IN THE SUPREME COURT OF FLORIDA
Case No. 52,214

SARASOTA COUNTY, FLORIDA and MARY J. ORR
Supervisor of Elections,

Appellants,

vs.

TOWN OF LONGBOAT KEY, FLORIDA
CITY OF SARASOTA, FLORIDA,
CITY OF VENICE, FLORIDA,
AND
CITY OF NORTH PORT, FLORIDA,

Appellees,

On Appeal from the Circuit Court,
Twelfth Judicial Circuit of Florida

REPLY BRIEF OF APPELLANTS

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TABLE OF AUTHORITIES

Constitution Provisions

Statutes

Ordinances of Sarasota County

TABLE OF CONTENTS

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INTRODUCTION

This reply brief responds to points raised in both the appellee's brief and the Amicus Curiae Brief filed on behalf of the Florida League of Cities, Inc.

ARGUMENT
I.

THE CONSTITUTION PERMITS THE RESOLUTION OF "DUAL TAXATION" DISPUTES IN HOME RULE COUNTIES BY CHARTER AMENDMENTS APPROVED AT A REFERENDUM OF THE ELECTORATE.

Appellees argue that the issue of "dual taxation" is not before the court and has no relevance to the instant controversy. They are half right. The dual taxation question is not directly before the court, but that issue does have relevance to this case. There is an inextricable joinder of the recurrent questions of which level of government is to make decisions and how appropriate funding sources are to be provided for each level. As this court has noted, the affirmance of the constitutional prohibition concerning "dual taxation" will lead to fundamental changes for local government. Alsdorf v. Broward County, 333 So. 2d 457, 460 n.13 (Fla. 1976).

The question in this case is whether the voters of Sarasota county will be able to reconcile a "dual taxation" controversy through adoption of charter amendments. The amendments, if adopted by the electors, would centralize the administration of certain governmental services in the county and avoid the costs and conflicts arising from

fragmented administration of those services by both the municipalities and the county.

The amicus curiae restates the "Point Involved" and submits that the fundamental issue is whether a charter county by amendment to the charter can divest the municipalities within the county of a governmental, corporate, or proprietary power.

If that is the question, then it is answered by Article VIII, Section 1(g) of the Florida Constitution which states:

> (g) Charter 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.

The Constitution clearly provides that a charter county shall have all such power of self-government not inconsistent with general law. The charter can provide that in event of a conflict between a county and city ordinance, that the county ordinance shall prevail. By express mandate

of the constitution, a charter county can divest a municipality of its prime governmental power -- the power to regulate through enactment of ordinances.

This "home rule" authority conferred by the Constitution has been reaffirmed by the legislature in Section 125.86, Florida Statutes. There, the county commission is charged with the power and duty to "adopt, pursuant to the provisions of the charter, such ordinances of county-wide force and effect as are necessary for the health, safety and welfare of the residents." Significantly, Section 125.86 then continues as follows:

> "It is the specific legislative intent to recognize that a county charter may properly determine that certain governmental areas are more conducive to uniform county-wide enforcement and may provide the county government powers in relation to those areas as recognized and as may be amended from time to time by the people of that county."

The potential for divestiture of municipal powers is also recognized in Section 166.021, Florida Statutes, which delineates the powers of municipalities.[1/] There,

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1/ Section 166.021, Florida Statutes provides as follows:

(Continued on next page)

the legislature has affirmed that as provided by Article VIII, Section 2(b) of the Constitution, municipalities have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services. Subsection (3)

1/ (Continued)

(1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

(2) "Municipal purpose": means any activity or power which may be exercised by the state or its political subdivision.

(3) The Legislature recognizes that pursuant to the grant of power set forth in s.2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state legislature may act, except:

(a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;

(b) Any subject expressly prohibited by the Constituion;

(c) Any subject expressly preempted to state or county government by the Constitution or by general law; and

(Continued on next page)

evidences legislative recognition that a municipality has the power to enact legislation upon any subject except those prohibited by the Constitution, preempted to the state or county by the Constitution or general law, or, preempted to a county pursuant to a county charter adopted under the

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1/ (Continued)

(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.

