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

PROTECT ST. PETE BEACH ADVOCACY GROUP, etc., et al.,

Plaintiffs,

v. CASE NO.: 24-000041-CI

CITY OF ST. PETE BEACH, etc., et al, Section 20

Defendants.
_____/

DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON LIABILITY

Defendants (the "City" and the "Commissioners") respectfully submit this reply in support of their motion for summary judgment on liability.

INTRODUCTION

Plaintiffs' response exposes this case as a meritless effort to foist their political priorities on City government by throwing anything at the wall they think might stick. They abandon over half their claims, invite the Court to violate two Second District precedents, mislead about other precedents, and pretend (without a shred of evidence) the City could have held a legal election any faster than it has. This is a straightforward case for summary judgment:

- Plaintiffs lack standing because their challenge to the Commissioners' title to office can only be brought by a person claiming title to that office, which Plaintiffs concede they do not claim. This requires only that the Court apply two decisions of the Second District that Plaintiffs can't distinguish. (*Infra* Point I). This issue disposes of the case in full.

- On the merits, Plaintiffs' claims fail because the Commission vacancies did not "occur simultaneously" under Section 3.06(d) of the Charter. Things "occur simultaneously" when they happen at the same time. As a matter of undisputed fact, the vacancies here did not happen at the same time. (*Infra* Point II). This issue disposes of the case in full.

- It was impossible for the City to hold a special election on the schedule Plaintiffs demand. The undisputed facts are (1) the City depends on the Supervisor to conduct its elections,

(2) the Supervisor refused to conduct an election for the City sooner than August, and (3) a vendor could not have conducted a legal special election any faster than the Supervisor could have. (*Infra* Point III). This issue disposes of the case in full.

- Plaintiffs have abandoned Counts II, IV, and V of the Amended Complaint, and Counts I and III are moot as to Districts 1 and 3. (*Infra* Point IV). This issue disposes of all counts except the parts of Counts I and III relating to Districts 2 and 4.

- Plaintiffs are not entitled to declaratory relief because the Commission's past decisions are protected by the *de facto officer* doctrine, and any claim about its future decisions is unripe. (*Infra* Point V). This issue disposes of Count I, the only claim for declaratory relief Plaintiffs have not abandoned.

ARGUMENT

I. Plaintiffs lack standing to pursue any of their claims.

Plaintiffs lack standing because under section 80.01, Florida Statutes (2023), only a "person claiming title to an office which is exercised by another has the right, on refusal by the Attorney General" to challenge the officeholder's right to office in quo warranto and Plaintiffs cannot dodge that limitation on their standing with a declaratory judgment claim. (Def. MSJ at 8-12).[1] Plaintiffs' argument to the contrary requires the Court to violate two controlling Second District precedents applying section 80.01 on indistinguishable facts. (*See* Pl. Resp. at 8-12).

The first is *Epsey*, in which the Second District held that section 80.01 precludes plaintiffs from challenging an officeholder's right to office in quo warranto "unless they claim entitlement to the office." 523 So. 2d at 1278. The second is *Tobler*, which held the same and, further, that a plaintiff cannot evade section 80.01 through a claim for declaratory judgment, because that would "allow indirectly, by collateral attack, what cannot be accomplished directly." 297 So. 2d at 62 & n.3. Plaintiffs don't dispute that they lack standing under *Epsey* and *Tobler*. (*See* Pl. Resp. at 11).

[1] Record citations are as follows: (1) "Def. MSJ" is Defendants Motion for Summary Judgment on Liability; (2) "Pl. Resp." is Plaintiffs' response; (3) "Stip." is the parties' Stipulation of Undisputed Facts filed on April 25, 2024; (4) "NOF" is Defendants' Notice of Filing filed on April 25, 2024, and (5) "SNOF" is Defendants' Supplemental Notice of Filing filed with this Reply.

