SUPREME COURT OF FLORIDA

Case No. SC04-990
L.T. Case No. 4D02-3626

CITY OF HOLLYWOOD

Petitioner

vs.

COLON BERNARD MULLIGAN, ET AL.

Respondent

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

A. Statement of the Case and Facts:

Respondents adopt the Statement of the Case and Facts as submitted by Petitioner, however Respondents set forth their outline of the subject ordinance below for additional clarity.

B. Outline of the Ordinance:

On May 5, 1999, the City of Hollywood enacted Ordinance 0-99-12 that created Sec. 101.46 of its ordinances entitled "Vehicle Impoundment." This ordinance established procedures for the impoundment of vehicles that were used to facilitate the commission of drug and/or prostitution related crimes. (R. I:38-43; App. 1-6).

Hollywood Ordinance Sec. 101.46 - Impoundment of Motor Vehicles; Controlled Substances and Prostitution - provides that a motor vehicle shall be

subject to impoundment whenever a police officer has probable cause to believe that the vehicle contains any controlled substance or cannabis as defined in Chapter 893 of the Florida Statutes, was used in the purchase, attempt to purchase, sale or attempted sale of such controlled substance or cannabis, or was used to facilitate the commission of an act of prostitution, assignation or lewdness as defined in and pursuant to Sec. 796.07 of the Florida Statutes. The Ordinance further provides, that upon impoundment of the motor vehicle, the police officer shall provide written notice by hand delivery to the owner of the vehicle or the person in control of the vehicle, that the vehicle has been impounded by the City of Hollywood Police Department. (R. I:39-40; App. 2-3).

If the vehicle owner is unavailable to receive such notice, the notice shall be provided within five (5) working days from the date of the impoundment excluding Saturdays, Sundays and legal holidays. (R. I:39; App. 2). The purpose of the notice is to advise the owner of the vehicle or person in control of the vehicle with the notice of his or her right to request a preliminary hearing pursuant to Section (D) as defined in the Ordinance.

Section (C) of the Ordinance provides that the vehicle shall not be seized or impounded under this Section if: (1) the possession, use, or sale of the controlled substance and/or cannabis is authorized by Chapter 893 or Chapter 499 of the Florida Statutes; or (2) the vehicle was stolen at the time it would otherwise have

been subject to seizure and impoundment; or (3) the vehicle was operating as a common carrier at the time it would otherwise have been subject to seizure and impoundment; or (4) the vehicle was seized pursuant to the Florida Contraband Forfeiture Act. (R. I:40; App. 3).

Section (D) of the Ordinance sets out the procedure for hearings as well as the levying of any "administrative fee" for violation of the Ordinance. That section provides that in order to be entitled to a preliminary hearing, the owner of the vehicle or his/her agent/representative must submit a written request for a preliminary hearing to the Police Chief or his/her designee within five (5) days of receipt of the written notice of seizure. (R. I:40; App. 3).

Upon receipt of the written request, the City of Hollywood must schedule a hearing within ninety-six (96) hours, excluding Saturdays, Sundays, and legal holidays, before a Special Master or Alternate Special Master of Hollywood (hereinafter referred to as "Special Master"). A copy of the written notice of the date, time and location of the hearing shall be delivered to the address provided by the owner and/or his/her agent/representative. At the hearing, the City of Hollywood has the burden to show that there is probable cause to believe that the motor vehicle is subject to impoundment and continued seizure. (R. I:40; App. 3).

If the Special Master determines that there is probable cause, he/she shall order the continued impoundment of the vehicle unless the vehicle owner pays the

City an "administrative fee" of $500.00, plus towing and storage costs, or posts a bond in an equivalent amount. If the Special Master determines there is probable cause and that the motor vehicle is subject to continued impoundment, the City of Hollywood shall then schedule a final hearing, unless the "administrative fee" plus any towing and storage costs have been paid. If there is a finding of no probable cause, the vehicle shall be released forthwith to the owner without the imposition of any penalties or fees. (R. I:40-41; App. 3-4).

