IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

JENNIFER MCCOY PARKER,
and LINDA C. HEIN,

Plaintiffs,

v. Case No.: 16-001524-CI-8

The CITY OF MADEIRA BEACH, a Municipal Government of the State of Florida, and TRAVIS PALLADENO, in his official capacity as Mayor for the City of Madeira Beach,

Defendants.
_____/

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, JENNIFER MCCOY PARKER and LINDA C. HEIN, by and through their undersigned attorneys and pursuant to Fla. R. Civ. P. 1.510, hereby move this Court to enter summary judgment against Defendant, the CITY OF MADEIRA BEACH (the "CITY"), and in support thereof states:

1. The present case involves a challenge by Plaintiffs to the procedures used by the CITY to give notice that certain ordinances were being proposed for enactment. Plaintiffs argue that the ordinances are void for failure of the CITY to include the proper language in the title of the required newspaper notices. In its Motion for Summary Judgment, the CITY does not argue that the newspaper title language complies with statutory requirements. Rather, the CITY argues that the ordinances subject to this lawsuit did not have to be noticed in conformity with the enhanced notice provisions, which require the newspaper title language, because the ordinances did not change the list of uses allowed within a zoning category. However, the CITY is incorrect because the ordinances not only add temporary lodging as a use within the Planned Development

District, but the ordinances also substantially affect the use of land with the CITY.

Procedural Background

2. This is an action by Plaintiffs for declaratory relief.

3. Plaintiffs' filed an Amended Complaint on April 6, 2016, that contained a request for declaratory judgment asking the court to find four CITY ordinances void (collectively, the "Ordinances"):

a. Ordinance 2014-07 ("SAP Amendment")

b. Ordinance 2014-08 ("LDR Amendment")

c. Ordinance 2014-09 ("Comp. Plan Amendment")

d. Ordinance 2015-18 ("Rezoning Amendment")

4. The Amended Complaint alleges that the Ordinances are void for failure to comply with the statutorily required notice provisions of Fla. Stat. § 166.041(3)(c)2. Specifically, the newspaper advertisements which published the proposed Ordinances did not give the public proper notice of what changes were being proposed because the statutorily required title did not describe the "type of change" that the ordinances would create.

5. The CITY filed an Answer with only one affirmative defense, that Plaintiffs lack standing.

Summary Judgment Evidence

6. Affidavit of JENNIFER MCCOY PARKER

7. Affidavit of LINDA C. HEIN

8. Affidavit of Aimee Servedio

Undisputed Factual Background

9. The factual background in this case is undisputed and is accurately stated in the

Affidavit of the CITY clerk, Aimee Servedio. The only thing left for the Court to decide is the effect of the Ordinances and whether they change the list of uses permitted within a zoning category.

Standard

10. Summary judgment is proper where the moving party shows conclusively that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Coral Wood Page, Inc. v. GRE Coral Wood, LP*, 71 So. 3d 251, 253 (Fla. 2d DCA 2011) (citing *Holl v. Talcott,* 191 So. 2d 40, 43 (Fla. 1966); Fla. R. Civ. P. 1.510(c)). When the nonmoving party has alleged affirmative defenses, the moving party must conclusively refute the factual bases for the defenses or establish that they are legally insufficient. *Id*.

Standing

11. As to standing, it is well settled in Florida law that "[a]ny affected resident, citizen or property owner of the governmental unit in question has standing to challenge" a zoning ordinance which is void because it was not properly enacted, as where required notice was not given. *Renard v. Dade County*, 261 So. 2d 832, 838 (Fla. 1972).

12. In the present case, Plaintiffs' affidavits adequately disclose that they are affected residents and property owners. Both affidavits show that the Ordinances will substantially affect the Plaintiffs because they permit greater development entitlements in the area near my home. (Aff. of LINDA C. HEIN and JENNIFER MCCOY PARKER, ¶ 4). Thus, Plaintiffs have standing.

Required Notice for Enactment of Local Ordinances

13. Fla. Stat. § 166.041 governs the procedure that municipalities must follow in order to give notice to the public that a proposed ordinance is being considered for enactment.

14. Courts have consistently held that ordinances not enacted in compliance with the procedural and notice requirements of Fla. Stat. § 166.041 are null and void. *Southern Entertainment Co. of Florida, Inc. v. City of Boynton Beach*, 736 F. Supp. 1094, 1102 (S.D. Fla. 1990); *Coleman v. City of Key West*, 807 So. 2d 84, 85 (Fla. 3d DCA 2002).

