IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

ELECTED COUNTY MAYOR
POLITICAL COMMITTEE, INC,

Appellant/Cross-Appellee,

Case No.: 2D08-3882
L.T. No.: 08-015176

v.

JAMES E. SHIRK,

Appellee/Cross-Appellant,

and

BUDDY JOHNSON, Supervisor of
Elections, Hillsborough County,
Florida, in his official capacity,

Appellee/Cross-Appellee.
____/

APPELLEE/CROSS-APPELLANT'S ANSWER AND INITIAL BRIEF

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STATEMENT OF THE CASE

On July 7, 2008, James Shirk, the Appellee/Cross-Appellant ("Appellee Shirk"), filed a complaint for declaratory and injunctive relief, a motion for temporary injunction, and a memorandum of law in support of the motion for temporary injunction in the circuit court for Hillsborough County. (App. Tabs 3-5 5-36).[1] In the pleadings, Shirk sought to declare a proposed amendment to the Hillsborough County Charter invalid and to enjoin Hillsborough County Supervisor of Elections, Buddy Johnson ("Appellee Johnson") from placing the charter amendment on the November 4, 2008, general election ballot on the basis that the petition form for the charter amendment utilized language limiting it solely to the general election in November 2006 and that the charter amendment's ballot title and summary were misleading. (App. Tab 3-5 5-36). The charter amendment is referred to by the parties as the "Elected County Mayor Amendment."

On July 24, 2008, Elected County Mayor Political Committee, Inc., which was formerly known as Taking Back Hillsborough County Political Committee, Inc., moved to intervene in the lawsuit. (App. Tab 7 49-61). Elected County Mayor Poltical Committee, Inc. ("Sponsor") was the sponsor of the challenged

[1] Due to the expedited nature of this appeal, the record is contained in appendices to the parties' briefs. References to Appellee Shirk's Appendix will be made by the designation "App." followed by "Tab #" and page number.

charter amendment. (App. Tab 7 49). The trial court granted the motion on August 1, 2008. (App. Tab 9 74).

A hearing on Appellee Shirk's Motion for Temporary injunction was held on August 1, 2008. (App. Tab 10 75-125). At the hearing, the parties stipulated that there were no material facts in dispute and that the hearing could proceed as a hearing for final declaratory relief. (App. Tab 10 79). At the conclusion of the hearing, the trial court issued an oral ruling on two claims raised by Appellee Shirk, but reserved ruling on a third claim. (App. Tab 10 123). Later that afternoon, the trial court filed a written order finding as follows:

> 1. The language on the Charter Amendment Petition Form stating ". . . .the ballot in the next general election" does not constitute a limitation that would prevent the Charter Amendment from the 2008 ballot.
> The language in the Charter Amendment Summary is not misleading.
>
> 2. The language in the Charter Amendment Summary stating ". . .election of the County Mayor shall be held in even number years beginning with the general election held in the year 2008", is a self-imposed limiting condition that cannot occur in 2008.
> It is therefore,
>
> ORDERED AND ADJUDGED that Plaintiff's Complaint for Declaratory Relief is granted and the County Mayor Charter Amendment is invalid.

(App. Tab 1 1-2).

The Sponsor filed a notice of appeal on August 4, 2008, and sought expedited treatment of the appeal. The Sponsor also filed a motion for stay pending review in the trial court. That motion was denied by the trial court on August 5, 2008. The Sponsor's initial brief was filed on August 8, 2008.

STATEMENT OF THE FACTS

The Hillsborough County Charter authorizes the citizens of the County to amend the Charter through an initiative petition process. Section 8.03 of the Hillsborough County Charter states:

> The power to propose amendments to this Charter by initiative is vested in the people:
>
> (1) The power may be invoked by filing with the supervisor of elections a petition containing a copy of the proposed Charter amendment. Each petition must be circulated in each numbered board district and must be signed by a number of electors in each of one-half of districts 1 through 4 and of the county as a whole equal to eight (8) per cent of the votes cast in each of such districts and the county as a whole in the last preceding election in which a president or presidential electors were chosen. The address of each signer, and date of each signature, must appear on the petition. Each petition shall embrace but one subject and matter properly connected therewith. A date certain must be designated to and certified by the supervisor of elections as the beginning date of any petition drive, and said drive shall terminate six (6) months after the date. In the event sufficient signatures are not acquired during that six-month period, the petition drive shall be rendered null and void and none of the signatures may be carried over onto another identical or similar petition.
>
> (2) The petition shall be filed with the supervisor of elections who shall, within a period of not more than thirty (30) days, determine whether the petition contains the required valid signatures. The

> supervisor shall be paid the sum specified by general law by the persons or committee seeking verification.
>
> (a) If it is determined that the petition does not contain the required signatures, the supervisor shall so certify to the board of county commissioners and the petition drive shall be at an end. No additional names may be added to the petition, and the petition shall not be used in any other proceeding.
>
> (b) If it is determined that the petition has the required signatures, the supervisor shall so certify to the board of county commissioners and place the amendment on the ballot.

The Sponsor invoked this petition process in April 2006, by filing a petition with Appellee Johnson in accordance with Section 8.03(1). (App. Tab 2 3-4). The petition was designated Charter Amendment Petition Form 06-5 and was approved on April 11, 2006. (App. Tab 2 3-4). The petition sought to amend Article V of the Hillsborough County Charter and included the following ballot title and ballot summary:

> BALLOT TITLE: REPLACING THE CURRENT APPOINTED ADMINISTRATOR WITH A NONPARTISAN ELECTED COUNTY MAYOR.
>
> BALLOT SUMMARY: Shall the Hillsborough County Charter be revised to replace the office of an appointed County Administrator for a nonpartisan elected County Mayor; limited to two consecutive terms; specifying executive functions, powers and duties; specifying that the County Mayor will not be a member of the Board.

