WEISS SEROTA HELFMAN COLE & BIERMAN

AT THE CROSSROADS OF BUSINESS, GOVERNMENT & THE LAW

M E M O R A N D U M

TO: Town of Cutler Bay Charter Revision Commission Members

FROM: Mitch Bierman, Esq, and Haydee Sera, Esq., Town Attorneys

DATE: February 22, 2018

RE: Town Charter Proposal for Referenda Requirement on Development

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At the February 7, 2018 Charter Revision Commission ("CRC") meeting, the CRC requested that the Town Attorney research whether section 163.3167(8), Florida Statutes would prevent the Town from adopting a Charter requirement that a referendum be conducted prior to development of a designated wetland. Section 163.3167(8), Florida Statutes provides that an "initiative or referendum process in regard to any development order is prohibited." *See* Section 163.3167(8), Florida Statutes (attached and linked to here). The statute contains very limited exceptions to the prohibition, none of which apply to the Town of Cutler Bay. Accordingly, after researching section 163.3167(8), Florida Statutes, it is our opinion that the Town is preempted from adopting a charter provision requiring a referendum for purposes of development.

This opinion is supported by case law and a Florida Attorney General opinion interpreting section 163.3167, Florida Statutes. In Attorney General Opinion number 2017-03, the Florida Attorney General opined that, based on section 163.3167, Florida Statutes, a municipal charter may not be amended to include language that would result in the mandatory denial of certain development orders or to require that local comprehensive plan amendments be implemented only pursuant to a vote arising from an initiative or referendum process. *See* Florida Attorney General Opinion 2017-03 (attached and linked to here).

Two cases interpreting section 163.3167(8), Florida Statutes are also attached for your review: *Archstone Palmetto Park, LLC v. Kennedy*, 132 So. 3d 347 (Fla. 4th DCA 2014) and *Preserve Palm Beach Political Action Committee v. Town of Palm Beach*, 50 So. 3d 1176 (Fla. 4th DCA 2010). *Archstone* indicates the State Legislature intended to bar referenda for all development orders, comprehensive amendments, and map amendments, except for

specifically grandfathered in provisions described in section 163.3167(8)(b), Florida Statutes. A charter amendment enacted now would be done outside the statutory exception period of section 163.3167(8)(b), Florida Statutes and would therefore fall within the control of section 163.3167(8)(a), Florida Statutes, which bars any initiative or referendum regarding development orders or conditions.

Attachments:

1) Section 163.3167, Florida Statutes
2) Florida Attorney General Opinion 2017-03
3) *Archstone Palmetto Park, LLC v. Kennedy*, 132 So. 3d 347 (Fla. 4th DCA 2014)
4) *Preserve Palm Beach Political Action Committee v. Town of Palm Beach*, 50 So. 3d 1176 (Fla. 4th DCA 2010)

Select Year: 2017 Go

The 2017 Florida Statutes

Title XI
COUNTY ORGANIZATION AND INTERGOVERNMENTAL RELATIONS

Chapter 163
INTERGOVERNMENTAL PROGRAMS

View Entire Chapter

163.3167 Scope of act.—

(1) The several incorporated municipalities and counties shall have power and responsibility:

(a) To plan for their future development and growth.

(b) To adopt and amend comprehensive plans, or elements or portions thereof, to guide their future development and growth.

(c) To implement adopted or amended comprehensive plans by the adoption of appropriate land development regulations or elements thereof.

(d) To establish, support, and maintain administrative instruments and procedures to carry out the provisions and purposes of this act.

The powers and authority set out in this act may be employed by municipalities and counties individually or jointly by mutual agreement in accord with this act and in such combinations as their common interests may dictate and require.

(2) Each local government shall maintain a comprehensive plan of the type and in the manner set out in this part or prepare amendments to its existing comprehensive plan to conform it to the requirements of this part and in the manner set out in this part.

(3) A municipality established after the effective date of this act shall, within 1 year after incorporation, establish a local planning agency, pursuant to s. 163.3174, and prepare and adopt a comprehensive plan of the type and in the manner set out in this act within 3 years after the date of such incorporation. A county comprehensive plan shall be deemed controlling until the municipality adopts a comprehensive plan in accord with this act.

(4) Any comprehensive plan, or element or portion thereof, adopted pursuant to this act, which but for its adoption after the deadlines established pursuant to previous versions of this act would have been valid, shall be valid.

(5) Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to chapter 380 or who has been issued a final local development order and development has commenced and is continuing in good faith.

(6) The Reedy Creek Improvement District shall exercise the authority of this part as it applies to municipalities, consistent with the legislative act under which it was established, for the total area under its jurisdiction.

(7) Nothing in this part shall supersede any provision of ss. 341.8201-341.842.

(8)(a) An initiative or referendum process in regard to any development order is prohibited.

(b) An initiative or referendum process in regard to any local comprehensive plan amendment or map amendment is prohibited unless it is expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011. A general local government charter provision for an initiative or referendum process is not sufficient.

(c) It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order. It is the intent of the Legislature that initiative and referendum be prohibited in regard to any local comprehensive plan amendment or map amendment, except as specifically and narrowly allowed by paragraph (b).

