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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 80,780

CITY OF MIAMI BEACH, Petitioner

v.

RUSSELL GALBUT, Respondent

SEEKING DISCRETIONARY JURISDICTION REVIEW OF
QUESTION CERTIFIED BY
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT
IN
Case No. 92-86

PETITONER'S REPLY BRIEF ON MERITS

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ARGUMENT

FLORIDA'S ANTI-NEPOTISM LAW SHOULD BE LIBERALLY CONSTRUED SO AS TO EFFECTUATE THE LEGISLATIVE INTENT OF RESTRICTING APPOINTMENT OF RELATIVES.

Respondent has stated that Florida's anti-nepotism law must be strictly construed, citing Baillie v. Town of Medley, 262 So. 2d 693 (Fla. 3d DCA 1972). Answer brief at p. 6. Respondent's citation of Baillie, however, is misplaced because the Third District Court of Appeal specifically granted a **liberal** interpretation to Florida's anti-Nepotism Law by holding that the term "any other political subdivision" did not include "towns" because "...the application of section 116.10 or 116.111[1] to "towns" might render the municipal corporation inoperative for lack of qualified persons to serve as elected or appointed officials. The common weal would not be served." The Third District's liberal interpretation was specifically noted by Judge Carroll in his dissenting opinion:

> I respectfully dissent from the majority decision as it relates to nepotism. The policy and purposes for prohibiting nepotism are applicable to officers of municipal corporations which are incorporated towns as well as to officers of incorporated cities or other political subdivisions of the state. ...It is said the statute should be strictly construed. In my view the majority opinion gives it a loose, rather than strict construction, by concluding that the prohibition of that statute, applicable to officers of state agencies and cities shall not apply to the equivalent officers of an incorporated town. ..."

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[1]/ The Baillie decision concerned Florida's predecessor anti-nepotism law, Fla. Stat. §116.111.

(Emphasis added.) Id. at 697 (Carroll, J., dissenting in part).

Respondent attempts to distinguish the City's citation of City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971) by arguing that laws enacted for a public benefit do not require a liberal interpretation. See, Answer Brief at pgs. 6 - 7. However, a detailed reading of Berns reveals that the law at issue, Florida's Government-in-the-Sunshine Law, Fla. Stat. §286.011(1), was extended by judicial construction -- this Court specifically applied a **liberal** interpretation of the Sunshine Law because a public benefit law required an expansive interpretation in order to avoid even potential violations:

> ...In this area of regulating the statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus of any two or more members permits crystallization of secret decisions to a point just short of ceremonial acceptance.

(Emphasis added.) Id. at 41. The goal of blocking evasive techniques of a public benefit law's intent and purpose is at the heart of the City's argument and it is this purpose that compels the holding that where statutory language has not been articulated to accomplish such goal, liberal interpretation must apply in order to meet legislative intent. In situations involving laws which have been enacted to protect the general welfare, the needs and usages of the activity[2], that is appointment of individuals to

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[2]/ On page 12 of its Answer Brief, Respondent refers to Florida Industrial Commission v. Manpower Inc. of Miami, 91 So. 2d 197, 199 (Fla. 1956), which case held that "a legislature in legislating with regard to an industry or activity, must be regarded as having in mind the actual condition to which the act will apply, that is the needs and usages of such activity." The

municipal boards and committees by related public officials and their brethren legislators, mandates a liberal interpretation in order to block any possible evasive techniques concerning cronyism -- in light of the Third District's order, such techniques do not constitute an "evil motive" on the part of public officials as claimed by Respondent in its brief[3], yet represent an appropriate, and legal act. Nonetheless, and as opined by the First District Court of Appeal in Morris, and the Third District Court of Appeal in Baillie, such actions must be discontinued for purposes of upholding public confidence in the municipal appointment process to avoid even the appearance of impropriety.

Reasons for dismissing Respondent's Due Process argument[4] are twofold: (1) this constitutional argument was never specifically raised by Galbut below and, accordingly, may not be raised for the first time on appeal (e.g., Angora Enterprises, Inc. v. Cole, 439 So. 2d 832 (Fla. 1983); and (2) Respondent's citation of Rush v. Dept. of Prof. Reg. Board of Podiatry, 448 So. 2d 26 (Fla. 1st DCA

Manpower court analyzed licensing laws applicable to the employment activity at issue and determined that no probable evil would occur were the appellee/employment agency to avoid the effect of the subject statute. In holding as such, however, the Court was cognizant of the rule that administrative interpretation of a statute is entitled to great weight and ordinarily will not be disturbed unless clearly erroneous or unauthorized. Petitioner City urges this Court to recognize that despite its determination of an erroneous administrative finding in Manpower, the interpretation of the State of Florida Commission on Ethics of Florida Statute Section 112.3135 is authorized as being an interpretation consistent with the legislature's intent governing deterrence of nepotism in government.

[3]/ See Answer Brief at p. 14.

[4]/ See, Answer Brief at pages 8 and 9

1984), for the proposition that an individual has the right to know in advance what conduct is proscribed, clearly supports the City's position since the Court therein failed to find any due process violation despite the fact that the statute did not expressly proscribe elements of the stated offense; similarly, although not expressly stating that municipal officials are absolutely prohibited from appointing relatives of any public officer to City boards, the knowledge of such prohibited activity should be imputed to public officers in view of the legislature's recognition of a heightened need for adherence to ethical standards and avoidance of ethical impropriety.

Finally, with reference to Morris v. Seeley, 541 So. 2d 659 (Fla. 1st DCA 1989), Respondent's stated distinction between the First District's decision and the present situation is incorrect:

> However, Morris is clearly distinguishable from the instant case in that the sheriff or one of his designees was required to sign the final promotion order. The sheriff in Morris was therefore caught on the horns of a dilemma under the statute: whether he abstained or not, he was still in violation of the anti-nepotism law by virtue of the overt act he was required to perform.

(Emphasis added.) Answer brief at p. 10. The Morris decision is indistinguishable from the case at bar since, as acknowledged by Respondent, the public officer therein possessed the power to abstain in making the promotion and allow it to occur as result of signature by a fellow public official -- the Morris sheriff was thus in the same position as Miami Beach City Commissioner Eisenberg who also could have abstained in the appointment of his

relative Galbut to the City's Zoning Board of Adjustment. Morris held that abstention simply does not resolve concerns with regard to nepotism. Morris is clearly applicable for purposes of determining Florida's Anti-Nepotism Law to be an absolute prohibition on the appointment of individuals to municipal boards by related public officials and/or their fellow City Commissioners.

Wherefore, Petitioner, City of Miami Beach, respectively requests that this Court accept jurisdiction of this matter and answer the certified question by holding that Florida's Anti-Nepotism Law prohibits the appointment of a City Commissioner's relative to a City's Zoning Board of Adjustment where the appointments are made by a five/sevenths vote at the City Commission, the related City Commissioner abstains from voting, and the related City Commissioner takes no action which advocates the appointment of the relative.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22nd day of January, 1993 to: **DAVID NEVEL,**

ESQUIRE, Attorney for Respondent, 1111 Lincoln Road, Suite 802, Miami Beach, Florida 33139 and **PHILIP C. CLAYPOOL**, General Counsel and **JULIA COBB COSTAS**, Staff Attorney, Commission on Ethics, Post Office Box 6, Tallahassee, Florida 32302-0006.

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