OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 630-1700

MEMORANDUM

TO: **The Honorable Mike Hogan, Supervisor of Elections**
Petitioner's Committee, Bennett Brown, Chair & James Radloff, Treasurer

FROM: **Office of General Counsel**

RE: **Referendum review: Charter Amendment on Voters' Right to Repeal Jacksonville City Laws; Preliminary Review & Determination of Invalidity**

DATE: **February 6, 2018**

I. Introduction

On January 29, 2018, the Office of General Counsel received the Supervisor of Elections' Memorandum, dated January 26, 2018, concerning a proposed Charter amendment which would give voters the right to repeal ordinances passed by City Council (the "Proposed Amendment"). Pursuant to Section 18.05(f)(1), City of Jacksonville Charter, the Supervisor has concluded that the petition for the Proposed Amendment meets the technical requirements for an initiative-referendum petition such as: (1) the petition is signed, (2) the signer is a registered voter, and (3) the number of qualifying petitions meets the threshold number required to undergo preliminary review for validation.

This Office is charged with determining the legal sufficiency of the form and substance of the petition. This Office has reviewed the Supervisor's Memorandum along with the provided materials and has determined that the proposed petition is legally defective and fatally misleading. It cannot be lawfully placed on the ballot.

As required by the Charter, the particulars of why the petition is defective are specified in this memorandum. In particular, this memorandum reviews the requirements that any initiative-referendum must meet in order for the Supervisor of Elections to have the authority to place such an item on the ballot and addresses the legal sufficiency of the petition and proposed ballot questions set forth.

II. Questions Asked.

A. Whether the initiative petition is legally sufficient.

B. Whether the ballot Title and Summary comply with all requirements necessary to appear on the ballot.

C. Whether the General Counsel has the duty to prevent a legally defective initiative petition from appearing on the ballot.

III. Short Answers

A. No. The initiative petition is not legally sufficient.

B. No. The ballot Title and Summary do not comply with all requirements necessary to appear on the ballot.

C. Yes. The General Counsel has the duty to prevent a legally defective petition from appearing on the ballot.

IV. Discussion

A. APPLICABLE LAW.

Section 18.05, Charter, Article VI, Section 5(a), Florida Constitution, and *Section 101.161*, Florida Statutes, set forth the legal requirements initiative petitions in Duval County must meet to place an initiative-referendum question on the ballot.

1. Section 18.05, Charter

The initiative-referendum process, governed by *Section 18.05*, begins with a group of five registered voters establishing a political committee as required by *Section 106.03*, Florida Statutes.[1] *Section 18.05(c)*, Charter. After this political committee has proof of its establishment, these five voters must file an affidavit stating that they will constitute a petitioners' committee.[2] In this case, the petitioners' committee is known as EmpowerJacksonville.org. The filed affidavit must state that *the Petitioners' Committee will be responsible* for (1) creating, (2) circulating, and (3) filing the petition, in proper form. *Section 18.05(d)*, Charter requires that the Petitioners' Committee create a referendum petition and authorizes the Petitioner's Committee to duplicate the petition form in order to circulate it. Each petition circulated and signed must contain "the full text of the proposed referendum as well as a ballot title and ballot summary *in compliance with state law*." *Section 18.05(d)(2)*, Charter. Each duplicate may be signed by only one registered voter, and each must include an affidavit of the circulator stating that:

(1) The circulator personally circulated the petition,

(2) The voter signed the petition in the presence of the circulator, and

[1] A copy of that proof is attached to the Supervisor of Elections' Memorandum.

[2] A copy of that affidavit is attached to the Supervisor of Elections' Memorandum. Proof of establishing a political committee must accompany the affidavit establishing the Petitioners' Committee.

(3) That the circulator believes the signature to be genuine

One of the most significant roles the Supervisor has with respect to the petition is to assure that the form of the petition complies with these requirements. The Supervisor has preliminarily determined that the petition complies as to form with the requirements. The Supervisor has not undertaken a review, and is not authorized to review, the petitions' compliance with the substantive ballot requirements or substantive law regarding initiative-referenda. The Office of General is charged with that responsibility, and this memorandum will review those legal requirements.

2. *Article VI, Section 5(a), Florida Constitution.*

The Supervisor may not place the Proposed Amendment on the ballot because it unlawfully proposes to give to the voters a referendum power not provided to them by law. "[T]he referendum power 'can be exercised whenever the people *through their legislative bodies* decide that it should be used.' *Florida Land Co. v. City of Winter Springs*, 427 So.2d 170, 173 (Fla.1983).' *Holzendorf v. Bell*, 606 So.2d 645, 648 (Fla. 1st DCA 1992)." *Gretna Racing, LLC v. Dep't of Bus. & Prof'l Regulation*, 178 So. 3d 15, 41, n.21 (Fla. 1st DCA 2015), *review granted sub nom. Gretna Racing, LLC v. Florida Dep't of Bus. & Prof'l Regulation*, No. SC15-1929, 2015 WL 8212827 (Fla. Dec. 1, 2015), and *approved sub nom. Gretna Racing, LLC v. Florida Dep't of Bus. & Prof'l Regulation*, 225 So. 3d 759 (Fla. 2017). The Fourth District summarized referendum power as follows:

