



STATE OF FLORIDA
TWELFTH JUDICIAL CIRCUIT

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ROBERT B. BENNETT
CHIEF JUDGE

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SPECIAL INSTRUCTIONS: IN RE: CASE 2006 CA 7727NC

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SEP 13 2006

IN THE CIRCUIT COURT FOR SARASOTA COUNTY, FLORIDA

**BOARD OF COUNTY COMMISSIONERS
OF SARASOTA COUNTY, FLORIDA,
Plaintiff,**

v.

CASE NO. 2006-CA-7727NC

**SARASOTA ALLIANCE FOR FAIR
ELECTIONS, a registered Florida
political action committee; KATHY DENT,
as Supervisor of Elections for Sarasota
County, Florida; FLORIDA SECRETARY
OF STATE, SUE COBB, in her official
capacity,**

Defendants.

**SARASOTA ALLIANCE FOR FAIR
ELECTIONS, INC., a Florida not-for-profit
Corporation, KINDRA L. MUNTZ,
individually, and SUSETTE BRYAN,
individually,**

Petitioners,

v.

**SARASOTA COUNTY, FLORIDA, a
political subdivision of the State of Florida;
KATHY DENT, as Supervisor of Elections
for Sarasota County,**

Respondents.

FINAL JUDGMENT

The Board of County Commissioners of Sarasota County, Florida ("Board") seeks a declaration of the constitutionality of a proposed amendment to the Sarasota County

charter.¹ The proposed charter amendment was filed with the Supervisor of Elections for Sarasota County on or about June 30, 2006.² On June 30, 2006, the Supervisor of Elections notified Sarasota County government of the filing of the proposed charter amendment. The Board of County Commissioners is required by the Sarasota County charter to submit the proposed charter amendment to the voters at a special election to be held within 60 days of the filing of the proposed changes with the Supervisor of Elections.³

Sarasota Association for Fair Elections ("S.A.F.E."), the sponsor of the proposed charter amendment (together with co-petitioners, Muntz and Bryan) seeks a writ of mandamus compelling the Board of County Commissioners to advertise and enact an ordinance setting the proposed charter amendment for special election.

The sole issue for the court's determination in this case is whether the proposed amendment is unconstitutional in its entirety. **Citizens for Responsible Growth v. City of St. Pete Beach**, ___ S.2d ___, 2006 WL 2381941 (Fla. App. 2 Dist. 2006). Two arguments are advanced by the parties opposing to the proposed amendment. First, it is argued that Florida's general election laws expressly or impliedly preempt the field of elections so that Sarasota County cannot enact the proposed amendment. Second, it is argued that even if the subject of elections is not preempted by general law, the proposed amendment conflicts with general law so that compliance with the one results in violation of the other.

¹ A copy of the proposed charter amendment is attached as Appendix A.

² The parties concede that the Supervisor of Elections certified sufficient petitions were signed by Sarasota County electors in accordance with Section 7.1(i) of the Sarasota County charter.

³ Section 7.1, Sarasota County Charter.

The court, having considered the evidence presented at trial and the argument of counsel for the parties, finds as follows:

1. The general law of the state does not expressly or impliedly preempt the field of elections so that Sarasota County cannot act on the proposed charter amendment.
2. The proposed charter amendment and the general law of Florida do not conflict such that compliance with one would result in violation of the other.

Section 101.5604, Florida Statutes (2006) while granting discretion to the Board to adopt and purchase voting systems, mandates only that the Board adopt and purchase a voting system approved by the Department of State. Nothing in Section 101.5604 prohibits the electorate from more narrowly restricting the field of voting machines from which the Board may choose.

The Board argues, and the evidence establishes, that the Department of State has not yet approved a voting system that will provide a voter verified paper ballot while at the same time providing accessibility to voters with disabilities as required by Section 101.715(1), Florida Statutes (2006).⁴ Given, however, that general law does not prohibit the use of a voting system as contemplated in the proposed amendment, the fact that such a system is not currently an approved system does not support a finding of conflict. This court cannot speculate what voting systems will have been approved by the effective date of the proposed amendment.

Section 6.2A(1) of the proposed amendment provides that the voter verified paper ballot "shall be the true and correct record of the votes cast and shall be the official record for purposes of any audit conducted with respect to any election in which the

⁴ The evidence at trial established that such a system is under consideration by the Department of State.

voting system is used. While votes may be tallied electronically, subject to audit, no electronic record shall be deemed a ballot.”

