IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D18-1845

WILLIAM DOUGLAS MUIR,
Plaintiff-Appellant,

v.

CITY OF MIAMI, A FLORIDA MUNICIPAL CORPORATION; FRANCIS SUAREZ, MAYOR; EMILIO T. GONZALEZ, CITY MANAGER; VICTORIA MENDEZ, CITY ATTORNEY, KEON HARDEMON, CHAIRMAN, KEN RUSSELL, VICE CHAIRMAN, JOE CARROLLO, COMMISSIONER, WILFREDO GORT, COMMISSIONER, MANOLO REYES, COMMISSIONER, CHRISTINA WHITE, SUPERVISOR OF ELECTIONS, MIAMI-DADE COUNTY; and MIAMI FREEDOM PARK, LLC, A DELAWARE LIMITED LIABILITY COMPANY, INTERVENOR

Defendants/Intervenor-Appellees.

On appeal from a Final Judgment Entered in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida
Lower Tribunal CASE NO. 2018-23224 CA 30

INITIAL BRIEF OF APPELLANT WILLIAM DOUGLAS MUIR

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INTRODUCTION

Intervenor "Miami Freedom Park, LLC," a Delaware Limited Liability Company desires the privilege to govern who gets to play in one of the City of Miami's largest public parks for the next ninety-nine years and to monopolize the right to negotiate a lease with the City administration to occupy this park. All that stands in the Intervenor's way are laws which this Court is asked to uphold, that Jorge Mas derided as "antiquated", but which form the backbone of the open market and free enterprise system, and two principled City of Miami Commissioners, Manolo Reyes and Willie Gort who have publicly opposed the unsolicited parkland take over. Melreese, a park held in trust by the City for the public for this and future generations, should not be put up for lease for 99 years while the children who play in it now, and future generations who could be bound by these lease terms, are not eligible to vote or given an alternative to its lease and permanent occupation by the Intervenor.

The order dismissing the Plaintiff's suit is a non-sequitur. The order defies the principle found in article I, section 21 of the Florida Constitution that all residents of the State of Florida, including the Plaintiff-Appellant, a member of The Florida Bar, have access to the courts. ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.")

Had the amended complaint actually been ruled on, rather than the trial court

inexplicably entering an order on the abandoned initial complaint and the responses thereto, the trial court would have abused its discretion by dismissing with prejudice and not allowing the plaintiff to amend. The law which has developed under Rule 1.190 has established clearly that denial of leave to amend will be considered an abuse of discretion, requiring appellate reversal, unless either (1) the proposed amendment would prejudice the other party (and that prejudice could not be accommodated by continuance or other fashion); or (2) the privilege to amend has been abused; or (3) the amendment would be futile. Kent Harrison Robbins v. City of Miami Beach, 664 So. 2d 1150, 1151 (Fla. 3d DCA 1995).

> [T]here is nothing to preclude Robbins from otherwise attempting to seek redress in an action for declaratory relief, injunctive relief and/or petition for statutory writ of certiorari provided he can demonstrate his standing to institute or maintain such an action. See Citizens Growth Mgmt. Coal., Inc. v. W. Palm Beach, Inc., 450 So. 2d 204 (Fla. 1984); Renard v. Dade County, 261 So. 2d 832 (Fla. 1972). Since Robbins' complaint is conceivably amendable to sustain a cause of action under another theory, we must conclude that the trial court abused its discretion in dismissing the complaint with prejudice. E.g., Gamma Dev. Corp. v. Steinberg, 621 So. 2d 718 (Fla. 4th DCA 1993); Kovach v. McLellan, 564 So. 2d 274, 276 (Fla. 5th DCA 1990); CoCountryside Christian Center, Inc. v. Clearwater, 542 So. 2d 1037 (Fla. 2d DCA 1989);
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> Kent Harrison Robbins v. City of Miami Beach, 664 So. 2d 1150, 1151-52 (Fla. 3d DCA 1995).

As a general matter, when a motion to dismiss is granted for failure to state a cause of action, the trial court is required to exercise the utmost liberality by giving the pleading party every opportunity to correct the defects in the challenged

pleading, by dismissing without prejudice and with leave to amend. Fla. R. Civ. P. 1.190(a),(e). It has been stated that "[a]ny doubt" regarding whether to grant a motion for leave to amend should be resolved in favor of the amendment. Santos v. Flores, 116 So. 3d 518, 520 (Fla. 3d DCA 2013); Overnight Success Constr.,Inc. v. Pavarin Constr. Co., 955 So. 2d 658, 659 (Fla. 3d DCA 2007). The language of Rule 1.190, that leave to amend be "freely" given "when justice so requires" has been recognized as a statement of the state's strong public policy to apply liberality in pleadings amendments to enable cases to be resolved on their merits.

An order to show cause does not constitute a responsive pleading as contemplated by the Florida Rules of Civil Procedure and does not preclude amendment to the petition. Lovette v. McNeil, 8 So. 3d 411 (Fla. 1st DCA 2009). R. 423. Because it is not even a pleading, the City and the Intervenor's motion to dismiss, does not deprive the plaintiff of right to amend a complaint without prior leave of court. BBoca Burger, Inc. v. Forum, 912 So. 2d 561, 566-67 (Fla. 2005). The trial court had a ministerial duty upon receipt of the facially sufficient four-count amended complaint, (R. 368-420) amended as a matter of course, and of absolute right to issue or amend the alternative writ previously issued.

The amended complaint for writ of mandamus raises factual issues in dispute between the parties, such as whether the development is a unified development project, which the trial court had a duty to resolve upon evidence submitted by the

parties, not after review of a motion to dismiss the plaintiff's initial complaint which had already been amended and superseded, and which was capable of further amendment to cure defects perceived by the trial court. Oceanside Plaza Condo. Ass'n v. Foam King Indus., 206 So. 3d 785 (Fla. 3d DCA 2016).

STATEMENT OF CASE AND FACTS

After commencement of the suit, on July 18, 2018, three City of Miami commissioners named as defendants in the amended complaint sided with the Intervenor after a special presentation in which the Intervenor applied to the Commission for a referendum that asked voters whether to authorize the Intervenor to "waive bidding" and develop the park into a mall, commercial complex, and a soccer stadium with various conditions.

Pursuant to section 166.031(2), Florida Statutes and the City of Miami Charter, Laws of Florida, Chapter 10847 Section 6(f), "no measure shall go into effect until thirty days after its passage," yet members of the City Commission were so eager to waive bidding for the Intervenor that they could not wait for voter approval to waive bidding on Melreese park to enter into negotiations with a single party, the Intervenor.

After debating the ballot language to be included on the referendum, and the development conditions they would ask the voters to approve, the Commissioners approved two resolutions asking voters to authorize the Intervenor to takeover and

govern the future use of Melreese Park.

Plaintiff filed a complaint for writ of mandamus to enforce the rights of residents of the City of Miami "to have the Mayor, City Manager, and City Commissioners perform their duties and exercise their power in a manner consistent with Florida Statutes, the City Charter and its municipal code". R. 385-386.

