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December 19, 2013

Kimberle B. Weeks
Supervisor of Elections
Flagler County Government Services Building
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Bunnell, FL 32110

Re: Palm Coast Municipal Elections

Dear Ms. Weeks:

This is to follow up on our discussions and my consultation with you concerning the upcoming Palm Coast City elections which are planned to occur during the general election cycle of 2014. I have had an opportunity to examine all of the data and emails you gave me Monday from your communications with the city, the Attorney General's Office and the General Counsel's Office of the Department of State.

Your primary concern is the validity of a city charter amendment conducted in 2011 and how its adoption affects the upcoming 2014 general election. If the amendment is invalid, was the election conducted in 2011 void, drawing into question the legitimacy of those presently serving in city office? Can the flaw be corrected in a timely, legally valid way? Is a declaratory judgment necessary and obtainable to determine the validity of the charter amendment and the validity of the 2011 elections? Given the approaching general election cycle with the activities of qualifying, preparing ballots timely for mailing to absentee voters, etc., will there be time enough to secure a prompt remedy in order that elections can proceed free from doubt?

There are other ancillary issues that you mentioned, such as the absence of an interlocal agreement with the city for the 2014 election cycle and the conflict in qualifying periods for city candidates as compared to the qualifying periods of all other candidates for that cycle. You are concerned that these qualifying periods should coincide for election efficiency and certainty to the candidates. There are also issues you have with the handling of absentee ballots for the city elections and how the city

process in the charter conflicts with state law if the 2014 general election cycle is to be used.

Additionally, you are concerned with internal inconsistencies within the city charter concerning city elections that you have found. You also could not find the correct city charter on the city's web page for the benefit of Palm Coast residents and taxpayers.

Your interest is to assure that a valid election is held in the city for the two city council seats that are up for election. Finally, your overriding interest is to have these issues resolved in the most inexpensive way for the Flagler County taxpayers that finance your budget.

Florida law fortunately offers a way that you can have these issues corrected without an Attorney General's Opinion (for which the AG Office has said is not available for the specific question you want answered) and also resolved without the expense and delay of an uncertain declaratory judgment. Simply put, the present statutes and case law allow all of these issues that are election centered to be addressed by way of an ordinance of the city and an interlocal agreement between the city and your office. An ordinance can set the time of the city elections to coincide with the general election regardless if there was or was not a valid 2011 charter amendment. The same ordinance can set the qualifying periods to coincide with the general election cycle. Further, Florida law already directs that the absentee ballots shall be handled under the prescribed statutory procedures and not under the charter when the city uses the general election cycle as Palm Coast is doing here.

A declaratory suit or Attorney General Opinion are unnecessary for the issues of election dates, qualifying periods, and absentee ballots provided the city enacts an ordinance consistent with state law. You can set out in the interlocal agreement what the ordinance will contain to assure yourself that all of the impediments to a smooth and valid election are removed. As for the inconsistencies within the charter, the city is empowered to correct them in the opinion of the city counsel. The city can endeavor to post the correct version of the charter, preferably after the ordinance is enacted, enabling an updating or re-codification of the city's charter. You could address these as part of your interlocal agreement with the city.

As to those who were elected in 2011 based on the charter amendment, the time for challenging these terms of office has long passed, as I explain below when I address the law. The statute governing candidate elections requires a court filing within 10 days of the winning candidates being certified. While it is possible for a taxpayer or voter of the city to file a suit now or during the upcoming election cycle to attempt to raise the

validity of the election, you will not have to expend any funds in such a suit. The suit must name the Flagler County Canvassing Board as the defendant. Our office would be responsible for its defense. Please note that in such a suit the Canvassing Board is not the real party in interest for this claim related to the 2011 or 2014 elections, depending upon what is the subject of the suit. It would be up to the city to intervene in the suit to address any challenges that might be entertained by the court, essentially to present its case to the court that either the court lacked jurisdiction or if jurisdiction existed there was no flaw that invalidated the election. This is the city's burden and not the Canvassing Board's.

Here are the statutes and other law that lead to these results.

With respect to the issue of establishing a modified election date and modified qualifying periods for candidates, the statutes and supporting Attorney General Opinions confirm the ability of a municipality to implement such modifications by ordinance. That is, a referendum is not required and the text of a charter can legally be modified by the enactment of an ordinance. Before 1995 this was not possible. Municipalities sought to make such adjustments which the Attorney General determined not to be a lawful means based on the statutes as they then read.

This led to a statutory amendment in 1995 which modified the law in § 166.021, *Fla. Stat.*, which enabled such changes to be accomplished without the holding of a referendum. Within the same law, § 100.3605(2) was amended to specifically provide that such modifications could be enacted by ordinance. An ordinance enacted pursuant to the statute would have the legal effect of revising the charter.

This view of the statutes was confirmed by an opinion from Attorney General Bill McCollum in 2007, AGO 2007-34.

