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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CITY OF NAPLES, FLORIDA, a Florida)
municipal corporation,)
)
Appellant,)
)
v.)
)
ETHICS NAPLES, INC., a Florida)
nonprofit corporation,)
)
Appellee.)
_____)

Case No. 2D18-4486

Opinion filed February 21, 2020.

Appeal from the Circuit Court for Collier
County; Hugh D. Hayes, Judge.

Christopher D. Donovan and James D. Fox
of Roetzel & Andress, LPA, Naples, for
Appellant.

C.B. Upton of Upton Law Firm, P.L.,
Tallahassee; and Anthony P. Pires, Jr., of
Woodward, Pires, & Lombardo, P.A.,
Naples, for Appellee.

KHOUZAM, Chief Judge.

Ethics Naples, Inc., sponsored a citizens' initiative to amend the Naples
City Charter to create an independent ethics commission responsible for amending the
City's Ethics Code. Enough signatures were collected to place the measure on the

ballot, but the City of Naples refused to do so and instead filed a declaratory action challenging the proposed amendment as unconstitutional. Ethics Naples counterclaimed for writ of mandamus, seeking to compel the City to submit the proposed amendment to the people for a vote pursuant to section 166.031, Florida Statutes (2017). On cross motions for judgment on the pleadings, the court entered judgment in favor of Ethics Naples. The court concluded that the City had failed to make the threshold showing that the proposed amendment was unconstitutional both in its entirety and on its face, and the City was ordered to place the proposed amendment on the ballot at a special election to be called by the City Council. The City appeals, arguing that the circuit court applied the incorrect standard, that the proposal is unconstitutional even under the standard that the court applied, and that the proposal's title and summary are misleading. But the circuit court applied the correct test and appropriately declined to address the merits of the City's arguments before the amendment had been approved by the voters. And the proposal's title and summary are accurate. Accordingly, we affirm.

I. The Proposed Amendment

The proposed amendment would add article 17, sections 17.1 through 17.4, entitled "Commission on Ethics and Government Integrity," to the City Charter. The ballot title and summary describe the measure as follows:

BALLOT TITLE: Referendum amending charter, establishing an ethics commission, ethics office, and minimum requirements for ethics code.

BALLOT SUMMARY: Shall the Charter of the City of Naples be amended to establish an independent ethics commission, set minimum requirements for the ethics code, and establish an ethics office?

Section 17.1(1) would create the commission, stating "[t]here is hereby created an independent Commission on Ethics and Governmental Integrity ("Ethics Commission") whose members shall be electors of the City of Naples at the time of appointment and throughout their terms, and none of whom may be an officer or employee of the City of Naples." Section 17.1(2) sets forth the mechanism by which the members of the commission would be appointed:

The Ethics Commission shall have five volunteer members who shall be appointed as follows:

- (a) One appointed by the State Attorney for the Twentieth Judicial District [sic];
- (b) One appointed by the Public Defender for the Twentieth Judicial District [sic];
- (c) One appointed by the Collier County Sheriff;
- (d) One appointed by the City of Naples representative on the Board of County Commissioners of Collier County; and
- (e) One appointed by the City Council.
- (f) Should an appointing authority listed above in (2)(a)-(e) be unable or unwilling to make an appointment, the authority for that appointment shall be assigned in the following order to: (i) the Chief Judge for the Twentieth Judicial District [sic] or his or her judicial designee; (ii) the Collier County Clerk of the Circuit Court; or (iii) the Collier County Bar Association. An appointing authority may have only one appointee on the Commission at the same time.