In the event that a preliminary hearing is not requested within the five (5) day requirement, or if there is a determination of probable cause at the preliminary hearing, and the "administrative fee" plus any towing and storage costs have not been paid, the City shall schedule a final hearing. Pursuant to Section (E), the City shall then notify, by certified mail, return receipt requested, the vehicle owner of record of the date, time and location of a final hearing to be conducted pursuant to the subsection. The hearing must occur no later than forty-five (45) days after the date the vehicle was seized and impounded. (R. I:41; App. 4).

At the final hearing, the City has the burden to show by a preponderance of the evidence that the vehicle was seized and impounded pursuant to Section (A) and that the owner of the vehicle either knew or should have known after reasonable inquiry that the vehicle was being used or likely to be used in violation of Section (A). If the Special Master finds that the vehicle is subject to

impoundment, an order is then entered finding the owner of record of the vehicle civilly liable to the City for an "administrative fee" not to exceed $500.00 plus towing and storage costs. The vehicle shall then remain impounded until the "administrative fee" plus any towing and storage costs are satisfied. As in the preliminary hearing, if the City of Hollywood fails to meet its burden of proof, the vehicle shall be returned to the owner. If the owner does not claim the seized vehicle, it may be subject to disposal pursuant to Chapter 705, Fla. Stat. (R. I:41; App. 4).

SUMMARY OF ARGUMENT

The District Court correctly concluded that when a vehicle is seized ("impounded") pursuant to the ordinance, a forfeiture of the vehicle has been performed.

Although Respondents agree that municipal home rule powers are generally conferred by Article VIII of the Florida Constitution, and recognized by Fla. Stat. §166.021(1), said municipal home rule powers are not without limitation.

Excepted from municipal home rule powers, is "[a]ny subject expressly preempted to state or county government by the constitution or by general law."

The Florida Contraband Forfeiture Act ("FCFA") deals with forfeitures arising from the commission of crimes. §§932.701-932.707, Fla. Stat. (2000).

The ("FCFA") provides that "[i]t is the policy of this state that law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners and lienholders.." (Emphasis supplied.) Such is an express preemption by general law of municipal criminal contraband forfeiture (impoundment) laws.

Prostitution is a crime ("criminal purpose"), and therefore law enforcement officers must utilize the provisions of the ("FCFA") if they choose to "impound" (forfeit) a vehicle.

The fact that the ("FCFA") defines "contraband" as, "Any personal property, including ... any ... vehicle of any kind ... which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony...," demonstrates that the legislature expressly intended to prohibit the forfeiture of vehicles based upon the commission of a misdemeanor.

Inasmuch as the ("FCFA") requires a felony to forfeit a vehicle, any ordinance that purports to authorize the forfeiture of vehicles used in connection with a misdemeanor is in direct conflict with the Act's limitation to felonies.

Further, the ordinance conflicts with the ("FCFA"), in that the ordinance

fails to provide for various due process protections and relegates the important

issue of the propriety of the seizure to a municipal agency, thus bypassing a court of law.

ARGUMENT

I.

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE CITY OF HOLLYWOOD IMPOUNDMENT ORDINANCE (SEC. 101.46, CITY OF HOLLYWOOD CODE) WAS PREEMPTED BY FLORIDA CONTRABAND FORFEITURE ACT ("FCFA") AND IS THEREFORE INVALID.

A. The District Court correctly held that the so-called "impoundment" is in reality a "forfeiture."

"Forfeiture" is "a loss of property or a right vested in one, as a penalty for violating law or for a breach of contract." *Howard Cole & Co. v. Williams,* 27 So.2d 352, 356 (Fla. 1946). More narrowly, "criminal forfeiture" is a governmental seizure of property due to its involvement in crime. *Black's Law Dictionary,* p. 336 (5th Ed. 1979).

The District Court appropriately held that whether the loss of the vehicle is temporary (through payment of the required fee) or permanent (as where the owner cannot or will not pay the fee), owners are deprived of certain rights in the seized

vehicles as a penalty for violating law.

Due to their harshness, it has been held that forfeiture laws are disfavored and must be strictly construed. *City of Miami v. Miller, 4* So.2d 369, 370,148 Fla. 349, 350 (Fla. 1941). Any doubts must be resolved in favor of the party opposing forfeiture. *Cabrera v. Department of Natural Resources,* 478 So.2d 454, 456-457 (Fla. 3rd DCA 1985).

