IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D12-4325

SHERYL STECKLER, in her Official capacity as Inspector General of Palm Beach County, Florida,

Petitioner,

vs.

TOWN OF GULF STREAM, ET AL.,

Respondents,

NOTICE OF SUPPLEMENTARY AUTHORITY

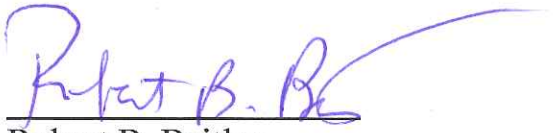
Petitioner, Sheryl Steckler, in her official capacity as Inspector General of Palm Beach County (the IG), pursuant to Fla. R. App. P. 9.225, submits as supplemental authority *Davis v. Gronemeyer*, 251 So. 2d 1 (Fla. 1971), *Creighton v. City of Santa Monica*, 160 Cal. App. 3d 1011 (Cal. 2nd Appellate District 1984), *Green v. Safir*, 174 Misc. 2d 400 (N.Y. Supreme 1997), *Green v. Safir*, 255 A.D. 2d 107 (N.Y. App. Div. 1998), *Education Dev. Ctr., Inc. v. Palm Beach County,* 751 So. 2d 621 (Fla. 4th DCA 1999), *Rothman-Browning v. Marshall*, 83 So. 3d 859 (Fla. 4th DCA 2011), and *Martin County v. Edenfield*, 609 So.2d 27 (Fla. 1992), copies of which are attached to this notice.

Davis v. Gronemeyer, 251 So. 2d 1, 3 (Fla. 1971), *Creighton v. City of Santa Monica*, 160 Cal. App. 3d 1011, 1014-1022 (Cal. 2nd Appellate District 1984), *Green v. Safir*, 174 Misc. 2d 400, 405 (N.Y. Supreme 1997) and *Green v. Safir*, 255 A.D. 2d 107 (N.Y. App. Div. 1998) are each submitted as authority in connection with Appellant's argument in point IA regarding Appellant's capacity to sue, at pages 12-19 of the Initial Brief and at pages 1-7 of the Reply Brief.

Education Dev. Ctr., Inc. v. Palm Beach County, 751 So. 2d 621, 623 (Fla. 4th DCA 1999) is submitted as authority in connection with Appellant's argument in point IB regarding Appellant's standing to intervene, at pages 19-26 of the Initial Brief and at pages 7-11 of the Reply Brief.

Rothman-Browning v. Marshall, So. 3d 859, 860-861 (Fla. 4th DCA 2011) and *Martin County v. Edenfield*, 609 So.2d 27, 29 (Fla. 1992), are each submitted in connection with Appellant's arguments regarding both Appellant's capacity to sue and Appellant's standing.

Respectfully submitted this 21st day of February, 2013.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Inspector General's Notice of Supplementary Authority has been provided by email this 21st day of February, 2013, to those on the attached service list.

CERTIFICATE OF E-FILING

I HEREBY CERTIFY that a copy of the foregoing Inspector General's Notice of Supplementary Authority has been e-filed this 21st day of February, 2013, pursuant to the requirements of Administrative Order No. 2011-1.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Inspector General's Notice of Supplementary Authority is Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

Robert B. Beitler

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251 So.2d 1
W. A. DAVIS et al., Appellants,
v.
Fred G. GRONEMEYER et al., Appellees.
No. 39670.
Supreme Court of Florida.
July 12, 1971.

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Hobart O. Worley, Jr., of Barksdale, Tucker & Worley, Pensacola, for appellees.

McCAIN, Justice.

Pursuant to Fla.Const. Article V. § 4(2), F.S.A., we review by direct appeal a final judgment of the Circuit Court, Escambia County, construing certain provisions of the Constitution of Florida as amended in 1968.

The facts are not in dispute. In 1951, the Florida Legislature, by special act (Chapter 27537, Laws of Florida) created a civil service system for the civil service employees of Escambia County, and provided therein for a Civil Service Board (hereinafter called the Board) to administer and enforce the provisions of the law. The initial law has been amended seventeen times since 1951, and in 1967, by Chapter 67--1370, Laws of Florida, the Legislature substantially revised the civil service system. The Act, as amended, continued in full force and effect following adoption of the 1968 Florida Constitution.

Subsequently, on January 9, 1970, appellants, the Board of County Commissioners of Escambia County (hereinafter called the County Commission), enacted and adopted Ordinance No. 69--1, which repealed Chapter 27537, together with all its amendments. At the same time the County Commission also enacted Ordinance No. 69--2, creating a County Civil Service System for the employees specified in the Ordinance. These actions were allegedly taken pursuant to the 'home rule' provisions of the 1968 Constitution as set forth in Article VIII thereof and implemented by Chapter 69--234, Laws of Florida, Fla.Stat. §§ 125.65 and 125.69, F.S.A., [1] and Chapter 69--32, Laws of Florida, Fla.Stat. §§ 125.66, .67 and .68, F.S.A.

We are called upon to consider two issues on this appeal: (1) whether appellees, the Civil Service Board of Escambia County, or its individual members, have standing to bring a suit seeking to enjoin the enforcement and implementation of Ordinances No. 69--1 and 69--2; and (2) if so, whether the 1968 Florida Constitution authorizes repeal of Chapter 27537, as

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amended, by the Board of County Commissioners of Escambia County. The Circuit Court determined that appellees did have standing to sue and enjoined enforcement and implementation of the ordinances, concluding that the actions of the County Commission were not authorized by the Constitution.

We turn first to the question of the standing of the Civil Service Board to seek an injunction against the enforcement and implementation of the ordinances.

The issue is one of first impression in this State. The County Commission argues, first, that appellees are foreclosed from raising the issue of the County's authority to repeal Chapter 27537

by the well established rule that office holder cannot question the constitutionality of a state statute without showing that he will be injured its enforcement. State ex rel. Atlantic its enforcement. State ex rel. Atlantic Coast Line R. Co. v. State Board of Equalizers, 84 Fla. 592, 94 So. 681 (1922); City of Pensacola v. King, 47 So.2d 317 (Fla.1950); Steele v. Freel, 157 Fla. 223, 25 So.2d 501 (1946); State ex rel. Watson v. Kirkman, 158 Fla. 11, 27 So.2d 610 (1946); Green v. City of Pensacola, 108 So.2d 897 (Fla.App.1st, 1959); and State ex rel. Davis v. Love, 99 Fla. 333, 126 So. 374 (1930).

This argument is not persuasive. The Civil Service Board does not challenge the validity of any state statute. It seeks only to test the validity of Ordinances 69--1 and 69--2 under the 1968 Florida Constitution and Chapter 69--234 and 69--32, Laws of Florida. Moreover, in general, the cases holding that a ministerial officer may not challenge the validity of a statute have reference to those situations in which an office holder appointed to perform duties under a given act refuses to perform those duties because of the alleged constitutional invalidity of the act. In such a case, it is said that unless expenditure of public funds is involved, the office holder is foreclosed from questioning the validity of the act. State ex rel. Davis v. Love, Supra.

In the instant case we are not confronted with this type of situation. The Board has been willing at all times to perform its duties under Chapter 27537 and its amendments, but has been prevented from doing so by the actions of appellants.

It is true that Chapter 27537, as amended, does not give the Board an express power to sue. The Act does, however, give the Board power to enforce its provisions, to prevent violations, and to retain counsel. [2] In our opinion, the necessary and fair inference to be drawn from these powers, taken collectively, is that they give the Board power to bring suit to test the constitutionality of ordinances which presume to repeal the Act. Indeed, if repeal by the County Commission may be characterized as the ultimate violation of the Act, as we think it may, the Board would be remiss in performing its obligation to require and enforce observance of the Act if it permitted the repeal to go untested. Accord, City of Pensacola v. King, Supra.

We turn, then, to the second issue confronting us: whether the 1968 Florida Constitution authorizes repeal of Chapter 27537, as amended, by the Board of County Commissioners of Escambia County. Escambia County is a non-charter county. Accordingly, we are initially concerned with the proper construction to be placed on Fla.Const. Article VIII, § 1(f) (1968), which provides:

'(f) Non-charter government. Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, County ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal

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ordinance shall not be effective within the municipality to the extent of such conflict.' (Emphasis supplied.)

Considered alone, it is apparent that this provision prohibits the kind of action taken by the County Commission in this case. The Board of County Commissioners of a non-charter county is empowered to enact county ordinances only to the extent such are not inconsistent with general or special law. Chapter 27537 is a special law. Since the Legislature, by special act, has pre-empted the civil service field, it follows that the Board may not enact an ordinance on the same subject. It would be inconsistent with special law to do so.

A further support for this theory is Fla.Const. Article III, § 14, which provides that the Legislature may create civil service systems and boards for county, district and municipal employees. While the Legislature is not required

by Article III, § 14, to create such systems, the clear implication of this provision is that where it has done so, it will be considered to have pre-empted the field.

Petitioner urges, however, that Fla.Const. Article VIII, § 6(d) creates an exception to § 1(f). Article VIII, § 6(d), provides:

'(d) Ordinances. Local laws relating only to unincorporated areas of a county on the effective date of this article may be amended or repealed by county ordinance.'

The 1968 Constitution does not define the term 'local law'. Article X, § 12(g) does provide, however, that the term 'special law' means a special or local law. It follows that at least one definition of a local law is a 'special law'; that is, a special act of the Legislature, enacted pursuant to Article III, § 10 of the 1968 Constitution or Article III, § 21 of the 1885 Constitution. [3]

We must next determine whether Chapter 27537, on the effective date of Article VIII related only to unincorporated areas of Escambia County within the meaning of § 6(d). If so, repeal of Chapter 27537 was proper. If not, the actions of the County Commission were unauthorized.

On this point, we have searched the transcript of the proceedings of the Convention of the Florida Constitutional Revision Commission, the Minutes of the Constitutional Revision Session of the Committee of the Whole House (July 31 and August 21, 1967), and constitutional revision material available in the Supreme Court library without success. Section 6(d) appears to have been inserted in Article VIII virtually without debate and without substantial revision following adoption of the proposed first draft.

Chapter 63--1775, Laws of Florida, establishes a civil service system for the City of Pensacola, covering municipal employees. Appellant urges, therefore, that the county civil service system established by Chapter 27537 and amended by Chapter 67--1370, relates only to the unincorporated areas of Escambia County and was properly repealed by county ordinance.

We find this argument to be without merit. Without attempting to delineate all examples, suffice it to say that the services provided by counties and cities to residents are overlapping and concurrent in numerous areas, i.e. police protection. A reading of Chapters 27537 and 67--1370, indicates that the county employees covered by the Act are engaged in all facets of county government and provide all manner of county services. Necessarily, then, the Act

relates to the incorporated as well as the unincorporated areas of Escambia County. Accordingly, it is our conclusion that the County Commission was without authority under Article VIII, § 1(f) and § 6(d) to repeal Chapter 27537, Laws of Florida, as amended.

Section 1 of Article VIII of the Constitution of 1968, is implemented by Chapter 69--32, Laws of Florida and Chapter 69--234, Laws of Florida. Chapter 69--32 provides a procedure for the exercise of ordinance making powers by counties and is of no concern to us here. Chapter 69--234, however, is substantive, and must be construed consistently with the Constitution. In pertinent part, Chapter 69--234, provides:

'Section 1. In accordance with the provisions of Article VIII, section 1 of the state constitution, Counties shall have all powers of local self-government including governmental, corporate and proprietary powers to enable them to conduct county government, perform county functions and render county services, and may exercise any such power for county purposes for the health, safety or welfare of its citizens, not inconsistent with general or special law.

'Section 4. The provisions of this act shall be so construed as to secure for the counties the broad exercise of home rule powers granted by the constitution.'

The above language is general, and apparently covers both section 1(f), relating to non-charter counties, and section 1(g) relating to charter counties. We have seen, however, that non-charter counties have home rule power only to the limited extent provided by Article VIII, § 6(d), Constitution of 1968. Thus, the above statutory provision, insofar as it purports to grant broad home rule powers to counties must be and is hereby limited in effect to charter counties with single exception described in this opinion.

