IN THE SUPREME COURT,
STATE OF FLORIDA

MICHAEL A. YAKUBIK, et al.,

Appellants,

vs.

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

Appellee.

Case No. 66,004

REPLY BRIEF OF APPELLANTS

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PREFACE

For purposes of readability and clarity, the Appellants in this appeal will be referred to collectively as "the Appellants." Appellee, Lee County, will hereinafter be referred to as "Lee County" or "the County." The Fort Myers Beach Sewer District will be referred to as the "FMBSD" or "District," and the South Fort Myers Sewer District will be referred to as the "SFMSD." The Water and Sewer Revenue Bonds, Series 1984, which were validated by the lower court, will be referred to as "the Revenue Bonds" or "the Bonds."

References to the Appendix/Exhibits, Volume I, which Appellants submitted with their Initial Brief are indicated by (A/E. _____) or (A/E. Vol. I, _____) with appropriate Exhibit letters indicated, and references to the Appendix/Transcript of Hearing, Volume II, which Appellants submitted with their Initial Brief are indicated by (A/T. ____) with appropriate page numbers inserted. References to the Appendix/Exhibits, Volume III, submitted by Appellants are indicated by (A/E. Vol. III, ____) with appropriate Exhibit letters indicated. Included in the Appendix/Exhibits, Volume III are Exhibits B and C of which this Court should take judicial notice if this Court decides to consider the collateral estoppel issue argument by Appellee and the related documents which Appellee is submitting to this Court for the first time on appeal and

which were not introduced in the trial court. Unless otherwise indicated, emphasis in quoted materials has been added.

STATEMENT OF FACTS

Appellee failed to recount how the County appropriated the District's sewer facilities for the use of non-FMBSD residents who did not contribute to the cost of providing the facilities.

After the County created the FMBSD to provide for the construction of sewer facilities to serve FMBSD, bonds were issued for the FMBSD to finance the facilities, payable from special ad valorem taxes and assessments levied on the properties within the FMBSD. The County subsequently merged the FMBSD with the SFMSD and the County water system, (A/T. p. 93-94) but never made any equitable arrangements concerning the bonded indebtedness of the inhabitants of the FMBSD. In fact, special assessments and special ad valorem taxes are still being collected only from the inhabitants of the FMBSD to pay the bonds. (A/T. p. 103)

Lee County then permitted areas outside the FMBSD to connect to the FMBSD's sewer facilities without having to contribute to the payment of the bonded indebtedness incurred to construct the facilities. (A/E. 0) (A/T. 88-89) Because these new connections exceeded the capacity of the facilities intended to serve only the FMBSD, the County imposed a moratorium on all new connections, precluding even FMBSD residents who contributed to the cost of the facilities from obtaining sewer services. (A/E. 0) (A/E. p. 89)

INTRODUCTION

Appellants object to consideration of issues and documents which were never raised or introduced in the lower court and adopt the arguments set forth in their two Motions to Strike and their Request for Leave to File a Reply to Appellee's Response.

The Florida Evidence Code allows trial courts but not appellate courts to take judicial notice of certain matters.[1] This statute sets forth rules of evidence which are substantive law and which may be changed by the legislature. State v. Garcia, 229 So. 2d 236 (Fla. 1969); State v. L. H., 392 So. 2d 294 (Fla. 2d DCA 1980); Campbell v. Skinner, 43 So. 874 (Fla. 1907); Goldstein v. Maloney, 57 So. 342 (Fla. 1911); Black v. State, 81 So. 411 (Fla. 1919).

Hillsborough County Board of County Commissioners v. Public Employees Relations Commission, 424 So. 2d 132 (Fla. 1st DCA 1982) holds that the Florida Evidence Code provides for judicial notice only by trial courts and not by appellate courts. 424 So. 2d at 134. Judicial notice is not to be taken by appellate courts because appeals are to determine whether the lower

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[1] Sections 90.201 through 90.205, Florida Statutes do not specify whether they apply to appellate courts, but sections 90.206 and 90.207 make it clear the code applies only to trial courts. Section 90.206 provides that a court

> may instruct the jury during the trial to accept as a fact a matter judicially noticed.

Appellate proceedings are not trials and do not involve juries. In Section 90.207 entitled "Judicial Notice By Trial Court In Subsequent Proceedings", the legislature obviously intended to limit the taking of judicial notice in "subsequent proceedings" to subsequent trial court proceedings.

tribunal committed error on the basis of the issues and evidence before it, and are not evidentiary proceedings. 424 So. 2d at 134.

