

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN
AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO: 2006 CA 014101 AA

DAWN PARDO,

Plaintiff(s),

vs.

JIM JACKSON, et al.,

Defendant(s).

**ORDER GRANTING IN PART, AND DENYING IN
PART, PETITIONER'S MOTION FOR ISSUANCE
OF PEREMPTORY WRIT OF MANDAMUS**

This matter came before the court on the petitioner's request for the issuance of a peremptory writ of mandamus. On December 21, 2006, petitioner initiated this action by filing a complaint for alternative writ of mandamus. Petitioner, Dawn Pardo, is a member of a petition committee in the City of Riviera Beach. The committee seeks to place on the March 13, 2007 ballot two proposed amendments to the City of Riviera Beach's municipal charter and a referendum to repeal City Ordinance 3016. The proposed charter amendments are: 1) a petition for charter amendment limiting the number of years that the City may lease municipal property; and 2) a petition for charter amendment establishing height limitations for municipal beach property. The respondents are, respectively, the council members of the City of Riviera Beach, the city clerk for the City of Riviera Beach, and the City itself.

On January 8, 2007, the Honorable David F. Crow entered an alternative writ of mandamus and order to show cause. The court's order compelled the respondents to either place the requested referendum and charter amendments on the March 2007 ballot

or, alternatively, to show cause why the referendum and amendments should not be placed on the ballot. The order further transferred this action to Division AA based on a previously filed declaratory judgment action styled *City of Riviera Beach Beach v. Dawn Pardo, et al*, Case No. 06 CA 014100 AA.

On January 11, 2007, the petitioner filed a motion for emergency hearing on her request for a peremptory writ of mandamus. The motion for an emergency hearing was granted by the Honorable Howard Harrison, Senior Judge, and a hearing was scheduled for 2:00 p.m. January 26, 2007. On January 26, 2007, the court heard argument on the petitioner's request for a peremptory writ of mandamus. The hearing was continued to permit the respondents to file their response to the alternative writ of mandamus in accordance with Fla. R. Civ. P. 1.630, and in accordance with the time frame set forth in the alternative writ of mandamus.

On January 29, 2007, the respondents filed their answer and affirmative defenses to the alternative writ of mandamus. On February 1, 2007, the court again heard argument on the petitioner's application for a peremptory writ of mandamus and on the respondents' opposition. Based upon the presentation of the parties, the court makes the following findings.

It is well settled that mandamus is awarded "to enforce the performance of a ministerial duty imposed by law where such duty has not been performed as the law requires." *State ex rel. Clendinen v. Dekle*, 173 So.2d 452, 456 (Fla. 1965) (citations omitted). Mandamus is not appropriate when a determination of controverted facts is necessary to ascertain the rights of the parties. *Sandpiper Bay, Inc. v. LaChance*, 384 So.2d 948, 950 (Fla. 4th DCA 1980); *Immer v. City of Miami*, 898 So.2d 258, 259 (Fla.

3rd DCA 2005). Mandamus will only lie when the act sought to be compelled is ministerial. Mandamus is not appropriate to compel the performance of a discretionary act. *Town of Manalapan v. Rechler*, 674 So.2d 789, 790 (Fla. 4th DCA 1996).

While various grounds have been advanced by the respondents in opposition to the request for mandamus relief, the primary issue at this stage of the proceeding is whether controverted facts preclude the court from granting mandamus relief without first conducting an evidentiary hearing or trial.

To support the assertion that issues of fact exist, respondents initially point to the petition committee's alleged failure to comply with Article X of the City Charter. Article X of the City's Charter sets forth procedures to be followed for initiative and referendum petitions. Respondents contend that there are issues of fact concerning whether the petition committee properly complied with Article X. Specifically, the respondents allege that: 1) more than five circulators were used to circulate the petitions; 2) the affidavits of the circulators are false as the circulators/affiants did not personally witness the signing of many of the petitions and cannot attest that the signatures are genuine; and 3) the affidavits of the circulators are flawed in that they do not state that the signer had an opportunity to read the ordinance proposed or sought to be reconsidered.

Importantly, the respondents do not allege that the underlying signatures of the electors are forgeries. The petitioner asserts, and the respondents concede, that the signatures offered in support of the referendum and charter amendments have each been verified by the Supervisor of Elections of Palm Beach County. The respondents also concede that the Supervisor of Elections has certified the signatures of at least 10% of the

registered voters in the City of Riviera Beach as it relates to the two proposed charter amendments.

Based upon the foregoing, the court finds that issues of fact exist with regard to the whether the procedural requirements of Article X of the City Charter have been met. The existence of controverted facts with regard to the affidavits executed by the circulators precludes the court from granting mandamus relief with respect to the referendum to repeal Ordinance 3016 without first conducting an evidentiary hearing. *Sandpiper Bay, id.* It appears clear that this referendum is governed by Article X of the City Charter.¹ However, a different analysis applies to the two proposed amendments to the City Charter.

Amendments to municipal charters are governed by Florida Statute Section 166.031 (1). Section 166.031(1) provides that the electors of a municipality may "by petition signed by 10 percent of the registered electors" submit to the electors a proposed amendment to a municipal charter. There are no procedural requirements within the statute relating to the number of circulators for a petition. Likewise, the statute does not require circulators to attest to the fact that the petitions were signed in the presence of the circulators. In short, none of the procedural requirements in Article X of the City Charter are contained in the statute.

