Filing # 197441134 E-Filed 05/01/2024 07:32:43 PM

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

PROTECT ST. PETE BEACH ADVOCACY GROUP, a Florida not-for-profit corporation, *et al*.,

Plaintiffs,

Case No. 24-000041-CI

v.

CITY OF ST. PETE BEACH, a political subdivision of the State of Florida, *et al*.,

Defendants,

and

CP ST. PETE, LLC,

Intervenor.
_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, Protect St. Pete Beach Advocacy Group, by and through the undersigned counsel, pursuant to Fla. R. Civ. P. 1.510(c), responds in opposition to the Motion(s) for Summary Judgement submitted by the Defendant, City of St. Pete Beach ("the City") and Intervenor CP St. Pete, LLC, ("intervenor") and in opposition thereof states as follows:

INTRODUCTION

It is not disputed that in December 2023 four St. Pete Beach city commissioners announced that instead of providing the public with detailed financial disclosures as required by Florida law that they would resign their seats instead. There is no dispute that by December 18, 2023 all four elected members of the St. Pete Beach City Commission announced that they would resign their seats by year end. Everyone agrees that the City sent an email to residents that said: "The City of

St. Pete Beach has a vacancy on the City Commission all district seats (Districts 1-4)." The City and intervenors concede the plain language of section 3.06(d) of the City Charter. Under the City Charter once two or more vacancies existed the power to fill the vacancies resided with the electors of St. Pete Beach and not with the city commissioners.

The supposed emergency here was one of the city commissioners' own creation. The City argues that government, "would have been frozen in ice," if the Commissioners did not appoint replacements. But, Commissioners chose to slow walk their resignations to create this crisis. While law changed in May 2023 and commissioners were specifically briefed on this change in law in August 2023, they waited until mid-December 2023 to publicly announce their resignations by year end. Mayor Petrila expressed his frustration with the timing of the resignations and subsequent appointment process, stating, "We knew about Form 6 and if you all want to take offense to this, I'm -- I apologize in advance. We knew about Form 6 months and months in advance."

Nevertheless, the City and intervenors argue that even though residents of St. Pete Beach have the enumerated and fundamental right to an elected government (enshrined in the State Constitution and in the City of St. Pete Beach charter), that commissioners can wipe that all away to avoid being transparent in the name of "continuity of government". This claim exists nowhere in the law. Here, the Commissioners themselves are responsible for the emergency their illegal actions attempt to fix. Instead of engaging in a legal argument about the powers of commissioners under these circumstances, the City and intervenors employ an array of affirmative defenses to avoid coming to terms with their legally dubious construct. They erroneously argue that taxpayers do not have standing to challenge noncompliance the city charter and the state constitution. They argue, "The public benefitted from a stable government and nobody was hurt."

The City argues the *de facto* officer doctrine. But that does not apply here because Plaintiffs challenged the authority of the appointed commissioners within days of their illegal appointment. They argue the claim is moot (because elections for two of the four commissioners have already occurred since the filing of this suit), but this request for declaratory relief falls into an exception where the Court must consider this claim. They argue ripeness, but this similarly fails.

The City argues, "Out of options, the four commissioners made the practical decision, in the interests of government continuing to function, to time their resignations so the resulting vacancies could be filled by appointment under the City's Charter (the "Charter") until elections could be held." This argument is not grounded in the plain language of the Constitution or the City Charter and requires the Court to rewrite the law--- which it (similarly) does not have the power or authority to do.

The public was deprived elected government in the name of expediency so as to allow Commissioners who sought to shield their financial condition from public disclosure (even though every other official serving in this capacity (statewide) must disclose this information to the public). This case presents a conflict between what resigning commissioners deem to be the "practical decision" versus the limits on the power of the commission to fill vacancies when two or more resignations have been tendered.

I. STATEMENT OF ADDITIONAL SUMMARY JUDGMENT FACTS

1. Commissioners Grill and Friszolowski attended an August 11, 2023 presentation by the Florida League of Cities where the requirements of SB 774 and Form 6 were discussed at length. *See* Stip. Ex. A-2 at 5:11-17; Stip. Ex. A-2 at 30:2-9; Stip. Ex. B-2 at 10:18-25 ("The Florida League of Cities have estimated. So, we went to the FLC Conference in was it summertime, August? *So, nobody should be surprised*."); *see also* Stip. Ex. A-2 at 11:11-15 (Commissioner

Friszolowski discussing Florida League of Cities meeting); Stip. Ex. B-2 at 12:8-11 (Friszolowski: "So, Commissioner Grill is correct. We, the three of us attended the Florida League Cities. That was one of the seminars. *I don't think this is a new issue*.").

2. At the August 11, 2023 Florida League of Cities meeting—which three commissioners attended—there was a presentation titled "Let the Sunshine In: Everything You Need to Know about Form 6."[1]

3. At the December 21, 2023 city commission meeting, Mayor Petrila expressed his frustration with the timing of the resignations and subsequent appointment process, stating:

> We knew about Form 6 and if you all want to take offense to this, I'm -- I apologize in advance. We knew about Form 6 months and months in advance. There's no reason to leave this to the very last commission meeting of the year for us to then have to have seven emergency commission meetings in a seven -- in -- in a two-week period where I've committed to, while I'm out of the country on vacation, to attend those meetings.

