



FLORIDA DEPARTMENT *of* STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

May 24, 2012

Ms. Dorothy "Dotti" Wynn
Chair, 2012 Orange County Charter Review Commission
c/o Orange County Comptroller's Office
P.O. Box 38
Orlando, Florida 32802

RE: DE 12-05 -- Advertising; Expenditures
-- Use of Local Government Funds. §
106.113, Florida Statutes.

Dear Ms. Wynn:

This letter responds to a request for an advisory opinion submitted on behalf of the 2012 Orange County Charter Review Commission by Wade Vose, the Commission's General Counsel. Because the Commission plans to engage in political activity and has questions about compliance with Florida's election laws with respect to campaign finance law with respect to its intended actions, the Division has the authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2011).

By way of background, your general counsel states that the Charter Review Commission is an independent commission under Orange County government whose purpose is to review the county charter and to place proposed charter amendments on the general election ballot. Historically, the Commission has prepared a voter guide to be mailed to Orange County voters, explaining the Commission's rationale in proposing the charter amendments and educating voters as to the anticipated effects of adopting or not adopting the proposed amendments. Your attorney wants to ensure that the preparation of such a voter guide would not conflict with either section 106.113, Florida Statutes (2011), or its interpretation rendered by the Division in *Division of Elections Opinions* 10-06 and 10-07 (June 14, 2010).

Section 106.113, Florida Statutes (2011), 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.

(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. [*Emphasis added.*]

Based upon subsequent legislative changes to the definition of "electioneering communications," which applied the term only to communications about candidates, the Division opined that the 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, that is subject to the vote of the electors" was superfluous. The Division adheres to this opinion. However, your attorney specifically requests further clarification of the two 2010 opinions by asking the following four questions as they relate to the Commission's intended action of issuing the voter's guide:

- (1) Does the prohibition imposed by Section 106.113, Florida Statutes, extend only to local government expenditures for communications that constitute political advertisements?
- (2) Does the definition of political advertisement extend only to communications that constitute express advocacy?
- (3) Does the Division maintain its opinion expressed in *Division of Elections Opinion 05-06* that the use of the term "expressly advocates" in the definition of "political advertisement" indicated the Legislature's intent to apply the *Buckley* "magic words" standard to political advertisements, requiring that to constitute express advocacy, the communication must contain express words of advocacy of election or defeat of a candidate or issue such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "oppose," and "reject"?

- (4) Is it then the case that communications that do not satisfy the "magic words" express advocacy standard of *Buckley* are not prohibited under Section 106.113, Florida Statutes?

The short answer to all of these questions is "yes."

First, if one applies the Division's prior opinions regarding the superfluous "electioneering communications" language within section 106.113, the only prohibition remaining is that 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 concerning an issue, referendum, or amendment, including any state question, that is subject to a vote of the electors. Thus, the Division opines that section 106.113, Florida Statutes (2011), addresses only "political advertisements."

Second, the definition of "political advertisement" requires that that advertisement expressly advocate the election and defeat of a candidate or approval or rejection of an issue.¹ Therefore, section 106.113's prohibition is that 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 an advertisement that expressly advocates the approval or rejection of an issue, referendum, or amendment, including any state question, that is subject to a vote of the electors.

Third, as stated in *Division of Elections Opinion 05-06* (September 21, 2005), the use of the term "expressly advocates" is intended to apply the "magic words" standard to political advertisements as set forth by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). The "magic words" standard requires that the communication contain express words of advocacy for the election or defeat of a candidate or issue such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "oppose," and "reject." The Division adheres to this view; therefore, for purposes of section 106.113, for an advertisement to be a "political advertisement," it must contain language which satisfies the "magic words" standard of *Buckley v. Valeo* relating to the approval or rejection of "an issue, referendum, or amendment, including any state question, that is subject to a vote of the electors."

Finally, as previously stated, the Division interprets section 106.113 to now only prohibit "political advertisements." Because a "political advertisement" requires the element of express advocacy, which in turn, requires the use of the "magic words" standard of *Buckley v. Valeo*, the avoidance of such words in any expression would preclude the expression or message from being in violation of section 106.113, Florida Statutes (2011). Therefore, local government

¹ See § 106.011(17), Fla. Stat. (2011) (To be a "political advertisement," the expression, by means other than the spoken word, must be a (1) a paid expression; (2) in a "communications media" (as defined in § 106.011(13), Fla. Stat.); and be one which (3) expressly advocates the election and defeat of a candidate or the approval or rejection of an issue.)

Ms. Dorothy "Dotti" Wynn
May 24, 2012
Page 4 of 4

expenditures for communications that do not satisfy the definition of a "political advertisement" are not prohibited by section 106.113.

SUMMARY

Applying the Division's prior opinions regarding the superfluous "electioneering communications" language in section 106.113, Florida Statutes (2011), the prohibition within the section now addresses only "political advertisements." A political advertisement as defined in chapter 106, Florida Statutes (2011), 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). Local government expenditures for communications that do not satisfy the definition of a "political advertisement" are not prohibited by section 106.113.

Sincerely,

A handwritten signature in blue ink, appearing to read "Gisela Salas", with a horizontal line underneath.

Dr. Gisela Salas
Director, Division of Elections

cc: Wade Vose, Esq.