Legislative # 180402B

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
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: 19-0007345-CI

Plaintiff,

v.

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

Defendant.

______________________________________/

PLAINTIFF'S REPLY IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Florida Gulf Coast Chapter Associated Builders & Contractors, Inc. ("ABC Gulf"),[1] through undersigned counsel and in accordance with the *Agreed Case Management Order*, files *Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment*, and states:

INTRODUCTION

1. Although the City agrees with ABC Gulf's undisputed material facts (City's Oppos. at 2[2]), it argues ABC Gulf is not entitled to summary judgment on any of its counts. The City's arguments are based on a misapprehension of both the applicable summary judgment standard and the substantive law applicable to the claims.

[1] For consistency, ABC Gulf uses the same abbreviations in this reply as was used in its summary judgment motion.

[2] Because the City declined to number the pages of its opposition, cites to the City's opposition are to the pages of the pdf of the City's opposition.

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2. In short, the challenged ordinances amount to a misuse of municipal powers in violation of the law. Summary judgment should be entered in ABC Gulf's favor, and the challenged ordinances should be declared null and void.

SUMMARY JUDGMENT STANDARD

The City improperly relies on a federal district court order based on Fed. R. Civ. P. 56 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) for the applicable summary judgment standard. City's Oppos. at 2. As recently recognized by the Second District Court of Appeal, "federal cases based on Federal Rule of Civil Procedure 56 as interpreted in *Celotex* 'are of limited precedential value in Florida summary judgment cases'[.]" *Wendel v. Mease Hosp.*, 291 So. 3d 1000, 1002 (Fla. 2d DCA 2020) (quoting *Byrd v. BT Foods, Inc.*, 948 So. 2d 921, 924 (Fla. 4th DCA 2007).

The City's reliance on *Devin v. Hollywood*, 351 So. 2d 1022 (Fla. 4th DCA 1976) for the summary judgment standard is equally misplaced. The phrase "summary judgment" is not even mentioned in that opinion.

The Court should rely on ABC Gulf's summary judgment standard. Summary Jmnt. Mot. at 7-8.

ARGUMENT[3]

I. THE FLORIDA LEGISLATURE HAS PREEMPTED THE APPRENTICESHIP ORDINANCE.

With respect to Count I, the City's argument is based on a mischaracterization of ABC Gulf's argument. Contrary to the City's contention (which is not supported by a specific cite to the summary judgment motion), ABC Gulf does ***not*** argue that it is entitled to summary judgment on Count I merely because "nothing in [Fla. Stat. Chap.] 446 * * * authorizes the City

[3] To facilitate review, this argument section mirrors the argument sections of the City's Response.

to require apprentices[.]" City's Oppos. at 3. Rather, ABC Gulf argues the Apprenticeship Ordinance is preempted by Fla. Stat. Chap. 446 because, among other things: (i) Fla. Stat. Chap. 446 occupies the entire field of developing, promoting, monitoring, servicing, and ensuring compliance with uniform minimum apprenticeship and preapprenticeship standards; (ii) the Apprenticeship ordinance expressly conflicts with the provisions of Fla. Stat. Chap. 446; and (iii) the Apprenticeship Ordinance expressly conflicts with the Florida Department of Education's ("FDOE") regulations duly-enacted pursuant to Fla. Stat. Chap. 446. Summary Jmnt. Mot. at 12-20.

The City's focus on the Chapter 446 lack of express language prohibiting municipal ordinances addressing apprenticeships is misplaced. The City acknowledges that preemption can arise via implied preemption even where there is no specifically preclusive language. City's Oppos at 3. But it overlooks that the test for such preemption requires the Court to look "to the provisions ***of the whole law***, and to its ***object and policy***[]" in determining whether local legislation would "present a ***danger*** of conflict with that pervasive scheme." *D'Agastino v. City of Miami*, 220 So. 3d 410, 420-21 (Fla. 2017) (e.s.); *see also*, *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

The City's argument relies on its unfounded assumption without analysis[4] that purported "minimum standards" legislation somehow allows municipalities to enact far-reaching ordinances like the Apprenticeship Ordinance regardless of the Legislature's intent to preempt the entire field. To the contrary, Florida courts have consistently held that local governments are preempted from regulating an area "well-covered" by existing statutes, even when those statutes only attempt to establish "minimum standards". *See, e.g*, *Masone v. City of Aventura*, 147 So. 3d

[4] The City's Opposition is devoid of any analogous cases on this issue.