Therefore, the prohibition on initiative and referendum stated in paragraphs (a) and (b) is remedial in nature and applies retroactively to any initiative or referendum process commenced after June 1, 2011, and any such initiative or referendum process commenced or completed thereafter is deemed null and void and of no legal force and effect.

(9) Each local government shall address in its comprehensive plan, as enumerated in this chapter, the water supply sources necessary to meet and achieve the existing and projected water use demand for the established planning period, considering the applicable plan developed pursuant to s. 373.709.

(10)(a) If a local government grants a development order pursuant to its adopted land development regulations and the order is not the subject of a pending appeal and the timeframe for filing an appeal has expired, the development order may not be invalidated by a subsequent judicial determination that such land development regulations, or any portion thereof that is relevant to the development order, are invalid because of a deficiency in the approval standards.

(b) This subsection does not preclude or affect the timely institution of any other remedy available at law or equity, including a common law writ of certiorari proceeding pursuant to Rule 9.190, Florida Rules of Appellate Procedure, or an original proceeding pursuant to s. 163.3215, as applicable.

History.—s. 4, ch. 75-257; s. 1, ch. 77-174; s. 3, ch. 85-55; s. 6, ch. 86-191; s. 1, ch. 87-338; s. 1, ch. 92-129; s. 5, ch. 93-206; s. 1, ch. 95-322; s. 23, ch. 96-410; s. 158, ch. 2003-261; s. 11, ch. 2004-5; s. 1, ch. 2004-37; s. 3, ch. 2004-372; s. 1, ch. 2004-381; s. 42, ch. 2010-102; s. 3, ch. 2010-205; s. 7, ch. 2011-139; s. 1, ch. 2012-99; s. 1, ch. 2013-115; s. 3, ch. 2013-213; s. 1, ch. 2014-178.

Advisory Legal Opinion - AGO 2017-03

Print Icon Print Version

Number: AGO 2017-03
Date: April 4, 2017
Subject: Municipal Charter Amendment

April 4, 2017

Mr. Lonnie N. Groot
Attorney for the City of Daytona Beach Shores
1001 Heathrow Park Lane, Suite 4001
Lake Mary, Florida 32746

RE: MUNICIPALITIES – CHARTER AMENDMENT – REFERENDUM REGARDING DEVELOPMENT ORDERS AND COMPREHENSIVE PLAN AMENDMENTS – whether s. 163.3167, Fla. Stat., allows a municipality to amend its city charter through an initiative or referendum process to include language resulting in mandatory denial of certain development orders and requiring an initiative or referendum to implement local comprehensive plan amendments.

Dear Mr. Groot:

On behalf of the City Council, you have asked the following question:

May the city charter be amended by referendum to include language "which results in the mandatory denial of certain development orders" and which requires that "local comprehensive plan amendment[s]" be implemented only pursuant to "a vote arising from the initiative or referendum process"?[1]

In sum:

The city charter may not, consistent with section 163.3167, Florida Statutes, be amended through an initiative or referendum process to include language "which results in the mandatory denial of certain development orders" and which requires that "local comprehensive plan amendment[s]" be implemented only pursuant to "a vote arising from the initiative or referendum process."

Florida's Growth Policy Act, Chapter 163, Florida Statutes, provides a direct answer to your question. As amended in 2014, section 163.3167(8), Florida Statutes–which governs local government initiative or referendum processes in regard to any

development order–currently provides that "[a]n initiative or referendum process in regard to any development order is prohibited." The Legislature expressly indicated its intent that this prohibition be "remedial in nature[,]" providing:

"(c) It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order. It is the intent of the Legislature that initiative and referendum be prohibited in regard to any local comprehensive plan amendment or map amendment, except as specifically and narrowly allowed by paragraph (b). Therefore, the prohibition on initiative and referendum stated in paragraphs (a) and (b) is remedial in nature and applies retroactively to any initiative or referendum process commenced after June 1, 2011, and any such initiative or referendum process commenced or completed thereafter is deemed null and void and of no legal force and effect."[2]

In interpreting an earlier version of section 163.3167, Florida Statutes (which, at the time, prohibited an initiative or referendum process "in regard to any development order or in regard to any local comprehensive plan amendment or map amendment *that affects five or fewer parcels of land*"), the Second District Court of Appeal considered the validity of proposed city charter amendments which would require elector approval for any comprehensive plan or plan amendment affecting more than five parcels of land. *Citizens For Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1147–48 (Fla. 2d DCA 2006). The appellate court held that the proposed amendments were "inferentially permitted" by section 163.3167:

"Clearly, the Legislature has proscribed use of the initiative and referendum process in matters affecting five or fewer parcels of land. And just as clearly, the Legislature inferentially permitted use of the initiative and referendum process in development orders or comprehensive plans or amendments affecting six or more parcels."

Id. at 1149–50.[3]

While the court's reasoning in *Citizens For Responsible Growth* may have suggested that proposed ordinances or charter amendments might be authorized to the extent they complement, rather than conflict with, the Growth Policy Act's statutory framework, the basis for any such leeway has since been removed. By subsequent amendment to section 163.3167, Florida Statutes, the condition that the prohibited initiative or referendum process must involve local comprehensive plan amendments or map amendments "affecting five or fewer parcels of land" was eliminated.