Respondents contend that Article X of the City Charter merely supplements the provisions of Section 166.031(1) and that the procedural requirements of the City Charter are not in conflict with Section 166.031(1). The court disagrees. Section 166.031

¹ As the court has concluded that issues of fact preclude the issuance of mandamus relief with respect to the referendum, the court will not address whether the City Council's failure to act on the referendum was a discretionary act.

appears to be the sole method by which a municipal charter may be amended. While the parties have not provided the court with any controlling appellate case law authority on this issue, the court finds persuasive the opinions of the Florida Attorney General's office. See, Opp. Att'y. Gen. Fla. 93-23 (1991); Opp. Att'y. Gen. Fla. 88-30 (1998).

The legislature has not seen fit to impose any requirements other than the signature of 10% of the electors. *Thayer v. State*, 335 So.2d 815, 817 (Fla. 1976) (legislative directive as to how a thing shall be done is, in effect, a prohibition against its being done in any other manner). As it is admitted that the Supervisor of Elections has certified that the petitions at issue meet the 10% threshold, nothing more is required by the statute.

As the petitioners have complied with the requirements of Section 166.031(1), the controverted facts relating to whether the procedural requirements of Article X have been satisfied are not material. Therefore, these controverted facts do not preclude the issuance of mandamus relief with respect to the two proposed charter amendments.

Respondents also contend that the issuance of a peremptory writ of mandamus is barred by the doctrine of laches and by the equitable defense of unclean hands. At the hearing on February 1, 2007, the respondents indicated that their unclean hands defense was based on the petition committee's failure to comply with the procedural requirement of Article X of the City Charter. As already discussed, these facts, while controverted, are not material to the two proposed amendments to the City Charter and do not preclude the entry of mandamus relief.

Laches is a defense to issuance of a writ of mandamus. *Wright v. Frankel*, 2006 WL 3780671 (Fla. App. 4th Dist.) 32 Fla. L. Weekly D97. At the hearing on February 1,

2007, the respondents conceded that laches cannot be applied to the referendum to repeal Ordinance 3016, or to the proposed charter amendment to limit the number of years that the City can lease municipal property. Prior to the enactment of Ordinance 3016, the City Charter provided that no lease of municipal property could exceed 50 years.

Ordinance 3016 extended the permissible lease term from 50 years to 99 years. The petition committees' challenge to Ordinance 3016 through a petition for a referendum repealing the ordinance, and the proposed charter amendment seeking to reinstate the 50 year limitation, was almost immediate and respondents concede that no unreasonable delay occurred here.

With regard to the proposed charter amendment limiting the height of beach front property, respondents primarily assert that the petitioner should have filed earlier a declaratory judgment action to determine whether the procedural requirements of Article X of the City Charter applied to charter amendments under Section 166.031. The court finds that this theory will not support a laches defense. The petitioner had a right to rely on the plain language of Section 166.031, and there was no need to test the statute's application before the issue was raised in this case.

Respondents also assert that the petitioner waived the right to rely on Section 166.031(1) because the petitioner attempted to meet the procedural requirements of Article X in proposing the two charter amendments. The court finds that, even if true, these facts will not support a waiver of the petitioner's statutory right to propose

amendments to the City Charter. Both amendments clearly stated that they were being proposed pursuant to Section 166.031.²

The final issue with respect to the petitioner's request for mandamus relief is whether the placement of the proposed charter amendments on the ballot for the next general election is a ministerial or discretionary act. Once the requirements of Section 166.031(1) have been met, placement of the proposed amendment or amendments on the ballot is mandatory. Section 166.031(1) provides that the "governing body of the municipality shall place the proposed amendment contained in the ordinance or petition to a vote of the electors at the next general election..." No discretion is granted to the governing body of the municipality by the statute. Therefore, the act of placing the proposed charter amendments to the vote of the electors is ministerial, and the performance of that act can be compelled by the issuance of a writ of mandamus.

Based upon the foregoing, it is hereby,

ORDERED and **ADJUDGED**, as follows:

1. Petitioner's request for the issuance of a peremptory writ of mandamus compelling the placement of the referendum to repeal Ordinance 3016 on the March 2007 ballot is denied.
2. Petitioner's request for the issuance of a peremptory writ of mandamus compelling the respondents to place the two proposed charter amendments on the March 2007 ballot is granted. Respondents Jim Jackson, Norma Duncombe, Vanesse Lee, Elizabeth Wade, Ann Iles, Carrie Ward and the City of Riviera Beach are commanded to

² At the hearing on February 1, 2007, the respondents informed the court that the proposed amendments would not force amendment of the City's comprehensive plan. Therefore, the court does not need to consider the respondents fifth affirmative defense.

forthwith, and no later than February 8, 2007, set an election on the two proposed charter amendments in original form for the electors of the City of Riviera Beach at the next general election currently scheduled for March 13, 2007.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida, on this 5th day of February, 2007.



Glenn D. Kelley
Circuit Court Judge

copy furnished:

John M. Jorgensen, Esq., 4400 PGA Boulevard, Suite 800, Palm Beach Gardens, Fl. 33410

Richard A. Jarolem, Esq., 515 North Flagler Drive, 18th Floor, West Palm Beach, Fl. 33401

Brian B. Joslyn, Esq., 515 North Flagler Drive, Suite 1900, West Palm Beach, Fl. 33401