

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

DAWN PARDO,

Petitioner,

CIVIL DIVISION

CASE NO.: 502006CA014101XXXXMB AA

vs.

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

Respondents.

**RESPONSE AND AFFIRMATIVE DEFENSES TO ALTERNATIVE WRIT OF
MANDAMUS**

Respondents JIM JACKSON, NORMA DUNCOMBE, VANESSA LEE, ELIZABETH WADE, ANN ILES, CARRIE WARD AND THE CITY OF RIVIERA BEACH (collectively the "City") hereby file their Response and Affirmative Defenses to the Alternative Writ of Mandamus pursuant to Rules 1.630 and 1.140 Fla. R. Civ. P. and allege as follows:

ANSWER

1. Paragraphs 3, 4, 6(B), 6(E), 7(C), 7(D) 7(F) 7(J) 7(K), and 8 of the Complaint for Issuance of Alternative Writ of Mandamus, incorporated in the Alternative Writ of Mandamus by reference are admitted.

2. Paragraphs 6(J), 9, 10 of the Complaint for Issuance of Alternative Writ of Mandamus, incorporated in the Alternative Writ of Mandamus by reference are denied.

3. The City is without knowledge as to paragraphs 1, 2, 5, 6(C), 6(D), 7(B) to the Complaint for Issuance of Alternative Writ of Mandamus, incorporated in the Alternative Writ of Mandamus by reference, therefore same are denied.

4. As to Paragraphs 6(A), the City would assert that the City Charter, City Ordinances and §166.031, F.S., governs Amendments to the Charter. In the event that the

Charter and/or City ordinances conflict with §166.031, than §166.031 would control. The City would further state that §166.031 is the best evidence of the statute.

5. As to Paragraph 6(F) the City would admit that it could not handle the verification of whether the petitions contained the required number of signatures and that the City Clerk directed that the referendum papers be submitted to the Palm Beach County Supervisor of Elections to examine and determine whether the required number of qualified electors signed the charter amendment petitions. The City would further state that the Letter attached to the Complaint as Exhibit "D" is the best evidence of its contents. The remainder is denied.

6. As to Paragraph 6(G) the City is without knowledge as to the Certification by the Supervisor of Elections, however the City would assert that the best evidence of the contents of the letter is found in the exhibit attached to the Complaint as Exhibit "E". The City admits that it certified that the petition bore a total of 2682 signatures according to the certification of the Supervisor of elections. The City would further assert that the best evidence of the City Clerk's findings can be found in Exhibit "F" to the Complaint.

7. As to Paragraph 6(H) the City is without knowledge as to the Certification by the Supervisor of Elections, however the City would assert that the best evidence of the contents of the letter is found in the exhibit attached to the Complaint as Exhibit "G". The City admits that it certified that the petition bore a total of 2646 signatures according to the certification of the Supervisor of Elections. The City would further assert that the best evidence of the City Clerk's findings can be found in Exhibit "H" to the Complaint.

8. As to Paragraph 6(I) the City admits that the next General election is scheduled for March 2007. The remainder is denied.

9. As to Paragraph 6(K) the City admits receiving the letter attached to the Complaint as Exhibit "J". The remainder is denied.

10. As to Paragraph 7(A) The City Admits that Article X of the Charter provides the referendum. but would state the best evidence of the contents of Article X is the document attached to the Complaint as Exhibit J.

11. As to Paragraph 7(E) the City admits that on November 3, 2006, within the 30-day time period of the ordinance sought to be reconsidered, the petition committee filed referendum petition papers with the City Clerk. The remainder is denied.

12. As to 7(G) the City would admit that it could not handle the verification of whether the petitions contained the required number of signatures and that the City Clerk directed that the referendum papers be submitted to the Palm Beach County Supervisor of Elections to examine and determine whether the required number of qualified electors signed the charter amendment petitions. The City would further state that the letter attached to the Complaint as Exhibit "D" is the best evidence of its contents. The remainder is denied.

13. As to Paragraph 7(H) the City is without knowledge as to the Certification by the Supervisor of Elections, however the City would assert that the best evidence of the contents of the letter is the letter itself, attached to the Complaint as Exhibit "M".

