

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT  
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

CITY OF VERO BEACH, FLORIDA,  
a municipal corporation created pursuant  
to the laws of the State of Florida  
Plaintiff,

CASE NO.: 31 2022 CA 000632

vs.

VERO BEACH PRESERVATION ALLIANCE, INC.,  
a Florida not for profit corporation; LESLIE TILLEY,  
KAREN MARCIL, and INDIAN RIVER COUNTY  
SUPERVISOR OF ELECTIONS,  
Defendants.

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**ORDER GRANTING PLAINTIFF, CITY OF VERO BEACH'S,  
COMPLAINT FOR DECLARATORY JUDGMENT**

This matter came before the Court for a non-jury trial on November 4, 2022, on the City of Vero Beach's ("City") Complaint for Declaratory Judgment. At the trial, the City and Vero Beach Preservation Alliance, Inc. ("Alliance") presented oral and written evidence via witnesses and documents. The City presented the live testimony of Monte Falls, the City Manager, Jason Jeffries, the City's Planning Director, Barry Segal, attorney representing the not-for-profit corporation Vero Beach Dog Park, Inc., Brady Roberts, Executive Director of the not-for-profit corporation Vero Beach Museum of Art, Inc., and Stuart Keiller, Executive Director of the not-for-profit Youth Sailing Foundation of Indian River County, Inc. The Alliance presented the live testimony of Karen Marcil, President of the not-for-profit Vero Beach Preservation Alliance, Inc. The Court took extensive notes during the trial, considered the arguments of counsel, reviewed the pretrial briefs and draft orders provided by counsel at the trial, and reviewed in detail the case law provided therein and argued by both sides, as well as the statutory provisions relevant to the issues at hand. Having considered the arguments and all of the written filings from all parties, together with the oral and written evidence submitted and accepted into evidence at the trial, the Court enters this Declaratory Judgment based upon the following Relevant Procedural History, Findings of Fact and Conclusions of Law:

### **RELEVANT PROCEDURAL HISTORY**

On September 30, 2022, the City filed its Complaint for Declaratory Judgment, Permanent Injunction and Request for Priority Setting. On September 2, 2022, Circuit Court Judge Janet Croom issued an order recusing herself. On September 6, 2022, the case was reassigned to Circuit Court Judge Laurie Buchanan. Judge Buchanan issued an Order on Agreed motion for Enlargement of Time to File Answer on September 15, 2022. The Indian River County Supervisor of Elections filed its Answer & Affirmative Defenses on September 16, 2022, and has adopted a neutral stance in this matter.

The Court conducted an expedited case management conference on October 3, 2022. On October 4, 2022, this Court issued an Order Setting case for Trial on October 25, 2022. The Alliance and fellow defendants Gary Froomjian, Leslie Tilley, and Karen Marcil filed an Answer and Defenses with a request to drop the individual defendants on October 4, 2022, followed by an Amended Answer and Defenses on October 6. The City filed its Reply to Amended Answer and Defenses on October 11, 2022. The City then dropped Froomjian as a party on October 11, and the Court issued an Order to dismiss without prejudice the City's Allegations of Individual Liability against Tilley and Marcil on October 18, 2022. On October 27, 2022, the Court issued an order determining the Indian River County Supervisor of Elections to be an indispensable party.

The Alliance sought and obtained from this Court both an enlargement of time and a continuance of the trial date. On October 27, 2022, this Court issued an Order setting a non-jury trial date for November 4, 2022. This Court ultimately conducted that non-jury trial, receiving and hearing the testimony of witnesses, written evidence, and arguments from the parties on November 4, 2022. The Court requested and received proposed orders from the parties, and withheld its ruling until 7:01 P.M. (i.e., after the closing of the polls) in an effort to avoid any potential influence to the results of the referendum election.

