IN THE SUPREME COURT OF FLORIDA

LAKE WORTH UTILITIES AUTHORITY, et al., Appellants, vs. CITY OF LAKE WORTH, Appellee.	)	CASE NO. 66,102

APPEAL FROM THE FIFTEENTH CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA, AS CERTIFIED TO THE SUPREME COURT BY THE FOURTH DISTRICT COURT OF APPEAL.

BRIEF OF APPELLEE

GIBSON & ADAMS
Attorneys for Appellee
303 First Street
Suite 400
Post Office Box 1629
West Palm Beach, FL. 33402
Telephone: (305) 655-8686

TABLE OF CONTENTS

PREFACE

This is an appeal by the Lake Worth Utility Authority and Thomas M. Forbes from an Order of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, dismissing a Countercomplaint by the Lake Worth Utility Authority and Thomas M. Forbes against the City of Lake Worth and declaring that Special Act, Chapter 69-1215, which purported to create the Lake Worth Utility Authority, was unconstitutional. The Appellate Court for the Fourth District of Florida certified the appeal, without review, to the Supreme Court and this Court accepted jurisdiction.

The parties will be referred to in this Brief as:

Lake Worth Utility Authority and Thomas M. Forbes as Authority or Appellants.

City of Lake Worth as City or Appellee.

References used in this Brief are:

(R-) Appropriate page of Record on Appeal.

(A-) Appropriate page of Appellee's Appendix.

TABLE OF CITATIONS

CONSTITUTIONS:

STATEMENT OF THE CASE

The people of Florida adopted the 1968 Constitution and thereby approved constitutional home rule for municipalities. Article VIII, Section 2(b) vests municipalities with the three powers necessary for constitutional home rule: "governmental, corporate and proprietary". Article VIII, Section 2(b), also permits municipalities to exercise "any power for municipal purposes, except as otherwise provided by law".

The legislature adopted Chapter 69-1215 which became effective in November, 1969. Chapter 69-1215 created the Lake Worth Utilities Authority and transferred to that "independent agency" of the City of Lake Worth all governmental, corporate and proprietary powers of the City concerning municipal water, sewer and electric service, a violation of Article VIII, Section 2(b) and Article VIII, Section 4. The governing board of this Authority was non-elected, a violation of Article VIII, Section 2(b).

In 1973, the Florida Legislature adopted Chapter 73-129 to enable and implement the constitutional home rule provided for in Article VIII, Section 2(b). Florida Statutes 166.021(5) specifically empowers the legislative body of a municipality to amend or repeal prior special acts of the

legislature which pertain to a particular municipality, such as, Chapter 69-1215.

The City of Lake Worth acquiesced in the continued existence and operation of the Lake Worth Utilities Authority, because its existence was believed to be lawful, and because its presence was, for a time, benign. On May 29, 1984, the City repealed Chapter 69-1215, abolishing the Lake Worth Utilities Authority, and assumed control of all municipal utility operations in accordance with the City Charter.

The Lake Worth Utilities Authority sought a mandatory injunction in a pending action: (City Of Lake Worth v. Lake Worth Utilities Authority, Case No. 84-1876 CA(L) J, Circuit Court, Fifteenth Judicial Circuit.)

The City responded with a Motion to Dismiss with prejudice, raising the constitutional infirmities of Chapter 69-1215. Following argument and extensive briefing by the parties, the Court below granted the City's Motion to Dismiss with prejudice. In so doing, the Court ruled as follows:

> 1. Chapter 69-1215 is unconstitutional, and has been unconstitutional, since its inception, as the Legislature of the State of Florida has no authority to transfer from the duly elected legislative body of a municipality its constitutionally vested governmental, corporate, and proprietary powers to perform municipal functions and render municipal services. Article VIII, Section 2(b), Constitution of the State of Florida, 1968.

2. Article III, Section 11(a), Constitution of the State of Florida, 1968, does not authorize the Legislature to pass laws, such as Chapter 69-1215 and the Chapter cannot survive the constitutional attack made upon it.

3. Charter 69-1215 suffers from additional constitutional infirmities. In creating the "Authority" and prescribing its powers and authority, the Legislature provided the "Authority" to 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" obviously exercises municipal-legislative functions, but its members are non elective.

4. The court agrees with the "City's" position, that had Chapter 69-1215 been constitutional in its inception, it was properly repealed by the ordinances under consideration. However, as the court rules the chapter was unconstitutional in its inception, this matter will not be further discussed. (R 468)

Motion for Rehearing was denied on July 31, 1984. Notice of Appeal was filed August 3, 1984, to the Fourth District Court of Appeal. The Fourth District Court certified this case to the Florida Supreme Court on October 31, 1984. The Florida Supreme Court accepted jurisdiction herein by its Order of November 11, 1984.

POINTS ON APPEAL

I

IS THE STATE LEGISLATURE EMPOWERED BY ARTICLE III TO TRANSFER BY SPECIAL ACT FROM THE CITY OF LAKE WORTH GOVERNMENTAL, CORPORATE, AND PROPRIETARY POWERS MANDATED TO THAT CITY BY ARTICLE VIII SECTION 2(B)?

II

WHETHER CHAPTER 69-1215 IS UNCONSTITUTIONAL BECAUSE IT ATTEMPTS TO CREATE A MUNICIPAL GOVERNMENTAL AGENCY HAVING LEGISLATIVE POWERS WHICH ARE EXERCISED BY NON ELECTED OFFICIALS, CONTRARY TO THE REQUIREMENT OF ARTICLE VIII, SECTION 2B?

III

WHETHER CHAPTER 69-1215, IF CONSTITUTIONAL, BECAME A MUNICIPAL ORDINANCE PURSUANT TO FLORIDA STATUTE 166.021(5) AND WAS PROPERLY REPEALED BY CITY OF LAKE WORTH ORDINANCES 84-12 THROUGH 84-15?

IV

WHETHER ATTORNEYS FOR THE FORMER LAKE WORTH UTILITIES AUTHORITY AND ITS FORMER DIRECTOR FORBES ARE ENTITLED TO ATTORNEYS FEES AND COSTS FROM PUBLIC FUNDS OF THE CITY OF LAKE WORTH?

POINT I

IS THE STATE LEGISLATURE EMPOWERED BY ARTICLE III TO TRANSFER BY SPECIAL ACT FROM THE CITY OF LAKE WORTH GOVERNMENTAL, CORPORATE AND PROPRIETARY POWERS MANDATED TO THAT CITY BY ARTICLE VIII SECTION 2(B)?

