

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 Florida Non-  
profit corporation;

Defendant.

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**ORDER**

This matter came before the Court on cross motions for Judgment on the Pleadings or in  
the Alternative for Summary Judgment

The City of Naples filed this action seeking a declaratory judgment on an initiative  
petition to amend City of Naples Charter. Ethics Naples, Inc. sponsored the petition and  
collected sufficient signatures to place the measure on the ballot pursuant to section 166.031,  
Florida Statutes (2018).

The parties entered into an Agreed Case Management Plan (DE# 53) and agree that there  
is no genuine issue as to any material fact.

Pursuant to the Agreed Case Management Plan:

A. on September 4, 2018, the City of Naples filed its Motion For Judgment On The  
Pleadings Or Alternatively For Summary Judgment. (DE #56)

B. on September 14, 2018, Ethics Naples, Inc. filed its Response To the City of Naples  
Motion For Judgment On The Pleadings Or Alternatively For Summary Judgment

and Ethics Naples, Inc's. Motion For Judgment on the Pleadings Or Alternatively For Summary Judgment. (DE #57)

The parties having waived oral argument on the motions, and the Court having considered the pleadings, filings, arguments, and authorities, ORDERS, ADJUDGES AND DECREES:

1. Ethics Naples, Inc.'s Motion For Judgment On The Pleadings is GRANTED for the reasons set forth on the record in the transcript of this Court's proceeding held on October 5, 2018. A copy of that transcript is attached hereto as Exhibit "A".
2. The City of Naples Motion For Judgment On The Pleadings Or Alternatively For Summary Judgment is DENIED.
3. City of Naples must place the propose Charter Amendment on the ballot at the next general election or at a special election to be called by the City Council. *See, City of Naples v. Ethics Naples, Inc.*, Case No. 2D18-2111, (2d DCA June 1, 2018) and *Senior Citizens Protective League, Inc. v. McNayr*, 132 So. 2d 237, 239 (Fla. 3d DCA 1961)(declining to set special election date and saying, "[f]or the court to interfere, by either a mandatory or prohibitory injunction, with the discretion that the Board of County Commissioners exercise within the confines of their authority would be an invasion by the judiciary of a legislative function.").

DONE AND ORDERED in Naples, Collier County, Florida this \_\_\_\_\_ day of October, 2018

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Hugh D. Hayes, Circuit Court Judge

Conformed copies via email to:

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2                   IN THE CIRCUIT COURT OF THE  
3                   20TH JUDICIAL CIRCUIT, IN AND  
4                   FOR COLLIER COUNTY, FLORIDA  
5

6                   CASE NO.: 18-CA-001166  
7

8                   CITY OF NAPLES, FLORIDA,  
9                   A Florida Municipal corporation,  
10                  Plaintiff,

11                  vs.

12                  ETHICS NAPLES, INC., a  
13                  Florida Non-profit corporation,  
14                  Defendant.

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16                  PROCEEDINGS

17  
18                  Held before the Honorable Hugh D. Hayes at Collier  
19                  County Courthouse, Naples, Florida, on October 5, 2018,  
20                  at 10:00 a.m. before Charissa L. Dines, being a Registered  
21                  Professional Reporter and Notary Public, State of Florida  
22                  At Large.

1                   A P P E A R A N C E S

2                   ROBERT D. PRITT, ESQ.  
3                   JAMES D. FOX, ESQ.  
4                   Roetzel & Andress  
5                   Third Floor  
6                   850 Park Shore Drive  
7                   Naples, Florida 34103

8                   Appearing on behalf of Plaintiff

9                   ANTHONY P. PIRES, JR., ESQ.  
10                  Woodward, Pires & Lombardo  
11                  Suite 200  
12                  3100 Tamiami Trail North  
13                  Naples, Florida 34103

14                  Appearing on behalf of Defendant

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1                   THE COURT: Good morning. Go ahead and have a seat,  
2 please.