City Manager Falls testified to (1) the details of how the Alliance submitted the proposed referendum to the City, (2) the Alliance's submittals of ballot language that differed from the ballot language in the petition, (3) the City's submission of ballot language approved by the Alliance to the Supervisor of Elections, (4) the scope and details of the 26 various Charter-protected city properties (the "listed properties") and facilities, the transfer of which is prohibited by the Charter without referendum approval, (5) the impacts to planned expansions of public projects on the listed

properties that would arise from requiring referendum approval, (6) the impacts to the other proposed referendum charter amendment that would approve a concept plan for the “3 Corners Project,” and (7) the failure of the Alliance’s ballot language to fully and accurately disclose these impacts to voters. City Planner Jeffries testified to (1) the details of the public participation for the “3 Corners Project,” (2) the lack of clarity and specificity in the ballot language used to describe the application of a new referendum requirement to certain expansions of “structures,” and (3) the failure of the Alliance’s ballot language to fully and accurately disclose impacts to future city projects, including the “3 Corners Project.” Witnesses Segal, Roberts, and Keiller testified to how they believe the proposed referendum proposal will negatively impact donations and fund raising for their planned expansions to the Vero Beach Dog Park, the Vero Beach Museum of Art, and the Youth Sailing Foundation training facility.

The Alliance’s witness, Karen Marcil, testified that its board of directors determined to propose the ballot language to amend the City Charter after a June 7, 2022, vote of the City Council to approve an expansion to the Marina. Witness Marcil testified to the development of the initial ballot language by June 30, 2022, and the submittal of new ballot language to the City on August 2, 2022. Witness Marcil testified that she talked to city council members in an effort to obtain their support for the referendum.

### **FINDINGS OF FACT**

1. The Alliance submitted a referendum petition to voters through the distribution of individual cards referred to as “referendum petition cards” labelled “Referendum Petition for City of Vero Beach Registered Voters” (“the petition”) beginning on or about July 13, 2022.
2. The parties agree that the Alliance has collected the requisite signatures on the petition proposing an amendment to the City Charter.
3. The petition asks electors to print their name, address, zip code, voter registration number, or date of birth.
4. Each petition asks electors to print their name, address, zip code voter registration number or date of birth.
5. The petition has a date line and a signature line for an elector to sign and fill out.

6. The petition states: “I \_\_\_\_\_ [print name as it appears on your voter ID card], being a registered voter in the City of Vero Beach, petition the City of Vero Beach to place on the November 2022 ballot a question to amend Sec. 5.05 of the City Charter as follows:

“The South Marina/dry storage property shall be added to the protected properties list, and all listed properties in that Section shall be further protected by limiting the increase in size of structures thereon to no more than 20 [twenty] percent of their existing size, adding any new structures or any increase greater than 20 percent shall not be permitted without the approval of the majority of City electors by referendum proposing such addition or alteration.”

7. The ballot summary in the petition is not in the form of a “yes/no” question.

8. The petition does not list or contain a ballot title.

9. In an attempt to correct the deficiencies, on August 2, 2022, the Alliance sent new ballot language, informing the City that “the petition language is not exactly the same as the actual ballot question, although the essence is the same.”

10. The Alliance’s substituted ballot language provides:

“Shall the City Charter be amended by adding to Section 5.05 the land adjacent to and north of Alex MacWilliam Park designated as Marina Dry Storage; and shall all Section 5.05 listed properties be restricted to future structures being added of no greater than 500 square feet, or existing structures increased by 20% [twenty percent] in size, without a referendum majority vote in favor of same.”

Title: Amendment of the Vero Beach Charter Section 5.05

11. The City sent the Alliance’s attorney an email on August 12 notifying her that the City did not believe that the proposed ballot language complied with § 101.161, *Florida Statutes*, but did not propose any alternative language to the Alliance attorney.

12. On August 14, 2022, the Supervisor of Elections certified that a sufficient number of petition signatures were submitted to place the proposed referendum on the ballot for November 8, 2022.