The judgment appealed from is therefore affirmed.

Affirmed.

ROBERTS, C.J., and ERVIN, BOYD and DREW, (Retired), JJ., concur.

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1 We note that Fla.Stat. § 125.65, F.S.A., has since been repealed by Chapter 71--14, Section 3(1), Laws of Florida. For purposes of this appeal, however, we must consider the statute as constituted at the time of the contested events.

2 See Chapter 67--1370, Section 4(b) and (j).

3 For purposes of this appeal, it is not necessary to decide whether the term local law also has reference to the so-called 'population acts' enacted under the Constitution of 1885. Chapter 27537, Laws of Florida was enacted in accord with the procedure prescribed by Article III, § 21, Constitution of 1885 for enactment of local laws, and accordingly is not susceptible to challenge as an invalid population act.

KAREN CREIGHTON, etc. et al., Plaintiffs and Respondents, v. CITY OF SANTA MONICA, et al., Defendants and Appellants; SANTA MONICA RENT CONTROL BOARD, Real Party in Interest and Appellant

Civ. No. B003559

Court of Appeal of California, Second Appellate District, Division Two

160 Cal. App. 3d 1011; *207 Cal. Rptr. 78*; *1984 Cal. App. LEXIS 2474*

October 12, 1984

PRIOR HISTORY: [***1] Superior Court of Los Angeles County, No. WEC 83569, Raymond Choate, Judge.

DISPOSITION: The judgment is reversed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a taxpayers' action against a city, various municipal officers, and a rent control board challenging the board's legal authority to formulate its own budget and hire an independent legal staff, the trial court enjoined the board from continuing to adopt its own budget and directed the city attorney to begin representing the board in all legal matters. The city had amended its charter by initiative measure establishing a comprehensive system of rent control to be administered by the rent control board consisting of popularly elected commissioners. The new charter specifically empowered the board to hire and pay necessary staff and to finance its reasonable and necessary expenses by charging landlords annual registration fees. By a series of subsequently enacted ordinances, the city council affirmed the authority of the board to determine its financial and personnel policies. (Superior Court of Los Angeles County, No. WEC 83569, Raymond Choate, Judge.)

The Court of Appeal reversed. The court held the voters intended the rent control board to be autonomous in budgetary and legal affairs as evidenced by those provisions of the charter amendment that conferred on the board the authority to impose fees, enforce the law, and employ a regular staff, and that the city council simply clarified the amendment and provided a means of implementation by adopting the series of ordinances directing the board to adopt a budget and affirming the authority of the board to employ independent legal counsel. The court held there was no improper delegation of authority, which had been delegated by the electorate through the device of an initiative amendment to the charter. (Opinion by Compton, Acting P. J., with Beach and Gates, JJ., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports, 3d Series

(1) Municipalities § 11 -- Charters -- Contents and Interpretation. --A city's charter is the equivalent of a local constitution. It is the supreme organic law of the city, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law. Charter cities may make and enforce all ordinances and regulations subject only to restrictions and limitations imposed in their several charters. Within its scope, such a charter is to a city what the state Constitution is to the state.

(2) Municipalities § 11 -- Charters -- Contents and Interpretation. --The various sections of a city's charter must be construed together, giving effect and meaning so far as possible to all parts thereof, with the primary purpose of harmonizing them and effectuating the legislative intent as therein expressed. Where it is impossible to reconcile conflicting provisions, special provi-

sions control more general provisions and later enacted provisions control those earlier in time.

(3) Initiative and Referendum § 3 -- Constitutional Provisions. --Although the legislative power under the Constitution is formally vested in the Legislature, the people reserve to themselves the powers of initiative and referendum, and the power of initiative must be liberally construed to promote the democratic process.

(4) Initiative and Referendum § 1 -- Construction. --It is a general rule of statutory construction that a court will interpret a measure adopted by a vote of the people in such a manner as to give effect to the intent of the electorate. The words must be read in a sense which harmonizes with the subject matter and the general purpose and object of the amendment, consistent with the language itself. The words must be understood, not as the words of the civil service commission, or the city council, or the mayor, or the city attorney, but as the words of the voters who adopted the amendment. They are to be understood in the common popular way, and, in the absence of some strong and convincing reason to the contrary, they are not entitled to be considered in a technical sense inconsistent with their popular meaning. To ascertain the intent of the electorate it is proper to consider the official statement made to the voters in connection with propositions of law they are requested to approve or reject.

(5a) (5b) Municipalities § 82 -- Departments and Boards -- Rent Control Board -- Authority to Adopt Budget and Retain Legal Staff. --A city rent control board, established by an initiative measure and popularly elected so as to be independent of city council interference or control, had authority to formulate its own budget and hire an independent legal staff, where the charter amendment enacted by the initiative provided the board should finance its reasonable and necessary expenses by charging fees payable by landlords, gave it the power to issue necessary rules and regulations and to hire and pay necessary staff, and where the innate characteristics and functions of the board required it to employ an independent legal staff. Thus, a city ordinance clarifying the amendment and providing a means of implementation by adopting a series of ordinances directing the board to adopt a budget after public hearing and confirming the authority of the board to employ independent legal counsel was not an improper delegation of authority or an illegal expenditure of public funds.

(6) Municipalities § 12 -- Charters -- Amendment -- Initiative. --Where the voters have altered their charter by initiative measure, but the terms of the amendment are ambiguous when read with existing law, the legislative body may interpret the initiative in order to harmonize it with existing law.

(7) Municipalities § 58 -- Ordinances, Bylaws and Resolutions -- Validity -- Presumptions and Burden of Proof. --In determining the validity of an ordinance or a statute, the presumption is that the enactment is valid. Where ordinances or bylaws have been enacted pursuant to competent authority they will be supported by every reasonable intendment and reasonable doubts as to their validity will be resolved in their favor. Courts are bound to uphold municipal ordinances and bylaws unless they manifestly transcend the powers of the enacting body.

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Stacey & Jones, Sherman Stacey, David M. Shell and Craig Mordoh for Plaintiffs and Respondents.

JUDGES: Opinion by Compton, Acting P. J., with Beach and Gates, JJ., concurring.

OPINION BY: COMPTON

OPINION

[*1014] [**80] In April 1979, the Santa Monica City electorate amended its city charter by initiative measure establishing a comprehensive system of controls on residential rents. To administer this system the amendment provided for the creation of a permanent rent control board (Board), consisting of five popularly elected commissioners, with the authority to regulate maximum rents and to issue permits for the removal of rental units from the rental housing market. The new charter provision specifically empowered the Board to "hire and pay necessary staff" (Santa [***2] Monica City Charter, art. XVIII, § 1803(f)(6)) and to "finance its reasonable and necessary expenses by charging landlords annual registration fees." (Santa Monica City Charter (Charter), art. XVIII, § 1803(n).) By a series of subsequently enacted ordinances, the Santa Monica City Council affirmed the authority of the Board to determine its financial and personnel policies. As a result, since 1979, the Board has adopted its own budget and retained the services of eight staff attorneys to represent it in well over three hundred cases.

Some four years later, in November 1983, plaintiffs instituted a taxpayers action [1] against defendants City of Santa Monica (City), various municipal officers, and the Board, as real party in interest, challenging the Board's legal authority to formulate its own budget and hire an independent legal staff. Plaintiffs' generally contended that there had been an illegal expenditure of public funds and an unlawful delegation by the City attorney of his official duties. The superior court, ruling in favor of plaintiffs, enjoined the Board from continuing to adopt its own budget and directed the City attorney to begin representing the Board in all legal [***3] matters. Defendants and real party in interest appeal, arguing that the trial court exceeded its jurisdiction by deciding a purely legislative matter and erroneously ignored the intent of the electorate in interpreting the City Charter. We agree and therefore reverse the judgment. [2]

1 Plaintiffs Karen Creighton, David Dobrin, and Dale Berguson are Santa Monica taxpayers and renters who pay to their landlords $ 6 each month as reimbursement for a registration fee that the landlords must pay to the Board.

2 Following entry of judgment and issuance of a peremptory writ of mandate, the trial court issued a stay order to June 30, 1984, upon the condition that defendants and real party in interest begin implementation of the judgment. The Supreme Court, however, subsequently granted a writ of supersedeas that stayed the effect of the trial court's ruling pending the outcome of this appeal.

[*1015] The City is a municipal corporation organized under the laws and Constitution of the State of California [***4] and freeholders' charter adopted November 5, 1946, under sections 3 and 5 of article XI of the state Constitution. The Charter itself establishes a "Council-Manager" form of government, under which the City Council is vested with all powers of the city except as limited by the Charter and the state Constitution. The Council may confer additional powers on other charter agencies, but may not take away powers specifically conferred by the Charter. The City Manager is designated the chief executive officer and head of the administrative branch of the city government, responsible to the Council for the proper administration of all affairs of the City.

The Charter further establishes a general budgetary process under which the City Manager is to prepare and transmit to the Council a proposed budget based on estimates of revenue and expenditures received from each of the various City departments. The Council is then to consider the proposed budget, make appropriate revisions and, following public hearing, adopt a budget.

The adoption of the budget is, of course, the primary tool by which the City Council translates policy into action. The Council projects revenues and determines levels [***5] of fees and taxes. It appropriates funds for mandatory costs, basic City services, and discretionary programs. It authorizes expenditures [**81] for personnel, ordinary expenses, and capital improvements desired in the forthcoming fiscal year. Each agency and department is therefore required to submit a detailed work program delineating its goals, specific objectives, and other miscellaneous budget items necessary to carry out its mission.

Following adoption of the budget, the City controller audits requests for expenditures by the city departments to insure that funds have been appropriated. The City treasurer may then issue warrants on City accounts.

The City attorney, who serves at the pleasure of the Council and is subject to its control, generally conducts the legal business of the City. The holder of this office is responsible for giving legal advice and making tactical decisions in all litigation matters. The Council, however, retains the authority for making final decisions as to the prosecution, settlement, or appeal of all civil cases involving the City.

Article X of the Charter provides for the establishment of certain specific boards and commissions, whose [***6] members are appointed by the Council. Other appointed City departments have been established by ordinance. Pursuant to article XIII of the Charter, the Council may confer additional duties [*1016] upon a commission or board established under the Charter, but may not detract from the Charter-prescribed functions of officers and agencies. None of these appointed agencies possess the authority to impose fees, adopt budgets, hire staff, or sue and be sued. The City attorney furnishes legal advice and representation to these agencies.

At the heart of the controversy in the instant case is the Santa Monica Rent Control Law as set forth in article XVIII, sections 1800-1812 of the City Charter. This amendment to the Charter was proposed by initiative, was adopted by the City electorate on April 10, 1979, and took effect immediately upon passage. [3]

3 The full text of Article XVIII is set out in the appendix hereto.

The measure specifically provides for the establishment of an elected Rent Control Board and [***7] assigns to it duties including the registration of all controlled rental units, the establishment and adjustment of fair and equitable rent levels for those units, and the issuance of permits for the removal of controlled units. (§ 1803.) The Board is expressly given the power to issue necessary rules and regulations, and to hire and pay nec-

essary staff. (§§ 1803(f)(6), 1803(g).) The Board is empowered and required to charge landlords annual registration fees in amounts it deems reasonable in order to finance its reasonable and necessary expenses. (§ 1803(n).)

Shortly after the passage of the amendment, the City Council adopted Ordinance No. 1127 to codify, clarify and implement article XVIII and "to integrate it into the whole of the City, its government, law and plans." This ordinance provided, inter alia, that the City Manager and City staff were to administer and supervise the Board's financial, personnel and purchasing affairs. Ordinance No. 1127 did, however, recognize the Board's final appointing authority over its employees. Although the Board was required to submit a budget in the same manner as other City departments, its budget was to be approved as transmitted except [***8] the Council reserved the power to disapprove items requiring the expenditure of general funds or involving "a manifestly unreasonable use of public resources or manifestly unreasonable risk of loss to the City." Suits against the Board were to be considered suits against the city and defended by the City attorney.

