OA 1-8-85

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 APPELLANTS

FRANK A. KREIDLER
Attorney for the Lake Worth Utilities Authority
521 Lake Avenue, Suite 3
Lake Worth, Florida 33460
Telephone: (305) 586-5151

ARTHUR KOSKI
Attorney for Lake Worth Utilities Authority

DONALD KOHL
Attorney for Utilities Director FORBES

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STATEMENT OF CASE AND FACTS

The Lake Worth Utilities Authority (hereinafter referred to as the "Authority") was created by a Special Act of the Legislature, Chapter 69-1215 and approved at referendum held November 4, 1969. It was created as a separate unit of the City Government. The Authority may sue and be sued in its own name. The original act was amended by two special acts of the legislature in 1972 and 1973, Chapters 72-591 and 73-524, Special Acts of Florida.

On May 29, 1984, the City Commission of the City of Lake Worth passed two "emergency" ordinances (which only require one reading), 84-12 (R-172) and 84-14 (R-176), basically dissolving the Authority. Both emergency ordinances became effective immediately. City forces terminated three employees of the Authority, including the Director, Thomas Forbes, changed the locks on various doors, changed the signatories on the Authority bank accounts, advised the Authority attorneys that their services were terminated and took various other actions to implement their goals.

Also on May 29, 1984, the City Commission passed two regular ordinances (Ord. 84-13, R-174 and Ord. 84-15, R-178) on first reading which passed at second reading on June 11, 1984. They track the language of the "emergency" ordinances and also attempt to dissolve the Authority.

The Authority through its undersigned attorneys filed a counter-complaint (Supp. R-564 to 574 with attachments "AA" thru "MM" in the original record) for declaratory and

injunctive relief on May 30, 1984. A hearing was held before the trial court on June 1, 1984. A Motion to Dismiss (R-138) the counter-complaint was filed by the City on June 1, 1984.

The Authority's position was that the City's acts were void, ultra vires, illegal and/or of no effect. Furthermore irreparable harm would occur if the City continued to function as the operator of the Authority's system in that due to the uncertainty of the status of the Authority the system would be unable to legally negotiate and finance the purchase of additional electrical generation capacity from the Orlando Utilities Commission; the system would be unable to legally negotiate and finance increased sewage treatment capacity at the regional wastewater treatment plant in West Palm Beach (presently the Authority and its subcontract customers, Lantana, Palm Springs, Atlantis, Manalapan, Palm Beach and South Palm Beach are on a hook-up moratorium which has effectively curtailed construction and development in these communities) and the uncertainty of Authority's contractual situation would irreparably harm the Authority's standing as a financially sound and reliable contractual partner in the business community.

The City contended the Authority was unconstitutional when it was created and further the City could do what it did pursuant to Municipal Home Rule Powers Act, F.S. 166.011. The City extended its constitutional argument to the point that it considered other similar utility authorities or commissions created across the state to be unconstitutional.

The parties stipulated that the affidavits and

testimony presented by the Authority in support of a temporary restraining order on June 1, 1984, could be considered by the trial court in its decision on the issuance of a temporary injunction.

The Authority further contended that the City was without the power to undo by ordinance what the Legislature had done by special act. The trial court agreed with the City, and on July 5, 1984, denied the Authority's motion for an injunction and dismissed with prejudice the Authority's counter-complaint (R-468). The court denied (R-553) the Appellants' Motion for Rehearing (R-474 to 542) and Motion for Attorneys' Fees and Costs (R-288 to 290). It is from these final orders that this appeal was taken.

POINTS INVOLVED

Appellants submit that the issues, properly phrased, are as follows:

POINT I

WHETHER THE EXERCISE OF GOVERNMENTAL, CORPORATE AND PROPRIETARY POWERS GRANTED TO MUNICIPALITIES IN ARTICLE VIII, SECTION 2(b), FLA. CONST., IS SUBJECT TO THE CONTROL OF THE STATE LEGISLATURE.

POINT II

WHETHER CHAPTER 69-1215 WAS AN UNLAWFUL DELIGATION OF LEGISLATIVE POWER TO A NON-ELECTED BODY.

POINT III

WHETHER THE TRIAL COURT ERRED IN UPHOLDING THE CITY'S ORDINANCES AS VALID UNDER THE MUNICIPAL HOME RULE POWERS ACT F.S. 166.011.

POINT IV

WHETHER THE AUTHORITY AND FORBES ARE ENTITLED TO ATTORNEYS' FEES AND COSTS.

POINT I

THE EXERCISE OF GOVERNMENTAL, CORPORATE AND PROPRIETARY POWERS GRANTED TO MUNICIPALITIES IN ARTICLE VIII, SECTION 2(b), FLA. CONST., IS SUBJECT TO THE CONTROL OF THE STATE LEGISLATURE.

The positions of the parties below and the holding of the trial court on this issue are succinctly set forth in the order from which this appeal was taken.

