IN THE SUPREME COURT OF FLORIDA

MICHAEL A. YAKUBIK, DONALD S. AUSTIN, GARRETT REASONER, PETER E. BRIGHT, ELIZABETH STUTZMAN, PORTIA VON GUNTEN, MAURICE THOMMASSIN, FENNELL PHILLIPS AND CITIZENS ACTION FUND, INC.,

Appellants,

v.

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Appellee.

CASE NO. 66,004

CIRCUIT COURT CASE NO. 84-2145CA-RTS

APPEAL FROM THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR LEE COUNTY

BRIEF OF APPELLEE

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PREFACE

The reference in this brief to the pertinent portions of the record in the case will be reflected by the following symbols or prefixes:

Applee App. ___ - Appellee's Appendix (Filed Separately)

Applant App. ___ - Appellants' Appendix/Exhibits

Tr. ___ - Transcript of Hearing

STATEMENT OF THE CASE

Appellee, Lee County, Florida, was the plaintiff below, having filed its Complaint for validation of its not exceeding $13,500,000 Water and Sewer Revenue Bonds, Series 1984, on May 10, 1984 pursuant to Chapter 75, Florida Statutes. An order to show cause was entered by the Court on May 16, 1984 and publication was made in compliance with Section 75.06(1), Florida Statutes. No issue is presented in this case regarding the regularity of the order to show cause or its publication. The State Attorney for the Twentieth Judicial Circuit timely filed his Answer. On June 28, 1984, the date of the final hearing, Appellants intervened in the proceeding by filing their Answer to the Complaint. The Court determined to postpone the hearing until August 2, 1984.

Appellee filed a motion on July 10, 1984, to strike the affirmative defenses asserted by Appellants and on July 24, 1984, Appellants moved the Court for leave to amend their Answer to add additional affirmative defenses.

On August 2, 1984, a lengthy hearing on Appellee's Complaint was held before Robert T. Shafer, Jr., Circuit Judge. At the hearing, the Court granted Appellants' motion to add additional affirmative defenses and, in addition, granted Appellants' motion to add an additional defendant. At the conclusion of the hearing, the Court reserved ruling on the issues raised in order

to take under consideration the arguments and evidence presented. On September 10, 1984, the Court entered a Final Judgment validating Appellee's 1984 Bonds, stating with respect to the issues raised by Appellants that their Answer and Amended Answer "show no cause why the prayer of the Plaintiff should not be granted" and, further, that "the objections contained in the Answer and the Amendment thereto are hereby overruled and dismissed".

Appellants timely filed their Notice of Appeal on October 8, 1984.

STATEMENT OF FACTS

On April 24, 1984, Appellee's Board of County Commissioners adopted Resolution No. 84-4-25 (hereinafter called the "1984 Resolution") authorizing the issuance of Appellee's $13,500,000 Water and Sewer Revenue Bonds, Series 1984 (hereinafter called the "1984 Bonds") for the purpose of financing the acquisition and construction of improvements to Appellee's combined and consolidated water and sewer system. (Applant App. A) Specifically, such improvements consist of (1) the construction of an administrative complex to house Appellee's Division of Environmental Protection Services (the division that administers the County's water and wastewater distribution and collection systems and treatment plants) (Tr. 11) and (2) the construction of a regional sludge processing facility. (Tr. 20) The 1984 Resolution was adopted pursuant to Chapter 153, Part I, Florida Statutes (hereinafter referred to as "Part I"). By its terms, the 1984 Resolution is supplemental to a resolution adopted by Appellee's Board of County Commissioners on April 27, 1966, as amended (hereinafter called the "Original Resolution"). (Applee App. 1) The 1984 Resolution incorporates the covenants and provisions of the Original Resolution by reference. The 1984 Bonds, when issued, will be payable from and secured by a pledge of and lien upon the revenues of Appellee's combined and consolidated water and sewer system on a parity with the outstanding

bonds of an issue of $3,300,000 Water and Sewer Revenue Bonds, dated November 1, 1976 (hereinafter called the "1976 Bonds"); an issue of $4,800,000 Water and Sewer Revenue Bonds, Series 1978 (hereinafter called the "1978 Bonds"); an issue of $5,000,000 Water and Sewer Revenue Bonds, Series 1979A (hereinafter called the "1979A Bonds"), and an issue of $15,917,000 Water and Sewer Revenue Bonds, Series 1979B (hereinafter called the "1979B Bonds"). Appellee's 1976 Bonds were authorized by Resolution No. 76-12-23, adopted by Appellee's Board of County Commissioners on December 29, 1976, as amended (hereinafter called the "1976 Resolution"). (Applee App. 2) The 1978 Bonds were authorized by Resolution No. 78-7-10, adopted by the Board on July 5, 1978, as amended (hereinafter called the "1978 Resolution"). (Applee App. 3) Appellee's 1979A Bonds were authorized by Resolution No. 79-7-11, adopted on July 11, 1979, as amended (hereinafter called the "1979A Resolution") (Applee App. 4) Appellee's 1979B Bonds were authorized by Resolution No. 79-7-12, also adopted on July 11, 1979, as amended (hereinafter called the "1979B Resolution"). (Applee App. 5)

Appellee's 1976 Resolution, 1978 Resolution, 1979A Resolution and 1979B Resolution were adopted under the authority of Part I and were, by their terms, supplemental to the Original Resolution. Each of the aforesaid resolutions specifically incorporated the covenants and provisions of the Original

