IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 2016-018370-CA-01

FLORIDA RETAIL FEDERATION, INC., a Florida not-for-profit corporation and SUPER PROGRESO INC., a Florida for-profit corporation,

Plaintiffs,

v.

THE CITY OF CORAL GABLES, FLORIDA, a Florida municipality,

Defendant.
_____/

ORDER (I) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; AND (II) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter came before the Court for hearing on February 2, 2017 upon the cross-motions for summary judgment filed by the Plaintiffs, Florida Retail Federation, Inc. ("FRF") and Super Progresso Inc. ("Super Progreso"), and the Defendant, the City of Coral Gables (the "City"). Additionally, on February 22, 2017, Plaintiffs and Intervenor filed a joint objection to Defendant's proposed order. Defendant filed its response to the joint objection on February 23, 2017. The Court, having reviewed the pleadings, considered the arguments of the Plaintiffs, Defendant, and the State of Florida as intervening party, and being otherwise duly advised in the premises, makes the following findings of fact and conclusions of law.

For the sake of clarity, the joint objection filed by Plaintiffs and Intervenor is overruled because there is no basis for this court to ignore any portion of Defendant's proposed order.

I. Background

This lawsuit focuses on the interplay between two pieces of legislation addressing the regulation of polystyrene use: Ordinance 2016-08, enacted by the City on February 9, 2016 (the "City Ordinance"), and section 500.90, Florida Statutes, enacted by the Florida Legislature on March 16, 2016. On July 18, 2016, the Plaintiffs filed their Complaint for Declaratory Judgment and Injunctive Relief wherein they seek a declaration that the City Ordinance is invalid because the regulation of polystyrene was purportedly preempted by sections 500.90, 403.708(9) and 403.7033 of the Florida Statutes. The City filed a Motion to Dismiss, arguing that none of these statutory provisions preempted the regulation of polystyrene and that the City Ordinance remains valid and enforceable. The Court held a hearing on the Motion to Dismiss at which time it instructed the parties to bring the issues back before the Court on a motion for summary judgment or motion for judgment on the pleadings.

On November 4, 2016, the City filed its Answer, Affirmative Defenses, and Counterclaim seeking a declaration that sections 500.90, 403.708(9) and 403.7033 are unconstitutional, as well as its Motion for Summary Judgment. The Plaintiffs filed their competing Motion for Summary Judgment on December 6, 2016. The State of Florida was granted permission to intervene, and on December 6, 2016, it filed a Response in Opposition to Coral Gables' Motion for Summary Judgment. (The Plaintiffs and the State of Florida are collectively referred to herein as the "Opponents").

At the hearing on the parties' cross-motions for summary judgment, the Court orally ruled that the Plaintiffs have standing to bring their claims.

II. Findings of Fact

The City Commission considered the City Ordinance on December 8, 2015. *See* Compl. Ex. 1. The City Ordinance, as considered, prohibited (1) the sale or use of polystyrene containers by City vendors or contractors within the City or in performing their duties under a City contract (Subdivision III); (2) the sale or use of polystyrene articles by special event permittees in City facilities (Article VII); and (3) the sale or use of polystyrene "food service articles" by food service providers and stores within the City (Article VIII). *See id.* The City Ordinance set forth exemptions for food service articles prepackaged in polystyrene, polystyrene used to package raw meat, fish, or poultry, and certain not-for-profit and governmental entities, as well as code enforcement procedures for issuing tickets and fines for violations of the City Ordinance and for appealing violations found by the City. *See id.*

The City Commission postponed the legislation's enactment upon the request of the City Chamber of Commerce and Business Improvement District (the "BID"), to allow businesses within the City limits an opportunity to comment on the proposed legislation. *See* Compl. Ex. 3. The BID reviewed the legislation over the course of the coming months, and made two minor additions to the ordinance's text: a $1,000 fine added for any violation after a violator's third in a twelve-month period, and a requirement that the City continue to "make the ordinance known" to those subject to it after the conclusion of its educational campaign on the ordinance. *See id*. With these changes, the City adopted and enacted the ordinance on February 9, 2016. *See id*.

One month later, on March 9, 2016, the Florida Legislature passed House Bill 7007, creating section 500.90, Florida Statutes, and providing:

> **500.90 Regulation of polystyrene products preempted to department.** — The regulation of the use or sale of polystyrene products by entities regulated under this chapter is preempted to the [Florida Department of Agriculture and Consumer Services]. – The

> regulation or sale of polystyrene by entitled regulated under Chapter 500 is preempted to the department. **This preemption does not apply to local ordinances or provisions thereof enacted before January 1, 2016,** and does not limit the authority of a local government to restrict the use of polystyrene by individuals on public property, temporary vendors on public property, or entities engaged in a contractual relationship with local government for the provision of goods or services, **unless such use is otherwise preempted by law**.

(emphasis added).

The City was the only municipality affected by the provision granting protection to local ordinances enacted before January 1, 2016(the "Retroactivity Provision"). Numerous other municipalities enacted ordinances regulating the use of polystyrene, but all were excluded from section 500.90's preemptive reach. Cities with existing polystyrene regulations include: Bal Harbour (Ord. No. 577, § 2, 2014), Bay Harbor Islands (Ord. No. 973, 2015), Hollywood (Am. Ord. 0-96-56, 1996), Key Biscayne (Ord. No. 2014-10, 2014), Miami Beach (Ord. No. 2015-3962, 2015), North Bay Village (Ord. No. 215-14, 2015), and Surfside (Ord. No. 1630, 2015).[1] The effect of the Retroactivity Provision is that the City Ordinance was the only enacted ordinance invalidated.