> "Constitution of the State of Florida, 1968...
>
> Article VIII, Section 2. Municipalities.
>
> (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.
>
> * * *
>
> The "City" urges this court to rule the emphasized portion of the foregoing constitutional article, grants to the municipalities additional power for municipal purposes, except as otherwise provided by law; while the "Authority" urges the court to interpret the proviso as a limitation upon all municipal authority which is to be controlled by the legislative branch of government.
>
> If the latter interpretation is accepted by this court, the philosophy of home rule being exercised by municipalities would be governed by the philosophy as set forth in the state's prior constitution change would have been warranted as the Legislature would continue to control all authority vested in municipalities. Each time municipal authority, or change in municipal authority, was sought, it would be necessary to approach the legislative branch of government.
>
> The court rejects such philosophy and interpretation and rules it was the intent of the 1968 Constitution to bestow upon established municipalities vested governmental, corporate, and proprietary powers to enable them to conduct

municipal government, perform municipal functions and render municipal services without the intervention or authority of the legislative branch of government.

The emphasized portion of the constitutional provision under consideration granted to municipalities additional constitutional authority to perform municipal services, unless the Legislature promulgates laws prohibiting or regulating the exercise of the additional municipal authority."

The court thus held that only in the exercise of some power other than a governmental, corporate or proprietary power is a municipality subject to the Laws of the State of Florida. The court grounded its holding in its understanding of the difference in the limited powers granted to municipalities under Florida's previous constitutions and the much broader powers granted municipalities in the 1968 Constitution. Respectfully, the court simply misunderstood the home rule concept embodied in the 1968 Constitution.

The present City of Lake Worth was established under Special Law of the State of Florida in 1949. This law, as amended, is set forth in Part I, Subpart A, Charter of the City of Lake Worth, Florida.

Contained within said Charter, under Section 3(9), (10), (11), (12), (14), (15), (39), and (40) is the delegated authority to operate its water, sewer and electric utility systems. The City operated these utility systems until 1969.

Prior to 1968, the municipalities of Florida were wholly dependent on legislative grant for the exercise of any power. As explained in City of Deland v. Moorhead, 96 Fla. 737, 739, 119 So. 117, 118 (1928):

> Under section 8, article 8, of the Constitution, municipalities in this state can exercise only such powers and prerogatives as are conferred on them expressly or impliedly by legislative enactment. (citations omitted)

The Florida rule followed "Dillon's Rule," the general national rule of municipal powers set out in J. Dillon, Municipal Corporations, S 237 (5th ed. 1911) The "rule" expressed in that section provided that:

> . . .a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation - not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

For a general discussion of the development of municipal powers in Florida, see Sparkman, "The History and Status of Local Government Powers in Florida," 25 U.Fla.Law Rev. 271, 274-288 (1973).

The necessity of seeking specific legislative authority for any action a municipality sought to take was a serious impediment to the ability of municipalities to meet the new demands being placed upon them by Florida's rapidly growing population. The efforts of many local government officials to secure a greater degree of autonomy finally met with some success with the adoption of the 1968 Constitution. The essential distinction in the new and old constitutions was

explained by Justice Ervin, dissenting in City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801, 807 (Fla. 1972). After quoting the relevant language from the 1885 Constitution and the 1968 Constitution, he stated:

> "The difference in the two provisions is obvious. Under the earlier constitution, municipalities had only such powers as were specifically granted them by the Legislature.
>
> Legislative control over cities . . . (was) absolute, subject only to the restriction that it shall not contravene some provision of the Constitution." Cobo v. O'Bryant, Fla. 1959, 116 So.2d 233, 236. The converse is now true. The 1968 revision to the Florida Constitution has given municipalities governmental, corporate, and proprietary powers to enact municipal legislation unless otherwise provided by law. Commentary to Art. VIII, s.2(b), 26A F.S.A., pp. 291, 292." (emphasis supplied)

As Justice Ervin noted, the 1968 Constitution essentially "flip-flopped" municipal powers. Whereas under the 1885 Constitution municipalities were required to look to the Legislature for every grant of power, under the 1968 Constitution they were only required to determine whether the Legislature, by general or special law, has forbidden some exercise of municipal power.

This interpretation of Article VIII, Section 2(b) of the 1968 Constitution accords with the plain meaning of the words used there. That section grants to municipalities ". . . governmental, corporate and proprietary powers. . ." That is an extremely broad grant of power, but it is limited by the phrase that follows it; and may exercise any power for municipal purposes except as otherwise provided by law." The

City, and the trial court, read that second phrase as an additional grant of power, not a limitation on the three specific grants of power. Essentially the City would have the Court import the word, "additional," so that the phrase would read "and may exercise any additional power for municipal purposes except as otherwise provided by law."

Florida Attorneys General have understood the constitution to provide for ultimate legislative control over municipal home rule powers.

An opinion rendered to the City of Avon Park discussing the power of the City by ordinance to provide for the tenure and removal of a building code official states:

> However, nothing in Part VI of Ch. 533 requires adoption of a model code containing specific requirements as to a building official, his appointment, tenure, or removal from office or limits the city in making any provisions it sees fit as to those matters, so long as these provisions are otherwise constitutional and within the ambit of s. 2, Art. VIII, State Const., and s. 166.021(1) and not in conflict with general or special law or county charter prohibitions or preemptions specified in s. 166.021(3) and (4). (emphasis supplied)

1979 Op.Atty.Gen. Fla. 79-21 (March 5, 1979)

The Florida Legislature also believes that the 1968 Constitution provides for legislative supremacy. There exists a host of statutes which limit municipal home rule powers. For example, Section 166.261, Fla. Stat. (1983), strictly limits the power of a municipality to invest surplus funds, Section 166.231, Fla. Stat. (1983), limits the amount of public service tax which may be levied by a city, Section 166.441, Fla. Stat.

