IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

DIAN S. GEORGE,

Plaintiff,

v.

CASE NO. 312009CA012891XXXXXX
Judge Paul B. Kanarek

CHARLES R. WILSON, a/k/a CHARLIE WILSON, Vero Beach City Councilman; KAY CLEM, Indian River County Supervisor of Elections; CITY OF VERO BEACH CANVASSING BOARD, consisting of JAMES M. GABBARD, in his official capacity as Vero Beach City Manager; a member of the City of Vero Beach Canvassing Board; CHARLES P. VITUNAC, in his official capacity as Vero Beach City Attorney and a member of the City of Vero Beach Canvassing Board; and TAMMY K. VOCK, in her official capacity as a member of the City of Vero Beach Canvassing Board,

Defendants.

_____/

FINAL JUDGMENT ON VERIFIED ELECTION CONTEST

This matter came on to be heard on December 2, 2009, on the plaintiff's Verified Election Contest filed pursuant to Section 102.168, Florida Statutes (2009), and the court having considered the testimony and evidence presented and heard argument of counsel and making the following findings of fact;

1. Article II, Section 2.01 of the Charter of the City of Vero Beach sets forth the qualifications required to be a member of the City Council. Prior to March 14, 2006, Section 2.01 provided as follows:

> There shall be a City Council of five members elected at large by the electors of the City. Only qualified electors of the City shall be eligible to be members of the City Council.

On March 14, 2006, following a Special Election, Article II, Section 2.01 was amended to provide:

> There shall be a City Council of five members elected at large by the electors of the City. Only qualified electors of the City with a minimum of one year of residency in the City as of the qualifying deadline shall be eligible to be members of the City Council

2. The parties have stipulated and agreed as follows;

a. For at least one year immediately prior to September 1, 2009, the defendant, Charles Wilson, resided at 1057 6th Avenue, Vero Beach, which is a residence located in Indian River County and not within the City of Vero Beach.

b. That on September 1, 2009, Mr. Wilson leased a home located at 1835 36th Avenue, Vero Beach, which is located within the City of Vero Beach.

c. That the qualifying period for the election in dispute ended September 4, 2009.

d. That the election was held on November 3, 2009. Mr. Wilson was the top vote getter and was elected to the Vero Beach City Council. He has been sworn in and is holding the office of Vero Beach Councilman.

e. That the plaintiff Dian S. George is an elector of the City of Vero Beach and was qualified to vote in the election of November 3rd.

3. The evidence shows that the first record of any utility services in the City of Vero Beach in the name of Mr. Wilson occurred on March 19, 2001, when utility service was turned on at a residence located at 475 Date Palm Road. The utility service was discontinued at that address on October 31, 2002. On that same date (October 31, 2002) Mr. Wilson had the utilities turned on at his home located at 1057 6th Avenue, unit B-5. The 6th Avenue address is not located within the City of Vero Beach. The utility service for the 6th Avenue condominium remains connected and in Mr. Wilson's name as of the date of the hearing.

4. On August 31, 2009, Mr. Wilson had the utilities turned on at a home located at 1835 36th Avenue, which is located within the City of Vero Beach.

5. Mr. Wilson testified that he moved into the City of Vero Beach in 2001, and lived at 475 Date Palm Road for approximately two years. He further testified that when he moved out of the Date Palm house he moved in with a friend in the city until September, 2004. At the time of the 2004 hurricanes he moved to the 6th Avenue apartment. He testified that he continued to live outside of the City of Vero Beach until September 1, 2009, when he moved into a rental located at 1835 36th Avenue. This home is within the City of Vero Beach and is his current residence and is his current residence.

6. Several months prior to qualifying, Mr. Wilson spoke with the Vero Beach City Attorney, Charles Vitunac, concerning the residency requirements of Section 2.01 of the City Charter. At the time of this discussion Mr. Wilson did not reside in the city. Mr. Wilson expressed his view that the one year residency requirement could be met by living in the City of Vero Beach for at least one year at any time in the past. Mr. Vitunac told Mr. Wilson that he did not agree with this interpretation and that to be qualified to run for election Mr. Wilson had to be a city resident for at least one year immediately preceding the qualifying date.