Under the present version of the law, "except as specifically and narrowly allowed by paragraph (b)," the initiative and referendum process is prohibited in regard to any development order, local comprehensive plan amendment, or map amendment. Because your query concerns a prospective charter amendment, the exception provided by subsection (b) for processes "expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011[,]" would not apply.[4]

As applied to your question, you indicate that it has been proposed that the city charter be amended through an initiative or referendum process to include language "which results in the mandatory denial of certain development orders" and which requires that "local comprehensive plan amendment[s]" may be implemented only

pursuant to "a vote arising from the initiative or referendum process." Were the proposed amendment to have the outcomes you describe, this would result in violations of the clear statutory proscriptions against implementation of the initiative or referendum process in regard to any development order or local comprehensive plan amendment.

Based on the foregoing, I am of the opinion that the city charter may not, consistent with section 163.3167, Florida Statutes, be amended through an initiative or referendum process to include language "which results in the mandatory denial of certain development orders" and which requires that "local comprehensive plan amendment[s]" be implemented only pursuant to "a vote arising from the initiative or referendum process."

Sincerely,

Pam Bondi
Attorney General

PB/ttlm

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[1] Based on the quoted language (taken directly from your letter), it is presumed that the proposed charter amendment, if adopted, would have the legal effect you have asserted. This office otherwise would not interpret the effect of any proposed charter amendment language. *See* Frequently Asked Questions About Attorney General Opinions (available at http://myfloridalegal.com/pages.nsf/Main/dd177569f8fb0f1a85256cc6007b70ad) (last visited March 6, 2017).

[2] § 163.3167(8)(c), Fla. Stat. (2016).

[3] In later addressing a different question under the same provision, the Fourth District Court of Appeals determined that the statutory prohibition precluded a referendum to challenge a city ordinance which amended the City's comprehensive plan and provided for rezoning of a 4.02-acre parcel of land. *City of Lake Worth v. Save Our Neighborhood, Inc.*, 995 So. 2d 1002, 1003-04 (Fla. 4th DCA 2008). In so doing, the appellate court rejected the challengers' argument that "affected" parcels comprised not only the parcel specifically described in the amendment, but "may also include other affected parcels" which were not directly subject to the amendment. *Id.* at 1003.

[4] § 163.3167(8)(b), Fla. Stat., specifies that "[a] general local government charter provision for an initiative or referendum process is not sufficient."

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132 So.3d 347
District Court of Appeal of Florida,
Fourth District.

ARCHSTONE PALMETTO PARK, LLC, and City of Boca Raton, a Florida Municipality, Appellants,
v.
Kathleen KENNEDY, James M. Sullivan, Peter S. Barbour, Douglas R. Bloch, Darold R. Hurlbert and John A. Clarke, Appellees.

No. 4D12–4554.
|
Jan. 29, 2014.

Synopsis

Background: City brought declaratory judgment action against voters who had sought a citywide referendum to determine whether city ordinance should be repealed, seeking a declaration that development orders were not statutorily subject to referendum. The Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Lucy Chernow Brown, J., entered judgment in favor of voters, and city and intervening property owner appealed.

Holdings: The District Court of Appeal, Schiff, Louis H., Associate Judge, held that:

[1] voters' right to referendum was effectively tied to amendment that permitted local governments to retain and implement certain charter provisions, and provided for an initiative or referendum process in regard to development orders, and

[2] legislature did not intend to radically expand the referendum process, but rather intended to bar referendum for development orders unless exempted by specific charter provisions in place as of June 1, 2011.

Reversed and remanded.

West Headnotes (6)

[1] Zoning and Planning

Approval of voters or property owners; referendum and initiative

Voters' right to referendum was effectively tied to amendment that permitted local governments to retain and implement certain charter provisions and provided for an initiative or referendum process in regard to development orders. West's F.S.A. Const. Art. 6, § 5(a); West's F.S.A. § 163.3167(8).

Cases that cite this headnote

[2] Statutes

Referendum

"Referendum" is the right of the people to have an act passed by the legislative body submitted for their approval or rejection. West's F.S.A. Const. Art. 6, § 5(a).

Cases that cite this headnote

[3] Statutes

Referendum

The availability of the referendum is constrained to those situations where the people through their legislative bodies decide it should be used. West's F.S.A. Const. Art. 6, § 5(a).

Cases that cite this headnote

[4] Zoning and Planning

Approval of voters or property owners; referendum and initiative

Zoning and Planning

Approval of voters or property owners; referendum and initiative

Without express wording to the contrary, the legislature did not intend to radically expand the referendum process through general charter provisions by amending a statutory amendment that had served to bar referenda for all development orders, comprehensive amendments, and map amendments to grandfather in and exempt specific charter provisions that permitted referendum, when such provisions were commonplace throughout the state, and the

amendment clearly expressed the Legislature's intent to bar referendum for development orders unless exempted by specific charter provisions that were in existence prior to June 1, 2011. West's F.S.A. § 163.3167(8).

