



MEMORANDUM

TO: 2016 Pinellas County Charter Review Commission
FROM: Wade C. Vose, Esq., General Counsel
DATE: January 4, 2016
SUBJECT: Preliminary Legal Analysis of Proposed Recall Provision Relating to County Commissioners and Constitutional Officers

Pursuant to the Commission's request, I have prepared a preliminary analysis of legal issues relating to amending the Pinellas County Charter to provide for the recall of county commissioners and constitutional officers.

Recall of County Commissioners

As noted in the chart titled "Comparison of Counties on Recall Vote" prepared by Meiller & Associates, 18 of Florida's 20 charter counties specifically provide for the recall of county commissioners in their county charters. Notwithstanding its prevalence among county charters and its absence from Pinellas' charter, it is important to note that the members of the Pinellas County Commission are presently subject to recall pursuant to Florida law.

Section 100.361(1), Fla. Stat. provides in its first sentence that "[a]ny member of the governing body of a municipality or charter county, hereinafter referred to in this section as "municipality," may be removed from office by the electors of the municipality." The statute goes on to specify procedures for conducting a recall petition and election, together with related provisions. Subsections 11 and 12 of the statute go on to clarify the applicability of the statute to the governing bodies of all charter counties:

(11) INTENT. – It is the intent of the Legislature that the recall procedures provided in this act shall be uniform statewide. Therefore, all municipal charter and special law provisions which are contrary to the provisions of this act are hereby repealed to the extent of this conflict.

(12) PROVISIONS APPLICABLE. – The provisions of this act shall apply to cities and charter counties whether or not they have adopted recall provisions.

Subsection 12 of the statute was amended by the Legislature in 1990 (Ch. 90-315, Laws of Florida), after the Florida Supreme Court found that the prior wording of the subsection rendered only those cities and charter counties that had specifically adopted a recall provision subject to the statute. *See In re Recall of Koretsky*, 557 So.2d 24 (Fla. 1990).

Accordingly, the addition of a recall provision to the Pinellas County Charter would not have an immediate effect on whether the members of the Pinellas County Commission are subject to recall. However, in the event that the Legislature subsequently reverses course and once again makes the recall statute applicable only to those cities and charter counties that opt in, the

addition of a recall provision to the Pinellas County Charter would have the effect of subjecting the members of the Pinellas County Commission to recall in the wake of such a change.

Recall of Constitutional Officers

In contrast to the 18 charter counties that provide for the recall of their county commissioners, only seven county charters address the recall of county constitutional officers. These counties fall into two general categories. Four counties (Brevard, Duval, Miami-Dade, and Orange) subject their elected charter officers to recall. That is, these county charters provide for the availability of recall as to those offices that have been abolished as constitutional offices and the duties transferred to offices created under the county charter, pursuant to Article VIII, Section 1(d) of the Florida Constitution. The other three counties (Columbia, Polk, and Sarasota) directly subject their five county constitutional officers to recall without converting them to charter officers.

Section 100.361, Fla. Stat. does not address the recall of county constitutional officers, but rather subjects only “member[s] of the governing body of a municipality or charter county” to removal by the electors. Section 100.361(1), Fla. Stat. However, the Attorney General has found that the fact that an officer is omitted from this statute does not preclude the officer from being subject to recall via charter provision. See Op. Att’y Gen. Fla. 82-82 (1982). No other provision of the Florida Statutes or the Florida Constitution subjects county constitutional officers to recall.

Accordingly, the first question presented is whether a county charter can subject county constitutional officers to recall, and under what conditions or prerequisites (e.g., conversion to charter officers).¹ The second question is whether the Pinellas County constitutional officers can be subjected to recall via an amendment to the Pinellas County Charter proposed by the Pinellas County Charter Review Commission, in light of the unique protections provided to the constitutional officers in Sections 2.06, 4.03, and 6.04 of the Pinellas County Charter.

***Telli v. Broward County* - County Charter’s “broad authority... regarding county officers”**

As to the first question, while there is no direct case law on point, recent appellate authority would suggest that a county charter can subject its county’s constitutional officers to recall, and that it is unnecessary to convert them to charter officers to do so.