Resolution by reference. The Original Resolution authorized the issuance of Appellee's Water System Revenue Bonds (hereinafter called the "1966 Bonds"). The 1966 Bonds were payable from and secured by a pledge of and lien upon the revenues of Appellee's water system. Section 4.08 of the Original Resolution provided, however, that in the event Appellee acquired a sewer system and determined to combine the water system and the sewer system into a single combined water and sewer system and to issue additional bonds payable on a parity with the 1966 Bonds secured by a lien upon the revenues of the combined water and sewer system, the revenues of such combined system shall be pledged to the 1966 Bonds and all additional bonds payable on a parity with the 1966 Bonds. Section 4.09 of the Original Resolution established certain financial tests for the issuance of additional bonds to be payable on a parity with the 1966 Bonds. Appellee's 1976 Bonds, 1978 Bonds, 1979A Bonds and 1979B Bonds were issued as additional bonds under Section 4.09 of the Original Resolution and are secured by a lien upon and pledge of the revenues of Appellee's combined and consolidated water and sewer system. Further, Appellee's 1976 Bonds, 1978 Bonds, 1979A Bonds and 1979B Bonds were validated by final judgments entered in the Circuit Court in and for Lee County. (Applee Apps. 6, 7 and 8)

Appellee's combined and consolidated water and sewer system presently consists of <u>five</u> utility systems combined into

one for the purposes of management, financing and other purposes. (Tr. 15) The five systems are (i) the Matlacha sewer system, a small collection system with a treatment plant; (ii) the East Lee County sewer system consisting of a collection system; (iii) the South Fort Myers sewer system which is a collection system; (iv) the Fort Myers Beach sewer system consisting of a complete collection system and a treatment plant, and (v) the water system which consists of two primary water treatment plants. (Tr. 15)

The water system was initially financed by the proceeds of the 1966 Bonds. (Tr. 39)

In the late 1960s, Appellee's consulting engineers and financial consultants participated in the development of an overall plan for financing sewer projects in Lee County. (Tr. 47) It was determined that sewer projects could not be supported by user charges alone, so a financing plan was devised whereby sewer projects would be financed by a combination of ad valorem taxes, the levy and collection of special assessments and sewer rates and charges. (Tr. 47) The sewer rates were to be set to provide only for the payment of the operating expenses. (Tr. 47) By the early 1970s, Appellee's Board of County Commissioners had created nine separate sewer districts to implement the financing plan. (Tr. 83) Each of the districts were created by resolution after public hearings. (Tr. 83) The districts were created for the purpose of providing sewer services to the inhabitants of the

defined areas. (Tr. 84) The Fort Myers Beach Sewer District (hereinafter called "FMBSD") was created by resolution of Appellee's Board of County Commissioners on August 16, 1972 (Applant App. H) On December 5, 1972, a bond election was held in each of the districts on the question whether general obligation bonds of Appellee should be issued to finance the cost of the acquisition and construction of a sewer system within the area of each of the districts. (Tr. 84) Two of the nine bond issues were approved by the voters; the other seven bond issues were defeated. (Tr. 85) The residents of the area comprising FMBSD authorized the issuance of $8,930,000 General Obligation Bonds by Appellee. (Applant App. I) (Tr. 85)

Appellee's General Obligation Bonds were issued pursuant to a resolution adopted on January 3, 1977, as amended and supplemented (hereinafter called the "General Obligation Bond Resolution"). (Applee App. 9) Cited as authority for the adoption of the General Obligation Bond Resolution and the issuance of the General Obligation Bonds was Part I, specifically Section 153.08 thereof. The General Obligation Bond Resolution provides that the General Obligation Bonds shall be payable from and secured by the full faith, credit and unlimited taxing power of the County within FMBSD. Revenues of the sewer system constructed within FMBSD are not pledged to the payment of the General Obligation Bonds. (Tr. 77) Section 12 of the General

Obligation Bond Resolution, as amended by Resolution No. 77-8-20, adopted on August 24, 1977, provides that the revenues of the sewer system may be used to reduce the ad valorem taxes in any year only after Appellee shall have made an irrevocable election to apply such revenues. (Applee App. 10) The General Obligation Bonds are outstanding in the principal amount of $8,420,000 (Applant App. J) and are currently being paid from ad valorem taxes levied annually within FMBSD. (Tr. 41, 103)

Appellee subsequently issued its $3,770,000 Special Assessment Bonds to pay for a part of the cost of the sewer system constructed within the area of FMBSD. (Tr. 54) The Special Assessment Bonds were authorized to be issued by Resolution No. 77-6-10, adopted on June 16, 1977, as amended (hereinafter called the "Special Assessment Bond Resolution"). (Applee App. 11) Part I was cited as authority for the issuance of the bonds in the Special Assessment Bond Resolution. The Special Assessment Bonds were payable from and secured solely by a lien upon and pledge of special assessments levied upon properties within FMBSD specially benefited by the construction of the sewer system (Tr. 54) Revenues of the sewer system were not pledged to the Special Assessment Bonds. (Tr. 77) The Special Assessment Bond Resolution was amended by Resolution No. 79-2-75, adopted on February 28, 1979, prior to the issuance of the Special Assessment Bonds, specifically for the purpose of

deleting a pledge of the revenues of the sewer system. (Applee App. 12) The Special Assessment Bonds have been paid. (Tr. 41, 54) Unpaid assessments are still being collected by Appellee, however. (Tr. 54, 103)

Appellee combined the sewer system within FMBSD and the South Fort Myers sewer system into the combined and consolidated water and sewer system of the County by Resolution No. 78-5-34, adopted on May 25, 1978. (Applant App. N) Previously, on September 29, 1976, by Resolution No. 76-9-33, Appellee had combined sewer systems to be constructed in North Fort Myers and East Lee County and the existing county owned and operated water system into a combined water and sewer system in those areas. (Applee App. 13) The intent of Appellee's Board of County Commissioners, as stated in Resolution No. 78-5-34, was to create a single county-wide system to best serve the water and sewer needs of the inhabitants of the entire unincorporated area of the County. (Applant App. N., Section 3) The purpose of the combination and consolidation of the sewer systems into the combined utility was to provide a more efficient operation by combining the administrative functions and to provide a mechanism for marketing bonds to finance capital projects. (Tr. 16) Resolution No. 76-9-33 combining the initial two sewer systems and the water system into a combined water and sewer system was adopted prior to the issuance of Appellee's 1976 Bonds; simi-

larly, Resolution No. 78-5-34, combining the remaining two sewer systems into the combined water and sewer system was adopted prior to Appellee's issuance of its 1978 Bonds.

