O/a 1-8-85

IN THE SUPREME COURT OF FLORIDA

LAKE WORTH UTILITIES AUTHORITY,
THOMAS M. FORBES,

Petitioners

v.

CASE NO. 66,102

CITY OF LAKE WORTH,

Respondent

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

BRIEF OF AMICUS CURIAE

FLORIDA LEAGUE OF CITIES

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INTRODUCTION

The Appellants, Lake Worth Utilities Authority and Thomas M. Forbes, were the Defendants in the Trial court. The Appellee, the City of Lake Worth was the Plaintiff in the lower court. The Florida League of Cities, Inc. is an amicus curiae, pursuant to motion filed with this Court, and represents the interests of the cities of the State of Florida. In this brief, the Lake Worth Utilities Authority will be referred to as the "Authority", its governing board will be referred to as "members of the Authority", and the City of Lake Worth will be referred to as "the City".

STATEMENT OF CASE AND FACTS

This case is before the Court on appeal from the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. This Court accepted jurisdiction pursuant to a certification by the District Court of Appeal pursuant to Article V, Section 3(b)(5) of the Constitution of Florida that the order of trial court passed upon a question of great public importance requiring immediate resolution by this Court on November 9, 1984.

The Amicus League addresses itself only to the legal issues raised by our reworded point on appeal and will accept the Statement of Case and Facts adopted by the Appellee.

POINT INVOLVED ON APPEAL

WHETHER CHAPTER 69-1215, LAWS OF FLORIDA, UNCONSTITUTIONALLY VESTS MUNICIPAL LEGISLATIVE POWERS AND FUNCTIONS IN A NON ELECTED AUTHORITY IN VIOLATION OF ARTICLE VIII, SECTION 2(b) OF THE FLORIDA CONSTITUTION.

ARGUMENT

CHAPTER 69-1215, LAWS OF FLORIDA, UNCONSTITUTIONALLY VESTS MUNICIPAL LEGISLATIVE POWERS AND FUNCTIONS IN A NON-ELECTED AUTHORITY IN VIOLATION OF ARTICLE VIII, SECTION 2(b) OF THE FLORIDA CONSTITUTION.

On November 5, 1968, Florida's electorate ratified Art. VIII, Sec. 2, Fla. Const. (1968). The proposal was segregated from the general constitutional revisions and placed on the ballot. There was to be no attempt to legislatively "log-roll" this proposal, to sandwich it between other matters of interest. The proposal was to stand or fall on its own merit. It stood.

Article VIII, Sec. 2(b), Fla. Const. (1968) provides:

> (b) Powers. Municipalities shall have 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 as otherwise provided by law. Each municipal legislative body shall be elective. (emphasis supplied).

In contrast, Article VIII, Sec. 8, Fla. Const. (1885), stated that "(t)he legislature shall have the power to establish ... municipalities ..., to prescribe their jurisdiction and powers, and to alter or amend the same at any time..."

There are two important distinctions between the 1885 and 1968 provisions: the 1968 provision "gives municipalities residual powers except as provided by law"[1] and it requires that "each municipal legislative body" be "elective".

The issue before this Court sub judice is whether Article VIII, Sec. 2(b), Fla. Const., places a limitation on the State Legislature's power to prescribe who may exercise governmental, corporate and proprietary powers to conduct

[1] Legislative Reference Bureau's Legislative Analysis of SJR 5-2X (1968)

municipal government, perform municipal functions and render municipal services. Amicus respectfully submits, that by virtue of the last sentence in Article VIII Sec. 2(b), Fla. Const., the legislative powers associated with conducting municipal government, performing municipal functions and rendering municipal services must be vested in a municipally elected body. Chapter 69-1215, Laws of Florida, which created the Lake Worth Utilities Authority, vests municipal legislative powers in an appointive board in violation of Article VIII, Section 2(b) of the 1968 Florida Constitution.