The City Charter Section 29-A(b) provides in part:

> (b) Sales and leases of real property; prohibition. ***Except as otherwise provided in this section, there shall be no sale, conveyance, or disposition of any interest, including any leasehold, in real property owned by the city,*** the department of off-street parking, or the downtown development authority***, unless there has been prior public notice and a prior opportunity given to the public to compete for said real property or interest.*** Any such sale, conveyance, or disposition shall be conditioned upon compliance with the provisions of this section; such procurement methods as may be prescribed by ordinance; and any restrictions that may be imposed by the city, the department of off-street parking, or the downtown development authority, as appropriate. ***Further, no right, title, or interest shall vest in the transferee of such property unless the sale, conveyance, or disposition is made to the highest responsible bidder, as is determined by the city commission***, or the off-street parking board, or the downtown development authority board of directors. (Emphasis added.)

City of Miami ordinances provide in pertinent part:

> Chapter 18, ARTICLE V. - SALE OR LEASE OF CITY'S REAL PROPERTY Sec. 18-176. - Methods and procedures for sales and leases.
>
> (a) ***Any* sale, conveyance or disposition of any interest, including any leasehold in real property, owned by the city,** the off-street parking department, or the downtown development authority **shall be made in the manner set forth in this article, and said sale, conveyance or disposition shall be conditioned upon compliance with the provisions of this article V.**

(Emphasis added.)

Chapter 18, Article V, Sec. 18-177. - Competitive sealed bidding.

(a) Conditions for use. **Competitive sealed bidding shall be used in those circumstances in which it is practicable and advantageous for the city to specify all detailed plans, specifications, standards, terms and conditions relating to a property interest already owned by the city or to be acquired and disposed of by the city, so that adequate competition will result and award may be made to the highest responsible and responsive bidder**. ***In all other instances*** **there shall be a public notice required prior to the sale or disposition of city-owned property in order to allow potential purchasers to compete.**

(b) Invitations for bids. An invitation for bids shall include, but not be limited to, all relevant items stipulated in Chapter 18-79(b), as well as all information necessary to describe the particular property interest owned or to be acquired and disposed of, including any conditions or restrictions upon the use of such property. (c)Public notice. Notice inviting bids shall be in accordance with the provisions of Chapter 18-79(d).

(d) Prebid conferences. Prebid conferences to discuss the contemplated purchase or disposition of property interest may be held in accordance with provisions of Chapter 18-79(e).
(a) Bid opening. Bid opening shall be in accordance with the provisions of Chapter 18-79(f).
(b) Bid acceptance and evaluation. Bid acceptance and evaluation shall be in accordance with the procedures established by the chief procurement officer.
(c) Award. The city manager shall submit recommendations as to the award to the city commission, which may reject all bids. **The contract shall be awarded with reasonable promptness by written notice to the responsible and responsive bidder** ***whose bid offers the city the highest total compensation from the proposed sale, lease, conveyance or other disposition, as the case may be.*** The decision of the city commission shall be final. All contracts shall be approved as to form and correctness by the city attorney, and a copy shall be filed with the city clerk. (Emphasis added).

Chapter 18, Section 18-177, Article V requires competitive sealed bidding or public notice prior to the sale or disposition of City-owned property in order to allow potential purchasers to compete, and provides that the "contract shall be awarded

with reasonable promptness to the responsible and responsive bidder whose bid offers the city the highest total compensation from the proposed sale, lease, conveyance, or other disposition as the case may be."

The City did not provide prior public notice and a prior opportunity for the public to compete as called for by Chapter 29-A(b), and Chapter 29-B, and Chapter 18, Article V of the Code of Ordinances, and the ballot language and the resolution provided no notice of the Commission's intent to destroy the right of the public to prior public notice and a prior opportunity to compete safeguarded by Chapter 29 and Chapter 18, Article V.

On July 24, 2018, the Circuit Court issued an alternative writ, to the defendants named in the initial complaint shortening the time the defendants had to respond from the filing of the initial complaint from 20 days to 14 days. R. 94-96.

On August 1, 2018, the trial Court held a status conference, the Court, having not been provided the City's Motion to Dismiss the initial complaint until that day. R. 502.

On August 14, 2018, prior to a responsive pleading filed by defendants or Intervenor and prior to the scheduling of a hearing on defendants' motion to dismiss, Plaintiff timely and properly filed an amended complaint "Amended complaint/Alternative writ of mandamus." Fla. R. Civ. P. 1.190. ("A party may amend a pleading once as a matter of course at any time before a responsive pleading

is served"). Rule 1.630(e) provides that a defendant "shall respond to writ as provided in rule 1.140."

The trial judge admitted he did not read the complaint prior to the less than twenty-minute status conference of August 15, 2018. R. 786. (The Court: "I'm asking you what it is because I haven't had an opportunity to read it, and its' [sic] 50 pages. I just got it around five minutes ago.")

The hearing at which plaintiff's suit was dismissed was not noticed for a hearing on a motion to dismiss. R. 359-367. However, despite the lack of notice prior to the status conference that the Judge intended to make a ruling disposing of the case, or even rule on a motion to dismiss, prior to the status conference the trial court prepared an order dismissing plaintiff's initial complaint with prejudice. R. 803-807.

On August 29, Plaintiff-Appellant timely filed a motion for rehearing, stating Plaintiff's grounds to vacate the trial court's order, and requesting leave to amend. R. 421-458.

On August 31, the Motion for Rehearing was summarily denied. R. 808. This appeal followed.

Our courts have the responsibility to enforce the Florida Constitution, and in so doing, the trial court was called upon to determine straightforward legal questions, The trial court was asked to determine whether:

A. The amended Laws Of Florida, Chapter 10847, § 29-B, violates article III, section 11(a)(10) of the Florida Constitution prohibiting special laws pertaining to disposal of public property, namely the City-owned Melreese property, including any interest therein, for private purposes to Miami Freedom Park, LLC, a private company.

B. The amended Laws Of Florida, Chapter 10847, § 29-B, violates article III, section 11(a)(12) of the Florida Constitution prohibiting special laws pertaining to granting of privilege to a private corporation, Miami Freedom Park, LLC.

SUMMARY OF THE ARGUMENT

Contrary to the Trial Court's Judgment, § 29-A(b) (Sales and leases of real property; prohibition) and Chapter 18, Article V does not grant the Commission discretion whether to provide prior public notice and a prior opportunity given to the public to compete for said real property or interest. Commissioners are bound in their discretion for sale or lease of public land to choose competitive sealed bidding, or ensure public notice in order to allow potential purchasers to compete and ensure that the any lease or sale of property goes to the highest responsible bidder. Commissioners are not at liberty to do neither, favoring one entity over every other member of the public.