(App. Tab 2 3-4). The petition also included the following statement: "I am a registered voter of Florida and hereby petition the Supervisor of Elections

Hillsborough County to place the following amendment to the Hillsborough County Charter on the ballot in the next general election." (App. Tab 2 3-4).

In or around April 2006, the Sponsor began collecting signatures on the petition. (App. Tab 3 7). However, by August 2006, the deadline set by Appellee Johnson for placement on the 2006 general election ballot, it had failed to collect the required number of signatures. (App. Tab 5 23). Although the Sponsor challenged the deadline imposed by Appellee Johnson for placement on the November 2006 ballot in Taking Back Hillsborough County Political Committee, Inc. v. Johnson, Case No. 06-CA-005933 (Fla. 13th Jud. Cir. 2006), the challenge was unsuccessful. (App. Tab 6 39). The Sponsor continued to collect signatures, and on October 31, 2006, Appellee Johnson certified the signatures for the petition and directed that the charter amendment be placed on the general election ballot in November 2008. (App. Tab 3 16-18).

SUMMARY OF THE ARGUMENT

The trial court correctly applied the law and removed the Elected County Mayor Amendment from the 2008 general election ballot. The amendment contained a self-imposed deadline requiring the election of the county mayor in November 2008, an event that, as found by the trial court, could not occur. Since the amendment is self-executing and the deadline is a key component of the amendment, this problem cannot be fixed and the confusion to the voters who are

not informed of the impossibility of implementation of the amendment invalidates the amendment under section 101.161, Florida Statutes.

Any defect in the wording of the Final Judgment does not warrant reversal since it is clear that the trial court properly invalidated the amendment under section 101.161, Florida Statutes. A trial court's decision must be affirmed if there is any basis which would support the judgment.

The trial court erroneously found that the petition form did not limit the amendment to the 2006 general election ballot. The use of self-limiting language in the petition restricted it to the 2006 general election ballot. The electors who signed the petition form were entitled to rely on the language contained therein and neither the charter nor state law could rewrite the petition form to allow for the amendment's placement on the 2008 ballot.

The ballot summary of the amendment was misleading, and the trial court's finding to the contrary was erroneous. The ballot summary and title failed to inform the voter that the amendment did not merely replace an appointed official with an elected official, but also diluted the power of the Board of County Commissioners by expanding the powers of the newly elected official. The transfer of power was a material component of the amendment, and the ballot title and summary's failure to inform the voters of this transfer of power was misleading and a violation of section 101.161, Florida Statutes.

ARGUMENT

I. THE TRIAL COURT PROPERLY REMOVED THE CHARTER AMENDMENT FROM THE BALLOT BECAUSE IT CONTAINED A SELF-IMPOSED DEADLINE THAT COULD NOT OCCUR.

A. Standard of Review

Whether the trial court properly removed the Elected County Mayor Amendment from the ballot is a question of law. Accordingly, the standard of review is de novo. See Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000); Sancho v. Smith, 830 So. 2d 856 (Fla. 1st DCA 2002).

B. The Elected County Mayor Amendment Is Clearly And Conclusively Defective Because It Contains a Self-Imposed Limiting Condition That Cannot Be Met.

In determining whether a public measure is clearly and conclusively defective, a Court must determine whether the ballot summary and title accurately represent the proposed amendment to give fair notice to the voters, i.e. "to ensure that each voter will cast a ballot based on the full truth." Sancho , 830 So. 2d at 861, quoting, Armstrong v. Harris, 773 So. 2d 7, 21 (Fla. 2000). The Legislature codified these requirements in section 101.161, Florida Statutes. As the Florida Supreme Court explained in Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982), "[t]he purpose of section 101.161 is to assure the electorate is advised of the true meaning, and ramifications, of an amendment." Thus, section 101.161 ensures that

an amendment does not "fly under false colors," but instead ensures "truth in packaging." Armstrong, 773 So. 2d at 13.

Courts when determining whether a ballot title and summary meet the accuracy requirement closely examine the wording of the title and summary and the wording of the amendment including any deadlines contained therein. See Advisory Opinion to the Attorney General Re Florida Locally Approved Gaming, 656 So. 2d 1259 (Fla. 1995); Advisory Opinion to the Attorney General Re Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose, 953 So. 2d 471 (Fla. 2007). The Elected County Mayor Amendment contains a specific deadline in section 5.03 which states that "[t]he non-partisan primary and general election of the County Mayor shall be held in even number years, **beginning with the general election held in the year 2008**." (App. Tab 2 4) (emphasis added). The trial court properly found that this deadline "is a self-imposed limiting condition that cannot occur in 2008." The impossibility of the implementation of the amendment is a clear and conclusive defect that results in a misleading ballot title and summary and the invalidation of the amendment.

The Sponsor contends that the phrase "beginning with the general election held in the year 2008" is "merely a means of starting the clock running to conduct elections" and that the intent of the phrase "is to require that the non-partisan

primary and general elections for County Mayor be held in even number years after the adoption of the Amendment by the voters." (IB 13). The Sponsor's contentions should be rejected by this Court.

The language in section 5.03 of the charter amendment is clear and unambiguous. It sets the date for the change in the county's governance for the general election in 2008. At that time, the position of county administrator ceases to exist, and an elected, strong county mayor assumes office. The Sponsor's attempt to supplant the plain and obvious meaning of this provision is contrary to the long established principle that "[w]here the language of a statute [or charter] is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." West Palm Beach Golf Comm'n v. Callaway, 604 So. 2d 880, 881 (Fla. 4th DCA 1992); see also Holly v. Auld, 450 So. 2d 217 (Fla. 1984).

