

KANEY & OLIVARI, P.L.
ATTORNEYS AT LAW

55 Seton Trail • Ormond Beach, FL 32176
Ph (386) 675-0691 • Fax (386) 672-7003
www.KaneyOlivari.com

Jonathan D. Kaney Jr.
Jonathan D. Kaney III
Michael P. Olivari

December 11, 2013

Volusia County Council
Volusia County
123 W. Indiana Avenue
DeLand, Florida 32720

Re: Investigation Regarding Waverly Matter

Honorable Members of the County Council:

On November 21, 2013, the Council adopted a motion to hire the undersigned as "special counsel to independently advise the County Council on a process and procedure . . . in order to make investigation into the affairs of county governmental operations relating to the Waverly matter." As special counsel, your motion requires me to complete the investigation and make a report back to the Council within 90 days and directs me to provide a report on December 12, 2013 on the procedures for the investigation. This is my report.

Objective and Purpose of the Investigation

The objective of this investigation is to discover (uncover) complete and accurate information concerning that series of related events which the motion refers to as the "Waverly Matter." This includes whether Waverly and its affiliates had a plan or scheme to obtain undue influence over County government by various means, including by supporting candidates for public office in the county with political advertisements on bus benches provided by Waverly Media under a contract with the County's Votran agency. So far, the still incomplete public record suggests that there was such a plan which involved unlawful campaign contributions, false campaign finance reports, and diversion of revenue from the County through in-kind political contributions. Waverly's manager has pled guilty to felony violations of the election laws in this scheme. But the issue concerning the Waverly Matter requires greater knowledge than is presently available.

I will search for complete and accurate information about the Waverly Matter. The search will include, but not be limited to: identifying and interviewing witnesses, reviewing documents and contracts, analyzing campaign disclosures and contributions, reviewing the County's contracting policies and procedures and the extent of compliance therewith, and studying whether ethics and campaign laws currently applicable to county government are sufficient in light of the investigative findings.

The ultimate purpose of the investigation is to provide the Council with an accurate, fact-based report with analysis and recommendations from which the Council could determine if appropriate legislation is warranted concerning purchasing, campaign finance, ethical standards for public officials, or other matters of county government.

To be clear, I will refer to the investigation described in the foregoing paragraphs as the "Waverly Investigation" or simply as the "Investigation" I do this to make clear that the following discussion refers to this particular investigation having this stated objective and purpose and not to any other or broader investigation. The Investigation is solely for the stated legislative purposes.

Investigative Process and Procedure

To properly conduct the Investigation it will be necessary to interview and take sworn statements from witnesses, review documents, and analyze financial records. The subjects of interviews may include elected and appointed county officials and county employees, candidates and any other witnesses with knowledge or experience with Waverly's bus bench sign practices, as well as current and former officials and employees of Waverly Media and Votran. I will obtain records and documents, including financial records, pertaining to the Waverly matter, as well as records and other documents in the custody of the County or in the custody of any witness or other interview subject.

Authority of the Council to Investigate the Waverly Matter

It is my opinion that the Council is vested with constitutional and statutory authority to conduct the Investigation.

I have reviewed the opinion issued by my learned friend Dan Eckert. Mr. Eckert and I agree that the Council has a broad power to conduct legislative fact-finding. He opines, and I agree, that "so long as the investigation is directed to the

charter legislative purpose, the disclosure of crimes and the acts of specific individuals is immaterial and incidental.”

With respect, however, I cannot agree with his implication that section 309 of the Charter restricts Council’s power to investigate only the affairs of the county government operations [and] not all those subjects on which the county council might legislate.” Nor can I agree with the further implication that such Investigation must be limited to that process stated in section 309. The charter does not express any such limitation. Rather, the argument that the Council’s investigative power is so limited relies exclusively on an interpretive principle that the expression of one thing implies the exclusion of any other, a hoary old maxim known as *expressio unius est exclusio alterius*. (known for short as the “*expressio unius* doctrine”).