Section 101.46(E)(2)(b) of the ordinance (R. I:41; App. 4) states that "[t]he seized vehicle[1] *shall* remain impounded until the administrative penalty plus towing or storage costs are satisfied." That this constitutes "a loss of property or a right vested in one, as a penalty for violating law," *Howard Cole & Co. v. Williams, supra.,* hence a forfeiture, can hardly be denied.

Further as noted by Respondents in the District Court, the City of Hollywood itself used the term "auto forfeiture" in letters which accompanied the contracts of special masters Mark E. Berman and Christopher Mark Nielson when they were retained. These letters, written on September 17, 1999, by Assistant City Attorney, Tracy A. Lyons, state in pertinent part as follows; (R. 46-49; App. 7).

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[1] Or, presumably, any posted bond in lieu of the seized vehicle.

> "As a special master, you will be required to preside over quasi-judicial code enforcement. In addition, the City of Hollywood has also begun an auto forfeiture program. The local police have been authorized to seize any auto involved with certain drug arrests and loitering violations. The Special Masters will also preside over the hearings for any contested auto forfeiture."[2] (R. I:48; App. 7)

While certainly not conclusive, this language does lend support to Petitioners' argument that the ordinance is a purposeful forfeiture scheme.

B. The Florida Contraband Forfeiture Act ("FCFA") unequivocally demonstrates the intent of the Legislature to preempt the ability of local governments to pass enactments dealing with forfeitures of personal property used in the commission of crime.

Respondents agree that municipal home rule powers are generally conferred by Article VIII of the Florida Constitution, and recognized by Fla. Stat. §166.021(1). However, said municipal home rule powers are not without limitation.

Fla. Stat., §166.021(3)(c), excepts from municipal home rule powers, "Any subject expressly preempted to state or county government by the constitution or by general law."

The Florida Contraband Forfeiture Act ("FCFA") deals with forfeitures arising from the commission of crimes, and therefore preempts any municipal ordinances dealing with the forfeiture (impoundment) of vehicles used in the commission of

[2] See Appendix A attached to Plaintiff's Motion for Summary Judgment, containing Plaintiff's Request for Admissions dated August 18, 2000, and City of Hollywood's Response to Plaintiff's Request for Admissions, dated September 13, 2000. (R. I:82-93).

crime.

Fla. Stat., §932.704(1), provides that "[i]t is the policy of this state that law enforcement agencies *shall* utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for *criminal purposes* while protecting the proprietary interests of innocent owners and lienholders." (Emphasis supplied.)

The District Court, recognizing that prostitution is a crime ("criminal purpose"), correctly determined that law enforcement must utilize the provisions of the ("FCFA") if they choose to "impound" (forfeit) a vehicle, and that the above language is an express preemption by general law of municipal criminal contraband forfeiture laws. Hence, the municipalities are precluded from legislating in this area, and may not adopt ordinances on the same subject, and surely not provisions that conflict with such general law.

After deciding that the ("FCFA") preempts municipal forfeiture provisions for criminal contraband, the District Court noted that said Act defines "contraband" as, "Any personal property, including ... any ... vehicle of any kind ... which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any *felony*, whether or not comprising an

element of the felony..." Fla. Stat. (2002), §932.704(2)(a)5. (Emphasis supplied.)

It is submitted, that the District Court correctly concluded that inasmuch as the ("FCFA") requires a felony to forfeit one's vehicle, forfeitures based on mere misdemeanors are not authorized.

It is respectfully submitted, that there *is* logic to not subjecting one to the loss of his property for the commission of a mere misdemeanor, however likewise, there *is* logic to support the loss of his property for the commission of a more severe offense, a felony.

Additionally, it is submitted that the ("FCFA") expressly preempts the subject matter by providing a comprehensive method for the forfeiture of property. See *§§* 932.701-932.707, Fla. Stat. (2000). This Act applies to all law enforcement agencies including municipal police departments. See §932.7055(4), Fla. Stat. (2000) (providing for disposition of property if the seizing agency is a county or municipal agency).