Cases that cite this headnote

[5] Statutes
Intent

Legislative intent is the polestar that guides the interpretation and construction of a statute.

1 Cases that cite this headnote

[6] Statutes
Reports and analyses

While staff analyses are not determinative of final legislative intent, they are, nevertheless, one touchstone of the collective legislative will.

Cases that cite this headnote

Attorneys and Law Firms

***348** Gerald F. Richman and Manuel Farach of Richman Greer, P.A., West Palm Beach, and Charles L. Siemon and J. Michael Marshall of Siemon & Larsen, P.A., Boca Raton, for appellant Archstone Palmetto Park, LLC.

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***349** Ralf Brookes, Cape Coral, for appellees.

Trela J. White and Jennifer G. Ashton of Corbett, White and Davis, P.A., Lantana, for Amicus Curiae, The Palm Beach County League of Cities, Inc.

Jane West, St. Augustine, for Amicus Curiae, Florida Coalition for Preservation.

Opinion

SCHIFF, LOUIS H., Associate Judge.

On occasion, the Legislature provides explicit guidance as to its intent and how a statute is to be applied for a specific case. This is one such instance. We reverse the declaratory judgment in favor of the appellees, which interpreted a 2012 amendment to section 163.3167(8), Florida Statutes, as requiring the City of Boca Raton to submit a development order to public referenda. Read properly, the 2012 amendment served to reaffirm the longstanding prohibition on referenda for development orders while grandfathering in specific charter provisions permitting referenda in place as of June 1, 2011.

Factual Background

[1] In February 2012, the City of Boca Raton adopted Ordinance 5203, which amended a previously-approved development order by, among other things, setting additional development approval requirements for a four-acre parcel of land owned by appellant Archstone. Although Ordinance 5203 was styled as an amendment, the parties stipulated that it was a "local government development order."

One month after the ordinance's passage, the appellees, a group of Boca Raton residents, collectively filed a petition, pursuant to Section 6.02 of the City's charter, seeking a citywide referendum to determine whether Ordinance 5203 should be repealed. Although not specifically addressing development orders, Section 6.02 [1] conferred upon the City's residents a general power of referendum with regard to the passage of city ordinances, providing as follows:

> The qualified voters of the city shall have the power by petition to require reconsideration by the council of any adopted ordinance or resolution, and if council fails to repeal an ordinance or resolution, to approve or reject it at a city election ....

At the time the appellees initiated their petition, section 163.3167(8), Florida Statutes (2011) ("the 2011 Amendment"), barred referendum proceedings for all development orders. As became effective on April 6, 2012, however, the Legislature amended section 163.3167(8)

(the "2012 Amendment") to permit local governments to "retain[ ] and implement[ ]" charter provisions that were in effect as of June 1, 2011, and provided "for an initiative or referendum process *in regard to development orders.*" § 163.3167(8), Fla. Stat. (2012) (emphasis added).

Unsure of the 2012 Amendment's impact, the City brought suit in the circuit court seeking a declaratory judgment to the effect that development orders, such as Ordinance 5203, were not statutorily subject to referendum. One week later, Archstone, as the owner of the parcel subject to Ordinance 5203, intervened in the action as a co-plaintiff. Through their pleadings, the appellants collectively argued the City ***350** was powerless to process the appellees' referendum petition since the 2012 Amendment's "grandfather" clause applied only to a charter's "express" referendum provision, and "the City has never had a referendum process that specifically applied to development orders."

Following cross-motions for summary judgment, the trial court entered an order denying the appellants' motions while granting that of the appellees. In its order, the trial court found that, through the passage of the 2012 Amendment, "the Legislature intended for the referendum process to be permitted for Development Orders, where ... the City Charter provided for this prior to June, 2011." Accordingly, since Section 6.02's general provision "for the referendum process on *any* Ordinances" impliedly included development orders, the trial court reasoned "the 2012 Amendment support[ed] the referendum process in th[e instant] case."

To support its ruling, the trial court traced section 163.3167(8)'s legislative history, recognizing the 2012 Amendment was enacted to grandfather in previously permitted charter provisions rendered invalid under the 2011 Amendment's blanket prohibition. Nevertheless, the trial court interpreted the statute's inclusion of the phrase "development orders" to evidence the Legislature's intent to expand the referendum process to all general charter provisions, such as Section 6.02, which inferentially, although not directly, apply to development orders. Additionally, given this expansive view, the trial court interpreted the 2012 Amendment as overruling this Court's decision in *Preserve Palm Beach Political Action Committee v. Town of Palm Beach,* 50 So.3d 1176 (Fla. 4th DCA 2010), which questioned the efficacy of subjecting development orders to referendum.

The appellants challenge the trial court's interpretation as contrary to the Legislature's intent. Specifically, they argue the 2012 Amendment did nothing to disturb the previous bar on referendum for development orders, since its express purpose was to satisfy a contingent settlement agreement by grandfathering in a municipality's limited charter provision. As an issue of statutory interpretation, our review is de novo. *See Kephart v. Hadi,* 932 So.2d 1086, 1089 (Fla.2006), *cert. denied,* 549 U.S. 1216, 127 S.Ct. 1268, 167 L.Ed.2d 92 (2007).

