



MEMORANDUM

Office of the City Attorney

070658

Phone: 334-5011/Fax 334-2229
Box 46

TO: Mayor and City Commissioners

DATE: November 26, 2007

FROM: City Attorney


CONSENT

SUBJECT: Kevin Daly and Carol Daly vs. City of Gainesville; Eighth Judicial Circuit, Court Case No. 01-2007-CA-4328

Recommendation: The City Commission authorize the City Attorney and/or Special Counsel if insurance coverage is available, to represent the City of Gainesville, in the case Kevin Daly and Carol Daly vs. City of Gainesville; Eighth Judicial Circuit, Court Case No. 01-2007-CA-4328

On November 8, 2007, the City was served with a Summons and Complaint filed by Kevin and Carol Daly in the Circuit Court. The Dalys challenge the City's off street parking, landlord tenant, and noise ordinances alleging they affect their property and liberty rights under the Florida Constitution to own and lease properties. The Dalys seek declaratory relief and costs.

Prepared by:


Stephanie M. Marchman,
Assistant City Attorney

Submitted by:


Marion J. Radson,
City Attorney

IN THE CIRCUIT COURT, EIGHTH
JUDICIAL CIRCUIT, IN AND FOR
ALACHUA COUNTY, FLORIDA.

CASE NO.: 01-07-CA-4328

DIVISION: K

A TRUE COPY
SADIE DARNELL-SHERIFF
ALACHUA COUNTY, FLORIDA
Served at 11 AM on the 20 07 Day
of Nov
BY [Signature]
As Deputy Sheriff

KEVIN DALY and
CAROL DALY,

Plaintiffs,

vs.

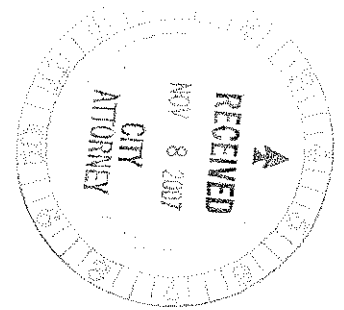
CITY OF GAINESVILLE

Defendant.

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Persons with a disability who need any accommodation in order to participate should call Jan Phillips, ADA Coordinator, Alachua County Courthouse, 201 E. University Ave., Gainesville, FL 32601 at (352) 337-6237 within two (2) working days of your receipt of this notice; if you are hearing impaired call (800) 955-8771; if you are voice impaired, call (800) 955-8770.

**SUMMONS
IMPORTANT**

THE STATE OF FLORIDA;
TO EACH SHERIFF OF THE STATE:



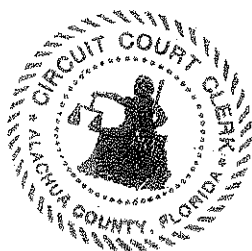
You are commanded to serve this summons and a copy of the complaint in this lawsuit on:

CITY OF GAINESVILLE
c/o Pegeen Hanrahan, Mayor
200 East University Avenue
Gainesville, FL 32601

Defendant is required to serve a written answer to said complaint on Sidney F. Ansbacher, Plaintiff's attorney, whose address is 50 North Laura Street, Suite 1100, Jacksonville, FL 32202, within twenty (20) days after service of this summons upon that defendant, exclusive of the day of service, and to file the original of same written defenses with the Clerk of this Court either before service on plaintiff's attorney or immediately thereafter. If a

defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint.

DATED October 23, 2007.



J. K. "Buddy" IRBY
ALACHUA COUNTY CLERK

By: D. Thomas
Deputy Clerk

SIDNEY F. ANSBACHER
GrayRobinson, P. A.
50 North Laura Street, Suite 1100
Jacksonville, Florida 32202

Attorney for Plaintiffs

COPY

IN THE CIRCUIT COURT, EIGHTH
JUDICIAL CIRCUIT, IN AND FOR
ALACHUA COUNTY, FLORIDA

CASE NO.: 01-07-CA-4328
DIVISION: K

KEVIN DALY and
CAROL DALY,

Plaintiff,

v.

CITY OF GAINESVILLE

Defendant.

