

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

APPELLATE DIVISION (CIVIL): AY
Case Nos.: 502012CA003213XXXXMB
502012CA006013XXXXMB

BYRD FAMILY TRUST

Appellant,

v.

TOWN OF JUPITER

Appellee.

Opinion filed: **APR 17 2013**

Appeal from the Order of the Town of Jupiter Special Magistrate (January 23, 2012) and the Order of the Town of Jupiter Special Magistrate (March 23, 2012)

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REVERSED AND REMANDED, IN PART, AFFIRMED, IN PART.

This is a consolidated appeal to the Fifteenth Judicial Circuit in and for Palm Beach County from two Orders of the Town of Jupiter ("the Town") Code Compliance Special Magistrate, entered against the Byrd Family Trust ("the Trust") dated January 23, 2012 and March 23, 2012. The parties (pursuant to a Joint Stipulation of Facts) agree that the Trust is the legal owner of a residential property in the town of Jupiter.

On December 16, 2010, the Town received a complaint that mangrove trees had been removed from the Trust's property and that the surrounding area had been filled with sand. After an investigation, the Town found that mangroves had indeed been removed and that sand

had been deposited on the property. The Trust did not have a permit to remove the mangroves or to place sand on the property. Consequently, on December 20, 2010, the Town issued a stop work order on the property to prevent the further removal of any mangrove trees. Thereafter, on February 16, 2011, the Town issued a Notice of Violation related to the removal of the mangroves from the Trust's property and relating to the placement of sand on the property without a permit.

The Trust filed a Motion to Dismiss the Town's Notice of Violation, challenging, *inter alia*, the Special Magistrate's jurisdiction to regulate mangroves. On October 7, 2011, the Special Magistrate granted, in part, and denied, in part, the Motion to Dismiss. Significant to this appeal, the Special Magistrate found that the Town had jurisdiction to enforce state law relating to mangroves.

On January 23, 2012, the Special Magistrate issued a Violation Order finding that the Trust violated both Section 26-99 of the Jupiter Town Code, by failing to adhere to state statutes regulating the alteration of mangroves, and Section 24-83 of the Jupiter Town Code by failing to obtain a permit for the placement of sand on the property. Based on these findings, the Special Magistrate fined the Trust \$15,000 for each mangrove tree removed from the property resulting in a total fine of \$1,635,000.00. The Special Magistrate also fined the Trust \$15,000 for the placement of sand on the property without a permit. Finally, on March 23, 2012, the Special Magistrate awarded the Town attorney's fees and costs against the Trust.

This Court has jurisdiction to review the decision of the Special Magistrate. § 162.11, Fla. Stat. (2012) and Fla. R. App. P. 9.030(c). The standard of review this Court must apply when evaluating the Special Magistrate's administrative finding is limited to three issues. The first issue is whether the Special Magistrate afforded Appellant procedural due process. The

second issue is whether the Special Magistrate observed the essential requirements of law. The third and final issue is whether the Special Magistrate's findings and judgment are supported by competent substantial evidence. *Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

The Trust does not argue lack of procedural due process and does not argue that there was a lack of competent substantial evidence to support the Special Magistrate's findings. The Trust's sole argument on appeal is that the Special Magistrate wholly failed to observe the essential requirements of law by applying and enforcing certain provisions of the Jupiter Town Code.

Jurisdiction of the Town of Jupiter

The parties have stipulated that one hundred and nine (109) mangrove trees were cut down and removed from the property. The parties further agree that the Town has *not* been delegated authority over mangrove trees pursuant to the Mangrove Trimming and Preservation Act §§ 403.9321-403.9333, Fla. Stat. (2011) ("the Mangrove Act" or "the Act"). The primary issue raised on appeal is whether the Town, through the Special Magistrate, had jurisdiction to impose a fine against the Trust for the removal of the 109 mangrove trees at issue.

The Trust asserts that the Town has no authority to regulate or enforce any ordinance related to mangroves as local regulation and enforcement is preempted by the Mangrove Act, §§ 403.9321-403.9333, Fla. Stat. (2011). The Trust contends that without the power to regulate or enforce the Mangrove Act, the Town has no ability to fine the Trust for removing mangroves.