On April 26, 2016, the City passed an additional ordinance ("Ordinance No. 2016-28") in the exercise of its authority granted by the Dade County Home Rule Amendment to the Florida Constitution, nullifying section 500.90 to the extent that the statute's preemption of polystyrene regulations was a special law applicable only to the City, and determining that the City's polystyrene regulations are not preempted and remain enforceable.

[1] The Court can take judicial notice of these city ordinances pursuant to Florida Statutes § 90.202(10).

Plaintiffs filed suit on July 18, 2016, challenging only Article VIII of the City Ordinance — the provision of the City Ordinance that prohibits the sale or use of polystyrene "food service articles" by food service providers and stores within the City *See id.* ¶ 34 & Ex. 1. Plaintiffs contend that this provision of the City Ordinance is preempted by section 500.90, and also by sections 403.708(9) and 403.7033, Florida Statutes, which provide:

> **403.7033 Departmental analysis of particular recyclable materials.**—The Legislature finds that prudent regulation of recyclable materials is crucial to the ongoing welfare of Florida's ecology and economy. As such, the Department of Environmental Protection shall undertake an analysis of the need for new or different regulation of auxiliary containers, wrappings, or disposable plastic bags used by consumers to carry products from retail establishments. The analysis shall include input from state and local government agencies, stakeholders, private businesses, and citizens, and shall evaluate the efficacy and necessity of both statewide and local regulation of these materials. To ensure consistent and effective implementation, the department shall submit a report with conclusions and recommendations to the Legislature no later than February 1, 2010. **Until such time that the Legislature adopts the recommendations of the department, no local government, local governmental agency, or state government agency may enact any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags.**
>
> **403.708 Prohibition; penalty.—**
>
> . . .
>
> (9) The packaging of products manufactured or sold in the state may not be controlled by governmental rule, regulation, or ordinance adopted after March 1, 1974, other than as expressly provided in this act.

(emphasis added).

Plaintiffs do not allege that the City has enforced the City Ordinance against Super Progreso, the FRF, or any member of the FRF and, as of the date of the hearing on the subject motions, the City Ordinance had not been applied to them.

III. Conclusions of Law

A. Legal Standard

"A duly enacted ordinance of a local government is presumed valid, and the party challenging it carries the burden of establishing its invalidity." *Hoesch v. Broward Cnty*, 53 So. 3d 1177, 1180 (Fla. 4th DCA 2011) (citing *Lowe v. Broward Cnty.*, 766 So. 2d 1199, 1203 (Fla. 4th DCA 2000)). "A corollary of this presumption is that an appellate court will indulge every reasonable presumption in favor of an ordinance's constitutionality." *Id.* at 1180.

B. Section 500.90, Florida Statutes Is Unconstitutional.

1. The Florida Constitution Prohibits Special Acts Directed Solely at Miami-Dade County or Its Municipalities.

In 1956, the Florida Constitution was amended to authorize the citizens of Miami-Dade County to adopt a home rule charter. Art. VIII, §11, Florida Const. of 1885 (1956), *retained in*, Art. VIII, § 6, n.3, Florida Const. of 1968 (the "Home Rule Amendment"). The "metropolitan government of Miami-Dade County is unique in this state due to its constitutional home rule amendment." *Metropolitan Dade County v. City of Miami*, 396 So. 2d 144, 146 (Fla. 1980). One of the primary purposes of the Home Rule Amendment is to prevent the Florida Legislature from enacting laws directed solely at Miami-Dade County or any one of its municipalities. Under the Amendment, the Florida Legislature retained the power only "to enact general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida." Home Rule Amendment, §§ (5), (6) (9). These sections provide:

> (5) Nothing in this section shall limit or restrict the power of the Legislature to enact **general laws** which shall relate to Dade County and any other one or more counties in the State of Florida **or to any municipality in Dade County and any other one or more municipalities of the State of Florida**, and the home rule charter provided for herein shall not conflict with any provision of this Constitution nor of any applicable

general laws now applying to Dade County and any other one or more counties of the State of Florida except as expressly authorized in this section nor shall any ordinance enacted in pursuance to said home rule charter conflict with this Constitution or any such applicable general law except as expressly authorized herein, nor shall the charter of any municipality in Dade County conflict with this Constitution or any such applicable general law except as expressly authorized herein, provided however that said charter and said ordinances enacted in pursuance thereof may conflict with, modify or nullify any existing local, special or general law applicable only to Dade County.

(6) Nothing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties of the State of Florida **or to any municipality in Dade County and any other one or more municipalities of the State of Florida relating to county or municipal affairs** and all such general laws shall apply to Dade County and to all municipalities therein to the same extent as if this section had not been adopted and such general laws shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith, and shall supersede any provision of any charter of any municipality in Dade County in conflict therewith.

(9) It is declared to be the intent of the Legislature and of the electors of the State of Florida to provide by this section home rule for the people of Dade County in local affairs and this section shall be liberally construed to carry out such purpose, and it is further declared to be the intent of the Legislature and of the electors of the State of Florida that the provisions of this Constitution and general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida enacted pursuant thereto by the Legislature shall be the supreme law in Dade County, Florida, except as expressly provided herein and this section shall be strictly construed to maintain such supremacy of this Constitution and of the Legislature in the enactment of general laws pursuant to this Constitution.

Id. (emphasis supplied).

Florida courts have consistently held that the Home Rule Amendment forecloses the Florida Legislature from enacting "laws which relate only to Dade County [or its municipalities]." *State v. Cannon*, 181 So. 2d 346, 347 (Fla. 1965). *See also, e.g.*, *Barry v. Garcia,* 573 So. 2d 932, 935 (Fla. 1991) ("The stated objective of the home rule legislation was to transfer the power the legislature had in passing local bills and special laws applicable only to Dade County, from the state to the Dade County Board of County Commissioners, **and hence on to the municipalities**.")

