

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT, IN AND FOR PALM
BEACH COUNTY, FLORIDA.

CASE NO.: 50 2006 CA 014101 XX XX MB AA

DAWN PARDO,

Petitioner,

vs.

JIM JACKSON, NORMA DUNCOMBE,
VANESSA LEE, ELIZABETH WADE,
ANN ILES, CARRIE WARD AND THE
CITY OF RIVIERA BEACH,

Respondents.

@atalpumd

ORMD, LLC's MOTION TO INTERVENE

ORMD, LLC, by and through its undersigned attorneys, hereby files this, its Motion to Intervene, and as grounds therefor would state:

Introduction

ORMD, LLC ("Developer") was selected as the Master Developer for the Ocean Mall Redevelopment (the "Development") as a result of a Request for Proposal process initiated by the City of Riviera Beach ("City"), approximately 3 years ago. During the 3-year process, countless public hearings were held during which the nature of the Development was discussed, including, without limitation, the location of the structures contained within the Development, the term of the ground leases on which the Development would be constructed and the height of the buildings contained within the Development. During the entire 3-year process, the Development was always contemplated to be constructed on ground leases of not less than 99 years with a building height of 300 feet. During the entire 3-year process, there was extensive

public participation, the result of which was the City and the Developer making modifications to the proposed Development. During the entire 3-year process, millions of dollars were expended by Developer and the City and on December 18, 2006, the City, the Community Redevelopment Agency of the City of Riviera Beach ("CRA") and the Developer entered into a Development and Disposition Agreement, two ground leases, an option agreement and a community redevelopment partnership agreement covering the Development, which included the City's approval of a Conceptual Plan for the subject redevelopment. The Petitioners have had numerous opportunities during the 3-year period to make their positions known and to take whatever formal action they deemed warranted. They now attempt to derail by process which has been well-vetted, and in doing so, create an unnecessary urgency. Furthermore, as the City has demonstrated and as more fully described below, we believe that the Petitioners' arguments are without merit.

1. Petitioner's Complaint for the issuance of an Alternative Writ of Mandamus, filed forty-five days ago, concerns two charter amendments proposed by petition committees to amend the City's charter to limit the number of years the City may lease municipal beach property and to limit to five(5) stories the height of any buildings or structures on municipal beach property.

2. The Complaint further concerns a petition committee's effort to repeal City Ordinance 3016 which authorizes the City to enter into lease agreements of municipal beach property for a period of ninety-nine years.

3. The Ocean Mall Redevelopment, for which the Developer was selected as the Master Developer, pursuant to which the Development and Disposition Agreement and the ground leases referred to above were entered into between the Developer, the City and the CRA,

concerns the same municipal beach property which is the subject of the charter amendments and the repeal of Ordinance 3016.

4. There can be no question that Developer has a sufficient interest in the pending litigation which would warrant intervention pursuant to Florida Rule of Civil Procedure 1.230. *Barnhill v. Florida Microsoft Anit-Trust Litigation*, 905 So. 2d 195 (Fla. 3d DCA 2005) (a person is entitled to intervene when his interest in the matter in litigation is "of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505 (Fla. 1992) (quoting *Morgareidge v. Howey*, 78 So. 14, 15 (Fla. 1918)).

5. Developer acknowledges that as an intervener, its interest is subordinate to the recognition of the propriety of the instant proceeding. *Armetta v. CleveTrust Realty Investors*, 359 So. 2d 540 (Fla. 4th DCA 1978).

6. Further, it is likely that an appeal will be filed by the party which believes it to be aggrieved by the Court's ruling and Developer seeks to participate in such proceedings which it will be unable to do if leave to intervene is not granted. *Tallahassee Democrat, Inc. v. O'Grady*, 421 So. 2d 58 (Fla. 1st DCA 1982)

7. Developer recognizes that the Court intends to issue a decision on Petitioner's request for the issuance of an Alternative Writ of Mandamus quickly. It is not Developer's intention to disrupt or to delay that decision, but place before the Court a critical legal issue which Developer intends warrants the denial of the relief requested by Petitioner and which issue was raised by the City in its filing with the Court but not briefed, nor has the Court been provided with legal authority which Developer believes is directly on point and which mandates denial of Petitioner's request for the issuance of an Alternative Writ of Mandamus herein.