(1983), limits the exercise of the power of eminent domain by cities, Ch. 175, Fla. Stat. (1983), requires certain municipalities to operate a municipal fire fighters' pension trust fund within strict guidelines, subsection 366.04(2)(b), Fla. Stat. (1983), allows the Public Service commission "to prescribe a rate structure" for municipal electric utilities, and Ch. 119, Fla. Stat. (1983), requires that certain public records of municipalities be available for public inspection and prohibits the destruction of those records. According to the City's constituional "municipal independence" philosophy, it appears that Ch. 166, Fla. Stat. (1983) is completely unnecessary and unconstitutional. These and hundreds of other statutes clearly prohibit or limit the exercise of municipal corporate, governmental or proprietary powers.

The City acknowledged in the court below that the construction it suggests would lead to serious doubts about the applicability of many state statutes to municipal governments. For example, in its reply brief below, in discussing the applicability of Section 286.011, Florida Statutes (1983), Florida's "Government in the Sunshine Law" to municipal governments, the City stated:

> We contend that municipalities are a coequal branch of government with the State as shown by the express language of the Florida constitution, and our main brief. The people of Florida in limiting legislative power of the State did not provide Constitutional authority for the State to impose mandatory procedures upon municipalities in the exercise of a municipality's constitutional "governmental" powers.

The Supreme Court in City of Long Beach Resort v. Collins 261 So.2d 498 (1972) summarized the general authority of the Legislature by stating on page 500:

> This was the prerogative of the Legislature which has life and death powers over municipalities which are created, modified and can be abolished by the Legislature.

If any real doubt as to the meaning of Art. VIII s.2 exists, it is appropriate to look to the intent of the framers and adopters of the provision. State ex rel. Dade County v. Dickinson, 230 So.2d 130 (Fla. 1969). In this case that intent can be found in the records and documents of the 1968 Constitution Revision Commission and its various committees. See Exhibits attached to the Authority's Motion for Rehearing.

The initial draft of Art. VIII s.2(b) was prepared by the Local Government Committee of the Commission. It provided:

> (2) Powers. Municipalities shall have the power of self government and are granted governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and are authorized to exercise any power for municipal purposes which does not conflict with general law, except as the legislature may otherwise provide by special act. Powers relating to municipal administration, organization, personnel and procedure shall be exclusively a matter of municipal jurisdiction, provided members of a municipal legislative body shall be chosen by popular election.

An analysis of this proposed language by the Committee on Style and Drafting noted certain inconsistencies:

> The apparent broad powers granted by the first part of this subsection are completely negated by the words "not in conflict with general law, except as the legislature may otherwise provide by special law." These words preserve the complete legislative control over municipal powers, functions and services. In doing so they negated the limitation upon this legislative power which would be implied from the fact that Section 2(1) restricts the power of the legislature in amending municipal charters "to form of government and functions of officers.

The same committee, in an analysis of the section dealing with charter counties which contained the identical grant of "the power of self government" noted:

> It is difficult to perceive how an unqualified grant of the 'power of self government' can be augmented.

It is readily apparent that the framers intended to "preserve the complete legislative control over municipal powers, functions and services" since the language which the Committee said preserved that power, in only slightly modified form, found its way into the constitution, while language granting the broad power of self government to municipalities does not appear in the constitution.

Such was also the intent of the adopters of the Constitution. The Analysis of Proposed Revision by the Legislative Reference Bureau was prepared at public expense and made available to the electorate prior to ratification by the voters. The analysis of Art. VIII s.2(b) stated:

> (b) Gives municipalities residual powers except as provided by law. Present Article VIII, Section 8, requires that the Legislature prescribe the jurisdiction and powers of municipalities.

Residual power is defined in Webster's Seventh New Collegiate Dictionary as "power held to remain at the disposal of a governmental authority after an enumeration or delegation of specified powers to other authorities." In this case, the power delegated to another authority was the power of the Legislature to retain ultimate control over municipal powers. The residual power is whatever home rule power the legislature leaves with municipalities. With the analysis of the Legislative Reference Bureau available to them the voters ratified Art. VIII s.2(b) in its present form. Clearly there was not intention on the part of the drafters or the adopters of this constitutional provision to embark on a radical scheme for local government whereby municipalities in the exercise of governmental, corporate or proprietary powers would be free from the ultimate control of the state legislature. Rather, the intent was to avoid the necessity of municipalities looking to the legislature for specific delegation of each power they sought to exercise, as was the case under the previous constitution, and to enable municipalities to go about the business of governing subject only to two restrictions on their power: that it be exercised for a municipal purpose and that it be subject to the laws, both general and local, of the State of Florida as those laws exist at any given time.