> "Referendum is the right of the people to have an act passed by the legislative body submitted for their approval or rejection." *City of Coral Gables v. Carmichael*, 256 So.2d 404, 411 (Fla. 3d DCA 1972) (quotation marks and citation omitted). In Florida, the availability of the referendum is constrained to those situations where "the people through their legislative bodies decide it should be used." *Fla. Land Co. v. City of Winter Springs*, 427 So.2d 170, 172–73 (Fla. 1983) (footnote omitted). In this regard, Article VI, section 5(a) of the Florida Constitution provides that "referenda shall be held as provided by law," with the phrase "as provided by law" equating to "as passed 'by an act of the legislature." *Holzendorf v. Bell*, 606 So.2d 645, 648 (Fla. 1st DCA 1992) (quoting *Broward Cnty. v. Plantation Imports, Inc.*, 419 So.2d 1145, 1148 (Fla. 4th DCA 1982)); *Grapeland Heights Civic Ass'n v. City of Miami*, 267 So.2d 321, 324 (Fla.1972) (defining "law" as used in the Florida Constitution as "enact[ed] by the State Legislature").

Archstone Palmetto Park, LLC v. Kennedy, 132 So. 3d 347, 350 (Fla. 4th DCA 2014).

The First District applied these same principles to an initiative-referendum that purported to give initiative-referendum power to approve or disapprove one single type of ordinance. Even though the ballot proposed was very limited in scope, the court in no uncertain terms invalidated that effort by the voters to grant themselves referendum powers, explaining:

> Article 6, section 5, Florida Constitution, controls the manner in which the power of referendum may be granted. That section provides in part: "Special elections

> and referenda shall be held as provided by law." Under the Constitution, the phrase "as provided by law" means as passed "by an act of the legislature." Broward County v. Plantation Imports, Inc., 419 So.2d 1145, 1148 (Fla. 4th DCA 1982). Since the constitution expressly provides that the power of referendum can be granted only by the legislature, it is beyond the power of the electorate to say what shall or shall not be done by referendum. As appellee points out, the electorate has no power, by initiative and referendum, to enact a charter amendment conferring upon itself the power to restrict action by the City Council by making the council's action subject to referendum. *This is so simply because no such authority has been granted by the legislature.* The City Council has the authority under the provisions of the charter to enact ordinances, or to amend the charter, without a referendum. *Unless some provision of the charter grants to the electorate the right of referendum as to the authorized acts of the council undertaken by the council without necessity of a referendum, the electorate has no authority to reimpose a referendum requirement on the council's authority to amend the charter or to do any other act within the council's authority.*

Holzendorf v. Bell, 606 So. 2d 645, 648–49 (Fla. 1st DCA 1992) (emphasis added). The First District Court of Appeal "conclude[d], that because the proposed amendment sought to *usurp the legislature's authority* to grant the right of referendum, the amendment was properly found defective by the trial court, and properly ordered not eligible for placement on the ballot for a referendum vote." *Id*. at 649 (emphasis added).

Section 4.02, Charter, reads, in pertinent part, as follows:

> Where the consolidated government has any power or duty and the responsibility for the exercise of such power or the performance of such duty is not fixed by this charter or by general or special law, the power or duty shall be exercised or performed as follows: *All powers and duties of the consolidated government which are legislative in nature shall be exercised and performed by the council.* All powers and duties which are executive in nature shall be exercised or performed by the mayor or such other executive officer of the consolidated government as the mayor may designate, except as otherwise specifically provided herein.

(Emphasis added). The voters, then, cannot grant to themselves an initiative-referendum power not granted to them by their legislative bodies. The Charter places legislative powers and duties under the exclusive jurisdiction of the council. The Florida Constitution places legislative powers and duties under the exclusive jurisdiction of the council. The Proposed Amendment would seek to impermissibly usurp the legislative power of the Florida Legislature and the City Council by placing it into the hands of the voters. As concluded by the First District, this Proposed Amendment, if enacted, is unlawful and unenforceable as *de hors* the legislative authority for referenda and is not eligible for placement on the ballot.

