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December 17, 2009

Hon. Kendall T. Moore, Chairman  
Brevard County Charter Review Commission  
1290 U.S. Highway 1  
Rockledge, FL 32955

Dear Mr. Moore:

I have been informed that Dale Young is bringing a proposed Brevard County Charter amendment to your meeting tonight to make the Brevard School's Superintendent an elected position as opposed to appointed as it is now.

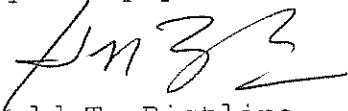
The Brevard County Charter is inapplicable to the Brevard County School Board and the proposed amendment would be ineffective and unconstitutional.

Attached is a copy of my August 10, 2006, letter to Scott Knox dealing with a similar situation. All three of the review attorneys concurred with my opinion (copies of letters attached).

In sum, the powers and functions of the District School Board are regulated by Article IX, Section 4(a) of the Florida Constitution and the office of the School Superintendent is governed by Article IX, Section 5 of the Constitution and Sections 1001.46 and 1001.461, Fla. Stat., and cannot be preempted or regulated by the Brevard County Charter. Brevard's Superintendent is an appointee of the Brevard County School Board by virtue of a referendum election pursuant to Section 1001.461, Fla. Stat., and cannot be changed by an amendment to the Brevard County Charter.

Please call should you have any questions or comments.

Very truly yours,



Harold T. Bistline  
School Board Attorney

HTB/pc  
Enclosures

cc: School Board Members  
Dr. Brian T. Binggeli, Superintendent of Schools  
Scott Knox, Brevard County Attorney  
Dr. Ronald Bobay

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August 10, 2006

Mr. Scott Knox  
Brevard County Attorney  
2725 Judge Fran Jamieson Way  
Viera, FL 32940

RE: Proposed Amendments To Brevard County Charter

Dear Mr. Knox:

This firm represents the School Board of Brevard County, Florida ("School Board"). I am writing to you to express my comments regarding the proposed amendments to the Brevard County Charter as those amendments purport to apply to the School Board. I will not repeat the comments made by municipal attorneys, Dwight Severs and Paul Gougelman, in their well reasoned letters to you except to say that I agree with their positions regarding the inconsistency of the proposed charter amendments with general law.

District school boards were created by Article IX, Section 4(a) of the Constitution of the State of Florida (1968) Article IX, Section 4(b) provides in part that "The school board shall operate, control and supervise all free public schools within the school district"... District school boards have been determined to be a part of the state system of public education. Board of Public Instruction v. State ex rel. Allen, 219 So.2d 430 (Fla. 1969). See also Canney v. Board of Public Instruction of Alachua County, 222 So.2d 803 (Fla. 1st DCA 1969).

The above cited authorities make it clear that district school boards are agencies of the state and not an instrumentality of county government or a municipality subject to regulation by a county charter. As further support for this position I refer to Article VIII, Section 1(g), Fla. Const., which authorizes county charter government and states in part that "The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances." (emphasis added) Nothing in Article VIII, Section 1(g) authorizes a charter county to regulate the functions or usurp the powers of a district school board.

Mr. Scott Knox  
Brevard County Attorney  
August 10, 2006  
Page 2

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As the Florida Supreme Court held in Broward County v. City of Ft. Lauderdale, 480 So.2d 631, 634 (Fla. 1985):

"Section 1(g), as we conclude both from the commentary and an understanding of the constitutional scheme vis-a-vis charter counties, was intended to specifically give charter counties two powers unavailable to non-charter counties: the power to preempt conflicting municipal ordinances, and the power to avoid interventions of the legislature by special laws. The power to preempt is the power to exercise county power to the exclusion of municipal power. (emphasis added again)

In sum, it is my opinion that the Brevard County Charter is inapplicable to the Brevard County School Board and may not serve to preempt or regulate the powers or functions provided to the School Board by the Constitution of the State of Florida, general law or Department of Education rule.

Although I believe the above discussion is dispositive regarding the Brevard County Charter's inapplicability to the School Board, Section 5.7.5 (a) of the proposed amendments relating to schools is also invalid as contrary to general law.

The adoption of levels of service regarding school concurrency is governed exclusively by general law. SB 360 which became law on July 1, 2005, amended Chapter 163, Part II, Fla. Stat., and provides a comprehensive framework for the negotiation and adoption of interlocal agreements regarding school concurrency between district school boards and local governments. The attempted regulation of the implementation of school concurrency by county charter is contrary to law and thus violative of Article VIII, Section 1(g), Fla. Const.

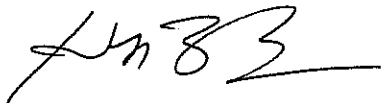
Further, the attempt to regulate class size by the proposed amendments to the County Charter is also invalid for two reasons: the Brevard County Charter is inapplicable to the School Board, and class size is governed exclusively by Article IX, Section 1, Fla. Const., and general law.

Mr. Scott Knox  
Brevard County Attorney  
August 10, 2006  
Page 3

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In conclusion, the proposed charter amendments are facially unconstitutional to the extent that the amendments attempt to regulate the powers and functions of the School Board and should not be placed on the ballot by the County Commission. I request that you furnish a copy of this letter to the Attorney's Review Panel for their consideration. Thank you.

Very truly yours



Harold T. Bistline  
School Board Attorney

HTB/pc

cc: School Board Members  
Dr. Richard A. DiPatri, Superintendent of Schools  
County Commissioners  
Peggy Busacca, County Manager  
Dwight Severs, Esquire, City Attorney  
City of Titusville  
Nicholas F. Tsamoutales, Esquire, City Attorney  
City of Palm Bay, Town of Melbourne Beach &  
Melbourne Village  
James Beadle, Esquire, City Attorney  
City of Satellite Beach  
Karl Bohne, Esquire, City Attorney  
Cities of West Melbourne, Indian Harbour Beach  
and Town of Malabar  
James Fowler, Esquire, City Attorney  
City of Cocoa Beach  
Michael Kahn, Esquire  
Town of Palm Shores  
Anthony Garganese, Esquire, City Attorney  
Cities of Cocoa and Cape Canaveral  
Joseph E. Miniclier, Esquire, City Attorney  
City of Rockledge  
Paul Gougelman, Esquire, City Attorney  
City of Melbourne

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PLEASE REPLY TO FORT LAUDERDALE

August 15, 2006

Commissioner Helen Voltz, Chair  
Brevard County Board of County Commissioners  
2725 Judge Fran Jamieson Way  
Vienna, FL 32940

RE: Brevard County Charter Review Panel / Review of Proposed Charter Amendments

Dear Commissioner Voltz:

Pursuant to the direction provided by County Attorney Scott Knox, the following consists of my legal analysis of the two proposed charter amendments, as a member of the Charter Review Panel.

**Analysis of Proposed Charter Amendments and Ballot Language**

Pursuant to Section 7.3.2.3 of the Brevard County Charter, members of the legal panel are to review the proposed amendments and ballot language to insure that the amendment 1) embraces one subject only; 2) is consistent with the Florida Constitution and general law; and 3) is consistent with the Brevard County Charter.

**I. Proposal 1 – Preserve the Quality of Life in Brevard County by Managing the Issuance of Building Permits**

This proposal intends to prohibit the issuance of any building permits by the County or any municipality in the County if the new construction will cause certain levels of service to exceed 100% of capacity, subject to certain exceptions.

a. **Ballot Title and Ballot Summary**

With respect to the proposed ballot language, pursuant to Section 101.161(1), Florida Statutes, the ballot language for a referendum issue may not exceed 75 words in length, and must contain an explanatory statement describing the chief purpose of the measure. In addition, Section 101.161(1) requires that the ballot title not exceed 15 words in length. Section 101.161(1) reads as follows:

Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot. . . . The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the [proposal], . . . [T]he substance 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.