(emphasis supplied); *Dade County v. Dade County League of Municipalities*, 104 So. 2d 512, 517 (Fla. 1958) ("The plain objective to be accomplished by this provision was to endow the people of Dade County with the power to exercise home rule.")

For the reasons discussed below, the Court finds that the section 500.90 violates the Home Rule Amendment.

2. Section 500.90 Is an Impermissible Special Law Aimed at the City.

Section 500.90 does not invalidate the City Ordinance by name, but as written the statute's Retroactivity Provision applies only to the City because it is the *sole* municipality that enacted a local ordinance during the six-month window between January 1 and July 1, 2016. For this reason, section 500.90 is an impermissible special law. To construe the statute otherwise would allow the Legislature to defeat the express provisions of the Home Rule Amendment and destroy the intended autonomy in local affairs that Miami-Dade County and its municipalities enjoy. *See S&J Transportation, Inc. v. Gordon*, 176 So. 2d 69, 71 (Fla. 1965) (finding statute unconstitutional where its population criteria rendered it applicable only to Miami-Dade County).

This is not the first time that the Florida Legislature has run afoul of the prohibition in enacting laws directed to Miami-Dade County or its municipalities as revealed in its legislative history. In *Homestead Hospital, Inc. v. Miami-Dade County*, 829 So. 2d 259 (Fla. 3d DCA 2002), the court considered a state law intended to change the manner in which the County collects and distributes funds for its public hospital system. The court held that the act was "as written ... applicable only to Miami-Dade County, and therefore, [was] an unconstitutional special law." *Id*. at 262.

A legislative act need not on its face declare that it is directed only at Miami-Dade County or one of its municipalities to be considered an invalid special act related solely to the County. In

S & J Transportation, Inc. v. Gordon, 176 So. 2d 69 (Fla. 1965), for example, the Florida Supreme Court considered a state law that purported to apply to "any county with a population greater than 900,000 persons and owning and operating an airport," but the only county in the state that met that definition was Miami-Dade. *See* 176 So. 2d at 70. The court held that the act violated subsections (5) and (6) of the Home Rule Charter which the Court interpreted to "mean that the Legislature may not lawfully adopt any act which relates only to Dade County. Only acts which apply to Dade County and one or more [other] counties may be lawfully adopted." *Id*. The Court found this statute violated "the limitation that the Legislature shall not lawfully pass any act which relates only to Dade County." *Id*. at 71. The Court explained:

> A reasonable construction of this constitutional scheme is that the Legislature no longer has authority to enact laws which relate only to Dade County. This is true regardless of the subject matter, the manner of passage of whether according to previous decisions of this court they would be classified as valid general laws. If this section was construed otherwise the Legislature would still have the power to enact laws applicable only to Dade County on a population or other reasonable classification basis on a myriad of subjects and completely destroy the intended autonomy in local affairs.
>
> This means that as to matters which affect only Dade County, and are not the subject of constitutional provisions or valid general acts pertaining to Dade County and one or more other counties, the electors of Dade County may govern themselves autonomously and differently than the people of the other counties of the state.

176 So. 2d at 71.

Similarly, in *State ex rel. Worthington v. Cannon*, 181 So. 2d 346, 347 (Fla. 1965), *cert. denied*, 384 U.S. 981, 86 S. Ct. 1881, 16 L. Ed. 2d 691 (1966), the Florida Supreme Court held that a statute providing for a twenty-three person Grand Jury "in counties having a population of 750,000 or more" was unconstitutional because at the time it was enacted it applied "solely to Dade County, in violation of Article VIII, § 11, Florida Constitution." The Court explained that

the provisions of the Home Rule Amendment "were designed to afford Dade County home rule in affairs pertaining solely to the county and to retain the supremacy of the Constitution and general laws (applicable to Dade and one or more other counties). The Legislature is not now authorized to enact laws which relate only to Dade County." *Id.* at 347. It follows, the court concluded, that legislative acts which apply only to Dade County "are in violation of the Constitution of the State of Florida." *Id.* This was true even though, theoretically, the statute could have applied to additional Florida counties in the future. The immediate effect of the statute was felt only by Dade County and, therefore, the statute was unconstitutional.

In this case, the City Ordinance was first introduced on December 8, 2015, and it was enacted on February 9, 2016, prior to the enactment of section 500.90 on March 9, 2016. Section 500.90 did not become effective until several months later, on July 1, 2016 (the "Effective Date"), yet it reaches back and invalidates any ordinance regulating polystyrene adopted after January 1, 2016. It is undisputed that the only polystyrene ordinance in existence on the Effective Date to be invalidated by Section 500.90 is the City Ordinance.[2] The Plaintiffs concede as much on page 8 of their response to the City's Motion for Summary Judgment where they recognize that Coral Gables was the only municipality excluded from the protection given to similar ordinances:

> . . . July 1, 2016 was the date when certain local regulations by the grandfathered beach towns (**but not Coral Gables'**), and certain regulations of polystyrene by city vendors, became legal." (emphasis added).

The fact that Section 500.90 applies to all counties and municipalities going forward does not validate or excuse the impact of the Retroactivity Provision on the City Ordinance, and the Court cannot ignore this aspect of the statute when conducting its constitutional analysis. Because

[2] While Plaintiffs suggest that the City of Orlando had a polystyrene ordinance as of April 1, 2016, nothing in the record indicates that this city had ever adopted such an ordinance.

the City is the only municipality to have its polystyrene regulation invalidated by the Retroactivity Provision, Section 500.90 is an improper special law.

