IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO. 2018-021933-CA-01 (22)

NATALIE NICHOLS,

Plaintiff,

v.

CITY OF MIAMI BEACH,
FLORIDA,

Defendant.
_____/

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant, the City of Miami Beach (the "City"), files this reply in further support of its motion for partial summary judgment and response in opposition to Plaintiff Natalie Nichols' ("Nichols") cross-motion for summary judgment on Count III of the Second Amended Complaint for Declaratory Judgment. Plaintiff's arguments in favor of her preemption claim, which alleges that the schedule of fines provided under the challenged City ordinances are preempted by Florida law, fails for a number of reasons.[1]

First, the plain language of the statute demonstrates that the Ordinances are not preempted under Florida law because Chapter 162 of the Florida Statutes permits a municipality to create an alternative code enforcement system and specifically provides that nothing in

[1] Nichols challenges two City zoning ordinances that restrict the rental of properties for terms of six months or less if they are located in certain residential zoning districts, City Code §§ 142-905(b)(5) and 142-1111 (collectively, the "Ordinances").

sections 162.01-.12 of that Chapter prohibits a local government from enforcing codes by any other means. Plaintiff's reading of the statute, which attempts to carve out the fines provision in section 162.09 as somehow exempt or different, is contrary to the plain meaning of Chapter 162.

Second, Plaintiff's reliance on a Second District Court of Appeal opinion and decisions of the Florida Attorney General is misplaced because binding precedent from the Third District Court of Appeal squarely states that municipalities have the authority to regulate independently Chapter 162 by establishing an alternative code enforcement system.

Third, even if the Court were to find that section 162.09 applied, the Ordinances, which provide for a per-*violation* fine, do not conflict with that provision, which sets forth a "cap" on per-*day* fines.

Finally, Nichols lacks standing to challenge a fine structure that has not been enforced against her.

ARGUMENT

I. THE ORDINANCES ARE NOT PREEMPTED BY FLORIDA LAW BECAUSE THE CITY HAS CREATED AN ALTERNATE ENFORCEMENT SYSTEM PURSUANT TO CHAPTER 162 OF THE FLORIDA STATUTES

Nichols argues that while Chapter 162 permits a local government to adopt alternative methods of enforcement pursuant to section 162.03, it does not "have anything to do with the statutory penalties that may be imposed." Cross-Mot. at 6. But this construction of the statute disregards the plain language of its provisions and controlling precedent recognizing that municipalities have the authority to adopt their own code enforcement system as an alternative to Chapter 162.

A. Plaintiff's Reading Of Chapter 162 Of The Florida Statutes Is Contrary To Its Plain Meaning

Plaintiff's reading of Chapter 162 is contrary to the Florida Supreme Court's directive that where, as here, a statute is clear and unambiguous, it must be given its plain and obvious meaning. *See Kumar v. Patel*, 227 So. 3d 557, 559 (Fla. 2017) ("We first examine the statute's plain meaning, resorting to rules of statutory construction only if the statute's language is ambiguous."); *Streeter v. Sullivan*, 509 So. 2d 268, 271 (Fla. 1987) ("The first rule of statutory interpretation is that '[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation…the statute must be given its plain and obvious meaning.'"); *see also Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 301, 313 (Fla. 2017) (Lawson, J., concurring in part and dissenting in part) (the "first (and often only) step in statutory construction is to ask what the Legislature actually said in the statute,. . . based upon the common meaning of the words used").

It is clear from the language of the statute that while Chapter 162 provides one way to enforce ordinances, a municipality may establish an alternate enforcement system, including the amount of fines to be assessed for violations. This is not, as Plaintiff urges, premised solely upon the language "assess fines," *see* Cross-Mot. at 4, but, instead, it is based on the plain language of the statute as a whole. For example, the statute expressly states that

> a municipality may, by ordinance, adopt an *alternate code enforcement system* that gives code enforcement boards or special magistrates designed by the local governing body, or both, the authority to hold hearings and *assess fines against violators* of the respective county or municipal codes and ordinances.

§ 162.03(2), Fla. Stat. (emphasis added). The statute further provides:

> It is the legislative intent of ss. 162.01-162.12 to provide an *additional or supplemental* means of obtaining compliance with local codes. *Nothing*

> *contained in ss. 162.01-162.12* shall prohibit a local governing body from enforcing codes by any other means.

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

Nichols essentially argues that a municipality like the City can opt out of certain sections of Chapter 162 with regard to the procedures for code enforcement, but must follow section 162.09 with regard to fines. And to conclude otherwise, she argues, would render section 162.09's "strict statutory caps" meaningless. Cross-Mot. at 6. But this reading is contrary to the plain language of Chapter 162. To hold out section 162.09 as somehow exempt or different from the other provisions in Chapter 162 disregards section 162.13, which sets forth that nothing prohibits a municipality from opting out of sections 162.01-.12.