13. On August 15, the Alliance’s attorney sent two emails to the City, including one that contained a final version of substituted ballot language as follows:

“Shall the City Charter be amended by adding to Section 5.05 the land north of Alex MacWilliam Boat Basin Park/Bob Summers Park designated as South Marina Dry Storage; and adding to listed properties a further restriction on any future structures being added thereto of anything greater than 500 total square feet, or existing structure increased by 20% total size [footprint and volume], without a referendum approval by City voters in favor of same.”

14. The Alliance approved the substitute ballot language to be placed on the November 8, 2022, election ballot.

15. The substitute ballot language is not the same ballot language contained in the referendum petition cards.

16. The Supervisor of Elections placed the substituted ballot language on the November 8, 2022, general election ballot, as requested by the Alliance.

### **CONCLUSIONS OF LAW**

#### ***I. Declaratory judgment is appropriate.***

Before a petition to amend a municipal charter is submitted to the electors, if the petition appears to be constitutionally invalid or in violation of general law on their face, a municipality may ask for a declaratory judgment from the court seeking a determination as to the validity of the proposed amendment. *See Holzendorf v. Bell*, 606 So. 2d 645, 646 (Fla. 1st DCA 1992); *see also W. Palm Beach Assoc. of Firefighters v. Bd. of City Comm'rs*, 448 So. 2d 1212, 1213-14 (Fla. 4th DCA 1984) (finding that a declaratory judgment to determine validity of proposed charter amendments is preferred method). The City of Vero Beach has correctly availed itself of declaratory judgment to determine the validity of the charter petition submitted by the Alliance.

#### ***II. Statutory requirements for placement of a charter amendments on the ballot.***

Section 101.161(1), *Florida Statutes* provides in pertinent part:

(1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The ballot summary of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The ballot summary of the amendment or other public measure shall be an explanatory statement, not

exceeding 75 words in length, of the chief purpose of the measure... The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of (e.s.).

The provisions of Section 101.161(1) of *Florida Statutes* are mandatory, and strict compliance is required. Section 166.031, *Florida Statutes*, provides:

166.031 Charter amendments.—

(1) The governing body of a municipality may, by ordinance, or the electors of a municipality may, by petition signed by 10 percent of the registered electors as of the last preceding municipal general election, submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter except that part describing the boundaries of such municipality. The governing body of the municipality shall place the proposed amendment contained in the ordinance or petition to a vote of the electors at the next general election held within the municipality or at a special election called for such purpose. (e.s.).

Section 101.161, *Florida Statutes*, provides that each constitutional amendment or other public measure that is submitted to the vote of the people must contain both a ballot title not exceeding 15 words and a ballot summary that does not exceed 75 words.

The cases on this issue typically addressed challenges to ballot language long-before the election. In this case, the court and the parties did not have the luxury of time. The Alliance was formed in April 2022 in response to the City's proposed marina project. The City voted in June 2022 to go ahead with the project. The Alliance immediately thereafter began to form its response by beginning to collect petitions in July 2022. It is undisputed and this court finds that the ballot summary contained in the petition cards was not in the form of a question and there was no ballot title. However, it is also undisputed, and this court finds, that the ballot summary appearing on the actual ballot *was* in the form of a question.

### ***III. The final ballot language is not the same ballot language contained in the petition.***

It is undisputed that the ballot summary that appears on the actual voter ballot is not the same as the ballot summary contained in the signed, referendum petition cards. The Alliance

submitted this changed language to the City on August 2, and then again modified the changed language on August 15 after certification of the petition signatures with the Supervisor of Elections. The “before” and “after” language is provided below:

REFERENDUM PETITION FOR CITY OF VERO BEACH REGISTERED VOTERS (July 13)

**NOTE:** Please complete all information requested below and affix your signature at the bottom. Information will become public record once submitted to the Indian River County Supervision of Elections.

I \_\_\_\_\_ [print name as it appears on your voter ID card], being a registered voter in the City of Vero Beach, petition the City of Vero Beach to place on the November 2022 ballot a question to amend Sec. 5.05 of the City Charter as follows:

The South Marina/dry storage property shall be added to the protected properties list, and all listed properties in that Section shall be further protected by limiting the increase in size of structures thereon to no more than 20 [twenty] percent of their existing size, adding any new structures or any increase greater than 20 percent shall not be permitted without the approval of the majority of City electors by referendum proposing such addition or alteration.

