IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT IN AND
FOR COLLIER COUNTY, FLORIDA

CITY OF NAPLES, FLORIDA, a Florida Municipal Corporation,

Plaintiff,

vs.

CASE NO. 18-CA-001166

ETHICS NAPLES, INC., a non-profit corporation ,

Defendant.
_____/

CITY OF NAPLES'
MOTION FOR JUDGMENT ON THE PLEADINGS
OR ALTERNATIVELY FOR SUMMARY JUDGMENT

The City of Naples moves for judgment on the pleadings or alternatively for summary judgment[1] on Ethics Naples, Inc.'s, proposed charter amendment ("Proposed Amendment") because it is facially illegal under both the Florida Statutes and Florida's Constitution.

Background and Procedural Posture

The City of Naples filed the instant declaratory action to have this Court determine whether a charter amendment initiative petition (the "Petition" or "Proposed Amendment") violates the constitution and laws of the State of Florida. *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So.2d 1144 (Fla. 2d DCA 2006) (citing *W. Palm Beach Ass'n of Firefighters, Local Union 727 v. Bd. of City Comrs of City of W. Palm Beach*, 448 So. 2d 1212,

[1] It is not entirely clear from the case law which procedural path is appropriate for expedited hearings regarding challenges to initiative petitions that contain pure issues of law.

1214 (Fla. 4th DCA 1984) (saying that when a city questions the constitutionality of an initiative petition, the "preferred procedure" is to file a declaratory action)).

This case has travelled a circuitous route, including two trips to the Second District Court of Appeal, and a dismissal of Ethics Naples' substantially similar mandamus case by this Court.[2] Ethics Naples then answered and filed a motion to dismiss the declaratory action in this case arguing that before it was placed on the ballot this Court lacked jurisdiction to determine whether the initiative petition was illegal. This Court denied the Motion to Dismiss on August 21, 2018. The parties then agreed that the issues before the Court should be expeditiously resolved by a motion for judgment on the pleadings or in the alternative for summary judgment.[3]

Legal Standards

Judgment on the Pleadings

A motion for judgment on the Pleadings is appropriate, "[a]fter the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fla. R. Civ. P. 1.140. Upon a motion for judgment on the pleadings all well pleaded allegations of fact by the opposing party must be accepted as true and all factual allegations by the moving party are treated as false. *See Tanglewood Mobile Sales, Inc. v. Hachem*, 805 So. 2d 54 (Fla. 2d DCA 2001). "To grant judgment on the pleadings, a trial

[2] *See, e.g.,* Order denying Emergency Petition for Writ of Mandamus dated May 8, 2018 in Case No: 2D18-1814, Order transferring Mandamus action to Twentieth Judicial Circuit, bearing Case Nos. 2D18-1814 and L.T. No.: 18-CA-1166, Plaintiffs' Mandamus action in Case No. 18-CA-1352; Order Denying Emergency Motion to Amend Order to Show Cause dated May 24, 2018 in Case No: 18-CA-1352 by the Second DCA, Case No. 18-CA-1352, and Order Dismissing Emergency Petition for Writ of Mandamus dated June 8, 2018 in Case No: 18-CA-1352.

[3] See Case Management Plan and Order, dated August 27, 2018.

court must find that, based on the pleadings, the movant is entitled to judgment as a matter of law." *Britt v. State Farm Mut. Auto. Ins. Co*., 935 So. 2d 97, 98 (Fla. 2d DCA 2006).

Summary Judgment

Upon a motion for summary judgment, "the judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510. The Florida Supreme Court has said, "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia County v. Aberdeen at Ormond Beach, L.P*., 760 So. 2d 126, 130 (Fla. 2000); *Castro v. Homeowners Choice Prop. & Cas. Ins. Co.*, 228 So. 3d 596, 598–99 (Fla. 2d DCA 2017), *reh'g denied* (Oct. 20, 2017); and, *Roker v. Tower Hill Preferred Ins. Co*., 164 So. 3d 690, 692 (Fla. 2d DCA 2015). "If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper." *Johnson v. Deutsche Bank Nat'l Tr. Co. Americas*, 2018 WL 2169930, 43 Fla. L. Weekly D1071 (Fla. 2d DCA May 11, 2018) *quoting Atria Group, LLC v. One Progress Plaza, II, LLC*, 170 So. 3d 884, 886 (Fla. 2d DCA 2015); *see also, Nard, Inc. v. DeVito Contracting & Supply*, Inc., 769 So.2d 1138, 1140 (Fla. 2d DCA 2000)(saying "the merest possibility of the existence of a genuine issue of material fact precludes the entry of final summary judgment.") Further, "to be entitled to summary judgment, the movant must not only establish that there are no genuine issues of material fact regarding the parties' claims, but also the movant "must either factually refute the affirmative defenses or establish that they are legally insufficient*." Taylor v. Bayview Loan Servicing, LLC*, 74 So. 3d 1115, 1117 (Fla.