Stip. Ex. C-2 at 82:2-10; *see also* Stip. Ex. D-3 at 59-60

4. St. Pete Beach Mayor Adrian Petrila stated, "The irony is that the reason that we're here today even having this discussion is because we have four individuals who do not want to uphold the laws of the state of Florida, but rather they want to remove themselves from that law. We've had multiple months, since at least June or July, that we've known about this." Stip. Ex. D-3 at 59-60.

5. Commissioner Grill, who was the first to resign, later responded "[y]es. We knew this was coming." Stip. Ex. C-2 at 86:14-15.

[1] The PowerPoint from that presentation is available on the Florida League of Cities website at: https://www.floridaleagueofcities.com/docs/default-source/2023-ac-ppts/form-6-presentation.pdf?sfvrsn=1c71d1d5_0

6. Despite this, both commissioners waited more than four months to announce their resignations at the last regularly scheduled commission meeting before the end of the year.[2]

II. THE APPOINTMENT OF CITY COMMISSIONERS VIOLATED THE CITY CHARTER

After devoting the bulk of its motion to arguing for its affirmative defenses, the City makes a misguided attempt to argue that the appointments in question did not violate the city charter. *See* City's Motion at 19-23.

First, in arguing that multiple vacancies did not "occur simultaneously," the City asks this Court to accept a definition of the word "occur" when other, more plausible, definitions exist. While "occur" can mean "happen," it can also mean "to exist or be present in, among, etc." *Occur*, CAMBRIDGE DICTIONARY; *see also Occur*, MERRIAM-WEBSTER DICTIONARY ("to be found or met with"). And "simultaneously" mean "existing *or occurring* at the same time." *Simultaneously*, MERRIAM-WEBSTER DICTIONARY (emphasis added); *see also Simultaneously*, CAMBRIDGE DICTIONARY ("happening *or existing* at exactly the same time" (emphasis added)).

Under the interpretation offered by the City, two vacancies would have to "happen at the same time" in order to trigger the extraordinary vacancies provisions in § 3.06(d). City's Motion at 20 ("So, in everyday English, to say that two or more events 'occurred simultaneously' is to say that they 'happen at the same time.'"). In other words, the City is arguing that only in the bizarre instance where multiple commissioners submit a joint resignation at precisely the same moment would section 3.06(d) ever come into effect. *See* City's Motion at 21 ("two or more commissioners did not give formal notice or leave their post at the same time."). A much more plausible and

[2] Plaintiffs have made a public records request to the City of St. Pete Beach for records that use the keyword "form 6" and "SB 774." The public records request is pending. The request was made after the City filed its Motion for Summary Judgment on April 25, 2024. Pursuant to Fla. R. Civ. P. 1.510(d)(2), Plaintiffs request the ability to supplement this filing to include any records produced by the City and to the extent necessary to allow Defendant and Intervenor to respond to the same before the hearing.

sensical interpretation is that multiple vacancies "occur simultaneously" if they "exist or are present at the same time." Here, multiple vacancies existed at the same time.

The City tellingly argues that "[t]here were not two or more *resignations* that occurred at the same time." City's Motion at 21 (emphasis added). But it is not resignations—but rather vacancies—that must occur simultaneously to trigger section 3.06(d). For the reasons explained in Plaintiffs' Motion for Summary Judgment, multiple vacancies occurred simultaneously and the commission was without authority to appoint interim commissioners.

The City additionally argues that it satisfied the requirements of section 3.06(d) by calling for special elections in March and August 2024. The Plaintiffs acknowledge that the commission called for special elections. *See* Stip. ¶¶ 22-23. What the Plaintiffs question—what their quo warranto petition seeks to adjudicate—is what authority the commission had to appoint interim commissioners.

The City cannot rely on section 3.06(c) for this authority. Section 3.06 states that "***A*** vacancy on the commission shall be filled in one of the following [two] ways." (emphasis added). This section repeatedly refers to single vacancies by using singular nouns, i.e., "a vacancy," "the unexpired term," "chose a successor," "the newly elected commissioner" and "the occurrence of the vacancy." When multiple vacancies occur, section 3.06(c) no longer controls and the commissioner no longer has the authority to appoint interim commissioners. Instead, the extraordinary vacanc***ies*** provision, section 3.06(d), controls and the only option is to "call a special election to fill the vacant commission position***s***." *Cf. D.S. v. J.L.*, 18 So. 3d 1103, 1110 (Fla. 1st DCA 2009) ("When two statutory provisions conflict, the specific provision controls over the general one." (quoting *Murray v. Mariner Health*, 994 So. 2d 1051, 1061 (Fla. 2008)); *Murray v. Mariner Health*, 994 So. 2d 1051, 1061 (Fla. 2008) ("A rule of statutory construction which is

relevant in this construction is that where two statutory provisions are in conflict, the specific provision controls the general provision." (quoting *State ex rel. Johnson v. Vizzini,* 227 So. 2d 205, 207 (Fla. 1969)).