Sections 17.1(3)-(5) cover the timeframes for filling vacancies on the Commission, the circumstances under which a commissioner may be removed, and the

terms that commissioners would serve. Section 17.1(6)(a)-(e) sets forth the Commission's authority and responsibilities:

- (a) Develop and draft an amended Ethics Code;
- (b) Advise the City Council in all ethical matters and recommend proposed ordinances, resolutions, or charter amendments to the City Council;
- (c) Adopt its own bylaws and due process procedures consistent with the laws of the State of Florida;
- (d) Provide training in state and local ethics of all persons covered by the Ethics Code;
- (e) The Ethics Commission is authorized to:
 - (i) Receive complaints alleging ethical violations or violations of law, investigate complaints on its own initiative, subpoena witnesses, administer oaths, audit records, take evidence, and compel disclosure;
 - (ii) Refer ethical violations or violations of law to appropriate enforcement agencies;
 - (iii) Prepare and issue reports to the City Council and the public relating to any ethical violations or violations of law;
 - (iv) Levy penalties, including financial penalties, censure, and recommend removal from office or position;
 - (v) Register and regulate the activities of lobbyists;
 - (vi) Employ staff and hire consultants to assist in the performance of its responsibilities.
 - (vii) Direct the Office of Ethics and Governmental Integrity in the execution of its authority and responsibility.

Section 7.2 sets forth how the Ethics Commission would amend the Ethics

Code:

(1) Within 180 days of its formation, the Ethics Commission shall draft an amended Ethics Code, and may propose further amendments as needed.

(2) Any proposed amendment to the Ethics Code by the Ethics Commission, including the initial amendment required above in (1), shall be presented to the City Council. The amendment shall become law as of that City Council meeting unless five or more members vote against it.

Finally, section 17.3 sets forth the minimum requirements of the Ethics Code and section 17.4 would establish an Office of Ethics and Governmental Integrity which would report to the Ethics Commission.

II. Constitutionality

The City argues that the Ethics Commission would constitute an unelected legislative body prohibited by article VIII, section 2(b), of the Florida Constitution because under section 7.2, the Commission's amended ethics code would automatically become law unless five or more members of the City Council vote against it. The City also argues that section 17.1(2) of the proposed amendment creates dual offices as prohibited by article 2, section 5(a), of the Florida Constitution because it requires various public officials to take on the second office of "appointing authority."

Underpinning these arguments is the City's claim that preelection challenges to citizens' referenda should be reviewed under the same standard as postelection challenges. Once an amendment is approved by voters, "it may be examined by the courts in the same manner that any statute or ordinance may be examined." Rivergate Rest. Corp. v. Metropolitan Dade County, 369 So. 2d 679, 684 (Fla. 3d DCA 1979). Accordingly, once an amendment is approved, it is appropriate to determine whether an unconstitutional provision requires that the entire amendment be

stricken or whether the offending provision can be severed from the remainder of the amendment. See, e.g., Fla. Dep't of State, Div. of Elections v. Martin, 916 So. 2d 763, 773 (Fla. 2005) (addressing the severability of a statute); Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011, 1021 (Fla. 2d DCA 2005) (addressing the severability of an ordinance).

But the circuit court was correct that preelection challenges to citizens' referenda are much more limited. In the preelection context, the court may only properly consider the constitutionality of a proposed amendment where the opponent in good faith challenges the amendment's constitutionality in its entirety and on its face. Citizens for Responsible Growth v. City of St. Pete Beach, 940 So. 2d 1144, 1146-47 (Fla. 2d DCA 2006). Where "an examination of the proposed amendment reveals that if adopted it would be legally operative in part, even though it might ultimately become necessary to determine that particular aspects violate the Constitution, then the submission of such a proposal to the electorate for approval or disapproval will not be restrained." Dade County v. Dade Cty. League of Municipalities, 104 So. 2d 512, 515 (Fla. 1958). In other words, "[w]hen a petition can 'have a valid field of operation even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law,' it must be submitted to the electorate." Citizens for Responsible Growth, 940 So. 2d at 1146-47 (quoting Dade County, 104 So. 2d at 515). "Only when a petition is unconstitutional in its entirety may it be precluded from placement on the ballot." Citizens for Responsible Growth, 940 So. 2d at 1147. Therefore, "[a]n individual piecemeal attack upon a portion of the proposal, as opposed to an attack on the proposal in toto, [is] not sufficient to enable the circuit court to enjoin

the election or to delete the language of the proposed ordinance that the court found to be [unconstitutional]." Rivergate Rest., 369 So. 2d at 683. Rather, once the court determines that the ordinance at issue is "not invalid in its entirety, or once it [becomes] clear that the appellant intended only a piecemeal attack on the proposed ordinance, the circuit court's judicial function [is] at an end and the wisdom vel non of the proposal [is] purely a matter for the electorate to decide." Id.

