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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO. 16-2016-CA-004930

DIVISION: CV-A

JOSEPH ANDREWS, CONNIE BENHAM, JUAN P. GRAY, LYNNE PRICE, and REV. LEVY WILCOX, as individuals and qualified electors of Duval County, Florida,

Plaintiffs,

vs.

THE CITY OF JACKSONVILLE, a consolidated political subdivision of the State of Florida; and MIKE HOGAN, as Duval County Supervisor of Elections,

Defendants.
_____/

ORDER ADDRESSING MOTIONS FOR SUMMARY JUDGMENT IN ANDREWS VS. THE CITY OF JACKSONVILLE

This cause came before the court on Defendants', the City of Jacksonville ("City") and Duval County Supervisor of Elections Mike Hogan, Amended Motion for Summary Judgment and Plaintiffs', Joseph Andrews, Connie Benham, Dr. Juan P. Gray, Lynne Price, and Rev. Levy Wilcox, Motion for Summary Judgment. The motions were argued by the parties at a hearing held on May 2, 2017. The issues are framed by Plaintiff's Amended Complaint for Declaratory, Injunctive, and Other Relief.

Background

On March 25, 2016, Florida Governor Rick Scott signed Florida General Law 2016-146-E into law. The bill created sections 112.64(6) and 212.055(9), Florida Statutes, and the sections were set to take effect on July 1, 2016. On May 10, 2016, the City of Jacksonville's City

Council adopted Ordinance 2016-300-E, which set a referendum seeking approval of the pension liability surtax by Jacksonville voters at the August 30, 2016 election. The referendum vote was held on August 30, 2016, and the Jacksonville voters approved the surtax by a 65% to 35% margin.

Plaintiffs filed a two-count Complaint on July 26, 2016, seeking declaratory and injunctive relief. On January 26, 2017, Plaintiffs filed an Amended Complaint adding an additional 5 grounds to their original two-count Complaint. On March 3, 2017, Defendants filed an Amended Motion for Summary Judgment and on March 7, 2017, Plaintiffs filed a Motion for Summary Judgment. On May 2, 2017 a Summary Judgment Hearing was held on both parties' motions for summary judgment.

Summary Judgment Standards

Under Rule 1.510, Florida Rules of Civil Procedure, a summary judgment "shall be rendered forthwith 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 held that a movant for summary judgment need not "exclude every possible inference that the opposing party might have other evidence available to prove his case. . . . [S]uch a requirement is not a part of the burden imposed upon a summary judgment movant." Harvey Bldg., Inc. v. Haley, 175 So. 2d 780, 782 (Fla. 1965). The Harvey court went on to hold that "[i]f the moving party presents evidence to support the claimed non-existence of a material issue, he will be entitled to a summary judgment unless the opposing party comes forward with some evidence which will change the result – that is, evidence sufficient to generate an issue on a material fact." Id. at 782-783. "It is not sufficient in defense

of a motion for summary judgment to rely on the paper issues created by the pleadings." Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966) (emphasis supplied). Once the movant for summary judgment tenders competent evidence to support the motion, "the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. *It is not enough for the opposing party merely to assert that an issue does exist. . . .* The party opposing a motion for summary judgment must present evidence, not simply legal argument, demonstrating the existence of a disputed issue of material fact." The Fla. Bar v. Mogil, 763 So. 2d 303, 307 (Fla. 2000) (emphasis in original).

The function of the rule authorizing summary judgments "is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact." Pearson v. St. Paul Fire & Marine Ins. Co., 187 So. 2d 343, 347 (Fla. 1st DCA 1966). For purposes of deciding the Motion, both parties are in agreement that there is no genuine factual dispute.

