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**AGENDA ITEM
ST. JOHNS COUNTY BOARD OF COUNTY COMMISSIONERS**

Deadline for Submission - Wednesday 9 a.m. – Thirteen Days Prior to BCC Meeting

1/16/2024

BCC MEETING DATE

TO: Joy Andrews, County Administrator

DATE: January 4, 2024

FROM: David Migut, County Attorney

PHONE: 904 209-0805

SUBJECT OR TITLE: Outside Counsel Presentation: Election-Related Comments

AGENDA TYPE: Business Item

BACKGROUND INFORMATION:

At the December 5, 2023 Board of County Commissioners meeting, the Board passed a motion that included retaining outside counsel to provide a legal analysis related to commissioner conduct. On December 7, 2023 the County entered into an agreement with Raymond Treadwell, Esquire, Shareholder with Lawson Huck Gonzalez, PLLC for such services. Mr. Treadwell has provided a written legal opinion and will present his findings to the Board.

1. IS FUNDING REQUIRED? No

2. IF YES, INDICATE IF BUDGETED. No

IF FUNDING IS REQUIRED, MANDATORY OMB REVIEW IS REQUIRED:

INDICATE FUNDING SOURCE:

SUGGESTED MOTION/RECOMMENDATION/ACTION:

Presentation Item.

For Administration Use Only:

Legal: DM 1/8/2024

OMB: JDD 1/8/2024

Admin: Angela Cowling 1/8/2024

January 8, 2024

VIA ELECTRONIC MAIL

David Migut
County Attorney
St. Johns County, Florida
500 San Sebastian View
St. Augustine, Florida 32084

RE: *Legal Analysis of Commissioner Krista Joseph's Comments at the November 21, 2023 Board of County Commissioners Meeting.*

Dear Mr. Migut:

As requested, we have analyzed whether the comments made by Commissioner Krista Joseph at the Board of County Commissioners Meeting held on November 21, 2023 (the "Board Meeting") violated section 104.31, Florida Statutes, or any other applicable Florida laws. We have concluded that Commissioner Joseph likely violated section 104.31, and we have found no other laws applicable under the circumstances.

I. Background

a. County Commissioners and the 2024 Election

St. Johns County has a Board of County Commissioners (the "Commission") composed of five members serving staggered terms of four years (the "Commissioners"). Art. VIII, s. 1(e), Fla. Const. Each of the five districts within the County elects a Commissioner who resides within that district. *Id.* Furthermore, there are no limits upon the number of four-year terms a Commissioner may serve on the Commission.

During the upcoming 2024 election, three of the five districts will be electing their respective Commissioners - Districts 1, 3, and 5. Currently, District 1 is

represented by Commissioner Christian Whitehurst, District 3 is represented by Commissioner Roy Alaimo, and District 5 is represented by Commissioner Henry Dean (collectively, the “Incumbent Commissioners”). Given that there are no term limits, all three Incumbent Commissioners could run for reelection. As of November 21, 2023, none of the Incumbent Commissioners had yet filed to run for reelection. But Commissioner Alaimo has since filed to run.

Commissioner Krista Joseph, who represents District 4, was first elected to the Commission in 2022, therefore she is not up for reelection during the 2024 election cycle. Nevertheless, candidates for the District 1, 3, and 5 seats claim to have been endorsed by Commissioner Joseph for this election cycle. Ann-Marie Evans is a candidate in District 1, and her campaign website prominently displays the message, “COMMISSIONER KRISTA JOSEPH ENDORSES ANN-MARIE.”¹ The website even fully recites an endorsement letter from Commissioner Joseph. Ann Taylor is a candidate in District 5, and her campaign website similarly displays the message, “Endorsed by St. Johns County Commissioner Krista Joseph.”² Her website also fully recites an endorsement letter from Commissioner Joseph. It further states, “When elected, I will vote with Commissioner Joseph, who endorses me, to slow down the growth of St. Johns County.” Finally, Bill Freeman was a candidate for District 3 on November 21, 2023, and he also claimed to be endorsed by Commissioner Joseph, but his campaign and campaign website are no longer active.³ None of these endorsed individuals are Incumbent Commissioners, and these endorsements appear to precede Commissioner Joseph’s comments at the Board Meeting on November 21, 2023.

