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BOARD OF COUNTY COMMISSIONERS

**TO:** Commissioner John Tobia  
**FROM:** Morris Richardson, County Attorney  
**SUBJECT:** Municipal Incorporation Timeline, Procedures, and Other Considerations  
**DATE:** November 9, 2022

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You have asked for a general description of what is required for an unincorporated area to incorporate as a municipality, along with a timeline. The creation of municipalities is generally governed by the Formation of Municipalities Act (the "Act").<sup>1</sup> A summary of that procedure is as follows:

1. A charter for incorporation of a municipality must be adopted by a special act of the legislature, upon a determination that the standards set forth in the Act have been met.<sup>2</sup>
2. To inform the legislature on the feasibility of a proposed incorporation, a feasibility study must be completed and submitted to the legislature no later than the first Monday after September 1 of the year before the regular session of the legislature during which the municipal charter would be enacted.<sup>3</sup> For example, in order for the legislature to enact a municipal charter in the 2024 legislative session, the feasibility study would need to be completed and submitted no later than Monday, September 4, 2023. The feasibility study is required to contain:
  - a. the location of territory subject to boundary change and a map of the area that identifies the proposed change;<sup>4</sup>
  - b. the major reasons for proposing the boundary change;<sup>5</sup>
  - c. specified characteristics of the area involved in the proposed change, including a list of the current land use designations applied to the subject area in the county comprehensive plan, a list of the current county zoning designations applied to the subject area, a general statement of present land use characteristics of the area, a description of

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<sup>1</sup> § 165.011 to 165.081, Fla. Stat.

<sup>2</sup> § 165.041(1)(a), Fla. Stat.

<sup>3</sup> § 165.041(1)(b), Fla. Stat.

<sup>4</sup> § 165.041(1)(b)1, Fla. Stat.

<sup>5</sup> § 165.041(1)(b)2, Fla. Stat.

development being proposed for the territory, if any, and a statement of when actual development is expected to begin, if known;<sup>6</sup>

- d. a list of all public agencies, such as local governments, school districts, and special districts, the current boundary of which falls within the boundary of the territory proposed for the change or reorganization;<sup>7</sup>
- e. a list of current services being provided within the proposed incorporation area, including, but not limited to, water, sewer, solid waste, transportation, public works, law enforcement, fire and rescue, zoning, street lighting, parks and recreation, and library and cultural facilities, and the estimated costs for each current service;<sup>8</sup>
- f. a list of proposed services to be provided within the proposed incorporation area, and the estimated cost of such proposed services;<sup>9</sup>
- g. the names and addresses of three officers or persons submitting the proposal;<sup>10</sup>
- h. evidence of fiscal capacity and an organizational plan as it relates to the area seeking incorporation that, at a minimum, includes (1) existing tax bases, including ad valorem taxable value, utility taxes, sales and use taxes, franchise taxes, license and permit fees, charges for services, fines and forfeitures, and other revenue sources, as appropriate; and (2) a five-year operational plan that, at a minimum, includes proposed staffing, building acquisition and construction, debt issuance, and budgets;<sup>11</sup>
- i. data and analysis to support the conclusions that incorporation is necessary and financially feasible, including population projections and population density calculations, and an explanation concerning methodologies used for such analysis;<sup>12</sup>
- j. an evaluation of the alternatives available to the area to address its policy concerns;<sup>13</sup> and
- k. evidence that the proposed municipality meets the statutory requirements for incorporation.<sup>14</sup>

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<sup>6</sup> § 165.041(1)(b)3, Fla. Stat.

<sup>7</sup> § 165.041(1)(b)4, Fla. Stat.

<sup>8</sup> § 165.041(1)(b)5, Fla. Stat.

<sup>9</sup> § 165.041(1)(b)6, Fla. Stat.

<sup>10</sup> § 165.041(1)(b)7, Fla. Stat.

<sup>11</sup> § 165.041(1)(b)8, Fla. Stat.

<sup>12</sup> § 165.041(1)(b)9, Fla. Stat.

<sup>13</sup> § 165.041(1)(b)10, Fla. Stat.

<sup>14</sup> § 165.041(1)(b)11, Fla. Stat.