(4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the Constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal, governmental, corporate, or proprietary purposes not expressly prohibited by the Constitution, general or special law, or county charter and to remove any limitation, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. However, nothing in this act shall be construed to permit any changes in a special law or municipal charter which affect the exercise of extraterritorial powers or *[which effect] an area which includes lands within and without a municipality or *[any changes in] a special law or municipal charter which affect the creation or existence of a municipality, the terms of elected officers and the manner of their election, the distribution of powers among elected officers, matters prescribed by the charter relating to appointive boards, any change in the form of government, or any rights of municipal employees, without approval by referendum

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authority of §§1(g),3, and 6(e), Article VIII of the Constitution. Subsection (4) expresses the intent of the legislature to extend to municipalities the exercise of powers for municipal, governmental, corporate, or proprietary purposes not expressly prohibited by the Constitution, general or special law, or county Charter.2/

1/ (Continued)

of the electors as provided in s. 166.031. Any other limitation of power upon any municipality contained in any municipal charter enacted or adopted prior to July 1, 1973, is hereby nullified and repealed.

(5) All existing special acts pertaining exclusively to the power or jurisdiction of a particular municipality except as otherwise provided in subsection (4) shall become an ordinance of that municipality on the effective date of this act, subject to modification or repeal as other ordinances.

2/ The amicus concedes that a charter county through its charter can provide that its ordinances prevail in event of conflict. However, amicus argues that Article VIII, Section 1(g) only applies to the "common, garden variety type of municipal regulatory or penal ordinance."

This construction is without merit. It is in clear conflict with Section 166.021, Florida Statutes, supra, note 1. Furthermore Section 166.041(1)(a), Florida Statutes defines a municipal ordinance to mean "an official legislative action of a governing body, which action is a regulation of a general and permanent nature and enforceable as a local law."

The cases cited by amicus curiae to counter the clear language of the Constitution and statutes offer his position no relief. Amicus cites Gessner v. Del-Air Corp., 154 Fla. 829, 17 So. 2d 522 (1944) and White v. Crandon, 116 Fla. 162, 156 So. 303 (1934) for the principle that if there is a doubt as to the existence of the power of a county, it cannot be assumed. Both of those cases were decided well prior to the grant of home rule power to charter counties contained in the 1968 revision. Counties operating under a charter are now presumptively considered to have the broad powers of self-government.

Amicus Curiae misconstrues State ex rel. Volusia County v. Dickinson, 269 So. 2d 9 (Fla. 1972). In issue was the authority of Volusia County charter government to levy an excess tax on the sale of cigarettes. The Court upheld the levy noting that the governing body of a county operating under a Charter may enact county ordinances not inconsistent with general law. The question of whether a charter can provide that a county ordinance preempts a city ordinance was not present in the case.3/

3/ Appellant also has no quarrel with and questions the relevance of Weaver v. Heidtman, 245 So. 2d 295 (Fla. 1st D.C.A. 1971). Appellants do not dispute that the legislature may by general law, regulate the conduct of county officials.

Amicus Curiae then seeks support from the schedule provisions of Article VIII, Sec. 6(b) in arguing that the status of municipalitites and the performance of municipal functions cannot be changed by charter amendment. Amicus argues that the phrase "in accordance with law" contained within the schedule means an act of the Florida legislature.4/

Review of Article VIII, Section 1 reveals the weakness of that position. For example, subsections (d) and (e) establish certain county offices and the manner of their selection. With certain limitations, these offices can be abolished, or their manner of selection changed, by county charter. Article VIII, Section 1 authorizes these changes without need of enactment of a statute by the legislature.

4/ Article VIII, Section 6(b) provides:

> "(b) COUNTIES, COUNTY SEATS; MUNICIPALITIES; DISTRICTS. The status of the following items as they exist on the date this article becomes effective is recognized and shall be continued until changed in accordance with law: The counties of the state; their status with respect to the legality of the sale of intoxicating liquors, wines and beers; the method of election of county officers; the performances of municipal functions by county officers; the county seats; and the municipalities and special districts of the state, their powers, jurisdiction and government."

