


OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
Suite 480, City Hall
117 West Duval Street
Jacksonville, FL 32202
(904) 630-1672

MEMORANDUM

TO: Charter Revision Commission Members
Duval County School Board Members

FROM: Steven E. Rohan, Deputy General Counsel 

DATE: January 28, 2010

RE: Election vs. Appointment of Duval County School Board Members

I. Background

The Charter Revision Commission (the "Commission") is established pursuant to Chapter 17, *Ordinance Code*. The current Commission members were appointed by City Council in May 2009. The powers and duties of the Commission are set forth in section 17.103 as follows:

The Commission shall make recommendations to the Council and the members of the Legislature representing Duval County concerning those provisions in the Charter and other special acts of the Legislature affecting the Consolidated City of Jacksonville. In making its recommendations, the Commission shall consider whatever factors are relevant to the establishment of a relationship between the state and local units of government in the Consolidated City of Jacksonville and which are best calculated to fulfill the needs of the citizens of the Consolidated City of Jacksonville.

§ 17.103, Ord. Code.

The issue of having an appointed school board, in lieu of an elected School Board, is under consideration by the Commission. To date, numerous public comments, letters and presentations regarding this issue have been provided to the Commission for its consideration. Included in the materials received by the Commission are letters from distinguished former Florida Bar Association President and former General Counsel, James C. Rinaman, Jr., and the Honorable and respected veteran attorney, School Board Member William C. Gentry. As a result of these letters, the Charter Revision Commission (Commission) requested that the Office of General Counsel provide a legal opinion on this issue. Since then, the Duval County School Board (School Board) has also requested a legal opinion.

I appreciate the patience of both the Commission and the School Board while this opinion was thoughtfully researched and prepared.

II. Question Asked

Whether the process for selecting members of the Duval County School Board may be changed by Charter amendment from an election to an appointment, and if not, what constitutional changes would be necessary in order to appoint School Board members?

III. Short Answer

It is clear that the 1934 amendment to the Florida Constitution of 1885, creating the Jacksonville Constitutional Amendment and authorizing the consolidation of all governments within the boundaries of Duval County, provided the State Legislature broad authority to adopt the Charter of the City of Jacksonville (Jacksonville Charter) which provided for the consolidated City of Jacksonville. It is also clear that the School Board is a part of the consolidated government and that the 1934 amendment at that time provided the authority for an appointed school board in Duval County. It is also clear, however, that there is now a specific constitutional provision contained in Article IX, section 4(a), providing for elected school board members throughout the State and that the Florida Constitution was significantly altered in 1968 and subsequently.

As shown by the letters of Mr. Rinaman and Mr. Gentry, and the sharply divided opinions of courts ruling on charter issues, respected attorneys and judges can disagree on the interpretation and effect of these two competing provisions. Given the strongly held but competing positions set forth by two of Jacksonville's most experienced attorneys, and the competing constitutional provisions, it is apparent that the ultimate determination of whether the Jacksonville Charter can be amended to provide for the appointment of School Board members will be decided by a state court of competent jurisdiction.

Given the strong likelihood of a legal challenge to such a Charter amendment, and the uncertainty of its outcome, as explained herein, if the Commission, as a policy matter, recommends to the City Council that School Board members be appointed, the most appropriate method would be by constitutional amendment applied statewide, and providing for a local option by referendum of the people.

IV. Analysis

Jacksonville's Charter and Consolidated Government

The City of Jacksonville (Jacksonville) is governed by a consolidated form of constitutional charter government that is unlike the government in any other of the sixty-six counties in the State of Florida. Jacksonville's government arises from an express grant of authority in the Florida Constitution to the Florida Legislature which permits the legislature to create a unique form of consolidated government. This grant of authority originated in 1934 when Article VIII of the Florida Constitution of 1885 was amended to add Section 9, relating specifically and solely to Duval County (the "Jacksonville Constitutional Amendment"). The Jacksonville Constitutional Amendment provides in pertinent part:

SECTION 9. Legislative power over city of Jacksonville and Duval County.--The Legislature shall have power to establish, alter or abolish, a Municipal corporation to be known as the City of Jacksonville, extending territorially throughout the present limits of Duval County, in the place of any or all county, district, municipal and local governments, boards, bodies and officers, constitutional or statutory, legislative, executive, judicial, or administrative, and shall prescribe the jurisdiction, powers, duties and functions of such municipal corporation, its legislative, executive, judicial and administrative departments and its boards, bodies and officers.

Art. VIII, § 9, Fla. Const. (1985, as amended in 1934) (emphasis added).