The Florida Supreme Court addressed the issue of whether a specific ballot title and summary complied with the statutory requirements in the matter of In re Advisory Opinion to the Attorney-General – Save Our Everglades, 636 So.2d 1336 (Fla. 1994). The ballot title at issue in the Save Our Everglades matter read as follows: "SAVE OUR EVERGLADES". 636 So.2d 1336. The Florida Supreme Court held that the title "SAVE OUR EVERGLADES" was misleading. According to the Florida Supreme Court, the title was misleading for the following reason:

It implies that the Everglades is lost, or in danger of being lost, to the citizens of our State, and needs to be "saved" via the proposed amendment. Yet, nothing in the text of the proposed amendment hints at this peril. . . . A voter responding to the emotional language of the title could well be misled as to the contents and purpose of the proposed amendment. 'A proposed amendment cannot fly under false colors; this one does.' Askew v. Firestone, 421 So.2d at 156.

Save Our Everglades, 636 So.2d at 1341.

Similarly, the first proposed Brevard County Charter amendment is deficient as it implies that the quality of life in Brevard County is in danger of not being preserved. The title for the proposed Charter amendment reads as follows: "Preserve the Quality of Life in Brevard Co. by Managing the Issuance of Building Permits." As drafted, the language implies that the quality of life is not being preserved; however, nothing in the proposed amendment indicates what is happening to create the loss of quality of life.

The only statement that defines what factors constitute the "quality of life" is the definition included in the Charter Amendment; however, there is no clear indication as to how the adoption of the amendment will "preserve" a quality of life. In addition, the term "quality of life" means many things to many people. Due to the subjective interpretation of the phrase "quality of life",

the use of the phrase could mislead a voter as to the contents and purpose of the proposed amendment. See, In re Advisory Opinion to the Attorney General – Florida Marriage Protection Amendment, 926 So.2d 1229, 1239 (ballot title and summary cannot contain emotional and subjective evaluation language) citing, In re Advisory Opinion to the Attorney General – Protect People from the Health Hazards of Second-Hand Smoke by Prohibiting Workplace Smoking, 814 So.2d 415, 420 (Fla. 2002). Therefore, following the rationale in the Save Our Everglades Advisory Opinion, the proposed title violates Section 101.161, Florida Statutes.

With respect to the ballot summary, the use of the phrase “. . . necessary to our quality of life,” again interjects a subjective component to the consideration of the amendment. The language in the summary does not provide the voter with clear understanding of the phrase “quality of life,” as it may mean different things to different people, notwithstanding the definition in the proposed amendment. As stated in the Save Our Everglades opinion, the ballot summary is no place for “subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment and no more. The political motivation behind a given change must be propounded outside the voting booth.” Save Our Everglades, 636 So.2d at 1342; citing, Evans v. Firestone, 457 So.2d 1351, 1355. Consequently, the ballot summary does not comply with Section 101.161, Florida Statutes, and should not be placed on the ballot as drafted.

#### **b. Single Subject Requirement**

Section 7.3.2.3 of the Brevard County Charter requires that the members of the legal panel analyze whether the proposed amendment “embraces only one subject.” As the Brevard County Charter specifically requires compliance with the “single subject” limitation, one must look to Florida case law that interprets related state constitutional amendments and state legislation, in order to apply the proper analysis to determine whether the proposed amendment complies with the single subject requirement.

In reviewing a proposed amendment to determine whether it embraces a single subject, it is not necessary to rule on the merits of the proposal. The single subject requirement, as interpreted by the Florida Supreme Court, “. . . is a rule of restraint that protects against unbridled cataclysmic changes in Florida’s organic law.” In re Advisory Opinion to the Attorney General re: Property Rights, 699 So.2d 1304 (Fla. 1997).

In the Property Rights advisory opinion, the Florida Supreme Court held that the proposed amendment did not comply with the single subject requirement because it affects several branches of government in a way that would substantially alter the functions of the different branches of government. While the proposed Brevard County amendment does not affect different branches of government, it does impact different levels of government, including, but not limited to Brevard County, the Brevard County School Board, and all of the municipalities in Brevard County.

The proposed amendment would adopt a level of service for school concurrency as well as other functions provided by the County and the individual municipalities in Brevard County. With respect to the School Board, Article IX, Section 4(b) of the Florida Constitution provides as follows:

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.

Section 1001.32(2), Florida Statutes specifically provides that

In accordance with the provisions of s. 4(b) of 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.

As written, the Florida Constitution and the relevant statutory provisions do not provide for any ability of the County to regulate the operation of schools within the County by charter or ordinance. Article VIII, Section 1(g) of the Florida Constitution authorizes county charter government, and states:

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.

As the inclusion of proposed levels of service for schools within Brevard County conflicts with the general law related to the operation of schools within Brevard County, the adoption of a proposed Charter amendment would have a cataclysmic change on the operation of government in Brevard County. Therefore, following the Property Rights opinion, the proposed charter amendment embraces more than one subject, and therefore cannot be authorized under the County charter.

In addition, the proposed charter amendment, if adopted would impact a municipality's ability to set their own levels of service for the various services mentioned in the charter amendment. As a result, the proposed charter amendment would have a similar impact on the relationship between county and city government in Brevard County. This shift in governance violates the limitations on a Charter County's powers as specified in Article VIII, Section 1(g) of the Florida Constitution cited above. Therefore, with respect to the impact on municipal government's ability to control its own levels of service within their respective municipal boundaries, the proposed amendment embraces more than one subject, and cannot be authorized under the County Charter.

**c. Whether the Proposal is consistent with the Florida Constitution, Florida Law, and the Brevard County Charter**

As stated above, the issues related to whether the proposed charter amendment embraces more than one subject, by analogy, lead to the conclusion that the proposed charter amendment is

inconsistent with the Florida Constitution, Florida General Law, and the Brevard County Charter. This conclusion is reached due to the following reasons:

1. The proposed regulation on levels of service for schools within the County violates Article IX, Section (4)(b), Florida Constitution, and Section 1001.32, Florida Statutes.
  2. The proposed regulation on levels of service within municipal boundaries violates Article VIII, Section 1(g), Florida Constitution, and Section 163.3180, Florida Statutes.
  3. The exceptions contained in the proposed charter amendment do not provide a reasonable method for determining whether the limitations will apply
- (1) **The proposed regulation on levels of service for schools within the County violates Article IX, Section (4)(b), Florida Constitution and Section 1001.31, Florida Statutes.**

If adopted, the proposed charter amendment would impose a specific level of service for schools in Brevard County. Section 5.7.5(a) of the proposed charter amendment reads as follows:

(a) Schools:

School concurrency shall be established on a district-wide basis and shall include all public schools in the district and all portions of the district whether located in a municipality or an unincorporated area. By October 2010, Brevard County School's class size maximums shall not be greater than the following:

- (1) The maximum number of students assigned to each teacher who is teaching core-curricula courses in public school classrooms for pre-kindergarten through grade 3 shall not exceed 18 students.
- (2) The maximum number of students assigned to each teacher who is teaching core-curricula courses in public school classrooms for grades 4 through 8 shall not exceed 22 students.
- (3) The maximum number of students assigned to each teacher who is teaching core-curricula courses in public school classrooms for grades 9 through 12 shall not exceed 25 students.

If adopted, the proposed charter amendment would violate relevant provisions of the Florida Constitution and state law related to classroom size and the operation of school districts, and would therefore be invalid.