3. *Requirements of Section 101.161, Florida Statutes*

Section 101.161, Florida Statutes, governs the legal requirements for a valid ballot and, therefore, pursuant to *Section 18.05*, Charter, a valid petition requires: "Whenever a . . . public measure is submitted to the vote of the people, a ballot summary of such . . . public measure shall be printed in clear and unambiguous language on the ballot . . . ." *Section 101.161(1)*, Florida Statutes, states, "The ballot summary of the . . . public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure." The Florida Supreme Court has interpreted this requirement as follows:

> This Court has stated that any proposed constitutional amendment must be "*accurately* represented on the ballot; otherwise, voter approval would be a nullity." *Armstrong v. Harris*, 773 So.2d 7, 12 (Fla. 2000). Section 101.161(1), Florida Statutes (2007), codifies this principle:
>
> > 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.... Except for amendments and ballot language proposed by joint resolution, the 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.
>
> (Emphasis supplied.) *See also Askew v. Firestone*, 421 So.2d 151, 155 (Fla. 1982) ("[T]he voter should not be misled.... All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide.... *What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot.*" (alteration in original) (quoting *Hill v. Milander*, 72 So.2d 796, 798 (Fla. 1954)). Reduced to colloquial terms, a ballot title and summary cannot "fly under false colors" or "hide the ball" with regard to the true effect of an amendment. *See Armstrong*, 773 So.2d at 16. To determine whether the ballot title and summary of proposed Amendment 5 satisfy the requirements of section 101.161, Florida Statutes (2007), the Court must consider two questions: "(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written, misleads the public." *Advisory Opinion to Attorney Gen. re Prohibiting State Spending for Experimentation that Involves the Destruction of a Live Human Embryo*, 959 So.2d 210, 213-14 (Fla. 2007) (quoting *Advisory Opinion to Attorney Gen. re Fla. Marriage Prot. Amendment*, 926 So.2d 1229, 1236 (Fla. 2006).

Florida Dep't of State v. Slough, 992 So. 2d 142, 146–47 (Fla. 2008). These same standards apply to proposed charter amendments. *Miami-Dade Cty. v. Vill. of Pinecrest*, 994 So. 2d 456,

458 (Fla.3d DCA 2008) ("Florida law, as codified in section 101.161 of the Florida Statutes, requires that voters must be told, in clear and unambiguous language, what the primary effect will be if the proposed Charter amendment is adopted."). "In *Wadhams* [*v. Board of County Commissioners*, 567 So.2d 414, 416 (Fla.1990)], the [Florida Supreme Court] . . . applied section 101.161(1) to an amendment by referendum of the Sarasota County Charter." *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 565 (Fla. 1st DCA 2006). More particularly, the First District held that a 1994 amendment to the Jacksonville Charter was adopted to clarify any ambiguity in section 18.05(j) "to make clear that compliance with all relevant parts of section 101.161 is required" for any referendum to amend the Charter. *Evans v. Bell*, 651 So. 2d 162, 166 (Fla. 1st DCA 1995).

The Supervisor has determined that the Petitioners' Committee has submitted the number of valid petitions necessary to trigger the preliminary validation provisions of *Section 18.05(f)(1)*, Charter. Upon receipt of the Supervisor's Memorandum, this Office now has the duty to determine whether the ballot Title and Summary comply with *Section 101.161*, Florida Statutes.

The Proposed Amendment contains the following ballot Title and Ballot Summary, and the full text of the proposed amendment:

BALLOT TITLE: Voters' Right to Repeal Jacksonville City Laws

BALLOT SUMMARY: This amendment to the Charter of the City of Jacksonville gives voters the right to repeal laws enacted by the Jacksonville City Council.

*** * ***

FULL TEXT OF THE PROPOSED AMENDMENT:

Be it enacted by the People of Jacksonville . . . as follows:

> (b) Repeal of Ordinance. A repeal of an ordinance by referendum may be proposed by ordinance or by a petition signed by qualified voters of Duval County equal in number to at least five (5) percent of the total number of registered voters in the city at the time of the last preceding general consolidated government election; provided, the same or substantially same referendum to repeal an ordinance may not be proposed more than one time in any twelve (12) month period unless any petition subsequent to the first petition shall be signed by qualified voters of Duval County equal in number to at least ten (10) percent of the total number of registered voters in the city at the time of the last preceding general consolidated government election. The right to repeal an ordinance by referendum shall survive and not be diminished or otherwise affected by any legislative adoption, readoption, codification, recodification, incorporation, reincorporation, or amendment of such ordinance subsequent to the original adoption of the ordinance. Any contrary provision of this Charter notwithstanding, petition forms for repeal of an

ordinance by referendum shall not require any affidavit or signature by the circulator thereof unless such circulator is paid to solicit signatures on the petition.

(a) Summary of Argument regarding Section 101.161, Florida Statutes

The Proposed Amendment violates the ballot title and summary requirements of *Section 101.161*, Florida Statutes, by misstating the substance of the Proposed Amendment. It omits the inherent limitations on the power it purports to grant to the voters. The Summary fails to inform the voters that: (1) the chief purpose of the Proposed Amendment, is to create a super legislative body unbound by traditional concepts of separation of powers, (2) notwithstanding the language in the ballot Title and Summary, the Proposed Amendment substantially overstates the power to repeal ordinances by referendum, (3) the Proposed Amendment substantially alters executive and legislative functions and powers of the City, (4) the Proposed Amendment will alter multiple functions of city government, and (5) the Proposed Amendment will remove the separation of power between the executive and legislative branches of city government required by Article 4 of the Charter. In sum, the ballot Title and Summary fail to disclose significant collateral effects.