Indeed, even if the Court resorted to rules of statutory construction, Plaintiff's interpretation of the statute would impermissibly render section 162.13—not 162.09—meaningless. *See Verdi v. Metro. Dade Cty.*, 684 So. 2d 870, 873 (Fla. 3d DCA 1996) ("We are 'compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful.'" (citation omitted). The better reading, consistent with the plain language of the statute, is that communities may choose to use the provisions of Chapter 162 or not. In other words, section 162.03(2) permits a local government to adopt an alternative code enforcement system by ordinance and section 162.13 serves to clarify that a municipality may opt out of any of the additional means of enforcement set forth in sections 162.01-.12—including section 162.09's schedule of fines, which may be followed if a municipality chooses not to adopt an alternative means.

As set forth in the City's Motion, the City, recognizing the need for more substantial penalties in order to protect the health, safety, and welfare of its citizens, has explicitly created such an alternative code enforcement system pursuant to Chapter 162. *See* Mot. at 6-7 (citing

City Code §§ 30-1, 30-2; City Ord. No. 2000-3236 at 2). While section 30-74(d) of the City Code generally tracks the language of section 162.09, Florida Statutes, by setting limits upon fines for most code violations, section 30-80 specifically contemplates that other methods and means may be used for code enforcement—including where, as here the legislative body determines that different fines are necessary to secure compliance. City Code § 30-80 ("None of the provisions contained in this chapter shall be considered exclusive. The city administration or code inspectors have the option to use any method provided by law or municipal or county ordinance to enforce the provisions of the various city or county codes, or conditions required thereunder."); March 9, 2016 Commission Memo for Ordinance 2010-3685, Second Reading – Public Hearing, p. 2 (noting that these fines are intended to "prohibit the unscrupulous conduct of those persons seeking to financial[ly] exploit the rental of single and multi-family residences").

B. The Third District Court Of Appeal Has Upheld The Authority Of Municipalities To "Completely Abolish" Chapter 162 In Favor Of An Alternative Code Enforcement System

Plaintiff does not have a response to the plain language of the statute, and instead relies upon a non-binding case from the Second District, *Stratton v. Sarasota County*, 983 So. 2d 51 (Fla. 2d DCA 2008). Nichols' reliance on this opinion is misplaced.

First, despite Plaintiff's insistence, *Stratton* did not address "precisely the argument that Miami Beach makes in this case." Cross-Mot. at 8. In *Stratton*, a county included in its claim of lien payroll expenses incurred for the county's employees' time supervising the demolitions of the plaintiff's property. The county argued that its local ordinances allowed for such an award of the "entire cost of demolition" and "all administrative costs" and that it was "relying on its local code provisions rather than the provisions of chapter 162 to collect these payroll expenses from

Stratton." *Stratton*, 983 So. 2d at 54, 55. The Court concluded that Chapter 162 did not permit the county to directly pass through its payroll expenses for code employees' time. *Id.* at 55. However, the Court did not identify, or otherwise address or analyze, whether this local code provision cited by the county had been adopted as part of an alternate code enforcement system or whether the county had explicitly opted out of Chapter 162. Nor did the Court comment on the authority of a municipality to do so. Whether a provision of the county building code can be cited as authority to include payroll expenses on a lien stemming from a demolition, with no discussion of an alternative code system, does not bear upon the question presented here.[2]

Second, even if *Stratton* addressed the preemption question at issue here (it did not), the Third District's decision in *Miami-Dade County. v. Brown*, 814 So. 2d 518 (Fla. 3d DCA 2002), is controlling. *See Pardo v. State*, 596 So. 2d 665, 666 (1992) (observing that "if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it" and only in the "absence of interdistrict conflict" do "district court decisions bind all Florida trial courts") (citations omitted). In *Brown*, the Court upheld Miami-Dade County's alternative system of code enforcement (including an alternative schedule of fines), adopted pursuant to Chapter 162, against a challenge arguing it contravened sections 162.06 and 162.09, Florida Statutes. *See* 814 So. 2d at 519–20.[3] Indeed, the Third District instructed that

[2] The county cited to Sarasota County Code § 22-34 as authority for its inclusion of payroll expenses in the lien. Chapter 22 (covering buildings and building regulations) contains a provision regarding violations, penalties, and enforcement, which specifically provides that "[t]he provisions of this article shall be enforced in the same manner as misdemeanors are prosecuted . . . or by proceedings before the Code Enforcement Special Master, pursuant to F.S. ch. 162." *See* Sarasota County Code § 22-37(a). Thus it appears that the county in *Stratton* specifically chose to be bound by the enforcement mechanisms set forth in Chapter 162 with regard to building code violations.

[3] Plaintiff does not address the fact that Miami-Dade's alternative code enforcement system, Chapter 8CC, sets forth its own schedule of civil penalties. *See* Mot. at 8; Miami-Dade County Code ¶ 8CC-10.