Moreover, as has been noted, the legislature has expressly recognized the authority conferred upon charter counties by passage of Sections 125.86 and 166.021, Florida Statutes. The term "in accordance with law" encompasses the operation of a county charter -- authorized by the Constitution and recognized by statute.

II.

THE PROPOSED CHARTER AMENDMENTS DO NOT INVOLVE A "CONSOLIDATION" AS THAT TERM IS USED IN ARTICLE VIII, SECTION 3.

In their brief, the appellees note that it is the position of the County that Ordinance 77-31 is not a consolidation as that term is used in Article VIII, Section 3. The appellees then state on page 11:

> "We could not agree more readily with that conclusion."

The clear language of Section 3 necessitates this candid admission. Consolidation is defined by the cases and the language of the Constitution to mean the unification of a County and the government of one or more municipalities into a single government. Obviously, that would not result even if the voters of Sarasota County approve all five charter amendments. The government of each of the cities and of the county would remain intact and separate.

The appellants argue that the charter amendments are a ploy -- an attempt to consolidate by by-passing Section 3.

Yet the action of the county commission in proposing the amendments is entirely consistent with the recognition expressed in Section 125.86 that a county charter may properly determine that certain governmental areas are more conducive to uniform county-wide enforcement and provide the county government powers in relation to those areas.

This is precisely the function that the Sarasota County Commission has performed in submitting the charter amendments to the people of that county. The electorate will have the opportunity to determine whether the areas of recreational facilities, roads, land use, crime, or pollution control are more conducive to uniform county-wide or city administration.

The amicus curiae asserts that Albury v. City of Jacksonville Beach, 291 So. 2d 82 (1 D.C.A. Fla. 1973) undermines the conclusion that consolidation has reference to the extinction of county and city governments in favor of a new governing body. Scrutiny of that opinion refutes this contention. Indeed, the court pointed out that the holding in Albury was to some extent at variance with the single government concept envisioned by the consolidation legislation. The court found, however, that the single

government concept was modified by passage of an amendatory act relating to the former municipalities. The court emphasized that without passage of the subsequent legislation a single government would have been the result.

Having conceded that the proposed charter amendments do not involve a consolidation as that term is contemplated in Article VIII, Section 3, the cities and amicus then argue that Article VIII, Section 4 has some relevance. This argument was before the trial judge and rejected.

Article VIII, Section 4 states:

> §4. Transfer of powers
>
> By law or by resolution of the governing bodies of each of the governments affected, any function or power of a county, municipality or special district may be transferred to or contracted to be performed by another county, municipality or special district, after approval by vote of the electors of the transferor and approval by vote of the electors of the transferee, or as otherwise provided by law.

The Cities contend on page 12 of their brief that the authority granted to charter counties under Article VIII, Section 1(g) is somehow limited by the language of Section 4.

This contention is without merit. Section 4 offers no limitation on the clear language of Article VIII, Section 1(g) and Sections 125.86 and 166.021, Florida Statutes. Furthermore, although it is not necessary to reach this point, the charter amendments are consistent with Section 4.

Section 4 does not conflict with Section 1(g). It offers a broad, general, alternative method of transfer of powers applicable to municipalities, special districts and counties -- both charter and non-charter. If Sarasota County were a non-charter county, Section 4 would be applicable. Since it operates under a charter approved by vote of the electors of the county, Section 1(g) prevails.

Moreover, the proposed charter amendments are entirely consistent with Section 4. The Cities' brief lends support for this position.

In its main brief, appellants demonstrated that if the proposed charter amendments were a "consolidation", as argued by the Cities, then Chapter 69-45 (which brought together the tax assessment and collection functions of cities and counties) would be unconstitutional.

In attacking this argument, the cities inconsistently argue that Chapter 69-45 is not a consolidation. Rather, they argue, it is a transfer of powers under Section 4.

The Cities explain on page 15 of their brief that Section 4 provides for transfer of powers "by law ... and ... as otherwise provided by law". The cities assert that Chapter 69-45 transfered the assessment and collection functions from the cities to the counties "by law ... and ... as otherwise provided by law" without necessity of resolutions of the governing bodies of the affected governments.