The court's ruling and judgment is erroneous as it improperly references the initial complaint as grounds for dismissing the amended complaint/alternative writ of mandamus, and its dismissal of the amended complaint with prejudice is an abuse of discretion as set forth herein. Boca Burger, Inc., 912 So. 2d at 566-67; Oceanside Plaza Condominium Ass'n, Inc. v. Foam King Industries, Inc. *supra.*

> Filing of an amended complaint constitutes an abandonment of the original complaint, including any attached or incorporated exhibits, assuming the allegations to be true and construing all reasonable inferences therefrom in favor of the non-moving party…"Only the second amended complaint was properly before the court, having superseded the first"…"We find that the trial court erred in dismissing the Second Amended Complaint, which was timely and properly filed, because the trial court improperly considered the dismissed First Amended Complaint as grounds to dismiss the Second Amended Complaint. Long-standing Florida case law makes clear that the filing of an amended complaint constitutes "an abandonment of the original complaint which was superseded, [and it] ceased to be part of the record and could no longer be viewed as a pleading.

Id.

The undersigned Plaintiff-Appellant adequately alleged standing. He alleged standing as a voter, as a resident challenging constitutionality of the charter amendment, and as a resident and citizen has standing to enforce a public right. Accordingly, the plaintiff-appellant has adequately alleged standing to seek mandamus, or declaratory relief, and the trial court's Order should be reversed. All three bases for standing exist independently for Muir under established precedent binding on the trial Court. The City of Miami did not claim that Muir lacked standing. The Intervenor LLC, claiming that it had standing under the Citizen's bill

of rights in its motion to intervene, filed after the July 24, 2018 hearing should have been judicially estopped from maintaining the position that Muir lacks standing under the same bill of rights, however, the court never held a hearing on the Intervenor's Motion to Intervene, despite objection, treating the intervention as a full party defendant as a mere formality, and entering an order permitting full-party status *ex parte*. R. 97-98, 117. R. 486-501.

For these and the reasons set forth below, the Court should reverse the trial court's order dismissing the Plaintiff's complaint with prejudice, and nullify the amendment to Laws of Florida, Chapter 10847, Section 29-B.

STANDARD OF REVIEW

Plaintiff-Appellant seeks review of the trial court's Final Order Dismissing Plaintiff's suit with prejudice. The standard of review of a trial court's ruling on a motion to dismiss is *de novo.* Heritage Prop. & Cas. Ins. Co. v. Romanach, 224 So. 3d 262, 265 (Fla. 3d DCA 2017). Giller v. Giller, 190 So. 3d 666, 668 (Fla. 3d DCA 2016) (In determining the merits of a motion to dismiss, the trial court must limit itself to the four corners of the complaint, including any attached or incorporated exhibits, assuming the allegations to be true and construing all reasonable inferences therefrom in favor of the non-moving party.) Oceanside Plaza Condominium Ass'n, Inc. v. Foam King Industries, Inc., 206 So. 3d 785 (Fla. 3d DCA 2016).

ARGUMENT

I. THE TRIAL COURT DID NOT CARRY OUT ITS ELEMENTAL DUTY OF REVIEWING THE LEGAL SUFFICIENCY OF PLAINTIFF-APPELLANT'S AMENDED COMPLAINT AND ASSUMING THE ALLEGATIONS TO BE TRUE, PRIOR TO RULING ON MOTIONS TO DISMISS THE SUPERSEDED INITIAL COMPLAINT, AND ABUSED ITS DISCRETION BY NOT ALLOWING LEAVE TO AMEND

A. The Trial Court Improperly Considered The Superseded Initial Complaint And Response Thereto Filed By The Defendants, Which Does Not Carry Over To The Amended Complaint As Grounds For Dismissal With Prejudice And Failed To Correct The Error When It Was Brought To The Trial Court's Attention In Undersigned's Motion For Rehearing.

A motion to dismiss as provided in rule 1.140 filed by the defendants does not fall under the category of "responsive pleading" for purposes of the rule allowing a party to amend a pleading once as a matter of course at any time before a responsive pleading is served, and therefore does not preclude a party amending the complaint subsequent to the filing of such a motion. Shapiro v. Tulin, 60 So. 3d 1166 (Fla. 4th DCA 2011).

Courts which have considered Fla. R Civ. P. 1.190(a) in its present form have concluded that a response to a prior pleading *does not* carry over to an amended pleading. § 1.190:22 Responding to Amended Pleadings—Prior Responses DO NOT Carry Over, 4 Fla. Prac., Civil Procedure § 1.190:22; Geer v. Jacobsen, 880 So. 2d 717, 720 (Fla. 2nd DCA 2004) ("Almengual's previously filed notice and motion did not carry over as a response to the amended complaint, and Almengual

did not otherwise respond to the amended complaint. See Fla. R. Civ. P. 1.190 committee notes, 1980 amend. (noting that a response is required to an amended pleading); Abrams v. Paul, 453 So.2d 826 (Fla. 1st DCA 1984) (stating that an answer to the original complaint did not carry over as a response to the amended complaint)".

Here, the trial court improperly considered the superseded initial complaint and response thereto filed by the defendants, which does not carry over to the amended complaint as grounds for dismissal with prejudice and failed to correct the error when it was brought to the trial court's attention in undersigned's Motion for Rehearing. R. 421-458.[1] Oceanside Plaza Condominium Ass'n, Inc. v. Foam King Industries, Inc., 206 So. 3d 785 (Fla. 3d DCA 2016); Lovette, 8 So. 3d 411. R. 423. Accordingly, the dismissal with prejudice should be vacated and such other relief as the court deems just and proper should be entered against defendants.[2] (Muir: "there's no motion pending before the Court, your honor, pursuant to 1.190 as a matter of course, I have the right"-- Trial Court [interrupting]: "There is a motion

[1] For example: the Court considers the allegation that the Charter amendment violated the single-subject rule contained in the first amended complaint as grounds for dismissal "with prejudice" contrary to law. Oceanside Plaza Condominium Ass'n, Inc. v. Foam King Industries, Inc., 206 So. 3d 785 (Fla. 3d DCA 2016).

[2] The defense of lack of personal jurisdiction as to Christina White, Miami-Dade Supervisor of elections is personal to the additional defendant, and cannot be raised by objection by the attorney for the City of Miami, whose clients have been served as provided by law.

pending. There's a motion to dismiss the complaint.") R. 781-782, 793. The trial Court further clarified that he ruled to dismiss the amended complaint based on the motions filed by the defendants responding to the initial complaint (MR. MUIR: So, you're ruling on the basis of this [sic] city's motion, not on the basis of Mr. Schuman s [sic] motion? Is that the rule? [Sic] THE COURT: I'm ruling on both.") R. 794.

> Pursuant to Rule 1.630(d)(2), "[i]f the complaint shows a prima facie case for relief, the court shall issue . . . an alternative writ in mandamus." An alternative writ in mandamus is essentially an order to show cause. See Gilliam v. State, 996 So. 2d 956, 958 (Fla. 2d DCA 2008) (stating that if a petition for writ of mandamus states a prima facie case for relief, the trial court must issue an alternative writ, "which 'is essentially an order to [**19] show cause why the requested relief should not be granted.'" (quoting Bostic v. State, 875 So. 2d 785, 786 (Fla. 2d DCA 2004))); Conner v. Mid-Fla. Growers, Inc., 541 So. 2d 1252, 1256 (Fla. 2d DCA 1989) ("Upon receipt of a facially sufficient petition for writ of mandamus, a court having jurisdiction to consider such a petition should first issue an alternative writ, which is essentially an order to show cause why the requested relief should not be granted."). "If the petition and answer to the alternative writ raise disputed factual issues, the trial court must resolve these issues upon evidence submitted by the parties." See Radford v. Brock, 914 So. 2d 1066, 1068 (Fla. 2d DCA 2005).
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> Additionally, Rule 1.630(e) provides that a defendant "shall respond to writ as provided in rule 1.140."