8. Developer requests of this Court that it grant its Motion to Intervene as a Defendant herein, and, in addition to the previously filed response and arguments of the City, which Developer adopts, requests that the Court accept, in addition thereto, the argument set forth below by Developer as its Response in Opposition to Petitioner's Complaint for Issuance of Alternative Writ of Mandamus.

9. Petitioner, briefly, in her Supplemental Memo of Law filed four days ago on February 1, 2007, acknowledged that the City has asserted that the imposition of height limitations on the municipal beach property affects the City's Comprehensive Plan and would result in an amendment thereto. Petitioner argues that this argument asserted by the City is a "diversionary tactic."

10. Developer would respectfully suggest that the affect of the proposed charter amendments and the repeal of Ordinance 3016 on the City's Comprehensive Plan is not only not a "diversionary tactic" but the basis upon which this Court should deny Petitioner's application for the issuance of a Writ of Mandamus.

Legal Argument

11. In the most recent case of *Riverfront Developers, LLC vs. the City of Titusville and Fred D. Galey*, 14 FLW Supp. 54 (18th Jud. Cir. 2006), Circuit Court Judge David E. Silverman of the 18th Judicial Circuit, enjoined and prohibited the City of Titusville from enforcing a building height limitation of a charter amendment if same was approved by referendum. This case concerned a proposed charter amendment prohibiting the construction of new buildings that exceed 35 feet in height. In the Riverfront Developers' case, the developer sought to remove from the ballot the issue of an amendment to a city charter to restrict the height of new structures to 35 feet and, alternatively, to enjoin enforcement of the amendment if

approved by the voters. The Court determined that the developer was likely to prevail on its claim that the height limitation amendment was invalid as being inconsistent with the city's Comprehensive Land Use Plan and inconsistent with the objectives and policies of the city's Comprehensive Plan.

12. Alternatively, the Court found that the developer was likely to prevail because the proposed amendment would constitute an amendment to the Comprehensive Plan that did not comply with statutorily mandated intergovernmental review.

13. In reaching its decision in *Riverfront Developers*, the Court set forth its analysis in the section of its opinion entitled "The Likelihood of Prevailing". Within that section of the Court's opinion, the Court cited to the case of *City of Cocoa Beach v. Vacation Beach, Inc.*, 852 So. 2d 358 (Fla. 5th DCA 2003).

14. The *City of Cocoa Beach* case concerned two proposed charter amendments, one which would limit the height of any structure to be erected to no greater than 45 feet above the grade of the building site. The Fifth DCA emphasized that it was addressing a narrow issue when it held that the subject charter amendments were not invalid under §163.3194(2), Fla. Stat. which section prevents land development regulations or amendments thereto from being adopted by a governing body until they are referred to the local planning agency for review and recommendation as to the relationship of the proposals to the Comprehensive Plan of the municipality.

15. However, the Fifth DCA specifically stated that its holding should not be construed as a declaration that the charter amendments were valid and stated at foot note #1:

"For example, we have not addressed the validity of the charter amendments under §163.3194(1) and (b) of the Growth Management Act, which prohibit amendments to 'land development regulations' if such amendments are

inconsistent with the Comprehensive Plan. We note parenthetically that this subsection seems to apply irrespective of by whom the amendments are adopted.”

16. The charter amendments and the repeal of Ordinance 3016 which Petitioner seeks to place on the March ballot, are inconsistent with the City’s Comprehensive Plan.