2d DCA 2011) *quoting Konsulian v. Busey Bank*, N.A., 61 So.3d 1283, 1285 (Fla. 2d DCA 2011).

Challenge to a Petition Title: Section 101.161, Florida Statutes

Section 101.161(a) requires that, "[t]he ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure." The Florida Supreme Court has said this means that "the ballot title and summary must fairly inform the voter of the chief purpose of the amendment." *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 798 (Fla. 2014). A misleading title due to an omission requires that a petition not be placed on the ballot. *Advisory Opinion to the Atty. Gen. re Fish & Wildlife Conservation Com'n*, 705 So. 2d 1351, 1355 (Fla. 1998).[4]

Declaratory Relief Regarding the Substance of a Petition

The legal standard for declaratory relief when a municipality challenges the legality of initiative petition to change a local charter has been laid out in *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So.2d 1144 (Fla. 2d DCA 2006).

> We begin with the premise that "all political power is inherent in the people and that we must, if possible, interpret the amendment as constitutional." *Charlotte County Bd. of County Comm'rs v. Taylor*, 650 So.2d 146, 148 (Fla. 2d DCA 1995) (*citing Miami Dolphins, Ltd. v. Metro. Dade County*, 394 So.2d 981 (Fla.1981)). Our consideration of the issue is limited to whether the challenged petitions, individually, contravene the Florida Constitution as inconsistent with state law. When a petition can "have a valid field of operation even though segments of the *1147 proposal or its subsequent applicability to particular situations might result in contravening the organic law," it must be submitted to the electorate. *Dade County v. Dade County League of Municipalities*,

[4] Hereinafter *Advisory Opinion re FWCC.*

> 104 So.2d 512, 515 (1958). Only when a petition is unconstitutional in its entirety may it be precluded from placement on the ballot. This avoids the possible expenditure of substantial amounts of public money to do a "vain and useless thing." Id. at 514.
>
> 45 If the opponent of a proposed amendment "in good faith questions the constitutionality of the ordinance in its entirety and on its face[,] the court may properly consider that question in advance of an election concerning its approval." *W. Palm Beach Ass'n of Firefighters, Local Union 727 v. Bd. of City Comm'rs of the City of W. Palm Beach*, 448 So.2d 1212, 1214 (Fla. 4th DCA 1984). "The principle that a municipal ordinance is inferior to state law remains undisturbed. Although legislation may be concurrent, enacted by both state and local governments in areas not preempted by the state, concurrent legislation by municipalities may not conflict with state law. If conflict arises, state law prevails." Id. at 1214-15 (*quoting Miami Beach v. Rocio Corp.*, 404 So.2d 1066, 1070 (Fla. 3d DCA 1981)). *See also Tribune Co. v. Cannella*, 458 So.2d 1075, 1079 (Fla. 1984) (holding that "the legislative scheme of the Public Records Act has preempted the law relating to any delay in producing records for inspection" and could not be contravened by city policy).

Id. at 1146–47.

Home Rule and Preemption

Article VIII, Section 2, Florida Constitution, grants municipalities home rule powers "except as otherwise provided by law." *See, e.g., City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992) (noting that previously the "Powers not granted a municipality by the legislature were deemed to be reserved to the legislature. This reservation of authority was known as 'Dillon's Rule' as expressed in John F. Dillon, The Law of Municipal Corporations § 55 (1st ed. 1872)"). After the enactment of Article VIII, Section 2, "legislation by municipalities may not conflict with state law. If conflict arises, state law prevails." *Citizens For Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1147 (Fla. 2d DCA 2006)(*quoting W. Palm Beach Ass'n of Firefighters, Local Union 727 v. Bd. of City Comm'rs*

of the City of W. Palm Beach, 448 So.2d 1212, 1214 (Fla. 4th DCA 1984); *Miami Beach v. Rocio Corp.,* 404 So.2d 1066, 1070 (Fla. 3d DCA 1981)).

A local government enactment may be inconsistent with state law if (1) the Legislature "has preempted a particular subject area" or (2) the local enactment conflicts with a state statute." *Sarasota All. For Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). This preemption may be either express or implied. "Express preemption requires a specific legislative statement; it cannot be implied or inferred." *Id*.

However, "preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." *Barragan v. City of Miami*, 545 So.2d 252, 254 (Fla. 1989). Preemption is implied "when 'the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.' " *Id*. at 886 (*quoting Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005). "Implied preemption is found where the state legislative scheme of regulation is pervasive and the local legislation would present the danger of conflict with that pervasive regulatory scheme." *Sarasota All. For Fair Elections, Inc.,* 28 So. 3d at 886.

