IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR ALACHUA COUNTY

ROSS AMBROSE,
Plaintiff,

vs.

Case No.: 01-2012-CA-3385
Division: J

THE CITY COMMISSION of the CITY OF HIGH SPRINGS, a municipal corporation and PAM CARPENTER, as Supervisor of Elections Of Alachua County, Florida,
Defendants.
_____/

ORDER ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

Before the Court are the following: Defendant City Commission of the City of High Springs' Motion to Dismiss, filed September 19, 2012, and Plaintiff's Response to Defendant's Motion to Dismiss and Request for Emergency Injunctive Relief, filed October 1, 2012. The matters were heard on October 25, 2012, and all parties were present. The Court, having reviewed the motion, response, and file, and having heard testimony and argument of counsel, FINDS as follows:

A. Plaintiff's Complaint seeks declaratory and injunctive relief related to an ordinance that proposes a charter amendment, which will be on the ballot for the November 6, 2012 general election. Defendant Carpenter ("Supervisor of Elections") filed an Answer, and Defendant City Commission of the City of High Springs ("City Commission") moved to dismiss. In his response to the motion to dismiss, Plaintiff also seeks temporary injunctive relief. The motion to dismiss will be discussed first, followed by a discussion of the temporary injunction.

B. The facts relevant to the motion to dismiss, as alleged in the Complaint, are as follows: The City Commission, at the suggestion of its Vice Mayor, called an emergency meeting on July 17, 2012. The purposes of the meeting were a) to reach an agreement on the language of a proposed ordinance containing a proposed charter amendment that, if passed by a vote of the City Commission, would then be placed on the November 6, 2012 general election ballot for approval, and b) to agree on the dates for public notice, public hearing, and a special meeting for its consideration. Ordinance 2012-13 is titled

> An Ordinance Proposing an Amendment to the City of High Springs Charter Section 5 "General Provisions," to Add Section 5.07 "Municipal Borrowing"; Restricting Additional Municipal Borrowing to One Million Dollars; Directing that this Amendment be Placed on the Ballot of the General Election on November 6, 2012; Providing for an Effective Date for the Proposed Charter Amendment if Approved; Providing for Severability; and Providing for an Effective Date.

The Ordinance provides that Section 5.07 is being added to restrict borrowing to one million dollars unless the City Commission votes otherwise, by a two-thirds majority, and submits the matter to a referendum. It further adds language to Section 5.07 that establishes the one million dollar debt limit, unless voted otherwise by the City Commission and a referendum; provides that the total amount of debt incurred in any single loan shall not exceed one million dollars; and defines terms. On July 19, 2012, the notice of Ordinance 2012-13 was published, and the special meeting regarding Ordinance 2012-13 was held, during which the first reading and public hearing were conducted. The City Commission held a discussion and voted three to two in favor of its passage. On July 31, 2012, the second reading of Ordinance 2012-13 was had and a public hearing conducted. During the course of the meeting, two amendments to Ordinance 2012-13

were proposed by City Commissioners before a vote was taken. The first proposal raised the proposed debt limit to three million dollars, but the motion to amend failed. The second proposal raised the proposed debt limit to two million dollars, and that motion to amend passed. Ordinance 2012-13, as proposed, then contained a two million dollar debt limit, and that version of the Ordinance passed by a vote of three to two. After the vote, there was some discussion as to whether the pre-vote amendment to the proposed language was a substantial change, which would have required the notice and hearing process to begin anew before it could be enacted. After this discussion, the City Commission voted to reconsider its passage of Ordinance 2012-13. When it was suggested to the City Commission that its Rules of Civility prohibit substantive action upon a matter during the same meeting at which the decision to reconsider it is made, the City Commission voted to suspend its rules. The City Commission then voted to return the language of Ordinance 2012-13 to the original proposed debt limit of one million dollars, and the meeting was adjourned. Thereafter, Ordinance 2012-13, with the one million dollar debt limit, was submitted to the Supervisor of Elections for placement on the November 6, 2012 general election ballot.