The specific charter amendment provisions related to classroom size are in direct conflict with the Florida Constitution "Classroom Size Amendment" that was adopted in 2002 by the voters of the State of Florida. Specifically, Article IX, Section 1, Florida Constitution provides as follows:

To assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that:

(1) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for pre-kindergarten through grade 3 does not exceed 18 students;

(2) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students; and

(3) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students.

The reference to core-curricula courses as contained in the proposed charter amendment conflicts with the language contained in the Florida Constitution. There is no reference to "core-curricula" in the Florida Constitution. Due to the conflicting provisions, the charter provisions, if adopted would be invalid due to the fact that the Florida Constitution supersedes the County Charter.

In addition to the conflicting language, Brevard County does not have the authority, through the adoption of a charter provision to control the classroom sizes of classes within schools. Article IX, Section 4(b) of the Florida Constitution provides as follows:

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.

Section 1001.32(2), Florida Statutes specifically provides that

In accordance with the provisions of s. 4(b) of 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.

As written, the Florida Constitution and the relevant statutory provisions do not provide for any ability of the County to regulate the operation of schools within the County by charter or ordinance. Article VIII, Section 1(g) of the Florida Constitution authorizes county charter government, and states:

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.

As the inclusion of proposed levels of service for schools within Brevard County conflicts with the general law related to the operation of schools within Brevard County, the adoption of a proposed Charter amendment would be in violation of both the Florida Constitution and Florida law. Therefore, the proposed charter amendment is invalid.

**(2) The proposed regulation on levels of service within municipal boundaries violates Article VIII, Section 1(g), Florida Constitution, and Section 163.3180, Florida Statutes.**

As proposed, the charter amendment would impose levels of service on potable water, sanitary sewer, stormwater management, recreation areas and open space, the landfill, law enforcement and police protection, fire protection, emergency medical and rescue, and transportation services. The levels of service would apply throughout Brevard County, both within and outside of municipal boundaries. As proposed, Section 5.7.3 reads:

Any governing body located in incorporated or unincorporated areas of Brevard County, Florida, shall temporarily suspend issuing new construction building permits when that permit causes either Schools, Potable and Resource Water Supply, Sanitary Sewer, Stormwater Management and Drainage, Parks Recreation and Open Space, Solid Waste, Law Enforcement and Police Protection, Fire Protection, Emergency Medical & Rescue Protection, or Transportation Facilities to exceed 100% of their stated Levels of Service, as contained in this section, subject to certain exemptions.

The proposed amendment specifically conflicts with Section 163.3180(3), Florida Statutes, which reads as follows:

**Governmental entities that are not responsible for providing, financing, operating, or regulating public facilities needed to serve development may not establish binding level-of-service standards on governmental entities that do bear those responsibilities.** This subsection does not limit the authority of any agency to recommend or make objections, recommendations, comments, or determinations during reviews conducted under s. 163.3184.

Section 163.3180(3), Fla. Stat. specifically prohibits any governmental entity, such as Brevard County from adopting levels of service that will apply to other governmental entities that bear the responsibility for providing, financing, operating, or regulating public facilities. The term "public facilities" is defined as follows in Section 163.3164(24) as follows:

"Public facilities" means major capital improvements, including, but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities, and spoil

disposal sites for maintenance dredging located in the intracoastal waterways, except for spoil disposal sites owned or used by ports listed in s. 403.021(9)(b).

By definition the County is prohibited from adopting levels of service for all of the specific public facilities defined in Section 163.3164(24), Florida Statutes. Therefore, if adopted, the charter amendment will violate the Florida Constitution and State Statutes, and would be invalid.

**(3) The exceptions contained in the proposed charter amendment do not provide a reasonable method for determining whether the limitations will apply**

While the proposed charter amendment appears to require a moratorium on the issuance of any building permits that will cause levels of service to exceed the levels contained in the charter proposal, there are certain exceptions to the rule. Specifically, Section 5.7.4(b) provides an exception in the event that the application of the level of service would "result in a bona fide taking or Bert J. Harris Act claim for compensation by a developer or landowner".

From a practical aspect, the application of any of the applicable levels of service could result in a bona fide taking or a Bert J. Harris Act claim. The only method to determine if a "bona fide taking results," would be to have a court of law determine whether a taking occurs. The exemption would really not apply until after a developer sought relief in court. By requiring a landowner to sue in order to determine whether an exemption would apply is not favored in the law, and is therefore, invalid.

In fact, by requiring a property owner to sue in order to determine whether they would be exempt from the applicable levels of service could give rise to a claim under the Bert J. Harris Act. If the adoption of the charter amendment imposes an inordinate burden on the property owner's rights to develop his or her property, that in itself could be a claim under the Bert J. Harris Act. See, Attorney General Opinion 2006-31, July 20, 2006 (an amendment to a town charter initiated by the registered electors is an "action of a governmental entity" that could give rise to a claim under the Bert J. Harris Act).

The term "inordinate burden" is defined in Section 70.001(c), Florida Statutes as follows:

The terms "inordinate burden" or "inordinately burdened" mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. The terms "inordinate burden" or "inordinately burdened" do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.

Based upon this definition, the imposition of the levels of service could directly restrict the use of real property such that the property owner is unable to attain the reasonable investment-backed expectation for the existing use of the property. This would result in the property owner claiming that the charter amendment imposes an "inordinate burden" on the use of his or her property, and justify the filing of a Bert J. Harris Act claim.

As the proposal currently reads, once a Bert J. Harris claim is filed, the property owner could claim the applicable exemption from the levels of service. Due to the possibility of a property owner rendering the charter amendment meaningless, through the simple filing of a Bert J. Harris claim, a voter does not have the assurance that the amendment will do as stated in the ballot summary. Therefore, due to the potential misleading of the voter, the proposed amendment is invalid. See, Save Our Everglades, supra.

In addition, as stated in Section 70.001(4)(a), Florida Statutes:

Not less than 180 days prior to filing an action under this section against a governmental entity, a property owner who seeks compensation under this section must present the claim in writing to the head of the governmental entity, except that if the property is classified as agricultural pursuant to s. 193.461, the notice period is 90 days. The property owner must submit, along with the claim, a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property.

Therefore, as the proposal reads, the developer or landowner would be able to obtain an exemption from the applicable level of service in order to obtain a building permit by simply filing a claim with the local government. This would in essence, make the building permit moratorium meaningless and unenforceable. As such, the amendment is misleading and invalid.

Finally, the third exemption contained in proposed Section 5.7.4 states that the applicable level of service would not apply if the imposition of the level of service "would be inconsistent with general or special law." As stated above, the imposition of these levels of service is inconsistent with general law. All property owners would, therefore, be able to avail themselves of the exemption to the imposition of levels of service. Consequently, notwithstanding the language in the proposed amendment, a local government in Brevard County could not impose a moratorium on the issuance of building permits as the levels of service are inconsistent with the Florida Constitution and general law. This renders the amendment meaningless, and therefore, invalid.

## **2. Proposal 2 – An Exclusive Method For Approving Voluntary Annexations**

Proposal 2 provides for an "Exclusive Method for Approving Voluntary Annexation." Typically voluntary annexation is controlled by the procedures contained in Section 171.044, Florida Statutes; however, Section 171.044(4) provides for Charter Counties to adopt their own exclusive method of voluntary annexation. Section 171.044, Florida Statutes states as follows:

The method of annexation provided by this section shall be supplemental to any other procedure provided by general or special law, **except that this section shall not apply to municipalities in counties with charters which provide for an exclusive method of municipal annexation.**

Therefore, pursuant to Section 171.044(4), Brevard County may adopt, through its charter, an exclusive method for voluntary annexations.

