IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC12-644

RICHARD MASONE,

Petitioner,

v.

CITY OF AVENTURA,

Respondent.

ANSWER BRIEF ON THE MERITS OF CITY OF AVENTURA

ON DISCRETIONARY REVIEW FROM A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

Edward G. Guedes, Esq.
Florida Bar No. 768103
Michael S. Popok, Esq.
Florida Bar No. 44131
John J. Quick, Esq.
Florida Bar No. 648418
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
2525 Ponce de Leon Blvd., Ste. 700
Coral Gables, Florida 33134
Telephone: (305) 854-0800
Facsimile: (305) 854-2323

Counsel for City of Aventura

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS iii

REFERENCES USED IN BRIEF vii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 1

A. The Ordinance. 1

B. Subsequent state legislation of red light cameras 4

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. ANY PREEMPTION OR CONFLICT ANALYSIS MUST OCCUR IN THE CONTEXT OF THE BROAD MUNICIPAL HOME RULE AUTHORITY ENJOYED BY THE CITY. 6

A. Municipal legislative authority prior to and after the 1968 Florida Constitution. 7

B. Municipal authority under the Act. 9

C. The Court's continued expansive interpretation of municipal home rule authority. 12

D. The Ordinance's presumption of validity 27

II. CHAPTER 316 NEITHER EXPRESSLY NOR IMPLIEDLY PREEMPTS THE ORDINANCE. 28

A. There is no express preemption. 28

B. There is no implied preemption 34

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.

2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

TABLE OF CONTENTS
(Continued)

Page

III. THE ORDINANCE DOES NOT CONFLICT WITH STATE STATUTES 37

A. Sections 316.002 and 316.008 contemplate the City's exercise of authority within specified areas without creating a conflict with state statute. 39

B. The Ordinance clearly does not apply when Chapter 316 is implicated 44

C. Masone's concerns about "hodge-podge" municipal legislation are unwarranted 45

IV. MASONE'S RELIANCE ON ATTORNEY GENERAL OPINIONS IS MISPLACED. 46

V. THE FIFTH DISTRICT MISAPPLIED THIS COURT'S MUNICIPAL HOME RULE PRECEDENTS IN *UDOWYCHENKO*. 48

CONCLUSION 50

CERTIFICATE OF SERVICE 51

CERTIFICATE OF COMPLIANCE 52

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.

2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

TABLE OF CITATIONS

Page

Cases

Anderson v. State, 87 So. 3d 774 (Fla. 2012) 32

Atwater v. Kortum, 95 So. 3d 85 (Fla. 2012) 32

Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989). 19

City of Aventura v. Masone, 89 So. 3d 233 (Fla. 3d DCA 2011) 1

City of Boca Raton v. Gidman, 440 So. 2d 1277 (Fla. 1983) 12, 13

City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992) 7, 9, 12, 13,15, 32, 43

City of Davenport v. Seymour, 755 N.W. 2d 533 (Iowa 2008) 37

City of Hollywood v. Mulligan, 934 So. 2d 1238 (Fla. 2006)..... passim

City of Kissimmee v. Fla. Retail Federation, Inc., 915 So. 2d 205 (Fla. 5th DCA 2005) 27

City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972)..... 8, 9, 50

City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764 (Fla. 1974)..... 11

City of Ocala v. Nye, 608 So. 2d 15 (Fla. 1992)..... 15, 41, 43

City of Orlando v. Udowychenko, 98 So. 3d 589 (Fla. 5th DCA 2012) 1, 36, 48, 49, 50

Daniels v. Fla. Dep't of Health, 898 So. 2d 61 (Fla. 2005)..... 28

F.Y.I. Adventures, Inc. v. City of Ocala, 698 So. 2d 583 (Fla. 5th DCA 1997) 38

Fla. Dep't of Rev. v. Fla. Mun. Power Agency, 789 So. 2d 320 (Fla. 2001)..... 32

Lowe v. Broward County, 766 So. 2d 1199 (Fla. 4th DCA 2000)..... 28

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.

2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

Mendenhall v. City of Akron, 881 N.E. 2d 255 (Ohio 2008) 37

Metropolitan Cas. Ins. Co. v. Tepper, 9 So. 3d 209 (Fla. 2009) 34

Nichols v. Yandre, 9 So. 2d 157 (Fla. 1942). 41, 48

Phantom of Brevard, Inc. v. Brevard County, 3 So. 3d 309 (Fla. 2008) 21, 22, 33, 35, 38

Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (Fla. 2d DCA 2005) 22, 25, 33, 34, 35. 39

Roper v. City of Clearwater, 796 So. 2d 1159 (Fla. 2001) 16, 32

Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So. 3d 880 (Fla. 2010) 21, 24, 25, 36, 37, 39

Shands Teaching Hosp. and Clinics, Inc. v. Mercury Ins. Co. of Florida, 97 So. 3d 204 (Fla. 2012) 35

State v. City of Cleveland, 859 N.E. 2d 923 (Ohio 2006) 37

State v. City of Sunrise, 354 So. 2d 1206 (Fla. 1978) 12, 42

State v. Kuhlman, 729 N.W.2d 577 (Minn. 2007) 37

System Components Corp. v. Fla. Dep't of Transp., 14 So. 3d 967 (Fla. 2009) 37

Thomas v. State, 614 So. 2d 468 (Fla. 1993) 21, 38

Tribune Co. v. Cannella, 458 So. 2d 1075 (Fla. 1984) 19, 35

Statutes

§ 24.122(3), Fla. Stat. 20

§ 101.041, Fla. Stat. 27

Chapter 159, Fla. Stat. 16

Chapter 162, Fla. Stat. 17, 18, 44, 47

§ 162.09(2)(c), Fla. Stat. 4

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.

2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

§ 320.8249(11), Fla. Stat. 20

§ 322.27, Fla. Stat 38

Chapter 791, Fla. Stat. 21

§ 791.001, Fla. Stat. 21, 22, 23

Constitutional Provisions

Article VIII, § 1(g), 3 of the Florida Constitution 10, 12, 49

Article VIII, § 2 of the Florida Constitution 10, 12, 49

Article VIII, § 2(b), the Legislature in 1973 ..... 7, 9

Article VIII, § 2(b), 1968 Florida Constitution 8

Article VIII, § 6(e) of the Florida Constitution 10, 12, 49

Article VIII, § 8 of the Florida Constitution in 1885 8

Other Authorities

AGO 05-41 ..... 46, 47

AGO 2005-41 at 2. 48

AGO 97-06 ..... 46, 47

City Code, § 2-342(j). 4

City Code, § 48-26. 32

City Code, § 48-31 47

City Code, § 48-32. 47

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.

2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

§ 166.021, Fla. Stat 10, 11, 14, 19, 34, 35, 41, 43, 50

§ 166.044, Fla. Stat. 20, 34

§ 166.401, Fla. Stat. 15

Chapter 170, Fla. Stat. 14, 42

Chapter 316, Fla. Stat. ..... passim

§ 316.002, Fla. Stat ..... passim

§ 316.007, Fla. Stat. ..... passim

§ 316.008, Fla. Stat. ..... passim

§ 316.008(1), Fla. Stat. ..... passim

§ 316.0076, Fla. Stat. 4, 34

§ 316.0083, Fla. Stat. 1

§ 316.640(5)(A), Fla. Stat. 2

§ 316.1001, Fla. Stat. 43

§ 316.1001(2)(b), Fla. Stat. 43

§ 316.1001(2)(c), Fla. Stat 43

§ 316.1001(2)(d), Fla. Stat. 43

§ 316.07456, Fla. Stat. 4, 5, 35

Chapter 318, Fla. Stat. 5, 6, 32, 36, 38, 46

§ 318.001(w), Fla. Stat. 50

§ 318.13(3), Fla. Stat. 44

§ 318.14(8), Fla. Stat. 38

§ 318.32(1), Fla. Stat 44

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.

2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

REFERENCES USED IN BRIEF

Petitioner, Richard Masone, will be referred to as "Masone."

Respondent, City of Aventura, will be referred to as the "City."

References to Masone's initial brief on the merits will appear as "IBM" followed by the appropriate pagination.

References to the record on appeal will appear as "R." followed either by the appropriate pagination, volume number of combination thereof.

References to the City's appendix in support of its answer brief on the merits will appear as "City App."

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

INTRODUCTION

The petition arises from the Third District Court of Appeal's decision in *City of Aventura v. Masone*, 89 So. 3d 233 (Fla. 3d DCA 2011), which has been certified to be in conflict with *City of Orlando v. Udowychenko*, 98 So. 3d 589 (Fla. 5th DCA 2012).

STATEMENT OF THE CASE AND FACTS

Masone's recitation of the statement of the case and facts is largely unobjectionable, except where it engages in comparisons of the Ordinance with provisions in Chapter 316, Florida Statutes. Masone's interpretation of state statutory requirements, when compared with those of the Ordinance, might have been better suited for the argument section of his brief. Additionally, his repeated comparisons between the Ordinance and the City of Orlando's red light camera program (which is the subject of *City of Orlando v. Udowychenko*, Case No. SC12-1471, pending before the Court) was never part of the proceedings below and cannot be said to be part of the statement of the case or facts in *this* proceeding.

A. The Ordinance.

Masone does not fully set forth the substance of the Ordinance, previously codified at City Code sections 48-25 through 48-41, which established the City's red light camera program prior to the Legislature's 2010 enactment of the Mark

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

Wandall Traffic Safety Act (the "Wandall Act").[1] Among the salient features of the Ordinance were:

> Section 48-25 – statement of intent to "supplement law enforcement personnel in the enforcement of red light signal violation," not to prevent officers "from issuing a citation for a red light signal violation in accordance with other routine statutory traffic enforcement techniques."
>
> Section 48-26 – providing (i) the Ordinance will not "supersede, infringe, curtail or impinge upon state or county laws related to red light signal violations or conflict with such laws"; (ii) an ancillary deterrent to signal violations to reduce accidents and injuries; and (iii) enforcement through the City's code enforcement mechanisms, rather than through uniform traffic citations and county courts, but specifically not precluding use of the latter when City police personnel decide not to rely on the Ordinance.
>
> Sections 48-27 through 48-29 – defining the parameters of the enforcement scheme (including conditions of violation), without reference to Chapter 316 (except to define a traffic control signal).
>
> Section 48-31 – providing for (i) review of recorded images by a Traffic Control Infraction Review Officer ("TCIRO"), who shall be either a police officer or individual qualified under section 316.640(5)(A), Florida Statutes; and (ii) issuance of a notice to the owner of the vehicle observed committing a "red zone infraction."
>
> Section 48-32 – setting forth the contents of the notice of violation sent to the registered owner of the vehicle, including a signed statement by the TCIRO that, based on review of the recorded images, the vehicle was involved in and was utilized to commit a red zone infraction.
>
> Section 48-33 – affording the owner of the vehicle the option to (i) pay the civil penalty, or (ii) appear before the code enforcement special

---

[1] Predominantly codified at section 316.0083, Florida Statutes. In response to the Wandall Act, the City amended the Ordinance on June 17, 2010, to bring its red light camera program into conformity with the requirements imposed by the new legislation. *See* Ordinance No. 2010-06. For this reason, many of the references to the Ordinance and its application appear in the past tense.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

master to contest the notice; failure to invoke either is considered an admission of liability and an order may issue imposing the maximum civil penalty plus administrative costs. No uniform traffic citation may issue.