The trial judge answered this question in the negative in his order of July 5, 1984, as follows:

> 1. Chapter 69-1215 is unconstitutional, and has been unconstitutional, since its inception, as the Legislature of the State of Florida has no authority to transfer from the duly elected legislative body of a municipality its constitutionally vested governmental, corporate, and proprietary powers to perform municipal functions and render municipal services. Article VIII, Section 2(b), Constitution of the State of Florida, 1968.
>
> 2. Article III, Section 11(a), Constitution of the State of Florida, 1968, does not authorize the Legislature to pass laws, such as Chapter 69-1215 and the Chapter cannot survive the constitutional attack made upon it. (R 468)

This case presents this Court with first impression constitutional issues concerning Article VIII, Sections 2 and 4, and Article III, Section 11. In our brief we have followed the prior decisions of this Court concerning methods of constitutional analysis and interpretation.

Gray v. Bryant, 125 So.2d 846 (Fla. 1960) is particularly instructive:

> [4] The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision

> lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. State ex rel. City of Fulton v. Smith, 1946, 355 Mo. 27, 194 S.W.2d 302. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing. City of Shawnee v. Williamson, Okl.1959, 338 P.2d 355. The fact that the right granted by the provision may be supplemented by legislation, further protecting the right or making it available, does not of itself prevent the provision from being self-executing. People v. Carroll, 1958, 3 N.Y.2d 686, 171 N.Y.S.2d 812, 148 N.E.2d 875. Id. at 851. (Emphasis supplied.)
>
> * * * *
>
> [5] The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people. (Emphasis supplied.) Id. at 851.

The Court then compares the present Constitution with the prior one and concludes that the people intended to depart from the prior system:

> [6] The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfil the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.

* * * *

> Where there is a choice as here such a constitutional provision must always be construed to be self-executing for such construction avoids the occasion by which the people's will may be frustrated. Gray, Id. at 852.

We have also been guided by Schreiner v. McKenzie Tank Lines, 408 So.2d 711 (1 DCA Fla. 1982), wherein that Court states:

> [3] Our view that the constitutional provision is self-executing is reinforced by Plante, supra, at 936. "A constitutional provision is to be construed in such a manner as to make it meaningful. A construction that nullifies a specific clause will not be given unless absolutely required by the context." Id. Since there were no statutory enforcement provisions in effect to provide relief between 1974, when Article I, Section 2 was amended to include the physically handicapped, and July 1, 1978, which was the effective date of the statutory protections, the only relief available would be based on the constitutional provision. A decision that the constitutional provision is not self-executing would in effect cause the provision to have been null during that period. This would negate the will of the people in approving this amendment to the constitution, and the will of the people is always the paramount consideration in determining the self-executing nature of a provision. Gray, supra, at 851. Id. at 714. (Emphasis supplied.)

We begin with a comparison of the power relationship which existed between municipalities and the state legislature, in the 1885 Constitution and the 1968 Constitution. A comparison of the two Constitutions

demonstrates a clear intention to effect a change in this power relationship. We will show that the Florida Legislature intends municipalities to have broad home rule powers over local affairs. Finally, we will show that the legislative action of the City of Lake Worth, here under review, was authorized by the 1968 Constitution and Chapter 73-129.

Under the 1885 Constitution, the Legislature was given the power over municipalities in Article VIII, Section 8:

> The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. When any municipality shall be abolished, provision shall be made for the protection of its creditors. (Emphasis supplied.)

Because of this provision, we believe Ch. 69-1215 would have been constitutional under the 1885 Constitution, for the legislature was apparently empowered to create "independent municipal utility authorities". Such agencies, if empowered by the 1885 Constitution, should not be threatened by the holding in this case.

The 1968 Constitution changed the power relationship between the municipalities of Florida and the State Legislature in two fundamental ways.

The language quoted above, which grants legislative control over the powers and jurisdiction of municipalities, is omitted from the 1968 Constitution. This omission is

indicative of the intent of the drafters to effect a change in this power relationship.

"A difference between the language of a provision in a revised state constitution and that of a similar provision in the preceding state constitution is viewed as indicative of a difference in purpose." 16 Am.Jur.2d Constitutional Law, Section 120.

If it had been the intention of the drafters of the 1968 Constitution that the powers of the State Legislature over municipalities remain unchanged, the language of the 1885 Constitution would have been carried forward unaltered. In contrast, the 1968 Constitution omits the above language.

The 1968 Constitution in Article VIII, Section 2 speaks directly to the status of municipalities in Florida, unlike the 1885 Constitution. Thus a comparison of the two Constitutions indicates that a change in the power relationship was intended.

Article VIII, Section 2(b) provides as follows:

> 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.

The above language contains four grants of power to municipalities. For purposes of illustration, we restate these four Grants of Power as follows:

1. First Grant: Municipalities shall have (possess) governmental powers to enable them to conduct municipal government, perform municipal functions, and render municipal services.

2. Second Grant: Municipalities shall have (possess) corporate powers, to enable them to conduct municipal government, perform municipal functions and render municipal services.

3. Third Grant: Municipalities shall have (possess) proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services.

These three grants were self executing, and vested in each municipality upon the adoption of Article VIII; the vesting instrument being the existing municipal charter. Otherwise, municipalities lawfully exercising power pursuant to the 1885 Constitution would have lost their source of constitutional power upon adoption of the 1968 Constitution. Since "all political power is inherent in the people", power would reside in the people until the legislature subsequently enabled and implemented Article VIII.

Our contention is supported by the Schedule to Article VIII in Section 6(b) thereof. This provides that the "status of municipalities, their powers, jurisdiction, and

government," shall be continued upon the effective date of Article VIII. Since municipalities, upon the effective date of Article VIII, no longer derive their powers through the State Legislature, municipalities must be empowered by the 1968 Constitution or they have no power. Article IV, Section 7 indicates that municipal powers vest through the municipal charter. The vesting of these three mandatory powers provides the minimum power necessary for the continuation of the status quo on the effective date of Article VIII.

The "Fourth Power Grant" was discretionary. This grant was non-self executing, requiring enabling and implementing legislation before this power could vest. The State Legislature determined the dimensions of this Fourth Power Grant, and provided the mechanism for its exercise in the Municipal Home Rule Powers Act, 73-129. These statutes enable and implement the Fourth Grant of Article VIII, Section 2(b):

Fourth Grant: Municipalities may exercise Any Power for Municipal Purposes, except as otherwise provided by law. "May Exercise" means that Municipalities are "constitutionally permitted" but not "empowered" to exercise "any power for municipal purposes".

This "Fourth Grant" is connected to the three mandatory grants by the conjunctive "and". A common meaning

for "and" is "in addition". (Black's Law Dictionary at 112 [4th Ed. Rev., 1968].)

The Supreme Court of Ohio faced this issue in the interpretation of the Ohio Home Rule provision. The Ohio power grants are different from Art. VIII, Sec. 2(b), but the structure of the grants is identical. The Ohio Home Rule article reads as follows:

> S. 3 [Powers]
> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Adopted September 3, 1912.) Art. 18, Sec. 3. (Emphasis supplied.)

