IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

NED KIMMELMAN,

Plaintiff,

vs. **CASE NO. 50-2025-CA-011366-XXXA-MB**

CITY OF BOCA RATON, FLORIDA; WENDY LINK as the PALM BEACH COUNTY SUPERVISOR OF ELECTIONS,

Defendants.

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY INJUNCTION

Plaintiff, Ned Kimmelman, files this Memorandum of Law in support of his Emergency Motion for Temporary Injunction.

1. The Emergency Motion for Temporary Injunction seeks to stop two citizen initiative petition based public measures from being placed on the ballot for the January 13, 2026 election for State Representative in District 87.

2. The Charter Amendment (**Exhibit 1**) cannot be placed on the January 13, 2026 ballot because that would violate City Charter Article VII, Section 7.01 titled "Charter Amendment" (**Exhibit 2**).

Section 7.01(b)(3) states:

Certification of petition. Upon certification of the petition by the city clerk in accordance with the procedures established in section 6.06 for initiative petitions, the council shall place the proposed amendments to a vote of the electors not less than sixty (60) days after certification at

the next regularly scheduled election or at a special election called for such purpose. **In no event shall the charter amendment be voted upon later than three (3) months from the date of certification.** (emphasis added).

The initiative petition for the Charter Amendment (**Exhibit 3**) was not certified by the City Clerk until October 2, 2025 (**Exhibit 4)**, making the three (3) month cutoff date for an election January 2, 2026 (even using a 31 day month calculation, the deadline would have been January 3, 2026). That did not occur. Instead, the City passed a resolution to place it on the January 13, 2026 ballot for election of the State Representative in District 87 (**Exhibit 5**).

This is determinative. The Charter Ordinance cannot appear on the January 13, 2026 ballot and Defendants must be enjoined from processing and printing it. There is also case precedent directly on point. In *City of Miami Beach v. Herman,* 346 So. 2d 122 (Fla. 3d DCA 1977), a resident property owner and taxpayer sued to obtain a pre-election injunction preventing a rent control ordinance from being placed on a ballot. That ordinance was proposed by a citizen initiative. The lower court entered a permanent injunction and the city appealed. The Third District Court of Appeals affirmed, ruling that Section 26 of the city's Charter clearly provided a minimum 60 day period between certification of the petitions and the date of the election, that this requirement was not met and the trial judge was correct in enjoining the city from placing the ordinance on the ballot. Our facts differ from those in *Herman* only in that its injunction stopped the election from occurring before the mandatory 60 day minimum period. The Third District cited *Tacker v. Board of County Commissioners of Polk County,* 170 So. 458, 127 Fla. 248 (Fla. 1936), in which a citizen taxpayer sought and obtained an injunction preventing a ballot from being printed because an initiative petition's failure to obtain the signatures required by law was fatal to placing its question on the ballot. The Florida Supreme Court ruled that the

plaintiff had standing to have enforced by injunction the observance of a statutory condition that was precedent to any legal right in the Polk County Commissioners to call an election. The instant facts differ from *Tacker* only in that the requisite 10% signature requirement in Section 7.01(b) is not involved.

3. The Charter Amendment violates the Florida Constitution, the Municipal Home Rule Powers Act, Fla. Stat. Sec. 166.011, et seq., and Fla. Stat. Sec. 166.031(1) (**Exhibit 6**). The Charter Amendment's operative (enabling) language is as follows:

> Protection of City-Owned Lands. The city council shall not in any manner alienate from the public, lease, or sell any land that is owned by the City of Boca Raton greater than one-half (0.5) acre, or any part thereof, ***except upon approval of the proposed action at a referendum election.*** (emphasis added).

The Charter Amendment thus conflicts with Article VI, Section 5 of the Florida Constitution:

SECTION 5. Primary, general, and special elections.—

(a) A general election shall be held in each county on the first Tuesday after the first Monday in November of each even-numbered year to choose a successor to each elective state and county officer whose term will expire before the next general election and, except as provided herein, to fill each vacancy in elective office for the unexpired portion of the term. A general election may be suspended or delayed due to a state of emergency or impending emergency pursuant to general law. **Special elections and referenda shall be held as provided by law.** (emphasis added).