Miami - Dade Cty. Bd. of Cty. Comm'rs v. An Acc. Miami - Dade, 208 So. 3d 724, 732 (Fla. 3d DCA 2016)

The trial court first said that he would "give you a brief argument," then shut down any argument. R. 791. Expecting the Court would be familiar with the procedure outlined in Florida Rule of Civil Procedure 1.630 and know that to

entertain motions to dismiss the amended complaint the trial court would first have to review the legal sufficiency of the amended complaint, find it legally sufficient, and then have the respondents agree to substitute their initial, non-responsive motion to dismiss as their response to the Plaintiff's amended complaint, the hearing did not go as one would expect, especially when the matter noticed for the hearing was on the standing of the Intervenor-appelle to intervene as a full-party defendant, a motion to intervene by radio show host and local activist Grant Stern, and a motion to compel discovery by the Intervenor-appellee. R. 359-362 R. 366. For the motions to dismiss to be properly before the trial Court, Plaintiff would first have to prevail by having the trial Court re-issue or amend the alternative writ. For that reason, Plaintiff had no objection to the trial Court's ruling on both, as an initial finding that the complaint showed a *prima facie* case for relief was a prerequisite to the Court's ruling on a motion to dismiss the amended complaint.

B. The Trial Court Abused Its Discretion By Refusing To Grant Plaintiff-Appellant's Request For Leave To File A Second Amended Complaint, Requiring Appellate Reversal

There can be no showing that Plaintiff's privilege to amend has been abused when plaintiff amended the complaint as of absolute right and as a matter of course prior to a hearing on a motion to dismiss the original pleading, nor do exceptional circumstances warrant such dismissal with prejudice. *See* Kent Harrison Robbins v. City of Miami Beach, 664 So. 2d 1150, 1151-52 (Fla. 3d DCA 1995)(infra.)

> In the civil context, dismissing a complaint without granting at least one opportunity to amend is considered an abuse of discretion unless the complaint is not amendable. See Sonny Boy, L.L.C. v. Asnani, 879 So. 2d 25, 28-29 (Fla. 5th DCA 2004) (holding that refusal to allow amendment of a complaint is an abuse of discretion unless "it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile"); Thompson v. Jared Kane Co., 872 So. 2d 356, 360 (Fla. 2d DCA 2004) (same); Cason v. Fla. Parole Comm'n, 819 So. 2d 1012, 1013 (Fla. 1st DCA 2002) (same);Hayward & Assocs. v. Hoffman, 793 So. 2d 89, 90 n.3 (Fla. 2d DCA 2001) (stating that because the complaint in question was the first submitted by the plaintiff, "to enter a final order dismissing the complaint with prejudice and without opportunity to amend would have been an abuse of discretion"); Maximino v. State, 747 So. 2d 448, 448 (Fla. 4th DCA 1999) (**11) (stating that it is an abuse of discretion to dismiss a complaint without leave to amend "without giving the party offering the defective pleading an opportunity to amend, unless it is apparent that the pleading cannot be amended so as to state a cause of action"); Imperatore v. NationsBank, N.A., 677 So. 2d 933, 935 (Fla. 4th DCA 1996) (finding abuse of discretion where the trial court dismissed a complaint with prejudice without allowing the plaintiff to amend); Balcar v. Ramos, 595 So. 2d 308, 308 (Fla. 4th DCA 1992) (stating same as Nev. Interstate Props. Corp.).

Bryant v. State, 901 So. 2d 810, 818 (Fla. 2005).

The Court erred in finding contrary to the allegations in Plaintiff's Am. Complaint that Plaintiff failed "to allege or demonstrate that he has suffered any injury, let alone an injury that is different from the public." *Contra* this finding see ¶¶ 13, 14, 30 as alleged and re-alleged in ¶¶ 18, 31, 52, and 68 of the Amended Complaint. R. 368-420.

The Court also concludes as a matter of law that that whether to designate a project a unified development project is "clearly discretionary" despite the

mandatory "shall" language defining unified development project in the Charter, Sec. 29-A, and the standard applicable to a motion to dismiss that the allegation that the project was in fact a unified development project be taken as true. Contrary to the Court's judgment, if the project is a unified development project, it is not a discretionary decision for the Commission to ignore the mandatory definition and proceed as if it were not.

The statutory provisions in Section 29-A should not be rendered meaningless by failing to hold an evidentiary hearing in accordance with the facts and equities of the case and failing to enforcing the safeguards in Section 29-A(b). A statute will not be construed in such a way that it renders meaningless any other statutory provision. Twin Oaks Villas, Ltd. v. Joel D. Smith, LLC, 79 So. 3d 67 (Fla. 1st DCA 2011); Katherine's Bay, LLC v. Fagan, 52 So. 3d 19 (Fla. 1st DCA 2010)

The Charter's use of the mandatory term "shall", governing the substantive rights of the public normally creates an obligation impervious to judicial discretion. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 118 S. Ct. 956 (1998); City of St. Petersburg, 41 So. 3d 322, (Fla. 2d DCA 2010). Even if one were to accept the trial court's determination that such designation is discretionary, the trial court abused its discretion by not allowing Plaintiff to amend his complaint to state a cause of action for declaratory and injunctive relief, rather than mandamus, to determine whether the City was

obligated to follow the specific procedures outlined in 29-A**.**

II. BECAUSE PLAINTIFF-APPELLANT ALLEGED A PRIMA FACIE CASE FOR MANDAMUS RELIEF IN HIS FOUR-COUNT AMENDED COMPLAINT, THE TRIAL COURT WAS REQUIRED TO RE-ISSUE OR AMEND THE ALTERNATIVE WRIT SHIFTING THE BURDEN TO THE CITY TO COME FORWARD WITH FACTS IT CONTENDS SUPPORT ITS REFUSAL TO PERFORM ITS LEGAL DUTY

A. Mandamus Is Appropriate Because Plaintiff-Appellant Has A Clear Legal Right, and the The City has an Indisputable Legal Duty To Follow Section 29 of the City of Miami Charter And Article 18-V Of The City Of Miami Code Of Ordinances

The City Commissioners were not authorized to enter into negotiation of minimum lease terms in advance of voter approval of a Charter amendment that purportedly authorizes the negotiations. Section 29-A provides "…no right, title, or interest shall vest in the transferee of such property unless the sale, conveyance, or disposition is made to the highest responsible bidder, as is determined by the city commission".