In Fitzgerald v. City of Cleveland, 103 N.E. 512 (Ohio 1913), Justice Wanamaker analyzes the Ohio power grants as follows:

> The first half of section 3, article XVIII, known as the home rule amendment, clearly refers to nothing but municipal powers when it says: "Municipalities shall have authority to exercise all powers of local self-government." The last half of section 3, article VII, is as follows: "And to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." It is contended that this last half cuts down or subtracts from the grant of power in the first half. Now, if I understand the conjunction "and", it means addition, not subtraction. One of the first lessons of the child in simple arithmetic is put on the blackboard thus: 5 and 4 equal 9. Suppose the teacher taught the child that 5 and 4 equal 1, on the ground that "and" meant to cut down or subtract, how long would the teacher hold his job? And yet this theory is

> just as tenable as to say that the second half of section 3, beginning with "and", cuts down or subtracts from the first half. The first half relates wholly to municipal power. The last half relates wholly to state power. The first half is as unlimited as the second half is limited. The second half could not possibly relate to municipal power, because the first half is as comprehensive as a grant of power could be, and therefore no addition could be made to it. If it be claimed that "not in conflict with general laws", as found in the second half, modifies also the first half, then it must follow that all municipalities are as absolutely under the control and domination of the state Legislature to-day as they were before the adoption of the home rule amendment, because all general laws now on the statute books would be preserved, and future Legislatures might proceed with municipal legislation at their pleasure. Home rule would be but an empty eggshell, a mere snare and ideality. See also, Canada v. Phillips, 151 N.E.2d 722 (Ohio 1958). (Emphasis supplied.)

Appellants argue that the language which follows the word "and" in VIII, 2(b), may be used to subtract from the power grants which precede the "and". They argue that the words "except as otherwise provided by law" in VIII, 2(b) have the effect of "Re Vesting" in the State Legislature the power it possessed over municipalities under the 1885 Constitution. The trial judge correctly observed that such a construction would mean that the changes, intentionally incorporated in the 1968 Constitution, have no real effect.

In City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972), implicit in the majority opinion is the prior vesting of governmental, corporate, and proprietary

powers. The City was before the Court in its "corporate" identity, and the ability of the City to enact ordinances (a governmental power) is not questioned. The issue there presented was whether the City possessed powers which extended beyond the mandated "governmental, corporate, and proprietary powers" to the power of "rent control".

The majority opinion's emphasis upon the importance of the Municipal Charter conforms to our position that it is the Municipal Charter through which constitutional powers vest. The majority emphasizes that the very term "municipal" imposes limits upon the exercise of home rule. The majority advises municipalities that they have not received "omnipotence" however, and that certain matters are by their nature reserved to the State; such as, master-servant relationships, landlord-tenant relationships, and matters of descent and administration of estates.

In his Dissent, Justice Erwin contends that all municipal powers contained in Article VIII 2(b) have already vested in municipalities and that no additional legislation is required to implement the power grants. Under either the majority position, or the minority position, the first three powers vest at the time of the adoption of Article VIII.

Home Rule was again before this Court in City of Miami Beach v. Forte Towers, Inc., 305 So.2d 764 (Fla. 1974).

Forte, supra, declares Florida Statute 166.021 to be constitutional. The Court affirms that, at the time of Fleetwood, supra, the City did not have power to enact rent control, but subsequent to the enactment of Florida Statute 166.021, the City had such power. The Court states that the City is now "further empowered" by virtue of Florida Statute 166.021.

We direct the Court's attention to the specific language and sentence structure employed by Justice Dekle:

> "It provides, in new F.S. s. 166.021(1), that municipalities shall have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services; it further enables them to exercise any power for municipal services, except when expressly prohibited by law. (Emphasis supplied).

The first portion of the sentence describing 166.021(1) is a restatement of that portion of Article VIII, 2b, we contend to be self executing, mandatory, power grants. The verb "provides" rather than "enables" is used in the first portion of the sentence. The second portion of the sentence, significantly separated by a semi-colon, is said to "enable" municipalities to exercise this additional grant of power. The Court here illustrates in the language above that the provision "except when expressly prohibited by law" does not apply to the self executing powers (governmental, corporate,

and proprietary). The second portion of the grant alone was "enabling", because the prior "power grants" had already vested (were self executing).

The Court then eliminates the definition of "municipal purposes" as being a factor in the vesting of the additional municipal powers.

The same sentence structure is used by this Court in Contractors & Builders Association v. Dunedin, 329 So.2d 314 (Fla. 1976). Therein we find the following:

> Municipal corporations have "governmental, corporate and proprietary powers" and "may exercise any power for municipal purposes, except as otherwise provided by law".

A consistent statement from this Court may be found in State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978):

> Article VIII, Section 2, Florida Constitution, expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose". It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority. (Emphasis supplied).

While we take comfort in the consistent statements of this Court, the Constitution itself provides compelling evidence that our position is correct.

The Constitution provides in Article VIII, Section 4 a specific method whereby powers vested pursuant to Article VIII

may be transferred. The legislature is not here empowered to transfer municipal powers by special act, nor does Article III so empower the legislature. This omission previously discussed is indicative of a change of purpose by the drafters.

Article VIII, Section 4 provides that municipal powers may only be transferred to another County, Municipality, or Special District. An examination of 69-1215 establishes without question that it purports to transfer municipal powers to a simultaneously created agency, which is a "part of the City of Lake Worth", and which therefore cannot be "another county, municipality, or special district". (R 95)

The transfer of powers section was recently interpreted by the Fourth District Court of Appeal in City of Fort Lauderdale v. Cox v. Broward County v. Carroll, (October 10, 1984), 9 FLW 2171, as follows:

> This provision has been interpreted by the Florida Supreme Court to require a "resolution of the governing bodies of each of the governments affected." Sarasota County v. Town of Longboat, 355 So.2d 1197 (Fla. 1978).

As Chief Justice Roberts said, in Dade County Class. Teach. Ass'n., Inc. v. Legislature, 269 So.2d 684, 686 (Fla. 1972):

> When the people have spoken through their organic law concerning their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; however, in the absence of appropriate legislative action, it is the responsibility of the courts to do so.

> [5] Where people in a constitution or charter vote themselves a governmental benefit or privilege, they the people in whom the power of government is finally reposed, have the right to have their constitutional rights enforced... (Emphasis supplied.)

Although the appellate courts of Florida have not addressed the issue here raised, the Louisiana Court of Appeals has done so. In La Fleur v. City of Baton Rouge, 124 So.2d 374, 379 (1 DCA La. 1960), the Court said as follows:

> [5,6] A municipality, where created by legislative mandate in accordance with the Constitution, is granted powers and authority which are subject to change by the Legislature but where the creation of the municipality has its origin in the Constitution itself, then the Legislature is not vested with authority to alter, change or interfere with the powers and authority so granted to the municipality.... (Emphasis supplied.)