Although the sewer systems were consolidated for financing reasons (Tr. 91), Appellee maintains the financial integrity of each of the five different utility systems that comprise the combined water and sewer system. (Tr. 16) Expenses are segregated and charged to the particular system that incurs the benefit from each expenditure. (Tr. 16) Personnel time, for instance, is charged specifically by system through Appellee's positive time accounting system. (Tr. 16) Some overhead functions are carried as a separate fund but are charged back to each of the five separate utility systems based on benefit derived from such overhead function. (Tr. 16) The purpose for keeping Appellee's records in such manner is to allow Appellee to provide a mechanism for establishing and charging rates and charges that are equitable to each of the five systems, such that each system pays for the services it receives and receives income in association with expenditures it makes. (Tr. 17) With respect to the debt service associated with Appellee's outstanding revenue bonds, debt service is charged to specific systems. (Tr. 19) For example, debt service associated with the water plant expansion would be charged solely to the users of the water system in levying rates and recovering the cost of the debt service.

(Tr. 19) The same premise applies to rates charged to the users of the sewer system within FMBSD. (Tr. 19) The users of the system within FMBSD are not charged a debt service component for Appellee's outstanding revenue bonds. (Tr. 78) Even though the revenues of the sewer system within FMBSD are pledged to the payment of Appellee's outstanding revenue bonds, as are the revenues of all five of Appellee's sytems (Tr. 58), the users of the sewer system within FMBSD have never been charged a debt service component to pay the debt service on Appellee's outstanding revenue bonds. (Tr. 78)

Appellee has been levying rates, fees and charges for the water system since June 1, 1966. (Applee App. 14) Recent rates for the water system were established by Resolution No. 80-8-19 (Applee App. 15) and connection fees were established by Resolution No. 80-8-20. (Applee App. 16) Both resolutions were adopted on August 20, 1980. The rates for the water system were subsequently amended by Resolution 83-4-35, adopted on April 27, 1983. (Applee App. 17) Rates for sewer services of the sewer system within FMBSD were initially established by Resolution No. 77-3-25 adopted on March 25, 1977. (Applee App. 18)

POINTS PRESENTED

Point I

APPELLEE'S 1984 RESOLUTION NEED NOT AND CANNOT FIX THE INITIAL SCHEDULE OF RATES, FEES AND OTHER CHARGES FOR THE SERVICES OF ITS COMBINED AND CONSOLIDATED WATER AND SEWER SYSTEM

Point II

APPELLEE'S WATER AND SEWER SYSTEM WAS LAWFULLY COMBINED AND CONSOLIDATED

Point III

REVENUES OF THE SEWER SYSTEM WITHIN FMBSD WERE NOT PLEDGED TO GENERAL OBLIGATION BONDS OR SPECIAL ASSESSMENT BONDS

Point IV

APPELLANTS ARE ESTOPPED FROM ASSERTING THE WRONGFUL CONSOLIDATION OF APPELLEE'S WATER AND SEWER SYSTEM

POINT I

APPELLEE'S 1984 RESOLUTION NEED NOT AND CANNOT FIX THE INITIAL SCHEDULE OF RATES, FEES AND OTHER CHARGES FOR THE SERVICES OF ITS COMBINED AND CONSOLIDATED WATER AND SEWER SYSTEM

Part I, in Section 153.06 thereof, authorizes counties to issue water revenue bonds, sewer revenue bonds or general obligation bonds for the purpose of financing the cost of water and sewer systems and additions, extensions and improvements thereto. Section 153.09 sets forth certain provisions to be included in the authorizing resolution and in either the water revenue bonds or the sewer revenue bonds. Section 153.091(1) specifically authorizes the issuance of water and sewer revenue bonds for the purpose of financing the construction, acquisition or improvement of water systems and sewer systems which have been combined by the county. Section 153.091(2) provides that all of the provisions of the chapter with respect to water systems and improvements and sewer systems and improvements, water revenue bonds and sewer revenue bonds shall apply to combined systems and to water and sewer revenue bonds to the extent the same are applicable in the event the county has combined its water system and its sewer system into a combined water and sewer system.

Section 153.11 authorizes counties to fix rates, fees and charges for the use of the services to be provided by the

system. Section 153.11(1)(a) requires a county to fix the initial schedule of rates, fees and charges in the resolution providing for the issuance of either water revenue bonds or sewer revenue bonds or both. Section 153.11(1)(b) provides in pertinent part that after the system or systems shall have been in operation, the county commission may revise such schedules of rates, fees and charges from time to time. Sections 153.11(3)(a), (b) and (c) provide the mechanics, including publication of notice and public hearing, for the adoption of initial rates, fees and charges and subsequent changes and revisions of such rates, fees and charges.

Appellant argues that Appellee failed to comply with the provisions of Section 153.11(1)(a) because it did not include an initial schedule of rates, fees and charges in Resolution No. 84-4-25, which authorized the issuance of the 1984 Bonds. However, Section 153.11 clearly distinguishes between initial rates for a new system in subpart (1)(a) thereof and revisions of rates from time to time after the system has been in operation in subpart (1)(b) thereof.

Subpart (1)(b) provides in part as follows:

> (b) After the system or systems shall have been in operation the county commission may revise such schedule of rates, fees and charges from time to time.

The Appellants ignore the meaning of the word "initial" in subpart (1)(a) of Section 153.11. Black's Law Dictionary (5th

Ed., 1979, West Publishing Co., p. 704) defines initial as "That which begins or stands at the beginning". Webster's Third New International Dictionary (G. & C. Merriam Company, Springfield Mass., 1971 p. 1163) defines initial as "1: of or relating to the beginning: marking the commencement. . . 2: placed or standing at the beginning [the ~ word of a verse]. . .". Thus the initial schedule of rates for the system is the schedule adopted at the beginning or commencment of the operation of the system.

Appellee's combined water and sewer system has been in operation since the water system was constructed with the proceeds of the 1966 Bonds. The Original Resolution was required to incorporate an initial schedule of rates adopted after due notice and public hearings as provided in Section 153.11(3). The Appellants have not suggested or introduced any evidence that this was not done.