Article VIII, Section 1(g) authorizes home rule powers to charter counties. Section 125.64, Florida Statutes, provides for adoption of a county charter and subsequent amendment of that charter. Section 125.86, Florida Statutes, provides that "a county charter may properly determine that certain governmental areas are more conducive to uniform county wide enforcement and may provide the county government powers in relation to those areas as recognized and as may be amended from time to time by the people of that county". The proposed charter amendments are authorized by the Constitution and by state statutes. Therefore, transfer of functions under Section 4 may be accomplished by charter amendment "as otherwise provided by law".

III.

A HOME RULE COUNTY ORDINANCE CALLING FOR CHARTER AMENDMENT BY VOTE OF THE ELECTORS HAS THE FORCE OF "SPECIAL LAW" AS THAT TERM IS USED IN ARTICLE VIII, SECTION 3.

The arguments made heretofore are dispositive of this case. The appellants emphasize that this additional point is offered only as an alternative argument and the Court will not be required to reach this point. It is offered as an independent basis for reversing the trial court's opinion if the proposed charter amendments are found to be a consolidation under Article VIII, Section 3.

Article VIII, Section 3 authorizes the consolidation of a county and one or more municipalities into a single government which may exercise the powers of the county and municipalities. According to the provision, the consolidation plan may be proposed only by special law which shall become effective if approved by vote of the electors of the county, or of the county and municipalities affected, as may be provided in the plan. It is the appellant's position that even if the proposed charter amendments are a consolidation, an ordinance in a "home rule county" calling for charter amendment by vote of the electors has the force and dignity of special law and satisfies the requirements of Article VIII, Section 3.

The amicus cites Delano v. Dade County, 287 So. 2d 288 (Fla. 1973) as squarely rejecting this proposition. The Court, however, was there faced with a different section of the Constitution. The question presented was whether the Supreme Court had jurisdiction over trial court decisions passing on the validity of county ordinances of Dade county. The relevant constitutional language is contained in Article V, Section 3(b)(1) which states as follows:

> "The Supreme Court shall hear appeals . . . from orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty . . ."

The Court held that the foregoing provision did not allow for a construction which would include the right of direct appeal of cases passing upon the validity of ordinances in home rule counties. Delano does not preclude a determination that a charter county ordinance is of equal force and dignity as a special law for purposes of Article VIII, Section 3.

IV.

THE TRIAL COURT ERRED IN ENJOINING THE ELECTION BASED UPON ITS FINDING THAT THE PROPOSED CHARTER AMENDMENTS WERE UNCONSTITUTIONALLY VAGUE.

The appellees argue that the proposed charter amendments are too general and therefore impermissably vague. They argue that the proposals are fatally defective because they fail to detail how municipal functions would be assumed, should one or more of the proposals be approved by the electorate.

This argument ignores the language of the proposed amendments. The amendments clearly provide that the sections are to be implemented by appropriate county ordinances.

A county charter is similar to a constitution. A constitution should mark only the outlines of power to be possessed by a government without attempting to specify each one in detail. M'Culloch v. Maryland, 4 Wheat 316,407, 4 U.S. 310 (1819). To prescribe the means by which government should in all future times execute its powers would change the character of the instrument and give it the properties of a legal code and deprive the legislature of the ability to meet exigencies. Fairbanks v. United States, 181 U.S. 283,288 (1900).

The proposed amendments provide the outlines of

power to be exercised by the county government. For example, Section 1.4 states:

> Consolidation of Air and Water Pollution Control Services and Functions. Notwithstanding any other provision of this charter, all municipal air and water pollution control services and functions shall be consolidated and provided by this county government. The Board of County Commissioners shall have the power to carry out and enforce this section by appropriate ordinances which, notwithstanding any other provisions of this Charter, shall prevail over any municipal ordinance in conflict therewith.

The proposed amendment is clear and unambiguous and permits the electorate to make an informed choice at the polls. The county commission by ordinance would implement the charter provision and is allowed the flexibility to avail itself of experience, exercise its reason, and to accommodate its legislation to circumstances.

