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CITY COUNTY AND LOCAL GOVERNMENT ATTORNEY

January 11, 2022

Via email only

Marshall Labadie, Town Manager
Town of Highland Beach
3614 South Ocean Blvd.
Highland Beach, FL 33487

Re: March 2022 Charter Referendum

Dear Marshall:

I had advised the Mayor and Commission, at the meeting of January 4, 2022, that the information which the Town was distributing to its residents in order to explain each of the five (5) referendum questions is consistent with, and in accordance to these requirements set forth in Florida Law. The Town of Highland Beach underwent a month's long public Charter Review Committee process, which resulted in several recommendations that were made to the Town Commission. In response to those recommendations by the Charter Review Committee, the Town Commission publicly discussed these matters and other suggestions to determine the potential revisions to the Town Charter. Subsequently, the Town Commission voted, at a public meeting, to place five (5) questions on the ballot that relate to the amendments of the Charter. These questions are summarized as follow:

1. Resident Approval to Change Control of Water Plant, Fire, and Police Departments;
2. Funding Limit for any Single Project;
3. Payment of Lawful Debts (Signing Checks);
4. Terms of Office for Mayor; Vice Mayor and Commissioner; and
5. Setting Salaries for Mayor, Vice Mayor and Commissioner.

Equally important, the Town Commission has voted to expressly authorize the dissemination of explanatory information to the residents of the Town regarding these five (5) charter questions. In that regard, I have thoroughly reviewed the attached letters that have been prepared

for dissemination by the Mayor, Vice Mayor and each of the Commissioners, in conjunction with Section 106.113 of the Florida Statutes and other pertinent and relevant law relative to this matter.

Specifically, the relevant provision of Florida Statute 106.113 reads as follows:

(2) A local government or a person acting on behalf of local government may not expend or authorize the expenditure of, and a person or group may not accept, public funds for a political advertisement or electioneering communication concerning an issue, referendum, or amendment, including any state question that is subject to a vote of the electors. This subsection does not apply to an electioneering communication from a local government or a person acting on behalf of a local government which is limited to factual information.

The Florida Division of Elections Opinion DE 10-07 confirms that the above law no longer applies to non-candidate "electioneering communications," but clarifies that the statute does apply to "political advertisements" for local governments. Further, the Florida Division of Elections, in Opinion 12-05, has determined that "local government expenditures for communications that do not satisfy the definition of "a political advertisement" are not prohibited by Section 106.113 Florida Statutes." In order to statutorily establish the definition of a political advertisement pursuant to Section 106.011 of the Florida statutes, the communication "must contain words which expressly advocate the approval or rejection of an issue based upon the "magic words" standard found in *Buckley v. Valeo*, 424 U.S. 1 (1976). Specifically, in *Buckley v. Valeo*, 424 U.S. 1.1976, the United States Supreme Court held that express advocacy may be regulated, and listed the words which establish express advocacy to be as follows: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject."

The Fourth District Court of Appeal in *Dinerstein v. Bucher*, 287 So. 3d 639 (Fla. Dist. Ct. App. 2020) recognized the "functional equivalent of express advocacy" test that was established by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324-25, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). In *Citizens United*, the Supreme Court announced that in applying the "functional-equivalent test," a "court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Citizens United*, 558 U.S. at 324-25, 130 S.Ct. 876.

As mentioned previously, the Florida Division of Elections, in Advisory Opinion DE 05-06 (September 21, 2005), has adopted the Buckley standard in conjunction with Chapter 106 of the Florida Statutes. Consistent with Section 106.011(15) of the Florida Statutes, to be prohibited "political advertisement" the communication must expressly advocate the election or defeat of a candidate or the approval or rejection of an issue. It is well established that local governments may participate in factual based public education activities, which does not expressly advocate for the approval or rejection of an issue.

In this matter, each of the letters provided fit the definition of factual based public education activities. As is clearly evident from a review of these subject letters, none of these communications contain any of the Buckley Court's definition of express advocacy or the Citizens United Court's "functional equivalent of express advocacy" standard. Therefore, none of these letters expressly advocate for the approval or rejection of any issues set forth or identified within the five (5) charter questions. In fact, each of the letters is a synopsis of the decision-making process of the Town Commission pertaining to each of these Charter Referendums.

Accordingly, none of the letters violate Section 106.113 of the Florida Statutes and they are in accordance with applicable Florida Law.

Sincerely,



Glen J. Torcivia
Town Attorney

Enclosures

c: Mayor and Commissioners
c: Lanelda Gaskins