



Orlando Anti-Discrimination Ordinance Committee
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Equality Begins at Home

Mayor Jacobs,

OADO thanks you for meeting with us and other members of the LGBT and allied community last week to discuss your intentions with regard to the proposed Domestic Partnership Registry. We appreciate the opportunity to hear your thoughts and to provide you feedback. Our team left feeling positive about your commitment to maintaining an open mind and ongoing dialogue and also very troubled by some of your assumptions about how this ordinance must be written. We appreciated your clear commitment to bringing the issue to the BCC in February. You raised questions about our objectives in our meeting last week. Let's start by addressing those.

OADO expects our leaders in Orange County to do everything possible to both recognize the many contributions of Orange County's large lesbian, gay, bisexual and transgender community and to do everything in your power to fill the serious gaps in protections for our families. We believe that there are straight couples who do not get married for financial, legal, and emotional reasons; thus, we support keeping an Orange County domestic partnership registry (DPR) ordinance inclusive of straight-unmarried couples. We recognize that there is a general lack of education about the limited protections offered through state and federal law for individuals with non-romantic and non-biological relationships and support the County's desire to bring greater clarity and efficiency to those processes. We believe that though compelling and worthy of action, this is a distinctly different issue than the need to provide enforceable legal protections to couples who cannot or will not get married and their children. We believe that the only way to provide the full blanket of legal protections for unmarried couples and their children is to name and define "domestic partners" in the new law we create, a practice that is consistent with two decades of public and private policy across the state and country.

We reject the idea that naming and defining "domestic partners" in an Orange County DPR is in violation of Amendment 2, and caution you and your legal team to do your due diligence before taking a position with such far-reaching implications. Just last year, you, Orange County Commissioners, and Orange County attorneys created public policy that named and defined "domestic partners." In the last two years elected, appointed, and administrative leaders in the City of Orlando, City of Kissimmee, City of St. Cloud, University of Central Florida, Kissimmee Utility Authority, Toho Water Authority, Orlando Utility Authority, and Orange County worked with their staff attorneys to create benefit policies for unmarried gay (and sometimes straight) employees and their children that name and define "domestic partners." No one, including yourself and your legal advisors, has found legal grounds for denying these protections to the families of your own employees. We are deeply concerned that you could argue against those same protections for all citizens of Orange County.

We are looking forward to meeting with you again before this issue is presented to the BCC. In the interim, we've prepared research and responses to the specific concerns you raised last week. We're confident that you will keep your promise to maintain an open mind and an open heart as we continue dialogue.

Michael Slaymaker

Founder, Orlando Anti-Discrimination Ordinance Committee

1. CONSTITUTIONALITY

You stated that you cannot support a Domestic Partnership Registry because you believe it would be unconstitutional, in violation of Florida's anti-gay-marriage constitutional amendment (which you supported and have stated that you still support). We believe this assumption is wrong and cannot be supported with any legitimate legal authority. When directly questioned about the basis for this conclusion, you were unable to cite to any Florida legal authority supporting that position. We presented you (and County Attorney Jeff Newton) with a condensed legal brief setting forth Florida appellate case law that supports the constitutionality of Domestic Partnership Registries, including a decision from the Florida 4th District Court of Appeals ("Lowe") and a decision from the Florida Supreme Court ("Amendment 2"). You and Mr. Newton were familiar with the Lowe decision, but both of you admitted that you were not aware of the Amendment 2 decision, even though it was included in the packet of materials given to you by the Orlando legal staff in October. Mr. Newton referred to a court decision from Michigan, which we are very familiar with and would caution against using to form any substantive legal opinion. The Michigan case did not involve a challenge to a domestic partner registry but a domestic partnership benefits policy (much like the one adopted earlier this year by you, your staff and the Orange County BCC) and did not involve Florida law.

