



MIAMI BEACH

JOSE SMITH, CITY ATTORNEY

OFFICE OF THE CITY ATTORNEY

MEMORANDUM

TO: Mayor Matti Herrera Bower and
Members of the City Commission

CC: Jorge Gonzalez, City Manager

FROM: Jose Smith, City Attorney

DATE: August 11, 2011

SUBJECT: **LEGALITY OF THE INITIATIVE PETITION FOR A CHARTER
AMENDMENT REGARDING A PROPOSED "SENSIBLE MARIJUANA
POLICY."**

Commissioner Michael Gongora requested an opinion from the City Attorney addressing the legality of placing on the ballot a proposed charter amendment received from the Committee for Sensible Marijuana Policy ("CSMP"). The proposed amendment would create section 8.10 in the City's Charter making the possession of less than 20 grams of marijuana by an adult a civil code violation punishable by a fine of not more than \$100.00 per violation where the marijuana was intended for personal use. The proposed charter amendment would likely be found to be unlawful because Florida state law preempts local government regulation of controlled substances.

City of Tallahassee v. Tallahasseean's for Practical Law Enforcement, 2nd Jud. Cir. Ct. Case No. 04-2018, is the only known Florida case on point and addressed the same issue. There, a petition proposed a charter amendment providing for a marijuana policy making the investigation, arrest, and prosecution of marijuana offenses the City's lowest law enforcement priority where marijuana was intended for adult personal use. The trial court held that the City of Tallahassee did not have to place the proposal on the ballot for a vote by the city's electors because the ballot question was in conflict with and preempted by State law. The trial court decision is attached as Exhibit A.¹

It is a fundamental principle of preemption doctrine that "a municipality may not act in an area preempted by the legislature." Tribune Co. v. Cannella, 458 So. 2d 1075,

¹ An appeal filed by the proponents of the City of Tallahassee amendment was dismissed by the First District Court of Appeal in Tallahasseean's for Practical Law, etc. v. City of Tallahassee (Fla. 1st DCA 2005)(Case No. 1D04-4420) after the proponent-appellants failed to file an initial brief.

1077 (Fla. 1984), appeal dismissed, 471 U.S. 1096, 105 S. Ct. 2315, 85 L. Ed. 2d 835 (1985). Under preemption principles, “[m]unicipal ordinances must not conflict with any controlling provision of a state statute.” City of Miami v. Wellman, 875 So. 2d 635, 630 (Fla. 3d DCA 2004) (citing Thomas v. State, 614 So. 2d 468, 470 (Fla. 1993)). Under “Florida’s Municipal Home Rule Power’s Act...[t]he preemption need not be explicit, so long as it is clear that the legislature has clearly preempted local regulation of the subject.” Barragan v. City of Miami, 545 So. 2d 252, 254 (Fla. 1989). Where the Florida legislature’s regulation of the subject is “pervasive” and if further regulation of the subject by a local government “would present a danger of conflict with that pervasive regulatory scheme” then the subject is preempted by the state. Tribune, 458 So. 2d at 1077.

In ruling that the petition was preempted by state law, the City of Tallahassee court cited to Florida Statutes Chapter 893, the “Florida Comprehensive Drug Abuse Prevention and Control Act” (“Act”). The Act sets forth statewide priorities for drug control and enforcement and lists marijuana as a Schedule 1 controlled substance, the highest priority. Additionally, the penalty provisions for the selling, manufacturing, or possession of various controlled substances are clearly set forth in Section 893.13 of the Florida Statutes. As the court stated, Chapter 893 reflects the Florida Legislature’s attempt “to provide for a uniform, comprehensive, and systematic regulation of prohibited drugs in the State of Florida.” City of Tallahassee (Final Judgment at 5). Indeed, as the trial court stated in City of Tallahassee, at 5 “[u]niform statewide enforcement” is implicit in the various enactments in Chapters 893 and 943 of the Florida Statutes. In those Chapters, the Florida Legislature has “clearly set forth a comprehensive and uniform law enforcement and drug control program for the state.” Both the proposed amendment in the City of Tallahassee case and the one submitted to the City here seek to establish “a local strategy or priority with respect to drug control which is in conflict with and pre-empted by state law.” Id.