Preemptive intent is also shown by the history of the Florida Contraband Forfeiture Act. When enacted as Chapter 74-385, House Bill No. 2930, showed on its face the Legislature's intent to provide "uniform procedures for confiscation of vessels, motor vehicles and aircraft containing contraband articles." Therefore, the Legislature's expressed intent was to establish uniformity and exclusiveness in

procedures for confiscating the instrumentalities of crime.

The Court in *Tribune Company v. Cannella*, 458 So.2d 1075 1077 (Fla. 1984), set forth the following:

> "Under the preemption doctrine a subject is preempted by a senior legislative body from the action by a junior legislative body if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present a danger of conflict with the pervasive regulatory scheme…" (Emphasis supplied.)

As discussed above, the Florida Contraband Forfeiture Act, provides that "[i]t is the policy of this state that law enforcement agencies *shall* utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for *criminal purposes.*..Fla. Stat., §932.704(1). Said Act's purpose was stated to provide for "uniform procedures for confiscation of vessels, motor vehicles and aircraft containing contraband articles." Therefore, the legislature's expressed intent was to establish a *pervasive scheme,* fostering uniformity and exclusiveness in procedures for confiscating the instrumentalities of crime.

Further, inasmuch as the ("FCFA") permits forfeitures only for the commission of felonies, when a municipality passes an ordinance that permits forfeitures (impoundments) for the commission of misdemeanors, that is a clear

conflict with the Legislature's wishes as set forth in the ("FCFA").

As noted in *Rinzler v. Carson*, 262 So.2d 661, 668 (Fla. 1972), "A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden."

To permit forfeitures (impoundments) for the commission of misdemeanors is contrary to the requirement of the commission of a felony set forth by the legislature, and attempts to permit such forfeiture (impoundment) for misdemeanors that has been forbidden.

The Petitioner cites various cases where preemption was not found in the particular case. It is submitted, that not one of those cases present a situation where there was a scheme set forth in the state statute as *pervasive* as is the ("FCFA"), thereby requiring a finding of preemption.

Lastly, on page 16 of Petitioner's initial brief, Petitioner argues that the District Court erred in concluding that, since the state has regulated the subject of motor vehicles which are used in the commission of felonies, local government cannot regulate motor vehicles which are used to commit misdemeanors.

It is respectfully submitted, that Petitioner has lost sight of the fact that the Florida Contraband Forfeiture Act ("FCFA") is an act dealing with the forfeiture of

vehicles used in the commission of crime, it is not a statute that attempts to "regulate" motor vehicles. *Said statute has spoken on what circumstances must be present to subject a motor vehicle to forfeiture, to wit: the commission of a felony*.

C. Preemption need not be explicit, it may be implied.

As noted in *Hillsborough County v. Florida Restaurant Assoc., Inc.*, 603 So.2d 587 (Fla. 2nd DCA 1992), "Under the standard for determining implied preemption in *Tribune Company v. Cannella,* the legislative scheme must be so pervasive that it completely occupies the field, thereby requiring a finding that an ordinance which attempts to intrude upon that field is null and void." (Emphasis supplied.)

The scheme set forth in the ("FCFA") is *pervasive*, requiring a finding that the local ordinance which attempts to intrude upon that field is null and void.

The Court in *Barragan v. City of Miami*, 545 So.2d 252, 254 (Fla. 1989), stated "[t]he preemption need not be explicit, so long as it is clear that the legislature has clearly preempted local regulation of the subject."

It is respectfully submitted, that the Legislature understood that the fund-raising aspects of forfeitures could quickly overrun the stated policy of removing instruments of crime from criminals, and therefore set forth the requirement of the

commission of a *felony*. In this regard, it is easy to visualize the situation where a municipality, in the interest of fund-raising, could pass a vehicle forfeiture (impoundment) ordinance subjecting one's vehicle to forfeiture (impoundment) for the violation of an ordinance prohibiting the washing of one's vehicle between certain hours, or on certain days.

