MUNICIPAL AUTHORITY

Municipal Authority: Bonding Authority

Boschen v. City of Clearwater,
777 S.2d 958 (Fla. 2001)

A public-health-and-safety exception to a public-referendum requirement is not equivalent to the restrictive, essential-governmental-functions test. Additionally, a city can meet the public-health-and-safety exception even if there is conflicting evidence regarding whether the disputed project promotes public health and safety, and even if the project contemplates economic development in addition to public health and safety.

FACTS AND PROCEDURAL HISTORY

The City of Clearwater filed a complaint seeking a bond validation, and Suzanne Boschen filed an answer, challenging the City's authority to issue the bonds, and the design, engineering, and purpose of the project. The trial court granted the bond validation. Pursuant to the City's Charter, the City enacted an ordinance that authorized the issuance of Infrastructure Sales Tax Revenue Bonds to finance the cost of capital improvements at the entrance of Clearwater Beach. No ad valorem taxes were required to pay back the bonds. The improvements included "construction of a traffic roundabout, roadway realignment, elimination of the signal system, pedestrian crossings, land-scaping, and a water fountain central to the roundabout." *Boschen*, 777 S.2d at 960. The City authorized the issuance of the bonds for no more than $12 million in principal.

The City Charter requires a public referendum for bonds issued in excess of one million dollars unless the bonds are issued for "public health, safety or industrial development, and refunding." City of Clearwater, Pinellas County, Fla., Charter art. IX (Mar. 9, 1999). Based on the City's studies, the City concluded that the improvements would augment the roadway's level of service, help air quality, and make the area safer for pedestrians. The City also found that landscaping the roundabout would calm

traffic, which in turn would reduce pedestrian accidents. Therefore, the City determined that the project was essential for the continued health and safety of Clearwater's residents and visitors and issued the bonds without a public referendum.

Regardless of the City's purported findings, conflicting evidence suggested that the project's primary purpose was economic redevelopment, not transportation. Other evidence also casts doubt on the propriety of the City's conclusions. The trial court held that slowing traffic, improving traffic circulation, and sidewalks, and enlarged walkways, and crosswalks were essential governmental responsibilities. Additionally, although the landscaping and the fountain were for aesthetic purposes, they could not be separated from the overall project, which satisfied the required purposes.

LEGAL ANALYSIS

Boschen contended that the City did not have the authority to issue the bonds absent a referendum. Although the City Charter excepted projects with public health and safety purposes from the referendum requirements, Boschen maintained that the public-health-and-safety exception was equivalent to the more stringent essential-governmental-functions doctrine, which the City failed to satisfy. The City alleged that the 1968 revisions to the Florida Constitution nullified the essential-governmental-functions doctrine. If the public-health-and-safety exception was not equivalent to the essential-governmental-functions doctrine, then the court must examine the evidence to determine if it supported the City's conclusion that the project furthered the public health and safety, which Boschen claimed it could not do.

Boschen alleged that only essential government functions met the public-health-and-safety exception to the Charter's referendum requirement. A 1930 amendment to the Florida Constitution was interpreted to require local-government entities to obtain prior referendum approval before bonds could be issued. Fla. Const. art. IX, § 6 (1885). The referendum requirement was imposed during times of economic adversity to abridge imprudent spending and to stop local governments from further deteriorating the State's credit. *State v. Fla. State Improvement Commn.*, 60 S.2d 747, 751, 753 (Fla. 1952). The court liberally interpreted the requirement only for "the most basic and necessary functions of government." *Boschen*, 777 S.2d at 964 (citing *Fla. State Improvement Commn.*, 60 S.2d at 753). Therefore, if the bond

obligation sustained an essential governmental necessity, prior referendum approval was not necessary. The test for an essential governmental necessity was narrowly construed to inquire whether "the county government would cease to exist if the improvement [was] not provided." *State v. County of Manatee*, 93 S.2d 381, 383 (Fla. 1957).

