

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

October 9, 2006

CASE NO.: 2D06-4339 L.T.
No. : 20006-CA-7727NC

Sue Cobb, Florida
Secretary Of State

v. Board Of County
Commissioners Of Sarasota

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellees Sarasota Alliance for Fair Elections', Kindra Muntz's, and Susette Bryan's motion to correct or clarify order of court dated October 4, 2006 is granted. This court overlooked Appellees Sarasota Alliance for Fair Elections', Kindra Muntz's, and Susette Bryan's October 3, 2006, response to Secretary of State Sue M. Cobb's suggestion of certification to the Florida Supreme Court, a copy of which is attached to this order. Therefore, we reissue this court's October 4, 2006, order and replace the first sentence of the order with the following, "Appellant has filed a suggestion, in which Appellee Board of County Commissioners of Sarasota County, concurs, and Appellees Sarasota Alliance for Fair Elections, Kindra Muntz, and Susette Bryan object, requesting that this court certify this appeal as one requiring immediate resolution by the Florida Supreme Court, pursuant to Florida Rule of Appellate Procedure 9.125."

After reviewing Appellees Sarasota Alliance for Fair Elections', Kindra Muntz's, and Susette Bryan's response, this court reaffirms its certification of this appeal to the Florida Supreme Court, pursuant to rule 9.125, as one presenting an issue of great public importance and involving circumstances which require that the Florida Supreme Court immediately resolve the issue rather than allowing the normal appellate process to run its course.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Thomas D. Hall-enclo.
Stephen E. De Marsh, Esq.
Thomas D. Shults, Esq.

Peter Antonacci, Esq.
Ronald A. Labasky, Esq.
Karen Rushing, Clerk

Allen C. Winsor, Esq. Kenza
Van Assenderp, Esq.
Frederick J. Elbrecht, Esq.

bp


James Birkhold
Clerk



SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

FLORIDA SECRETARY OF STATE,
SUE COBB, in her official capacity,

Appellant,

2nd DCA Case No. 2D06-4339
L.T. Case No. 2006CA 7727N~

v.

(Consolidated) \- "-,

BOARD OF COUNTY COMMISSIONERS
OF SARASOTA COUNTY, FLORIDA; et al.,

Appellees.

RESPONSE TO SECRETARY OF STATE SUE M. COBB'S SUGGESTION
OF CERTIFICATION TO THE FLORIDA SUPREME COURT

COME NOW the Appellees, Sarasota Alliance for Fair Elections, Kindra Muntz, and Susette Bryan and hereby serve this Response pursuant to the Order of this Court dated September 27, 2006 and state:

1. This is an appeal from a pre-election judgment of the lower court that a proposed amendment to the Sarasota County Charter be submitted to the voters on November 7, 2006. (See September 13, 2006 Final Judgment attached). If approved by the people of Sarasota County, the amendment will take effect in 2008 and apply only to Sarasota County. As such, the judgment effects only one county and lacks statewide application so as to render the Final Judgment ". . . of great public importance" as required by Fla. R. App. P. 9.125. See American Civil Liberties

Union of Fla. v. Hood, 881 So. 2d 664 (Fla. Ist DCA 2004) and Harris v. Coalition to Reduce Class Size, 824 So. 2d 245 (Fla. Ist DCA 2002) where a proposed constitutional amendment and a decision declaring unconstitutional a statute concerning constitutional amendments were deemed to be of such great public importance that certification to the Florida Supreme Court was justified.

2. Should the proposed amendment pass, Sarasota County would, in 2008, begin using a paper ballot voting system that is similar to or the same as the paper ballot systems presently used by 52. of Florida's 67 counties. Contrary to the Secretary of State's argument, the proposed amendment, if passed by the electorate, will provide for more, not less, consistency between Sarasota and other counties.