The Opponents' reliance on *City of Miami Beach v. Frankel*, 363 So. 2d 555 (Fla. 1978) is misplaced. , In *Frankel*, the City of Miami Beach let a rent control ordinance expire. The City of Miami Beach then scheduled a referendum to adopt a new rent control ordinance, but *before* the measure went to a vote, a state statute went into effect, the terms of which were inconsistent with the proposed referendum. *See id* at 556. The City of Miami Beach intended to go forward with the referendum, but a group of taxpayers and property owners brought an action seeking to have the proposed ordinance declared illegal and the referendum enjoined. Summary judgment was granted against the City of Miami Beach, and the Supreme Court of Florida affirmed.

The factual distinctions between *Frankel* and this case are significant, and they compel this Court to find that the *Frankel* opinion is not controlling. In *Frankel*, the City of Miami Beach had not enacted its proposed ordinance prior to the time the state statute went into effect, and the city was no different than every other municipality effected by the state law. In contrast, the City Ordinance was considered and enacted prior to the Legislature's enactment of section 500.90, and months before section 500.90 became effective. In addition, the City is the only municipality with an *existing* local ordinance regulating polystyrene as of July 1, 2016 to have its ordinance invalidated by the Retroactivity Provision. The City is being singled out and treated differently than every other municipality with an existing local ordinance as of the Effective Date. No similar facts appear in *Frankel*, rendering the opinion distinguishable and unpersuasive.

Considering the above, the Court finds that the Retroactivity Provision contained in section 500.90 is a special law applicable only to the City, and Section 5 of Florida's Home Rule

Amendment for Dade County authorizes the City to nullify its effect. The City did just that when it passed the April Home Rule Ordinance.

3. Section 500.90 Delegates Legislative Power to the Department of Agriculture Without Defined Standards.

The Court also finds that section 500.90, Florida Statutes is unconstitutionally vague because the Legislature delegated preemption authority to the Department of Agriculture (the "Department") without defining guidelines or standards for the exercise of the Department's discretion in implementing the statute. In so doing, the Legislature violated the doctrine of nondelegation of powers, which requires the Legislature to provide specific legislative guidelines when delegating legislative discretion to any executive agency. *See Department of Prof'l Regulation, Fla. State Bd. of Med. v. Marrero*, 536 So. 2d 1094, 1098 n.1 (Fla. 1st DCA 1988).

"[T]he doctrine of nondelegation of legislative power ... is ... firmly embedded in our law." *Solimena v. State Dep't of Bus. Regulation, Div. of Pari-Mutuel Wagering*, 402 So. 2d 1240, 1245 (Fla. 3d DCA 1981) (citation omitted) (ellipses in original). "[T]he crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent." *Department of Ins. v. Se. Volusia Hosp. Dist.*, 438 So. 2d 815, 819 (Fla. 1983) (citation omitted); *see, e.g., Solimena*, 402 So. 2d at 1245 ("In determining whether the legislature has improperly delegated discretion to the agency, [the court] must consider whether the statute establishes standards and guidelines which direct the agency in implementing the law.") (*citing Coca-Cola Co. v. State Dep't of Citrus*, 398 So. 2d 427 (Fla. 1981)). "When the legislature confers authority on an agency charged with administering an aspect of police power, agency discretion must be governed by legislative standards and subject to

judicial review." *Id.* at 1245 (citing *Reynolds v, State*, 383 So. 2d 228 (Fla. 1980)). As the Florida Supreme Court has explained:

> [U]nder article II, section 3 of the constitution the Legislature "may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law."... This prohibition, known as the nondelegation doctrine, requires that "fundamental and primary policy decisions ... be made by members of the legislature who are elected to perform those tasks, and [that the] administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program." In other words, statutes granting power to the executive branch "must clearly announce adequate standards to guide ... in the execution of the powers delegated. The statute must so clearly define the power delegated that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion."

Bush v. Schiavo, 885 So. 2d 321, 332 (Fla. 2004) (citation omitted).

As written, section 500.90 affords the Department unfettered discretion to regulate the use of polystyrene products, with *no* guidelines or standards for its exercise of legislative power or the fulfillment of the Legislature's intent. Without guidelines or standards from the Legislature, the Department has no means by which to ascertain the Legislature's intent or fulfill that intent in exercising the broad discretion afforded it by the enactment of section 500.90. *See, e.g., Lewis v. Bank of Pasco County*, 346 So. 2d 53, 55-56 (Fla. 1976) ("This Court has held in a long and unvaried line of cases that statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in execution of the powers delegated."); *Department of State, Div. of Elections v. Martin*, 885 So. 2d 453, 458-59 (Fla. 4th DCA 2004) (declaring unconstitutional statute vesting "unbridled discretion" in Department of Elections to determine whether nominee could withdraw from election after forty-second day before election).

Courts have found statutory provisions more comprehensive than section 500.90 to violate the doctrine of nondelegation. In *High Ridge Management Corp. v. State*, 354 So. 2d 377 (Fla.

1977), the Florida Supreme Court held as unconstitutional a provision of section 400.23, Florida Statutes authorizing the Department of Health to promulgate rules establishing uniform criteria for the evaluation of nursing home facilities. *See id.* at 379-80. Section 7 of section 400.23 so authorized the Department, and set forth the five rating categories to be employed, the weight to be carried by the grade in the nursing home's review, a requirement that the rules promulgated be consistent with federal laws and regulations, and a time for appeal by the nursing home of its grade, among other things. *See id.* Despite this detail, the Supreme Court found section 7 to be unconstitutional because it provided no objective guidelines for the rating system described — there were, for example, no criteria for determining what would earn a facility a particular rating. *See id.* at 380 ("Without objective guidelines for the rating of licensed nursing homes as 'AA,' 'A,' 'B,' 'C,' and 'F,' the rating system ... cannot withstand constitutional attack.").