15. The reason that such notice procedures are required was explained by the Third District Court of Appeal in *Coleman*:

> The notices are mandated in order to protect interested persons, who are thus given the opportunity to learn of proposed ordinances; given the time to study the proposals for any negative or positive effects they might have if enacted; and given notice so that they can attend the hearings and speak out to inform the city commissioners prior to ordinance enactment. Noncompliance with the notice provisions takes away or reduces these opportunities.

16. There are different types of notice procedures required under Fla. Stat. § 166.041. The type of notice procedure required depends on the type of ordinance that is being proposed.

17. Plaintiffs claim that the Ordinances should have been noticed according to the "enhanced notice" procedures, which require the following:

> a. The local governing body shall hold two advertised public hearings on the proposed ordinance. At least one hearing shall be held after 5 p.m. on a weekday, unless the local governing body, by a majority plus one vote, elects to conduct that hearing at another time of day. The first public hearing shall be held at least 7 days after the day that the first advertisement is published. The second hearing shall be held at least 10 days after the first hearing and shall be advertised at least 5 days prior to the public hearing.
>
> b. The required advertisements shall be no less than 2 columns wide by 10 inches long in a standard size or a tabloid size newspaper, and the headline in the advertisement shall be in a type no smaller than 18 point. The advertisement shall not be placed in that portion of the newspaper where legal notices and classified advertisements appear. The advertisement shall be placed in a newspaper of general paid circulation in the municipality and of general interest and readership in the municipality, not one of limited subject matter, pursuant to chapter 50. It is the legislative

> intent that, whenever possible, the advertisement appear in a newspaper that is published at least 5 days a week unless the only newspaper in the municipality is published less than 5 days a week. **The advertisement shall be in substantially the following form:**
>
> **NOTICE OF (TYPE OF) CHANGE**
>
> The (name of local governmental unit) proposes to adopt the following ordinance: (title of the ordinance) .
>
> A public hearing on the ordinance will be held on (date and time) at (meeting place)
>
> (emphasis supplied)

18. However, only certain types of ordinances come under this enhanced notice provisions.

19. Before 1995, ordinances which came within the purview of the enhanced notice requirements of Fla. Stat. § 166.041 included ordinances "which substantially change permitted use categories in zoning districts."

20. Courts interpreted this language to apply to ordinances that "substantially affected the use of land." *Daytona Leisure Corp. v. City of Daytona Beach*, 539 So. 2d 597, 599 (Fla. 5th DCA 1989); *Baywood Const., Inc. v. City of Cape Coral*, 507 So. 2d 768, 769 (Fla. 2d DCA 1987).

21. In 1995, the Legislature made minor revisions to this language. The language describing the types of ordinances was changed to ordinances "that change the actual list of permitted, conditional, or prohibited uses within a zoning category."

22. Cases that have applied this new statutory language still apply the same standard that applied to the prior version of the statute, that the ordinance must "substantially affect the use of land." *Webb v. Town Council of Town of Hilliard*, 766 So. 2d 1241, 1244 (Fla. 1st DCA 2000); *Funtana Village, Inc. v. City of Panama City Beach*, 2016 WL 375102 (N.D. Fla. 2016);

Lady J. Lingerie, Inc. v. City of Jacksonville, 973 F. Supp. 1428 (M.D. Fla. 1998).

23. Thus, ordinances which add an additional use to a zoning category, and ordinances that substantially affect the use of land are subject to the enhanced notice provisions of Fla. Stat. § 166.041.

24. Ordinances that set minimum distance requirements or change setback and height restrictions have been found to "substantially affect land use." *Daytona Beach,* 539 So.2d at 597 (ordinance increased the minimum distance between a business selling alcohol and a residential area); *City of Miami Beach v. State,* 108 So.2d 614 (Fla. 3d DCA 1959) (ordinance changed setback and height restrictions on new buildings).

Argument

25. In the present case, the SAP Amendment, LDR Amendment, and the Comp. Plan Amendment add additional uses to land categories, and substantially affect the use of land with the CITY.

Addition of Temporary Lodging Use within the Planned Development District

26. The LDR Amendment now allows a temporary lodging use within the Planned Development District. This is evidenced by the title, preamble, and text of the LDR Amendment.

27. The title of the LDR Amendment states the ordinance will now be "PROVIDING FOR TEMPORARY LODGING USE IN THE PD DISTRICT." (Aff. of Aimee Servedio, Ex. 2, pg. 1).