In *Telli v. Broward County*, 94 So.3d 504 (Fla. 2012), the Florida Supreme Court receded from its opinion rendered ten years earlier in *Cook v. City of Jacksonville*, 823 So.2d 86 (Fla. 2002), which had held that county charters could not impose term limits on county officers. In so ruling, the Court in *Telli* discussed with approval substantial portions of Justice Anstead’s dissent

¹ The fact that seven other charter counties have provisions in their charters purporting to subject their constitutional or charter officers to recall is not necessarily strong evidence that such provisions are legal. At best, it may indicate that others have believed that such provisions are legal. Just as likely, it may simply be that sufficient cause to expend the funds and effort to challenge such a provision has not arisen.

in *Cook*, and even went so far as to state, “we now agree with Justice Anstead’s dissenting opinion, and recede from *Cook*...” *Telli*, 94 So.3d at 512. As stated in Justice Anstead’s dissent, a substantial portion of which was quoted in *Telli*:

The autonomy of local governments is at the heart of these two sections of the Florida Constitution (referring to Art. VIII, Secs. 1(d) and 1(g), Fla. Const.), and the two sections vest broad authority in charter counties regarding charter governments and county officers. This broad language was obviously intended to allow charter counties wide latitude in enacting regulations governing the selection and duties of county officers. For example, article VIII, section 1(d), specifies that county officers may be elected or chosen in some other manner, and that any county office may even be abolished. By these provisions, it is apparent that the framers intended for charter counties to be self-governing in both providing for county officers and in providing for the manner in which county officials will be selected. Additionally, article VIII, section (1)(g), specifies that charter counties exercise their powers in a way that is “not inconsistent with general law.” The term limit provisions in the charters in these cases are not inconsistent with any provision of general law relating to elected county officers. Given this grant of broad authority and consistency with general law, I can find no legal justification for concluding that charter counties should not be allowed to ask their citizens to vote on eligibility requirements of local elected officials, including term limits, since they could abolish the offices completely or decide to select the officers in any manner of their choosing.

Cook, 823 So.2d at 96 (*Anstead, J. dissenting*).

Justice Anstead went on to refer to “charter counties... exercising their authority over county officers by imposing term limits.” *Id.*

While neither *Telli* nor Justice Anstead’s dissent in *Cook* explicitly refer to subjecting constitutional officers to recall, these authorities appear to suggest that subjecting county officers to recall via county charter would survive constitutional scrutiny, either as an exercise of the county charter’s power over the manner of selecting county officers, or a more general exercise of a county charter’s “broad authority... regarding county officers”.

As to the relevance of the distinction between constitutional and charter officers in this context, the *Telli* Court, in receding from *Cook*, affirmatively stated that it should have affirmed *Pinellas County v. Eight is Enough in Pinellas*, 775 So.2d 317 (Fla. 2d DCA 2000). 94 So.3d at 512. Further, Justice Anstead’s dissent said that he would have affirmed the case. *Cook*, 823 So.2d at 96 (*Anstead, J. dissenting*). *Eight is Enough in Pinellas* is discussed in further detail *infra*, but for present purposes it is noteworthy that the case found constitutional the imposition of term limits on county constitutional officers that had not been converted to charter officers. This suggests that the “broad authority... regarding county officers” of county charters described by Justice Anstead and adopted by the Florida Supreme Court in *Telli* encompasses both constitutional county officers and charter officers.

Applicability of Charter Protections for Pinellas County Constitutional Officers

As to the second question (whether the protections for the constitutional officers in the Pinellas Charter change the above result), the matter is substantially less clear. Three separate sections of the Pinellas County Charter provide unique protections for the Pinellas County constitutional officers. Section 2.06 of the Pinellas County Charter states in pertinent part:

The county shall not have the power, under any circumstances, to abolish any municipality or in any manner to change the status, duties, or responsibilities of the county officers specified in section 1(d), art. VIII of the state constitution.

Section 4.03 of the Pinellas County Charter states:

This document [Charter] shall in no manner change the status, duties, or responsibilities of the [following] county officers of Pinellas County: The clerk of the circuit court, property appraiser, tax collector, sheriff, and supervisor of elections.