Section 48-34 – setting forth the procedures for conducting hearings before special masters and providing that, absent the filing of a section 48-35 affidavit by the owner, a presumption arises that the owner was operating the vehicle at the time of the violation.

Section 48-35 – allowing an owner to file an affidavit of non-responsibility, indicating (among other grounds) that the vehicle at the time of the violation was either in the "care, custody, or control of another person" without the owner's consent. Upon the presentation of an affidavit identifying the individual in actual use of the vehicle at the time of the violation, "any prosecution of the notice…shall be terminated."

Sections 48-36 and 48-37 – providing for imposition and collection of penalties and administrative charges.

Section 48-38 – providing exceptions that the Ordinance will not apply to (i) a red zone infraction resulting in a vehicle collision (unless no citation or charge is issued for violation of a state statute); (ii) any emergency vehicle responding to a call; and (iii) any instance where the operator of the vehicle is issued a citation for the same incident for violating the state statute governing red light signal violations.

Section 48-39 – providing that the penalty assessed shall be deemed a non-criminal, non-moving violation for which no points may be assessed against the driving record of either the owner or the responsible party.

Section 48-41 – providing for signage "at the primary motor vehicle entry points to the City" providing notice of the Ordinance to drivers.

Masone's characterization of the code enforcement hearing process afforded by the Ordinance as "an appellate proceeding" (IBM at 1, 4) is factually inaccurate. Section 48-34 states that the owner of the vehicle "may present testimony and

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

evidence" at the hearing, and is afforded the protections set forth in Article V of Chapter 2 of the City Code (governing code enforcement).[2]

Additionally, Masone's assertion that the City's special master lacked "discretion to relax" the fines for violations (IBM at 6) is factually inaccurate. City Code section 2-347 provides that the City, as part of its code enforcement scheme, may "exercise any powers given to municipalities or their Special Masters by F.S. ch. 162." Section 162.09(2)(c) states that a code enforcement officer "may reduce a fine imposed pursuant to this section." § 162.09(2)(c), Fla. Stat.[3]

B. Subsequent state legislation of red light cameras.

During the appeal before the Third District, the Legislature adopted the Wandall Act. The City argued below that the adoption of the Wandall Act reflected the Legislature's acknowledgment that it had not previously preempted the field of red light camera enforcement of signal violations. R. Vol. 2 at 8-10. The City relied principally on (i) section 316.0076, Florida Statutes, where the Legislature expressly stated, for the first time, that "[r]egulation of the use of cameras for enforcing the provisions of this chapter is expressly preempted to the state," § 316.0076, Fla. Stat. (2010), and (ii) section 316.07456, "Transition

---

[2] That particular article ensures the owner "the right to call and examine witnesses, to introduce exhibits, to cross examine opposing witnesses on any matter relevant to the issues..., to impeach any witness..., and to offer rebuttal of the evidence." City Code, § 2-342(j). It further requires that "fundamental due process shall be observed and shall govern the proceedings." *Id.* at § 2-342(i).

[3] All statutory references are to the 2008 Florida Statutes, unless indicated.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

implementation," where the Legislature indicated: "[A]ny such [red light camera] equipment...used to enforce an ordinance enacted by a county or municipality on or before July 1, 2011, is not required to meet the specifications established by the Department of Transportation until July 1, 2011." § 316.07456, Fla. Stat. (2010).

The City otherwise accepts Masone's statement of the case and facts.

SUMMARY OF ARGUMENT

Under Article VIII, section 2 of the Florida Constitution and the Municipal Home Rule Powers Act, codified in Chapter 166, Florida Statutes, municipalities enjoy the broadest home rule powers possible, able to legislate on any subject and in any manner to the same extent as the Florida Legislature, unless such local legislation is expressly preempted by or in irreconcilable conflict with state law. As such, the Ordinance is entitled to every presumption of validity.

Chapters 316 and 318, Florida Statutes, neither expressly nor impliedly preempted the City from enacting the Ordinance. On the contrary, sections 316.002 and 316.008, Florida Statutes, specifically contemplated that the City could exercise its police powers to address local traffic needs through the supplemental powers enumerated in section 316.008(1) – including the ability to regulate, restrict or monitor traffic movement through the use of security devices – and when doing so, such local legislation would not conflict with the remainder of Chapter 316. The plain language of these statutory provisions, along with this Court's prior municipal home rule authority jurisprudence, makes clear that the Ordinance was neither preempted by nor in conflict with the state's traffic laws.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

Moreover, the fact that the Ordinance accomplished its salutary objectives through means other than those set forth in Chapters 316 and 318 is not determinative of the conflict analysis. When viewed through the prism of sections 316.002 and 316.008, it is apparent that compliance with the Ordinance did not require violation of state statute. The Ordinance explicitly had no application when a police officer contemporaneously observed a red light violation and issued a uniform traffic citation pursuant to Chapter 316. As such, the two legislative schemes were parallel and could co-exist.

ARGUMENT

I. ANY PREEMPTION OR CONFLICT ANALYSIS MUST OCCUR IN THE CONTEXT OF THE BROAD MUNICIPAL HOME RULE AUTHORITY ENJOYED BY THE CITY.

While Masone seeks to stand the analytical process on its head by focusing from the outset on the differences between the Ordinance and state law, the proper place to start any preemption or conflict analysis is with an examination of the broad municipal home rule powers afforded by the Florida Constitution and state statute. The City, therefore, will begin by examining the origins of home rule authority and its interpretation by this Court before proceeding to examine whether the exercise of such home rule powers has in this instance been preempted by or is in conflict with state legislative authority. As the City will ultimately conclude – and as the Third District correctly determined – the City enjoyed home rule authority to enact the Ordinance.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

A. Municipal legislative authority prior to and after the 1968 Florida Constitution.

As this Court has explicitly recognized, prior to the adoption of the 1968 Florida Constitution, "all municipal powers were dependent upon a specific delegation of authority by the legislature in a general or special act." *City of Boca Raton v. State*, 595 So. 2d 25, 27 (Fla. 1992) ("*City of Boca Raton*"). Under what was then known as "Dillon's Rule," any "powers not granted a municipality by the legislature were deemed to be reserved to the legislature." *Id.* This constitutional arrangement, however, proved unworkable as Florida's population grew and local governments' needs expanded, resulting in countless bills being submitted to the Florida Legislature to permit "municipalities to provide *solutions to local problems*." *Id.* (emphasis added).

Changing demographic and political realities resulted in the amendment of the Florida Constitution in 1968 and the adoption of Article VIII, section 2(b), which reads:

> (b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

Fla. Const. Art. VIII, § 2(b).[4] However, in the first home rule powers case to come before this Court after the adoption of the 1968 Constitution – *City of Miami Beach*

---

[4] In contrast, the 1885 Constitution provided that "[t]he Legislature shall have power to establish, and to abolish, municipalities to provide for their government, (continued . . .)

v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972) – the Court took a somewhat restrictive view of the newly granted municipal home rule authority. In considering the validity of Miami Beach's rent control ordinance at the time, the Court concluded that the municipality lacked the authority to enact the ordinance. *Id.* at 802.

While the Court acknowledged the adoption of the 1968 Constitution and its enhancement of municipal authority, it nonetheless rejected the rent control ordinance using language that harkened back to the relationship between municipal and state government founded on the 1885 Constitution:

> The City of Miami Beach does not have the power to enact the ordinance in question. This Court recognizes that the language in the Florida Constitution which governs the powers exercisable by municipalities has been changed by Article VIII, Section 2(b), 1968 Florida Constitution. ... Although this new provision does change the old rule of the 1885 Constitution respecting delegated powers of municipalities, it still limits municipal powers to the performance of Municipal functions.
>
> That the paramount law of a municipality is its charter, (just as the State Constitution is the charter of the State of Florida,) and gives the municipality all the powers it possesses, unless other statutes are applicable thereto, has not been altered or changed. *The powers of a municipality are to be interpreted and construed in reference to the purposes of the municipality and if reasonable doubt should arise as to whether the municipality possesses a specific power, such doubt will be resolved against the City.* Municipal corporations are established for purposes of local government, and, *in the absence of specific delegation*

(. . . continued)
to prescribe their jurisdiction and powers, and to alter or amend the same at any time." Fla. Const., Art. VIII, § 8 (1885).

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

> *of power, cannot engage in any undertakings not directed immediately to the accomplishment of those purposes.*
>
> * * *
>
> The weight of authority is that *without specific authorization from the state, the cities cannot enact a rent control ordinance either incident to its specific municipal powers or under its General Welfare provisions.*

Id. at 803-04 (emphasis added; internal quotation marks and citations omitted). Seeming to retreat from the 1968 Constitution – and while citing to decisions from other states – the Court went on to observe that "[m]atters that because of their nature are inherently reserved for the State alone and among which have been the master and servant and landlord and tenant relationships, matters of descent, the administration of estates ... and many other matters of general and statewide significance, are not proper subjects for local treatment." *Id.* at 804.

In the wake of the *Fleetwood Hotel* decision and its rhetoric, the Legislature interceded and enacted the Municipal Home Rule Powers Act, now codified at Chapter 166, Florida Statutes (hereafter, the "Act"). *See City of Boca Raton*, 595 So. 2d at 27-28 (acknowledging that the enactment of the Act was in response to the Court's holdings in *Fleetwood Hotel*). The adoption of the Act forever altered the landscape of municipal home rule authority.