492, 497 (Fla. 2014) (finding local ordinances "covered by" Florida statutes that fail to expressly authorize local ordinances in the subject field preempted by Florida law); *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779, 778 (Fla. 1st DCA 2016) (finding local ordinance dealing with insurance requirements for motor vehicles preempted by Florida law); *City of Orlando v. Udowychenko*, 98 So. 3d 589, 599 (Fla. 5th DCA 2012) (finding a local ordinance's "imposition of separate and additional penalties for running a red light…" to be impliedly preempted by Florida law).

While Fla. Stat. Chap. 446 may refer to "minimum standards" regarding apprenticeship regulations, the City overlooks or intentionally ignores that this statutory scheme expressly requires these standards be "***uniform***," and that the FDOE (***not*** municipalities) are tasked with developing regulations addressing apprenticeships and apprenticeship programs. § 446.011(2), Fla. Stat. (e.s.). Only the DOE is authorized to enact far-reaching apprenticeship regulations, including those addressing the registration and promotion of apprenticeship programs, and mandatory terms and conditions for agreements between contractors and apprentices. These mandatory terms and conditions address apprenticeship hours and wages, performance standards for apprentices and apprenticeship programs, and penalties for violating apprenticeship regulations. In light of the Legislature's express desire for uniformity, it is for the FDOE—***not*** municipalities—to establish standards for apprenticeable trades. The FDOE's standards alone must govern the uniform minimum standards applicable to all apprenticeable trades uniformly. *See* §§446.011-446.092, Fla. Stat. The FDOE's Legislatively-granted authority over apprenticeship standards irrefutably preempts the Apprenticeship Ordinance. As a result, the ordinance must be declared void.

The City also omits or intentionally ignores that the Apprenticeship Ordinance directly conflicts with, or at least "present[s] a danger of conflict" with, various provisions of both Fla. Stat. Chap. 446 and the FDOE's regulations. These conflicts include, but are not limited to: (i) Section 2-262 of the Apprenticeship Ordinance, which defines "apprentice" to include workers participating in an "industry certification training program", is in direct conflict with Section 6A-23.003(3) of the Florida Administrative Code, which requires apprentices to be individually registered in registered programs approved by the FDOE; (ii) Section 2-263(a) of the Apprenticeship Ordinance, which requires 15% of all hours of work be performed by apprentices, presenting, at least, a danger of conflict with Section 6A-23.004(g) of the Florida Administrative Code, which sets forth a mandatory apprentice-to-journeyworker ratio; and Section 2-777 of the Apprenticeship Ordinance, which requires apprentice wages to comply with prevailing Davis-Bacon Act minimums as opposed to the standard of "[a] progressively increasing schedule of wage rates" set forth by the FDOE in Section 6A-23.004(e) of the Florida Administrative Code.

In addition, the City fails to squarely address the statute's clear intent that the City cannot require apprenticeships to be used on local government projects. The Florida Legislature has decreed 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," subject to a limited exception not applicable here. §446.011(4), Fla. Stat. The Apprenticeship Ordinance conflicts with the express language of this statute by attempting to require apprentices on the City's construction projects. Accordingly, the Apprenticeship Ordinance is preempted, and ABC Gulf is entitled to Summary Judgment on Count I of its Amended Complaint.

It is the clear and expressed intent of the Florida Legislature that the FDOE's "uniform" regulations preempt the attempts of municipalities to establish unique apprenticeship standards and apprenticeship programs. But even if it does not (it does), the Apprenticeship Ordinance presents the danger of conflicting with Florida Legislature's pervasive regulatory scheme governing the development, preparation and monitoring of apprentices and apprenticeship programs. ABC Gulf is entitled to summary judgment on this count.