¹ <https://electann-marie.com/>

² <https://voteanntaylor.com/>

³ <https://www.votebillfreeman.com/>

b. Additional Context for Commissioner Joseph’s Comments at the Board Meeting on November 21, 2023

During some recent Board Meetings, Commissioner Joseph has disagreed with her colleagues and lost on some newsworthy votes by the Commission.

For example, on October 17, 2023, Commissioner Joseph sought to amend the County’s tree protection regulations in the Land Development Code. Some of her fellow Commissioners criticized the proposals at issue during their debate. Speaking in favor of the proposals, Commissioner Joseph highlighted the “clear-cutting” by developers and lamented the failure by builders to support larger environmental “buffers.” She concluded her comments by stating, “I hope everyone remembers this in a year when maybe some of these people run for reelection.” Commissioner Joseph’s motion to move forward with crafting new tree regulations failed by a vote of 3 to 2.⁴

In November, Commissioner Joseph failed in other votes by 4 to 1. As background, the Commission appoints advisory committees and boards to make recommendations to the Commission.⁵ For example, the Ponte Vedra Zoning and Adjustment Board (PVZAB) advises the Commission on development and land use matters within the Ponte Vedra Zoning District.

On November 7, 2023, the Commission met to consider a request to rezone approximately 90.5 acres of land within Ponte Vedra to allow for the redevelopment of the Ponte Vedra Inn & Club. The PVZAB had reviewed the project on September 11, 2023, and recommended denying the redevelopment.⁶ Nevertheless, the full Commission, following presentations by the affected

⁴ <https://stjohnscountyfl.new.swagit.com/videos/276726>; <https://www.firstcoastnews.com/article/news/local/st-johns-county-commission-changes-tree-ordinance/77-e4d6648a-cae6-44bc-ae92-38343fe044b1>

⁵ <https://webapp.sjcfl.us/brdscommittees/Boards.aspx?Sort=All>

⁶ <https://www.jaxdailyrecord.com/news/2023/sep/12/board-recommends-denial-of-planned-unit-development-for-ponte-vedra-inn-club/>

parties and the general public, voted 4 to 1 to approve the redevelopment. Commissioner Joseph was the only member to vote against it.⁷ Thereafter, two members of the PVZAB resigned.⁸

Another such advisory board to the Commission is the Land Acquisition Management Program (LAMP) Conservation Board. On November 21, 2023, when the Commission considered some appointments to the LAMP Conservation Board, the Commission did not approve one applicant recommended to it by the current members of the LAMP Conservation Board. The current LAMP Board unanimously recommended Nicole Crosby for appointment by the Commission.⁹ Commissioner Joseph then spoke in favor of Crosby at the November 21, 2023 Commission meeting. But the other Commissioners favored Anila Lahiri. The vote was 4 to 1 to appoint Lahiri, with only Commissioner Joseph opposed.¹⁰

Near the conclusion of that meeting, Commissioner Joseph made the comments that are the subject of this evaluation.

c. Commissioner Joseph's Comments at the Board Meeting on November 21, 2023

Toward the end of the Board Meeting on November 21, 2023, each Commissioner had an opportunity to provide a "Commissioner's Report" on a subject of his or her own choosing. Commissioner Joseph made the following comments which led to this exchange:¹¹

Commissioner Joseph: Hello everybody. I was going to talk about Ponte Vedra High School swim team that won state. The girls won state. But I'm

⁷ <https://stjohnscountyfl.new.swagit.com/videos/280425>; <https://www.jaxdailyrecord.com/news/2023/nov/07/ponte-vedra-inn-club-redevelopment-approved-by-st-johns-county/>