Section 500.90 provides far less. It affords the Department blanket preemptive authority without any guidelines or criteria for meeting the Legislature's intent. This flaw is fatal because it is well-recognized that a governmental agency has no inherent rulemaking authority. *See* Fla Stat. § 125.54(e). Nor can the Department implement statutory provisions setting forth general legislative intent or policy. *State v. Peter R. Brown Constr., Inc.*, 108 So. 3d 723, 726 (Fla. 1st DCA 2013). A simple general grant of authority is insufficient guidance for the adoption of specific rules. *Florida Dept. of Highway Safety & Motor Vehicles v. JM Auto, Inc.*, 977 So. 2d 733, 734 (Fla. 1st DCA 2008).

4. Plaintiffs' Distinction Between Statutes of Preemption and Statutes of Delegation Is Untenable, and the Department's Preexisting Authority is Not Enough.

The Opponents advance several arguments in an effort to excuse the infirmities in 500.90, none of which the Court finds persuasive. First, the Opponents argue that guidance to the

Department in implementing section 500.90 is unnecessary because the statute is one of preemption as opposed to a delegation of rulemaking authority. The Opponents cite no authority for this distinction and, regardless, the Court finds that section 500.90 does in fact expressly delegate authority to regulate polystyrene to the Department, to the exclusion of all other state agencies and departments, by its express terms: "[t]he regulation of the use or sale of polystyrene products by entities regulated under this chapter is preempted to the [Department]."

Second, the Opponents argue that enabling legislation is unnecessary because the Department has preexisting authority in section 500.09 to, among other things, "adopt rules relating to food safety and consumer protection requirements for the manufacturing, processing, packing, holding, or preparing of food; the selling of food at wholesale or retail; or the transporting of food by places of business not regulated under chapter 381 or chapter 509." This argument fails, however, because section 500.09 does not grant the Department unlimited authority to regulate the use of polystyrene for any and all purposes and, as admitted by the Opponents, section 500.90 gave the Department no greater rights than it already had prior to its enactment. *See* Plaintiffs' Response at 14 (". . . it is clear that § 500.90 Fla. Stat. confers no *additional authority* on [the Department]") and 17 (". . . § 500.90 does not designate any new or additional regulatory power to [the Department]. . . ."); State's Response at 19 ("Reading section 500.90 in the context of [the Department's] preexisting authority to regulate polystyrene, as the Court must, makes clear that the new provision confers no additional authority on the [Department]").

Section 500.09 authorizes the Department to enact rules only relating to food safety and consumer protection concerns. In fact, the State goes to great lengths in its response to make clear that "section 500.09 provides rulemaking authority with respect to polystyrene *only for specified purposes*. . . ." *See* State Response at 22 (emphasis added). *See also* State Response at 23 ("Far

from giving [the Department] *carte blanche* to regulate polystyrene as it chooses, section 500.09(4) sets out various activities . . . that may be regulated for one of two purposes: food safety or consumer protection."). The Department's enactment of rules outside of those parameters is not authorized, and would be considered an invalid exercise of delegated legislative authority. *See Peter R. Brown Constr.*, 108 So. 3d at 727 (finding that administrative code rule was an invalid exercise of delegated legislative authority).

In this case, the Court finds that the City enacted the City Ordinance to address certain environmental and aesthetic concerns, matters which are unquestionably within the City's inherent police power. *See Miami-Dade County v. Malibu Lodging Invs., LLC*, 64 So. 3d 716, 720 (Fla. 3d DCA 2011) (upholding city ordinance that prohibited signs in certain areas as a "proper exercise of the County's broad home rule and police powers."). The City Ordinance does not relate to food safety or consumer protection and, therefore, it is not in conflict with section 500.90 or the Department's regulatory authority.

5. Section 500.90 Is Arbitrary and Capricious.

The City asserts that the Retroactivity Provision in section 500.90 creates at least two classification schemes that are not reasonably related to the purpose of the legislation, rendering the statute arbitrary and capricious. In response, the Opponents contend that the Legislature has free reign to classify local governments and municipalities regardless of whether such classification has a reasonable relationship to the statute. In addition, the State argues that the City is not entitled to substantive due process because it is not a "person" entitled to such protections under the Fourteenth Amendment of the Federal Constitution. The Court is compelled to find in favor of this City on this issue.

Although cases have held that municipalities have no substantive due process rights for purposes of the Federal Constitution's Fourteenth Amendment, the City's protection against arbitrary laws does not depend on the Fourteenth Amendment. Instead, the City's protection against arbitrary laws is based on express language found in Article III, section 11(b) of the Florida Constitution. That section states that "[i]n the enactment of general laws on other subjects, political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law."

Applying this constitutional provision, courts have recognized that classification schemes affecting municipalities cannot be arbitrary. For example, in *Department of Business Regulation v. Classic Mile*, 541 So. 2d 1155 (Fla. 1989), the issue before the Florida Supreme Court was the constitutionality of a statute regulating the simulcasts of horse races. The statute provided criteria establishing a class of counties in which a facility could be licensed. All parties in the action agreed that Marion County was the sole county that would ever fall within the statutorily designated class of counties eligible for licensure due to specific requirements in the statute. In conducting its analysis, the Florida Supreme Court noted that "[a] statutory classification scheme must bear a reasonable relationship to the purpose of the statute in order for the statute to constitute a valid genera law. . . . *Statutes that employ arbitrary classification schemes are not valid as general laws.*" *Id.* at 1157 (emphasis added) (internal citation omitted).