II. BOTH CHALLENGED ORDINANCES DIRECTLY CONFLICT WITH AND VIOLATE THE PUBLIC BIDDING LAWS, FLA. STAT. CHAP. 255.

With respect to Count II, both the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance conflict with the express language of and the Legislature's intent behind Florida's competitive bidding statutes. The City cannot credibly dispute that Florida's competitive bid statutes—which require municipalities to competitively bid and award contracts on all projects estimated to cost more than $300,000—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) (also holding that "public contracts ***must*** be awarded to effectuate this intent." (e.s.)); *see also City of Sweetwater v. Solo Const. Corp.*, 823 So. 2d 798, 801 (Fla. 3d DCA 2002) ("The principal benefit to the public authority is the opportunity of purchasing the goods and services required of it at the ***best price obtainable***." (e.s.); *Eng'g Contractors Ass'n of S. Fla., Inc. v. Broward Cty.*, 789 So. 2d 445, 450 (Fla. 4th DCA 2001) ("[C]ompetitive bidding statutes must ***always*** be viewed with the public's protection in mind." (e.s.)).

The limited discretion provided to municipalities awarding public contracts on competitive bids may only be utilized if based on "clearly defined criteria" that is not "exercised

arbitrarily or capriciously." *City of Sweetwater*, 823 So. 2d at 802. The City's reliance on the cases cited on this point are severely misplaced. For example, in *City of Sweetwater*, the Third District held that the municipality acted in an arbitrary and capricious manner in violation of Florida's competitive bidding laws when awarding a public contract to the contractor it deemed to be the "most responsible." *Id.*; *see also, Engineering Contractors Ass'n of S. Florida, Inc. v. Broward Cty.*, 789 So. 2d 445, 450-52 (Fla. 4th DCA 2001). Similarly misplaced is the City's reliance on *Department of Transportation v. Groves-Watkins Constructors*, 530 So. 2d 912 (Fla. 1988). That case merely stands for the proposition that the discretion given to state agencies in awarding public bids includes the discretion to completely reject all bids, assuming it does so on grounds that the project would be "too costly" under the received bids. *Id.* at 914. If anything, *Groves-Watkins* reinforces ABC Gulf's point—that the discretion afforded by Florida's competitive bidding laws to municipalities are limited by the intent of the Legislature to ensure public contracts are awarded in a way to ensure the "best price obtainable." *See City of Sweetwater*, 823 So. 2d at 801. The City has run afoul of both the letter and the spirit of Florida's competitive bidding laws by introducing arbitrary employment requirements resulting in increased costs as a condition to a public contract award. ABC Gulf is entitled to summary judgment on Count II of its Amended Complaint.

Equally misguided is the City's attempt to analogize the instant case to those addressing local-preference or disadvantaged ***business*** ordinances. While the competitive bidding statute ***expressly provides*** that local-preference ordinances and disadvantaged business ordinances may be excepted from the general "lowest responsive and responsible bidder" requirements of competitive bidding laws,[5] there is no such express exemption for apprenticeships or

[5] §255.20(1)(i), Fla. Stat.

disadvantaged ***worker*** ordinances. The Legislature's silence speaks volumes. *Young v. Progressive Southeastern Ins. Co.*, 753 So. 2d 80, 85 (Fla. 2000) ("Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another." (quoting *Moonlit Waters Apartments Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996)). It further confirms that local-preference guidelines and disadvantaged business requirements are the ***only*** requirements that can be considered consistent with the "lowest responsible and responsible bidder" rule underlying Florida's competitive bidding laws. *Cf.*, *id.* The Apprenticeship Ordinance and Disadvantaged Worker Ordinance are consistent with neither. Accordingly, they do not fit within the limited exception to the Florida competitive bidding laws' general requirements. ABC Gulf is entitled to summary judgment on its Count II.

But even if the challenged ordinances' employment requirements are within the authority granted to municipalities under competitive bidding laws (they are not), the should still be declared null and void because the City's criteria for determining a winning bid are not "clearly defined." *See Liberty Cty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982). Both Ordinances state that the contract "shall be awarded to the lowest responsive and responsible bidder ***or to the entity who is either determined to be the most qualified entity or whose proposal was deemed most advantageous to the City.***" § 2-270(f); § 2-263(f) (e.s.). Simply stated, the challenged ordinances' "most qualified" or "most advantageous" criteria improper for consideration under Florida's competitive bidding laws. *City of Sweetwater*, 823 So. 2d at 802 (holding that award of a public contract to the "most responsible bidder" was arbitrary and capricious); *Engineering Contractors Ass'n of S. Florida, Inc.*, 789 So. 2d at 450-52. Moreover, the City fails to define (let alone "clearly define") the "most qualified" or "most advantageous"

entity. The result is the epitome of the "arbitrary and capricious" standard that competitive bidding laws are specifically designed to protect against.