Amicus does not allege the Act unlawfully delegated legislative powers to the Authority, as that legal doctrine is commonly and traditionally understood, see Cooksey v. Utilities Commission, 261 So.2d 129 (Fla. 1972); Sarasota County v. Borg, 302 So.2d 737 (Fla. 1974); nor does Amicus assert that the powers exercised by the Authority could not have transferred to another elective body pursuant to Art. VIII, Sec. 4, Fla. Const. Rather, Amicus submits that Art. VIII, Sec. 2(b), Fla. Const. (1968), mandates that the legislative powers associated with the exercise of municipal powers for municipal government be vested in a body elected by the citizens residing in the municipality.

While the Legislature has broad powers to control local affairs, it may not violate the purposes of the people in adopting the Constitution. Amos v. Mathews, 99 Fla. 1, 126 So. 308 (1930). The Courts of this State have on a number of occassions held that the Florida Constitution places a limitation on the State Legislature's power to govern the activities of

local government.[2] Therefore, the idea that Art. VIII, Sec. 2(b), Fla. Const., also places certain limitations on the State Legislature's power over local government is not a novel one.

The overall and clear intent of Art. VIII, Sec. 2(b), Fla. Const., was to provide for the exercise of substantial legislative powers within municipalities and to have these powers exercised by elected officials. Unless clearly to the contrary, constitutional provisions are to be interpreted in reference to their relation to each other, that is in para materia, since every provision was inserted with a definite purpose. Burnsed v. Seaboard Coastline Railroad Company, 290 So.2d 13 (Fla. 1974). And, it cannot be assumed that the framers of the State Constitution used words idly. Amos v. Mathews, supra. The very same section that vests municipal governments with broad municipal powers requires that each municipal legislative body be elective. Reading these sentences together clearly indicates a presumption that the framers and the electors intended that anybody exercising municipal legislative powers be elected.

[2]In State v. City of Stuart, 97 Fla. 69, 120 So. 335 (1929), this Court held that notwithstanding the supposedly plenary power of the Legislature over cities to alter, extend, or contract municipalities the Legislature had no power to arbitrarily enlarge the limits of a city. In Gough v. State, 55 So.2d 111 (Fla. 1951), this Court held that the Legislature did not have the power to confer on the City judicial powers then vested in the judiciary by virtue of Art. V, Sec. 11, Fla. Const. (1885). Additionally, this Court, in Dickinson v. Board of Public Instruction of Dade County, 217 So.2d 553 (Fla. 1968), held constitutionally invalid a claims bill in part on the grounds that the Dade County Home Rule Amendment, Art. VIII, Secs. 11(5), (6) and (9), Fla. Const. (1885) (carried forward by Art. VIII, Sec. 6, Fla. Const. (1968)) deprived the State of the legislative authority to enact laws which relate only to the affairs of Dade County. In Fire Control Tax Dist. v. Palm Beach County, 423 So.2d 539 (Fla. 4th DCA 1982), the 4th DCA held that a special act authorizing the Palm Beach County Commission to fix the boundaries of a fire control district violated Art. VIII, Sec. 4, Fla. Const. (1968), because the Act did not provide for a resolution of the governing body of the areas to be affected or petition of ten percent of the qualified voters in each area.

A literal reading of the words indicates that it was the intent of the framers and the electors to vest any and all municipal legislative powers in the hands of an elective body. The second sentence of Art. VIII, Sec. 2(b), Fla. Const., dictates that "municipal legislative body" was not intended to be limited strictly to "city councils" or "city commissions"; if such was the case, the framers clearly had it within their power to effectuate such a meaning by using those express terms. A construction of the Constitution is favored which gives effect to every clause and every part thereof; and it is fundamental that a construction of the Constitution which renders any of its provisions meaningless or inoperative should not be adopted by the courts. Burnsed v. Seaboard Coastline Railroad Co., supra. To construe this provision so as not to give full effect to its literal reading would be to render it inoperative and meaningless. Whether the body invoking the legislaltive powers of the community is labeled a "commission", a "council", a "board", or an "authority" is irrelevant; the provision must be construed as reserving all municipal legislative powers to an elected body.