Ultimately, the Court found that the classification scheme employed by the statute was "wholly arbitrary, having no reasonable relationship to the subject of the statute. . . ." *Id.* at 1159. As a result, the statute was not a valid general law. *Id.* *See also City of Miami v. McGrath*, 824 So. 2d 143 (Fla. 2002) (following *Classic Mile* in finding statute an invalid special law because municipalities were subject to an arbitrary classification scheme); *Waybright v. Duval County*, 142

Fla. 875 (Fla. 1940) (recognizing that there must be a reasonable basis for classifying counties differently); *Miami v. Dade County*, 190 So. 2d 436, 440 (Fla. 3d DCA 1966) (upholding a statute because the varying treatment was "neither capricious nor arbitrary."); *Florida League of Cities, Inc. v. Dep't of Environ. Reg.*, 503 So. 2d 1363 (Fla. 1st DCA 1992) (in a case between an association of cities and a state agency, the court recognized that agency rules, like statutes, cannot be arbitrary and capricious).[3]

Pursuant to the plain language of the Florida Constitution and the above authority, the Court must reject the Opponents' position that the Legislature is free to pass arbitrary and capricious legislation affecting local governments. The Opponents' argument is contrary to both law and common sense and, taken to its logical extreme, would allow for absurd results. For example, imagine that instead of providing a January 1, 2016 protection date for prior ordinances, section 500.90 stated that existing local ordinances in every city whose name begins with the letter "C" are invalid. This would be the epitome of an arbitrary and capricious classification, and the Court is unwilling to find that such a law would pass constitutional muster.

6. Section 500.90 Creates Two Arbitrary Classification Schemes in Violation of the Florida Constitution

Section 500.90 creates two classification schemes, neither of which has a reasonable relationship to the subject of the statute. First, by choosing an exemption date of January 1, 2016, the Legislature created a classification scheme that bears no reasonable relationship to a legitimate state purpose. Local ordinances adopted prior to January 1, 2016 are not materially different than the City Ordinance, and there is no reasonable justification for giving them special preference.

[3] *See also Goodman v. Martin County Health Dept.*, 786 So. 2d 661, 664 (Fla. 4th DCA 2001) ("A statue that is vague, arbitrary, or capricious and bears no reasonable relationship to a legitimate legislature intent is unconstitutional").

Second, without citation to any authority, statutory language, or legislative history, Plaintiffs (not the State) assert that the Legislature had the intent and discretion to liberalize the purportedly strict prohibitions on local polystyrene regulation in sections 403.7033 and 403.708(9) for certain "beach towns" that sought to regulate polystyrene use. This additional classification scheme – beach towns vs. non-beach towns – fairs no better. All municipalities have an interest in controlling litter within their borders, and Plaintiffs have not demonstrated that beach towns are entitled to greater rights than municipalities without beaches. Moreover, the Court finds that the State's silence on this particular argument speaks volumes. Had the State sought to protect beach towns, the Legislature could have easily included language to that effect in the statute. The clear language of the statute, however, focuses exclusively on laws existing prior to January 1, 2016. Furthermore, there is no language in the statute defining what would be considered a "beach town". Local ordinances in effect in North Bay Village and Bay Harbor Islands were included in the protection, yet those municipalities do not have traditional public beaches. If a municipality is considered a beach town because it borders on a large body of water, the City would qualify as such and its ordinance should be entitled to the same protection. In sum, there is simply no support for the Plaintiffs' position that the Legislature intended to grant special protection to beach towns, or that such a classification scheme is reasonably related to the purpose of the statute.

The Court's decision is guided by the Florida Supreme Court's opinion in *Rollins v. State*, 354 So. 2d 61 (Fla. 1978). In that case, the owner and operator of a billiard hall was arrested and charged with violating Fla. Stat. § 849.06, which made it unlawful for any person to permit minors to visit or play billiards in a billiard parlor. The statute contained an exception for minors playing billiards in a bowling establishment. The business owner filed a motion to dismiss in the trial court, arguing that the statue was arbitrary and discriminatory because it treated owners and

employees of billiard parlors and bowling alleys differently. The trial court denied the motion, and appeal was taken to the Florida Supreme Court.

The Supreme Court found that the classification made by the legislature (billiard halls v. bowling establishments) had no reasonable relation to the statute. The Supreme Court recognized that there was no "practical difference between billiards played in a billiard parlor and billiards played in a bowling alley sufficient to warrant a special classification. . . ." *Id.* at 63. Accordingly, the statute was unconstitutional.

The Supreme Court found support for its decision in two cases: *Moore v. Thompson*, 126 So. 2d 543 (Fla. 1960) and *Mikell v. Henderson*, 63 So. 2d 508 (Fla. 1953). In *Moore*, the Supreme Court had determined that a Sunday closing law applicable only to used car dealers was unconstitutional because there was no "valid and substantial reason" that would allow the legislature to make the law applicable to only one class of business. *Moore*, 126 So. 2d at 551. In *Mikell*, the Supreme Court had considered a statute that forbade gamecock fighting on land, but which did not apply if the same activity was conducted on a steamboat or other water craft. The Supreme Court determined that the statute was unreasonable and arbitrary, and denied the appellant equal protection under the law. *Mikell*, 63 So. 2d at 509.

The classifications created by the legislature in section 500.90 are no less arbitrary and capricious than the classifications considered by the Supreme Court in *Rollins*, *Moore*, and *Mikell*. There is no valid and substantial reason to treat the City differently than the municipalities granted protection by the Retroactivity Provision. January 1, 2016 predates the Effective Date of section 500.90 by six months and is of no legal or practical significance. Similarly, the "beach towns" protected by the Retroactivity Provision have no greater interest in regulating litter than the City and, as noted above, the City fits the definition of "beach town" given the inclusion of North Bay

Village and Bay Harbor Islands in the protected class. As a result, section 500.90 is unconstitutional.