B. Municipal authority under the Act.

In an apparent rebuke of the Court's restrictive interpretation of Article VIII, section 2(b), the Legislature in 1973 made clear in the Act the exceedingly broad

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

scope of municipal home rule authority.[5] Section 166.021, Florida Statutes, states:

(1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and *may exercise any power for municipal purposes, except when expressly prohibited by law.*

> (2) "Municipal purpose" means *any activity or power which may be exercised by the state or its political subdivisions.*
>
> (3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, *the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act*, except:
>
> (a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;
>
> (b) Any subject *expressly* prohibited by the constitution;
>
> (c) Any subject *expressly* preempted to state or county government by the constitution or by general law; and

---

[5] It must be noted here – though it will be elaborated upon subsequently – that sections 316.002 and 316.007, Florida Statutes, which form the foundation of Masone's preemption and conflict arguments, were enacted *two years before* the Act was adopted by the Legislature. *See* Ch. 71-135, Laws of Fla. Consequently, whatever preemptive effect those statutory provisions may have, it cannot be said that the Legislature originally intended for the effect to be measured against the broad conveyance of municipal home rule authority reflected in the Act two years later. If anything, the Act must be read as a further limitation on state preemption, with the Legislature having been fully aware of its recent amendments to Chapter 316 and yet having failed to "carve out" traffic regulation as an exception to home rule power in section 166.021(3).

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

> (d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.
>
> (4) *The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution.* It is the further intent of the Legislature to extend to municipalities *the exercise of powers* for municipal governmental, corporate, or proprietary purposes *not expressly prohibited* by the constitution, general or special law, or county charter and *to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.*

§ 166.021, Fla. Stat. (emphasis added).

In adopting the Act, the Legislature not only conferred on municipalities the *same* inherent legislative authority it enjoyed, itself, but explicitly carved out limited areas where municipalities could *not* legislate. Among those, in relevant part, are areas "expressly preempted to the state ... by the constitution or by general law" and areas "expressly prohibited by the constitution, general or special law...." §§ 166.021(3) and (4), Fla. Stat. In doing so, the Legislature effectively placed municipalities on a par with state government when acting to provide for the health, safety and welfare of their residents, and imposed on the Legislature the concomitant obligation to communicate its intent expressly and unambiguously when electing to restrict municipal home rule authority through legislative preemption.

In the years immediately following the adoption of the Act, this Court began to recognize the broad scope of constitutional and statutory municipal home rule authority. Thus, the following year, in *City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764 (Fla. 1974), the Court reversed direction and unanimously upheld

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

the inherent authority of the City of Miami Beach to enact essentially the same rent control ordinance the Court had rejected just two years earlier. *Id.* at 765, 766 (describing municipal home rule authority as a "broad grant of power to municipalities").[6] Similarly, in *State v. City of Sunrise*, 354 So. 2d 1206 (Fla. 1978), the Court continued its expansive interpretation of home rule authority. In considering a challenge to the issuance of municipal bonds, the Court stated:

> Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. *The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.* Since there is no constitutional or statutory limitation on the right of municipalities to issue refunding revenue bonds not payable by ad valorem taxes, we hold that municipalities may issue "double advance refunding bonds" so long as such bonds are pursuant to the exercise of a valid municipal purpose.

Id. at 1209 (emphasis added).

C. The Court's continued expansive interpretation of municipal home rule authority.

From the adoption of the Act in 1973 to the present, this Court has consistently interpreted municipal home rule authority broadly in the face of claims

---

[6] Eighteen years later, the Court in *City of Boca Raton* would go further and characterize the authority conferred as "the vast breadth of municipal home rule power." 595 So. 2d at 28.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

of preemption by and conflict with state statute.[7] Thus, in *City of Boca Raton v. Gidman*, 440 So. 2d 1277 (Fla. 1983) ("*Gidman*"), the Court recognized that the 1968 amendment of the Florida Constitution, coupled with the adoption of the Act, had altered the manner in which restrictions on municipal authority would be construed. The *Gidman* Court specifically rejected the plaintiffs' contention that "grants of power that are out of the usual range, and that may result in public burdens, or which in their exercise touch the right to liberty or property or any common law right of the citizens must be strictly construed." *Id.* at 1281. Despite language in the city's charter precluding the expenditure of city funds "to the benefit of any religious, charitable, benevolent, civic or service organization," the Court upheld the city's funding of a child care center that was a charitable organization because the provision of educational services was a "municipal purpose" encompassed by home rule authority. *Id.* at 1280-81, 1282.

In 1992, the Court issued two decisions broadly interpreting the home rule authority conferred on municipalities. First, in *City of Boca Raton*, the Court considered, *inter alia*, the State's challenge to Boca Raton's imposition of a special assessment to repay municipal bonds. 525 So. 2d at 26. In assessing whether Boca Raton had the inherent authority to impose the assessments, the Court engaged in a comprehensive review of the history of municipal home rule

---

[7] In fact, none of the Court's decisions cited by Masone finds that municipal home rule authority has been preempted.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

authority. After noting the "vast breadth of municipal home rule power," the Court went on to conclude:

> Thus, a municipality may now exercise any governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law, and *a municipality may legislate on any subject matter on which the legislature may act, except those subjects described in paragraphs (a), (b), (c), and (d) of section 166.021(3). The provisions of section 166.021(3)(a) and (d) are irrelevant to the instant case.* Therefore, it would appear that the City of Boca Raton can levy its special assessment unless it is expressly prohibited by law-section 166.021(1), expressly prohibited by the constitution-section 166.021(3)(b), or expressly preempted to the state or county government by the constitution or by general law-section 166.021(3)(c).

Id. at 28 (emphasis added). The Court rejected the State's contention that Chapter 170, Florida Statutes, which addresses special assessments, preempted Boca Raton's exercise of home rule power, noting that the chapter recognized that its procedures were "deemed to provide a supplemental, additional, and alternative method of procedure for the benefit of all cities, towns, and municipal corporations of the state."[8] *Id.* at 29.

---

[8] Similarly (and as more fully elaborated *infra* at 39-40), section 316.002, which lies at the heart of Masone's preemption and conflict arguments, states: "The Legislature recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities. Section 316.008 enumerates the area within which municipalities may control certain traffic movement or parking in their respective jurisdictions. *This section shall be supplemental to the other laws or ordinances of this chapter and not in conflict therewith.*" § 316.002, Fla. Stat. (emphasis added).

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

In the second municipal home rule powers case that year, the Court considered a challenge to the City of Ocala's authority to exercise eminent domain to acquire more property than was needed to satisfy the municipal purpose in question. *City of Ocala v. Nye*, 608 So. 2d 15 (Fla. 1992). The Fifth District had concluded that Ocala lacked the authority to do so, but this Court reversed:

> The City argues that because the Department of Transportation (DOT) and counties, as political subdivisions of the state, are expressly permitted by statute to condemn more property than is necessary where they would save money by doing so, the City may likewise do so pursuant to its home rule powers. We agree.

Id. at 16-17. The Court continued its reasoning:

> Thus, municipalities are not dependent upon the legislature for further authorization, and legislative statutes are relevant only to determine limitations of authority. [citation omitted]. Although section 166.401, Florida Statutes (1989), purports to authorize municipalities to exercise eminent domain powers, *municipalities could exercise those powers for a valid municipal purpose without any such "grant" of authority. If the state has the power to take particular land for public purposes, then a municipality may also exercise that power unless it is "expressly prohibited."* ***Although section 166.401(2) does not expressly grant the taking of an entire parcel by a municipality to save money, it also does not expressly prohibit a municipality from doing so.***

Id. at 17 (emphasis added). *City of Boca Raton*, and especially *Nye*, stand for the broad propositions that (i) a municipality may exercise any power the state legislature may exercise, and (ii) even when a statute conferring authority does not expressly indicate how that authority may be exercised, *as long as the statute does*

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

not expressly prohibit any particular mechanism, municipalities enjoy the inherent authority to be creative in their exercise of home rule power.[9]

More recently, this Court has decided a series of cases that have further entrenched the broad exercise of municipal home rule powers. Beginning in 2001, when *Roper v. City of Clearwater*, 796 So. 2d 1159 (Fla. 2001) was decided, the Court has consistently reaffirmed home rule authority. In *Roper*, a taxpayer challenged Clearwater's issuance of municipal bonds to finance a sports stadium. *Id.* at 1159-60. Among the taxpayer's arguments was that Clearwater had approved the bonds without complying with the requirements of Chapter 159, Florida Statutes. *Id.* at 1162. The Court rejected the argument:

> Here, ... the local government acted pursuant to its home rule charter powers in authorizing issuance of the bonds in question. Article VIII, section 2, Florida Constitution, which provides that municipalities "may exercise any power for municipal purposes except as provided by law," *has consistently been construed as giving municipalities broad home rule powers*.
>
> * * *
>
> Further, Ordinance No. 6675-01, through which the City authorized issuance of the Bonds, refers only to "Chapter 166, Part II, Florida Statutes [the Municipal Home Rule Powers Act], and other applicable provisions of law," and *makes no reference to chapter 159*. See Bond Ordinance § 1. *Although the City looked to chapter 159 to interpret the phrase, "industrial development," as used in its charter, it did not thereby invoke chapter 159 as a source of authority in exercising its*

---

[9] These holdings are ultimately germane to and defeat Masone's criticism (IBM at 9, 22, 27, 30, 34) that the authority conferred by sections 316.002 and 316.008 does not explicitly authorize the City to create a separate enforcement mechanism through its existing code enforcement scheme. *See infra* at 41-44.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

> *charter powers to issue the bonds, and did not need to meet the requirements of chapter 159.*

Id. at 1162 (emphasis added). Noting that "chapter 159 [like section 316.002] provides that the authority contained therein is supplementary, and not in derogation of any powers of a local agency otherwise conferred," *id.* at 1163, the Court concluded that the issuance of bonds clearly fell within Clearwater's municipal home rule authority and strict compliance with Chapter 159 was not required. *Id.* at 1163-64.

In the seminal case of *City of Hollywood v. Mulligan*, 934 So. 2d 1238 (Fla. 2006), the Court continued its analytical "train of thought" when it considered a challenge to Hollywood's vehicle impoundment ordinance, based on purported preemption by and conflict with the Florida Contraband Forfeiture Act ("FCFA"). *Id.* at 1240. The Fourth District Court of Appeal had concluded that the municipal ordinance was preempted by, or in the alternative, conflicted with the FCFA. *Id.* at 1241. This Court reversed.