Analysis

I. Motion to Dismiss

The purpose of a motion to dismiss is to determine whether a complaint states a cause of action. *See Locker v. United Pharmaceutical Group, Inc.*, 46 So. 3d 1126, 1127-28 (Fla. 1st DCA 2010), *Rudloe v. Karl*, 899 So. 2d 1161, 1162 (Fla. 1st DCA 2005). In its analysis, a court

may look no further than the allegations contained in the complaint, including any incorporated attachments, and must treat those allegations as true. *Id.*

a. Count I: Declaratory Judgment

Plaintiff seeks, in Count I, a declaratory judgment that Ordinance 2012-13 is void because a) it was passed without reasonable notice; b) the return to the one million dollar debt limit was a new ordinance, which should have been enacted as such; and c) the new ordinance was passed without notice and a hearing. Plaintiff cites these actions as violations of Section 286.011, Florida Statutes, or alternatively, as violations of Section 166.041, Florida Statutes.[1]

Section 286.011 provides, generally, that all meetings of a municipal corporation at which official acts are to be taken are public and shall be open to the public at all times. It further provides that no formal action is considered binding except that which is taken at such a meeting, and the commission must provide reasonable notice of all such meetings. Whether notice under Section 286.011 is reasonable varies depending on the situation. *Rhea v. City of Gainesville*, 574 So. 2d 221, 222 (Fla. 1st DCA 1991) (one and one-half hours notice to the media of a special meeting was a prima facie showing that reasonable notice had not been afforded); *contrast Yarbrough v. Young*, 462 So. 2d 515, 516 (Fla. 1st DCA 1985) (two days notice was sufficient, considering that all but one commissioner, city staff, and two local media members attended the meeting).

[1] In an early paragraph that is incorporated into Count I of Plaintiff's Complaint, Section 166.041 is mentioned, and the facts alleged relate to its requirements, so the court is treating it as an alternative theory for the relief requested.

In this case, the Complaint alleges that the meeting during which Ordinance 2012-13 was passed occurred on July 31, 2012.[2] The public notice, attached and incorporated into the Complaint as Exhibit H,[3] indicates that it was published on July 19, 2012, and it states that the Ordinance will be considered at a meeting, to include a public hearing, on July 31, 2012. Section 286.011 is relevant to the meeting, and whether it was open and properly noticed. It contains no requirement that copies of proposed ordinances be available to those in attendance. If the City Commission has a customary practice of notifying the public of meetings, it is not clear from the Complaint. However, Plaintiff has alleged that the public notice that the ordinance would be considered, which contained the date and time of the meeting, was published in a newspaper of general circulation more than ten days before the meeting occurred; the entire City Commission was present at the meeting; members of the public appeared and spoke at the public hearing; and the meeting was open at all times during which business was conducted. Together, these allegations indicate sufficient notice of the meeting. *See Yarbrough*, 462 So. 2d at 515 (two days notice was sufficient, considering that all but one commissioner, city staff, and two local media members attended a meeting). Therefore, as a matter of law, the meeting that occurred on July 31, 2012, was not conducted in violation of Section 286.011, Florida Statutes.

As to the action upon Ordinance 2012-13 taken at the July 31, 2012 meeting, Section 166.041, Florida Statutes, applies. Section 166.041 provides, in pertinent part, that a proposed ordinance must be read on at least two separate days and, at least ten days prior to adoption, be

[2] Plaintiff also alleges that the July 19, 2012 special meeting, at which the first reading of Ordinance 2012-13 occurred, was held without reasonable notice. However, the City's own charter, which is attached and incorporated into the Complaint as Exhibit D, only requires twelve hours notice for special meetings, when practicable. In this case, nearly two days notice of the special meeting was alleged.

[3] No certified copies were attached to the Complaint, but for the purpose of a motion to dismiss, the Complaint and its attachments are considered true.

noticed once in a newspaper of general circulation in the municipality, before it is enacted. The notice must contain the date, time, and place of the meeting, the title of the proposed ordinance, and the place within the municipality where it may be inspected by the public. From the Complaint (including Exhibits G and H), it is clear that proposed Ordinance 2012-13 was read first, on July 19, 2012, and second, on July 31, 2012, and it was published on July 19, 2012. Public hearings were also conducted at both the July 19, 2012 and July 31, 2012 meetings. Thus, Ordinance 2012-13 was read at least twice and published in a newspaper of general circulation in the City ten days before it was enacted. The notice also contains the date, time, and place of the meeting, the title of proposed Ordinance 2012-13, and that it may be inspected at the City Clerk's office between 8:00 am and 4:30 pm, Monday through Friday. The notice concludes with an invitation to attend the meeting and speak. These allegations indicate that the requirements of Section 166.041 have been met. However, the analysis does not end here because the language of Ordinance 2012-13 was amended before it was enacted.