3                   Well, let me first start out by saying thanks very  
4 much to counsel for both parties for providing the Court  
5 with some very thorough and very good brief writings on  
6 the part of somebody in your firms. They did some  
7 excellent research and were able to provide, to at least  
8 this jurist, some very clear-cut arguments and they were  
9 very well written, so I appreciate that; it's always  
10 very helpful.

11                  Let me just say too, that the history of the cases  
12 in this area are somewhat interesting in the way we  
13 apply the determinative ruling. In other words, some of  
14 these cases have a history of using summary judgments,  
15 some have a history of using motions for judgment on the  
16 pleadings. It's pretty clear, historically, without  
17 trying to cast any aspersions on anybody, any  
18 practitioners or jurists in the state, that it's kind of  
19 an odd type of case to review. I have chosen to  
20 utilize, though, the rule that you've made reference to,  
21 our Florida Rule of Civil Procedure 1.140[c], and grant  
22 the defendant's motion for judgment on the pleadings and  
23 concomitantly deny the plaintiff's motion for judgment  
24 on the pleadings. And that gives us, in essence, maybe  
25 not appropriate terminology, but a coup de grace, so to

1 speak. In other words, a finality so that you can take  
2 it up for review, which I understand both sides have  
3 given consideration to, and it's very understandable if  
4 either side wishes that. It's not over until it's over,  
5 so to speak.

6 But I do want to go on the record and to utilize  
7 some of the language that you have provided in your  
8 memoranda and explain, to some extent, how the Court  
9 concludes as it does. And first of all, you both agree  
10 that, of course, under the Florida Constitution there  
11 was a very good citation to Article 1, Section 1, which  
12 states that, "All political power is inherent in the  
13 people." And it continues and says, "The enumeration of  
14 certain rights shall not be construed to deny or impair  
15 others retained by the people." And then you have a  
16 citation to the Florida Supreme Court case of Florida  
17 Land Company, and I'm leaving the cites -- well, I'll  
18 put this cite in, and it's 427 So 2d 170, 1983, where  
19 the Court stated that, "The citizens of the State of  
20 Florida in drafting and adopting the 1968 constitution  
21 reserved certain powers to themselves, choosing to deal  
22 directly with some governmental measures. The  
23 referendum, then, is the essence of a reserved power."

24 And then in the advisory opinion that they gave to  
25 the attorney general in 2002, which is a citation of 818

1           So 2d 491, and on Page 494, the Court said, "The Court  
2       has traditionally applied a deferential standard of  
3       review to the validity of a citizen initiative petition  
4       and has been reluctant to interfere with the right of  
5       self-determination for all Florida citizens to formulate  
6       their own organic law."

7           And then as you both refer, with great emphasis, to  
8       the Florida Supreme Court decision in *Dade County versus*  
9       *Dade County League of Municipalities*, which was a 1958  
10      decision cited at 104 So 2d 512, and I referenced this  
11      at our last meeting, and it's found on Page 518 of that  
12      opinion, and it explains in essence the direction or the  
13      philosophy that the Florida Court, of course speaking  
14      for all of its courts, uses initially in examining these  
15      types of procedures.

16           And I will reiterate what we stated at the last  
17      meeting, but it says, "We wish to emphasize that we are  
18      not here finding the existence or nonexistence of such  
19      alleged conflicts. In a proceeding of this kind, the  
20      courts cannot with propriety go beyond measuring the  
21      proposal by the standards set in the constitution  
22      itself. Any effort on our part to attempt to reconcile  
23      the provisions of the existing charter with the proposed  
24      amendment prior to the approval of the latter would be  
25      an encroachment on the political functions of the

1       electorate and then would amount to nothing more than an  
2       advisory opinion on our part in a matter of which is  
3       beyond our immediate judicial province."