The Court's conclusion that "mandamus is not available to compel the City to comply with Section 29-A of the Charter because Miami-Dade's Home Rule Amendment and Charter provide for the exclusive requirements for submitting a charter amendment to the electorate" is contrary to law, as: there was and is an existing duty to the public and Plaintiff to provide public notice and the prior opportunity for the public to compete, and the proposed amendment to 29-B provided no notice that it is intended to apply retroactively, and destroy the

safeguards in Section 29-A(b) guaranteeing the Plaintiff and the public's present right to notice and prior opportunity compete for the sale or lease of public land.

"The Court will not divine a legislative intent that a new law be **applied to disturb existing** contractual rights **or duties** when there is no express indication to that effect; instead the statute will be presumed to apply prospectively." Hassen v. State Farm Mut. Auto. Ins. Co., 674 So. 2d 106 (Fla. 1996). Where it is intended that a statute should have retrospective operation, the title must convey appropriate notice of this aspect. Chiapetta v. Jordan, 153 Fla. 788, 16 So. 2d 641 (1943). Therefore, contrary to the Court's conclusion of law, Plaintiff has standing to enforce those existing rights and compel the municipal defendants' pre-existing duties as alleged in the amended complaint,

Contrary to the allegations in Plaintiff's complaint, the judgment concludes, "Plaintiff has not demonstrated that a constitutional or statutory right has been violated".

As alleged, in R. 373, ¶¶ 20, 21, and re-alleged in R. 385 ¶31, R. 402 ¶52, and R. 410, ¶ 68 the proposed amendment by the City Commission to Laws Of Florida, Chapter 10847, Section 29, a legislative enactment by the legislature of the state of Florida, as alleged is void, a clear violation of article III, section 11(a)(10), 11(a)(12) of the Florida Constitution; and *inter alia*:

a. the Plaintiff, a registered voter and the public were not given prior public notice and a prior opportunity given to the public to compete for the sale or lease of public land (in violation of the rights of the public and plaintiff to prior public notice as defined in Laws Of Florida, Chapter 10847, Section 29) and in violation of the right to be given a prior opportunity to compete for the sale or lease of public land under Section 29-A(b), and

b. the Plaintiff, and the public's right to have their Commission carry out their duties in a constitutional manner and in a manner consistent with the Charter was violated by the Commission's proposed amendment to Laws Of Florida, Chapter 10847, § 29-B prohibited by article III of the Florida Constitution., Section 11(a)(10) 12).

III. PLAINTIFF, ON BEHALF OF THE PUBLIC AND AS A MEMBER OF THE AFFECTED PUBLIC, SEEKING TO ENFORCE A PUBLIC RIGHT HAS STANDING TO BRING HIS CLAIM FOR MANDAMUS, AND OTHER RELIEF. HE HAS STANDING TO CHALLENGE A CHARTER AMENDMENT ON THE GROUNDS THAT IT IS UNCONSTITUTIONAL, HAS STANDING TO CHALLENGE AN ILLEGAL REFERENDUM, AND AS A RESIDENT OF MIAMI HAS STANDING UNDER THE CITIZEN'S BILL OF RIGHTS

A. The Trial Court's Ruling that Muir Lacked Standing To Bring a Claim for Mandamus or Other Relief Was in Error

The court errs by concluding that Plaintiff, as a member of the affected public, has no standing to enforce a public right or must allege an injury that is different from the public when seeking to vindicate primarily a public right. The trial order

concludes in error: "Plaintiff lacks standing to challenge the City's resolution submitting the charter amendment to the electorate. To demonstrate standing to seek a writ of mandamus challenging government action, plaintiff must demonstrate a special injury different than the injury suffered by the general public.[3]" Contrary to the Court's conclusion, the law of standing in the State of Florida is where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that the relator has any legal or special interest in the result, it being sufficient that the relator is interested as a citizen in having the law executed and the duty in question enforced. *Compare* 35 Fla. Jur. 2d. MANDAMUS AND PROHIBITION, § 120 (2012), at 475(citing State ex rel. Village of North Palm Beach v. Cochran, 112 So. 2d 1 (Fla. 1959)[4],Fla. Indus.

[3] The trial court cites Centrust Sav. Bank v. City of Miami, 491 So. 2d 657, 577 (Fla. 3d DCA 1986); School Board of Volusia City v. Clayton, 681 So. 2d 1066, 1068 (Fla. 1997); N. Broward Hosp. Dist. v. Fornes, 476 So. 2d 154, 155 (Fla. 1985) and Kneapler v. City of Miami, 173 So. 2d 1002, 1004 (Fla. 3d DCA 2015) and would deny standing to citizens and residents bringing a constitutional challenge to the enactment of a prohibited special law, contrary to the application by the Florida Supreme Court of the special injury standing requirement in the cases cited to challenges to the taxing and spending power of the legislature absent a constitutional challenge. *See* Herbits*, infra.*

[4] State ex rel. Vill. of N. Palm Beach v. Cochran, 112 So. 2d 1 (Fla. 1959) ([T]he decided weight and preponderance of the authorities establish the following to be the correct rule as to who are proper relators in mandamus proceedings: 'When the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. The relator (in such case) is considered the real party, and his right to the relief must clearly appear; but where the object is the enforcement of a public right the people are regarded as the real

Com. v. State ex rel. Orange State Oil Co., 155 Fla. 772, 21 So. 2d 599, 1945 (1945))) *with* 35 Fla. Jur. 2d. MANDAMUS AND PROHIBITION, § 119 (2012), at 473.

A line of cases that defendants did not address in their motions to dismiss the initial complaint decided by the Florida Supreme Court support Plaintiff-Appellant's standing and distinguish between the judicial standing requirement for a relator or plaintiff seeking to vindicate primarily a "public right" as the Plaintiff does, versus a "private right". *e.g.* Pleus v. Crist, 14 So. 3d 941 (Fla. 2009)("Petitioner, as a citizen and taxpayer, has a clear legal right to request that the Governor carry out that duty. *See* Chiles v. Phelps, 714 So.2d 453, 456 (Fla.1998).") (citing Martinez v. Martinez, State ex rel. Pooser v. Wester).

The right to "prior public notice" and the right "to a prior opportunity given to the public to compete for said real property or interest" found in Laws Of Florida, Chapter 10847, § 29-A are expressly "public rights." The trial court does not have the liberty to engraft the heightened standing requirement (for enforcement of a private right in the absence of a constitutional challenge) found in the line of cases

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party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed, and the duty in question enforced.' 14 Amer. & Eng.Enc.Law, 218 and authorities there cited. The above has been adopted by this court as being the correct rule in McConihe v. State, 17 Fla. 238, and in State v. Crawford, 28 Fla. 441, 10 So. 118 [14 L.R.A. 253].' It seems clear to us that the act of the respondent so affects the relator municipality and all the citizens thereof as to characterize it as an act of public nature.)

cited to support the trial court's final judgment, ***especially*** when the cases relied upon by the Court in its conclusions of law were decided before the enactment of the Miami-Dade County Citizen's Bill of Rights and Section 52 of the City Charter, *supra*. *See* Herbits, discussed *infra.*

In Plaintiff's action, Plaintiff seeks to vindicate primarily a public right, as a member of the affected public which is a right also personal to him, including the right to prior public notice and a prior opportunity to compete for the sale or lease of City-owned real property, i.e. R. 368-420. ¶¶ 10, 11, 32, 35, 36, 37, 38, 40, etc., and that any sale or lease be awarded to the highest responsible bidder.