COMPLAINT TO DECLARE INVALID PORTIONS OF
ORDINANCES WHICH AFFECT PLAINTIFFS' PROPERTY

Plaintiffs Kevin Daly and Carol Daly, husband and wife (Daly), sue Defendant, City of Gainesville, Florida (City), and state:

1. This is an action for declaratory relief pursuant to Ch. 86 of the Florida Statutes.
2. The Plaintiffs have resided in Alachua County, Florida, continually for decades. They leased property to principally college and university students there for much of that time. The Plaintiffs own the following described rental real estate: See Attached Exhibit "A."
3. The Defendant is a municipal corporation located in Alachua County, Florida.

4. As set forth in detail below, the Plaintiffs face an ever-increasing draconian set of ordinances, adopted by Defendant. The ordinances individually and *in pari materia*, materially affect rights protected under the Florida Constitution.

5. The below described ordinances of the Defendant impede materially Plaintiffs' property and liberty rights, protected by the Florida Constitution to own and to lease their properties.

COUNT I:

PARKING

6. Paragraphs 1 – 5 are incorporated by reference.

7. Defendant's putative parking ordinance, subsection 30-56(c)(4), purportedly authorizes the City to regulate off-street parking on, inter alia, residential yards. A copy is attached as Exhibit "B." This ordinance is an unlawful delegation of authority, as it does not relate to the City's transportation network. Further, there is no limitation in that ordinance to off-street parking on private property that the owner makes available for public travel or general and open public use. See, e.g., Fla. AGO 96-53; see also, *Kuvin v. City of Coral Gables*, 2007 Fla. App. 13015 (Fla. DCA3 2007).

8. Subsection 30-56(c)(4) is confiscatory, vague, arbitrary, discriminatory, illegal, unreasonable, unlawful, and unconstitutional, and has no relation to the public health, safety, morals, or general welfare of the City.

9. The Plaintiffs are in doubt as to their rights under subsection 30-56(c)(4), and their legal and equitable rights and privileges are affected, impaired, and endangered by that subsection. The Plaintiffs challenge the constitutionality and validity of that

subsection. Plaintiffs are entitled to have this court, by a declaratory decree, construe and determine the invalidity, illegality, and unconstitutionality of that subsection, and to have this Court, by a declaratory decree, adjudicate, and determine the rights of the Defendant to enforce subsection 30-56(c)(4) of City Ordinance through its administrative officers and agents (including but not limited to lay persons whom the City has authorized to enforce the ordinance).

WHEREFORE, Plaintiffs request: (1) declaratory relief holding that subsection 30-56(c)(4) is unconstitutional and void on its face; (2) costs; and (3) such further relief as may be meet and proper.

COUNT II:

NOISE ORDINANCE

10. Paragraphs 1 – 5 are restated.

11. The City's noise ordinance is codified at Chapter 15 of the City Code. The Plaintiffs are further challenging the validity and constitutionality of the following sections of Chapter 15 of the City Code: (i) The definition of "Plainly Audible," particularly regarding sounds or noises "that can be clearly heard by a person using his/her normal hearing faculties, at a distance of 200 feet or more from the real property line of the source of the sound or noise." (ii) Subsection 15-3(b), which purports to regulate sound limits, "which, if exceeded, will have a high probability of producing permanent hearing loss in anyone in the area where the sound levels are being exceeded." See attached Exhibit "C."

(1) The above-noted provisions of the Noise Ordinance are unreasonable, arbitrary, unconstitutional, unlawful, and confiscatory, in that they amount to a delegation of legislative power without adequate standards, and that no pattern or uniformity of plan can be gleaned from either section, which would save the Plaintiffs from arbitrary, discriminatory or capricious action on the part of the Defendant in attempting to deprive the Plaintiffs of their property without due process of law.

12. The Defendant is not bound by any standards or guides whatsoever in interpreting those subsections.

13. Those sections are void and unconstitutional and should be stricken under the "void for vagueness" rule.

14. The Plaintiffs are in doubt as to their rights under subsection 15-2 definition of "Plainly Audible," and subsection 15-3(b) of the City Code, and their legal and equitable rights and privileges are affected, impaired, and endangered by the that subsection. The Plaintiffs challenge the constitutionality and validity of each such subsection. Plaintiffs are entitled to have this court, by a declaratory decree, construe and determine the invalidity, illegality, and unconstitutionality of both subsections, and to have this Court, by a declaratory decree, adjudicate, and determine the rights of the Defendant to enforce subsection 15-2 definition of "Plainly Audible," and subsection 15-3(b) of the City Code through its administrative officers and agents (including but not limited to lay persons whom the City has authorized to enforce this ordinance).