In a case dealing with other issues, the Second District discussed the new Constitutional status of municipalities in City of Temple Terrace v. Hillsborough Ass'n., Etc., 322 So.2d 571, 576 (2 DCA Fla. 1975), the Court commented:

> Superior Sovereign Test
>
> [4] The argument in favor of this view is that since a municipality is a creature of the state legislature, it should not be permitted to use its zoning to thwart a state function. The premise upon which this contention is made seems to have been weakened by the adoption of Florida's new Constitution. Article VIII,. . .

> Thus, even though municipalities may be created by statute, their powers are derived from the Constitution. (Emphasis supplied.)

Although the case deals with sovereign immunity, the opinion of Justice Overton in Cauley v. City of Jacksonville, 403 So.2d 379, 385 (Fla. 1981), addresses the new status of municipalities:

> We note that section 768.28 also furthers the philosophy of Florida's present constitution that all local governmental entities be treated equally. Since 1968, municipal corporations, counties, and school districts have been in constitutional parity with one another and possess equal taxing powers. Art. VIII, Fla.Const.

Justice Overton further comments as follows:

> "Municipalities can no longer be identified as partial outcasts as opposed to other constitutionally authorized local governmental entities."

City of Safety Harbor v. City of Clearwater, 330 So.2d 840, 841 (2nd DCA Fla. 1976), is a case wherein two cities entered into a contract concerning future annexation areas. In holding that a city may not contract away its powers, the Court said as follows:

> [1] Article VIII, Sec. 2(c), of the Florida constitution of 1968, provides that annexation of unincorporated lands by a municipality must be exercised as provided by general or special law. The legislature granted this power of annexation to Clearwater; Sec. 6(d) of the Charter of the City of Clearwater (Ch. 9710, Laws of Florida, Special Acts of 1923, as amended by Ch. 65-1386, Laws of Florida, Special Acts of 1965.) As in the case of other governmental authorities vested

in a municipality, this power cannot be contracted away. (Emphasis supplied.)

In the case of Tweed v. City of Cape Canaveral, 373 So.2d 408, 409 (4 DCA Fla 1979):

> [1-3] We reach a different conclusion in this case because Section 166.021, Florida Statutes (1973) effectively redefines the authority of the City Council to enter into longer term governmental function contracts with employees and this statute was not considered in our decision in City of Riviera Beach v. Witt, supra, and must be considered here. Although this statute can be characterized as an implementing statute under Art. VIII, Section 2(b), Florida Constitution we view it as expanding the authority of municipalities to govern and control themselves without state interference. (Emphasis supplied.)

In AGO-OP. 76-212, p. 413 (1976) we find:

> Chapter 166, F. S., is an attempt to return as broad a control as possible over municipal governmental matters directly to the municipalities. The provisions of s. 166.021 are to be construed so as to secure for municipalities the broad exercise of home-rule powers granted by the Constitution. Thus, in light of s. 2(b), Art. VIII, State Const., and s. 166.021, the continued validity of the Florida cases cited, infra, which adopted a restrictive view of municipal powers is highly questionable. Instead, Florida would appear to be among those states, such as Maryland, which do not resolve conflicts between the state and its political subdivisions on the sole basis of preemption but instead look also to the purpose of the local regulation in light of the home-rule powers possessed by municipalities. Cf. City of Temple Terrace, supra, at 577.

In the case of Edris v. Sebring Utilities Commission, 237 So.2d 585, 586 (2 DCA Fla. 1970), the Court determined that:

> [1] Admittedly, a municipality in operating a utility to supply service to its inhabitants is acting in its proprietary capacity and not in its governmental capacity, and is governed by the same laws and may exercise the same rights as a private corporation under the same circumstances.

Article VIII, Section 2(b) says municipalities shall have proprietary powers.

Furthermore, in Largo v. L & S Bait Company of Florida, 256 So.2d 412, 413 (2 DCA Fla. 1972), the Court observed:

> [1] It is the well settled law in the State of Florida that the construction and operation of a sewage disposal system is a governmental function.

Article VIII, Section 2(b) says municipalities shall have governmental powers.

Chapter 69-1215, in Section 1, purports to create, "... as a part of the government of Lake Worth", a "utilities authority" which shall:

1. Be responsible for the development, production, purchase, and distribution of all electric, gas, water, sanitary sewer collection and disposal and other utility services by the City.

2. The Authority shall have exclusive jurisdiction, control and management of the utilities of the City and all of its operations and facilities.

3. The Authority shall have all the powers and duties possessed by the City to construct, acquire, expand, and operate utility systems.

4. The Authority shall operate as a separate unit of city government.

5. The Authority shall be free from the jurisdiction, direction and control of other city officers and of the City Commission. (R 95)

From the above it is clear that Chapter 69-1215 attempts to transfer powers of the City to another simultaneously created "agency of the city". This is contrary to the mandate of the Constitution that the municipality shall have these governmental, corporate and proprietary powers.

There can be no doubt that the City of Lake Worth is properly "vested" with utility powers. Article VIII, Section 6(b) recognizes Lake Worth as the recipient of Constitutional powers upon the effective date of Article VIII.

The specific powers which "vested" in the City of Lake Worth through the City Charter with respect to utility operations are as follows:

> Section 3(9) Power to own public service systems.
>
> Section 3(10) Power of general water supply including power to furnish surplus water to outside municipalities.
>
> Section 3(11) Power to impose rates for public utilities.
>
> Section 3(15) Power to dispose of sewage.
>
> Section 3(40) Power to borrow money for purchasing and operating public utilities. (R 49)

These Charter powers, to the extent that they are governmental powers, or corporate powers, or proprietary powers are vested constitutional powers of the City of Lake

Worth pursuant to Article VIII Section 2(b) of the Florida Constitution and the City Charter. They may only be transferred in accordance with Article VIII, Section 4.

Appellant in his brief makes several statements about 69-1215 which are simply not true. He states as follows:

1. Ch. 69-1215 is an express prohibition against the exercise of municipal home rule power over the cities utility system. (P 15).

2. Ch. 69-1215 is authorized by Article III, Section 11(a)(1). (P 16).

3. Ch. 69-1215 is an amendment to the Lake Worth City Charter. (P 16).

4. The constitutionality of 69-1215 has been "ratified" by the Florida Supreme Court. (P 16).

An examination of 69-1215 reveals that neither the Title nor the Body of the Act contains any "express prohibition". 69-1215 rather purports to transfer vested municipal powers. For the same reason, 69-1215 is not an amendment to the City of Lake Worth Charter; it purports to be the Charter for the Lake Worth Utilities Authority, which it creates. If 69-1215 is a charter amendment or an express prohibition, its title violates Article III, Section 6 in that neither subject matter is contained in the title to 69-1215. (R 92)

In Article III, Section 11(a)(1), the legislature is not empowered to create new municipal agencies or to transfer municipal powers to other agencies. Appellants misread a

constitutional limitation upon the power of the legislature as an "empowering" provision of the Constitution. Properly read, Article III Section 11(a)(1) limits legislative powers to special acts which may pertain to the "election, jurisdiction or duties of officers of municipalities or local governmental agencies". The power to create a municipal agency and transfer vested municipal powers is nowhere to be found therein. This section merely preserves the legislative power to pass those types of special laws. Those special laws, however, must be consistent with the other provisions of the Constitution which limit the legislature in its power relationship with municipalities. i.e. Art. VIII Section 2 & 4.