**a. Single Subject**

At first glance, Proposal 2 does appear to embrace only one subject, which is the method for approving voluntary annexations. A more careful review of the proposal, however, indicates that the proposed language also includes provisions related to the ability of a municipality to adopt land use and zoning designations for annexed property. The proposal also addresses issues related to contraction of municipalities. Due to the fact that the proposal affects more than just the method of voluntary annexation, it violates the single subject rule and is invalid.

Under Florida law, the Florida Supreme Court held that the single subject rule protects voters from "log-rolling" or being forced to accept an unfavorable portion of an initiative in order to enact a favorable change in the constitution. In re Advisory Opinion to the Attorney General – Local Government Comprehensive Land Use Plans, 902 So.2d 763, 766 (Fla. 2005). As stated by the Supreme Court, the Court determines whether the proposed amendment manifests a "logical and natural oneness of purpose." Continuing, the Supreme Court stated:

A proposed amendment meets this test when it may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme. **Unity of object and plan is the universal test.**"

Land Use Plans, 763 So.2d at 766, citing, Fine v. Firestone, 448 So.2d 984 at 990.

In this instance, while the proposed ballot summary indicates an intention to only deal with voluntary annexation, several provisions contained in the proposed amendment relate to matters not connected to the annexation process. Specifically, Sections 9.2.3 (a), (b), (c), and (d) relate to residential density and the relevant zoning designations that may result following the annexation. Sections 9.2.3(d) and (g) relate to establishing levels of service. Section 9.2.3(e) relates to student population of schools that may be affected by the annexation. Section 9.2.3(h) relates to the potential for an increase in millage of an existing municipal taxing unit. Finally, proposed Section 9.4 relates to potential contraction in the event a land use or zoning change is applied for during the first five (5) years following annexation.

As a result of the inclusion of the various other parameters and elements to this "method for voluntary annexation", the unity of object and plan is lost. The inclusion of various references to levels of service, zoning designations, school population, and millage causes one to conclude that the proposed amendment is not solely an attempt to provide for an "exclusive method for approving voluntary annexation." Instead it would appear to be a method by which the County charter would control a municipality's ability to not only annex property, but to also apply land

use and zoning designations to property. These additional conditions result in the lack of a "oneness of purpose". Consequently, the proposed amendment amounts to improper log-rolling, and violates the single subject requirement.

**b. Consistency with Florida General and Special Law**

Section 9.4 of the proposed amendment includes a requirement that would void the municipal ordinance authorizing the voluntary annexation ". . . if the owner of the annexed property applies for a land use or zoning change, other than the changes specified by the city in accordance with subsection 9.2.3 above, within five (5) years of the date that the election results are certified." By including a provision that is in essence a "contraction" requirement, the proposed amendment imposes on Florida general law related to contraction of municipal boundaries. Consequently, the proposed amendment is invalid, and cannot be considered.

Section 171.044(4), Florida Statutes, states that a county charter may provide for an exclusive method of voluntary annexation. There is no similar provision related to the contraction of municipal boundaries. The sole method for municipal boundary contraction is provided in Sections 171.051 and 171.052, Florida Statutes.

Article VIII, Section 1(g) of the Florida Constitution authorizes county charter government, and states:

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.

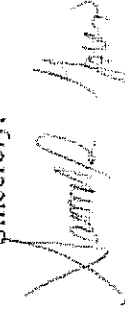
Proposed charter section 9.4 is inconsistent with Florida General Law, as Section 171.051 and 171.052, Florida Statutes, are the sole method by which a municipality's boundaries may be contracted. Due to this inconsistency, Proposal 2 is invalid, and cannot be considered as a charter amendment.

**3. Conclusion**

Both proposed charter amendments have numerous deficiencies. As a result, neither charter amendment complies with the single subject requirement, or is consistent with the Florida Constitution, or Florida General law. Consequently, as drafted, neither proposal meets the requirements of Section 7.3.2.3 of the Brevard County Charter. Therefore, neither proposal can be forwarded to Brevard County voters for consideration at a referendum election.

I will be attending the August 23, 2006 County Commission meeting to answer any questions regarding my opinion. In anticipation of the meeting, if you have any additional questions, or require any additional information, please do not hesitate to contact my office.

Sincerely,



Samuel S. Goren, Esq.



David N. Tolces, Esq.

DNT:dnt

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Cc: Scott Knox, County Attorney

**DORAN, WOLFE, ANSAY & KUNDID**

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August 15, 2006

Scott Knox, County Attorney  
Brevard County Government Center  
Building "C" – 3rd Floor  
2725 Judge Fran Jamieson Way  
Viera, Florida 32940

Re: Legal Review of Proposed Charter Amendments  
Relating to Concurrence and Annexation

Dear Mr. Knox:

It has been my pleasure to serve as a member of Brevard County's Legal Review Panel during its charter review process. Please accept this letter as my report on the proposed amendments to Article 5.7 (Quality of Life) and Article 9 (Voluntary Annexation) of the Brevard County Home Rule Charter ("Charter").

In accordance with Section 7.3.2.3 of the Charter, my review of each proposed amendment is limited to determining whether it embraces one subject and is consistent with the Florida Constitution, general law and the Charter.

**Proposed Amendment Creating Section 5.7 (Quality of Life)**

**BALLOT TITLE:** Preserve the Quality of Life in Brevard Co. by Managing the Issuance of Building Permits.

**BALLOT SUMMARY:** Shall the Brevard County Home Rule Charter be amended to provide that any governing body located within the geographical boundaries of Brevard County, Florida, shall temporarily suspend issuing new construction building permits when that permit causes either Schools, Drinkable Water, Sewage, Drainage, Recreation Areas, Landfill, Police, Fire, Rescue or Transportation Services necessary to our quality of life, to exceed 100% of capacity, subject to certain exceptions?

Based on my legal review of the proposed amendment creating Section 5.7 (Quality of Life), I find that it does not qualify for placement on the ballot for consideration at a referendum election. In

accordance with Section 7.3.2.3 of the Charter, I offer the following conclusions:

1. The proposed amendment creating Section 5.7 (Quality of Life) is single subject in nature as it exclusively addresses the managing of growth to maintain social capital.
2. The proposed amendment creating Section 5.7 (Quality of Life) is not consistent with general law. First, it violates § 163.3180(3), Fla. Stat. (2005), which provides:

Governmental entities that are not responsible for providing, financing, operating, or regulating public facilities needed to serve development may **not** establish binding level-of-service standards on governmental entities that do bear those responsibilities. This subsection does not limit the authority of any agency to recommend or make objections, recommendations, comments, or determinations during reviews conducted under s. 163.3184.

As the proposed amendment establishes binding levels of service on local governments within Brevard County, the amendment violates § 163.3180(3), Fla. Stat. (2005), unless Brevard County also assumes the responsibility for providing, financing, operating, or regulating public facilities.

Second, the proposed amendment violates § 101.161, Fla. Stat. (2005), in that the ballot title, in utilizing the phrase “Preserve the Quality of Life”, amounts to an improper emotional appeal and/or political rhetoric. Section 101.161 requires that the substance of any proposed amendment or other public measure be printed in clear and unambiguous language on the ballot. The purpose of this requirement is so that the voter will have notice and not be misled as to its purpose and can cast an intelligent and informed ballot. *In re Advisory Opinion to the Attorney General – Save Our Everglades*, 636 So. 2d 1336, 1341 (Fla. 1994); *Volusia Citizens' Alliance v. Volusia Home Builders Association*, 887 So. 2d 430 (Fla. 5th DCA 2004).

The ballot summary, which also utilizes the “quality of life” phrase, also runs afoul of § 101.161, in that it is not limited to informing the voter of the legal effect of the amendment. *Volusia Citizens' Alliance*, 887 So. 2d at 430 (“[T]he ballot summary is no place for subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment and no more. The political motivation behind a given change must be propounded outside the voting booth.”).