Plaintiffs' Count One: Ordinance 2016-300-E is Void Ab Initio

Plaintiffs allege that City Ordinance 2016-300-E is void *ab initio* because it was passed in May 2016, prior to its enabling statute, section 212.055(9), becoming effective in July 2016. Plaintiffs argue that without section 212.055(9), the City did not have any other legal basis to pass Ordinance 2016-300-E. Plaintiffs have conflated the City's ability to call a referendum with its ability to levy a tax. Plaintiffs are correct that the city must act under the authority of enabling state legislation in order to actually levy and collect the tax. See City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1, 3 (Fla. 1972). The City, however does not purport to levy the tax as a direct result of the referendum. The Ordinance expressly states that multiple

preconditions must occur before the surtax is levied, including, the ending of the Better Jacksonville ½-cent surtax in 2030.

Further, the language of Section 212.055(9)(b) only requires the city to have a referendum to adopt the surtax and does not place any restriction on when the referendum may be held, nor, suggest section 212.055 in any way grants the City authority to hold the referendum. Thus, section 212.055(9) and Ordinance 2016-300-E are clear in demonstrating that the referendum does not directly levy the pension liability surtax and the City was free to hold the referendum vote at any time. Therefore, Defendants are entitled to summary judgment on Count One as a matter of law.

Plaintiffs' Count Two: Failure of Referendum Ballot Summary Language to Clearly and Unambiguously State the Chief Purpose of the Ballot Issue.

Plaintiffs allege the referendum ballot summary language violates section 101.161(1), Florida Statutes, because the ballot summary's explanation of the chief purpose of the ballot is unclear and ambiguous and contains misstatements of fact that are materially misleading. Plaintiffs also claim the summary violates section 101.161(1) because it exceeds seventy-five (75) words.

1. Ballot Summary Language is Unclear and Ambiguous

Plaintiffs claim the ballot summary language is unclear and ambiguous because of the vocabulary, sentence structure, and misleading statements in the summary. In support of this claim, Plaintiffs subject the summary language to the Flesh-Kincade Grade Level and Flesch Reading Ease tests. Plaintiffs claim the results of these tests demonstrate that a reader would need a graduate level reading comprehension in order to understand the ballot summary. Thus, Plaintiff argues, there is no way the ballot summary language could be interpreted as clear and unambiguous.

Section 101.161(1) states in part, "whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot." The purpose of a ballot title and summary is to provide fair notice of the ballot proposal so that a voter can cast an intelligent and informed ballot. Florida Educ. Ass'n v. Florida Dept. of State, 48 So. 3d 694, 700 (Fla. 2010). The ballot language must state the chief purpose of the ballot proposal, but does not need to explain every detail or ramification. Id. The test to determine whether the ballot summary language is defective is whether the language fairly informs the voter of the chief purpose of the ballot proposal, and whether the summary language, as written, misleads the public. Id. at 701. Only when the record demonstrates the ballot proposal is clearly and conclusively defective, may a court invalidate the summary. Armstrong v. Harris, 773 So. 2d 7, 11 (Fla. 2000).

Plaintiffs' use the Flesh-Kincade Grade Level and Flesch Reading Ease tests to demonstrate that the vocabulary and sentence structure of the ballot summary language is unclear and ambiguous. Their use of these tests in determining whether the ballot summary language complies with section 101.161(1) is misplaced. Plaintiff states that the Flesch Reading Ease test is applied to insurance policies pursuant to section 627.4145, Florida Statutes. Plaintiff does not cite, nor does there appear to be any, case law applying these tests to ballot summaries in order to determine if the summaries are clear and unambiguous.

In addition to the lack of case law, there is no logical basis to applying these tests to ballot summary language. Both Flesch tests reward passages of text that have sentences containing fewer words and syllables. See Carol M. Bast, Lawyers Should Use Plain Language, Fla. B.J., Oct. 1995, at 30, 32. In the context of ten thousand (10,000) word insurance policies,

drafters have wide latitude in word choice and sentence structure in order to achieve better scores on the Flesch tests. Under the seventy-five word limit mandated by section 101.161, however, drafters do not have the luxury of using more sentences and words to better explain complex concepts. Thus, for the Court to place weight in the Flesch tests in determining whether the ballot summary language is clear and unambiguous would be illogical. Therefore, Plaintiffs claim that the ballot summary language is not clear and unambiguous based on the Flesch tests is without merit.

