

IN THE CIRCUIT COURT, SEVENTH  
JUDICIAL CIRCUIT, IN AND FOR  
VOLUSIA COUNTY, FLORIDA.

CASE NO.: 2014-10972-CIDL  
DIVISION: 01

JONATHAN D. KANEY, JR., as  
Special Counsel to the County Council of  
Volusia County, Florida; THE COUNTY  
OF VOLUSIA

Plaintiffs,

vs.

KIMBERLY WAS, JUSTIN KENNEDY,  
THEODORE DORAN, WAVERLY MEDIA,  
LLC, RAMARA GARRETT, and  
JAMES SOTOLONGO

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**ORDER PARTIALLY GRANTING DEFENDANT'S THEODORE DORAN'S  
MOTION FOR JUDGMENT ON THE PLEADINGS ON  
COUNT I OF THE COUNTERCLAIM**

THIS MATTER came before the court on two competing motions for judgment on the pleadings. The first motion was Mr. Kaney's *Petitioner's Motion for Judgment on the Pleadings and Memorandum of Law in Support Thereof*, and the second motion was *Doran's Motion for Judgment on the Pleadings and Response to Petitioner's Motion for Judgment on the Pleadings and Incorporated Memorandum of Law*. This court has previously granted Mr. Doran's motion for judgment on the pleadings as to Count II of the counterclaim. Therefore, little discussion is offered with regard to Count II of the counterclaim as it has been addressed by this court in its previous Order.

After a review of the motions, considering the argument of counsel, the memoranda submitted and the law, this court finds that as to Count I of Mr. Doran's *Motion for Judgment on the Pleadings and Response to Petitioner's Motion for Judgment on the Pleadings and Incorporated Memorandum of Law* the motion should be partially granted.

Both sides in this dispute<sup>1</sup> generally agree on the standard to be applied by this court in consideration of the motions. Therefore there is no need to dwell on procedure and only limited consideration is offered in this regard. The only procedural issue in dispute is whether the court can consider Mr. Kaney's report to the County Council of Volusia County in determination of the issues. Mr. Kaney's report was not attached to Mr. Kaney's Amended Petition in this case. It was Mr. Doran who attached the report to his counterclaim. It is also Mr. Doran who is highly critical of the report's findings. There are legal requirements for consideration of attachments when addressing a motion for judgment on the pleadings.

This court may consider an attachment to the pleadings only when the attachment is part of the cause of action. Matters which are outside of the pleadings cannot be considered<sup>2</sup>. The court finds that consideration of the report is inconsequential to the determination of the issues. Therefore, for purposes of this order the court disregards it since it is of no legal consequence to the court's findings.

So the issue in this case is whether the County Council of Volusia County can authorize the issuance of subpoenas pursuant to its investigation into the "Waverly Media matter." The

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<sup>1</sup> There are other defendants in this cause whose claims or issues are not addressed by this Order. Only Mr. Kaney's and Mr. Doran's motions are addressed by this Order.

<sup>2</sup> A motion for judgment on the pleadings raises only questions of law and matters outside the pleadings cannot be considered. See *Cartan Tours, Inc. v. ESA Services, Inc.*, 833 So. 2d 873 (Fla. 4th DCA 2003); *Ray v. Elks Lodge No. 1870 of Stuart*, 649 So. 2d 292 (Fla. 4th DCA 1995); *Faircloth v. Garam*, 525 So. 2d 474 (Fla. 5th DCA 1988); *Whitaker v. Powers*, 424 So. 2d 154 (Fla. 5th DCA 1982).

court finds that this is purely a legal question ripe for determination. The court finds that the Volusia County Council did not have the authority to enact an ordinance which expressly authorized the issuance of subpoenas for purposes of an investigation that did not comport with Section 309 of the charter. In this case, the subpoena issued by Mr. Kaney to Mr. Doran was improper because the county charter does not have an express provision for the issuance of subpoenas for investigations conducted within the inherent or implied power of the county.

The issues surrounding this case can be broken down in the following manner. First, whether the county council could order an investigation into a specific matter. Second, whether the type of investigation which was authorized here constituted an investigation pursuant to section 309 of the county charter; or whether the investigation was one conducted within the inherent or implied power to investigate as Mr. Kaney has argued throughout these proceedings. Lastly, whether the county council: 1) has the power to issue subpoenas, and 2) is that power delegable.