Section 97.021(3), Florida Statutes (2006) provides, in pertinent part, as follows:

Definitions. –

(3) “Ballot” or “official ballot” when used in reference to:

(b) “Electronic or electromechanical devices” means a ballot that is voted by the process of electronically designating, including by touchscreen, or marking with a marking device for tabulation by automatic tabulating equipment or data processing equipment.

Section 101.5602, Florida Statutes (2006), in pertinent part, reads as follows:

Purpose. –

The purpose of this act is to authorize the use of electronic and electromechanical voting systems in which votes are registered electronically or are tabulated on automatic tabulating equipment or data processing equipment.

Section 101.5603, Florida Statutes (2006) reads, in pertinent part, as follows:

Definitions relating to Electronic Voting Systems Act. – As used in this act, the term:

(2) “Ballot” means the card, tape, or other vehicle upon which the elector’s choices are recorded.

Nothing contained in referenced sections of Florida’s general election laws is in conflict with the provisions of Section 6.2A of the proposed amendment. Specifically, nothing contained in the referenced sections prohibits the use of voter verified paper ballots as the “true and correct record of votes cast,” or the use of voter verified paper ballots as “the official record for purposes of any audit conducted.” Nothing contained in the reference sections prohibits the proposed amendment’s prohibition against an

electronic record being deemed a ballot in Sarasota County. Finally, nothing in the proposed amendment transgresses the requirement of Section 101.041, Florida Statutes (2006) that “no vote shall be received or counted in any election, except as prescribed by this code.”

Section 6.2A(2) of the proposed amendment mirrors applicable provisions of general law, and, therefore, no conflict exists.

Section 6.2B of the proposed amendment requires mandatory, independent, random audits of Sarasota County’s voting system. Section 101.591, Florida Statutes (2006) provides as follows:

Voting System Audit.-

- (1) The Legislature, upon specific appropriation and directive, may provide for an independent audit of the voting system in any county. Within 30 days after completing the audit, the person conducting the audit shall furnish a copy of the audit to the supervisor of elections and the board of county commissioners;
- (2) An audit conducted pursuant to subsection (1) shall consist of a study and evaluation of the voting system used during any primary, general, municipal, or presidential preference primary election to provide reasonable assurance that the system is properly controlled, can accurately count votes, provides adequate safeguards against unauthorized manipulation and fraud, and complies with the requirements of law and rules of the Department of State.

Nothing in Section 101.591 prohibits mandatory audits as envisioned by the proposed amendment or more expansive, more stringent audits than those contemplated in Section 101.591(2). Furthermore, nothing in the proposed amendment provides or requires that, for purposes of an audit, independent auditors handle ballots or ballot cards

in violation of the provisions of Sections 101.572 or 119.07(5), Florida Statutes (2006).⁵ Nothing in the referenced statute indicates an intent that the issue of audits of voting systems is in any way preempted by general law.

Audits of provisional and Military and Overseas ballots are not addressed in Florida's general election laws. The provisions of the proposed amendment in no way interfere with the rights of persons casting provisional ballots or the counting of absentee ballots cast by overseas electors as set forth in Section 101.048, Florida Statutes or Rule 1S-2.013, Florida Administrative Code, respectively. Nor do the audit provisions of the proposed amendment appear to have any relevance to the issue of recounts which are provided for in Sections 102.141(6) or 101.166, Florida Statutes (2006) or Rules 1S-2.301 and 1S-2.301(1)(f), Florida Administrative Code. No conflict exists between the proposed amendment and the referenced statutory or code sections.

Section 6.2C of the proposed charter amendment, prohibiting certification of elections prior to completion of the mandatory audits provided for in Section 6.2B, does appear to be in conflict with the provisions of Section 102.141, Florida Statutes. Furthermore, the opening sentence of Section 6.2C is vague at best when extending the prohibition against certification to some point in time when "any cause for concern about accuracy of results has been resolved." However, this court's examination is limited to determining whether the proposed amendment is unconstitutional in its entirety.

Rivergate Restaurant Corporation v. Metropolitan Dade County, 369 So.2d 679 (Fla. 3d DCA 1979).

⁵Sections 101.572 and 119.07(5) require that no person other than the Supervisor of Elections or the supervisor's employees shall handle or touch ballots.


