

IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

DANIEL D. LINDEMANN and
GERALD W. HOLZWORTH

Case No.: 2017-CA-001704-K

Plaintiffs,

v.

THE CITY OF PENSACOLA,
THE CITY OF PENSACOLA COMMUNITY
REDEVELOPMENT AGENCY, and
THE FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION

Defendants.

MOTION TO DISMISS

Defendant, the City of Pensacola (the “City”), pursuant to Rule 1.140, *Florida Rules of Civil Procedure*, respectfully requests that this Court dismiss the Complaint for Declaratory Relief filed by Plaintiffs, Daniel D. Lindemann and Gerald W. Holzworth, and in support state:

I. Summary

Plaintiffs lack standing to challenge the validity of the lease agreement between the City and the Florida Fish and Wildlife Conservation Commission (“FWC”) as they have not suffered any special injury that is different from the injuries to other citizens. Even if Plaintiffs had standing, they have failed to articulate sufficient grounds to invalidate the lease. Plaintiffs inability to state a claim requires dismissal of both claims with prejudice.

II. Background

Plaintiffs attempted to assert two claims for declaratory relief seeking to invalidate a lease agreement between the FWC and the City. The leased property (“Bruce Beach”) was acquired by the City through two separate conveyances – the first in 1945 and the second in

1974. Compl. ¶ 10. Several years later, the City created a community redevelopment area pursuant to Chapter 163, *Florida Statutes*, which included Bruce Beach. *Id.* ¶¶ 15 & 17. On May 12, 2014, the FWC and the City entered into the lease agreement for Bruce Beach. Compl. Ex. A. Under the lease, the FWC agreed to build and maintain the Florida Gulf Coast Marine Fisheries/Enhancement Center. Compl. Ex. A.

Plaintiffs mistakenly believe this lease is void. In Count I, Plaintiffs argue the City failed to comply with certain statutory notice requirements that are not applicable to the lease or the leased property. In Count II, Plaintiffs allege the lease automatically became void when the FWC failed to timely commence construction of the project. However, there are no allegations that the City has attempted to terminate the lease, and Plaintiffs do not have any right to terminate or otherwise invalidate the lease.

II. Memorandum of Law

A. Plaintiffs do not have standing.

Plaintiffs do not have standing to pursue the declaratory relief they seek because they have not and cannot allege a special injury. “[C]itizens and taxpayers lack standing to challenge a governmental action unless they demonstrate either a special injury, different from the injuries to other citizens and taxpayers, or unless the claim is based on the violation of a provision of the Constitution that governs the taxing and spending powers.” *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015); *Smith v. City Of Fort Myers*, 944 So. 2d 1092, 1094 (Fla. 2d DCA 2006) (dismissing a citizen’s declaratory action challenging the city’s transfer of its ownership of a park to the county because the citizen did not allege a special injury and, thus, did not have standing); *N. Broward Hosp. Dist. v. Fornes*, 476 So. 2d 154, 156 (Fla. 1985) (“In the present case, Fornes does not allege any special injury to her, and consequently, she has no standing to

sue to enjoin the District's planned expansion.”). This special injury requirement extends to citizens who challenge leases entered into by local governments. *Kneapler v. City of Miami*, 173 So. 3d 1002, 1003 (Fla. 3d DCA 2015); *Solares*, 166 So. 3d at 1094.

In order to challenge the validity of the lease between the City and the FWC, Plaintiffs must identify an injury that they have suffered that is unique and different from the injuries suffered by other citizens. Plaintiffs believe the lease is invalid because the City of Pensacola Community Redevelopment Agency (the “CRA”) did not execute the lease, the City disposed of the property for less than its fair value without proper hearing and notice, and the FWC failed to commence construction of the hatchery and enhancement center. However, the Complaint fails to allege how this conduct by the FWC and the City has negatively impacted Plaintiffs in any way.

Regardless, even if these allegations are true, none of this conduct caused any unique injury to either Plaintiff. The Complaint fails to allege how the lack of notice, the failure of the CRA to execute the lease, and the failure to commence construction have caused a special injury to Plaintiffs that is different from the injuries to other citizens. Plaintiffs’ allegations that their property lies within the same Redevelopment Area as Bruce Beach is not sufficient to confer standing on Plaintiffs. Accordingly, Plaintiffs’ lack of standing requires dismissal of their claims with prejudice.

