

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

CITY OF TITUSVILLE, a Florida Municipality,

Plaintiff,

Vs.

Case No. 2022-CA-038303

SPEAK UP TITUSVILLE, INC.,
A Florida Not for Profit Corporation.

Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGEMENT

Each Party in this action has moved for a Summary Judgment for Declaratory Judgment. A hearing was held on May 9, 2023 in which the Court heard oral arguments of the Attorneys for the Parties. Each Party also submitted written memoranda and legal citations of authority.

1. FACTS:

- A. The City of Titusville is a Florida municipality with its Charter adopted and established pursuant to Article VIII, Section 2 of the Florida Constitution.
- B. The City has a Council-Manager form of government in which the City Council is vested with all authority to enact local legislation, adopt Budgets, determine policies and appoint the City Manager as set forth in Article 1, Section 10, Titusville City Charter.
- C. Speak Up Titusville, Inc. was created as a Not for Profit Corporation on May 24, 2021.
- D. Speak Up Titusville embarked upon a citizen initiative to amend the City's Charter pursuant to Section 166.031(1), Florida Statutes.
- E. Speak Up Titusville drafted and disseminated a Petition which, if passed by a majority of the citizen qualified voters of Titusville, would amend

- the City's Charter to add a new Section 11.1.
- F. On July 18, 2022, the Brevard County Supervisor of Elections formally notified the City's Clerk by a letter, that Speak Up Titusville had met the necessary requirements for the Charter Amendment to be placed on the ballot for the 2022 elections.
 - G. The City, on August 9, 2022, adopted Resolution No. 15-2022, calling for a Referendum Election on November 8, 2022, on the proposed Charter Amendment.
 - H. On August 22, 2022, The City forwarded City Resolution No. 15-2022 to the Supervisor of Elections in order to have the Charter Amendment placed on the ballot. The ballot summary language was identical to the language in the Charter Amendment initiative.
 - I. The Charter Amendment had to be submitted no later than August 22, 2022, to be included on the November general election ballot to be voted upon by the voters of the City.
 - J. The City filed its Motion for Summary Judgment on July 22, 2022.
 - K. The necessary procedures were followed by the City to have the Charter Amendment placed on the ballot.
 - L. On November 8, 2022, a majority of Titusville's voters approved the Amendment by a vote of 14,967 votes "yes" and 3,092 votes "no".
 - M. Section 166.03(2), Florida Statutes, requires the City to incorporate the Amendment into the Charter and file the revised Charter with the Department of State. The City refused to certify the Amendment and place it in the Charter.

2. THE AMENDMENT:

Ballot Title: RIGHT TO CLEAN WATER CHARTER AMENDMENT

Ballot Summary: Shall the Charter of the City of Titusville be amended to recognize a right to clean water and prohibit actions which interfere with this right? (Y/N)

 Full Text: The Charter of the City of Titusville is amended to add Section 11.1, as follows:

1. Right to Clean Water. Residents of the City of Titusville possess the right to clean water, which shall include the right to Waters of Titusville which flow, exist

in their natural form, are free of pollution, and which maintain a healthy ecosystem.

2. Violations. Governmental or corporate entities shall not engage in any alleged, proposed or continuing activity which violates the rights secured by this Charter.

3. Remedies. Any resident of Titusville may bring a legal action, in the name of the resident or in the name of the Waters of Titusville, in a court of appropriate jurisdiction to enjoin violations of the right to clean water. Remedies shall include injunctive relief to enjoin the violation and monetary damages to restore the waters to their pre-damaged state.

4. Definitions. (a) "Clean Water" shall mean Waters that are free from Pollution.

(b) "Pollution means the non-natural presence in the Waters of the City of Titusville of any one or more substances, contaminants, or pollutants in quantities potentially harmful or injurious to human health, native wildlife dependent on clean Waters (not to include mosquitos or other blood-feeding flies) or water quality which may unreasonably interfere with the enjoyment of life, liberty or property, including outdoor recreation, business interests and property values within the City of Titusville.

(c) "Waters" include, but are not limited to, portions of the Indian River Lagoon, tributaries, lakes, ponds, wetlands, and all other naturally occurring waters and water bodies within the political boundaries of the City of Titusville, including fresh, brackish, saline, surface or underground waters. Waters do not include constructed swimming pools or artificial wetlands which use natural processes for water retention and treatment to improve water quality. Waters may include, however, constructed water bodies that amount to being a tributary, having a physical outlet or overflow into the Waters of the City of Titusville.