This court has previously addressed the first issue. This court has found that the county council was well within its realm when it hired Mr. Kaney to conduct an investigation into the “Waverly Media Matter.” For that proposition, this court has cited the county’s charter. Section 601.2 of the Volusia County Charter states:

**Section 601.2 Department of Legal Services.** The county attorney shall be the director of the department of legal services and may hire licensed attorney assistants to perform the duties of the department. .... Special attorneys and experts shall be employed only when required in specific matters upon the recommendation of the county attorney and approved as a budgetary expenditure in the best interests of the county. (Ch. 70-966, Laws of Florida (Sp. Acts), Art. VI ' 601.2) [emphasis]

This provision makes it clear that the county council had the expressed authority to hire Mr. Kaney and tasked him with the responsibility to find out answers regarding its inquiry. What apparently was not clear from this court's previous finding relates to the second issue.

When it comes to inquiries, there are several types of investigations that can be conducted. Grand jury investigations, coroner inquests, internal affairs investigations, criminal investigations, and civil investigations, are just a few that easily come to mind. In this case the county council determined to begin an investigation into the "Waverly Media Matter." The type of investigation then became relevant since the enacting ordinance did not specify what type of investigation was to be conducted.<sup>3</sup>

There are two types of investigations which are at issue here. First is an investigation pursuant to the county charter's section 309 which has limitations in scope and manner; the second is a general inquiry investigation which has no defined limitations other than the enacting ordinance's parameters. The second type of investigation is the one that Mr. Kaney refers to as an "inherent power" investigation. This court finds that under either type of investigation, the result is still the same.

The Volusia county charter (section 309) has an express provision regarding investigations. The provision reads as follows:

Section 309. Investigations.

Pursuant to powers granted by this charter, the council may make investigation into the affairs of the county governmental operations, and for this purpose the council shall cause subpoenas to be issued for witnesses, administer oaths, take testimony and require the production of evidence before the council in session. Any person who fails or refuses to obey such subpoena issued in

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<sup>3</sup> It appears that a section 309 investigation was contemplated by the council although that in itself is not clear.

the exercise of those powers by the council, shall be guilty of a misdemeanor upon conviction and punished according to law. (Ch. 70-966, Laws of Florida (Sp. Acts), Art. III, ' 309) [emphasis]

In analyzing this provision it is quite clear that section 309 of the charter provides for the issuance of subpoenas when an investigation is being conducted by the council. However, the subpoena provision is not without limitations. Section 309 of the charter requires that the production of evidence be brought before the council while the council is in session. It also requires the council itself to issue the subpoenas. Section 309 establishes a set of criteria for how the investigations are to be conducted. Investigations before the council in session are likely to carry heightened formality given the procedural requisites for a session. Even from a due process standpoint of view, the inquiry before the council would be from the council members – all of whom are accountable to the citizens of this county. The subpoena issued to Mr. Doran did not comport with the requirements of section 309 of the charter.

Mr. Doran in this case was subpoenaed to appear before Mr. Kaney – not the county council. Furthermore, the subpoena did not summon Mr. Doran to appear before the county council as required by section 309 of the charter. Lastly, the subpoena was not issued by the council itself, but issued by Mr. Kaney pursuant to the enacting ordinance. In view of all of these things, the subpoena issued to Mr. Doran was not in accord with section 309 of the county council charter and therefore, Mr. Doran is entitled to relief under this theory. Now this court must then consider a general inquiry investigation.

It has been argued by Mr. Kaney pursuant to the theory of *expression unius est exclusion alterius*<sup>4</sup> that the county council has the inherent power to investigate. His argument hinges on the premise that section 309 of the charter is not a limitation on investigations. In sum, the

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<sup>4</sup> *Daniels v. Florida Dep't of Health*, 898 So.2d 61, 64 (Fla. 2005)

express provisions regarding investigations in the county charter are not to be read as an exclusion of all other available means of investigation. This court has previously partially agreed with Mr. Kaney. The court previously held that the county council has the inherent power to conduct an investigation into matters which it deems worthy of investigation – within the limits of its powers. Article VIII, § 1(g) of the Florida Constitution grants powers for local self government.

Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances. Phillip J. Padovano, *Civil Practice*, § 7:29 (2014)

This provision of the Florida Constitution grants the county broad powers. However, the power is not without limits. The enacting ordinance authorizing the investigation into the “Waverly Media Matter” has some guidelines and limitations within the scope of the investigation. The ordinance (2014-01) states in part as follows:

SECTION I:

The county council delegates to special counsel Jonathan D. Kaney Jr., or Noah C. McKinnon Jr., the authority to conduct an investigation of the Waverly Matter; to issue subpoenas for sworn testimony and evidence production to such persons as special counsel shall determine necessary; and to enforce such subpoenas by legal action. This ordinance shall be construed broadly to achieve its purpose. Such subpoenas shall be enforceable to the maximum extent allowed by law. Special counsel shall render a final report of their investigation by March 14, 2014, unless unable to do so for non-compliance with a subpoena.