The rules of preemption apply equally to initiative petitions to amend a municipal charter. 940 So.2d 1144. Moreover, after examining multiple cases of claimed preemption involving initiative petitions under various legal theories, the Third District Court of Appeals said, "Irrespective of *how* the issue landed in the courts, in each case, the trial and appellate courts court reached and decided the issue of referendum legality. *In none of these cases did a referendum question that had been adjudicated illegal reach the voters. Mullen v. Bal Harbour Vill*., 241 So.3d 949, 957 (Fla. 3d DCA 2018)(emphasis added).

Facts

1. There are no disputed material facts regarding the legal claims and defenses in this case. Indeed, the claims and defense are all based on a facial challenge to the proposed initiative petition. "A facial constitutional challenge considers only the text of the [proposed law], not its application to a particular set of circumstances." *State v. Cotton*, 198 So. 3d 737, 742 (Fla. 2d DCA 2016), review denied, SC16-544, 2016 WL 3272991 (Fla. June 15, 2016)(*citing Abdool v. Bondi*, 141 So.3d 529, 538 (Fla. 2014)). Ethics Naples has admitted the The following paragraphs in the Complaint.[5]

2. The CITY OF NAPLES, Florida, is a Florida municipal corporation, in Collier County, Florida, with a principal address of 735 8th Street South, Naples, Florida 34102.

3. ETHICS NAPLES, INC. is a Florida non-profit corporation, with a principal address of

4. This Court has jurisdiction pursuant to Chapter 86, Florida Statutes.[6]

5. Venue is proper as the parties and this cause of action all are in Collier County, Florida.

6. [Intentionally left blank here]

7. Ethics Naples, Inc. formed in August 2017.

8. Its purpose [inter alia] is to "urg[e] the public to contact members of legislative bodies for the purpose of proposing, supporting, or opposing legislation; by advocating the adoption or rejection of legislation; and by advancing the practice of ethical conduct by legislative members."

9. Ethics Naples drafted a proposed charter amendment ("Proposed Amendment") to create an independent ethics commission for the City of Naples.

10. [Intentionally left blank here]

11. [Intentionally left blank here]

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[5] For ease of reference they are numbered here corresponding to the paragraphs in the Complaint. Paragraphs intentionally left blank here are not relied upon for purpose of this motion.

[6] On August 24, 2018, this Court denied Ethics Naples' Motion to Dismiss, which motion argued this Court lacked jurisdiction to grant declaratory relief.

12. [Intentionally left blank here]

13. In October 2017, Ethics Naples began collecting electors' signatures to place the Proposed Amendment on the November 2018 ballot. The Proposed Amendment would create and independent ethics commission for the City of Naples. A true and correct copy of the Proposed Amendment is attached [to the Complaint] as Exhibit A.

14. On April 16, 2018, at a duly noticed public workshop, the City Council discussed in open session certain initial concerns about the Proposed Amendment's legality. Ethics Naples was invited to attend that meeting and participate, but declined to do so. At the April 16, 2018, City Council meeting, the City Council asked the City Attorney to prepare a formal legal opinion regarding the legality of the Proposed Amendment.

15. Ethics Naples has submitted the Proposed Amendment to the City Council.

16. The City received certification from the Collier County Supervisor of Elections that at least 10% of the qualified electors from the previous election had signed the petition for the Proposed Amendment, as required by section 166.031(1), Florida Statutes.

17. On or about April 29, 2018, the City Attorney submitted to the City Council his formal legal opinion and memorandum regarding the Proposed Amendment and recommended that the City not place the Proposed Amendment on the August 28, 2018, ballot due to its illegality, a true and correct copy of that memorandum is attached [to the Complaint] as Exhibit B.

18. [Intentionally left blank here]

19. On May 2, 2018, after due public notice and after allowing public comment on the Proposed Amendment, the City Council considered a Resolution authorizing the Supervisor of Elections to place the Proposed Amendment before the electors at the August 28, 2018, election.

20. The Charter Amendment Transmittal Resolution (the "Resolution") is titled:

    A RESOLUTION AUTHORIZING THE CHIEF ELECTION OFFICIAL (NAPLES CITY CLERK) TO SUBMIT TO THE COLLIER COUNTY SUPERVISOR OF ELECTIONS REFERENDUM LANGUAGE AMENDING THE CHARTER OF THE CITY OF NAPLES RELATING TO ETHICS TO BE PLACED ON THE BALLOT FOR THE AUGUST 28, 2018 PRIMARY ELECTION; PROVIDING THE CHIEF ELECTION OFFICIAL TO OBTAIN THE NECESSARY SPANISH TRANSLATION OF THE REFERENDUM; AND PROVIDING AN EFFECTIVE DATE.