17. Pursuant to the City’s Comprehensive Plan adopted on November 7, 2001, the CRA was to prepare a redevelopment plan for the Community Redevelopment Area, with a prioritized strategy for redevelopment, Policy 1.2.1. Pursuant to Policy 1.2.10 of the Comprehensive Plan, the 2001 Redevelopment Plan was to include controls and guidelines for all public and private development within the Community Redevelopment Area. These controls were to provide for unique imaging character with “setbacks, height, density, parking, architectural elements, landscaping, colors and materials, construction timing and procedure that assure design excellence and quality in the final development projects.”

18. Pursuant to the stated policy of the City’s Comprehensive Plan, the CRA retained a multi-disciplinary team of national and local firms to create an Amended Redevelopment Plan to provide the concept, methods and direction to achieve the City’s redevelopment goals.

19. The City and the CRA’s Redevelopment Plan contemplates the re-development of the subject property, including the development of a hotel on the subject property.

20. The zoning currently in effect for the subject municipal beach property allows for a building height of 105 feet. Pursuant to §163.3164(23), “land development regulations” include, by definition, local government zoning and any other regulations controlling the development of land.

21. Without taking into consideration the height restriction of 5 stories and the limitation on the lease term of 50 years would render the private redevelopment of the municipal beach property financially unfeasible, there is no question, as recognized by the analysis in the

Riverfront Developers, LLC, and in foot note #1 of the *City of Cocoa Beach* case, that Petitioner's proposed charter amendment limiting the height of structures on municipal beach property to 5 stories constitute an impermissible amendment to "land development regulations" within the context of §163.3194(1)(b), Fla. Stat. (2005) - as a 105 foot height limitation is currently in effect.

22. Further, as was similarly found by the Court in *Riverfront Developers*, the proposed height limitation by the Petitioner herein, is inconsistent with the City's Comprehensive Plan, as it is not "compatible with and further the objectives, policies, land uses and densities or intensities in the comprehensive plan..." §163.3194(3)(a), Fla.Stat. (2005).

23. Further, as was recognized by the Court in *Riverfront Developers*, the charter amendment limiting height structures on municipal beach property to 5 stories has the effect of improperly impacting the City's Comprehensive Plan and would constitute an amendment of said Comprehensive Plan not in compliance with proposed §163.3184 and §163.3189, Fla. Stat. (2005). "Where all the land uses, objectives and policies of the Comprehensive Land Use Plan are subordinated to the single value of having buildings less than a certain height, the height requirement can properly be said to have impacted and amended the Comprehensive Land Use Plan." *Riverfront Developers* at 57.

24. Further, the subject municipal beach property consists of three parcels of land. The proposed charter amendment restricting the height of municipal beach property structures to 5 stories has the practical effect of amending the City's Comprehensive Plan. The Florida Legislature in Stat. 163.3167(12), while recognizing the ability of the public to engage in referendum or initiative in limited circumstances, has specifically prohibited initiatives or referenda that affect less than five parcels of land. §163.3167(12) provides:

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

Policy

25. The Florida Legislature determined that decisions affecting land development would be through a system of "top-down planning" and adopted, in accordance therewith, in 1985, the "Local Government Comprehensive Planning and Land Development Regulation Act" (the "Act") as Part II of Chapter 163 of the Florida Statutes.

26. This "top-down planning" provides for each unit of government (i.e., the State, the region, the counties and the cities) to adopt binding comprehensive plan(s) which, through a system of review by each level of government, would result in consistent comprehensive plans, each in accord with one another.

27. The Act was specifically intended to comprehensively regulate land use throughout the State and to require the governing bodies of local governments to coordinate their planning and development activities with those of the State and regional agencies and to cooperate with other units of local government in furtherance of the goals of integrated comprehensive plans that are internally and externally consistent as to substance and process. See, §163.3161(2), Fla. Stat. (2005); §163.3164(4), Fla. Stat.; and §163.3161(6), Fla. Stat.