However, more recent cases have held that 1968 revisions to the Florida Constitution superseded these prior decisions and have expressly repudiated the essential-governmental-functions doctrine. *State v. School Bd. of Sarasota County*, 561 S.2d 549, 553 (Fla. 1990); *State v. County of Dade*, 234 S.2d. 651 (Fla. 1970). The reasons for the doctrine no longer apply. It was created during a time when local governments had almost no power to finance significant government projects without prior referendum approval. Furthermore, the essential-government-functions doctrine was not reinstated by the Charter's public-health-and-safety exception because the plain language of the Charter excepts from referendums "revenue bonds for public health, safety or industrial development." *Boschen*, 777 S.2d at 963. At the ballot, voters were asked whether they wanted to repeal the portion of Article IX containing the public-health-and-safety exception, but chose to retain Article IX without varying any of its terms. Therefore, the exception to the referendum requirement was for "bond obligations that improve 'public health, safety and industrial development,'" and was not the equivalent of the essential-governmental-functions doctrine. *Id*. at 966.

Boschen next claimed that the project was not for the public health and safety, but rather for economic redevelopment, so that the City still needed a public referendum before the bonds could be issued. The City maintained that there was enough evidence to support its findings that the project advanced public health and safety.

"[L]egislative declarations of public purpose are presumed valid and should be considered correct unless patently erroneous." *State v. Housing Financing Auth. of Pinellas County*, 506 S.2d 397, 399 (Fla. 1987) (citing *Pepin v. Div. of Bond Fin.*, 493 S.2d 1013 (Fla. 1986)). Although there was competing evidence, because the City contemplated heath-and-safety concerns, researched different options, and consulted with its staff, the City's findings that the project furthered the public health and safety were not erroneous. Even though the traffic study and the

engineering study provided competing recommendations, the City was entitled to rely more heavily on one report than the other. A traffic engineer testified that the roundabout would be less effective than the City concluded, but he never submitted his findings to the City. Although economic concerns also prompted the project, these concerns did not override the fact that the project also furthered public health and safety. *Town of Medley v. State*, 162 S.2d 257, 260 (Fla. 1964). In fact, courts have acknowledged the health-and-safety concerns inherent in managing traffic congestion. *Welker v. State*, 93 S.2d 591, 594 (Fla. 1957). Finally, despite the fact that much of the construction cost was due to the building of the fountain and the landscaping, the roadway improvements were part of an overall project, and there was substantial evidence in the record showing that, taken as a whole, the project benefited public health and safety.

Although there was conflicting evidence about whether the project promoted public health and safety, and even though the City was motivated by economic concerns in addition to public health and safety, the court could not reweigh the evidence. Rather its inquiry was limited to whether the City based its findings on competent, substantial evidence, which the court answered in the affirmative.

RESEARCH REFERENCE

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 15, §§ 40.04, 43.14, 43.44 (Beth A. Buday & Donna M. Poczatek eds., 3d ed., Clark Boardman Callaghan 1995).

Robin Lynn Petronella

Municipal Authority: Domestic-Partnership Ordinance

Lowe v. Broward County,
766 S.2d 1199 (Fla. Dist. App. 4th 2000)

There has been a major change in the law of domestic relations. Now, domestic partnerships between adults of the same sex can be legal, and ordinances that grant rights and benefits to same-sex partners of county employees may be valid if carefully drawn. Domestic-partnership ordinances will be upheld if they lie within the home-rule authority of the local-government charter and do not conflict with existing state law. The 1999 Broward County domestic-partnership ordinance, approved in 2000,

created a new legal relationship between unmarried adults. Specifically, the ordinance allows adults to register publicly as unmarried domestic partners, and entitles them to many of the same benefits and privileges previously afforded only to married couples.

FACTS

In January 1999, in an effort to promote fairness and equality and to improve employee recruitment, retention, and loyalty, the Broward County Board of County Commissioners enacted the State's first Domestic Partnership Act (DPA). Almost immediately the DPA became the subject of a lawsuit. In February 1999, Lawrence Lowe, a taxpayer and property owner in Broward County, claimed that the DPA violated Article VIII, Section 1(g) of the Florida Constitution, which lays out the boundaries of home rule. Lowe contended that the County had exceeded its charter and intruded into an area of exclusive state control — the area of domestic relations. In addition, Lowe maintained that the DPA contradicted Florida's new Defense of Marriage Act (DOMA).