21. [Intentionally left blank here]

22. At the May 2, 2018, city council meeting, the City Council voted 4-3 to table the Resolution and directed the City Attorney to file a declaratory action with this Court. The City Council's Resolution is attached [to the Complaint] as Exhibit C.

Claims

The Proposed Amendment is illegal, inter alia, because it:

(1) violates section 101.161(1), Florida Statutes, because its ballot summary does not inform the voters of its chief purpose;

(2) violates Article VIII, section 2(b) of the Florida Constitution because it creates a legislative body that is not elective, in violation of the command that "[e]ach municipal legislative body shall be elective";

(3) violates section 166.041, Florida Statutes, which controls how municipalities, notice, vote, and adopt ordinances, in several different ways;

(4) grants extra-statutory and extra-constitutional appointing powers to the constitutional officers listed in section 17.1 of the Proposed Amendment;

(5) violates Article II, section 5(a) of the Florida Constitution because it delegates the appointment powers of the sovereign, here the City, to constitutional officers who already hold an office, in violation of dual office-holding provision;

(6) violates separation of powers by making the Ethics Commission, prosecutor, judge, and jury, while it also has executive and legislative powers; and

(7) attempts to give the Ethics Commission unbridled discretion in enacting laws about what is unethical and in determining how such law may be violated.

Argument

A. Section 101.161(1), Florida Statutes, summary fails to state the chief purpose.

The ballot summary does not state that legislative power is being taken away from the elected representative of the citizens of Naples and is being given to an unelected board appointed by persons not accountable to the citizens of the City. Such a fundamental shift of legislative power to an agency cannot be omitted from the ballot summary without misleading the citizens. *Advisory Opinion to the Atty. Gen. re FWCC*, 705 So. 2d at 1355.

A ballot summary must stand on its own. *In re Advisory Opinion to Atty. Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply*, 177 So. 3d 235, 245 (Fla. 2015). Besides the word limitation, a ballot summary must be set forth in clear and unambiguous language that fairly informs and not misleads the electors. *Id*.

When evaluating a ballot summary's chief purpose, "[t]he Court has repeatedly stated that the ballot summary should tell the voter the *legal effect*, and no more." *Florida Dept. of State v. Mangat*, 43 So. 3d 642, 648 (Fla. 2010) (citation omitted; emphasis supplied). Moreover, it must "assure that the electorate is advised of the *true meaning*, and *ramifications*, of an amendment." *Id.* (emphasis supplied). To this end, a court must employ "careful scrutiny" to determine whether the summary is "clearly and conclusively defective" and allow it to stand only if it meets these requirements. *In re Advisory Opinion to Atty. Gen. re Limits or Prevents Barriers to Local Solar Elec. Supply*, 177 So. 3d at 245.

The Florida Supreme Court has repeatedly found unconstitutional ballot summaries that omit key legal effects and ramifications. *Advisory Op. to Att'y Gen. re Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225, 228 (Fla. 1991) (stating that a "ballot summary may be defective if it omits material facts necessary"); *Florida Dept. of State v. Florida State Conference of NAACP Branches*, 43 So. 3d 662, 669 (Fla. 2010) (omission failed to inform the

electors that the proposed amendment would "dilute" certain constitutional provisions; and *Advisory Opinion to the Atty. Gen. re FWCC*, 705 So. 2d at 1355.

In *Advisory Opinion re FWCC*, the Supreme Court kept off the ballot a proposal to take legislative power away from the Legislature and give it to an independent commission. The court struck the proposal from the ballot saying, "The summary does not explain to the reader that the power to regulate marine life lies solely with the legislature… The summary does not sufficiently inform the public of this transfer of power." 132 So.3d at 798.

The ballot summary here states in total:

> "Shall the Charter of the City of Naples be amended to establish an independent ethics commission, set requirements for the ethics code, and establish an ethics office?"

See Proposed Amendment at pg. 1.

This summary fails to inform the electors of the Proposed Amendment's legal effects and ramifications. The summary omits that persons with no affiliation with the City will appoint persons to the proposed ethics commission and that the legislative power of the City will be transferred from the elected representative of the citizens of Naples to these unelected persons.

The Proposed Amendment delegates to the State Attorney for the Twentieth Judicial District, Public Defender for the Twentieth Judicial District, and the County Sheriff to make appointments to the proposed commission. Likewise, the Proposed Amendment provides for a "back-up" delegation the Chief Judge for the Twentieth Judicial District "or his or her designee" to make appointments, as well as the Collier County Bar Association, in the event that other appointers do not make their appointments. The Chief Judge's "designee" could be anyone, since there is no limitation on whom the Chief Judge may appoint to make an appointment to the proposed ethics commission. Similarly, the Collier County Bar Association does not limit its

membership to attorneys within the City, or even Collier County. None of these are elected by the citizens of the City of Naples.