Appellee is not required to include such initial schedule in the resolution authorizing its 1984 Bonds because the initial schedule of rates, fees and charges was incorporated into the Original Resolution in 1966.

Once the system has been established and is operational subsection (1)(b) provides for the revision of the initial schedule of rates from time to time as necessary. The interest of the property owners and system users in having an opportunity to be heard concerning such revision of rates is fully preserved by

subsection 3(c), which requires that such revision "be made in the same manner as such rates, fees or charges were originally established. . .". Appellee has been charging and revising rates, fees and charges for the use of its combined water and sewer system, including the sewer system within FMBSD, for many years. The initial rates for the water system were established in 1966. (Applee App. 14) The initial rates for the sewer system within FMBSD were established in 1977. (Applee App. 18) It is ridiculous to argue that Appellee must now adopt an "initial schedule" of rates, fees and charges. If the Appellants' desire to challenge the rates, fees and charges for the system they have every right to do so in an appropriate forum. Such a challenge is, however, clearly not appropriate in a validation proceeding, City of Gainesville v. State, 366 So.2d 1164, (Fla. 1979).

The statute sets forth an orderly, fair, and practical scheme for the initial establishment and subsequent revision of water and sewer rates. Appellee has complied with the scheme. Appellee's 1984 Resolution need not fix an initial schedule of rates for the system and the absence of such a schedule from the resolution is not grounds for the Court to overturn the circuit court's judgment validating Appellee's 1984 Bonds.

POINT II

APPELLEE'S WATER AND SEWER SYSTEM WAS LAWFULLY COMBINED AND CONSOLIDATED

By Resolution No. 78-5-34, duly adopted on May 25, 1978, Appellee combined and consolidated the sewer system in the unincorporated area of the county comprising the FMBSD into the county water and sewer system for financing and other purposes. (Applant App. N)

Appellants argue that such combination and consolidation was illegal because Appellee failed to comply with the provisions of Chapter 153, Part II, the County Water and Sewer District Law (hereinafter referred to as "Part II"), regarding the combination of districts organized under Part II. Further, Appellants argue that the adoption of Resolution No. 78-5-34 effected a merger or dissolution of the district in contravention of the provisions of Chapter 165, the Formation of Local Governments Act.

Appellants' arguments are unfounded for a number of reasons. First, the FMBSD was authorized and created pursuant to Part I and is governed by the provisions of that part. Part II is not applicable to FMBSD and need not be complied with in connection with FMBSD. Second, there has been no combination, merger or dissolution of FMBSD, which continues to exist as a separate sewer district. The County has merely consolidated the sewer system in the geographic area encompassed by FMBSD into the

county's combined water and sewer system in a manner which is fully compatible with and permissible under Part I. Because the district has not been combined, merged or dissolved, neither the provisions of Chapter 165 nor the provisions of Part II (assuming arguendo that Part II were applicable) have been violated.

A. PART II IS NOT APPLICABLE TO FMBSD

Appellants fail to distinguish between districts established pursuant to Part I ("Part I districts") and districts created pursuant to Part II ("Part II districts"). Part I districts are essentially accounting and financing mechanisms used to deliniate the geographic area served by the financed water and/or sewer facilities and to apportion to the landowners within such geographic area (through ad valorem taxes and special assessments) or users of the facilities (through rates and charges) the cost of such facilities.

(1) PART I DISTRICTS

Part I, was created by Chapter 29837, Laws of Florida, enacted in 1955 as

> An Act authorizing and empowering the several counties of the State of Florida and the Boards of County Commissioners thereof to act in relation to the furnishing of water and the collection, treatment and disposal of sewage; authorizing and empowering such counties to purchase, construct, improve,

> extent, enlarge, reconstruct, maintain, equip, repair and operate water supply systems, waste system improvements, sewage disposal systems and other sewer improvements; prescribing the powers and duties of the county commissioners in connection with the construction, financing and operation thereof;. . .; empowering the County Commissioners to divide the county into water and/or sewer districts and to issue general obligation bonds secured by property in and ad valorem taxes received from such districts . . .; prescribing the powers and duties of the county in connection with the foregoing.

As indicated in the title of the Act and as set forth in the codified statute, water and sewer systems provided under Part I are owned, operated, managed and controlled by the county. See Section 153.03, Florida Statutes. The "districts" into which the Board of County Commissioners is authorized to divide the county under Part I have no independent corporate or political existence or powers separate and apart from the county itself.

This point is amply demonstrated by Section 153.08 relating to the issuance of bonds and the levying of taxes for Part I districts. Subsection 1 of Section 153.08 is correctly cited by Appellants as providing:

> (1) The county commission is hereby authorized to establish within the county such water and sewer districts as it may deem necessary.

and further provides:

> For the purpose of providing and financing the facilities provided for in this chapter, general obligation bonds may be issued covering the facilities located in such district and to be paid by general ad valorem taxes levied in and collected from such district or districts; provided, however, that no such general obligation bonds for such district or districts shall be issued by the county unless the issuance of such bonds shall be approved by a majority of the votes in an election . . . . (emphasis supplied)

Subsection (2) of Section 153.08 relates to the levy of ad valorem taxes.

> (2) For the payment of the principal and interest thereon on any such general obligation bonds issued for the benefit of such district or districts issued under the provisions of this chapter the county commission is hereby authorized and required to levy annually a special tax upon all taxable property within the said district or districts over and above all other taxes authorized or limited by law sufficient to pay such principal and interest as the same respectively becomes due and payabale . . . . (emphasis supplied)

Bonds issued under Part I are issued by and are obligations of the county; ad valorem taxes levied under Part I are levied by the county. The Part I district itself cannot issue bonds or levy taxes but merely serves the limited function of delineating the geographic area in which such special ad valorem taxes will be levied (or, in regard to revenue bonds, in which the facilities producing the pledged revenues will be located).