Because this is a central issue, I will take some time to discuss why the doctrine cannot be applied to restrict the Council’s investigative authority. Quite recently, the First District Court of Appeals provided an authoritative discussion of the *expressio unius* doctrine in *Crews v. Florida Pub. Employers Council 79, AFSCME*, 113 So. 3d 1063, 1071-72 (Fla. 1st DCA 2013). The Court held that a proviso in the general appropriations act appropriating funds for privatization of prison health care services in one region did not bar the Legislative Budget Committee from amending the budget to provide funds for privatization in other regions. In the course of rejecting the lower court’s application of the *expressio unius* doctrine, the district court explained:

This maxim is “strictly an aid to statutory construction and not a rule of law.” *Smalley Transp. Co. v. Moed's Transfer Co.*, 373 So.2d 55, 56 (Fla. 1st DCA 1979). The correctness of the principle as applied to a particular statute “depends entirely on context,” *In re Sealed Case No. 97-3112*, 181 F.3d 128, 132 (D.C.Cir.1999), including the history and structure of the legislation being examined. *see In the Matter of Am. Reserve Corp.*, 840 F.2d 487, 492 (7th Cir.1988). . . . In fact, this maxim properly applies only when the court can determine that the matters expressly mentioned are intended to be exclusive. *Smalley*, 373 So.2d at 57 . . . For these reasons, it has been deemed “a valuable servant, but a dangerous master to follow in the construction of statutes or documents.” *Id.*

Crews, 113 So.2d at 1071-72.

The argument that Section 309 limits the investigative power by implication fails to take account of the fact that power to investigate does not derive only from section 309 but rather inheres in the power to legislate. "The power of investigation is a necessary adjunct to the exercise of the power to legislate." *Johnston v. Gallen*, 217 So. 2d 319, 321 (Fla. 1969). "[It] is inherent in the legislative process. . . . It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544-46 (1963). It is therefore inappropriate to infer that section 309 is the exclusive authority for any such investigation or that the investigative power is limited by the negative implication supplied by the *expressio unius* doctrine.

This power to investigate is inherent in the home rule power constitutionally vested in the Council. See, Fla. Const., art. VIII, § 1(g) ("The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law.") "The supreme court has "broadly interpreted the self-governing powers granted charter counties under article VIII, section 1(g)." *Lowe v. Broward County*, 766 So. 2d 1199, 1204 (Fla. 4th DCA 2000) quoting *State v. Broward County*, 468 So.2d 965, 969 (Fla.1985). In addition, Florida Statutes, Section 125.01(3)(a) states that the statutory powers of counties therein enumerated "shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated. . . .".

When this standard is applied here, it is abundantly clear that section 309 is not intended to be exclusive and should not be restrictively interpreted under the *expressio unius* doctrine. The charter is laced with provisions negating the application of the *expressio unius* doctrine to this or, for that matter, any other provision of the charter. Section 102 provides that the County "shall have all rights and powers of local self-government" Section 202 provides that the County shall "have such additional county and municipal powers as may be required to fulfill the intent of this charter." Most importantly, section 204 provides:

The powers granted by this charter shall be construed liberally in favor of the charter government. The specified powers in this charter shall not be construed as limiting, in any way, the general or specific powers of the government, as stated in this article. It is the intent of this article to grant the charter government the full power and authority to exercise all of the governmental powers

necessary for the effective operation and conduct of the affairs of the charter government.

The charter could not be clearer if it expressly said that the *expressio unius* doctrine shall not be applied to limit the authority of the charter government. Accordingly, it is my opinion that the Council has the authority to conduct the Investigation.

The Power to Effect the Investigation Through the Agency of Special Counsel.

It is further my opinion that the Council has the authority to conduct the Investigation through the agency of special counsel, including the authority to adopt an ordinance granting special counsel the authority to compel testimony and production of evidence by subpoena for the purpose of obtaining relevant and pertinent evidence. This authority is included in the inherent home rule power to investigate for legislative purposes.

In 1975, the Attorney General advised the City Attorney for the City of Clearwater that the City Commission could grant subpoena powers to a community relations board established by ordinance under its home rule powers. See, AGO 75-11. The opinion observed:

it is a well-settled rule that, without violating constitutional provisions bearing on separation and delegation of powers or due process, an administrative agency may be given and may exercise the power to require the attendance of witnesses in proceedings of a purely investigatory nature. Annotation, 27 A.L.R. 2d 1208-19. Of course the questions to the subpoenaed witness must be pertinent and relevant to the purpose for which the agency is authorized to conduct hearings.