Here is a summary of the relevant Florida case law:

***Lowe v. Broward County*, 766 So.2d 1199 (Fla. 4th DCA 2000).** Broward County passed a Domestic Partnership Registry and it was challenged in court as unconstitutional on several grounds. The Florida 4th DCA upheld the Broward County DPR against all of those constitutional challenges with one exception that related to the specific wording of one of the provisions. (This drafting defect was expressly cured in the Orlando DPR.) At page 1206, the Court noted that under Florida law there are two separate and distinct ways in which a local government enactment may be inconsistent with state law: (1) where the state legislature has preempted a particular subject area, and (2) where the local enactment conflicts with an existing state statute. At page 1205, the Court held that the Broward County DPR **was not preempted by state law**, holding that the Broward County DPR does not legislate within that domestic relations zone that is reserved for the state; does not address the panoply of statutory rights and obligations exclusive to the traditional marriage relationship; does not reflect a legislative value judgment that elevates a non-traditional personal relationship to equal status with the marital relationship created under Florida law; does not intrude to a substantial degree into a matter inherently reserved for the state alone. At page 1208, the Court further held that the Broward County DPR **did not conflict with the state statute** defining marriage as the union of one man

and one woman. The Court held that the DPR's extension of limited benefits does not create a "marriage-like relationship" in contravention of 741.212, FS, because the statute is directed at same sex marriages, with all the rights and obligations of traditional marriages, whereas the DPR is not limited to persons of the same sex, and the DPR simply provides limited benefits to domestic partners as opposed to creating "that plethora of rights and obligations that accompany a traditional marriage." At page 1210, the Court struck one provision of the DPR related to recognizing domestic partners as each others' healthcare surrogates because it purported to override an existing state statute (765.401) which establishes an order of priority for healthcare surrogates where an individual has not expressly designated such a surrogate. The healthcare surrogate provision of the Orlando DPR was expressly drafted to overcome this drafting deficiency of the Broward County DPR and is entirely consistent with the cited statute.

Advisory Opinion To The Attorney General Re Florida Marriage Protection Amendment, 926 So.2d 1229 (Fla. 2006). Prior to Amendment 2 being placed on the ballot for a statewide vote, it was challenged in court as violating the "single subject rule," which requires that proposed constitutional amendments be strictly limited to a single subject. Opponents of Amendment 2 argued that it would address more than 1 subject, that it would not only constitutionally ban same-sex marriage but that it would also potentially ban domestic partnerships. The Florida Supreme Court disagreed, and held that Amendment 2 only addressed 1 subject, the definition of traditional marriage as one man and one woman. The Court held that Amendment 2 would simply add the provisions of 741.212, FS, to the constitution and would not impact domestic partnerships. At page 1234, the Court held that "the voter is merely being asked to vote on the singular subject of whether the concept of marriage and the rights and obligations traditionally embodied therein should be limited to the union of one man and one woman. The plain language of the proposed amendment is clear that the legal union of a same-sex couple that is NOT the 'substantial equivalent' of marriage is not within the ambit of this constitutional provision."

To our knowledge there is no other Florida caselaw that addresses this issue. Moreover, in similar circumstances, ordinances creating domestic partner registries and providing benefits for municipal employees have been upheld by appellate courts in Alaska, California, Colorado, Georgia, Illinois, Maryland, New York, Washington and Wisconsin. We can find no instance of a domestic partner registry being held unconstitutional. There have been a few municipal ordinances that granted domestic partner health insurance benefits that have been held to be impermissible, because specific state laws expressly defined the persons for whom municipalities could provide health insurance benefits in a way that excluded domestic partners. That is not the case in Florida.

Statements by Proponents and Authors of Amendment 2. John Stemberger, the avowed anti-gay activist who helped write and led the effort to pass Amendment 2, has made it clear in public record that there would be no challenge to or chilling effect against the creation of DPRs. The excerpts below are a snapshot of his multiple statements on the topic and support the conclusion that DPRs do not violate Amendment 2:

"Amendment 2 will have no effect on domestic partnerships."