The trial court denied Lowe's constitutional challenge and, in September 2000, the Fourth District Court of Appeal upheld the lower court decision. At the same time, the appellate court certified the question to the Florida Supreme Court as a matter of great public importance. In April 2001, the court denied review, and the ordinance stood.

LEGAL ANALYSIS

The court considered two key issues: (1) whether the DPA legislated in an area of law that the State reserves for itself, and (2) whether the DPA is inconsistent with, and preempted by, existing State law.

A. Does the DPA intrude into matters reserved to the State?

Home-rule counties, such as Broward County, have broad powers but cannot legislate in areas of the law over which the State has exclusive authority. Fla. Const. art. VIII, § 1(g). Although the Legislature has granted home-rule counties full power to legislate at the local level, that authority does not extend to matters of State-wide concern. The law of domestic relations has, by tradition, been an area of State-wide concern.

Landlord-and-tenant law was analyzed as a matter of State-wide concern in *City of Miami Beach v. Fleetwood Hotel, Incorporated*, 261 S.2d 801 (Fla. 1972), when Miami Beach attempted to enact a rent-control ordinance. Miami Beach was not successful because the Florida Supreme Court found landlord-and-tenant law to be an area reserved to the State alone. The *Lowe* court distinguished *Fleetwood Hotel* by concluding that, although the city of Miami Beach had attempted to modify existing landlord-and-tenant law, the Broward County DPA did not modify any existing State law and therefore did not intrude into this exclusive area.

Although the court acknowledged the State's authority over the area of domestic-relations law, it reasoned that the DPA did not rise to the level of equal status with marriage. A new marriage-like relationship was not created by this ordinance, because unlike a legal marriage, no rights and obligations had been established in domestic partnerships that would survive the termination of the relationship. For instance, the DPA merely grants insurance benefits and extends certain visitation privileges at County facilities. It does not grant a domestic partner an elective share of an estate, automatically extend equal rights in property acquired during the relationship, or allow the partners to hold property by the entirety. For these reasons, the court found that the DPA did not encroach upon the area of domestic relationships.

B. Is the DPA inconsistent with existing State law?

The *Lowe* court held that the DPA is not inconsistent with Florida's Defense of Marriage Act, found in Section 741.212 of the Florida Statutes, and is not preempted by it. Preemption is analyzed under *Tallahassee Memorial Regional Medical Center, Incorporated v. Tallahassee Medical Center, Incorporated*, 681 S.2d 826 (Fla. Dist. App. 1st 1996), in which the court held that implied preemption could be found only where there was pervasive evidence of the Legislature's intent to preempt, and where there were strong public-policy reasons for the Legislature to occupy that field. *Id.* at 831 (citing *Tribune Co. v. Cannella*, 458 S.2d 1075 (Fla. 1984)). Although Florida's DOMA is strongly worded and specifically invalidates marriage-like relationships between persons of the same sex, the *Lowe* court held that Florida's DOMA did not preempt the DPA because domestic partnerships are not "relationships treated as marriages." The

court focused on that phrase in the DPA, rather than "relationships between persons of the same sex," which is also a part of DOMA. Without much legal analysis, the court concluded that DOMA was aimed at same-sex *marriages* rather than same-sex *relationships*. Therefore, because the DPA did not create a same-sex *marriage*, it survived the challenge.

Another subject evaluated under the concept of state preemption was that of health-insurance benefits offered to domestic partners. Certain health-insurance benefits appeared to be "expressly preempted" by Florida Statutes Section 112.08(2)(a). This section provides that local-government entities may extend insurance benefits only to officers, employees, and their dependents. Because the Florida Constitution and Statutes failed to define "dependents," the court held that it could define "dependents" according to its interpretation of the ordinary meaning of the term. The definition the court chose was, "relying on or requiring the aid of another for support." *Lowe*, 766 S.2d at 1209 (citing *American Heritage College Dictionary* 373 (3d ed., Houghton Mifflin Co. 1993)). Because domestic partners could meet the definition of "relying on or requiring the aid of another," the court found that part of the ordinance to be valid.