(b) If all candidates for an office have the same party affiliation and the winner will have no opposition in the general election, all qualified electors, regardless of party affiliation, may vote in the primary elections for that office.

Under the Constitution, the phrase "as provided by law" means as passed "by an act of the legislature". There is no City Charter provision giving the electorate the right to impose a referendum requirement, and Fla. Stat. Sec. 166.031(1) conditions such an election upon

either the municipality passing an ordinance for same or by petition if citizens obtain 10% of the number of last general election registered voters necessary to place it on a ballot. Yet, the Charter Amendment restricts the City's action thereunder by making it subject to a mandatory future public referendum, rather than a possible referendum via the requisites of Fla. Stat. Sec. 166.031(1). But "the electorate has no power, by initiative or referendum, to enact a charter amendment conferring upon itself the power to restrict action by the city council by making the council's action subject to referendum. This is so simply because no such authority has been granted by the legislature." *Holzendorf v. Bell*, 606 So. 2d 645, 648 (Fla. 1st DCA 1992).

The single operative (enabling) section of the Charter Amendment conflicts with Florida law, making it invalid and unconstitutional in its entirety. Therefore, the entire Charter Amendment cannot be put on a ballot for a vote. *See* the throughly researched and well reasoned decision in *Kurth v Town of Jupiter, Florida*, Palm Beach County Circuit Court Case No..50-2023-CA16266XXXXAMB (Judge Reid P. Scott), and cases cited therein including *Holzendorf* and the same parts of the Florida Constitution.

4. The proposed ballot language for the Charter Amendment consists of a ballot title and purported "ballot summary" produced by the Defendants via public records requests (together the "ballot language" - **Exhibit 7**). They violate Fla. Stat. Sec. 101.161 (**Exhibit 8**) which is also derived from Article VI, Section 5 of the Florida Constitution, and cannot be permitted to appear on a ballot.

But before diving into that, the ballot language contains the same enabling language that appears in the text of the Charter Amendment (plus the ballot title says "Voter Approval Required"), so that ballot language violates the Florida Constitution, Fla. Stat. Sec. 166.031(1)

and the Florida Home Rule Powers Act. For the same reasons set forth in Plaintiff's argument against the text of that public measure in paragraph 3, *supra,* the ballot language cannot be on the ballot.

In this pre-election analysis of Fla. Stat. Sec. 101.161, there are two main questions to ask: first, whether the ballot title and summary fairly inform the voter of the chief purpose of the amendment, and second, whether the language of the title and summary, as written, misleads the public. Implicit is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity. The ballot language may not "hide the ball" or deprive the voter of an opportunity to know and be on notice as to the proposition on which he is to cast his vote. *Askew v Firestone,* 421 So. 2d 151 (Fla. 1982).; *Metropolitan Dade County v. Shiver,* 365 So. 2d 210, 212 (Fla. 3d DCA 1978). The ballot title and ballot summary must be read together in determining whether the ballot information properly informs the voters. *Advisory Opinion to the Attorney General re: Voluntary Universal Pre-Kindergarten Education,* 824 So. 2d 161, 166 (Fla. 2002).

The ballot title is anything but clear and unambiguous, and uses the word "*certain*" to modify "lands" for the first time. Why? That word is so misleading and can mean many things, but to begin with it means less than "*any*", which is the only word in the enabling language of the Charter Amendment text describing **which** lands are being made subject to this proposed public measure. In this context, does "any" mean "all"? Yes, it does, and does "certain" mean particular lands and not others? Yes, it does. Does "certain" mean any lands that are .5 acre or more, or less than that? Maybe. Or does "certain" mean some unseen land(s) in different corners of the city? Maybe. Does it mean the land underneath the

Florence Fuller Center and Boca Raton Museum of Art? Maybe. After all, there are well over 180 City-owned properties within its municipal boundaries, so the possibilities are endless. And why is this ballot title not the same as the apparent title of the enabling language itself ("Protection of City-Owned Lands"). Even then, the ballot title would remain unclear, ambiguous and without an explanatory statement of the chief purpose of the Charter Amendment, as will be further argued, *infra*.