B. The City of Miami Charter Provides an Independent Basis for Plaintiff-Appellant's Standing

On November 8, 2016, nearly 100,000 voters of the City of Miami voted to enact an amendment to Section 52 of the Charter of the City of Miami ("Charter"). The public was overwhelmingly in favor of this amendment, by a nearly 5:1 margin.

The Charter provision provides:

> Remedies for violations. Residents of the City ***shall have standing*** **to bring legal actions to enforce the City Charter**, the Citizens' Bill of Rights, and the Miami-Dade County Citizens' Bill of Rights as applied to the City. Such actions shall be filed in Miami-Dade County Circuit Court pursuant to its general equity jurisdiction and, if successful, the plaintiff shall be entitled to recover costs, but not attorney's fees, as fixed by the court. Any public official, or employee who is found by the court to have willfully violated this section shall forthwith forfeit his or her office or employment.

Sec. 52. - Citizens' Bill of Rights.

The City of Miami or the City Attorney (on behalf of the individual defendants) did not raise lack of standing as a defense in its' motions to dismiss. Whether Plaintiff has standing under an express provision of a home rule Charter has already been litigated and lost by the City of Miami and another developer, with the Third District Court of Appeal rejecting the City's argument and determining that the City of Miami's argument that Plaintiff lacked standing under the Miami-Dade County Home Rule Charter "fails as well". Herbits v. City of Miami, 207 So. 3d 274 (Fla. 3d DCA 2016)

> The City and Flagstone have raised two arguments in opposition to the application of the provisions of the Citizens' Bill of Rights. First, they argue that section (C), "Remedies for Violations," provides a remedy, but does not expressly confer standing in the manner that the environmental statute, section 403.412(2)(a), Florida Statutes (1977), did in Fla. Wildlife Fed'n v. State Dep't of Envtl. Regulation, 390 So. 2d 64, 64 (Fla. 1980). We reject that argument; the environmental statute authorized the Department of Legal Affairs, any political subdivision or municipality of the state, "or a citizen of the state," to maintain an action for injunctive relief. Id. at 65 n. 1. Similarly, the Citizens' Bill of Rights remedy provision expressly applies to "a citizen."
>
> Second, the City and Flagstone rely on section (D) of the Citizens' Bill of Rights, requiring our construction of these rights to be "supplementary to and not in conflict with the general laws of Florida." The City and Flagstone argue that the "general laws of Florida" as used in that provision refer not only to legislative enactments, but also to the judicial decisions limiting taxpayer and citizen standing as described above in section III. According to this argument, the "general laws" would thus include the "special injury or constitutional challenge" requirements detailed in Solares, and the cases relied upon by that opinion.
>
> This argument fails as well. Section 11(5) of the Florida Constitution of 1885 and section 6(e) of Article VIII of the Florida

> Constitution of 1968, establishing the framework for the Home Rule Charter for Miami–Dade County, refer to "the power of the Legislature to enact general laws which shall relate to Dade County." Contextually, section (D) of the Citizens' Bill of Rights in the Home Rule Charter does not expand the definition of "general laws" to engraft judicial limitations on taxpayer standing into the specific remedies provided to each citizen in section (C).

Plaintiff-Appellant has a statutory right pursuant to Section 52 *supra*, Herbits, 207 So. 3d 274, citing Fla. Wildlife Fed'n v. State Dep't of Envtl. Regulation, 390 So. 2d 64 (Fla. 1980)("private citizens could institute suit under Environmental Protection Act without showing special injury required by traditional rule of standing").

Contrary to the Court's conclusion, In Herbits, *Id.* decided before the enactment of Section 52 of the City Charter the court held as follows:

> "[T]he Florida Supreme Court has repeatedly held that citizens and taxpayers lack standing to challenge a governmental action unless they demonstrate either a special injury, different from the injuries to other citizens and taxpayers, or unless the claim is based on the violation of a provision of the Constitution that governs the taxing and spending powers." Solares v. City of Miami, 166 So. 3d 887, 888 (Fla. 3d DCA 2015) (citing Sch. Bd. of Volusia Cty. v. Clayton, 691 So. 2d 1066, 1068 (Fla. 1997); N. Broward Hosp. Dist. v. Fornes, 476 So. 2d 154, 155 (Fla. 1985); Henry L. Doherty & Co. v. Joachim, 200 So. 238, 240 (Fla. 1941); Rickman v. Whitehurst, 74 So. 205, 207 (Fla. 1917)).
>
> **There is a further exception, however, when legislation provides a cause of action and standing to private citizens. Fla. Wildlife Fed'n v. State Dep't of Envtl. Regulation, 390 So. 2d 64 (Fla. 1980). As we explain below in section III.D. of this opinion (addressing Count IV of the complaint), that exception applies to the unique rights conferred through the Miami-Dade County Home Rule Charter and its Citizens' Bill of Rights. As a duly enacted source of rights**

> **and standing, the Citizens' Bill of Rights was neither raised nor considered in the taxpayer standing decisions of the Florida Supreme Court cited above, or in our decisions in Solares and** Kneapler v. City of Miami, 173 So. 3d 1002 (Fla. 3d DCA 2015)**.** (Emphasis added).

Had the City of Miami Charter granting residents of the City of Miami standing to enforce the Charter been enacted at the time, the Court may have decided Count III of the Herbits declaratory action differently, as the Court distinguishes Solares and Kneapler on the grounds of the unique rights conferred through a Citizen's Bill of Rights. "Although we find that the allegations establish a case for violation of section 29-A by the City and Flagstone, and although we analyze the issue separately as an element of Count IV, we affirm the dismissal of Count III with prejudice based on a lack of special injury, nexus, and standing when the violation of section 29-A is asserted as a separate and independent claim." Herbits v. City of Miami, 207 So.3d 274 (Fla. 3d DCA 2016)).

The court erred in finding that Plaintiff lacks standing without evidentiary hearing, as Plaintiff's allegations as a matter of law were legally sufficient to establish standing, and this necessarily factual determination as appears on the judgment made at a status conference in which no evidence was presented is contrary to law. "The standing of a particular plaintiff is a question of fact for the trial court. Lykes Bros. v. Bd. of Comm'rs, 41 So. 2d 898 (Fla. 1949)." Miller v. Publicker Indus., Inc., 457 So. 2d 1374, 1375 (Fla. 1984).