7. On August 31, 2009, Mr. Wilson registered to vote in the City of Vero Beach. He had never been registered to vote in Vero Beach before that date even though he had lived in the city for some period of time beginning in September, 2001.

8. On September 2, 2009, Mr. Wilson signed his Oath of Candidate pursuant to F.S. 99.021, swearing that he was qualified to hold office as a Vero Beach City Councilman. He filed this Oath of Candidate with the City Clerk. At the time of qualifying Mr. Vitunac again told Mr. Wilson that he did not believe that he was qualified to run for election as he had not been a resident of the city for one year immediately preceding the date of qualifying.

9. Prior to the date of qualifying Mr. Vitunac contacted the Florida Department of State, Division of Elections, to determine what the city should do if Mr. Wilson filed qualifying papers. Mr. Vitunac testified that he was advised by the Division of Elections that the City Clerk, the person to whom the candidate submits their qualifying papers, performs a purely ministerial function and cannot judge the qualifications of the candidate or refuse the filing. This opinion is in accord with the advisory opinion from the Director of the Division of Elections to the Clerk of the City of Miami, dated July 15, 2009, which was filed as part of the plaintiff's Memorandum of Law.

10. On November 5, 2009, the Canvassing Board of the City of Vero Beach certified the results of the November 3, 2009, election.

11. This case was filed on November 12, 2009.

12. The issue in this case is whether Charles Wilson was qualified to be elected as a member of the Vero Beach City Council. The plaintiff argues that Section 2.01 of the City Charter requires that Mr. Wilson be a resident of the city for a period of at least one year immediately preceding the date of qualifying. It is Mr. Wilson's position that the Section 2.01

only requires that at the time of qualifying he had been a resident of the city for at least one year at some time during his life. He argues that the minimum of one year of residency does not have to occur immediately prior to the date of qualifying. Mr. Wilson also alleges various defenses in his Answer including;

a. there are multiple interpretations of Section 2.01 of the Charter and because of there is ambiguity it must resolve against the City and in favor of Mr. Wilson;

b. that the Charter does not require that he be a resident for at least one year immediately preceding the qualifying date;

c. that Section 2.01 of the Charter is unconstitutional because it restricts eligibility to run for office;

d. that the plaintiff is barred by estoppel because she did notbring this action before the election; and

e. that Section 2.01 is unconstitutionally vague because it is capable of multiple interpretations and as such should be declared unconstitutional and the election process should revert back to the requirements that existed prior to the 2006 amendment of the Charter under which there is no residency requirement.

13. The parties have stipulated that Kay Clem, the Indian River County Supervisor of Elections be dismissed from this case.

It is therefore;

Ordered and Adjudged as follows:

In interpreting the meaning of Article II, Section 2.01 of the City Charter the court must look to the same rules of interpretation and construction as are applicable to statutory construction. *Rinker Materials Corp. v. City of N. Miami*, 286 So.2d 552, 553 (Fla. 2000). As with any case of statutory construction this court must begin with the actual language used in the statute. *Heart of Adoptions v. J.A.*, 963 So.2d 189 (Fla. 2007). The purpose of all rules relating to statutory construction is to discover the true intention of the law. Where the legislative intent

is plain and unambiguous, no construction is necessary and the court should only give effect to the plain meaning of the statute. *State v. Egan*, 287 So.2d 1 (Fla. 1973).

An inquiry into the legislative history may only begin if the court finds the statute is ambiguous. *Weber v. Dobbins*, 616 So.2d 956 (Fla. 1993). A statute is ambiguous when its language is subject to more than one reasonable interpretation and may permit more than one outcome. *Nicarry v. Eslinger*, 990 So.2d 661 (Fla. 5th DCA 2008).

In this case the court finds that Section 2.01 is clear and unambiguous, and capable of only one reasonable interpretation. In order to be eligible to be a candidate for City Commission Mr. Wilson had to have been a resident of the city for at least one year immediately preceding the date of qualifying. Having been a resident between 2001 and 2004 was not sufficient to meet the qualification requirements of the City Charter.