In April 1980 and December 1982, Ordinance No. 1127 was extensively amended by the City Council. The newly adopted ordinances, codified as sections 4601-4615 of the Santa Monica Municipal Code, placed the power to administer and supervise financial, personnel, and purchasing affairs with the Board and its staff. Specifically, Ordinance Nos. 1153 and 1265 recognized [*1017] the Board's authority to hire its own legal [**82] staff and, following a public hearing, to adopt its own budget. [4]

> 4 Santa Monica Municipal Code section 4608 provides in pertinent part as follows: "Prior to the beginning of each fiscal year, July 1, the Rent Control Board shall hold a public hearing on a proposed budget for the Rent Control Administration for said fiscal year, and shall adopt a budget. Copies of the adopted budget shall be filed with the City Clerk, Controller, and City Manager. From the effective date of the budget, the amount stated therein as proposed expenditures shall be and become appropriated by the Board to the Rent Control Administration for the respective objects and purposes therein stated . . . ."
>
> Santa Monica Municipal Code section 4611 provides: "Legal Staff hired by the Rent Control Board shall represent and advise the Rent Control Board and its staff in any or all actions in which the Board or its staff, in or by reason of their official capacity, are concerned or are a party."

[***9] In challenging the Board's legal authority to act autonomously, plaintiffs generally rely upon those provisions of the Charter that prohibit both the City Council and City attorney from delegating any of their prescribed duties. [5] Both defendants and real party in interest argue, however, that the rent control laws may be harmonized with the general Charter provisions so as to give effect to the will of the electorate and thus allow the Board to maintain its independence from other municipal agencies.

> 5 Charter, article XIII, section 1303 provides as follows: "The City Council by ordinance may assign additional functions or duties to offices, departments or agencies established by this Charter, but may not discontinue or assign to any other office, department or agency any function or duty assigned by this Charter to a particular office, department, or agency."

(1) A city's charter is, of course, the equivalent of a local constitution. It is the supreme organic law of the city, subject only to conflicting provisions [***10] in the federal and state constitutions and to preemptive state law. (*San Francisco Fire Fighters v. City and County of San Francisco (1977) 68 Cal.App.3d 896, 898 [137 Cal.Rptr. 607]*; *Brown v. City of Berkeley (1970) 57 Cal.App.3d 223, 231 [129 Cal.Rptr. 1]*.) "[Charter] cities may make and enforce all ordinances and regulations subject only to restrictions and limitations imposed in their several charters . . . . Within its scope, such a charter is to a city what the state Constitution is to the state." (*Campen v. Greiner (1971) 15 Cal.App.3d 836, 840 [93 Cal.Rptr. 525]*.)

(2) Under settled rules of statutory interpretation, the various sections of a charter must be construed together, giving effect and meaning so far as possible to all parts thereof, with the primary purpose of harmonizing them and effectuating the legislative intent as therein expressed. (*Hanley v. Murphy (1953) 40 Cal.2d 572, 576 [255 P.2d 1]*.) Where it is impossible to reconcile conflicting provisions, special provisions control more general provisions and later enacted provisions control those earlier in time. (*County of Placer v. Aetna Cas. etc. Co. (1958) 50* [***11] *Cal.2d 182, 189 [323 P.2d 753]*; [*1018] *City of Petaluma* v. *Pacific Tel. & Tel. Co. (1955) 44 Cal.2d 284, 288 [282 P.2d 43]*; *Diamond International Corp. v. Boas (1979) 92 Cal.App.3d 1015, 1031 [155 Cal.Rptr. 616]*.)

(3) At this juncture, we also point out that, although the legislative power under our constitutional framework is firmly vested in the Legislature, "the people reserve to themselves the powers of initiative and referendum." (*Cal.Const., art. IV, § 1.*) It follows from this that, "'[the] power of initiative must be liberally con-

strued . . . to promote the democratic process.'" (*San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal.3d 205, 210, fn. 3 [118 Cal.Rptr. 146, 529 P.2d 570]*; see also *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 219 [149 Cal.Rptr. 239, 583 P.2d 1281].*) **(4)** It is a general rule of statutory construction that a court will interpret a measure adopted by a vote of the people in such a manner as to give effect to the intent of the electorate. (*Diamond International Corp. v. Boas, supra, at pp. 1033-1034.*) "'The words must be read in a sense which [***12] harmonizes with the subject-matter and the general purpose and object of the amendment, [**83] consistent of course with the language itself. The words must be understood, not as the words of the civil service commission, or the city council, or the mayor, or the city attorney, but as the words of the voters who adopted the amendment. They are to be understood in the common popular way, and, in the absence of some strong and convincing reason to the contrary, not found here, they are not entitled to be considered in a technical sense inconsistent with their popular meaning.'" (*Burger v. Employees' Retirement System (1951) 101 Cal.App.2d 700, 702-703 [226 P.2d 38].*) To ascertain the intent of the electorate it is, of course, proper to consider the official statements made to the voters in connection with propositions of law they are requested to approve or reject. (See *Lundberg v. County of Alameda (1956) 46 Cal.2d 644, 653 [298 P.2d 1]*; *State of California v. Superior Court (1962) 208 Cal.App.2d 659, 664 [25 Cal.Rptr. 363].*)

Bearing in mind the foregoing interpretive aids, we briefly review the political and social millieu that existed at the time [***13] the rent control intitiative came before the voters.

In 1976, the California Supreme Court held in *Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129 [130 Cal.Rptr. 465, 550 P.2d 1001]*, that rent control was a constitutional exercise of the traditional police powers of municipalities. Shortly thereafter, in light of inflationary trends and the continual rise in rental costs, combined with the growing phenomenon of condominium conversion, numerous California cities began considering the enactment of rent controls. [*1019]

Proposition A, the current Charter amendment, was placed on the ballot by initiative at the 1979 municipal election. Ballot arguments by proponents of the initiative measure referred to the hostility of the City Council to any form of meaningful rent control. [6] In fact, the City's mayor endorsed the ballot statement opposing the measure. Proposition A was approved by the voters at the general municipal election of April 10, 1979.

6 As stated in the official ballot pamphlet mailed to all registered voters before the election: "Santa Monica is confronted with a severe housing crisis. [] The crisis was recently documented by the Rental Housing Mediation Coordinator for Santa Monica, who reported . . . a portion of the tenant population is experiencing high rent increases and evictions without cause. [] The Santa Monica City Council has failed to come to grips with the problem. That is why more than 9,000 signatures were collected during an unprecedented 7-week petition campaign by supporters of renters' rights. Proposition A appears on the ballot by popular demand."

[***14] **(5a)** After thoroughly reviewing the language of the Charter amendment and the events that led to its passage, we are convinced that the electorate intended to have the rent control law exclusively administered by a popularly elected Rent Control Board independent of City Council interference or control. That the voters intended the Board to be autonomous in budgetary and legal affairs is clearly evidenced by those provisions of the Charter amendment that confer upon the Board the authority to impose fees (§ 1803(n)), enforce the law (§§ 1809-1811), and employ a regular staff (§ 1803(f)(6)).

We agree with defendants and real party in interest that the power to appropriate funds and adopt a budget constrains the ability to determine the level of service necessary to carry out the programs and achieve the goals of the Board. The power to direct the course of legal matters is critical to effective enforcement of the rent control laws. It was intended by the voters that the Board, and not the City Council, exercise these basic functions. The language of the Charter with respect to financing and legal matters, and the legislative history before and after the enactment of the Charter amendment, [***15] compels the conclusion, consistent with well-established rules of statutory construction, that the Board is autonomous in fiscal and legal affairs. As made clear by the City and the Board in their respective briefs, any other construction would undermine the salient purpose of having an elected rather than an appointed agency.

[**84] Section 1803(n) of the Charter amendment [7] defines and limits the City Council's authority to fund the Board's operations for the six months ending [*1020] in October 1979. The Board's power to finance or fund its own operations and to determine the amount of the registration fees to be charged landlords encompasses and necessarily includes the power to budget or plan its expenditures. The trial court's ruling, requiring the City Council to adopt a budget for the Board, rendered the phrase "[the] Board shall finance its

reasonable and necessary expenses by charging . . . fees" meaningless.

> 7 Section 1803(n) provides: "The Board shall finance its reasonable and necessary expenses by charging landlords annual registration fees in amounts deemed reasonable by the Board. The first annual registration fee shall be set by the Board within thirty days after assuming office. The Board is also empowered to request and receive funding when and if necessary, from any available source for its reasonable and necessary expenses. Notwithstanding the preceding provisions of this paragraph, the City Council of the City of Santa Monica shall appropriate sufficient funds for the reasonable and necessary expenses of the Interim Board and Board during the six month period following adoption of this Article."

[***16] The budgetary autonomy of the Board is integral to the implementation of the rent control law. The Board is a rule-making and adjudicatory agency, with its own hearing examiners and enforcement arm. Its decisions are directly reviewable by the courts. (§ 1808.) The Board is specifically empowered to raise fees to cover its reasonable expenses. Under the circumstances, we can only conclude that the voters intended for the Board, and not the City Council, to control its own budgetary policies.

Similar considerations also lead us to the conclusion that the Board possesses the legal authority to employ its own legal staff. The broad mandate of section 1803(p) [8] places no limit upon the kind of staff the Board may employ. It requires only that the Board be guided in its staffing decisions by considerations of efficiency and the purpose of the charter amendment. Virtually all of the substantive functions of the Board, including rule-making, administrative proceedings, and actions in the courts, require legal advice and representation. An elected entity that makes judicially reviewable decisions and that is a party to judicial proceedings clearly possesses the right to the services [***17] of an attorney of its choosing and subject to its control.

> 8 Section 1803(p) of the Charter amendment reads as follows: "The Board shall employ and pay such staff including hearing examiners and inspectors, as may be necessary to perform its functions efficiently in order to fulfill the purposes of this Article."

We recognize that the Charter amendment does not expressly specify whether the Board is to be represented by an independent legal staff or the City attorney. When we consider the intent of the electorate, however, we think it clear that the Board, if it is to remain a truly autonomous body, must be entitled to the legal counsel of its own choosing. The Board, unlike other City agencies and departments, is composed of popularly elected commissioners who have the authority under the charter amendment to initiate legal action and determine the course of any litigation affecting the rent control laws. The Board, not the City or the City Council, is the "client" that is entitled to legal representation [***18] in such instances. The City attorney, however, provides legal advice to the City's appointed boards and commissions. [*1021] For the most part, these municipal agencies are not empowered to initiate legal action. The City Council therefore has control of all litigation concerning these agencies, and the Council and its members constitute the "client" whom the City attorney represents when the City is a party to legal action. Under the circumstances, it is the innate characteristics and functions of the Board that entitle it to employ an independent legal staff.

As we see it, the City Council, by enacting the ordinances in question, has done nothing more than clarify and implement the intent of the electorate. **(6)** It is well [**85] established that where the voters have altered their charter by initiative measure, but the terms of the amendment are ambiguous when read with existing law, the legislative body may interpret the initiative in order to harmonize it with existing law. (See *California Housing Finance Agency v. Patitucci (1978) 22 Cal.3d 171, 178 [148 Cal.Rptr. 875, 583 P.2d 729]*.)

(7) In determining the validity of an ordinance or a statute, the presumption [***19] is that the enactment is valid. (*Galligan v. City of San Bruno (1982) 132 Cal.App.3d 869, 873 [183 Cal.Rptr. 466]*.) "'. . . "Where ordinances or bylaws have been enacted pursuant to competent authority they will be supported by every reasonable intendment and reasonable doubts as to their validity will be resolved in their favor. Courts are bound to uphold municipal ordinances and bylaws unless they manifestly transcend the powers of the enacting body."'" (*Brown v. City of Berkeley (1976) 57 Cal.App.3d 223, 231 [129 Cal.Rptr. 1]*; see also *Acton v. Henderson (1957) 150 Cal.App.2d 1, 14 [309 P.2d 481]*.)

