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**CITY COMMISSION
SPECIAL MEETING
CITY OF ST. PETE BEACH**
155 Corey Avenue

**Friday, October 24, 2014
5:00 PM**

Call to Order
Pledge of Allegiance
Roll Call

1. Action Items

- a. Discussion of the Commission's options for next steps
in light of the Second District Court of Appeal's
decision in Anderson v. City of St. Pete Beach, Appeal
Case No. 2D12-5969**

2. Adjournment

APPEAL

If a person decides to appeal any decision made at this meeting, they will need a record of the proceeding and, for such purpose, may need to ensure that a verbatim record of the meeting is made, which record includes the testimony and evidence upon which the appeal is to be based. (F.S. 286.0105) The City does not furnish verbatim transcripts; interested parties should make the necessary arrangements for verbatim transcripts.

AMERICAN DISABILITIES ACT

In Accordance with the American's with Disabilities Act and F.S. 286.26, persons with disabilities needing special accommodations to participate in this meeting should contact City Hall at (727) 367-2735 no later than (4) days prior to the meeting for assistance.

The public is cordially invited to attend. All agenda material is available for review at City Hall.

*Privileged & Confidential Attorney Work
Product Regarding Pending Litigation*

MEMORANDUM

TO: City of St. Pete Beach Commissioners

CC: Andrew Dickman

FROM: Susan Churuti
Michael Davis

DATE: October 20, 2014

RE: *Anderson v. City of St. Pete Beach*, Appeal Case No. 2D12-5969

This memorandum discusses the Commission's options for next steps in light of the Second District Court of Appeal's decision in *Anderson v. City of St. Pete Beach*, Appeal Case No. 2D12-5969, which was issued on October 15, 2014. It also discusses which option our firm recommends pursuing.

Background of Anderson Litigation

The City has been involved in a series of litigation over its comprehensive plan since 2005. In 2006, the City became the first local government in the state to amend its charter to include referendum requirements for comprehensive plan amendments ("Local Referendum Requirements"). Subject to limited exceptions, these provisions required the City's voters to approve by referendum comprehensive plans, comprehensive plan amendments, and increases to maximum building heights and density.

In 2008, the City adopted comprehensive plan amendments to increase the City's limits on development height and density, which would allow for more hotel growth ("2008 Amendments"). As part of that approval, on June 3, 2008, the voters of St. Pete Beach overwhelmingly approved the plan amendment. The 2008 Amendments were challenged on various procedural and substantive grounds. The substantive challenge was brought by Dr. Pyle; the procedural challenge was brought by Dr. Pyle and Mr. Kadoura. The City prevailed in the substantive challenge, and the 2008 Amendments were found "in

compliance” in accordance with Florida’s growth management statutes. The challenge was lengthy, involving a two day hearing before an administrative judge before the Division of Administrative Hearings, approval by the State of Florida Department of Community Affairs, and a successful appeal at the First District Court of Appeal, which did not issue an opinion. However, the 2008 Amendments were found invalid on procedural grounds relating to the manner in which the referendum election under the city charter was conducted. Mr. Kadoura also brought a lawsuit alleging that the City violated the Sunshine Law during three shade meetings where the City discussed the then-pending Pyle and Kadoura litigation. The City prevailed in that lawsuit and on appeal before the Second District Court of Appeal, which did not issue an opinion.

During the shade meetings, the City discussed repealing the Local Referendum Requirements and re-adopting the 2008 Amendments as a strategy to moot the then-pending *Pyle* and *Kadoura* litigation. After the state-wide constitution amendment “Hometown Democracy” at the ballot box failed, the City’s voters also repealed the Local Referendum Requirements, on March 7, 2011.

