

MIAMI BEACH

OFFICE OF THE CITY ATTORNEY

LTC No. 399-2022

LETTER TO COMMISSION

TO: Mayor Dan Gelber and Members of the City Commission

FROM: Rafael A. Paz, City Attorney *Rafael Paz for RAP*

DATE: September 22, 2022

SUBJECT: Court Victory in *Deco Walk Hotel and Golf Club, LLC et al. v. City of Miami Beach*

The purpose of this LTC is to advise you of today's court victory in *Deco Walk Hotel and Golf Club, LLC et al. v. City of Miami Beach*. As you are aware, the City Commission recently unanimously enacted a major overhaul of the City's Sidewalk Café Program. As part of that overhaul, the City Commission repealed the previous Sidewalk Café Ordinance in its entirety and replaced it with a contract-based model that employs concession agreements instead of permits. The new contract-based framework will go into effect on October 1, 2022, following the expiration of the current permits for this fiscal year.

The purpose of the new contract-based model is to ensure that the City retains complete control over which restaurants are asked to provide this amenity on City property, after a court entered a preliminary injunction last year finding that the prior sidewalk cafe permits created a protectible property interest to do business on City property.

In a collaborative effort with the Administration, including the City Manager's Office, Public Works, Code Compliance, Planning, and Information Technology Departments, the City Attorney's Office has developed the outdoor dining concession agreement template, negotiated changes with multiple existing sidewalk café operators, and conducted trainings with operators on the requirements of the new program.

After extensive good-faith negotiations, the City has entered into **147 concession agreements** with existing restaurants. These negotiated agreements include minor common-sense revisions requested by various restaurants and include verifiable performance improvement measures requested by the City for multiple problem restaurants.

Despite the fact that 147 restaurants (as of the date of this LTC) were able to negotiate acceptable terms with the City, nine restaurants sued the City in Miami-Dade County Circuit Court in an attempt to invalidate the new concession agreement program. The plaintiffs, many of whom had an extensive prior record of code compliance issues, argued that they had a continuing protectible property interest in the renewal of their sidewalk café permit even after the repeal of the Sidewalk Café Ordinance.

After three hearings, Judge Alan Fine **denied the plaintiffs request for an emergency preliminary injunction** and affirmed the City's right to implement the new concession agreement program, holding the following:

I will be denying the motions for a temporary injunction because the Plaintiffs do not have a substantial likelihood of success on the merits for the following reasons:

- 1. **To the extent the Plaintiffs had a protectable property interest** entitling them to procedural due process from the pre-2021 City of Miami Beach ordinance(s), **that interest was terminated by the June 2022 repeal of the 2021 Ordinance.** There is no constitutional impediment to the City's repeal of the ordinance which governed the Sidewalk Café Program. While there are good-faith arguments that any protectable property interests must still be in force because the Resolution is a continuation of the Sidewalk Café Program by another means, **I conclude that the process engaged in by the City to repeal the 2021 Ordinance and substitute a proprietary contract-based model is a legitimate exercise of municipal authority.** Key to this conclusion is the fact that the real property at issue is exclusively owned by the City, the City has a continuing interest in what happens on its property, nothing that has happened created any vested property rights in any of the Plaintiffs and all prior ordinances made clear that the grant of a permit was conditional. At most they were entitled to procedural due process in the renewal or termination of any individual permit and that entitlement was terminated with the repeal of the Ordinance....*
- 2. Without a protectable property interest to require procedural due process, there is nothing in the terms of the form contract that is unconstitutional.*
- 3. The Contract process established by the Resolution is not a contract of adhesion as there is evidence that numerous of the 140 contractees have sought and received modifications.*

The City's case was litigated by Chief Deputy City Attorney Rob Rosenwald and outside counsel, Carlton Fields, P.A., including Shareholders Enrique D. Arana and Scott E. Byers and associate Rachel A. Oostendorp.

A copy of the court's order is attached. Plaintiffs have indicated that they will appeal the ruling. If appealed, we are confident that the Third District Court of Appeal will affirm the trial court's well-reasoned order.

As always, feel free to contact me or Chief Deputy City Attorney Rob Rosenwald for further information about this or any City litigation matter.

RAP/RFR/ag

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

CASE NO: 2021-025673-CA-01

SECTION: CA44

JUDGE: Alan Fine

SRA/LINCOLN THEATER, LLC et al

Plaintiff(s)

vs.