(5b) The citizens of Santa Monica, exercising the power of the initiative, resolved the fundamental policy questions in this case by enacting the Charter amendment provisions empowering the Board to regulate rents, finance its necessary and reasonable expenses through fees, and employ and pay its own staff. The City Council simply clarified this amendment and provided a means of implementation by adopting a series of ordinances directing the Board to adopt a budget after public hearing and affirming the authority of the Board to employ independent legal counsel.

[***20] Contrary to plaintiff's contention there was no improper delegation of authority by the Council or the City attorney. The authority was delegated by the electorate through the device of an initiative amendment to the Charter.

By adopting the Charter amendment, the Santa Monica electorate enacted basic policies as to how the system of rent control within the City should [*1022] be administered. The City Council, by the passage of various implementing ordinances, sought to effect the intent of the voters and clarify any existing ambiguities. In so doing, the Council carefully integrated the administration of the rent control laws into the structure of city government. The choice of the people and the Council in this regard cannot be said clearly and unequivocally to violate the mandate of the City Charter. In keeping with salutary constitutional principles we must therefore defer to these legislative judgments as a matter of separation of powers. (See *Lockard v. City of Los Angeles (1949) 33 Cal.2d 453, 450 [202 P.2d 38, 7 A.L.R.2d 990]*; *City of Santa Monica v. Grubb (1966) 245 Cal.App.2d 718, 720 [54 Cal.Rptr. 210]*; *Armas v. City of Oakland (1933)* [***21] *135 Cal.App.411 [27 P.2d 666].*)

The judgment is reversed.

[*1023] Appendix

SANTA MONICA CHARTER

ARTICLE XVIII - RENT CONTROL LAW

Article XVIII adopted at General Municipal Election, April 10, 1979. Res. 5383 (CCS).

SECTION 1800. Statement of Purpose. A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens. The purpose of this Article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica [**86] so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return on their investment.

In order to accomplish [***22] this purpose, this Article provides for an elected rent control board to ensure that rents are at a fair level by requiring landlords to justify any rents in excess of the rents in effect one year prior to the adoption of this Article. Tenants may seek rent reductions from the rent in effect one year prior to the adoption of this Article by establishing that those rents are excessive. In addition to giving tenants an opportunity to contest any rent increase, this Article attempts to provide reasonable protection to tenants by controlling removal of controlled rental units from the housing market and by requiring just cause for any eviction from a controlled rental unit.

SECTION 1801. Definitions. The following words or phrases as used in this Article shall have the following meanings:

(a) Board. "Board" refers to the appointed or elected rent control board established by this Article.

(b) Commissioners. The members of the Board and interim Board are denominated Commissioners.

(c) Controlled Rental Units. All residential rental units in the City of Santa Monica, including mobile homes and mobile home spaces, and trailers and trialer spaces, except:

(1) Rental units in hotels, [***23] motels, inns, tourist homes and rooming and boarding houses which are rented primarily to transient guests for a period of less than fourteen (14) days.

(2) Rental units in any hospital, convent, monastery, extended medical care facility, asylum, non-profit home for the aged, or dormitory owned and operated by an institution of higher education.

(3) Rental units which a government unit, agency or authority owns, operates, manages or in which governmentally-subsidized tenants reside only if applicable Federal or State law or administrative regulation specifically exempt such units from municipal rent control.

(4) Rental units in owner occupied dwellings with no more than three (3) units.

(5) Rental units and dwellings constructed after the adoption of this Article: this exemption does not apply to units created as a result of conversion as opposed to new construction.

(d) Housing Service. Housing services include but are not limited to repairs, maintenance, painting, providing light, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, refuse removal, furnishings, telephone, parking and [***24] any other benefit, privilege or facility connected with the use or occupancy of any rental unite. Services to a rental unit shall include a proportionate part of services provided to common facilities of the building in which the rental unit is contained.

(e) Landlord. An owner, lessor, sublessor or any other person entitled to receive rent for the use and occupancy of any rental unit, or an agent, representative or successor of any of the foregoing.

(f) Rent. All periodic payments and all nonmonetary consideration, including but not limited to, the fair market value of goods or services rendered to or for the benefit of the landlord under and agreement concerning the use or occupancy of a rental unit and premises, including all payments and consideration demanded or paid for parking, pets, furniture, subletting and security deposits for damages and cleaning.

(g) Rental Housing Agreement. An agreement, oral, written or implied, between a landlord and tenant for use or occupancy of a rental unit and for housing services.

(h) Rental Units. Any building, structure, or part thereof, or land appurtenant thereto, or any other rental property rented or offered for rent for living [***25] or dwelling house units, and other real properties used for living or dwelling purposes, together with all housing services connected with [**87] use or occupancy of such property such as common areas and recreational facilities held out for use by the tenant.

(i) Tenant. A tenant, subtenant, lessee, sublessee or any other person entitled under the terms of a rental housing agreement to the use or occupancy of any rental unit.

(j) Recognized Tenant Organization. Any group of tenants, residing in controlled rental units in the same building or in different buildings operated by the same management company, agent or landlord, who requests to be so designated.

(k) Rent Ceilings. Rent ceiling refers to the limit on the maximum allowable rent which a [*1024] landlord may charge on any controlled rental unit.

(l) Base Rent Ceiling. The maximum allowable rent established in Section 1804(b).

SECTION 1802. Interim Rent Control Board. No later than thirty (30) days after the adoption of this Article, the City Council of the City of Santa Monica shall appoint a five-member Interim Rent Control Board. No person shall be appointed to the Interim Rent Control Board unless he [***26] or she is a duly qualified elector of the City of Santa Monica. The Interim Board shall exercise the following powers and duties until the Permanent Board is elected in accordance with the provisions of Section 1803(d) and assumes office:

(1) Require registration of all controlled rental units under Section 1803(q).

(2) Seek criminal penalties under Section 1810.

(3) Seek injunctive relief under Section 1811.

SECTION 1803. Permanent Rent Control Board.

(a) Composition. There shall be in the City of Santa Monica a Rent Control Board. The Board shall consist of five elected Commissioners. The Board shall elect annually as chairperson one of its members to serve in that capacity.

(b) Eligibility. Duly qualified electors of the City of Santa Monica are eligible to serve as Commissioners of the Board.

(c) Full Disclosure of Holdings. Candidates for the position of Commissioner shall submit a verified statement listing all of their interests and dealings in real property, including but not limited to its ownership, sale or management, during the previous three (3) years.

(d) Election of Commissioners. Commissioners shall be elected at general municipal elections in the same [***27] manner as set forth in Article XIV of the Santa Monica City charter, except that the first Commissioners shall be elected at a special municipal election held within ninety (90) days of the adoption of this Article. The elected Commissioners shall take office on the first Tuesday following their election.

(e) Term of Office. Commissioners shall be elected to serve terms of four years, beginning on the first Tuesday following their election, except that of the first five Commissioners elected in accordance with Section 1803 (d), the two Commissioners receiving the most votes shall serve until April 15, 1985 and the remaining three commissioners shall serve until April 18, 1983. Commissioners shall serve a maximum of two full terms.

(f) Powers and Duties. The Board shall have the following powers and duties:

(1) Set the rent ceilings for all controlled rental units.

(2) Require registration of all controlled rental units under Section 1803(q).

(3) Establish a base ceiling on rents under Section 1804(b).

(4) To make adjustments in the rent ceiling in accordance with Section 1805.

(5) Set rents at fair and equitable levels in order to achieve the intent of this Article.

(6) [***28] Hire and pay necessary staff, including hearing examiners and personnel to issue orders, rules and regulations, conduct hearings and charge fees as set forth below.

[**88] (7) Make such studies, surveys and investigations, conduct such hearings, and obtain such information as is necessary to carry out its powers and duties.

(8) Report annually to the City Council of the City of Santa Monica on the status of controlled rental housing.

(9) Remove rent controls under Section 1803(r).

(10) Issue permits for removal of controlled rental units from rental housing market under Section 1803(t).

(11) Administer oaths and affirmations and subpoena witnesses.

(12) Establish rules and regulations for deducting penalties and settling civil claims under Section 1809.

(13) Seek criminal penalties under Section 1810.

(14) Seek injunctive relief under Section 1811.

(g) Rules and Regulations. The Board shall issue and follow such rules and regulations, including those which are contained in this Article, as will further the purposes of the Article. The Board shall publicize its rules and regulations prior to promulgation in at least one newspaper of general circulation in the City of [***29] Santa Monica. The Board shall hold at least one (1) public hearing to consider the views of interested parties prior to the adoption of general adjustments of the ceilings for maximum allowable rents under Section 1805, and any decision to decontrol or re-impose control for any class of rental units under Section 1803(r). All rules and regulations, internal staff memoranda, and written correspondence explaining the decisions, orders, and policies of the Board shall be kept in the Board's office and shall be available to the public for inspection and copying. The Board shall publicize this Article so that all residents of Santa Monica will have the opportunity to become informed about their legal rights and duties under rent control in Santa Monica. The Board shall prepare a brochure which fully describes the legal rights and duties of landlords and tenants under rent control in Santa Monica. The brochure will be available to the public, and each tenant of a controlled rental unit shall receive a copy of the brochure from his or her landlord.

(h) Meetings. The Board shall hold at least forty-eight (48) regularly scheduled meetings [*1025] per year. Special meetings shall [***30] be called at the request of at least three Commissioners of the Board. The Board shall hold its initial meeting no later than fifteen (15) days after taking office.

(i) Quorum. Three Commissioners shall constitute a quorum for the Board.

(j) Voting. The affirmative vote of three Commissioners of the Board is required for a decision, including all motions, regulations, and orders of the Board.

(k) Compensation. Each Commissioner shall receive for every meeting attended Seventy-Five ($ 75.00) Dollars, but in no event shall any Commissioner receive in any twelve month period more than Forty-seven Hundred and Fifty ($ 4,750.00) Dollars for services rendered.

(l) Dockets. The Board shall maintain and keep in its office all hearing dockets.

(m) Vacancies. If a vacancy shall occur on the Board, the Board shall within thirty (30) days appoint a qualified person to fill such a vacancy until the following municipal election when a qualified person shall be elected to serve for the remainder of the term.

(n) Financing. The Board shall finance its reasonable and necessary expenses by charging landlords annual registration fees in amounts deemed reasonable by the Board. The first [***31] annual registration fee shall be set by the Board within thirty days after assuming office. The Board is also empowered to request and receive funding when if necessary, from any available source for its reasonable and necessary expenses. Notwithstanding the preceding provisions of this paragraph, the City Council of the City of Santa Monica shall appropriate sufficient funds for the reasonable and necessary expenses of the Interim Board and Board during the six month period following adoption of this Article.

[**89] (o) Recall. Commissioners may be recalled in accordance with the provisions of Article XIV of the Charter of the City of Santa Monica.

(p) Staff. The Board shall employ and pay such staff, including hearing examiners and inspectors, as may be necessary to perform its functions efficiently in order to fulfill the purposes of this Article.

(q) Registration. Within sixty (60) days after the adoption of the Article, the Board shall require the registration of all controlled rental units, which shall be re-registered at times deemed appropriate by the Board. The initial registration shall include the rent in effect at the time on the date of the adoption of this [***32] Article, base rent ceiling, the address of the rental unit, the name and address of the landlord, the housing services provided to the unit, a statement indicating all operating cost increases since the base rent ceiling, and any other information deemed relevant by the Board. The Board shall require the landlord to report vacancies in the controlled rental units and shall make a list of vacant controlled rental units available to the public. If the Board, after the landlord has proper notice and after a hearing determines that a landlord has willfully and knowingly failed to register a controlled rental unit, the Board may

authorize the tenant of such a nonregistered controlled rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is properly registered. After a rental unit is properly registered, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not properly registered. Whether or not the board allows such withholding, no landlord who has failed to register properly shall at any time increase rents for a controlled rental unit until such units [***33] are properly registered.