Like the City here, Hollywood had enacted an ordinance that functioned through the municipality's existing code enforcement mechanisms authorized by Chapter 162, Florida Statutes, rather than through the courts. *Id.* at 1242. The procedure used by Hollywood was described, in relevant part, as follows:

> The ordinance requires that upon seizing and impounding a vehicle for one or more of the enumerated misdemeanor offenses, the City's police ... must *provide written notice to the owner of the vehicle or the person in control of the vehicle* that the vehicle is being impounded by the City of Hollywood Police Department and that there is a right to request a preliminary hearing. ... *An owner or operator may request a preliminary hearing*, and, if requested, the hearing must be held within ninety-six

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

> hours. *This preliminary hearing is held before a code enforcement official called a special master who, according to the City, is appointed pursuant to chapter 162, Florida Statutes....*
>
> If the owner does not request a preliminary hearing, or if the special master finds probable cause for the seizure at the preliminary hearing, the City schedules a final hearing and notifies the vehicle owner. ... At the final hearing, ... *[i]f the special master finds that the vehicle is subject to impoundment, an order is then entered finding the record owner of the vehicle civilly liable to the City for an administrative fee, not to exceed $500, as well as towing and storage costs. The vehicle remains impounded until the administrative fees are satisfied.* The *funds recovered are allocated, first, as reimbursement to the police department for costs incurred in enforcing the ordinance (towing and storage), and second, as surplus to the City's general fund.*

Id. at 1242-43 (emphasis added; citations omitted).

The Fourth District had found that Hollywood's ordinance was expressly preempted by the FCFA because the statute stated that law enforcement agencies "shall utilize" the provisions of the FCFA when forfeiting contraband articles used for criminal purposes.[10] *Id.* at 1244. The Fourth District had further found "that under section 932.701(2)(a)(5) of the FCFA, the Legislature had expressly limited the forfeiture of vehicles to felony offenses." *Id.* This Court rejected the Fourth District's reasoning. The Court first articulated the guiding principles on preemption:

> In Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers. *Under its broad home rule powers, a municipality may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the State.*

---

[10] The Court preliminarily held that "the words 'shall utilize' alone do not express preemption." *Id.* at 1244.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

> Preemption essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature. *Express preemption requires a specific statement; the preemption cannot be made by implication [or] by inference. However, the preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject.*

934 So. 2d at 1243 (emphasis added; citations, footnotes and internal quotation marks omitted).[11]

The *Mulligan* Court then went on to explain the error in the Fourth District's analysis:

> [A] change in this law occurred in 1973 when the Municipal Home Rule Powers Act was enacted. *This act removed all general limitations on a municipality's power to legislate in a particular field. See* § 166.021, Fla. Stat. (2002). Passed the year before the original version of the FCFA, the Municipal Home Rule Powers Act does not reserve to the Legislature the

---

[11] Given the explicit statement in section 166.021(3) that a legislative subject must be "expressly preempted to state or county government" in order to overcome municipal home rule authority, it is unclear why the Court's jurisprudence shifted to allow for "implied" preemption. The first case on the subject was *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984), where the Court endorsed the idea that preemption could be found "if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present *a danger of conflict* with that pervasive regulatory scheme." *Id.* at 1077 (emphasis added). This approach seems to conflate unnecessarily the doctrines of preemption and conflict, and the Court did not attempt to explain its divergence from the Legislature's requirement that preemption be "expressly" stated. *See* http://www.merriam-webster.com/dictionary/expressly, last accessed April 12, 2013 (defining "expressly" to mean "explicitly"). The implied approach, however, "stuck" and was reiterated without further elaboration in *Barragan v. City of Miami*, 545 So. 2d 252 (Fla. 1989). For better or worse, it is now part of this Court's preemption jurisprudence, unless the Court is inclined to recede from it. *See* Footnote 22, *infra*.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

> power to legislate in the field of forfeiture. One cannot lightly disregard this omission because the Legislature did retain field preemption in other areas. For example, in chapter 166 itself, the Legislature preempted the field in regard to ammunition sales. *See* § 166.044, Fla. Stat. (2002) ("No municipality may adopt any ordinance relating to the possession or sale of ammunition."). *And since 1973, the Legislature has continued to use similar preemptive language in other contexts*. For instance, regarding the lottery, the Legislature stated that "[a]ll matters relating to the operation of the state lottery *are preempted to the state*, and no county, municipality, or other political subdivision of the state shall enact any ordinance relating to the operation of the lottery authorized by this act." § 24.122(3), Fla. Stat. (2005); *see also* § 320.8249(11), Fla. Stat. (2005) ("The regulation of manufactured homes installers or mobile home installers *is preempted to the state*....").

Id. at 1246 (emphasis added).

Having concluded that Hollywood's ordinance was not preempted, the Court turned to the Fourth District's alternative conclusion that the ordinance conflicted with the FCFA:

> As an alternative basis for its decision, the Fourth District held that even if the ordinance is not preempted by the FCFA, the ordinance is in conflict with the FCFA *because it does not meet the procedural due process requirements of the FCFA*. [citation omitted]. We disagree. In addition to the absence of preemption, there is no conflict between the FCFA and the ordinance. *The statute and the ordinance can coexist.*

Id. (emphasis added). The Court offered three (and only three) examples of situations where a municipal ordinance conflicts and cannot co-exist with a state statute, such as (i) when a municipality forbids what the state "has expressly licensed, authorized or required"; (ii) when a municipality authorizes "what the legislature has expressly forbidden"; or (iii) where the penalty imposed by ordinance exceeds that imposed by the state for the same misconduct. *Id.* at 1247.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

See also Thomas v. State, 614 So. 2d 468, 470 (Fla. 1993) (holding "an ordinance penalty may not exceed the penalty imposed by the state" and "[a] city may not enact an ordinance imposing criminal penalties for conduct essentially identical to that which has been decriminalized by the state").

After reiterating that "[m]unicipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute," *id.*, the *Mulligan* Court nonetheless went on to conclude:

> Additionally, *the ordinance expressly does not apply when the vehicle is subject to seizure under the FCFA.*[12] The fact that the FCFA and the ordinance *employ differing procedures to achieve their purposes does not amount to an improper "conflict" necessitating the invalidation of the ordinance.* Therefore, the FCFA and the ordinance can coexist.

934 So. 2d at 1247 (emphasis added).

The Court continued to apply the broad principles reaffirmed in *Mulligan* in *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008) and *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880 (Fla. 2010).[13] In the former case, the Court considered a challenge to a county ordinance that regulated the use, supply and sale of fireworks in a manner inconsistent with Chapter 791, Florida Statutes. *Phantom of Brevard*, 3 So. 3d at 310. The Fifth District's decision conflicted with the Second District's decision in *Phantom of*

---

[12] Just as the City's Ordinance does not apply if an officer observes a red-light violation and issues a uniform traffic citation under Chapter 316.

[13] While neither case involved a city, the preemption and conflict analysis was the same, as is evidenced by the Court's reliance on municipal home rule cases like *Mulligan*. *Phantom of Brevard*, 3 So. 3d at 314; *Browning*, 28 So. 3d at 886.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (Fla. 2d DCA 2005) with respect to whether the ordinances conflicted with state statute.[14] 3 So. 3d at 310.

The Fifth District had explained its conflict analysis as follows:

> Brevard County's financial responsibility ordinance is in direct conflict with section 791.001, Florida Statutes, which provides that chapter 791 "*shall be applied uniformly throughout the state.*" Because chapter 791 does not contain any financial responsibility standard or requirement, *retailers and other supply-side entities are subject to potentially disparate obligations throughout the state.* Although the legislature has provided counties with considerable discretion to determine the amount of a bond required of a fireworks display licensee under section 791.03, *there is no reason to believe that the legislature would have countenanced a system in which a seller of fireworks or sparklers must maintain a particular amount of liability insurance simply because one of the counties in which it does business requires such coverage.*

Id. at 311 (emphasis added).[15] In contrast, the Second District's reasoning on the same subject provided:

> Although the ordinance does establish a permitting process for all businesses involving fireworks and that process imposes additional requirements on businesses wanting to avail themselves of the benefits of doing business in Pinellas County, this permitting process does not directly conflict with the provisions of chapter 791.
>
> ... *A person can comply with the requirements of the ordinance without violating chapter 791, and can comply with the requirements of chapter 791 without violating the ordinance.*

---

[14] The Fifth District had concluded that Chapter 791 did not preempt the ordinance in question, and this Court did not consider that ruling. *Phantom of Brevard*, 3 So. 3d at 310.

[15] These are substantially similar uniformity arguments to the ones presented by Masone in this case. IBM at 8-10, 12, 15-16, 19, 30-32, 34, 36, 37-38.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

Id. at 311-12 (emphasis supplied). The Second District's analysis, ultimately approved by the Court, focused on whether the *individual* who is the subject of legislative enforcement could comply with the local ordinance without violating the state statute – an analysis entirely consistent with the conflict examples cited by the Court in *Mulligan*.

Notwithstanding the legislative mandate that Chapter 791 "be applied uniformly throughout the state," *id.* at 312, this Court endorsed the Second District's analysis and quashed the Fifth District's decision:

> There is conflict between a local ordinance and a state statute *when the local ordinance cannot coexist with the state statute.* [citations omitted]. Stated otherwise, the test for conflict is whether in order to comply with one provision, a violation of the other is required.
>
> * * *
>
> The Fifth District concluded that the "Evidence of financial responsibility" provision conflicts with section 791.001, which provides that chapter 791 is to be "applied uniformly throughout the state." More specifically, the Fifth District found that Brevard County's "Evidence of financial responsibility" provision *will subject fireworks businesses to varying insurance coverage requirements throughout the State.* However, *focusing on potential differences caused by varying local requirements confuses the issue. Because chapter 791 does not include an insurance coverage standard or requirement, chapter 791 is not being applied disparately.* In other words, *a state statute is not being applied in a non-uniform manner when a locality enacts a regulation on a particular matter that is not addressed in the statute. The statute is being applied uniformly. It is the local ordinance that is creating any variance between counties.*

Id. at 315 (emphasis added).