This view is further confirmed by the fact that in 1977 another Constitution Revision Commission met, considered Art. VIII s.2 and declined to change it. The minutes of a

meeting of the Local Government Committee held October 12, 1977, reflect the following:

> The Committee discussed generally the history of special acts in Florida and the decline in the number of such acts in recent years since the 1968 Constitutional revision and subsequent home-rule legislation. Chairperson DeGrove observed that the once-popular view of the "local bill evil" has been somewhat modified by awareness that local bills can be an effective tool for reorganizing local governments. (emphasis supplied)

Later in that same meeting, the minutes reflect that the Florida League of Cities offered an amendment which would have substituted the language "except as otherwise prohibited by general law" for "except as otherwise provided by law" in Art. VIII s.2(b). The Committee adopted an amendment to the proposed amendment which struck the work "general". The minutes show:

> Commissioner Birchfield moved a substitute proposal which would delete the word "general" from the amendment. The purpose of the substitute was expressed to permit the Legislature to retain the power to supersede municipal authority by appropriate special laws.
>
> The substitute motion carried, and the proposal amendment (with the word "general" deleted) also carried. (emphasis supplied)

The amendment as passed did not make its way into the constitution, and the legislative authority to alter municipal power by general or special law remained unchanged.

The Municipal Home Rule Powers Act, Chapter 166, Fla. Stat. (1983), recognizes and preserves the same ultimate

legislative control over municipal powers. Subsection 166.021(1) provides:

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

The legislative intent in enacting Section 166.021 is expressed in subsection 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.

The difference in the constitutional provisions and the provisions of the Act is that the Act requires that legislative control over municipal powers be by express prohibition rather than "except as otherwise provided." Beyond any doubt the act creating the Lake Worth Utilities Authority, Chapter 69-1215, Laws of Florida (1969), is an express prohibition against the City exercising the powers granted the Authority over the utilities system.

The Legislature has always had the constitutional authority to enact the special law creating the Authority. The

applicable constitutional grant of power to the Legislature is contained in Article III, Sec. 11 (a)(1):

(a) There shall be no special law or general law of local application pertaining to:

(1) election, jurisdiction or duties of officers, except officers of municipalities, charted counties, special districts or local governmental agencies (e.s.).

The law review article, "Local Government Powers in Florida," U. of Florida Law Review, Vol XXV (1973) p. 271, follows this interpretation. At p. 289 and 290 in discussing Art. VIII 2(b) the author states "even in the broad grants to cities and charter counties, state legislative supremacy is retained by proviso" (e.s.). Also at p. 291 in a further discussion of municipal home rule "Municipalities are granted the exercise (of) any power for municipal purposes except as otherwise provided by law. Therefore, municipal home rule may be limited by general law, special law, or general law of local application" (e.s.).

Additionally, s. 2(a), Art. VIII State Const. provides that municipal charters may be amended pursuant to general or special law. Thus the enactment of Chapter 69-1215, amended by special law the Charter of the City of Lake Worth, Florida, and created a separate unit of City government, the Lake Worth Utilities Authority. Note that the charter of the City of Lake Worth, Florida, sec. 13(3) was specifically repealed by Chapter 69-1215, and that Sec. 16 of Chapter 69-1215 specifically repeals a portion of the City Charter.

The substantive constitutionality of Chapter 69-1215 is established by the State Constitution itself.

The basic constitutionality of the Authority has further been ratified by the Supreme Court of Florida. The case originated in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Case No. 82-1411 in Florida Municipal Power Agency v. State of Florida, and the ..... Lake Worth Utilities Authority.... et al.

The case involves the Lake Worth Utilities Authority in its contract with the Florida Municipal Power Agency (hereinafter referred to as "FMPA") to obtain nuclear energy from the Florida Power and Light St. Lucie II Nuclear Plant. The trial judge specifically found the Authority was a public agency and its contract was constitutional, see Paragraph 6, beginning on page 5 of Circuit Judge Cawthorn's Final Judgment.

In a direct appeal to the Florida Supreme Court, State of Florida v. FMPA, 428 So.2d 1387 (Fla. 1983), the state alleged that the agreements and contracts were unconstitutional and contrary to law. The Authority was one of the participants with FMPA and its contract and agreement with FMPA was one of those being questioned as being unconstitutional. The Supreme Court stated that the contract and agreement between FMPA and the Authority were constitutional. The Court finds **"no error in the trial court's validation of this bond issue and we affirm the final judgment"** (emphasis supplied) of Judge Cawthorn.

The FMPA decision is controlling law on the constitutionality of the Authority when considered with the Supreme Court mandate in McCoy Restaurants Inc. v. City of Orlando 392 So.2d 252 (Fla. 1980), also see State v. City of Miami, 379 So.2d 651 (Fla. 1980). The Supreme Court in ruling upon a bond validation of the Greater Orlando Aviation Authority stated:

> "The sole purpose of a validation proceeding is to determine whether the issuing body had the authority to act under the constitution and the laws of the state."

The FMPA validation proceeding together with the approval given by the Supreme Court is a prima facie establishment of the constitutionality of the Authority and Chapter 69-1215. As it relates to the basic constitutional issue the trial court should also be governed by the burdens of proof imposed by judicial decision. Although the trial court may inquire into the existence of legislative power to enact a statute, the absence of power must clearly appear before the statute will be declared ineffectual. City of Miami v. Kayfetz 92 So.2d 798 (Fla. 1957).