The Sponsor's interpretation of section 5.03 goes beyond the plain and obvious language of the amendment and attempts to change the amendment in order to save it from the impossible to meet deadline contained therein. The fact that the Sponsor is attempting to change the language impliedly through the judicial process rather than expressly as was done in Citizens for a Fair Tampa v. Iorio, 3 Fla. L. Weekly Supp. 52a (13th Jud. Cir. March 2, 1995), aff'd, Iorio v.

Citizens for a Fair Tampa, 661 So. 2d 32 (Fla. 2d DCA 1995) does not legitimize the attempted change. As the circuit court in Citizens for a Fair Tampa held "there nonetheless appears to be no legal authority to support the proposition that one individual, acting either as or for the committee chairman, is empowered to permit changes to the wording of an initiative measure after it has been circulated and signed by the requisite number of electors." Id.

The Sponsor chose to impose a deadline in the amendment instead of utilizing more generic language such as it now proposes. It cannot now assert that the trial court erred by interpreting the amendment exactly as it was worded by the Sponsor.

The Sponsor further argues that even if the amendment is interpreted to contain a self-imposed deadline that the trial court erred in invalidating the amendment because the deadline does not affect the substance of the amendment. In support of its argument, the Sponsor cites to Advisory Opinion to the Attorney General Re Florida Locally Approved Gaming, 656 So. 2d 1259 (Fla. 1995). The Sponsor's reliance on Florida Locally Approved Gaming is misplaced.

In Florida Locally Approved Gaming, the sponsor proposed a constitutional amendment to authorize gaming at casinos. Although the sponsor sought to place the amendment on the November 1994 ballot, it failed to collect sufficient signatures and therefore, sought to place the amendment on the November 1996

ballot. One of the provisions within the amendment stated "[b]y general law enacted no later than July 1, 1995, the legislature shall implement this section with legislation to license, regulate and tax gaming." 656 So. 2d at 1262. The Governor and the Cabinet filed a brief challenging the ballot title and summary as misleading because the amendment would not be placed on the ballot until the deadline for legislative action had passed. Id. at 1263. The Florida Supreme Court disagreed.

In upholding the validity of the amendment, the Court noted that the amendment "clearly is not intended to be self-executing." Id. The Court further explained:

> We find that, in the instant case, this deadline for legislative action does not void the proposal because we conclude that it does not affect the substantive provisions of the proposed amendment **requiring the Legislature to implement the proposal.** The intent is clear that the Legislature must act within a reasonable time.

Id. at 1264 (emphasis added). Thus, because the provision was not self-executing but depended on legislative enactment and the legislative enactment was the substantive provision, the Court determined that, in that limited circumstance, the deadline contained within the amendment did not invalidate the amendment. Although the Court upheld the amendment, it warned sponsors about the "unnecessary use of date-specific deadlines when a more general deadline would

suffice," and stated "[p]roponents of amendments would be well advised to avoid this type of problem in the future." 656 So. 2d at 1264.

Unlike in Florida Locally Approved Gaming, the Elected County Mayor Amendment is self-executing. No legislative enactment is required to implement the provision. Additionally, the deadline is a key component of the amendment since it sets the date for the change from the appointed county administrator to the elected strong county mayor, directly affecting the employment of the county administrator. See, e.g., Davis v. City of Tallahassee, 11 Fla. L. Weekly Supp. 231a (Fla. 2nd Jud. Cir. January 28, 2004)(invalidating the City's attempt to change the effective date of a proposed initiative and stating "the effective date of the amendment here *is* a substantive matter because it directly affects two incumbent city commissioners' terms of office"). By the self-executing terms of the provision, the county administrator's position ceases to exist in November 2008. However, because of the amendment's placement on the November 2008 ballot, if the amendment is approved by the voters, there will be no elected county mayor to replace the abolished county administrator. Hence, the key component of the amendment is impossible. This impossibility, of which the voters are not informed in the ballot summary, is a clear and conclusive defect in the amendment. Accordingly, the trial court properly removed the amendment from the ballot. See Advisory Opinion to the Attorney General Re Extending Existing Sales Tax to

Non-Taxed Services Where Exclusion Fails to Serve Public Purpose, 953 So. 2d 471 (Fla. 2007)(invalidating a self-executing amendment that included a date specific deadline).[2]

In Extending Existing Sales Tax, the Florida Supreme Court invalidated an amendment that used a date specific deadline like the one it warned sponsors not to use in Locally Approved Gaming. In so doing, the Supreme Court noted that when examining whether a ballot summary is misleading, a court "must also review the summary through the lens of the critical dates the amendment contemplates to determine whether the summary may be misleading or confusing." 953 So. 2d at 482. The constitutional amendment at issue in that case required that the Legislature review sales tax exemptions prior to July 1, 2008, and after the completion of such review, make all services not exempted subject to sales tax on January 1, 2009. Because the proposed amendment was scheduled for the November 2008 election, the review contemplated by it could not be completed. Moreover, because the proposed amendment was self-executing, the Legislature was without authority to extend the dates contained therein. Consequently, the Supreme Court concluded that "the ballot summary cannot be approved because of

[2] The Sponsor's attempt to distinguish Extending Existing Sales Tax by citing to Gray v. Winthrop, 156 So. 270 (Fla. 1934) and Pope v. Gray, 104 So. 2d 841 (Fla. 1958) is unavailing. Neither of these cases is applicable to this case. First, they do not involve section 101.161, Florida Statutes. Moreover, neither case involved a self-imposed time deadline within the amendment.

the confusion it will present to the voter as to the effectiveness and operation of the proposal in view of the conflicting deadlines." Id. at 485.