When deciding between conflicting interpretations of statutes or ordinances regulating elections, Florida Courts strongly favor the interpretation that ensures that the voting public has the opportunity to elect public officials. *Spector v. Glisson*, 305 So. 2d 777, 781 (Fla. 1974) ("It has been said that the Only excuse for the appointment of any officer made elective under the law Is founded on the emergency of the public business and that when an elective office is made vacant the Policy of the law is to give the people a chance to fill it as soon as possible."); *see also Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." (marks and citations omitted). In *Spector v. Glisson*, for example, the Florida Supreme Court emphasized the importance of elections noting:

> We have historically since the earliest days of our statehood resolved as the public policy of this State that interpretations of the constitution, absent clear provision otherwise, should always be resolved in favor of retention in the people of the power and opportunity to select officials of the people's choice, and that vacancies in elective offices should be filled by the people at the earliest practical date.
>
> . . .
>
> We feel that it necessarily follows from this consistent view and steadfast public policy of this State as expressed above, that *if the elective process is available, and if it is not expressly precluded by the applicable language, it should be utilized to fill any available office by vote of the people at the earliest possible date*. Thus the elective process retains that primacy which has historically been accorded to it consistent with the retention of all powers in the people, either directly or through their elected representatives in their Legislature, which are not delegated, and also consistent with the priority of the elective process over appointive powers except where explicitly otherwise provided. We thereby continue the basic premise of our

> democratic form of government, that it is a 'government of the people, by the people and for the people.

305 So. 2d at 781; *see also id.* ("As between the appointive power on the one hand and the power of the people to elect on the other, the policy of the law is to afford the people priority, if reasonably possible, and of course here it was very logically available. If such policy is to be modified, let the people speak."); *Wright v. City of Miami Gardens*, 200 So. 3d 765, 774 (Fla. 2016) ("Given the fundamental importance of free and fair elections to our republican form of government, the recurrence of these 'banking errors' and their ensuing harsh consequences, as well as the strong potential that other prospective candidates have similarly been turned away, but simply declined to keep fighting, we consider this issue to be one of fundamental importance."); *Trotti v. Detzner*, 147 So. 3d 641, 644 (Fla. 1st DCA 2014) (noting that "[t]he Florida Supreme Court held that the seat should be filled by election, recognizing that Florida law generally favors the elective process."); *Trotti v. Scott*, 271 So. 3d 904, 908 (Fla. 2018) (Lewis, J., dissenting from order discharging jurisdiction) ("Since the establishment of this Court in 1846, there is not a single opinion that stands for the proposition that trial court judges, or any other public officers, can unilaterally determine the manner of selecting their successors by tendering a delayed resignation to take effect almost a year in the future.").

Here, the Court should favor the interpretation of section 3.06 that gives meaning to every subdivision, that is the most faithful to the plain language, and that safeguards the right of the electorate to choose their elected officials.

III. PLAINTIFFS HAVE STANDING TO PURSUE THIS ACTION

The City's opening argument is that Plaintiffs lack standing to seek a writ of quo warranto because no plaintiff alleges that they are entitled to hold the city commission offices in question. But this is not the law. *Whiley v. Scott*, 79 So. 3d 702, 706 n.4 (Fla. 2011) (citing *Chiles v. Phelps*,

714 So. 2d 453, 456 (Fla. 1998) ("[W]hen bringing a petition for writ of quo warranto, individual members of the public have standing as citizens and taxpayers. . . . the extent of harm to the petitioner is not pertinent."); *Johnson v. Office of State Attorney*, 987 So. 2d 206, 207 (Fla. 5th DCA 2008) ("Quo warranto is '[a] common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed.' *Black's Law Dictionary* 1285 (8th ed. 2004). It is properly used to challenge the 'power and authority' of a constitutional officer." (quoting *Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc.*, 978 So.2d 134, 139 n.3 (Fla. 2008)); *Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989) ("In quo warranto proceedings seeking the enforcement of a public right the people are the real party to the action and the person bringing suit "need not show that he has any real or personal interest in it." (footnote omitted) (citing *State ex rel. Pooser v. Wester*, 126 Fla. 49, 53, 170 So. 736, 737 (1936))); *Boan v. Florida Fifth Dist. Court of Appeal Judicial Nominating Comm'n*, 352 So. 3d 1249, 1252 (Fla. 2022) ("As to standing, we see a close analogy to cases where this Court has recognized 'citizen and taxpayer' standing to challenge a governor's alleged noncompliance with constitutional provisions regulating the judicial appointment process. *See Thompson v. DeSantis*, 301 So. 3d 180 (Fla. 2020); *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009). Petitioners' claims are similar in kind, even if directed at a different actor in the constitution's appointment process. Assuming the correctness of our precedents on standing in quo warranto cases, we conclude that the petitioners' constitution-based allegations suffice to establish standing here."); 21 Fla. Prac., Elements of an Action § 1703:1 (2023-2024 ed.) ("A petition for writ of quo warranto is an action to challenge the exercise of some right or privilege, the peculiar powers of which are derived from the state. Statutes exist empowering the Florida Attorney General to bring petitions for writ of quo warranto, but *the right to bring such a petition is not the Attorney General's alone.* Quo warranto proceedings seek the

enforcement of a public right, so the people are the real party to the action and the person bringing suit need not show that he has any real or personal interest in it." (emphasis added)).