IV. MANDAMUS LIES TO CHALLENGE AN ILLEGAL, OR UNCONSTITUTIONAL REFERENDUM.

A. PLAINTIFF'S COMPLAINT IS AMENDABLE, FOR EXAMPLE TO SUSTAIN A CAUSE OF ACTION UNDER THE THEORY THAT THE REFERENDUM PROCESS IN REGARD TO ANY DEVELOPMENT ORDER IS PROHIBITED BY THE LEGISLATURE AND UNCONSTITUTIONAL AND THE REFERENDUM IS THEREFORE NULL AND VOID AND OF NO LEGAL FORCE AND EFFECT

Section 163.3164, Florida Statutes in pertinent part provides:

> (15) "Development order" means any order granting, denying, or ***granting with conditions*** an application for a development permit.
> (16) "Development permit" includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, **or any other official action of local government having the effect of permitting the development of land.**
> (29) "Local government" means **any county or municipality**.

Id. § 163.3164.(emphasis added)section 163.3167, Florida Statutesprovides:

> **(a) An initiative or referendum process in regard to any development order is prohibited.**
> (b) An initiative or referendum process in regard to any local comprehensive plan amendment or map amendment is prohibited unless it is expressly authorized by specific language in a local government charter that was lawful and in effect on June 1, 2011. **A general local government charter provision for an initiative or referendum process is not sufficient.**
> **(c) It is the intent of the Legislature that initiative and referendum be prohibited in regard to any development order.** It is the intent of the Legislature that initiative and referendum be prohibited in regard to any local comprehensive plan amendment or map amendment, except as specifically and narrowly allowed by paragraph (b).
> Therefore, the prohibition on initiative and referendum stated in **paragraphs (a) and (b) is remedial in nature and applies retroactively to any initiative or referendum process commenced after June 1, 2011, and any such initiative or referendum process commenced or completed thereafter is deemed null and void and of**

no legal force and effect.

Section 163.3167, Florida Statutes(emphasis added).

The three Commissioners resolved to ask the voters of the City of Miami to amend § 29-B, with the intended effect of

> AUTHORIZING THE USE OF THE DEMISED PROPERTY FOR A SOCCER STADIUM, ENTERTAINMENT CENTER, INCLUDING FOOD AND BEVERAGE VENUES, OFFICES, RETAIL, HOTEL AND CONFERENCE CENTER, AND OTHER ANCILLARY COMMERCIAL DEVELOPMENT WITH A MAXIMUM HEIGHT NOT TO EXCEED FEDERAL AVIATION ADMINISTRATION AEROSPACE OBSTRUCTION STANDARDS, WITH RESTRICTIONS, REVERSIONS, AND RETENTION BY THE CITY OF ALL OTHER RIGHTS; FURTHER REQUIRING MFP TO UNDERTAKE THE REMEDIATION AND SITE DEVELOPMENT FOR A PUBLIC PARK OF APPROXIMATELY FIFTY-EIGHT (58) ACRES TO BE DEVELOPED ON PROPERTY ADJACENT TO THE DEMISED PROPERTY, CURRENTLY USED FOR THE MELREESE COUNTRY CLUB AND PURSUANT TO CHARTER SECTION 29-B, ENTITLED "CITY OWNED PROPERTY SALE OR LEASE GENERALLY," CALLING FOR A SPECIAL ELECTION AND PROVIDING THAT THE CHARTER AMENDMENT SHALL BE SUBMITTED TO THE ELECTORATE AT THE SPECIAL ELECTION TO BE HELD ON NOVEMBER 6, 2018;

The proposed charter amendment provision directed by the three Commissioners to be sent to the electorate for referendum purports to add to Chapter 10847, Laws of Florida (1925), § 29-B the following language:

> "waive competitive bidding to negotiate and execute a Ground Lease and Master Development Agreement with Miami Freedom Park, LLC, for a total lease term of ninety-nine (99) years, for approximately seventy-three (73) acres of City owned property located generally at 1400 Northwest 37th Avenue, Miami, Florida, 33125, with a minimum annual base rent payable to the City of Miami equal to the greater of (a)

> fair market value, as determined by state certified appraisers, or (b) five percent (5.0%) of rent from the retail, office, and hotel development within the Demised Property, but no less than three million five hundred seventy-seven thousand three hundred sixty-five dollars ($3,577,365.00), **for the development of a soccer stadium; with at least one (1) million square feet of office space, art and entertainment spaces, and food and beverage venues; and a hotel with at least 750 units and conference center with ancillary commercial uses,** with any restrictions, reversions, and retention by the City of all other rights, including at least a one (1%) transfer fee payable to the City, with such Lease and Master Development Agreement requiring City Commission approval."

The ballot question incorporated in whole below, including its title, asks the electorate to permit the development of a soccer stadium and commercial complex and permit the Intervenor to convert a public park into a soccer stadium, office, retail, and commercial, development, and hotel with conditions:

> Proposed Charter Amendment for the Lease and development of a soccer stadium and commercial complex
>
> Shall Miami's Charter be amended authorizing City to negotiate, execute 99-year lease with Miami Freedom Park LLC, for approximately 73 acres of City land, waiving bidding, converting Melreese Country Club (1400 Northwest 37 Avenue) at no cost to City to:
> • soccer stadium;
> • minimum 1,000,000 square feet office, retail, commercial uses;
> • minimum 750 hotel rooms;
> • living wage for on-site employees;
> • $3,577,365 minimum annual rent;
> • $20,000,000 for 58-acre public park or
> other green space?

This Court has in the past prevented invalid referendum from reaching the voters.

> A review of Fla. Case law reveals several different methods employed by various parties to challenge the legality of a referendum question. In some cases, like this one, municipal officials fearing an invalid referendum question would reach voters stopped the referendum process, which compelled referendum proponents to seek a writ of mandamus. In some cases, third parties sought to enjoin an alleged illegal referendum. &, in some cases, the municipality (along with an intervening third party) sought declaratory relief to enjoin an alleged illegal referendum. Irrespective of how the issue landed in the courts, in each case, the trial & appellate courts Court reached & decided the issue of referendum legality. In none of these cases did a referendum question that had been adjudicated [**18] illegal reach the voters.
> …We leave it to the Legislature and, where authorized, municipal governing bodies to codify any preferred mechanism for challenging a purported invalidity [*958] of a referendum question.

Mullen v. Bal Harbour Vill., 241 So. 3d 949, 951 (Fla. 3d DCA 2018) ("Petition 82 conflicts with section 163.3167(8)(a) A municipality may not adopt a law, whether a Charter section or an ordinance, that conflicts with a state statuteCity of Palm Bay v. Wells Fargo Bank, N.A., 114 So. 3d 924, 929 (Fla. 2013) (stating that "municipalities are precluded from taking any action that conflicts with a state statute").) (Emphasis Added).