<http://Miamiherald.typepad.com/gaysouthflorida/2008/10/floridas-amendm.html>

“I appeared before the Florida Supreme Court with Attorney Mat Staver of Liberty Counsel as he argued the ‘single subject’ requirement at an oral argument court hearing. The high court quickly and summarily rejected the ACLU’s arguments that the amendment would affect domestic partnerships and other benefits.” And “To ensure that existing domestic partnerships are not affected, Amendment 2 also prohibits any union that is the ‘substantial equivalent’ of marriage. The words ‘substantial equivalent’ mean ‘almost equal’ or ‘virtually identical’ and were found by the Florida Supreme Court to be clear, unambiguous and words ‘frequently used by the common voter.’ These words give the court a bright-line test to weigh the rights of ‘other legal unions’ against those rights found in marriage. Existing domestic partnerships in Florida grant a very small bundle of 6-8 rights. In contrast, marriage grants hundreds of rights at a state level and 1,138 rights at a federal level. **Florida’s domestic partnerships are quite safe for the simple reason that their 6-8 rights could never be legally construed to be the substantial equivalent equal to the huge number of rights conferred in marriage.**”

<http://www.tampabay.com/blogs/the-buzz-florida-politics/content/stemberger-strikes-back>

“The citizen initiated and citizen led Amendment 2 has nothing at all to do with government action.” And “**Telling senior citizens that they will lose social security and or domestic partner benefits by voting yes on 2 is outright fraud.**” <http://uspoliticalscene.com/tag/amendment-2>

Savings Clause. Finally, despite the conclusive and unrebutted legal authority cited above, the Orlando DPR and other DPRs include a savings clause: “This ordinance shall not be construed to supersede any federal, state, or other city laws or regulations, nor shall this ordinance be interpreted in a manner as to bring it into conflict with federal, state, or other city laws. Nothing in this ordinance shall be construed as recognizing or treating a domestic partnership as a marriage.”

In conclusion, Mayor Jacobs, there is no legal authority that supports your stated conclusion that an Orange County DPR would be unconstitutional.

2. NAMING AND RECOGNIZING “DOMESTIC PARTNER” FAMILIES

You stated that you do not intend to support a Domestic Partnership Registry because you do not believe it is government’s role to create a new “legal status” by recognizing “domestic partners.” First of all, we are not aware of, nor did you cite to, any legal authority which holds that implementing a DPR would create some new “legal status.” To the contrary, in the Lowe decision, the Court held that the Broward County DPR did not “elevate a non-traditional personal relationship to equal status with the marital relationship created under Florida law.” Implementing a DPR would not create a “status,” it would simply define unmarried couples and their children as “domestic partners” in order to clearly grant certain rights to them as a family unit. Orange County has already defined and recognized “domestic partners” when it implemented domestic partner employee benefits last year, recognizing unmarried same-sex couples and their children as a family unit for purposes of providing them with health insurance and other employment benefits.

Keeping consistency in language is important for more than just legal clarity and even goes beyond the need to streamline government and avoid building systems incongruent with the City of Orlando's registry. As we discussed and as reflected in the chart that we handed to you last week, there are numerous rights and benefits, in addition to the 7 specific legal rights created by the Orlando DPR ordinance, that attach to the definition of DP and which would not be accessible to DPs and their families if they are not recognized as such.

Some examples of the supplemental benefits that would accrue by following the long tradition of naming and defining "domestic partners" in the new ordinance include DP health insurance, pension, and other benefits provided by some employers; memberships and other benefits provided to DPs by some businesses (YMCA, AAA, AVIS), and certain "family" visitation and other rights provided to DPs by the Executive Order issued recently by President Obama. Without designation as DPs in the new ordinance, unmarried families could be denied access to these rights and protections provided by the private sector and the federal government.

The Children of Domestic Partners

Perhaps the greatest deficiency that would result from not recognizing DP families is that the children of such families would be ignored. Without naming and defining "domestic partners" and their families, the children in these families would not receive the benefits provided by the Orlando DPR ordinance. Though you pledged to explore the issue further, you acknowledged that the benefits provided to children of DP families by a DPR would not be accessible to them under your proposed plan. One example of how this would impact DP families is what we call the "Brady Bunch" scenario, where 2 adults in an unmarried relationship each bring children into a new family unit. (Imagine Bob and Carol Brady but not married.) If Carol gets an incurable disease or is in a horrific accident and is lying on her death bed in ICU, Bob's children would have the right to visit Carol *if* Bob and Carol were registered as DPs. Carol would have the right to be notified if emergency first responders found one of Bob's children in a life threatening accident. No parent, biological or not, should ever have to worry about if they'll be called in an emergency or allowed to visit their child in the hospital. Children of DPs would be denied these protections under your plan.