The trial court had no authority to declare a statute unconstitutional unless it appeared beyond a reasonable doubt that it is in positive conflict with the Constitution under any rational view taken. Miami v. Kayfetz, supra; State ex rel. David v. Rose, 97 Fla. 710, 122 So.225 (1929).

The courts have further stated that the repugnancy between a statute and the Constitution must be clear, Haddock

v. State 141 Fla. 132, 192 So.802 (Fla. 1940), plain, Wright v. Board of Public Instruction 48 So.2d 912 (Fla. 1950), inevitable McNeil v. Webeking 66 Fla. 407, 63 So.728 (1913), or substantial, Wright v. Board of Public Instruction, supra.

A law is presumptively constitutional and the one who challenges it has the burden of demonstrating the invalidity. The Authority requests reversal of the trial court Order of July 5, 1984.

The construction advanced by the City would also require the Court to overrule both those cases which hold that where a conflict exists between state law and a municipal ordinance the ordinance must give way and those cases which prohibit municipal ordinances in areas preempted by state law. Both principles of Florida law were examined in City of Miami Beach v. Rocio Corp., 404 So2d 1066, 1069 (Fla. 3d DCA 1981) in the context of the Municipal Home Rule Powers Act, Chapter 166, Florida Statutes (1983):

> We conclude that the legislature has expressed its purpose to afford municipalities home rule with the exception of preempted subjects. We find no preemption of the subject of condominium conversion. The City is therefore permitted to exercise its power on that subject unless otherwise precluded.
>
> One impediment to constitutionally derived legislative powers of municipalities occurs when the municipality enacts ordinances which conflict with state law. (citations omitted)
>
> Municipal ordinances are inferior to state law and must fail when conflict arises. (citations omitted)

To construe Article VIII, Section 2(b) as urged by the City would require a wholesale revision of the jurisprudence of this state. It would also require this Court to find that the framers of the 1968 Constitution intended not to broaden the source of municipal powers but rather to bring about a fundamental change in the nature and structure of Florida government. The Constitution reveals no such radical intention. The Constitution was meant to, and does, allow the municipalities of Florida to go about their business without the necessity of constantly inquiring into the source of their authority for every action they intend to take. It was not intended, however, to make municipalities "coequals" with the state and free from ultimate legislative control. In the case at bar, the Legislature determined that those municipal functions of the City of Lake Worth relating to the providing of utility services should be administered by a board created for that purpose. The Constitution does not prohibit the Legislature from making that determination nor does it permit the City Commission of Lake Worth to reverse that determination.

POINT II

CHAPTER 69-1215 WAS NOT AN UNLAWFUL DELIGATION OF LEGISLATIVE POWER TO A NON-ELECTED BODY.

The trial court also concluded that the Act was unconstitutional due to the Authority being non-elected and having legislative powers.

The very question of improper delegation of legislative powers has been decided by the Supreme Court.

In 1972, a similar question on the constitutionality of the New Symrna Beach Utilities Commission, Special Act 67-1754, (this special act is virtually identical to the Authority's act in concept and operation) was presented to the Supreme Court, Cooksey v. Utilities Commission 261 So.2d 129 (Fla. 1972). The Court found this delegation of power was expressly constitutional.

The Cooksey decision upheld the constitutionality of an appointive, non-elective, commission as it relates to s.2(b) Art. VIII, State Const.

The Authority is not a "municipal legislative body" as contemplated in Art. VIII, Sec. 2(b). A legislative body has the power to make laws, Words and Phrases Fla. Jur., p.460. Statutes enacted by the Legislature and ordinances enacted by municipalities are laws; resolutions as passed by the Authority are not laws, they are merely expressions of a governmental

body concerning matters of administration, see F.S. 166.041 (1)(b).

The delegation of administrative powers to a board or authority has long been recognized in Florida law. Zoning boards, solid waste authorities, airport authorities, downtown development authorities, utility commissions (Orlando, Sebring, Ft. Pierce, Jacksonville, New Symrna Beach) and consumer affairs officers are just some examples. As long as there are adequate standards limiting the discretion of the particular body, the delegation will be upheld, Pinellas County v. Castle 392 So.2d 1292 (Fla. 1981).

Further a complete discussion as to the powers granted to the Authority is given in Attorney General Opinion 79-3 January 16, 1979. In a three page opinion the Attorney General concluded that:

> "Therefore I am of the opinion that the Lake Worth Utilities Authority is not a municipality and possesses no home rule powers or other legislative powers except those powers as are expressly granted by Ch. 69-1215 or are necessarily implied because they are essential to carry into effect those powers expressly granted. Edgarton v. International Co. 89 So.2d 488 (Fla. 1956); State v. Smith, 35 So.2d 650 (Fla. 1948); Gessner v. Del-Air Corporation 17 So.2d 522 (Fla. 1944); AGO's 069-130, 073-261, 073-374, 074-49 and 074-169.

The Authority was created for definitely restricted purposes, recognized by the law, St. Joe Natural Gas Co. v. City of Ward Ridge 265 So.2d 714 (1 D.C.A. 1972), and the creation is not for general community government.

