

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CITY OF RIVIERA BEACH, CASE NO. 50 2006 CA 014100 XXXX MB AA

Plaintiff,

v.

DAWN PARDO; DIANA DIMEO; KATHY
GROOVER; DRAGA M. LINDBLOM; AND
GORDON ROWSE,

Defendants.

DATE RECEIVED

SEP - 6 2007

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO INTERVENOR'S
COUNTERCLAIM/CROSSCLAIM

Defendants Dawn Pardo, Diana Dimeo, Kathy Groover, Draga M. Lindblom, and Gordon Rowse move this Court for the entry of a Summary Judgment on Intervenor's Counterclaim/Crossclaim and as grounds therefore, Defendants would show that the pleadings, depositions, exhibits, interrogatories, admissions, and any affidavits on file show that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law.

The grounds upon which this Motion is based and the substantial matters of law to be argued are as follows:

BACKGROUND

The City of Riviera Beach ("City") initiated this action seeking declaratory relief that two proposed Charter Amendments and a proposed referendum to repeal Ordinance No. 3016 are insufficient under the City Charter and in Conflict with Chapter 163. On April 27, 2007 the City dismissed its claim with prejudice. On February 27, 2007 ORMD, LLC ("ORMD") intervened in this action and was permitted to file a counterclaim/crossclaim. In Count I of the Counterclaim/Crossclaim ORMD seeks

EXHIBIT " 1 "

declaratory relief that the proposed Charter Amendments and proposed referendum to repeal Ordinance No. 3016 are (1) preempted by Chapter 163, (2) conflict with the comprehensive plan, (3) unconstitutional, and (4) arbitrary and capricious. In Count II ORMD seeks declaratory relief that the proposed Charter Amendments and proposed referendum to repeal Ordinance No. 3016 are invalid because the petitions fail to comply with the requirements of the City Charter.

UNDISPUTED FACTS REQUIRING NO PROOF AT TRIAL

1. On October 4, 2006 the City Council enacted Ordinance No. 3016 to amend Section 3 of Article XIII of the City Charter, which authorized the City to lease its municipal beach property for 99 years, instead of 50 years. (A copy of Ordinance No. 3016 is attached as Exhibit "A")
2. On November 3, 2006 petition papers for a referendum to repeal Ordinance No. 3016 were submitted to the City. (A copy of the proposed referendum is attached as Exhibit "B")
3. On November 3, 2006 petition papers for two Charter Amendments ("Petition for Charter Amendment Limiting the Number of Years that the City may Lease Municipal Property" and "Petition for Charter Amendment Establishing Height Limitations for Municipal Beach Property" (hereinafter referred to as the "two Charter Amendments")) were submitted to the City. (A copy of the two Charter Amendments are attached as Exhibits "C" and "D")
4. The City had a total of 19,617 register voters. The Supervisor of Elections certified the signatures of at least 10% of the registered voters in the City as it relates to the two proposed Charter Amendments. (A copy of the letter from the City Clerk and certifications from the Supervisor of Elections are attached as

Composite Exhibit "E")

5. On February 5, 2007 this Court in *Dawn Pardo v. Jim Jackson, et al.*, Case No. 2006 CA 014101 AA, issued a Peremptory Writ of Mandamus commanding the City to place the two Charter Amendments on the March 2007 ballot. The Court found factual issues remained as to compliance with the procedural requirements of the City Charter that prevented the placement of the referendum to repeal Ordinance No. 3016 on the ballot. (A copy of the order on the peremptory writ is attached as Exhibit "F")
6. On March 13, 2007 the voters overwhelming adopted the two Charter Amendments. The two Charter Amendments are now part of the City Charter. (A copy of the election results from the Palm Beach County Supervisor of Elections' web page is attached as Exhibit "G")
7. On May 16, 2007 the City Council enacted Ordinance No.3025, which repealed Ordinance No. 3016. (A copy of Ordinance No. 3025 is attached as Exhibit "H")
8. The City did not amend the Comprehensive Plan after the City Council adopted Ordinance No. 3016, after the two Charter Amendments were adopted, or after the City Council adopted Ordinance No.3025, which repealed Ordinance No. 3016. (Affidavit of Mary McKinney attached as Exhibit "I").
9. Ordinance No. 3016 did not amend any portion of the Comprehensive Plan. The two Charter Amendments did not amend any portion of the Comprehensive Plan. (Affidavit of Mary McKinney attached as Exhibit "I").
10. The City never passed an ordinance approving the height of any structure sought to be built by ORMD on the municipal beach property. (Affidavit of Mary McKinney attached as Exhibit "I").