Naming Domestic Partners is Good For Business – Attracting Major Corporations to Central Florida

Though critical to individual equality, a Domestic Partnership Registry also burgeons Orange County's economic viability. As we advised you in our meeting, there is much authority to substantiate this point, including data from Fortune 500 Company positions on diversity and inclusivity. Your commitment to high-value job creation through corporate recruitment and development is a compelling argument for a Domestic Partnership Registry. You note in your *Orange County, Florida, 2011 Annual Report*, that job growth and business development is a priority. Your own Job Summit Series highlighted community support and advocacy for business environments aligned with Fortune 500 company diversity policies. Of the Orlando Sentinel's Central Florida Business Top 100 companies cross referenced to the Human Rights Campaign Corporate Equality Index, 64 of the 100 scored an 85% or greater, showing their

aggressive commitment to diversity and inclusive policies and benefits. Such companies specifically look for jurisdictions that have inclusive diversity policies such as “Domestic Partnership” Registries.

Corporate recruitment and development is competitive. Further, as a worldwide tourist destination, inclusive and progressive policies such as a Domestic Partnership Registry are an essential tool to attract an even broader population to enjoy the “good life” offered by Orange County. Refusing to implement a domestic partnership registry denies Orange County the opportunity to compete for these economic benefits. Domestic partnership benefits have existed since 1984 and proliferate throughout the United States. Currently, there are numerous states that have statewide domestic partnership registries, or more expansive rights for domestic partner families, covering approximately 46% of the population of the United States. In Florida, domestic partner registries currently exist in jurisdictions that cover approximately 35% of the population of Florida. The Orange County Commission must promote Central Florida as a community which exceeds expectations and proactively fosters a wide array of corporate cultures, as a point of differentiation.

A Domestic Partnership Registry is not only right for individual equality, but it is the right thing to do for job creation and the economic growth of Orange County.

Overwhelming Community Support for a Domestic Partnership Registry

It is undeniable that there has been an unprecedented outpouring of community support for a countywide domestic partnership registry (and not for any proposed alternative). The public hearings on the Orlando DPR were overwhelmingly positive, and its implementation last month was met with widespread praise and support. Your office has received close to 2000 communications from citizens, businesses, organizations, elected officials, religious and community leaders urging you to support a county DPR; the Orlando Sentinel editorial board has published no less than 3 endorsements of a county DPR; a recent Sentinel poll reflected more than 90% support for a county DPR. It is rare indeed in this day and age to find such universal support for a government proposal.

3. CONFIDENTIALITY OPTION

You suggested a plan where individuals could execute the beneficiary designation documents but choose not to record them as an Official Record, and referenced certain scenarios where people might not want the documents to be a public record (the example you raised was of a victim of domestic violence who wants to secretly designate someone other than her abusive spouse). We expressed some concerns about the viability of this “option” and raised circumstances where it could lead to disastrous consequences for the individuals involved. You replied that, as a Republican, you believed in the principle of “personal responsibility” and therefore are willing to accept what could be, for some, dire consequences. We would strongly urge you to reconsider this aspect of your plan as we believe that recordation of the documentation provides needed access to confirmation of the registration and the current status of the registration in times of

emergency. The recordation, as devised and implemented by the Orange County Comptroller, provides no information other than the ability to search the Official Records database by name and confirm the existence and status of a registration.

4. UNFAIR CRITICISM OF ORLANDO DPR

The Orlando DPR ordinance has been presented to you as a model for an Orange County DPR Ordinance. The Orlando DPR was drafted based on existing and vetted model policy, with some added tweaks to improve certain provisions based on legal concerns (as noted above) and based on consultation with affected parties. During the meeting you made several remarks about the Orlando DPR that were invalid. For example, you purported to quote a provision that referred to a “deceased” changing their mind about cremation after they are dead. Below is the provision you referred to:

- (a) Funeral/burial Decisions. Registry as a domestic partner shall be considered to be written direction by the decedent of his or her intention to have his or her domestic partner direct the disposition of the decedent’s body for funeral and burial purposes as provided in Chapter 497, Florida Statutes, unless the decedent provides conflicting, written inter vivos authorization and directions that are dated after the date of the registration, in which case the later dated authorization and directions shall control.