Furthermore, sound public policy supports this interpretation. The right of the people to select their own officers is their sovereign and political right. Treiman v. Malmquist, 342 So.2d 972 (Fla. 1977); Nelson v. Robinson, 301 So.2d 508 (Fla. 2nd DCA 1974). A citizen of the State of Florida possesses certain political rights which he has granted to himself by constitutional provisions. One of these is the right to vote. Joughin v. Parks, 107 Fla. 833, 147 So. 273 (1933). This right cannot be infringed on by the Legislature, and any attempt by the legislative branch to infringe

upon such a right should be strictly construed by the judiciary and, if possible, curtailed. Riley v. Holmer, 100 Fla. 938, 131 So. 330 (1930). To interpret Art. VIII, Sec. 2(b), Fla. Const., as authorizing the State Legislature to vest municipal legislative powers in an appointed board essentially results in the disenfranchisement of the municipal electorate. Surely it was not the intent of the electors, in passing Art. VIII, Fla. Const., to give to someone else their right to vote on those persons who would exercise the legislative powers of the community and thus exert a substantial impact over the citizens' day-to-day lives.

The spirit as well as the letter of the Constitution should be preserved and given full force and effect. Amos v. Mathews, supra. The spirit of Art. VIII, Sec. 2(b), is to allow discretionary local decisions to be made at the local level by local elected officials.

Whether the City Commission appoints the members or the Legislature appoints the members, the fact remains that a holding that the Legislature can vest municipal legislative powers in an appointed board is the same as to hold that the Legislature can effectively eliminate the citizens of a community from the process of electing those persons who will in part exert legislative control over their day-to-day lives. This turns the spirit of home rule on its ear. It embarks upon a path that rationally leads to government centralized in Tallahassee with the State Legislature instilled with the power to vest agents of the State, through the power of appointment, with the authority to decide what is best for the citizens of a community; a holding that embarks on a path that amounts to the antithesis of the spirit of Art. VIII, Sec. 2, Fla. Const. If the Legislature can do

this, it can deprive every citizen in this State of every vestige of local self-government, and impose upon them the rule of governing bodies in whose selection they have no choice; a principal utterly at variance to American history, traditions, and ideals of government. Can the Legislature set up a police district or a fire district or any other district to perform municipal government, and vest legislative powers in boards appointed by the Legislature and thereby impose upon the citizens of a community the rule of governing bodies in whose selection they had no choice? When the Constitution was framed, there can be no doubt that the makers of the Constitution had in mind, when using the second sentence of Art. VIII, Sec. 2(b), Fla. Const., that the citizens of the communities of this State would have certain powers, among them the power of selection of all persons who will invoke the municipal legislative powers of the community. This concept was and has been for years an essential feature of local government in this country. To hold otherwise is to rob local government of its soul.

The functions vested in the Utility Authority by Ch. 69-1215, Laws of Florida, as amended by Ch. 72-591, Laws of Florida, and Ch. 73-524, Laws of Florida, concern the construction, operation, and ownership of all municipal utilities within the City of Lake Worth and it is beyond question that the construction, ownership, and operation of public utilities serves a municipal purpose and constitutes a municipal service. Jacksonville Electric Light Company v. City of Jacksonville, 36 Fla. 229, 18 So. 677 (1895), electric utility; State v. City of Miami, 146 Fla. 266, 200 So. 535 (1941), water systems; State v. City of Miami, 157 Fla. 726, 27 So.2d 118 (1946), sewer system; see also Cooksey v. Utilities Commission, 261 So.2d 129 (Fla. 1972).