The City's ordinance is, of course, primarily about obtaining revenues. To avoid precisely that scenario, the legislature, in the Florida Contraband Forfeiture Act, required placement of all proceeds from forfeitures in a special law enforcement trust fund. See §932.7055(4), Fla. Stat. (2000). The Act even specifies the types of programs that cities may fund from those proceeds. See *id*. The legislature explicitly prohibited the funds from being "used to meet normal operating expenses." *Id.* The City's ordinance allows indiscriminate use of the funds.

To this same end of avoiding profiteering, the legislature placed several protections in the Act that are not in the City's ordinance. If the property owner prevails in a forfeiture case under the Act, the seizing agency must pay for the loss of

value in, and the loss of income from, the seized property. See §932.704(9)(b), Fla. Stat. (2000). The court can also award the property owner attorneys fees. *See* §932.704(10), Fla. Stat. (2000). The City's ordinance provides no such protections.

Because of this potential for abuse by local governments, the legislature passed the Act to provide a *uniform* forfeiture law. The statutory title explicitly lists the Legislature's desire to provide *"uniform* procedures for confiscation of vessels, motor vehicles and aircraft containing contraband articles" as one reason for the Act. Chap. 74-385, Laws of Fla. This expressed intent to establish uniformity and exclusiveness in procedures for confiscating the instrumentalities of crime preempts the City from legislating on that subject.

Lastly, the Petitioner in its brief gives examples of acts where the legislature used very specific preemption language.

It is respectfully submitted, that just because on certain occasions, and in certain instances, the legislature uses specific preemption language does not diminish in any respect the principals of *implied preemption* set forth in *Tribune Company v. Cannella*, 458 So.2d 1075 1077 (Fla. 1984), as noted above.

It should be noted, that the Third District Court of Appeal in *City of Miami v. Sidney S. Wellman, et al. and Nadine Theodore, et al.*, 29 Fla. L. Weekly D328

(Fla. 3d DCA Feb. 4, 2004), held that the Miami Vehicle Impoundment Ordinance was preempted by the Florida Contraband Forfeiture Act. (App. 19-34). Said Miami ordinance is substantially identical to the subject ordinance in this cause.

Additionally, the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, on July 13, 2004, entered its Order Granting Plaintiffs' Motion for Summary Judgment and Order Enjoining the City of Tampa from Enforcing Section 14-27 of the Tampa Code of Ordinances (App. 35), which is the City of Tampa's Vehicle Impoundment Ordinance. Again, said ordinance is very similar to the ordinance in the case at bar.

II.

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE CITY OF HOLLYWOOD IMPOUNDMENT ORDINANCE (SEC. 101.46, CITY HOLLYWOOD CODE) IS IN CONFLICT WITH THE FLORIDA CONTRABAND FORFEITURE ACT ("FCFA") AND IS THEREFORE INVALID.

As the District Court held, "Apart from a preemption of the forfeiture area, we also note the ordinance conflicts with FCFA section 932.704(2)-(4) providing for judicial proceedings, instead of an administrative agency, and for jury trials. The ordinance fails to provide for judicial proceedings de novo and a trial by jury. Instead it relegates the important issue of the propriety of the seizure to a municipal agency, thus bypassing the court and jury. Even if the entire area of

forfeitures were not preempted by FCFA, the statute would not authorize conflicting ordinances." It is submitted, that the "statute" that they are referring to is Fla.Stat.§166.021(1) regarding home rule powers.

Even if the ("FCFA") was found not to have preempted the municipality's *ability* to pass ordinances in a given field, it is well-settled that municipal law must *not conflict* with state law: "The principle that a municipal ordinance is inferior to state law remains undisturbed. Although legislation may be concurrent, enacted by both state and local governments in areas not preempted by the state, concurrent legislation by municipalities may not conflict with state law. If conflict arises, state law prevails. *West Palm Beach Ass'n of Firefighters Local Union 727 v. Board of City Com'rs of City of West Palm Beach*, 448 So.2d 1212, 1214-1215 (Fla. 4th DCA 1984) (citing *City of Miami Beach v. Rocio Corp.*, 404 So.2d 1066, 1070 (Fla. 3rd DCA 1981)); *Board of Trustees v. Dulje*, 453 So.2d 177 (Fla. 2nd DCA 1984).

In other words, even if a municipality is authorized to pass a particular ordinance because there is no preemption, that ordinance cannot conflict with state law.