Plaintiffs also claim the ballot summary language is unclear and ambiguous because it contains misstatements of fact. Plaintiffs allege there are five misstatements that cause the ballot summary language to be misleading. The statements at issue are:

> **(1)** "Increasing the employee contribution for those plans to a minimum of 10%." Plaintiffs claim this is a misstatement because it implies every employee will have their contribution increased to 10%. Plaintiffs argue that this is not true because newly hired employees are already contributing 10% of their income to pension plans.
> **(2)** "Which ends upon elimination of the unfunded pension liability or in 30 years maximum." Plaintiffs claim this is a misstatement because the surtax is authorized until 2060. Plaintiffs argue the ballot implies the surtax would begin immediately, but in reality could begin as late as 2030 and run until 2060.
> **(3)** "Permanently closing up to three of the City's unfunded defined benefit retirement plans." Plaintiffs claim this is a misstatement because the plans will not be closed entirely, but only to new members.
> **(4)** "Ending the Better Jacksonville ½-cent sales tax." Plaintiffs claim this is a misstatement because the ballot summary does not clarify that the pension surtax is a new tax and not an extension of the Better Jacksonville tax.
> **(5)** The use of the word "plan" in the ballot summary title. Plaintiffs claim this is a misstatement because the vote is for the levying of a tax and not an overall plan to solve the pension issue.

None of the examples of alleged misstatements Plaintiffs cite amount to a level of ambiguity that would cloud the chief purpose of the referendum. The chief purpose of the provision is to reduce or eliminate the City's unfunded pension liability through the use of a dedicated ½-cent sales tax to be adopted for not more than 30 years once the Better Jacksonville ½-cent sales tax ends. The

ballot summary clearly states this and the statements Plaintiffs claim are misleading do not cause the summary to be so ambiguous as to create a different interpretation of the chief purpose.

2. Ballot Summary Language Exceeds 75 Words.

Plaintiffs claim the ballot summary language fails to comply with section 101.161(1) because it exceeds seventy-five words. Plaintiffs argue that the word 10% should be counted as two words ("ten percent") instead of one word and the word ½-cent should be counted as three words ("one half cent") instead of one word. Thus, Plaintiffs claim that the word count total should be increased by three and the total number of words in the ballot summary should be seventy-eight (78) words. Plaintiffs do not cite any case law in support of their interpretation of how these words should be counted. In light of this, the Court does not find any merit to Plaintiffs' claim that the ballot summary language is greater than seventy-five words. Further, to the extent there is any merit to Plaintiffs' claim, the indiscretion of exceeding the seventy-five word maximum by a mere three words would not warrant a complete invalidation of the referendum vote. Therefore, Defendants are entitled to a summary judgment on Count Two as a matter of law.

Plaintiffs' Count Three: Supervisor of Elections Mike Hogan Failed to Comply With Section 100.342, Florida Statutes, and Ordinance 2016-300-E

Plaintiffs allege that Supervisor of Elections Mike Hogan failed to comply with the requirements of section 100.342, Florida Statutes, when he failed to post a notice of election in the third week prior to the election. Plaintiffs also claim that the other two notices posted by the Supervisor of Elections are insufficient as a matter of law because the notices fail to conform to the notice style outlined in Ordinance 2016-300-E. Plaintiffs' claim that the Supervisor of Elections did not post a notice in the third week prior to the election is without merit. The

Supervisor of Elections posted a notice in the Florida Times-Union on August 11, 2016. Plaintiff's claim that the other notices were insufficient as a matter of law is also without merit. The chief purpose of the notice is to "apprise the inhabitants of the affect area and directly interested persons of the general nature and purpose of the act." Barndollar v. Sunset Realty Corp., 379 So. 2d 1278, 1280 (Fla. 1979). The notice posted by the Supervisor of Elections adequately appraises on the general nature and purpose of the act. To the extent the notice differs from Exhibit 1 of Ordinance 2016-300-E, the differences do not amount to a level that would warrant the Court to invalidate the entire election. Therefore, Defendants are entitled to summary judgment on Count Three as a matter of law.