LEGAL ARGUMENT

ALL CLAIMS AS TO THE REPEAL OF ORDINANCE NO. 3016 AND THE CHARTER AMENDMENT REINSTATING THE 50 YEAR LEASE LIMITATION ARE MOOT

Defendants are entitled to summary judgment as to all claims raised in the counterclaim/crossclaim concerning the referendum to repeal Ordinance No. 3016 and the Charter Amendment to reinstate the 50 year lease limitation as these issues are now moot. It is the function of a trial court to decide actual controversies by a judgment, which can be carried into effect, and not give opinions on moot questions, or decide principles of law which cannot effect the matter in issue. *Merkle v. Guardianship of Jacoby*, 912 So.2d 595 (Fla. 2d DCA 2005). An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. *Id.*

A. Referendum to Repeal Ordinance No. 3016

The controversy concerning the referendum to repeal Ordinance No. 3016 is moot as the City Council passed Ordinance No. 3025 repealing Ordinance No. 3016. Since the City Council passed an ordinance repealing Ordinance No. 3016 a referendum is no longer necessary and a judicial determination would have no effect.

B. Charter Amendment to Reinstate the 50 year Lease Limitation

The controversy concerning the Charter Amendment to reinstate the 50 year lease limitation in the City Charter is moot because the City Council passed Ordinance No. 3025 repealing Ordinance No. 3016. Ordinance No. 3016 amended Section 3, Article XIII of the City Charter to extend the permissible lease term from 50 years to 99 years. The repeal of Ordinance No. 3016 by the City Council reinstated the 50 year lease limitation in the City Charter, thereby having the same effect as the passage of the Charter Amendment. A judicial determination would have no effect on the 50 year lease limitation.

**THE TWO CHARTER AMENDMENTS ARE CONSTITUTIONAL AS THEY ARE NOT
IN EXPRESS CONFLICT WITH ANY STATE STATUTE AND ARE NOT PREEMPTED
BY ANY STATE STATUTE**

Article VIII, Section 2(b) of the Florida Constitution provides that municipalities "may exercise any power for municipal purposes except as otherwise provided by law." Section 166.021, Florida Statutes, provides that municipalities may exercise any power for municipal purposes, except where expressly prohibited by law or expressly preempted by general law. *See also Lowe v. Broward County*, 766 So.2d 1199 (Fla. 4th DCA 2000).

The two Charter Amendments do not expressly conflict with any state statute. The Charter Amendments are only inconsistent with state law if they specifically conflict with a state statute. *Cf. Engineering Contractors Ass'n of South Florida, Inc. v. Broward County*, 789 So.2d 445 (Fla. 4th DCA 2001)(addressing whether an ordinance conflicts with a state statute). Specific conflict with a state statute means that one must violate one provision in order to comply with the other. *Id.* Compliance with the two Charter Amendments do not conflict with any state statute.

Further, the two Charter Amendments are not expressly preempted by any state statute. Express preemption requires a specific statement and cannot occur through implication or inference. *Florida League of Cities, Inc. v. Department of Insurance and Treasurer*, 540 So.2d 850 (Fla. 1st DCA 1989). ORMD has cited no state statute that contains a statement prohibiting a municipality from amending a City Charter to include height restrictions on municipal property or to reinstate a lease restriction that was originally included in the City Charter.¹

¹The preemption argument as to whether the City may amend the City Charter to include lease restrictions and height limitations is defeated by the fact that the City, at the insistence of ORMD, amended the City Charter to loosen the lease restrictions of municipal property.