For example, in *Thompson v. DeSantis*, Representative Geraldine Thompson challenged Governor DeSantis's appointment of Renatha Francis to the Florida Supreme Court. 301 So. 3d 180 (Fla. 2020). She argued that because then-Judge Francis had not been a member of the Florida Bar for at least 10 years, she was ineligible for the office and also ineligible to be nominated by the Judicial Nominating Commission. The petition sought quo warranto and mandamus relief against the JNC and Governor DeSantis. Governor DeSantis made the same argument the City makes here—that "the Petitioner lack[ed] standing to bring th[at] action 'because she alleges no direct and articulable stake in the outcome of th[at]' proceeding." *Id.* at 184. The Court rejected this argument and found that Rep. Thompson had standing "as a citizen and taxpayer." *Id.* And the Court explicitly noted that its holding was not affected by the fact that Rep. Thompson was a member of the State Legislature. *Id.* at 184 & n.4 ("The Petitioner also asserts standing in her capacity as a member of the Florida Legislature, but we fail to see how this case has anything to do with the Petitioner's legislative duties.").

The City's reliance on *Hall v. Cooks* is similarly misguided. 346 So. 3d 183 (Fla. 1st DCA 2022). While the lower Court ruled that Plaintiffs did not have taxpayer standing to challenge the mayor's qualifications to hold office, they did not challenge that holding on appeal. Accordingly, the First DCA never reached that issue finding instead that the issue was waived. *Id.* at 189 ("As such, the plaintiffs have waived this issue and affirmance is required."); *cf. also State v. Yule*, 905 So. 2d 251, 259 (Fla. 2d DCA 2005) (Canady, J., specially concurring) ("The doctrine of stare decisis, of course, does not require that we treat every broad statement of principle made in a prior decision as establishing a binding rule. Courts often deliver statements of legal principle that are

not material to the determination of the issues actually presented and decided. We unquestionably should avoid the tendency of latching on to each and every statement of legal principle in judicial opinions and treating them as binding holdings." (citing Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953, 1065 (2005))); *Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020) ("Any statement of law in a judicial opinion that is not a holding is dictum. . . . A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment." (citing *Yule*)).

While the City argues that the Second DCA's holdings in *Butterworth v. Espey*, 523 So. 2d 1278, 1279 (Fla. 2d DCA 1988), and *Tobler v. Beckett*, 297 So. 2d 59, 61 (Fla. 2d DCA 1974), are controlling, *see* City's MSJ at 9-10, more recent precedent from the Second DCA (not cited in the City's motion) holds otherwise. For example, in *Florida Dep't of Corr. v. Holt*, 373 So. 3d 969, 970 (Fla. 2d DCA 2023), the Second DCA cited the Florida Supreme Court's decision in *Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989), for the proposition that "[i]n quo warranto proceedings seeking the enforcement of a public right the people are the real party to the action and the person bringing suit 'need not show that he has any real or personal interest in it.'" Notably, the *Martinez* decision relied on by the Second DCA was decided the year after its decision in *Espey*. *See also Macnamara v. Kissimmee River Valley Sportsmans' Ass'n*, 648 So. 2d 155, 164 (Fla. 2d DCA 1994) (recognizing that the Court in *Martinez* rejected the argument "that only the Attorney General or persons suffering special injury could bring quo warranto actions").

Plaintiffs are residents of the City and have a right to elect their public officials. They alleged that that right was violated when the city commission appointed four members in

contravention of the requirements of the city charter. That Plaintiffs have standing to bring this suit cannot seriously be disputed.

IV. THE *DE FACTO* OFFICER DOCTRINE DOES NOT APPLY TO THE APPOINTED COMMISSIONERS

The *de facto* office doctrine is limited in its applicability to situations where the would-be officer's authority is not timely challenged. *Holloway v. State*, 342 So. 2d 966, 968 (Fla. 1977) ("a *De facto* officer may act lawfully *provided that a party to be affected does not make a timely attack on his authority.* The rationale for the rule is that those who rely on the actions of an apparently qualified officer have a right to assume that he properly occupies his position*, but if his authority is timely challenged innocent parties will be on notice not to rely on it to their detriment.*"); § 12:161. Acts, 3 McQuillin Mun. Corp. § 12:161 (3d ed.) ("the reason for validating the acts of a *de facto* officer does not exist if the public and third persons are aware of defects in the officer's title and are consequently not deceived."). As the Florida Supreme Court has long recognized:

> Florida follows the general rule that (1) acts of a de facto officer are valid as to third persons and the public until title to such office is adjudicated insufficient, and (2) such officer's authority may not be collaterally attacked or inquired into by affected third parties. . . . The public has a right to assume that officials apparently qualified and holding office do in face properly occupy the position and have authority to exercise the powers of the office. *But when a party to be affected by an official's act or decision holds actual knowledge that such official might not in fact legally occupy the office, and when the party makes a Timely and direct attack on the authority and jurisdiction of the person attempting to exercise the powers of the office, there is no reliance by an innocent party and no reason to apply the rule*.

Treasure, Inc. v. State Beverage Dept., 238 So. 2d 580, 585 (Fla. 1970); *see also State v. Murphy*, 13 So. 705, 716 (Fla. 1893) (to be deemed a *de facto* officer, official "must show that he is acting *under such circumstances of reputation or acquiescence* as were calculated to induce people without inquiring to submit to or invoke his action, supposing him to be the officer he assumes to be."); *State v. Tippett*, 134 So. 52, 53 (Fla. 1931) ("A de facto officer is one who without lawful

right exercises the functions of the office which he holds *under such circumstances as are calculated to induce people without inquiry to suppose he is the officer*.").