As this case is analogous to Extending Existing Sales Tax, the trial court correctly invalidated the Elected County Mayor Amendment, and its decision should be affirmed. The Sponsor chose a date specific deadline and may not now change to a more general timeline.

C. The Ballot Title and Summary Are Misleading.

Appellee Shirk will address the misleading nature of the ballot title and summary in greater detail in the cross-appeal portion of this brief (see Issue III), but will briefly address some of the issues raised by the Sponsor in its initial brief in subsection D. The Sponsor contends that the trial court properly found that the ballot title and summary were not misleading, and therefore, the court could not go beyond section 101.161, Florida Statutes to invalidate the Elected County Mayor Amendment. Contrary to the Sponsor's contention, the trial court did not exceed its authority. Instead, the trial court properly applied section 101.161 and invalidated the amendment for a clear and conclusive defect.

In the Final Judgment, the trial court found that the ballot summary was not misleading and then, held the "language in the Charter Amendment Summary stating '. . . election of the County Mayor shall be held in even number years beginning with the general election held in the year 2008', is a self-imposed

limiting condition that cannot occur in 2008." Although these two findings may seem contradictory, it is clear that the trial court was adopting the argument of Appellee Shirk that the ballot summary was misleading under section 101.161, Florida Statutes because it failed to disclose to the voters that a key component of the amendment could not occur because of a self-imposed limiting condition in the amendment. As stated previously, this impossibility, of which the voters are not informed in the ballot summary, is a clear and conclusive defect in the amendment. Accordingly, the trial court properly removed the amendment from the ballot. See Advisory Opinion to the Attorney General Re Extending Existing Sales Tax to Non-Taxed Services Where Exclusion Fails to Serve Public Purpose, 953 So. 2d 471 (Fla. 2007)(invalidating a self-executing amendment that included a date specific deadline).

The trial court's finding that the ballot summary was not misleading was a rejection of the remaining issues raised by Appellee Shirk. As demonstrated under Issue III of this brief, this finding of the trial court was erroneous.

Moreover, in reviewing the trial court's decision, an appellate court will uphold that decision "if there is any basis which would support the judgment in the record." Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla.

1999).[3] As the Florida Supreme Court explained in Applegate v. Barnett Bank, 377 So. 2d 1150, 1152 (Fla. 1979):

> The written final judgment by the trial court could well be wrong in its reasoning, but the decision of the trial court is primarily what matters, not the reasoning used. Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it.

Since, as demonstrated above, the amendment violated section 101.161 for the reasons cited by the trial court, any defect in the wording of the order is not a basis for reversal.

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[3] Appellee Shirk could present arguments supported by the record, even if they were not raised in the trial court. See Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999). Hence, contrary to the Sponsor's claim in footnote 11, a single subject violation could be considered by this Court. There is even support for such an argument in the record in that the amendment does not merely substitute an appointed official for an elected official, but also impacts the powers of the Board of County Commissioners as explained in Issue III. See Advisory Opinion to Attorney General Re Save Our Everglades, 636 So. 2d 1336, 1341 (Fla. 1994); Advisory Opinion to Attorney General Re Independent NonPartisan Comm'n to Apportion Legislative and Congressional Dists., 926 So. 2d 1218 (Fla. 2006).

CROSS APPEAL[4]

II. THE TRIAL COURT ERRED IN FINDING THAT THE ELECTED COUNTY MAYOR AMENDMENT PETITION FORM WAS NOT LIMITED TO PLACEMENT ON THE NOVEMBER 2006 GENERAL ELECTION BALLOT

A. Standard of Review

In this instance, because no discretion was exercised by Appellee Johnson, the determination of whether the charter amendment petition form limited its placement to the November 2006 general election is a question of law. Accordingly, the standard of review is de novo. See Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000); Sancho v. Smith, 830 So. 2d 856 (Fla. 1st DCA 2002).

B. The Elected County Mayor Petition Form Used Self-Limiting Language Requiring Its Placement Solely On The November 2006 Ballot.

The petition form signed by the electors of Hillsborough County for the Elected County Mayor Amendment began with the statement "I am a registered voter of Florida and hereby petition the Supervisor of Elections Hillsborough County to place the following amendment to the Hillsborough County Charter on the ballot **in the next general election.**" (App. Tab 2 3)(emphasis added). The

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[4] In an abundance of caution, Appellee Shirk filed a notice of cross-appeal to challenge the trial court's rejection of certain issues raised by Appellee Shirk in his complaint and at the hearing. Since the trial court granted Appellee Shirk full relief, a cross-appeal technically may not be necessary. Regardless of the procedural posture of these issues, they provide alternative reasons for affirming the ultimate decision reached by the trial court.

petition form also included the ballot title and summary and the full text of the proposed amendment, including the provision that the elected county mayor would be elected in even numbered years, "beginning with the general election in the year 2008." (App. Tab 2 3-4).

The Sponsor began collecting signatures on this petition in April 2006. All signatures for the petition were collected in 2006, and Appellee Johnson certified the signatures in 2006, prior to the November 2006 general election. (App. Tab 3 16). Thus, every person who signed the petition signed with the knowledge that the amendment would be on the next general election, i.e. November 2006, and that the mayor would be elected in 2008.