The Attorney General correctly summarized the issue of constitutional application in Attorney General Opinion 79-3, supra:

> "While the Lake Worth Utilities Authority is a part of the government of the City of Lake Worth, it does not possess the general powers of the municipality within the purview of s.2 Art. VIII, State Const.

Although dealing with s. 1 Art. III, State Const., the issue of delegating legislative powers was brought forward by the Supreme Court in State v. Housing Finance Authority of Polk County 376 So.2d 1158 (Fla. 1979).

In analyzing F.S. 159, the Supreme Court adopted the rational of the Attorney General Opinion 79-3.

> "We have carefully examined all the provisions of the Housing Finance Authority Law, chapter 159, part IV, Florida Statutes (1978) and find that the statute, as a whole, provides adequate guidelines and does not improperly delegate the legislative power of the state to the Authority.

Chapter 69-1215 is complete with guidelines for operation of the utility system by the Authority. No improper delegation of legislative power has been made by the Legislature or by the City of Lake Worth.

In addition to the inherent guidelines of Chapter 69-1215, additional statutory laws such as F.S. 366 and F.S. 180 provide the basic powers to the municipality or in this case the separate unit of city government, the Authority, for the establishment and operation of the utility system.

This is rational also set forth by the Supreme Court in Cooksey.

Further the Supreme Court in Mohme v. City of Cocoa 328 So.2d 422 (Fla. 1976) recognizes on page 424, "commissions to which these (municipal) bodies delegate such authority" in municipal utility operation.

Also in Cobo v. O'Bryant 116 So.2d 233 (Fla. 1959) the issue of constitutionality of a utility board was addressed.

The Cobo case specifically declares constitutional the acts which established the Key West Utility Board. The Key West Utility Board was established to operate the Key West municipal electric system. The Board consisted of the Mayor, and four citizen members who could appoint their own successors. In upholding the constitutionality of such a Utility Board the Supreme Court stated on p. 237:

> "It should be borne in mind that, while it has been said that a municipality may own property and exercise proprietary functions, nevertheless, the property remains public. So long as a statutory enactment recognizes this continued public nature of property and merely sets up an agency for its operation and control in the continued interest of the public there can be no objection to such legislation. We are not here holding that the Legislature could completely appropriate or divert to some different use, property owned by a municipality in its proprietary capacity. However, we are not confronted with this problem. The Legislature in its wisdom merely established a municipal agency to operate the publicly owned property for the benefit of the public. Whether or not this Court deems such legislation wise or salutary is of no consequence at all. Granting the existence of the power to act,

> the wisdom of exercising it and the necessity for its exercise are matters for legislative determination: (e.s.).

Furthermore, in considering the Legislature's delegation of power in the creation of the Key West board the Court said at p.235:

> "... the Legislature creates a municipality. It (the Legislature) has the Authority to abolish it and certainly has the power to regulate and control its government by statutory enactment."

The Cobo court correctly sets forth the response to the City's current complaints concerning the Authority's acts. On page 236:

> "Appellants here urge that the authority conveyed to the utility board...could be abused to the detriment of the people of the community even though the people themselves had no direct part in establishing these agencies of city government. The answer to this contention is simply that under our representative system the people control their government through legislative representation. The fact that governmental power may be abused if exercised by some unscrupulous official chosen to administer it, offers no support to the contention that the power itself cannot exist constitutionally to be exercised by capable and conscientious officials."

Further on page 230 the Cobo Supreme Court states:

> "...if the agency established to carry out the functions dedicated to it by the Legislature abuses its responsibility or is guilty of fraud, deceit or other unscrupulous conduct, then appropriate remedies are available."

The case of City of Orlando v. Evans et al, Members of the Orlando Utilities Commission 182 So.264 (1938) is cited

in Cobo and established the constitutionality of the Orlando Utilities Commission. The Orlando case is a clear and concise definition of the need and authority for a municipal Authority. On page 267:

> "The principle of local self government is predicated on the theory that the citizens of each municipality or governmental subdivision of a state should determine their own local public regulations..."

It should carefully and strongly be noted that neither Orlando nor Key West were given the blessing of the voters as was done in Lake Worth, yet the Supreme Court upheld both Authorities.

If the guidelines in place in 1971, when Cooksey was decided, were sufficient to uphold the constitutionality of the New Smyrna Beach Utilities Commission, the guidelines in place now are sufficient beyond any doubt.

In Safer v. City of Jacksonville, 237 So.2d 8 (Fla. 1st DCA 1970), the court held that the power of the Housing Board of Adjustments and Appeals to grant variances from zoning ordinances did not constitute an invalid delegation of legislative power. The only standards limiting the Housing Board's power to change the applicability of city ordinances were that variances were appropriate where manifest injustice or undue hardship would result without a variance. The Lake Worth Utilities Authority is mandated 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 systems. Ch. 69-1215 s.1.

Bonds may be issued only in amounts "necessary to finance all or part of the costs of acquisition, construction, repairs, replacements, improvements, additions and extentions of the city's utilities and equipment required therefore." Ch. 69-1215, s.8(8). The standards provided are more than sufficient to meet the threshold requirements of a validly delegated legislative power as set forth in Askew v. Cross Key Waterways, 372 So.2d 913, 919 (Fla. 1978):

> When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.