As a result of the foregoing, the proposed ballot Title and Summary fail to meet the standards of Section 101.161, Florida Statutes. That section requires the substance of a proposed Charter amendment to be set out in an explanatory statement of the "chief purpose" of the measure. "In [*In re Advisory Op. to Att'y Gen.—Save Our Everglades*, 636 So.2d 1336, 1339 (Fla.1994)], the Supreme Court explained the meaning of section 101.161 in the following way . . . [S]ection 101.161 requires that the ballot title and summary for a proposed constitutional amendment state in clear and unambiguous language the chief purpose of the measure." *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 795 (Fla. 2014) (Internal quotations omitted). "This is so that the voter will have notice of the issue contained in the amendment, will not be misled as to its purpose, and can cast an intelligent and informed ballot." *Id*.

1. The Summary fails to inform the voters about the chief purpose of the Proposed Amendment, which is to create a super legislative body unbound by traditional concepts of separation of powers.

The Ballot Title and Ballot Summary obfuscate the chief purpose of the Proposed Amendment. The Ballot Title and Summary identify the chief purpose of the Proposed Amendment as being to grant to the voters the right to "repeal" ordinances adopted by the City Council. As defined by Black's Law Dictionary, "repeal" means: "Abrogation of an *existing* law by express legislative act." REPEAL, Black's Law Dictionary (10th ed. 2014). "[T]he effect of a repealing statute is to obliterate the statute repealed as completely as if it had never been enacted. . . ." *Gen. Capital Corp. v. Tel Serv. Co.*, 212 So. 2d 369, 385 (Fla. 4th DCA 1968), *aff'd in part*, 227 So. 2d 667 (Fla. 1969) (citation and internal quotation omitted). A repeal acts on an existing law, not future laws.

Neither the Title or the Summary disclose that the Proposed Amendment, if adopted, would create un-repealable ordinances. The text of the Proposed Amendment states in part, "The

right to repeal an ordinance by referendum shall survive and not be diminished or otherwise affected by any legislative . . . [action] subsequent to the original adoption of the ordinance." As explained in some depth by the California Court of Appeal:

> Every legislative body may modify or abolish the acts passed by itself or its predecessors. This power of repeal may be exercised at the same session at which the original act was passed; and even while a bill is in its progress and before it becomes a law. The legislature cannot bind a future legislature to a particular mode of repeal. It cannot declare in advance the intent of subsequent legislatures or the effect of subsequent legislation upon existing statutes.

Cty. of Sacramento v. Lackner, 97 Cal. App. 3d 576, 589–90, 159 Cal. Rptr. 1, 8–9 (Ct. App. 1979) (citation and internal quotation omitted). Explained much more simply by the Florida Supreme Court in its very first years of existence: "[A]ll laws can be repealed." *Ponder v. Graham*, 4 Fla. 23, 34 (1851). This same rule applies to municipal governments.

> 'It is a general rule, subject to certain qualifications hereinafter noted, that a Municipal Corporation has the right to reconsider its actions and ordinances, and adopt a measure or ordinance that has previously been defeated or rescind one that has been previously adopted before the rights of third parties have vested. Moreover, in the absence of statute or a rule to the contrary, the Council may reconsider, adopt or rescind an ordinance at a meeting subsequent to that at which it was defeated or adopted, at least where conditions have not changed and no vested rights have intervened.' 37 Am.Jur.Sec. 150, p. 762. *Dal Maso*, 182 Md. 200, 206, 34 A.2d 464 (1943).

Boomer v. Waterman Family Ltd. P'ship, 232 Md. App. 1, 11, 155 A.3d 901, 907–08, *cert. granted*, 453 Md. 357, 162 A.3d 838 (2017), and *aff'd*, 456 Md. 330, 173 A.3d 1069 (2017).

The Proposed Amendment, while impermissibly placing legislative power in the voter, also seeks to place the voter-legislature above the laws applicable to other legislative bodies. It negates the power of the City Council today and future City Councils to repeal or amend an ordinance adopted by initiative-referendum. With every "repeal" enacted under the Proposed Amendment, the voters would withdraw permanently from the City Council the power to adopt ordinances that would have the effect of repealing the initiative-referendum-enacted "repealing" ordinance. The voters become a super-legislative body with power to permanently withdraw substantive legislative power from the City Council. As noted below, the Mayor has no authority to veto ordinances adopted through the process created by the Proposed Amendment.

The Title and Summary make no note of this extraordinary power. They do not note the creation of power untethered from any checks or balances. They do not in any way hint at, much less state, the chief purpose of the Proposed Amendment. Failure to disclose the actual purpose of the Proposed Amendment is a fatal flaw under the provisions of section 101.161, Florida Statutes, compelling that the Proposed Amendment be kept off the ballot.

2. The Summary fails to note that the Proposed Amendment substantially overstates the power to repeal ordinances by referendum vote.