However, because sufficient signatures were not collected by the August 2006 deadline set by Appellee Johnson for placement on the 2006 general election ballot, the amendment was placed on the November 2008 ballot. The Sponsor challenged the August 2006 deadline in an attempt to place the amendment on the November 2006 general ballot, but the circuit court upheld the deadline in Taking Back Hillsborough County Political Committee, Inc v. Johnson, Case No. 06-CA-005933 (Fla. 13th Jud. Cir. 2006). Instead of beginning the petition drive anew because of the self-limiting language contained in the petition, the Sponsor continued to collect signatures on the same petition form and did not dispute the amendment's placement on the 2008 ballot. However, the placement of the

amendment on the November 2008 ballot was erroneous since by the terms of the petition form, a form drafted by the Sponsor, the amendment was valid only for the 2006 general election.

A similar situation arose in Eight Is Enough in Pinellas v. Ruggles, 678 So. 2d 898 (Fla. 2d DCA 1996). In Ruggles, a political committee entitled Eight is Enough in Pinellas circulated, in the summer of 1994, a petition to amend the Pinellas County Charter to include term limits for several elective offices. Id. at 899. The petition that was circulated contained the following statement: "I am a registered voter of Pinellas County, Florida, and hereby petition the Pinellas County Board of County Commissioners to place the following amendment to the Pinellas County Home Rule Charter on the ballot of the next scheduled countywide election." Id. at 900. The next scheduled countywide election was in November 1994. Eight is Enough failed to collect sufficient signatures to be placed on that ballot, but continued to submit signatures to the Supervisor of Elections who accepted the signatures.

In June 1995, concerned with the validity of the petition, the Supervisor requested an opinion from the County Attorney. The County Attorney found that the petitions dated prior to the November 1994 election were no longer valid. In so holding, the County Attorney "reasoned that the petitions were self-limiting to that election and were no longer valid . . . [and] the Supervisor could not merely

assume that the signatories would want the initiative on any subsequent ballot when they had expressly asked that it be presented at a particular election." Id. After receiving the County Attorney's opinion, the Supervisor invalidated the petitions signed prior to November 1994. Eight is Enough filed a declaratory judgment action to challenge the Supervisor's actions. The circuit court upheld the Supervisor's actions, and Eight is Enough appealed to this Court. This Court upheld the circuit court's decision and found that the Supervisor's actions were not unreasonable. Id. at 901.

The same defect present in Ruggles is present in this case. The Elected County Mayor Amendment petition form stated that the charter amendment would be placed on the **next** general election ballot, i.e. the November 2006 ballot, and all those who signed the petition did so prior to November 2006. Additionally, the text of the amendment which was included on the petition form set the election for the county mayor for November 2008. Thus, by signing the petition, the electors expressly indicated their desire to place the charter amendment on the November 2006 general election ballot and not on some future ballot. As the Court in Ruggles explained, the fact that some electors may not object to the charter amendment's placement on a subsequent ballot does not save the amendment because the petition failed to include such a choice.

Accordingly, the utilization of self-limiting language that led electors, like Appellee Shirk, to believe that the charter amendment would only be placed on the November 2006 precludes the Elected County Mayor Amendment from being placed on the November 2008 ballot. It is invalid and is not entitled to ballot placement. Thus, the trial court's holding that "[t]he language on the Charter Amendment Petition Form stating '. . . .the ballot in the next general election' does not constitute a limitation that would prevent the Charter Amendment from the 2008 ballot" should be reversed.

The Sponsor and Appellee Johnson argued below that Ruggles is distinguishable because the Hillsborough County Charter provides six months for a petition drive and adopts the Florida Election Code's time period for valid signatures (four years). See §§8.03 & 8.04, Hillsborough County Charter; §100.371(3), Fla. Stat. (2007). At the hearing, Appellee Johnson argued that he followed the law and "did not exercise discretion." [5] (App. Tab 10 96). He did not consider the actual language used in the petition. (App. Tab 10 98).

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[5] The charter provides for a six month petition drive after which signatures are null and void if a sufficient number of signatures are not collected. See §8.03, Hillsborough County Charter. The Supervisor then has 30 days to validate the signatures. Once validated, the amendment is placed on the next general election ballot. See §8.04, Hillsborough County Charter. As stated previously, in this case, all signatures were collected and validated prior to the November 2006 general election, but not prior to the printing of the ballots.

While differences exist between the Hillsborough County Charter and the charter at issue in Ruggles, this Court's analysis of the use of self-limiting language still applies. Regardless of the time periods provided by the charter or state law, the Sponsor chose to limit the amendment to a particular election. Neither the charter nor state law required the Sponsor to use this time specific language. Indeed, the petition form (DS-DE 19) available on the Division of Elections website, www.election.dos.state.fl.us, does not use limiting language such as "next." The Sponsor chose to waive placing the amendment on any other ballot in favor of placing the amendment on the 2006 ballot and having an elected mayor by 2008 (if the amendment passed). The electors who signed the petition should not pay for the Sponsor's failed gamble.

Although no other appellate court has addressed this issue, circuit courts have applied Ruggles in similar situations. In Bates v. Raddatz, 9 Fla. L. Weekly Supp. 171a (Fla. 16th Jud. Cir. January 11, 2002), the amendments at issue stated that they were to be "'submitted to the electors, as a separate ballot question, or a special referendum to be held within 30 days of certification of this petition.'" This self-imposed limitation was logistically and statutorily impossible. While the sponsor argued that the self-limiting language was not mandatory but a suggestion, the circuit court, citing to Ruggles, upheld the Village's decision not to place the amendments on the ballot. In so doing, the circuit court stated:

> When a voter signs a petition to amend the charter, the voters' signature on the petition represents that voter's approval of the form and content of the petition. It does not authorize a subsequent change in the purpose or intent of the petition. The voters who signed the three petitions to amend the chapter specifically demanded that a referendum be presented to the electorate within 30 days of the certification by the Village.