(r) Decontrol. If the average annual vacancy rate in any category, classification, or area of controlled rental units exceeds five (5) percent, the Board is empowered, at its discretion and in order to achieve the objectives of this Article to remove rent controls from such categories, classifications, or areas for purposes of decontrol consistent with the objectives of this Article. In determining the vacancy rate for any category, classification or area of controlled rental units, the Board shall consider all available data and shall conduct its own survey. If units are decontrolled pursuant to this subsection, controls shall be reimposed if the Board finds that the average annual vacancy rate has thereafter fallen below five (5) percent for such category, classification or area.

(s) Security Deposits. Any payment or deposit of money the primary function of which is to secure the performance of a rental agreement or any part of such agreement, including an advance payment of rent, shall be placed in an interest bearing account at an institution whose accounts are insured by the Federal Saving and Loan Insurance Corporation until such time as it is returned [***34] to the tenant or entitled to be used by the landlord. The interest on said account shall be used by the landlord to offset operating expenses and shall be a factor in making individual rent adjustments under Section 1805. In lieu of complying with this requirement, the landlord may pay interest directly to the tenant in accordance with the requirements of any state law.

(t) Removal of Controlled Rental Unit from Rental Housing Market. Any landlord who desires to remove a controlled rental unit from the rental housing market by demolition, conversion or other means is required to obtain a permit from the Board prior to such removal from the rental housing market in accordance with rules and regulations promulgated by the Board. In order to approve [*1026] such a permits, the Board is required to make each of the following findings:

(1) That the controlled rental unit is not occupied by a person or family of very low income, low income or moderate income.

(2) That the rent of the controlled rental unit is not at a level affordable by a person [**90] or family of very low income, low income or moderate income.

(3) That the removal of the controlled rental unit will not [***35] adversely affect the supply of housing in the City of Santa Monica.

(4) That the landlord cannot make a fair return on investment by retaining the controlled rental unit.

Notwithstanding the foregoing provisions of this subsection, the Board may approve such a permit:

(1) If the Board finds that the controlled rental unit is uninhabitable and is incapable of being made habitable in an economically feasible manner, or

(2) If the permit is being sought so that the property may be developed with multifamily dwelling units and the permit applicant agrees as a condition of approval that the units will not be exempt from the provisions of this Article pursuant to Section 1801(c) and that at least fifteen (15) percent of the controlled rental units to be built on the site will be at rents affordable by persons of low income.

SECTION 1804. Maximum Allowable Rents.

(a) Temporary Freeze. Rents shall not be increased during the one hundred-twenty (120) day period following the date of adoption of this Article.

(b) Establishment of Base Rent Ceiling. Beginning one-hundred-twenty (120) days after the adoption of this Article, no landlord shall charge rent for any controlled rental [***36] units in an amount greater than the rent in effect on the date one year prior to the adoption of this Article. The rent in effect on that date is the base rent ceiling and is a reference point from which fair rents shall be adjusted upward or downward in accordance with Section 1805. If there was no rent in effect on the date one year prior to the adoption of this Article, the base rent ceiling shall be the rent that was charged on the first date that rent was charged following the date one year prior to the adoption of this Article.

(c) Posting. As soon as the landlord is aware of the maximum allowable rent, the landlord shall post it for each unit in a prominent place in or about the affected controlled rent units. The Board may require that other information it deems relevant also be posted.

SECTION 1805. Individual and General Adjustment of Ceilings on Allowable Rents.

(a) The Board may, after holding those public hearings prescribed by Section 1803(g), set and adjust upward or downward the rent ceiling for all controlled rental units in general and/or for particular categories of

controlled rental units deemed appropriate by the Board. Such an adjustment, however, need [***37] not take effect immediately, and the Board may decide that new rent ceilings shall not take effect until some reasonable date after the above-state time periods.

(b) Each year the Board shall generally adjust rents as follows:

(1) Adjust rents upward by granting landlords a utility and tax increase adjustment for actual increases in the City of Santa Monica for taxes and utilities.

(2) Adjust rents upward by granting landlords a maintenance increase adjustment for actual increases in the City of Santa Monica for maintenance expenses.

(3) Adjust rents downward by requiring landlords to decrease rents for any actual decreases in the City of Santa Monica for taxes.

In adjusting rents under this subsection, the Board shall adopt a formula of general application. This formula will be based upon a survey of landlords of the increases or decreases in the expenses set forth in this subsection.

(c) Petitions. Upon receipt of a petition by a landlord and/or tenant, the maximum rent of individual controlled rental units may be adjusted upward or downward in accordance with the procedures set forth elsewhere in this Section. The petition shall be on the form provided by the Board. Notwithstanding [***38] any other provision of [**91] this Section, the board or hearing examiner may refuse to hold a hearing and/or grant a rent adjustment if an individual hearing has been held and decision made with regard to maximum rent within the previous six months.

(d) Hearing Procedure. The Board shall enact rules and regulations governing hearings and appeals of individual adjustment of ceilings on allowable rents which shall include the following:

(1) Hearing Examiner. A hearing examiner appointed by the Board shall conduct a hearing to act upon the petition for individual adjustment of ceilings on allowable rents and shall have the power to administer oaths and affirmations.

(2) Notice. The Board shall notify the landlord if the petition was filed by the tenant, or the tenant, if the petition was filed by the landlord, of the receipt of such a petition and a copy thereof.

(3) Time of Hearing. The hearing officer shall notify all parties as to the time, date and place of the hearing.

[*1027] (4) Records. The hearing examiner may require either party to a rent adjustment hearing to provide it with any books, records and papers deemed pertinent in addition to that information [***39] contained in registration statements. The hearing examiner shall conduct a current building inspection and/or request the City to conduct a current building inspection if the hearing examiner finds good cause to believe the Board's current information does not reflect the current condition of the controlled rental unit. The tenant may request the hearing examiner to order such an inspection prior to the date of the hearing. All documents required under this Section shall be made available to the parties involved prior to the hearing at the office of the board. In cases where information filed in a petition for rent ceiling adjustment or in additional submissions filed at the request of the hearing examiner is inadequate or false, no action shall be taken on said petition until the deficiency is remedied.

(5) Open Hearings. All rent ceiling adjustment hearings shall be open to the public.

(6) Right of Assistance. All parties to a hearing may have assistance in presenting evidence and developing their position from attorneys, legal workers, recognized tenant organization representatives or any other persons designated by said parties.

(7) Hearing Record. The Board shall make [***40] available for inspection and copying by any person an official record which shall constitute the exclusive record for decision on the issues at the hearing. The record of the hearing, or any part of one, shall be obtainable for the cost of copying. The record of the hearing shall include: all exhibits, papers and documents required to be filed or accepted into evidence during the proceedings; a list of participants present; a summary of all testimony accepted in the proceedings; a statement of all materials officially noticed; all recommended decisions, orders and/or rulings; all final decisions, order and/or rulings, and the reasons for each final decision, order and/or ruling. Any party may have the proceeding tape recorded or otherwise transcribed at his or her own expense.

(8) Quantum of Proof and Notice of Decision. No individual adjustment shall be granted unless supported by the preponderance of the evidence submitted at the hearing. All parties to a hearing shall be sent a notice of the decision and a copy of the findings of fact and law upon which said decision is based. At the same time, parties to the proceeding shall also be notified of their right to any appeal [***41] allowed by the Board and/or to judicial review of the decision pursuant to this Section and Section 1808 of this Article.

(9) Consolidation. All landlord petitions pertaining to tenants in the same building will be consolidated for

hearing, and all petitions filed by tenants occupying the same building shall be consolidated for hearing unless there is a showing of good cause not to consolidate such petitions.

(10) Appeal. Any person aggrieved by the decision of the hearing examiner may [**92] appeal to the Board. On appeal, the Board shall affirm, reverse or modify the decision of the hearing examiner. The Board may conduct a de novo hearing or may act on the basis of the record before the hearing examiner without holding a hearing.

(11) Finality of Decision. The decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal; however, in the event that the Board on appeal reverses or modifies the decision of the hearing examiner, the landlord, in the case of an upward adjustment in rent, or the tenant, in the case of a downward adjustment of rent, [***42] shall be ordered to make retroactive payments to restore the parties to the position they would have occupied had the hearing examiner's decision been the same as that of the Board's.

(12) Time for Decision. The rules and regulations adopted by the Board shall provide for final Board action on any individual rent adjustment petition within one-hundred and twenty (120) days following the date of filing of the individual rent adjustment petition.

(3) Board Action in Lieu of Reference to Hearing Examiner. The Board, on its own motion or on the request of any landlord or tenant, may hold a hearing on an individual petition for rent adjustment without the petition first being heard by a hearing examiner.

(e) In making individual and general adjustments of the rent ceiling, the Board shall consider the purposes of this Article and shall specifically consider all relevant factors including but not limited to increases or decreases in property taxes, unavoidable increases or decreases in operating and maintenance expenses, capital improvement of the controlled rental unit as distinguished from normal repair, replacement and maintenance, increases or decreases in living space, furniture, [***43] furnishings or equipment, substantial deterioration of the controlled rental unit other than as a result of ordinary wear and tear, failure of the part of the landlord to provide adequate housing services or to comply substantially with applicable housing, health and safety codes, federal and state income tax benefits, the speculative nature of the investment, whether or not the property was acquired or is held as a long term or short term investment, and the landlords rate of return on investment. It is the intent of this Article that upward adjustments in rent be made only when demonstrated necessary to the landlord making a fair return on investment.

[*1028] (f) No rent increase shall be authorized by this Article because a landlord has a negative cash flow as the result of refinancing the controlled rental unit if at the time the landlord refinanced the landlord could reasonably have foreseen a negative cash flow based on the rent schedule then in existence within the one year period following refinancing. This paragraph shall only apply to that portion of the negative cash flow reasonable foreseeable within the one year period following refinancing of the controlled rental [***44] unit and shall only apply to controlled rental units refinanced after the date of adoption of this Article.

(g) No rent increase shall be authorized by this Article because a landlord has a negative cash flow if at the time the landlord acquired the controlled rental unit, the landlord could reasonably have foreseen a negative cash flow based on the rent schedule then in existence within the one year period follow acquisition. This paragraph shall only apply to that portion of the negative cash flow reasonably foreseeable within the one year period following acquisition of a controlled rental unit and shall only apply to controlled rental units acquired after the date of adoption of this Article.

(h) No landlord shall increase rent under this Section of the landlord:

(1) Has failed to comply with any provisions of this Article and/or regulations issued thereunder by the Board, or

(2) Has filed to comply substantially with any applicable state or local housing, health or safety law,

[**93] SECTION 1806. Eviction. No landlord shall bring any action to recover possession or be granted recovery of possession of a controlled rental unit unless:

(a) The tenant has failed to [***45] pay the rent to which the landlord is entitled under the rental housing agreement and this Article.

(b) The tenant has violated an obligation or covenant of his or her tenancy other than the obligation to surrender possession under proper notice and has failed to cure such violation after having received written notice thereof from the landlord in the manner required by law.

(c) The tenant is committing or expressly permitting a nuisance in, or is causing substantial damage to, the controlled rental unit, or is creating a substantial interference with the comfort, safety or enjoyment of the landlord or other occupants or neighbors of the same.

(d) The tenant is convicted of using or expressly permitting a controlled rental unit to be used for an illegal purpose.

(e) The tenant, who had a rental housing agreement which has terminated, has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms as are not inconsistent with or violative of any provisions of this Article and are materially the same as in the previous agreement.

(f) The tenant has refused the landlord reasonable [***46] access to the controlled rental unit for the purpose of making necessary repairs or improvements required by the laws of the United States, the State of California or any subdivision thereof, or for the purpose of showing the rental housing unit to any prospective purchaser or mortgagee.

(g) The tenant holding at the end of the term of the rental housing agreement is a sub-tenant not approved by the landlord.

(h) The landlord seeks to recover possession in good faith for use and occupancy of herself or himself, or her or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law.

(i) The landlord seeks to recover possession to demolish or otherwise remove the controlled rental unit from rental residential housing use after having obtained all proper permits from the City of Santa Monica.