The starting point for analysis of a proposed Charter amendment is an identification of its chief purpose. "First, the Court asks whether 'the ballot title and summary ... fairly inform the voter of the chief purpose of the amendment.'" *In re Advisory Opinion to the Atty. Gen. re Additional Homestead Tax Exemption*, 880 So. 2d 646, 651 (Fla. 2004) (citation omitted). The chief purpose of the Proposed Amendment is stated in both its Title and its Summary; namely, to permit a citizen vote on repealing "city laws." The Ballot Summary, however, significantly overstates the power of voters to repeal ordinances. First, Florida law reserves to the Council, and the Council alone, the power to adopt (or repeal) certain ordinances, including, but not limited to, budget and land use ordinances and ordinances that implement collectively-bargained agreements.

A ballot summary that leaves out material information is clearly and conclusively defective. *Advisory Op. to the Att'y Gen. re Stop Early Release of Prisons*, 642 So. 2d 724, 727 (Fla. 1994). Put another way: "The problem … lies not with what the summary says, but, rather, with what it does not say." *Askew v. Firestone*, 421 So.2d 151, 156 (Fla. 1982). *Accord*, *Matheson v. Miami-Dade Cty.*, 187 So. 3d 221, 240 (Fla. 3d DCA 2015) and *Advisory Opinion to Attorney Gen. re 1.35% Prop. Tax Cap, Unless Voter Approved*, 2 So. 3d 968, 976 (Fla. 2009). A summary that fails to disclose important consequences renders the Proposed Amendment defective. *Advisory Op. to the Att'y Gen. re: Fairness Initiative Requiring Legislative Determination that Sales Tax Exemptions and Exclusions Serve a Public Purpose*, 880 So.2d 630, 633 (Fla. 2004) (*Sales Tax Exemptions*). The Florida Supreme Court has stricken proposed constitutional amendments that create a factual impression that is misleading because the ballot summaries failed to communicate material information. *Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So.2d 888 (Fla. 2000) (*Treating People Differently*); and *Advisory Opinion to the Attorney General re Right of Citizens to Choose Health Care Providers*, 705 So.2d 563 (Fla. 1998) (*Health Care Providers*). In *Additional Homestead Tax Exemption*, for example, the Court identified the chief purpose of the amendment as providing an additional homestead exemption. It then struck the proposal because property taxes are composed of a property valuation and a millage rate, and since the latter was not addressed by the amendment the ballot summary was flying 'under false colors' with its promise of tax relief. *Additional Homestead Exemption*, 880 So. 2d at 653.

The Supreme Court applied similar reasoning in *In re Advisory Op. to the Att' Gen. re Casino Authorization, Taxation & Regulation*, 656 So. 2d 466 (Fla. 1995) (*Casino Authorization*), where the ballot summary said voters could authorize casinos at 'hotels' when the proposed amendment itself authorized casinos in the much broader category of 'transient lodging establishments.' 656 So. 2d at 468. *See also, Advisory Op. to the Att'y Gen. re Tax Limitation*, 644 So. 2d 486, 494 (Fla. 1994) (*Tax Limitation*) (ballot summary was held misleading which said the proposed constitutional amendment 'requires voter approval of new taxes' and 'increases in tax rates,' because it implied that the Constitution didn't already have caps or limits on taxes when in fact it did). In *Advisory Op. to the Att'y Gen. re Fish and Wildlife Conservation*, 705 So. 2d 1351 (Fla. 1998), the Court found defective a ballot summary

that advised voters that the amendment being proposed would unify two Commissions, one of which was a legislative creation and the other a constitutional body, although the ballot summary 'accurately points out that the two commissions will be combined into one.' 705 So. 2d at 1355. The summary was held misleading because voters were not told it 'strips the legislature of its exclusive power to regulate marine life and grants it to a constitutional entity.' *Id*.

Similarly, this Proposed Amendment suggests that the citizens, by repeal, could strip the City Council of its power to adopt a final budget. The Florida courts have already held that "referendum provisions in a local government's charter are generally inapplicable to matters of appropriation and fiscal management. *See State ex rel. Keefe v. City of St. Petersburg*, 106 Fla. 742, 145 So. 175, 175 (1933) ('To hold that the initiative and referendum provisions of the charter are applicable to appropriation ordinances, would materially obstruct, if not entirely defeat, the purpose of having a budget system.')." *Town of Gulf Stream v. Palm Beach Cty*, 206 So. 3d 721, 725–26 (Fla. 4th DCA 2016). The Proposed Amendment also suggests the citizens could take from the Council its final authority to act as the legislative body under Chapter 447, Florida Statutes, by subjecting to referendum repeal the Council's adoption of an ordinance implementing a collective bargaining agreement. The Florida Courts have already invalidated a similar provision in the Florida Statutes. *City of Miami Beach v. Bd. of Trustees of City Pension Fund for Firefighters & Police Officers in City of Miami Beach*, 91 So. 3d 237, 241 (Fla. 3rd DCA 2012) ("[T]he referendum requirement of Section 166.021(4), Florida Statutes, as the City seeks to apply it to the collectively bargained Pension Agreement, is violative of Article I, Section 6 of the Florida Constitution."). The Summary fails to inform the voters that they may not by referendum repeal ordinances adopting *any* development order. "[T]he Legislature enacted the 2011 Amendment [to Section 163.3167(8)(a)], which served to bar referenda for *all* development orders, comprehensive amendments, and map amendments." *Archstone Palmetto Park, LLC v. Kennedy*, 132 So. 3d 347, 351 (Fla. 4th DCA 2014). (Section 163.3167(8)(a), Florida Statutes, reads as follows: "An initiative or referendum process in regard to any development order is prohibited.") The Summary fails to inform the voters that they will not have veto power over those types of ordinances despite the apparent grant of power.