The Court in *Treasure, Inc.* went on to note that "[a]ny other rule would unreasonably restrict bona fide challenges to public officials' authority and jurisdiction." *Treasure Inc.*, 238 So. 2d at 585. The Court distinguished cases like *Town of Kissimmee City v. Cannon*, by noting that it was "not presented with the situation where once a public official has acted a third party decides to challenge the legality of the official's appointment." *Id.* at 585 & n.14 (citing *Cannon*, 7 So. 523, 524 (Fla. 1890). Rather, the Court explained, the Petitioner "prior to any formal proceedings on the merits directly challenged the effectiveness of the appointment and thereby any and all jurisdiction or authority to act in the matter." *Id.* at 585 ("Here there is no question that the [public official in question]'s authority and jurisdiction was timely questioned."); *see also Card v. State*, 497 So. 2d 1169, 1174 (Fla. 1986) ("The requirement that an objection to the authority of a de facto judge be timely made is not unique to our jurisdiction and is based upon sound principles of public policy."); *Pierre v. State*, 821 So. 2d 1174, 1177 (Fla. 3d DCA 2002) ("the challenge in this case was not made until after the sentencing proceeding, which is an untimely objection.") *Stein v. Foster*, 557 So. 2d 861, 862–63 (Fla. 1990) ("An objection to a de facto judge's authority to serve must be timely made. At the latest this should be before the final judgment is entered in the action."); *Sawyer v. State*, 113 So. 736, 744 (Fla. 1927) (authority of assistant county solicitor could not be challenged in habeas proceeding where no "timely objection had been made thereto before pleading to the merits and going to trial"); *Johnson v. Office of State Attorney*, 987 So. 2d 206, 208 (Fla. 5th DCA 2008) ("a defendant may not utilize the extraordinary writ of quo warranto as a postconviction safety net to challenge the authority of the prosecuting authority or judge when the outcome of the trial was not as he expected or hoped for.").

Here, Plaintiffs filed suit on January 3, 2024—less than two weeks after the first appointment they allege was unlawful and six days before the appointment of Betty Rzewnicki on January 9. *Compare* Compl. *with* Stip. ¶ 17. Significantly, this was almost eight weeks before the vote to approve the Sirata conditional use permit.[3] Moreover, it was well known within the relatively small St. Pete Beach community that Plaintiffs had sued questioning the authority of the four appointed commissioners to hold office.[4] The Intervenor, CP St. Pete, LLC, was aware of the mass resignation of city commissioners and the controversy surrounding the appointment of their successors. In fact, CP St. Pete requested a continuance of the special commission meeting scheduled to debate and discuss the Sirata conditional use permit.[5] Here, as in *Treasure Inc.*, there has been no reasonable reliance by third parties that the appointed commissioners were entitled to hold office. *Cf. Andrade v. Regnery*, 824 F.2d 1253, 1255 (D.C. Cir. 1987) ("the *de facto* officer

[3] *See* Veronica Brezina, *Massive expansion of Sirata Beach Resort approved, will bring two new hotels to St. Pete Beach*, ST. PETE RISING (Feb. 28, 2024).

[4] *See* Kailey Tracy, *St. Pete Beach residents sue city over commission appointments after 4 resignations*, FOX 13 TAMPA BAY (Jan. 8, 2024); Tracey McManus, *St. Pete Beach lawsuit claims city illegally skipped special election*, TAMPA BAY TIMES (Jan. 6, 2024); Kailey Tracy, *Lawsuits over St. Pete Beach appointments*, FOX 13 TAMPA BAY (Jan. 8, 2024); Mark Schantz, *Group files suit over St. Pete Beach commission appointments*, TAMPA BAY NEWSPAPERS (Jan. 8, 2024); Mark Schantz, *Protect St. Pete Beach amends complaint about commission appointments*, TAMPA BAY NEWSPAPERS (Feb. 14, 2024); Jack Evans, *More twists in St. Pete Beach hotel battle ahead of key vote today*, TAMPA BAY TIMES (Feb. 21, 2024) ("The Protect St. Pete Beach Advocacy Group in turn sued the city over the appointments, arguing that they're invalid and that the new, unelected commissioners shouldn't get to decide key issues — including the Sirata redevelopment."); Veronica Brezina, *Commissioners Delay Vote on Massive Expansion of St. Pete Beach's Sirata Resort*, ST. PETE RISING (Feb. 22, 2024) ("The key vote comes less than two months after four of five St. Pete Beach commissioners resigned due to Florida's new personal financial disclosure rules. The newly appointed commissioners, who will be determining the fate of the planned project, were sworn into office just a few weeks ago. Amid the change in the board makeup, Protect St. Pete Beach, an organization that has vocally opposed the Sirata Beach Resort development, is legally challenging the legality of the commissioner appointments, which were appointed by the remaining commissioners instead of elected by the residents."); Angie Angers, *After delays and leadership changes, St. Pete Beach hotel vote looms*, SPECTRUM NEWS 9 (Feb. 21, 2024) ("After rounds of delays, the St. Pete Beach City Commission may reach a final decision on the Sirata Beach Resort's proposed redevelopment project. . . . The advocacy group "Protect St. Pete Beach" sued the city over the new commission appointments, stating that the commissioners shouldn't get to decide key issues, given that they were not elected.")