C. Sections 403.708(9) and 403.7033 Do Not Preempt Local Regulation of Polystyrene.

The Opponents argue that the City Ordinance was preempted by sections 403.708(9) and 403.7033 even if section 500.90 is found to be unconstitutional. The Court disagrees for several reasons. First, it is a fundamental principle of legislative interpretation that "the Legislature is presumed to know existing law when a statute is enacted." *See Wright v. City of Miami Gardens*, 200 So. 3d 765, 773 (Fla. 2016) (quoting *Dickinson v. Davis*, 224 So. 2d 262, 264 (Fla. 1969)); *Collins Investment Co. v. Metropolitan Dade County*, 164 So. 2d 806 (Fla. 1964). Thus, the legislature's specific enactment of section 500.90 to preempt the regulation of polystyrene to the Department evidences the legislature's understanding that sections 403.708(9) and 403.7033 did not already do so. *See Sharer v. Hotel Corp. of Am.*, 144 So. 2d 813, 817 (Fla. 1962) ("It should never be presumed that the legislature intended to enact purposeless and therefore useless, legislation.").

This understanding is exemplified by the plain and unambiguous language in section 500.90 allowing local governments to restrict the use of polystyrene "by individuals on public property, temporary vendors on public property, or entities engaged in a contractual relationship with the local government for the provision of goods or services, "***unless such use is otherwise preempted by law.***" (emphasis added). If sections 403.708(9) and 403.7033 truly had the effect of preempting all regulation of polystyrene to the State, as the Opponents suggest, the language in section 500.90 purporting to grant limited regulatory authority to local governments would be rendered meaningless as there would be no instance in which a use was not "otherwise preempted by law." It is a fundamental rule of statutory interpretation that courts should avoid readings that

render part of a statute meaningless. *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 456 (Fla. 1992)). "Furthermore, whenever possible courts must give full effect to *all* statutory provisions and *construe related statutory provisions in harmony with one another*." *Id.* at 245 (citation omitted) (emphasis added in part).

Construing section 500.90 in a manner that gives meaning to all of its provisions, and harmonizing its language with sections 403.708(9) and 403.7033 to the extent they may overlap[4] or are otherwise applicable, leads this Court to conclude that sections 403.708(9) and 403.7033 did not preempt all local regulation of polystyrene. Any other interpretation would render a significant portion of section 500.90 meaningless.

Second, as with section 500.90, sections 403.708(9) and 403.7033 lack the necessary standards and guidelines for implementation, rendering them unconstitutionally vague for the same reasons discussed above. *See* Section II(B)(3), *supra*. Section 403.7033 is even more egregious than section 500.90 and 403.708(9) because it allows the State to do nothing - indefinitely. The statute required the Department of Environmental Protection to conduct a study and provide a report (the "Report") to the Legislature no later than February 1, 2010, which it did. The statute further provides that "until such time that the Legislature adopts the recommendations" of the Department of Environmental Protection, no local government, local governmental agency, or

[4] The City does not dispute the fact that statutes may overlap in certain instances, but the cases cited by the State in their opposition do not deal with statutes that purportedly preempt the regulation of the same subject matter. *See e.g. Mora v. Tower Hill Prime Inc. Co.*, 155 So. 3d 1224 (Fla. 2d DCA 2015) (the court recognized that two provisions of the same statute regulating insurance providers overlapped such that factors satisfying one section of the statute could also satisfy another section); *Rivera v. Torfino Enters.*, 914 So. 2d 1087 (Fla. 4th DCA 2005) (finding the victim of retaliatory firing could pursue remedies under Whistleblowers Act and Florida Civil Rights Act); *Fayerweather v. State*, 332 So. 2d 21 (Fla. 1976) (recognizing that the same conduct could be considered a crime under more than one statute).

state government agency may adopt *any* rules or regulations related to the use of "auxiliary containers, wrappings, or disposable plastic bags." The Legislature was given the Report in 2010 and, to date, none of the recommendations contained therein have been adopted. The statute provides no guidelines or deadlines with respect to the Department's adoption or rejection of the environmental recommendations, leaving local governments and state agencies in a state of indefinite limbo.

Plaintiffs rely on the case of *Classy Cycles, Inc. v. Bay County*, 201 So. 3d 779 (1st DCA 2016) in support of their position that section 403.7033 is not arbitrary and capricious simply because the Legislature has failed to act in a timely manner. The facts in *Classy Cycles*, however, are distinguishable from this case in many respects, and the opinion provides no support for the Plaintiffs' position. In that case, the owner of a vehicle rental business (the "Appellant") challenged local ordinances enacted by the City of Panama City Beach and Bay County imposing specific safety vests and insurance requirements. The Appellant sought a declaratory judgment from the trial court declaring that the ordinances exceeded the scope of the authority of the local governments. Summary judgment was entered in favor of the local governments and appeal was taken.

On further review, the appellate court found that vehicle safety equipment was already well-covered by existing statutes and, therefore, the safety vest requirements were expressly preempted. Likewise, the court found that the local government insurance requirements were expressly preempted by section 316.007, Florida Statutes, and impliedly preempted by the "pervasive scheme of regulation set forth in Florida law." *Id.* at 788. The key to the court's decision in *Classy Cycles* was the existence of a "pervasive scheme of regulation" surrounding the subject matter of the local regulations.

Similarly, the case of *Masone v. City of Aventura*, 147 So. 3d 492 (Fla. 2014), cited by the Plaintiffs in support of their argument that the sections 403.708(9) and 403.7033 expressly preempt all local regulation of polystyrene, involves a comprehensive statutory scheme regulating a particular subject. In that case the issue was whether certain municipal ordinances prohibiting and providing punishments for red light violations were expressly preempted by the Florida Uniform Traffic Control Law ("FUTCL"). The court found that FUTCL contained a "detailed code regulating traffic throughout the state," as well as "two broad preemption provisions." *Id.* at 495. The court further found that each of the contested ordinances created a "municipal code enforcement system for the disposition of red light violations that is entirely separate from the enforcement system under chapters 316 and 318 [of the Florida statutes]." *Id.* at 496.