Third, the proposed amendment, to the extent it regulates development, violates § 163.3194(1)(b), Fla. Stat. (2005), which requires that “[a]ll land development regulations enacted or amended shall be consistent with the adopted comprehensive plan, or element or portion thereof...”. According to § 163.3194(3)(a), Fla. Stat. (2005), a “land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development

permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.” Based upon a cursory review, it appears the proposed amendment may violate Brevard County’s Comprehensive Plan as well as the City of Melbourne’s Comprehensive Plan.<sup>1</sup>

Fourth, “[a]ll elements of a comprehensive plan, whether mandatory or optional, shall be based upon data appropriate to the element involved.” § 163.3177(8), Fla. Stat. (2005). As the proposed amendment establishes levels of service, a required element of a local government’s comprehensive plan, data must be presented justifying or supporting the levels of service proposed. §§ 163.3177(3)(a)(3) and 163.3177(8), Fla. Stat. (2005); *Innkeepers Motor Lodge, Inc. v. City of New Smyrna Beach*, 460 So. 2d 379, 379-80 (Fla. 5th DCA 1984) (Property owner who intended to construct hotel on its property brought action challenging “density cap” which had been incorporated into city charter by way of special referendum election. The court found that the figures for the density cap were arbitrarily adopted, as the group that initiated the referendum process failed to conduct a study to justify the twelve/twenty-four figures for the cap.).

Fifth, the proposed amendment, in establishing levels of service for school concurrency and water supply violates Chapter 163, Florida Statutes, as recently amended by Senate Bill 360, which became law on June 1, 2005. Senate Bill 360 provides, among other things a framework for the negotiation and adoption of interlocal agreements regarding school concurrency between district school boards and local governments. §§ 163.3177(12), 163.31777 and 163.3180, Fla. Stat. (2005). Thus, the proposed amendment’s regulation of school concurrency is contrary to general law.

3. The proposed amendment creating Section 5.7 (Quality of Life) is not consistent with the Florida Constitution, in that Article VIII, Section 1(g) provides:

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 ordinance **not inconsistent with general law**. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances. (emphasis added).

The proposed amendments’ violation of §§ 163.3177(3)(a)(3), 163.3177(6)(c), 163.3177(8), 163.3177(12), 163.31777, 163.3180, 163.3194(1)(b), 163.3194(3)(a), and 101.161, Fla. Stat. (2005), cause a violation of Article VIII, Section 1(g) of the Florida Constitution.

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<sup>1</sup> The author herein notes that Brevard County’s Planning and Zoning staff has presented draft alternative language, for discussion purposes, that revises the proposed amendment by referring to level of service standards adopted by a jurisdiction’s comprehensive plan.

In addition, if approved, the proposed amendment would violate Article IX, Section 4(a) of the Florida Constitution, which provides: “[t]he school board shall operate, control and supervise all free public schools within the school district...”. *See also*, § 1001.32(2), Fla. Stat. (2005)(“In accordance with the provisions of s. 4(b) of 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.”). Even as a charter government, Brevard County cannot preempt or regulate the powers and functions specifically provided to school boards by the Florida Constitution, and further enumerated in Florida Statutes. *See*, Fla. Const. Art. VIII, Section 1(g).

4. The proposed amendment creating Section 5.7 (Quality of Life) is not consistent with the Charter, as it violates general law and the Florida Constitution. Section 1.6 of the Charter provides:

The provisions of this Charter are not intended, and shall not be construed, to conflict with the Constitution of the State of Florida, general law, or special law approved by vote of the electorate.

5. There may be ways to cure the defects in the proposed amendment creating section 5.7 (Quality of Life). As general law prohibits a county from establishing binding levels of service on local governments, unless the county also assumes the responsibility for providing, financing, operating, or regulating public facilities, this amendment, in order to be legal, must be limited to establishing growth management and/or level of service *goals* or simply refer to a local government’s levels of service, as established in their comprehensive plans. Alternatively, Brevard County would have to assume responsibility for providing, financing, operation or regulation of the public facilities. Additionally, the ballot title and summary must be revised to exclude any language in the nature of an emotional appeal and/or political rhetoric.

**Proposed Amendment Creating Section 9 (Voluntary Annexations)**

**BALLOT TITLE:** An Exclusive Method for Approving Voluntary Annexations.

**BALLOT SUMMARY:** Shall the Brevard County Home Rule Charter be amended to establish an exclusive method for approving voluntary annexations in Brevard County, Florida that would require the annexing municipality to obtain by referendum approval of a voluntary annexation from registered electors residing in the unincorporated and incorporated areas affected by a proposed voluntary annexation?

Based on my legal review of the proposed amendment creating Section 9 (Voluntary Annexation), I find that it does not qualify for placement on the ballot for consideration at a referendum election. In accordance with Section 7.3.2.3 of the Charter, I offer the following conclusions:

1. The proposed amendment creating Section 9 (Voluntary Annexation) is single subject in nature as it exclusively addresses an exclusive method for approving voluntary annexations.

2. The proposed amendment creating Section 9 (Voluntary Annexation) is not consistent with general law in that the provision of contraction at Section 9.4 violates §§ 171.051 and 171.052, Fla. Stat. (2005). Specifically, Section 9.4 of the proposed amendment provides that “the approval of the registered electors shall be deemed withdrawn and the voluntary annexation ordinance shall be void if the owner of the annexed property applies for a land use or zoning change, other than the changes specified by the city in accordance with subsection 9.2.3 above, within five (5) years of the date that the election results are certified.” This contraction provision is contrary to the statutory contraction procedures found at § 171.051, Fla. Stat. (2005), which sets forth the procedure for contraction, and § 171.052, Fla. Stat. (2005), which provides the criteria for contraction of municipal boundaries by stating:

Only those areas which do not meet the criteria for annexation is s. 171.043 may be proposed for exclusion by municipal governing bodies. If the area proposed to be excluded does not meet the criteria of s. 171.043, but such exclusion would result in a portion of the municipality becoming noncontiguous with the rest of the municipality, then such exclusion shall not be allowed.

These two statutory provisions provide the uniform and exclusive method for the contraction of a municipality’s boundaries. *See*, § 171.021(2), Fla. Stat. (2005)(“The purposes of this act are to set forth procedures for adjusting the boundaries of municipalities...and to set forth criteria for determining when annexations or contractors may take place so as to...(2) Establish uniform legislative standards throughout the state for the adjustment of municipal boundaries.”). Therefore, as Section 9.4 of the proposed amendment is inconsistent with general law, it does not qualify for placement on the ballot.

3. The proposed amendment creating Section 9 (Voluntary Annexation) is not consistent with the Florida Constitution, in that Article VIII, Section 1(g) provides:

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 ordinance **not inconsistent with general law**. The charter shall provide which shall prevail in the

event of conflict between county and municipal ordinances. (emphasis added).

The proposed amendments' violation of §§ 171.051 and 171.052, Fla. Stat. (2005), cause a violation of Article VIII, Section 1(g) of the Florida Constitution.

4. The proposed amendment creating Section 9 (Voluntary Annexation) is not consistent with the Charter, as it violates general law and the Florida Constitution. Section 1.6 of the Charter provides:

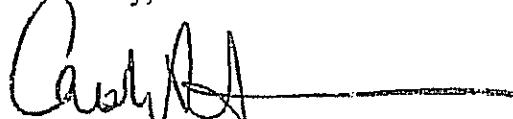
The provisions of this Charter are not intended, and shall not be construed, to conflict with the Constitution of the State of Florida, general law, or special law approved by vote of the electorate.

