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*FLORIDA BAR BOARD CERTIFIED
CITY COUNTY AND LOCAL GOVERNMENT ATTORNEY

July 27, 2023

Via email only

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

Re: Section 106.113, Florida Statutes – follow-up questions

Dear Marshall:

As you are aware, we drafted a legal opinion, dated January 31, 2023 (attached), regarding the Legislature's 2022 revisions to Section 106.113, Florida Statutes. These amendments further limited expenditures by local governments of public funds for communications sent to electors on referendums. Since then, we received additional questions on the interpretation of this statute from the Town Commission. Please see below for the questions posed and our recommendations on the same.

Question No. 1: Can the Town communicate upcoming referendum questions in the "Manager's Monthly" newsletter which is mailed out and emailed to our residents?

Short Answer: No. If there is a pending referendum, the Town is not permitted to expend public funds to send any communication to electors concerning the referendum which is "subject to a vote of the electors."

Full Answer: As mentioned in our prior opinion, there is no guidance on how a court will interpret the language and limits of the revised statute. However, it is likely that the Town is not prohibited by Section 106.113 from communicating with its electors to gather information on any issue that is *not* currently "subject to a vote of the electors." "Subject to a vote of the electors," may reasonably be interpreted as any issue currently (1) on an upcoming ballot; or (2) the subject of an adopted or pending ordinance seeking to place the referendum question on an upcoming ballot. Therefore, an adopted or pending referendum ordinance could be considered "subject to a vote of the electors" and, therefore, it is recommended that it not be included in any communication from the Town to an elector. Conversely, the Town may include issues that are not yet "subject to a vote of the electors" (e.g., issues with no pending or adopted referendum ordinance) in the Manager's Monthly newsletter.

Question No. 2: Can the Town communicate upcoming referendum questions on social media?

Short Answer: No. The Town cannot communicate upcoming referendum questions on social media.

Full Answer: Section 106.113, Florida Statutes, provides exceptions to the prohibition against the Town sending communications to its electors on referendum questions. The statute allows the Town to: (1) report on official actions of the local government's governing body in an accurate, fair, and impartial manner; (2) post factual information on a government website; (3) post factual information in printed materials; (4) host and provide information at a public forum; (5) provide factual information in response to an inquiry; and (6) provide information as otherwise authorized or required by law. The posting of information on a pending referendum question on the Town's social media is not included in the list of exceptions, and, as such, it is recommended that the Town not use social media for this purpose. The Town, however, may communicate issues (not the subject of a pending or adopted referendum ordinance) on social media because they are, arguably, not yet considered to be "subject to a vote of the electors."

Question No. 3: What is the timeframe in which we can communicate before the question is considered an official ballot question (i.e., "subject to a vote of the electors")?

Short Answer: The statute does not address any timeframe or define "subject to a vote of the electors."

Full Answer: As mentioned in the full answer to Question No. 1 above, it is our opinion that "subject to a vote of the electors," may reasonably be interpreted as any issue currently (1) on an upcoming ballot; or, (2) the subject of an adopted or pending ordinance seeking to place the referendum question on an upcoming ballot. However, neither the Florida courts, Attorney General's Office, or Division of Elections have provided any rulings or opinions on this issue. Until we have an official ruling or opinion, we recommend that the Town consider an issue to be "subject to a vote of the electors" when it is the subject of a pending referendum ordinance (i.e., an ordinance has been drafted and is scheduled for first reading on a Town Commission agenda).

Please let me know if you have any questions regarding the answers provided above, or if the Town wishes to request an opinion on any of these questions to the Florida Division of Elections for a more definitive answer.

Sincerely,

Glen J. Torcivia

Glen J. Torcivia
Town Attorney

Enclosure

c: Len Rubin, Esq.
Terisha Cuebas, MPA, Assistant Town Manager
Lanelda Gaskins, Town Clerk

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CITY COUNTY AND LOCAL GOVERNMENT ATTORNEY

January 31, 2023

Via email only

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

Re: Section 106.113, Florida Statutes

Dear Marshall:

As you are aware, the Legislature amended Section 106.113, Florida Statutes (see attached), to further limit expenditures by local governments of public funds for communications sent to electors on issues, referendums, etc. that are subject to a vote of such electors regardless of whether such communication is limited to factual information. The Town is exploring the option of hiring a company to conduct polls of the Town's electors regarding various issues affecting the Town which raises the issue of whether such polls are prohibited under Section 106.113.

To date, there is no guidance on how the state, or a court will interpret the limits of the revised statute. However, we believe that it is likely that the Town is not prohibited by Section 106.113 from communicating with its electors to gather information on any issue that is not currently "subject to a vote of the electors." "Subject to a vote of the electors," may reasonably be interpreted as any issue not currently (1) on an upcoming ballot; or, more conservatively, (2) the subject of an adopted or pending ordinance seeking to place the issue or referendum on an upcoming ballot.

Marshall Labadie, Town Manager
Town of Highland Beach
January 31, 2023
Page 2

Therefore, based on a reasonable interpretation of the statute's language, the Town may consider the polling of its electors on issues not currently "subject to a vote of the electors." Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Glen J. Torcivia", with a stylized flourish at the end.

Glen J. Torcivia
Town Attorney

Enclosure

c: Len Rubin

Select Year: 2022 ▼

The 2022 Florida Statutes (including Special Session A)

[Title IX](#)

ELECTORS AND ELECTIONS

[Chapter 106](#)

CAMPAIGN FINANCING

[View Entire Chapter](#)

106.113 Expenditures by local governments.—

(1) As used in this section, the term:

(a) “Local government” means:

1. A county, municipality, school district, or other political subdivision in this state; and
2. Any department, agency, board, bureau, district, commission, authority, or similar body of a county, municipality, school district, or other political subdivision of this state.

(b) “Public funds” means all moneys under the jurisdiction or control of the local government.

(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 any other communication sent to electors concerning an issue, referendum, or amendment, including any state question, that is subject to a vote of the electors. This subsection applies to a communication initiated by a local government or a person acting on behalf of a local government, irrespective of whether the communication is limited to factual information or advocates for the passage or defeat of an issue, referendum, or amendment. This subsection does not preclude a local government or a person acting on behalf of a local government from reporting on official actions of the local government’s governing body in an accurate, fair, and impartial manner; posting factual information on a government website or in printed materials; hosting and providing information at a public forum; providing factual information in response to an inquiry; or providing information as otherwise authorized or required by law.

(3) With the exception of the prohibitions specified in subsection (2), this section does not preclude an elected official of the local government from expressing an opinion on any issue at any time.

History.—s. 1, ch. 2009-125; s. 2, ch. 2022-56.