Notwithstanding the above provisions, possession shall not be granted if it is determined that the eviction is in retaliation for the tenant reporting violations of this Article, for exercising rights granted under this Article, including the right to withhold rent upon authorization of the Board under Section 1803(q) or Section 1809 of for organizing other [***47] tenants. In any action brought to recover possession of a controlled rental unit, the landlord shall allege and prove compliance with this Section.

SECTION 1807. Non-Waiverability. Any provision, whether oral or written, in or pertaining to a rental housing agreement whereby any provision of this Article for the benefit of the tenant is waived, shall be deemed to be against public policy and shall be void.

SECTION 1808. Judicial Review. A landlord or tenant aggrieved by any action or decision of the Board may seek judicial review by appealing to the appropriate court within the jurisdiction.

SECTION 1809. Civil Remedies.

(a) Any landlord who demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this Article or any rule, regulation or order thereunder promulgated, shall be liable as hereinafter provided to the tenant from whom such payments are demanded, accepted, received or retained, for reasonable attorney's fees and costs as determined by the court, plus damages in an amount of five hundred ($ 500.00) Dollars or three (3) times the amount by which the [*1029] payment or payments demanded, [***48] accepted, received or retained exceed the maximum lawful rent, whichever is the greater.

[**94] (b) In lieu of filing a civil action as provided for in Section 1809(a), the Board shall establish by rule and regulation a hearing procedure similar to that set forth in Section 1805(d) for determination of the amount of the penalty the tenant is entitled to pursuant to Section 1809(a). After said determination, the tenant may deduct the penalty from future rent payments in the manner provided by the Board.

(c) If the tenant from whom such excessive payment is demanded, accepted, received or retained in violation of the foregoing provisions of this Article or any rule or regulation or order hereunder promulgated fails to bring a civil or administrative action as provided for in Section 1809(a) and 1810(b) within one-hundred and twenty (120) days from the date of occurrence of the violation, the Board may settle the claim arising out of the violation or bring such action. Thereafter, the tenant on whose behalf the Board acted is barred from also bringing an action against the landlord in regard to the same violation for which the Board has made a settlement or brought an action. [***49] In the event the Board settles said claim, it shall be entitled to retain the costs it incurred in settlement thereof, and the tenant against whom the violation has been committed shall be entitled to the remainder.

(d) The appropriate court in the jurisdiction in which the controlled rental unit affected is located shall have jurisdiction over all actions brought under this Section.

SECTION 1810. Criminal Remedies. Any landlord violating this Article shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisions of this Article shall be punished by a fine of not more than five hundred ($ 500.00) dollars or by imprisonment in the county jail for a period not exceeding six months, or by both such fine and imprisonment.

SECTION 1811. Injunctive Relief. The Board, and tenants and landlords of controlled units, may seek relief from the appropriate court within the jurisdiction within which the affected controlled rental unit is located to restrain or enjoin any violation of this Article and of the rules, regulations, orders, and decisions of the Board.

SECTION 1812. Partial Invalidity. If any provision of this Article or application thereof to [***50] any person or circumstances is held invalid, this invalidity shall not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable. This Article shall be liberally construed to achieve the purposes of this Article and to preserve its validity.

In the Matter of Mark Green, as Public Advocate for the City of New York, Petitioner, v. Howard Safir, as Commissioner of the New York City Police Department, et al., Respondents.

INDEX NO. 108239/97

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

174 Misc. 2d 400; *664 N.Y.S.2d 232*; *1997 N.Y. Misc. LEXIS 497*

October 14, 1997, Decided

DISPOSITION: [***1] The petition for access to the requested records is granted.

HEADNOTES

Public Officers - Public Advocate - Authority to Review Police Department Files Petitioner Public Advocate for the City of New York, an independently elected official authorized to review complaints relating to City services and programs and to make proposals to improve the City's response to complaints (*NY City Charter § 24 [f] [2]*), is entitled to review Police Department files in disciplinary cases where the Civilian Complaint Review Board substantiated complaints against police officers and in approximately one third to one half of all such substantiated cases the officer involved received no disciplinary action, to determine whether any patterns exist to the decisions of its Commissioner with respect to police discipline. The Public Advocate is a "watchdog" over City government and a counterweight to the powers of the Mayor. Unlike other City Commissioners, the Advocate has no subpoena powers to support his disclosure request. Misconduct by those invested with police powers is a concern, particularly given the amount of substantiated complaints which resulted in no discipline. Further, access is not barred by *Civil Rights Law § 50-a (1)* which protects the confidentiality of police personnel records since subdivision (4) provides that the confidentiality provision does not apply to any agency of government which requires the records in furtherance of official functions. Here, petitioner seeks review in furtherance of his official function and has agreed to redact the names of the officers involved.

Administrative Law - Failure to Exhaust Administrative Remedies - Proceeding by Public Advocate for Access to Police Department Records Petitioner Public Advocate for the City of New York, an independently elected official authorized to review complaints relating to City services and programs and to make proposals to improve the City's response to complaints (NY City Charter [Charter*] § 24 [f] [2]*), was not required to exhaust administrative remedies prior to commencing an action against the Police Commissioner to obtain review of Police Department files in disciplinary cases where the Civilian Complaint Review Board substantiated complaints against police officers since Charter *§ 24 (j)* which provides that where a City agency does not comply with a request by the Public Advocate for access to agency records, the Public Advocate may request a Committee of the Council to require production, is permissive and there is nothing to indicate that application to the City Council is the exclusive means by which the Public Advocate can obtain data denied him by a City agency. The City Council is not an adjudicatory body. As a separate legislative branch of government it is not intended to be the arbiter of disputes between two other independently elected City-wide officials. Also, the procedure in *section 24 (j)* is one whereby the Public Advocate, denied subpoena power under the Charter, can obtain the assistance of a Committee. To interpret the statute otherwise would allow the Council to stymie an investigation which could prevent the designated City "watchdog" from performing any true investigation of abuses in government.

Parties - Standing - Public Advocate Petitioner Public Advocate for the City of New York, an independently

elected official authorized to review complaints relating to City services and programs and to make proposals to improve the City's response to complaints (*NY City Charter § 24 [f] [2]*), has the capacity to sue the Police Commissioner to obtain review of Police Department files in disciplinary cases where the Civilian Complaint Review Board substantiated complaints against police officers since the right to bring suit to implement the power set forth in the Charter, even though not specifically set forth therein, is implied from the functional responsibility of petitioner to perform his tasks.

COUNSEL: *Emery, Celli, Cuti & Brinckerhoff,* New York City, for petitioner. *Paul A. Crotty, Corporation Counsel* of New York City, respondent *pro se,* and *Masako C. Shiono* for Paul A. Crotty and another, respondents. *Richard M. Weinberg,* New York City, for Council of the City of New York, *amicus curiae. Schulte, Roth & Zabel,* New York City, for City Club of New York and others, *amici curiae.*

JUDGES: EDWARD R. LEHNER, J.

OPINION BY: EDWARD R. LEHNER

OPINION

[**233] [*401] Edward H. Lehner, J.

The central issue posed herein is whether petitioner, in his capacity as Public Advocate for the City of New York, is [*402] entitled to review files of the Police Department in disciplinary cases where the Civilian Complaint Review Board (CCRB) "substantiated" complaints against police officers.

In the petition it is asserted that between one third and one half of all cases in which the CCRB substantiated a claim of police misconduct, the officer involved received no disciplinary action. The CCRB is an independent city agency established pursuant to *section 440 of the New York* [***2] *City Charter* (the Charter) to investigate public complaints of police misconduct. Petitioner alleges that in the past three and a half years he has received numerous complaints from residents of all five boroughs regarding misconduct and abuse by police officers, including complaints with respect to the failure of the City Police Department (NYPD) to impose discipline against officers whose actions resulted in charges being substantiated by the CCRB.

Petitioner maintains that under the Charter he has an obligation to determine "the effectiveness of City agency responses" and "ascertain whether the NYPD's failure to prosecute and/or impose discipline against misbehaving officers is indicative of systemic problems in the response to complaints" (paras 19, 21). In his memorandum of law, petitioner poses the issue he wishes to investigate in the following manner (at 24): "Has our police force--which we hail as effective and aggressive--become unable or unwilling to discipline its own members when they misbehave? Or has the much-debated all-civilian CCRB grown too credulous of citizen complaints?"

Section 24 (f) (2) of the Charter states that the Public Advocate shall "review complaints [***3] of a recurring and multiborough or city-wide nature relating to services and programs, and make proposals to improve the city's response to such complaints". Based on this provision, petitioner seeks access to case files on actions taken by the NYPD between January 1, 1995 and December 31, 1996 "on 'substantiated' CCRB complaints referred to the Police Commissioner pursuant to *Section 440 (c)* of the Charter [and] on cases of potential NYPD discipline initiated by the NYPD's Internal Affairs Division and or Advocate's Office on the basis of complaints by members of the public". Petitioner acknowledges that any access to the files will be "subject to redaction of the names of the subject police officers".

Although petitioner submits an application he made for the requested files under the Freedom of Information Law (*Public Officers Law art 6*), at oral argument it was stated that relief herein is not being sought under such law.

[*403] Respondents oppose the petition arguing that (i) the court lacks jurisdiction "because petitioner has failed to exhaust his administrative remedy under *New York City Charter § 24 (j)*"; (ii) "the records petitioner seeks do not relate to any [***4] of petitioner's Charter-mandated functions"; (iii) "petitioner lacks the capacity to bring this proceeding", and (iv) "the records petitioner seeks are confidential under *Civil Rights Law § 50-a (1)*" (respondents' mem of law, dated June 12, 1997, at 2).

[**234] Discussion

The Office of Public Advocate was created pursuant to the Charter revision of 1989. Although initially established as a continuation of the Office of the President of the City Council, in 1993 the title of the Office was changed to Public Advocate (Local Laws, 1993, No. 19 of City of New York). While many communities may have officers who perform functions similar to those vested in the Public Advocate, the position as an independently elected office can be said to be unique to New York City.

From the proceedings of the Charter Revision Commission (the Commission), it is evident that the intent of the Commission was to make the Public Advocate a "watchdog" over City government and a counterweight

to the powers of the Mayor. While it appears that the Commission considered the issue of granting the Public Advocate subpoena power, no such authority was granted even though this power is possessed by the [***5] Commissioner of the Department of Investigation (Charter § 805) and the Commissioner of the Department of Consumer Affairs (Charter § 2203). The vision of the office was an independent public official to monitor the operations of City agencies with the view to publicizing any inadequacies, inefficiencies, mismanagement and misfeasance found, with the end goal of pointing the way to right the wrongs of government.

Misconduct by those invested with police power is now, and always has been, an area of concern to government. Here the petitioner is seeking to review files of the NYPD to determine whether any patterns exist to the decisions of its Commissioner with respect to police discipline. He is not seeking to resolve individual complaints as he clearly lacks authority to do so as such matters are clearly those which "another city agency is required by law to adjudicate" (Charter *§ 24 [f] [4] [i]*). That one third to one half of CCRB "substantiated" complaints resulted in no discipline is a legitimate area for study by petitioner to determine why such a result ensued [*404] with the possibility of recommendations for changes in the operation of the CCRB and/or the [***6] NYPD. Accordingly, I find that an examination of the files sought is within the purview of the powers and duties of petitioner.

With this finding in mind, the next issue presented is whether access to the files is barred by *subdivision (1) of Civil Rights Law § 50-a*. That provision states that police personnel records "shall be considered confidential and not subject to inspection or review without the express written consent of such police officer ... except as may be mandated by lawful court order". However, subdivision (4) of that section provides that the above-quoted provision shall not apply to "any agency of government which requires the records ... in the furtherance of their official functions".

Since I have concluded that review of the files for the reasons aforesaid is in "furtherance" of petitioner's "official function", the provisions of this section are not a bar to the relief requested. Petitioner has agreed that if the files are made available, respondents may redact the names of police officers involved, and I would add that not only should the names be redacted but, to insure the confidentiality intended by the statute, any other information that would tend [***7] to identify the officer involved should also be redacted. In this connection, see *Heard v Cuomo (142 AD2d 537* [1st Dept 1988]), where, notwithstanding the mandate for the confidentiality of records of patients of mental health facilities set forth in *Mental Hygiene Law § 33.13 (c)*, the Court required the disclosure of a number of "carefully redacted" patient discharge plans, finding that "there is a legitimate public interest in information regarding the procedures for the release and aftercare of mental patients" (at 539). There is similarly a valid public interest in disciplinary procedures of the NYPD.