[5] Mark Parker, *Commission Turmoil Delays Sirata Redevelopment Vote*, ST. PETE CATALYST (Jan. 12, 2024) ("Kentucky-based management company Columbia Sussex requested a continuation because every district representative recently resigned. . . . Local attorney Jane Graham, representing the advocacy group Protect St. Pete Beach (PSPB), also requested a continuance, albeit for different reasons. She asserted that the commission was not lawfully seated – the basis for a PSPB lawsuit against the city. . . . City officials implemented a last-minute, novel plan to stagger resignations and appoint rather than elect new commissioners.").

doctrine does not bar challenges to government action based on the Appointments Clause where (1) the lawsuit is brought at or around the time of the challenged action, and (2) the plaintiffs can show that the agency or department had actual notice of the claimed defect in the acting official's title to office."); *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 353 (5th Cir. 2013) ("the *de facto* officer doctrine generally is inapplicable to a timely constitutional challenge to the appointment of an officer:").

In *Sibley*, which the City cites in its motion, the Court further explained that application of the de facto officer doctrine is limited to situations in which the would-be officer fails to meet a technical requirement of assuming the office. *The Florida Bar v. Sibley*, 995 So. 2d 346, 351 (Fla. 2008) ("A *de facto* officer exercising the functions of office in consequence of a known and valid appointment or election may serve *if the only defect in title is a failure to comply with some requirement or condition such as executing an oath* or doing so in accordance with a prescribed form.") (citing *Gregory v. Woodbery*, 53 Fla. 566, 43 So. 504, 507 (Fla. 1907)); *see also Wrenn v. D.C.*, 808 F.3d 81, 84 (D.C. Cir. 2015) ("The *de facto* officer doctrine applies in the context of technical defects and confers validity upon acts performed by a person acting under color of official title, even if it is later determined that the title is deficient.").

Similarly, *Kane v. Robbins* is inapplicable because it did not involve a prompt challenge to the school board's authority and the current board members had been "duly elected in nonpartisan elections." 556 So. 2d 1381, 1385 (Fla. 1989). There the Republican Executive Committee of Marion County sued to invalidate a special law requiring non-partisan school board elections. Importantly, the suit was brought in 1989 despite the special law in question having been passed in 1976. The school board was concerned that the decision "may invalidate thousands of acts and decisions of the school board since" that time. *Id.* On motion for rehearing, the Court held that

prior acts that went unchallenged were not invalidated by the Court's holding that the special law was unconstitutional. And despite the validity of prior acts, the Court nevertheless "remand[ed] the case with directions that the circuit court enter judgment declaring void the election of the incumbent school board members of Martin County." *Id.*

In *State ex rel. Hawthorne v. Wiseheart*, 28 So. 2d 589, 593 (Fla. 1946), the Florida Supreme Court was again faced with a situation where a public official held office unchallenged for nearly two years before suit was brought challenging his title to that office. *Id.* at 274 (noting that judge in question "has, in fact, performed the duties of the office for almost two years without question after the time expired in which his title was subject to assault"); *see also id.* at 590-91 (noting that Petitioner was appointed on June 24, 1946 to office held by sitting judge since June 4, 1943). The Petitioner alleged that the sitting judge's appointment was invalid because at the time of his appointment he was a member of the legislature and the salary for judges had increased during his tenure as a State Senator. *Id.* at 591-92 ("no member of the Legislature is eligible to appointment as Circuit Judge or to any civil office that was created or the emoluments thereof were increased during the time for which he was elected."). In applying the *de facto* officer doctrine, the Court noted that the sitting judge "was in peaceful position, discharging his official duties in view of the public, with public acquiescence, and without the slightest appearance of a usurper." Id. at 593 (sitting judge's "technical disqualification was relieved long before the assault was made on his title."). The Court went on to explain that if the sitting judge's title to the office had been challenged earlier, it would not have hesitated to remove him from office:

> If [the sitting judge]'s title to the office of Circuit Judge had been challenged during the period he was elected to the Legislature, he would no doubt have been declared ineligible and ousted, but that period expired in November, 1944, nearly two years ago. We think, by the very terms of the Constitutional prohibition, it should be construed like a statute of limitations of a statute of repose, and, since the limitation

> has long since run and there is no other charge of disqualification, [the sitting judge]'s eligibility cannot now be drawn in question.

Because the sitting judge's legislative term had expired and there was no other disqualifying factor, the Court held that the appointment was voidable, but not void *ab initio*. *Id.* at 594 ("If his appointment was void, it was null and without binding effect, and nothing binding could flow from it; neither could it be cured.").