Ordinance 2012-13, itself, sets forth an enumerated purpose of amending the charter to include a one million dollar debt limit, and the language of the proposed charter amendment includes a one million dollar debt limit. It is also clear from the Complaint that the language of Ordinance 2012-13, as proposed, was amended to include a two million debt limit before the vote was taken. The two million dollar debt limit ultimately was included in the version of Ordinance 2012-13 that the City Commission voted to pass, three to two. At this point in the meeting, it is clear that the City Commission passed Ordinance 2012-13, which contained a two million dollar debt limit. If the increase in the debt limit from one million dollars to two million dollars is a substantial or material change, then the City Commission was required to begin the

enactment process anew, with notice and hearing. *See generally Neumont v. State*, 967 So. 2d 822, 825 (recognizing that such a requirement, arising from a 1982 opinion of the Florida Attorney General, exists).

Neumont is the first (and only, as far as this court's research has shown) Florida case to define a substantial or material change in the context of enacting an ordinance. While the facts of *Neumont* relate to county zoning ordinance amendments, the definition developed by the Florida Supreme Court is applicable to this case because the general ordinance requirements regarding notice and hearing applicable in that case (publication ten days prior and a public hearing) are sufficiently similar to the current requirements of Section 166.041. The Court engaged in a comprehensive discussion of the policy reasons behind the definition of a substantial or material change to a proposed ordinance, and noted that the definition it ultimately adopted was derived from a Florida Attorney General Opinion and is consistent with relevant Florida cases. *Id.* at 828-31. A substantial or material change to a proposed ordinance is one that changes the original purpose. *Id.* at 829-831. Focus on the original purpose allows a public body to adopt changes based on input received at a public hearing, without infringing on the public's right to receive adequate notice of those proposed changes. *Id.* at 830.

Applying the definition to this case, the enumerated purpose of Ordinance 2012-13, as set forth in both the title and the Ordinance itself, is to amend the charter to limit the amount of debt that may be incurred by the City to one million dollars. The ordinance further sets forth the language of the proposed charter amendment, which includes a limit on the total amount of debt that may be incurred by the City to one million dollars, per any single loan transaction, and to one million dollars in the aggregate, absent a two-thirds majority vote by the City Commission

and a referendum. With the explicit purpose and the inclusion in the title, it would be very difficult to find that the general purpose of Ordinance 2012-13 is not to amend the charter to include a one million dollar debt limit.[4] Therefore, when the City Commission voted to amend the language of Ordinance 2012-13 to include a proposed charter amendment with a two million dollar debt limit, the original purpose of Ordinance 2012-13 was changed because the debt limit was twice as much as the published notice indicated. Since the original purpose changed, the amendment to a two million debt limit was a substantial or material change that required the notice and hearing requirements to begin anew.

Notwithstanding the preceding analysis, the allegations regarding the events that occurred immediately after the City Commission passed Ordinance 2012-13 indicate that the City Commission returned the proposed charter amendment to the one million dollar debt limit. As alleged in the Complaint, what exactly happened after the City Commission voted to reconsider is not clear. The parties have not argued the propriety of the substantive action taken after the City Commission voted to suspend its rules, and this court will not make that decision at this juncture. To "return" to the one million dollar debt limit, it seems that the City Commission would have had to take a route similar to one of the following: i) reconsider both its vote on the motion to amend the language to include a two million dollar debt limit and its vote to approve Ordinance 2012-13, ii) repeal Ordinance 2012-13 and enact a new ordinance, or iii) enact a new ordinance that repeals Ordinance 2012-13 by implication. This is because an ordinance may only be amended or repealed by ordinance. *See City of Coral Gables v. City of Miami*, 190 So. 427, 429 (Fla. 1939) (revision of an ordinance may only be effected by an act equal in dignity to the

[4] In fact, the Complaint alleges that the City Attorney gave similar advice to the City Commission before the motion to reconsider was made.