On this point, *Engineering Contractors Ass'n of S. Florida, Inc.* is instructive. In that case, Broward County enacted an ordinance implementing a procedure for awarding municipal contracts whereby a committee would rank contractors, based on various factors, and would then choose the lowest competitive bid from a short-list of contractors chosen by the committee based on those factors. *Id.* at 447. The Fourth District held that the ordinance conflicted with competitive bidding laws, and explained that "[u]ltimately, the contract is let not to the lowest responsible or lowest competent bidder, but instead to the lowest bidder among those contractors preferred by the selection committee. Such a result is contrary to the dictates of… competitive bidding statutes." *Id.* at 451.

The City's amorphous "most qualified" and "most advantageous" "criteria" are even less clear than the inadequate criteria invalidated by the *Engineering Contractors* Court. Here, the City does not include any factors from which to determine which bidder is "most qualified" or "most advantageous". That runs "contrary to the dictates of… competitive bidding statutes." *Id.*

In sum, both challenged ordinances violate Florida's competitive bidding laws in a variety of ways. Their onerous requirements are antithetical to purpose of competitive bidding laws—i.e., to ensure the lowest cost to the general public. They also operate outside the limited exceptions to the "lowest responsible bidder" requirements of Fla. Stat. Sec. 255.20(1)(i). Their vague criteria are the definition arbitrary and capricious. Accordingly, both challenged ordinances are preempted by Florida's competitive bidding laws. ABC Gulf should be granted summary judgment declaring they are both null and void.

III. THE MINIMUM WAGE REQUIREMENTS IN THE CITY'S ORDINANCES VIOLATE FLORIDA'S MINIMUM WAGE LAWS.

With respect to Count III, Fla. Stat. Sec. 218.077(2) "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. 2d 426, 428 (Fla. 3d DCA 2019) (e.s.). 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 minimum wages or benefits that are required by state and federal law. §218.077(2), Fla. Stat.

The City attempts to avoid this statute by seeking to squeeze the challenged ordinances' wage requirements into one of its three limited exceptions. The City's arguments are unpersuasive and should be rejected.

Under Fla. Stat. Sec. 218.077(2), only certain types of employees may be paid more than the federal minimum wage: "[E]mployees of an employer contracting to provide goods and 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.* The Florida Supreme Court has instructed that these exceptions "should be narrowly and strictly construed." *Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097, 1100 (Fla. 1990). The City's argument that the wage requirements only apply to contractors who have been awarded a public contract overlooks at least two key issues. First, the subject wage requirements are contained in the City's municipal code, ***not*** a contract with the City. Second, they are a ***precondition*** to bidding on the project itself. In light of the foregoing, the wage requirements of the challenged ordinances are simply incapably of satisfying the narrow exceptions Fla. Stat. Sec. 218.077(2).

Furthermore, the wage requirements improperly require construction employers to raise employee wages across the board to an amount above the federal minimum wage. By requiring

employers to pay their apprentices and disadvantaged workers at a rate higher than the required federal minimum, employers are ostensibly obligated to pay their regular employees at a rate equal to or higher than that rate, regardless of whether or not those employers are covered by the Ordinances or whether they are working on a public contract. As such, the wage requirements have the effect of increasing the minimum wage requirements across the construction industry, and accordingly, are in violation of Florida Statute 218.077.

IV. THE CHALLENGED ORDINANCES' RETAINAGE PROVISIONS ALSO VIOLATE FLORIDA LAW.

With respect to Count VI, the City's arguments are based on a misunderstanding of both the requirements and purpose of Florida's retainage laws. A plain language reading of the challenged Ordinances makes clear that they purport to allow the City to withhold the difference between 15% of the dollar value of the hours of work performed and the dollar value of the labor hours actually performed by apprentices or disadvantaged workers. That exceeds the 10% initial withholding limit (and 5% reduction upon 50% completion) permitted by Fla. Stat. Sec. 218.735. The City attempts to avoid this fatal flaw in its challenged ordinances by claiming without authority that the 15% retainage figure allotted by the challenged ordinances would never exceed the maximum percentage allotted under Florida law because Florida law allows 10% retainage on "not only labor hours but also equipment and materials, among other things." City' Oppos. at 14. At best, the City's argument is an overstatement. For example, a City-hired labor contractor paid strictly on a man-per-hour basis would be subject to the City's 15% retainage withholding, and none of the withheld payment would be for equipment, materials, or "other things". That would directly conflict with Florida law; this danger of conflict warrants declaring the challenged ordinances null and void. *See D'Agastino v. City of Miami*, 220 So. 3d at 420-21.

