IN THE SUPREME COURT OF FLORIDA

THOMAS M. WOHL and JOHN F. FARLEY,

~~Intervenors~~/Appellants,

v.

THE SEBRING UTILITY COMMISSION, a body corporate and politic of the City of Sebring, Florida,

Plaintiff/Appellee,

v.

STATE OF FLORIDA, AND THE TAXPAYERS, PROPERTY OWNERS AND CITIZENS OF SAID CITY OF SEBRING, INCLUDING NON-RESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND OTHERS HAVING OR CLAIMING ANY RIGHTS, TITLE OR INTEREST IN PROPERTY TO BE AFFECTED BY THE ISSUANCE OF THE BONDS HEREIN DESCRIBED, OR TO BE AFFECTED IN ANY WAY THEREBY,

Defendants/Appellees.

Appeal
Case No. 67,668

INITIAL BRIEF OF APPELLANTS

Appeal from the Bond Validation Judgment of the Circuit Court of the Tenth Judicial Circuit, in and for Highlands County, Florida, CASE NO. 85-169-G (Honorable J. Dale Durrance, Circuit Judge)

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PRELIMINARY STATEMENT

This is an appeal from a bond validation judgment by the circuit court, Art. V, §3(b)(2) Fla. Const.; §75.08 Fla. Stat. (1981); Rule 9.030(a)(1)(B)(i), Fla.R.App.P.

In accordance with Rule 9.110(i), Fla.R.App.P., portions of the record have been included in an appendix which is being filed herewith. References to the Appendix are by (A. ____).

References to Appellee, the Sebring Utilities Commission, are by Sucom.

Intervenors/Appellants, THOMAS M. WOHL and JOHN F. FARLEY are referenced herein as Intervenors.[1]

References to documents received in evidence are:

Intervenors' Exhibits	(Int. Ex.___)
Sucom's Exhibits	(Suc. Ex.___)

The exhibits referenced in this brief are also included in the Appendix. Therefore, references will be combined as (A. ___/___ Ex.___).

Additionally, two transcripts are included in the appendix, the court having taken testimony in this consolidated matter on February 11, 1985 and July 29, 1985. References to the transcript which is included in the appendix are by (T.___/A.___).

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[1] In 1983 these same Intervenors appealed the circuit court's bond validation judgment of a revenue bond issue in the amount of $120 million which, likewise, had not been approved by the electorate. However, Messrs. Wohl and Farley were not identified in the notice of appeal or the proceedings here, case number 63,839. On motion to dismiss after we filed our brief, the court dismissed the appeal by referencing Sucom's motion to dismiss the appeal. Sucom's ground for the motion was that the Intervenors were not identified. However, it subsequently developed that the appeal was moot in any event because Sucom did not sell the $120 million bond issue.

STATEMENT OF THE CASE

Sucom operates electric power generating facilities. It filed its COMPLAINT FOR VALIDATION on May 29, 1985, alleging that it had "determined to issue not exceeding $130,000,000 Original Principal Amount Utility System Revenue Bonds (Series 1985 A) of the Commission . . . for the purpose of paying or redeeming the Outstanding Bonds. (¶9; A. 1-8). The "Outstanding Bonds" were described in the allegations as $92,750,000 and $1,800,000 revenue bonds sold during 1981 and 1984, and $2,350,000 notes issued on March 28, 1985. (¶4; A.2). Its RESOLUTION described the forthcoming bond sale as being for the purpose of paying the Outstanding Bonds. (¶11; A.3).

By paragraph 12 of its COMPLAINT, Sucom asserted that ¶209 of the RESOLUTION "authorizes . . . the issuance of the Bonds for the purpose of providing funds, together with other available funds, for paying at their respective maturities or redeeming at a selected redemption date or dates, or purchasing through a program for tenders, together with interest thereon until their payment or redemption and any redemption premium or purchase, all of the Outstanding Bonds." (A.4).

Sucom alleged that its RESOLUTION provides in §209 that the proceeds of the Bonds simultaneously with the delivery thereof shall be applied by the Trustee in the manner specified, which application shall not be inconsistent with the accomplishment of the purposes set forth in paragraph 12 of the COMPLAINT (¶13;A.4).

Significantly, the COMPLAINT does not include any allegation whatsoever that the proposed Series 1985A bond issue is for the purpose of <u>immediately</u> repurchasing the Outstanding Bonds, or repurchasing same within a short time.

Intervenors filed their motion to dismiss with their answer and affirmative defenses. (A.150-158). Among other things they assert that, contrary to Sucom's allegations, neither the Florida Constitution nor the Laws of Florida authorize any commission to borrow money to finance electric and water utilities. And, Intervenors pointed out the CHARTER which governs Sucom requires voter approval of unlimited borrowing and the sale of revenue bonds in order to secure such borrowing. Additionally, Intervenors stated that §3 of the CHARTER, enacted in 1963, constitutes an unlawful delegation of legislative power. Finally, they argued that §12.04 of the CHARTER, authorizing "refunding bonds", does not allow the sale of bonds which will have the effect of increasing Sucom's indebtedness. Intervenors pointed out that the proposed "refunding revenue bond issue" of $130,000,000 exceeds the amount of the "Outstanding Bonds" ($92,750 plus $1,800,000 plus $2,350,000).