The case of *Barry v. Garcia*, 573 So.2d 932 (Fla. 3d DCA 1991), which is cited in a footnote in Mr. Eckert's opinion, offers no authority to the contrary. Construing the Miami city charter, this case concluded that a resolution of the city commission was ineffective to grant subpoena power to an independent review board investigating relations between police officers and residents of the Overtown area after civic disturbances in 1989.

When it held that the Miami city commission lacked the authority to delegate the power to issue subpoenas to the review board, the Court construed the particular provisions of the Miami city charter and the unique provisions of the

1956 constitutional amendment creating the Metropolitan government in Dade County. The Court refused to consider the home rule provisions of the 1968 Constitution because a clause of that constitution exempted Dade County from the home rule provisions of Article VIII "as if this article had not been adopted." *Barry*, 573 So.2d at 935. In the absence of the modern constitution's home rule powers, the Court construed the Miami charter restrictively, relying on a now-defunct doctrine known as Dillon's rule, which held that local governments may exercise only those powers that are expressly granted by the legislature. This doctrine, which is the antithesis of home rule, was abrogated by the home rule provisions of the 1968 Constitution. See, *City of Boca Raton v. State*, 595 So. 2d 25, 27-28 (Fla. 1992).

Therefore, *Barry* is inappropos because it construes the specific provisions of the Miami city charter restrictively under the now-defunct Dillon's rule. It is not permissible to apply the interpretation of one city charter as if it created a rule of law applicable to all other charters, no matter how they are worded. *Barry* has no bearing on the present issue because it is unique to the particular circumstances of the Miami charter and Dade County Metro government construed in light of the 1985 constitution. These circumstances are not present in this case.

Recommendation Regarding Subpoenas

I do not foresee an immediate need to use subpoenas to obtain testimony. There appears to be a significant number of witnesses who will provide testimony voluntarily, and I will begin by obtaining all such voluntary testimony. Ultimately, however, it may become necessary to resort to subpoena to complete the Investigation. In a decision affirming the legislative power of investigation, the United States Supreme Court aptly stated:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information--which not infrequently is true--recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

Accordingly, I recommend that the Council enact an ordinance authorizing special counsel to issue subpoenas to obtain relevant and pertinent testimony and evidence from any witness where the subpoena is necessary for that purpose. I will ask Mr. Eckert to work with me regarding the form and content of such an ordinance for the Council's consideration at the next appropriate meeting after public notice has been published.

Assistance

It is already clear that this assignment will require a great deal of effort in interviewing witnesses and reviewing documents. To assist me in meeting the 90 day deadline, I propose to associate Mr. Noah C. McKinnon, Esq., of McKinnon and McKinnon in Ormond Beach. Mr. McKinnon is a veteran prosecutor and civil trial lawyer with substantial experience in local government with whom I have cooperated in several significant matters in recent years. I plan to divide the workload so that there is no likelihood of "double billing." His billing rate will be \$290 per hour, the same rate that I quoted in my recent email to the Council.

Specific Plan of Action

I will carry out the assignment under your November 21, 2013 motion as follows:

1. I will complete my review of the documents and records that have been accumulated to this date.
2. I will continue to coordinate with the County Attorney in regard to the pending suit for discovery against Waverly Media, Ltd., and will make use in this Investigation of information gleaned in this action.
3. I will interview all identifiable witnesses who agree to provide testimony voluntarily.
4. I will obtain such additional documents and records as are relevant and voluntarily available from witnesses or others.
5. I will confer with the State Attorney and seek such information as can be obtained in light of applicable public records exemptions, bearing in mind that the prosecutor has discretion to release records of even an active investigation.

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6. If necessary to obtain relevant testimony or other evidence, I will issue subpoenas as necessary and will notify the Council when I do so.

When this labor has reached fruition, I will submit written and oral reports to the Council detailing the findings and recommendations. Meanwhile, I will submit monthly statements for my time and out of pocket expenses for myself and Mr. McKinnon at the rates I have provided.

I appreciate the confidence you have shown by asking me to perform this service. It will not necessarily be easy, but it is very important, and I am happy to have this opportunity to serve.

Sincerely,



Jonathan D. Kaney Jr.
Direct: 386-675-0691
Cell: 386-290-0820
E-mail: jon@kaneyolivari.com

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