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IN THE SUPREME COURT
STATE OF FLORIDA

BROWARD COUNTY, a political subdivision of the State of Florida, Petitioner, vs. CITY OF FORT LAUDERDALE and ROBERT O. COX, Respondents.	CASE NO.: 66,289 FOURTH DISTRICT COURT OF APPEAL NO. 84-527

REPLY BRIEF OF PETITIONER

SUSAN F. DELEGAL
General Counsel
for Broward County
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (305) 357-7600

JANET LANDER
Assistant General Counsel
for Broward County

Attorneys for Petitioner

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ARGUMENT

AMENDMENT OF A COUNTY HOME RULE CHARTER TO PROVIDE THAT A COUNTY ORDINANCE RELATING TO HANDGUN MANAGEMENT PREVAILS OVER A MUNICIPAL ORDINANCE RELATING TO THE SAME SUBJECT MATTER, TO THE EXTENT OF ANY CONFLICT, DOES NOT INVOKE THE PROVISIONS OF ARTICLE VIII, SECTION 4 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

A. No Transfer of Power has been Effected by the Amendment to Section 8.04 of the Broward County Charter.

Every argument advanced by the City of Fort Lauderdale and Robert O. Cox presumes that the amendment to Section 8.04 of the Broward County Home Rule Charter involves a transfer of power. Respondents have attempted to divert the Court's attention from the concept of charter preemption as it applies in the instant case by stating that the Supreme Court rejected the charter preemption argument advanced by the Petitioner in Sarasota County v. Town of Longboat Key, 355 So.2d 1197 (Fla. 1978). (Brief of Respondents at 7.)

It should first be noted that the Supreme Court did not reject the theory of charter preemption in Sarasota County. The Court rejected Sarasota County's contention that as a home rule county, it was exempt from the provisions of Art. VIII, § 4, Fla. Const. In Sarasota County, an undisputed transfer of five separate and distinct municipal functions or powers from four Sarasota County cities to the county was attempted without compliance with the procedural requirements of Art. VIII, § 4, Fla. Const. Broward County

does not seek to avoid this Court's clear mandate for compliance with the procedural requirements of Art. VIII, § 4, Fla. Const., where a transfer of power is involved. But where no transfer of power has been effected, as in the instant case, the provisions of Art. VIII, § 1(g), Fla. Const., should be applied without encumbrance.

B. The So-Called Power To "Opt Out" and the Power To "Prevail" are Not Municipal Powers or Functions Contemplated by Art. VIII, § 4, Fla. Const.

Resolution of this issue requires careful examination of what "power" the County has purportedly transferred from Fort Lauderdale to itself. The City of Fort Lauderdale and Robert O. Cox argue that one aspect of the power to regulate handguns is "opting out." (Brief of Respondents at 5.) Opting out generally refers to the result achieved when a city enacts an ordinance containing language to the effect that a county ordinance shall not apply within the boundaries of that municipality. However, a municipality cannot opt out of a Broward County ordinance if the subject matter of the ordinance is among those specifically set forth in Section 8.04 of the Broward County Charter. (Appendix to Initial Brief of Petitioner at Tab F.)

Accordingly, it must be decided whether the power to opt out is a municipal power or function contemplated by Art. VIII, § 4, Fla. Const. There is no authority in support of such a proposition. However, there is authority which indicates that the attempt on the part of a municipality to avoid the countywide effectiveness of a Broward County ordinance is violative

of Article VIII, Section 1(i) of the Florida Constitution which provides that county ordinances shall be filed with the Secretary of State and shall become effective at such time thereafter "as is provided by general law." Pursuant to § 125.66(1), Fla. Stat., a county ordinance shall become effective upon receipt of official acknowledgment from the Department of State that such ordinance has been filed therewith.

In 1976, the City of Margate, a municipality in Broward County, adopted an ordinance which provided that no ordinance of Broward County shall become effective within that municipality until approved by the City Council. The Attorney General of Florida was of the opinion that such a municipal ordinance does not create the substantive conflict contemplated by Art. VIII, § 1(g), Fla. Const., or Section 8.04 of the Broward County Charter. Additionally, the opinion stated that the foregoing provisions do not authorize a Broward County municipality to adopt an ordinance delaying or otherwise making contingent the effectiveness of a Broward County ordinance not in conflict with a municipal ordinance. 1976 Op. Att'y Gen. Fla. 076-150 (June 30, 1976).

The language set forth in Section 2 of City of Fort Lauderdale Ordinance No. C-83-16 which might be violative of Art. VIII, § 1(i), Fla. Const. states that:

> No requirements relating to the acquisition, transfer or management of firearms shall be effective within the City of Fort Lauderdale other than those imposed by federal or state law or by an ordinance of the City of Fort Lauderdale. Specifically, Broward County Ordinance No. 83-1 and the regulations established thereby shall not apply

within the City of Fort Lauderdale. (Appendix to Initial Brief of Petitioner at Tab H.)