first one), *Greeley v. City of Jacksonville*, 17 Fla. 174, 178-79 (Fla. 1879) (to the extent that the more recent ordinance conflicts with an earlier version, the conflicting language in the earlier version is repealed by implication), *Gen. Dev. Util., Inc. v. Davis*, 375 So. 2d 20, 22 (Fla. 2d DCA 1979) (ordinance cannot be amended by motion), *Bubb v. Barber*, 295 So. 2d 701, 702 (Fla. 2d DCA 1974) (ordinance may only be amended by passing an ordinance). Plaintiff has essentially alleged that the "return" process was the enactment of a new ordinance, which was accomplished without proper notice and hearing. Plaintiff has also alleged that such action, if proven, is in violation of Section 166.041. Therefore, Plaintiff has stated a cause of action for declaratory judgment. *See* Fla. Stat. § 86.021 (2012).

b. Count II: Injunctive Relief

To state a cause of action for injunctive relief, a plaintiff must allege ultimate facts that establish (1) irreparable injury, (2) a clear legal right, (3) lack of an adequate remedy at law, and (4) that the requested injunction would not be contrary to the interest of the public generally. *Weekley v. Pace Assembly Ministries, Inc.*, 671 So. 2d 220, 220-221 (Fla. 1st DCA 1996).

First, Plaintiff has alleged that an action taken by the City Commission is void, which is an irreparable injury to anyone affected by it. Second, Plaintiff has a clear legal right to have notice of a proposed ordinance and the opportunity to participate in a hearing, pursuant to Section 166.041.

Third, by the very nature of this case, there is not an adequate remedy at law. Plaintiff has alleged noncompliance by the City Commission with the notice and hearing requirements of Section 166.041. The notice requirements of Section 166.041 must be met with strict

compliance, or the ordinance enacted is null and void. *See Coleman v. City of Key West*, 807 So. 2d 84, 85 (Fla. 3d DCA 2001). The adequate remedy for a void ordinance is to enjoin its becoming effective.

Fourth, Plaintiff has alleged that Ordinance 2012-13 is void for the City Commission's failure to follow the processes required by law for enactment. He seeks to enjoin Ordinance 2012-13, and ultimately the charter amendment it proposes, from becoming effective. Such an injunction is not contrary to the public interest because the public certainly has an interest in receiving notice and having the opportunity to participate in a hearing before an ordinance is enacted. Because Plaintiff has alleged the ultimate facts that, if proven, will establish that injunctive relief is appropriate, he has stated a cause of action in Count II.

II. Temporary Injunction

Plaintiff included, in his response to the City Commission's motion to dismiss, a request for emergency injunctive relief. The court will treat this as a motion for temporary injunction. Temporary injunctions are extraordinary and drastic remedies, which should only be granted sparingly. *Fla. High Sch. Athletic Ass'n v. Melbourne Cent. Catholic High Sch.*, 867 So. 2d 1281, 1285-86 (Fla. 5th DCA 2004). The party seeking a temporary injunction must establish the following: (1) the likelihood of irreparable harm and unavailability of an adequate remedy at law, (2) a substantial likelihood of success on the merits, (3) the threatened injury to the petitioner outweighs any possible harm to the respondent, and (4) the granting of a temporary injunction will not harm the public interest. *Id.*

Plaintiff testified at the hearing. The essence of his testimony was the truth of the allegations that are also contained in the Complaint. No testimony to refute his claims was presented. The court also considered the certified copy of the excerpt of the transcript from the July 31, 2012 City Commission meeting.

The first prong of the analysis requires an examination of the likelihood of irreparable harm and unavailability of an adequate remedy at law. Plaintiff asserted that Ordinance 2012-13 is void because the City Commission did not comply with the notice and hearing requirements under Florida law. Ordinance 2012-13 contains a proposed charter amendment that has been submitted for a vote in the general election on November 6, 2012. If an action taken by the City Commission is void, it is an irreparable injury to anyone affected by it. Further, there is not an adequate remedy at law because the notice requirements of Section 166.041 must be met with strict compliance, or the ordinance enacted is null and void. *See Coleman v. City of Key West*, 807 So. 2d 84, 85 (Fla. 3d DCA 2001). The appropriate remedy for a void ordinance is to enjoin its becoming effective, which is accomplished in equity. *See id.*

The second prong of the analysis is whether Plaintiff has established a substantial likelihood of success on the merits. The transcript excerpt indicates that the City Commission's first motion to reconsider the vote to pass Ordinance 2012-13 was withdrawn after someone apprised the City Commission of one of its own rules, which provides that no substantive action upon reconsideration of a matter should be taken in the same meeting. Thereafter, the City Commission voted to suspend its rules. After suspending its rules, the Vice Mayor moved, under the suspended rules, to return Ordinance 2012-13 to the form that was advertised, with the "one

million dollar number." The motion carried by a vote of three to two. Before any further City Commission action was taken, the meeting was adjourned.

