



MEMORANDUM

To: Kelly Fernandez
City Attorney, City of Venice

From: Susan L. Trevarthen, Edward G. Guedes and Blayne Yudis

Date: December 5, 2022

RE: Issues with Citizen Petition Referendum Regarding Land Development Regulations

I. BRIEF OVERVIEW

This memorandum proposes an argument challenging the citizen referendum petition to repeal Ordinance No. 2022-15 (the "Petition" and "Ordinance," respectively). The Ordinance, adopted by the Venice City Council earlier this year, replaced the City's existing land development regulations ("Old LDRs") with new land development regulations ("New LDRs"), which are consistent with the City's more recently enacted comprehensive development master plan ("Comp Plan").¹

If the Petition obtains the number of signatures required by the City Charter, then under section 9.05 of the Charter, the filing of the Petition with the City Clerk will suspend the effect of the Ordinance, including its replacement of the Old LDRs with the New LDRs. This memorandum argues that the Charter's suspension of the Ordinance resulting from the filing of a qualifying Petition would violate state law because it results in the City reverting to the Old LDRs, which are not consistent with the Comp Plan.

II. ANALYSIS

- a. State law requires the City to implement LDRs consistent with its Comp Plan.

Florida law requires each local government to maintain a comprehensive plan. § 163.3167(2), Fla. Stat. To implement a comprehensive plan, Florida law requires each local government to adopt or amend LDRs in the following manner:

¹ At the City's direction, we have assumed (and therefore, not independently verified) that the Old LDRs are inconsistent with the Comp Plan.

Within 1 year after submission of its comprehensive plan or revised comprehensive plan for review . . . each county and each municipality shall adopt or amend and enforce land development regulations *that are consistent with and implement their adopted comprehensive plan.*

§ 163.3202(1), Fla. Stat. (emphasis added).

In December 2017, the Venice City Council adopted its Comp Plan in compliance with subsection 163.3167(2). To comply with subsection 163.3202(1), the City Council adopted the Ordinance, which replaced the Old LDRs with the New LDRs, precisely to achieve consistency with the Comp Plan. Specifically, the Ordinance states that its adoption “replaces” the Old LDRs with the New LDRs:

Section 3. Adoption of the Restated Code. The Restated Code . . . is hereby adopted as the Land Development Regulations . . . amending and restating the existing City of Venice Land Development Regulations and Zoning Map in their entirety. *The Restated Code is understood to replace the City’s existing Code of Ordinances, Subpart B, Land Development Regulations*

Ordinance, § 3 (emphasis added).

- b. The Charter’s suspension of the Ordinance would leave the City with LDRs that are not consistent with its Comp Plan, in violation of state law.

Section 9.05 of the Charter states that “[w]hen a citizen referendum petition, purporting to include the required number of signatures, is *filed* with the city clerk, the ordinance or resolution sought to be reconsidered shall be suspended from taking effect.” (emphasis added).

Under section 9.05, if the Petition obtains the required number of signatures, its filing with the City Clerk automatically suspends the Ordinance. Absent the Ordinance’s efficacy, the Restated Code will not “replace the City’s existing Code of Ordinances, Subpart B, Land Development Regulations.” That means that the Old LDRs will remain in effect. As a result, the City will not have implemented LDRs consistent with its current Comp Plan. Therefore, if the Ordinance is suspended pursuant to the Charter, the City will be in violation of section 163.3202(1), Florida Statutes.²

- c. Florida precedent establishes that municipalities are precluded from taking any action that violates state law.

The Florida Constitution grants municipalities the authority to exercise any power for municipal purposes “except as otherwise provided by law.” Art. VIII, § 2(b), Fla. Const.

² Even if a strained argument could be fashioned that “suspension” of the Ordinance did not extend to its replacement of the Old LDRs, the violation of state law would nonetheless occur because the City would be left with no effective LDRs whatsoever in place.

“The critical phrase of article VIII, section 2(b)—‘except as otherwise provided by law’—establishes the constitutional superiority of the Legislature’s power over municipal power.” *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 928 (Fla. 2013). “Accordingly, [m]unicipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute.” *Id.* (quoting *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993)). By extension, “municipalities are precluded from taking any action that conflicts with a state statute.” *Id.* at 929.