> "Referendum is the right of the people to have an act passed by the legislative body submitted for their approval or rejection." City of Coral Gables v. Carmichael, 256 So. 2d 404, 411 (Fla. 3d DCA 1972) (quotation marks and citation omitted). In Florida, the availability of

> the referendum is constrained to those situations where "the people through their legislative bodies decide it should be used." DCA 1972) (quotation marks and citation omitted). In Florida, the availability of the referendum is constrained to those situations where "the people through their legislative bodies decide it should be used." (Emphasis Added).
> "Referendum is the right of the people to have an act passed by the legislative body submitted for their approval or rejection." City of Coral Gables v. Carmichael, 256 So. 2d 404, 411 (Fla. 3d DCA 1972) (quotation marks and citation omitted). In Florida, the availability of the referendum is constrained to those situations where "the people through their legislative bodies decide it should be used." DCA 1972) (quotation marks and citation omitted). In Florida, the availability of the referendum is constrained to those situations where "the people through their legislative bodies decide it should be used." Bd. of County Com'rs of Dade County v. Wilson, 386 So. 2d 556 (Fla. 1980). In this regard, Article VI, section 5(a) of the Florida Constitution provides that "referenda shall be held as provided by law," with the phrase "as provided by law" equating to "as passed 'by an act of the legislature.'" Holzendorf v. Bell, 606 So. 2d 645, 648 (Fla. 1st DCA 1992).
>
> Archstone Palmetto Park, L.L.C. v. Kennedy, 132 So. 3d 347, 350 (Fla. 4th DCA 2014). (Citations Omitted).. In this regard, Article VI, section 5(a) of the Florida Constitution provides that "referenda shall be held as provided by law," with the phrase "as provided by law" equating to "as passed 'by an act of the legislature.'" Holzendorf v. Bell, 606 So. 2d 645, 648 (Fla. 1st DCA 1992).

Archstone Palmetto Park, L.L.C. v. Kennedy, 132 So. 3d 347, 350 (Fla. 4th DCA 2014). (Citations Omitted).

"Indeed, the list of development permits contained in section 163.3164(8), Florida Statutes (1977) was not meant to be exhaustive as it was followed with the language "or any other official action . . . having the effect of permitting the development of land."" Graves v. City of Pompano Beach, 74 So. 3d 595, 598 (Fla. 4th DCA 2011)

> Under § 163.3164(15), "development order" refers to "any order granting, denying, or granting with conditions an application for a *development permit*." (Emphasis added). The term has been broadly construed. 3d 595 (Fla. 4th DCA 2011); Arbor Props., Inc. v. Lake Jackson Prot. All., Inc., 51 So. 3d 502 (Fla. 1st DCA 2010). The definition of "development permit" includes "any other official action of local government having the effect of permitting the *development* of land." § 163.3164(16), Fla. Stat. (emphasis added). As recognized by the Fourth District in Graves v. City of Pompano Beach, 74 So. 3d 595, 598 (Fla. 4th DCA 2011), "development" is broadly [*706] construed and includes "any building activity" (§§ 163.3164(14), 380.04(1)), or "change in the intensity of use of land, such as an increase in the number of dwelling units in a structure or on land or a material increase in the number of businesses, manufacturing establishments, offices, or dwelling units in a structure or on land." § 380.04(2)(b).

O'Neil v. Walton Cty., 149 So. 3d 699, 705-06 (Fla. 1st DCA 2014).

The Mas group and the City of Miami can't circumvent the intent of the legislature and the legislature's prohibition on referendum regarding development orders by arguing that the lease and development is still subject to negotiation between a developer and a municipality. That argument has already been rejected in Florida. Pres. Palm Beach PAC v. Town of Palm Beach, 50 So. 3d 1176, 1176 (Fla. 4th DCA 2010).

> "Much of Preserve's argument is based on the common understanding that an order, by definition, is often unilateral and non-negotiable. However, we note that development orders are often the product of negotiations between a developer and a municipality. Joseph Van Rooy, The Development of Regional Impact in Florida's Growth Management, 19 J. Land Use & Envtl. L. 255, 256 (2004)."

Pres. Palm Beach PAC, 50 So. 3d at 1176.

B. The Referendum Clearly And Plainly Violates Section 163.3167, Florida Statute. The referendum Is Null And Void And Of No Legal Force And Effect to Amend Section 29-B.

"Fundamental or plain error, such as this one, is not waived simply because the parties and the trial court ignored the clear statutory prohibition…Fundamental error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. SSSanford v. Rubin, 237 So. 2d 134 (Fla. 1970) (Finding that fundamental error may be raised for the first time on appeal). Toiberman v. Tisera, 998 So. 2d 4, 8 (Fla. 3d DCA 2008) (finding a clear violation of the statutory prohibition against arbitration of cases involving child custody, visitation, and child support.)

"The Dade County Charter has been given constitutional approval, but only to the extent that it is consistent with the former article VIII, Section 11 (now in article VIII, section 6). If any provision of the Dade County Charter, or any action taken pursuant to the Charter, contravenes the limitations or prescriptions of article VIII, section 6 of the 1968 Constitution, it is necessarily unconstitutional and void. See State ex rel. Dade County v. Nuzum, 372 So. 2d 44 (Fla. 1979); Gray v. Golden, 89 So. 2d 785 (Fla. 1956)." Bd. of County Com'rs of Dade County v. Wilson, 386 So. 2d 556 (Fla. 1980).

> The Florida Constitution declares that Dade County's home rule powers are explicitly subject to the supremacy of general state law:
> (6) Nothing in this section [defining Dade County's home rule power] shall be construed to limit or restrict the power of the Legislature to

> enact general laws which shall relate to Dade County and any other one or more counties of the state of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida [*504] relating to county or municipal affairs and all such general laws shall apply to Dade County and to all municipalities therein to the same extent as if this section had not been adopted and such general laws shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith, and shall supersede any provision of any charter of any municipality in Dade County in conflict therewith.
>
> Art. VIII, § 11(6), Fla. Const. (1885) ("Home Rule Amendment"); *see* art. VIII, § 6(e), Fla. Const. (1968) (incorporating article VIII, section [**28] 11, Florida Constitution (1885)).
>
> The Florida Constitution and general laws are "supreme" in Metropolitan Dade County, except as expressly provided in the Home Rule Amendment. Art. VIII, § 11(9), Fla. Const. (1885). The Home Rule Amendment must be "strictly construed" to maintain such supremacy. *Metropolitan Dade County v. City of Miami*, 396 So. 2d 144, 148 (Fla. 1980). Consequently, whenever "any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute." *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972)(citation omitted)

Metro. Dade Cty. v. Chase Fed. Hous. Corp., 737 So. 2d 494, 503-04 (Fla. 1999).

A general local government charter provision for a referendum process is not sufficient to confer authority on the commission to call for a special election asking the electorate to "author[ize] the use of the demised property for a soccer stadium, entertainment center, including food and beverage venues, offices, retail, hotel and conference center, and other ancillary commercial development."

Local governments have not been given omnipotence by home rule provisions or by Article VIII, Section 2 of the 1968 Florida Constitution. City of Miami Beach v. Fleetwood Hotel, 261So, 2d 801, 804 (Fla. 1972).

CONCLUSION

For the reasons set forth above, this Court should vacate the trial court's Order, and remand the case with instructions to reinstate undersigned's complaint and nullify the defective charter amendment.

Dated: March 25, 2019 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing document was on this day, March 25, 2019, electronically filed with the Third District Court of Appeal using the eDCA system and was served via electronic mail on the following counsel of record pursuant to Fla. R. Jud. Admin 2.516 and Fla. R. App. P. 9.420:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document was prepared using Times New Roman 14-point font, and is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/WILLIAM DOUGLAS MUIR