It is equally clear that the members of the Authority are authorized to exercise legislative powers in conjunction with the operation of its municipal utilities and the provision of its municipal utility services. The term "legislative power" has been defined as the power to pass rules of law for the regulation of people or property, and the term "legislative function" has been held to involve the exercise of discretion as to the contents of the law, the policy of the law, and the selection of the means to be used in accomplishing the stated purpose of the law. 16 C.J.S., Constitutional Laws, Sec. 106. It has been said that, absent constitutional limitations, the sole brake on the exercise of legislative power is the exercise of the legislative body's discretion. State v. Board of Public Instruction for Dade County, 126 Fla. 142, 170 So. 602 (1936). This Court has held that where a legislative body exercises its legislative power, the limit of the Court's authority is to measure the validity of the resulting enactment by the requirements of controlling law and, if met, the legislation should be upheld; it is not the function of the Court to explore the wisdom or advisability of the enactment. State ex rel. Eichebaum v. Cochran, 114 So.2d 797 (Fla. 1959). This Court has also held that there is a presumption that legislative determinations or findings of fact are correct and should not be voided absent a clear showing that they are arbitrary, oppressive, discriminatory, or without basis in reason or justification. City of New Smyrna Beach v. Fish, 384 So.2d 1272 (Fla. 1980).

The City's control over the Authority's utility business is trifling

and insignificant.[4] By comparison, the Authority's powers evidence those of a city within a city. The Authority's enabling legislation, Ch. 69-1215, Laws of Florida, provides in part that the Authority:

> ...shall be responsible for the development, production, purchase and distribution of all electricity, gas, water, sanitary sewer collection and disposal, and other utility services by the City. The Authority shall have exclusive jurisdiction, control, and management of the utilities of the City and all its operations and facilities. The Authority shall have all the powers and duties possessed by the City to construct, acquire, expand and operate utility systems, and to do any and all acts or things that are necessary, convenient, or desirable in order to operate, maintain, enlarge, extend, preserve and promote an orderly, economic and businesslike administration of the utility system. The Authority shall operate as a separate unit of government; and except as otherwise provided in this Act, the Authority shall be free from the jurisdiction, direction, and control of other city officers and of the City Commission.

Ch. 69-1215, Sec. 1, Laws of Florida. In addition to these general powers,

[4]While the City is responsible for the appointment of the initial members of the Authority, subsequent successor members are nominated by the Authority, and the nominations are approved by the City Commission, Ch. 69-1215, Sec. 1(1), Laws of Florida. Vacancies are filled in the same manner as the successors are appointed. Ch. 69-1215, Sec. 1(2), Laws of Florida. The Mayor, the City Manager, or a City Commissioner may sit on the Authority, but only as a non-voting ex officio member. Ch. 69-1215, Sec. 1, Laws of Florida. The City Commission may remove a member only for malfeasance, misfeasance, or nonfeasnace in office, or upon conviction of a felony. Ch. 69-1215, Sec. 1(2), Laws of Florida. The City Commission may not initiate the consolidation of various portions of the utility operations with other city operations in order to promote the efficient and economical operation of the utilities, it may only approve a consolidation initiated by the Authority. Ch. 69-1215, Sec. 7, Laws of Florida. The City Commission may approve any franchise purchase. Ch. 69-1215, Sec. 8(1), Laws of Florida. The Authority need not gain Commission approval to enter into a joint venture with another party to use the City's property. Ch. 69-1215, Sec. 8(3), Laws of Florida. In using City right-of-way in conjunction with its utility operations, the Authority need only adhere to City regulations regarding right-of-way restoration. Ch. 69-1215, Sec. 5, Laws of Florida. The City can require that the Authority provide the City an annual financial report and can require that the Authority's annual audit be conducted by a certified public accountant appointed by the Commission. Ch. 69-1215, Sec. 8(12), Laws of Florida. Finally, the Authority need only transfer 10% of the Authority's gross revenues of the water and sewer systems, after provision is made for the Authority's operating and maintenance expense, its debt obligations, and like, to the City's general revenue fund. Ch. 69-1215, Sec. 11, Laws of Florida.