In addition, the challenged ordinances' "retainage" provisions are not "retainage" provisions at all; rather, they are punitive forfeiture penalties which directly conflict with the purpose and intent of Florida's retainage laws. A plain reading of the challenged ordinances provide that "the prime contractor will ***forfeit*** from the retainage the dollar value 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 during the major construction project[]" upon its first failure to meet the hours requirements of the Ordinance. 2-270(f); § 2-263(f) (e.s.). Neither Fla. Stat. Sec. 218.735 nor any other retainage-related statute permits such "forfeiture". This is because the intent of retainage laws is to incentivize a contractor to remediate defective work and perform its scope of work to completion by withholding a certain percentage of the contractor's progress payments until all work has been completed. In contrast, the challenged ordinances' "retainage" provisions have no such effect; rather the "retained" amount is automatically forfeited by the contractor, penalizing it for noncompliance with the challenged ordinances' hour and wage requirements.

The City's contention that its penalty is akin to a "payment dispute" rings hollow because the penalty is not related to defective or incomplete work—it is based solely on alleged noncompliance with the challenged ordinances.

At bottom, under the guise of a "retainage" provision, the challenged ordinances impose an improper penalty on contractors that fail to comply with the ordinances' onerous requirements. Those penalties conflict with language and intent of Florida's retainage laws. ABC Gulf is entitled to summary judgment on this count.

V. BOTH OF THE CHALLENGED ORDINANCES SHOULD BE DECLARED UNCONSTITUTIONAL FOR VIOLATING THE FLORIDA CONSTITUTION'S EQUAL PROTECTION CLAUSE AND DUE PROCESS CLAUSE.

a. The Ordinances Violate the Equal Protection Clause of the Florida Constitution by Discriminating Between "Favored and Unfavored Segments of Society."

With respect to Counts IV and V, even if the challenged ordinances are subject to the rational basis test, which ABC Gulf does not concede, the City overstates the level of deference provided to government entities under that test and the Ordnances also fail under a rational basis analysis. *Muratti-Stuart v. Dep't of Bus. & Professional Regulation*, 174 So. 3d 538, 540 (Fla. 4th DCA 2015) ("The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for naked transfers of wealth." (quoting *St. Joseph Abbey v. Castille*, 700 F. 3d 154, 165 (5th Cir. 2012)). In fact, Florida courts have often found local economic regulations similar to those imposed by the challenged ordinances to fail the rational basis test under the equal protection clause and substantive due process clause. *See e.g.*, *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1214 (Fla. 2000); *Dep't of Ins. v. Dade Cty. Consumer Advocate's Office*, 492 So. 2d 1032 (Fla. 1986); *Eskind v. City of Vero Beach*, 159 So. 2d 209, 211 (Fla. 1963).

In *Eskind*, the Florida Supreme Court struck down a municipal ordinance that prohibited public advertising of rates for certain upscale lodging houses, e.g., hotels. *Id.* at 209. The city argued that the subject ordinance was rationally related to the economic welfare of the community, and by limiting upscale lodging houses' ability to advertise, more modest upscale lodging houses, like motels, would become more attractive to visiting tourists. *Id.* The Florida Supreme Court declared the ordinance unconstitutional on equal protection grounds, and explained:

> There are cases which recognize the exercise of the police power to promote the general economic welfare of the community. Those which approve comprehensive zoning plans are typical. However, we have found none which permits discriminatory legislation damaging to one segment of a class of

> businesses and beneficial to another segment of the same class. Such is the impact of the subject ordinance… [The City] does not have the power to impose arbitrary restrictions which deprive an individual of his property rights under the banner of regulation. We have the view that the subject ordinance is nothing less than an attempted exercise of the police power to restrict competition between favored and unfavored segments of the same business activity. If expanded to other fields, such an exercise of power could be destructive of the competitive, free enterprise system.