In *City of Jacksonville v. Citizens for Public Safety Committee*, 02-5378-CA (4th Judicial Circuit, in and for Duval County, Florida) *aff'd* (without opinion) *Citizens for Public Safety Committee v. City of Jacksonville*, 855 So.2d 59 (Fla. 1st DCA 2003), Chief Judge Donald Moran agreed with this analysis holding that the proposed amendment under his review was not the proper subject of a binding referendum, because it "usurp[ed] the authority of the Jacksonville City Council to exercise legislative power over budgetary and finance matters." In addition, Chief Judge Moran agreed with the City's argument that the proposed amendment under his review violated Chapter 447, Florida Statutes and Article I, Section 6, Florida Constitution, because the amendment under his review impinged upon the power of unions and the City to collectively bargain. In sum, the Circuit Court and the First District held that the voters could not by referendum override the legislative powers of the City Council. The Proposed Amendment does not note that restriction on repealing ordinances. Instead, the Proposed Amendment misleads the voter by proposing a Charter amendment permitting repeal of ***all*** ordinances.

3. The Summary fails to inform the voters that the Proposed Amendment will alter multiple functions of city government.

The Proposed Amendment has a 'very distinct and substantial effect' on the Consolidated Government's structure altering and purporting to grant to voters the Council's legislative functions. *See Tax Limitation*, 644 So. 2d at 494-95. It also substantially alters the functions of the executive branch of the City's government by removing the Mayor's authority to veto ordinances adopted by voter referendum that repeal City Council ordinances. In fact, the Proposed Amendment affects exactly the same swath of executive and legislative powers that was the basis for the Court's invalidation of a previously proposed amendment in *Advisory Op. to the Att'y Gen. re People's Property Rights Amendments Providing Compensation For Restricting Real Property Use*, 699 So. 2d 1304, 1308 (Fla. 1997). When the City Council adopts an ordinance repealing a prior ordinance, the City Charter gives the Mayor the election to veto the repealer, leaving the law as it was unless the City Council overrides the veto. But when the voters by referendum, as would be allowed by this Proposed Amendment which prohibits any change to its scope, adopt an ordinance repealing a prior ordinance, the Mayor has no authority under the existing language of the Charter or the Proposed Amendment to veto the voters'ordinance. Rather than preserving a balance of power between the legislative and executive branches, this Proposed Amendment places all authority in a legislative body comprised of the voters without checks and balances by the executive branch of government. The result essentially converts the City's republican form of government into a direct democracy contrary to the form of government crafted by the framers of the United States Constitution, and in turn codified in the Florida Constitution and the Charter.

4. The Summary fails to inform the voters that the Proposed Amendment substantially alters executive and legislative functions and powers of the City.

Adoption of ordinances is the most important function of local governments. *See* §§ 125.01 and §§ 166.021 *et seq*, Florida Statutes, (setting forth the powers of counties and municipalities, respectively, to provide for and regulate services). Within the ambit of these responsibilities, local governments must plan and provide for (i) roads, bridges, parking and traffic circulation, (ii) air, rail, and bus terminals and public transportation systems, (iii) sanitary sewer systems, solid waste collection and disposal, drainage, and potable water, (iv) conservation of natural resources, (v) parks, preserves, playgrounds, recreation areas, open spaces, libraries, museums, and other recreational and cultural facilities, (vi) public buildings, (vii) housing and community redevelopment, and (viii) establish zoning, housing and building codes. *Id.* All of these functions must be regulated by local governments. *Id*.; 163.3202, Florida Statutes.

Local governments perform their land planning and regulatory functions, for example, by preparing, amending, and adopting local comprehensive land use plans in accordance with chapter 163, Florida Statutes, and by enacting regulations consistent with those plans pursuant to section 163.3202, Florida Statutes. The Proposed Amendment would alter the performance of these responsibilities by overlaying them with voter negation at the ballot box, effectively taking the legislative function of land use planning out of the hands of local governments and ceding the performance of those functions to citizens, in direct contravention of the requirements of chapter 163, Florida Statutes. Put another way, local governments are not allowed by law to regulate land

use in a manner inconsistent with their comprehensive plans. The Proposed Amendment purports to usurp this legislatively required function by attempting to create a supervisory legislative branch – the initiative-referendum.