5. Severability. To the extent any provision of this Section impermissibly conflicts with any superior state or federal law governing the same conduct, such provision shall be severable and all other provisions shall remain fully enforceable."

3. ISSUES:

- A. Whether the title and summary clearly and accurately inform the voter of the chief purpose of the Amendment?
- B. Whether the language of the title and summary, as written, is likely to mislead the public?
- C. Whether Section 403.412(9)(a), Florida Statutes, expressly and directly pre-empts the Speak Up Titusville Charter Amendment?
- D. If Section 403.412(9)(a), Florida Statutes, is found to pre-empt the Speak Up Titusville Charter Amendment, is the Statute unconstitutional?

4. CONSTITUTION AND RELEVANT STATUTES:

A. 166.031

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

(2) Upon adoption of an amendment to the charter of a municipality by a majority of the electors voting in a referendum upon such amendment, the governing body of said municipality shall have the amendment incorporated into the charter and shall file the revised charter with the Department of State. All such amendments are effective on the date specified therein or as otherwise provided in the charter.

B. 101.161

(1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such

a manner that a “yes” vote will indicate approval of the proposal and a “no” vote will indicate rejection. The ballot summary of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.

(3)(a) Each joint resolution that proposes a constitutional amendment or revision shall include one or more ballot statements set forth in order of priority. Each ballot statement shall consist of a ballot title, by which the measure is commonly referred to or spoken of, not exceeding 15 words in length, and a ballot summary that describes the chief purpose of the amendment or revision in clear and unambiguous language. If a joint resolution that proposes a constitutional amendment or revision contains only one ballot statement, the ballot summary may not exceed 75 words in length. If a joint resolution that proposes a constitutional amendment or revision contains more than one ballot statement, the first ballot summary, in order of priority, may not exceed 75 words in length.

C. 403.412(9)(a)

(9)(a) A local government regulation, ordinance, code, rule, comprehensive plan, charter, or any other provision of law may not recognize or grant any legal rights to a plant, an animal, a body of water, or any other part of the natural environment that is not a person or political subdivision as defined in s. 1.01(8) or grant such person or political subdivision any specific rights relating to the natural environment not otherwise authorized in general law or specifically granted in the State Constitution.

D. Article II, section 7(a), Florida Constitution

7 (a) It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and

unnecessary noise and for the conservation and protection of natural resources.

E. 403.021 Legislative declaration; public policy.—

(1) The pollution of the air and waters of this state constitutes a menace to public health and welfare; creates public nuisances; is harmful to wildlife and fish and other aquatic life; and impairs domestic, agricultural, industrial, recreational, and other beneficial uses of air and water.

(2) It is declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife and fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses and to provide that no wastes be discharged into any waters of the state without first being given the degree of treatment necessary to protect the beneficial uses of such water.

(4) It is declared that local and regional air and water pollution control programs are to be supported to the extent practicable as essential instruments to provide for a coordinated statewide program of air and water pollution prevention, abatement, and control for the securing and maintenance of appropriate levels of air and water quality.

(5) It is hereby declared that the prevention, abatement, and control of the pollution of the air and waters of this state are affected with a public interest, and the provisions of this act are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state.

(6) The Legislature finds and declares that control, regulation, and abatement of the activities which are causing or may cause pollution of

the air or water resources in the state and which are or may be detrimental to human, animal, aquatic, or plant life, or to property, or unreasonably interfere with the comfortable enjoyment of life or property be increased to ensure conservation of natural resources; to ensure a continued safe environment; to ensure purity of air and water; to ensure domestic water supplies; to ensure protection and preservation of the public health, safety, welfare, and economic well-being; to ensure and provide for recreational and wildlife needs as the population increases and the economy expands; and to ensure a continuing growth of the economy and industrial development.

F. 403.182 Local pollution control programs.—

(1) Each county and municipality or any combination thereof may establish and administer a local pollution control program if it complies with this act. Local pollution control programs in existence on the effective date of this act shall not be ousted of jurisdiction if such local program complies with this act. All local pollution control programs, whether established before or after the effective date of this act, must:

(a) Be approved by the department as adequate to meet the requirements of this act and any applicable rules and regulations pursuant thereto.

(b) Provide by ordinance, regulation, or local law for requirements compatible with, or stricter or more extensive than those imposed by this act and regulations issued thereunder.