REFERENDUM TO AMEND SECTION 5.05 OF THE CITY OF VERO BEACH CHARTER  
(August 15, 2022)

Shall the City Charter be amended by adding to Section 5.05 the land north of Alex MacWilliam Boat Basin Park/Bob Summers Park designated as South Marina Dry Storage; and adding to listed properties a further restriction on any future structures being added thereto of<sup>1</sup> anything greater than 500 total square feet, or existing structures increased by 20% total size (footprint and volume), without a referendum approval by City voters in favor of same?

The language now appearing on the ballot differs from the petition language used by the Alliance to gather referendum petition card signatures.

The Alliance twice submitted modifications to the original ballot language *after* the signatures were gathered for the petition. This City alleges that this impermissibly interfered with the signature gathering process in that the petitions themselves tell voters that the language that follows their signature will appear on the ballot when it has not. The City argues that the ballot summary must be identical and this failure to have identical language on the referendum petition cards and the actual ballot is fatal, as is the Alliance’s failure to put a ballot title on the referendum

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<sup>1</sup> The original final version submitted by the Alliance contained the word “or” instead of “of.” Although there was a typographical error in the language that appears on the actual ballot, the inadvertent change from “or” to “of” is not the cause of any substantial ambiguity.

petition cards<sup>2</sup>. This court disagrees. It was obvious that the language on the referendum petition cards was not in compliance with Section 166.031, *Florida Statutes* because it was not in the form of a question and did not contain a ballot title. However, this court could not find a case that stands for the proposition that if the language is not 100% identical or if the petition card did not contain a ballot title, the proposed ballot initiative must be stricken. There is a clear preference to give deference to the voters, whenever the statutory requirements are met, so long as the final ballot language is clear, unambiguous and not misleading.

The Alliance argues that if there were any deficiencies with the proposed ballot summary, the City is responsible to provide the “ballot summary” in compliance with the statute. Although the Alliance cites to *Shulmister v. City of Pompano*, 798 So. 2d 799 (Fla. 4<sup>th</sup> DCA 2001), claiming that this case is controlling precedent, the *Shulmister* is not factually on point. In *Shulmister*, the Chair of an initiative committee circulated a petition of an amendment to a city charter, unlike here, the proposal contained a ballot summary. The ballot summary included the phrase “all commencing before the municipal election of March 1999.” Without this phrase, the ballot summary would have been less than 75 words. Furthermore, by the time the language was ready to be placed on the ballot, that language was obsolete. The Appellate Court found that the City could strike this phrase (as it was surplusage) and present the question to voters. In *Shulmister* the Appellate Court found that placing the explanatory statement on the ballot was a ministerial act. In that instance, the ballot language was already written and provided to electors who signed petitions. The only thing that was needed for the *Shulmister* ballot summary to pass muster was to delete eight superfluous words in the ballot summary that referred to an effective date that had already passed. Nothing in *Shulmister* imposes an affirmative duty upon the City to re-write the Alliance’s proposed ballot summary or to correct any statutory deficiencies.

Drafting a ballot summary is not a “ministerial” function. Indeed, drafting a ballot summary is complex and the subject of much litigation. A ministerial function cannot be subjective. Preparing a ballot summary to determine the chief purpose of a measure and material terms is subjective. The City was not the sponsor of the petitions and accordingly, the City was not in a

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<sup>2</sup> The City also argues that the ballot summary on the referendum petition cards exceeds 75 words, but this court cannot find conclusively that it does. Due to the use of “/”, the summary on the petition cards contains 75 or 76 words, depending upon whether one counts the “/” words as 2 words or one. The ballot summary on the actual ballot is less than 75 words.



position to interpret the sponsor's purpose or intent in putting forth the petitions. This is particularly true here as the sponsor itself submitted multiple drafts of ballot language *after* the referendum petition cards were signed.