The Jacksonville Constitutional Amendment expressly allows the consolidated government to replace or modify all aspects of the existing local governments and to bring them within the consolidated government by permitting the establishment of a single municipal corporation in place of all governments and offices, whether constitutional or statutory. *Id.* The Jacksonville Consolidation Amendment also grants plenary legislative power to recreate local government in Duval County, allowing the establishment of a single municipal corporation with a structure and powers of its own choosing. In 1967, pursuant to this constitutional authority, the Florida Legislature adopted Chapter 67-1320, Laws of Florida. Only days later, two amendatory acts, Chapters 67-1535 and 67-1547, Laws of Florida, were also adopted by the legislature. These three special acts became the Charter of the Consolidated City of Jacksonville (the “Jacksonville Charter”).

Thereafter, the Charter was approved by the electorate by referendum in a special election on August 8, 1967, with the consolidated government beginning effective October 1, 1968.¹ As a result, a municipal corporation known as the Consolidated City of Jacksonville came into existence, thereby displacing essentially all other units of local government.²

The courts have long recognized that the special grant of authority embodied in the Jacksonville Consolidation Amendment allows broad modifications to the usual structure of county, municipal and constitutional offices. For example, the Florida Supreme Court, in *Jackson v. Consolidated Gov’t of the City of Jacksonville*, 225 So. 2d 497 (Fla. 1969), held “The Jacksonville Consolidation Amendment is a special provision applying only to Duval County and giving the Legislature power at any time to consolidate the county and the cities within it into a municipality.”

¹ The consolidated government has existed for over forty years. In 1992, the Florida Legislature re-adopted the Charter, as amended. Ch. 92-341, § 1, at 131, Laws of Fla. The legislature, in readopting the Charter, specifically provided that the Charter “supersedes all laws and parts of laws which may be in conflict [with the Charter].” Ch. 92-341, § 5, at 214, Laws of Fla.

² For example, the Florida Legislature empowered Jacksonville with the general powers of both a city and a county. § 3.01(1), Jacksonville Charter. Instead of a county commission made up of five to seven members, as provided by article VIII, section 1(e), Florida Constitution of 1968, the consolidated government is governed by a nineteen-member City Council. § 5.01, Jacksonville Charter. Article 1 of the Charter states specifically that “all boards, bodies and officers of the former governments are consolidated into a single body politic and corporate. § 1.01(a), Jacksonville Charter.

Id. at 501. In upholding the constitutionality of the Charter, the Supreme Court stated:

Inasmuch as the Jacksonville Consolidation Amendment specifically authorized the legislature to devise a charter creating a consolidated government, a charter enacted in accordance with that section does not violate any other general provisions of the Constitution, nor does the Charter amend or revise any general law dealing with the officers in Duval County which are abolished.

Id. at 503. The First District Court of Appeal has similarly acknowledged the broad authority under the Jacksonville Constitutional Amendment. *See City of Jacksonville v. Slaughter*, 344 So. 2d 271, 273 (Fla. 1st DCA 1977) (citing to *Jackson* and noting that Article VIII, section 9 of the Florida Constitution authorizes the legislature to provide a consolidated charter for Duval County); *see also City of Jacksonville v. Cook*, 765 So. 2d 289, 293 (Fla. 1st DCA 2000), *rev'd* 823 So. 2d 86 (Fla. 2002) (“Jacksonville’s home rule powers authorize it to establish a governmental framework within its governmental boundaries which may affect all county officers enumerated in the constitution.”)³ To understand the extent of the broad authority granted the legislature under the Jacksonville Constitutional Amendment requires a review of the history of the Florida Constitution.

History of the Florida Constitution

The Jacksonville Constitutional Amendment was added to the Florida Constitution in 1934 as section 9 of Article VIII. At that time, Article VIII provided no home rule authority to counties in general. Art. VIII, § 6, Fla. Const. (1885). By contrast, the Jacksonville Constitutional Amendment provided to Jacksonville the broadest power of any county in the state.⁴ This authority provided for the reconstitution of all governments within the boundaries of Duval County, including the executive, administrative and judicial governments. The breadth of the authority, therefore, reached not only to the School Board, but even the judicial system. This is evident for several reasons. At the time of the Jacksonville Constitutional Amendment, the judicial system included a variety of courts, including a unique court of record in Escambia County, Justices of the Peace, and such other courts or commissions as the legislature was authorized to establish. Art. V, Fla. Const. (1885, as amended). Given the State Legislature’s authority over the establishment of courts and the broad power granted to the Legislature under the Jacksonville Constitutional Amendment, there is no doubt that the Legislature could create a unique court system in Duval County. *See* Ch. 67-1320, at 1361-64, Laws of Fla.; *see also* *infra* at page 6, discussion of the 1972 Amendment to the Florida Constitution.

