Legislative # 180402A

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

FLORIDA GULF COAST CHAPTER
ASSOCIATED BUILDERS &
CONTRACTORS, INC., as an
Organization and Representative
of its Members,

CASE NO: 19-007345-CI

Plaintiff,

v.

CITY OF ST. PETERSBURG,
a political subdivision of
the State of Florida,

Defendant.
_____/

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Florida Gulf Coast Chapter Associated Builders & Contractors, Inc. ("ABC Gulf"), pursuant to Fla. R. Civ. P. 1.510 and in accordance with the *Agreed Case Management Order*, files *Plaintiff's Motion for Summary Judgment*, and states:

INTRODUCTION

1. This is an action for declaratory and injunctive relief seeking to declare certain unauthorized ordinances that purport to impose various onerous staffing requirements on contractors involved in various City construction projects null and void.

2. In support of this motion, ABC Gulf relies on the *Stipulated Facts* ("Stip. Facts") filed June 22, 2020, which is incorporated herein by reference.

3. The substantial matter of law to be argued are set forth herein.

4. Because there are no disputed questions of material fact and ABC Gulf is entitled

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to judgment as a matter of law, summary judgment should be entered in ABC Gulf s favor against Defendant, City of St. Petersburg (the "City") on Counts I through VI[1] of ABC Gulf's *Amended Complaint for Declaratory and Injunctive Relief.*

UNDISPUTED MATERIAL FACTS

The City Enacts the "Apprenticeship Ordinance"

5. In 2015, the City enacted Sections 2-296 and 2-297 of the St. Petersburg Code of Ordinances, titled "Major construction project requirements for employing apprentices." Stip. Facts ¶ 8.

6. In 2019, the City amended that ordinance, relocated it to Sections 2-261 through 2-264 of the St. Petersburg Code of Ordinances, and retitled it "Major Construction Project Requirements for Employing Apprentices" (the "Apprenticeship Ordinance"). Stip. Facts ¶ 9.

7. The Apprenticeship Ordinance provides "[a]t least 15 percent of all hours of work performed on a major construction project shall be performed by apprentices employed by prime contractors or subcontractors." Stip. Facts ¶ 10 (Sec. 2-263(a)).

8. The Apprenticeship Ordinance defines a "major construction project" as "a City project with a contract amount of $1,000,000.00 or more, as approved by City Council, which involves building, altering, repairing, improving, demolishing or replacing any public structure, building, or roadway, or other public improvement." Stip. Facts ¶ 10 (Sec. 2-262).

9. The Apprenticeship Ordinance defines "apprentice" as:

> subject to section 2-264, any person who is enrolled in and participating in an apprenticeship program for an apprenticeable occupation registered with the State of Florida Department of Education, as the registered agent for the United States Department of Labor. Subject to section 2-264, if the person or entity responding

[1] As part of its Amended Complaint, in Count VII, ABC Gulf also sought injunctive relief preventing the enforcement of the Ordinances at issue in this case. However, because the City has represented that it is not currently enforcing the Ordinances, ABC Gulf has not moved for summary judgment on Count VII. Notwithstanding the City's posture on the Ordinances, ABC Gulf reserves the right to move for summary judgment on Count VII in the future.

> to a solicitation for a major construction project certifies that, after a search and review of the Florida Department of Education website, there are not any apprentices available from a State of Florida Department of Education approved apprentice program that has geographical jurisdiction in any part of Region 3 to perform the specific work described in the solicitation documents, apprentice means any person who is participating in an industry certification training program, company sponsored training program or an on-the-job training program (such as the Florida Department of Transportation On-the-Job Training Program) to perform the work specified in the major construction project contract documents. Industry certification is a process through which persons are assessed by an independent, third-party certifying entity using predetermined standards for knowledge, skills, and competencies, resulting in the award of a credential that is recognized by the industry. A company sponsored training program shall require that apprentices are employed through a process equivalent to the State of Florida Department of Education, as determined by the POD.

Id.

10. The Apprenticeship Ordinance defines "apprenticeable occupation" as "criteria for apprenticeship occupations set forth in F.S. § 446.092." *Id.*

11. The Apprenticeship Ordinance defines "[h]ours of work performed" as "actual labor hours worked on a major construction project (including actual labor hours worked by apprentices). Hours of work performed shall not include hours worked by foremen, superintendents, owners and workers who are not subject to the responsible wage required by section 2-277." *Id.*

12. Under the Apprenticeship Ordinance, a contractor bidding on a major City construction project must:

> submit a description of their proposed apprentice usage with their bid, proposal, or statement of qualifications. The description must include, but is not limited to, total work hours estimated for the major construction project, a demonstration of 15 percent of the total work hours proposed to be performed by apprentices, construction trades, program sponsors or sources (including any certification if there are no apprentices from a Region 3 State of Florida Department of Education approved apprenticeship program), subcontractor opportunities and estimated duration of the employment of apprentices.

Stip. Facts ¶ 10 (Sec. 2-263(b)).

13. Under the Apprenticeship Ordinance, "[t]he prime contractor shall pay apprentices it employs for a major construction project, and shall require its subcontractors who employ apprentices for a major construction project to pay such apprentices, at the hourly rates set forth in section 2-277." Stip. Facts ¶ 10 (Sec. 2-263(c)).

14. The Apprenticeship Ordinance also provides: "[t]he contract for a major construction project between the City and the prime contractor shall include a provision requiring the prime contractor to comply with the requirements of this division and shall provide that the failure of the prime contractor to comply with such requirements may result in consequences for noncompliance." Stip. Facts ¶ 10 (Sec. 2-263(g)).

15. The Apprenticeship Ordinance also provides that a contractor who fails to comply these requirements will receive a penalty of increasing severity, as follows:

a. For the first failure to comply with the requirements of this division and associated contractual requirements-the prime contractor will forfeit from the retainage the dollar value of the difference between (i) 15 percent of the dollar value of the hours of work performed, and (ii) the dollar value of the labor hours actually performed by apprentices during the major construction project.

b. For the second failure to comply with the requirements of this division and associated contractual requirements-the prime contractor will be debarred from responding to solicitations for all City contracts for one year.

c. For the third failure to comply with the requirements of this division and associated contractual requirements-the prime contractor will be debarred from responding to solicitations for all City contracts for three years.

Stip. Facts ¶ 10 (Sec. 2-263(k)(2)(a)-(c)).

The City Enacts the "Disadvantaged Worker Ordinance"

16. The City enacted Section 2-298.5 of the St. Petersburg Code of Ordinances, titled "Major construction project requirements for disadvantaged workers," in 2015. Stip. Facts ¶ 11.

17. In 2019, the City amended that ordinance, relocated it to Sections 2-268 through 2-

270 of the St. Petersburg Code of Ordinances, and retitled it "Major Construction Project Requirements for Employing Disadvantaged Workers" (the "Disadvantaged Worker Ordinance"). Stip. Facts ¶ 12.

18. Under the Disadvantaged Worker Ordinance, "[a]t least 15 percent of all hours of work performed on a major construction project shall be performed by disadvantaged workers employed by prime contractors or subcontractors." Stip. Facts ¶ 13 (Sec. 2-270(a)).

19. The Disadvantaged Worker Ordinance defines a "major construction project" as "a City project with a contract amount of $1,000,000.00 or more, as approved by City Council, which involves building, altering, repairing, improving, demolishing or replacing any public structure, building, or roadway, or other public improvement." Stip. Facts ¶ 13 (Sec. 2-269).

20. The Disadvantaged Worker Ordinance defines a "[d]isadvantaged worker" as "(i) a person who has a criminal record, (ii) a veteran, (iii) a Southside Community Redevelopment Area resident, (iv) a person who is homeless, (v) a person without a GED or high school diploma, (vi) a person who is a custodial single parent, (vii) a person who is emancipated from the foster care system, or (viii) a person who has received public assistance benefits within the 12 months preceding employment by the prime contractor or subcontractor." Stip. Facts ¶ 13 (Sec. 2-269).