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

In *Browning*, Sarasota County sought a declaratory judgment regarding the constitutionality of a proposed charter amendment relating to the conduct of elections in the county. 28 So. 3d at 885. The case presented questions of both possible preemption and statutory conflict. *Id.* In addressing the issue of preemption, the Court began its analysis as follows:

> Florida's Election Code is contained in Title IX of the Florida Statutes. *While the Election Code is extensive, encompassing chapters 97 through 106 and 125 pages of the Florida Statutes*, it contains no express language of preemption. Thus, we agree with the Second District that express preemption does not apply in this case. However, preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject. Moreover, *courts are careful in imputing an intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers.*
>
> *Preemption is implied when the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature. Implied preemption is found where the state legislative scheme of regulation is pervasive and the local legislation would present the danger of conflict with that pervasive regulatory scheme.*

Id. at 886 (emphasis added; citations and internal quotation marks omitted).[16]

Although the Second District had concluded that Florida's Election Code impliedly preempted the proposed charter amendment, this Court disagreed:

---

[16] While Masone encourages this Court to disregard as "irrelevant" the local public safety benefits derived from red light cameras (IBM at 49-50), that characterization is incorrect. As *Browning* makes clear, public policy *does* factor into the Court's consideration of implied preemption. In that regard, the Florida Department of Highway Safety and Motor Vehicles has recently reported the local benefits to municipalities of fewer accidents resulting from the implementation of red light cameras. *See* City App. B.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

> The Second District concluded that the Election Code establishes "a detailed and comprehensive statutory scheme for the regulation of elections in Florida, thereby evidencing the legislature's intent to preempt the field of elections law, except in those limited circumstances where the legislature has granted specific authority to local governments." [citation omitted]. *While we agree that Florida's Election Code is a detailed and extensive statutory scheme, we conclude that the Legislature's grant of power to local authorities in regard to many aspects of the election process does not evince an intent to preempt the field of election laws.*

Id. at 886-87 (emphasis added). In reaching this conclusion, the Court cited to cases in which "Florida courts have not found an implied preemption of local ordinances which address local issues." *Id.* at 887-88 (citing *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005) and *GLA & Assocs. v. City of Boca Raton*, 855 So. 2d 278 (Fla. 4th DCA 2003)).

The Court concluded its preemption analysis in language particularly germane here:

> In the instant case, the Legislature clearly did not deprive local governments of all local power in regard to elections. To the contrary, *the Election Code specifically delegates certain responsibilities and powers to local authorities*, including the choice of voting systems to be used in each locality.... *This statutory scheme undoubtedly recognizes that local governments are in the best position to make some decisions for their localities.*[17] *In light of this, we conclude that the Election Code does not impliedly preempt the field of elections law.*

Id. at 887-88 (emphasis added).

---

17 *Compare* § 316.002, Fla. Stat. ("The Legislature recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities.").

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

With regard to the question of whether the ordinance conflicted with the Election Code, the three issues considered represent a primer on conflict analysis:

> (i) whether a voting system the Legislature had specifically authorized for use in elections (touch screen machines) could be prohibited by local governments, *id.* at 888;
>
> (ii) whether the county could require "mandatory, independent, and random audits" consisting of "publicly observable hand counts of the voter verified paper ballots in comparison to the machine counts," when the Election Code conferred authority on the Legislature to determine whether to conduct an audit, *id.* at 889; and
>
> (iii) whether certification of election results could be delayed to complete locally required manual recounts when the State had its own deadline for certification of results and its own system for conducting manual recounts, *id.* at 889-90.

Reiterating that "[t]he test of conflict between a local government enactment and state law is 'whether one must violate one provision in order to comply with the other,'" *id.* at 888, the Court concluded that the first two issues did not present a conflict, but the third one did. *Id.* at 888-90.

With respect to the first issue, the Court reasoned no conflict existed because the Legislature's enumeration of acceptable voting systems constituted the imposition of minimum requirements for systems, and those requirements were merely "*expanded* by the additional standards that the [local] amendment would impose." *Id.* at 888 (emphasis added). The county could comply with the requirements of the local legislation without violating the requirements of the state law. *Id.* As for the second issue, the Court concluded there was no conflict because, while the Election Code authorized the Legislature to require an audit of

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

voting systems, it did not specify procedures for such an audit or (more importantly) did not actually prohibit counties from conducting their own audits. *Id.* at 889.

With regard to the third issue, however, the Court found multiple conflicts based on certification deadlines imposed by the Election Code, specific regulatory requirements in the Florida Administrative Code as to how recounts were to take place, and ultimately, a provision in the Election Code that states that "no vote shall be received or counted in any election, except as prescribed by this code." *Id.* at 890 (quoting § 101.041, Fla. Stat. (2006)). The Court also noted the potential for simultaneous manual recounts to be occurring, conducted by different entities, pursuant to different procedures. *Id.* Because of these conflicts, the Court noted, the local legislation did not "parallel or complement the Election Code, but rather conflict[ed] with it." *Id.* The Court then held that the provision relating to manual recounts could be severed from the amendment because the charter provided for severability and the other provisions were not "necessarily dependent for their operation upon" the conflicting provision. *Id.* at 891.

D. The Ordinance's presumption of validity.

Masone's challenge to the Ordinance faces a high burden – the axiomatic presumption of the validity of ordinances, which applies with equal force to preemption challenges to municipal home rule authority. *See, e.g., City of Kissimmee v. Fla. Retail Federation, Inc.*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005) (applying presumption of validity of legislation to preemption challenge to

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

municipal ordinance); *Lowe v. Broward County*, 766 So. 2d 1199, 1203 (Fla. 4th DCA 2000) ("indulg[ing] every reasonable presumption in favor of ordinance's constitutionality," in light of preemption challenge to county ordinance).

II. CHAPTER 316 NEITHER EXPRESSLY NOR IMPLIEDLY PREEMPTS THE ORDINANCE.

The plain language of sections 316.002, 316.007 and 316.008 provides all the guidance needed to resolve the question of whether the Legislature, prior to the Wandall Act, expressly or impliedly preempted municipal use of red light cameras to regulate violations. *See, e.g., Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005) (holding when a statute's language is clear, an appellate court "will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent").

A. There is no express preemption.

While there is no question – and the City has never disputed – that Chapter 316 manifests a legislative intent for uniformity of traffic laws around the state and limits (to a certain degree) how municipalities may regulate traffic movement, it *also* clearly manifests an intent to allow municipalities to exercise their home rule authority within certain areas. Here, the statutory provisions relevantly state:[18]

> 316.002 **Purpose.** – It is the legislative intent in the adoption of this chapter to make uniform traffic laws to apply throughout the state and its

---

[18] While Masone devotes considerable time to an examination of these statutes, he gives short shrift to the language in the statutes indicative of the Legislature's intent *not* to preempt.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

several counties and uniform traffic ordinances to apply in all municipalities. *The Legislature recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities. Section 316.008 enumerates the area within which municipalities may control certain traffic movement or parking in their respective jurisdictions. This section shall be supplemental to the other laws or ordinances of this chapter and not in conflict therewith.* It is unlawful for any local authority to pass or to attempt to enforce any ordinance in conflict with the provisions of this chapter.

316.007 **Provisions uniform throughout state.** – The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and *no local authority shall enact or enforce any ordinance on a matter covered by this chapter unless expressly authorized.*

§§ 316.002, 316.007, Fla. Stat. (italicized emphasis added).

Section 316.008, referenced in section 316.002, enumerates no less than 23 separate areas in which municipalities may regulate traffic movement:

316.008 Powers of local authorities. –

(1) *The provisions of this chapter shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from:*

(a) Regulating or prohibiting stopping, standing, or parking.

(b) Regulating traffic by means of police officers or official traffic control devices.

(c) Regulating or prohibiting processions or assemblages on the streets or highways, including all state or federal highways lying within their boundaries.

(d) Designating particular highways or roadways for use by traffic moving in one direction.

(e) Establishing speed limits for vehicles in public parks.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

(f) Designating any street as a through street or designating any intersection as a stop or yield intersection.

(g) Restricting the use of streets.

(h) Regulating the operation of bicycles.

(i) Regulating or prohibiting the turning of vehicles or specified types of vehicles.

(j) Altering or establishing speed limits within the provisions of this chapter.

(k) Requiring written crash reports.

(l) Designating no-passing zones.

(m) Prohibiting or regulating the use of controlled access roadways by any class or kind of traffic.

(n) Prohibiting or regulating the use of heavily traveled streets by any class or kind of traffic found to be incompatible with the normal and safe movement of traffic.

(o) Designating hazardous railroad grade crossings in conformity to criteria promulgated by the Department of Transportation.

(p) Designating and regulating traffic on play streets.

(q) Prohibiting pedestrians from crossing a roadway in a business district or any designated highway except on a crosswalk.

(r) Regulating pedestrian crossings at unmarked crosswalks.

(s) Regulating persons upon skates, coasters, and other toy vehicles.

(t) Adopting and enforcing such temporary or experimental regulations as may be necessary to cover emergencies or special conditions.

(u) Enacting ordinances or erecting signs in the rights-of-way to control, regulate, or prohibit hitchhiking on streets or highways, including all state or federal highways lying within their boundaries.

(v) Regulating, restricting, or prohibiting traffic within the boundary of any airport owned by the state, a county, a municipality, or a political

subdivision and enforcing violations under the provisions of this chapter and chapter 318.

(w) *Regulating, restricting, or monitoring traffic by security devices or personnel on public streets and highways,* whether by public or private parties and providing for the construction and maintenance of such streets and highways.

§ 316.008, Fla. Stat.[19]

What is readily apparent from the foregoing statutory provisions is that, *notwithstanding* an intent to maintain uniformity and to limit (not preclude) municipal authority in the general field of traffic enforcement, the Legislature *clearly* recognized that there exist areas of local concern where municipalities *would* have the authority to "regulate the movement of traffic," and set forth those areas in section 316.008, Florida Statutes. § 316.002, Fla. Stat. Equally important, the Legislature *clearly* indicated that the exercise of municipal authority under section 316.008(1) would be "*supplemental to* the other laws or ordinances of this chapter and *not in conflict therewith.*" *Id.* (emphasis added). Moreover, when section 316.008(1) provides that "the *provisions of this chapter* shall not be deemed to prevent local authorities" from exercising the authority conferred in section 316.008, the phrase by necessity encompasses *all* of the provisions in sections 316.002 and 316.007, including those that Masone insists prevented the City from enacting the Ordinance.