This Court has previously recognized the limited func-

tion and nature of similar taxing districts. In State v. Sarasota County, 372 So.2d 1115 (Fla. 1979), Sarasota County had created Special Utility District No. 1 pursuant to Section 125.01(q), Florida Statutes. In a bond validation suit, the issue arose whether Sarasota County was precluded from using the proceeds of general county revenue bonds exclusively for the benefit of the existing district. The Court ruled that the proposed project within the district served a valid county purpose in part because

> First, special districts are essentially financing vehicles rather than full-fledged political entities. See generally Gallant v. Stephens, 358 So.2d 536 (Fla. 1978). Thus, the use of county revenues to help finance projects within an intra-county special district does not per se lack a valid public purpose. Id. at 1117.

The Court's holding is based upon the finding that special taxing districts do not have pre-emptive and exclusive authority to accomplish their designated purposes, but primarily function as a vehicle or organizational unit for financing purposes. Similarly, dependent sewer districts established pursuant to Part I are limited as to function and powers and are primarily a vehicle for the financing of county water and/or sewer systems.

(2) PART II DISTRICTS

In distinct contrast to Part I, Part II provides for the creation of water and sewer districts governed by a district

board "acting for and on behalf of such district as a body corporate and politic" with broad powers to own and control water and sewer systems within the district.

Part II was enacted in 1959 by the legislature as a law separate, distinct and independent from Part I. Part II provides generally for the creation of a district by referendum; the governing of such district by a district board which may be the board of county commissioners ex officio or may be a separate body duly elected; the authorization and issuance of general obligation bonds and revenue bonds of the district; the fixing of rates, fees and charges of the facilities by the district board, and if applicable, the levy of special assessments by the district board. In contrast to Part I, Part II contemplates districts that are distinct political entities.

It is particularly appropos to note that Part I and Part II are plainly inconsistent with regard to the issuance of bonds and the levy of ad valorem taxes. Bonds issued under Part II are issued by and are obligations of the district (not the county); ad valorem taxes levied under Part II are special taxes levied by the district board. Section 153.63, Section 153.68, Florida Statutes.

It is clear from a reading of the two statutory parts that Part I and Part II are separate laws. They were enacted in different years. They have different titles. Part I is The

County Water System and Sanitary Sewer Financing Law and Part II is The Water and Sewer District Law. Part I provides for the acquisition, construction and operation of water and sewer systems by the county and the division of the county into geographic districts for the purpose of financing such systems. Part II provides for the creation of water and sewer districts as seperate political entities and the acquisition, construction and operation of water and sewer systems by such entities.

(3) THE COUNTY MAY PROCEED UNDER PART I ONLY

Part II was enacted by the legislature to provide the counties an "alternative authority" and method for the provision of water and sewer facilities and services. Section 153.88, Florida Statutes, provides "the provisions of this law shall be liberally construed to effect its purposes and shall be deemed cumulative, supplemental and alternative authority for the exercise of the powers provided herein".

Section 153.20 provides that Part I shall be deemed to provide an additional and alternative method for the doing of the things authorized therein and shall be regarded as supplemental and additional to the powers conferred upon county commissioners by other laws. Further, it provides that the chapter, being necessary for the welfare of the inhabitants of the several counties, is to be liberally construed to effect its purposes.

The county may choose to proceed under Part I, retaining title and control over the water and/or sewer system within the district and issuing its own bonds therefor, or the county may proceed under Part II, and create a separate body corporate and politic to hold title and exercise control over the water and/or sewer systems and issue bonds therefor which are not obligations of the county. The only connection between Part I and Part II is that they deal with the same general subject matter, that is, water and sewer systems. It was never intended that they be, nor can they be, logically read together. They are completely independent authorities for providing water and sewer service to unincorporated areas of a county.

Where a law recites that it is supplemental and additional or alternative authority for the accomplishment of certain purposes, this Court has held that the public entity may choose which law to utilize. In Speer v. Olson, 367 So.2d 207 (Fla. 1978), Pasco County elected to finance certain facilities but not to utilize Part I to do so. Referring specifically to Section 153.20, the Court stated in Speer as follows:

> This language, or language similar to it in other general laws, has been construed by this Court on may occasions and always for the purpose for which the Legislature intended it; not as a limitation or prohibition of a power but as an added grant of authority or power to a particular thing or perform a particular act the power or authority for which was ot contained in, or in fact was in conflict with the authority of, any other law, and then only when the public entity was invoking such additional and supplemental power and availing itself of its use. (Id. at 212)

Further, in Speer, the Court stated:

> ... an act, when it recites that it is an additional and supplemental grant of power, may be used in addition to other laws on the same subject, but may be rejected by a public entity and another applicable law used in its place. So it is in this case. Pasco County has elected to proceed solely under the provisions of Chapter 125, Florida Statutes (1975), as amended, and has rejected the use of any other statute. In so doing it has acted properly and within the scope of its authority as set forth by decisions of this Court. (Id. at 213)

Thus, the above provisions of Section 153.20 empower Appellee to proceed under Part I to the exclusion of all other laws on the subject.

There can be no question that the Appellee has elected to utilize Part I in connection with the establishment of its combined water and sewer system including the sewer system constructed within FMBSD. The Original Resolution, the 1976 Resolution, the 1978 Resolution, the 1979A Resolution, the 1984 Resolution, the General Obligation Bond Resolution and the

Special Assessment Bond Resolution all specifically refer to Part I as authority for the actions taken or authorized therein. Further, FMBSD has been consistently operated as a Part I district by the county. The county has held title to the system within FMBSD, has managed and controlled the system, has fixed rates and charges for the system and has issued bonds for the financing of the system.

The above reasons demonstrate irrefutably that FMBSD, as a Part I district, is not subject to the restrictions found in Part II, Section 153.59(9). Thus, the lower court was correct in its judgment of validation of Appellee's 1984 Bonds because non-compliance with Section 153.53(9) is not a basis upon which to deny validation.