28. The Act explicitly defines a limited role of the public as part of the statutory scheme of a comprehensive planning process in that it provides for extensive public participation, but not determination, in the decision-making process of the local governing body with respect to land use, development and planning. §163.3181(1) - (2), Fla. Stat.

29. The proposed charter amendments by Petitioner and the repeal of Ordinance 3016 violate the fundamental principles of the Act to effectuate "top-down planning" in order to

achieve consistency between the State, regional and local comprehensive plans and land development regulations promulgated thereunder and mandated as City and CRA responsibilities, with limited and defined citizen input.

30. The proposed charter amendments and repeal of Ordinance 3016 place a legal straightjacket on the City prohibiting it from taking action which would assure design excellence and quality in the final development by attempting to unconditionally impose a strict and unconditional 5-story height limit on municipal beach property and a maximum of a 50-year lease term for municipal beach property; such actions would improperly usurp the statutory responsibilities of the City with respect to zoning and planning decisions required under the Growth Management Act (Chapter 163, Fla. Stat.) and constitute land development regulations in the form of a de-facto moratorium on height and length of lease terms without the benefit of any data or analysis and with no regard for the formalities required by statute for such types of municipal action.

Conclusion

31. In conclusion, Developer respectfully requests that this Court deny Petitioner's application for issuance of Alternative Writ of Mandamus in that:

(a) The proposed charter amendment restricting height of buildings on municipal beach property and the proposed charter amendments and the referendum to repeal Ordinance 3016, both concerning a 50-year lease term cap, clearly violate the Florida Statutes' prohibition against amendments to the City's Comprehensive Plan and to land development regulations which amendments are inconsistent with the City's Comprehensive Plan, §163.3194(1)(b), Fla. Stat. (2005);

(b) The proposed charter amendments and the referendum to repeal of Ordinance 3016 are inconsistent with the City's Comprehensive Plan and the Community Redevelopment Act (Part III, Chapter 163, Fla. Stat.) which confers upon municipalities the authority and powers necessary to carry-out necessary redevelopment activity;

(c) The charter amendment restricting the height to 5 stories of buildings constructed on municipal beach property constitutes a de-facto improper amendment to the City's Comprehensive Plan without the necessary series of inter-governmental reviews required by Fla. Stat. §163.3184 and §163.389 (2)(a);

(d) The proposed charter amendments and referendum to repeal Ordinance 3016 are prohibited by Fla. Stat. §163.3167(2);

(e) The charter amendments and repeal of Ordinance 3016 are arbitrary, capricious and not reasonable, having not been justified by any particular study and not allowing for the possibility of variance. *Innkeepers' Motor Lodge, Inc. v. City of New Smyrna Beach*, 460 So. 2d 379, 380 (Fla. 5th DCA 1984); and

(f) To the extent that the proposed charter amendments and repeal of Ordinance 3016 are inconsistent with the general laws of the State of Florida, Chapter 163, specifically, the proposed charter amendments and repeal of Ordinance 3016 would be unconstitutional as a direct and irreconcilable conflict with Chapter 163, Fla. Stat. *West Palm Beach Association of Firefighters Local Union 727 v. Board of City Commissioners of the City of West Palm Beach*, 448 So. 2d 1212, 1213 - 14 (Fla. 4th DCA 1984).

WHEREFORE, ORMD, LLC requests this Honorable Court grant its Motion to Intervene as a party Defendant herein, allow this motion to serve as a response to Petitioner's Complaint and deny the relief sought by Petitioner and grant such other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by facsimile and U.S. mail to Brian Joslyn, Esq., Casey Ciklin, *et al.*, 515 No. Flagler Drive Suite 1800, West Palm Beach, FL 33401; Palm Ryan, City Attorney, City of Riviera Beach, 600 W. Blue Heron Boulevard, Suite C-225 and John M. Jorgenson, Esq., Scott Harris, *et al.*, 4400

PGA Boulevard, Suite 800, Palm Beach Gardens, FL 33410 this 5th day of February, 2007.

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