Id.; see also Rhodus v. Islamorada, 6 Fla. L. Weekly 277a (Fla. 16th Jud. Cir. February 26, 1999)(finding that the self-limiting language of a charter petition limiting it to being decided on December 15, 1998, precluded its consideration by the Village on a different date).

The electors who signed the Elected County Mayor Petition were entitled to rely upon the language in the petition form. The Sponsor's decision to limit the petition to the 2006 election did not violate the charter or state law, and therefore, the electors would have no reason to believe that the amendment would appear on the 2008 ballot. While some electors may not have cared on which ballot the amendment appear, others, like Appellee Shirk, clearly did. As the Florida Supreme Court held in Armstrong v. Harris, 773 So. 2d 7, 13-14 (Fla. 2000), "the courts are the proper forum in which to litigate the validity of . . . amendments" and the courts will evaluate an amendment's "validity on various grounds." Since Appellee Johnson performed a ministerial act and did not evaluate the language used on the petition form or use any discretion in making his decision to place the amendment on the 2008 ballot, the validity of the petition form in light of its self-

limiting language is a legal question to be decided by the courts. Based on Ruggles, Bates, and Rhodus, the Elected County Mayor Amendment petition is invalid.

III. THE TRIAL COURT ERRED IN FINDING THAT THE BALLOT TITLE AND SUMMARY WERE NOT MISLEADING.

A. Standard of Review

The determination of whether a ballot title and summary are misleading pursuant to section 101.161, Florida Statutes is a question of law, and the standard of review is de novo. See Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000); Sancho v. Smith, 830 So. 2d 856 (Fla. 1st DCA 2002).

B. The Ballot Title and Summary of the Elected County Mayor Amendment Is Misleading and Invalid Pursuant to Section 101.161, Florida Statutes.

Section 101.161, Florida Statutes requires all public measures that are submitted to the vote of the people to contain a ballot title and summary. The statute requires the ballot title to "consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of." §101.161(1), Fla. Stat. (2007). It further requires the ballot summary to include an explanatory statement of not more than 75 words that informs the voter of "the chief purpose of the measure." §101.161(1), Fla. Stat. (2007). Section 101.161 applies equally to amendments to the Florida Constitution and to local public measures to amend city

and county charters. See Wadhams v. Board of County Comm'rs of Sarasota County, 567 So. 2d 414 (Fla. 1990). Accordingly, the Florida Supreme Court's many opinions interpreting the statute as applied to constitutional amendments apply to local amendments as well.

The Florida Supreme Court has held that public measures that are submitted to the vote of the people must be "*accurately* represented on the ballot; otherwise, voter approval would be a nullity." Armstrong v. Harris, 773 So. 2d 7, 12 (Fla. 2000)(emphasis in original); see also § 101.161, Fla. Stat. (2007). This requirement mandates that the ballot title and summary of a proposed amendment appearing on the general election ballot express the substance of the amendment in clear and unambiguous terms. Armstrong, 773 So. 2d at 12; Smith v. American Airlines, 606 So. 2d 617 at 620 (striking a proposed initiative from the general election ballot due to a defective ballot summary). "[T]he gist of [this] ... requirement is simple: A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." Armstrong, 773 So. 2d at 16. Instead, the ballot title and summary are there to provide "truth in packaging." Armstrong, 773 So. 2d at 13; see also Florida Ass'n of Realtors, Inc. v. Smith, 825 So. 2d 532, 536 (Fla. 1st DCA 2002). Accordingly, in order to achieve ballot placement a ballot title and summary must "state in clear and unambiguous language the chief purpose of the measure," Advisory Opinion to

Attorney General Re Save Our Everglades, 636 So. 2d 1336, 1341 (Fla. 1994), so that the voters "will not be misled as to its purpose." Id.

In this case, the ballot title and summary state:

> BALLOT TITLE: REPLACING THE CURRENT APPOINTED ADMINISTRATOR WITH A NONPARTISAN ELECTED COUNTY MAYOR.
>
> BALLOT SUMMARY: Shall the Hillsborough County Charter be revised to replace the office of an appointed County Administrator for a nonpartisan elected County Mayor; limited to two consecutive terms; specifying executive functions, powers and duties; specifying that the County Mayor will not be a member of the Board.

(App. Tab 2 3-4).

The article of the Hillsborough County Charter affected by the proposed amendment is Article V. The Elected County Mayor Amendment seeks to incorporate the following changes to Article V (additions are underlined and deletions are delineated by strike through):

> V. Executive Branch: Elected County Mayor ~~Administrator~~
>
> Section 5.01. Elected County Mayor ~~Administrator~~.
>
> The executive responsibilities and powers of local self government of the county not inconsistent with this Charter shall be assigned to and vested in ~~the~~ an elected County Mayor ~~administrator~~. The Executive Branch shall be composed of an elected County Mayor, the officers and employees of the administrative offices and executive divisions established by this Charter or created by the Board. One or more assistant county administrators may be appointed by the County Mayor

~~administrator with the advice and consent of the board~~ and shall serve at the pleasure of the County Mayor ~~administrator~~.

Section 5.02. Administrative Organization.

All functions of the executive branch shall be allotted among not more than ten divisions or offices. Each division or office shall be administered by a division or office head in accordance with the administrative code. Each division or office head shall be appointed by the County Mayor ~~administrator~~ with the advice and consent of the board and shall serve at the pleasure of the County Mayor ~~administrator~~. Each division or office head shall report to and be responsible to the County Mayor ~~administrator~~ or designated assistant county administrator. The County Mayor ~~administrator~~ may, as allowed by ordinance, require one division or office to undertake a task of another division or office on a temporary basis ~~or until the board provides otherwise~~.