THE CITY OF MAMI BEACH, FLORIDA

Defendant(s)

**ORDER DENYING PLAINTIFFS' EMERGENCY MOTIONS FOR TEMPORARY
INJUNCTION**

Docket Index Number: 63

THIS MATTER came to be heard before the Court on Friday, September 9 and Tuesday, September 13, 2022 on the Emergency Motions for Temporary Injunction (the "**Motions**") filed by Plaintiffs Ounze Corporate LLC d/b/a Tapelia ("**Tapelia**"), Braza y Lena LLC d/b/a Ole Ole Steakhouse ("**Ole Ole**"), TNT Gigino Holding, LLC d/b/a Espanola Cigar Bar & Lounge ("**Espanola Cigar Bar**"), Deco Walk Hotel & Golf Club, LLC d/b/a Voodoo Rooftop Lounge & Hookah ("**Voodoo**"), Spice Art Restaurants, Inc. d/b/a Jalapeno Mexican Kitchen ("**Jalapeno**"), 524 Ocean LLC ("**524 Ocean**"), Il Giardino d/b/a Il Giardino ("**Il Giardino**"), SOBE USA, LLC d/b/a Oceans Ten ("**Oceans Ten**"), Manyplus Limited, LLC d/b/a 7 Spices ("**7 Spices**"), and Suri South Beach, Inc. d/b/a D'Vine Hookah Lounge ("**D'vine Hookah**") (collectively, "**Plaintiffs**"). Having reviewed the Motions and the Responses filed by the City of Miami Beach (the "**City**"), as well as the preliminary record in this case, and having heard oral argument, the Court makes the following findings:

UNDISPUTED FACTS AND PROCEDURAL POSTURE^[1]

The City created a sidewalk café program, as set forth in Sections 82-322 to 82-391 of the

City Code of Ordinances, which allowed restaurant and bar owners to apply for an annual permit to establish sidewalk cafés on City property. The ordinances provided that “the approval, issuance and continued operation of a sidewalk café is subject to the City Manager’s discretion, which is deemed conditional at all times.” Miami Beach Code § 82-381. In March 2021, the City amended the sidewalk café ordinances to provide that the City Manager would consider the business owners’ conduct in determining whether to grant or renew a permit to use City property. Ordinance No. 2021-4403, § 82-382 (the “**Ordinance**”).

Thirteen business owners, whose permit applications for a sidewalk café permit for the 2021-2022 permit year were denied, filed six related actions challenging the constitutionality of the Ordinance. Those plaintiffs filed emergency motions for temporary injunction arguing that the Ordinance violated their due process rights. On December 27, 2021, Judge Thomas granted a temporary injunction, concluding that “the [sidewalk café permit] process, particularly the [sidewalk café permit] renewal process, creates a constitutionally protected expectation and privilege that necessarily requires due process of law,” and making a preliminary finding that the Ordinance was unconstitutional on its face, including that it failed to satisfy due process.

On June 22, 2022, the City Commission, after holding two public Commission meetings, repealed the City’s sidewalk café ordinances, which included the challenged Ordinance, effective October 1, 2022. Ordinance No. 2022-4492.^[2] The City also adopted a Resolution, which authorized the City Manager to enter into concessionaire agreements with selected restaurant owners and operators allowing such owners and operators to provide outdoor food and beverage service and consumption on the City’s Property. Resolution No. 2022-32205 (“**Concessionaire Agreement Resolution**”).

On August 10, 2022, five of the plaintiffs in the original actions, Espanola Cigar Bar, Voodoo, Jalapeno, 524 Ocean, and Il Giardino, along with three new Plaintiffs, Oceans Ten, 7 Spices, and D’Vine Hookah, filed a separate lawsuit challenging the City’s new concession

program and moved for a temporary injunction. By agreement of the parties, the new lawsuit was consolidated with the original six related actions. On August 25, 2022, Plaintiffs Tapelia and Ole Ole filed an Amended Complaint challenging the City’s new concession program, and moved for a temporary injunction.^[3] Because the Motions filed by the Plaintiffs are substantially similar, the Court addresses them together.

CONCLUSIONS OF LAW

For the reasons set forth below, the Court finds that Plaintiffs do not have a substantial likelihood of success on the merits and therefore denies the Motions. The Court “need not discuss the remaining elements of the temporary injunction test, because a movant’s failure to establish any single element means that the injunction must be denied.” *Fla. Dep’t of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1110–1111 (Fla. 2021).