---

[19] Masone has not meaningfully disputed that a red light camera would constitute a "security device" encompassed by subparagraph (w). On the contrary, he assumes it as a given. IBM at 21.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

Masone does not address these critical acknowledgments by the Legislature that whatever preemptive intent may be read into sections 316.002 and 316.007 must be measured against other precatory language in those same sections and section 316.008. *See Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012) ("This Court is bound to 'interpret statutes as they are written and give effect to each word in the statute.'") (quoting *Fla. Dep't of Rev. v. Fla. Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001)); *Anderson v. State*, 87 So. 3d 774, 777 (Fla. 2012) ("[A] statute is to be read as a consistent whole, and a court should accord meaning and harmony to all of its parts, with effect given to every clause and related provision."). Instead, he ignores these statements of legislative intent and insists that, because sections 316.002 and 316.007 contain *some* provisions that otherwise restrict the exercise of municipal authority, *any* effort by a municipality to regulate traffic movement must strictly comply with *all* aspects of Chapters 316 and 318. This argument runs counter to both the plain language of the statutes and this Court's prior jurisprudence regarding municipal home rule authority.

When a statutory scheme recognizes that state statutes are supplemental to the exercise of municipal home rule authority, it cannot be said that the Legislature intended to preempt the subject matter.[20] *See City of Boca Raton*, 525 So. 2d at 29 (finding no preemption where statutory scheme was "supplemental, additional, and alternative method of procedure"); *Roper*, 796 So. 2d at 1163 (finding no

[20] The Ordinance itself recognizes that its provisions were "an ancillary deterrent to traffic control signal violations to reduce accidents and injuries." City Code, § 48-26.

preemption where the provisions of Chapter 159 were "supplementary"). Similarly, the mere expression of intent to maintain uniformity of laws statewide does not constitute an express preemption by the Legislature, particularly where the Legislature confers specific authority to municipalities to regulate traffic movement in certain areas. *See, e.g., Phantom of Brevard*, 3 So. 3d at 311, 315 (rejecting Fifth District's uniformity analysis and concern that retailers would be "subject to potentially disparate obligations throughout the state").

The express preemption required to defeat municipal home rule authority "requires a specific statement; the preemption cannot be made by implication [or] by inference." *Mulligan*, 934 So. 2d 1243; *see also Phantom of Clearwater*, 894 So. 2d at 1018. There is no provision in Chapter 316 that expressly preempts the Ordinance. On the contrary, sections 316.002 and 316.008 specifically recognize there may be local circumstances requiring "municipalities to pass certain other traffic ordinances in regulation of municipal traffic" and authorized local governments to "regulat[e], restrict[], or monitor[] traffic by security devices or personnel on public streets and highways...." In the face of such explicit authorization, it is inherently unreasonable to read or write into Chapter 316 an explicit preemption of constitutional home rule authority. This is especially true when one considers that the Legislature knows how to expressly preempt local authority in the area of security camera traffic regulation. The Wandall Act contains a perfect example of explicit preemption in newly enacted section

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

316.0076, which states: "[r]egulation of the use of cameras for enforcing the provisions of this chapter is expressly preempted to the state."[21] § 316.0076, Fla. Stat. (2010); *see also Mulligan*, 934 So. 2d at 1246 (citing numerous examples of the Legislature expressly indicating an intent to preempt local legislation).

B. There is no implied preemption.

The doctrine of implied preemption "is actually a decision by the courts to create preemption in the absence of an explicit legislative directive." *Phantom of Clearwater*, 894 So. 2d at 1019. The doctrine, therefore, is at odds with municipal home rule powers, since section 166.021(4), Florida Statutes, unambiguously states: "It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal government...not *expressly* prohibited by the

---

[21] The inclusion of such preemption language would have been unnecessary if existing law had already preempted the use of security cameras to regulate red light signal violations. Since legislation should never be read in such a fashion as to render provisions superfluous or meaningless – *see, e.g., Metropolitan Cas. Ins. Co. v. Tepper*, 9 So. 3d 209, 215 (Fla. 2009) – the more reasonable conclusion to be drawn from the inclusion of the foregoing preemption statement is that Chapter 316 did not previously (and certainly did not explicitly) preempt use of security cameras to enforce red light signal violations. Additionally, the Legislature went one step further and endorsed municipalities' continued use of existing red light security cameras for an additional year. *See* § 316.07456, Fla. Stat. (2010) (providing grace period for existing red light programs to come into technical compliance with new requirements). The Legislature could have readily terminated all existing municipal red light security camera programs, but chose not to do so. If the Legislature merely intended to reiterate disapproval of earlier red light camera programs, it could have said so – as it did, for example, in preempting local regulation of ammunition. *See* § 166.044, Fla. Stat. (2012) ("Any such ordinance in effect on June 24, 1983, is void.").

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

constitution, general or special law, or county charter and to *remove any limitations, judicially imposed or otherwise*, on the exercise of home rule powers other than those so *expressly* prohibited." (Emphasis added). Consequently, "[c]ourts should be reluctant to 'preclude a local elected governing body from exercising its local powers' by finding preemption by implication 'in the absence of an explicit legislative directive.'" *Shands Teaching Hosp. and Clinics, Inc. v. Mercury Ins. Co. of Florida*, 97 So. 3d 204, 211 (Fla. 2012) (quoting *Phantom of Clearwater*, 894 So. 2d at 1019); *Browning*, 28 So. 3d at 886 (same holding). As the Second District has observed, "[I]f the legislature can easily create express preemption by including clear language in a statute, there is little justification for the courts to insert such words into a statute." *Phantom of Clearwater*, 894 So. 2d at 1019.[22]

---

[22] While not necessary for the resolution of this petition in favor of the City, the City would be remiss if it did not urge the Court to re-examine and *recede* from the "implied preemption" exception to municipal home rule authority. First, it is contrary to the explicit Legislative directive in section 166.021(4), Florida Statutes, removing "judicially imposed" limitations on home rule authority. If there is conceptual disagreement with that mandate, the remedy rests with the Legislature, which chose to limit its preemptive authority, not in the creation and extension of a judicial doctrine. Second, the concerns underlying "implied preemption" have actually been concerns about potential *conflict* with state statute. *E.g.*, *Cannella*, 458 So. 2d at 1077 (endorsing that preemption could be found if "senior legislative body's scheme of regulation of the subject is pervasive" and "further regulation of the subject by the junior legislative body would present *a danger of conflict* with that pervasive regulatory scheme.") (emphasis added). Consequently, those concerns might be better addressed by examining whether the municipal legislation represents an actual and substantial conflict with the state scheme. If, however, the schemes can co-exist and compliance with one does not require violation of the other, as in *Mulligan* and *Phantom of Brevard*, then that should end the inquiry.

There can be no implied preemption based on a pervasive scheme if the Legislature has actually delegated authority to municipalities to act within the same field as the Legislature. That was the Court's conclusion in *Browning*:

> To the contrary, the Election Code specifically *delegates certain responsibilities and powers to local authorities*. This statutory scheme undoubtedly *recognizes that local governments are in the best position to make some decisions for their localities*. In light of this, we conclude that the Election Code *does not impliedly preempt* the field of elections law.

28 So. 3d at 887-88 (emphasis added); *see also id.* at 886-87 ("While we agree that Florida's Election Code is a detailed and extensive statutory scheme, *we conclude that the Legislature's grant of power to local authorities in regard to many aspects of the election process does not evince an intent to preempt the field of election laws*.") (emphasis added).[23] The Court's focus on the Legislature's recognition of the need for local legislation to address local needs is particularly instructive here, where the Legislature in section 316.002 has acknowledged that it "recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the

---

[23] Masone cites with approval the Fifth District's reasoning in *Udowychenko*, 98 So. 3d at 596 that implied preemption should be found because "the legislative scheme of enforcing traffic is pervasive; chapters 316 and 318 cover almost every area of traffic regulation and enforcement, encompassing 125 pages in the publication of the Florida Statutes." IBM at 39. Of course, this precise reasoning was rejected by the Court in *Browning*, where despite the "extensive statutory scheme" of the Election Code and the fact that it encompasses *nine* chapters (as opposed to only two) and 125 pages of the Florida Statutes, this Court concluded that local legislation was not impliedly preempted. 28 So. 3d at 886.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

movement of traffic outside of such municipalities."[24] § 316.002, Fla. Stat. *See also Browning*, 28 So. 3d at 887-88 (citing to cases where "Florida courts have not found an implied preemption of local ordinances which address local issues.").[25]

III. THE ORDINANCE DOES NOT CONFLICT WITH STATE STATUTES.

The City has never disputed that there are numerous differences between the scheme implemented by the Ordinance and the scheme implemented by the state's

---

[24] Below, Masone tried to avoid the implications of this Legislative acknowledgment by arguing that the authority the Legislature meant to confer was authority to act only in situations unique to a particular municipality. [CITATION]. Such an argument would, of necessity, fail. First, it is difficult to imagine a municipal traffic or parking condition so unique that it cannot occur in another municipality in such a manner as would necessitate exercise of the section 316.008(1) enumerated powers. Second, such an interpretation would impose upon the enacting municipality the onerous, if not impossible, burden of first determining whether the condition it is facing is truly unique throughout the state, a patently absurd requirement. *See System Components Corp. v. Fla. Dep't of Transp.*, 14 So. 3d 967, 981 (Fla. 2009) ("[I]t is axiomatic that courts should...avoid giving [a statute] an interpretation that will lead to an absurd result."). For example, section 316.008(1)(a) allows a municipality to exercise authority to "regulat[e] or prohibit[] stopping, standing, or parking." § 316.008(1)(a), Fla. Stat. If the exercise of such authority were conditioned on the enacting municipality's first ascertaining that no other municipality is experiencing the same problem, the authority could never be exercised.

[25] While Masone chastises the City for not addressing *State v. Kuhlman*, 729 N.W.2d 577 (Minn. 2007) below (IBM at 18), he neglects to point out that the supreme courts of two other states have ruled that comparable municipal ordinances providing for automated traffic enforcement systems, enacted under similar municipal home rule powers, were not preempted by state traffic laws. *See City of Davenport v. Seymour*, 755 N.W. 2d 533 (Iowa 2008) (running red lights or speeding); *Mendenhall v. City of Akron*, 881 N.E. 2d 255 (Ohio 2008) (speeding); *State v. City of Cleveland*, 859 N.E. 2d 923 (Ohio 2006) (speeding).

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

traffic laws, as set forth in Chapters 316 and 318. However, differences do not a conflict make. *Mulligan*, 934 So. 2d at 1247 ("[E]mploy[ing] differing procedures to achieve their purposes does not amount to an improper 'conflict' necessitating the invalidation of the ordinance."). As previously noted, this Court's test to determine whether a conflict precludes the exercise of municipal home rule authority requires that the two pieces of legislation cannot co-exist, such that compliance with one requires violation of the other. *Phantom of Brevard*, 3 So. 3d at 315; *Mulligan*, 934 So. 2d at 1246.