Plaintiffs' Count Four: Intentional Misrepresentation and Abuse of Authority by Public Officials Regarding the Pension Tax.

Plaintiff claims various city officials made intentional misrepresentations and abused their authority while advocating the passage of the pension surtax referendum. The cited examples by the Plaintiffs do not reveal any gross misconduct by City officials. Instead, they highlight Plaintiffs' different interpretation of the effects of the pension surtax on the City's pension liability issues. The time and place for Plaintiffs to challenge and oppose the City's interpretation of these effects is not after the election in the courts, but instead, by engaging City officials in discourse and campaigning their opposing positions to the electorate. To invalidate the will of the voters based on a difference of interpretation of statements by the City, such as, whether this is a "new" tax or whether this tax "protects future generations from higher taxes" would be preposterous. Plaintiffs fail to cite any precedence from Florida courts involving similar alleged misconduct that resulted in the court invalidating an election post hoc. Therefore, Defendants are entitled to summary judgement on Count Four as a matter of law.

Plaintiffs' Count Five: Florida General Law Chapter 2016-146 Violates the Single Subject Requirement

Plaintiffs claim that General Law Chapter 2016-146 violates the Single Subject Requirement found in Article III, Section 6, of the Florida Constitution because the General Law modifies two separate statutes, section 212.055(9) and section 112.64(6). "The purpose of the constitutional prohibition against a plurality of subjects in a single legislative act is to prevent a single enactment from becoming a 'cloak' for dissimilar legislation having no necessary or appropriate connection with the subject matter." State v. Lee, 356 So. 2d 276, 282 (Fla. 1978). The legislature is accorded wide latitude in the enactment of laws and courts shall only strike down a statute when there is a plain violation of the Single Subject Requirement. Id. This constitutional provision is not intended to require laws to be unnecessarily restrictive in their scope and operation. Id.

In reviewing whether legislation complies with the Single Subject Requirement, the court must apply a two-step analysis: (1) determine the single subject as the short title, and (2) analyze the provisions of the law to determine whether they are properly connected to the subject. Franklin v. State, 887 So. 2d 1063, 1074-78 (Fla. 2004). Provisions are properly connected to the subject: "(1) if the connection is natural or logical, or (2) if there is a reasonable explanation for how the provision is (a) necessary to the subject or (b) tends to make effective or promote the objects and purposes of legislation included in the subject." Id. at 1078. References to multiple statutes on the same subject do not automatically render an act unconstitutional. See Gaulden v. Kirk, 47 So. 2d 567, 575 (Fla. 1950).

Applying the above stated principles, General Law 2016-146 deals with only one subject. The subject of General Law 2016-146 is "discretionary sales surtaxes." The object and purpose of the legislation is to provide prerequisites and restrictions on a sales surtax for unfunded

pension liabilities. Section 112.64 was amended to authorize a county to apply proceeds of a tax toward reducing unfunded pension liabilities and the amortization of those proceeds. Section 212.055 was amended to authorize the county to levy the tax if certain conditions were met and specifying the conditions under which the tax terminates. In reviewing the General Law in its entirety it is clear the amended sections are both naturally and logically connected to each other. Therefore, Defendants are entitled to summary judgment on Count Five as a matter of law.

Plaintiffs' Count Six: Florida General Laws 2016-146 Amends Florida Statutes to be Mutually Inconsistent.