⁸ <https://www.firstcoastnews.com/article/news/local/two-development-review-board-members-resign-ponte-vedra-inn-club-expansion-gets-the-ok/77-9ad60f79-0031-44a4-8d33-c93eab8abc15>

⁹ <http://www.co.st-johns.fl.us/LAMP/media/2023/10-10-23-LAMP-Minutes.pdf>

¹⁰ <https://stjohnscountyfl.new.swagit.com/videos/281734>

¹¹ <https://stjohnscountyfl.new.swagit.com/videos/281734> (4:10:35-4:13:25)

going to move on to something that I think is more important to our county. I'm going to give a public service announcement for something. And I am thankful for America because guess what we get in this country, we get hope. If you are sick of the traffic, clear cutting of the trees, high density housing, approval of more housing, children overcrowded in the schools, living in modular class rooms and really trying to learn, ignoring advisory boards. Just, Ponte Vedra advisory board, eh, we don't need them. Or Lamp advisory board, eh, we're not going to listen to them. Breaking zoning height rules on the beach. Feel you aren't listened to. Developers are controlling the boards. No response for your e-mails. You know what, there's hope. Less than nine months, we have an election. I stopped by Vicky Oakes. Here's the information.

Commissioner Dean: Point of order.

Commissioner Arnold: I think this is out of line. Mr. Migut.

Attorney Migut: We have a point of order, so please stop speaking.

Commissioner Dean: Can she make a political speech during an official county commission meeting?

Attorney Migut: It's - our rules are silent on political, political speech. In general, should be related to county, county business.

Commissioner Joseph: Where, where does it say that? 'Cause I looked for it. It's not in here. It's not in here. I looked for it. I even warned you that I already, I already talked to another attorney about what I'm allowed to say. And I was approved to talk about general, to the city, to the

people of St. Johns County about Election Day that is only nine months away. And there's three open commissioner seats [gesturing her hand toward her fellow commissioners].

Attorney Migut: Commissioner, we have a decorum and civility policy. I would ask you to try to get whatever point you're going, you're speaking in a manner that is respectful to your co-commissioners.

Commissioner Joseph: Well, there is three open seats. No one here has to, you know, has come up to say they are running again,...

Commissioner Arnold: Mr. Migut.

Commissioner Joseph: ...and I was actually going to say, which is on public. D-1, Anne Marie Evans is running, D-3, Bill Freeman is running.

Commissioner Arnold: Yea, I don't believe you can campaign on public property.

Commissioner Joseph: I am not campaigning. I am saying what is on the website for Vicky Oakes. Public...

Commissioner Arnold: Okay, this is not...

Commissioner Joseph: This is a public service announcement about elections and who is already signed up to run for the county commission seats.

Attorney Migut: Commissioner, I believe you've crossed the line with our decorum and civility policy. I would ask you to refrain from making any more comments on that topic.

Commissioner Joseph: Okay, but I, why can't I say that the election is in nine months, less than nine months?

Attorney Migut: I think that's a fine statement. You've already made that statement.

Commissioner Joseph: Okay. Thank you, sir.

Following the other Commissioners' Reports, the Board Meeting adjourned.

II. Legal Analysis

a. The Florida Election Code

The Florida Election Code, codified in Chapter 104, Florida Statutes, contains a number of prohibitions meant to protect against the subversion of the elective process. *See State v. Brown*, 298 So. 2d 487, 490 (Fla. 4th DCA 1974) (recognizing that the provisions of Chapter 104 are "intended to maintain the purity of elections."). "Without purity in the election process, our entire system of government will decay." *Id.*

Within the Election Code, section 104.31 prohibits a county officer from using "his or her official authority or influence for the purpose of interfering with an election or a nomination of office or coercing or influencing another person's vote or affecting the result thereof." § 104.31(1)(a), Fla. Stat.

b. The Florida Election Code and Commissioner Joseph's Comments

The facts at issue are a matter of public record. Commissioner Joseph made her comments during an official Board Meeting of the County Commission on November 21, 2023, which was video recorded. Although the comments occurred following the regular agenda items, the "Commissioners' Reports" were

equally part of the official Board Meeting. Indeed, the only reason she could speak during the “Commissioners’ Reports” was due to her position as County Commissioner. It is therefore undeniable that Commissioner Joseph was using “her official authority or influence” to make the election-related comments on November 21, 2023. § 104.31(1)(a), Fla. Stat.