In *Edwards v. State*, 422 So.2d 84 (Fla. 2nd DCA 1982), the Court stated,

> "In some respects, the Venice ordinance sets a greater penalty than that prescribed by the law of Florida. Except in serious

> cases involving minimum mandatory sentences, state law grants a trial judge the discretion to withhold adjudication and order probation. § 948.01, Fla.Stat. (1981). Moreover, where drug charges are brought under sections 893.13(1)(e) or (1)(f), Florida Statutes (1981), the judge is authorized to require a violator to participate in a drug rehabilitation program in lieu of prison or probation. § 893.15, Fla.Stat. (1981). For the less serious violations of chapter 893, the judge also retains the discretion to decide whether or not to impose a fine. Yet, the Venice ordinance eliminates all of these options and requires a minimum mandatory sentence and a minimum fine for each violation. To this extent, the ordinance is invalid because it conflicts with state law. *People v. Quayle*, 122 Misc. 607, 204 N.Y.S. 641 (Albany County Ct.1924). (Emphasis supplied.)

Just as the ordinance in the *Edwards* case failed to provide substantive and procedural options for the accused that were provided under the state statute, so does the ordinance in the case at bar fail to provide substantive and procedural options that are provided in the ("FCFA").

It is submitted, that the ordinance cannot coexist with the ("FCFA"), and therefore there is a conflict. Specifically, since the ("FCFA") is pervasive in the field of the forfeiture of motor vehicles used in the commission of crime, and only vehicles used in the commission of a felony are eligible for forfeiture, any ordinance that permits the forfeiture (impoundment) of a vehicle for the commission of a misdemeanor conflicts and cannot coexist with said state statute.

The Petitioner asserts that the ordinance provides that it is inapplicable "in all instances where the ("FCFA") is applicable," so the ordinance and the statute can coexist.

In response to this assertion, Respondents would point out that the ordinance provides, "(C) This section shall not apply and the vehicle *shall not be seized* or impounded under this section if: (4) The vehicle *was seized* pursuant to the Florida Contraband Forfeiture Act." (Emphasis supplied.)

It is submitted, that the Petitioner misses the point. Specifically, since in order to forfeit (impound) pursuant to the ("FCFA"), there must have been a *felony* committed, any ordinance that permits the forfeiture (impoundment) of a vehicle for a *misdemeanor* cannot coexist.

Put another way, in order to comply with the ordinance (forfeiture/impoundment for a misdemeanor), one must violate the requirement of a "felony" in the ("FCFA").

Additionally, the Petitioner argues that the ordinance and the statute "govern different conduct." Again, the ("FCFA") governs under what situations and circumstances vehicles can be forfeited, *it is not a statute governing the conduct of the perpetrator*.

Below is a discussion of some of the substantive and procedural rights that the ordinance fails to accord to one whose vehicle has been seized, unlike the

("FCFA") that *does* accord such rights and protections, demonstrating further conflict between the ordinance and the ("FCFA").

This forfeiture scheme revealed by section 101.46(A) of the ordinance, (R. I:39; App. 2) provides only one prerequisite for seizing a vehicle: a police officer's belief in probable cause that the vehicle is being used to facilitate an illegal drug transaction or prostitution. Vehicle forfeiture under the ordinance commences on an *ex parte* basis.

Under section 101.46(D)(4) (R. I:40-41; App. 3-4), the owner of a vehicle that has been seized *ex parte* may post bond for the vehicle's return pending a hearing. Logically speaking, however, the mere substitution of cash for a seized vehicle does not change the fact that property has been seized. Consequently, the City's proceedings against such property, be it the seized vehicle or the bond which takes its place, are *in rem* in nature.

The immediate consequence of an *ex parte* governmental seizure of personal property is a requirement under the Florida Constitution to inform persons who hold interests in the property of their right to an adversarial preliminary hearing:

> After the ex parte seizure of personal property, the state must immediately notify all interested parties that the state has taken their property in a forfeiture action; and that they have a right to request a post-seizure adversarial hearing.

Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991).