Conflict sufficient to supersede municipal home rule authority has a "very strict and limited meaning." *F.Y.I. Adventures, Inc. v. City of Ocala*, 698 So. 2d 583, 584 (Fla. 5th DCA 1997). The Ordinance does not fall into any of the categories traditionally recognized by this Court as giving rise to an irreconcilable conflict: (i) when a municipality forbids what the state "has expressly licensed, authorized or required"; (ii) when a municipality authorizes "what the legislature has expressly forbidden"; or (iii) where the penalty imposed by ordinance exceeds that imposed by the state for the same misconduct.[26] *Mulligan*, 934 So. 2d at 1247; *Thomas*, 614 So. 2d at 470.

---

[26] Masone argues that because the Ordinance allows for the imposition of a fine on repeat offenses greater than the one imposed by state statute, a conflict must arise. IBM at 31-32. The problem with the argument is that it compares proverbial apples and oranges. While it is true that a second offense under the Ordinance allows for a fine of $250, it is equally true that the Ordinance *does not impose points for the offense*, unlike the state statutes. *Cf.* City Code, § 48-39 with §§ 318.14(8) and 322.27, Fla. Stat. The value of those imposed points, in terms of increased insurance expense or potential suspension of a license, cannot loosely be

(continued . . .)

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

A. Sections 316.002 and 316.008 contemplate the City's exercise of authority within specified areas without creating a conflict with state statute.

Both section 316.002 and section 316.008 recognize that when a municipality is acting within the areas of authority designated in section 316.008, a disqualifying conflict does *not* arise. Section 316.002 states, in pertinent part:

> The Legislature recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities. *Section 316.008 enumerates the area within which municipalities may control certain traffic movement or parking in their respective jurisdictions.* This section *shall be supplemental* to the other laws or ordinances of this chapter *and not in conflict therewith.*

§ 316.002, Fla. Stat. (emphasis added). Similarly, section 316.008 echoes the idea that a municipality exercising the powers enumerated therein acts outside of Chapter 316 and not in conflict therewith:

> *The provisions of this chapter shall not be deemed to prevent* local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from: ... (w) Regulating, restricting, or monitoring traffic by security devices or personnel on public streets and highways....

(. . . continued)
compared with a fixed fine under the Ordinance so as to conclude that the Ordinance's penalty is impermissibly greater than the statute's, especially when considered in the context of municipal home rule authority. Moreover, even if the Ordinance's fine were impermissibly greater than the statute's, the remedy is to sever the offending provision or reduce the penalty, not invalidate the entire Ordinance based on conflict. *Browning*, 28 So. 3d at 891; *Phantom of Clearwater*, 894 So. 2d at 1013, 1017. The Ordinance contained a severability clause. R. 121-22.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

§ 316.008(1)(w), Fla. Stat. (emphasis added). Remarkably, Masone does not address these provisions in his initial brief on the merits.

The plain language of these statutory provisions reflects that when the Legislature enacted the otherwise comprehensive uniform traffic laws set forth in Chapter 316, it *also* enacted provisions authorizing municipalities to act outside Chapter 316 without conflicting with that scheme, *and without running afoul of the conflict language in sections 316.002 and 316.007* upon which Masone relies. Had the Legislature intended for the conflict language in section 316.002 and 316.007 to trump all other provisions in Chapter 316, it would have used language to that effect. Instead, the Legislature did the contrary and stated that the enumerated powers in section 316.008(1) were "supplemental to" Chapter 316 and "not in conflict therewith," notwithstanding all the other "provisions of this chapter." §§ 316.002, 316.008(1), Fla. Stat.

For this reason, Masone's extensive recitation of the history that preceded (and purportedly motivated) the enactment of Chapter 316 is entirely beside the point. If anything, that history demonstrates that the Legislature knew precisely what it was doing when it carved out areas in which municipalities could act to address local concerns without conflicting with Chapter 316. Even in the face of that history, and just two and a half years after Florida voters amended the Florida Constitution to confer broad, independent powers on municipalities (in order to

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

alleviate the burdens imposed the Legislature), the Legislature knew to allow local governments flexibility to address local traffic concerns.[27]

Therefore, Masone's recurring argument that the Ordinance's approach to enforcement of red light signal violations is not specifically authorized by Chapter 316 is a *non sequitur*. Regardless of how "dramatic" the differences are (IBM at 9), for purposes of conflict analysis, no such authorization is needed, either under Chapter 316 or Article VIII, section 2(b) of the Florida Constitution, or section 166.021, Florida Statutes. This Court has, therefore, on more than one occasion, recognized the inherent flexibility municipalities enjoy to structure solutions to local problems, even in the face of an existing state statutory scheme.

In *Nye*, for example, the Court upheld a municipality's broader exercise of eminent domain than what was articulated by statute, observing that "municipalities are not dependent upon the legislature for further authorization" to act. 608 So. 2d at 17. It then concluded:

> If the state has the power to take particular land for public purposes, then a municipality may also exercise that power unless it is "expressly prohibited." *Although section 166.401(2) does not expressly grant the*

---

[27] Any attempt to assert that the authority to "regulate, restrict *or* monitor" conferred by section 316.008(1)(w) does not include the authority to "enforce" must fail. This Court has previously held that the "verb 'regulate' embraces the fixing of limitations and restrictions and also the enforcement of them." *Nichols v. Yandre*, 9 So. 2d 157, 159 (Fla. 1942). *See also* Merriam-Webster Online Dictionary, defining "regulate" as "to govern or direct according to rule; b(1): to bring under the control of law or constituted authority," http://www.merriam-webster.com/dictionary/regulate, last accessed April 12, 2013.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

> *taking of an entire parcel by a municipality to save money, it also does not expressly prohibit a municipality from doing so.*

Id. (emphasis added). Similarly, in *City of Boca Raton,* Boca Raton had imposed special assessments to repay municipal bonds, but elected not to comply with the comprehensive scheme set forth in Chapter 170, Florida Statutes. 525 So. 2d at 26, 29. The Court observed that Chapter 170 (like sections 316.002 and 316.008) reflected that municipalities could employ "supplemental, additional, and alternative" methods than those contemplated in Chapter 170, as long as those methods were not "expressly prohibited." *Id.* at 28, 29-30.

In *City of Sunrise*, the city had devised a "novel" mechanism for raising revenue – double advanced refunding bonds. 354 So. 2d at 1207. Despite the fact that section 166.101 enumerated specific types of bonds that could be issued by municipalities, *id.* at 1208-09, this Court determined that absent a specific prohibition, Sunrise enjoyed the flexibility under its municipal home rule authority to structure the financing as it did:

> *Since there is no constitutional or statutory limitation on the right of municipalities to issue refunding revenue bonds not payable by ad valorem taxes,* we hold that municipalities may issue "double advance refunding bonds" so long as such bonds are pursuant to the exercise of a valid municipal purpose.

Id. at 1209 (emphasis added).

One of the many criticisms leveled by Masone against the Ordinance is that it punishes owners of vehicles for red light camera violations, rather than drivers, as is provided for in Chapter 316. IBM at 17-20. This criticism (like the other statutory differences highlighted by Masone) betrays his fundamental

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

misinterpretation of municipal home rule authority. There is no question that Chapter 316 punishes drivers for running red lights, but the notion of punishing vehicle owners for traffic infractions is not unheard of. Much like the Ordinance, section 316.1001, Florida Statutes, contemplates photographic enforcement of toll violations and the mailing of a notice of violation to owners of vehicles determined to have not paid a toll. §§ 316.1001(2)(b) and (d), Fla. Stat. Like the Ordinance, the toll statute allows an owner to submit an affidavit indicating that the vehicle was "at the time of the violation, in the care, custody, or control of another person." § 316.1001(2)(c), Fla. Stat. Clearly, the State has the authority to punish a vehicle owner for a toll violation based on photographic evidence.

As state statute provides, and this Court has repeatedly observed, under its home rule authority, a municipality may exercise any power the state may exercise. §§ 166.021(2) and (3), Fla. Stat. ("'Municipal purpose' means any activity or power which may be exercised by the state" and "the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act"); *Nye*, 608 So. 2d at 17; *City of Boca Raton*, 525 So. 2d at 28. The fact that prior to the Wandall Act the Legislature had not yet specifically addressed photographic enforcement of red light violations against vehicle owners does not mean that it lacked the power to do so or that municipalities were precluded from taking such action, unless (of course) it was expressly prohibited by statute.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

B. The Ordinance clearly does not apply when Chapter 316 is implicated.

The Ordinance on its face makes clear the City's intent not to conflict with state law or foreclose the operation of Chapter 316. Section 48-26 states, "This section shall not supersede, infringe, curtail or impinge upon state or county laws related to red light signal violations or conflict with such laws." Inasmuch as the Ordinance operates outside the Uniform Traffic Code (by use of a code enforcement mechanism pursuant to Chapter 162)[28] and does not result in the issuance of uniform traffic citations, section 48-26 is not self-serving, but rather entirely accurate. Moreover, section 48-38 provides that the Ordinance will not apply whenever a police officer observes a violation and issues a uniform traffic citation under Chapter 316.

Masone points out that Chapter 318 contemplates that a county court judge or trained civil infraction hearing officer must adjudicate all "traffic signal violations." IBM at 28. That is not, however, accurate. While section 318.32, Florida Statutes, does evince an intent to have civil infraction hearing officers adjudicate the guilt or innocence of anyone "charged with any civil traffic infraction," the term "infraction" is defined for purposes of Chapter 318 as "a noncriminal violation that may require community service hours under s. 316.027(4), but is not punishable by incarceration." §§ 318.13(3) and 318.32(1), Fla. Stat. In fact, all of Chapter 318 concerns itself with the "disposition of traffic

---

[28] *See Mulligan*, 934 So. 2d 1242-43 (approving impoundment ordinance that implemented enforcement through code enforcement mechanism).

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

infractions." The Ordinance plainly does not address "infractions," since the Ordinance does not, under any set of circumstances, provide for community service hours. The Ordinance, like any other municipal code enforcement provision, concerns itself with fines imposed for the improper use of an owner's property within the City's jurisdiction.