Id. at 211.

When applied to this case, the holding of *Eskind* warrants entry of summary judgment in ABC Gulf's favor. Here, the City attempts to "provide[] educational opportunities" to individuals who not only fall under the category of "apprentice" or "disadvantaged", but also the construction industry as a whole. For the individual construction workers, the challenged ordinances eliminate significant employment opportunities by discriminating "between favored and unfavored segments of the same business activity." *See id.* at 212. For the construction industry as a whole, the arbitrary employment requirements adopted by the City deprive certain businesses—namely those whose work is less apt to untrained or unskilled workers—of its fundamental right to occupational freedom, albeit to benefit "unfavored segments of the same business activity." *Id.*

It is unclear why the City has chosen the construction industry, and only the construction industry, to shoulder the burden for addressing the "welfare of the community" in this manner. The City imposes no such mandate on other entities who do business with or purchase goods or services from the City.

Moreover, there does not appear to be any real connection between the City's actions and its desired outcome. For example, the Disadvantaged Worker Ordinance's preamble claims the City has found that "[t]he 2015 St. Petersburg unemployment rate was 5.7 percent," but fails to provide any logical connection between hiring disadvantaged workers and decreasing

unemployment. §2-268 (found at the first page of Exhibit B to the Stip. Facts). Requiring certain contractors to hire disadvantaged workers will not result in more jobs; it will merely result in one class of individuals obtaining jobs that would have otherwise gone to another. Thus, even accepting the City's "findings" at face value, there is no relationship between the City's stated intent to "decrease unemployment overall" and its requirement that contractors bidding on City projects to hire "disadvantaged workers."

Similarly, the Apprenticeship Ordinance's preamble states that more experienced "Journey level construction workers are retiring in numbers greater than the number of applicants to replace those workers, creating shortages of skilled construction workers." § 2-261(a)(1) (found at the first page of Exhibit A to the Stip. Facts). The City further claims that the "shortage of craft labor skills is a challenge for the City and its capital improvements projects." *Id.* But the City fails to explain how it is has purportedly been "challenged," or recite any evidence that the City has been unable to undertake "capital improvement projects" because of shortage of journey workers or a lack of construction firms willing to bid on projects as a result of the purported lack of journeyworkers. If anything, the opposite is true; contractors are ***dissuaded*** from bidding on the City's projects because of the challenged ordinances' onerous requirements and draconian penalties for failing to meet those requirements. The City's failure to cite any evidence or make any concrete findings on these issues illustrates that the City is simply attempting to address issues outside the scope of its municipal powers. The City's unfounded attempt to legislate political issues is not unlike similar prior failed attempts which lacked the necessary connection between the stated "public benefit" sought to be advanced and the statutory means of achieving it.

For example, in *State v. Robinson*, 873 So. 2d 1205, 1214 (Fla. 2004), the Florida Supreme Court struck down the Florida Sexual Predator's Act as unconstitutional. The *Robinson* statute sought to "protect children from sexual predators and sexual conduct," and deemed anyone convicted of a felony "where the victim is a minor" as a "sexual predator." But the *Robinson* statute was not rationally related to the interest in protecting children from sexual predators because it reached individuals convicted of crimes that lacked any sexual component, e.g., the *Robinson* defendant, who was arrested for carjacking a car with a child in the backseat. *Robinson* is akin to this case. Simply stated, there is no connection between the City's overall unemployment rate five years ago and the City's attempt to require the hiring of disadvantaged workers under threat of loss of work or loss of retainage.

Estate of McCall v. U.S., 134 So. 3d 894 (Fla. 2014) is also instructive. In that case, the Florida Supreme Court held that statutory cap on noneconomic damages in medical malpractice cases violated the equal protection. The Legislature stated that it imposed the caps to ameliorate high malpractice insurance rates, which purportedly were forcing physicians to practice without liability insurance or to refrain from performing high risk procedures. The Supreme Court held that even if high insurance rates were so impacting physicians, the challenged statute would still fail the rational basis test because there was no direct correlation between damages caps and reduced malpractice premiums. *Id.* at 909-11. *McCall* is analogous; there is no evidence of a direct correlation between the challenged ordinances and their desired effect, e.g., lowering the unemployment rate or increasing the pool of qualified contractors to perform capital projects.