21. The Disadvantaged Worker Ordinance defines "[p]ublic assistance benefits" as "unemployment benefits, Medicare or Medicaid benefits, or food assistance benefits as administered by the federal government or State of Florida." *Id.*

22. The Disadvantaged Worker Ordinance defines "[h]ours of work performed" as the "actual labor hours worked on a major construction project (including actual labor hours worked by disadvantaged workers). Hours of work performed shall not include hours worked by foremen, superintendents, owners and workers who are not subject to the responsible wage required by

section 2-277." *Id.*

23. Under the Disadvantaged Worker Ordinance, a contractor bidding on a major City construction project must:

> [Provide] a list of the resources which will be used to identify disadvantaged workers, a list of subcontractors proposed to be used for the project, total work hours estimated for the major construction project, a demonstration of 15 percent of the total work hours proposed to be performed by disadvantaged workers, and a description of the work to be performed by the disadvantaged workers.

Stip. Facts ¶ 13 (Sec. 2-270(b)).

24. Under of the Disadvantaged Worker Ordinance, "[t]he prime contractor shall pay disadvantaged workers it employs for a major construction project, and shall require its subcontractors who employ apprentices for a major construction project to pay such disadvantaged workers, at the hourly rates set forth in section 2-277." Stip. Facts ¶ 13 (Sec. 2-270(c)).

25. Under the Disadvantaged Worker Ordinance, "[t]he contract for a major construction project between the City and the prime contractor shall include a provision requiring the prime contractor to comply with the requirements of this division and shall provide that the failure of the prime contractor to comply with such requirements may result in consequences for noncompliance." Stip. Facts ¶ 13 (Sec. 2-270(g)).

26. The Disadvantaged Worker Ordinance also provides that a contractor who fails to comply these requirements will receive a penalty of increasing severity, as follows:

> a. For the first failure to comply with the requirements of this division and associated contractual requirements - the prime contractor will forfeit from the retainage the dollar value of the difference between (i) 15 percent of the dollar value of the hours of work performed and (ii) the dollar value of the labor hours actually performed by disadvantaged workers during the major construction project.

b. For the second failure to comply with the requirements of this division and associated contractual requirements - the prime contractor will be debarred from responding to solicitations for all City contracts for one year.

c. For the third failure to comply with the requirements of this division and associated contractual requirements - the prime contractor will be debarred from responding to solicitations for all City contracts for three years.

Stip. Facts ¶ 13 (Section 2-270(k)(2)(a)-(c)).

The City Incorporates the "Wage" Ordinance into both of the challenged Ordinances

27. In Section 2-277, the City enacted an ordinance entitled "Responsible wage for certain construction contracts" which requires that:

> Every contractor shall pay, and shall ensure that all subcontractors pay, no less than the hourly wage for each craft or trade under the most recent Davis-Bacon Act wage rates listed for Pinellas County to each employee for each hour of covered work performed by that employee. In the event that a craft or trade does not have an hourly wage, the contractor shall submit a request for a wage determination to the United States Department of Labor. Prior to receiving a response from the United States Department of Labor, the contractor shall pay or ensure that all subcontractors pay each employee for each hour of covered work at the hourly wage for a comparable craft or trade that currently exists as determined by the POD. In the event that the hourly wage for a craft or trade under the most recent Davis-Bacon Act wage rates listed for Pinellas County is less than the living wage set forth in this division, then every contractor shall pay, and shall ensure that all subcontractors pay no less than living wage set forth in this division to each employee for each hour of covered work performed by that employee.

Stip. Facts ¶ 14 (Sec. 2-277(a) (the "Wage Ordinance")).

28. The Wage Ordinance is incorporated into both the Apprentice Ordinance and the Disadvantaged Worker Ordinance. Stip. Facts ¶ 14.

MEMORANDUM OF LAW

A. Summary Judgment Standard

The function of the summary judgment procedure is to expedite litigation and conserve resources when the record lacks sufficient evidence to justify a trial. *Fogel v. Staples the Office Superstore, Inc.*, 750 So. 2d 30, 32 (Fla. 2d DCA 1998). Rule 1.510 provides for entry of summary

judgment where "the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). In such cases, a motion for summary final judgment must be granted. *See Connell v. Sledge*, 306 So. 2d 194, 196 (Fla. 1st DCA 1975).

The moving party has the initial burden of establishing the absence of any ***genuine*** issue of ***material fact***. The term "genuine" means "a real as distinguished from a false or colorable" issue of material fact. *Harrison v. Consumers Mort. Co.*, 154 So. 2d 194, 195 (Fla. 1st DCA 1963). The phrase "material fact" means "[facts] which may affect the outcome of the case." *Encarnacion v. Lifemark Hosps. of Fla.*, 211 So. 3d 275, 277 (Fla. 3d DCA 2017); *see also Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.*, 964 So. 2d 261, 264 (Fla. 4th DCA 2007) ("An issue of fact is 'material' if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case.") (citation omitted).

Once the movant tenders competent evidence to support its motion, the non-movant is required to "come forward with counterevidence sufficient to reveal a genuine issue." *Golden Hills Golf & Turf Club, Inc. v. Spitzer*, 475 So. 2d 254, 254-55 (Fla. 5th DCA 1985). Although all reasonable inferences must be drawn in favor of the non-movant, the non-movant may not rely on bare, conclusory assertions in the pleadings to oppose summary judgment. *See, e.g., Bryant v. Shands Teaching Hosp. & Clinics, Inc.*, 479 So. 2d 165, 168 (Fla. 1st DCA 1985). "[I]t is never enough 'for the opposing party merely to assert that an issue does exist.'" *Fisel v. Wynns*, 667 So. 2d 761, 764 (Fla. 1996) (quoting *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979)). Also, summary judgment should be granted where the opposing evidence is either too incredible to believe or is without probative value, even if true. *Escobar v. Bill Currie Ford Inc.*, 247 So. 2d 311, 316 (Fla. 1971).

B. The municipal ordinance power is limited.

Article VIII, § 2(b) of the Florida Constitution and the Municipal Home Rule Powers Act, § 166.021, *et seq.*, Fla. Stat., provide municipalities with power to, among other things, "conduct municipal government, perform municipal functions and render municipal services[.]" Art. VIII, § 2(b), Fla. Const; §166.021(1), Fla. Stat. But, a municipal ordinance is invalid where either: (1) it is either expressly or impliedly preempted by state law; or (2) where there is no preemption, the ordinance directly conflicts with state law. *See D'Agastino v. City of Miami*, 220 So.3d 410, 421 (Fla. 2017); *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 927 (Fla. 2013); *Phantom of Brevard, Inc. v. Brevard Cty.*, 3 So. 3d 309, 314 (Fla. 2008). This is because local "ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993).

1. Municipalities cannot enact expressly- or impliedly-preempted ordinances.

Fla. Stat. Chap. 166 expressly imposes limitations on municipalities, and prohibits them from exercising any power that is expressly prohibited by law, the Constitution, or preempted to the State or county. Specifically, Fla. Stat. Sec.§ 166.021(3) provides, in relevant part:

> The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
> . . .
> (b) Any subject expressly prohibited by the constitution;
>
> (c) Any subject expressly preempted to state or county government by the constitution or by general law; and
>
> (d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.

§ 166.021(3), Fla. Stat.