Moreover, Intervenors assert eight affirmative defenses, discussed herein.

The CONSOLIDATED FINAL JUDGMENT (A. 479-491)) reflects two cases which the circuit court had under consideration as of the date of the judgment, August 21, 1985. Case number 84-284-G was an action wherein Intervenors (Plaintiffs there) sought declaratory and injunctive relief which is the essence of the matter now under appeal. The court took testimony on February 11, 1985 (T. 1-307/A. 168-312). Thereafter, on May 29, 1985, Sucom filed its COMPLAINT FOR VALIDATION in case number 85-169-G, the matter which is the subject of this direct appeal. The parties cooperated in that a show cause order (A. 148-149) was consented to on June 5, 1985 and the two cases were consolidated for trial on July 3, 1985, the date which Intervenors (Plaintiffs in case number 84-284-G) had obtained for completion of their original action. Subsequently, the court, on its own motion, reset

the trial for July 29, 1985. All issues raised in both cases were considered by the court at that hearing and the court ordered that all exhibits received in 84-284-G also be marked and filed in 85-169-G. (T. 85/A. 400)[2]

The circuit court entered its CONSOLIDATED FINAL JUDGMENT on August 21, 1985, validating the subject bonds. Procedural requirements are not in issue here because Sucom complied with the requirements of obtaining the necessary show cause order and advertising same prior to the final hearing on July 29, 1985.

Intervenors timely filed their notice of appeal on September 19, 1985. (A. 492).

STATEMENT OF THE FACTS

The Sucom CHARTER

Sucom, a part of the government of the City of Sebring, Highlands County, Florida, was created by Laws of Fla. 1945, Ch. 23535; Amended Laws of Fla., 1951, Ch. 27893; Amended Laws of Fla., Ch. 63-1926, Amended Laws of Fla., Ch. 67-2068, Amended Laws of Fla., 1979, Ch. 79-567. (A.9-10, 31, 32, 33). It operates electrical power generating plants and sells electricity to approximately 10,000 ratepayers in Sebring, Florida.

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[2]In preparation for dictating this brief, undersigned counsel reviewed case number 85-169-G at the clerk's office and ascertained that the exhibits have not yet been duplicated and filed in this matter. However, in the event that the court enters its order directing that the file be transmitted by the clerk, we shall request that the exhibits be duplicated.

The 1951 amendment to the CHARTER, attached to Sucom's COMPLAINT as Exhibit A (Suc. Ex. 3/A. 9-35) provides for three types of borrowing which it may engage in. First, by virtue of §1.12 of the CHARTER, Sucom may borrow an amount not in excess of 40% of the previous year's net earnings from the utilities operation, said loan to be for a period of not more than two years, the purpose of the borrowing to be for operating expense, alterations and repairs of the utilities under its management and control. The second type of authorized borrowing is for the purpose of replacing machinery and equipment and enlarging or extending the public utilities; this borrowing is limited to the amount of the previous year's net earnings from the utilities, and may not exceed a period of five years. §1.12. (Complaint Ex. A, pp. 47-48; Suc. Ex. 3; A.15-16).

Section 12.01 of the CHARTER provides that Sucom is authorized and empowered "without limitation as to amount, or as to maturities," to borrow money and issue revenue bonds securing the money so borrowed "...subject to the approval of the freeholders owning real estate situate in the City of Sebring, Highlands County, Florida, and who are also qualified to vote in any general election of said City. ..." (Suc. Ex. 3; P. 49 A. 17). Sucom has not obtained voter approval for this third type of borrowing, i.e. unlimited borrowing, utilizing revenue bonds to secure the borrowing, since 1964. (MacBeth testimony; A.377).

Prior to May 14, 1963, Sucom's counsel forwarded to the Secretary of State for prefiling an amendment to the CHARTER. It provides:

> Section 3. Construction of act.--This act shall be construed to authorize the issuance of revenue bonds or certificates subject to approval of the freeholders when required under the constitution of the state and shall not

be construed to be in conflict with the general law of the state authorizing the issuance of revenue bonds or certificates payable solely from the municipal utilities revenues.

(Int. Ex. 2; Suc. Ex. 5; A. 159-160).

Because this amendment required voter approval at a City election, Sucom advertised the upcoming election, but did not correctly state the substance of the amendment which became §3 of the CHARTER (Suc. Ex. 3, pp. 63-64; A. 31-32) after the December 10, 1963 referendum election. The advertising included the following language:

> THIS IS TO GIVE NOTICE, That a Special Election will be held on December 10, 1963 to vote on a Special Act of the Florida Legislature amending Section 3 of Chapter 27893 of the Laws of Florida of 1951 relating to the construction of said Act. The amendment provides the issuance of revenue bonds or certificates pursuant to said Act shall not be construed to be in conflict with the general law of the State of Florida authorizing the issuance of revenue bonds or certificates payable solely from the municipal utility revenues.
>
> The amendment, in order to be passed, must be approved by a majority of the electors of the City of Sebring voting in said Special Election.
>
> DATED this 12th day of November, 1963.