3. This District Court is the appropriate forum for review of a final judgment in a pre-election challenge to a proposed charter amendment. *See, e.g., Citizens for Responsible Growth v. City of St. Pete Beach* So. 2d. 2006 WL 2381941 (Fla. 2d DCA 2006). As recognized by this Court in Citizens for Responsible Growth v. City of St. Pete Beach, *supra*, only when a proposed charter amendment is unconstitutional in its entirety can it be removed from the ballot. The arguments made by the opponents of the charter amendment in Citizens for Responsible Growth are similar to those made by the opponents to the charter amendment herein. In Citizens for Responsible Growth, the opponents argued that

Chapter 163, Florida Statutes, sets forth "all encompassing legislative directives" regarding local land use decisions and therefore the charter amendments were pre-empted. This District Court was more than capable of evaluating the pre-emption argument in Citizens for Responsible Growth without certifying the case to the Florida Supreme Court under Fla. R. App. P. 9.125.

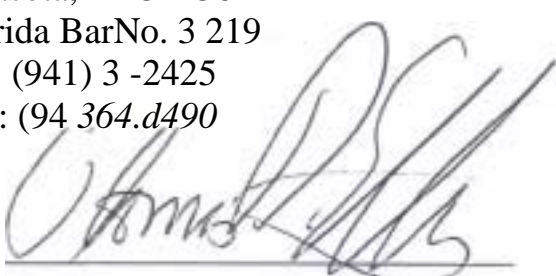
4. The concern expressed by the Secretary of State that there may be insufficient time for a complete appellate review of the charter amendment by the November 2008 election is premature and unwarranted. The Secretary of State and Supervisor of Elections have waived the stay provisions of Fla. R. App. P. 9.310(b)(2) and no party has sought expedited review of this matter. Accordingly, there is no need for immediate resolution by the Supreme Court as required by Fla. R. App. P. 9.125. Moreover, if the people of Sarasota County do not approve the proposed amendment at the November 7, 2006 election, this case will be moot and there will be no need for this or any other court to expend further judicial labor in this matter. Finally, if the proposed amendment is approved by the voters there is more than sufficient time for the District Court and, if necessary, the Florida Supreme Court, to make a determination concerning this appeal.

WHEREFORE the Appellees, Sarasota Alliance for Fair Elections, Kimbra Muntz and Susette Bryan, respectfully request this Court to deny the Suggestion for Certification to the Florida Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile and U.S. Mail to Stephen E. DeMarsh, County Attorney, and Frederick J. Elbrecht, Assistant County Attorney, Office of the County Attorney, 1660 Ringling Boulevard, Sarasota, Florida 34236, (941) 861-7267; Kenza Van Assenderp, Esquire and Ronald A. Labasky, Esquire, Young Van Assenderp, P.A., 225 S. Adams Street, Suite 200, Tallahassee, Florida 32301-1700, (850) 561-6834; and Peter Antonacci, Esquire, and Allen C. Winsor, Esquire, Gray Robinson, P.A., P.O. Box 11189, Tallahassee, Florida 32302-3189, (850) 577-3311 this 2nd day of October, 2006.

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By: 
Thomas D. Shults,
EsqUIJ\

IN THE CIRCUIT COURT FOR SARASOTA COUNTY, FLORIDA

BOARD OF COUNTY COMMISSIONERS
OF SARASOTA COUNTY, FLORIDA,
Plaintiff,

v.

CASE NO. 2006-CA-7727NC

SARASOTA ALLIANCE FOR FAIR
ELECTIONS, a registered Florida political
action committee; KATHY DENT, as
Supervisor of Elections for Sarasota County,
Florida; FLORIDA SECRETARY OF STATE,
SUE COBB, in her official capacity,

Defendants.

I

SARASOTA ALLIANCE FOR FAIR
ELECTIONS, INC., a Florida not-for-profit
Corporation, KINDRA L. MUNTZ,
individually, and SUSETTE BRYAN,
individually,

Petitioners,

v.

SARASOTA COUNTY, FLORIDA, a
political subdivision of the State of Florida;
KATHY DENT, as Supervisor of Elections for
Sarasota County,

Respondents.