During 2011, the Florida legislature was in the process of adopting a dramatic simplification of the growth management laws. The City had been part of a previous pilot plan under state statute to streamline the process. The other pilot programs were in each city in Broward and Pinellas Counties, Hialeah, Jacksonville and Tampa, which were characterized as “built out.” The City then lobbied the Legislature for legislation authorizing cities that had charter provisions like its Local Referendum Requirements (Longboat Key, Key West, Yankeetown and North Miami) to readopt comprehensive plan amendments that were previously found “in compliance” by the Department of Community Affairs, by simply adopting a legislative ordinance. The legislature agreed and enacted the legislation as section 76 of 2011-139, Law of Florida (2011), which is now codified as section 163.32466, Florida Statutes. After the law took effect, the City followed the law and re-adopted the 2008 Amendments by ordinance in June 2011 (“2011 Amendments”).

In this lawsuit, Mr. Anderson claimed that the 2011 Amendments were invalid because the City (1) violated the Sunshine Law by discussing the possibility of repealing the Local Referendum Requirements and lobbying for a state law at the shade meetings; and (2) adopted the amendments in reliance on a state law that was not validly enacted by the Florida legislature under the procedural requirements for “special” laws. In his amended complaint, Mr. Anderson argued that the plan was not adopted in accordance with the Growth Management Act (chapter 163). In his brief, he later argued that the 2011 Amendments were invalid because the City did not comply with the general municipal notice requirements of section 166.041, Florida Statutes (the Municipal Home Rule Powers Act) in adopting them. The City prevailed before the trial court, which found that the legislature intended the process in section 163.32466 to govern the City’s plan. Mr. Anderson appealed.

The transcripts of all shade meetings at issue in this case were provided to Mr. Anderson and released into the public record in March 2010 while the litigation was pending before the trial court, after the city election.

While the appeal was pending, the City re-adopted the comprehensive plan amendments in 2013 ("2013 Amendments"). Mr. Anderson, joined by two other citizens, filed an administrative petition alleging that the 2013 Amendments do not comply with the substantive requirements of state growth management law. That administrative proceeding is currently pending, but has been stayed pending the outcome of the appeal. Essentially, the same plan adopted in 2008 by Ordinance 2008-15, was readopted in 2011 by Ordinance 2011-19, and readopted in 2013 by Ordinance 2013-13.

On October 15, 2014, a three-judge panel of the appellate court issued an opinion reversing the trial court in the *Anderson* case, concluding that the City violated the Sunshine Law and failed to comply with the notice requirements of section 166.041 in adopting the 2011 Amendments. On October 16, 2014, the appellate court issued an order granting Mr. Anderson's motion to recover his appellate attorneys' fees.

Section 286.011(5), Florida Statutes, provides that the plaintiff is entitled to recover its reasonable attorneys' fees and costs on appeal if it appeals a court order which finds the government body violated the Sunshine Law. The trial judge, Judge Demers, ruled in the City's favor, concluding that the City did not violate the law. Under section 286.011(5), no fees may be assessed against any individuals if the government body followed the advice of its attorney, which the City did. However, like in *Chmielewski*, the appellate court awarded appellate fees under subsection (4) even though the City prevailed before the trial court.

Threshold Issues

A threshold issue is whether this City Commission wants to continue to defend the plan approved by the voters in 2008, and readopted in 2011 and 2013, or wants to adopt a different comprehensive plan.

Options Regarding Next Steps

Based on the appellate court's rulings, the City's options moving forward are as follows:

1. Do not challenge the appellate court's decision and then readopt the 2008/2011/2013 plan in the manner outlined by the appellate court: after a cure meeting and in accordance with the procedures set forth in section 166.041(3)(c). By doing so, the City would be in the position it would be in if it prevailed on appeal (but it would not moot the order granting appellate attorneys' fees). This will allow you to at least have a

comprehensive plan in place while you decide whether you want to keep the plan, amend it, or adopt a new plan.