(c) Provide for the enforcement of such requirements by appropriate administrative and judicial process.

(6) Notwithstanding the existence of any local pollution control program, whether created by a county or municipality or a combination thereof or by a special law, the department shall have jurisdiction to enforce the provisions of this chapter and any rules, regulations, or orders issued pursuant to this chapter throughout the state; however, whenever rules, regulations, or orders of a stricter or more stringent nature have been adopted by a local pollution control program, the

department, if it elects to assert its jurisdiction, shall then enforce the stricter rules, regulations, or orders in the jurisdiction where they apply.

(7) It shall be a violation of this chapter to violate, or fail to comply with, a rule, regulation, or order of a stricter or more stringent nature adopted by a local pollution control program, and the same shall be punishable as provided by s. 403.161. If any local program changes any rule, regulation, or order, whether or not of a stricter or more stringent nature, such change shall not apply to any installation or source operating at the time of such change in conformance with a currently valid permit issued by the department.

G. 403.412 Environmental Protection Act.—

(1) This section shall be known and may be cited as the “Environmental Protection Act of 1971.”

(2)(a) The Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against:

1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations; et. Seq.

5. DISCUSSION:

The Court has searched for a definition of “clean water” in the Federal Environmental Laws as well as the State of Florida Environmental Statutes and has not found any specific definition of the term. However, the Statutes all speak in terms of “pollution” of the “waters”, both of which have broad and extensive definitions under the Statutes. Logically, ALL waters created by nature are not clean or suitable for drinking or other human or animal or plant consumption, such as waters flowing over rocks and substances which mix its pollutants in the water. Consider an obvious example of this concept in the waters found in some of the areas

in Yellowstone National Park which are toxic to humans and animals. So the concept in most all the Statutes, Federal and State, deal with the pollution of waters by various means devised by humans, such as dumping pollutants into the waters through dredging, filling in wetlands, industrial operations including dry cleaners, etc..

The first matter raised by the City is that the statement in the ballot summary does not clearly disclose the primary or chief purpose of the proposed Amendment. The Court does not find it ambiguous or unclear and finds that it properly discloses the main or chief purpose of the proposed Amendment. In addition, the Court finds that it does not and did not mislead the public.

Another issue is that the Amendment gives a right to a citizen of Titusville to bring a legal action in the name of the Waters of Titusville. The Amendment provides that the action would have to be brought by a citizen of Titusville in the name of the Waters of Titusville, a nominal action which has been allowed by Courts in the past. See *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106, 1107 (9th Cir. 1988) in which suit was brought by a natural person on behalf of an animal, the Palila. In any event, the Charter Amendment has a severability clause which could be applied if determined to be improper. The principle that the Courts may only prevent the electors from voting on a proposed Initiative if it is clearly invalid in its entirety was upheld in *Gaines v. City of Orlando*, 450 So. 2d 1174 (Fla. 5thDCA 1984).

The City maintains that Section 403.412(9)(a) pre-empts the Amendment and certification of the Charter Amendment. The Florida Constitution refers to the “natural resources and scenic beauty” of Florida as being protected. “Waters” and “pollution” and other terminology has been defined by both Florida and Federal Statutes. The term “natural environment” in the statute is not unconstitutionally vague. “Natural” is derived from foreign language words meaning “as it relates to the earth” (not human senses, attributes or relationships) “existing in or produced by nature ; not artificial” or in the Biblical sense, the earth and its resources as originally made by God. See Merriam-Webster Dictionary and several definitions occurring in a Google

search for “natural”. Merriam-Webster defines “environment” as “the complex of physical, chemical, and biotic factors (as climate, soil and living things) that act upon an organism or ecological community and ultimately determines its form and survival”. “Environmental” basically means the circumstances, objects or conditions by which one is surrounded. The term “natural environment” defines itself and is not likely to confuse or deceive anyone of voting age who have their faculties intact. It is very close in meaning to “natural resources and scenic beauty” used in the Florida Constitution. The Florida Legislature did not see the need to define the term in Florida Statute 403.031 even though it titled the Statute “Environmental Control” and did define “person”, “plant”, “waters”, “pollution” and several others. Further, the Statute itself, Section 403.412(9)(a) states what it means by the terminology. It states that no plant, animal, body of water or any other part of the natural environment that is **not** a person or political subdivision can be granted any specific legal rights to the natural environment not otherwise authorized in general law or specifically granted in the State Constitution. The laws now allow private citizens to file suit to enforce the environmental laws of the State. The argument relative to the exclusive right to approve environmental laws by the Florida Department of Environmental Protection applies to all local pollution control programs, not enforcement of those programs.