This court does not pass judgment on the adequacy or necessity for the council actions. It merely looks at the authority used by the council in achieving its goal as they relate to Mr. Doran. Given its perceived general authority the council saw it fit to 1) authorize an investigation, 2) authorize the issuance of subpoenas pursuant to the investigation and 3)

delegated that authority to Mr. Kaney. As previously held, the court finds that the county council had the authority to conduct its investigation into the “Waverly Media Matter.” However, the use of “inherent” subpoena power is not one dwelling in law.

There is no precedent that this court has found which shows that municipalities enjoy the inherent broad power to issue subpoenas. In almost every case in which this court has looked, subpoena power is derived by some express provision of law – and rightfully so. A subpoena is akin to a summons or an order. It cannot be ignored. The consequences for failing to adhere to a subpoena’s requirement can result in serious sanctions including incarceration. A subpoena will deprive a citizen of his/her time, freedom, property and privacy. Without limitations, subpoena power can be subject to misuse or abuse.

Although not directly on point, this court is swayed by the case of *Barry v. Garcia*, 573 So. 2d 932 (Fla. 3d DCA 1991). In that case, the Court held that municipalities have no authority to grant subpoena power to independent investigatory bodies consisting of non elected officials. The *Barry* case also held that when the governing clause of any charter or act denotes the express power to issue subpoenas (or delegation of the power to subpoena), the charter or act becomes the standard to the exclusion of any other general grant of power or authority. This court does recognize that the *Barry* case was applicable to a city government as opposed to a county government. But the distinction does not render the case inapplicable here.

This court finds that subpoena power needs to be expressly granted by constitution or charter, statute, act, rule or order. A subpoena is a tool of the court because it is generally enforceable by the court. In the case *sub judice*, the county

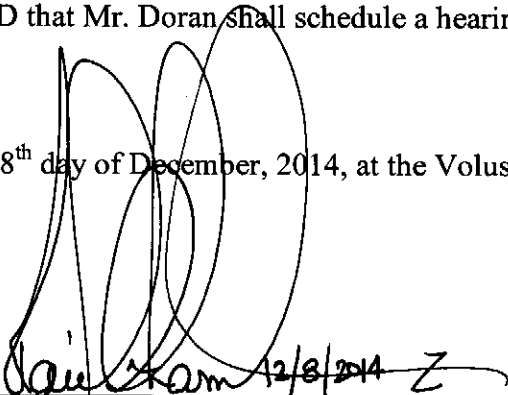
council of Volusia County enacted an ordinance which was partially within its inherent power (i.e. power to investigate) and partially outside the scope of its inherent powers (i.e. power to subpoena). In this case, the county council of Volusia County delegated a power to Mr. Kaney which it did not have: to wit, the inherent power to subpoena private citizens for purposes of a general inquiry or investigation into the “Waverly Media Matter.” Mr. Doran is entitled to relief under this theory as well.<sup>5</sup> THEREFORE, it is hereby

ORDERED AND ADJUDGED that Mr. Doran’s *Motion for Judgment on the Pleadings and Response to Petitioner’s Motion for Judgment on the Pleadings and Incorporated Memorandum of Law* is PARTIALLY GRANTED, it is further

ORDERED AND ADJUDGED that Mr. Kaney’s *Petitioner’s Motion for Judgment on the Pleadings and Memorandum of law in Support Thereof*, is DENIED, it is further

ORDERED AND ADJUDGED that Mr. Doran shall schedule a hearing on the remaining issue of damages.

DONE AND ORDERED this 8<sup>th</sup> day of December, 2014, at the Volusia County Courthouse, DeLand, Florida.



RAUL A. ZAMBRANO  
CIRCUIT JUDGE

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<sup>5</sup> In support of his motion, Mr. Doran’s motion raises several grounds. In finding that the Volusia County Council did not have the authority to authorize the issuance of subpoenas in this case, the court finds that its ruling on this issue is dispositive and therefore the court will not consider the remaining arguments.



Copies to:

Jonathan D. Kaney, Jr., Esq., via: [jon@kaneyolivari.com](mailto:jon@kaneyolivari.com)  
Theodore R. Doran, Jr., Esq., via: [tdoran@doranlaw.com](mailto:tdoran@doranlaw.com)  
Douglas K. Gartenlaub, Esq., via: [dgartenlaub@burr.com](mailto:dgartenlaub@burr.com)