Instead, they assert that "more recent precedent from the Second DCA holds otherwise." (Pl. Resp. at 11). That claim is false. Neither of the decisions Plaintiffs cite to support that assertion involved a challenge to an officeholder's title to office, so neither was governed by section 80.01's limitations on standing as was the case in *Epsey* and *Tobler*. In *Florida Dep't of Corrections v. Holt*, 373 So. 3d 969 (Fla. 2d DCA 2023), the Department of Corrections used quo warranto to prevent a public defender from appearing in a civil case because public defenders lack statutory authority to appear in civil cases. And *Macnamara v. Kissimmee River Valley Sportsmans' Ass'n.*, 648 So. 2d 155 (Fla. 2d DCA 1994), was a challenge to a riparian owner's authority to fence off public lands. Neither *Holt* nor *Macnamara* mentioned standing under section 80.01 because neither had anything to do with it: Those cases did not present challenges to an officeholder's right to hold office to which section 80.01, *Epsey*, and *Tobler* are applicable.[2]

Likewise, *Thompson v. DeSantis*, 301 So. 3d 180 (Fla. 2020) (Pl. Resp. at 10), is irrelevant here because it wasn't a challenge to an officeholder's title to which section 80.01 applies. In *Thompson*, the petitioner sought quo warranto against (1) a judicial nominating commission, arguing it exceeded its authority by nominating an ineligible candidate to the supreme court and (2) the Governor, for selecting that candidate. *See* 301 So. 3d at 183-84. But the candidate in *Thompson* never held the office of justice and was not named as a respondent, and the petitioner did not seek a judgment of ouster (there was no officeholder to oust) or to invalidate the candidate's official acts (she hadn't taken any).[3] *See id*. By its terms, section 80.01 does not apply to those claims, so, predictably, the court did not even discuss it. *See id.* at 184.

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[2] Even if there were tension between these cases and *Epsey* and *Tobler*—there isn't—the Court must follow *Epsey* and *Tobler* because those decisions are binding unless and until overruled by the Second District *en banc*. *See State v. Crose*, 378 So. 3d 1217, 1243 (Fla. 2d DCA 2024).

[3] Although the Governor had appointed the candidate, she was never commissioned. *Id.* n.3; *see also State ex rel. Lawson v. Page*, 250 So. 2d 257, 258 (Fla. 1971).

In dispositive contrast, Plaintiffs' claims here expressly challenge the Commissioners' right to hold office. Their quo warranto counts are explicitly styled as ones "challenging the right of [the Commissioners] to hold the office of City Commissioner." (Am. Compl., Counts III & IV, titles). Their declaratory judgment counts seek the same kind of relief. (*Id.* Counts I, II, & V, wherefore clauses). *Epsey* and *Tobler*—consistent with a long line of authority—hold that section 80.01 limits standing to pursue *those claims* to contestants for office. *See also State ex rel. Wurn v. Kasserman*, 179 So. 410, 411 (Fla. 1936); *Hall v. Cooks*, 346 So. 3d 183, 188-89 (Fla. 1st DCA 2022); *Fouts v. Bolay*, 795 So. 2d 1116, 1117 (Fla. 5th DCA 2001). Plaintiffs' response fails to cite a single decision—even in their lengthy string-cite at pages 8 to 9—holding otherwise.

The bottom line is the Legislature passed a statute limiting standing to challenge an officeholder's title to contestants for that office. While Plaintiffs are correct that citizen-standing is accepted in *other* challenges to which the statute does not apply, the Legislature forbade it *in a challenge like the one Plaintiffs make here*. For good reason. Every Tom, Dick, and Harry has an opinion about public officials, but government can't work if every Tom, Dick, and Harry can challenge an official's right to office in court at any time for any reason. *See McSween v. State Live Stock Sanitary Board of Fla.*, 122 So. 239, 244 (Fla. 1929).

Finally, Plaintiffs also lack standing to pursue their declaratory judgment claims (Counts I, II, and V) under a third controlling Second District precedent, *Smith v. City of Pinellas Park*, 336 So. 2d at 1255 (Fla. 2d DCA 1976). In *Smith*, the Second District held that citizens alleging they were denied the right to vote on a matter effecting municipal government failed to present a justiciable controversy and were "relegated to their remedies at the polls." *Id.* at 1256. This point was presented in our motion (Def. MSJ at 12-13), and Plaintiffs fail to address it.

