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To: Morris Richardson, Esq., County Attorney  
From: Jamy Dinkins, CivForge Law, PA  
Date: September 6, 2022  
Re: County Commission proposed Charter amendment

The foregoing is a review of a proposed Resolution of the Brevard County Board of County Commissioners placing a proposed Charter amendment on the ballot relating to the calculation of the salary of County Commissioners. The Resolution has not yet been adopted by the Board of County Commissioners. This memorandum is designed to advise the County Commission on the legality of the proposal, but does not provide policy advice.

### **Overview**

The proposed Resolution revises section 2.6 of the Charter to accomplish, broadly, the following:

- Repeal the existing method for and restrictions on determining Commissioner salaries; and
- Create a new method for determining Commissioner salaries based on existing Florida Statutes.

The proposed ballot summary describes the complete repeal of the existing method for determining compensation and the replacement of that method with one tied to the statutory calculation method.

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

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

### **Procedural matters**

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

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

### *Single subject requirement*

Florida law is replete with single-subject requirements for legislation and constitutional amendment, most prominently in the Constitution's limitation on the power of the legislature to adopt bills that "embrace but one subject and matter properly connected therewith," in article III, section 6, and the limitation on the initiative method to amend the constitution to proposals that "embrace but one subject and matter directly connected therewith." Art. IX, Sec. 3, Fla. Const. Though the difference in these provisions is minor (amounting to a single word), the Florida Supreme Court views the "directly connected" language as more narrow. *Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984).<sup>1</sup> Generally, a proposal embraces one subject if it has "a natural relation . . . as component parts or aspects of a single dominant plan or scheme." *Id.* at 990 (quoting *City of Coral Gables v. Gray*, 19 So. 2d 318 (Fla. 1944)). Essentially, there must be a "oneness of purpose" in order for the proposal to meet the single-subject test, and affects a single function of the existing governmental structure. *Id.* While charter amendments proposed by the County Commission are not subject to the single-subject requirement, the analysis is helpful in determining whether the ballot language is misleading.

The proposed Resolution addresses a single subject, namely, the method of calculating salaries for County Commissioners. The process of government affected is singular: payment for certain government officials. There is a oneness of purpose embraced in the proposed Resolution that lends clarity to its understanding and does not tend to mislead voters.

### *Ballot language*

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

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

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

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

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

The chief purpose of Resolution 2022-006 is to change the method for calculating salaries of County Commissioners. This purpose is adequately captured in the summary, which articulates the repeal and replacement of the existing language with the new method, based on existing Florida statutes.

The ballot language must also not be misleading. *Slough*, 992 So. 2d at 147. A ballot summary is misleading if it inaccurately states information about the proposal or if it omits material information from the summary. *Advisory Op. to Att’y Gen.*, 632 So. 2d at 1021. The proposed ballot summary states that section 2.6 of the charter is to “be replaced in its entirety.” However, the actual text amending the charter does not replace every component of existing section 2.6—in fact, the sentence “All other compensation must be based on actual expense incurred in Board directed performance of duties of Commissioner as provided by general law of the State of Florida.” The summary would lead voters to believe they were removing this provision, leaving the County Commission without guidance as to expense reimbursement.

Being simply misleading is likely insufficient to defeat a ballot summary, however.<sup>2</sup> The misstatement must also be material. *Askew*, 421 So. 2d at 157 (Overton, J., concurring). The concept of reimbursement for expenses is somewhat less important than the change in salary calculation method described in the ballot summary, however, for many voters, an assurance that the public treasury will not finance lavish expenses for elected officials may be just as important as the salary itself. Given there are no true examples of misleading ballot summaries where the courts found the misstatements to be immaterial, It would be difficult to conclude with confidence that the inaccurate statement found in the ballot summary here is immaterial.

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<sup>2</sup> While every case that addresses misleading ballot statements has rejected those statements, they all indicate that the offending statements were “materially” misleading. We can presume, therefore, that some misstatements may not be material, but have no precedent to assist with determining what the threshold for materiality is. This memorandum adopts a conservative viewpoint that a misstatement is immaterial only if it is the functional equivalent of a rounding error; that is, saying “reduce by half” when the actual reduction is 50.3%, or similar. *Cf. Carroll v. Firestone*, 497 So. 2d 1204 (Fla. 1986)(rejecting a challenge that a ballot summary was misleading because it did not specifically state that the monies deposited in the “Education Lotteries Trust Fund” were not obligated to be used for education when there was no explicit statement that the monies would be appropriated in any particular way).

The ballot summary as written in the proposed resolution is insufficient to meet the requirements that the summary be clear, unambiguous, and not misleading.

### Consistency with general law

A County Charter is the purest form of the exercise of home rule power granted by the Florida Constitution. In the absence of federal or state law (or constitutional authority) to the contrary, the charter is the paramount law of a county. *Hollywood, Inc. v. Broward Cnty.*, 431 So. 2d 606, 609 (Fla. 1983). Regulating the salaries of county officers is unquestionably within the power of the County, so long as it does not run afoul of state or federal provisions.

Chapter 145 of the Florida Statutes, which is referenced in the proposed Resolution, sets forth a uniform method of establishing salaries for County Commissioners. While this may, on its own, be enough to defeat an attempt to alter those salaries by an individual county, there is specific language in section 145.012, Florida Statutes, that allows the provisions of a county charter to alter the method of calculating county officers' salaries. In other words, the proposed amendment is specifically permitted by chapter 145.

As it does not otherwise conflict with general law, the substance of the proposal is proper and would be enforceable if challenged.<sup>3</sup>

### Suggested correction to ballot language

The flawed ballot summary, fortunately, is easily remedied. The only portion that could create confusion is the implication that the entirety of the existing language is to be repealed. Simply removing that implication is likely sufficient to resolve the misstatement. Ballot language such as the following would likely be approved by a court if challenged:

Effective January 1, 2025, shall Article 2, Section 2.6 of the Brevard County Charter be amended to provide that the salary of the Brevard County Board of County Commissioners be determined solely as 90 percent of that set forth in Chapter 145, Florida Statutes for county commissioners, as amended

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<sup>3</sup> While there may be a constitutional question arising from a reduction in salary for those County Commissioners elected prior to the adoption of the amendment, if adopted, it is likely that question is irrelevant. It could be argued that an elected officer has a property right in a salary as it exists at the time of their election, and for those County Commissioners elected in 2022 (or who take office between now and the 2024 referendum via appointment or special election), the existing salary may be vested. However, it is extraordinarily unlikely that the application of the new formula would cause the salary to decrease; currently, County Commissioners earn \$58,145 in salary while the new formula, based on the most recent calculations of the Legislature's Office of Economic and Demographic Research, indicates the new salary of County Commissioners would be \$87,205.50. In order for the proposed formula to render a salary below the current salary, the population of Brevard County would need to decline by more than 75%. Because the likelihood of this is so remote, a full analysis of the employment law question is unwarranted.

from time to time, which provides a uniform method of compensation for county commissioners with similar duties across the state?

This revision eliminates the potentially misleading “replaced in its entirety” language. It also adds “solely” to clarify that the additional salary provisions in the current version of section 2.6 (such as those limiting salary increases to the average increase for county employees or those providing for nullification) are eliminated by the amendment.

### **Conclusion**

While the proposed Resolution is substantively proper, and does not conflict with general law, the proposed ballot summary is materially misleading in that it states that section 2.6 of the Charter is to be replaced in its entirety, while in fact some of the original language is to remain. Revising the ballot summary as described, however, would resolve the issue.