³ The only limitation on this special grant of authority thus far was held by the Supreme Court in *Cook v. City of Jacksonville*, 823 So.2d 86, 94-5 (Fla. 2002), in which the Court found that the broad grant of authority given to the legislature to create the Jacksonville Charter did not allow for establishment of term limits in the face of an amendment to Article VI, Section 4(c) of the Constitution, providing for term limits for specific constitutional officers.

⁴ The other constitutional county government’s amendments were not added to the Florida Constitution until years later: section 10, legislative power over city of Key West and Monroe County, adopted in 1936; section 11, Dade County home rule charter, adopted in 1942; and section 24, Hillsborough County home rule charter, adopted in 1966.

Also, in 1942, Article VIII of the Florida Constitution was amended to add Section 11, Dade County, home rule charter, which authorized the electorate of Dade County to adopt a home rule charter abolishing all municipal, county or district governments, special taxing districts, authorities, boards or other governmental units within Dade County except for the Board of County Commissioners, the Board of Public Instruction of Dade County, the Superintendent of Public Instruction and the jurisdiction of the circuit court and any other court provided for by the Constitution. Art. VIII, § 11, Fla. Const. (1885, as amended in 1942). The Jacksonville Constitutional Amendment contains no similar restriction.

Furthermore, in 1934, Article VIII, relating to municipal and county government, included the election of a superintendent of public instruction along with the other county constitutional officers – the clerk, sheriff, constables, county assessor, tax collector and county surveyor. Art. VIII, § 6, Fla. Const. (1885, as amended). Article XII, relating to education, granted the Legislature the discretion to provide for the division of any county into convenient school districts, and any incorporated municipality could constitute a district, thus allowing for various districts within one county, Art. XII, §§ 10-11, Fla. Const. (1885, as amended).

The aforementioned provisions remained essentially the same until after the Jacksonville Charter was adopted by the State Legislature and approved by the Duval County electorate in 1967.

It was not until 1968, on the heels of the adoption of the Jacksonville Charter, that the landscape of the Florida Constitution began a dramatic change.⁵ In 1968, the Florida Constitution was almost completely revised by three joint resolutions adopted during special sessions in the summer of 1968 and ratified by the electorate on November 6, 1968 (with the exception of Article V, relating to the judiciary, which was carried forward from the 1885 Florida Constitution, as amended). Fla. Const. (1968). The revised Article VIII provided for home rule power by counties operating under county charters. Art. VIII, § (1)(g), Fla. Const. (1968). It also authorized the consolidation of a county and the governments of one or more municipalities located within the county into a single government. Art. VIII, § 3, Fla. Const. (1968). It continued to provide for the election of the county officers: sheriff, tax collector, tax assessor, supervisor of elections and clerk of the circuit court; however, the superintendent of public instruction was no longer included. *See* Art. VIII § (1)(d), Fla. Const. (1968). The Jacksonville Constitutional Amendment, as well as the Monroe County, Dade County, and Hillsborough County provisions, was expressly retained and carried forward from the 1885 Constitution. Art. VIII, § 6(e), Fla. Const. (1968).

Another significant change in 1968 involved Article IX, relating to education. For the first time, the Constitution provided that each county shall constitute a school district and that each school district shall have a school board consisting of five or more elected board members. Art. IX, § 4, Fla. Const. (1968). It also required that the school board operate, control, and supervise all public schools within the school district. *Id.* Each school district was required to have an elected

⁵ The only other change relevant to this discussion that occurred prior to the revised 1968 Constitution was an amendment to Article XII, relating to education, authorizing certain counties (including Duval County) to have a superintendent of public instruction appointed by the county board of public instruction. Art. XII, § 2A, Fla. Const. (1885, as amended in 1956). The planned appointment of a superintendent of public instruction is noted by the Local Government Study Commission of Duval County in its discussion of the school board system. *See* Local Government Study Commission of Duval County, Blueprint for Improvement, 140 (1966).

superintendent of schools, except where provided by resolution of the district school board, or by special law, approved by the electorate, a district school superintendent could be employed by the district school board. Art. IX § 5, Fla. Const. (1968).

Another constitutional revision relevant to this issue occurred in 1972 with the adoption of a revised Article V, relating to the judiciary. The revised Article V established, for the first time, a statewide uniform court system. The judicial power was vested in the supreme court, district courts of appeal, circuit courts and county courts. The State, political subdivisions and municipalities were expressly prohibited from establishing any other courts. Art. V, § 1, Fla. Const. (1968, as amended in 1972) The revised Article V provided for a schedule by which the old Article V of the 1885 Constitution was repealed, abolishing and/or providing for the sunset of various municipal courts and other courts not continued under the uniform statewide judicial scheme. Art. V, § 20(d)(5), Fla. Const. (1968, as amended in 1972). Significantly, it provided:

Judges holding elective office in all other courts abolished by this article, whose terms do not expire in 1973 including judges established pursuant to Article VIII, sections 9 [Duval county] and 11 [Dade County] of the Constitution of 1885 shall serve as judges of the county court for the remainder of the term to which they were elected. Unless created pursuant to section 9, of this Article V such judicial office shall not continue to exist thereafter.