ARGUMENT

I.

RESOLUTION NO. 84-4-25 IS SUBJECT TO THE REQUIREMENTS OF SECTIONS 153.11(1) AND (3), FLORIDA STATUTES.

Lee County's attempted rationalization of its failure to comply with Section 153.11(1)(a), F.S., ignores the plain meaning of the statute. In a nutshell, the County's argument is that compliance with the rate schedule requirements of Section 153.11 is unnecessary because the proposed new County sewage treatment facility is "an addition" to an existing County sewage system. Even if the new facility is "an addition", it does not obviate the need for complying with Section 153.

Section 153.11(1)(a), provides that the County

> shall in the resolution providing for the issuance of either water revenue bonds or sewer revenue bonds, or both, fix the initial schedule of rates, fees and other charges for the services furnished or to be furnished by the facilities, to be paid by the owner, tenant or occupant of each lot or parcel of land which may be connected with and use any such facility by or through any part of the water system of the county.

What does the term "facilities" mean? It obviously refers to the facilities to be financed by the "resolution providing for issuance" of the bonds. Moreover, the statute does not apply only to the original facilities in an existing water or sewer system. The last nineteen words of Section 153.11(1)(a) expressly comtemplate and include a facility that is added to an

existing system. In addition, and more importantly, Section 153.02(7) defines "facility" as:

> Such water system, sewage disposal systems, water system improvements and/or sewer improvements or additions thereto as are defined by this Chapter.

Under the plain meaning of these relevant statutory provisions, the "initial schedule of rates" requirement of Section 153.11(1)(a) applies to any bond resolution to finance any new water or sewer facility even if it is an "addition " to an existing system. Compliance with Section 153.11(1)(a) is especially important in this case since no rates have ever been established in Lee County for any countywide sewer facility.

Section 153.11(1)(b) does not alter this conclusion as the County contends. That section provides in part that:

> 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 County argues that the term "system" refers only to a county's first sewage plant or facility and that subsequently an unlimited number of sewage plants or facilities may be financed with bond resolutions which contain no initial rate schedules for the new facilities. This argument is contrary to the plain language of the applicable statutory provisions.

With regard to sewage systems, the term "system", as used in Section 153.11(1)(b), is defined by statute. Section 153.02(5) defines "sewage disposal system" to mean and include:

> Any plant, system, facility or property used . . . in connection with the collection, treatment or purification or disposal of sewage, and, without limiting the generality of the foregoing definition shall embrace

> treatment plants, pumping stations, intercepting sewers, pressure lines, mains and all necessary appertenances and equipment. . . .

The new County sewage treatment plant or facility to be financed by Resolution 84-4-25 is a "system" within the meaning of Section 153.11(1)(b). Thus, while Lee County may revise the rates for the new system after it has been in operation, this does not obviate the need to fix an initial rate schedule for the plant in the bond resolution as required by Section 153.11(1)(a).

Even under the County's tortured construction of Sections 153.11(a) and (b), the County cannot prevail. Lee County has never had a countywide sewage treatment facility; thus, the proposed new facility is not an expansion or improvement to an existing countywide sewage system for which rates were previously adopted.

No initial rate schedule for the new sewage facility has ever been prepared and adopted in accordance with Section 153.11(3), and bond Resolution No. 84-4-25 contains no initial rate schedule as required by Section 153.11(1)(a). While the County has bombarded the Court with numerous old bond resolutions which were not introduced in the trial court, none of these bond resolutions contain a sewer rate schedule for a countywide sewer facility.

Faced with these undeniable facts, Lee County requests this Court to hold that the initial rate schedule for the proposed new sewage treatment facility was adopted in 1966 when the County adopted a water bond resolution to finance construction of a county water system!!!!!! (See Brief of Appellee, p. 15)

Adoption of this absurd contention would render meaningless the requirements of Sections 153.11(1) and (3) which are "imperative to the protections which this statute provides to the public." Bruns v. County Water-Sewer District, 354 So. 2d 862, 863 (Fla. 1977).

II.

THE FMBSD HAS OPERATED PURSUANT TO AND IS SUBJECT TO THE REQUIREMENTS OF CHAPTER 153, PART II, FLORIDA STATUTES.

Lee County contends that the FMBSD is subject only to the requirements of Chapter 153, Part I and not Chapter 153, Part II, particularly Sections 153.53(9) and 153.62(3)(a).