[2] **[3]** "Referendum is the right of the people to have an act passed by the legislative body submitted for their approval or rejection." *City of Coral Gables v. Carmichael,* 256 So.2d 404, 411 (Fla. 3d DCA 1972) (quotation marks and citation omitted). In Florida, the availability of the referendum is constrained to those situations where "the people through their legislative bodies decide it should be used." *Fla. Land Co. v. City of Winter Springs,* 427 So.2d 170, 172–73 (Fla.1983) (footnote omitted). In this regard, Article VI, section 5(a) of the Florida Constitution provides that "referenda shall be held as provided by law," with the phrase "as provided by law" equating to "as passed 'by an act of the legislature.' " *Holzendorf v. Bell,* 606 So.2d 645, 648 (Fla. 1st DCA 1992) (quoting *Broward Cnty. v. Plantation Imports, Inc.,* 419 So.2d 1145, 1148 (Fla. 4th DCA 1982)); *Grapeland Heights Civic Ass'n v. City of Miami,* 267 So.2d 321, 324 (Fla.1972) (defining "law" as used in the Florida Constitution as "enact[ed] by the State Legislature"). Thus, as applied to this case, the appellees' right to referendum is effectively tied to the reach of the 2012 Amendment.

Legislative History

[4] **[5]** "Legislative intent is the polestar that guides the interpretation and construction ***351** of a statute." *Anderson v. State,* 87 So.3d 774, 777 (Fla.2012). "Where a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent." *Beyel Bros. Crane & Rigging Co. of S. Fla., Inc. v. Ace Transp., Inc.,* 664 So.2d 62, 64 (Fla. 4th DCA 1995) (citing *City of Miami Beach v. Galbut,* 626 So.2d 192 (Fla.1993)). "However, when a statute is unclear or ambiguous as to its meaning, the Court must resort to traditional rules of statutory construction ...." *Murray v. Mariner Health,* 994 So.2d 1051, 1061 (Fla.2008). In conducting such analysis,

"courts are permitted to consider subsequently enacted legislation in determining the meaning of a statute," *Edward T. Byrd & Co. v. WPSC Venture I,* 66 So.3d 979, 983 (Fla. 5th DCA 2011) (citing *Martin Daytona Corp. v. Strickland Constr. Servs.,* 941 So.2d 1220, 1224 (Fla. 5th DCA 2006)), particularly where the "amendment was enacted soon after a controversy regarding the statute's interpretation arose." *McKenzie Check Advance of Fla., LLC v. Betts,* 928 So.2d 1204, 1210 (Fla.2006) (citing *Lowry v. Parole & Prob. Comm'n,* 473 So.2d 1248, 1250 (Fla.1985)).

To discern the Legislature's intent in enacting the 2012 Amendment, first we must navigate the statute's history. The limitations placed upon referenda for development orders originated in 1995, when the Legislature enacted section 163.3167(12), Florida Statutes (1995), which provided as follows:

> An initiative or referendum process in regard to any development order or in regard to any local comprehensive plan amendment or map amendment that affects five or fewer parcels of land is prohibited.

Applying this statute, this Court decided *Preserve Palm Beach Political Action Committee v. Town of Palm Beach,* 50 So.3d 1176 (Fla. 4th DCA 2010), *rev. denied,* 63 So.3d 750 (Fla.2011). *Preserve Palm Beach* involved the determination as to whether a proposed charter amendment constituted a development order, and thus was statutorily barred from referendum. In finding section 163.3167(12) to apply, this Court noted " 'the due process problems associated with subjecting small property owners to public referendum votes when they would otherwise be entitled to a quasi[-]judicial hearing and review procedures.' " *Id.* at 1179. Furthermore, we questioned the wisdom of subjecting a development order to referendum, stating:

> The right of the people to vote on issues they are entitled to vote on is one of utmost importance in our democratic system of government. But there are issues—such as the right of a small landowner to use his property subject only to government regulations—which should not be determined by popular vote. Section 163.3167(12) rightfully protects the small landowner from having to submit her development plans to the general public and ensures that those plans will be approved or not, instead, by the elected officials of the municipality in a quasi-judicial process.

Id.

Less than a year after *Preserve Palm Beach,* the Legislature enacted the 2011 Amendment, which served to bar referenda for *all* development orders, comprehensive amendments, and map amendments. *See* § 163.3167(8), Fla. Stat. (2011). Besides simply placing a limitation on referenda power, however, the 2011 Amendment also had the residual effect of invalidating the in-place charter provisions promulgated by several Florida ***352** municipalities, not including Boca Raton, [2] which tracked the 1995 statute's limited permission of referenda.

The Town of Yankeetown's charter, for example, contained the following provision, which specifically permitted referenda for comprehensive plans affecting more than five parcels of land:

> Section 11. Voter approval is required for approval of comprehensive land use plan or comprehensive land use plan amendments affecting more than five parcels except for amendments to the Capital Improvements Element of the Comprehensive Plan, including annual updates to the capital improvement schedule shall not require voter approval.