WHEREFORE, Plaintiffs request: (1) declaratory relief holding that (a) subsection 15-2 definition of "Plainly Audible," and (b) subsection 15-3(b) of the City

Code are each facially unconstitutional and void; (2) costs; and (3) such further relief as may be meet and proper.

COUNT III.

LANDLORD-TENANT

15. Paragraphs 1 – 5 are restated.

16. By City Ordinance 070107, on July 15, 2007, the Defendant amended Section 14.5 of the City Code regulating landlords. See attached Exhibit “D.”

17. Among other material changes, the 2007 amendments imposed draconian, joint and general liability on both landlord, and tenants for multitudinous noise, off-street parking and other alleged violations of the City Code. See 14.5-2(C). Such liability results in “points,” where there are “repeated wrongdoings of violation and/or adjudication of guilt, finding of guilt with adjudication withheld, waiver of right to contest the violation or please of no contest”

18. Section 14.5-3 authorizes revocation of a landlord’s permit from the City to lease that dwelling unit after six or more points accumulate “during three consecutive annual (i.e., August 1 through July 31) permit periods”

19. As stated above, Plaintiffs lease to a principally student population. The average tenant stays no more than one (1) school year. It is highly probable that alleged offenses will have occurred up to three years prior to hearing under the landlord ordinance addressing accumulated points.

20. The permit point violation system is materially stricter than Ch. 83, Part II, Fla. Stat., entitled Residential Tenancies. Most significantly, the City may impose points

on numerous putative violations by tenants for which the Residential Tenant Act requires the landlord to give the tenant a seven (7) day cure period.

21. Further, the ordinance requires landlords to evict tenants in response to putative violations for which Ch. 83 requires a seven (7) day notice to cure.

22. The ordinance does not require any specific timeframe for notice to landlord, nor does it provide any hearing to a landlord until six (6) points have accumulated. As set forth above, hearing on a rolling three (3) year point basis will often occur one (1) to three (3) years after the student tenant has left.

23. Additionally, although landlords may not have hearing rights to contest points accumulated against tenants until six (6) points accrue within a rolling three (3) year period, landlords are compelled by Johnson v. Davis to notify prospective tenants of the accumulation of points and prospective loss of lease rights.

24. Accordingly, the point system unconstitutionally impairs landlords' due process rights to property and liberty, including but not limited to their contractual rights with tenants.

25. Additionally, the point system is an unlawful delegation of legislative authority to regulate residential tenancies.

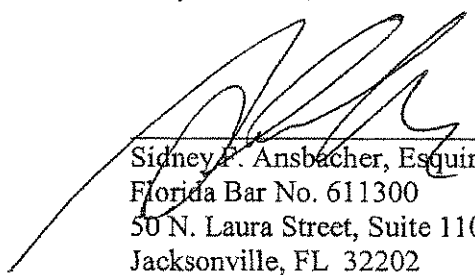
26. The ordinance purports to require residential landlords to evict tenants who create a public nuisance. This converts the discretionary eviction rights under Ch. 83, Fla. Stat., into a putative mandate. S. 83.52(7), Fla. Stat., allows a landlord to evict a tenant who creates a nuisance. This mandate is preempted by Ch. 83, Fla. Stat.

27. Further, the mandate to evict constitutes an attempt by the city to delegate to private landlords a prosecutorial function. I.E., the determination of and punishment for a public nuisance.

28. The Plaintiffs are in doubt as to their rights under section 14-5 of the City Code, and their legal and equitable rights and privileges are affected, impaired, and endangered by the that subsection. The Plaintiffs challenge the constitutionality and validity of that subsection. Plaintiffs are entitled to have this court, by a declaratory decree, construe and determine the invalidity, illegality, and unconstitutionality of that subsection, and to have this Court, by a declaratory decree, adjudicate, and determine the rights of the Defendant to enforce section 14-5 of the City Code through its administrative officers and agents.

WHEREFORE, Plaintiffs request: (1) declaratory relief holding that section 14-5 of the City Code is unconstitutional and void on its face; (2) costs; and (3) such further relief as may be meet and proper.

GrayRobinson, P.A.



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