The rationale for this argument is that Part I applies to "systems" which are controlled by the County; that Part II applies to "districts" which are separate political bodies with separate boards; and that the FMBSD falls into the first category and not the second. (See Brief of Appellees, pp. 20-22). This artificial distinction ignores both the statutory language of Chapter 153 and the following facts:

(1) The County has always treated the FMBSD as a separate district.[2]

(2) The County issued special assessment bonds to finance construction of the FMBSD sewage treatment facilities (A/E. K). However, Chapter 153, Part I contains no authorization for

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[2] For example, in Resolution No. 76-9-32 (A/E. L), the County made application to the Florida Division of Bond Finance on behalf of "the Fort Myers Beach Sewer District, a political subdivision of the State of Florida", for a pollution control loan pursuant to Section 14, Article VII, of the Constitution of Florida.

special assessment bonds which are defined and provided for only in Sections 153.52(11) and 153.74(2) of Chapter 153, Part II.

Further inconsistencies and misinterpretations of Chapter 153 in the County's arguments include but are not limited to the following:

(1) On pages 18-19 of its brief, the County asserts that the FMBSD is a Part I district because it is operated by the County, whereas Part II districts are operated by separate boards. However, Section 153.52(3) of Part II defines "district board" as "the Board of County Commissioners of any county" and Section 153.60 of Part II provides that the Board of County Commissioners shall be the ex officio governing board of any water and sewer district created within the County. The Lee County Board of County Commissioners served as the district board and the ex officio governing board of the FMBSD (A/E. L, M, P), passed resolutions for the FMBSD (A/E. L), and brought and defended suits on behalf of the FMBSD (A/E. M).

(2) The County argues on page 22 that the FMBSD cannot be a Part II district because bonds issued on behalf of those districts are the obligations of the district and not the County. However, the FMBSD general obligation bonds (A/E. J) are not obligations of the County as a whole, where they expressly provide that they

> are secured by the full faith, credit and unlimited taxing power of the County within the Fort Myers Beach Sewer District . . . and will be payable from a special ad valorem tax levied upon all taxable property within the district over and above all other taxes authorized or limited by law . . . ."

(3) The County strains mightily to distinguish between Part I "systems" and Part II "districts", but it cannot conceal, and even admits the fact that it created a district, the FMBSD, pursuant to Chapter 153, and not merely a sewer system. The only provisions governing the creation, operation, powers, merger or dissolution of water and sewer districts are found in Part II and not Part I. In enacting Part II, the legislature's purpose was to provide a detailed statutory framework for the creation and operation of the water and sewer districts which had been previously authorized by Section 153.08.

The County's contention that it may establish a district under Section 153.08 without following any of the requirements found in Part II of Chapter 153 leads to an absurd result and would render Part II meaningless. No local government, if given the choice, would opt to operate under Part II if it is free to ignore the restrictions of that part by simply electing to operate under the standardless provisions of Section 153.08. Pursuant to the well-established rule of statutory construction that a court should avoid a construction that leads to unreasonable or absurd results, see State v. Webb, 398 So. 2d 820 (Fla. 1981); Wakulla County v. Davis, 395 So. 2d 540 (Fla. 1981), this Court should construe Parts I and II in pari materia.

Section 153.20, F.S., does not dictate a different result as the County contends on pages 24-25 of its Brief. When the legislature enacted Section 153.20, Part II of Chapter 153 was not in existence. Therefore, the stipulation in Section 153.20 that Part I was supplemental and additional to powers conferred by other laws referred only to then-existing laws and not to the subsequently enacted Part II.

III.

LEE COUNTY EFFECTIVELY MERGED OR DISSOLVED THE FMBSD WITHOUT COMPLIANCE WITH THE REQUIREMENTS OF CHAPTER 165, FLORIDA STATUTES.

Lee County concedes on page 27 of its brief that the FMBSD is a special district subject to the requirements of Chapter 165, F.S., for the merger or dissolution of such districts. However, the County contends there has been no merger or dissolution of the FMBSD.

The rationale for the County's ingenious argument is that although the County has combined the sole asset of the FMBSD, i.e., the District sewer system, into the countywide sewer system to serve County residents and finance the County system, the FMBSD continues to exist, albeit in name only. According to the County, while the County has taken the only asset of the FMBSD, it has not merged or dissolved the FMBSD because it did not comply with the requirements of Chapter 165 for such a merger or dissolution. If this absurd argument is accepted, it will permit every local government in the State to circumvent the merger or dissolution requirements of Chapter 165 by simply taking all of the assets of special districts while allowing the districts to continue to exist in name only.