The Florida Supreme Court has recognized that municipal powers may be preempted expressly or impliedly:

> Relevant here, a local government enactment may be inconsistent with state law where the Legislature has preempted a particular subject area. Florida law recognizes both express preemption and implied preemption. On one hand, express preemption requires a specific legislative statement—it cannot be implied or inferred—and the preemption of a field is accomplished by clear language. On the other hand, implied preemption occurs when the state legislative scheme is pervasive and the local legislation would present a danger of conflict with that pervasive scheme. In other words, preemption is implied when the legislative scheme is so pervasive as to virtually evidence an intent to preempt the particular area or field of operation, and where strong public policy reasons exist for finding such an area or field to be preempted by the Legislature. Thus, preemption does not require explicit words so long as it is clear from the language utilized that the Legislature has clearly preempted local regulation of the subject. The test for implied preemption requires that we look to the provisions of the whole law, and to its object and policy. Further, the nature of the power exerted by the Legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute are all vital to this determination. . . .
>
> Nevertheless, as we reemphasized in *City of Palm Bay*, ***because the Legislature is ultimately superior to local government*** under the Florida Constitution, ***preemption can arise even where there is no specifically preclusive language***.

D'Agastino, 220 So. 3d at 420-21 (internal quotes, brackets, and citations omitted) (e.s).

Thus, a municipality may not legislate concurrently with the Legislature on any subject preempted by state law. *Cf. City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006).

2. Also, municipalities cannot enact ordinances that conflict with statutes.

"Under Florida law, a separate and distinct way for a local enactment to be inconsistent with state law is where the local enactment conflicts with a state statute." *D'Agastino*, 220 So. 3d at 421 n.8 (citing *Sarasota All. For Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 885-86 (Fla. 2010)). Even though the Florida Legislature and municipalities may have concurrent power to legislate in certain areas, "concurrent power does not mean equal power." *City of Palm Bay*, 114 So. 3d at 929. "The critical phrase of article VIII, section 2(b) [of the Florida Constitution] —

'except as otherwise provided by law'— establishes the constitutional superiority of the Legislature's power over municipal power. Accordingly, municipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." *Id.* at 928 (internal quotation marks and brackets omitted); *see also D'Agastino*, 220 So. 3d at 421 ("We further reaffirmed in *City of Palm Bay* that the language 'except as otherwise provided by law' contained in the constitutional provision "establishes the constitutional superiority of the Legislature's power over municipal power.").

The Florida Supreme Court has long "recognized that where concurrent state and municipal regulation is permitted, 'a municipality's concurrent legislation must not conflict with state law.'" *City of Palm Bay*, 114 So. 3d at 928 (quoting *Thomas v. State*, 614 So.2d 468, 470 (Fla. 1993)); *see also Phantom of Brevard, Inc.*, 3 So. 3d at 314. In other words, "[a] municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden." *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972).

"Such 'conflict preemption' comes into play 'where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute.'" *City of Palm Bay*, 114 So. 3d at 928 (quoting 5 McQuillin Mun. Corp. § 15:16 (3d ed. 2012)). An ordinance impermissibly conflicts with a state statute where "the local ordinance cannot coexist with the state statute." *Orange County v. Singh*, 268 So. 3d 668, 674 (Fla. 2019) (quoting *Phantom of Brevard*, 3 So. 3d at 314). In short, "[t]he test of conflict between a local government enactment and state law is whether one must violate one provision in order to comply with the other." *Browning*, 28 So. 3d at 888 (internal quotations and citations omitted); *see also City of Orlando v. Udowychenko*, 98 So. 3d 589, 597 (Fla. 5th DCA 2012).

When a municipal "ordinance flies in the face of state law" or cannot be reconciled with state law, the ordinance "cannot be sustained." *Barragan v. City of Miami*, 545 So. 2d 252, 255 (Fla. 1989). Where such an inconsistent ordinance has been enacted, it "must be declared null and void." *Hillsborough Cty. v. Fla. Rest. Ass'n, Inc.*, 603 So. 2d 587, 591 (Fla. 2d DCA 1992). Application of the foregoing principles leads to the inescapable conclusion that the City lacks the power to enact either the Apprenticeship Ordinance or the Disadvantaged Worker Ordinance. As a matter of law, both must be declared null and void.

C. ABC Gulf is Entitled to Summary Judgment on Count I Because the Apprenticeship Ordinance is Preempted by and Conflicts with Fla. Stat. Chap. 446.

The Apprenticeship Ordinance is preempted by and irreconcilably conflicts with Fla. Stat. Chap. 446. This alone renders the Apprenticeship Ordinance null, void, and unenforceable.

1. The Apprenticeship Ordinance irreconcilably conflicts with core provisions of Fla. Stat. Chap. 446.

Fla. Stat. Chap. 446, titled "Job Training," expressly regulates, monitors, promotes, and otherwise maintains Florida "apprenticeships" and "preapprenticeships." §§446.011, Fla. Stat., *et seq.* Multiple provisions of Fla. Stat. Chap. 446 provide Florida's Department of Education ("DOE") with ***sole*** responsibility for establishing and maintaining apprenticeship requirements. This Chapter also expressly tasks the DOE with developing, promoting and monitoring apprenticeship program standards and policies throughout the State to ensure consistent standards and enforcement. These statutes preempt the Apprenticeship Ordinance, and render it void.

Among other things, Fla. Stat. Chap. 446 expressly provides:

- "It is the intent of the Legislature that the [DOE] have ***responsibility*** for the development of the apprenticeship and preapprenticeship ***uniform*** minimum standards for the apprenticeable trades[.]" §446.011(2), Fla. Stat. (e.s.);
- "It is the further intent of ss. 446.011-446.092 that the [DOE] ensure quality training through the adoption and enforcement of ***uniform*** minimum standards and that the [DOE] promote, register, monitor, and service apprenticeship and

training programs and ensure that the programs adhere to the standards." §446.011(3), Fla. Stat. (e.s.);

- "The [DOE] ***shall***: (1) Establish uniform minimum standards and policies governing apprentice programs and agreements. The standards and policies ***shall govern*** the terms and conditions of the apprentice's employment and training, including the quality training of the apprentice for, but not limited to, ***such matters as ratios of apprentices to journeyworkers***, safety, related instruction, and on-the-job training[.]" §446.032(1), Fla. Stat. (e.s.);[2]

- "[The DOE's uniform standards] ***may not include*** rules, standards, or guidelines that require the use of apprentices and job trainees on state, county, or municipal contracts." *Id.* (e.s.);

- "It is the intent of the Legislature that this act ***not require*** the use of apprentices on construction projects financed by the state or any county, municipality, town or township, public authority, special district, municipal service taxing unit, or other agency of state or local government." §446.011(4), Fla. Stat. (e.s); and

- [W]henever any government or agency of government employs, of its own choice, apprentices or employs contractors who employ apprentices, the behavior of the government and the contractors employed by the government ***shall be governed by the provisions of this act.***" § 446.011(4), Fla. Stat. (e.s.).

A plain-language review of the above unambiguous provisions make a few things clear. First, the Legislature tasked the DOE, and ***only*** the DOE, with developing, promoting, monitoring, servicing, and ensuring compliance with uniform minimum apprenticeship and preapprenticeship standards. §§446.011(2), (3), Fla. Stat. Second, the DOE's exclusive uniform standards "shall" or ***must***[3] govern apprentice-to-journeyworker ratios and other terms and conditions of apprentice employment and training, and ***cannot*** require apprentices on government-funded projects. §446.032(1), Fla. Stat. Third, the Legislature expressly intended ***not*** to require municipalities, like City, to use apprentices in publicly-funded construction projects. §§446.011(4), Fla. Stat. And

[2] "Journeyworker" means "a person working in an apprenticeable occupation who has successfully completed a registered apprenticeship program or who has worked the number of years required by established industry practices for the particular trade or occupation." §446.21(4), Fla. Stat.
[3] *See, Townsend v. R.J. Reynolds Tobacco Co.*, 192 So.3d 1223, 1229 (Fla. 2016) ("Generally, the word `shall' is interpreted as mandatory in nature.").

fourth, if municipalities, like the City, wish to employ apprentices or contractors who employ apprentices, they ***must*** comply with Fla. Stat. Chap. 446. §§446.011(4) Fla. Stat.