Accordingly, the question as to whether City of Fort Lauderdale Ordinance No. C-83-16 created a sufficient substantive conflict between itself and Broward County Ordinance No. 83-1 (Appendix to Initial Brief of Petitioner at Tab G) so as to legally preclude the effectiveness of the latter within the City of Fort Lauderdale remains unanswered. Also, this raises a question as to whether a municipal ordinance enacted solely for the purpose of "opting out" of a county ordinance is constitutional. However, the constitutionality of Ordinance No. C-83-16, enacted by the City of Fort Lauderdale in response to the enactment of Broward County Ordinance No. 83-1, is not at issue herein. This argument is presented only in rebuttal to Respondents' assertion that the power to opt out, by enacting an ordinance which provides that Broward County Ordinance No. 83-1 shall not apply within the City of Fort Lauderdale, is one aspect of the regulation of handguns by a municipality (Brief of Respondents at 5).

The City of Fort Lauderdale and Robert O. Cox also regard the "power to prevail" as a power susceptible to transfer. (Brief of Respondents at 5 and 6.) If the Court were to accept this argument it would create a constitutionally untenable merger of Art. VIII, § 1(g) with Art. VIII § 4 of the Florida Constitution.

Respondents have cited no authority in support of the theory that the "power to prevail" is within the purview of Art. VIII, § 4, Fla. Const. The commentary by Talbot "Sandy" D'Alemberte pertaining to Article VIII,

Section 1(g) of the Florida Constitution explains that the power to prevail is established by Article VIII, Section 1(g) of the Florida Constitution:

> ". . . the power which may be granted to county governments under a charter is the power to have county ordinances take precedence over municipal ordinances . . ." 26A Fla. Stat. Ann. 271 (1970).

Noncharter counties are not granted this power. Commenting on Art. VIII, § 1(f), Fla. Const., Talbot "Sandy" D'Alemberte wrote:

> "In any case, county governments may be delegated or granted powers by the legislature to operate as self-governing units even to the extent of having jurisdiction over municipal ordinances when a charter is adopted . . . Absent a charter, the county government may be delegated all powers of self-government except the power over municipal ordinances." 26A Fla. Stat. Ann. 270 (1970).

Therefore, the City of Fort Lauderdale and Robert O. Cox's argument classifying the "power to prevail" as a municipal power is incorrect. In counties operating under a charter form of government, the constitution vests this power in the county. The legitimate exercise of this power by a charter county is not dependent upon the consent of municipalities through resolutions and multiple referenda. The vehicle provided by Art. VIII, § 1(c), Fla. Const., for the exercise of this power is a single countywide referendum by which the charter may be adopted, amended or repealed.

The City of Fort Lauderdale and Robert O. Cox have stated that Broward County concedes that "once the charter amendments and ordinance became effective, the City of Fort Lauderdale's exclusive power to regulate handguns was transferred to the Petitioner" (Brief of Respondents at 5). Re-

spondents' contention is completely contradictory to the stated position of Broward County regarding so-called exclusiveness and transfer of power because at no stage of the proceedings has any such point been conceded by the County. That is one of the points which the Fourth District Court of Appeal misapprehended. (Appendix to Initial Brief of Petitioner at Tab C, p. 2.)

In response to the claim of the Respondents that the "exclusive power" of the City of Fort Lauderdale to regulate handguns within its boundaries has been transferred to the County as a result of the charter amendments, it should first be noted that the City and the County had concurrent jurisdiction over handgun management both before and after the inclusion of handgun management in the conflict of ordinance provisions of the Broward County Charter. As a practical result of the amendment to Section 8.04 of the Broward County Charter, the City may no longer enforce an ordinance containing a substantive conflict with the Broward County Handgun Management Ordinance for the purpose of avoiding the operation of the Broward County Handgun Management Ordinance within the City of Fort Lauderdale to the extent of that conflict. However, the City of Fort Lauderdale has not lost its power to enact ordinances relating to handgun management.

Secondly, Respondents have provided no authority in support of their "exclusiveness of power" contention. Article VIII, § 1(g) Fla. Const., provides the lawful authority for Broward County to enact legislation relating to handgun management while Art. VIII, § 2(b), Fla. Const., and § 166.021, Fla. Stat., provide the lawful authority for municipalities to enact ordinances

relating to the same subject. Both entities continue to exercise jurisdiction and control over handgun management. A charter limitation on the City's exercise of that jurisdiction and control should not be equated with a transfer of power.

C. Charter Preemption is a Separate and Distinct Concept Derived from Art. VIII, § 1(g), Fla. Const., and is Not Intended to Apply to a Transfer of Power within the Purview of Art. VIII, § 4, Fla. Const.

Respondents correctly point out that there are significant differences between the powers of Dade County and Broward County under their respective home rule charters. However, the conclusion reached by the City of Fort Lauderdale and Robert O. Cox, as to the effect of these differences on charter preemption, is incorrect. Broward County agrees that the holding in Metropolitan Dade County v. City of Miami, 396 So.2d 144, 146 (Fla. 1980), established the so-called Dade County exception to compliance with the procedural requirements of Art. VIII, § 4, Fla. Const, wherein the Florida Supreme Court held that Article VIII, Section 6(e) controls over Article VIII, Section 4 of the Florida Constitution. Article VIII, Section 6(e) of the 1968 Florida Constitution provides that Section 11, Article VIII of the Constitution of 1885, as amended, shall remain in full force and effect as if this Article (VIII) had not been adopted.