The other claims of vagueness in the argument of Defendant are without merit and will not be discussed.

In *Florida Wildlife Federation v. State Department of Environmental Regulation*, 390 So.2d, 64 (Fla.1980) the Florida Supreme Court confirmed that the citizens of Florida have been given the capacity to protect their rights to a clean environment, a right not previously furnished them directly, by enactment of sub-section 7 of 403.412. A Florida Citizen can now bring a cause of action under the statute without showing a special equity.

Contrary to what the City argues, the term “clean waters” does not mean waters that are entirely free from pollution. The Amendment itself defines what pollution is, that is that the unnatural substances, contaminants or pollutants **are contained in** quantities potentially harmful or injurious to human or native wildlife, excluding certain bugs, or which

unreasonably interfere with recreation or business values in the City. The statement connotes that it is expected to have some unnatural substances in the water as long as it is not in quantities harmful or potentially harmful. This is consistent with the Federal Safe Drinking Water Act (42 U.S.C.) and other environmental regulations in the Florida Environmental Protection Act (Chapter 412, F.S) as well as environmental control as codified in Chapter 403, Florida Statutes. The Act provides procedures for a citizen applying for injunctive relief and protects both the agency sued and the citizen's rights. The Amendment is compatible with the Statutes and specifically states that if it is in violation of any superior State or Federal Law, that it is severable, i.e. the State or Federal Law prevails.

The claims of Defendant that Section 403.412(9)(a) violates the U.S. Constitution and the Florida Constitution are without merit and will not be discussed.

In *Shulmister v. City of Pompano Beach*, 798 So. 2d 799 (Fla. 4th DCA 2001) the Court held that because Section 101.161(1), requires the governing body to place the proposed amendment on the ballot, it is that body's responsibility to provide a ballot summary in compliance with Section 101.161(1). See also *City of Riviera Beach v. Riviera Beach Citizens Task Force*, 87 So. 3d 18 (Fla.4th DCA 2012) in which the City had the ministerial duty to provide a ballot summary and did not do so. The Court said that the city cannot complain that its own failure to perform it's duty can prevent the citizens from voting on the charter amendment proposal.

The adoption of the proposed Amendment approved by a majority vote of the voters in Titusville, leaves only a ministerial duty to certify the Amendment. Section 166.031(1) reserves to the people the right to amend the City's Charter without the approval of and even in the fact of vehement objection from the governing body. See *City of Cocoa Beach v. Vacation Beach, Inc.*, 852 So. 2d 358 (Fla. 5th DCA 2003)

6. RESERVATION JURISDICTION:

The Court reserves jurisdiction to award costs and attorney's fees if authorized and for all legal purposes, including but not limited to entering orders of

enforcement or other legal remedy. Should this Judgment be appealed by either Party, a Motion for Stay Pending Appeal will be considered.

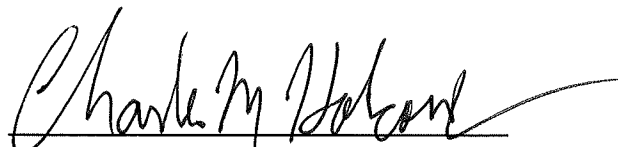
7. RULING:

IT IS ORDERED AND ADJUDGED as follows:

A. The Motion For Summary Judgment for Declaratory Judgment filed by the City of Titusville be and hereby is **DENIED**.

B. The Motion For Summary Judgment for Declaratory Judgment filed by Speak Up Titusville, Inc. be and hereby is **GRANTED** in part to the extent of granting the request that the City be required to certify the Amendment. The request to declare any violation of the Federal Constitution or that any section of the Florida Statutes is unconstitutional is **DENIED**.

DONE AND ORDERED at the Moore Justice Center, Viera, Florida, on the 22nd day of May, 2023.


Charles M. Holcomb
Senior Circuit Judge

I hereby certify that copies were furnished by electronic service to:

Richard Grosso, Esquire richardgrosso1979@gmail.com
Leonard Collins, Esquire leonard.collins@gray-robinson.com
Office of the Attorney General of Florida oag,civil.eserve@myfloridalegal.com


Shannon Zeleniak
Judicial Assistant