Chapter 162 "confers on local government the authority to either adopt Chapter 162, or *completely abolish Chapter 162* and adopt an alternative code enforcement system." *Id.* at 519 (emphasis added); *see also Verdi*, 684 So. 2d at 873. This is entirely consistent with the plain language of section 162.13 setting forth that sections 162.01-162.12 were intended only to provide an additional means for obtaining compliance and shall not prohibit a municipality from enforcing codes in other ways.

Plaintiff also relies upon two opinions from the Florida Attorney General, AGO 2000-53 and 2001-77, which likewise are neither binding upon this Court nor squarely address the preemption issue here. *See Bunkley v. State*, 882 So. 2d 890, 897 (Fla. 2004) ("[O]pinions of the Attorney General are not statements of law.").

First, Florida Attorney General Opinion 2000-53 responded to a question regarding whether a city was authorized to adopt and enforce an ordinance pursuant to section 162.21, Florida Statutes, prohibiting tree removal without a permit, with a penalty of $12,500 or more for violation of the statute. The Attorney General observed that a municipality has several options for enforcement of municipal code violations, and concluded that the city was "authorized to utilize enforcement mechanisms other than section 162.21, Florida Statutes, to enforce a 'tree ordinance' with a penalty greater than that set forth in section 162.21, Florida Statutes." *Id.* at *4. But the Opinion did not, as Plaintiff asserts, conclude that cities must nonetheless comply with section 162.09(2)(d). Instead, the Attorney General noted that while the city was "*not required* to utilize Part I, Chapter 162, Florida Statutes, to enforce its 'tree ordinance,'" those "provisions may provide some guidance in crafting an enforcement mechanism for the city." *Id.* at *3 (emphasis added). In other words, the Attorney General suggested the fines structure set forth in section 162.09 could be used as a guidepost to a municipality for determining fines (and

potentially protecting that amount from future judicial scrutiny), but did not conclude that those provisions must be followed or would otherwise preempt a higher amount—indeed, it stated the opposite.

Similarly, Florida Attorney General Opinion 2001-77 addressed the question of whether a code enforcement board may alter the procedures set forth in sections 162.07 and 162.09, Florida Statutes, to impose a fine at the first hearing upon the finding that a violation was proven and remained unabated. The Attorney General first made the unremarkable conclusion that Chapter 162's code enforcement procedures are additional or supplemental means of compliance and do not preempt or otherwise prevent a municipality from enforcement by other means. *Id.* at *2. The Attorney General next concluded that while a municipality may enforce its codes by a means other than Chapter 162, where the city *does* utilize the provisions of Chapter 162, "it may not change the procedures prescribed therein." *Id.* at *5. Because the City has adopted an alternative code enforcement system, *see* City Code § 30-2, this Opinion is inapposite to Nichols' preemption claim.

The non-binding and inapposite opinions cited by Plaintiff do nothing to disturb the Third District's clear holding that a municipality like the City has the authority to entirely abolish Chapter 162 to adopt its own alternative enforcement system.

II. THE ORDINANCES DO NOT CONFLICT WITH SECTION 162.09

Even assuming *arguendo* Chapter 162 applies here, the Ordinances do not conflict with section 162.09(d)(2). Plaintiff initially argues that the City cannot simultaneously make such an argument while also observing that the City had recognized a need for "more substantial penalties" than those provided under 162.09(d)(2). *See* Cross-Mot. at 11-12. This is incorrect. First, the City's argument is asserted in the alternative. Second, the fact that the City has

identified a harm requiring substantial penalties to ensure compliance does not mean that the Ordinances cannot comport with section 162.09 for purposes of preemption analysis.

As explained in the City's Motion, the fines set forth in the Ordinances are determined by a different measure—per violation—than the fine structure in section 162.09(2)(d)—per day. The Ordinances do not conflict with Chapter 162, even if it were to apply, because the per violation fines do not necessarily "exceed" the per day fines set forth in section 162.09.

III. PLAINTIFF DOES NOT HAVE STANDING TO CHALLENGE THE ORDINANCES

Nichols argues that she has standing to challenge the Ordinances because the Ordinances apply to her. However, as explained in the City's Motion (at 11-12), an action for declaratory judgment must allege an actual controversy based upon more than the mere possibility of legal injury. *See, e.g.*, *Santa Rosa Cty. v. Admin. Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995) ("'Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical state of facts which have not arisen'") (citations omitted); *Fla. Soc'y of Ophthalmology v. State, Dep't of Prof'l Regulation*, 532 So. 2d 1278, 1279 (Fla. 1st DCA 1988) (no justiciable controversy for declaratory judgment action where it was alleged "what *might* occur under the revised act, instead of what has occurred that would demonstrate an actual controversy") (emphasis in original). Nichols seeks an advisory opinion with regard to the constitutionality of a fine structure that has not been enforced against her.

CONCLUSION

For the reasons stated above and in the City's Motion for Summary Judgment, the City respectfully requests that this Court grant summary judgment in its favor on Count III or dismiss the claim for lack of standing.

Dated: May 10, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 2019, a true and correct copy of the foregoing document was filed electronically though the Florida Courts E-Filing Portal which electronically served all counsel of record including:

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