3. To incorporate a municipality, the area proposed to be incorporated
  - a. must be compact and contiguous and amenable to separate municipal government;<sup>15</sup>
  - b. must have a total population of at least 5,000 according to the latest official state census, special census, or estimate of population;<sup>16</sup>
  - c. must have an average population density of at least 1.5 persons per acre, or in the alternative, must have extraordinary conditions requiring the establishment of a municipal corporation with less existing density;<sup>17</sup>
  - d. must have a minimum distance of at least two miles from the boundaries of an existing municipality within the county where incorporation is proposed. This distance is measured from any part of the area proposed for incorporation, or in the alternative, the area proposed for incorporation must have an extraordinary natural boundary which requires separate municipal government;<sup>18</sup>
  - e. must have a proposed municipal charter which
    - i. prescribes the form of government and clearly defines the responsibility for legislative and executive functions,<sup>19</sup> and
    - ii. must not prohibit the legislative body of the municipality from exercising its powers to levy any tax authorized by the Constitution or general law.<sup>20</sup>
  - f. Other requirements regarding solid waste contracts:
    - i. In accordance with the Florida Constitution,<sup>21</sup> the plan for incorporation must honor existing solid waste contracts in the affected geographic area subject to incorporation, with the following exception:<sup>22</sup>
    - ii. The plan for incorporation may provide for existing contracts for solid waste collection services to be honored only for five years or the remainder of the contract term, whichever is less, and may require that a copy of the pertinent portion of the contract or other written evidence of the duration of the contract,

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<sup>15</sup> § 165.061(1)(a), Fla. Stat.

<sup>16</sup> § 165.061(1)(b), Fla. Stat. (Please note, this 5,000 is based on the size of the county within which the proposed area to be incorporated lies).

<sup>17</sup> § 165.061(1)(c), Fla. Stat.

<sup>18</sup> § 165.061(1)(d), Fla. Stat.

<sup>19</sup> § 165.061(1)(e)(2), Fla. Stat.

<sup>20</sup> § 165.061(1)(e)(2), Fla. Stat.

<sup>21</sup> Art. I, § 10, Fla. Const.

<sup>22</sup> § 165.061 (1)(f), Fla. Stat.

excluding any automatic renewals or “evergreen” provisions, be provided to the municipality within a reasonable time after a written request to do so.<sup>23</sup>

g. Other requirements regarding financial allocations and the assumption of indebtedness or property benefiting the area proposed to be incorporated:

i. The special act incorporating a new municipality may provide a procedure for establishing the distributive share of local option gas tax moneys in counties where such a tax is levied, when appropriate under § 336.025(4)(b), Fla. Stat.<sup>24</sup>

ii. The special act shall also provide for assumption of the existing governmental indebtedness or property specially benefiting that area, if any, the fair value of such and the manner of transfer and financing.<sup>25</sup>

4. Because Brevard County is a charter county, the special act incorporating a municipality within Brevard County should also provide for referendum approval by the electors in the county, since incorporation has the effect of divesting a portion of the County Commissioner’s powers of local self-government in favor of a new municipal government.<sup>26</sup>

5. Other considerations:

a. Any MSTU encompassing the area proposed to be incorporated, would have to be modified to exclude those areas, unless the new municipality’s city council enacts an ordinance consenting to the continuation of the MSTU.<sup>27</sup> Absent this consent, funds derived from the MSTU could no longer be spent within the new city’s limits.

b. County fire assessments could still be collected by the county within the newly incorporated area; however, the new city council could also opt out of those assessments, by ordinance, which would require the city to either provide their own fire service, enter into an interlocal agreement providing for fire services, or go without fire service.

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<sup>23</sup> § 165.061(1)(f), Fla. Stat.

<sup>24</sup> § 165.071(1), Fla. Stat.

<sup>25</sup> § 165.071(1), Fla. Stat.

<sup>26</sup> Article VIII, §1(g), Fla. Const. “CHARTER GOVERNMENT. Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, *or with special law approved by vote of the electors.*”

<sup>27</sup> §125.01(1)(q), Florida Statutes, “... Subject to the consent by ordinance of the governing body of the affected municipality given either annually or for a term of years, the boundaries of a municipal service taxing or benefit unit may include all or a part of the boundaries of a municipality...”

