



2020 ORANGE COUNTY CHARTER REVIEW COMMISSION (CRC)

January 22, 2020

Committee Recommendation

Rights of the Wekiva River and Econlockhatchee River Committee

Committee Members:

Eugene Stoccardo, Chair
John E. Fauth
Anthony (Tony) Suarez
James R. Auffant
Nikki Mims

Background

On July 10, 2019, the 2020 Charter Review Commission (the "CRC") considered a proposal from Member Eugene Stoccardo in favor of establishing an evaluation topic the Rights of the Wekiva River and Econlockhatchee River. The CRC voted 7 – 5 to establish the evaluation topic and 12 – 0 to create a separate committee to examine the issue and report its findings back to the CRC. Thereafter, on November 6, 2019, the CRC voted 8 - 4 to expand the evaluation topic to include all bodies of water in Orange County, as the basins of the two rivers comprise a huge portion of Orange County.

Summary of Recommendation

Beginning on July 25, 2019, the Rights of the Wekiva River and Econlockhatchee River Committee (the "Committee") held 11 public meetings to hear public input and consider proposals regarding the creation of "Rights of Nature"¹ for the Wekiva and Econlockhatchee Rivers, the violation of which would be actionable by citizens of Orange County and by Orange County itself. On November 6, 2019, with the approval of the CRC, the scope of the Committee's area of inquiry expanded to all bodies of water in Orange County.

Over the course of multiple meetings the Committee considered and analyzed several drafts of proposed amendments provided to the Committee and prepared by representatives of a group called the Environmental Defense Fund and other local environmental activists including Chair

¹ According to the website, <https://therightsofnature.org>, Rights of Nature "is the recognition and honoring that Nature has rights. It is the recognition that our ecosystems – including trees, oceans, animals, mountains – have rights just as human beings have rights. Rights of Nature is about balancing what is good for human beings against what is good for other species, what is good for the planet as a world. It is the holistic recognition that all life, all ecosystems on our planet are deeply intertwined."

A more detailed explanation of the "Rights of Nature" can be found here: <https://therightsofnature.org/what-is-rights-of-nature/>.

Stoccardo. The Committee also heard from members of the public as to their respective concerns and suggestions regarding the creation of a charter amendment granting “rights of nature” to the waters of Orange County.

On December 16, 2019, the Committee met to further review proposed Charter amendment language. At that meeting, the General Counsel was directed to assist in drafting the amendment and to attempt to “delete” or “collapse” the scope of the amendment to address some of the legal issues presented by the then current draft.

On January 6, 2020, the Committee met to consider for final vote a draft amendment prepared and submitted by Chair Stoccardo and a draft amendment prepared by the General Counsel at the committee’s request. The General Counsel provided a comparison version to the Committee so the members could see and understand the differences between the two versions. After substantial discussion and careful consideration of the information presented, the Committee voted 4 to 1 to recommend to the full CRC that the General Counsel’s version of the draft amendment to the Orange County Charter be submitted to the voters. The draft amendment attempts to further protect the waters of Orange County from pollution by prohibiting certain conduct by governmental agencies, non-natural persons or corporate entities and by providing a private right of action to every citizen of the County to enforce the prohibitions set forth in the amendment.

Although some members of the public expressed concern that the proposed draft amendment prepared by the General Counsel at the direction of the Committee was not broad enough to provide all of the protections and remedies that should be available to the citizens and Waters of Orange County, the majority of the Committee expressed the opinion that the condensed draft amendment prepared by General Counsel met the intent of the Committee and provided potentially enforceable rights and restrictions versus one that provided broader rights and remedies, but was also more readily subject to legal challenge on the basis of vagueness.

Reasons for Recommendation

1. Orange County Waters Need Additional Protection from Unchecked Growth.

Over the course of the various meetings the Committee was presented with information related to nitrate concentrations, sources and its effects on the Wekiva River and Econlockhatchee River. The Committee was also presented information related to regulatory agencies, cases and studies regarding toxins and waterways. The general consensus of those who presented to the Committee was that unchecked growth was largely responsible for the degradation of the two rivers and that the State of Florida and the County Commission had not been up to the task of adequately protecting these waters.

2. Federal Law, Florida Law and County Regulations are Insufficient Protection and don't provide an Individual Right to Sue for Enforcement.