The constitutionality of 69-1215 has never been ruled upon by the Florida Supreme Court or any Court prior to the July 5, 1984, order here appealed. State of Florida v. Florida Municipal Power Agency 428 So.2d 1387 (Fla. 1983) did not rule on the constitutionality of Special Act 69-1215. The issues here presented have never been raised before to our knowledge. It is a well established rule of law that, in the absence of fundamental error, the court will not, of its own volition, raise or voluntarily pass upon the constitutionality of an act of the legislature where the question of

constitutionality has not been raised. 10 Fla.Jur.2d, Constitutional Law, Section 53.

Appellants misunderstand the concept of Residual Home Rule (P. 12-13). Under Article VIII, Section 2(b) and 73-129, "residual home rule" means that Home Rule (inherent power) resides in municipalities and they may exercise "any power for municipal purpose" unless they are "expressly prohibited" from exercising power by the Constitution or law, or unless the subject matter has been "expressly preempted". Any power, not expressly denied to municipalities, "resides" with them.

Furthermore, Appellants' interpretation of the Legislature's intent to retain ultimate control is exactly the opposite of the Legislature's own statements of intent. The Florida Legislature has expressed its intent so clearly that no doubt should remain:

> F.S. 166.021(4)
> (4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.
>
> F.S. 166.042 Legislative intent.-
> (1) It is the legislative intent that the repeal by chapter 7-129, Laws of Florida, of chapter 167, 168, 169, 172, 174, 176, 178, 181,

> 183, and 184 of Florida Statutes shall not be interpreted to limit or restrict the powers of municipal officials, but shall be interpreted as a recognition of constitutional powers. It is, further, the legislative intent to recognize residual constitutional home rule powers in municipal government, and the Legislature finds that this can best be accomplished by the removal of legislative direction from the statutes. It is, further, the legislative intent that municipalities shall continue to exercise all powers heretofore conferred on municipalities by the chapters enumerated above, but shall hereafter exercise those powers at their own discretion subject only to the terms and conditions which they choose to prescribe. (Emphasis supplied).

The actions of the State Legislature are consistent with the intent expressed above. The Legislature chose to enable and implement the grant of "any power for municipal purposes". (F.S. 166.021[1].) The Legislature defined "municipal purpose" in the broadest possible terms. (F.S. 166.021[2].) The Legislature specifically made municipal charter amendments and ordinances superior to pre-existing special acts of that same legislature. (F.S. 166.021[4][5].) The Legislature gave municipalities the power to amend charters (F.S. 166.031). The Legislature repealed pre 1973 charter provisions that impair the free exercise of municipal home rule. (F.S. 166.021[4].) In the face of this overwhelming evidence of legislative intent, Appellant's argument is bizarre.

We were unable to locate the exact derivation of Article VIII, Section 2(b) in the State Archives. Our appendix contains a list of the materials examined and reviewed. Our research did confirm that "Home Rule" was intended. The final draft of Article VIII, Section 2(b) by the Constitutional Revision Commission reads as follows:

> (b) Powers. Municipalities shall have the power of self-government. They 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. (A 11)

That draft was changed in the Legislature to the present form. The phrase "power of self government" was removed. In floor debate in the Florida House of Representatives on August 29, 1967, this removal was explained as follows:

> SPEAKER - "Is there discussion or any questions?"
>
> MR. GISSENDANNER - "Mr. Danahy, why has the Committee shied away from the language "municipality shall have power of self-government?'
>
> DANAHY - "The senate version which is really before you in 681 strikes those words and the reasons that the Senators gave us and that we felt was a reasonable compromise in the spirit of the two body system which we have and we think is correct, is that really those words, perhaps in the case of a municipality, are superfluous, Mr. Gissendanner. (Emphasis supplied). (A 13)

One of the architects of Home Rule in the Florida House, then Representative Paul Danahy, now the distinguished jurist of Florida's 2nd District Court of Appeals, says "power of self government" was superfluous concerning municipalities.

Municipalities already possessed the "power of self government". They already possessed this power by virtue of their Charters granted pursuant to the 1885 Constitution. They already had corporate existence. They already possessed "governmental and proprietary" powers. Their "power source" originated, however, with the State Legislature, not the Constitution.

Our position is supported by the following quote from Note, Constitutional Law - State Constitution - City of Miami Beach Lacks Power Under Home Rule Provisions of 1968 Florida Constitution to Enact Rent Control Ordinance, 1 FSU L. Rev. 360, 364 (1972):

> 2) The draft of article VIII, section 2(b), of the proposed revised constitution of Florida, released on November 10, 1966, provided that "municipalities shall have the power of self-government". The use of such language during the drafting process indicates that the framers intended to effect some drastic change in the previously existing provision dealing with local government powers. Although the phrase was struck without comment from the House version of the revised constitution on a vote on an amendment in the House of Representatives on August 29, 1967, the staff report of the House Committee on Community Affairs, in reference to this deletion, stated that the "basic impact of

> the proposal was not greatly affected". Id. at 364. (Emphasis supplied.)

We reviewed numerous other law review articles and case notes. Our appendix contains a list of those we found helpful.

One of the significant historical documents we uncovered was a memorandum from John Wesley White, Local Government Analyst to the House Committee on Local Government, dated December 16, 1966. Mr. White discusses the two theories of local government then prevalent in the United States: The "creature theory" and the "Home Rule" theory. He reveals that Florida followed the "Creature theory" prior to the 1968 Constitution. Upon the adoption of the 1968 Constitution, Florida abandoned the "creature theory" in favor of the "inherent power" or "home rule" theory:

> The important difference between the two theories is that under the creature theory the Legislature is free to define what is a municipal affair without regard to whether or not it is of local concern; and, thus, the Legislature may freely invade such areas. Under the inherent right theory, on the other hand, the state would be stopped by the barrier of local concern which it could not penetrate.
>
> Basically, Article VIII of the 1968 Constitution adopts the inherent power theory with a few restrictions. The major restriction concerns the cities finance and taxing power, which must be granted by the state.
>
> The basic theory of home rule, then, is that it is synonymous with local autonomy, the freedom of a local unit of government to pursue self-determined goals without interference by the Legislature or other agencies of a state government. Legally, home rule describes a particular method for distributing power between

> state and local governments. Id. (Emphasis supplied). (A 17)

A return to the "creature theory" would return the "local bill evil". In State v. Orange County, 281 So.2d 310 (Fla. 1973) regarding county home rule powers provided for in Article VIII, this Court observed:

> "The object of Article VIII of the 1968 Constitution was to do away with the local bill evil."