I

FINAL JUDGMENT

The Board of County Commissioners of Sarasota County, Florida ("Board") seeks
a declaration of the constitutionality of a proposed amendment to the Sarasota County

. . .

charter. ¹ The proposed charter amendment was filed with the Supervisor of Elections for Sarasota County on or about June 30, 2006.² On June 30, 2006, the Supervisor of Elections notified Sarasota County government of the filing of the proposed charter amendment. The Board of County Commissioners is required by the Sarasota County charter to submit the proposed charter amendment to the voters at a special election to be held within 60 days of the filing of the proposed changes with the Supervisor of Elections.³

Sarasota Association for Fair Elections ("S.A.F.E."), the sponsor of the proposed charter amendment (together with co-petitioners, Muntz and Bryan) seeks a writ of mandamus compelling the Board of County Commissioners to advertise and enact an ordinance setting the proposed charter amendment for special election.

The sole issue for the court's determination in this case is whether the proposed amendment is unconstitutional in its entirety. Citizens for Responsible Growth v. City of St. Pete Beach, S.2d, 2006 WL 2381941 (Fla. App. 2 Dist. 2006). Two arguments are advanced by the parties opposing to the proposed amendment. First, it is argued that Florida's general election laws expressly or impliedly preempt the field of elections so that Sarasota County cannot enact the proposed amendment. Second, it is argued that even if the subject of elections is not preempted by general law, the proposed amendment conflicts with general law so that compliance with the one results in violation of the other.

¹ A copy of the proposed charter amendment is attached as Appendix A.

² The parties concede that the Supervisor of Elections certified sufficient petitions were signed by Sarasota County electors in accordance with Section 7.1 (i) of the Sarasota County charter.

³ Section 7.1, Sarasota County Charter.

The court, having considered the evidence presented at trial and the argument of counsel for the parties, finds as follows:

1. The general law of the state does not expressly or impliedly preempt the field of elections so that Sarasota County cannot act on the proposed charter amendment.

2. The proposed charter amendment and the general law of Florida do not conflict such that compliance with one would result in violation of the other.

Section 101.5604, Florida Statutes (2006) while granting discretion to the Board to adopt and purchase voting systems, mandates only that the Board adopt and purchase a voting system approved by the Department of State. Nothing in Section 101.5604 prohibits the electorate from more narrowly restricting the field of voting machines from which the Board may choose.

The Board argues, and the evidence establishes, that the Department of State has not yet approved a voting system that will provide a voter verified paper ballot while at the same time providing accessibility to voters with disabilities as required by Section 101.715(1), Florida Statutes (2006).⁴ Given, however, that general law does not prohibit the use of a voting system as contemplated in the proposed amendment, the fact that such a system is not currently an approved system does not support a finding of conflict. This court cannot speculate what voting systems will have been approved by the effective date of the proposed amendment.

Section 6.2A(I) of the proposed amendment provides that the voter verified paper ballot "shall be the true and correct record of the votes cast and shall be the official record for purposes of any audit conducted with respect to any election in which the

⁴The evidence at trial established that such a system is under consideration by the Department of State.

voting system is used. While votes may be tallied electronically, subject to audit, no electronic record shall be deemed a ballot."

Section 97.021(3), Florida Statutes (2006) provides, in pertinent part, as follows:

Definitions.

(3) "Ballot" or "official ballot" when used in reference to:

(b) "Electronic or electromechanical devices" means a ballot that is voted by the process of electronically designating, including by touchscreen, or marking with a marking device for tabulation by automatic tabulating equipment or data processing equipment.

Section 101.5602, Florida Statutes (2006), in pertinent part, reads as follows:

Purpose.

The purpose of this act is to authorize the use of electronic and electromechanical voting systems in which votes are registered electronically or are tabulated on automatic tabulating equipment or data processing equipment.

Section 101.5603, Florida Statutes (2006) reads, in pertinent part, as follows:

Definitions relating to Electronic Voting Systems Act. - As used in this act, the term:

(2) "Ballot" means the card, tape, or other vehicle upon which the elector's choices are recorded.