There is perhaps nothing more significant in a representative democracy than the transfer of the power from elected representative to unelected and unaccountable government officials. Because the ballot summary does not even mention that the Proposed Amendment's transfer of this power, the rational elector reading the ballot summary would simply assume that persons within the City—likely the electors' representatives—would make the appointment and pass the ethics laws, not unaccountable outsiders or membership organizations. The omission fails to inform the electors that they are delegating appointing authority to persons who are not directly accountable and who may then appoint any City elector they wish.

The Proposed Amendment would vest in an ethics commission the power to enact law, here ordinances, "unless five or more [Council] members vote against it." *See* Proposed Amendment § 17.2(a). Nothing in the ballot summary informs electors that an affirmative vote for the Proposed Amendment is a vote to transfer majority-elective representation in exchange for an unelected and unrepresentative governmental body with free rein over the passage of ethics-related laws unless the City Council exercises a supermajority veto to the contrary.[7] Ramifications of this magnitude must be spelled out in the ballot summary. *Advisory Opinion re FWCC,* 132 So.3d at 798. But here they are not.

The ultimate effect of this scheme to deprive the citizens of elected representative supplanting them with unelected appointees accountable to no one. The ballot proposal summary

[7] The power of veto is not a legislative power but is rather an executive one. "[T]he veto power is intended to be a negative power, the power to nullify, or at least suspend, legislative intent. It is not designed to alter or amend legislative intent." *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 265 (Fla. 1991) (quoting *See Florida House of Representatives v. Martinez*, 555 So.2d 839, 845 (Fla. 1990).

nowhere says that the power to enact ethics legislation is being taken from the City Council and given to unelected ethics commission, in contravention of the constitutional requirement that all legislation to be enacted by an elective body.[8] In sum, the facts here are little different from those in *Advisory Opinion re FWCC,* 132 So.3d at 798. The "the summary does not explain to the reader that the power to regulate … lies solely with the legislature… The summary does not sufficiently inform the public of this transfer of power." *Id.*

Because the ballot summary does not inform voters that legislative power is being taken away from elected representatives and given to an unelected body, the petition violates section 101.161(1), Florida Statutes.

B. Violates Article VIII, section 2(b), Florida Constitution, because The commission would be an unelected legislative body.

A Florida municipality is free to adopt any one of several basic municipal-government forms so long as "[e]ach municipal legislative body" is "elective." Art. VIII, § 2, Fla. Const. The proposed ethics commission is a legislative body because it has the authority make law and engage in quasi-judicial functions. *Barry v. Garcia*, 573 So. 2d 932, 939 (Fla. 3d DCA 1991) (stating that "a city commission . . . is a legislative body of a city").

Proposed Amendment section 17.2(2) says:

> Any proposed amendment to the Ethics Code by the Ethics Commission, including the initial amendment required above in (1), shall be presented to the City Council. The amendment *shall become law* as of that City Council meeting unless five or more members vote against it. (Emphasis added.)

So the proposed ethics commission would be legislative body. But it would not be elected. Instead, it would come into existence only though appointments made by unelected

[8] See discussion below concerning section 166.041, Florida Statutes (2018).

appointers. *See* Proposed Amendment § 17.1. The plain and public meaning of "elective" in 1968 shows "elective" means that electors must select the governing body. *See*, *e.g.*, *State ex rel. Reynolds v. Roan*, 213 So. 2d 425, 426 (Fla. 1968) (stating that a superintendent was "re-elected" and by the electors and calling the last term in office "his last elective term"). Because the Proposed Amendment would create a non-elected legislative governing body, it violates Article VIII, section 2(b) of the Florida Constitution. It attempts an illegal delegation of such power (regardless of whether it is ever actually exercised by the proposed commission) that violates the constitution. *Duval County Sch. Bd. v. State, Bd. of Educ*., 998 So. 2d 641, 644 (Fla. 1st DCA 2008)(saying delegation of the power to the State DOE to operate charter schools even if not exercised violated constitution.).

C. Violates section 166.041, Florida Statutes, delineating how municipalities adopt ordinances.

The Proposed Amendment attempts to contravene the procedures set forth in section 166.041, Florida Statutes, which specify and govern the adoption of municipal ordinances. It has been repeatedly held that when an act falls within the ambit of Section 166.41, an ordinance must be enacted pursuant to the statute's provisions or it is null and void. *See, e.g., Coleman v. City of Key W*., 807 So. 2d 84, 85 (Fla. 3d DCA 2001)(construing section 166.041(3)); *HealthSouth Doctors' Hosp., Inc. v. Hartnett*, 622 So.2d 146 (Fla. 3d DCA 1993); *David v. City of Dunedin*, 473 So.2d 304 (Fla. 2d DCA 1985); *Fountain v. City of Jacksonville*, 447 So.2d 353 (Fla. 1st DCA 1984).