The reason for this distinction between preelection and postelection challenges is that "[a]ll political power is inherent in the people." Art. I, § I, Fla. Const.; see also Citizens for Responsible Growth, 940 So. 2d at 1146 ("We begin with the premise that 'all political power is inherent in the people and that we must, if possible, interpret the amendment as constitutional.' " (quoting Charlotte Cty. Bd. of Cty. Comm'rs v. Taylor, 650 So. 2d 146, 148 (Fla. 2d DCA 1995))). In drafting and adopting the Florida Constitution, the citizens of the state "reserved certain powers to themselves, choosing to deal directly with some governmental measures. The referendum, then, is the essence of a reserved power." Fla. Land Co. v. City of Winter Springs, 427 So. 2d 170, 172 (Fla. 1983). Moreover, "[a] referendum cannot . . . be characterized as a delegation of power" because "[u]nder our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create." City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 672 (1976). "In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." Id. Accordingly, Florida Courts "traditionally [have] been reluctant to interfere with this right [of self-determination] by barring citizens from formulating their own organic law." Advisory Op.

to Att'y Gen. re Right to Treatment & Rehab., 818 So. 2d 491, 494 (Fla. 2002).

"The common thread running through cases concerning the referendum process is the principle that citizens are free to express their views on municipal matters through the power of referendum and that courts should not interfere with the exercise of their referendum rights except in very narrow circumstances." Wright v. Frankel, 965 So. 2d 365, 372 (Fla. 4th DCA 2007).

Under this well-established framework, the circuit court properly concluded that the City's challenges to the referendum in this case were not challenges to the amendment in its entirety and on its face. Although the City argues that it proved that the proposed amendment is unconstitutional even under this stringent preelection standard, the City challenged only portions of the referendum and its challenges do not invalidate the entire proposal. Specifically, the court found:

The principles established in the Dade County case, and several of the other appellate court cases have, as argued, consistently and clearly ruled that unless the entire proposed amendment is both invalid on its face and illegal in its entirety, judicial litigation challenges to individual sections of a proposed citizen referendum amendment cannot be used to block placement of the amendment on the ballot. Rather, such legal challenges to individual sections of the proposed amendment should be deferred until after the proposed amendment, including the challenged sections, is submitted to the voters. And there's good citation authority for this from the Citizens Responsible Growth case as well as the Rivergate Restaurant case.

The circuit court's analysis is correct. The proposed amendment contains sections 17.1 through 17.4, each with multiple subsections, but the City's arguments target only sections 17.1(2) and 17.2(2). Accordingly, the City is not challenging the amendment "in its entirety." See City of Riviera Beach v. Riviera Beach Citizens Task Force, 87 So.

3d 18, 24 (Fla. 4th DCA 2012) ("Here, the appellants have not demonstrated the invalidity of each and every provision of the amendment. Thus, the trial court was correct in not restraining the electorate's opportunity to vote on it.").

Most tellingly, the City has not challenged the very first subsection of the amendment—section 17.1(1)—which would create the independent Ethics Commission in the first place. The City likewise does not challenge most of the Ethics Commission's authority and responsibilities under section 17.1(6). The City also has not challenged the validity of section 17.3, setting forth the minimum requirements of the Ethics Code, or section 17.4, establishing an Office of Ethics and Governmental Integrity that would report to the Ethics Commission. Far from "demonstrat[ing] the invalidity of each and every provision of the amendment," the City has not even challenged "each and every provision" of the proposed amendment, starting with the very creation of the independent Ethics Commission itself.¹ City of Riviera Beach, 87 So. 3d at 24. Even assuming that all of the City's challenges are facial challenges, the City's failure to challenge the proposal in its entirety is fatal to its claims at this stage.