Nothing contained in referenced sections of Florida's general election laws is in conflict with the provisions of Section 6.2A of the proposed amendment. Specifically, nothing contained in the referenced sections prohibits the use of voter verified paper ballots as the "true and correct record of votes cast," or the use of voter verified paper ballots as "the official record for purposes of any audit conducted." Nothing contained in the reference sections prohibits the proposed amendment's prohibition against an

electronic record being deemed a ballot in Sarasota County. Finally, nothing in the proposed amendment transgresses the requirement of Section 101.041, Florida Statutes (2006) that "no vote shall be received or counted in any election, except as prescribed by this code."

Section 6.2A(2) of the proposed amendment mirrors applicable provisions of general law, and, therefore, no conflict exists.

Section 6.2B of the proposed amendment requires mandatory, independent, random audits of Sarasota County's voting system. Section 101.591, Florida Statutes (2006) provides as follows:

Voting System Audit.

- (1) The Legislature, upon specific appropriation and directive, may provide for an independent audit of the voting system in any county. Within 30 days after completing the audit, the person conducting the audit shall furnish a copy of the audit to the supervisor of elections and the board of county commissioners;
- (2) An audit conducted pursuant to subsection (1) shall consist of a study and evaluation of the voting system used during any primary, general, municipal, or presidential preference primary election to provide reasonable assurance that the system is properly controlled, can accurately count votes, provides adequate safeguards against unauthorized manipulation and fraud, and complies with the requirements of law and rules of the Department of State.

Nothing in Section 101.591 prohibits mandatory audits as envisioned by the proposed amendment or more expansive, more stringent audits than those contemplated in Section 101.591 (2). Furthermore, nothing in the proposed amendment provides or requires that, for purposes of an audit, independent auditors handle ballots or ballot cards

in violation of the provisions of Sections 101.572 or 119 .07(5), Florida Statutes (2006). s
Nothing in the referenced statute indicates an intent that the issue of audits of voting
systems is in any way preempted by general law.

Audits of provisional and Military and Overseas ballots are not addressed in
Florida's general election laws. The provisions of the proposed amendment in no way
interfere with the rights of persons casting provisional ballots or the counting of absentee
ballots cast by overseas electors as set forth in Section 101.048. Florida Statutes or Rule
1 S-2.013. Florida Administrative Code. respectively. Nor do the audit provisions of the
proposed amendment appear to have any relevance to the issue of recounts which are
provided for in Sections 1 02. 141(6) or 101.166. Florida Statutes (2006) or Rules IS-2.301 and IS-
2.301(1)(f). Florida Administrative Code. No conflict exists between the
proposed amendment and the referenced statutory or code sections.

Section 6.2C of the proposed charter amendment, prohibiting certification of
elections prior to completion of the mandatory audits provided for in Section 6.2B, does
appear to be in conflict with the provisions of Section 102.141, Florida Statutes.
Furthermore, the opening sentence of Section 6.2C is vague at best when extending the
prohibition against certification to some point in time when "any cause for concern about
accuracy of results has been resolved." However, this court' s examination is limited to
determining whether the proposed amendment is unconstitutional in its entirety.
Rivernate Restaurant Corooration v. Metropolitan Dade County. 369 So.2d 679 (Fla.
3d DCA 1979).

5Sections 10] .572 and]] 9.07(5) require that no person other than the Supervisor of Elections or the
supervisor's employees shall handle or touch ballots.

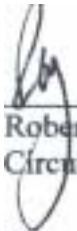
3. The proposed charter amendment can have a valid field of operation even though parts of it may contravene general law. Therefore, the proposed charter amendment must be submitted to the electorate. Citizens for Responsible Growth v. City of Ste Pete Beach. So.2d __,2006 WL 2381941 (Fla. 2d DCA 2006).

4. The judgment should not be interpreted as an expression by the undersigned judge in support of, or in opposition to, the proposed charter amendment

It is therefore

ADJUDGED that the Board of County Commissioners of Sarasota County shall submit the proposed amendment to the Sarasota County Charter to the Sarasota County electorate in accordance with the requirements on provisions of Article VII of the Sarasota County Charter.