II. The vacancies did not "occur simultaneously" under Section 3.06(d) of the Charter.

On the merits, Plaintiffs argue only that Section 3.06(d) precluded the appointments because the vacancies created by the prior commissioners' resignations "occur[ed] simultaneously" and required the City to "call a special election." (Pl. Resp. at 5-8). But the vacancies did not "occur simultaneously" because they did not happen at the same time: The indisputable facts are that the prior commissioners both formally announced their resignations and actually resigned on different dates.[4] (Def. MSJ at 20-21). *See also Rimmer v. Tesla*, 201 So. 2d 573, 576-77 (deaths "occurred otherwise than simultaneously" when separated in time). Simply put, "[t]wo events that occur at about the same time *do not occur simultaneously*." *Valdea Co. LLC v. American Seating Co.*, 2014 WL 11633700, at *5 (S.D. Fla. May 19, 2014) (emphasis added).

Plaintiffs evade this fatal problem by interpreting the term "occur" to mean "to exist or be present in," so they can say the vacancies "occurred simultaneously" even though they indisputably happened on different days. (Pl. Resp. at 5). The law forecloses that distortion of language: Words in a legal text—the Charter—must be given their "usual, ordinary, and commonly accepted meaning[]," *City of Tallahassee v. Fla. Police Benevolent Ass'n.*, 375 So. 3d 178, 183 (Fla. 2023), so the way the word is used in "ordinary, everyday discourse" controls. *City of Treasure Island v. Tahitian Treasure Island, LLC*, 253 So. 3d 649 (Fla. 2d DCA 2017).

In ordinary English, "occur" means "happen." *See, e.g.*, *S.H. v. Dep't of Child. and Fam's.*, 328 So. 3d 30, 31 (Fla. 5th DCA 2021) (using "occur" and "happen" as synonyms); *Graham v.*

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[4] The prior commissioner for District 1 formally announced his resignation on December 18, 2023 and officially surrendered office on December 26, 2023. (Ex. B-3 to Stip. at 31:4-6; Ex. D-3 to Stip. at 6-7). The prior commissioner for District 2 formally announced on December 12, 2023 and officially surrendered office on December 27, 2023. (Ex. A-3 to Stip. at 1-9; Ex. E-3 to Stip. at 74-75). The prior commissioner for District 3 formally announced on December 30, 2023 and officially surrendered office that same day. (Ex. 7 to NOF). The prior commissioner for District 4 formally announced on December 21, 2023 and officially surrendered office that same day. (Ex. C-3 to Stip. at 19-20, 66-67).

Langley, 683 So. 3d 1147, 1148 (Fla. 5th DCA 1996) (same). If someone says "I don't know why mistakes occur," they mean they don't know why they happen. "Accidents occur" means they happen. It would be abnormal to say "a concert will occur at Tropicana Field" to mean it will "exist or be present" at Tropicana Field instead of it will happen there. In ordinary English, "vacancies occur" means they happen. *See also See Occur*, CAMBRIDGE DICTIONARY, bit.ly/3JPdV8u (last accessed May 5, 2024) (examples; "If any of these symptoms occur …, consult your doctor" and "Evolution occurs as a result of adaptation"); *Occur*, MERRIAM-WEBSTER DICTIONARY, bit.ly/3xWjyPx (last accessed May 5, 2024) (example; "The accident occurred at 5 p.m.").

Although "occur" might sometimes mean "exist or be present," that's not the everyday usage. The dictionaries Plaintiffs cite (Pl. Resp. at 5) give as examples "[t]his bird occurs in New England," MERRIAM-WEBSTER DICTIONARY, *supra*, "[m]inerals occur naturally," and "[v]iolence of some type seems to occur in every society." CAMBRIDGE DICTIONARY, *supra*. But Section 3.06 doesn't address scientific observations or abstract ideas. It addresses specific events: "vacancies," which occur upon a "death, resignation, or forfeiture of … office." (Charter § 3.06(a), Ex. 5 to NOF). A death, resignation, or forfeiture—and thus a vacancy—occurs when it happens.