The question presently before the Court is distinguishable from *Classy Cycles* and *Masone* because there is no pervasive scheme regulating the use of polystyrene, and the Department lacks authority to create one outside its limited boundary of food safety and consumer protection. In fact, these cases actually highlight the lack of any statutory conflict in this case. There is also insufficient evidence to find that the legislature preempted local regulation of polystyrene "so as to invoke the severely restricted and strongly disfavored doctrine of 'implied preemption.'" *Exile v. Miami-Dade County*, 35 So. 3d 118, 119 (Fla. 3d DCA 2010).[5]

[5] The court cited the following in support of its finding that a statute regulating the post-conviction treatment of sexual predators did not impliedly preempt local regulation on the same subject: *Browning v. Sarasota Alliance for Fair Elections, Inc.,* 968 So.2d 637 (Fla. 2d DCA 2007), *reversed on other grounds* 28 So.3d 880 (Fla.2010); *City of Hollywood v. Mulligan,* 934 So.2d 1238, 1243 (Fla.2006); *Tribune Co. v. Cannella,* 458 So.2d 1075, 1077 (Fla.1984); *Phantom of Clearwater v. Pinellas County,* 894 So.2d 1011, 1019 (Fla. 2d DCA 2005), *approved sub. nom., Phantom of Brevard v. Brevard County,* 3 So.3d 309, 315 (Fla.2009); *Lowe v. Broward County,* 766 So.2d 1199, 1207 (Fla. 4th DCA 2000), *rev. denied,* 789 So.2d 346 (2001) ("The courts should be careful in imputing intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers."); *Tallahassee Mem. Reg. Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.,* 681 So.2d 826, 831 (Fla. 1st DCA 1996).

D. Plaintiffs' Facial Challenge to the City Ordinance Fails.

At the hearing on the City's Motion to Dismiss, the Plaintiffs stated that they were asserting only a facial challenge to the City Ordinance. To succeed on the facial challenge, Plaintiffs shoulder the burden of proving that the law at issue can never be applied in a constitutional manner. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1109 (Fla. 2008) (quoting *Florida Dep't of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005)). A law will be found facially unconstitutional only if there is no set of circumstances under which the statute can be applied in a valid manner. *Stop the Beach Renourishment*, 998 So. 2d at 1109 (quoting *Florida Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005)).

Plaintiffs admit in their Complaint that the City Ordinance can be applied in a constitutional manner under certain circumstances. Specifically, Plaintiffs do not challenge Sections 3 and 4 of the City Ordinance that prohibit the sale or use of expanded polystyrene by City contractors and vendors under City contract, and the use of polystyrene containers at special events held by the City. In fact, section 500.90 expressly allows such regulation.

Also, the particular portion of the City Ordinance that Plaintiffs challenge can be applied in many instances without conflicting with the statute. Section 500.90 does not preempt the City's authority to restrict the use of polystyrene (i) on public property; (ii) by temporary vendors on public property; and (iii) by entities that contract with the City for the provisions of goods or services. Section 5 of City Ordinance, which amends Chapter 34 "Nuisances," of the City's Code, provides that "[f]ood service providers and stores shall not sell, use, offer for sale, or use, or provide food in expanded polystyrene food service articles." This section may be applied in each of the following instances, all of which would fall within the section 500.90 preemption exceptions:

- Restaurants with outdoor seating on a City right-of-way (public property) cannot serve food in polystyrene containers to their customers seated outside;

- Restaurants and other vendors with walk-up windows and take-out service can be subject to polystyrene restrictions as they are providing the polystyrene for use on the City's right-of-way;

- The City owns property that is leased to third-party tenants. Use of polystyrene by these tenants can be restricted to the extent they are operating on public property; and

- Restaurants and stores having vendor contracts with the City can be subject to polystyrene restrictions even in non-City matters.

These examples demonstrate that the City Ordinance can be applied in a constitutional manner, and that the Plaintiffs' facial challenge fails.

E. The City Is Immune From Suit Based on Separation of Powers.

Because there has been no challenge to an actual application of the City Ordinance through appropriate administrative channels, Plaintiffs' claims constitute impermissible requests that the Court violate the City's sovereign immunity based on separation of powers. *See Detournay v. City of Coral Gables*, 127 So. 3d 869, 872 (Fla. 3d DCA 2013). The City adopted a comprehensive ordinance regulating polystyrene, which has been incorporated in the City Code and includes procedures and penalties for enforcement of the City Ordinance. The City has prosecutorial discretion as to how and to what extent it will enforce the City Ordinance, and quasi-judicial discretion to process appeals brought by violators before such appeals are brought to the Circuit Court.

Plaintiffs ask this Court to violate the doctrine of separation of powers by declaring the City Ordinance facially invalid before it has been applied, even though there are clear and admitted facially valid applications of the City Ordinance. Recognizing that courts should not second guess the political and police power of other branches of government, the Court will allow the City to exercise its prosecutorial discretion to apply the City Ordinance as it deems appropriate. *See*

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 2779, 81 L. Ed. 2d 694 (1984); *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523 (Fla. 1995).

IV. Conclusion

Pursuant to the above, the Court hereby grants the City's Motion for Summary Judgment. The Plaintiffs' competing Motion for Summary Judgment is denied.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 02/27/17.

JORGE E. CUETO
CIRCUIT COURT JUDGE

FINAL ORDERS AS TO ALL PARTIES
SRS DISPOSITION NUMBER 12
THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.
Judge's Initials JEC

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

The parties served this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

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