Of course, if the amendment is adopted, the City may be able to appropriately challenge the amendment on the grounds it has raised here. We emphasize that "we are not at this time passing upon the merits of the proposed ordinance itself. Nothing in this opinion should be read endorsing the merits of the

¹We reject the City's suggestion that it has challenged the proposed amendment in its entirety because it has challenged the mechanism for appointing members of the commission and every provision of the amendment hinges on a fully operational ethics commission. This is a question of severability that cannot be reached before the amendment has been approved by voters. See Martin, 916 So. 2d at 773; Phantom, 894 So. 2d at 1021; Rivergate Rest., 369 So. 2d at 683.

proposed ordinance or precluding any challenge to its contents, or any portion thereof, should it be subsequently adopted." Rivergate Rest., 369 So. 2d at 684.

III. Title and Summary

The City also claims that the amendment's title and summary are misleading and do not fairly inform the voters of the true effect of the amendment as required by section 101.161(1), Florida Statutes (2017). Under this section, "whenever a public measure is submitted to a vote of the people, a ballot summary must be printed in clear and unambiguous language on the ballot, which 'shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.' " Andrews v. City of Jacksonville, 250 So. 3d 172, 174 (Fla. 1st DCA 2018) (quoting § 101.161(1)). "Implicit in this provision is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity." Detzner v. League of Women Voters of Fla., 256 So. 3d 803, 807 (Fla. 2018) (quoting Armstrong v. Harris, 773 So. 2d 7, 12 (Fla. 2000)). "Ballot summaries need not explain every ramification of a proposal, but must make sure that the chief purpose is clear and unhidden." Andrews, 250 So. 3d at 174. "A ballot title and summary cannot either 'fly under false colors' or 'hide the ball' as to the amendment's true effect." Detzner, 256 So. 3d at 808 (quoting Armstrong, 773 So. 2d at 16). In determining whether the ballot title and summary—which must be read together—comply with section 101.161(1), we must consider two questions: "first, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language of the title and summary, as written, misleads the public.' " Id. (quoting Advisory Op. to Att'y Gen. re Fla. Marriage Prot. Amendment, 926 So. 2d 1229,

1236 (Fla. 2006)). However, we do "not consider the substantive merit of the proposed amendment." Id.

The City argues that the summary and title in this case are misleading because they do not disclose that the City Council currently has exclusive authority over ethics, that the City already has an Ethics Code, or that the Ethics Commission constitutes an unelected legislative body whose proposals "shall become law" unless a supermajority of the City Council vetoes them. However, we conclude that the summary and title, when read together, fairly and accurately inform voters of the chief purposes of the amendment: to create an independent Ethics Commission, set minimum requirements for the Ethics Code, and establish an ethics office. The Ethics Commission is specifically described as "independent," implying that the commission would be independent from already-existing bodies with authority over ethics. The commission's authority over the Ethics Code is described as "set[ting] minimum requirements"—not creating an entirely new ethics code. This language aligns with the full text of the proposed amendment providing that the commission would make recommendations and advise the City Council on amendments to the already-existing Ethics Code, with the City Council retaining the authority to approve or reject any of the commission's proposals. While the mandatory language found in section 17.2(2) does appear to be incongruous with the advisory function of the commission elucidated in the rest of the proposed amendment, it does not change the chief purpose of the amendment. The constitutionality of this provision and its severability from the rest of the amendment are questions that will be appropriately addressed when and if the

proposal is approved by voters. See Martin, 916 So. 2d at 773; Phantom, 894 So. 2d at 1021; Rivergate Rest., 369 So. 2d at 683.

Because the circuit court appropriately declined to address the merits of the City's arguments before the amendment had been approved by the voters and the proposal's title and summary are accurate, we affirm the judgment in favor of Ethics Naples.

Affirmed.

SMITH, J., Concur.

SALARIO, J., Concur in result only.