Art. V, § 20(d)(5), Fla. Const. (1968, as amended in 1972) (emphasis added).

Cook v. City of Jacksonville

As previously stated, the Supreme Court in *Cook v. City of Jacksonville* narrowed the broad authority of the Jacksonville Constitutional Amendment with respect to term limits. In *Cook*, the Florida Supreme Court refused to extend the Jacksonville Constitutional Amendment's broad powers to include establishing term limits for the Clerk of the Circuit Court. 823 So. 2d 86, 94-5 (Fla. 2002). Since the Supreme Court's ruling, Florida courts have cited to the *Cook* decision in addressing potential conflicts between charter provisions and the Constitution and Florida Statutes. See, e.g., *Citizens for Reform v. Citizens for Open Government, Inc.*, 931 So. 2d 977, 980 (Fla. 3d DCA 2006) (a charter provision that conflicts with the Florida Constitution or general Florida law is unconstitutional); *Demings v. Orange County Citizens Review Board*, 15 So. 3d 604, 606 (Fla. 5th DCA 2009) (the electorate has the option of maintaining the constitutional offices or abolishing them, but is prohibited from "piecemeal transfer of responsibilities" from a constitutional officer).

There is no doubt that the School Board is part of Consolidated Government.⁶ As the history of the Florida Constitution reveals, however the analysis does not end with the Jacksonville Charter. There exists a specific constitutional provision providing for the election of school board members.

⁶ The Circuit Court of the Fourth Judicial Circuit has recognized the Duval County School Board as being a part of the consolidated government and a part of the Jacksonville Charter. See Order Granting Motion to Dismiss, *Gibson v. Mullaney*, No. 1-3098, at 3 (Fla. 4th Cir. Ct. Apr. 11, 2002)(Section 108.503, Jacksonville Ordinance Code, prohibits one agency of the consolidated government from maintaining an action against any other agency of the consolidated government unless expressly authorized by City Council).

Article IX, section 4(a) of the Florida Constitution provides in pertinent part:

Each County will constitute a school district In each school district there shall be a school board composed of five or more members chosen by vote of the electors in a non-partisan election for appropriately staggered terms of four years, as provided by law.

Art. IX, § 4(a), Fla. Const. (1968, as amended in 1998). Thus, the issue is how to reconcile the election of school board members provided in Article IX, section 4(a) with the broad grant of authority in the Jacksonville Constitutional Amendment found in Article VIII, section 6(e). In *Cook*, a sharply divided Supreme Court, with dissenting opinion, held that a “term limit” provision of the Jacksonville Charter was unconstitutional as applied to the Clerk of Court. This decision overturned a unanimous First District Court of Appeal decision which had approved the Jacksonville Charter term limit provision.

There are several potential grounds to distinguish *Cook* from the present situation. First, although the *Cook* Court mentioned the Jacksonville Constitutional Amendment in a footnote, the Court did not explicitly analyze the Jacksonville Constitutional Amendment. The Court’s ruling combines the *Cook* argument with an appeal of a charter county in *DeBlaker v. Eight Is Enough in Pinellas*, discussing term limits in the context of a typical charter county. The Court did not distinguish Duval County from Pinellas County, whose term limit charter provision was also struck down. Second, *Cook* addressed a specific term limit provision contained in Article VI, not a provision regarding education contained in Article IX. The Court’s ruling in *Cook* may be distinguished; however, the outcome of a constitutional challenge to a Jacksonville Charter amendment providing for the appointment of School Board members is uncertain and would result in protracted litigation. Any such challenge would most assuredly require that the Supreme Court revisit its *Cook* decision.

V. Conclusion

For the foregoing reasons, if the Commission, as a policy matter, recommends to the City Council the creation of an appointed School Board, the most appropriate method for accomplishing this would be by amendment to the Florida Constitution applied statewide, providing for a local option by referendum of the people. If the Commission recommends an amendment to the Jacksonville Charter, and such recommendation is favorably acted upon by the City Council or the State Legislature, resulting in the establishment of a referendum, any such amendment would result in litigation, with a court ultimately deciding its constitutionality. Litigation on this matter will be challenging given the changes to the Constitution since 1968 and given the Supreme Court’s decision in *Cook*.