That is confirmed by how "occur" is used—and not used—throughout Section 3.06. *See City of Tallahassee*, 375 So. 3d at 183 (looking to context to determine ordinary meaning). Section 3.06(c)(2) provides that when certain vacancies are filled by appointment, the City must "schedule a special election to be held not sooner than sixty (60) days, nor more than one (1) year following the *occurrence of the vacancy*." (Charter § 3.06(c)(2), Ex. 5 to NOF) (emphasis added). That means the election must be held between 60 days and a year after the vacancy *happens*; otherwise, the sentence would make no sense. Furthermore, when Section 3.06 does refer to an existing vacancy

it does not use the word "occur" and instead uses phrases like the "the vacated seat" or the "vacant commission positions." (*Id.* § 3.06(c)(1), (d)). In Section 3.06, "occur" means "happen."

Plaintiffs contend this is "bizarre" because it means that Section 3.06(d) doesn't often apply. (*See* Pl. Resp. at 5). But section 3.06(d) is titled "Extraordinary vacancies," so the whole idea is it won't often apply. And interpreting "occur" in accord with its ordinary meaning of "happen" gives Section 3.06(d) a plainly operative scope. Vacancies might "occur simultaneously" if, for example, two or more commissioners died in a single car accident or two or more commissioners accused of misconduct resigned at the same time to avoid an investigation.

Finally, Plaintiffs argue that "if the elective process is available …, it should be utilized." (Pl. Resp. at 7) (quotation omitted). But Section 3.06(d)'s reference to "vacancies" that "occur simultaneously" unambiguously means vacancies that happen at the same time, so resorting to policy considerations is not an option. *See Conage v. United States*, 346 So. 3d 594, 597 (Fla. 2022). And even if it was, it is undisputed that an election for Districts 1 and 3 has happened, and Plaintiffs produce no summary judgment evidence that the "elective process" is "available" for Districts 2 and 4 before August 2024: The City has not conducted its own election in 25 years, the Supervisor will not conduct an election before August, and Plaintiffs' allegation that a vendor could conduct an election turned out to be false. (Def. MSJ at 5-6, 28). So, any ambiguity should be resolved in favor of sustaining the interim appointments because "[v]acancies in office are to be avoided whenever possible." *Adv. Op. to Gov.*, 600 So. 2d 460, 462 (Fla. 1992); *see also Adv. Op. to Gov. re Request of Sept. 6, 1974*, 301 So. 2d 4, 7 (Fla. 1974), *abrogated on other grounds by*, *Adv. Op. to Gov. re Sheriff and Jud. Vacancies*, 928 So. 2d 1218 (Fla. 2006). Plaintiffs' insistence that the City had to live with no Commission at all until an election is absurd.

III. Plaintiffs' claims fail because it was impossible for the City to conduct a legal special election on the expedited basis Plaintiffs demand.

Plaintiffs' claims hinge on the City being required to conduct a snap election for all four districts sooner than the March 2024 election for Districts 1 and 3 and the August 2024 election for Districts 2 and 4—when or how, they will not say. But this much is undisputed:

- Any election would have been illegal unless it complied with the Florida Election Code's detailed requirements concerning qualifications, voting hardware and software, tabulation equipment, voter information, mail-in, overseas, and provisional ballots, canvassing, voter challenges, poll watchers, and other matters. (Def. MSJ at 27-28).

- The City has not conducted an election on its own in at least 25 years. (Declaration of Amber LaRowe ("LaRowe Decl.") ¶ 9, Ex. 1 to NOF).

- The Supervisor conducts the City's elections. (*Id.*).

- The Supervisor refused to conduct an election for the City for Districts 1 and 3 any sooner than March 2024 and for Districts 2 and 4 any sooner than August 2024. (*Id.* ¶¶ 2-6).

- The Supervisor advised the City against trying to conduct its own election and that, to its knowledge, no other municipality in Pinellas does so. (*Id.* ¶ 5).

- The vendor Plaintiffs alleged could conduct an election for the City on short notice was unable to do so in compliance with the Florida Election Code.[5] (Deposition of John Siebel, Ex. 4 to NOF at 18, 29, 30-33, 37-38; Plaintiffs' Answers to Interrogs., Ex. 2 to NOF).

Under these circumstances, the snap election Plaintiffs demand was impossible to conduct.