28. Further, the preamble of the ordinance reads:

> "WHEREAS, Minor revision to the current list of zoning districts and the purpose, ***permitted uses*** and application process for the PD Planned Development zoning district ***in order to provide for utilization of the PD zoning district in conjunction with the RFH and PR-MU plan categories***." (emphasis supplied).

(Aff. of Aimee Servedio, Ex. 2, pg. 2).

29. This clauses discloses two things: (1) that the LDR Amendment made revisions to the permitted uses within the Planned Development District; and (2) this revision to the allowable uses was done so that the increases in densities and intensities could be used in conjunction with the Resort Facilities High ("RFH") and PR-MU plan categories contained within the CITY's Comprehensive Plan.

30. Consistent with the title and preamble, the LDR Amendment makes textual changes to Section 110-387 of the CITY's Land Development Regulations, titled "Uses permitted." The changes specifically add "temporary lodging" to the list of permitted uses. The exact underline and strike-through version of the LDR Amendment reads as follows:

> **Sec. 110-387. Uses permitted.**
> No specific list of uses permitted is established for the PD district. Land proposed for development under the PD district may contain a mixture of temporary lodging, residential, commercial, recreational and other uses, as permitted by the Future Land Use Map designated on the site.

(Aff. of Aimee Servedio, Ex. 2, pg. 6-7).

31. In its Motion for Summary Judgment, the CITY argues that the addition of the language "temporary lodging" cannot change the list of actual uses permitted because of the language "No specific list of uses permitted is established for the PD district," in Section 110.387. (Def. Mtn. Sum. Jud. at p. 12-13; ¶ 59). First, such an argument is directly contradicted by the LDR Amendment's title and preamble mentioned above. Second, rules of statutory interpretation require that a provision enacted by the legislature must have some useful purpose. *Smith v. Piezo Tech. & Prof'l Adm'rs*, 427 So. 2d 182, 184 (Fla. 1983). If there really is no contstraint to the type of uses permitted within the PD District, then there would be no need to

add the "temporary lodging" language. Thus, the only plausible reading of the amendment is the temporary lodging is now a permitted use within the PD district.

The Ordinances Also Substantially Affect the Use of Land

32. The SAP Amendment and the Comp. Plan Amendment work together to substantially increase development standards and allow for a substantial increase in the densities and intensities for land use in their respective zoning categories.

33. In the preamble for the SAP Amendment, it states that the proposed ordinance will "allow greater temporary lodging densities and intensities than any current zoning district." (Aff. of Aimee Servedio, Ex. 1, pg. 2).

34. The preamble goes on to state that such amendment is designed to accommodate "additional temporary lodging use" in certain districts within the city. (Aff. of Aimee Servedio, Ex. 2, pg. 2).

35. The language of the SAP Amendment is consistent with the wherefore clauses. One textual addition reads as follows:

> <u>The development standards for a Temporary Lodging Use in the Commercial Core and C-3 and C-4 zoning districts of the Causeway districts may be increase consistent with the standards set forth in the Resort Facilities High plan category when part of a zoning amendment utilizing the Planned Development (PD) zoning district.</u>
>
> (Aff. of Aimee Servedio, Ex. 1, pg. 3).

36. The (RFH) plan category referred to above is a new zoning category that was installed in the Comprehensive Plan through the Comp. Plan Amendment. (Aff. of Aimee Servedio, Ex. 3, pg. 3).

37. The RFH plan category was actually made into a sub category of the more general Mixed-Used land use category. The purpose of the RFH was to allow greater density and

intensity allowances to accommodate the growing tourisms industry for a community that is already largely built-out. (Aff. of Aimee Servedio, Ex. 3, pg. 2-3).

38. As evidenced by the textual additions, the RFH category will allow substantial increases to the units per acre, Floor Area Ratio, and Impervious Service Ratio for temporary lodging establishments. (Aff. of Aimee Servedio, Ex. 3, pg. 3).

39. Further, the RFH category is to be used in conjunction with the Planned Development District added by the LDR Amendment. A review of that amendment shows that a new formula for calculating density is now permitted, by allowing density/intensity averaging, and such a formula will substantially increase the allowable densities and uses within the zoning category. (Aff. of Aimee Servedio, Ex. 2).

40. All of these amendments substantially affect the use of land in a way consistent with *Daytona Beach* and *City of Miami Beach*, mentioned above.