Lee County knows that this argument has no merit. When the County combined the East Fort Myers Sewer System into the Countywide Sewer System, it adopted Ordinance 78-6 which replaced and dissolved the East Fort Myers Sewer District (A/T. 98-99; A/E. Vol. III, A). The County should have and was required to adopt a similar ordinance for the FMBSD.

The FMBSD has been effectively merged or dissolved. The FMBSD no longer performs the functions for which it was created. The FMBSD was not created as "essentially a financing vehicle", and certainly it was not created as a financing vehicle for a sewer system for County residents outside the FMBSD. Rather, it was created expressly for the purpose of providing a sewer system to serve the residents of the FMBSD. However, after FMBSD residents accepted the bonds and special tax obligations necessary to construct the sewer system, the County merged the FMBSD sewer system into a new consolidated county system and allowed county residents outside the FMBSD to use the system to an extent which necessitated a moratorium on any further connections, even by FMBSD residents. (A/T. 88-89) (A/E. Vol. I, N)

Lee County's failure to follow the requirements of Chapter 165 in eliminating the FMBSD has serious consequences for FMBSD residents. First, because Lee County failed to effectuate the merger or dissolution by passage of an ordinance under Section 165.041(4) or an ordinance approved by the voters under Section 165.051(b), no notice of the County's intent to merge or abolish the FMBSD was ever given to FMBSD residents by the County. Thus, the Appellants and other FMBSD residents never had an opportunity to be heard on this issue.

More importantly, the County merged or dissolved the FMBSD without making any equitable arrangement regarding the bonded indebtedness of the FMBSD as required by Section 165.061(4)(c) or Section 165.071(2). Thus, FMBSD residents, who have been deprived of their sewer system, are still saddled with the full responsibility for paying off the bonded indebtedness incurred

for the system. Other County residents, who now have the benefit of the system, have no responsibility for the bonded indebtedness incurred to build the system. As the County admits on pages 29-30 of its brief, special assessments and special ad valorem taxes are still being collected solely within FMBSD to pay off the bonds used to build the FMBSD sewer system which is now being used for the benefit of the entire county.

This Court should consider carefully what its approval of Lee County's actions will mean for the entire state. Following the Lee County scheme, any Florida county can create a special district, induce the citizens of the district to authorize special taxes on their property to finance a sewer system to serve the district, and then take the constructed sewer system for countywide use while leaving the district residents fully responsible for paying for the system. Such unconscionable conduct violates the letter and the spirit of Sections 165.061(4)(c) and Section 165.071(2) and should not be condoned.

IV.

THE REVENUE BONDS SHOULD NOT BE VALIDATED BECAUSE THEY VIOLATE PRIOR BOND PROVISIONS.

Appellee asserts for the first time in this appeal, entirely on the basis of documents never introduced in the trial court, that the general obligation and special assessment bonds issued to finance the sewer facilities to serve the inhabitants of the FMBSD were amended to eliminate any pledge of the gross revenues of the facilities toward the payment of the bonds. If the pledges of the gross revenues were eliminated by the County, it simply compounds the gross inequities which have occurred as

a result of the County's appropriation of the District's facilities in violation of Sections 165.061(4)(c) and 165.071(2).

After inducing FMBSD residents to approve the issuance of general obligation and special assessment bonds to finance the FMBSD sewer facilities, which were to be paid from revenues of the facilities as well as the special taxes and assessments, the County appropriated the facilities for the use of County residents outside the District. The County then eliminated any pledge of the revenues toward the payment of the bonds, including surplus revenues from the system which were to be used to reduce the special tax burden of FMBSD residents. Thus, the FMBSD residents must pay the entire bonded indebtedness although the entire County is now using and benefitting from the FMBSD sewer system.

V.

APPELLANTS ARE NOT ESTOPPED FROM ASSERTING THE WRONGFUL CONSOLIDATION OF APPELLEE'S WATER AND SEWER SYSTEM.

Appellants strenuously object to the County's attempt to raise the issue of collateral estoppel for the first time on appeal and incorporate the arguments set forth in Appellants' Motion to Strike and to File an Extended Reply Brief.