In *City of Palm Bay*, Wells Fargo challenged a municipal ordinance creating a super-priority provision for code enforcement liens. *Id.* at 926. On appeal, the Florida Supreme Court explained that multiple state statutes provide a “general scheme for priority of rights with respect to interest in real property.” *Id.* at 927-28. Because the super-priority provision established a priority “inconsistent with the priority established” by the state statutes, the Court concluded that the ordinance conflicted with state law. *Id.* at 928. Therefore, there was “a sufficient ground for concluding that the ordinance’s super-priority provision [was] invalid.” *Id.*

Similarly, in a case directly involving citizen petitions, *Mullen v. Bal Harbour Village*, 241 So. 3d 949 (Fla. 3d DCA 2018), the court considered a proposed charter provision that conflicted with state law. In *Mullen*, the Village declined to submit a petition, seeking to amend the Village’s charter to require a popular vote to approve certain, defined commercial development, to the electoral process. *Id.* at 951. The Village argued that the petition conflicted with state law because, if the proposed amendment were approved at the election, it would result in a conflict with section 163.3167(8)(a), Florida Statutes, which prohibits initiative or referendum processes in regard to development orders. *Id.* at 952. The Third District agreed, and citing to *City of Palm Bay*, explained that “[a] municipality may not adopt a law, whether a Charter section or an ordinance, that conflicts with a state statute.” *Id.* at 956. Therefore, because the end result of the petition conflicted with subsection 163.3167(8)(a), the Court agreed with the trial court’s holding that the petition was illegal. *Id.*

- d. To avoid violating state law, the City Clerk should not allow the filing of the Petition.

Here, as explained above, the filing of the Petition with the City Clerk automatically suspends the Ordinance, leaving the City in violation of state law because it will be without LDRs consistent with its Comp Plan.³ Therefore, like in *Palm Bay* and *Mullen*, allowing the filing of the Petition to suspend the Ordinance would constitute municipal action that conflicts with a state statute. Accordingly, the City has grounds to question the legality of the Petition.

³ In contrast, if the Petition had employed a more surgical approach, challenging only select provisions of the Ordinance, the outcome of this analysis might be different. However, the Petition seeks the repeal of the Ordinance in its entirety.

How should the City safeguard against the automatic suspension of the Ordinance? Rather than proceeding to court in advance of the submission of the Petition to the City Clerk to obtain declaratory and injunctive relief regarding the Petition's illegal effect, the City Clerk should simply reject the Petition when it is presented, in short, prepermitting its "filing."

Section 9.04 of the Charter contemplates a review and signature certification process by the City Clerk to assure that the Petition complies with the signature collection requirements of sections 9.03 and 9.04. Neither of those provisions, however, addresses any illegal *consequences* flowing from the certification or filing of the Petition. Additionally, the suspension contemplated by section 9.05 is not dependent on the City Clerk's signature certification. Charter, § 9.05 ("When a final citizen referendum petition, *purporting* to include the required number of signatures, is *filed* with the city clerk, the ordinance ... sought to be reconsidered shall be suspended....") (emphasis added).

While there is no Charter provision specifically authorizing the City Clerk to reject the mere filing of the Petition, it bears noting that the Village Clerk in *Mullen* initially rejected the subject petition, albeit for incorrect reasons, also without express authorization in the Village Charter. 241 So. 3d at 951-52. When the citizens filed suit, the Village then interposed the argument regarding the illegality of the proposed charter amendment. *Id.* at 953-54.⁴ As previously noted, the Third District agreed with the Village. In doing so, the court specifically rejected the citizens' suggestion that the clerk was required to forward the signatures (notwithstanding the illegality of the petition) and to affirmatively seek judicial relief. *Id.* at 956-57.

The upshot of *Mullen* appears to be that, even if the City Clerk rejects the filing of the Petition without express authorization in the City Charter, the matter will eventually end up in court by means of a citizen lawsuit (as was the case in *Mullen*). In response to that lawsuit, the City could argue the illegal effect of the Petition as described herein. That is the course of action that we recommend: to pattern the City's actions on the *Mullen* case, and refuse to accept the filing of the Petition.

III. CONCLUSION

In sum, the filing of the Petition would leave the City in violation of state law. But because the City is precluded from taking any action that conflicts with state law, the City has grounds to refuse to accept the Petition for filing.

⁴ Specifically, the Village argued that because one of the petitions was illegal, the Village "could not be compelled to forward to the Supervisor [of Elections] signatures in support of that petition." *Id.* at 954.