Section 5.03. County Mayor ~~Administrator~~: ~~Qualifications,~~ Election, ~~Appointment~~, Term of Office; Compensation.

(1) The County Mayor ~~administrator~~ shall be a full-time position combining both the duties of ceremonial head and operational head of the county. ~~officer who holds a masters degree in public administration, management, or related field shall have three years of executive or management experience in public administration.~~ The County Mayor county administrator shall be elected at large and shall not be a member of the board of county commissioners. The term of office shall be for a term of four years not to exceed two consecutive terms and will commence on the second Tuesday of January in the year following the election. ~~appointed by an affirmative vote of not less than five members of the board of county commissioners and may be removed at any time by an affirmative vote of not less than five members of the~~

~~board or upon the affirmative vote of four (4) members at each of two (2) regular meetings not less than thirteen (13) days apart and no more than twenty-eight (28) days apart.~~ The <u>County Mayor shall be</u> ~~administrator need not be~~ <u>a registered voter and a</u> resident of the county at the time of <u>election to office and throughout the term of office.</u> ~~appointment, but shall within a reasonable time become and remain while in office a resident of the county.~~ <u>The non-partisan primary and general election of the County Mayor shall be held in even number years, beginning with the general election held in the year 2008</u>. The County <u>Mayor</u> ~~administrator~~ shall not engage in any other business or occupation.

(2) The compensation of the <u>Mayor</u> ~~administrator~~ shall be fixed by the board of county commissioners by ordinance at a level which is commensurate with the requirements of the position. ~~The county administrator's compensation, including severance pay, may be set by contract if allowed by and pursuant to ordinance.~~

(3) The office of County <u>Mayor</u> ~~administrator~~ shall be deemed vacant if the incumbent: takes up residence outside the county; is by death, illness, <u>resignation, refusal of the Mayor to serve, removal</u>, or other casualty or reason unable to continue to perform the duties of his office; <u>or</u> resigns. ~~or is removed by the board of county commissioners in the manner prescribed in Section 5.03(1).~~ A vacancy in the office shall be filled in <u>accordance with state law</u>. ~~the same manner~~ as the original appointment. The board of county commissioners may appoint an interim administrator in the case of vacancy, temporary absence, or disability of the present administrator until a successor has been appointed and qualified or the administrator returns.

Section 5.04. ~~Political Activity by Administrator~~ Duties. The County Mayor shall have the following powers and duties:

(1) Manage the operation of all elements of County government under the jurisdiction of the Board, consistent with the policies, ordinances and resolutions enacted by the Board;

(2) Be responsible for the execution of all contracts and legal documents, but may delegate this authority;

(3) Appoint and dismiss heads of County departments and divisions, which appointments shall be subject to confirmation by the Board;

(4) Assure the faithful execution of all ordinances, resolutions and orders of the Board and all laws of the State which are subject to enforcement by the County Mayor, or by officers who are subject under this Charter to the Mayor's discretion and supervision;

(5) Present annually at a time designated by the Board, a "State of the County" message, setting forth programs and recommendations to the Board;

(6) Supervise the daily activities of employees;

(7) Serve as the chief administrative official of the county, official representative and ceremonial dignitary for the government of Hillsborough County with prerogative to issue proclamations; and,

(8) Carry out other powers and duties as required by this Charter or may be prescribed by the Board.

~~The county administrator shall not hold any political office nor take part in any political activity other than voting.~~

~~Section 5.05. Performance Bond.~~

~~The county administrator shall be required to post a performance bond in accordance with general law.~~

The ballot title and summary of the proposed amendment are clearly misleading in that they do not state the true effect of the changes to Article V. The misleading nature of the ballot title and summary is not only in what they state, but in what they fail to state. They fail to inform the voter that the amendment expands the powers of the County Mayor beyond those granted the County Administrator and removes powers from the Board of County Commissioners. See Advisory Opinion to the Attorney General Re Fish and Wildlife Conservation Comm'n, 705 So. 2d 1351, 1355 (Fla. 1998)(invalidating an amendment because the summary failed to "sufficiently inform the public of this transfer of power" from the legislature to a constitutional entity).

The current charter provides for an appointed County Administrator who must hold a masters degree in public administration, management or related field and who has at least three years of experience in public administration. See Section 5.03, Hillsborough County Charter. The County Administrator is accountable to the Board, and may appoint Assistant County Administrators only upon the advice and consent of the Board. The powers and duties of the County Administrator are not included in Article V of the Hillsborough County Charter. Instead, the powers and duties of the County Administrator are listed in the Code of Ordinances of the County, specifically in the Administrative Code, Chapter 2 ¼, Hillsborough County Code of Ordinances. Under this chapter, the County

Administrator is granted the power to negotiate contracts for the County, subject to approval by the Board. See Chapter 2 ¼, Sec. 2 ¼-21, Hillsborough County Code of Ordinances.

The proposed charter amendment does not merely substitute an elected County Mayor for the appointed County Administrator as indicated by the ballot title. Rather, it abolishes the education and experience requirements of the County Administrator, allows the County Mayor unfettered power to appoint Assistant County Administrators, places the powers and duties of the County Mayor in the Charter, and grants unbridled contractual power to the County Mayor. The ballot title erroneously implies that the only change sought by the amendment is in the switch from an appointed County Administrator to an elected County Mayor without any indication the County Mayor will gain power at the expense of the Board. Such a title cannot stand. See Advisory Opinion to the Attorney General Re Save Our Everglades, 636 So. 2d 1336, 1341 (Fla. 1994).