- c. The franchise agreement with Florida Power & Light (FP&L) pertains only to the unincorporated area. Where this is most likely the case, when a new city is created, the area within the city limits is no longer unincorporated, and the franchise fee formula set forth in the county ordinance would not be applied within those city limits. The franchise ordinance would be considered a contract, and it is questionable under the contracts clause of the state and federal constitution whether the special act incorporating the new city could even address the issue of the franchise agreement terms which restrict Florida Power & Light's payment obligation to the unincorporated area. The new city may require its own franchise agreement and the county would probably not be able to collect franchise fees in the newly incorporated areas without an amendment to the FP&L franchise agreement agreed upon by the city.

6. Can the County pay for the feasibility study?

Yes, it appears that a county could pay for the feasibility study for the incorporation of an area within the county. We have found no statute indicating that a charter county cannot pay for such a feasibility study. In addition, see section 163.3217, Florida Statutes, which specifically speaks to a county's funding a feasibility study required in Chapter 165, Florida Statutes (the statute which details the process of how an area within an existing county can become an incorporated municipality) when the county is sponsoring what is called a "municipal overlay." Section 163.3217, Florida Statutes states, "If a county has adopted a municipal overlay, the development of the municipal overlay shall be funded by the county, unless there is written agreement between the county and another entity to fund it."<sup>28</sup> Therefore, the legislature has recognized that the payment of a feasibility study for the incorporation of a municipality within a county may be paid by a county.

Please see a copy of the April 17, 2001, Minutes of the Meeting of the Board of County Commissioners, Brevard County, Florida, "Re: Feasibility Study for Port St. John", where members of the citizens group, "Port St. John For Tomorrow", requested that the County pay for a feasibility study for Port St. John to incorporate, which study was to be completed by the University of Central Florida at a cost of less than \$21,000, and the County Commissioners unanimously approved the request to have the County fund the feasibility study. Please also note that prior to approving the request to fund the feasibility study, the County had placed on the ballot a referendum asking the electorate in the Port St. John area whether they were in favor of having a feasibility study done, to make sure there was enough interest in this issue, and that referendum had passed.

- a. What is a municipal overlay, if the County chose to proceed in this manner?

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<sup>28</sup> § 163.3217, Fla. Stat.; § 165.041(1)(c), Fla. Stat.

A municipal overlay is an amendment to a county's comprehensive plan, and it allows a county, in cooperation with the public, to address the future possible incorporation a specific geographic area and the impact of municipal incorporation on the provision of public services to serve the area.<sup>29</sup> A county governing body, or a citizen's organization that represents property owners in the area affected, may sponsor the preparation of the municipal overlay.

A municipal overlay shall be adopted as an amendment to the local government comprehensive plan.<sup>30</sup>

- b. The contents of a municipal overly are similar to the requirements to create a municipality and are as follows:
  - i. Boundary options for the creation of the new municipality,
  - ii. A feasibility study as outlined in chapter 165, Fla. Stat.
  - iii. A map of existing and proposed land uses in the area by type and density.
  - iv. Population projections for the area.
  - v. Data and analysis relating to the provision of public facilities for the area.

7. It does not appear that MIRA, the Merritt Island Redevelopment Agency, a dependent special district within Brevard County, could use its funding as a redevelopment agency to pay for a feasibility study to incorporate a portion or all of Merritt Island. We have found no case law directly on point where a county redevelopment agency paid for a feasibility study for the incorporation of a municipality within a county. The County Commissioners, in establishing MIRA,<sup>31</sup> stated in essence that the establishment of MIRA was in response to finding blight in that area and that its goal was to prevent further blight and deterioration, and that MIRA would have all the authority and powers to carry out and effectuate the purposes of community redevelopment, as stated in Part III, Chapter 163, Florida Statutes, the Community Redevelopment Act of 1969. The authority and powers stated in the Community Redevelopment Act of 1969 include such powers as the ability to acquire property within a blighted or slum area, to demolish and remove buildings, to conduct redevelopment activities in areas that are deteriorating and economically distressed, in accordance with a community redevelopment plan and may include the preparation of such a plans. Those activities enumerated in Chapter 163, Part III, do not include and do not align with spending funds on a feasibility plan to incorporate a municipality within a county.

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<sup>29</sup> § 163.3217(1), Fla. Stat.

<sup>30</sup> § 163.3217, Fla. Stat., § 163.3184, Fla. Stat

<sup>31</sup> See Ordinance 88-43