The City of Tallahassee court also noted that the petition sought “to require all law enforcement officers—county, state, and federal, as well as city—which enforce laws in the city to have a certain law enforcement priority.” Id. While that specific language is not in the present petition, the requirement that a violation “shall result in the issuance of a civil citation...” has the same effect. (Emphasis added). See petition submitted by CSMP attached as Exhibit B. Moreover, as the City of Tallahassee court concluded, “[i]t would be unlawful for a city ordinance or charter provision to attempt to dictate or restrict the authority of such officers.” This holding is similar to the rulings finding municipal red light camera ordinances unlawful and preempted to the State prior to the Florida Legislature specifically authorizing local governments, under certain conditions, to adopt their own red light camera code compliance programs. See Mason v. City of Aventura, 11th Jud. Cir. Ct. Case No. 09-12735 CA 09, Feb. 26, 2010 (appeal by City of Aventura pending in the Third District Court of Appeal, Case No. 3D10-1095) and Udowychenko v. City of Orlando, 9th Jud. Cir. Ct. Case No. 2009-CA 26741, Aug. 9, 2010 (appeal by City of Orlando pending in the Fifth District Court of Appeal, Case No. 5D11-720).

In sum, a court addressing the legality of the proposed Miami Beach amendment would probably rule consistently with the City of Tallahassee decision because both the proposed amendment in that case and the one proposed here seek to establish municipal enforcement standards governing the prosecution of marijuana offenses that conflict with those established by Florida law.²

JS/DT/sc/lr/mem

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² Additionally, the proposed amendment may implicate federal law. The federal Controlled Substances Act ("CSA") makes possession of marijuana a federal crime. 21 U.S.C. §§ 812(c), 844(a). In a recent Memorandum issued by James M. Cole, Deputy Attorney General for the United States Department of Justice ("DOJ"), the policy of the DOJ has been stated as follows: "[p]ersons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act ("CSA"), regardless of state law." Moreover, the DOJ has specifically opined that "[s]tate laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including the enforcement of the CSA."

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

RECEIVED

SEP 03 2004

CITY OF TALLAHASSEE, FLORIDA, a
Florida Municipality,

City of Tallahassee
City Attorneys Office

Plaintiff,

CASE NUMBER: 04-2018

vs.

TALLAHASSEANS FOR PRACTICAL
LAW ENFORCEMENT, a Political Action
Committee,

Defendants.

CONFORMED
COPY

FINAL JUDGMENT

THIS CAUSE came before the Court on the City of Tallahassee's Complaint for Declaratory Relief filed on August 20, 2004. Defendant, Tallahaseans for Practical Law Enforcement (TPLE), filed an Answer and requested an emergency hearing on the matter. On August 25, 2004, this Court held a hearing where counsel for the parties presented argument on the issues raised in Plaintiff's Complaint for Declaratory Relief.

TPLE is a political action committee registered with the Leon County Supervisor of Elections Office pursuant to Section 106.03, Fla. Stat. (2003). TPLE circulated a petition among registered voters of the City of Tallahassee. The petition was titled as a "City of Tallahassee Municipal Charter Amendment Petition." On August 10, 2004, Ion Sancho, Supervisor of Elections for Leon County, Florida, certified that 8,459 valid signatures of qualified electors of the City had been received. This number exceeded

the ten percent (10%) requirement of Section 166.031(1), Fla. Stat., for having a Municipal Charter Amendment placed on the ballot. By letter dated August 11, 2004, to the attorney for the City, TPLE demanded that its proposed amendment be placed on the next general election ballot on November 2, 2004.

Section 166.031(1), Fla. Stat. (2003), provides:

"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."

While the title of the petition circulated by TPLE indicates that it is a "Municipal Charter Amendment Petition," the actual text of the proposed amendment differs. The proposed amendment states:

Be it enacted by the people of the City of Tallahassee, Florida: The Code of Ordinances of the City of Tallahassee is hereby amended by adding a section, to be numbered 15-26, which said section is to read as, follows:

- A. The City of Tallahassee Police Department, City Attorney's Office, City Manager, and all other law enforcement agencies acting in the City shall make the investigation, arrest and prosecution of marijuana offenses, where the marijuana was intended for adult personal use, the City's lowest law enforcement priority.

- B. "Adult personal use" is defined as the possession of less than twenty grams of marijuana by an adult at least eighteen years of age, where the marijuana is not open to public view. The sale of marijuana for remuneration is not defined as personal use and is subject to prosecution under existing state laws.
- C. The Tallahassee Police Department shall report marijuana arrests and the City Attorney's Office shall report marijuana prosecutions annually, including those undertaken in Tallahassee by the Leon County Prosecutor's office and all other law enforcement agencies for arrests made in Tallahassee.