2. Challenge the appellate court's decision on the Sunshine Law count and its decision that the 2011 Amendments are invalid because the City failed to comply with section 166.041. This would be done by filing a motion for rehearing by the entire appellate court rehearing en banc (as opposed to the original three-judge panel) or rehearing by the three-judge panel. This option may be faster than option 1 if you are successful.

3. Only challenge the appellate court's decision on the Sunshine Law count, by a motion for rehearing or rehearing en banc.

4. Only challenge the appellate court's decision that the 2011 Amendments are invalid because the City failed to comply with section 166.041, by a motion for rehearing or a rehearing en banc.

The 2011 Amendments will be invalid unless the City prevails on rehearing of the decision regarding section 166.041 or readopts pursuant to the ruling of the appellate court. Since the appellate court determined that the 2011 Amendments were invalid based on noncompliance with section 166.041, it did not decide whether the Sunshine Law violation rendered the 2011 Amendments invalid. Therefore, if the City prevails on rehearing of the decision regarding section 166.041, the appellate court would have to decide whether it is invalid due to the Sunshine Law violation. However a readoption of the 2008/2011/2013 plan would include a cure meeting. The appellate court's opinion could conclude that the Sunshine Law violation rendered the 2011 Amendment invalid. Therefore, the City would likely have to prevail on rehearing on section 166.041 and the Sunshine Law count in order for the 2011 Amendments to be valid. However, readoption of the 2008/2011/2013 plan in a manner that cures the Sunshine Law violation may have the same effect.

If the City chooses to readopt the 2008/2011/2013 plan, it can simultaneously repeal the 2013 Amendments. This will require two public hearings and will start the clock again for another set of citizens to file an administrative challenge, which has a lengthy and expensive process in the City's experience. We hope that by following the path laid out by the appellate court, the likelihood of success in a procedural challenge will be reduced.

If the 2011 Amendments are invalid (because the City does not prevail on rehearing and does not readopt in 2014), the City will be able to keep its comprehensive plan in place if it prevails in the administrative challenge to the 2013 Amendments.

Unless the City prevails on rehearing of the Sunshine Law count, the appellate court's order granting Mr. Anderson's motion for appellate attorneys' fees will stand and the amount of fees will be determined by the trial judge. If the order stands, the City's options are to (1) pay the full amount of attorneys' fees and costs that Mr. Anderson demands; (2)

attempt to negotiate a lower amount of attorneys' fees and costs; or (3) challenge the amount of Mr. Anderson's claimed attorneys' fees and costs at a hearing before the trial court. We do not yet know the amount of fees and costs that Mr. Anderson will seek.

Recommendation

In any event, we recommend pursuing options 1 and 2 together. Option 1 is a 2014 readoption of the 2008/2011/2013 plan under the process laid out by the appellate court; and option 2 is filing a motion for rehearing on both the Sunshine Law and adoption issues. The motion for rehearing would ask for the case to be reheard by all judges on the appellate court (instead of only the three-judge panel that originally decided the case), or, alternatively, by the original three-judge panel.

Procedure for Rehearing

A motion for rehearing is filed pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure and must state with particularity the points of law or fact that in the opinion of the court overlooked or misapprehended. This might include:

A. Overlooked or misapprehended facts – adoption process.

1. "City did not dispute that it did not follow the procedure for rezonings in 166.041(3)(c)," when asked in oral argument advised it was "clearly a legislative enactment," and cited the Florida Supreme Court's holding in *Snyder. Bd of County Com'rs of Brevard County v. Snyder*, 627 So.2d 474 (Fla. 1993). The appropriate subsection of 166.041 is (3)(a), for legislative findings, not (3)(c).

2. The City was actually operating under a pilot plan pursuant to § 163.32465 on a test basis, and not under *any* regular statutory scheme.

3. As pointed out in the oral argument, the appellate route this case took indicates this is legislative; if quasi-judicial, it would be a certiorari action based on the record below, not an original declaratory action.