B. The City was not required to give public notice before executing the lease.

The notice requirements in Section 163.80(3), *Florida Statutes*, do not apply to properties acquired before the creation of a community redevelopment area. “The notice requirements for the disposal of real property acquired for redevelopment purposes in section 163.380(3)(a), *Florida Statutes*, do not apply to city-owned property located within the city's community

redevelopment area which was acquired for purposes other than community redevelopment prior to the creation of the city's community redevelopment area.” Fla. Att’y Gen. Op. 2010-47 (2010); *see also* Fla. Att’y Gen. Op. 2008-21 (2008) (“[T]he notice requirements for the disposal of real property acquired for redevelopment purposes in section 163.380(3)(a), Florida Statutes, do not apply to city-owned submerged lands located within the city’s community redevelopment area which were acquired for purposes other than community redevelopment prior to the creation of the city’s community redevelopment area.”).

The City acquired Bruce Beach several years before the City established the community redevelopment area, in which the property now sits. Plaintiffs allege the City acquired the Bruce Beach property through two separate transactions. Compl. ¶ 10. The City acquired the first part on January 17, 1945, and acquired the second part on August 21, 1974. *Id.* Several years later, the “City dedicated and assigned Bruce Beach to the CRA in or about 1980 . . . for the purpose of promoting, planning, packaging and accomplishing Bruce Beach’s redevelopment.” Compl. ¶ 17.

Plaintiffs’ Complaint alleges that the City acquired Bruce Beach long before the City established the community redevelopment area. Compl. ¶¶ 15 & 17. Accordingly, the notice requirements in Section 163.380(3), *Florida Statutes*, do not apply to the City.

Moreover, the City was exempt from providing public notice of the lease before execution. *See* § 163.400(2), Fla. Stat. The City has the authority to lease its property to any other public body “[f]or the purpose of aiding in the planning, undertaking, or carrying out of community redevelopment and related activities.” *See* § 163.400(1), Fla. Stat. “Any sale, conveyance, lease, or agreement provided for in this section may be made by a public body without appraisal, public notice, advertisement, or public bidding.” § 163.400(2), Fla. Stat.

Although Section 163.400 and Section 163.380 cover the same subject matter, Section 163.400 controls over Section 163.380 because Section 16.400 is more specific. *Cricket Properties, LLC v. Nassau Pointe at Heritage Isles Homeowners Ass'n, Inc.*, 124 So. 3d 302, 307 (Fla. 2d DCA 2013) (“It is well settled that a more specific statute covering a particular subject is controlling over one covering the same subject in general terms.”).

Plaintiffs allege the City leased the property to FWC – a government agency. Compl. ¶ 18. Therefore, the City was entitled to enter into the “lease . . . without appraisal, public notice, advertisement, or public bidding.” § 163.400(2), Fla. Stat. Plaintiffs’ attempt to invalidate the lease between the City and FWC for lack of proper notice is flawed and unavailing.

C. The termination provisions of the lease are not automatic.

Even assuming the FWC has breached the lease by failing to timely commence construction, the lease is valid until the City takes action to enforce it. “It is a general rule that provisions in leases for their forfeiture upon the breach of the lessee's covenants are for the benefit of the lessor, and he had the election to determine whether he will insist upon the forfeiture or not.” *Altieri v. Atl. Nat. Bank of W. Palm Beach*, 168 So. 2d 693, 695 (Fla. 2d DCA 1964). “The breach of a condition or covenant for which a forfeiture is expressly provided does not automatically terminate the lease. There must be some act upon the lessor's part evidencing his intention to treat the lease as actually forfeited.” *Id.*

The lease provides that the FWC “agrees to immediately forfeit all property interests and any rights under this Lease, and the Lease shall be void” if the FWC fails to commence construction within three years following the execution of the lease. Compl. Ex. A. § 20. However, the FWC’s rights do not automatically terminate under the lease. The City must pursue these remedies or enforce the terms of the lease in order to divest the FWC of its property

interest. Plaintiffs have not and cannot allege that the City has sought to terminate the lease due to the FWC's failure to commence construction.

The City is the only party that can pursue these remedies. Plaintiffs are not parties to the lease, and do not have any right to enforce the lease terms. While the City may have certain remedies available to it, nothing in the lease requires the City to enforce it or otherwise seek to compel the FWC to forfeit its rights and property interests under the lease. Thus, the lease is still valid and enforceable, and Count II should be dismissed with prejudice.

WHEREFORE, the City respectfully requests that this Court dismiss the Complaint for Declaratory Relief with prejudice, and grant any further relief that this Court deems just and proper.

Respectfully submitted this 15th day of December, 2017,

GRAYROBINSON, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 15, 2017, I electronically filed the foregoing with the Clerk of the Court by using the eFiling Portal, which will forward a copy via electronic

email to: Robert Emmanuel, Esquire, rae@esclaw.com, and Adam Cobb, acobb@esclaw.com,
30 South Spring Street, Pensacola, Florida 32502.

GRAYROBINSON, P.A.

/s/ Jason A. Zimmerman
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