Unlike in *Wiseheart*, the taint to the appointed St. Pete Beach commissioner's title to office cannot be cured—they were appointed to an office that could not legally be filled by appointment. *Cf. id.* ("It is accordingly our view that Section 5, Article III of the Constitution, is a prohibition against appointing a member of the Legislature to any civil office during the time for which he was elected and that *the title to any such appointment may be held invalid by quo warranto if moved against during that period*.").[6] Moreover, any argument that the *de facto* officer doctrine legitimizes acts taken by the appointed commissioners is better addressed at the remedy stage of this proceeding. See, *Fed. Election Com'n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) ("[T]he court should avoid an interpretation of the *de facto* officer doctrine that would likely make it impossible for these plaintiffs to bring their assumedly substantial constitutional claim and would render legal norms concerning appointment and eligibility to hold office unenforceable." (quoting *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984))

V. MOOTNESS/RIPENESS

The City argues that Plaintiffs' claims as to Districts 1 and 3 are moot. Not So. Plaintiffs acknowledge that the District 1 and District 3 seats were filled by special election (although no election was in fact held due to candidates for both offices running unopposed.) *See* Stip. ¶¶ 19-

[6] Plaintiffs acknowledge that any taint to the title of the Commissioners for Districts 1 and 3 was removed on March 26, 2024 when they were deemed elected by virtue of running unopposed. *See* Stip. ¶¶ 19-22.

22. Plaintiffs further acknowledge that their requested relief of a judgment of ouster is no longer available. However, this does not mean meaningful relief cannot be granted as to these seats. *Contra* City's Motion at 16 (arguing that Plaintiffs' requested relief "will serve no purpose as to Districts 1 and 3.").

Plaintiffs' Complaint challenges the legitimacy and efficacy of any acts taken by Commissioners Rznewnicki and Marriott from the dates they were appointed through March 26, 2023. Importantly, without these two commissioners' votes, the Sirata conditional use permit would have failed.[7] Moreover, even if there was merit to the City's mootness argument, Plaintiffs' request for declaratory relief falls into an exception to the mootness doctrine "for controversies that are capable of repetition, yet evading review." *Green v. Alachua Cnty.*, 323 So. 3d 246, 249 (Fla. 1st DCA 2021) (citing *Tandon v. Newsom*, —— U.S. ——, 141 S. Ct. 1294, 1297 (2021)); *see also Cornelio v. Dep't of Highway Safety & Motor Vehicles*, 357 So. 3d 277, 279 (Fla. 2d DCA 2023). ("In dismissing as moot Mr. Cornelio's certiorari petition, the circuit court failed to apply the capable-of-repetition-but-evading-review exception to mootness and denied Mr. Cornelio the due process to which he was entitled.").

The City's ripeness argument is similarly without merit. The City argues that Plaintiffs' claims are not ripe because, with de jure officers seated for Districts 1 and 3, the commission has a quorum. City's Motion at 17-18. The City attempts to weave elaborate hypotheticals where future acts of the commission may be valid despite the seats for Districts 2 and 4 being unlawfully occupied. *Id.* While there may be some permutations of commission votes that result in legitimate acts, this does not limit the court's ability to provide meaningful declaratory relief. Per the City's telling, Plaintiffs must wait for the commission to hold a vote where the District 2 and 4 votes are

[7] Jack Evans, *St. Pete Beach approves permit for contentious Sirata expansion*, TAMPA BAY TIMES (Feb. 28, 2024).

determinative (as was the case with the Sirata vote) to file suit. The ripeness doctrine is simply not that demanding.

VI. THE IMPOSSIBILITY DEFENSE DOES NOT EXCUSE THE CITY FROM COMPLYING WITH THE PROVISIONS OF ITS CHARTER

Finally, the City argues that conducting an election before August 2024 would have "required the City to perform illegal and impossible acts." City's Motion at 8. However, the City made no attempt to even inquire about the possibility of holding a municipal special election other than through the Supervisor of Elections. The impossibility defense is simply not applicable here for the reasons explained below. But even if it were, the City's arguments in this regard fall flat for two reasons: First, the City attempts to shift the burden of proof by suggesting that Plaintiffs have an obligation to affirmatively prove that an election could have been conducted. *Cf. Ellingham v. Florida Dept. of Children & Family Services*, 896 So. 2d 926, 927 (Fla. 1st DCA 2005) ("The party seeking to assert the affirmative defense has the burden of proof as to that defense." (citing *Pub. Health Trust of Dade County v. Holmes*, 646 So. 2d 266 (Fla. 3d DCA 1994)). And second, even assuming an election could not have been conducted, there was still no authorization (in the City Charter or otherwise) for appointing interim commissioners and the City's argument that "the consequence [of not appointing interim commissioners] would be a government that could not function." City's Motion at 26.

The impossibility defense, most frequently seen in the contract law context, provides that "a party is discharged from performing a contractual obligation which is impossible to perform." *Marathon Sunsets, Inc. v. Coldiron*, 189 So. 3d 235, 236 (Fla. 3d DCA 2016). But the application of the defense is limited to situations where the party invoking it "neither assumed the risk of impossibility nor could have acted to prevent the event rendering the performance impossible." *Id.*

As the Florida Supreme Court held more than 75 years ago, "the dominant rule seems to be that where performance of a contract becomes impossible after it is executed, or if knowledge of the facts making performance impossible were available to the promisor, he cannot invoke them as a defense to performance." *Shore Inv. Co. v. Hotel Trinidad, Inc.*, 29 So. 2d 696, 697 (Fla. 1947). As one federal court explained it, "the Florida defense of impossibility is about 'change.' It arises as a defense when the real world has in some way failed to correspond with the imaginary world hypothesized by the parties to the contract." *Verbal v. TIVA Healthcare, Inc.*, 628 F. Supp. 3d 1222, 1232 (S.D. Fla. 2022) (citing *Cook v. Deltona Corp.*, 753 F.2d 1552, 1558 (11th Cir. 1985)).