4              Then again both the Second District Court of  
5       Appeals in its controlling decision of *Citizens for*  
6       *Responsible Growth versus the City of St. Pete Beach*,  
7       cited at 940 So 2d 1144, a 2006 opinion, and as well the  
8       Fifth District's decision in *Gaines versus the City of*  
9       *Orlando*, citation 450 So 2d 1174, a 1984 decision. Both  
10      of those cases give the Court the authority to enter a  
11      judgment on the pleadings pursuant to 1.140[c], and  
12      that's the choice the Court -- not only one of the  
13      choices that counsel for their parties have asked the  
14      Court to utilize, but the Court agrees that's the  
15      appropriate rule to follow.

16              Of significance, of course, is the *Citizens for*  
17       *Responsible Growth* case that came from our district  
18       court of appeals in 2006, and I'll reiterate some of the  
19       language from that case that I believe to be controlling  
20       for the lower court. "All political power is inherent  
21       in the people and a Court must, if possible, interpret  
22       an amendment as constitutional. A Court's consideration  
23       of issue is limited to whether a challenged petition to  
24       amend a municipal charter contravenes the Florida  
25       Constitution as inconsistent with Florida law. When a

1 petition can have a valid field of operation, even  
2 though segments of the proposal or its subsequent  
3 applicability to particular situations might result in  
4 contravening the organic law, it must be submitted to  
5 the electorate. Only when a petition is  
6 unconstitutional in its entirety may it be precluded  
7 from placement on the ballot. This avoids the possible  
8 expenditure of substantial amounts of public money to do  
9 a vain and useless thing. If the opponent" -- as I have  
10 determined previously applies in this case -- "If the  
11 opponent of a proposed amendment in good faith questions  
12 the constitutionality of the ordinance in its entirety  
13 and on its face, the Court may properly consider that  
14 question in advance of an election concerning its  
15 approval. The principal that a municipal ordinance is  
16 inferior to state law remains undisturbed, and if  
17 conflict arises, of course, state law prevails."

18 Later the Court in its opinion says as follows, "A  
19 Florida circuit court has discretion to make a  
20 pre-election determination of the facial  
21 constitutionality of any proposed amendment slated to  
22 appear on the ballot. But generally it is inappropriate  
23 for a reviewing court to undertake to discuss in any  
24 measure either the wisdom or the lack of wisdom  
25 reflected by a proposed amendment to a municipal

1 charter.

2 "When a petition can have a valid field of  
3 operation even though segments of the proposal or its  
4 subsequent applicability to particular situations might  
5 result in contravening the organic law, it must be  
6 submitted to the electorate. Only when a petition is  
7 unconstitutional in its entirety may it be precluded  
8 from placement on the ballot."

9 Of some interest or import as it applies to the  
10 arguments that have been made in our case, I am just  
11 highlighting, and in that Citizens case, Petition II,  
12 the Second District says as follows on the facts of that  
13 case, "The city contends that the circuit court erred  
14 when it permitted Petition II to appear on the ballot.  
15 The proposed amendment requires a unanimous vote by the  
16 city commission for matters affecting five or fewer  
17 parcels under the comprehensive land use plan. The  
18 proposed charter amendment does not clash with Chapter  
19 163 because it would establish only an internal  
20 operating or procedural rule regarding the number of  
21 commissioners who must agree on an amendment affecting  
22 five or fewer parcels. We agree with the citizens that  
23 the procedural requirement imposed by the proposed  
24 amendment does not qualify as a "referendum" proscribed  
25 by the statute. In other provisions, such as emergency

1       ordinances, the city charter also requires a super  
2       majority vote. Furthermore, we find no merit in the  
3       city's argument that the amendment is vague, ambiguous,  
4       or misleading."

5                  To some extent there were obviously discussions and  
6       arguments at our current stage of the proceedings which  
7       are validly made but also may very well come up in the  
8       future. And I've referred to these as Phase I and Phase  
9       II, but Phase I, I guess you could say, is the facial  
10      challenge versus Phase II, the, "as applied" challenges.  
11      Most of the city's argument at this point, while quite  
12      interesting and useful in identifying potential defects  
13      should the citizens vote to approve the ordinance, are  
14      more appropriate for the Phase II as applied review or  
15      challenge, not at this Phase I facial constitutional  
16      analysis.

