



MEMORANDUM

TO: Chairman and Members of the Charter Review Commission
FROM: Paul Gougelman, Charter Commission General Counsel
SUBJECT: Recall
DATE: March 13, 2022

BACKGROUND:

At a recent meeting of the Charter Review Commission (“CRC”) meeting, two citizens asked that the CRC establish a right of recall for School Board Members. At the request of Member Matt Nye, the CRC asked for information regarding the recall of School Board Members, and whether it was possible. In addition, Member Blaise Trettis has drafted a proposal and submitted it for review.

Member Marie Rogerson also asked whether the County’s Constitutional Officers, including the Sheriff, the Property Appraiser, the Tax Collector, the Supervisor of Elections, and the Clerk of the Court, could be subject to recall.

SHORT ANSWER:

1) Mr. Trettis has submitted a proposal to amend the charter by providing for the recall of school board members. Is the proposal consistent with Florida law and the Florida Constitution. According to a 1971 opinion of the Attorney General, it may not be constitutional to provide in a county charter for the recall of a school board member. See Analysis, Section II.D. below. Mr. Trettis is considering requesting an opinion of the Attorney General. In addition, although it is a close question, the proposal may be inconsistent with general law set forth in Section 100.361, Florida Statutes. This is based on the implied preemption of the issue by the Florida Legislature. See Analysis, Section II.C. below. See *also* Analysis, Section IV., below.

2) Per Mr. Oliver: In Florida what offices are subject to recall? ANSWER: The only offices specifically provided for recall by general law are charter county commissioner and city council member. This is pursuant to Section 100.361, Florida Statutes. See Analysis, Section II.A. below.

3) Per Mr. Oliver: Who pays for a special election for recall or for filling a vacancy after a successful recall of an official? ANSWER: Pursuant to Section 100.361,



Florida Statutes, two separate petitions must be submitted for the recall of an official to be placed on the ballot. According to general law, the cost of the determination of whether eligible voters have signed each of the petitions is the responsibility of the party seeking the recall. §100.361(2)(g) and (3)(e), Fla.Stat. The recall statute does not specify who has the responsibility for paying for the recall election and the election to fill the vacancy. The Supervisor of Elections has asked the County Attorney to provide her with information in that regard, and we await further information in that regard. See Analysis, Section II.E. below.

4) Per Mr. Jenkins: Other than the County Charter, what other legal avenue is available for recall in Florida? ANSWER: The only avenue available for recall is pursuant to Section 100.361, Florida Statutes, a copy of which is attached. There is no other process provided. Thus, the recall of school board members would have to be provided by act of the Legislature. See Analysis, Section III., below.

5) Per Ms. Schmitt: Article 8 of the Charter provides for school board members to be elected from single member districts. Is Article 8 legal? What can the County do and not do with regard to school board? ANSWER: More likely than not, were this issue submitted to a court of law, the court would find that the inclusion in the County Charter of language providing for the election of school board members from single-member districts is not consistent with the Florida Constitution or general law. See Analysis, Section II.D. and III., below.

6) Per Mr. Trettis: What is the effect of a local bill presented by State Rep. Fine regarding providing for single member school board electoral districts? ANSWER: The legislation did not pass the Florida Legislature. As a result, the Charter's Article 8 providing for single-member School Board district elections appears inconsistent with general law. See Analysis, Section II.D., below.

7) Per Mr. Trettis: May the County Charter provide for the recall of School Board Members? ANSWER: The Trettis Recall Proposal appears inconsistent with the Florida Constitution as provided by a 1971 Attorney General Opinion. See Analysis, Sections II.D. and IV., below. A closer question is presented with regard to whether the proposal is inconsistent with Section 100.361, Florida Statutes, pursuant to the concept of implied preemption. See Analysis, Sections II.C. and IV., below. Additionally, certain provisions of the Trettis Recall Proposal may not be invalid but do not track concepts in the Article IV, Section 7 of the Florida Constitution and Section 100.361, Florida Statutes. See Analysis, Sections II.D. and IV., below. 8) Per Ms. Rogerson: May the County Charter provide for the recall of county constitutional officers such as sheriff, tax collector, supervisor of elections, clerk of court, or property appraiser? ANSWER: More likely than not, a court of law would determine that recall of the Sheriff, Tax Collector, Supervisor of Elections, Clerk of Court, or Property Appraiser is not provided for by Florida law based on the concept of implied preemption. See Analysis, Section V., below.