The Committee heard from speakers who argued that the current regulatory structure needed to be changed to protect the things that are valued (like air and water) and that creating a private right of action and allowing individual citizens standing to sue would be an important deterrent and better protected these Waters.

3. Protection of Water is Essential to the Health and Welfare of the Citizens of Orange County and its Economy.

Citizens expressed concerns regarding the costs and legal fees associated with pursuing violations or defending implementation of the proposed amendment should be compared with the cost of cleaning up the rivers after the fact. Further information was provided concerning the economic value on tourism and property values of having clean waters throughout the County. Thus, the overall sentiment from the public was that the cost of enforcement or defending the protections afforded by a charter amendment from legal challenges were outweighed by the benefits such an amendment would have on the County, its residents, tourists, and the Waters.

4. "Rights of Nature" is an Emerging Movement which Attempts to Empower Citizens to Protect Natural Resources against Pollution and Degradation by Creating Private Enforcement Rights to Citizens.

A full explanation and discussion of the emerging "Rights of Nature" movement can be found at <https://therightsofnature.org> and is not repeated here. However, fundamental to that movement is the idea that *"we – the people – have the legal authority and responsibility to enforce these rights on behalf of ecosystems. The ecosystem itself can be named as the injured party, with its own legal standing rights, in cases alleging rights violations."* <https://therightsofnature.org/what-is-rights-of-nature/>.

This concept is what the proposed amendment attempts to codify in a legally defensible way.

Arguments Against Recommendation

1. Property Rights not Adequately Protected.

The committee heard concerns expressed by a few members of the public as well as the General Counsel concerning the failure of the proposed amendment to address a number of issues, among them, existing property rights – some of which may already be vested and actionable.

2. Prohibited Activity/Remedies not Adequately Described.

Fundamental to legal enforceability is that a party charged with a violation of law must have been able to clearly identify the prohibited conduct before being so charged. Moreover, where injunctive

relief to correct a violation is called for (as opposed to monetary damages alone) the law should set out guideposts for what a violator must do to remedy the situation. For example, if a violator is ordered to “restore” a water body to its pre-violation condition, how would a court or the violator know when that has been achieved? Prior drafts of the amendment contained many terms like “thrive” and “rehydrate” with nebulous and legally problematic definitions. Those terms have been eliminated from the Committee approved final draft. Additionally, the approved final draft adopts existing state law definitions for the critical term, “pollution.”

3. Potential Litigation over Preemption, Vagueness, Standing and Property Rights Issues.

As described above, concern was expressed that the proposed amendment will be vulnerable to legal attack as being too vague to be enforceable, which concern prompted the request for the draft prepared by the General Counsel. The General Counsel’s memo discussing the vagueness issue is included as an exhibit to this report. However, there are other concerns regarding whether the amendment is (or will be) preempted by state and federal law, whether the broad standing provision will pass legal scrutiny, and whether the law provides adequate protections for existing property rights. Any or all of these issues could lead to costly litigation against its implementation and enforcement, as it has in other parts of the country where similar initiatives or charter amendments have been attempted.

4. Draft Amendment does not go far enough to Protect the Waters of Orange County.

The Chair and some other members of the public have expressed concern that the original version of the amendment and several subsequent versions do more to protect the waters of Orange County than the adopted version. In other words, the amendment recommended by the Committee does not go far enough to remedy the perceived harm. Their argument is that the current system has failed and that a more comprehensive approach is warranted even if it results in substantial litigation costs to the defend its enforceability.

Committee Recommendation

After careful consideration of the information presented, the Committee recommended on a 4-1 vote that the attached draft ballot title, summary and charter amendment be forwarded to the CRC for its consideration.

Accordingly, having carefully considered the comments and proposals of the public, the comments and information provided by invited guests, the memorandums and information provided by General Counsel, and the various other versions of the proposed amendment considered by the Committee, and otherwise being fully advised in the premises, **the Committee recommends that the attached amendment to the Orange County Charter, including Ballot Title and Summary, be made with respect to the Rights of the Wekiva River and Econlockhatchee River.**

Exhibits:

Proposed Amendment, Ballot Title and Summary

All Committee minutes

All legal memoranda provided the Committee by the General Counsel

Letter dated October 9, 2019 from Bobby R. Beagles, Florida Farm Bureau

Letter dated November 15, 2019 from Byron W. Brooks, County Administrator