17                  The principles established in the Dade County case,  
18       and several of the other appellate court cases have, as  
19       argued, consistently and clearly ruled that unless the  
20      entire proposed amendment is both invalid on its face  
21      and illegal in its entirety, judicial litigation  
22      challenges to individual sections of a proposed citizen  
23      referendum amendment cannot be used to block placement  
24      of the amendment on the ballot. Rather, such legal  
25      challenges to individual sections of the proposed

1 amendment should be deferred until after the proposed  
2 amendment, including the challenged sections, is  
3 submitted to the voters. And there's good citation  
4 authority for this from the Citizens For Responsible  
5 Growth case as well as the Rivergate Restaurant case.  
6 And I'm leaving the citations out, but I've given a copy  
7 of this to our court reporter so she can put the  
8 appropriate cites in there.

9 Then lastly, or almost lastly, it says, as  
10 explained by the Third District in *Rivergate Restaurant*  
11 *Corp versus Metropolitan Dade County*, a 1979 case, "The  
12 Court should order the entire amendment, including the  
13 challenged sections, to be sent forward to the ballot.  
14 If the voters approve the amendment, there is ample  
15 opportunity for the challengers to seek judicial review  
16 of individual challenged sections of the amendment after  
17 the vote."

18 So that's the basis for the Court's ruling.  
19 However, of course, there is one last point that I would  
20 like to ask you before you're welcome to put whatever  
21 you would like on the record, because obviously we're  
22 making a record for an appellate review. That is, what  
23 is the appropriate date to put this on the ballot? I've  
24 mentioned to you before -- well, I'll back up and say  
25 you've both conveyed to me in some form, some written

1 form, that -- I think you both have kind of given the  
2 Court a heads-up and said this is too late to go on the  
3 November general ballot. And so my -- and I've told you  
4 that, you know, with all due respect to everybody, I  
5 don't mean to offend anybody, but I don't consider this  
6 an emergency, and I'm not, as a general rule, interested  
7 in ordering a special election at some enhanced and  
8 special cost to the taxpayers. If there is a reasonable  
9 date for an election coming up, and with due  
10 consideration to the fact that that date must be, to  
11 some extent, after you've had a chance for appellate  
12 review. So there's no point, in my mind, in saying, oh,  
13 let's pick December, because in my mind you may not have  
14 a ruling from the appellate court in December; so you  
15 know, I don't want to waste everybody's time and/or  
16 their money.

17 So I am under the impression that there may be a  
18 normal city election in February or somewhere around  
19 that time, and if that's the case, I actually think that  
20 you can get an appellate answer somewhere by December,  
21 maybe January. So I open that up for discussion to you  
22 but I also don't want to cut either of you off from  
23 placing in the record whatever you wish.

24 Who wants to go first? Well, and then not only  
25 that, in order to set this up for an appropriate review,

1 I will at this point direct Mr. Pires to prepare the  
2 order, and then presumably you can attach a summary or  
3 condensed version of our court reporter's notes as a  
4 transcript.

5 MR. PIRES: Your Honor, what I would suggest is I  
6 would attach the full transcript, and so I'm ordering  
7 the transcript of this hearing, and provide, as per the  
8 custom and practice, to Mr. Pritt and Mr. Fox a copy of  
9 the proposed order. If I may have a moment to consult  
10 with my client, I think the February date may be a date.

11 MR. PRITT: Your Honor, Robert Pritt for the city.  
12 The next regular election, municipal election is March  
13 3rd of 2020.