C. Masone's concerns about "hodge-podge" municipal legislation are unwarranted.

Masone's repeated "hodge-podge" comments (IBM at 8, 13, 36) unfairly criticize the City and amount to the equivalent of a legal tempest in a teapot. To be clear, a driver travelling through the City knows what traffic laws to observe and is entirely able to comply with the Ordinance without violating state law. The City's program did not fundamentally alter the law relating to red-light traffic signals; a red light suddenly does not mean "yield" and red light penalties are not imposed upon the running of a yellow light. Either of those changes would have fundamentally altered the state's uniform traffic scheme, resulting in drivers being uncertain as to their driving obligations as they traveled from jurisdiction to jurisdiction. The City simply enacted a separate enforcement mechanism for comparable unlawful conduct. The Ordinance could not give rise to the purported chaos suggested by Masone's alarm of "hodgepodge" legislation.

Moreover, the Legislature, in enacting section 316.002 and 316.008(1) evidently recognized that there would, in fact, be circumstances within municipalities that would require a localized regulatory response, and that it was entirely appropriate and consistent with a uniform statewide traffic code, to allow

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

for local governmental authority to be exercised to control the situation in those instances, even if those laws differed. Consequently, municipalities are empowered to restrict or prohibit stopping, standing or parking within their jurisdictions, to determine and enforce traffic speed in public parks, and to regulate, restrict and monitor traffic through the use of security cameras. Masone may not appreciate or concur with the Legislature's grant of such authority, but to suggest that its exercise would result in a "hodgepodge" of inconsistent legislation is hyperbole, at best.

IV. MASONE'S RELIANCE ON ATTORNEY GENERAL OPINIONS IS MISPLACED.

Masone urges this Court to adopt the reasoning of two inapposite Attorney General opinions: AGO 97-06 and AGO 05-41 (AA:27-33). He fails to point out, however, that they are factually and legally distinguishable.

In AGO 97-06, the question presented to the Attorney General immediately takes his subsequent analysis out of the realm of relevancy: "May a county enact an ordinance authorizing the use of unmanned cameras ... for the purpose of issuing citations for violations of section 316.075, Florida Statutes?" AGO 97-06 at 1 (AA27) (emphasis added). Plainly, the concern raised by Palm Beach County did not address the City's situation, where the latter was seeking to regulate intersections through its code enforcement powers and mechanism. Instead, Palm Beach County was looking to issue citations under the state's uniform citation system, set forth in Chapters 316 and 318. In other words, Palm Beach County had not adopted a parallel system authorized by section 316.008(1)(w) (and Chapter

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

162, Florida Statutes), but rather was grafting onto the state's citation system a new requirement or mechanism for issuance of citations. In this context, the Attorney General concluded that it was "questionable" whether an "electronic traffic infraction detector may be independently used as the basis for issuing citations for violations...." AGO 97-06 at 2.

In AGO 05-41, the Attorney General was asked a more pointed question regarding a municipality's code enforcement authority to regulate red-light violations. AGO 05-41 at 1. In rendering his decision, however, the Attorney General defaulted to the earlier opinion in AGO 97-06, which asked an entirely different question regarding issuance of citations under the Uniform Traffic Code ("UTC"). The later opinion fails even to note the distinction between issuance of a citation under the Uniform Traffic Code and municipal code enforcement under Chapter 162, and concludes that "the photographic record from unmanned cameras monitoring intersections" may not be used "as the sole basis for issuing citations." AGO 05-41 at 3 (emphasis added). Of course, the City of Pembroke Pines had not asked about the issuance of citations under the UTC.

Moreover, to the extent Pembroke Pines' issuance of "citations" was based solely on the photographic record, the factual underpinnings of AGO 05-41 are distinguishable, since the City's issuance of a notice of violation under its program was not based solely on the photographic or videographic record, but rather upon a statutorily qualified police officer's review of such evidence and his or her conclusion that a violation of the City ordinance has occurred. City Code, §§ 48-31, 48-32.

On a more fundamental level, there is an analytical flaw in both of the Attorney General opinions Masone cites. In each instance, the Attorney General, without elaboration, ignores the plain and unambiguous language of section 316.008(1)(w). While the statutory language is quoted in each opinion as authorizing the regulation, restriction and monitoring of traffic through the use of cameras – AGO 97-06 at 1 and AGO 2005-41 at 2 – when it comes time to reach a conclusion, section 316.008(1)(w) suddenly becomes a statute that allows a municipality to "detect" or "monitor and advise," but nothing else. AGO 97-06 at 1; AGO 2005-41 at 2. No explanation is given as to why the verbs "regulate" and "restrict" do not encompass the authority to impose penalties for red light violations. As the City has previously pointed out, the "verb 'regulate' embraces the fixing of limitations and restrictions and also the enforcement of them." *Nichols*, 9 So. 2d at 159.

Neither Attorney General opinion endeavors to explain how a municipality may be legislatively authorized to regulate and restrict traffic through the use of red light cameras, yet be unable to take any enforcement action. For this reason, the analysis in each opinion is unsound, and the City would respectfully urge the Court not to adopt a comparable analysis.

V. THE FIFTH DISTRICT MISAPPLIED THIS COURT'S MUNICIPAL HOME RULE PRECEDENTS IN *UDOWYCHENKO*.

Clearly, Masone would prefer that this Court agree with the Fifth District's analysis in *Udowychenko* and reject the Third Distict's analysis below. However, to do so would require the Court to overlook the plain language of sections

316.002 and 316.008, and ignore or recede from a long line of municipal home rule precedents, all of which have been fully addressed in this brief. *See supra* at 6-27.

The Fifth District's analysis reveals that it accepted the defendant's invitation in that case to focus primarily on the differences between the state statutes and Orlando's ordinance rather than on municipal home rule authority. *Udowychenko*, 98 So. 3d at 597-99. However, as this Court observed in *Mulligan*, "employ[ing] differing procedures to achieve [legislative] purposes does not amount to an improper 'conflict' necessitating the invalidation of the ordinance." 934 So. 2d at 1247. What is striking in the Fifth District's analysis is the failure to note – much less discuss – the significance of the critical language in sections 316.002 ("Section 316.008 enumerates the area within which municipalities may control certain traffic movement.... This section *shall be supplemental to the other laws or ordinances of this chapter and not in conflict therewith.*") and 316.008(1) ("*The provisions of this chapter shall not be deemed to prevent local authorities*, ... from: ... (w) Regulating, restricting, or monitoring traffic by security devices or personnel on public streets and highways...."). The City respectfully suggests that these provisions determine the outcome of the preemption and conflict analysis at issue here.

Lastly, the Fifth District's treatment of municipal home rule authority is cursory, at best. This is evident from its failure to examine the development of such authority and its characterization of the Municipal Home Rule Powers Act as a "limitation" on the authority conferred by Article VIII, section 2 of the Florida Constitution. *Udowychenko*, 98 So. 3d at 595 ("However, section 166.021, Florida

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

Statutes (2011), which codified Article VIII, limits that power...."). This characterization is historically inaccurate. As noted earlier (*supra* at 9-12), section 166.021 was enacted in 1973 by the Legislature in response to this Court's unduly restrictive reading of Article VIII, section 2, in *Fleetwood Hotel*. If anything, section 166.021 was enacted to guarantee municipalities the broadest possible exercise of home rule authority, not to limit its exercise. The City respectfully urges the Court to disapprove the Fifth District's reasoning in *Udowychenko*.

CONCLUSION

Municipal home rule principles mandate that the Ordinance be upheld if there is any conceivable basis for doing so, in the absence of unequivocal preemption or irreconcilable conflict. The Ordinance was not preempted by state statute, either expressly or impliedly, certainly not in the face of the extensive authority conferred by Chapter 316 on municipalities to independently regulate traffic within their jurisdictions. Moreover, Masone has not demonstrated that the differences between the state statutory scheme and the Ordinance are such that compliance with one requires violation of the other, especially when the Legislature has stated that the City's exercise of authority under section 318.001(w) is supplemental to and not in conflict with any of the provisions in Chapter 316.

The City respectfully requests that the Court approve the Third District's decision below.

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323

Respectfully submitted,

Edward G. Guedes, Esq.
Florida Bar No. 768103
Michael S. Popok, Esq.
Florida Bar No. 44131
John J. Quick, Esq.
Florida Bar No. 648418
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
2525 Ponce de Leon Blvd., Ste. 700
Coral Gables, Florida 33134
Telephone: (305) 854-0800
Facsimile: (305) 854-2323

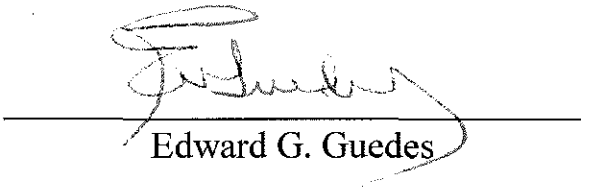
Counsel for City of Aventura

By: _____
Edward G. Guedes

CERTIFICATE OF SERVICE

I certify that a copy of this answer brief on the merits was served via e-mail on April 17, 2013, on: Bard D. Rockenbach, Esq. (bdr@FLAppellatelaw.com), Andrew A. Harris, Esq. (aah@FLAppellatelaw.com, jew@FLAppellatelaw.com) (Attorneys for Petitioner), Burlington & Rockenbach, P.A., 444 West Railroad Avenue, Suite 430, West Palm Beach, Florida 33401; Samuel J. Salario, Jr., Esq. (ssalario@carltonfields.com, bsickimich@carltonfields.com), Joseph H. Lang, Jr., Esq. (jlang@carltonfields.com), Amanda Sansone, Esq.

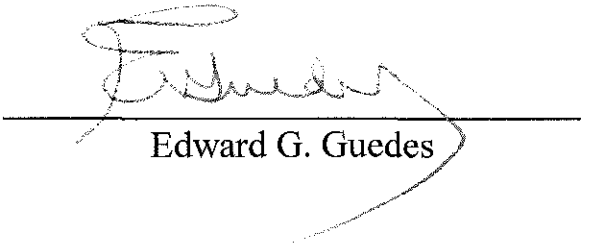
(asansone@carltonfields.com), Carlton Fields, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, Florida 33607.



Edward G. Guedes

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



Edward G. Guedes

WEISS SEROTA HELFMAN PASTORIZA COLE & BONISKE, P.L.
2525 PONCE DE LEON BOULEVARD, SUITE 700, CORAL GABLES, FLORIDA 33134 • TEL. 305-854-0800 • FAX 305-854-2323