5. In order to be legal, Section 9.4 of the proposed amendment, provided for contraction after five (5) years, must be removed.

**Conclusion**

Please advise if you require anything further from me regarding the proposed amendments. As I have a previous commitment, I am unable to attend the August 23, 2006 Board of County Commissioners meeting. However, my associate, Audrie Harris, will be in attendance and available to answer any questions you any have regarding the conclusions reached in this correspondence.

Sincerely,

  
Carolyn S. Ansay

CSA:kl

August 17, 2006

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Brevard County  
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Commissioner Ron Pritchard, D.P.A.  
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Commissioner Sue Carlson  
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Peggy Busacca, County Manager  
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**SUBJECT:** Review Panel Report; Proposed Charter Amendments; "Save Brevard"

Dear Commissioners, County Manager and County Attorney:

It is indeed an honor and a privilege to serve on the Charter review legal panel in accordance with the provisions of Sections 7.3.2.3 and 7.3.2.4 of the Brevard County Charter. We have been tasked with reviewing two proposed Charter amendments submitted by the Save Brevard PAC – one entitled "Preserve the Quality of Life in Brevard County by Managing the Issuance of Building Permits" and the other entitled "An Exclusive Method for Approving Voluntary Annexations".

The review set forth herein is limited to the controlling provisions of the County Charter. That is, my review will relate to whether, in my professional opinion, the proposed amendments and ballot language embrace one subject only and are consistent with the Florida Constitution, general law, and the Brevard County Charter as set forth in

Sections 7.3.2.3 and 7.3.2.4, and Section 1.6 which provides that "[t]he provisions of this Charter are not intended, and shall not be construed, to conflict with the *Constitution of the State of Florida*, general law, or special law approved by vote of the electorate." My review does not relate to the merits, wisdom, desirability, motives, or any other matter that may be involved with regard to the proposed Charter amendments.

I have conducted independent legal research and legal analysis with regard to the proposed Charter amendments and I have reviewed the following materials kindly submitted to the panel by Ms. Marcia A. Day of the Brevard County Attorney's office: (1) the Brevard County Board of County Commissioners Agenda Report for the July 25, 2006 meeting date (Item Number VIII E.5) with associated materials; (2) the two-page document entitled "Quality of Life" prepared by Save Brevard and handed out at the informational meeting; and (3) a single page document, entitled, "Draft Alternative Language for Discussion Purposes" which was prepared by Brevard County Planning and Zoning staff and presented to the Brevard County Commission at a meeting at which no action was taken.

I have also reviewed various written legal correspondence directed to me such as: (1) a copy of a letter, dated August 3, 2006, to the County Attorney from Dwight W. Severs, as City Attorney for the City of Titusville; (2) a second letter, dated August 7, 2006, from Mr. Severs to the attorney review panel; (3) a copy of a letter, dated August 8, 2006, from Joseph E. Miniclier, City Attorney for the City of Rockledge, to the County Attorney; (4) a letter, dated August 8, 2006, to the attorney review panel from Paul R. Gougelman, III, City Attorney, for the City of Melbourne, along with a copy of Mr. Gougelman's letter, dated August 7, 2006, to the County Attorney; and (5) a copy of a letter, dated August 10, 2006, to the County Attorney, from Harold T. Bistline, School Board Attorney for the Brevard County School District.

One of the documents presented to the panel suggested that we, on the attorney review panel, did not have an adequate period of time to conduct a review of the proposed Charter amendments. I reject that assertion. I had adequate time to come to the conclusions set forth herein and do not believe a "continuance" is necessary. The time frame allotted does not allow for a lengthy law review analysis, however, I will articulate my findings and conclusions in a concise manner and cite to legal authority that is persuasive and controlling.

**A. LEGAL ANALYSIS AND CONCLUSIONS REGARDING THE PROPOSED CHARTER AMENDMENT ENTITLED "PRESERVE THE QUALITY OF LIFE IN BREVARD COUNTY BY MANAGING ISSUANCE OF BUILDING PERMITS":**

- (1). *Ballot Language Compliance With Section 101.161, Florida Statutes, "Preserve the Quality of Life in Brevard County by Managing the Issuance of Building Permits"***

The controlling statute is Section 101.161, *Florida Statutes*. This statute requires that questions, such as whether to approve the proposed Charter amendments, must be presented to the electorate "in clear unambiguous language". Many decisions of the Florida Supreme Court provide helpful guidance in determining if ballot language complies with the controlling requirements of law. The Florida Supreme Court stated that ". . . an accurate, objective and neutral summary of the proposed amendment is the sine qua non of the citizen-driven process of amending our constitution." *Advisory Opinion to the Attorney General re Referendum Required for Adoption and Amendment of Local Government Comprehensive Land Use Plans*, 902 So.2d 763 (Fla. 2005), citing *Advisory Opinion to the Attorney General re Additional Homestead Tax Exemption*, 880 So.2d 646, 653-654 (Fla. 2004).

City and county charters are, of course, the "constitutions" of local governments. The scrutiny that the Supreme Court applies in making such decisions consists of two fundamental questions: (1) Does the ballot summary fairly inform voters of the chief purpose of the proposed amendment? (2) Does the language of the title and summary mislead the public? See *Advisory Opinion to the Attorney General re Right to Treatment and Rehabilitation for Non-Violent Drug Offenses*, 818 So.2d 491, 497 (Fla. 2002), and *Advisory Opinion to the Attorney General re Right of Citizens to Choose Healthcare Providers*, 705 So.2d 563, 566 (Fla. 1998).

In the *Land Use Plans* decision, the Florida Supreme Court determined that a sentence in the ballot summary stating "[p]ublic participation in local government comprehensive land use planning benefits Florida's natural resources, scenic beauty and citizens" was "fatally flawed" because the sentence contained "impermissible emotional rhetoric, 902 So. 2d at 771. Similarly, the Supreme Court stated that "[t]he title of the present initiative - - 'SAVE OUR EVERGLADES' - - is misleading. It implies that the Everglades is lost, or in danger of being lost, to the citizens of the State, and needs to be 'saved' via the proposed amendment." *In re Advisory Opinion to the Attorney General Save Our Everglades*, 636 So.2d 1336 (Fla. 1994). The Court also concluded that the ballot summary was misleading because it ". . . more closely resembles political rhetoric than it does an accurate and informative synopsis of the meaning and effect of the proposed amendment." *Id.* at 1342.

Also, the Fifth District Court of Appeal recently concluded that a ballot summary sentence stating that "[t]he establishment, implementation and enforcement of a (sic) Urban Growth Boundary (UGB) benefits Volusia County's natural resources, scenic beauty, orderly development and the welfare of its citizens" was defective in that it amounted to "political rhetoric." *Volusia Citizens Alliance, etc. v. Volusia Home Builders Association*, 887 So.2d 430, 431 (Fla. 5<sup>th</sup> DCA 2004). The Fifth District Court of Appeal quoted the Florida Supreme Court, wherein the Court stated, "[T]he ballot summary is no place for subjective evaluation of special impact. The ballot summary should tell the voter the legal effect of the amendment and no more. Political motivation behind a given

change must be propounded outside of the voting booth." *Id. citing Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984).

The proposed Charter amendment under discussion states in its ballot title "Preserve the Quality of Life in Brevard Co. by Managing the Issuance of Building Permits". That ballot title does not comport with the controlling requirements of Florida law as discussed, above. The ballot title does not fairly inform voters of the chief purpose of the proposed Charter amendment and misleads the public by the use of political rhetoric.

Accordingly, the proposed Charter amendment, in my judgment, should not proceed to be submitted to the Brevard County electorate, as it does not comply with the controlling requirements of State law.