Plaintiffs allege that Florida General Law 2016-146 amends sections 112.64(6) and 212.055(9) to be mutually inconsistent and therefore, unenforceable. Plaintiffs argue that section 212.055(9) contemplates a scenario where the proceeds of a pension liability surtax "have not been actuarially recognized," which directly conflicts with section 112.64(6)'s statement that future uncollected proceeds of a sales surtax "shall be actuarially recognized." Plaintiffs argue that because "shall" is mandatory, the two provisions are inconsistent and unenforceable. The statutes are not inconsistent and Plaintiffs' claim that the statutes are unenforceable is without merit. Section 112.64 deals with future uncollected surtax proceeds being actuarially recognized as part of the administration of a retirement plan, while section 212.055(9) deals with the use of those proceeds when they are levied as a part of that overall chapter. These provisions are related but deal with different situations and are not in direct conflict with each other. Therefore, Defendants are entitled to summary judgment on Count Six as a matter of law.

Plaintiffs' Count Seven: Section 112.64(6) Violates The Florida Constitution by Mandating Actuarial Standards.

Plaintiffs allege that section 112.64(6) violates the Florida Constitution because it conflicts with the standards set forth by the Governmental Accounting Standards Board ("GASB") by mandating the municipality to follow standards in conflict with GASB. Plaintiffs argue that a municipality that does not follow GASB standards will not be invested in by potential bond investors because they will not be able to adequately compare those municipalities to ones that follow GASB standards. Plaintiffs claim this will ostracize these municipalities' bonds in the bond market and no one will buy their bonds. Plaintiffs argue this would effectively eliminate the municipalities' ability to issue bonds, which would be a violation of the Florida Constitution. Plaintiffs also claim that the Florida legislature has exceeded its authority by attempting to regulate actuaries to practice their profession in a way that would be in violation of their professional ethics.

Section 112.64(6) does not violate the Florida Constitution because of its prescribed actuarial procedures. While Plaintiffs claim that section 112.64(6) conflicts with GASB standards, they do not specify which provisions of GASB conflict with section 112.64(6)'s mandate of immediate recognition of the present value of the proceeds of a future surtax.[1] Even if the method of actuarially recognizing the proceeds of the surtax set forth in section 112.64(6) conflict with GASB standards, Plaintiffs' claim fails because section 112.64(6) does not prohibit the proceeds from being actuarially recognized multiple ways. Thus, actuaries are free to report the proceeds in accordance with section 112.64(6) and GASB, which would allow actuaries to follow their professional standards and bond investors to adequately assess municipality bonds. Further, even if section 112.64(6) does interfere in some way with a municipality's ability to

[1] In fact, it appears Section 112.064(6) is in conformance with GASB statements 67 and 68; however, neither party presented evidence about whether any differences in the processes would produce fundamentally different results.

issue bonds, this is not the same as an outright stripping of its ability to issue bonds. Therefore, Defendants are entitled to summary judgment on Count Seven as a matter of law.

Conclusion

A court's decision to uphold an election and its underlying legislation should not be viewed as an endorsement of the merits of the legislation and the courtroom is not the venue opposing viewpoints to legislation should be litigated. A court has a duty to only set aside an election when it finds substantial non-compliance with statutory election procedure and reasonable doubt as to whether the election expressed the will of the voters. See Fouts v. Bolay, 795 So. 2d 1116, 1118 (Fla. 5th DCA 2001). In the instant case, Plaintiffs have made unconvincing allegations of non-compliance and have demonstrated to the Court that there is not any reasonable doubt as to whether the voters were able to accurately express their will. Accordingly it is:

ORDERED AND AJUDGED:

(1) Defendants' Amended Motion for Summary Judgment is **GRANTED** as to all counts of Plaintiffs' Amended Complaint for Declaratory, Injunctive, and Other Relief,

(2) Plaintiffs' Motion for Summary Judgment is **DENIED** as to all counts of Plaintiffs' Amended Complaint for Declaratory, Injunctive, and Other Relief.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida this 4 day of May, 2017.

DONALD R. MORAN, JR.
Senior Circuit Court Judge

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