There is also a complete absence of a ballot summary. The ballot language merely consists of that title followed by the enabling language of the Charter Amendment itself, but the statute expressly makes those two things independent of each other. The statute says that the ballot title and summary are to be *embodied in* the enabling ordinance. They are not the same thing.

There is no clear and unambiguous explanatory statement of the chief purpose of this public measure required of a ballot summary under Fla. Stat. Sec. 101.161. There is no explanation revealing that the City currently has complete power to sell, lease, convey, transfer or use (even "alienate") its city lands under the Florida Home Rule Powers Act and Article II, Sections 2.01 and 2.02 of the City Charter (**Exhibit 9**). The public needs to know what is and what will be and why. **It needs to be told that the obvious chief purpose of the Charter Amendment is to strip the City of all of that power which makes it a municipality under Fla. Stat. Sec. 166.011, et seq.**

So, too, the ballot language words "alienate from the public" and "or part thereof" are completely unclear and ambiguous. There is no explanation, no definition of what those words mean and how they form part of the chief purpose of the Charter Amendment, just as there is no

such explanation of what the word "certain" means in the ballot title versus "any" in the purported ballot summary.

The lay definition of "alienate" is to be estranged or disconnected from society, often due to a feeling of not belonging or a lack of common values with the group. This can manifest as social withdrawal, a sense of not being represented, or being misunderstood. (**Exhibit 10**). People may be somewhat familiar with that definition of "alienate", but there is no phrase "alienate from the public" in the dictionary or authoritatively defined anywhere else. Does that phrase mean alienate the public from any city owned lands including those more, less or equal to .5 in size? Does it mean that the annual carnival with rides that comes to the City for two weeks annually, leases the 1.8 acre city parcel next to Mizner Park (**Exhibit 11**) and charges $30.00 for admission, is equivalent to the City "alienating" the public if someone cannot afford it or simply does not want to pay? Does it mean that the leases for annual two day seafood festival on that land, and the art shows that come many times annually with concession stands and lease the 1 acre Sanborn Square Park (**Exhibit 12**) are equivalent to the City alienating the public if people cannot come because the admission fee is too much for them to pay? How about a lease of that 1 acre park by a private person or entity, or the City allowing a family to use it for a well-attended party with lots of kids and parents and bounce houses and rides? Can the people not invited complain or even sue the City because they are part of the uninvited public being "alienated"? And is the Boca Raton Museum of Art, which sits on donated City land, charges admission and often has exhibits that people may not like but would prefer something else they find attractive, equivalent to the public being alienated by the City from that land if they cannot afford to enter or just do not like what's there and feel shut out? Does it mean that people who are not invited

on a school field trip to see the City police evidence room are being alienated from that land by the City?

The legal definition of "alienate" is very different, meaning the transfer of property or property rights, and that includes voluntary transfer for use, easement, assignment, donation, gift, sale, lease, sublease and assignment, as well as any involuntary alienation such as eminent domain, foreclosure or adverse possession. (**Exhibit 13**). How is the voter going to know all that without a clear and unambiguous explanatory statement of their meaning and integral link to the chief purpose of the Charter Amendment?

The lay and legal definitions of "alienate from the public" get more unclear and ambiguous with the enabling words "or part thereof", which modify both the .5 acre or less phrase and the remaining part of any parcel greater than that. That language means that every city tract of land, of any size, involved in any conceivable land transaction may need a public vote under the Charter Amendment. Again, there is no clear and unambiguous explanatory statement in the ballot title or summary of these vague words and their connection to the chief purpose of the Charter Amendment.