Florida's constitutional home rule provision is unique. An examination of all existing Home Rule provisions in Constitutions of the United States, published by the Legislative Drafting and Research Fund of Columbia University, April 1984, indicates that the Ohio provision is similar to the Florida provision. For this reason, we have included in our appendix a list of various Ohio authorities.

While out of state authorities are available, the language of the Florida Constitution is so clear there is little room for interpretation. The intention of the drafters is clear: municipalities should have Home Rule. The people of Florida spoke through the adoption of Article VIII and said, "Municipalities Now Have Home Rule." The Florida Legislature through its statements of intent and its actions says "Municipalities Now Have Home Rule, and they have the maximum grant of home rule that the legislature can give". The opinions of this Court on Constitutional Construction, and

in Fleetwood, supra and Forte, supra, indicate there is no judicial restraint upon the exercise of home rule over local matters.

This Case presents this Court with the opportunity to resolve the question: Do municipalities in Florida have Home Rule or are they still merely creatures of the State?

For all the reasons above we respectfully submit that the answer must be in the affirmative and the decision of the Trial Court should be affirmed.

POINT II

WHETHER CHAPTER 69-1215 IS UNCONSTITUTIONAL BECAUSE IT ATTEMPTS TO CREATE A MUNICIPAL GOVERNMENTAL AGENCY HAVING LEGISLATIVE POWERS WHICH ARE EXERCISED BY NON ELECTED OFFICIALS CONTRARY TO THE REQUIREMENTS OF ARTICLE VIII, SECTION 2(B)?

The trial judge in his order of July 5, 1984, answered this question in the affirmative, stating:

> Charter 69-1215 suffers from additional constitutional infirmities. In creating the "Authority" and prescribing its powers and authority, the Legislature provided the "Authority" to 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."
>
> Chapter 69-1215 provided:
>
> "The Authority shall have <u>exclusive jurisdiction</u>, control and management of the utilities of the City, and all its operations and facilities. The Authority shall have <u>all the powers and duties possessed by the City</u> to construct, acquire, expand and operate utility systems, and to do any and all acts or things that are necessary, convenient, or desireable, to operate, maintain, enlarge, extend, preserve and promote an orderly and economic and business-like administration of the utility systems. <u>The Authority shall operate as a separate unit of city government</u>... [and] <u>shall be free from the jurisdiction, direction and control of other city officers and of the City Commission</u>." (emphasis supplied)
>
> Although the "Authority" is autonomous unto itself, it has the unique ability in Section 8 to issue and sell revenue bonds or certificates in such amounts as shall be deemed necessary to finance all or part of its costs of acquisition, etc. and the revenue bonds or certificates so

> issued become the obligations of the "City" of Lake Worth, which has no control over the "Authority!" The only limitation on this somewhat unusual financial provision is the "Authority" has no power to pledge the full faith and credit of the "City." The "Authority" obviously exercises municipal-legislative functions, but its members are non elective. (R 468)

There can be no doubt that the trial court's decision on this question is correct.

As has been shown, Article VIII provided municipalities in Florida with governmental, corporate and proprietary powers and added thereto "any power for municipal purposes". The drafters of this new Article granting Municipal Home Rule attached to the power grants a specific limitation upon the exercise of these powers.

The final sentence of Article VIII, Section 2(b) states very succinctly and clearly: "Each Municipal Legislative Body Shall Be Elected".

As this Court declared in Gray v. Bryant, supra:

> It is unncessary to apply rules of construction to arrive at the meaning of a constitutional provision when the language of the Constitution is clear and explicit. Id. at 862.

This sentence and the words employed appear to leave no room for interpretation. Their plain meaning is obvious. The use of the verb "shall" commands obedience. Furthermore, the entire Constitution is consistent with this requirement. At every level of government, the people of Florida through their

Constitution require that discretionary governmental powers be exercised by elected officials, because elected officials answer to the people. (Article III, Section 1; Article IV, Section 5; Article V, Sections 16, 17, 18; Article VIII, Section 1; Article IX, Section 4). This is the only method whereby the people retain control over their government.

Ch. 69-1215 states that the powers to be exercised by the Lake Worth Utilities Authority have their origin in the municipal powers of the City of Lake Worth. There is no dispute that the Lake Worth Utilities Authority is a municipal body. (R 92)

Ch. 69-1215 provides for an appointed board, free from the jurisdiction and control of the elected officials of the City. (Section 3.) This appointed board may control the nomination of successors in office. (Section 3.) The Lake Worth Utilities Authority Board is by law insulated from the electorate, and from the elected officials of the City of which they are a part. (R 92)

We have conceded that 69-1215 may have been permitted by the 1885 Constitution. The specific requirement that "each municipal legislative body shall be elected" was not present in the 1885 Constitution. Other municipal utility authorities lawfully empowered prior to the adoption of the 1968 Constitution may not be affected by this requirement. We believe this provision was intended to have prospective application only.

Ch. 69-1215 was enacted following the approval of Article VIII, and therefore must comply with this mandate. We have already shown that 69-1215 created a non-elected municipal body. The only issue remaining is whether said body is purportedly empowered to exercise legislative powers.

Charlotte County v. Ramport Utilities, 455 So.2d 455 (2 DCA Fla. 1984) holds specifically that the setting of rates for a public utility is a legislative function. The Lake Worth Utilities Authority has the power to set rates (69-1215, Section 8).

In Gaines v. City of Orlando, 450 So.2d 1174 (5 DCA Fla. 1984), the Fifth District Court says that "decisions dealing with the building and location of an electrical plant are proper subjects for the exercise of a City's legislative powers. The Lake Worth Utilities Authority has this power (Section 8.).

In Neff v. Bowmer, 1 Fla.Supp.2d 104 (1981) the Circuit Court in Hillsborough County found as follows:

> (a) Zoning, at whatever level of government, is a legislative function.
> (b) Article VIII, Section 2(b) of the Florida Constitution requires each municipal legislative body to be elective.
> (c) The State Legislature may not delegate to anyone other than a municipality's elective body the municipality's legislative function.

The broad powers that 69-1215 attempts to "grant" to the Lake Worth Utilities Authority include numerous legislative functions of a municipality. These powers are contained in Sec.

8 of 69-1215 and are generally encompassed in that portion of the trial court's order set forth at the beginning of this point on appeal. (R 95) Appellants allege in paragraph 19(c) of their Countercomplaint that the Authority must sign a contract based on its "legislative action." (R 567)

Florida Statutes s. 180.103 and 180.104 and other sections contained in that Chapter mandate that the "City Council or other legislative body, by whatever name known, "shall pass ordinances or resolutions for the construction or extension or financing any utility. Article VIII, Section 2(b) mandates that such legislative body be elected.

