefit
15 the citizens of Alachua County to hold a nonbinding referendum for the purpose of ascertaining
16 elector sentiment concerning a corporation's constitutional right to make unlimited independent
17 expenditures for speech that expressly advocates the election or defeat of a candidate. The
18 results of the election on this nonbinding referendum question shall be recorded in the minutes of
19 the Board of County Commissioners of Alachua County, Florida after the election.
20

21 3. Non-Binding Referendum. A non-binding referendum is hereby ordered to be
22 held in Alachua County on November 6, 2012, to ascertain the views of electors through voting
23 on the question set out below.
24

25 4. Notice of Non-Binding Referendum. Notice of the non-binding referendum shall
26 be published in a manner as required by law.
27

28 5. Places of Voting. The places of voting and the Inspectors and Clerks for the
29 polling places for the non-binding referendum election shall be the same places and persons as
30 for the General Election to be held on the same date.
31

32 6. Official Non-Binding Ballot. The form of the ballot to be used in the non-binding
33 referendum shall state in substantially the following form:
34

35 Only Natural Persons Have Constitutionally Protected Rights
36

37 Should the Constitution of the United States of America be amended to provide: that only
38 natural persons and not corporations, labor unions and other artificial entities are entitled to
39 constitutionally guaranteed rights, including free speech; and that the regulation of political
40 spending does not limit the right to free speech?
41

42 _____ Yes

43 _____ No
44

1 7. Printing of Ballots. The Supervisor of Elections of Alachua County is authorized
2 and directed to print ballots as required by law.

3
4 8. Election Procedure. The Supervisor of Elections shall hold, administer and
5 conduct the non-binding referendum election in the manner prescribed by law for holding
6 elections in the County. Returns shall show the number of qualified electors who voted at such
7 referendum election on the referendum and the number of votes cast respectively for and against
8 approval of the item. The returns shall be canvassed in accordance with law.

9
10 9. Election Results. The results shall be recorded in the minutes of the Board of
11 County Commissioners of Alachua County, Florida.

12
13 10. Severability. In the event that any word, phrase, clause, sentence, or paragraph
14 hereof shall be held invalid by any court of competent jurisdiction, such holding shall not affect
15 any other word, clause, phrase, sentence, or paragraph hereof.

16
17 11. Effective Date. This Resolution shall take effect immediately upon its adoption.
18 The Clerk to the Board of County Commissioners shall provide the Supervisor of Elections with
19 a certified copy of this Resolution.

20
21 DULY ADOPTED in regular session, this _____ day of _____, 2012.

22
23
24 BOARD OF COUNTY COMMISSIONERS
25 OF ALACHUA COUNTY, FLORIDA
26

27
28 ATTEST:

By: _____
Paula M. DeLaney, Chair

29
30
31 _____
32 J. K. Irby, Clerk

33 (SEAL)

APPROVED AS TO FORM

34
35 _____
36 Alachua County Attorney
37