The referendum to repeal Ordinance No. 3016 cannot possibly conflict with any state statute as the City initially passed Ordinance No. 3016. The right of the City to pass the ordinance includes the power to repeal or modify the ordinance. *Bishoff v. State*, 37 So. 808 (Fla. 1901). Further, there is no state statute that expressly preempts the ability of the City to enact an ordinance to amend the City Charter. If there was such a statute, then Ordinance No. 3016 would likewise be unconstitutional.

THE TWO CHARTER AMENDMENTS DO NOT VIOLATE CHAPTER 163 AS THEY ARE NOT LAND DEVELOPMENT REGULATIONS

In ¶187 ORMD seeks to declare the two Charter Amendments unconstitutional alleging that they are land development regulations thus requiring the City to adhere to Chapter 163 in their adoption.

Section 163.3194(2) provides in pertinent part as follows:

After a comprehensive plan for the area, or element or portion thereof, is adopted by the governing body, no land development regulation, land development code, or amendment thereto shall be adopted by the governing body until such regulation, code or amendment has been referred either to the local planning agency or to a separate land development regulation commission created pursuant to local ordinance, or to both, for review and recommendation as to the relationship of such proposal to the adopted comprehensive plan, or element or portion thereof. Said recommendation shall be made within a reasonable time, but no later than within 2 months after the time of reference.

The two Charter Amendments do not violate Chapter 163 as they are not land development regulations. A "land development regulation" is defined as "an ordinance enacted by a local governing body." Section 163.3213(2)(b), Florida Statutes. First, the two Charter Amendments are not ordinances. Second, the two Charter Amendments did not amend, repeal, or preempt any ordinance. Third, the two Charter Amendments were not adopted by the local governing body. The "governing body" is the City Council. See Section 163.3164(9). The two Charter Amendments were

enacted by an overwhelming majority vote by the voters of the City at the March 2006 election not the City Council. For these reasons, the two Charter Amendments are not land development regulations. See *City of Cocoa Beach v. Vacation Beach, Inc.*, 852 So.2d 358 (Fla. 5th DCA 2003)(holding that charter amendments adopted by a majority of the voters relating to maximum density and height of residential construction were not land development regulations).

In paragraph 76 ORMD challenges the validity of the Charter Amendments claiming that the Charter Amendments are amendments to the Comprehensive Plan that affect less than five parcels of property. Pursuant to Section 163.3167(12) an initiative or referendum process in regard to any development order or in regard to any comprehensive plan amendment or map amendment that affects five or fewer parcels is invalid. This argument fails for one simple reason. The Charter Amendments were not development orders and did not amend either the Comprehensive Plan or Future Land Use Map. “[T]he purpose of a comprehensive plan is to set general guidelines for future development, not necessarily to accomplish immediate land use changes.” *Southwest Ranches Homeowners Ass’n, Inc. v. Broward County*, 502 So.2d 931, 936 (Fla. 4th DCA 1987). The future land use for the “municipal beach property” or property within the “CF Community Facility District” is still the same as it was before the enactment of the two Charter Amendments. The Charter Amendments do not amend the City’s Comprehensive Plan nor do they affect the permissible zoning categories for “municipal beach property”. The City’s Comprehensive Plan does not control or determine the height of structures. Guidelines for height are contained in the City’s zoning code.

In ¶¶ 91, 96-102 ORMD further challenge the validity of the Charter

Amendments claiming that they are land development regulations that are inconsistent with the City's Comprehensive Plan. Even if the two Charter Amendments could be considered land development regulations, the sole proceeding available to challenge the consistency of a land development regulation with a comprehensive plan is an administrative proceeding. See Section 163.3213, Florida Statutes. As such this Court does not have the jurisdiction to determine if the two Charter Amendments are inconsistent with the City's Comprehensive Plan.