Nothing in Fla. Stat. Chap. 446 permits the City to require apprentices. To the contrary, Fla. Stat. Chap. 446 prohibits the entity solely responsible apprenticeship regulation, the DOE, from requiring apprentices on municipal projects. The Legislature both ***requires*** the City to comply with Fla. Stat. Chap. 446, and ***expressly intended*** that Fla. Stat. Chap. 446 ***not*** require apprentices. Accordingly, the City simply ***cannot*** require apprentices on its projects. The Apprentice Ordinance is preempted by and expressly conflicts with Fla. Stat. Chap. 446. It must be declared void.

Regardless, in direct contravention of the Florida Legislature's clear and express directives, the City's Apprenticeship Ordinance seeks to ***require*** that at least 15 percent of all hours of work performed on the City's major construction projects be performed by apprentices employed by the prime contractor or its subcontractors. Moreover, that Ordinance impermissibly sets forth other specific criteria and requirements that directly conflict with Fla. Stat. Chap. 446, including those for an individual to qualify as an apprentice under the Ordinance. *See* Sec. 2-263.

Fla. Stat. Chap. 446 expressly governs the City's employment of contractors who employ apprentices (Fla. Stat. Sec. 446.011(4)) and preempts the Apprenticeship Ordinance in a number of ways. First, Fla. Stat. Sec. 446.011(4)'s prohibition against requiring apprentices on municipal construction projects preempts the Apprenticeship Ordinance's requirement that 15% of all hours on major City construction projects be performed by apprentices. Second, that Apprenticeship Ordinance requirement is also preempted by Fla. Stat. Sec. 446.032(1), which prohibits the uniform apprenticeship standards from requiring apprentices on municipal contracts. *See* Sec. 2-263. Third, the DOE's exclusive responsibility for developing the apprentice-to-journeyworker ratio under Fla. Stat. Sec. 446.032(1) preempts the Apprenticeship Ordinance's arbitrary

establishment of 15% to 85% ratio of apprentices hours to other hours on major City construction projects. Fourth, Fla. Stat. Sec. 446.021(2)'s definition of "apprentice" and Fla. Stat. Sec. 446.021(6)'s definition of "apprenticeship program" preempts the Apprenticeship Ordinance's attempt to rewrite, and broadly expand, the definition of "apprentice" to impermissibly include "any person who is participating in an ***industry certification*** training program, company sponsored training program or an on-the-job training program" within the definition of "Apprentice." Sec. 2-262 (e.s.). The Apprenticeship Program then injects ambiguity into its preempted and impermissibly-overbroad "apprentice" definition by defining "industry certification" as "a process through which persons are assessed by an independent, third-party certifying entity using predetermined standards for knowledge, skills, and competencies, resulting in an award of a credential that is recognized by the industry." Stip. Facts ¶ 10 (Sec. 2-262).

Incredibly, the Apprenticeship Ordinance acknowledges these conflicts and attempts to mandate compliance with the inferior Apprenticeship Ordinance over controlling state statutes:

> Compliance with federal and state regulations. The provisions of this division shall be construed according to and in conformity with state, federal, and local laws concerning the ***solicitation and awarding of contracts***. Where a major construction project involves the expenditure of state or federal funds, the POD [Person Officially Designated] shall comply with such state or federal law and authorized regulations which are mandatorily applicable, including those which dictate that the provisions of this division may not be required on a particular project.

Sec. 2-263(m) (e.s.). Notably absent is ***any*** express requirement that the Apprenticeship Ordinance comply with job training or apprenticeship laws, like Fla. Stat. Chap. 446. Rather, the Apprenticeship Ordinance's purported "compliance with state law" provision requires compliance with state laws directed to solicitation and bidding of public contracts on all projects, and compliance with all other state laws (e.g. Fla. Stat. Chap. 446) ***only*** where a major project involves

"state or federal funds." *Id.* But Fla. Stat. Chap. 446 applies to ***all*** municipal projects, not just those involving state or federal funding. *See, e.g.*, §§ 446.011(4), 446.032(1), 446.091, Fla. Stat.

By requiring the City's POD to comply with all state laws on ***only*** those projects receiving state or federal funding, the City is flaunting its non-compliance with Fla. Stat. Chap. 446 on major municipally-funded projects, and improperly attempting to elevate its inferior local ordinance over Fla. Stat. Chap. 446. That is patently improper because "local governments lack the authority to craft their own exceptions to general state laws." *City of Palm*, 114 So. 3d at 929 (internal citation and quotation marks omitted). Because the City's Apprenticeship Ordinance impermissibly attempts to create an exception to Chapter 446, it must be declared invalid. *See id.*

In short, the Legislature expressed in no uncertain terms that it intended for the DOE, and ***only*** the DOE, to "have responsibility for the development of the apprenticeship and preapprenticeship uniform minimum standards for the apprenticeable trades" and for ensuring quality training through enforcement of the DOE's uniform standards. §§446.011(2)-(3), Fla. Stat.; *see also* §§446.032(1), Fla. Stat; §446.011(4), Fla. Stat. ("the behavior of the government and the contractors employed by the government ***shall*** be governed by the provisions of this act [Fla. Stat. Chap. 446]." (e.s.)). The City's Apprenticeship Ordinance irreconcilably conflicts with the Legislature's express directives in Fla. Stat. Chap. 446 by expanding the Legislature's prescribed definition of who may be considered an apprentice, thereby effectively lowering the DOE's uniform minimum standards, oversight, and training requirements for apprentices, which standards and requirements the Florida Legislature expressly reserved to the authority of the DOE. §§ 446.011(2)-(3), 446.021, 446.032(1), Fla. Stat.; Stip. Facts ¶ 10 (Sec. 2-262). It must be declared null and void

2. The Apprenticeship Ordinance also conflicts with regulations duly-enacted in accordance with Fla. Stat. Chap. 446 which have the effect of law.

In accordance with the Legislature's express mandate, the DOE has established regulations governing apprenticeship standards statewide that are codified in Rule 6A-23.001 through 23.011 of the Florida Administrative Code. These duly-enacted regulations "have the effect of law[.]" *State v. Jenkins*, 469 So. 2d 733, 734 (Fla. 1985) (citing *Florida Livestock Board v. Gladden*, 76 So. 2d 291 (Fla. 1954). Notably, every requirement within the City's Apprenticeship Ordinance fundamentally and irreconcilably conflicts with the corresponding requirements of Rule 6A-23, F.A.C. *See generally* R. 6A-23, F.A.C.; *cf.* Sec. 2-263. Of particular note, Rule 6A-23, F.A.C.'s provisions regarding the definition of "apprentice," the wage rate requirements for apprentices, and the required ratio of journeyworkers to apprentices differ significantly and incompatibly from the corresponding provisions contained in the City's Apprenticeship Ordinance.

For example, Rule 6A-23.004(e), F.A.C. states that for an apprenticeship program to be approved under state law, "[a] ***progressively increasing schedule of wage rates*** is to be paid to the apprentice, consistent with the skill acquired, which shall be expressed in percentages of the established journeyworker hourly rate." *Id.* (e.s.). The City's Apprenticeship Ordinance plainly conflicts with this regulation by requiring all apprentices to be paid the full prevailing Davis-Bacon Act wage for the apprentice's specific craft or trade. Stip. Facts ¶ 14 (Sec. 2-277).

Also, Rule 6A-23.004(2)(g), F.A.C. dictates that the initial ratio of apprentices to journeyworkers for construction-related employers may not be more than ***one*** apprentice to the participating employer in ***each*** apprenticeable occupation. *Id.* The Apprenticeship Ordinance conflicts with this regulation by requiring at least ***15%*** of the hours worked on a major construction project to be performed by apprentices. Because the Apprenticeship Ordinance irreconcilably conflicts with Rule 6A-23 of the F.A.C., it must be declared null and void. *See Browning*, 28 So.

3d at 888; *see also City of Orlando v. Udowychenko*, 98 So. 3d 589, 597 (Fla. 5th DCA 2012) ("The test of conflict between a local government enactment and state law is whether to comply with one provision, a violation of the other is required.") (citations omitted).