B. APPELLEE HAS NOT IMPROPERLY COMBINED AND CONSOLIDATED FMBSD WITH THE COUNTY-WIDE WATER AND SEWER SYSTEM BECAUSE FMBSD CONTINUES TO EXIST AS A SEPARATE ENTITY

Appellants argue that Resolution 78-5-34, which combined and consolidated the system within FMBSD into Appellee's water and sewer system was in violation of both Part II, Section 153.39(9) and Chapter 165, Florida Statutes, the Formation of Local Governments Act. As demonstrated above, however, Part II is not applicable to Part I districts, including FMBSD. Even if Section 153.39(9) had at one time been applicable, it has been

superseded by Chapter 165, which provides that Chapter 165 shall be the exclusive method for the creation, merger and dissolution of special districts of all types. Section 165.022, see Fire Control District No. 7 v. Palm Beach County, 423 So.2d 539 (Fla., D.C.A., 1982). Further, Section 159.39(9) would not have been applicable and Section 165 is not applicable because there has been no "merger or dissolution" of FMBSD.

Chapter 165, Florida Statutes, specifically Section 165.041, sets forth the procedures for incorporation, creation and merger of units of local government. Subsection (4) of Section 165.041 requires that the merger of one or more special districts may be accomplished by passage of an ordinance or resolution by the governing bodies of each unit to be affected. Subsection (5) of Section 165.041 sets forth the procedures for merger by petition.

The purpose of Chapter 165 is to provide for the creation, dissolution and merger of political units. As demonstrated above, the function and nature of a Part I district such as FMBSD are limited to being "essentially a financing vehicle". As such a limited political unit, FMBSD continues to exist and to separately perform those functions which are appropriate to its limited function and nature.

Section 153.091 of Part I states that a county may issue water and sewer revenue bonds for systems which have "been com-

bined by the county". Appellants contend that the means of such combination is governed exclusively by Part II, specifically Section 153.53(9) or, alternatively, by Chapter 165. This argument is unsupported by any logical reading of Chapter 153 as a whole.

Section 153.091 concerns combined systems, those systems financed pursuant to the provisions of Part I. In contrast, Section 153.53(9) sets forth the procedure for combining districts, as that term is used in Part II. This distinction between "systems" and "districts" highlights the difference between the separate parts of Chapter 153.

Under Part I, the "system" is that part of the county owned and operated water and/or sewer facilities lying within the geographically designated district. Under Part II, the "system" is the water and/or sewer facilities owned and operated by the district. Thus, under Part I, various county owned water and/or sewer facilities may be combined and consolidated into a single county-wide system without changing or altering the scope, nature, or function of the Part I districts within which such facilities are geographically located. After such combination and consolidation, the Part I district continues to function as the financing vehicle for the facilities located within its original boundries. In contrast, under Part II, a merger or consolidation would result in an aggregated physical system and a

change in the scope, government and function of the Part II districts involved. After such merger or consolidation, the resultant Part II district would be responsible for the ownership, control and financing of the system within the total geographic boundries of the merged Part II districts.

It is instructive to note that in the section of Chapter 165 relating to financial allocation upon dissolution of a special district the statute provides that after such dissolution

> The county is specifically authorized to levy and collect ad valorem taxes in the same manner as other county taxes from the area of the preexisting municipality or special district for repayment of any assumed indebtedness through a special purpose taxing district created for such purpose.

The legislature in this section recognized that after the dissolution of a special district and the assumption by the county of the assets and indebtedness of the dissolved district it would be appropriate for the county to establish a special taxing district similar in function to a Part I district to act as a financing vehicle.

Resolution No. 78-5-34 did not merge, consolidate or dissolve FMBSD. It combined the sewer system serving the inhabitants of FMBSD into Appellee's combined and consolidated and water and sewer system. There is no evidence in the record to show that FMBSD has been merged or dissolved. FMBSD continues to exist. Appellee's General Obligation Bonds, outstanding in the

principal amount of $8,420,000, are current with respect to the payments of principal and interest, and such payments are being made from the ad valorem taxes currently being levied and collected by Appellee within FMBSD. Special assessments have been and are currently being collected wihtin FMBSD with respect to Appellee's Special Assessment Bonds. Further, FMBSD continues to be treated as a special district for financial reporting purposes in routine financial reports filed by Appellee with the State of Florida. FMBSD was established solely to identify the area to be served by the sewer system and the properties to be taxed.

The purpose for which FMBSD was created will not be fully achieved until Appellee's outstanding General Obligation Bonds are paid in full. Then, and only then, will it be appropriate to dissolve FMBSD.

In conclusion, it is clear that the arguments of the Appellant that the provisions of Chapter 165 regarding merger or dissolution of a special district have been violated are not applicable since no merger or dissolution of FMBSD has occurred and FMBSD continues to perform the functions for which it was established.

C. STATUTORY CONSTRUCTION

In the course of their argument that Part II applies to

water and sewer districts referred to in Section 153.08 of Part I, Appellants set forth a number of well established rules of statutory construction. These rules of statutory construction, while unquestionably instructive in cases where appropriate, are either inapplicable to the instant case or do not operate to support Appellants' proposed reading of the statute.

First, where the language of the statute is plain and unambiguous there is no necessity for any construction or interpretation and the court need only give effect to its plain meaning. State v. Eagan, 287 So.2d 1 (Fla. 1973). Rules of statutory construction should be used only in case of doubt and should be used only to resolve doubt and never to create it. Englewood Water District v. Tate, 334 So.2d 626 (Fla., D.C.A., 1976). Part I and Part II are plain and unambiguous in regard to the nature and function of the different types of districts established or created thereunder and thus complicated rules of statutory construction are unnecessary. Where there is no doubt, the Appellants should not attempt to create doubt by interjecting inappropriate rules of statutory construction.