However, Broward County does not seek to enact ordinances in conflict with the state constitution or with general law as Dade County might,

where specifically authorized by Art. VIII, § 11, Fla. Const. (1885). Contrary to the assertion of the Respondents, Broward County has clear constitutional authority to amend Section 8.04 of the Broward County Charter to include handgun management to ensure uniform, countywide effectiveness of a handgun management ordinance pursuant to Art. VIII, § 1(g), Fla. Const. The transfer of powers provisions of Art. VIII, § 4, Fla. Const., are not applicable to the instant case because no power contemplated therein has been transferred.

Never at any stage of this proceeding has Broward County attempted "to lead one to the conclusion that § 166.021(3)(d), Fla. Stat., somehow elevates Art. VIII, § 1(g), Fla. Const., to a position of prominence over Art. VIII, § 4, Fla. Const. (Brief of Respondents at 7). Nor has the County argued that § 125.86(7), Fla. Stat., could supersede the procedural requirements of Art. VIII, § 4, Fla. Const. (Brief of Respondents at 8). What the County has argued is that where no transfer of power is involved, full force and effect should be given to these statutory provisions.

D. Under Art. VIII, § 4, Fla. Const., There Can Be No Such Thing as a "Partial Transfer of Power."

The phrase "partial transfer of power" has never, at any stage of these proceedings, been used by Broward County. This phrase first appeared in the October 10, 1984, opinion of the Fourth District Court of Appeal. (Appendix to Initial Brief of Petitioner at Tab B, p. 4.) Respondents have taken the position that, assuming arguendo, Art. VIII, § 4, Fla.

Const., prohibits the partial transfer of power, Fire Control Tax District No. 7 Trail Park v. Palm Beach County, 423 So.2d 539 (Fla. 4th DCA 1982), is controlling and prohibits a partial transfer of power. The Respondents' characterization of the facts involved therein as a "'partial transfer' of a portion of District No. 7's land and its governmental control over same to another district . . ." is completely inaccurate. In that case the court specifically found that a boundary change falls within the statutory meaning of "formation" of a special district, as defined in § 165.031(7)(d), Fla. Stat., thereby mandating compliance with the procedural requirements set forth in Chapter 165, Fla. Stat., which include, inter alia, passage of a concurrent ordinance by the governing bodies of each of the municipalities affected and a referendum for separate majorities by each unit or area to be affected. § 165.041(3)(a) and (b)1., Fla. Stat.

Both Fire Control Tax District and Sarasota County, supra, are clear examples of situations where no doubt existed as to whether a transfer of power had been effected, thereby requiring compliance with Art. VIII, § 4, Fla. Const. Fire Control District does not even remotely support Respondents' contention regarding the paradox of a "partial transfer" of power.

CONCLUSION

The weight of authority establishes that no transfer of power has been effected in the instant case. Conversely, there is no authority to support the City of Fort Lauderdale and Robert O. Cox's argument that prior to the charter amendment the City of Fort Lauderdale had "exclusive" authority to enact a handgun management ordinance. Nor is there any authority which supports Respondents' theory that the so-called "power to opt out" is contemplated by Art. VIII, § 4, Fla. Const. Whereas there is sound authority to indicate that the "power to prevail" belongs to a charter county.

Additionally, Respondents have confused transfer of power with charter preemption. Although Dade County is generally exempt from the procedural requirements of Art. VIII, § 4, Fla. Const., by virtue of Art. VIII, § 6(e), Fla. Const., charter preemption is derived from Art. VIII, § 1 (g), Fla. Const., and applies only in those instances where concurrent authority exists both before and after the adoption of a charter amendment to provide that a county ordinance shall prevail over a municipal ordinance as to a specific subject to the extent of such conflict. Finally, the paradox of a "partial transfer" of power having no basis in the constitution, statutes or case law should be laid to rest once and for all.

Based upon all arguments presented, the question certified by the Fourth District Court of Appeal should be answered in the negative and the

October 10, 1984, opinion of the Fourth District Court of Appeal should be reversed.

Respectfully submitted,

SUSAN F. DELEGAL
General Counsel
for Broward County
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (305) 357-7600

AND

By
JANET LANDER
Assistant General Counsel
for Broward County

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail to EUGENE L. HEINRICH, ESQUIRE, McCune, Hiaasen, Crum, Ferris & Gardner, Attorneys for Respondents, Post Office Box 14636, Fort Lauderdale, Florida 33301; and SAMUEL S. GOREN, ESQUIRE, Josias and Goren, Attorneys for Appellee, Jane Carroll, 3099 East Commercial Boulevard, Suite 200, Fort Lauderdale, Florida 33308, on this 19th day of February, 1985.

By: Janet Lander
JANET LANDER
Assistant General Counsel

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