41. Although the CITY argues in its Motion for Summary Judgment that comprehensive plan amendments can never change the list of uses within a zoning category, case law clearly holds otherwise. *See Payne v. City of Miami*, 52 So. 3d 707, 721 (Fla. 3d DCA 2010) (finding that an amendment to the FLUM element of a comprehensive plan "dramatically changes the permitted land development uses."); *Anderson v. City of St. Pete Beach*, 161 So. 3d 548 (Fla. 2d DCA 2014) (invalidating a comprehensive plan amendment for failure to comply with Fla. Stat. § 166.041).

42. Even the manner in which the CITY attempted to provide notice for the Ordinances show that it believed the Ordinances were subjected to the enhanced notice requirements. If the Ordinances do not change the list of uses permitted, as the CITY argues, then the ordinances would be subject to a different notice procedure contained in Fla. Stat. §

166.041. Not including the procedures for enactment of emergency ordinances, there is only one other type of notice procedure required in that section. This procedure is contained in subsection (3)(a) and requires notice of the proposed enactment to be placed in a newspaper only once. However, as shown by the City Clerk's affidavit, there were two newspapers notices for each of the Ordinances. (Aff. of Aimee Servedio, Ex. 5 and 7).

43. Thus, the SAP Amendment, LDR Amendment, and the Comp. Plan Amendment all fall within the requirements of the enhanced notice provisions.

The Title for the Newspaper Notices did not Comply with Fla. Sat. § 166.041(3)(c)2.b.

44. Although not contested by the CITY in its Motion for Summary Judgment, a review of the title of the newspaper advertisements for the Ordinances show that the CITY did not use the statutorily required language that would give citizens notice that there were changes being made to the CITY's local regulations.

45. In *Decker v. Citus County*, 2015 WL 6956545 (M.D. Fla. 2015), the court considered a similar challenge to an insufficient newspaper title that was supposed to give notice to a proposed change to a county ordinance. Under Fla. Stat. § 125.66, counties are required to have the same newspaper notice for proposed ordinances that change the use of land as cities: "NOTICE OF (TYPE OF) CHANGE." Instead of following the statutorily required language however, the title of the newspaper notice read "Notice of Intent to Consider an Ordinance Regulating Land Development in Citrus Count to be known as the Citrus County Land Development Code." The court rejected an argument that such language was in substantial compliance with the required newspaper title language.

46. In the present case, the newspaper title for the first reading of the SAP Amendment, LDR Amendment, and the Comp. Plan Amendment reads as follows:

CITY OF MADEIRA BEACH, FLORIDA
LOCAL PLANNING AGENCY
AND
BOARD OF COMMISSIONERS
NOTICE OF PUBLIC HEARINGS

(Aff. of Aimee Servedio, Ex. 5, pg. 2).

47. Simarly, the newspaper title for the second reading is as follows:

CITY OF MADEIRA BEACH, FLORIDA
BOARD OF COMMISSIONERS
NOTICE OF PUBLIC HEARINGS

(Aff. of Aimee Servedio, Ex. 7, pg. 2).

48. Nowhere in these titles is the type of change described or is it even mentioned that there was going to be a change in the ordinances at all.

49. Thus, the CITY did not follow the statutorily required notice procedures of Fla. Stat. § 166.041(3)(c), and the Ordinances are void.

CONCLUSION

50. The SAP Amendment, LDR Amendment, and the Comp. Plan Amendment are required to be enacted with the enhanced notice provisions of Fla. Stat. 166.041. Because the CITY did not strictly comply with these requirements, the ordinances are void *ab initio*.

[*certificate of service on following page*]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 23, 2016, I filed the foregoing with the Clerk of Court using the Florida Courts E-Filing Portal, which will electronically serve Jay Daigneault and Randy D. Mora, of TRASK DAIGNEAULT, LLP, 1001 S. Ft. Harrison Avenue, Suite 201, Clearwater, Florida 33756 at jay@cityattorneys.legal and randy@cityattorneys.legal.

Respectfully Submitted,

/s/Kenneth L. Weiss
Kenneth L. Weiss, Esq.
FBN: 0159021
kweiss1@tampabay.rr.com
11085 - 9th Street E.
Treasure Island, FL 33706
Telephone: 727-415-3672
Attorneys for Plaintiffs

and

/s/Paul M. Crochet
Timothy W. Weber, Esq.
FBN: 086789
timothy.weber@webercrabb.com
lisa.willis@webercrabb.com
Paul M. Crochet, Esq.
FBN: 111942
paul.crochet@webercrabb.com
Weber, Crabb & Wein, P.A.
Wittner Centre Office Building
5999 Central Avenue, #203
St. Petersburg, FL 33710
Phone No. (727) 828-9919
Fax No. (727) 828-9924
Attorneys for Plaintiffs