Second, if statutory construction must be resorted to, the maxim of "ut res magis valeat quam pereat" requires that the statute should be given effect as a whole and effect should be given to each statutory provision. State v. Zimmerman, 370 So.2d 1179 (Fla., D.C.A., 1979). If two statutory provisions permit

conflicting interpretations, where possible it is the duty of the courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions, and to find a reasonable field of operation that will preserve the force and effect of each. American Bakeries Co. v. Haines City, 131 Fla. 790, 180 So. 524 (Fla. 1938). If each provision cannot have the same effect when taken in connection with the other that it would have if taken independenly, the provision should be construed so as to give effect to what appears to have been the primary legislative intent. Florida, A & G C R R Co. v. Pensacola & G R R Co., 10 Fla. 195 (1862). As demonstrated above, Section 153.08 provides for the issuance of bonds and the levy of ad valorem taxes by the county for water and/or sewer districts. If Part II is construed to control Part I districts the provisions of Section 153.08 will be eviscerated and nullified because Part II provides for water and sewer district bonds and taxes to be issued and levied by the district itself. Such a construction would deprive Section 153.08 of any reasonable field of operation and would effectively repeal that Section. Such repeal would be without expressed legislative intent and would in fact be contrary to the legislative intent expressed in Part II that it "be deemed cumulative, supplemental and alternate authority for the exercise of the power provided" therein (Section 153.88(1)) and in Part I, Section 153.20.

Constructions which operate to repeal statutory provisions without expressed legislative intent and which are contrary to the expressed legislative intent should be avoided by the court where a clear and rational alternate interpretation is possible.

POINT III

REVENUES OF THE SEWER SYSTEM WITHIN FMBSD WERE NOT PLEDGED TO GENERAL OBLIGATION BONDS OR SPECIAL ASSESSMENT BONDS

Appellants assert that Appellee's 1984 Bonds should not be validated because the revenues of the sewer system within FMBSD, pledged to the payment of said 1984 Bonds as well as Appellee's outstanding 1976 Bonds, 1978 Bonds, 1979A Bonds and 1979B Bonds, are already pledged to Appellee's General Obligation Bonds and Special Assessment Bonds. Appellants conclude that violation of prior bond covenants precludes validation of the 1984 Bonds and cite State v. Sarasota County, 372 So.2d 1115, 1118 (Fla. 1979) for their position. However, the case states exactly the opposite conclusion. Justice Overton, writing for the majority, states:

> Finally, we find the assertion . . . that the instant bond issue will violate prior bond covenants is not a proper issue for this proceeding, and the contention is rejected. (Id. at 1118)

Appellants are also misstating the facts. Neither the General Obligation Bonds nor the Special Assessment Bonds were secured by the revenues of the sewer system constructed within FMBSD. The General Obligation Bonds are secured by the irrevocable pledge of the full faith, credit and unlimited taxing power of the County within the district. The General Obligation Bond

Resolution provides that the County, in each year while any of the General Obligation Bonds are outstanding, shall cause to be levied and collected a tax without limitation as to rate or amount on all taxable property within the district over and above all other taxes authorized or limited by law sufficient in amount to fully pay the principal of and interest on the General Obligation Bonds as the same shall become due. The General Obligation Bond Resolution further provides that the amount of such annual ad valorem tax may be reduced in any year by the amount of the net revenues derived from the operation of the sewer system and by the amount of the proceeds of special assessments levied against the properties benefited by the construction of such system which the County shall have irrevocably elected to apply to the payment of the principal of and interest on the General Obligation Bonds and which shall be available for such application after all of the requirements of the County's Special Assessment Bond Resolution shall have been fully complied with. Further, the General Obligation Bond Resolution provides that in the event in any year the proceeds of the ad valorem tax are insufficient to pay the principal of and interest on the General Obligation Bonds, the County will pay the deficiency from the surplus revenues derived from the operation of its then existing water and sewer system, but specifically provides, further, that the foregoing provisions shall not be

deemed to create a lien on such surplus revenues nor prevent the County from pledging specifically such surplus revenues to other bond issues.

The Special Assessment Bonds were secured by a prior lien on and pledge of the special assessments levied against the benefited properties within FMBSD. The Special Assessment Bond Resolution provided for a pledge of gross revenues of the system upon adoption, but this provision was specifically deleted by Resolution No. 79-2-25, duly adopted by Appellee's Board of County Commissioners on February 28, 1979, which amended the Special Assessment Bond Resolution prior to the issuance of the Special Assessment Bonds. (Applee App. 12)

POINT IV

APPELLANTS ARE ESTOPPED FROM ASSERTING THE WRONGFUL CONSOLIDATION OF APPELLEE'S WATER AND SEWER SYSTEM

Appellants raise an issue in this case addressing the validity of the bonds which was determined at prior validation proceedings. Under both Section 75.09, Florida Statutes, and the doctrine of collateral estoppel, Appellants are estopped from asserting now that Appellee's water and sewer system was improperly combined and consolidated.

Upon the rendering of a final judgment validating a bond issue all questions raised in the validation as well as questions that could have been raised are put to rest. Lipford v. Harris, 212 So.2d 766 (Fla. 1968). On September 28, 1978, a final judgment was entered by the Court below in Lee County v. State, et al., Case No. 78-2253, validating and confirming Appellee's 1978 Bonds. (Applee App. 7) On September 21, 1979, a final judgment was entered by the Court below in Lee County v. State, et al., Case No. 79-2508, validating and confirming Appellee's 1979A and 1979B Bonds. (Applee App. 8) These bonds were issued after the consolidation of the sewer system within FMBSD into Appellee's water and sewer system in May, 1978. Upon the expiration of the appeal periods, Section 75.09, Florida Statutes, provides that these judgments became:

> forever conclusive as to all matters adjudicated against plaintiff and all parties affected thereby including all property owners, taxpayers and citizens of the plaintiff, and all others having or claiming any right, title or interest in property to be affected by the issuance of said bonds, certificates or other obligations, or to be affected in any way thereby, and the validity of said bonds,... or of the proceedings authorizing the issuance thereof, including any remedies provided for their collection, shall never be called in question in any court by any person or party. (emphasis supplied)

"Any matter or thing" affecting the authority of a political subdivision to issue bonds is put in repose by validation. Weinberger v. Board of Public Instruction, 112 So. 253 (Fla. 1927).