While the ballot summary informs the voter that the County Administrator will be replaced by an elected nonpartisan County Mayor and that the amendment specifies the executive functions, power and duties of the County Mayor, it fails to inform the voter that the true effect of the proposed amendment is to remove major checks and balances between the legislative (County Commission) and executive (County Administrator/County Mayor) branches of the County government. In

section 5.01, it abolishes the Board's right to approve the Assistant County Administrators and it rests sole responsibility to execute contracts and bind the County in the County Mayor without any accountability to the Board. Moreover, the Board would have no authority on its own to amend the specific powers and duties set forth in section 5.04 of the Charter because the Charter may only be amended through a vote of the electorate. The result is a ballot title that is affirmatively deceptive and a ballot summary that is misleading. See Armstrong; Askew v. Firestone, 421 So. 2d 151 (Fla. 1982); Volusia Citizens' Alliance v. Volusia Home Builders Ass'n, 887 So. 2d 430 (Fla. 5th DCA 2004).

While the Sponsor argues that Appellee Shirk's position is not an accurate statement of what the Amendment actually does and is simply a subjective interpretation, the plain language of the Amendment belies the Sponsor's position. The Amendment clearly states that the County Mayor will appoint the assistant county administrators without the consent or approval of the Board, a power that the County Administrator clearly did not have. The Amendment also clearly delineates the execution of contracts as a power of the County Mayor although such power was not previously contained in the charter and the contractual power of the County Administrator was subject to Board approval and established policies of the Board. See Chapter 2, Sec. 2 1/4-21, Hillsborough County Code of Ordinances. In fact, the powers and duties of the County Administrator were

delineated in the Code of Ordinances and not in the Charter which is more difficult to amend. Thus, Appellee Shirk's position is accurate and objective.

The Sponsor also asserts that the changes highlighted by Appellee Shirk are not material and do not have to be contained in the ballot title and summary. This assertion also is without merit. Although the Sponsor attempts to avoid the issue, this amendment is about a transfer of power – replacing an appointed County Administrator with a strong, elected Mayor. In the initial brief, the Sponsor even refers to the companion amendment that further dilutes the Board's powers by granting the elected Mayor veto power over the Board (although that amendment is not before this Court). While the merits of the amendment are not at issue and it is not the Court's duty to determine whether the amendment is good or bad, it is the Court's duty to determine if the ballot title and summary adequately inform the voter of this transfer of power. In this instance, the ballot title and summary clearly do not sufficiently inform the voter of the dilution in the Board's power. See Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Comm'n, 705 So. 2d 1351, 1355 (Fla. 1998); Kobrin v. Leahy, 528 So. 2d 392 (Fla. 3d DCA 1988). Accordingly, the trial court, while reaching the correct decision in invalidating the amendment, erred in determining that the ballot title and summary were not misleading for failing to reveal the dilution in the Board's power.

CONCLUSION

The trial court properly found that the Elected County Mayor Amendment was clearly and conclusively defective and properly removed it from the November 2008 ballot. The ballot title and summary are misleading and the petition form for the amendment limited it to the November 2006 ballot. Accordingly, the trial court's order should be affirmed.

Respectfully submitted,

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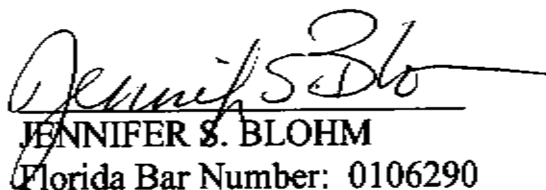
By: 

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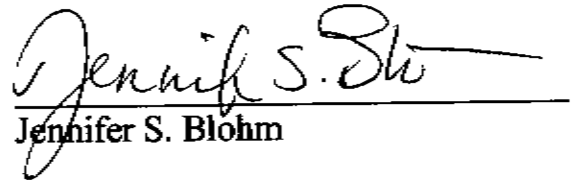
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 15th day of August, 2008, to: Barry Richard, Esquire, Glenn T. Burhans, Jr., Esquire, Greenberg Traurig, P.A., 101 East College Avenue, Tallahassee, Florida 32301 *counsel for Appellant/Cross-Appellee Elected County Mayor Political Committee, Inc.*; Peter Antonacci, Esquire, Allen Winsor, Esquire, Gray Robinson, P.A., Post Office Box 11189, Tallahassee, Florida 32302 *counsel for Appellee/Cross-Appellee Buddy Johnson, Supervisor of Elections, Hillsborough County, Florida*; and Kathy Harris, Esquire, County Center, 601 East Kennedy Boulevard, 16th Floor, Tampa, Florida 33602 *counsel for Appellee/Cross-Appellee Buddy Johnson, Supervisor of Elections, Hillsborough County, Florida.*



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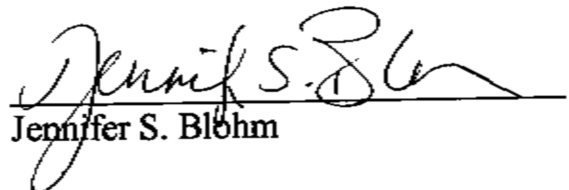
I HEREBY CERTIFY that this brief uses font size Times New Roman 14 in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).



Jennifer S. Blohm

IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

ELECTED COUNTY MAYOR
POLITICAL COMMITTEE, INC,

Appellant/Cross-Appellee,

Case No.: 2D08-3882
L.T. No.: 08-015176

v.

JAMES E. SHIRK,

Appellee/Cross-Appellant,

and

BUDDY JOHNSON, Supervisor of
Elections, Hillsborough County,
Florida, in his official capacity,

Appellee/Cross-Appellee.

____/

APPENDIX TO APPELLEE/CROSS-APPELLANT'S
ANSWER AND INITIAL BRIEF

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