#### ***IV. Drafting new ballot language is not a ministerial act.***

The Florida Supreme Court defined a ministerial act by explaining, "Duty is 'ministerial' when positively imposed by law without depending on officer's judgment or discretion, where performance is required at time and in manner specifically designated." *First Nat. Bank v. Filer* (Fla. 1933). Black's Law Dictionary, 8<sup>th</sup> Ed., p. 1017 defines the word "ministerial" to mean, "Of or relating to an act that involves obedience to instructions or laws instead of discretion, judgment or skill (the clerk's ministerial duties include recording judgments on the docket)." *Marbury v. Madison*, 5 U.S. 137, 157 (1803), discussed a ministerial act as "the subsequent duty of the secretary of state prescribed by law, and not to be guided by the will of the president." *Id.* 5 U.S. 157-158. Explaining that it was mandatory for the Secretary of State to affix a seal and deliver a document which was "not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued." *Id.* at 158.

A ministerial function cannot be subjective. Drafting new ballot language is complex and the subject of much litigation. The City is not in a position, nor does the plain language of Sections 166.031 and 101.161(1), *Florida Statutes*, require that the City interpret or modify the charter amendments' chief purpose or intent in putting forth the petitions. "If the ballot language does not satisfy the requirements of the law, we cannot rewrite it to correct its flaws: the only remedy is for the proposed amendment to be stricken from the ballot." *Smith v. Am. Airlines, Inc.*, 606 So. 2d 618, 621-22 (Fla. 1992). Cases pertaining to proposed state constitutional amendments are also applicable to local government charter amendments as well. *Elected County Mayor Political Comm., Inc. v. Shirk*, 989 So. 2d 1267, 1274 (Fla. 2d DCA 2008).

Section 166.031, *Florida Statutes* provides that the governing body of the municipality shall *place* the proposed amendment contained in the petition to a vote. Section 101.161(1), *Florida Statutes*, requires that the public measure shall be an explanatory statement, not exceeding

75 words in length, of the chief purpose of the measure. Both statutes are contained in “The Florida Election Code,” chapters 97-106, *Florida Statutes*. See Section 97.011, *Florida Statutes*.

The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.” *Fla. Dep’t of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005). “Related statutory provisions must be read together to achieve a consistent whole, and ... ‘[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.’” *Heart of Adoptions, Inc., v. J.A.*, 963 So. 2d 189, 199 (Fla. 2007) (quoting *Woodham v. Blue Cross & Blue Shield, Inc.*, 829 So. 2d 891, 898 (Fla. 2002)).

Reading Sections 166.031 and 101.161(1), *Florida Statutes*, *in pari materia* places no requirement on municipalities to *prepare or draft* new ballot summaries or titles. If the sponsor of an amendment fails to submit ballot language that conforms to Sections 166.031 and 101.161(1), the City cannot be responsible for flaws within ballot language submitted to the City and approved by the sponsor of the proposal. “A phrase must be viewed in the context of the entire statutory section.” *WFTV, Inc. v. Wilken*, 675 So. 2d 674, 678 (Fla. 4th DCA 1996). “[W]e do not ‘construe statutory phrases in isolation; we read statutes as a whole.’” *C.S. v. S.H.*, 671 So. 2d 260, 268 (Fla. 4th DCA 1996) (quoting *Arthur Young & Co. v. Mariner Corp.*, 630 So. 2d 1199, 1202 n.4 (Fla. 4th DCA 1994)). See, e.g., *Acad. for Positive Learning, Inc. v. Sch. Bd. of Palm Beach Cty.*, No. 4D19-2816, 2020 WL 1932971, at \*3 (Fla. 4th DCA Apr. 22, 2020) (“In addition to selectively reading the statute, appellants isolate it from its context—the statutory framework for funding schools.”).