The Authority further would direct this Court's attention to Clarke v. Morgan 327 So.2d 769 (Fla. 1975) wherein the Supreme Court addresses the requisite guidelines and standards for appointed boards. All of the above citations clearly indicate that Chapter 69-1215 was not an unlawful delegation of legislative power.

POINT III

THE TRIAL COURT ERRED IN UPHOLDING THE CITY'S ORDINANCES AS VALID UNDER THE MUNICIPAL HOME RULE POWERS ACT F.S. 166.011.

Any notion that the Municipal Home Rule Powers Act gives to cities the power to undo what the legislature has done is disposed of in Gaines v. City of Orlando, Case No. 83-1573, May 3, 1984 (Fla. 5th DCA 1984). The Court there held that the City of Orlando is powerless to directly affect the actions of the Orlando Utilities Commission:

> The Act further provides that cities have the power to legislate "concerning any subject matter upon which the state legislature may act," except for four described areas. s.166.021(3), Fl. Stat. (1983). However, these grants are limited by the existence of other laws. Article VIII grants cities inherent home rule powers "except as otherwise provided by law." (emphasis supplied)
>
> The meaning of these excepted powers is not clear. However, we do not think the 1968 Constitution or the Municipal Home Rule Powers Act abolished special or general laws which existed prior to their passage. See s.166.021(5), Fla.Stat. (1983). Nor would inherent home rule powers prevail over a subsequent state law. City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla. 1972); see Reese v. Thorne, 297 So.2d 9 (Fla. 1974).
>
> In this case the legislature gave the OUC exclusive authority to manage, operate and build electric utilities plants in Orange and Brevard Counties by special statutes. These are not part of the City's Charter. Any amendment to the City's Charter which purports to diminish or take away the OUC's powers over the utilities would necessarily be in conflict with those state laws. (footnotes omitted)

The Court reached that conclusion through an analysis of the Constitution and Laws of the State of Florida as they stand today. Any contention that a different result would have been obtained had the Orlando Utilities Commission charter been enacted after ratification of the 1968 Constitution must fail in light of the clear language of Art. XII s.6(a):

> All laws in effect upon the adoption of this revision, to the extent not inconsistent with it, shall remain in force until they expire by their terms or are repealed. (emphasis supplied)

The Fifth District stated that the Municipal Home Rule Powers Act did not prevail over state law. The Commission "was created by state law and it only can be changed by state law: (e.s.).

It should be noted that the Municipal Home Rule Powers Act, F.S. 166.011, does not allow legislation of the type passed by the City.

> F.S. 166.021 (1) As provided in s.2(b), Art. VII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

> F.S. 166.021 (3) The Legislature recognizes that pursuant to the grant of power set forth in s.2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
> (a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law

pursuant to s. 2(c), Art. VIII of the State Constitution;

F.S. 166.021 (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. However, nothing in this act shall be construed to permit any changes in a special law or municipal charter which affect the exercise of extraterritorial powers or which affect an area which includes lands within and without a municipality or any changes in a special law or municipal charter which affect the creation or existence of a municipality, the terms of elected officers and the manner of their election, the distribution of powers among elected officers, matters prescribed by the charter relating to appointive boards, any change in the form of government, or any rights of municipal employees, without approval by referendum of the electors as provided in s. 166.031. Any other limitation of power upon any municipality contained in any municipal charter enacted or adopted prior to July 1, 1973, is hereby nullified and repealed (e.s.).

In City of Miami Beach v. Rocio Corp., 404 So.2d 1066, 1069 (Fla. 3d DCA 1981), the city had passed an ordinance which placed limitations on the ability of owners to convert apartments into condominiums. Rocio Corp. sought to enjoin the enforcement of the ordinance on the grounds that it conflicted with state law and operated in an area preempted to the state by Ch. 718, Fla. Stat. (1979). The court determined first that

Ch. 718 did not evidence a legislative to preempt the subject to the state and then turned to the question of conflict between the ordinance and Ch. 718. The Court examined in detail the constitutional and statutory grants of municipal home rule:

> One impediment to constitutionally derived legislative powers of municipalities occurs when the municipality enacts ordinances which conflict with state law. Municipal ordinances are inferior to state law and must fail when conflict arises. (citations omitted)

The Court noted that it apparently was an issue of first impression as to whether the Municipal Home Rules Powers Act, Chapter 166, Fla. Stat. (1983), changed the general rule of law stated above.

> Although the legislature has extended municipal powers in the Municipal Home Rule Powers Act, the issue of conflict with state law has not been addressed. In City of Miami Beach v. Forte Towers, Inc., supra, the court overruled Fleetwood only with regard to the derivation of powers. The principle that a municipal ordinance is inferior to state law remains undisturbed. Although legislation may be concurrent, enacted by both state and local governments in areas not preempted by the state, concurrent legislation enacted by municipalities may not conflict with state law. If conflict arises, state law prevails.
>
> City of Miami Beach v. Rocio Corp, supra at 1070.

The Court held that the Miami Beach ordinances in question did conflict with state law, and that the trial court had therefore correctly enjoined their enforcement.