A. To The Extent Plaintiffs Had A Protectable Property Interest Entitling Them To Procedural Due Process Under The City’s Pre-2021 Ordinance, That Interest Was Terminated By The Repeal Of The Ordinance

Plaintiffs assert, among other things, that the City’s concession program is an improper attempt to take away a protectable property interest without affording due process; Plaintiffs assert that these protectable property interests in the sidewalk café permitting process continue to afford them due process under any renewed program regardless of the process by which it was accomplished. The Court disagrees and finds that any entitlement Plaintiffs may have had to due process pursuant to such protectable property interests was terminated by the City Commission’s June 2022 repeal of the sidewalk café program. *See Atkins v. Parker*, 472 U.S. 115, 129 (1985) (“The procedural component of the Due Process Clause does not ‘impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits.’”).^[4] There is no constitutional impediment to the City’s repeal of the sidewalk café ordinances. To the extent Plaintiffs argue that they were entitled to due process regarding the City’s repeal of the sidewalk café ordinances, the legislative process, including the City’s holding

of two public Commission meetings, fulfills such a requirement. *See 75 Acres, LLC v. Miami Dade Cnty.*, 338 F.3d 1288, 1294 (11th Cir. 2003).

While there are good-faith arguments that any protectable property interests must still be in force because the concession program is a continuation of the sidewalk café program by another means, the process engaged in by the City to repeal the sidewalk café ordinances and substitute a proprietary contract-based model is a legitimate exercise of municipal authority. *City of Largo v. AHF-Bay Fund, LLC*, 215 So. 3d 10, 17 (Fla. 2017); *Hamler v. City of Jacksonville*, 122 So. 220, 221 (1929); *McPhee v. Dade Cnty.*, 362 So. 2d 74, 79 (Fla. 3d DCA 1978). The real property at issue is exclusively owned by the City and the City has a continuing interest in what happens on its property. Additionally, nothing that has happened created any vested property rights in any of the Plaintiffs. This Court finds that Plaintiffs never had a “vested right” to operate sidewalk cafés on City property.^[5] Nor could there be any such vested right, since the sidewalk café ordinances only allowed Plaintiffs the opportunity to obtain annual permits to use City streets and sidewalks and the prior sidewalk café ordinances made clear that the grant of a permit was conditional. *See Sowell*, 192 So. 3d at 30–31 (plaintiff had no vested right to receive an ad valorem tax exemption for the following year where an application for exemption must be filed each year and reviewed by the property appraiser); *Holmes v. Marion Cnty.*, 960 So. 2d 828, 830 (Fla. 1st DCA 2007) (permit did not create vested right to continue use beyond its expiration because “issuance of a time-limited permit cannot create a reasonable expectation that the specially permitted use will be allowed to continue indefinitely”); *Marine One, Inc. v. Manatee Cnty.*, 898 F.2d 490, 1492–93 (11th Cir. 1990) (a permit to use public land could not create a compensable property interest in that land).

Accordingly, at most, Plaintiffs were entitled to procedural due process in the renewal or termination of any individual permit, and that entitlement was terminated with the repeal of the sidewalk café ordinances.

B. The City Is Within Its Rights To Delegate Contracting Authority To The City Manager

Plaintiffs argue that the Concession Agreement Resolution exceeds the City's statutory authority and is subject to challenge as an ordinance. However, this Court finds that the City is within its rights to delegate contracting authority to the City Manager so long as the City Manager uses a form of contract approved by the City Commission, either in advance or, if material changes are made, subject to Commission approval. A resolution may be used to accomplish "an expression of a governing body concerning matters of administration, an expression of a temporary character, or a provision for disposition of a particular item of administrative business of the governing body." § 166.041(b), Fla. Stat. Public contracts are quintessential matters of City administration, and may be authorized by resolution unless the City Charter or other applicable law expressly requires an ordinance. *See City of Key Largo*, 215 So. 3d at 17; *Marriot Corp. v. Metro. Dade Cnty.*, 383 So. 2d 662, 666 (Fla. 3d DCA 1980) (county contract may be authorized by resolution); 10 McQuillan Mun. Corp. § 29:24 (3d ed.) ("in the absence of a mandatory requirement, contracts may be authorized by resolution"). The City of Miami Beach Charter provides that the City Manager has authority to "negotiate all contracts and agreements in which the City is a party subject to the approval of the City Commission," and the Concession Agreement Resolution constitutes that approval. City Charter § 4.02(i).