4. The City officials have the same rights as other citizens to participate in the statewide debate on the omnibus rewrite of the Growth Management Act, and seek redress for their problems within legislative process. The legislative analysis indicates that the City was singled out as having stalled development.

B. Overlooked or misapprehended law – adoption process.

1. Since *Snyder* was decided by the Supreme Court in 1993, Florida Law has been is clear that comprehensive plans are legislative and policy making, not quasi-judicial and

policy applying. This is the fundamental error made by the court, and several other issues are improperly analyzed as a result. See generally *ABCs of Local Land use and Zoning Decisions*, Florida Bar Journal (2010): “Understanding whether a decision is quasi-judicial or quasi-legislative is critical, as procedural due process rights are enhanced in quasi-judicial proceedings and the standards of review are different.”

2. The appellate court should not have applied section 166.041 because it only applies to zoning and quasi-judicial hearings; it does not apply to comprehensive plan amendments and legislative hearings. Instead, comprehensive plan amendments and legislative hearings are governed by chapter 163. Since the City was not required to follow section 166.041, the 2011 Amendments cannot be invalid for failing to comply with its requirements. If the court reaches this conclusion on rehearing, it will have to decide Mr. Anderson’s primary argument: whether section 163.3246 (the 2011 law that the City relied on in adopting the 2011 Amendments) was constitutionally enacted. *Board of County Com’rs of Brevard County v. Snyder*, 627 So.2d 469 (1993). Because state statutes are presumed to be constitutional, the court would apply a standard of review that is favorable to the City.

3. This is not a zoning ordinance, as the court characterized it. Rather, it is a comprehensive land use amendment on its face. Under chapter 163, a rezoning is a “development permit” as defined by section 163.3164(16). The ordinance adopting the 2011 Amendments is a “comprehensive plan” as defined by section 163.3164(10).

4. Chapter 163 preempts chapter 166. Section 163.3184(11) sets forth the procedures for public hearings, and expressly provides “the notice procedures in chapters 125 and 166 are superseded by this section except as provided in [part II of chapter 163].” Section 163.32466 is within part II. Because this section specifically applies to comprehensive plan amendments, it controls over the more general provisions of chapter 166.

C. Overlooked or misapplied facts – Sunshine Law.

1. This ordinance is a readoption of ordinance 2008, which had been the subject of significant debate when originally adopted in 2008, culminating from public discourse and a referendum, as indicated in the digest of minutes of public meetings. Eighty six hearings are documented.

2. The City devised a plan to amend the City’s comprehensive plan the included a repeal or modification of certain provisions of the City’s charter – this happened by constitutional amendment failed and by operation of law when the legislature pre-empted the filed and prohibited it by adopting 163.3167(8), precluding initiation by referendum in regard to any development order or comprehensive plan amendment regardless of size. Robert L. Nabors, *Home Rule Impact of 2011, Repeal and Modification of Growth Management*, *Florida Home Rule Green Book*, § 7.11, 84 (2011).

3. The City is mandated by state law to have a comprehensive plan, its fundamental planning document. All zoning or other specific land development order must be in accordance with the comprehensive plan. § 163.3194, Fla. Stat.

4. There is no question that the *Pyle* and *Kadoura* litigation was pending. Under the plain language of the shade meeting statute, shade meetings may be held to discuss all available options in “strategy sessions related to litigation expenditures.” Cities, by their nature, have more options than private litigants because they have legislative powers, (Article VIII, 32(b), Florida Constitution), which, in some cases, can moot presently pending litigation. The shade meeting notices indicate which pending cases would be mooted. Indeed, the same appellate court mooted the pending *Kadoura* appeal after the referendum was passed. *Kadoura* (“Exemption is limited to the actual settlement of presently pending litigation.”). Each circuit civil number was cited and these discussions were strategy sessions related to litigation expenditures.