On the defense of the "exhaustion of administrative remedies", respondents point to Charter *§ 24 (j)*, which provides in part: "The public advocate shall have timely access to those records and documents of city agencies which the public advocate deems necessary to complete the investigations, inquiries and reviews required by this section. If a city agency does not comply with the public advocate's request for such records and documents, the public advocate may [**235] request an appropriate committee of the council to require the production of such records and [***8] documents pursuant to section twenty-nine of the charter".

Respondents' assertion that this proceeding must be dismissed for failure of petitioner to apply to a City Council Committee [*405] for the issuance of a subpoena lacks merit. This subdivision is clearly permissive and there is nothing to indicate that application to the City Council is the exclusive means by which the Public Advocate can obtain data denied him by a City agency. The City Council is not an adjudicatory body. It, as the separate legislative branch of government (sometimes aligned with a Mayor and other times opposed), was not intended by the Commission to be the arbiter of disputes between two other independently elected City-wide officials. Rather, the procedure set forth in subdivision (j) is one whereby the Public Advocate (denied subpoena power under the Charter) can obtain the assistance of a Council Committee in the performance of the monitoring and reviewing obligations set forth in Charter *§ 24*. It is noted that the City Council has submitted an amicus curiae memorandum in support of petitioner's position. To interpret subdivision (j) as urged by respondents would allow the Council to stymie [***9] an investigation which, if the Mayor and the Council were politically aligned together against the Public Advocate, could prevent the designated City "watchdog" from performing any true investigation of abuses in government.

Lastly, the respondents raise the issue as to whether petitioner has the capacity to sue. In his letter to petitioner dated March 21, 1997, the City Corporation Counsel flatly states that the "Charter does not authorize the Public Advocate to sue". However, acknowledging that the corporation counsel had this year commenced a proceeding on behalf of the Public Advocate in Albany County under the Freedom of Information Law (index No. 1746/97), respondents state (reply mem, dated July 31, 1997, at 3) that it "is not respondents' position that

petitioner can never bring a proceeding in his official capacity to enforce his Charter-mandated powers", but rather that he "lacks the capacity to sue to obtain access to the records he sought". Thus, in essence, it appears that on the question of the capacity to sue, all respondents are now arguing is that petitioner is not entitled to the records sought herein.

On the issue of the right of a government official to [***10] institute litigation, the Court in *Community Bd. 7 v Schaffer (84 NY2d 148* [1994]) set forth the following (at 156): "In a recent discussion on the subject, *Matter of City of New York v City Civ. Serv. Commn. (60 NY2d 436)*, we considered *both* the standing *and* the capacity of a governmental agency to bring an article 78 proceeding against another governmental entity. With respect to the capacity question, we stated that the authority of [*406] a government agency to bring suit does not require 'that in every instance there be express legislative authority' (*id., at 444-445*). Rather, the capacity to sue may also be inferred as a 'necessary implication from [the agency's] power[s] and responsibilit[ies],' provided, of course, that 'there is no clear legislative intent negating review' (*id., at 443, 444)*. The Court indicated in *City of New York* that the power to bring a particular claim may be inferred when the agency in question has 'functional responsibility within the zone of interest to be protected' (*id., at 445*)". Here I find that the right to bring suit to implement the power set forth in the Charter, even though not specifically [***11] set forth therein, is implied from the functional responsibility of petitioner to perform the tasks referred to above.

Accordingly, the petition for access to the requested records is granted.

In the Matter of Mark Green, as Public Advocate for the City of New York, Respondent-Appellant, v. Howard Safir, as Police Commissioner of the City of New York, et al., Appellants-Respondents.

1849

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

255 A.D.2d 107*; *679 N.Y.S.2d 383*; *1998 N.Y. App. Div. LEXIS 11653

November 5, 1998, Decided
November 5, 1998, Entered

COUNSEL: [***1] For Petitioner-Respondent-Appellant: Richard D. Emery.

For Respondents-Appellants-Respondents: Ellen B. Fishman.

Elliot I. Susser, Gail R. Zweig, and Eric B. Fisher for Amici Curiae, The Patrolmen's Benevolent Association of the City of New York, Richard Weinberg, General Counsel to the Council of the City of New York, City Club of New York, Women's City Club of New York, New York Civil Liberties Union and New York Public Interest Research Group.

JUDGES: Concur--Rosenberger, J. P., Nardelli, Wallach and Saxe, JJ. [*See,* 174 Misc 2d 400.]

OPINION

[*107] [**384] Judgment, Supreme Court, New York County (Edward Lehner, J.), entered January 15, 1998, which, in a *CPLR article 78* proceeding by petitioner Public Advocate (1) to compel respondent Police Commissioner to provide petitioner with access to all substantiated Civilian Complaint Review Board complaints and all case files of potential discipline initiated by the Internal Affairs Division and/or the Advocate's Office based on complaints by the public for the period between January 1, 1995 and December 31, 1996, and (2) to compel respondent Corporation Counsel to authorize petitioner to retain [***2] outside counsel to represent him in this matter, granted the application as to (1) on the condition that the names of the police officers involved and any other identifying information be redacted, and denied the application as to (2), unanimously modified, on the law, to the extent of authorizing petitioner to retain outside counsel nunc pro tunc and remanding to the IAS Court for a determination of the appropriate fee, and otherwise affirmed, without costs.

We agree with the cogent analysis of the *IAS Court (174 Misc 2d 400)* [**385] that petitioner is entitled to the records in question in furtherance of his independent duties under the New York City Charter, subject to appropriate redaction as was done here, that *Civil Rights Law § 50-a* does not bar such access, that *New York City Charter § 24 (j)* is permissive and therefore does not require petitioner to exhaust his administrative [*108] remedies by seeking a subpoena from the appropriate committee of the New York City Council, and that petitioner has the capacity to institute litigation. However, petitioner should have been authorized to retain outside counsel, the Corporation [***3] Counsel being in a position of obvious conflict in this dispute between two City public officials (*cf., Lamberti v Metropolitan Transp. Auth., 170 AD2d 224*). In remanding, we note that the fee request was not documented.

Concur--Rosenberger, J. P., Nardelli, Wallach and Saxe, JJ. [*See, 174 Misc 2d 400.]*

751 So.2d 621

EDUCATION DEVELOPMENT CENTER, INC., d/b/a My First Step Child Day Care Center, Margie L. Bellamy, David Spring, and The Association for Neighborhood Preservation, Inc., Appellants,

v.

PALM BEACH COUNTY, Salvation Army, and Sac Mercantile, Inc. d/b/a Army Navy Outdoors, Appellees.

No. 98-3786.

District Court of Appeal of Florida, Fourth District.

December 1, 1999.

[751 So.2d 622]

Nancy E. Guffey-Landers and J. Barry Curtin of Levy, Kneen, Mariani, Curtin, Kornfeld & Del Russo, P.A., West Palm Beach, for appellants.

Robert P. Banks, Assistant County Attorney, West Palm Beach, for Appellee-Palm Beach County.

Brian B. Joslyn and Ronald E. Crescenzo of Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, West Palm Beach, for Appellee-Salvation Army.

GUNTHER, J.

The appellants seek review of the trial court's order striking their complaint as a sham pleading. Finding error, we reverse.

The Palm Beach County Commissioners approved the Salvation Army's proposal to develop a prison work release/homeless facility in Palm Beach County. Within thirty days, Plaintiffs Education Development Center, Margie L. Bellamy, David Spring, the Association for Neighborhood Preservation, Inc., and SAC Mercantile, Inc. filed a complaint with Palm Beach County pursuant to section 163.3215, Florida Statutes, alleging that the development order issued to the Salvation Army was inconsistent with the comprehensive plan. SAC Mercantile, through its president, was the only plaintiff who signed and verified the complaint. After considering the complaint, the county commissioners decided to maintain their approval of the Salvation Army's proposal.

The plaintiffs then filed their complaint in circuit court. The Salvation Army intervened, filing a motion to strike all plaintiffs except SAC Mercantile for failing to verify the complaint. The trial court granted the motion. Those plaintiffs who were stricken from the complaint now appeal.

Section 163.3215 of the Florida Statutes allows an adversely affected third party to maintain an action to determine whether a development order is consistent with the comprehensive plan. Before an adversely affected third party can file suit in court, however, the party must first file a verified complaint with the local government within thirty days of the local government's action. § 163.3215(4). The issue here is whether, in a case involving multiple plaintiffs, the condition precedent of first filing

[751 So.2d 623]

a verified complaint with the local government is satisfied upon verification by only one plaintiff.

Section 163.3215 enlarged the class of persons with standing to challenge a development order as inconsistent with the comprehensive plan. See Southwest Ranches Homeowners Ass'n v. County of Broward, 502 So.2d 931, 935 (Fla. 4th DCA 1987). As a remedial statute, section 163.3215 should be liberally construed to advance the intended remedy, i.e., to ensure standing for any party

with a protected interest under the comprehensive plan who will be adversely affected by the governmental entity's actions. Parker v. Leon County, 627 So.2d 476, 479 (Fla. 1993); see Dotty v. State, 197 So.2d 315 (Fla. 4th DCA 1967)(remedial statutes are generally construed liberally). Requiring an adversely affected third party to first file a verified complaint with the local government before filing a complaint in court places the governmental entity on notice of the third party's position and intent to pursue that position in court. Parker, 627 So.2d at 479. Given this, a verified complaint is sufficient under section 163.3215(4) so long as it places the governmental entity on notice of all parties involved and the basis for their claim, regardless of how many parties verify the complaint.

Because the complaint here was verified by Plaintiff SAC Mercantile and alleged the basis for each plaintiffs standing and each plaintiffs position why the development order was inconsistent with the comprehensive plan, the trial court erred in striking it as to the appellants, i.e., those plaintiffs who did not verify the complaint. Accordingly, we reverse the trial court's order and remand for further proceedings.

REVERSED AND REMANDED.

FARMER and KLEIN, JJ., concur.

83 So.3d 859

Doris ROTHMAN–BROWNING, Individually, and as Co–Trustee of the Phyllis Rothman Irrevocable Trust u/a/d 9/12/2000, and as Co–Trustee of the Qualified Terminable Interest Property (QTIP) Trust under Article VIII of the George Rothman Amended and Restated Revocable Trust Agreement u/a/d 9/12/2000, Appellant,

v.

Marcia MARSHALL, as Guardian of the Person of Phyllis Rothman and Barbara Thomas, as Co–Trustee of the Phyllis Rothman Irrevocable Trust u/a/d 9/12/2000, and as Co–Trustee of the Qualified Terminable Interest Property (QTIP) Trust Under Article VIII of the George Rothman Amended and Restated Revocable Trust Agreement u/a/d 9/12/2000; and Citicorp Trust, N.A., as Co–Trustee of the Phyllis Rothman Irrevocable Trust u/a/d 9/12/2000, and as Co–Trustee of the Qualified Terminable Interest Property (QTIP) Trust under Article VIII of the George Rothman Amended and Restated Revocable Trust Agreement u/a/d 9/12/2000; and as Guardian of the Property of Phyllis Rothman, Appellees.

No. 4D11–2079.

District Court of Appeal of Florida, Fourth District.

Dec. 21, 2011.

[83 So.3d 860]

Stephen T. Maher of Shutts & Bowen LLP, Miami, for appellant.

Amy S. Rubin of Fox Rothschild LLP, West Palm Beach, for appellee, Marcia Marshall.

MAY, C.J.

This is an appeal from an order approving a guardianship plan. Two of the three appellees concede error.[1] The third appellee ("guardian") has not. We reverse.