Plaintiffs do not cite a single case involving a statute, charter, constitution, or similar law suggesting the Charter required the City to perform the impossible. Instead, they rely on inapposite cases involving what contracting parties expected when they inked a contract. (Pl. Resp. at 19-20).

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[5] This is not impermissible burden shifting. (Pl. Resp. at 19). Plaintiffs' interrogatory answers and their vendor's deposition are proper summary judgment evidence showing that a vendor could not conduct a snap election in compliance with Florida law. *See* Fla. R. Civ. P. 1.510(c)(1)(A). Under the new summary judgment standard, that evidence makes "an initial showing that there [is] no genuine dispute" about the facts supporting the impossibility defense and requires Plaintiffs' to produce evidence showing otherwise. *Arce v. Citizens Prop. Ins. Corp.*, --- So. 3d ---, 2024 WL 24945, at *2 n.3 (Fla. 3d DCA Jan. 3, 2024). They fail to do so.

But a Charter is not a contract—the Commission did not negotiate it—so what the parties intended has no role to play. Rather, if the law "requires performance of something that cannot be performed, the court may hold it inoperative." *Ivaran Lines, Inc. v. Waicman*, 461 So. 2d 123, 125 (Fla. 3d DCA 1984); *see also Rupp v. Dep't of Health*, 963 So. 2d 790, 795-96 (Fla. 3d DCA 2007). Furthermore, where it is impractical or impossible to hold an election immediately, the Florida Supreme Court has held that interim appointments are proper. *See In re Adv. Op. to Gov.*, 600 So. 2d at 463 ("It is impracticable and therefore not necessary to hold a special election…"); *Adv. Op. to Gov. re Request of Sept. 6, 1974*, 301 So. 2d at 7 (approving appointment where "[t]he timing of the vacancy … makes it impossible to practicably hold the election").

Because that is true here, Plaintiffs criticize the prior commissioners for not deciding to resign sooner than they did. (Pl. Resp. at 20). That is beside the point: (1) under Section 3.06(d), any alleged obligation to conduct a snap election arose only when the vacancies occurred and (2) the vacancies occurred between December 12 and 30, 2023. At that time, it was impossible for the City to conduct an election sooner than March and August. Because "[t]he timing of the vacancy created by the resignation … ma[de] it impossible to practicably hold the election" earlier, use of the appointment process in Section 3.06(c) of the Charter was proper. *Adv. Op. to Gov. re Request of Sept. 6, 1974*, 301 So. 2d at 7; *see also Jud. Nom. Comm'n. v. Graham*, 424 So. 2d 10, 12 (Fla. 1982) (holding that possibility of conducting an election to fill a vacancy is determined as of "an irrevocable communication of an impending vacancy").

Plaintiffs' presumptuous second-guessing of when the prior commissioners decided to resign underscores why they have no standing and is meritless.[6] Municipalities across the state saw

[6] Seeing the writing on the wall, Plaintiffs ask to delay a decision pending its receipt of public records—not requested until "after the City filed its motion for summary judgment"—bearing on the timing of the prior commissioners' resignations. (Pl. Resp. at 5 n. 2). That is meritless because (1) Plaintiffs have not supported the request with an affidavit or declaration, (2) Plaintiffs unreasonably

mass resignations in December 2023.[7] The decision to resign is obviously a deeply personal one, as the record shows. For example, one commissioner described how he struggled with whether he could live with the new Form 6 requirement. (*See, e.g.*, Ex. A-3 to Stip. at 1-9). Another hoped there would be a way for existing commissioners to work around the new requirement. (*See* Ex. A-3 to Stip. at 13-14). Plaintiffs don't get to Monday-morning quarterback those decisions.

IV. Plaintiffs have abandoned Counts II, IV, and V of the Amended Complaint and their claims involving Districts 1 and 3 are moot.

Because Plaintiffs' response abandons Counts II, IV, and V and Counts I and III are moot as to Districts 1 and 3, the most they can receive is relief as to Districts 2 and 4.