**(2). *Schools vis-à-vis the Proposed Quality of Life Charter Amendment***

As noted above, I received the letter, dated August 10, 2006, from the School Board Attorney for the Brevard County School District, Mr. Harold T. Bistline. I hereby adopt and incorporate the provisions of that letter into this panel member report. The subject proposed amendment is not consistent with the controlling provisions of Florida law as stated in the letter from Mr. Bistline.

Accordingly, the proposed Charter amendment, in my judgment, should not proceed to be submitted to the Brevard County electorate, as it does not comply with the controlling requirements of State law.

**(3). *Concurrency (Section 163.3180, Florida Statutes) vis-à-vis the Proposed Quality of Life Charter Amendment***

The proposed amendment, although purporting to be a planning document, in fact eviscerates the provisions of State growth management laws as articulated in Part II, Chapter 163, *Florida Statutes*, which is known and cited as the "Local Government Comprehensive Planning and Land Development Regulation Act." The arguments made by Mr. Severs and Mr. Gougelman are compelling in this regard. Section 163.3180, *Florida Statutes*, and related statutes and rules within the *Florida Administrative Code* provide for a comprehensive regulatory scheme. The proposed Charter amendment is inconsistent with that regulatory scheme that was attained after much debate, effort and dedication; has been well thought out as it has evolved since its original enactment, and generally well implemented.

Arguments have been asserted that the proposed Charter amendment is contrary to controlling State law in that it enters into the area of level of service establishment and related matters for multiple jurisdictions outside the comprehensive, and other governments planning (such as school planning statutes set forth in Chapter 1013,

*Florida Statutes*). It also has been argued that the proposed amendment enacts land development regulations without mandatory consideration being given to comprehensive plan consistency as required by Sections 163.3174, 163.3194, 163.3201, 163.3202, 163.3213 and 163.3215, *Florida Statutes*. In my judgment, the proposed amendment, if enacted, would be incompatible with the entirety of the growth management structure that has evolved, over time, by the Florida Legislature for general Statewide applicability. In my judgment, the proposed Charter amendment could not coexist with controlling provisions of Florida law. See, *Ellis v. Burk*, 866 So. 2d 1236 (Fla. 5th DCA 2004); *Board of County Commissioners of Marion County v. McKeever*, 436 So. 2d 299 (Fla. 5<sup>th</sup> DCA 1983).

Some may believe that the decision in *Seminole County v. City of Winter Springs*, 31 Fla. L. Weekly D1465, 2006 WL 1459775 (Fla. 5<sup>th</sup> DCA May 26, 2006), would control in that it involves an aspect of land use mandate in the context of a referendum election. However, Seminole County had already fully engaged in comprehensive planning that resulted in the Rural Area of the County being well established in the Seminole County Comprehensive Plan. Thus, the vote of the citizens of Seminole County ratified comprehensive planning that was already in effect and did not take the jurisdiction out of the Statewide system of comprehensive planning. In this case, the proposed Charter amendment would take Brevard County out of the Statewide system of comprehensive planning.

The proposed Charter amendment fails the standard set forth in the County Charter for Charter amendments; and, it contravenes controlling State law in violation of Article VIII, Section 1(g) of the *Constitution of the State of Florida* and Section 125.01, *Florida Statutes (2006)*. Additionally, Section 1.6 of the County Charter provides that “[t]he provisions of this Charter are not intended, and shall not be construed, to conflict with the *Constitution of the State of Florida*, general law, or special law approved by vote of the electorate.

Accordingly, the proposed Charter amendment, in my judgment, should not proceed to be submitted to the Brevard County electorate as it does not comply with the controlling requirements of State law.

**B. LEGAL ANALYSIS AND CONCLUSIONS REGARDING THE PROPOSED CHARTER AMENDMENT ENTITLED “AN EXCLUSIVE METHOD FOR APPROVING VOLUNTARY ANNEXATIONS”:**

***(1). Ballot Language – Single Subject; “An Exclusive Method for Approving Voluntary Annexations”***

The County Charter provides that the panel must determine “whether the proposed amendment and ballot language embraces one subject only. Section 7.3.2.1 Brevard County Charter. It also provides that “[e]ach (Charter) amendment shall embrace but

one subject and matter directly connected therewith." Section 7.3.2.1 Brevard County Charter. But for the requirement set forth in the County Charter, the single subject requirement would not be applicable. *Charter Review Commission of Orange County v. Scott*, 647 So. 2d 835 (Fla. 1994). The subject Charter amendment involves not only voluntary annexations, but also municipal contractions, land use matters and the vesting of powers in the Board of County Commissioners relating to the determinations of boundaries where registered elector affected by annexations reside.

The Supreme Court summarized the dangers of "logrolling" which results when a proposed amendment actually encompasses two separate subjects. *Advisory Opinion to the Attorney General re Independent Nonpartisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature*, 926 So.2d 1218 (Fla. 2006). The public policy against "logrolling" is that a voter should not be placed in an "all or nothing" situation where he or she favors one part of the proposal, but not another part.

The proposed Charter amendment is multifarious as proscribed by *Adams v. Gunter*, 238 So.2d 824, 831 (Fla. 1970). There is abundant case law that articulates the problems caused by multiple subjects being incorporated into the same ballot proposal. The Supreme Court stated that:

This (single subject) requirement avoids voters having to accept part of an initiative proposal, which they oppose in order to obtain a change in the constitution, which they support. An initiative proposal with multiple subjects, in which the public has had no representative interest in drafting, places voters with different views on the subjects contained in the proposal in the position of having to choose which subject they feel most strongly about.

*Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984).

It should be noted that the proposed Charter amendment contains a severability provision. The *Firestone* case held that a severability provision does not cure a violation of the single subject requirement. *Id.* at 997. The Court stated that "This language (the severability clause) is not part of the amendment and would not appear on the ballot. Further, such language cannot circumvent this Court's responsibility to determine whether the proposed amendment may be constitutionally be placed before the voters." *Id.*

Accordingly, the proposed Charter amendment, in my judgment, should not proceed to be submitted to the Brevard County electorate, as it does not comply with the controlling requirements of State law.

(2). ***Ballot Language – Compliance With Section 101.161(1), Florida Statutes; “An Exclusive Method for Approving Voluntary Annexations”***

The discussion set forth in Section A (1) above, is hereby restated by this reference thereto.

The proposed Charter amendment under discussion does not mention in its ballot or ballot summary that the proposed amendment relates to contraction of municipal jurisdictional limits, land use matters or that the proposed amendment vest adjudicatory powers in the Board of County Commissioners relating to the determinations of boundaries where registered electors affected by annexations reside.

It has been stated that citizen initiated amendments by means of petition have an additional obligation to provide accurate and objective ballot captions and summaries. This is so because, unlike proposals that arise from public legislative processes, there are no public hearings or similar public process in which the text of a proposal is developed. *See, Attorney Opinion to Attorney General re Additional Homestead Tax Exemption*, 880 So.2d 646 (Fla. 2004).

Consequently, the ballot must give each voter fair notice of the decision that he or she must make. In this case, neither the ballot title nor the ballot summary fairly inform voters of the chief purpose of the proposed Charter amendment and misleads the public by failure to adequately describe the action proposed to be taken.

Accordingly, the proposed Charter amendment, in my judgment, should not proceed to be submitted to the Brevard County electorate, as it does not comply with the controlling requirements of State law.