3. The Apprenticeship Ordinance also conflicts with Legislature's intention that apprenticeship programs be registered through local apprenticeship sponsors.

When enacting Fla. Stat. Chap. 446, the Legislature envisioned that the DOE would implement apprenticeship programs through registered "local apprenticeship sponsors." *See* §§ 446.021(2), (5); 446.032(2)(a), (3); 446.041; 446.071, Fla. Stat.[4] The DOE must approve a "local apprenticeship sponsor" upon determining that the sponsor meets all of the DOE's standards. § 446.071(1), Fla. Stat. The DOE is also required to "[c]ooperate with and assist local apprenticeship sponsors in the development of their apprenticeship standards and training requirements." § 446.041(8), Fla. Stat. Significantly, while Fla. Stat. Chap. 446 permits the DOE to "grant a variance" from its uniform apprenticeship standards if the local sponsor makes a "showing of good cause," such variances are limited to "nonconstruction trades." § 446.071(3), Fla. Stat. Fla. Stat. Chap. 446's local apprenticeship sponsor provisions further evidence the Legislature's intent that the uniform sponsorship standards and policies apply throughout Florida, and that local bodies must work with the DOE to implement those uniform standards and policies.

The Apprenticeship Ordinance flies in the face of the Legislature's clear intention to occupy the subject are of apprenticeships. In addition to the matters analyzed above, Sections 2-263(b) – (n) and 2-277 contain numerous mandatory requirements governing the City and contractors actions with regard to the employment of apprentices, including a prevailing wage requirement for all apprentices, which differ from and conflict with the applicable requirements,

[4] "A local apprenticeship sponsor may be a committee, a group of employers, an employer, or a group of employees, or any combination thereof." § 446.071(2), Fla. Stat.

standards and policies established by the DOE under express authority of Chapter 446. Consequently, complying with the Apprenticeship Ordinance would require violating the uniform standards and policies established by the DOE under Chapter 446—which further invalidates and renders null and void the City's Apprenticeship Ordinance.

As the Florida Supreme Court has long-held, "[a] municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden." *Rinzler*, 262 So. 2d at 668. The Florida Supreme Court recently reaffirmed this mandate when resolving conflicting opinions addressing municipalities' ability to enact ordnances allowing red-light cameras. *See Masone v. City of Aventura*, 147 So. 3d 492 (Fla. 2014). In that case, the Florida Supreme Court held that certain red-light camera ordinance were invalid because they were preempted by Fla. Stat. Chap. 316.

Like Fla. Stat. Chap. 446's preemptive verbiage, Fla. Stat. Chaps. 316 and 318 contain detailed code provisions regulating a specific subject-matter (traffic regulation). Fla. Stat. Chap. 316 contains preemptive provisions similar to those found in Fla. Stat. Chap. 446, including:

- "It is the legislative intent in the adoption of this chapter to make ***uniform*** traffic laws to apply throughout the state and its several counties and ***uniform*** traffic ordinances to apply in all municipalities. The Legislature recognizes that there are conditions which require municipalities to pass certain other traffic ordinances in regulation of municipal traffic that are not required to regulate the movement of traffic outside of such municipalities. Section 316.008 enumerates the area within which municipalities may control certain traffic movement or parking in their respective jurisdictions. This section shall be supplemental to the other laws or ordinances of this chapter and not in conflict therewith. ***It is unlawful for any local authority to pass or to attempt to enforce any ordinance in conflict with the provisions of this chapter.***" § 316.002, Fla. Stat. (e.s.); and

- "The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance on a matter covered by this chapter unless expressly authorized." § 316.007, Fla. Stat.

The *Masone* Court explained that while a municipality is given broad authority to enact

ordinances, such ordinances must yield to state statutes. The Court found that the subject ordinances handled red light violations in a manner that conflicted with the system established by Fla. Stat. Chaps. 316 and 318. Because the subject ordinances sought to impose punishment for matters "covered by" Chapter 316 (red-light violations), they could ***only*** be sustained as a valid exercise of municipal authority ***if*** expressly authorized by statute.

The *Masone* Court held this requirement was unmet by Fla. Stat. Sec. 316.008(1)(w), which grants authority for "regulating, restricting, or monitoring traffic by security devices," because it does not explicitly provide authority for local governments to adopt measures to punish conduct that is already subject to punishment under Chapters 316 and 318. As a result, the red-light ordinances were expressly preempted by state law, and therefore, null and void.

The *Masone* Court's analysis is applicable to here, and requires a declaration that Fla. Stat. Chap. 446 preempts the Apprenticeship Ordinance. Similar to Fla. Stat. Chap. 316, Fla. Stat. Chap. 446 includes a number of provisions which make clear that state law preempts any attempt by a municipality to regulate apprenticeships (including, but not limited to, efforts to mandate apprentices on municipal projects). In direct conflict with those preemptive provisions, the City has sought to require contractors, under threat of severe penalties, to insure that at least 15% of all hours worked on large City projects are performed by apprentices. It has also sought to impose other apprentice-related requirements. The Apprenticeship Ordinance's pronouncement that major City construction contract awards are conditioned on committing to the significant use apprentices directly and hopelessly conflicts with Fla. Stat. Chap. 446. Thus, it is preempted and void.

To summarize, Fla. Stat. Chap. 446 irreconcilably conflicts with, and therefore preempts, the Apprenticeship Ordinance. Accordingly, the Court should enter summary judgment in ABC Gulf's favor on Count I, and declare the Apprenticeship Ordinance null and void.

D. ABC Gulf is Entitled to Summary Judgment on Count II Because the City's Ordinances are Preempted by and in Conflict with Chapter 255, Florida Statutes.

Both the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance are preempted by Fla. Stat. Chap. 255, titled "Public Property and Publicly Owned Buildings." This alone renders the Disadvantaged Worker Ordinance, null, void, and unenforceable, and provides additional grounds for declaring the Apprenticeship Ordinance null, void, and unenforceable.

1. Public bidding laws require the City to award contracts to the lowest qualified bidder.

Fla. Stat. Chap. 255 codifies Florida's competitive bidding law, and requires public contracts to be awarded "to the lowest qualified and responsive bidder[.]" § 255.20(1)(d)(1), Fla. Stat. "Florida's competitive bid statutes were enacted for the benefit and protection of the public in that they are intended to ensure that the public receives the lowest and best price for goods and services and that public contracts are not awarded in an arbitrary and capricious manner." *Miami-Dade Cty. Sch. Bd. v. J. Ruiz Sch. Bus Serv., Inc.*, 874 So. 2d 59, 61 (Fla. 3d DCA 2004). "[P]ublic contracts ***must*** be awarded to effectuate this intent." *Id.* (e.s.); *see also City of Sweetwater*, 823 So. 2d at 801 ("There is a great public interest in ensuring that contracts be awarded to effectuate the intent of the competitive bid laws."). Moreover, "competitive bidding statutes must ***always*** be viewed with the public's protection in mind." *Eng'g Contractors Ass'n of S. Fla., Inc. v. Broward Cty.*, 789 So.2d 445, 450 (Fla. 4th DCA 2001) (e.s.).

Florida courts have repeatedly summarized Florida's competitive bid statutes as follows:

> Florida's competitive bid statutes . . . create a system by which goods or services required by public authorities may be acquired at the lowest possible cost. The system confers upon both the contractor and the public authority reciprocal benefits, and confers upon them reciprocal obligations. The bidder is assured fair consideration of his offer, and is ***guaranteed*** the contract if his is the lowest and best bid received. The principal benefit to the public authority is the opportunity of purchasing the goods and services required of it at the best price obtainable. Under

> this system, ***the public authority may not arbitrarily or capriciously discriminate between bidders, or make the bid based upon personal preference***.

City of Sweetwater, 823 So. 2d at 801; *Miami-Dade Cty.*, 874 So. 2d at 61; *Eng'g Contractors Ass'n*, 789 So. 2d at 450.