the Authority is vested with the discretion to exercise a vast array of powers over which the City's elected body or its citizens have virtually little or no control.[5] Chief among these powers are the Authority's ability to fix the rates to be charged for gas, electricity, water, sanitary sewer, and other utility servcies sold and rendered, to exercise the power of eminent domain, to adopt a budget and authorize, expend, and appropriate the funds of the utilities, and to issue and sell revenue bonds which shall be the obligations of the City. Ch. 69-1215, Sec. 8(4), (6), (8) and (12), Laws of Florida.

Since Miami Bridge Company v. Miami Beach Railway Company, 152 Fla. 458 12 So.2d 438 (1943), this Court has held that rate-making is a legislative function. See also Charlotte County v. Rampart Utilities, 455 So.2d 455 (Fla. 2nd DCA 1984). As such, the Courts' review of the fixed rates are confined to striking down rates which are clearly unreasonable and unjust. Id. Similarly, the Public Service Commission's jurisdiction over municipal electric utilities is limited generally to prescribing the rate structures of

[5] The Authority has the power to nominate its own members, Ch. 69-1215, Secs. 2(1) and (2), Laws of Florida, establish separate divisions for its electric, water, and other utility operations, Ch. 69-1215, Sec. 3, Laws of Florida, appoint its own utilities director and professional staff, Ch. 69-1215, Sec. 4, Laws of Florida and initiate the consolidation of the utility operations with other city operations. Ch. 69-1215, Sec. 7, Laws of Florida. It is also vested with the discretion and the power to purchase property in the name of the City, to adopt regulations governing extensions of its utility services and compensation therefor, to contract with any public or private entity or person for the joint use of poles and other property owned by the City, to use the City's public right-of-ways in the operation of its utilities, to borrow funds, and to invest idle utility funds. Ch. 69-1215, Sec. 8, Laws of Florida.

municipal electric utilities and to resolving territorial disputes involving municipal electric utilities. Sec. 366.02(1), Fla. Stat.; Sec. 366.04(2), Fla. Stat. The PSC has no jurisdiction over municipally owned water and sewer systems. Sec. 367.022(2), Fla. Stat. In fact, in City of Ormond Beach v. Mayo, 330 So.2d 524 (Fla. 1st DCA 1976), the 1st DCA held that the PSC lacked standing to attack the City's water rates.

In exercising the power of eminent domain, the Authority's determination of necessity for appropriating private property for a public use is initially a legislative determination. Indeed, the use of the proposed improvement, the extent of the public necessity for its construction, the expediency of constructing the improvement, the suitableness of the location selected, and the consequent necessity of taking the land selected, are all questions resting in the Legislature's discretion. 21, Fla.Jur.2d, Eminent Domain, Sec. 54. Generally, in reviewing the Authority's exercise of this legislative discretion, the Court's function is primarily to determine if the particular use is a public use, Wilton v. St. John's County, 98 Fla. 26, 123 So. 527 (1929), and to determine the amount of the compensation to be awarded. Danial v. State Road Department, 170 So.2d 846 (Fla. 1964).

The Authority is vested with the powers to issue revenue bonds without consent of the City Commission and to adopt a budget outlining the Authority's appropriations and expenditures for the ensuing year. The revenue bonds issued by the Authority are considered obligations of the City and the City does not approve or oversee the Authority's budget. The fiscal responsibility of government lies ultimately in the legislative branch, Pearl v. Lomelo, 416 So.2d 489 (Fla. 4th DCA 1982), and it is clear that the discretionary powers to appropriate funds for a lawful purpose and to issue revenue bonds are

legislative. State v. Green, 95 Fla. 117, 116 So. 66 (1928); Crowe v. City of Jacksonville Beach, 167 So.2d 753 (Fla. 1st DCA 1964). In Crowe, an action was brought to enjoin the City from expending proceeds derived from the sale of revenue bonds for the purchase of lands and the construction of improvements thereon. The complaint alleged the expenditure was illegal and an extravagant use of public funds thereby amounting to an arbitrary action and an abuse of discretion by the City. In response, Judge Wigginton, speaking for the Court, observed:

> While the issues raised by the complaint may form the basis for opposition to the council members' bid for re-election to office, they deal with acts lying within the discretion of the council with which courts are reluctant to interfere. As said by the Supreme Court of Florida in the Town of Riviera Beach case:
>
> "'"With the exercise of discretionary powers, courts rarely, and for only grave reasons, interfere. These grave reasons are found only where fraud, corruption, improper motives or influence, plain disregard of duty, gross abuse of power or violation of law, enter into and characterize the result. Difference in opinion or judgment is never a sufficient ground for interference." If the result of a given action, as the letting of a contract of an improvement, the construction and operation of a particular utility or the enactment of a certain ordinance, is an economic mistake, a municipal extravagance, and an improper burden upon the taxpayers, as so often urged in the contests of this nature, the prevailing answer of the courts is that the remedy, if any exists, is at the ballot box, rather than by injunction or other court proceeding. It may be stated broadly that this immunity from judicial control embraces the exercise of all municipal powers, whether legislative or administrative, which are strictly discretionary'."

167 So.2d at 755-756 (citations omitted).

Amicus respectfully submits that the above quote constitutes the gravamen of amicus' contention. Ch. 69-1215, Laws of Florida, vests a wide array of legislative powers in the Authority. The Authority's unfettered discretion is largely unchecked by the elected City Commission as well as the Courts.

If the Authority exercises its legislative powers injudiciously, the electors have virtually no power to redress injuries sustained as a result of the Authority's action because their main avenue of redress, the ballot box, has been foreclosed.

Such a total alienation of legislative powers from the elected body in the utility areas is an obvious violation of the overall scheme of Art. VIII, Sec. 2(b), Fla. Const. While this Court has granted the Legislature wide discretion to alienate municipal utility powers from the elective body where the transfer was accomplished prior to the 1968 Constitution, Cooksey v. Utilities Commission, 261 So.2d 129 (1972), City of Orlando v. Evans, 132 Fla. 609, 182 So. 264 (1938), Cobo v. O'Bryant, 116 So.2d 233 (Fla. 1959), none of these cases interpreted the propriety of such transfer after the adoption of Art. VIII, Sec. 2(b).

The previous interpretations were based upon a traditional delegation of powers analysis which focused upon the adequacy of standards where legislative powers had in fact been delegated to a non-elected board. Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983).

Such analysis is no longer valid after the people have expressed their desires that their municipal legislative powers be exercised by an elected body. Article VIII, Sec. 2(b), Fla. Const. (1968).

CONCLUSION

Based upon the cases, authorities and policies cited herein, the League respectfully requests this Honorable Court to Affirm the Decision of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Frank A. Kreidler, Esquire, 521 Lake Avenue, Lake Worth, Florida 33460; Donald P. Kohl, Esquire, 303 S. Congress Avenue, Suite 1-A, Palm Springs, Florida 33461 and Arthur C. Koski, Esquire, Tower Building B, Suite 140, 2300 West Glades Road, Boca Raton, Florida 33431, attorneys for the Appellants, Lake Worth Utilities Authority; and Thomas M. Forbes, Esquire, 521 Lake Avenue, Suite 3, Lake Worth, Florida 33460 and James M. Adams, Esquire, Gibson and Adams, 303 First Street, Post Office Box 1629, West Palm Beach, Florida, attorney for the Appellee, City of Lake Worth, on this 6th day of December, 1984

James P Cobb

Attorney