The amicus argues that the appellants have failed to meet their heavy burden to clearly demonstrate error below in the trial court's finding of vagueness. However, this Court has stated that when an appellate court has occasion to pass upon the validity of a statute after a trial court has found it to be unconstitutional, the statute is favored with a presumption of constitutionality. This is an exception to the rule that a trial court's judgment is

presumptively valid. Moreover, all reasonable doubts as to the validity of statutes under the Constitution are to be resolved in favor of constitutionality. In Re Estate of Caldwell, 247 So. 2d 1,3 (1971).

The amicus warns of an impending "chaos" in government should the proposed charter amendments be submitted to the people.

Then amicus blithely disregards the recent holding of this court in Smathers v. Smith, 338 So. 2d 825 (Fla. 1976) observing that the holding "may be suitable for constitutional or charter provisions located on the periphery of governmental functions and activities".

However, the amicus asserts that "in the very heart or 'nerve centers', of governmental machinery involving essential governmental services and functions, the courts cannot afford the luxury of considering the niceties of law in objective detachment while chaos would reign in vital governmental affairs". In other words, the electorate can be trusted to consider questions involving separation of powers but not whether a city or county runs the park and recreational services.

Similar warnings of impending doom were made by the appellee in Gray v. Golden, 89 So. 2d 785 (Fla. 1956). In that case, the legislature had proposed an amendment to the

Constitution providing home rule for Dade County. The Court noted that "[i]t cannot be questioned that it is an experiment in democratic government, but it is not for this court to say that the people of Dade County cannot undertake such an experiment when legally submitted and approved." 89 So. 2d at 788.

Then the Court emphasized the caution with which it considers an amendment to a constitution:

> "Another thing we should keep in mind is that we are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution we are construing. They have the right to change, abrogate, or modify it in any manner in which they see fit so long as they keep within the confines of the Federal Constitution...changes in government such as are proposed here are provoked in the interest of economy and efficiency, they necessarily contemplate the abolishment of some offices, boards, and agencies and the combination of others, but this is well within the power of the electorate." 89 So. 2d. at 790.

The Court in Gray v. Golden, supra, was considering an amendment to the state constitution. However, it is respectfully submitted that this same restraint should also be utilized in approaching county home rule charter amendments which also go to the people for approval or disapproval and which establish the principles of government at the local level.

This Court in Gray v. Golden concluded with words particularly relevant to the instant controversy:

> "To prepare a home rule charter to combine county and municipal functions and prepare for their government as contemplated by the proposed amendment will be a tedious and difficult undertaking; it will require wisdom and statesmanship of a high order but it is by no means impossible." 89 So. 2d at 791.

The charter amendments, should one or more be adopted by the people shall require similar statesmanship on the part of both the county and city governments to fulfill the mandate of the electorate. County ordinances will necessarily provide a schedule for undertaking county-wide enforcement. Problems may develop which will need to be overcome. Nevertheless, the amendments are properly submitted and the courts should not interfere with the right of the people to change government in Sarasota County as they see fit.

CONCLUSION

The trial court erred in enjoining the election now scheduled for November 8, 1977. The proposed charter amendments are a valid exercise of authority granted a charter county by Article VIII, Section 1(g), Florida Constitution. The amendments, if adopted by the voters, will not effect a consolidation into a single government as contemplated by Article VIII, Section 3.

The trial court erred in considering the question of whether the proposed amendments are vague since judicial action is premature. Having taken up the question, the trial judge decided the question erroneously.

The judgement appealed should be reversed and judgement should be directed for the Appellant.

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CERTIFICATE OF SERVICE

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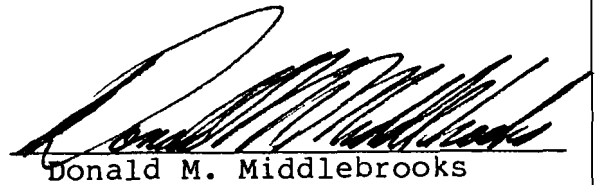

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