In Tweed v. City of Cape Canaveral, 373 So.2d 408 (Fla. 4th DCA 1979), it was also recognized that the Legislature retains the power to limit or alter municipal home rule powers. The Court had for consideration the validity of an employment contract the term of which extended beyond the term of the City Council which had entered into the contract, a formerly prohibited exercise of governmental power. The Court noted that the Municipal Home Rule Powers Act was intended to expand "the authority of municipalities to govern and control themselves without state interference," Tweed v. City of Cape Canaveral, supra at 409, and upheld the validity of the contract. However, the Court went on to state that the expanded powers given to municipalities are subject to legislative control, noting that the exercise of this clearly municipal governmental power to enter into contracts with employees might be subject to abuse and stating:

> If this occurs then the state legislature might, or might not, want to change the law but it is not up to us to change the legislature's intent and act in its stead. Tweed, supra at 410.

Finally, the Florida Supreme Court also concludes that municipal home rule powers can be limited by the Legislature. State v. City of Sunrise, 354 So.2d 1206 (Fla 1978), involved the validation of double advance refunding bonds to be used to refund water, gas and sewer bonds and for system improvement, obviously a municipal proprietary or governmental function. The Court held:

> Since there is no specific section in the Constitution authorizing municipalities to

> issue refunding revenue bonds, the Attorney General and all other parties have argued on rehearing that the municipalities may issue such bonds under their constitutional home rule powers. 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. Since there is no constitutional or statutory limitation on the right of municipalities to issue refunding revenue bonds not payable by ad valorem taxes, we hold that municipalities may issue "double advance refunding bonds" so long as such bonds are pursuant to the exercise of a valid municipal purpose.
>
> (footnote omitted) (emphasis supplied) supra at 1209.

The only inquiry necessary to determine the validity of the City of Lake Worth ordinances purporting to abolish the Authority is whether they conflict with state law. The answer to that is abundantly clear. The ordinances claim to repeal state law. A more clear conflict could not exist and, as in City of Miami Beach v. Rocio Corp., supra, an injunction against the enforcement of the Lake Worth ordinances is appropriate, and a reversal of the July 6, 1984 Order is warranted.

There is further evidence contained within the Legislative history of F.S. 166.011-166.044 which indicates that the Legislature did not intend to grant to municipalities unrestricted power of self-rule.

Amendment #9 to House Bill 1020 (Municipal Home Rule Powers Act) deleted certain language from Section 166.021(4). The language deleted read:

> It is the intent of the legislature to extend to the municipalities of the state the power to modify or repeal the provisions of any special act relating to such municipality enacted prior to July 1, 1973, in any manner not expressly prohibited by general law.

Had the above language remained in the statute, the trial court's decision may have been correct. However, the removal of such language indicates the intent of the Legislature that special acts allowing the exercise of extra territorial power as given to the Authority, see Section 8, Chapter 69-1215, giving it powers inside and outside the city, be given protection by F.S. 166.021(3)(a) and that a municipality not be given any power to repeal these special acts. See Gaines v. City of Orlando, supra, in which the City of Orlando is in the exact same situation by exercising powers within and without the city limits. The only way citizens served by these respective utilities receive representation is through the Legislature, not through a city commission on which they are not represented at all.

For the reasons stated above the Authority requests a reversal of the Order of the trial court dated July 5, 1984.

POINT IV

THE AUTHORITY AND FORBES ARE ENTITLED TO ATTORNEYS' FEES AND COSTS.

The Authority and Forbes contend that the City should be responsible for the payment of their attorneys' fees for the prosecution of the Complaint for Injunctive Relief and for the appeal of the trial court's order dated July 6, 1984. The Authority and Forbes contend that as a matter of public policy the representation provided by the attorneys is being provided for, and in, the best interest of the citizens of the City, as well as all consumers of the utility system of the City.

Public policy, equity, fairness, Section 111.07, Fla. Stat. (1983) and Section 286.011(4), Fla. Stat. (1983) all require the payment of the Authority's and Forbes' attorneys; fees and costs at the trial and appellate levels. Florida and other states have consistently held that public officers and (implicitly) public bodies are entitled to a proper defense of their position. See Ellison v. Reid 397 So.2d 352 (1 D.C.A. 1981); Lomelo v. City of Sunrise 423 So.2d 974 (4 D.C.A.. 1982) and City of Gretna v. Bailey 75 So. 491 (Lou. 1917).

CONCLUSION

The Appellants respectfully request that this court reverse the decision of the trial court, declare all of the ordinances of the City of Lake Worth unconstitutional and/or illegal, order the entry of a permanent injunction against the actions of City of Lake Worth and award attorneys' fees and costs to the Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been served by hand delivery to the following: Bernard Conko, Esquire, 303 First Street, P. O. Box 1629, West Palm Beach, Florida 33401; Frank A. Stockton, Assistant State Attorney, 300 North Dixie Highway, Palm Beach County Courthouse, West Palm Beach, Florida 33401; Michael E. Jackson, Esquire, 2925 Tenth Avenue North, Lake Worth, Florida 33461, on this twenty-first day of November, 1984

FRANK A. KREIDLER, ESQUIRE
Attorney for Appellants
521 Lake Avenue, Suite 3
Lake Worth, Florida 33460
Telephone: (305) 586-5151