Although Appellants claim that the Authority passes only "resolutions" and not "ordinances", it is not the name which is assigned to the act but rather the nature of the act that determines its character. A resolution is ordinarily of a temporary character, whereas an ordinance prescribes a permanent rule of conduct or government. Pensacola v. Southern Bell Telephone Company, 49 Fla. 161, 37 So. 820 (1905), Certain Lots v. Monticello, 159 Fla. 134, 31 So.2d 905 (1947).

The distinction between legislative action, on the one hand, and executive and judicial action, on the other, is not difficult to define: legislative action prescribes a general rule for future operation, whereas judicial and executive action is to be concerned with applying the general rule to specific

situations or persons. Modlin v. City of Miami Beach, 201 So.2d 70 (Fla. 1967) at p. 73.

McQuillin's Municipal Corporations, Vol. 5 (3d Ed.), s. 16.55 Legislative or Administrative Measures cited by this Court in State v. City of St. Petersburg, 61 So.2d 416 (Fla. 1952) at p. 419, states:

> . . .action relating to subjects of permanent and general character are usually regarded as legislative, and those provided for subjects of temporary and special character are regarded as administrative.

Also from that same work at Vol. 2 (3d Ed.) s. 10.32, Mandatory and Discretionary Powers comes this distinction:

> Official action is legislative or judicial where it is the result of judgment or discretion, and is ministerial when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, manner, and the occasion of the performance with such certainty that nothing remains for judgment or discretion. (Emphasis supplied.)

In City of Lake Worth v. State of Florida, 111 So.2d 433 (Fla. 1959) at p. 435, this Court, in distinguishing legislative from administrative functions in reference to an ordinance by which the City would make an extensive improvement of its utility plant held that this ordinance involving utilities expansion of the City of Lake Worth was legislative in character.

In Scott v. City of Orlando, 173 So.2d 501 (2 DCA Fla. 1965) the court was ruling on the selection of a location for

the construction of a theater and convention hall which decision was being submitted to the voters by referendum. The court cites numerous cases and authorities in reaching its holding that selection and designation of the site for a theater-convention hall was a legislative function. Other functions which were also cited as legislative included; selection of a site for a City Hall; acquisition or construction of a public utility; improvement ordinances; and/or contract for a municipal gas supply. Id.

Appellants rely upon several decisions regarding other utility authorities or commissions including but not limited to Cooksey v. Utilities Commission, 261 So.2d 129 (Fla. 1972), St. Joe Natural Gas Company v. City of Ward Ridge, 265 So.2d 714 (1 DCA Fla. 1972), Cobo v. O'Bryant, 116 So.2d 233 (Fla. 1959) and City of Orlando v. Evans, et al., 182 So.2d 264 (Fla. 1938). In so doing, Appellants continue to overlook that each of these cases dealt with special acts passed pursuant to the power granted to the Legislature under the 1885 Florida Constitution. Under that Constitution the Legislature had the authority to grant to municipalities quasi-legislative power. Nelson v. Lindsey, 10 So.2d 131 (Fla. 1942); City of Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769 (Fla. 1914).

There was no provision in the 1885 Constitution that required that legislative functions of municipalities be carried out by an elected body. The Legislature was thus permitted to create appointed municipal boards and to confer upon them municipal powers, including quasi-legislative powers.

The 1968 Constitution grants to municipalities broad powers, comparable to those of the legislature, over municipal matters. Just as members of the state legislature must be elected, so too must all municipal legislative bodies. Art. III, Sec. 2, and Art. VIII, Sec. 2(b), Fla.Const. This provision regarding municipal legislative bodies is contained in the same subsection of the Constitution setting forth and granting the municipal powers. The obvious intent is that these broad municipal powers are to be exercised by elected officials who are accountable to the people.

There can be no doubt that the broad powers which Special Act 69-1215 attempts to confer on the appointed Authority Board are municipal legislative functions which the Florida Constitution mandates shall be exercised only by an elected municipal legislative body. The Special Act is therefore unconstitutional and void ab initio.

POINT III

WHETHER CHAPTER 69-1215, IF CONSTITUTIONAL, BECAME A MUNICIPAL ORDINANCE PURSUANT TO FLORIDA STATUTE 166.021(5) AND WAS PROPERLY REPEALED BY LAKE WORTH ORDINANCES 84-12 - 84-15?

The trial judge answered this question in the affirmative stating:

> The court agrees with the "City's" position, that had Chapter 69-1215 been constitutional in its inception, it was properly repealed by the ordinances under consideration. However, as the court rules the chapter was unconstitutional in its inception, this matter will not be further discussed. (R 468)

We have earlier discussed the Municipal Home Rule Powers Act in its role as the enabling legislation for the Fourth Power Grant contained in Article VIII, Section 2(b). (Point I). Here we consider Florida Statute 166.021 as an implementing mechanism enabling municipalities to exercise the power necessary to resolve local issues.

From 1885 until 1968, a variety of local governmental agencies and special districts were created. Sparkman, The History and Status of Local Government Powers in Florida, 25 U. Fla. L. Rev. 271 at 286 (1973). This, as well as sheer numbers, was referred to as the "local bill evil", which was to be eliminated by Article VIII and the Home Rule Powers Act. Sparkman, The History and Status of Local Government Powers in Florida, supra, at 285. State v. Orange County, supra.

Developing a mechanism to resolve the jurisdiction and existence of various agencies, and the special acts which created them, was not a simple task. The State Legislature could have reexamined each of the thousands of pre-1973 special acts, and population acts, dealing with local matters and amended or repealed each according to its merits.

Home rule saved the Legislature from this process. In implementing the constitutional powers of Article VIII 2(b), the legislature provided for local control concerning the existing structure of government, and the special acts creating it (F.S. 166.021[4]&[5]).

Florida Statute 166.021 (1) is the enabling grant of "any power for municipal purposes", except when expressly prohibited by law". Forte, Id. In this case, the City of Lake Worth exercised this power to repeal a special act pertaining exclusively to the City of Lake Worth. Not only has the State Legislature declined to "expressly prohibit" the exercise of this power, but rather F.S. 166.021(5) specifically authorizes the use of this power by a municipality.

Since the power exercised was within the power grant of F.S. 166.021(1), we next consider the definition of "municipal purpose" contained in F.S. 166.021(2). Clearly

"municipal purpose" includes the provision of municipal water, sewer, and electric services.

Next we consider the limitations contained in Florida Statute 166.021(3). This contains four categories of limitations upon the exercise of municipal power. Only the third category might apply. In F.S. 166.021(3) the Legislature recognizes that "the legislative body of each municipality has the power to enact legislation concerning any subject matter, except those "expressly preempted" to state or county government by the Constitution or by general law. A special law, such as Ch. 69-1215, may not "expressly pre-empt" a subject matter to the state. Finding no express preemption, we consider the limitations contained in F.S. 166.021(4).