So "alienate from the public" and "or part thereof" leave the voter stuck in a mystery between the lay and legal worlds. Does that enabling language mean that the donation, sale, lease, easement, etc. of a 3 acre tract of city land will not need a public vote for .5 acres of it but the remaining 2.5 acres will need a public vote? Which .5 acres is that going to be, and who gets to decide that? Is it a number of spots on the entire tract each equivalent to .5 that will not need a public vote? Will a series of .5 acre sales or leases to one person or entity which together comprise that 3 acres avoid a public vote, or is there no way the entire tract can ever be

"alienated", sold or leased, in whole or in part, without a public vote? And what happens when the Florence Fuller Center or Boca Children's Museum, both with city leases, have to be renewed? Or some other charitable institution, person or for-profit entity that sits on donated (alienated) land wants to lease out or donate the use of some of that land or interior space? Will all or part of those city lands need a super-expensive public vote?

The ballot language is also unclear and ambiguous because of what it omits to say, including an explanation of the meaning and operation of the words "City Commission" in paragraph 4 of the Charter Amendment, which is important because Boca Raton has no City Commission, only a City Council. That would all be codified. And the ballot language makes no attempt to explain the critical, integral connection between the following text and the enabling language:

"WHEREAS, the majority of registered voters of the City of Boca Raton hereby find the proposed City Charter amendment creating new City Charter Section 7.11 will prevent alienation, lease or sale of public lands except where voters approval is obtained.

WHEREAS, *the majority of registered voters of the City of Boca Raton have determined that this ordinance amending the City Charter is necessary for the preservation of the health, welfare and safety of the community.*" (emphasis added).

Those are affirmative misrepresentations of fact, outrageous falsehoods which if allowed to be on the ballot could be voted in and codified into the City Charter. There are over 60,000 registered voters in the City. There is no possibility those recitals are or have ever been true. There is nothing in existence establishing that a majority of registered voters in the City are on record saying they "hereby find" and "have determined" what it says in the recitals. Plaintiff knows of nothing written and there is no vote, no public record, no statistic, no tabulation, no

polls, no focus groups, nothing governmental, absolutely nothing factual or legal which states or establishes in any manner that these statements are true and correct. The ballot language contains no clear and unambiguous explanatory statement of how those lies relate to and operate in concert with the Charter Amendment's chief purpose, i.e., the stripping of the city's power over its lands via the enabling language, but they are inescapably intertwined, and permitting the ballot language to be voted upon would flip the law on its head and turn this calculated abuse of the electoral process into a success.

5. The Proposed Ordinance's (**Exhibit 14**) enabling language is identical to the Charter Amendment's enabling language, and its ballot language (**Exhibit 15**) is identical to the ballot language for the Charter Amendment. Here, Plaintiff makes the same arguments as in paragraphs 3 and 4 except for Fla. Stat. Sec. 166.031(1). That statute and the case precedent cited concerning the Charter Amendment do not directly apply here, but their reasoning and citations to other authority do. Specifically, the enabling language that restricts City action without voter approval via a mandatory public referendum, conflicts with Article VI, Section 5 of the Florida Constitution, and violates both the Municipal Home Rule Powers Act, Fla. Stat. Sec. 166.011, et seq. and the City Charter, because none of them provide the electorate with any right to such a referendum, mandatory or otherwise. That enabling language in the Proposed Ordinance and ballot language (including the ballot title saying "Voter Approval Required") is facially unconstitutional and invalid and must be enjoined from appearing on the ballot.

I HEREBY CERTIFY that the above and forgoing was served on November 24, 2025 upon Defendant, City of Boca Raton, Florida via email to szeskind@wsh-law.com, tjames@wsh-law.com, dabbott@wsh-law.com, and pgrotto@wsh-law.com; and upon Defendant, Wendy Link,

Palm Beach County Supervisor of Elections, via email to dmarkarian@jeckharris.com; dglickman@jeckharris.com, and eservice@jeckharris.com.

NED KIMMELMAN, P.A.

By _____

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