There is nothing incorrect about this provision. The term “decedent” (as opposed to “deceased”) is a legal term of art that refers to a dead person in the present tense, as if they are alive. It is a term that gives a frame of reference – it is talking about the legal significance, after someone has died, of actions taken by that person (the “decedent”) during their life (“inter vivos”). The above provision accurately states that the decedent (referring to a living person who will become a “deceased” when they die), while still alive, may provide written authorization and directions concerning the disposition of their body when they die.

5. ANTI-GAY INFLUENCES

It continues to be significant to us and to our constituents in the LGBT community that your proposed plan, your language, and your reasons for rejecting the inclusion of “domestic partners” in the new ordinance are consistently similar to the proposal suggested to you by anti-gay activist John Stemberger at the June 21, 2011 BCC meeting (viewable on Orange TV videotape). Your “constitutional concerns” and concern about creating a “legal status” are substantially similar to the logic and language of anti-gay activists across Florida who have railed against any attempt to recognize and protect our families. It is language and tactics that are inconsistent with your record of recognizing and affirming your LGBT constituents and remains a serious point of concern for all of us. “Beneficiary Agreements,” similar substantively to what you have suggested, are a wholly insufficient alternative to DPRs, disingenuously proposed by anti-gay activists as an alleged “better” and “broader” solution – it’s a “bait and switch” scam that deprives DPs and their families of the full blanket of protection that they would otherwise have under a DPR.

We are further concerned that a political consultant with questionable intentions and a documented history of anti-gay activism appears to be guiding you in this matter.

6. TRANSPARENCY AND THE PRESS

We believe that for good or for ill this process has become very public. We found common ground last week in the understanding that a lack of communication has hurt our ability to reach our collective goals. Moving forward we encourage you to keep your commitment to public dialogue about your intentions and assumptions, including soliciting and receiving our input and feedback as you continue to craft a proposed ordinance. We will reciprocate by communicating with you in the same way we always have, by reaching out directly to you and your staff. We do not share your critique of the press and believe that Orlando's media outlets have consistently and objectively reported the facts of the DPR effort. In the future, for the sake of clarity, we recommend opening up our meetings to the press. There will be little room for misinformation if we are all in the same room and can address questions and miscommunications together. We share your and your staff's commitment to a truthful and transparent process that allows Orange County citizens to be fully informed on our progress or pitfalls.

7. BCC VOTE ON DOMESTIC PARTNERSHIP REGISTRY

You suggested to us that what you are proposing is 90% of what we are asking for. As we told you in the meeting, that is not accurate. Your current proposal falls extremely short of the rights and protections that we are seeking for DP families, protections which would only be provided by an ordinance that names and defines "domestic partners." Orange County is behind the curve on this issue and nothing short of a DPR can be acceptable to us. We are still hopeful that once you have had the opportunity to review and consider all of the information that we have provided to you, you will conclude that a DPR is the best and right solution to address these issues. However, if you do not reach this conclusion, then we appreciate your stated commitment to bring these alternatives to the BCC for discussion in February, and proceed to a vote on a DPR if there is sufficient support expressed by the Board members.

8. UNIFIED

Finally, we want to assure you, since you posed the question to us at the meeting, that OADO and the LGBT community are fully united in our position as stated to you at last week's meeting and herein. We have encouraged our community and allies to have patience, reassuring them that we are negotiating with you in good faith. We showed that good faith in our comments to the media following our meeting, despite troubling indications that anti-gay advisors may have a hand in steering you away from what is recognized across the state and across the country as the best way to provide these essential protections. We renew our request that you bring forward a Domestic Partnership Registry ordinance and will respond as a unified community to what emerges.