In pertinent part, the Mangrove Act provides as follows:

- (1) Sections 403.9321-403.9333 and any lawful regulations adopted by a local government that receives a delegation of the department's authority to administer and enforce the regulation of mangroves as provided by this section shall be the sole regulations in this state for the trimming and alteration of mangroves on privately or publicly owned lands. All other state and local regulation of mangrove is as provided in subsection (3).

- (3) A local government that wants to establish a program for the regulation of mangroves may request delegation from the department at any time. However, all local government regulation of mangroves, except pursuant to a delegation as provided by this section, is abolished 180 days after this section takes effect.

§ 403.9234, Fla. Stat. (2011). It is clear that, absent a delegation of authority, all regulation of mangroves by local governments is preempted. The Town acknowledges that it has not been delegated authority to administer and enforce the Mangrove Act pursuant to Section 403.9234. Nevertheless, the Town maintains that assessing a fine for removal of mangroves does not run afoul of the Mangrove Act's preemption of local government regulation.

The fine at issue here was assessed for violation of Section 26-99 of the Jupiter Town Code. Section 26-99 provides as follows:

Mangrove protection.

All trimming or removal of mangroves shall conform to the procedures and regulations established by the Florida Department of Environmental Protection (DEP) or the appropriate jurisdictional agency. Town staff shall have the authority to issue a stop work order if it appears that the DEP's regulations are being violated.

Section 26-99 of the Jupiter Town Code. The Town asserts that Section 26-99 does not conflict with the Mangrove Act, rather it merely requires residents to comply with the regulations established by the Florida Department of Environmental Protection.

While Section 26-99 does not establish regulations relating to mangroves apart from requiring compliance with DEP regulations, the assessment of a fine is an act of regulation preempted by the Mangrove Act and the Special Magistrate lacked jurisdiction to assess the fine. The plain language of the Mangrove Act abolishes "all local government regulation of mangroves." The Act also makes clear that a delegation of authority is required to "administer

and *enforce* the regulation of mangroves.” The Town failed to obtain a delegation of authority from the State and without such a delegation it has no ability to impose the fine at issue here.

A finding of preemption is consistent with the opinion of the Fourth District Court of Appeal in *Sun Harbor Homeowners Ass'n, Inc. v. Broward County Dept. of Natural Res. Prot.*, 700 So. 2d 178 (Fla. 4th DCA 1997). In *Sun Harbor*, Broward County attempted to fine a homeowner’s association for topping mangrove trees. The court concluded that the county ordinance at issue had been preempted by the Mangrove Act. Although argued on a different point of law, the court held: “Broward County has no authority to impose a civil penalty on anyone by virtue of regulatory ordinances inconsistent with general law. Therefore, petitioner properly enjoys an immunity under the constitution to be free from attempted regulation under ordinances no longer consistent with general law.” *Sun Harbor*, 700 So. 2d at 181.

To support the imposition of a fine, the Town relies on *J-II Investments, Inc. v. Leon County*, 908 So. 2d 1140 (Fla. 1st DCA 2005). *J-II Investments* was likewise relied upon by the Special Magistrate in denying the Trust’s jurisdictional challenge. The Town’s reliance on *J-II Investments* is misplaced.

J-II Investments involved preemption under the Florida Agricultural Lands and Practices Act. The Agricultural Act prohibited a county from “adopt[ing] any ordinance, resolution, regulation, rule or policy to prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation on land.” *Id.* at 1141. The First District Court of Appeal concluded that a prohibition on adopting new ordinances did not prevent the county from enforcing an existing ordinance. The Mangrove Act, however, does more than prohibit the adoption of ordinances relating to mangroves. The Act abolishes all regulation of mangroves absent a delegation of authority. *J-II Investments* is simply inapposite. The Special Magistrate’s finding premised on

the application of *J-II Investments, Sun Harbor*, and the Mangrove Act, is a departure from the essential requirements of the law and, as to this issue, the Violation Order of the Special Magistrate is reversed.