Florida courts recognize the public body's "wide discretion in soliciting and accepting bids, and subsequently awarding contracts, for public works on competitive bids." *City of Sweetwater*, 823 So. 2d at 802; *Eng'g Contractors Ass'n*, 789 So. 2d at 450. But, such discretion "***must*** be exercised based upon clearly defined criteria" and in view of the ***public's*** protection. *Id.* (e.s.).

Fla. Stat. Sec. 255.20 addresses local bids and contracts for public construction projects. Specifically, that statute requires municipalities to competitively bid and award contracts on projects estimated to cost more than $300,000.00. § 255.20(1), Fla. Stat.; *see City of Sweetwater*, 823 So. 2d at 802. The statute further states that if public construction work "[i]s to be awarded based on price, the contract ***must*** be awarded to the lowest qualified and responsive bidder in accordance with the applicable county or municipal ordinance or district resolution and in accordance with the applicable contract documents." § 255.20(1)(d)1, Fla. Stat. "A responsive bidder is one 'that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation.' " *Am. Eng'g & Dev. Corp. v. Town of Highland Beach*, 20 So. 3d 1000, 1001 (Fla. 4th DCA 2009) (quoting § 255.248(7), Fla. Stat.). Although the statute affords municipalities concurrent authority to enact "procedures for conducting the proposal process through the use of their . . . municipal ordinances," (*Emerald Corr. Mgmt. v. Bay Cty. Bd. of Cty. Comm'rs*, 955 So. 2d 647, 652 (Fla. 1st DCA 2007)), both the Apprenticeship Ordinance and Disadvantaged Worker Ordinances should be declared null and void because they conflict with the Florida competitive bidding statutes' express requirements.

2. The Apprenticeship Ordinance and Disadvantaged Worker Ordinance irreconcilably conflict with Fla. Stat. Chap. 255 by impermissibly elevating the City's policy objectives over the Legislature's mandate that public contracts be awarded to the lowest qualified responsive bidder.

Collectively, the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance attempt to place two preconditions on major construction contracts awarded by the City: (i) at least 15% of all hours of work must be performed by apprentices employed by the prime contractor or its subcontractors, and (ii) at least 15% of all hours of work must be performed by disadvantaged workers employed by the prime contractor or its subcontractors. Stip. Facts ¶¶ 10, 13 (Sec. 2-263(a); Sec. 2-270(a)). These ordinances were ***not*** enacted to enable the City to protect public funds by securing the lowest qualified bidder. *Miami Dade Cty.*, 874 So. 2d at 61; *City of Sweetwater*, 823 So. 2d at 802. Rather, they frustrate the Legislature's express directive that the ***only*** precondition to a municipal contract award is that the successful bidder be the lowest qualified bidder. § 255.20(1)(d)(1), Fla. Stat. Accordingly, both ordinances are preempted by Fla. Stat. Chap. 255, and must be declared void.

Neither the competitive bidding law, nor any other Florida law, requires contractors to employ "apprentices" or "disadvantaged workers" as a precondition to being awarded a public work contract. By attempting to require contractors to dedicate at least ***30%*** of all hours worked on major City construction projects to apprentices and disadvantaged workers, the City is attempting to impose its policy objectives over the Legislature's express intent that public contracts be awarded to the lowest qualified bidder. These preconditions frustrate the Legislature's stated intent by: (i) discouraging qualified would-be bidders from submitting what may be the lowest bid on major City construction projects, and (ii) requiring responsive qualified bidders to account for policy considerations that result in their bid no longer being the lowest bid.

The challenged ordinances' requirement that "apprentices" and "disadvantaged workers" be paid more than the wage required by law and dictated by the free market exacerbates these issues. Mandating payment of a certain prevailing wage for all "apprentices" and "disadvantaged workers" would have a significant adverse impact on the amount of the responsive bids, thereby preventing the City from obtaining the lowest qualified bid on its major construction projects. Accordingly, the policy-driven provisions of these ordinances irreconcilably conflict with the Legislature's directive in Fla. Stat. Chap. 255 that taxpayer-funded projects be awarded to the lowest qualified bidder. *See City of Palm*, 114 So. 3d at 928 (when a local ordinance "irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the [state] statute," the municipality's local ordinance is invalid.).

In sum, both of the City's challenged ordinances irreconcilably conflict with and are preempted by Fla. Stat. Chap. 255. They must be declared null, void, invalid, and unenforceable.

E. ABC Gulf is Entitled to Summary Judgment on Count III Because the City's Ordinances are Preempted by and in Conflict with Fla. Stat. Sec. 218.077.

Fla. Stat. Sec. 218.077 was enacted in 2003 to make Florida's minimum wage equal to the federal minimum wage. *City of Miami Beach v. Fla. Retail Fed'n, Inc.*, 233 So. 3d 1236, 1238 (Fla. 3d DCA 2017). "Section 218.077(2) of the Florida Statutes is a preemption statute that ***expressly prohibits*** political subdivisions of the state from establishing a minimum wage contrary to state or federal wage requirements." *Ultra Aviation Servs., Inc. v. Clemente*, 272 So. 3d 426, 428 (Fla. 3d DCA 2019) (e.s.). In pertinent part, Fla. Stat. Sec. 218.077 provides:

> (2) Except as otherwise provided in subsection (3), a political subdivision may not establish, mandate, or otherwise require an employer to pay a minimum wage, other than a state or federal minimum wage, to apply a state or federal minimum wage to wages exempt from a state or federal minimum wage, or to provide employment benefits not otherwise required by state or federal law.

§ 218.077(2), Fla. Stat.

By its plain and unambiguous language, Fla. Stat. Sec. 218.077 generally prohibits political subdivisions from passing or enforcing any ordinances that would require employers to pay wages or benefits over and above the minimum wages or benefits that are required by state and federal law. *See* § 218.077(2), Fla. Stat. Unquestionably, the City is subject to Fla. Stat. Sec. 218.077's preemptive limitations because it is a "political subdivision." § 1.01(8), Fla. Stat.

Regardless, the City has impermissibly sought to require contractors on major City construction projects to pay more than the federal minimum wage to "apprentices" and "disadvantaged workers" by enacting City Code Ordinance Sec. 2-277, which states:

> Every contractor shall pay, and shall ensure that all subcontractors pay, no less than the hourly wage for each craft or trade under the most recent Davis-Bacon Act wage rates listed for Pinellas County to each employee for each hour of covered work performed by that employee. In the event that a craft or trade does not have an hourly wage, the contractor shall submit a request for a wage determination to the United States Department of Labor. Prior to receiving a response from the United States Department of Labor, the contractor shall pay or ensure that all subcontractors pay each employee for each hour of covered work at the hourly wage for a comparable craft or trade that currently exists as determined by the POD. In the event that the hourly wage for a craft or trade under the most recent Davis-Bacon Act wage rates listed for Pinellas County is less than the living wage set forth in this division, then every contractor shall pay, and shall ensure that all subcontractors pay no less than living wage set forth in this division to each employee for each hour of covered work performed by that employee.

Sec. 2-277(a).

Any contention that the above ordinance is permitted by Fla. Stat. Sec. 218.077(3)'s exceptions to Fla. Stat. Sec. 218.077(2)'s general prohibition would be utterly without merit. Under Fla. Stat. Sec. 218.077(3), only three types of employees may be paid more than the federal minimum wage:

> 1. [E]mployees of the political subdivision;
>
> 2. [E]mployees of an employer contracting to provide goods or services for the political subdivision, or for the employees of a subcontractor of such an employer, under the terms of a contract with the political subdivision; or

3. [E]mployees of an employer receiving a direct tax abatement or subsidy from the political subdivision, as a condition of the direct tax abatement or subsidy.