C. Without A Protectable Property Interest To Require Procedural Due Process, There Is Nothing In The Terms Of The Form Contract That Is Unconstitutional

Plaintiffs' challenges to the form concession contract itself are also without merit. Without a protectable property interest to require procedural due process, there is nothing in the form contract that is unconstitutional, and the parties' rights are governed by the terms of the agreements they negotiate. There is no protectable interest in a public contract that may be terminated without cause. *See Econ. Dev. Corp. of Dade Cnty. v. Stierheim*, 782 F.2d 952, 954 (11th Cir. 1986). Numerous authorities hold that public contracts may include termination at will provisions, and the City's 90 days' notice provision under the form contract constitutes sufficient consideration to uphold such a provision. *See Rollins Servs. v. Metro. Dade Cnty.*, 281 So. 2d 520, 521 (Fla. 3d

DCA 1973) (upholding contract allowing county to terminate at any time upon 10 days' notice, as "the power to terminate a contract may be reserved, and obviously a city may revoke a contract when it has reserved such a right"); *Handi-Van, Inc. v. Broward Cnty.*, 116 So. 3d 530 (Fla. 4th DCA 2013) (affirming county's authority to enter into contract terminable for convenience because unilateral termination provisions are permissible as long as consideration exists, and notice requirement constituted sufficient consideration to uphold provision); *Stierheim*, 782 F.2d at 954–55 (holding contract that could be terminable by county without cause does not create protectable interest and observing that "[t]his type of termination clause has been held enforceable by Florida courts"). Moreover, Plaintiffs' argument that they lack meaningful opportunity to challenge termination is without basis, because it is well-settled that an agreement to arbitrate does not interfere with due process. *See Kaplan v. Kimball Hill Homes Fla., Inc.*, 915 So. 2d 755, 761 (Fla. 2d DCA 2005) (contractual arbitration does not violate due process rights). Moreover, per the City's agreement at oral argument, the right to arbitration under the form contract is triggered by the announcement of termination of the contract with at least 30 days' notice and thus creates no unconstitutionally in the concession agreements.^[6] Finally, this Court finds that the contract process established by the Concession Agreement Resolution is not a contract of adhesion based on evidence that numerous of the more than 140 restaurant and bar owners who have signed concession agreements have sought and received modifications.

Accordingly, it is ORDERED AND ADJUDGED that Plaintiffs' Emergency Motions for Temporary Injunction are denied.

^[1] The parties agreed that for purposes of the temporary injunction proceedings, the Court could decide the Motions based upon the parties' verified complaints, declarations, and affidavits without the need for live testimony or cross-examination.

^[2] The City initially appealed Judge Thomas' order. Because the challenged Ordinance was repealed while the appeal was pending, the City voluntarily dismissed its appeal and filed a motion to dismiss the complaint as moot and to dissolve the temporary injunction on that basis.

[3] On September 6, 2022, Plaintiffs Ocean 7 Café, The Place, Caffè Milano, Carlyle Café, and Il Bolognese filed a notice of dismissal. Plaintiff Manugio Corp. has indicated that its business is closing and therefore it is no longer pursuing its claims.

[4] The City contends that Judge Thomas' preliminary finding that due process protections applied to the sidewalk café ordinance was mistaken because there can be no protectable interest or entitlement in a government benefit that is discretionary. *See e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (“[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”). The Court did not address this issue at this hearing because, even if due process protections were applicable to the annual permits to use City property, there was no constitutional impediment to the City repealing the ordinances. This Court finds that Plaintiffs did not have a vested right to continue using City property at any time.

[5] “A vested right has been defined as ‘an immediate, fixed right of present or future enjoyment’ and also as ‘an immediate right of present enjoyment, or a present, fixed right of future enjoyment.’” *Sowell v. Panama Commons L.P.*, 192 So. 3d 27, 30 (Fla. 2016)

[6] Plaintiffs have stipulated to withdrawal of any claims related to the limited waiver of First Amendment rights in the concessionaire agreements.

DONE and ORDERED in Chambers at Miami-Dade County, Florida on this 21st day of September, 2022.

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Hon. Alan Fine

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on THIS MOTION

CLERK TO RECLOSE CASE IF POST JUDGMENT

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