To be clear, this Court does not condone the Trust's behavior. In flagrant disregard of State law, the Trust removed and destroyed protected trees and vegetation. The issue is who has jurisdiction to address, and remedy, this violation of State law. Jurisdiction here lies with the State of Florida through the Department of Environmental Protection, not with the Town.

Failure to Obtain an Engineering Construction Permit

The Trust next challenges the fine associated with the placement of sand on the property. For this violation, the Special Magistrate assessed a fine of \$15,000.00. The Trust does not dispute the finding of a violation, but simply the amount of the fine.

The Trust argues that the Special Magistrate failed to observe the essential requirements of the law because the Magistrate assessed a fine pursuant to Section 8-33 of the Jupiter Town Code when the fine should have been assessed pursuant to Section 24-82 of the Jupiter Town Code. After consideration, the Court concludes that the Trust has failed to carry its burden to demonstrate a departure from the essential requirements of law with respect to the imposition of this fine. The Special Magistrate's assessment of the fine for placing sand on the property without a permit is, therefore, affirmed.

Attorney's Fees/Costs

The final issue raised by the Trust concerns the award of attorney's fees and costs provided in the Special Magistrate's March 23, 2012 Order. The Trust's primary argument is that § 162.09(2)(d), Fla. Stat. (2011) only provides for a fine to cover costs incurred by the local government in enforcing its codes and "costs" do not include attorney's fees.

If Section 162.09(2)(d) were the only authority for an award of attorney's fees, the Trust would be correct. However, the Town has adopted the following provision with regard to attorney's fees as part of the municipal code:

- (a) A Special Magistrate shall have the duties, responsibilities and powers, and shall carry out the functions and procedures as set forth in Chapter 162, F.S. as amended from time to time. These duties, responsibilities and powers may include, *but are not limited to*, adopting reasonable rules and procedures for the conduct of hearings; subpoena alleged violators and witnesses to its hearings; subpoena evidence to its hearings; hold hearings and take testimony under oath and receive evidence; *assess fines and costs against violators, including but not limited to attorney's fees incurred by the Town for services by the Town Attorney and Magistrate*

(Sec. 8-29) (emphasis added). It appears that the Town clearly provided by ordinance for attorney's fees as a recoverable expense when it is the prevailing party; the issue is whether the Town had the authority to do so. The Court concludes that it did.

Pursuant to the Municipal Home Rule Powers Act (Chapter 166) a municipality may exercise any power for municipal purposes except when expressly prohibited by law. § 166.021(1), Fla. Stat. (2011). A municipality may provide by ordinance for the recovery of attorney's fees in an enforcement action. *See, e.g. City of Venice v. Valente*, 429 So. 2d 1241 (Fla. 2nd DCA 1983). Before a municipality may be prohibited from acting in a given area, there must be express preemption by the legislature. *Id.* at 1243.¹

The Trust essentially argues that the Town cannot, under its home rule powers, adopt an ordinance providing for attorney's fees because the legislature did not provide for the recovery of attorney's fees in Section 162.09(2)(d). According to the Trust, the legislature could have provided for attorney's fees in Section 162.09(2)(d), but did not; therefore, the Town cannot pass an ordinance providing for the recovery of attorney's fees. The Trust's argument fails.

¹ The Mangrove Act discussed *supra* is an example of express preemption.

The question is not whether the legislature could have provided for attorney's fees. The question is whether the legislature expressly *prohibited* the Town, or any other municipality, from adopting an ordinance providing for attorney's fees in an enforcement action. There is nothing in Section 162.09(2)(d) which expressly prohibits the Town from adopting an ordinance providing for an award of attorney's fees by the Special Magistrate.

Moreover, the fact that the legislature provided for a recovery of attorney's fees in Section 162.10, but not in Section 162.09(2)(d), does not mean that a municipality's power to adopt a fee ordinance is limited. In rejecting a similar argument, the court in *City of Venice*, *supra*, stated:

Appellee, in making an argument that the state legislature has preempted this area, points to the fact that the state legislature has provided for attorney's fees in special assessment suits. § 170.10, Fla. Stat. (1981). Appellee suggests this indicates legislative intent to reserve to itself the sole power to provide all other instances where municipalities may claim attorney's fees. However, in our opinion section 170.10 does not "expressly preempt" or impliedly preclude municipalities from providing for costs and attorney's fees in other appropriate instances of litigation

On a subject other than attorney's fees, our sister court has concluded, and we agree, that there must be "express preemption" by the legislature before a municipality may be prohibited from acting in a given area. *See City of Miami Beach v. Ricio Corp.*, 404 So. 2d 1066 (Fla. 3d DCA 1981).