SECTION 166.031, FLORIDA STATUTES, IS THE SOLE METHOD BY WHICH A MUNICIPAL CHARTER MAY BE AMENDED

Although ORMD argues in Count II that the two Charter Amendments are invalid because the petitions allegedly failed to comply with the requirements of the City Charter, this Court has already rejected this argument based upon the same undisputed facts in the *Pardo* action². Amendments to the City Charter are governed by Section 166.031, Florida Statutes. Section 166.031, Florida Statutes, is the sole method by which a municipal charter may be amended. Section 166.031 provides that only ten (10) percent of the registered voters need to sign a petition to amend the City Charter. Specifically, Section 166.031(1) provides as follows:

The governing body of a municipality may, by ordinance, or the electors of a municipality may, by petition signed by 10 percent of the registered electors as of the last preceding municipal general election, submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter except that part describing the boundaries of such municipality. The governing body of the municipality shall place the proposed amendment contained in the ordinance or

²The position taken by ORMD in Count II has already been rejected by this Court. In *Dawn Pardo v. Jim Jackson et al.*, Case No. 2006 CA 014101 AA this Court ruled that issues of fact as to whether the procedural requirements of the City Charter were followed are not material as Section 166.031, Florida Statutes, is the sole method by which a municipal charter may be amended.

petition to a vote of the electors at the next general election held within the municipality or at a special election called for such purpose.

Section 166.031(3) specifically preempts any charter provision to the contrary as it provides that a municipality may amend its Charter pursuant to the procedures of the statute notwithstanding any charter provision to the contrary. In addition, the Office of Attorney General has consistently stated that the charter amendment provisions prevail over conflicting provisions in a municipal charter. See Atty. Gen Op. 93-23(1993); 88-30(1988); 79-80(1979). In any event, the City Charter is completely silent about amendments. The only petition procedure referenced in the City Charter is for ordinance initiative and repeal. The City cannot graft its charter procedures for initiating ordinances onto state statutory procedures for charter amendments.

CONCLUSION

It is important to note that the only substantive change to the City Charter was the inclusion of a five story height limitation on municipal beach property. The City's zoning code was not changed. The City's Comprehensive Plan was not changed. The City's Future Land Use Map was not changed.

Since the issues surrounding the repeal of Ordinance No. 3016 and the Charter Amendment reinstating the 50 year lease limitation are moot Defendants are entitled to summary judgment as to these issues. Since the Charter Amendments are constitutional, not preempted or in express conflict with any statute, and not arbitrary and capricious, Defendants are entitled to summary judgment as to these issues pertaining to the Charter Amendments. Defendants are entitled to summary judgment on the issue of whether the Charter Amendments are inconsistent with Comprehensive Plan as the Charter Amendments are not land development regulations and if they

were the sole remedy to challenge the consistency of land development regulations is through an administrative proceeding. Lastly, Defendants are entitled to summary judgment that the Charter Amendments are valid since Section 166.031, Florida Statutes, is the sole method by which a municipal charter may be amended.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Brian B. Joslyn, Esq. and Richard A. Jarolem, Esq., Casey, Ciklin, Lubitz, Martens & O'Connell, 515 North Flagler Drive, 18th Floor, West Palm Beach, FL 33401, Gary M. Dunkel, Esq., Greenberg Traurig, P.A., 777 South Flagler Drive, Suite 300, West Palm Beach, FL 33401, Office of Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401 and Office of Attorney General State of Florida, The Capitol PL-01, Tallahassee, FL 32399-1050 on this 5th day of September, 2007.

SCOTT, HARRIS, BRYAN, BARRA,
& JORGENSEN, P.A.
Attorneys for Defendants
4400 PGA Boulevard, Suite 800
Palm Beach Gardens, Florida 33410
Telephone No.: (561) 624-3900
Facsimile No.: (561) 624-3533

John M. Jorgensen, Esq.
Florida Bar No.: 348112
S. Brian Bull, Esq.
Florida Bar No.: 363560