Delivering a document, stamping a document so that it is recorded, affixing a seal to a document, or even striking 8 superfluous words, as in *Shulmister*, are all ministerial acts. *Shulmister v. City of Pompano*, 798 So. 2d 799 (Fla. 4<sup>th</sup> DCA 2001). There is no case or controlling precedent that requires a municipal government to repair a deficient ballot summary or to prepare a completely new ballot summary when the proponent of the measure has failed to do so completely or correctly. The Court finds as a matter of law that the municipal government cannot be commanded to perform an act, in this case drafting ballot summary language, that is not ministerial in nature and that is not otherwise explicitly required by statute.

***V. The substituted ballot language fails to comply with Section 101.161, Florida Statutes, because it is unclear, ambiguous and misleading***

Section 101.161, *Florida Statutes*, mandates that the ballot summary for a public measure submitted to the electorate be “clear and unambiguous.” Under Florida law, if a ballot question fails the statutory requirements of clarity and accuracy, it must not reach the ballot. *Let Miami Beach Decide v. City of Miami Beach*, 120 So. 3d 1282, 1291 (Fla. 3d DCA 2013). The ballot summary must accurately communicate the effects of the proposal such that the voter will be provided with “fair notice of the content of the proposed measure so that he or she will not be misled as to its purpose and may intelligently cast his or her vote.” *Matheson v. Miami-Dade Cnty.*, 187 So. 3d 221, 225 (Fla. 3d DCA 2015) (quoting *City of Miami v. Staats*, 919 So. 2d 485, 487 (Fla. 3d DCA 2005)). A ballot summary is fatally defective if it omits material facts that are essential to understanding the changes in the proposed amendment. *Fla. League of Cities v. Smith*, 607 So. 2d 397, 399 (Fla. 1992); *Advisory Op. to Att’y Gen.- Ltd. Political Terms in Certain Elective Offices*, 592 So. 2d 225, 228 (Fla. 1991); *Wadhams v. Bd. of Cnty. Comm’rs*, 567 So. 2d 414,416-17 (Fla. 1990); *Askew v. Firestone*, 421 So. 2d. 151, 155-56 (Fla. 1982). No such clarity and specificity can exist where, as here, the original ballot language is modified by its proponents as to a material term ***after*** the petition cards. Any changes or omissions as to the material terms creates confusion, ambiguity and is misleading to the voters and must be stricken. In this case, unfortunately there is a distinct difference in a key material term, “structure,” between the referendum petition cards that were signed and the final ballot language.

The court heard undisputed testimony as to the definition of the term “structure.” Structures are defined as anything that is constructed on property, no matter what the size, and is not limited to actual buildings. In reference to new structures, the referendum petition cards states “adding *any* new structures...shall not be permitted without the approval of the majority of City electors by referendum proposing such addition or alteration.” (emphasis added) However, the final ballot language submitted by the Alliance refers to a “restriction on any future structures being added thereto of *anything greater than 500 total square feet.*” (emphasis added). This is a substantial change to a material term that creates ambiguity and is misleading to the voters who signed the referendum petition cards. It was represented on the petition cards that voter approval would be

required before the City could construct *any* new structure, regardless of the size of the structure. However, the final ballot summary language exempts from voter approval any new structures that are *less than 500 total square feet*. This is a substantial change to a material term and is exactly what is prohibited by Section 166.031, *Florida Statutes*.

It is therefore ORDERED that:

- A. The City's request for Declaratory Judgment is GRANTED.
- B. The ballot language prepared by the Vero Beach Preservation Alliance contained on the November 8, 2022, election ballot and election results are hereby declared invalid, null and void based upon Sections 166.031 and 101.161(1), Florida Statutes.
- C. The Indian River County Supervisor of Elections is permanently enjoined from publishing or certifying, unless otherwise required by law, the results of the subject referendum.

ORDERED in Fort Pierce, St. Lucie County, Florida, on November 8, 2022.



Electronically Signed by Circuit Judge Laurie E. Buchanan  
7:00 pm, Nov 08, 2022

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Laurie E. Buchanan  
CIRCUIT JUDGE

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