ADJUDGED at Sarasota, Florida this 13th day of September, 2006.


Robert B. Bennett, Jr.
Circuit Judge

Copies furnished by facsimile and United States mail to:
Stephen E. DeMarsh, Esquire
County Attorney
Frederick J. Elbrecht, Esquire
Deputy County Attorney Thomas D. Shults, Esquire
Morgan Bentley, Esquire
Ronald A. Labasky, Esquire

APPENDIX A

FULL TEXT OF PROPOSED AMENDMENT

Article VI, Section 6.2 ELECTIONS AND ELECTED OFFICERS. Be it enacted by the people of Sarasota County to amend this section as follows: Effective January 1, 2008, the following additional requirements shall apply to voting in all elections of persons or referenda in Sarasota County to ensure accuracy in elections and voter confidence in election results:

Section 6.2A Voter Verified Paper Ballot.

(1) No voting system shall be used in Sarasota County that does not provide a voter verified paper ballot. The voter verified paper ballots shall be the true and correct record of the votes cast and shall be the official record for purposes of any audit conducted with respect to any election in which the voting system is used. While votes may be tallied electronically, subject to audit, no electronic record shall be deemed a ballot.

(2) Any electronic voting machine shall allow the voter to correct his or her ballot by rejecting overvoted ballots at the time of voting, when voting in person at the polling place.

6.2B Mandatory Audits. In addition to Voting System Audits allowed in F.S. 101.591, the Sarasota County Supervisor of Elections shall provide for mandatory, independent, random audits of the voting system in Sarasota County. These audits shall consist of publicly observable hand counts of the voter verified paper ballots in comparison to the machine counts. The audit shall be conducted on Election Day or within 24 hours after the closing of the polls, in clear public view, by a reputable, independent and nonpartisan auditing firm. These audits shall be conducted for a minimum of 5% of Sarasota County precincts, for 100% of the ballot issues in the selected precincts; and for a minimum of 5% of the total ballots cast in Early Voting periods, 5% of the total Absentee ballots, and 100% of any precinct where there are highly unusual results or events. In addition, audits of 5% of Provisional ballots shall be completed by the 3rd day following the election, and audits of 5% of Military and Overseas (UOCA V A) ballots shall be completed within 24 hours of a primary election and within 10 days following a general election. The random selection of precincts to be audited shall be made in a physical, non-electronic, public drawing at the Supervisor of Elections Office only AFTER machine tallies from the precincts have been made public. This public drawing shall be made on an entirely random basis using a uniform distribution in which all precincts in the County have an equal chance of being selected. If machine counts are unavailable for any reason, the voter verified paper ballots shall be counted by hand by the independent auditors and recorded as the vote count for that precinct. Immediately upon completion of the audit, the persons conducting the audit shall furnish a copy of an audit to the Supervisor of Elections and the Board of County Commissioners and post the results for public view and copying at the Supervisor of Elections Office. The audit shall be considered a Florida public record pursuant to Florida Statute 119.

6.2C Certification of Election Results. No election shall be certified until the mandatory audits are complete and any cause for concern about accuracy of results has been resolved. Any discrepancies between machine counts and hand counts greater than 1 % or, if less than 1 % but sufficient to change the outcome of any measure, shall initiate a comprehensive manual audit of the voter verified paper ballots in all precincts and of all Absentee, Provisional, and Military and Overseas (UOCA VA) ballots. Such comprehensive manual audit shall be completed within 5 days after the election, with the exception of comprehensive audits of Military and Overseas ballots, which shall be completed within 5 days after a primary election, and within 10 days after a general election. Audits shall be completed by a reputable, independent and non-partisan auditing firm as in 6.2B above. A copy of these audits shall be retained for public view and copying at the Supervisor of Elections Office in addition to being given the County Commissioners. These audits shall be considered Florida public records pursuant to Florida Statute 119.