Moreover, the provisions of section 166.041, expressly state that they "shall constitute a uniform method for the adoption and enactment of ordinances." § 166.014(6), Fla. Stat. (2018 Further, "a municipality shall not have the power or authority to lessen or reduce the requirements of this section or other requirements as provided by general law." § 166.041(6),

Fla. Stat. Therefore, there can be no doubt that the Legislature has expressly pre-empted the method for adoption of municipal ordinances. *Sarasota All. For Fair Elections, Inc.,* 28 So. 3d at 886.

Section 166.041(1)(a) defines an "ordinance" as "an official legislative action of a governing body, which action is a regulation of a general and permanent nature and enforceable as a local law." Any proposed ethics law passed by the Ethics commission amendment easily falls within the definition of an "ordinance."

However, the method for passage of such City ethics ordinances runs afoul of Florida law in a number of ways. First, Section 166.041(8) states that its notice requirements are the minimum requirements. A proposed ordinance must be "read by title, or in full, on at least 2 separate days." § 166.041(3)(a), Fla. Stat. Under the Proposed Amendment, an ordinance would not be read on least two separate days. Rather, any proposed amendment "shall presented to the City Council" and the "amendment shall become law *as of that City Council meeting*." Proposed Amendment § 17.2 (emphasis added), leaving no time between presentment and the City's veto power. Thus, the Proposed Amendment does not allow for a reading on "at least 2 separate days" by the City Council.

Second, the City Council is the only elected "governing body of a municipality" in the City with the power to enact legislation. But the proposed ethics commission would be enacting ordinances. Because the proposed ethics commission would enact ordinances and not the governing municipal body, the City Council is not enacting ordinances as required by section 166.041(1)(a).

Third, Section 166.041(4), requires that "[a]n affirmative vote of a majority of a quorum present is necessary to enact any ordinance or adopt any resolution."[9] The Proposed Amendment states that an "amendment shall become law as of that City Council meeting unless five or more members vote against it." A proposed amendment thus would become City law without any official action of the City Council. Ipso facto, any Proposed Ethics Amendment would be enacted without an affirmative vote of the majority of the City Council. Indeed, the City Council would only retain veto power to "vote against it" by a 5/7ths super-majority.

Hence, the Proposed Amendment's notice requirements, method of enactment, and lack affirmative voting requirements all violate the "uniform method" set forth in section 166.041, Florida Statues.

D. Grants extra-statutory and extra-constitutional appointing powers to the constitutional officers

Valid appointment authority has been a fundamental prerequisite to holding and exercising emoluments and powers of office since at least *Marbury v. Madison*, 5 U.S. 137 (1803). There is no Florida Constitutional or statutory authorization for the state attorney, public defender or a clerk of circuit court to make appointments to a governmental body such as this. Constitutional officers possess only those powers granted to them, no more. "[O]ur state constitution is a limitation upon, rather than a grant of, power." *Whiley v. Scott*, 79 So. 3d 702, 715 (Fla. 2011)(holding the governor had only those powers granted by the Constitution). And, these powers and duties cannot be changed or expanded upon by the City of Naples. *See,* Art. III, § 11, Fla. Const. (a) (saying, that even the Legislature of the State of Florida cannot

[9] A quorum must be majority of governing body and majority of such quorum entitled to vote is necessary to enact any ordinance or adopt any resolution. Florida Op.Atty.Gen. No. 85-40, May 22, 1985 (1985 WL 190059).

changed the duties of Constitutional officers); and, *c.f., State ex rel. Ervin v. Mellick,* 68 So. 2d 824, 826 (Fla. 1953)(saying City was without power to change offices and powers of office established by the Legislature).

Proposed Amendment section 17.1(2) lists several constitutional officers and attempts to delegate to them appointment powers that exceed their constitutional authority.

The State Attorney, Public Defender, and the Sheriff are all constitutional officers who do not derive their authority from the County's charter or the board of county commissioners, and are neither generally accountable to the City of Naples or its citizens for their conduct in office. Nor for that matter are they subject to anyone else's direction in fulfilling their appointment duties.[10] None of this is in keeping with Florida law. Art. VIII, § 1(d), Fla. Const. *Demings v. Orange County Citizens Review Bd.*, 15 So. 3d 604, 610 (Fla. 5th DCA 2009).