To combat their provision's invalidation, the Town of Yankeetown filed a complaint in the Leon County circuit court seeking a declaratory judgment which would maintain its right to enforce Section 11, notwithstanding the 2011 Amendment's prohibition. *See Town of Yankeetown, FL v. Dep't of Cmty. Affairs, et al.,* Case No. 37 2011 CA 002036 (Fla.2d Cir.Ct.2011).

To resolve the matter, Yankeetown and the Department of Community Affairs reached a proposed settlement contingent upon the Legislature amending section

163.3167(8) to "grandfather-in those charter provisions, such as Yankeetown's, in place on the effective date of the Act that *specifically* provided for an initiative or referendum process relating to approval of any development order or any comprehensive plan or map amendment." Fla. H.R. Comm. on Econ. Affairs, Subcomm. on Community & Military Affairs, and Workman, HB 7081 (2012), Staff Analysis 4 (Apr. 9, 2012) (emphasis added). From this settlement, the 2012 Amendment was enacted, providing in full as follows:

> An initiative and referendum process in regard to any development order or in regard to any local comprehensive plan amendment or map amendment is prohibited. However, any local government charter provision that was in effect as of June 1, 2011, for an initiative or referendum process in regard to development orders or in regard to local comprehensive plan amendments or map amendments may be retained and implemented.

§ 163.3167(8), Fla. Stat. (2012).

Drawing from the statute's history, the Legislature intended to enforce the 2011 Amendment's impediment on the referendum process while exempting specific charter provisions permitting referendum, such as Yankeetown's Section 11, in place as of June 2011. Without express wording to the contrary, we decline to infer that the Legislature intended to radically expand the referendum process through general charter provisions, where such provisions are commonplace throughout our state. *See Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

2013 Amendment and the Intent of the Legislature

Such interpretation is cemented by a 2013 amendment to section 163.3167(8), which provided as follows:

> (8) (a) An initiative or referendum process in regard to any development order is prohibited.
>
> ***353** (b) An initiative or referendum process in regard to any local comprehensive plan amendment or map amendment is prohibited. However, an initiative or referendum process in regard to any local comprehensive plan amendment or map amendment that affects more than five parcels of land is allowed if it is expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011. *A general local government charter provision for an initiative or referendum process is not sufficient.*
>
> *(c) It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order....* Therefore, the prohibition on initiative and referendum stated in paragraphs (a) and (b) is remedial in nature and applies retroactively to any initiative or referendum process commenced after June 1, 2011, and any such initiative or referendum process that has been commenced or completed thereafter is hereby deemed null and void and of no legal force and effect.

§ 163.3167(8)(a)-(c), Fla. Stat. (2013) (emphasis added). As grounds for this amendment, the committee staff made express reference to the instant case in its accompanying May 14, 2013 staff analysis, stating:

> In October 2012, the Palm Beach County Circuit Court ruled that CS/HB 7081 (2012) extended the exception to all local government general referendum or initiative charter provisions in effect as of June 1, 2011. The court held that such a general provision encompassed specific land amendments, such as development orders and comprehensive map amendments, despite the charter language not specifically authorizing either. ***This broad interpretation is contrary to the intent of the 2011 and 2012 legislation,*** which sought to restrict these voting mechanisms.

Fla. H.R. Comm. on Econ. Affairs, Subcomm. on Economic Development & Tourism, and Trujillo, Perry, HB 7019 (2013), Staff Analysis 4–5 (May 14, 2013) (footnote omitted) (emphasis added).

[6] "While we recognize that staff analyses are not determinative of final legislative intent, they are, nevertheless, 'one touchstone of the collective legislative will.' " *White v. State,* 714 So.2d 440, 443 n. 5 (Fla.1998) (quoting *Sun Bank/S. Fla., N.A. v. Baker,* 632 So.2d 669, 671 (Fla. 4th DCA 1994)). Here, the above-mentioned staff analysis, when taken in conjunction with the changes made to section 163.3167(8), clearly expresses the Legislature's intent to bar referendum for development orders unless exempted by specific authorization that existed before June 1, 2011. Accordingly, we reverse the declaratory judgment with instructions for the trial court to enter a declaratory judgment in accordance with this opinion.

Reversed and remanded.

MAY and CIKLIN, JJ., concur.

All Citations

132 So.3d 347, 39 Fla. L. Weekly D230

Footnotes

1 Read in conjunction, Section 6.04 of the City's Charter provides the means of commencing such proceedings, providing as follows:

> Any five (5) qualified voters may commence initiative or referendum proceedings by filing with the city clerk an affidavit stating that they will constitute the petitioners' committee and be responsible for circulating the petition and filing it in the proper form, representing the petitioners in any subsequent formal proceedings, and withdrawing a submitted petition.

2 As of 2011, the local governments containing a specific referendum or initiative process affected by the 2011 Amendment included Yankeetown, Longboat Key, Key West, and Miami Beach. Fla. H.R. Comm. on Econ. Affairs, Subcomm. on Community & Military Affairs, and Workman, HB 7081 (2012,) Staff Analysis 3 n. 2 (Apr. 9, 2012).

50 So.3d 1176
District Court of Appeal of Florida,
Fourth District.

PRESERVE PALM BEACH POLITICAL ACTION COMMITTEE and Patrick Henry Flynn, Appellants,
v.
TOWN OF PALM BEACH, et al., Appellees.