5. It is expected that the comprehensive plan amendment at issue in the litigation, which was being considered by the city-wide and state-wide electorate, would involve “a wide range of political and policy issues” to evaluate and weigh against the costs of pursuing various litigation strategies. Although it was necessary for the City to discuss these issues to put the costs of its options in context, the appellate court found that talking about these issues exceeded the scope of strategy “relating to litigation expenditures,” and, therefore, violated the shade meeting statute.

6. The court concluded that the City was “[f]inding a way to adopt the comprehensive plan amendment, and avoid future litigation” regarding the readopted amendment. However, the City was not simply talking about how to avoid future litigation—through the 2011 Amendments, the City was trying to finalize the 2008 adoptions and referendum results that were challenged in the *Pyle* and *Kadoura* litigation.

7. A sufficient “cure” occurred because it was voted on again after full public discussion and participation. It has already been through local public hearings in 2008, a referendum, a DOAH trial, a Department of Community Affairs review, and an administrative appeal before the First District Court of Appeals.

8. Quasi-judicial actions, like rezoning, require the government body to make findings of fact and conclusions of law to create a record sufficient for review in a certiorari appeal. By contrast, the government body is not required to make findings of fact and conclusions of law, and motives of elected officials are irrelevant. *Manatee County v. Estech General Chemicals Corp.*, 402 So. 2d 75, 76 (Fla. 2d DCA 1981) (quashing order compelling county commissioner to testify as to reasons for disapproving application of regional impact because “the motive of the governmental entity in taking action, much less the motive of an individual commissioner in voting, has no relevance.”). The City Commission was not

required to add anything after several hours of public comment. Therefore, its action was not “perfunctory ratification” or “ceremonial acceptance.”

9. Because it was error to void the adoption of a comprehensive plan amendment by applying rezoning standard, the court must reach the remedy issue which whether a Sunshine Law violation can void a plan endorsed by the electorate. *Spiegel v. Knight*, 224 So.2d 703, 706 (Fla. 3d DCA 1969) (citing Fla. Jur., Elections of § 123 (“where ballots have been cast by voters who were, at the time, qualified to cast them, informalities or irregularities will not invalidate, where election results were not changed.”)).

10. The issue of the city manager’s authority to contract for services up to a certain dollar threshold was abandoned by the plaintiff/appellant because he filed his notice of appeal after the issue was briefed but before judge ruled.

D. Misapprehended law – Sunshine Law.

1. Under the quasi-judicial standard the court applied, that findings of fact and conclusions of law are required. However, in a legislative context, there is no such requirement or any necessary level of discussion at the public hearing.

2. The “cure meetings” were held on December 13, 2010, and January 6, 2011. The first lasted three hours, and the second lasted four hours. [R. 2932-33, 2989, 3440-3672]. These were part of a larger pattern of 86 public meetings at which the City’s comprehensive plan and the litigation surrounding were discussed. A digest of the minutes of those meetings are in the record. [R. 2922-35]. When authorized by a remedial state law to “readopt [] by ordinance,” how do elected official make a different decision? Unlike *Tolar*, in which there was a “ceremonial acceptance of secret actions or merely a perfunctory ratification of secret decisions,” this decision relates to “a comprehensive plan amendment adopted pursuant to 163.22465, subject to voter referendum by local charter, and found in compliance before June 2, 2011, may be readopted by ordinance.” Section 163.32465 was the pilot program mandated by the legislature for cities within Pinellas County.

Timeframe for Filing Motion for Rehearing

Note that the timeframe for filing a motion for rehearing is only 15 days from the date of the opinion. Since the opinion was issued on October 15, the motion for rehearing must be filed by October 30.

Finally, we would note that the transcripts at issue in the appeal were released in March 2011. The City Attorney has requested that the City Clerk compile a list of all shade meeting transcripts. We recommend that this list of transcripts in all City litigation matters be reviewed and that a report be filed with you as to which ones should be released in light

of the recent appellate decisions, for your consideration at a public meeting. We also recommend that the City Commission release this memorandum to the public.