Equally instructive is *Dep't of Revenue v. Amrep Corp.*, 358 So. 2d 1343, 1352 (Fla. 1987). In that case, the Florida Supreme Court held that a tax placed on Florida companies whose parent companies were domiciled in a different state was unconstitutional and failed the

rational basis test. The Court rejected the Department's argument that the tax was rationally related to the government interest in incentivizing companies to move their headquarters to Florida because the challenged statute placed heavier taxes on affiliated companies already operating out of Florida, thereby hurting Florida companies all the same. Similarly, the challenged ordinances in this case place a greater burden on contractors overseeing apprentices or disadvantaged workers lacking experience. Using a less experienced workforce will result in additional costs and time to correct or complete projects.

Another case that is insightful on this point is *Stadnik v. Shell's City, Inc.*, 140 So. 2d 871, 875 (Fla. 1962). In *Stadnick*, the Florida Supreme Court struck down a state pharmacy board rule prohibiting the advertisements of the names and prices of prescription drugs. The *Stadnick* Court rejected the agency's argument that the rule advanced the government's interest in preventing doctors from prescribing prescription drugs based solely on the patient's demand for name-recognized drugs. In doing so, the Court observed the rule could not achieve its intended goal because "there is simply no reasonable justification for such an administrative intrusion on private rights when the regulation is so completely lacking in public benefit." The same can be said here, where there is no connection between the challenged ordinances' stated intent and a public benefit. The ordinances simply do not advance the City's claimed interest in lowering unemployment or increasing the number of qualified construction firms.

The Florida Constitution does not allow the City to use its police power in this manner. As observed by the Florida Supreme Court over 65 years ago:

> The absurdity of the regulation becomes more apparent when we consider what effect the establishment of such a principle would have upon other businesses, occupations or professions. We have boards to regulate the practice of pharmacists, doctors, dentists, chiropractors, lawyers, and many others. If it is legal for the appellants to prohibit the issuance or renewal of a certificate or license for anyone to engage in the practices or professions above mentioned on

> the sole ground that he is engaged part time in some other business or occupation, then a regulation could be adopted that would make it illegal for the pharmacist to have a chicken farm on the side, the real estate broker to sell insurance or engage in building houses for profit, and for the lawyer to invest his earnings in rental property and collect his own rents, or for anyone engaged in these practices or professions (above mentioned) or any other sought to be regulated by the State, to engage in any other kind of business for profit.

Lee v. Delmar, 66 So. 2d 252, 255 (Fla. 1953). It is hard to imagine requiring any other profession to dedicate at least 30% of its workforce to inexperienced workers. The challenged ordinances are not based on reason. Regardless of the City's intentions, it is inequitable and discriminatory to burden the construction industry, or certain sectors of the construction industry, in this manner. The challenged ordinances must be stricken.

b. The Ordinances Lack the Clarity Required by the Due Process Clause of the Florida Constitution.

The Due Process Clause requires all legislation "give a person of ordinary intelligence fair notice of… what conduct is required or prohibited, measured by common understanding and practice." *State v. Carrier*, 240 So. 3d 152, 859-60 (Fla. 2d DCA 2018) (internal quotes and citations omitted). A statute or ordinance is deemed impermissibly vague if it "fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement." *Southeastern Fisheries Ass'n, Inc. v. Dep't of Natural Resources*, 453 So. 2d 1351, 1353 (Fla. 1984).

The challenged ordinances should be deemed unconstitutional because they are impermissibly vague in three (3) primary aspects. First, the "catch-all" provision stating the circumstances under which the parties are required to comply with state and federal law is ambiguous and confusing. Second, the wage requirements incorporated by reference into both of challenged ordinances fail to define or provide any guidance regarding which "comparable craft or trade" contractors should look to for wage determinations in the absence of a Davis-Bacon

wage determination on point. And third, the process for instituting backpay if the U.S. Department of Labor's determination on the applicable wage reveals that the wages previously paid were underestimated. This lack of clarity subjects contractors to significant liability for unpaid wage claims through no fault of their own. While the City acknowledges these points, it fails to present any legal support for its position to the contrary.