Under Mr. Wilson's interpretation of Section 2.01 a person would qualify for election if they had been a resident of the city during the first two years of their life, moved to Pensacola for the next fifty years, and then moved back to Vero one week before qualifying. This is not a reasonable interpretation of the Charter provision. Even if this court were to determine that Section 2.01 was ambiguous and that there was more than one reasonable interpretation, Mr. Wilson's argument would still fail. If the court were to determine that Section 2.01 is ambiguous the court would then look to the legislative intent. *Weber v. Dobbins*, 616 So.2d 956 (Fla. 1993). Based on the evidence presented during the hearing it is clear that the drafters of this Charter provision intended to require that candidates for City Council reside in the city at least one year immediately preceding the qualifying deadline.

In cases involving similar statutes, courts in Arizona, Georgia, and New York have found that an interpretation such as Mr. Wilson's to be an "absurd intent" on the part of the City

Council (*Rivera v. Erie Bd. Of Elections*, 164 A.D.2d 976, 560 N.Y.S.2d 536(1990), or an "unreasonable and strained construction" (*Triana v. Massion*, 513 P.2d 935(Ariz. 1973), or that such a construction lead to "unreasonable results" (*Griggers v. Moye*, 272 S.E.2d (Ga. 1980). In Florida, courts will not ascribe to the Legislature an intent to create absurd or harsh consequences, and so in interpretation avoiding absurdity is always preferred. *City of St. Petersburg v. Siebold*, 48 So.2d 291, 294 (Fla. 1950).

Mr. Wilson has raised several "affirmative defenses" in his Amended Answer. In his first affirmative defense he alleges that there are multiple interpretations of Section 2.01. He also argues that because the Charter provision was prepared by the City it must be construed against it and any ambiguity resolved in favor of Mr. Wilson's candidacy. As the court has noted, Section 2.01 is not ambiguous, but even if it was it would be necessary to look at the drafters' intent. Their intent is clear from the evidence presented and it does not support Mr. Wilson's position. The evidence shows that the drafters intended to require that a candidate for City Council reside within the city for at least a one year period immediately preceding the qualifying period.

His second affirmative defense alleges that the requirements of Section 2.01 are not ambiguous and that because Mr. Wilson resided in the city between 2001 and 2004 he has met the residency requirement of the Charter. This defense has already been addressed.

In the third affirmative defense Mr. Wilson claims that the ordinance is unconstitutional. He cites cases concerning restrictions on the eligibility to run for judicial office which simply do not apply to this case. Florida courts have recognized that there can be reasonable residency requirements to hold municipal office. *Nichols v. State*, 177 So.2d 467 (Fla. 1965); *Board of Commissioners of Sarasota County v. Gustafson*, 616 So.2d 1165 (Fla. 2nd DCA 1993); *Marina v. Leahy*, 578 So.2d 382(Fla. 3rd DCA 1991).

Mr. Wilson's fourth affirmative defense alleges that the plaintiff's case is barred by estoppel. He alleges that the plaintiff was aware of Mr. Wilson's lack of residence before the election and that because of this she is now estopped from bringing this action. First, there was no proof presented at the hearing that the plaintiff had any knowledge of Wilson's failure to meet the residency requirement before the election. More importantly, Section 102.168, *Florida Statutes* (2009) specifically authorizes the plaintiff to bring this action.

As his fifth affirmative defense Wilson alleges that the Charter provision is unconstitutionally vague and as such the City election process should revert back to the provisions of the Charter as they existed prior to the 2006 amendments. Counsel for Wilson cites no law for this proposition.

The court therefore finds because defendant Charles Wilson failed to meet the residency requirements of Article II, Section 2.01 of the Vero Beach Charter he was ineligible to be elected to the City Council.

Pursuant to the terms of Section 102.1682, *Florida Statutes* (2009), ouster is the appropriate remedy where a successful candidate was not eligible to run for office. The court therefore grants the plaintiff's Verified Election Contest and Motion for Ouster and orders that the defendant, Charles Wilson be removed from office and enters a Final Judgment of Ouster. The City of Vero Beach shall take such steps as are required under the terms of their Charter to fill this vacancy.

Done and Ordered at Vero Beach, Indian River County, Florida, this 7th day of December, 2009.

PAUL B. KANAREK
Circuit Judge

cc: Louis B. Vocelle, Jr., Esq.
Charles A. Sullivan, Sr., Esq.
Wayne R. Coment, Esq.