§218.077(3)(a)1.-3. Under binding Florida Supreme Court case law, these "exceptions or provisos should be ***narrowly and strictly*** construed." *Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097, 1100 (Fla. 1990) (e.s.). Indeed, "any [exception to a general prohibition] is ***construed strictly against the one who attempts to take advantage of the exception*** [i.e., the City]." *State v. Nourse*, 340 So. 2d 966, 969 (Fla. 3d DCA 1976) (e.s.). "[U]nless the right to the exception is ***clearly apparent*** in the statute, no benefits thereunder will be permitted. Any ambiguity in an exception statute is normally construed in a manner that restricts the use of the exception." *Id.* (e.s.).

Because the first and the third exceptions to Fla. Stat. Sec. 218.077(2) are unquestionably inapplicable to this case, City Code Ordinance Sec. 2-277 is preempted unless it is "clearly apparent" that Fla. Stat. Sec. 218.077(3)(a)2. applies here. Simply stated, it does not.

By its express terms, that exception allows the City to establish a minimum wage other than the state or federal minimum wage for ***only*** "the employees of an employer contracting to provide goods or services for the political subdivision, or for the employees of a subcontractor of such an employer, ***under the terms of a contract with the political subdivision***." *Id.* (e.s.). Per its plain language, that exception ***only*** allows for a higher minimum wage to be imposed as a ***term in a qualifying contract*** between the City and an individual employer which allows for a higher required minimum wage to be negotiated and included as a contractual term on a case-by-case basis taking into account the specific circumstances, costs, and needs of the particular project, employers, and workers. *See Ultra Aviation Servs.*, 272 So. 3d at 429 (holding Fla. Stat. Sec. 218.077(3)(a)2. did not apply to the county's unlawful Living Wage Ordinance). It ***does not*** give the City authority to institute an across-the-board city-wide ordinance raising the minimum wage for all members of a specific subset of workers.

Accordingly, City Code Ordinance Sec. 2-277 (which is part of both the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance) hopelessly and irreconcilably conflicts with Fla. Stat. Sec. 218.077(2). Thus, it is preempted and must be declared null and void.

F. ABC Gulf is Entitled to Summary Judgment on Count IV Because the City's Ordinances Violate the Equal Protection Clause of the Florida Constitution.

The Florida Constitution's Equal Protection Clause, Article I, Section 2, provides: "All natural persons, female and male alike, are equal before the law and have inalienable rights among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property." *Id.* "Under the Equal Protection Clause, persons who are similarly situated may not be classified and treated differently because 'the Constitution neither knows nor tolerates classes among citizens.' " *Brandon-Thomas v. Brandon-Thomas*, 163 So. 3d 644, 646 (Fla. 2d DCA 2015) (quoting *Romer v. Evans*, 517 U.S. 620 (1996)).

For decades, it has been "settled law that each of the personal liberties enumerated in the Declaration of Rights of the Florida Constitution is a fundamental right." *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004). Indeed, "[i]t is a basic truism of the law and reinforced by the United States Supreme Court that it is undoubtedly the ***right*** of every citizen of the United States to follow any lawful calling, business, or profession he may choose. . . . ***Occupational freedom***, the right to earn a living as one chooses, is a nontrivial ***constitutional right entitled to nontrivial judicial protection***." *Muratti-Stuart v. Dep't of Bus. & Prof'l Regulation*, 174 So. 3d 538, 540 (Fla. 4th DCA 2015) (internal quotes and citations omitted) (e.s.). Thus, the right to earn a living is a fundamental property right protected by Article I, Section 2 of the Florida Constitution.

Further, "[i]t is well settled that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional." *D.M.T. v. T.M.H.*, 129 So. 3d 320, 339 (Fla. 2013) (internal quotes and citations omitted). Thus, "[w]hen a statute or

ordinance operates to the disadvantage of a suspect class or impairs the exercise of a fundamental right, then the law must pass strict scrutiny." *State v. J.P.*, 907 So. 2d at 1109. "Under the Equal Protection Clause, [courts] also apply strict scrutiny in reviewing governmental action that infringes upon fundamental rights or discriminates based on suspect classifications." *Brandon-Thomas*, 163 So. 3d at 647 (citations omitted). To withstand strict scrutiny, a law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest. Strict scrutiny requires the City to demonstrate that each of the challenged Ordinances serve a compelling governmental interest and accomplish the intended goal through the use of the least intrusive means. *Id.* at 1110.

Both of the City's challenged ordinances infringe upon the fundamental occupational right to freedom of those ABC Gulf members and their employees who do not fall into the categories promoted by those statutes. ABC Gulf is entitled to a declaration that both the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance violate Florida's Equal Protection Clause of Article I, Section 2, and are therefore void.

G. ABC Gulf is Entitled to Summary Judgment on Count V Because the City's Ordinances Violate the Due Process Clause of the Florida Constitution.

The Florida Constitution's Due Process Clause, Article I, Section 9, provides: "No person shall be deprived of life, liberty or property without due process of law." *Id.* Occupational freedom, or the right to follow "any lawful calling, business, or profession," is among the rights protected by the Due Process Clause. *See Muratti-Stuart*, 174 So. 3d at 540.

The Due Process Clause provides both procedural and substantive protections. Procedurally, the Due Process Clause guarantees sufficient process (e.g., a hearing), before a person is deprived of a protected right. *Dept. of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991). Substantively, the Due Process Clause "limit[s] state authority to enact

measures that impinge on fundamental rights, even if enacted with appropriate procedural safeguards." *Brandon-Thomas*, 163 So. 3d at 646–47 (cites omitted).

Under the Due Process Clause, courts apply strict scrutiny to governmental actions that infringe on fundamental rights, i.e., a law infringing on a fundamental right ***must*** be stricken ***unless*** it is narrowly tailored to serve a compelling government interest through the least intrusive means. *See State v. J.P.*, 907 So. 2d at 1110; *Brandon-Thomas*, 163 So. 3d at 646-47.

Additionally, the Due Process Clause requires that laws which regulate "persons" give fair notice of the conduct that is required or prohibited. As recently explained by Judge Silberman:

> [W]hen a citizen challenges a statute as vague, any doubt as to a statute's validity should be resolved in the citizen's favor. Substantive due process implicates the vagueness doctrine, which requires that a statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct. The language of the statute ***must*** provide a definite warning of what conduct is required or prohibited, measured by common understanding and practice.

State v. Carrier, 240 So. 3d 852, 859-60 (Fla. 2d DCA 2018) (internal quotes and citations omitted) (e.s.). This clarity requirement is essential to the protections provided by the Due Process Clause and requires the invalidation of laws or ordinances that are impermissibly vague.

Thus, the Due Process Clause requires the City to provide regulated parties, like ABC Gulf's contractor members, notice of what is required of them so they may act accordingly. The Due Process Clause also provides that clear guidance is necessary so that those enforcing the law or ordinance do not act in an arbitrary or discriminatory way.

The Apprenticeship Ordinance, the Disadvantaged Worker Ordinances, and the Wage Ordinance which is incorporated into those Ordinances violate the Due Process Clause because they are impermissibly vague. Under the Apprenticeship Ordinance, contractors who enter into major construction contracts with the City must ensure that at least 15% of all hours of work on the project is performed by "apprentices" employed by the prime contractor or its subcontractors.

Stip. Facts ¶ 10 (Sec. 2-263(a)). Under the Disadvantaged Worker Ordinance, contractors who enter into construction contracts with the City on major projects must also ensure that at least 15% of all hours of work on the project is performed by "disadvantaged workers" employed by the contractor or its subcontractors. Stip. Facts ¶ 13 (Sec. 2-270(a)). The Ordinances further provide that contractors who violate the Ordinances are subject to stiff penalties, including forfeiture of retainage funds and debarment from "all City contracts" for up to three years. Stip. Facts ¶¶ 10, 13 (Sec. 2-263(k)(2); Sec. 2-270(k)(2)).