ANALYSIS: I

Concept of Recall in the United States

The concept of recall first appeared in America in the laws for the General Court of the Massachusetts Bay Colony in 1631. However, due to Alexander Hamilton's efforts, the concept was left out of the U.S. Constitution in 1787. Hamilton explained that it would make an elected official "a slave to all the capricious humors among the people."¹

The leading state with recall provisions is California. Progressives included the concept in the City of Los Angeles Charter in 1903, and it was used over the following years to recall several councilmembers and the mayor for alleged ties with the mob. In 1908, Oregon adopted the concept of recall, and in 1911, the concept was adopted in the state of California.²

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Recall in Florida

A

Background

With regard to the recall of elected officials, the Florida Constitution contains no provisions relating to recall. The Legislature has statutorily provided limited instances in which the voters may recall an elected official. Unlike states such as California, where Governors³ have been subject to recall twice in the last 20 years which events have been extensively reported in the national news media,⁴ there is no right of recall of a Florida Governor, Lt. Governor, member of the Cabinet, state legislator, school board member, or elected member of a special district.

¹ Spivak, Joshua, *The Recall Law of Unintended Consequences*, Washington Post (Oct. 9, 2003).

² The concept was promoted by progressive Republican Governor Hiram Johnson, who later went on to become a historically well-known member of the U.S. Senate from 1916 to 1945. See *Hiram Johnson*, Wikipedia, en.wikipedia.org/wiki/Hiram_Johnson.

³ California Governor Gray Davis was recalled in 2003. The recall of Gavin Newsom in 2019 failed.

⁴ *California governor recall election: Voters reject recall of Gavin Newsom*, Washington Post (Sept. 14, 2019); [Ballotpedia.org/Gavin_Newsom_recall](https://ballotpedia.org/Gavin_Newsom_recall), [Governor_of_California_\(2019-2021\)](https://ballotpedia.org/Governor_of_California_(2019-2021)); Spivak, Joshua, *The Recall Law of Unintended Consequences*, Washington Post (Oct. 9, 2003).

Various cities started sporadically providing for recall of city council members, and the Legislature in 1974,⁵ decided to bring some type of uniformity to the process. Section 100.361, Florida Statutes, was enacted at that time.⁶ Section 100.361(11) provides:

(11) INTENT.—It is the intent of the Legislature that the recall procedures provided in this act shall be uniform statewide. Therefore, all municipal charter and special law provisions which are contrary to the provisions of this act are hereby repealed to the extent of this conflict.

B

The Florida Recall Statute

As noted above, the only provision in Florida law for recall elections is Section 100.361, Florida Statutes. The statute specifies that it applies to the governing body of either a charter county or a municipality. §100.361(1), Fla.Stat.⁷ Furthermore, the statute is intended to provide a uniform statewide process for recall,⁸ and the statute automatically applies to all municipalities and charter counties whether or not they have adopted recall provisions in their charters or by ordinance.⁹

⁵ §§1, 2, Chap. 74-130, Laws of Fla.

⁶ *Id.* The statute has been amended 14 times.

⁷ Section 100.361(1) provides

(1) APPLICATION; DEFINITION.—Any member of the governing body of a municipality or charter county, hereinafter referred to in this section as “municipality,” may be removed from office by the electors of the municipality. When the official represents a district and is elected only by electors residing in that district, only electors from that district are eligible to sign the petition to recall that official and are entitled to vote in the recall election. When the official represents a district and is elected at-large by the electors of the municipality, all electors of the municipality are eligible to sign the petition to recall that official and are entitled to vote in the recall election. Where used in this section, the term “district” shall be construed to mean the area or region of a municipality from which a member of the governing body is elected by the electors from such area or region. Members may be removed from office pursuant to the procedures provided in this section. This method of removing members of the governing body of a municipality is in addition to any other method provided by state law.

⁸ §100.361(11), Fla.Stat.

⁹ §100.361(12), Fla.Stat. Prior to the time that this provision was adopted as a part of Section 100.361, Florida Statutes, an opinion of the Florida Attorney General, AGO 79-38, and an opinion of the Florida Division of Elections, DE 78-48, had reached this conclusion.