The County argues that Appellants are estopped, by virtue of the validation of prior bond issues, from contesting the legality of the creation of the combined water and sewer system by the County in this bond validation proceeding. However, the cases cited by the County are inapposite because they all involve challenges to bond provisions contained in previously validated bonds, or challenges to the issuance of refunding

bonds for the purpose of actually contesting the underlying previously validated bonds. See, e.g., Lipford v. Harris, 212 So. 2d 766 (Fla. 1968); Mobile Oil Corporation v. Shevin, 354 So. 2d 372 (Fla. 1977); State v. City of Venice, 2 So. 2d 365 (Fla. 1941); Weinberger v. Board of Public Instruction, 112 So. 253 (Fla. 1927).

The refunding bond cases cited by Appellee are also inapplicable to Appellants' challenge to the 1984 Revenue Bonds. For example, in Farrow et. al. v. City of Hialeah, 181 So. 838 (Fla. 1938), and State v. City of Venice, supra, the Court determined that refunding bond validation proceedings could not be utilized as a vehicle to challenge the original or underlying bond issues which had been finally validated.

Appellants in this case are attacking only the 1984 Revenue Bonds which have not been finally validated. They are not attacking any of the previously validated bonds referred to by the County. Thus, Lee County's lack of authority to issue the 1984 Revenue Bonds to finance the consolidated water and sewer system because the system was not lawfully created may properly be asserted in this bond validation proceeding. See, e.g., Bruns v. County Water-Sewer District, supra; Boca Ciega Sanitary District v. State, 161 So. 2d 529 (Fla. 1964).

Appellee correctly states that under Section 75.09, Florida Statutes, judgments validating a bond issue is forever conclusive as to the matters adjudicated with respect to that bond issue. However, Appellee oversteps the legal and logical boundaries of Chapter 75 by concluding that, once the County has issued a set of bonds which have been validated by the court,

the County's authority can never again be subject to challenge in subsequent validation proceedings for subsequent bond issues.

Lee County also asserts that Appellants are collaterally estopped from challenging the County's authority to issue the bonds based on the illegality of the creation of the combined system because that particular issue was actually litigated in connection with earlier bond issues. Noticeably absent from Lee County's brief, however, is any proof that this issue was actually litigated in any prior bond validation proceedings.

The case law cited by Appellee instructs that the concept of collateral estoppel precludes relitigation of issues which were actually litigated in an earlier action. For example, in Gordon v. Gordon, 59 So. 2d 40 (Fla. 1952), the court explained the difference between res judicata and collateral estoppel as follows:

> Under res judicata a final decree or judgment bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised, while the principle of estoppel by judgment is applicable where the two causes of action are different, in which case the judgment in the first suit only estops the parties from litigating in the second suit issues--that is to say points and questions--common to both causes of action and which were actually adjudicated in the prior litigation.

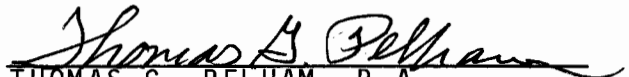
59 So. 2d at 44.

According to Lee County, the final judgments validating the 1978, 1979A and 1979B bond issues (Appendix of Appellee, Nos. 7 and 8) provide the basis for collateral estoppel. The final

judgments provided by Lee County, however, contain no indication that this particular question was ever actually litigated during prior bond validation proceedings. If this Court takes judicial notice of these Final Judgments, it should also take judicial notice of the pleadings in these cases (A/E. Vol. III, B, C), which verify that this issue was in fact never raised in these three prior bond validation proceedings.

The rights of Appellants could not have been adjudicated in the prior bond validation proceedings unless they were actually or constructively before the court. See Coral Realty, Inc. v. Peacock Holding Co., 138 So. 622 (Fla. 1931). At least two of the Appellants definitely were not before the court in the prior cases. Appellant Fennell Phillips was not even a Lee County resident during the validation proceedings of the 1978, 1979A and 1979B bonds. (A/T. 5, 81) Appellant Citizens Action Fund, Inc. (C.A.F.), did not exist until March 12, 1984, after the validation of the earlier bond issues. Therefore, the rights of Phillips and the C.A.F. were not actually litigated in the earlier bond proceedings.

Given its corporate purposes (A/E. Vol. I, Q), C.A.F.'s rights also were not even constructively before the court because it was not in privity with the actual parties to the earlier bond validation proceedings. See Coral Realty, Inc. v. Peacock Holding Co., supra.



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