Counts II, IV, and V. Counts II and IV of the Amended Complaint are directed to the Commissioners for Districts 2 and 4 and seek quo warranto and declaratory relief on the theory that those appointments did not comport with Section 3.06(c) of the Charter. Count V is directed to all Commissioners and seeks a declaration that their appointments violated article VIII, section 2's requirement that municipal legislatures be "elective." (Am. Compl., Counts II, IV, V). The City and the Commissioners moved for summary judgment on these counts because (1) Section 3.06(c)(2) authorized the appointments for Districts 2 and 4 and (2) article VIII, section 2 does not prohibit interim appointments pending upcoming elections. (Def. MSJ at 21-26). Plaintiffs' response fails to contest either argument. Because they are unwilling or unable to argue in favor

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delayed seeking the records, and (3) Plaintiffs have not shown that the evidence is at all "essential to justify its opposition." Fla. R. Civ. P. 1.510(d); *see also Full Pro Restoration v. Citizens Prop. Ins. Co.*, 373 So. 3d 1189, 1193-94 (Fla. 3d DCA 2023).

[7] *See* C.A. Bridges, *Will DeSantis replace dozens of local officials who resigned ahead of a new disclosure law?*, USA TODAY NETWORK-FLORIDA (Jan 4, 2024); Maya Washburn, *'A chilling effect': Some fear new finance law may scare away candidates from local elections*, PALM BEACH POST (Dec. 23, 2023); Joel Englehardt, *Mass exodus leaves gaping holes on city councils in Palm Beach* County, STET NEWS (Dec. 20, 2023); Tracey McManus, *New Florida law pushes some small town officials to resign*, TAMPA BAY TIMES (Dec. 12, 2023).

of those counts, the City and Commissioners are entitled to summary judgment on them. *See Rasmussen v. Collier Cty. Pub. Co.*, 946 So. 2d 567, 568 n.1 (Fla. 2d DCA 2006) (holding plaintiff abandoned claims by not addressing them in opposing summary judgment); *see also US Iron FLA, LLC v. GMA Garnett (USA) Corp.*, 660 F. Supp. 3d 1212, 1228 (N.D. Fla. 2023) (same).

Counts I and III. Counts I and III allege that the Commission vacancies could only be filled by election under Section 3.06(d) of the Charter. But Plaintiffs do not dispute that (1) as of January 16, 2024, the District 1 Commissioner was "deemed elected" because her sole opponent withdrew and (2) as of November 17, 2023, the District 3 Commissioner was the only candidate who qualified for election. (Stip. ¶¶ 20, 22; City Code § 38-11(a), Ex. 6 to NOF). The appointment of those Commissioners ceased to affect Plaintiffs' "right to elect their public officials" (Pl. Resp. at 11) on those dates. As to Districts 1 and 3, Counts I and III are moot. (Def. MSJ at 15-17).

Plaintiffs nonetheless argue that a tiny live controversy remains because they challenge "any acts taken" by the District 1 and 3 Commissioners through March 26, 2024—the date they were sworn in to elected terms. (Pl. Resp. at 18). But the only "act" they can point to is the Commission's approval of a conditional use permit for the Sirata Resort on or about February 28, 2024. (*Id.* & n.7). For all practical purposes, the District 1 and 3 Commissioners *were the elected commissioners* when that conditional use permit was approved, so the claims remain moot. *See McGraw v. DeSantis*, 358 So. 3d 1279, 1280 (Fla. 1st DCA 2023) ("Because McGraw has been re-elected…, no actual controversy remains here."). And at all events, Plaintiffs cannot challenge the approval of a conditional use permit in this case; as a matter of law, that is a quasi-judicial decision that is reviewable, if at all, only by certiorari. *See Park of Com. Assocs. v. City of Delray Beach*, 636 So. 2d 12, 15 (Fla. 1994); *Lee Cty. v. Sunbelt Equities II, Ltd. P'ship*, 619 So. 2d 996,

1001 (Fla. 2d DCA 1993). Indeed, Plaintiff Protect St. Pete Beach Advocacy Group has filed a certiorari proceeding in which it raises the same issue it raises here. (Petition, Ex. 1 to SNOF).

Striking out there, Plaintiffs summarily argue that the case is not moot under the exception for matters "capable of repetition yet evading review." (Pl. Resp. at 18). That doesn't pass the straight-face test. The exception applies only where "there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Morris Publ'g Grp., LLC v. State*, 136 So. 3d 770, 776 (Fla. 1st DCA 2014) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). There is absolutely no reason to think that the Commission will experience seriatim resignations resulting in the appointment of multiple commissioners pending an election again, let alone to think it will result in a Commission making decisions of which Plaintiffs disapprove.