In Farrow et. al. v. City of Hialeah, 181 So. 838 (Fla. 1938), the court, in a proceeding to validate a refunding bond issue, struck an answer attacking legal deficiencies in connection with the refunded bonds saying:

> [s]uch questions as are attempted to be raised as to the validity of the bond issue of 1926 which is now sought to be refunded became res adjudicata when the decree of validation thereof became absolute. The attack here is a collateral one on a final decree of a court of record. On other collateral attacks the same decree has heretofore been questioned and that decree has been held to be res adjudicata of the validity of the bonds now sought to be refunded. (Id. at 839)

See also State v. City of Venice, 2 So.2d 365 (Fla. 1941) (question of whether bonds were properly issued forever set to

rest by validation and therefore improperly raised at validation proceeding for refunding bonds).

Appellants are making a collateral attack on three properly validated bond issues of Appellee. Consideration of whether the system was properly combined and consolidated has been foreclosed by the res adjudicata effect created by Section 75.09, Florida Statutes. Consideration of Appellants' argument concerning proper consolidation of the system denies Appellee the benefit of the purpose of Chapter 75 proceedings, that is, a determination with finality of whether Appellee had the proper authority to issue bonds or to incur debt. State v. Suwanee County Development Authority, 122 So.2d 190 (Fla. 1960).

Appellants are further precluded from raising now the question of the proper consolidation of Appellee's water and sewer system by the doctrine of collateral estoppel or estoppel by judgment. Collateral estoppel prevents parties from relitigating issues that have previously been decided between them. Mobil Oil Corporation v. Shevin, 354 So.2d 372 (Fla. 1977). Collateral estoppel differs from res adjudicata in that while res adjudicata prevents relitigation of the same claim or cause of action by identical parties, collateral estoppel prevents relitigation of the same issue by the same parties in a different cause of action. Gordon v. Gordon, 59 So.2d 40 (Fla. 1952), cert denied 344 U.S. 878 (1952). Both doctrines are designed to add

certainty and stability to court decisions and to conserve judicial time and resources by preventing the relitigation of issues. Johnson v. U.S., 576 F.2d 606 (5th Cir. 1978).

Application of collateral estoppel requires that the parties in each suit be identical or in privity and that the particular issue involved be directly adjudicated or necessarily involved in the original suit. In Re Constructors of Florida, Inc. 349 F.2d 599 (5th Cir. 1965) cert denied 383 U.S. 912 (1966). Validation of Appellee's 1978, 1979A and 1979B Bonds provides the basis for application of collateral estoppel to Appellants' argument that Appellee's water and sewer system was improperly combined.

The term "privity", as used in connection with reference to the affect of a prior decree on parties and their privies, denotes mutual or successive relationship to the same rights or property. Coral Realty Co. v. Peacock Holding Co., 138 So. 622. (Fla. 1931). Under Chapter 75, Florida Statutes, the complaint to validate bonds is filed by the issuing body against the State and the citizens and inhabitants of the issuer. Being a matter of general interest to all citizens, the judgment is binding on each individual citizen, even if each is not an individually named party to the suit. See City of New Port Richey v. State, 145 So.2d 903 (Fla., D.C.A., 1962) (judgment against municipal corporation in a matter of general interest to all its citizens

is binding on them though they were not parties to the suit). Appellants were either residing in the County at the time the prior validation judgments were rendered or are now persons identically situated with the then residents of the County and with whom there is a mutuality of interest in the subject matter. Consequently, as current residents of the County, they were parties or privies to parties to the prior validation suits. See Young et. al. v. Miami Beach Improvement Company et. al., 46 So.2d 26 (Fla. 1950) (individual members of the public though not named in suit were each bound by decision against City).

Application of collateral estoppel also requires the prior determination of the particular issue, either by direct adjudication or by implication or necessity. Appellants correctly assert that improper consolidation of Appellee's water and sewer system would necessarily affect the validity of any of Appellee's water and sewer system revenue bonds. The 1978 Bonds, validated four months after the system was combined pursuant to Resolution No. 78-5-34, were the first bonds issued after the combination. A central issue, therefore, would necessarily have been the legality of that combination. Considering such timing and the importance of legal consolidation of the system to the validity of the 1978 Bonds, the question of whether the system was in fact properly combined and consolidated was necessarily decided by the Court below upon the rendering of that final

judgment. See Peckham v. Family Lean Co., 196 F.2d 838 (5th Cir. 1952) (estoppel of rights or questions necessarily involved in the conclusion reached). In fact, the Court, in its final judgment validating the 1978 bonds stated that Appellee, "in and by Chapter 153, Part I, Florida Statutes, and other applicable provisions of law, is authorized to acquire and construct a sewer system operated as a combined utility with the water system". (Applee App. 7)

Because the issue of proper consolidation of the system was necessarily decided in the 1978 validation proceedings and because Appellants were parties or privies to parties to those proceedings, Appellants are precluded by the doctrine of collateral estoppel from relitigating that issue. Any other result necessarily leads to the problem the doctrine of collateral estoppel is designed to prevent, namely, lack of stability of prior judicial decisions and the waste of judicial resources.

By virtue of the claim preclusion established by Chapter 75, Florida Statutes, and the doctrine of collateral estoppel, Appellants are precluded from raising now the issue of whether Appellee's water and sewer system was properly combined or consolidated. By their argument, Appellants are presenting the possibility that the question of proper consolidation of the system can never be put to rest. By raising the issue some six years after the event, Appellants are attacking the 1978 and 1979

validation judgments and the validity of bonds issued thereunder. In light of the importance of finality of judicial determinations and decisions, Appellants should be precluded from raising this issue at this late date.

CONCLUSION

For the foregoing reasons, the Final Judgment of the Circuit Court in and for Lee County, Florida, validating Appellee's $13,500,000 Water and Sewer Revenue Bonds, Series 1984, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by delivery via Federal Express to Thomas G. Pelham and Deanna E. Boone, Attorneys for Appellants, 535 John Knox Road, Suite 202, Tallahassee, Florida 32315 and to Martin Der Ovanesian, Assistant State Attorney, Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33902, this 21st day of November, 1984.

John C. McWilliams

Attorney