14. As to Paragraph 7(I), the City admits that it certified that the petition bore a total of 2944 signatures according to the certification of the Supervisor of elections. The City would further assert that the best evidence of the City Clerk's findings can be found in Exhibit "N". The remainder is denied.

15. As to paragraph 7(L) the City admits that council made a final determination of insufficiency on or about December 21, 2006 and that that final determination is subject to court review. The remainder is denied.

16. As to Paragraph 7(M) the City admits that Article X Section 6 of the Charter controls the actions of the City Council as it relates to the reconsideration of an ordinance. The

City also states that Article X Section 6 of the City Charter is the best evidence of the terms contained therein.

17. As to Paragraph 7(N) the City acknowledges that the demand letter attached to the Complaint as Exhibit "F" was received. The remainder is denied.

AFFIRMATIVE DEFENSES

18. As its First Affirmative Defense the City that Mandamus is improper for a discretionary Act. Specifically, Mandamus is only appropriate to compel the performance of ministerial duties devolved by law on public officers. See Town of Manalapan v. Rechler, 674 So. 2d 789, 790 (Fla. 4th DCA 1996). An act is ministerial "when there is no room for the exercise of discretion, and the performance being required is directed by law." Id.

In the instant action, the Petitioner asserts that the City violated Article X, §4 of the City Charter, by having both the City Clerk and City Council fail to certify the petitions as sufficient. While the Petitioner's assertions are correct in that the City Clerk and the City Council failed to certify the petitions as sufficient, the determinations of sufficiency/insufficiency are both discretionary acts and are both improper for mandamus.

Specifically, pursuant to Article X, §4(a) of the City Charter, upon receipt of an initiative petition/petition for referendum, the City Clerk is required to "complete a certificate as to its [the petition(s)] sufficiency, specifying if it is insufficient, the particulars wherein it is defective. . ." This review and determination is done after the petition is filed and as part of the procedure after filing. The City Clerk has no discretion and must review the petition and make a certification of sufficiency/insufficiency. Once the City Clerk reviews a petition and makes a determination that a petition is sufficient or insufficient, the ministerial act is completed. The actual finding of sufficiency/insufficiency by the City Clerk is, by definition, discretionary, as it is the City Clerk

who is vested with the decision-making authority. How that authority is exercised is purely a discretionary act.

If the City Clerk refused to review the petitions and/or refused to issue a determination of sufficiency/ insufficiency, mandamus would be appropriate. However, in the instant case, it is not disputed that the City Clerk reviewed the petitions in accordance with Article X of the City Charter and issued a determination in accordance with the requirements of the City Charter thereby fully completing the ministerial act.

Because the City Clerk conducted the review and issued a determination of sufficiency/insufficiency there is no ministerial act to challenge. The Petitioner is actually attempting to challenge the City Council's final determination of insufficiency, which as stated *supra*, is a discretionary act and therefore improper for mandamus. See Rechler, 674 So. 2d at 790.

In addition to the foregoing, Article X, §4(b) of the City Charter, requires the City Council to review the determination of sufficiency/insufficiency rendered by the City Clerk. "If a petition has been certified as insufficient . . . The council shall review the certificate at its next meeting following the filing of such request and approve or disapprove it, and the council's determination shall then be a final determination as to the sufficiency of the petition."

Once again, the actual process of review by the City Council is ministerial. The City Council, according to the City Charter, must review the City Clerk's determination and approve or disapprove the City Clerk's determination. As in the instance of the City Clerk, the decision concerning whether to approve/disapprove the City Clerk's recommendation by the City Council is one of a discretionary act. By the very terms of the City Charter, the decision on approving or disapproving is vested and discretionary with the City Council.

In the instant action, it is once again undisputed that the City Council followed the City Charter and fully performed its ministerial act there under by reviewing the decision of the City

Clerk and rendering a final determination. Specifically, on Wednesday, December 18, 2006 the City Council made its final determination that the petitions were insufficient. The City Council's findings were based upon the following:

(a) A finding that circulators left petitions available for signature but unattended and that some petitions were also circulated by telefax and e-mail with the result that any number of the petitions were accompanied by an affidavit executed by a circulator that did not personally circulate the paper, could not verify that all signatures were affixed in his or her presence and could not attest to the fact that each signor had an opportunity before signing to read the full text of the ordinance proposed or sought to be reconsidered. As a result of the actions of the circulators, some or all of the circulator affidavits and any qualified voter signatures contained in the Petition to which such affidavits are attached are void as a matter of law for the negligent and fraudulent conduct of the circulators and the false attestation contained in the circulator affidavits.