3. The proposed charter amendment can have a valid field of operation even though parts of it may contravene general law. Therefore, the proposed charter amendment must be submitted to the electorate. **Citizens for Responsible Growth v. City of St. Pete Beach**, ___ So.2d ___, 2006 WL 2381941 (Fla. 2d DCA 2006).

4. The judgment should not be interpreted as an expression by the undersigned judge in support of, or in opposition to, the proposed charter amendment

It is therefore

ADJUDGED that the Board of County Commissioners of Sarasota County shall submit the proposed amendment to the Sarasota County Charter to the Sarasota County electorate in accordance with the requirements on provisions of Article VII of the Sarasota County Charter.

ADJUDGED at Sarasota, Florida this 13th day of September, 2006.



 Robert B. Bennett, Jr.
 Circuit Judge

Copies furnished by facsimile and United States mail to:
 Stephen E. DeMarsh, Esquire
 County Attorney
 Frederick J. Elbrecht, Esquire
 Deputy County Attorney
 Thomas D. Shults, Esquire
 Morgan Bentley, Esquire
 Ronald A. Labasky, Esquire

APPENDIX A

FULL TEXT OF PROPOSED AMENDMENT

Article VI, Section 6.2 ELECTIONS AND ELECTED OFFICERS. Be it enacted by the people of Sarasota County to amend this section as follows: Effective January 1, 2008, the following additional requirements shall apply to voting in all elections of persons or referenda in Sarasota County to ensure accuracy in elections and voter confidence in election results:

Section 6.2A Voter Verified Paper Ballot.

(1) No voting system shall be used in Sarasota County that does not provide a voter verified paper ballot. The voter verified paper ballots shall be the true and correct record of the votes cast and shall be the official record for purposes of any audit conducted with respect to any election in which the voting system is used. While votes may be tallied electronically, subject to audit, no electronic record shall be deemed a ballot.

(2) Any electronic voting machine shall allow the voter to correct his or her ballot by rejecting overvoted ballots at the time of voting, when voting in person at the polling place.

6.2B Mandatory Audits. In addition to Voting System Audits allowed in F.S. 101.591, the Sarasota County Supervisor of Elections shall provide for mandatory, independent, random audits of the voting system in Sarasota County. These audits shall consist of publicly observable hand counts of the voter verified paper ballots in comparison to the machine counts. The audits shall be conducted on Election Day or within 24 hours after the closing of the polls, in clear public view, by a reputable, independent and nonpartisan auditing firm. These audits shall be conducted for a minimum of 5% of Sarasota County precincts, for 100% of the ballot issues in the selected precincts; and for a minimum of 5% of the total ballots cast in Early Voting periods, 5% of the total Absentee ballots, and 100% of any precinct where there are highly unusual results or events. In addition, audits of 5% of Provisional ballots shall be completed by the 3rd day following the election, and audits of 5% of Military and Overseas (UOCAVA) ballots shall be completed within 24 hours of a primary election and within 10 days following a general election. The random selection of precincts to be audited shall be made in a physical, non-electronic, public drawing at the Supervisor of Elections Office only AFTER machine tallies from the precincts have been made public. This public drawing shall be made on an entirely random basis using a uniform distribution in which all precincts in the County have an equal chance of being selected. If machine counts are unavailable for any reason, the voter verified paper ballots shall be counted by hand by the independent auditors and recorded as the vote count for that precinct. Immediately upon completion of the audit, the persons conducting the audit shall furnish a copy of an audit to the Supervisor of Elections and the Board of County Commissioners and post the results for public view and copying at the Supervisor of Elections Office. The audit shall be considered a Florida public record pursuant to Florida Statute 119.

6.2C Certification of Election Results. No election shall be certified until the mandatory audits are complete and any cause for concern about accuracy of results has been resolved. Any discrepancies between machine counts and hand counts greater than 1% or, if less than 1% but sufficient to change the outcome of any measure, shall initiate a comprehensive manual audit of the voter verified paper ballots in all precincts and of all Absentee, Provisional, and Military and Overseas (UOCAVA) ballots. Such comprehensive manual audit shall be completed within 5 days after the election, with the exception of comprehensive audits of Military and Overseas ballots, which shall be completed within 5 days after a primary election, and within 10 days after a general election. Audits shall be completed by a reputable, independent and non-partisan auditing firm as in 6.2B above. A copy of these audits shall be retained for public view and copying at the Supervisor of Elections Office in addition to being given the County Commissioners. These audits shall be considered Florida public records pursuant to Florida Statute 119.