Finally, perhaps the most glaring due process violation lies in the City's criteria for the award of contracts, which states that the contract shall be awarded to "the lowest responsive and responsible bidder or to the entity who is determined to be the most qualified entity or whose proposal was deemed most advantageous to the City." § 2-270(f); § 2-263(f). As discussed above, this provision irrefutably fails to give contractors any notice of the criteria that the City must abide by in awarding contracts, and indisputably "invite[s] arbitrary and discriminatory enforcement." *Southeastern Fisheries Ass'n, Inc.*, 453 So. 2d at 1353; *see also City of Miami v. Save Brickell Ave., Inc.*, 426 So. 2d 1100, 1104 (Fla. 3d DCA 1983) (holding a city ordinance unconstitutional for failing to express definite standards for municipal decision-making) *and Mahon v. Sarasota Cty.*, 177 So. 2d 665, 667 (Fla. 1965).

In *Mahon*, the Florida Supreme Court was tasked with determining the constitutional validity of a county ordinance governing the procedure by which Sarasota County disposed of physical nuisances on residential property. Pursuant to the ordinance, upon oral or written complaint by a resident, a county inspector would visit the subject property and, based on its own determination and opinion, determine whether municipal action be taken. The Court ultimately declared the entire process by which Sarasota County dealt with physical nuisances unconstitutional, and held "[the ordinance] is contrary to the rule that the execution of a statute

cannot be made to depend on the unbridled discretion of a single individual or an unduly limited group of individuals."[6]

The same can be said here, where a plain reading of both the Apprenticeship Ordinance and the Disadvantaged Worker Ordinance give the City "unbridled discretion" in determining the recipient of government contracts. Without setting forth any semblance of guidelines or criteria as to what the City considers " the most qualified… or most advantageous" contractor, the Ordinances unquestionably fail to provide contractors requisite notice of the procedure by which the contract will be awarded, and most certainly invite arbitrary and discriminatory enforcement of the Ordinances. *See Southeastern Fisheries Ass'n, Inc.*, 453 So. 2d at 1353.

The City's reliance on *Rectory Park, L.C. v. City of Delray Beach* is misplaced as that case is inapplicable to the undisputed facts. 208 F. Supp. 2d 1320 (S.D. Fla. 2002). For one, the local ordinance at issue in *Rectory Park* included eight (8) relatively specific factors that the City of Delray was required to consider when determining certain zoning performance standards. *Id.* at 1328. By contrast, the Ordinances enacted by the City in this case, do not contain any factors or definitions for what the City considers "most qualified" or "most advantageous". Additionally, in *Rectory Park*, the court acknowledges that the language of the standards outlined in the local ordinance do nothing to prohibit activity, "but rather illustrate[] factors that may lead to an increase in density." *Id.* at 1330. This is distinct from the instant action, where the "factors" by which the City is to award contracts lead to a direct prohibition from eligibility for government-funded construction projects.

Because the Ordinances unconstitutionally discriminate between sectors of the construction industry and fail to include requisite clarity in the criteria it requires the City to

[6] The Court also stated, in dicta, that it would appear that "the owner whose property has been destroyed as a result of a complaint, although other property similarly situated and containing a similar… hazard has not been complained against… can validly contend that he was denied the equal protection of the law." *Mahon*, 177 So. 2d at 667.

follow when awarding public contracts, summary judgment should be granted in favor of ABC, and the Ordinances should be deemed unconstitutional on grounds that they violate the Equal Protection Clause and Due Process Clause of the Florida Constitution.

CONCLUSION

In short, the City's Opposition to ABC Gulf's Summary Judgment Motion fails to raise any genuine issues of material fact. The Apprenticeship Ordinance, the Disadvantaged Worker Ordinance, and the wage requirements incorporated into those ordinances are preempted by controlling state law and violate the Florida Constitution's Equal Protection Clause and Due Process Clause. Accordingly, ABC Gulf is entitled to summary judgment as a matter of law declaring those ordinances null and void.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail or e-service to Joseph P. Patner, Esq. (Joseph.Patner@stpete.org) and Kenneth W. MacCollom, Esq. (Kenneth.MacCollom@stpete.org), P.O. Box 2842, St. Petersburg, Florida 33731, on this 3rd day of August, 2020.

Respectfully submitted,

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