In support of this conclusion, the Florida Supreme Court found that,

> individuals have compelling interests to be heard at the initiation of forfeiture proceedings against their property rights to assure that there is probable cause to believe that a person committed a crime using that property to justify a property restraint. Property rights are among the basic substantive rights expressly protected by the Florida Constitution.[3]

Id. 588 So.2d at 964.

Unfortunately for aggrieved vehicle owners, while section 101.46(B)(3) of the City's ordinance (R. I:40; App. 3) requires that police provide notice of the "right to request a preliminary hearing," it does not require notification of the right to an *adversarial* preliminary hearing. The failure of the ordinance to protect this Florida Constitutional right is fatal in itself.

The requirement for an *adversarial* proceeding applies to the final as well as the preliminary hearing. *Department of Law Enforcement v. Real Property,* 588 So. 2d 957 at 967. Section 101.46(D) of the ordinance, which sets forth the post-impoundment procedure, does not provide for an adversarial final hearing. To the contrary, section 101.46(D)(3) states that "formal rules of evidence[4] shall not apply at the hearing and hearsay evidence is admissible."

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[3] Article I, section 9 of the Declaration of Rights provides: "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself."

[4] The ordinance does not define "formal rules of evidence," but presumably this term refers to Chapter 90, Fla. Stats., the Florida Evidence Code.

That the ordinance is crafted to admit hearsay and to mandate that the rules of evidence "shall not apply," allows the City to use second-hand sources as conduits for the introduction of evidence, while denying aggrieved individuals the ability to challenge the trustworthiness of such evidence by objecting on grounds of hearsay or asserting formal rules of evidence. Not only does this undermine the adversary system, it is totally inconsistent with due process where "basic substantive rights expressly protected by the Florida Constitution" are at stake. *Department of Law Enforcement v. Real Property, supra.*, 588 So.2d at 964.

With regard to the lack of due process, it should be noted that the ordinance provides no remedy other than simply the return of the vehicle, when an impoundment lacks probable cause. Additionally, although the ordinance states that if there is a finding of no probable cause at the preliminary hearing, the vehicle will be returned "without the imposition of any penalties or fees," there is no explanation as to what is included in "penalties or fees," i.e., towing, storage, etc.

Further, when the City seizes a vehicle, its owner may be totally deprived of its use for up to 45 days, the deadline for the final hearing under section 101.46(E)(1) (R. I:41; App. 4). Such a lengthy impoundment may cause the owner to suffer actual losses as well as costs in the impoundment proceeding. If the City

fails to carry its burden of proof, the ordinance merely provides for the return of the seized vehicle and any bond posted. There is no mention of not having to pay towing or storage charges. It is submitted, that this is no post-deprivation remedy at all, much less an adequate one.

The Supreme Court of Florida has described one type of forfeiture scheme that matches the City's ordinance: "In those situations where a law enforcement agency already has lawfully taken possession of personal property during the course of routine police action, the state has effectively made an *ex parte* seizure for the purposes of initiating a forfeiture action." *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991).

Because of the invasion of fundamental property rights, forfeiture schemes must comport with due process. See *Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991). For the forfeiture of personal property[5], the state must immediately notify all interested parties after an *ex parte* seizure and inform them of the right to a preliminary adversarial hearing held within ten days. See *id. at* 965-66. The petition for forfeiture must be verified and supported by an affidavit See *id*. at 967. At this preliminary adversarial hearing, a court must decide if there is probable cause to believe the property was used in the commission of a crime. See *id*. at 966. The final hearing determining the ultimate issue is a jury trial,

[5] The requirements are slightly different for real property.

if desired, at which the state must prove its case by clear and convincing evidence. See *id.*, at 967-68.

The City's ordinance violates many, if not most of these requirements. The ordinance initially mimics the due process requirements by providing a preliminary hearing, but makes that hearing non-adversarial by abolishing the rules of evidence so that hearsay and other evidence, not subject to cross-examination, can be admitted. (R. I:38-43; App. 1-6). The ordinance also holds a final hearing, but without the right to jury trial, without requiring clear and convincing evidence. (R. 38-43; App. 1-6).