The critical question is whether her comments were “for the purpose of” either interfering with an election or coercing or influencing another person’s vote. § 104.31(1)(a), Fla. Stat. Commissioner Joseph insisted during the Board Meeting that her comments were simply a “public service announcement” about the upcoming election that was “less than nine months” away. From her perspective, she made “a public service announcement about elections and who is already signed up to run for the county commission seats.” When accused of campaigning on public property, she responded, “I am not campaigning. I am saying what is on the website for Vicky Oakes,” the Supervisor of Elections for St. Johns County.

Commissioner Joseph’s stated purpose might be believable if her comments were actually limited to the content of that stated purpose. But she spoke about much more than when the next election will be and who is currently registered to run. Instead, she began her comments by listing at least ten opinions that voters might care about. Two of those opinions dealt with issues or votes Commissioner Joseph had very recently lost among her fellow Commissioners: the “clear cutting of the trees” and “ignoring advisory boards,” like the “Ponte Vedra advisory board” and the “Lamp advisory board.” Furthermore, her criticism that voters might “feel you aren’t listened to” and might get “no response for your e-mails” seemed aimed at current officeholders. When she finished her list of issues and criticisms, she then stated, “You know what, there’s hope. Less than nine months, we have an election.”

With a transition like that, Commissioner Joseph was clearly making a campaign speech, not a public service announcement. It is not surprising her fellow Commissioners interjected.

Following Commissioner Dean's "point of order," Commissioner Joseph proceeded to make her main point: "there's three open commissioner seats." She waved her hand toward the Incumbent Commissioners. The County Attorney David Migut then interrupted her and pleaded for her to make "whatever point" she intended to make, but to do so "in a manner that is respectful to your co-commissioners." Commissioner Joseph then repeated her point, "Well, there is three open seats. No one here has . . . come up to say they are running again."

At that point, an average listener would have understood Commissioner Joseph's comments to be for the purpose of influencing voters with respect to the upcoming election on the Commission seats representing Districts 1, 3, and 5. Commissioner Joseph would not have prefaced her main point with numerous criticisms if she thought no change was needed with respect to the upcoming election. And she would not have characterized the upcoming election as "hope" if she thought voters were content with the status quo. In context, the unmistakable purpose of her comments was to encourage voting out the Incumbent Commissioners.

To make matters worse, Commissioner Joseph then mentioned two candidates she had already endorsed for those seats -- Anne Marie Evans and Bill Freeman. Although she did not repeat her endorsements of those candidates during the Board Meeting, simply drawing attention to other candidates after criticizing the status quo further demonstrated her purpose of encouraging voters to oust the Incumbent Commissioners. She also provided those candidates whom she had endorsed with higher visibility in the community using the platform of her official position as County Commissioner.

Commissioner Joseph's comments almost certainly fall within the prohibition in section 104.31(1)(a) of the Election Code. While carrying out her duties as a County Commissioner at an official County Commission meeting, she made comments that would naturally influence or coerce another person's vote, and her comments seemed designed for that very and unlawful purpose.

c. The Florida Elections Commission and the Willfulness Requirement

The Election Code classifies a violation of section 104.31(1)(a) as a misdemeanor of the first degree. § 104.31(3), Fla. Stat. Thus, a violation is susceptible to criminal prosecution by the State Attorney.