14 THE COURT: 2020?

15 MR. PRITT: Yes. There's not one coming up this  
16 year.

17 THE COURT: We won't be able to wait that long.

18 MR. PRITT: Well, actually the law says at the next  
19 regular election or a special election to be called for  
20 that purpose; I think the Second DCA was pretty clear  
21 that either one is optional. Normally it would go to  
22 November 8th, because that is the next one. However, I  
23 think -- I believe that the books are already closed for  
24 that.

25 THE COURT: Sure.

1                   MR. PRITT: Even if there were time. Otherwise,  
2 so --

3                   MR. PIRES: Your Honor, I don't know -- I'm sorry,  
4 Bob.

5                   MR. PRITT: So I think our position would be that  
6 it must be by the next general election held within the  
7 city, which I believe to be March 3rd of 2020, or at a  
8 special election to be called for the purpose, and that  
9 should be sufficient for any order.

10                  THE COURT: I agree.

11                  MR. PIRES: I guess part of the question, Your  
12 Honor, whether or not the Court can order the council to  
13 call a special election earlier than March of 2020.

14                  THE COURT: My belief is the appellate court says  
15 yes.

16                  MR. PIRES: That's my understanding.

17                  THE COURT: I do not think it is appropriate to  
18 wait until March of 2020. So I did not want to put the  
19 city to an expense of a special election just for a  
20 special election, but I thought that -- I was hoping,  
21 and just using my apparently bad memory, that it could  
22 be done somewhere in February, because I'm trying to  
23 anticipate how much appeal time you need. So I don't  
24 think it would be useful to order a special election. I  
25 mean, this is October, November, December. I mean, I

1 just don't -- I don't think you're going to get a reply  
2 from the Second District, unless they put it on the  
3 front burner, and they might, but I don't think they  
4 will if there's no special election date to make, you  
5 know. So I want to give, create a date that doesn't put  
6 them under some involuntary rush order situation.

7 MR. PIRES: May I suggest sometime before April  
8 1st. I don't like to do a lot of things on April 1st  
9 because a lot of people say April Fools. So it's on a  
10 Tuesday --

11 THE COURT: Here's what I would suggest. I would  
12 suggest the two of you get together and come up with a  
13 date, or two or three dates if you can't, and in which  
14 case you would have to give me two or three dates and  
15 let me pick eeny, meeny, miny, moe. But I would hope  
16 that you could come up with a date in the first quarter  
17 of 2019, and that's when it would be ordered.

18 MR. PIRES: March 26th, Your Honor, is a date we  
19 would suggest now, and that's the last Tuesday in March.

20 THE COURT: Well, why don't you talk, you know.  
21 I'm okay with that. I'm okay with any date and I was  
22 trying to anticipate that getting a reply back from the  
23 district court would be -- I felt comfortable thinking  
24 that we would get it back before the first of February.  
25 So anytime from February or March. I mean, I don't --

1           it doesn't matter to me, but it looks like it's going to  
2       have to be a special election, because I think to put  
3       this off for two years is just not reasonable.

4           MR. PIRES: Appreciate that, Your Honor, and my  
5       client agrees with that concept. Thank you.

6           THE COURT: Okay. So if you can come up with a  
7       date, give me the date. And if you can't agree to a  
8       date, give me three choices and I'll pick one.

9           Okay. Thanks very much and I appreciate all your  
10      hard work and best of luck to all of you.

11          MR. PRITT: Thank you, Your Honor.

12          (Whereupon, the proceedings were concluded at 10:19 a.m.)

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1 STATE OF FLORIDA

2 COUNTY OF COLLIER

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5           I, Charissa Lynne Dines, Court Reporter, certify  
6 that I was authorized to and did stenographically report the  
7 foregoing proceedings; and that this is a complete record of  
8 my stenographic notes.

9

10          I further certify that I am not a relative,  
11 employee, attorney or counsel to any party nor to the  
12 attorneys of said action, nor in any way interested in the  
13 outcome thereof.

14

15          DATED this 5th day of October, 2018.

16

17

*Charissa L. Dines*

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CHARISSA LYNNE DINES, COURT REPORTER

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