A copy of the ballot has not been presented, so it is not known, at this point, whether the proposed charter amendment on the ballot contains a one million dollar debt limit or a two million dollar debt limit. However, based on the state of the record at the time of the hearing, it is likely to be proven that Ordinance 2012-13, as passed by the City Commission, with a two million dollar debt limit, is void because, as discussed above, the change from the one million dollar debt limit, as set forth in the public notice, to the two million dollar debt limit, was a substantial or material change that requires the notice and hearing process to begin anew. It is thus likely that Plaintiff will be successful on his claim that Ordinance 2012-13 is void, because it is in violation of Section 166.041, Florida Statutes.[5] Similarly, Plaintiff is likely to prevail on his claim that the City Commission's attempt to amend Ordinance 2012-13 to return it to its original state (the one million dollar debt ceiling), is void because even if the change in the debt limit (to two million dollars) turns out to be valid, an ordinance cannot be amended by motion. *See City of Coral Gables*, 190 So. at 429 (revision of an ordinance may only be effected by an act equal in dignity to the first one), *Greeley*, 17 Fla. at 178-79 (to the extent that the more recent ordinance conflicts with an earlier version, the conflicting language in the earlier version is repealed by implication), *General Development Utilities, Inc.*, 375 So. 2d at 22 (ordinance cannot be amended by motion), *Bubb*, 295 So. 2d at 702 (ordinance may only be amended by passing an ordinance). Accordingly, it is likely that Plaintiff will be entitled to the declaratory relief he seeks.

[5] The transcript excerpt also reveals that the City Attorney advised the City Commission that its action would not likely withstand a challenge.

The third prong of the analysis requires a balancing of the threatened injury to Plaintiff and the possible harm to the City Commission and the Supervisor of Elections. At issue in this case is a violation of the right of a member of the public to receive notice and an opportunity to be heard during the City Commission's process of enacting an ordinance. The potential harm to the City Commission, if the temporary injunction is granted, is that the proposed charter amendment contained in Ordinance 2012-13 will not make it through the entire election process. As argued by the Supervisor of Elections, enjoining part of the election before a final decision is made on the merits of this case (including possible appellate review) could result in a future election on this or a similar issue becoming tainted. Each party has an important interest, but it cannot be said that one is more important than another.

The fourth prong of the analysis is whether granting the temporary injunction will harm the public interest. As just discussed, each party to this case has an important interest. Certainly, to grant a temporary injunction to the extent Plaintiff has requested will harm the public interest, because the vote and the election process are necessarily public. However, if there is no judicial interference with the vote on the proposed charter amendment and the ability to count and certify the votes, there will be minimal, if any harm to the public interest. Since Plaintiff is likely to succeed on the merits of this case, there will also be minimal, if any, harm to the public interest if the charter amendment (if passed by the requisite majority of the voters) is enjoined from taking

effect until the conclusion of this litigation, and the final hearing occurs expeditiously upon the closing of the pleadings.

It is therefore **ORDERED**:

1. The City Commission's Motion to Dismiss is granted in part and denied in part. Plaintiff has pled for declaratory and injunctive relief, based on alternative theories of the City Commission's violation of Sections 286.011 and 166.041, Florida Statutes. The facts and alternative theories are commingled. Therefore, the claims for relief based on Section 286.011 are dismissed with prejudice. As to the remaining claims, the City Commission shall file an Answer to the Complaint within ten (10) days from the date of this Order.
2. Plaintiff's Motion for a Temporary Injunction is granted in part. The Supervisor of Elections may fulfill all of her duties regarding the general election to be held on November 6, 2012. However, if passed by the requisite majority, the proposed charter amendment discussed at length in this Order shall not go into effect until further Order of this court. Pursuant to Florida Rule of Civil Procedure 1.610(2)(b), no bond will be required. Upon the closing of the pleadings pursuant to Florida Rule of Civil Procedure 1.440, the parties shall immediately coordinate and schedule the trial or final hearing, so that this case may be concluded as expeditiously as possible.

DONE and ORDERED on October 31, 2012.

STANLEY H. GRIFFIS, III, Circuit Judge

Certificate of Service

I hereby certify that a true and correct copy of the foregoing order was served, on October 31, 2012, to the following:

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