The Florida Elections Commission also has jurisdiction to investigate and determine violations of the Election Code, but the Commission may only find a violation when the conduct is "willful." § 106.25, Fla. Stat. ("For the purposes of commission jurisdiction, a violation shall mean the willful performance of an act prohibited by this chapter or chapter 104 . . .") (emphasis added). Willfulness is a determination of fact. *Id.*; *Fugate v. Fla. Elec. Comm'n*, 924 So. 2d 74, 75 (Fla. 1st DCA 2006).

There is a long, winding history of Florida courts' application of the willfulness requirement. As it existed before 2007, section 106.37 provided a definition of willfulness. At that time, the Florida Elections Commission relied on that section's definition of "willful violations" to establish violations of chapter 104. *See Fla. Elec. Comm'n v. John J. Fugate*, 2004 WL 2981372 (DOAH, Dec. 22, 2004) (Recommended Order) ("Thus, the Commission, consistent with its past holdings, again holds that Section 106.37, Florida Statutes, applies to alleged violations of Chapter 104, Florida Statutes.").

However, the First DCA disagreed that the definition in section 106.37 applied to violations of chapter 104 and, instead, invited the Commission to promulgate by rule a definition of "willful" to be applied to violations of chapter 104. *See Fugate*,

924 So. 2d at 76. In 2006, the Commission promulgated Rule 2B-1.002, F.A.C., which created a definition of willful. But in 2007, the Florida Legislature repealed section 106.37 and amended section 106.25(3) to state that “[w]illfulness is a determination of fact” *Id.* The Commission altered its rule in 2007 and survived a challenge to its authority to promulgate the rule in 2010. *See Fla. Elec. Comm’n v. Blair*, 52 So. 3d 9 (Fla. 1st DCA 2010) (finding that the repeal of section 106.37 and amendments to section 106.25(3) did not prohibit an adoption of a definition of “willfull” by rule).

However, in 2011, the Legislature acted again by prohibiting the Commission from adopting a definition of “willful” by rule, amending section 106.25(3) to state that “[t]he commission may not by rule determine what constitutes willfulness or further define the term ‘willful’ for purposes of this chapter or chapter 104.” Subsequently, in 2013, the Commission repealed Rule 2B-1.002.

Against this background, at least one decision from the Division of Administrative Hearings (DOAH), dealing with an alleged violation of the campaign financing law in chapter 106, applied the interpretation adopted by the First DCA in *Fugate*, 924 So. 2d at 75: “a willful act [is] one that is voluntarily and intentionally performed with specific intent and bad purpose to violate or disregard the requirements of the law.” *See Florida Elections Commission, Petitioner v. Conserve and Protect Florida’s Scenic Beauty, Respondent*, 2016 WL 1180548 (DOAH, Mar. 22, 2016) (Final Order), at *8.

Willfulness in Commissioner Joseph’s case is a closer call than the violation itself. After all, Commissioner Joseph indicated during the Board Meeting that she had sought independent counsel about what she was “allowed to say” and that she had even “warned” the County Attorney David Migut that she had sought such counsel. She then indicated that she “was approved to talk about general, to the city, to the people of St. Johns County about Election Day that is only nine months away.”

There are almost no cases analyzing the willfulness requirement in relation to section 104.31, Florida Statutes, but one case is probative. In *Florida Elections Commission v. Schwartz*, 2002 WL 127345 (DOAH, Jan. 31, 2002), the Administrative Law Judge found that the Mayor of Margate, Florida, had not acted willfully in violation of section 104.31, Florida Statutes, when she sent an endorsement letter on city stationary. Although the Mayor had not sought counsel about the letter in advance, the Mayor was already permitted to use the official seal of the City of Margate in correspondence or advertising when she was promoting the City. Furthermore, the City Attorney had recently advised the Mayor, in writing and orally, that she could endorse the candidate at issue. As a result, the Mayor “believed that writing the endorsement letter was something that she could do without violating the law.” 2002 WL 127345, at *2. The Administrative Law Judge found the Mayor’s belief to be “credible” based on the evidence, *id.*, and concluded that the Florida Elections Commission had not demonstrated a “knowledgeable or reckless commission of an act prohibited by” section 104.31, Florida Statutes. *Id.* at *5. Instead, the Mayor had a “good faith” belief that the endorsement letter was appropriate and not in violation of the Florida Election Code.