In contrast, the court did find conflict between Section 16½ — 158(c) of the DPA relating to the order of priority in which health-care surrogates would be named, and Florida Statutes Section 765.401, which mandates the specific order for choosing health-care surrogates. *Lowe,* 766 S.2d at 1210. In the case of health-care surrogates, because the Florida Statutes precisely set out the specific order of priority, the court found that the DPA was preempted by State law. The lesson here is that, when conflict with State law is at issue, local ordinances will be upheld more often if definitions in state statutes are vague. When State statutes define terms specifically, courts are more likely to find conflict with local ordinances, just as the *Lowe* court did here.

COMMENTARY

Local-government entities in more than half of the states have attempted to enact domestic-partnership ordinances. Ordinances that have been found valid, among others, are from California, Colorado, Georgia, Illinois, New York, and now, Florida. Local governments that have succeeded have been those in which the respective states failed to take two actions prior to the local government's enactment of the ordinance. First, the

states failed to clearly define the word "dependents" anywhere in their state constitutions; and second, states failed to clearly and expressly limit the powers granted to local governments under home-rule authority. The same is true in Florida. For this reason, if the Florida Legislature decides to "fix" these two vague aspects of the Florida Constitution, the future of domestic-partnership ordinances in Florida is uncertain. *See* Robin Cheryl Miller, *Validity of Governmental Domestic Partnership Enactment*, 74 A.L.R.5th 439 (1999) (providing a survey of domestic partnership ordinances in Colorado, Florida, Georgia, Illinois, Massachusetts, Minnesota, New York, and Virginia).

RESEARCH REFERENCES

- Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. Miami L. Rev. 1 (2000).
- Michael J. Kanotz, *For Better or For Worse: A Critical Analysis of Florida's Defense of Marriage Act*, 25 Fla. St. U. L. Rev. 439 (1998).

Carol Cole McCrory

Municipal Authority:
Police Power Controls – Street Management

Old South Duck Tours v. City of Savannah,
535 S.E.2d 751 (Ga. 2000)

A city ordinance prohibiting a tour company from using its amphibious vehicles to conduct tours in the City's historic district does not violate due process, as long as the ordinance is created through the City's police power. The Uniformity Clause of the Georgia Constitution preempts local ordinances in which general laws on the same subject are in place. There is an exception, however, when a local government exercises its police powers to enact a local ordinance pursuant to authority granted by general law. In that situation, a local ordinance prevails.

FACTS

Old South Duck Tours (Old South) sued the city of Savannah (City) for permission to use its amphibious vehicles to operate its tour service within the City's historic district. Although a City ordinance prohibited use of these vehicles within the historic district. Old South sought injunctive and declaratory relief,

arguing that a State statute, which authorized the Georgia Public Service Commission (GPSC) to issue permits for use of the vehicles within the district, preempted the City's ordinance. Old South also argued that the ordinance was unconstitutional because it violated Due Process and Equal Protection Clauses of the State and Federal Constitutions.

ANALYSIS

Local ordinances that are inconsistent with general law are preempted by general law and are therefore invalid. However, a local ordinance created pursuant to police-power authority granted by general law is an exception to the doctrine of preemption. The ordinance prohibiting amphibious vehicles in the historic district involved the exercise of the City's police power because it concerned the local government enacting a local law, which dealt with traffic on heavily traveled streets, clearly a matter of public safety. Therefore, the ordinance was an exception to the doctrine of preemption.

Constitutional equal protection prohibits governmental action from infringing on a fundamental right or involving a member of a suspect class. However, when the governmental action does not infringe on either, it is held to the least rigorous level of constitutional scrutiny, the rational-basis test. The ordinance did not implicate either because operation of tour-service vehicles was not a fundamental right and tour-business owners were not a suspect class. The court therefore applied the rational-basis test.

An ordinance involves a valid exercise of a city's police power and satisfies the rational-basis test if it is substantially related to the public health, safety, or general welfare of that city. The ordinance satisfied this rational-basis test because its purpose was to regulate traffic on heavily traveled City streets by a particular type of vehicle and to preserve the aesthetics and ambiance of the historic district.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 5, § 15.20 (Beth A. Buday & Victoria A. Braucher eds., 3d ed., Clark Boardman Callaghan 1996).
- Lawrence H. Tribe, *American Constitutional Law* § 16-6 (2d ed., Found. Press 1988).

Lindsey A. Smith