Notwithstanding the foregoing, the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance go on to state: "[w]here a major construction project involves the expenditure of state or federal funds, the POD [Person Officially Designated] shall comply with such State or federal law and authorized regulations which are mandatorily applicable, including those which dictate that the provisions of this division may not be required on a particular project." Stip. Facts ¶¶ 10, 13 (Sec. 2-263(m); Sec. 2-270(m)). The foregoing provisions appear to be the City's attempt to create a "catch-all" provision that calls into question when, if, and to what extent the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance apply in light of unspecified state or federal laws that may dictate that "the provisions of" the Ordinances "may not be required on a particular project." As a result, the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance are ambiguous, confusing, and impermissibly vague. Contractors contemplating or actually bidding on a major construction project do not have reasonable notice of if, and to what extent, the provisions of the Ordinances apply to any specific construction project.

Also, both the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance are impermissibly vague because they fail to provide clear guidance to those enforcing the Ordinances to ensure that enforcement is not arbitrary or discriminatory. Both the Apprenticeship and

Disadvantaged Worker Ordinances state that "[t]he prime contractor shall pay apprentices it employs for a major construction project, and shall require its subcontractors who employ apprentices for a major construction project to pay such apprentices, at the hourly rates set forth in section 2-277." Sec. 2-263(c); Sec. 2-270(c). The Wage Ordinance requires that:

> Every contractor shall pay, and shall ensure that all subcontractors pay, no less than the hourly wage for each craft or trade under the most recent Davis-Bacon Act wage rates listed for Pinellas County to each employee for each hour of covered work performed by that employee. In the event that a craft or trade does not have an hourly wage, the contractor shall submit a request for a wage determination to the United States Department of Labor. Prior to receiving a response from the United States Department of Labor, the contractor shall pay or ensure that all subcontractors pay each employee for each hour of covered work at the hourly wage for a comparable craft or trade that currently exists as determined by the POD. In the event that the hourly wage for a craft or trade under the most recent Davis-Bacon Act wage rates listed for Pinellas County is less than the living wage set forth in this division, then every contractor shall pay, and shall ensure that all subcontractors pay no less than living wage set forth in this division to each employee for each hour of covered work performed by that employee.

Sec. 2-277(a).

But if there is no Davis-Bacon wage rate listed for Pinellas County for the craft or trade performed by an apprentice or disadvantaged worker, the contractor must request a wage determination from the U.S. Department of Labor, and while waiting for such determination, must pay such apprentice or disadvantaged worker at the hourly wage for a comparable craft or trade that currently exists as determined by the POD. That provision provides no guidance whatsoever on: (i) what is a "comparable craft or trade" for those positions lacking a Pinellas County Davis-Bacon wage rate; or (ii) what a contractor must do if a wage determination requested and received from the U.S. Department of Labor reveals that, during the pendency of the determination, the contractor had in good faith paid such apprentice(s) or disadvantaged worker(s) a lower wage

based on a "comparable craft or trade" hourly rate. This exposes contractor to penalties under the Ordinances for unpaid wage claims through no fault of their own.[5]

As a result, the Wage Ordinance incorporated into the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance are impermissibly vague and fail to provide reasonable notice of the required rates for all employed apprentices or disadvantaged workers on a project. This vagueness exposes such contractors to penalties and liability for unpaid wage claims through no fault of their own in violation of their due process rights. Because the Ordinances do not promote compelling governmental interests through the least intrusive means, they fail a strict scrutiny analysis. Accordingly, ABC Gulf is entitled to a declaratory judgement that the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance violate the Due Process Clause of the Florida Constitution and therefore are invalid, unenforceable, and without effect.

H. ABC Gulf is Entitled to Summary Judgment on Count VI Because the City's Ordinances Violate Section 218.735 of the Florida Statutes.

Both the Apprenticeship Ordinances and the Disadvantaged Worker Ordinance seek to require a contractor who fails to comply with either of them to forfeit from its retainage the difference between (i) 15% of the dollar value of the hours performed, and (ii) the dollar value of labor hours actually performed by apprentices or disadvantaged workers during the project. *See* Stip. Facts ¶¶ 10, 13 (Sec. 2-263(k)(2)(a); Sec. 2-270(k)(2)(a)).

That "aspir[ational]" (Stip. Facts ¶ 16) penalty conflicts with the plain and unambiguous language of Fla. Stat. Sec. 218.735, which limits local governments to withholding ten percent (10%) of a contractor's retainage until such time as the contractor reaches fifty percent (50%) completion, at which time the local government "must reduce to 5 percent the amount of retainage

[5] Perhaps this is one of the reasons why "The City has not recently enforced the Ordinances[.]" Stip. Facts ¶ 16.

withheld from each subsequent progress payment made to the contractor," and which provides ***no*** mechanism for causing a contractor to forfeit a portion of the retainage despite satisfactory completion of a project:

> (8)(a) With regard to any contract for construction services, a local governmental entity may withhold from each progress payment made to the contractor an amount ***not exceeding*** 10 percent of the payment as retainage until 50-percent completion of such services.
>
> (b) After 50-percent completion of the construction services purchased pursuant to the contract, the local governmental entity ***must*** reduce to 5 percent the amount of retainage withheld from each subsequent progress payment made to the contractor. For purposes of this subsection, the term "50-percent completion" has the meaning set forth in the contract between the local governmental entity and the contractor or, if not defined in the contract, the point at which the local governmental entity has expended 50 percent of the total cost of the construction services purchased as identified in the contract together with all costs associated with existing change orders and other additions or modifications to the construction services provided for in the contract. However, notwithstanding this subsection, a municipality having a population of 25,000 or fewer, or a county having a population of 100,000 or fewer, may withhold retainage in an amount not exceeding 10 percent of each progress payment made to the contractor until final completion and acceptance of the project by the local governmental entity.

§ 218.735(8)(a), (b) Fla. Stat. (e.s.).

Simply stated, Fla. Stat. Sec. 218.735 does not authorize a local government to, as a sanction for non-compliance with a local ordinance, "keep" a contractor's retainage (let alone up to 15% of such retainage). For large projects (like those subject to the Ordinances), ten percent of the contract price is a significant sum, and withholding such an amount impacts the contractor and its subcontractors, who rely on that sum as their "bread and butter" typically signifying a large part of their overhead and profit.

The Florida Legislature obviously had this in mind when enacting Fla. Stat. Sec. 218.735, balancing the needs of local governments to retain leverage to ensure project completion while at the same time limiting local governments from excessively impacting the pockets of its contractors and their subcontractors. Because forfeiture of all or part of a contractor's retainage would

significantly adversely affect contractors and their subcontractors and suppliers, the Legislature made no provision for local governments to essentially "keep" the contractor's retainage, as envisioned by the Ordinances, notwithstanding satisfactory completion of the project. Had the Legislature intended to provide such power to local governments, it certainly would have expressly said so. By specifically limiting the amount a local government can withhold in retainage, and making ***no*** provision for the local government to keep it altogether where the work is completed in a satisfactory manner, the Legislature has made clear that the punitive retainage forfeiture intended by the Ordinances is unlawful. *See e.g., Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) ("[u]nder the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another.").

Accordingly, ABC Gulf is entitled to summary judgment that both the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance violate Fla. Stat. Sec. 218.735, and therefore are invalid, unenforceable, and without effect.

CONCLUSION

In short, there are no genuine issues of material fact, and ABC Gulf is entitled to summary judgment as a matter of law on each count alleged in its Complaint. The Apprenticeship Ordinance, the Disadvantaged Worker Ordinance, and the prevailing wage requirements incorporated into both ordinance are preempted by controlling superior state statutes, and violate the Florida Constitution's Equal Protection Clause and Due Process Clause. They must be declared unconstitutional, invalid, null, and void.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Florida Courts E-Filing Portal which will automatically serve a copy via electronic

mail to **Joseph P. Partner**, Esq. (Joseph.Patner@stpete.org) and **Kenneth W. MacCollom**, Esq. (Kenneth.MacCollom@stpete.org), P.O. Box 2842, St. Petersburg, Florida 33731, on this 6th day of July, 2020.

Respectfully submitted,

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