The guardian filed the guardianship plan with the trial court on April 4, 2011. The Clerk of Court completed its review of the Guardianship Plan and filed its approval on April 26, 2011. The co-trustee, both individually and in her fiduciary capacity, filed an "Objection to Annual Guardianship Plan of Guardian of Person" within thirty days on May 4, 2011. The trial court entered its Final Order approving the guardianship plan on April 29, 2011; it was rendered on May 5, 2011. At a subsequent hearing, the trial court denied the objection as untimely, never addressing its merits. From this order, the co-trustee now appeals.

The co-trustee argues that because she submitted a timely objection to the guardianship plan in accordance with section 744.367, Florida Statutes, the trial court erred in prematurely approving the plan without considering the objection. The co-trustee also argues the premature approval of the plan denied her due process. The guardian responds that section 744.369(1), Florida Statutes, only requires the trial court to review the guardianship plan within 30 days and because the trial court approved the guardianship plan within that time, it did not err.

This Court reviews questions of law de novo. Major League Baseball v. Morsani, 790 So.2d 1071, 1074 (Fla.2001).

Section 744.367(4), Florida Statutes, provides that, "[w]ithin 30 days after the annual report has been filed, any interested person, including the ward, may file written objections to any element of the report, specifying the nature of the objection." § 744.367(4), Fla. Stat. (2010). Section 744.369(7) provides that, "[i]f an objection has been filed to a report, the court shall set the matter for hearing and shall conduct the hearing within 30 days after the filing of the objection." § 744.369(7), Fla. Stat. (2010). Section 744.369(1) provides that, "[t]he court shall review the annual guardianship report within 30 days after the filing of the clerk's report of findings to the court." § 744.369(1), Fla. Stat. (2010).

Our supreme court has explained that, "[w]hen the words of a statute are plain and unambiguous and convey a definite meaning, courts have no occasion to resort to rules of construction—they must read the statute as written" and the court's inquiry should end. Nicoll v. Baker, 668 So.2d 989, 990–91 (Fla.1996). When "part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others in pari materia, the [c]ourt will examine the entire act

[83 So.3d 861]

and those in pari materia in order to ascertain the overall legislative intent." E.A.R. v. State, 4 So.3d 614, 629 (Fla.2009) (quoting Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So.2d 1260, 1265–66 (Fla.2008)).

Here, the co-trustee filed an objection to the guardianship plan precisely thirty days after it was filed. Under the plain meaning of sections 744.367(4) and 744.369(7), an objection filed within thirty days entitles the objector to a hearing. While section 744.369(1) does not expressly require the trial court to wait the full thirty days before entering a final order approving a guardianship plan, when section 744.369(1) is read in pari materia with sections 744.367(4) and 744.369(7), it is clear that an objection filed within thirty days is entitled to consideration. Otherwise, sections 744.367(4) and 744.369(7) would be rendered meaningless.

Reversed and Remanded for consideration of the Co–Trustee's objection.

WARNER and GROSS, JJ., concur.

Notes:

[1]Barbara Thomas and CitiCorp Trust, N.A. filed Confessions of Error.

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8 IER Cases 71, 17 Fla. L. Weekly S702
MARTIN COUNTY, Petitioner,
v.
Willie EDENFIELD, Sr., Respondent.
No. 78768.
Supreme Court of Florida.
Nov. 19, 1992.

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J. David Richeson and Joseph J. Mancini of Richeson and Brown, P.A., Fort Pierce, for petitioner.

W. Trent Steele and Philip M. Burlington of Edna L. Caruso, P.A., West Palm Beach, for respondent.

John J. Copelan, Jr., Co. Atty., Alexander Cocalis, Chief Trial Counsel, and Andrea Karns Hoffman and Maite Azcoitia, Asst. Co. Attys., Fort Lauderdale, amicus curiae for Broward County.

KOGAN, Justice.

We have for review Edenfield v. Martin County, 583 So.2d 1097 (Fla. 4th DCA 1991), which certified the following question of great public importance [1]:

In an action brought under the Whistle-Blower's Act, must summary judgment against plaintiffs be granted when plaintiffs participated in the wrongdoing they disclosed?

We have jurisdiction. Art. V, Sec. 3(b)(4), Fla. Const.

Willie Edenfield was an assistant road superintendent for Martin County, Florida. While working for the county, he used a Martin County truck to deliver sod to a private residence owned by his supervisor, and the sod was billed to and paid for by Martin County. Edenfield ordered a subordinate county employee to assist him in delivering the sod. These actions were completed at the behest of the supervisor.

A Martin County commissioner contacted Edenfield about the incident. Edenfield readily admitted his involvement upon questioning by the commissioner. He also implicated his supervisor. Later, Edenfield was moved into an inferior job at lower pay. Edenfield contends that no one other than himself was subjected to an adverse employment decision as a result of these incidents. However, Martin County contends that Edenfield's supervisor resigned and criminal charges were filed against him. Edenfield has countered that the supervisor resigned with his retirement benefits intact and there is no evidence in the record that the supervisor was prosecuted or suffered any other detriment.

Edenfield then sued the county under the Whistle-Blower's Act. Martin County moved for summary judgment, which was granted. On appeal, the district court reversed on grounds that the statute does not create an exception for whistle-blowers who are in pari delicto with the wrongdoers whose malfeasance they have revealed. Edenfield, 583 So.2d at 1098.

The Whistle-Blower's Act of 1986 forbids adverse actions against employees of state government and contractors who

disclose information on their own initiative in a sworn complaint; who are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal

government entity; or who refuse to participate in any action prohibited by this section.

Sec. 112.3187(7), Fla.Stat. (1989). Employees are protected for disclosures that include:

(a) Any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an agency or

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independent contractor that creates and presents a substantial and specific danger to the public's health, safety, or welfare.

(b) Any act or suspected act of malfeasance, misfeasance, or neglect of duty committed by an agency.

Sec. 112.3187(5), Fla.Stat. (1989). A governmental agency can raise as a defense the claim

that the adverse action was predicated upon grounds other than the employee's or person's exercise of rights protected by this section.

Sec. 112.3187(10), Fla.Stat. (1989).

Although Martin County urges us to find ambiguity in the statute, we believe the language is plain and supports the conclusions reached by the district court. Florida law is well settled that ambiguity is a prerequisite to judicial construction, and in the absence of ambiguity the plain meaning of the statute prevails. Holly v. Auld, 450 So.2d 217 (Fla.1984). Moreover, even if we accepted the proposition that ambiguity exists, we believe it clear that the Whistle-Blower's Act is a remedial statute designed to encourage the elimination of public corruption by protecting public employees who "blow the whistle." As a remedial act, the statute should be construed liberally in favor of granting access to the remedy. Amos v. Conkling, 99 Fla. 206, 126 So. 283 (1930). We so construe it here.

On its face, the statute declares that defendants can raise in defense the fact that the employee or other protected person was subjected to adverse action for some reason other than the act of whistle-blowing itself. Obviously, this can include the fact that the employee was involved in the corruption in question and was subjected to adverse action for that reason, and that reason alone, or for some other neutral and nonpretextual reason. However, the legislature characterized this as a "defense," not as an exception to the statute's protections. [2] As such, it is subject to the somewhat rigorous procedural niceties and burdens of proof that apply when a defense or its absence is asserted as the basis for a motion for summary judgment.

Under Florida law, a "defense" is any allegation raised by the defendant that, if true, would defeat or avoid the plaintiff's cause of action. Lovett v. Lovett, 93 Fla. 611, 112 So. 768 (1927). A defense is not a sufficient basis for granting a motion for summary judgment unless the evidence supporting that defense is so compelling as to establish that no issue of material fact actually exists. Harvey Building, Inc. v. Haley, 175 So.2d 780 (Fla.1965). For example, our courts consistently have held that plaintiffs are not entitled to summary judgment unless they conclusively disprove the existence of a defense raised by the defendants or establish its legal insufficiency. E.g., O'Neal v. Brady, 476 So.2d 294 (Fla. 3d DCA 1985). The reverse thus also must be true: Defendants moving for summary judgment must conclusively prove both the factual existence of the defense upon which they rely and its legal sufficiency. Cf. id.

Martin County has not conclusively proven the first of these elements. [3] Edenfield contends that he alone was singled out for adverse action while the supervisor who authored the corruption was allowed to retire with benefits. We acknowledge Martin County's contention that the supervisor was forced to retire and was the subject of a criminal complaint, but we do not believe these allegations of themselves are sufficient to take the question from the finder of fact. The record is not entirely clear on the

nature of these factual allegations. At least one reasonable inference is that Edenfield's punishment was of greater severity than his supervisor's, and thus that he was subjected to an adverse action at least in part because he blew the whistle. We believe that more lenient treatment

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of a co-perpetrator who is of equal or greater guilt can be used as evidence to infer a violation of the statute, although it is not necessarily dispositive of liability in all cases.

Thus, an issue of material fact continues to exist in the present record. Since Martin County has not conclusively proven the existence of the defense upon which it relies, the issue could not be removed from the finder of fact. [4] The order of summary judgment was inappropriate here.

In so concluding, we do not imply that employees or other persons protected by the act can render themselves immune from being penalized on the job for their participation in misconduct simply by being the first to blow the whistle. So long as the employer takes adverse action based solely on the misconduct or some other neutral and nonpretextual reason, the whistle-blowing employee would have no cause of action as a matter of law and a motion for summary judgment would be appropriately granted. However, the meting of lesser penalties to "silent" [5] co-perpetrators who are of equal or greater culpability often may be sufficient grounds to require that the motion for summary judgment be denied unless the employer can conclusively establish some neutral, nonpretextual reason for the adverse action. [6] Sec. 112.3187(10), Fla.Stat. (1989).

We caution, however, that the failure to prevail on the motion for summary judgment does not preclude a defendant from presenting evidence to the fact-finder at trial, as authorized by section 112.3187(10), Florida Statutes (1989). Nor does the lesser punishment meted to a co-perpetrator establish liability in every case. In this sense, the defense created by section 112.3187(10), Florida Statutes (1989), has two levels of operation.

First, summary judgment can be granted based on the defense only if the defendants have conclusively shown that no issue of material fact actually exists, under the principles outlined above. Otherwise, the case must be submitted to the fact-finder. Second, in presenting the case to the fact-finder, the defendant is entitled to submit all available admissible evidence and testimony tending to establish that the adverse employment action was based in whole or in part on matters not protected by the Whistle-Blower's Act, including involvement in the corruption or impropriety in question. Id. A lesser penalty meted to a silent co-perpetrator can support an inference of an unlawful act under the statute, but this inference can be rebutted if the employer establishes that the adverse employment action actually was neutral and nonpretextual notwithstanding the fact that unequal punishments were meted to co-perpetrators. On remand, Martin County shall be allowed to present and argue such evidence and testimony to the fact-finder at trial as are consistent with this opinion and the statute. [7]

For the reasons expressed here, the result reached by the district court is approved. We answer the certified question in the negative as qualified herein. This cause is remanded to the trial court for further proceedings consistent with our views above.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES and HARDING, JJ., concur.

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1 The district court did not phrase the question itself, so we do so ourselves.

2 This may not be true under the statute as it was amended on July 7, 1992. Ch. 92-316, Sec. 12, Laws of Fla. These amendments, however, were retroactive

only to July 1, 1992. Ch. 92-316, Sec. 16, Laws of Fla. Accordingly, the 1992 amendments do not apply to the present cause of action.

3 We agree, however, that involvement in corrupt acts in the abstract is a legally sufficient defense under the statute.

4 We express no opinion, however, as to whether Edenfield's punishment actually was more severe than his supervisor's or whether Edenfield is entitled to any award of damages. These are issues for the fact-finder.

5 By "silent," of course, we mean co-perpetrators who did not participate in the whistle-blowing.

6 A layoff necessitated by budget cuts, for example, would be a neutral reason provided there was no causal link between the whistle-blowing and the decision to lay off that particular employee.

7 We recognize that section 112.3187(10) also was amended in 1991. Ch. 91-285, Laws of Fla. Our opinion today obviously does not construe the 1991 amendments, although we do not view them as inconsistent with our views here.