No. 4D09–4947.
|
Dec. 15, 2010.
|
Rehearing Denied Feb. 4, 2011.

Synopsis

Background: Town filed complaint for expedited declaratory relief, seeking a declaration as to the constitutionality of proposed ballot initiative that sought to amend the town charter to incorporate provisions of town's agreement with a developer. The Fifteenth Judicial Circuit Court, Palm Beach County, David F. Crow, J., awarded summary judgment to town. Organization that proposed the initiative appealed.

Holding: The District Court of Appeal, Polen, J., held that initiative violated statute barring use of the initiative or referendum process in regard to any development order.

Affirmed.

West Headnotes (1)

[1] Zoning and Planning
Approval of voters or property owners; referendum and initiative

Proposed ballot initiative that would have amended town charter to incorporate provisions of agreement with developer concerning development of certain real property, and would have required any future changes to the agreement to be approved by voter referendum, violated statute barring use of the initiative or referendum process in regard to any development order, despite contention that the agreement was not a development order; initiative attempted to subject the developer's successor to the referendum process any time it wished to do something not anticipated in the agreement, which was the very thing prohibited by the statute. West's F.S.A. §§ 163.3164(7), 163.3167(12).

3 Cases that cite this headnote

Attorneys and Law Firms

***1176** Robert J. Hauser of Beasley Hauser Kramer Leonard & Galardi, P.A., West Palm Beach, and John M. Jorgensen of Scott, Harris, Bryan, Barra & Jorgensen, P.A., Palm Beach Gardens, for appellants.

John C. Randolph and Joanne M. O'Connor of Jones, Foster, Johnston & Stubbs, P.A., West Palm Beach, for appellee Town of Palm Beach.

John W. Little, III, P.A., and Richard J. Dewitt, III, of Brigham Moore, LLP, West Palm Beach, for appellee Sterling Palm Beach, LLC.

Opinion

POLEN, J.

Appellants, Preserve Palm Beach Political Action Committee and Patrick Henry ***1177** Flynn (collectively "Preserve"), appeal the trial court's order granting appellee, Town of Palm Beach's, motion for summary judgment and denying appellants' cross-motion for summary judgment.

In the underlying action, the Town filed a Complaint for Expedited Declaratory Relief seeking a determination of the constitutionality of a Charter amendment proposed by Preserve. The proposed amendment, to be voted on by the citizens of the Town in a February 2010 election, would have required that the Town of Palm Beach Charter be amended to incorporate portions of a 1979 Agreement between the Town of Palm Beach and a developer. The incorporated provisions would prohibit the construction of new buildings in Royal Poinciana Plaza and would require that the Poinciana Theater be used only as a

theater of the performing arts and/or visual arts or for lectures or other special events.

The complaint pled two counts of declaratory relief. Count I sought a determination of the constitutionality of the proposed amendment based on whether the amendment conflicted with section 163.3167(12), Florida Statutes, by purporting to use the initiative or referendum process to alter a development order. Count II sought a determination of the constitutionality of the proposed amendment based on whether the amendment was clear and unambiguous as required by section 101.161(1), Florida Statutes.

The parties agreed below that there were no genuine issues of material fact. The trial court was simply asked to determine two issues: (1) whether the 1979 Agreement was a development order, and (2) whether the proposed amendment was unconstitutional on its face.

The 1979 Agreement

The 1979 Agreement between the Town and Poinciana Properties, Ltd. (the developer), was executed in order to satisfy a precondition to the Town's granting of a variance to the developer. At a hearing on the developer's motion for variance, the Town Council granted the motion "subject to [execution of] an agreement, in a form satisfactory to the Town Attorney," which would provide for sixteen specific conditions. A town building official subsequently advised the developer that the building permit would only issue after certain procedures had been followed:

> After the town has approved said agreement, and after it has been recorded by the applicant, with original copy returned to the Town for the permanent record, and after the Town has received revised plans for approval which reflect the conditions of the agreement, then the Town Building permit to authorize commencement of construction may subsequently be issued.

The resulting Agreement provided, in part:

> WHEREAS, Partnership made an application for variance No. 39–78 with respect to the property known as the Royal Poinciana Plaza on Cocoanut Row in the Town of Palm Beach ...; and
>
> WHEREAS, after public notice and a public hearing on the Partnership application, the Town Council of Palm Beach granted said variance No. 39–78 with modifications of the original plan at its meeting on February 13, 1979 subject to the following conditions; and
>
> WHEREAS, Partnership suggested and volunteered some of said conditions and by this agreement does hereby covenant and agree with TOWN that the conditions hereinafter set forth have become binding obligations on the part of Partnership, and upon its successors and assigns.
>
> NOW, THEREFORE, know all men by these present that in consideration of the premises hereinbefore set forth and ***1178** for other good and valuable considerations, the parties do hereby agree as follows:
>
> ....
>
> 2. Subsequent to the completion of construction and during its ownership of the Royal Poinciana Plaza, the Partnership (and during the ownership of any purchaser) agrees to perform as follows:
>
> ....
>
> E. It will continue to lease the space now occupied and used by the "Poinciana Theater" only for use as a theater of the performing and/or visual arts and for lectures or other special events.