Severability of Provisions

If any provisions of this ordinance or its application to any person or circumstances is held invalid, the remainder of this ordinance or the application of the terms and provisions to other persons or circumstances shall not be affected.

(emphasis added)

The petition purports to enact an ordinance of the Code of Ordinances of the City of Tallahassee specifically referencing Section 15-26. The full text of the proposed amendment does not state, or otherwise indicate, that the City's Municipal Charter is to be amended by the proposal. While the process set forth in Section 166.031(1), Fla. Stat., may be used to amend the charter of a municipality, it may not be used to enact a municipal ordinance. The statutory requirements and procedures for adoption of a city ordinance are set forth in Section 166.041, Fla. Stat. Nothing in that section provides for a citizens' initiative process to enact a municipal ordinance. TPLE's petition is violative of state law in that it seeks to enact an ordinance by the petition initiative process. Such a process is not provided for in Chapter 166, Fla. Stat., and the

requirements for enacting an ordinance are specifically delineated in Section 166.041, Fla. Stat.

Defendant, TPLE, argues that the specific reference to the City's Code of Ordinances and specific ordinance number can be simply changed by this Court or the City. However, this would require the Court or the City to make a substantive change. TPLE's proposed enactment of an ordinance is prohibited by law. The City is not required to put a proposal prohibited by law on the ballot. *City of Miami Beach v. Smith*, 251 So.2d. 290, 292-293 (3d DCA 1971).

Further, the substance, or main purpose, of TPLE's proposed amendment is in conflict with, and prohibited by, state law. The proposed amendment seeks to establish the lowest law enforcement priority for the investigation, arrest, and prosecution of marijuana offenses in the City of Tallahassee. The proposal conflicts with Chapter 893, Fla. Stat., entitled, "Florida Comprehensive Drug Abuse Prevention and Control Act," which establishes statewide priorities for drug control and enforcement. All controlled substances prohibited in this state are listed, by priority, on Schedules I-V in Section 893.03, Fla. Stat. Marijuana is listed as Schedule I control substance, the highest priority.

Likewise, the penalty provisions for the selling, manufacturing, or possession of the various controlled substances are specifically detailed in Section 893.13, Fla. Stat., and correspond to the location of the controlled substance on the schedules.

The various sections of Chapter 893, Fla. Stat., reflect the legislature's attempt to provide for a uniform, comprehensive, and systematic regulation of prohibited drugs in the State of Florida. Uniform statewide enforcement is implicit in the various sections of Chapter 893 as well as Section 943.031, Fla. Stat.: A local ordinance, or charter amendment, which seeks to establish a different priority or strategy with respect to a particular controlled substance is violative of state law.

With its various enactments in Chapters 893 and 943, Fla. Stat., the legislature has clearly set forth a comprehensive and uniform law enforcement and drug control program for the state. Such legislative measures indicate that enforcement and control is now an area expressly preempted by the state legislature. The state preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject matter. *Tribune Company v. Cannella*, 458 So.2d. 1075, 1077 (Fla. 1984); *City of Miami v. Wellman*, 875 So.2d. 635, 640 (3d DCA 2004). TPI E's measure which seeks to establish a local strategy or priority with respect to drug control is in conflict with state law and preempted by state law.

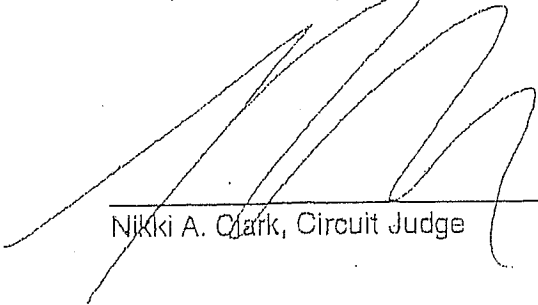
Finally, the proposal seeks to require all law enforcement officers—county, state, and federal, as well as city—which enforce laws within the incorporated area of Tallahassee to have a certain law enforcement priority. It would be unlawful for a City ordinance or charter provision to attempt to dictate or restrict the authority of such officers.

Accordingly, it is ORDERED and ADJUDGED:

That the Plaintiff, City of Tallahassee, does not have a legal duty to place TPLE's proposal on the ballot for a vote by City electors.

DONE and ORDERED in Tallahassee, Leon County, Florida, this 15th day of

Sept, 2004.



