



FLORIDA DEPARTMENT *of* STATE

CHARLIE CRIST
Governor

DAWN K. ROBERTS
Interim Secretary of State

June 14, 2010

Honorable Ron Govin
Chairman, Hillsborough Transit Authority
1201 E. 7th Avenue
Tampa, Florida 33605

RE: DE 10-07
Advertising; Expenditures – Use of Local
Government Funds.
§ 106.113, Florida Statutes.

Dear Chairman Govin:

This letter responds to a request for an advisory opinion submitted by the Hillsborough Transit Authority's General Counsel on behalf of its Board of Directors. Because the Board has questions relating to the propriety of political activities it may take under Florida's Election Code, the Division of Elections has authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2009).

Your counsel states that the Hillsborough Transit Authority is a regional transportation authority and an independent special taxing district. Your counsel further states one of the Hillsborough Transit Authority's specific statutory duties and powers set forth in section 189.438(1), Florida Statutes (2009), as an independent special district, is that it may "take all steps reasonable, necessary, or advisable, to generate local support for the development of projects." However, he posits that section 106.113, Florida Statutes (2009), which became effective on July 1, 2009, seemingly contradicts that statutory authority. Section 106.113 provides:

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.

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(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 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.

(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.

Your counsel poses three questions regarding section 106.113, Florida Statutes (2009), as it relates to the activities of the Hillsborough Transit Authority. We address your counsel's questions in *seriatim*, but also call your attention to *Division of Elections Opinion 10-06* (June 14, 2010), which also interprets section 106.113, Florida Statutes (2009).

First, do the provisions of section 106.113 as they relate to "electioneering constraints" (a term used by your counsel, which we interpret in the context of section 106.113 to mean "electioneering communications") remain effective and if so, are they applicable to the Hillsborough Transit Authority despite the rulings in *Broward Coalition of Condominiums*?¹ The short answer is Florida electioneering communication laws have now changed to overcome the constitutional infirmities discussed in *Broward Coalition*.² Because the current definition of "electioneering communication" now only applies to candidates and not issues, that portion of section 106.113 containing a prohibition on any activity that relates to an "electioneering communication concerning an issue, referendum, or amendment, including any state question,

¹ In *Broward Coalition of Condominiums, et. al. v. Browning, et. al.*, 2009 WL 1457972, Case No. 4:08cv445-SPM/WCS (N.D. Fla. May 22, 2009), the court permanently enjoined the Secretary of State and the Florida Elections Commission, their officers, agents, servants, employees, and attorneys, along with persons in active concert or participation with them from enforcing Florida's electioneering communication laws.

² Effective May 28, 2010, the definition of "electioneering communication" applies only to certain communications about candidates. The definition does not apply to communications about issues. Ch 2010-167, § 19, at 18, Laws of Fla. Furthermore, the communication is limited to those that are publicly distributed by a television station, radio station, cable television system, satellite system, newspaper, magazine, direct mail, or telephone that refers to or depicts a clearly identified candidate for office without expressly advocating the election or defeat of a candidate, but which is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate. The communication must be made within 30 days before a primary or special primary election or 60 days before any other election for the office sought by the candidate and be targeted to the relevant electorate in the geographic area the candidate would represent if elected. *Id.*

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that is subject to the vote of the electors” is superfluous and meaningless.³ The restrictions on the ability of “local government” to expend public funds on political advertisements remain intact.

Because section 106.113 was enacted later than section 189.438(1), Florida Statutes, it “may be viewed as the clearest and most recent expression of legislative will”⁴ on the ability of “local government” to expend public funds on political advertisements. Applying applicable principles of statutory construction, to include construing the statutes together to give both meaning, the later expression merely imposes a limitation upon the powers and duties otherwise found in the enabling statute for independent special districts. Therefore, the Hillsborough Transit Authority is able to comply with the provisions of section 189.438, Florida Statutes (2009), and any other enabling legislation, but now must do so within the restrictions found in section 106.113, Florida Statutes (2009). However, when applying section 106.113, it must do so with an understanding that the portion of section 106.113 concerning an “electioneering communication concerning an issue, referendum, or amendment” is meaningless based upon the Legislature changing the definition of an “electioneering communication” in 2010.

Second, does the definition of “local government” in section 106.113 apply to a state agency and an independent special district, such as the Hillsborough Transit Authority? The answer is that the definition of “local government” in section 106.113 applies to the Hillsborough Transit Authority. As a regional transportation authority, the Hillsborough Transit Authority is a “body politic” and a “special tax district.” §§ 163.566(1) and 163.570. Fla. Stat. (2009). Section 1.01(8), Florida Statutes (2009), defines both a “body politic” and “political subdivision” as including “counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and *all other districts in this state.*” [Emphasis supplied.] Section 106.113(1)(a)1, Florida Statutes (2009), defines “local government” in relevant part as “[a] county, municipality, school district, or other *political subdivision* in this state.” [Emphasis supplied.] Based upon the above definitions, the Hillsborough Transit Authority satisfies that portion of the section 106.113(1)(a)1 definition which includes “other political subdivision[s] in this state;” therefore, it is subject to the prohibitions found in section 106.113, Florida Statutes (2009).⁵

Third, can an independent special district, such as the Hillsborough Transit Authority, use public funds to educate the public about the importance, subject matter, and/or date of a scheduled referendum as long as they do not advocate a specific result? The answer is that section 106.113 does not prohibit the Hillsborough Transit Authority from expending or authorizing the

³ This result stems from the newer definition of “electioneering communication” being inserted into law in May 2010 and it being the latest expression of legislative intent regarding what constitutes an electioneering communication.

⁴ *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1287 (Fla. 2000).

⁵ Although your counsel posits that the Hillsborough Transit Authority is a state agency for some purposes, no facts were presented that it is actually a state agency. Instead, the facts reflect that it is a “political subdivision” in the state whose powers and duties originate from state statutes. This fact does not make it a state agency.

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expenditure of public funds for a communication that is limited solely to factual information or from authorizing or expending public funds for a purpose that does not otherwise encompass the section's prohibitions. The definition of "political advertisement" requires a paid expression consisting of express advocacy, so providing factual information without expressing a position in support or opposition to the issue would not be a "political advertisement." Also, the current definition of "electioneering communication" does not include communications about an issue. Therefore, section 106.113, Florida Statutes (2009), would not be violated by expending public funds on communications consisting only of factual information.

SUMMARY

Section 106.113(2), Florida Statutes (2009), prohibits a "local government" from expending or authorizing the expenditure of public funds for a "political advertisement" or an "electioneering communication" that concerns an issue. Because the Legislature changed the definition of an "electioneering communication" in 2010 to include communications only about candidates, the use of "electioneering communication" in section 106.113 "concerning an issue, referendum, or amendment" is meaningless. The definition of "local government" for purposes of section 106.113 includes an independent special district such as a regional transportation authority created under chapter 163, Florida Statutes. However, section 106.113 does not prohibit a local government from expending or authorizing the expenditure of public funds for a communication that is limited solely to factual information.

Sincerely,



Donald L. Palmer

Director, Division of Elections

pc: Clark Jordan-Holmes, Esq., Stiles, Taylor & Grace, P.A., Tampa, Florida