Finally, Section 6.04 of the Pinellas County Charter states in pertinent part:

Any other section of the Pinellas County Charter, chapter 80-590, Laws of Florida, notwithstanding, except for any proposed amendments affecting the status, duties, or responsibilities of the county officers referenced in §§ 2.06 and 4.03 of this Charter, charter amendments proposed under § 6.01 (proposed by Pinellas County Commission), § 6.02 (proposed by citizens' initiative), or § 6.03 (proposed by a Charter Review Commission) shall be placed directly on the ballot for approval or rejection by the voters and it shall not be a requirement that any such proposed amendments need to be referred to or approved by the Legislature prior to any such placement on the ballot.

Taken together, these three provisions prohibit both Pinellas County and the Pinellas County Charter from “chang[ing] the status, duties, or responsibilities” of the Pinellas County constitutional officers, and imply that any amendment to the Pinellas Charter “affect[ing] the status, duties, or responsibilities” of the constitutional officers may only be placed on the ballot after referral to and approval by the Florida Legislature.

Accordingly, the relevant question is whether subjecting the constitutional officers to recall via amendment to the Pinellas County Charter “change[s] the status, duties, or responsibilities” of those officers.

Eight is Enough in Pinellas, supra, appears to be the only appellate case that has directly analyzed the application of the phrase “change the status, duties, or responsibilities” with respect to the Pinellas County constitutional officers.

As noted above, *Eight is Enough in Pinellas* was subsequently quashed by the Florida Supreme Court in *Cook*. Ten years later, in *Telli*, the Florida Supreme Court receded from *Cook*, stating that “[t]he opinions of the First and Second (*Eight is Enough in Pinellas*) districts should have been affirmed.” At least one trial court has found this statement to mean that the referenced cases are once again good law. See *City of Jacksonville v. Fuller*, Circuit Court Case No. 10-2012-CA-8211 (Final judgment entered August 10, 2012). In any event, it is likely that trial and appellate courts having jurisdiction over Pinellas County will look to *Eight is Enough in Pinellas* in analyzing the phrase in question.

In *Eight is Enough in Pinellas*, the Second DCA provided the following analysis regarding an amendment to the Pinellas County Charter imposing term limits on the constitutional officers:

The County contends that the charter itself precludes the amendments at issue. Sections 2.06 and 4.03 of the charter state that neither the county nor the charter may change the “status, duties or responsibilities of the county officers specified in section 1(d), art. VIII of the state constitution.” Thus, the charter does prohibit certain amendments. *Term limits, however, do not affect the status, duties or responsibilities of a county officer, only the total length of time in which the officer could maintain status or perform duties and responsibilities.*

775 So.2d at 319-20.

The use of the phrase “the total length of time in which the officer could maintain status” appears to indicate that the court in *Eight is Enough in Pinellas* conceived of the term “status” as referring to an individual officer’s status as an office holder. Use of the phrase also seems to indicate that in the court’s analysis, affecting the length of time a county officer can maintain his status as an office holder does not impermissibly “affect the status... of a county officer”. Extrapolating from this reasoning, this case could be read to support the proposition that subjecting the Pinellas County constitutional officers to recall only affects the length of time a county officer can maintain his status as an office holder (contingent upon a successful recall effort), and thus by distinction does not impermissibly “affect the status... of a county officer”.

However, caution must be exercised in attempting to stretch the small bit of reasoning provided by the Second DCA in *Eight is Enough in Pinellas*. In its briefs before the Florida Supreme Court, the Pinellas County Attorney’s Office argued that “status” did not refer to any individual person’s status as an office holder, but rather referred to “the status of Charter versus non-Charter Officers” or “his or her status as a sovereign and autonomous Constitutional Officer.” The County further cited to an Attorney General’s Opinion that used the term “status” in this way, commenting on a contemplated Hillsborough County charter proposal wherein “the constitutional officers denominated in s. 1(d), Art. VIII, are not included as charter officers but retain their present status as constitutional officers....” Op. Att’y Gen. Fla. 81-7 (1981).

Under this reading, any invasion into the independence and autonomy of the constitutional officers could be seen as “chang[ing]” or “affecting” the status of Pinellas County’s constitutional officers. While apparently not adopted by the Second DCA in *Eight is Enough in*

Pinellas, the County’s prior arguments in this regard are by no means insubstantial. As proposals relating to the Pinellas County constitutional officers range further afield from the four corners of *Eight is Enough in Pinellas*, there is a potential that a trial or appellate court will limit *Eight is Enough in Pinellas* to its facts and adopt a broader definition of “status”.