(b) The petitions for City Charter amendment were signed by less than 15% of the total number of qualified voters registered to vote in the last regular election.

(c) The request for a City election on the referendum petition, seeking a repeal of Ordinance No. 3016's change in the limit on the term of a lease of municipal property from 50 to 99 years; and, an Initiative Petition requesting a City Charter amendment to amend the City Charter to require a term limit on a lease of the Ocean Mall property of 50 years were internally confusing and should not be placed on the same ballot.

(d) The Petitions were circulated by 114 people, far more people than the number of people in the Petition Committee who, pursuant to Article X, §2 of the City Charter, are to "be responsible for circulating the Petition...". (Emphasis added).

Petitioner actually acknowledges that the City Council made the final determination of insufficiency as required under the City Charter in Paragraph L of her petition, but misstates the reasons set forth by the City Council.

In either event, it cannot reasonably be disputed that the City Council performed its ministerial act by conducting the review of the City Clerk's decision and issuing a final determination. Had the City Council refused to conduct the review and/or refused to issue the final determination, mandamus would have been appropriate.

Because the City Council conducted the review there is no ministerial act to challenge. The Petitioner is actually attempting to challenge the City Council's final determination of insufficiency, which as stated *supra*, is a discretionary act and therefore improper for mandamus. See Rechler, 674 So. 2d at 790.

The City's Second Affirmative Defense is that, as stated, Petitioner's Petition for Issuance of Alternative Writ of Mandamus is improper because the signatures on the petition for the initiative/referendum petitions were procured by leaving the petitions unattended. Some of the petitions were circulated by telefax and e-mail with the result that the affidavit accompanying the purported signatures could not actually attest to the fact that each signor had an opportunity before signing to read the full text of the ordinance proposed or sought to be reconsidered. Furthermore, some of the petitions were gathered under the pretext of "cleaning up the beach".

18. The City's Third Affirmative Defense is that the Petitioner's Complaint for Issuance of Alternative Writ of Mandamus is improper because the right to which the Petitioner claims she is clearly entitled depends on the determination of controverted questions of fact. Mandamus is inappropriate where controverted questions of fact must be resolved. See Immer v. City of Miami, 898 So. 2d 258 (Fla. 3d DCA 2005); Decktight Roofing v. Amwest Surety, 841 So. 2d 667 (Fla. 4th DCA 2003); Sandpiper Bay, Inc. v. La Chance, 384 So. 2d 948 (Fla. 4th

DCA 1980). The factual issues include the validity of the signatures on affidavits, the discretionary acts of the City Clerk and the discretionary act of the City Council.

20. The City's Fourth affirmative Defense is that Petitioner's Petition for Issuance of Alternative Writ of Mandamus is improper as Petitioner has other adequate remedies, including an action for declaratory judgment, under Chapter 86, F.S. Mandamus is inappropriate unless Petitioner has exhausted all other legal and administrative remedies. See State ex. rel. Fraternal Order of Police, Orlando Lodge No. 25 v. City of Orlando, 269 So. 2d 402, 402 (Fla. 4th DCA 1972).

21. The City's Fifth Affirmative Defense is that the initiative seeking to amend the height limitations are an improper modification to the City's Comprehensive Plan and are therefore improper subject matter for an initiative petition.

22. The City's Sixth affirmative defense is that the individual council members should not have been named as defendants, as they were acting in their capacity as council members and not in their individual capacity.

23. The City's Seventh Affirmative defense is that as the Petition to Amend Charter is actually an initiative petition and as such, to the extent the City Charter does not conflict with §166.031, F.S., the City Charter controls.

24. The City's Eighth Affirmative Defense that the Affidavit of the Circulators is defective as the jurat on the affidavit of the circulators fails to state the each signor was given an opportunity before signing to read the full text of the ordinance proposed or sought to be reconsidered as required under Article X Section 3(c) of the City's Charter. Such a violation renders the affidavit and signature void as procedurally defective under the City's Charter.