(3). ***Municipal Contraction***

The proposed Charter amendment, which states in its ballot title and ballot summary that it relates to “voluntary annexations” and uses the singular or plural form of the words on four occasions, provides, in pertinent part, that “. . . voluntary annexation ordinance(s) shall be void if the owner of the annexed property applies for a land use or zoning change, other than the changes specified by the city . . . within five (5) years of the date that the election results are certified.” However, Section 171.031, *Florida Statutes*, defines the term “contraction” as “. . . the reversion of real property within municipal boundaries to an unincorporated status” and the above-quoted text from the proposed Charter amendment is a contraction. The proposed Charter amendment purports to pertain to voluntary annexations, which may be subject to charter provisions in accordance with the provisions of Section 171.044(4), *Florida Statutes*. The provisions of the proposed Charter amendment are not consistent with controlling provisions of law relating to the contraction of municipal boundaries. Specifically,

Section 171.051, *Florida Statutes*, relating to contraction procedures and Section 171.052, *Florida Statutes*, relating to criteria for contraction of municipal boundaries.

Additionally, in terms of inconsistency with the provisions of controlling law, a contraction taking place in the context and manner prescribed in the proposed Charter amendment could create chaos in terms of the ad valorem tax laws of the State. If an annexation ordinance is void ab initio (in arrears as the proposed text states that ordinances "shall be void" under certain circumstances); then what was the tax status during that up-to-five year period in which the property had been taxed, as if located within the city limits of a city only to have never have been taxable by the city during the period of time when the property was purportedly located within the city? The State Legislature has provided for a comprehensive system of ad valorem taxation within the State as well as budgetary procedures for both counties and cities. The retroactive contraction of municipal limits by virtue of removing property from the jurisdictional limits of a city, as if never within the jurisdictional limits of the city, could throw the well planned and cohesive ad valorem tax system into disarray as to affected parcels.

The proposed Charter amendment fails the standard set forth in the County Charter for Charter amendments, and contravenes controlling State law in violation of Article VIII, Section 1(g) of the *Constitution of the State of Florida* and Section 125.01, *Florida Statutes*. Additionally, Section 1.6 of the County Charter provides that "[t]he provisions of this Charter are not intended, and shall not be construed, to conflict with the *Constitution of the State of Florida*, general law, or special law approved by vote of the electorate."

#### **(4). *Appeal of Decision of the Board of County Commissioners***

The proposed Charter amendment provides for a determination of the boundaries where registered electors affected by an annexation reside based upon certain factual criteria. The proposed Charter amendment provides that appeals may be taken from decisions of the Board of County Commissioners to the Circuit Court. The proposed Charter amendment purports to state that the Circuit Court may set aside the boundaries determined to exist by the Board of County Commissioners if the challenger proves his/her/its case by clear and convincing evidence.

Under controlling Florida law, the decision of the Board of County Commissioners is a quasi-judicial decision. *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993). Courts have jurisdiction to consider petitions for writ of certiorari as set forth in Article V, Section 5(b), of the *Constitution of the State of Florida* and by Rule 9.030(c)(3), *Florida Rules of Appellate Procedure*. The standard of review for a Circuit Court reviewing the quasi-judicial action of a local government is that the Circuit Court must determine: (a) whether procedural due process was afforded to the applicant, (b) whether the essential requirements of law were observed, and (c) whether there is competent substantial evidence in the record to support the ruling of the local

governing body. *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals*, 541 So. 2d 106, 108 (Fla. 1989); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993); *Orange County v. Lust*, 602 So. 2d 568, 572 (Fla. 5<sup>th</sup> DCA) (en banc) (plurality opinion), *review denied*, 613 So. 2d 6 (Fla. 1992); *City of DeLand v. Benline Process Color Co.*, 493 So. 2d 26, 28 (Fla. 5<sup>th</sup> DCA 1986).

The purported establishment of a standard of review set forth in the proposed Charter amendment is not consistent with controlling State law.

Accordingly, the proposed Charter amendment, in my judgment, should not proceed to be submitted to the Brevard County electorate, as it does not comply with the controlling requirements of State law.

**C. SUMMARY OF CONCLUSIONS:**

- (1). The proposed Charter amendment entitled, "Preserve the Quality of Life in Brevard County by Managing the Issuance of Building Permits" is not in accord with the requirements of Sections 7.3.2.3 and 7.3.2.4 of the Brevard County Charter.
- (2). The proposed Charter amendment entitled, "An Exclusive Method for Approving Voluntary Annexations" is not in accord with the requirements of Sections 7.3.2.3 and 7.3.2.4 of the Brevard County Charter.
- (3). Although other members raised and commented on various issues, in my judgment the most salient issues have been addressed herein. Issues such as vagueness are more adjudicative as opposed to advisory which seem to be more closely connected to the role of the attorney review panel as prescribed in the County Charter. Issues such as inconsistency with the County's Comprehensive Plan and similar issues are clearly beyond the role and scope of the attorney review panel, unless tasked with a detailed and evidentiary based review process with extensive time being devoted to such analysis.

**D. POTENTIAL CURATIVE ACTONS:**

It is my understanding that, if a panel member determines that problems exist in a proposed Charter amendment, recommendations with regard to changes to the proposals would be considered.

In my judgment, the proposals would require substantial curative redrafting. That said, the overall thrust of the proposed Charter amendments seem to be to engage in a more

County-centered growth management effort. Accordingly, I would point out the following Charter provision from the Volusia County Charter:

**Sec. 202.3. Volusia Growth Management Commission.**

There is hereby created the Volusia Growth Management Commission (hereafter commission). The commission shall have the power and the duty to determine the consistency of the municipalities' and the county's comprehensive plans and any amendments thereto with each other. The commission may perform such other directly related duties, as the commission from time to time deems necessary.

The determination by the commission shall be binding on the submitting government. No plan, element of a plan, or amendment of a plan adopted after the date this article becomes law shall be valid or effective unless and until such plan, element of a plan, or amendment has been reviewed by the commission and has been certified as consistent. The review of any such determination of the commission shall be by certiorari.

The commission shall be composed of voting and nonvoting members. There shall be one voting member from each municipality within the county and five voting members from the unincorporated area of the county. The appointment of each voting representative shall be made by the governing body of each respective jurisdiction. The Volusia County School Board, the St. Johns River Water Management District, and the Volusia County Business Development Corporation shall each designate one nonvoting member to serve on the commission. The term of office of the commission members shall be fixed by the rules of procedures of the commission but shall not exceed four years.

Each voting member shall have a weighted vote. Each municipality represented shall have a vote equal to the percentage of its population with the overall county population. The unincorporated area representatives' combined vote shall not exceed the percentage of the unincorporated area's population with the overall county's population, and the individual vote of each unincorporated area representative shall be equal to the other. The determination of the weight of each vote shall be determined annually.

Rules of procedure for the commission's consistency review, and for the manner in which this section is to be enforced and implemented, and amendments thereto, shall be proposed by the commission and shall not become effective until adopted by ordinance approved by a two-thirds vote of the entire membership of the council.

The commission, by a two-thirds vote, shall adopt an annual budget which may provide for independent staff and which shall be funded by the county. The budget may be amended upon two-thirds vote of the full council.

This provision is, however, currently undergoing potential proposed revision by the Volusia County Charter Review Commission.

In conclusion, it has been an honor and a privilege to serve on the attorney review panel. I continue to be impressed with the officials and citizens of Brevard County. I regret that I am committed to a previously scheduled meeting in Tallahassee on August 23, 2006, and will not be able to attend the meeting at which the attorney review panel's determinations are discussed.

Thank you for your attention to this matter. Please call upon me if I can be of further assistance relative to this, or any other, matter.

Sincerely,

---

Lonnie N. Groot

**STENSTROM, MCINTOSH, COLBERT,  
WHIGHAM & PARTLOW, P.A.**

cc: Carolyn Ansay, Esquire  
David Tolces, Esquire