The United States Supreme Court in June 2018, made it perfectly clear that invalidly appointed officers have no authority to act and any action taken are thereby also invalid, requiring a complete do over. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018)(saying that a successful "challenge to the constitutional validity of the appointment of an officer" wholly invalidates any proceeding by the improperly appointed person.)[11]

E. Violates Article II, section 5(a), Florida Constitution, because it gives the appointment power of one sovereign to officers of another.

[10] See discussion below about unbridled discretion.

[11] There are provisions for backup appointments, but these too are invalid and glaringly unethical. For example, section 17.1 2(f) provides that the Chief Judge of the Twentieth Judicial Circuit shall be the first alternate appointing authority. However, Judicial Ethics Advisory Opinion 2009-14, says a chief judge may not make such appointments. The question presented there was: "May a chief judge appoint members to a Board of Ethics created by municipal ordinance for the benefit of the municipal government?" Answer: no. : http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-14.html.

The Florida Constitution prohibits any person from simultaneously holding more than one state, county, or municipal government office. Art. II, § 5(a), Fla. Const. says:

> (a) No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. *No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein*, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

Art. II, § 5, Fla. Const. (emphasis added).

The Supreme Court has defined the term "office" as follows:

> The term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an 'employment' does not comprehend a delegation of any part of the sovereign authority. The term 'office' embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract. An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office, and between an employee and an officer.

State v. Sheats, 83 So. 508, 509 (Fla. 1919).

Here there is the creation of a City executive office of appointment in the various constitutional officers presently holding the constitutional office. *Florida Dry Cleaning & Laundry Bd. v. Econ. Cash & Carry Cleaners*, 197 So. 550, 556 (Fla. 1940) (saying, "the Constitution does not contemplate that essential governmental powers or authority may be exercised by one not a duly commissioned officer."). The Proposed Amendment section 17.1(2) vests the State Attorney for the Twentieth Judicial District, Public Defender for the Twentieth Judicial District, Collier County Sheriff, Chief Judge for the Twentieth Judicial District, and the

Collier County Clerk of the Circuit Court with the power to appoint members to the proposed ethics commission. Each of these persons is a constitutional officer. Art. V, § 15, Fla. Const. (state attorney); Art. V, § 18 (public defender); Art. VIII, § 1(d) (sheriff and clerk); Art. V, § 2(b) (chief judge of a judicial circuit). The City of Naples' representative on the Collier County Commission is likewise a public office. Art. II, § 5, Fla. Const.

Further, "the [o]fficers in which the executive power of appointment is vested are generally regarded as continuous offices." *Tappy v. State ex rel. Byington*, 82 So. 2d 161, 169 (Fla. 1955) citing 42 Am.Jur. 962, Public Officers, Section 110. The additional office of a City of Naples appointment officer for members of the City of Naples Ethics Commission would likewise be vested in the continuous office of each constitutional officer. Because the Proposed Amendment would create a new office for each of them, and because it would be delegate "tenure, duration, and duties in exercising some portion of the [City's] sovereign power, conferred or defined by law," *Sheats*, 83 So. at 508, in "a continuous office," *Tappy v. State ex rel. Byington*, 82 So. 2d at 169, each current holder of the constitutional office would also hold an executive appointment office on behalf of the City, therefore, each constitutional officer would occupy his or her original office along with the one that the Proposed Amendment would create.

Thus, the Proposed Amendment would violate the Constitutions' dual office holding provision.

F. The Proposed Amendment's "officer" prohibition precludes a quorum in violation of section 166.041(4), Florida Statutes.

The Proposed Amendment would create an ethics commission that could never have a governing quorum. Section 166.041(4), Florida Statutes, states, "A majority of the members of

the governing body shall constitute a quorum. An affirmative vote of a majority of a quorum present is necessary to enact any ordinance. . . ."

Here there are five members: three Constitutional officers, a "City's Representative on the County Commission,"[12] and one City appointee.[13] If even three of these cannot be appointed, then there cannot be a quorum, a majority of the seats, to conduct any business, as only one of the five does not constitute a quorum. Id.

Finally, as to the Sheriff, State Attorney, Public Defender and the Chief Judge have an actual conflict of interest in that, by constitution, statute or rule, each participates in investigation, prosecution, defense or adjudication of ethics violations.

Every provision of the Proposed Amendment, however, is dependent upon the appointment of Ethics Commissioners, whether legislating, prosecuting, judging and jurying, carrying out executive functions, administering, advising, and training, etc.. They all require a sitting commission to be carried out. Without a quorum, the Ethics Commission quite simply has no valid field of operation at all.

G. Violates Separation of Powers

The Proposed Amendment also violates separation of powers by placing the power of subpoena, investigation, and prosecution, in the same entity that performs judicial functions.