Here, the timing of the resigning commissioner's decisions to resign coupled with the City's overreliance on the Supervisor of Elections to conduct its municipal elections resulted in the City's claim that in could not hold an election for Districts 2 and 4 until August 2024. The "imaginary world" hypothesized by the drafters of the City Charter is precisely what occurred. There has been no change rendering an election impossible that was not of the City's own doing. *Cf. Metro. Dade Cnty. v. Babcock Co.*, 287 So. 2d 139, 142 (Fla. 3d DCA 1973) ("a contracting party will not be relieved from his agreement to perform because of an inability that develops which could have been prevented or avoided, and a promissor will not be permitted to take advantage of an obstacle to performance which he has created or which lay within his power to remove or avoid.").

The resigned commissioners were agents of the City and their acts are imputed to the City. They were aware of the requirements of SB 774 and Form 6 long before their resignations in December 2023. At the December 21, 2023 city commission meeting, Mayor Petrila expressed his frustration with the timing of the resignations and subsequent appointment process, stating:

> We knew about Form 6 and if you all want to take offense to this, I'm -- I apologize in advance. We knew about Form 6 months and months in advance. There's no

> reason to leave this to the very last commission meeting of the year for us to then have to have seven emergency commission meetings in a seven -- in -- in a two-week period where I've committed to, while I'm out of the country on vacation, to attend those meetings.

Stip. Ex. C-2 at 82:2-10; *see also* Stip. Ex. D-3 at 59-60 ("The irony is that the reason that we're here today even having this discussion is because we have four individuals who do not want to uphold the laws of the state of Florida, but rather they want to remove themselves from that law. We've had multiple months, since at least June or July, that we've known about this."). Commissioner Grill, who was the first to resign, later responded "[y]es. We knew this was coming." Stip. Ex. C-2 at 86:14-15. Commissioners Grill and Friszolowski attended an August 2023 presentation by the Florida League of Cities where the requirements of SB 774 and Form 6 were discussed at length. Despite this, both commissioners waited more than four months to announce their resignations at the last regularly scheduled commission meeting before the end of the year.

The City claims that it has little to no recent experience in running elections and that it has relied on the Supervisor of Elections to conduct elections for it since at least 1999. When the City inquired with the Supervisor about the possibility of conducting its own election, the Supervisor responded that this "was not recommended," not that it was impossible. City's Motion at 27. But "impossibility of performance 'refers to the nature of the thing to be done—not the ability of the party to perform what he has agreed to do." *Verbal v. TIVA Healthcare, Inc.*, 628 F. Supp. 3d 1222, 1232 (S.D. Fla. 2022) (quoting *Lewis v. Belknap*, 96 So. 2d 212, 213–14 (Fla. 1957)). The City has not shown—and cannot show—that conducting an election before August 2024 would have been impossible. And again, even if the City could make this showing, the fact that holding an election sooner would have been impossible did not permit the City to fill the vacant seats by appointment in the interim.

Moreover, "courts are reluctant to excuse performance that is not impossible but merely inconvenient, profitless, and expensive." *Id.* (quoting *Valencia Ctr., Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1267, 1269 (Fla. 3d DCA 1985)). The City's argument is simply that it would have been more convenient to have the Supervisor conduct the special election and that "a local government that doesn't conduct its own elections and hasn't in at least 25 years would [not] have been able to pull this off . . ." City's Motion at 28; *see also id.* ("Compliance is easy with a county Supervisor of Election whose job it is to conduct a secure, reliable election in compliance with law.").

In essence, the City asks the Court to excuse it from complying with its governing document because doing so would have been inconvenient and could have potentially left the city government unable to act. Had the outgoing commissioners taken their offices more seriously and announced their decision to resign earlier, the city could have conducted qualifying and provided names to the Supervisor prior to the Supervisor's arbitrary and self-imposed deadline for inclusion on the March 2024 ballot. In short, the City cannot hide behind the impossibility defense where the actions of its own agents are responsible for making compliance with the city charter impossible.

VII. CONCLUSION

The Court should grant Plaintiff Protect St. Pete Beach Advocacy Group's Motion for Summary Judgment, deny the City of St. Pete Beach and intervenors CP St. Pete LLC Motion(s) and grant any relief it deems just and proper.

Dated May 1, 2024.

Respectfully submitted,

/s/ Leonard M. Collins

Leonard M. Collins (FBN 423210)
Andy Bardos (FBN 822671)
Ashley H. Lukis (FBN 106391)
Stephen K. Varnell (FBN 1004236)
GrayRobinson, P.A.
301 South Bronough Street, Suite 600
Tallahassee, Florida 32301
Telephone: 850-577-9090
andy.bardos@gray-robinson.com
leonard.collins@gray-robinson.com
ashley.lukis@ gray-robinson.com
stephen.varnell@gray-robinson.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that, on May 1, 2024, the foregoing document was furnished by email to all individuals identified on the Service List that follows.

/s/ *Leonard M. Collins*

Leonard M. Collins (FBN 423210)
GRAYROBINSON, P.A.