25. The City's Ninth Affirmative Defense is waiver. The Petitioner and the committee that submitted the petitions did so in accordance with the procedures as set forth under Article X

for initiative petitions. As such, the Petitioner, by her acts has waived any right to challenge the application of Article X of the City Charter as it relates to the application of §166.031, F.S.

26. The City's Tenth Affirmative Defense is laches. The proposed re-development of the Ocean Mall was contemplated for over 3 years. In addition, the RFP for the Ocean Mall redevelopment specified that it contemplated a 99-year lease over three years ago. In that time, the Petitioner could have brought an action for declaratory judgment seeking a judicial determination on the application of Article X of the City Charter to a Charter amendment and failed to do so. Furthermore, at any point prior to the Council's action on or about December 18, 2006 the Petitioner could have filed an action seeking a declaratory judgment on the application of Article X of the City Charter as it pertains to a Charter Amendment and §166.031, F.S. and failed to do so. Instead of bringing her action, Petitioner complied with the procedures under Article X as it relates to the Charter Amendment and therefore has waited too long to bring her claim that Article X does not apply to Charter Amendments and that §166.031, F.S. somehow governs the procedure for charter amendments.

27. The City's Eleventh Affirmative Defense is unclean hands. The proposed re-development of the Ocean Mall was contemplated for over 3 years. In addition, the RFP for the Ocean Mall redevelopment specified that it contemplated a 99-year lease over three years ago. In that time, the Petitioner could have brought an action for declaratory judgment seeking a judicial determination on the application of Article X of the City Charter to a Charter amendment and failed to do so. Furthermore, at any point prior to the Council's action on or about December 18, 2006 the Petitioner could have filed an action seeking a declaratory judgment on the application of Article X of the City Charter as it pertains to a Charter Amendment and §166.031, F.S. and failed to do so. Instead of bringing her action, Petitioner complied with the procedures under Article X as it relates to the Charter Amendment and it is only after the Council voted that the petitions were insufficient, made the allegation that Article X of the City Charter does not apply

to Charter Amendments and that §166.031, F.S. somehow controls the procedures for charter amendments, even though §166.031, F.S. does not address any procedures whatsoever.

28. As its Twelfth Affirmative Defense the City would assert is that the procedures under Article X do apply to Charter Amendments and does not conflict with §166.031, F.S. Specifically, in order to amend a charter, it must be done by ordinance, even if proposed under §166.031, F.S. As the amendment must be done by ordinance, the action being brought by Petitioner is that of initiative. It is clear that Article X of the City Charter governs the procedures for initiative petitions and therefore applies to instant action.

29. As its Thirteenth Affirmative Defense, the City would assert that mandamus is inappropriate, as continued judicial supervision will be necessary from the courts. As outlined above, the Petitioner is actually seeking to amend the City's Comprehensive Plan as it relates to the five-story height limitation. The governing statutes for amending a comprehensive plan may be found under Chapter 163, F.S. Under Chapter 163, F.S. a proposed revision to Comprehensive plan must among other things: be noticed; published; have hearings; be subject to review by the Department of Community Affairs; be subject to objections; be subject to judicial and quasi-judicial reviews and State Land Planning Association. It is apparent that the amendment of a comprehensive plan would require continued judicial supervision to effectuate the changes as proposed by the Petitioner. Mandamus is inappropriate where the relief sought does not ask the court to perform a single act, but, rather, continuous supervisory jurisdiction to ensure that the acts requested are performed correctly. See Rechler, 674 So. 2d at 790.

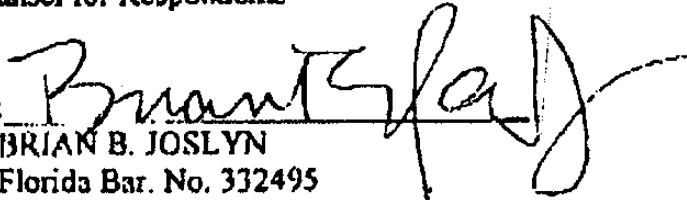
WHEREFORE, Based on the foregoing the City prays that this Court enter its Order dismissing the Complaint as well as award granting the City any other relief it deems just and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to John M. Jorgenson, Esq., Scott Harris Bryan et. al., 4400 PGA Blvd., Suite 800. Palm Beach Gardens Fl, 33410 this 29TH day of January, 2007.

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