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[12] Whatever that is. There does not appear to be any such legal designation in the resolutions and ordinances of Collier County or the law of Florida.

[13] Further, and somewhat curiously, section 17.1(1) prohibits a City "officer" from sitting on the proposed ethics commission. But, one member is appointed by the City Council and is thus a City "officer." In fact, arguably the Proposed Amendment would create five new City "officer" positions on the ethics commission, *Sheats*, 83 So. 508 at 509. This sets up a rather odd Catch 22. The Proposed Amendment's plain language could have said that an *existing* City of Naples officer may not fill the position, but that is not what the plain language says. Indeed, to save this unartfully drafted measure, the Court would have to rewrite it, which courts are generally not inclined to do.

(Compl. ¶ 18(h).). "The accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998)(quoting The Federalist No. 47)(Kennedy, J., concurring).

> "[S]eparation of powers recognizes three separate branches of government—the executive, the legislative, and the judicial—each with its own powers and responsibilities." *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004). In applying the separation of powers doctrine, the Court has done so strictly, explaining "that this doctrine 'encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power.'" *Id*. (quoting *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991)). *Whiley v. Scott*, 79 So. 3d 702, 708–09 (Fla. 2011).

The legislative power of the City is established, under section 2(b), Art. VIII of the State Constitution and section 166.021(2), in the legislative body of the City, the City Council. This legislative power cannot be transferred via a charter amendment to a commission. Rather, the Legislative power can only be delegated to another governmental body by amendment to the Constitution of Florida and section 166.021(2). *Cf., Advisory Opinion re Fish & Wildlife Conservation Com'n*, 705 So. 2d 1351.

Further, the power of prosecution (executive), judge (judicial), and jury (judicial) cannot be combined. The power to investigate is an executive function. The power to take evidence and make decisions (section 17.4 (3) (g)) is quasi-judicial. The power to hear cases and levy penalties is quasi-judicial. The plenary and exclusive power of the Ethics Commission to control both is arguably a violation of the requirement that the legislative, executive and judicial powers are to be separately allocated. True, the Florida Ethics Commission is set up similarly. However, there is a specific statutory procedure in place for dealing with separation of powers issues in that Commission that does not appear in the Proposed Amendment. *Compare* Chapter 112, Part III,

Florida Statutes (delineating in great detail the powers, procedures, and limits of the Commission's power).

H. Delegation of Unbridled Power and Discretion.

The Proposed Amendment provides no limitation on the authority of the Ethics Commission, but rather attempts to delegate unlimited authority to the Ethics Commission. Unbridled delegation of power without sufficient standards, has been held by the Supreme Court to be unconstitutional. *Cf.*, *City of Lakewood v Plain Dealer Publishing Co.*, 108 S.Ct. 2138 (1988) (regulation giving discretion of whether interfere with constitutional freedoms); Compare, Section 8(f), Art. II, Florida Constitution (expressly reserving the legislative power to the Legislature saying that the ethics Code shall be "prescribed by law"). Here, the Proposed Amendment sets out a number of minimum requirements for a regulation, but no limit (bridle) on the extent of authority.

II. ETHICS NAPLES AFFIRMATIVE DEFENSES

Ethics Naples has raised only two affirmative defenses. Both, have already been addressed by this Court. First, Ethics Naples claimed the Court lacked jurisdiction to issue a Declaratory Judgment based on the claims in the Complaint. Second, Ethics Naples claimed the Court lacked jurisdiction because a declaratory judgment was not yet ripe and would only be advisory. Ethics Naples brought both of these issues before the Court in its Motion to Dismiss for Lack of Jurisdiction. This Court's clearly has said that it has jurisdiction to issue a Declaratory Judgment, and it denied the Motion to Dismiss for lack of jurisdiction.

At the previous hearing, Ethics Naples posited that the question is severable. It is not. The undisclosed and misleading usurpation of legislative power; the grant of appointment power

by unauthorized persons, the unbridled discretion allocated to the proposed Commission, and the intrinsic interdependencies[14] -- all permeate the entire ballot question and propose amendment.

III. REMEDY

Because the proposed Amendment is misleading, illegal, and without a valid field of operation, the City of Naples requests that this Court Declare that the Proposed Amendment not be placed on the ballot due to its illegal provisions. *Mullen v. Bal Harbour Vill.*, 241 So.3d 949, 957 (Fla. 3d DCA 2018)(emphasis added)(saying,"In none of these cases did a referendum question that had been adjudicated illegal reach the voters.").

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[14] Indeed, the Proposed Amendment does not have a severability clause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 4, 2018, this document was electronically transmitted to the Clerk of Court via the Florida Courts E-Filing Portal ("FCEP") for filing and transmittal of electronic mailing to the following FCEP registrant(s):

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