5. The Summary fails to inform the voters that the Proposed Amendment will remove the separation of power between the executive and legislative branches of city government required by Article 4 of the Charter.

The Proposed Amendment, if enacted, would either *sub silentio* amend out of effective existence *Article 4* of the Charter or create an irreconcilable conflict with *Article 4* which conflict would create confusion as to the proper exercise of powers and by whom. *Section 4.01*, Charter reads as follows:

> The powers of the consolidated government shall be divided among the legislative, executive, and judicial branches of the consolidated government. No power belonging to one branch of the government shall be exercised by either of the other branches, except as expressly provided in this charter.

Section 4.02, Charter, reads, in pertinent part, as follows:

> Where the consolidated government has any power or duty and the responsibility for the exercise of such power or the performance of such duty is not fixed by this charter or by general or special law, the power or duty shall be exercised or performed as follows: All powers and duties of the consolidated government which are legislative in nature shall be exercised and performed by the council. All powers and duties which are executive in nature shall be exercised or performed by the mayor or such other executive officer of the consolidated government as the mayor may designate, except as otherwise specifically provided herein.

The Proposed Amendment, if adopted, eviscerates each of these sections, without notifying the voters of the existence of those sections, much less the impact on those sections. Alternatively, the Proposed Amendment cannot coexist with those sections, and, at some point in the future, the conflict will need to be resolved. Legislative powers may not be exercised by the voters in any possible manner consistent with a Charter requirement that "all" legislative powers be exercised by the Council.

6. The Summary fails to inform the voters that the Proposed Amendment loosens the signature requirements for petition forms for repeal of an ordinance.

Current law requires that signatures on a petition each be on a separate petition and contain an affidavit executed by the circulator of the petition stating that she or he is the person who circulated the signed petition, that the signature was done in the circulator's presence, and that circulator believes the signature to be genuine. Section 18.05(d)(3), Charter. These requirements assist in assuring the signatures are authentic and verifiable. The Proposed Amendment, however, relaxes these requirements and dispense with the requirement of an

affidavit, or even an acknowledgment, by the circulator that he or she witnessed the signature. Only paid circulators would still be subject to the requirement that efforts be made to collect verifiable signatures. In other words, the signatures on a repeal petition need not be collected with care.

(b) Conclusion of Argument regarding Section 101.161, Florida Statutes

In conclusion, the ballot Title and Summary violate *Section 101.161*, Florida Statutes, due to their failure to inform the voters of this substantial modification of the structure of the City's government. The Proposed Amendment effectively creates a new, supreme, fourth branch of government -- the citizenry -- with authority to exercise the powers and perform the functions of the legislative and executive branches of the Consolidated Government. The impact of the proposal is as permeating as was the effect in *Advisory Op. to the Att'y Gen. - Save Our Everglades*, 636 So. 2d 1336 (Fla. 1994), and effects changes in the functions of City government that are more than sufficient to warrant invalidating the Proposed Amendment. *See, Race in Public Education, Tax Limitation, supra.*

As stated, the Proposed Amendment will involve significant undisclosed collateral effects on the Charter. If disclosed, these collateral effects might very well affect the electorate's decision about whether to support the Proposed Amendment. The existence of undisclosed collateral effects from the Proposed Amendment is just another reason that the Proposed Amendment should not be on the ballot. *See, e.g., Race in Public Education*, 778 So. 2d at 900; *Advisory Op. to the Att'y Gen. -- Restricts Laws Related to Discrimination*, 632 So. 2d 1018, 1024 (Fla. 1994) (Kogan, J., concurring).

B. GENERAL COUNSEL DUTY.

The General Counsel has the duty to review any petition for referendum submitted to the Supervisor of Elections that meets the necessary thresholds for review. *Section 18.05(f)(1),* Charter, explicitly sets forth this duty, stating that after the Petitioners' Committee submits "ten (10%) percent of the qualified voter signatures required . . ., the supervisor of elections shall submit the proposed petition form to the City's Office of General Counsel for a determination of the *legal sufficiency of its form and substance*." (Emphasis added). This section directs the General Counsel to review a petition not merely as to form, but as to substance.

The General Counsel has issued at least two opinions directing the Supervisor to keep a question off the ballot. *General Counsel Opinion 69-169* and *Evans v. Bell*, 651 So. 2d 162, 165 (Fla. 1st DCA1995) in which the First District issued an order affirming a General Counsel directive to prohibit an initiative ballot from being placed before the voters because it did not comply with *Section 101.161(1),* Florida Statutes. In General Counsel *Opinion 95-1*, the General Counsel, pursuant to the current *Section 18.05*, Charter, reviewed the question of whether the ballot question contained "an irregularity" which should keep it from being placed before the voters. Past history, then, indicates that the General Counsel has exercised the Charter duty to review the validity of petitions and on at least two occasions has found the petition invalid.