Florida Statute 166.021(4) provides eight categories of pre 1973 special acts which thereafter may be amended or repealed after approval in a referendum vote of the people. A comparison of Ch. 69-1215 with these eight categories reveals that a referendum is not required to amend or repeal Ch. 69-1215. (See Appellee's Memorandum at R 182)

Since none of the preceding sections prevent the municipality of Lake Worth from exercising power upon Ch. 69-1215, it is subject to F.S. 166.021(5) which provides as follows:

> (5) All existing special acts (pre-1973) pertaining exclusively to the power or

> jurisdiction of a particular municipality except as otherwise provided in subsection (4) shall become an ordinance of that municipality on the effective date of this act, subject to modification or repeal as other ordinances. (Emphasis supplied).

Ch. 69-1215 is a pre 1973 special act which pertains to the power and jurisdiction of only one municipality, the City of Lake Worth. As such, it was converted by operation of law (F.S. 166.021[5]) into a municipal ordinance of the City of Lake Worth upon the effective date of F.S. 166.021(5). Resedean v. Civil Service Bd. of City of Pensacola, 322 So.2d 150 (1 DCA Fla. 1976).

As an ordinance of the City of Lake Worth, Ch. 69-1215 was inferior to the municipal charter. The legislative body of Lake Worth not only had the power to amend or repeal Ch. 69-1215, but, had an affirmative duty to act to enforce their municipal charter to the extent of its conflict with Ch. 69-1215. 12 Fla.Jur.2d, Contribution, Indemnity, and Subrogation to Counties and Municipal Corporations, s. 180.

City of Lake Worth Ordinances 84-12 - 84-15 were passed and adopted on May 29, 1984. Their effect was to repeal Ch. 69-1215 and abolish the Lake Worth Utilities Authority, if it ever existed. (R 337)

As a result of these legislative actions, the elected City Commission and the City manager now control all utility operations of the City of Lake Worth in accordance with the

City Charter. This was a local resolution of a local problem authorized by the Home Rule powers granted to municipalities by Article VIII Section 2(b) and the Municipal Home Rule Powers Act, 73-129.

There has been no interruption or diminution of water, sewer, or electric services to the citizens of Lake Worth. The Lake Worth Utilities Authority is missed only by its lawyers and its executive director. An unncessary municipal agency of Lake Worth has been removed by unanimous vote of the elected City Commission of Lake Worth, a majority of whom face reelection in March of 1985. They will be held accountable for their actions by their electorate, an experience foreign to the board members of the former Lake Worth Utilities Authority.

For all these reasons, we submit that the Trial Judge's decision, that Ch. 69-1215 if constitutional had been lawfully repealed, should be affirmed.

POINT IV

WHETHER ATTORNEYS FOR THE FORMER LAKE WORTH UTILITIES AUTHORITY AND ITS FORMER DIRECTOR FORBES ARE ENTITLED TO ATTORNEYS FEES AND COSTS FROM PUBLIC FUNDS OF THE CITY OF LAKE WORTH?

The trial judge answered this question in the negative in his Order of August 27, 1984, as follows:

> "It is the established law of this State that attorney's fees may be awarded a prevailing party only under three circumstances, viz:
>
> (1) Where authorized by contract;
>
> (2) Where authorized by a constitutional legislative enactment;
>
> (3) Where awarded for services performed by an attorney in creating or bringing into court a fund or other property.
>
> By statute, a trial court is authorized to 'award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party'."
>
> The attorneys seeking fees and costs have not brought themselves within any of the situations in which the court is authorized to grant them the relief they seek. (R 554)

The statues and cases cited by Appellants are inapposite. The cases cited and F.S. s. 111.07 apply only to the agency or body of which the public officer claiming attorney's fees was employed or a member. Neither the

Authority nor Forbes fit the circumstances for recovery of attorney's fees under those cited cases and statute; nor are either the Authority or Forbes "prevailing parties".

F.S. s. 286.011(4) referred to by the Appellants applies to violations of the "Florida Sunshine Law" when the party bringing the action has prevailed in proving a violation. The lower court in its Order of July 5, 1984, specifically states that it ". . .makes no conclusive finding a this stage of the proceedings as to a violation of F.S. 286". Appellants have failed in their Brief to demonstrate that the trial court erred.

CONCLUSION

"Home rule" is meaningless, unless local elected officials, accountable to their electors, have local control over local affairs. The elected City Commissioners of Lake Worth voted unanimously to abolish an agency of that City. This was a local resolution of a local political and legal problem. The ordinances were lawfully adopted. The subject matter of this legislation was purely local: the organization and control of the municipal water, sewer and electric service.

The Constitution of the State of Florida does not prohibit the legislative action taken by the City of Lake Worth. The subject matter of the legislative action was the municipal water, sewer, and electric service, and this subject matter has not been "expressly preempted" to any other level of government. This exercise of the legislative power of the City is not "expressly prohibited" by law. Municipal water, sewer and electric service is clearly within any definition of "municipal purpose" and municipal power. The action taken was authorized by Florida Statute 166.021(5). The action taken does not invade any "inherent power of the state", nor is there any basis for state concern with this purely local matter.

The City Commissioner's oath of office includes a requirement to support, protect and defend the Constitution of the State of Florida. The City Commissioners had an affirmative duty to act, to modify or eliminate an agency of that city, when they learned of its constitutional infirmities. They had a duty to place public funds under the control of a lawfully constituted body. They had a duty to assume all of the rights, duties and obligations of this "agency of the City". They had a duty not to impair the obligations of contract, or bonded indebtedness, or the rights of public employees. All of these duties were met and accomplished by the ordinances adopted by the City on May 29, 1984. We respectfully submit that the legislative actions taken by the City Commission are an example of home rule responsibly and properly exercised within constitutional and legislative limits.

The trial judge's decision here on appeal is eminently correct and should be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY, that a true and correct copy of BRIEF OF APPELLEE has been furnished: FRANK A. KREIDLER, ESQ., attorney for Lake Worth Utilities Authority, 521 Lake Avenue, Suite 3, Lake Worth, Florida, 33460; FRANK A. STOCKTON, Assistant State Attorney, 300 North Dixie Highway, Palm Beach County Courthouse, West Palm Beach, Florida, 33401, by mail delivery, this 5th day of December, 1984.

GIBSON & ADAMS, P.A.
Attorneys for Appellee
303 First Street
Suite 400
P. O. Box 1629
West Palm Beach, Florida 33402
Telephone: (305) 655-8686

By: _____
JAMES M. ADAMS

_____
BERNARD A. CONKO

_____
PAUL J. NICOLETTI

_____
RICHARD M. REDNOR