V. Any claim for declaratory relief is either barred by the *de facto* officer doctrine or is not ripe for decision.

The Court should grant summary judgment on Count I for a declaratory judgment because it can afford no relief: The Commission's past acts are protected by the *de facto* officer doctrine and any claim concerning its future acts are not ripe for decision. (Def. MSJ at 13-15, 17-18).

Past acts. Plaintiffs seek a declaratory judgment that "*any* action taken by the Commission … is null and void and of no force or effect." (Am. Compl., Count I, Wherefore clause) (emphasis added). Let's be clear about what that means: *Every decision the Commission made after the Commissioners' appointments*—its decisions to replace dune walkovers damaged in a hurricane, to buy a new truck for the facilities department, and to repair a seawall, as a few examples—*is void and ineffective*. (*See* Ex. C to NOF). That is plainly bonkers, would grind City government to a halt, and is rightly foreclosed by the *de facto* officer doctrine. (Def. MSJ at 13-15).

Relying principally on *Treasure, Inc. v. State Bev. Dep't,* 238 So. 2d 580 (Fla. 1970), Plaintiffs argue the doctrine does not apply "when a party to be affected by an official's act or

decision holds actual knowledge" that the official may not legally occupy office "*and* when the party makes a timely and direct attack" on his authority. (Pl. Resp. at 12). That's a half-truth because Plaintiffs tell the Court nothing about the facts of *Treasure*. There, the State Beverage Department commenced administrative proceedings to suspend or revoke a lounge operator's liquor license. *Id.* at 580. The proceedings occurred before a substitute director who had not been commissioned, and the lounge operator timely objected to his authority in the administrative proceedings themselves. *Id.* at 580, 586. The *de facto* officer doctrine did not protect the substitute director's decision against the lounge operator *in those proceedings* because "*the only party directly interested in the outcome* ..., other than the state and public in general, prior to any formal proceedings on the merits directly challenged the [substitute director's authority] … in the matter." *Id.* at 585 (emphasis added). In other words, what *Treasure* held was that the *de facto* officer doctrine does not preclude a party on the direct receiving end of a *de facto* officer's actions from challenging his actions, provided that the party also timely objects to the officer's authority.

What *Treasure* did not hold—and what none of the cases Plaintiffs' string-cite on page 13 hold either—is that any citizen, taxpayer, or advocacy group can void each and every decision taken by a municipal legislature simply because the citizen, taxpayer, or advocacy group has filed a lawsuit. For that reason, Plaintiffs' effort to distinguish the authorities cited in our motion on grounds that they did not involve timely challenges (Pl. Mem. at 15-17) is irrelevant. And even if Plaintiffs' distortion of *Treasure* had some validity, the only specific decision they identify as subject to challenge is the approval of the Sirata conditional use permit (Pl. Resp. at 14). But as shown above, any challenge to that decision in this lawsuit is both moot and improper, as the challenge can be raised, if at all, only in a petition for certiorari. (*See supra* at 11).

Future acts. As to future acts the Commission might take, Plaintiffs' claim is hypothetical, contingent, and speculative because it is dependent upon (1) the Commission making a decision with less than a majority of the three Commissioners who are indisputably elected and (2) that decision impairing Plaintiffs' interests in some way. (Def. MSJ at 17-19). Plaintiffs' response boils down to the bald assertion—unadorned by a single citation—that "[t]he ripeness doctrine is simply not that demanding." The City and the Commissioners marshalled the legal authority in their motion and rely on it here. Plaintiffs are entitled to no relief as to future acts of the Commission.

CONCLUSION

Plaintiffs' effort to hold the City hostage to their political preferences must end. The Court should render summary judgment in favor of the City and the Commissioners.

Dated: May 7, 2024

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed via the Florida Courts E-Portal, and a copy of said document has been served via the Florida Courts E-Portal on May 7, 2024 to all counsel of record.

/s/ Samuel J. Salario, Jr.
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