Though Commissioner Joseph’s conduct, much like the Mayor of Margate’s, violates the plain language of section 104.31(1), Florida Statutes, the Florida Elections Commission would have to prove that Commissioner Joseph’s violation was willful based on the factual evidence.

The fact that Commissioner Joseph claimed to have been following legal advice about what she was “allowed to say” cuts against a finding of willfulness. Nevertheless, if Commissioner Joseph was truly given legal advice that she was “approved to talk about” Election Day in “general” or generally, she failed to comply with that legal advice. She intentionally raised issues and criticisms that could be associated with the Incumbent Commissioners, and she repeatedly characterized the upcoming election as a reason for “hope” given that there

would be “three open commissioner seats.” Then she identified candidates by name who are running for those seats and who were endorsed by her.

Furthermore, after her fellow Commissioners and the County Attorney flagged her remarks as inappropriate, Commissioner Joseph continued to press her main point that “there’s three open commissioner seats.” Her subsequent naming of the candidates she had endorsed for those seats received immediate pushback from Commissioner Arnold, as well as the County Attorney who noted she had “crossed the line.” In sum, Commissioner Joseph sought counsel in advance because she knew the law might restrict her official speech, then when others stopped her in real time, she pressed ahead anyway. An objective factfinder could conclude that her violation of section 104.31(1) was reckless and willful.

Additional facts may further demonstrate Commissioner Joseph’s willfulness, such as whether and when she received training as a County Commissioner with respect to a public officer’s ethical duties and prohibited election-related conduct. If her training included any warning about campaign activity during official business, then she would have had knowledge of the prohibition at issue.

Finally, Commissioner Joseph has appeared to show no appreciation for the Election Code’s prohibition on campaign speech during official business since being censured by the four other Commissioners on December 5, 2023. At that subsequent meeting, Commissioner Dean expressly pointed to section 104.31 as the legal basis for the Commission’s censure motion. Commissioner Joseph defended her prior comments by declaring, “I was factual. There was not anything I said that was not factual.”¹² She also quoted the First Amendment. She then explained that she “was planning to name every candidate who was running” and reemphasized that she sought counsel from her attorney prior to making her comments on November 21, 2023. In short, Commissioner Joseph has not expressed any regret for her comments, because she believes they were

¹² <https://stjohnscountyfl.new.swagit.com/videos/283464>

lawful. Following the December 5, 2023 meeting and censure vote, Commissioner Joseph posted the following on Facebook:

 **Krista Keating-Joseph**
December 5 at 4:15 PM · YouTube · 

Today was an outrageous and egregious day. At today's County Commissioner meeting, the 4 other Commissioners CENSURED me for my Public Service Announcement to keep my constituents informed. There are no confirmed candidates, no incumbents yet, and the final election is a year away. DEAN made the motion and WHITEHURST seconded based on this video below.



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Given Commissioner Joseph's unwavering insistence that her comments were lawful – even after knowing the statutory prohibition on campaigning during an official meeting – a reasonable factfinder is likely to conclude that her behavior was willful and remains so.

III. Options

Based on the above information and legal standards, any person with firsthand knowledge could refer this matter to the Florida Elections Commission with a sworn complaint, pursuant to section 106.25, Florida Statutes, which could lead to a civil penalty against Commissioner Joseph. This matter could also be referred to the State Attorney for further consideration of a criminal charge.

As a final note, during the investigation of the background for Commissioner Joseph's comments, several Commissioners and staff raised concerns about an alleged destruction of a public record by Commissioner Joseph. Because an allegation of this nature is beyond the scope of this engagement, no further inquiry was made.

I will be available to answer the Commission's questions about this legal analysis at the Commission's meeting on January 16, 2024.

Sincerely,

/s/ Raymond Treadwell