Proposed Charter Amendment

Prompted by the threat of demolition of the theater, Preserve sponsored the following ballot title, summary, and charter amendment petition in an effort to incorporate portions of the 1979 Agreement into the Town Charter:

> BALLOT TITLE: Alterations of covenants of Royal Poinciana Plaza and Royal Poinciana Playhouse only by Referendum.

BALLOT SUMMARY: Voter approval required for alterations to the covenants set forth in the 1979 Royal Poinciana Plaza Agreement between the Town of Palm Beach and the predecessor of Poinciana Properties, Limited, concerning property known as the Royal Poinciana Plaza.

TEXT OF THE PROPOSED CHARTER AMENDMENT

(1) The Town of Palm Beach Charter [s]hall be amended to incorporate portions of the covenants set forth in the 1979 Agreement between the Town of Palm Beach and the predecessor of Poinciana Properties, Limited concerning property known as the Royal Poinciana Plaza; which do not allow the construction of new buildings in Poinciana Plaza, and require that the Poinciana Theater only be used as a theater of the performing arts and/or visual arts or for lectures or other special events.

(2) That a majority of Voters of the Town of Palm Beach voting in a referendum must approve any alterations to the Royal Poinciana Plaza Agreement.

After Preserve collected the required number of signatures, and the Town was told to put the proposed amendment on the ballot, the Town sought a declaratory judgment as to the constitutionality of the amendment. Following a hearing on the parties' motion and cross-motion for summary judgment, the trial court determined that the 1979 Agreement was a development order. Accordingly, the court granted the Town of Palm Beach's motion for summary judgment finding that the proposed amendment was facially unconstitutional because it conflicted with section 163.3167(12). The court then determined that the issue of whether the proposed amendment was unconstitutionally vague was moot. Preserve now timely appeals.

We agree with the trial court's order and affirm. Section 163.3167(12), Florida Statutes, provides in part:

> An initiative or referendum process in regard to any development order or in regard to any local comprehensive plan amendment or map amendment that affects five or fewer parcels of land is prohibited.

§ 163.3167(12), Fla. Stat. (2009). [1] "Development order" is defined as "any order granting, denying, or granting with conditions an application for a development permit." § 163.3164(7), Fla. Stat. (2009).

***1179** Preserve primarily argues that the Agreement is a "development agreement" and is not a "development order." In support of its argument, Preserve first contends that the 1979 Agreement is plainly not an order, which is commonly defined as a "command, direction, or instruction." [2] The Town of Palm Beach responds that the 1979 Agreement meets the definition of "development order" provided in section 163.3164(7) because only by the 1979 Agreement did the Town officially grant, with conditions, the developer's variance request.

As the trial court noted, there is no controlling authority defining a "development order" under the circumstances present here. However, a "development agreement" has been defined as "a contract between a [local government] and a property owner/developer, which provides the developer with vested rights by freezing the existing zoning regulations applicable to a property in exchange for public benefits." *Morgran Co. v. Orange County,* 818 So.2d 640, 643 (Fla. 5th DCA 2002) (quoting Brad K. Schwartz, *Development Agreements: Contracting for Vested Rights,* 28 B.C. Envtl. Aff. L.Rev. 719 (Summer 2001)). The 1979 Agreement at issue did not freeze the zoning as to the developer but granted a variance from zoning with specific conditions. The official act of the Town which allowed the development was the execution of the 1979 Agreement, and not the pronouncement of approval during the town meeting.

Much of Preserve's argument is based on the common understanding that an order, by definition, is often unilateral and non-negotiable. However, we note that development orders are often the product of negotiations between a developer and a municipality. Joseph Van Rooy, *The Development of Regional Impact in Florida's Growth Management,* 19 J. Land Use & Envtl. L. 255, 256 (Spring 2004).

The legislative history of section 163.3167(12) does not provide any guidance as to the purpose of the statute. Still, as the trial court recognized, "[I]t is not difficult to see the due process problems associated with subjecting small property owners to public referendum votes when they

would otherwise be entitled to a quasi[-]judicial hearing and review procedures." The proposed amendment attempts to subject the landowner of the property at issue to the referendum process every time the landowner wishes to do something not anticipated in the 1979 Agreement. In other words, this amendment seeks to do the very thing prohibited by section 163.3167(12). The trial court was correct in determining that the amendment conflicted with Florida law.

The right of the people to vote on issues they are entitled to vote on is one of utmost importance in our democratic system of government. But there are issues—such as the right of a small landowner to use his property subject only to government regulations—which should not be determined by popular vote. Section 163.3167(12) rightfully protects the small landowner from having to submit her development plans to the general public and ensures that those plans will be approved or not, instead, by the elected officials of the municipality in a quasi-judicial process.

Affirmed.

WARNER and LEVINE, JJ., concur.

All Citations

50 So.3d 1176, 35 Fla. L. Weekly D2834

Footnotes

1 Neither party disputes that the subject property is comprised of fewer than five parcels.

2 Citing Black's Law Dictionary (West's 9th ed.) at 1206.