As stated in *Department of Law Enforcement v. Real Property,* 588 So.2d at 967, "In forfeiture proceedings the state impinges on basic constitutional rights of the individual who may never have been formally charged with any civil or criminal wrongdoing. This Court has consistently held that the constitution requires substantial burdens of proof where state action may deprive individuals of basic rights. . . . In non-criminal contexts, this Court has held that constitutionally protected individual rights may not be impinged with a showing of less than clear and convincing evidence.

Additionally, [i]t is now well established that the ultimate issue of forfeiture

must be decided by jury trial unless claimants waive that right. *Department of Law Enforcement v. Real Property*, 588 So.2d at 967; See also *In re Forfeiture of 1978 Chevrolet Van*, 493 So.2d 433 (Fla. 1986) (examining the history of the right to a jury trial and concluding that this right is applicable to forfeiture proceedings).

With regard to who shall be notified that the vehicle has been seized, the City of Hollywood Impoundment Ordinance provides, that upon seizing the motor vehicle, the police officer shall "provide written notice by hand delivery to "the owner" of the vehicle or the person in control of the vehicle, and if "the vehicle owner" is unavailable to receive such notice, then notice shall be provided within five working days from the date of impoundment excluding Saturdays, Sundays, and legal holidays. Further the ordinance provides that the written notice shall advise "the owner" or person in control of the vehicle of his/her right to request a preliminary hearing. §101.46(B)(2) and (3). (R. I:39-40; App. 2-3).

In §101.46(D)(1), (R. I:40; App. 3) the ordinance provides that in order to be entitled to a preliminary hearing, "the owner" of the vehicle or his/her agent/representative must submit a written request for a preliminary hearing.

In §101.46(E)(1), (R. I:41; App. 4) the ordinance provides that the City shall notify by certified mail, return receipt requested, the "vehicle owner" of the date, time and location of the final hearing; §101.46(E)(2)(b) (R. I:41; App. 4) provides that the City shall have the burden of proof to show by a preponderance of the evidence

that "the owner of the vehicle" either knew, or should have known, after a reasonable inquiry, that the vehicle was being used or was likely to be used in violation of section (A), and §101.46(E)(3) (R. I:41; App. 4) provides that if the special master finds that the City did not meet its burden of proof or that one of the exceptions apply, that the vehicle shall be returned to "the owner" forthwith.

All of the provisions noted above use the words, "the owner," in the singular. There is no mention of co-owners not present at the time of a driver's arrest, such as spouses, other co-owners, lienors, and lessors. Therefore, the entire seizure/impoundment procedure is faulty at its inception inasmuch as there is no clear direction to serve notice of the seizure and the right to request a preliminary hearing upon such co-owners, etc.

At a minimum, procedural due process requires *notice* and an *opportunity to be heard*. The ordinance provides no such procedural safeguards for owners not present at the time of a driver's arrest, innocent spouses, co-owners, lienors, and lessors or renters of vehicles that are seized and impounded.

These conflicts invalidate the ordinance. "Municipal ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute."

Thomas v. State, 614 So.2d 468, 470 (Fla. 1993). Accordingly, an ordinance must not conflict with any controlling state statute, and if any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute. *City of Miami Beach v. Rocio Corp.,* 404 So.2d 1066,1069 (Fla. 3rd DCA 1981).

For the reasons set forth above, the ordinance conflicts with ("FCFA"), and therefore cannot stand.

CONCLUSION

Based on the foregoing, it is respectfully submitted, that this Honorable Court should answer the certified question in the affirmative, thereby declaring that the Florida Contraband Forfeiture Act preempts local governments from adopting ordinances imposing forfeiture of personal property for misdemeanor offenses, and that said impoundment ordinance conflicts with State law, and therefore the City of Hollywood Impoundment Ordinance, Sec. 101.46, City of Hollywood Code, is void, unenforceable and invalid.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing Respondents' Answer Brief was hand-delivered via courier this ____ day of July, 2004, to: Daniel L. Abbott, City Attorney, Office of the City of Hollywood Attorney, 2600 Hollywood Boulevard, Room 407, Hollywood, Florida 33020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, that this Respondents' Answer Brief has been submitted in Times New Roman 14-point font in compliance with the Florida Rules of Appellate Procedure.

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