Florida Courts regularly review ballots for consistency with Section 101.161, Florida Statutes. Indeed, in *Evans*, the First District reviewed the ballot for consistency with the title and summary requirements of state law. The City Charter, however, demands more in a review by the General Counsel, requiring not only a review of the ballot, but also a review of the substance of a proposal. In *Opinion 69-169*, the General Counsel first noted the responsibility that *Section 23.06*, the predecessor to *Section 18.05*, placed upon the General Counsel:

> It should be noted that Section 23.06, Charter, twice uses the word "proper" as a qualifying adjective of the proposal of the amendment, i.e.: "When an amendment to this charter has been properly proposed . . . that such referendum shall not be held in any election less than thirty days after the proper proposal of the amendment". Thus the Charter contemplates a determination not only of the sufficiency of the required types of signatures but also the legal propriety of the proposed amendment itself as shown on the face thereof.

Opinion 69-169. The General Counsel then concluded:

> In conclusion it is the opinion of this Office that the petitions [under review] on their face are legally insufficient and the proposed "amendments" are not contemplated or permitted as a matter of law by the amendatory process established in Section 23.05, Charter.
>
> The Supervisor of Elections should disregard and give no force and effect to said petitions because of their legal insufficiency. The Supervisor of Elections is without lawful authority to cause a public referendum to be held with respect to these petitions.

Id. *See, also, Wyatt v. Clark,* 299 Pac. 2d 799 (Ok. 1956) ("The municipal clerk may declare as insufficient an initiative or referendum petition which shows on its face that it covers a subject not reserved to the people under the initiative and referendum provisions of the constitution."). The General Counsel, in 1992, directed the Supervisor not to place on the ballot an initiative "constitutionally invalid on its face." *Holzendorf v. Bell*, 606 So. 2d 645, 646 (Fla. 1st DCA 1992). The First District upheld the General Counsel's action. *Id.*

The Charter requirement to review and determine legal sufficiency of an initiative before the Supervisor places the question on the ballot supports and conforms to other responsibilities and duties the Charter places upon the General Counsel. Should an initiative-referendum be enacted, the General Counsel would then have the legal duty and responsibility to review enacted changes to the Charter, if requested. In *General Counsel Opinion 91-0*, the General Counsel exercised that Charter duty and power, declaring as unenforceable a Charter amendment adopted by initiative-referendum. In other words, if the General Counsel did not review the substance of the Proposed Charter Amendment prior to a vote, the General Counsel would later have the obligation to review its substance after the vote. Should a proposed initiative-referendum seek to enact an invalid or unlawful Charter amendment, reviewing such a proposed initiative-referendum before a vote saves the City the cost of holding a referendum on an invalid proposal

and prevents the difficulties created by declaring such an amendment invalid after the actual adoption.

Section 7.02, Charter explains the General Counsel's authority to direct the Supervisor not to place an invalid initiative on the ballot, which reads in part as follows:

> Any legal opinion rendered by the general counsel shall constitute the final authority for the resolution or interpretation of any legal issue relative to the entire consolidated government and shall be considered valid and binding in its application unless and until it is overruled or modified by a court of competent jurisdiction or an opinion of the Attorney General of the State of Florida dealing with a matter of solely state law.

See also General Counsel Opinion 69-169 directing the Supervisor not to place an unlawful referendum on the ballot. Pursuant to *Section 7.02*, Charter, the General Counsel's opinion binds the Supervisor, as well, of course, as the Mayor and the City Council, each of whom, in any particular instance, may wish a proposal to be on or not on the ballot. As explained by the General Counsel in an opinion that resolved a legal question in then-pending litigation in which the Mayor and the City Council each wanted the General Counsel to take a legal position opposite to the other, once the General Counsel had taken a legal position, the Office would take the position for any and all the Consolidated Government in any and all litigation (i.e., it would be binding on the entire Consolidated Government). *General Counsel Opinion 97-1*. The General Counsel added that if either one of the clients engaged counsel to attack the opinion, it would be an unlawful expenditure of City funds.

In sum, if the General Counsel determines that a petition is invalid, that position is binding on all clients of the Consolidated Government, including the Supervisor of Elections in compiling the ballot.[3]

V. Conclusion

For the reasons set forth herein, the proposed petition is legally defective and fatally misleading, and the Proposed Amendment cannot lawfully be placed on the Ballot.

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[3] Any action taken by any officer of the Consolidated Government in opposition to that opinion would leave the acting officer subject to a claim of acting unlawfully or unlawfully spending City moneys. *See, Shulmister v. City of Pompano Beach*, 798 So.2d 799 (Fla. 4th DCA 2001), wherein a "supervisor of elections refused to place [a charter] amendment on the ballot," "[b]ecause the ballot summary did not comply with section 101.161(1)." *City of Riviera Beach v. Riviera Beach Citizens Task Force*, 87 So. 3d 18, 23 (Fla. 4th DCA 2012).