To further support this legislative authorization for municipalities, in 2008 the Legislature amended § 101.75(3) to make express that such a modification could be made by ordinance to shift a municipal election date to a date concurrent with any statewide or countywide election. *Laws of Fla.*, 2008-95, Section 23. The language specifically reads:

> Notwithstanding any provision of local law or ***municipal charter***, the governing body of a municipality may, ***by ordinance***, move the date of any municipal election to ***a date concurrent with any statewide or countywide election***. §101.75(3), *Fla. Stat.* (emphasis added).

The same holds true for adjusting the qualifying period in order to place it in sync with the modified election date. The 2008 law provides:

> The dates for qualifying for the election moved by the passage of such ordinance shall be specifically provided for in the ordinance. The term of office for any elected municipal official shall commence as provided by the relevant municipal charter or ordinance.

Id. See also AGO 00-61 to the same effect.

The ability to challenge a referendum amending a charter two years after the charter amendment was approved by the voters will be very difficult because of the lapse of time. A proposed charter amendment can be challenged in court by a citizen or taxpayer of the municipality prior to the election. That obviously did not happen. There is a statutory procedure for challenges immediately following an election, although it is unclear whether your grounds for the defect in the referendum can be alleged. More importantly, whether within the statutory allowance or not, the claim must be filed within ten days of the election being certified. § 102.168(2), *Fla. Stat.* See also §102.1682(2), providing that a judgment setting aside a referendum voids the election. The courts applying these provisions emphasize that these processes allow the election contest to proceed promptly and expeditiously to determine the effect of any irregularities in the election. Suing now, two years later, could be argued that it would not be consistent with this principle of expediting the final determination for the validity of an election. See also § 102.168(1)&(3), *Fla. Stat.*, providing for jurisdiction of a circuit court to hear a challenge against a question submitted by referendum but on limited, specified grounds.

As to the standard for judging defects, the courts have applied a reasonableness standard. In an older case originating from Flagler County, the First District Court of Appeal in 1969 considered an election challenge brought by Shelton Barber against the Flagler County Canvassing Board for having incorrectly tabulated absentee ballots, declaring George Moody, one of the members of the Canvassing Board, as the winner of the election. The election challenge statute had a requirement that Mr. Barber did not strictly comply with. The court dismissed the argument of the Canvassing Board which had pressed the court for a literal interpretation. In ruling in favor of Mr. Barber, the court stated:

> There can be no doubt that the purpose of the statutes permitting election contest is to prevent the thwarting of the will of the electors

> either by fraud or by common mistakes honestly made. If both the rights of the electors and the candidates are to be protected, a reasonable interpretation must be given to the statutes where same is necessary to accomplish the purpose for which it was enacted.

Barber v. Moody, 219 So. 2d 284, 286 – 287 (Fla. 1st DCA 1969).

The court continued with the basic premise that allowing election contests permits "the prompt and expeditious determination of the effect of any irregularities." Id at 287. Further, there is no doubt that public policy depends upon these prompt judicial challenges "to determine the issues on the merits to maintain the purity of elections, the sanctity of the ballot and the will of the electors." Id at 287. These concepts would likely form the basis of an argument by the city that the time for challenging the adoption of the 2011 charter amendment and the election of the individuals seated at that election is now past.

If we assume that there can in fact be a judicial claim at this late date to establish the invalidity of the 2011 charter amendment and, further, that it cannot be remedied for the purpose of the 2014 elections, a taxpayer of the municipality can file that election protest within ten days of the certification of either the primary election of 2014 or the general election of 2014, whichever is applicable. In such a case, the Flagler County Canvassing Board is a necessary party by statute, but on this particular issue, its position would be neutral. That is, it would not need to argue whether the charter amendment was valid or not. This is simply because the burden of establishing the amendment's validity would be on the City of Palm Coast. It would have to intervene in the case and demonstrate to the judge that the amendment was valid or that the judge was without authority to pass on its validity. The Canvassing Board essentially would have no substantive role, much like you had no substantive role except as the official record keeper in the litigation regarding the qualifying of Mr. Pollinger.

If the court were to determine that the charter amendment was invalid and that it affected the 2014 elections, the court could issue a judgment voiding the election. On the other hand, if the court for whatever reason determined that the election would hold, then the certification of the results by the Flagler County Canvassing Board would stand and the individuals would take office as elected.

In this scenario, there are very minimal costs in such a proceeding for the Flagler County taxpayers. This is because the County Attorney defends the Canvassing Board and that cost is already fully funded by way of annual appropriations. All proceedings

within the case as it affects the Canvassing Board would be handled by the County Attorney.

Obviously, the foregoing analysis and its success depend upon the cooperation of the city to take those steps that would allow the elections to proceed in concert with Florida law. Your interlocal agreement could address these matters such that the city and your office are in accord with the steps that need to be taken.

Should you have any questions or if I can amplify on any aspect, please let me know.

Sincerely

Albert J. Hadeed

AJH/jgc