City of Venice, 429 So.2d at 1243-44.

Finally, the legislature expressly stated that Chapter 162 was not the exclusive means to obtain compliance with local codes and ordinances. Section 162.13 provides as follows: "[i]t is the legislative intent of ss. 162.01-162.12 to provide an additional or supplemental means of obtaining compliance with local codes. Nothing contained in ss. 162.01-162.12 shall prohibit a local governing body from enforcing its codes by any other means." § 162.13, Fla. Stat. (2011). This expression of legislative intent is clearly inconsistent with a finding of preemption.

The Special Magistrate did not depart from the essential requirements of law with respect to the awarding of attorney's fees pursuant to Town ordinance. On this issue, the finding of the Special Magistrate is affirmed.

The Trust raises an additional issue as to the apportionment of attorney's fees and costs. The Trust argues that the Special Magistrate should have apportioned the costs and the attorney's fees awarded below because the Trust prevailed on four of the six issues it raised. The Trust also argues that the Magistrate should have apportioned the "awardable and non-awardable" costs between the two upheld violations.

"The party seeking fees has the burden to allocate them to the issues for which fees are awardable or to show that the issues were so intertwined that allocation is not feasible." *Crown Custom Homes, Inc. v. Sabatino*, 18 So. 3d 738, 740 (Fla. 2d DCA 2009). The Special Magistrate's finding on the fees and costs reads as follows:

Attorney's fees are normally apportioned, except when the issues are so intertwined that allocation is not feasible. In Edwin Craig Lubkey and Automated Vacuum Systems, Inc. v. Compuvac Systems, Inc., 857 So. 2d 966 (Fla. 2d DCA 2003) cited by the Respondent, the court stated "Further, the party seeking fees has the burden to allocate them to the issues for which fees are awardable or to show that the issues were so intertwined that allocation is not feasible." Lubkey at 997. While no [sic] specifically stated by the Town, but having been presented with four days of testimony and evidence, the facts and issues in this case are clearly intertwined. While the Town did not prevail on four of six allegations, neither did they have the burden of proving those allegations at trial, since they had already been dismissed. **The two counts upon which the Town prevailed are completely intertwined.** The testimony and evidence for each matter was simultaneous and similar. Respondent argues that if its appeal is successful, the attorney's fees and costs should be apportioned even between the two violations that were upheld by the magistrate. That seems like a bridge yet to be crossed, and as a result, the attorney's fees for this case are determined to be so intertwined that apportionment is not reasonably feasible.

(3/23/12 Order 7.) (emphasis added). The Special Magistrate's finding that the two counts in this case upon which the Town initially prevailed were "completely intertwined" is a bit confusing.

Apportionment relates to the task of allocating time between a claim where fees are not recoverable and a claim where fees are recoverable. There would be no need to allocate time between the two counts upon which the Town prevailed; rather apportionment would be between counts on which the Town prevailed and counts on which the Town did not prevail. The issue, therefore, is whether the four counts upon which the Town did not prevail were intertwined with the two counts upon which the Town did prevail.

In any event, the apportionment issue will need to be reconsidered by the Special Magistrate in light of this Court's reversal of the fine assessed for the removal of mangroves from the Trust's property. On remand, the Special Magistrate will determine whether apportionment is required or whether the issues between the prevailing and non-prevailing claims were so intertwined that allocation is not feasible. The same analysis will be required with respect to the costs.

The January 2012 Order of the Special Magistrate is hereby REVERSED as to Part b (Section 26-99) and AFFIRMED as to Part a (Section 24-83). The March 2012 Order is AFFIRMED as to entitlement and REMANDED to the Special Master to determine whether apportionment of attorney's fees and costs is required consistent with this opinion.

SASSER, BRUNSON and KELLEY, JJ. concur.