Nikki A. Clark, Circuit Judge

Copies provided to:

James R. English, City Attorney
Lewis E. Shelley, Senior Assistant City Attorney
Attorneys for Plaintiff—City of Tallahassee

Elizabeth Osmond, Esq.
Attorney for Defendant—Tallahasseeans for Practical Law Enforcement

CITY OF MIAMI BEACH - INITIATIVE PETITION Charter Amendment

We the undersigned registered voters of Miami Beach, Miami-Dade County, Florida, do hereby petition the City of Miami Beach Commission to submit the following amendment to the Miami Beach Charter to the registered voters of Miami Beach:

AMENDMENT TO CREATE SECTION NO. 8.10 (SENSIBLE MARIJUANA POLICY AMENDMENT) OF THE MIAMI BEACH CITY CHARTER

BALLOT TITLE: SENSIBLE MARIJUANA POLICY CHARTER AMENDMENT,
MIAMI BEACH CITY CHARTER SECTION NO. 8.10

BALLOT SUMMARY:

This proposed charter amendment is designed to create a new Section No. 8.10 of the Miami Beach City Charter (Sensible Marijuana Policy Amendment) to prohibit the adult possession of less than twenty (20) grams of marijuana where the marijuana was intended for personal use and to provide for a fine of not more than \$100.00 per violation.

- (1) It shall be a civil violation of the Charter of the City of Miami Beach, Florida for any adult person to possess cannabis, less than 20 grams, where the cannabis is intended for adult personal use.
- (2) "Adult personal use" is defined as the possession of less than twenty grams of cannabis by an adult of at least eighteen years of age where there is no evidence that the person was engaged in the delivery, manufacture, cultivation, or sale of cannabis for remuneration.
- (3) Violation of this section shall result in the issuance of a civil citation in the amount of one hundred dollars (\$100.00).
- (4) Any person charged with the infraction under this section who does not elect to appear shall pay the civil penalty within 30 days after the date of issuance of the citation.
- (5) Those parts of any ordinances in conflict with this section are hereby repealed.
- (6) If any provision of this charter section or its application to any person or circumstances is held invalid by the valid judgment or decree of a court of competent jurisdiction, the remainder of this charter section or the application of the terms and provisions to other persons shall not be affected.

ENMIENDA PARA CREAR LA SECCIÓN No. 8.10 (ENMIENDA RAZONABLE A LAS PAUTAS SOBRE MARIJUANA) DEL ESTATUTO DE LA CIUDAD DE MIAMI BEACH

TÍTULO DE LA BOLETA: ENMIENDA RAZONABLE A LAS PAUTAS SOBRE MARIJUANA,
ESTATUTO DE LA CIUDAD DE MIAMI BEACH SECCIÓN No. 8.10

RESUMEN DE LA BOLETA:

La enmienda propuesta a este estatuto tiene por objeto crear una nueva Sección No. 8.10 del Estatuto de la Ciudad de Miami Beach (Enmienda Razonable a las Pautas sobre Marijuana) para prohibir a una persona adulta la posesión de menos de veinte (20) gramos de marijuana en donde la marijuana sea para uso personal y considerar una multa de no más de \$100.00 por infracción.

- (1) Se considerará una infracción civil del Estatuto de la Ciudad de Miami Beach, Florida el que una persona adulta posea marijuana, menos de 20 gramos, en donde la marijuana sea para uso personal de un adulto.
- (2) "Uso personal de un adulto" se define como la posesión de menos de veinte gramos de marijuana por un adulto de por lo menos dieciocho años de edad, y en la cual no hay prueba de que la persona se dedicaba a la entrega, fabricación, cultivo o venta de marijuana para obtener una compensación.
- (3) La infracción de esta sección resultará en la emisión de una infracción civil por la cantidad de cien dólares (\$100.00).
- (4) Cualquier persona que cometa una infracción conforme a esta sección y que decida no comparecer, deberá pagar una multa civil en un período de 30 días a partir de la fecha de emisión de esta infracción.
- (5) Aquellas partes de cualquier orden donde exista conflicto con esta sección serán por lo tanto anuladas.
- (6) Si cualquier cláusula del estatuto de esta sección o su aplicación a cualquier persona o circunstancia se determina inválido por un fallo válido o por decreto de un tribunal que tenga jurisdicción, el resto de este código sección o su aplicación de los términos y condiciones a otras personas no se verá afectado.

[PETITION CONTINUES ON THE OTHER SIDE]