These notices were published on November 14 and 21, 1963. (Int. Ex. 15, 16; A. 161, 162). Additionally, several officials and Sucom's counsel

published an advertisement in the Sebring News-Sun, Inc. on December 5, 1963, describing the proposed amendment as:

> ... This amendment clarifies the issuance of revenue bonds or certificates under the Utilities Charter and provides that this shall not be in conflict with the powers granted the City under the General Law of the State of Florida. This brings Sebring in line with other municipalities in the State and is a good amendment. If there is any question about this, contact a member of the Utilities Commission.

(Int. Ex. 17; A. 163).

Finally, the December 10, 1963 ballot description that was presented to the voters contained the following language or description:

> Special Act of the Florida Legislature amending Section 3 of Chapter 27893 of the Laws of Florida of 1951 relating to the construction of said Act. The amendment provides the issuance of revenue bonds or certificates pursuant to said Act shall not be construed to be in conflict with the general law of the State of Florida authorizing the issuance of revenue bonds or certificates payable solely from the municipal utility revenues.

(Int. Ex. 3; A. 165).

Although this matter is discussed at greater length, ARGUMENT, below, it is possible to state the fact here that, §3 as pre-filed with the Florida Secretary of State was advertised in the newspaper and on the ballot as something which it was not. Thus, the statute provides that the "act" (CHARTER) shall be construed to authorize the issuance of revenue bonds

"subject to approval of the freeholders when required under the constitution of the state and shall not be construed to be in conflict with the general law of the state authorizing the issuance of revenue bonds or certificates payable solely from the municipal utility revenues." On the other hand, the advertising as well as ballot description suggested to the voters when deciding whether to authorize enactment of §3 advised them that "The amendment provides the issuance of revenue bonds or certificates pursuant to said Act shall not be construed to be in conflict with the general law of the State of Florida authorizing the issuance of revenue bonds or certificates payable solely from the municipal utility revenues." There was no descriptive reference to the Florida Constitution. Moreover, as will be argued herein, the general law of Florida did not authorize the sale of revenue bonds by public utility commissions in any event.

During the July 29, 1985 hearing, Intervenors called as a witness Mr. Joseph O. MacBeth who was counsel to the Commission during 1963. Mr. MacBeth was of the personal view during 1963 that Sucom was in an "untenable position" because it "couldn't grow". They (sic) couldn't issue revenue bonds or certificates unless they (sic) had the vote of the people in each case. The law didn't say that was required and I didn't think it should be required of the Commission." (T.63/ A.378). He testified that, after conferring with a member of the Florida House of Representatives, he prepared the §3 amendment for pre-filing with the Florida Secretary of State. Because the member had stated his desire that the proposed amendment be subject to voter referendum approval, Mr. MacBeth undertook to advertise the amendment and place it on the ballot. At all times, he was acting within the scope of his authority and employment as counsel for Sucom. He was not aware of any specific provisions of Florida general law. Moreover, it was his

view that the ballot description was adequate and sufficient for the purpose of apprising voters of the amendment. (T. 49-64; A. 364-379).

Relevant Revenue Bond Financings

The subject 1985 MASTER BOND RESOLUTION (COMPLAINT Exhibit C; Suc. Ex. 9; A. 50-147) is described by its terms as a refunding bond issue as well as a borrowing for general purposes. The RESOLUTION refers to the 1981 revenue bond issue in the amount of $92,750,000, the 1984 bond issue ($1,800,000) and the 1985 subordinated notes ($2,350,000) (Id. at 56), and states that Sucom has determined to issue its Utilities System Revenue Bonds (Series 1985A), a portion of the proceeds of which will be applied to pay at maturity or to redeem or to purchase the 1981 bonds (Id. at 58).

The RESOLUTION further provides that Sucom will, at all times while any of the bonds shall be outstanding, establish and collect utilities charges which, together with other income, are reasonably expected to yield net revenues equal to at least 1.0 times the Aggregate Debt Service for the forthcoming 12-month period. (Id. at §501, p. 44; A. 99). This means that Sucom will charge the rate payers, including Intervenors, an amount sufficient to guarantee payment of the yearly debt service.

The RESOLUTION refers to "Outstanding Bonds" as the 1981 bonds ($92,750,000), the October 1, 1984 bonds ($1,800,000) and the April 1, 1985 Subordinate Revenue Notes ($2,380,000, described above). (Id. at 71), and "Bonds" as those issued under the subject 1985 RESOLUTION, i.e. the $130 million bond issue. (Id. at 62). "Issuance of Bonds" means selling 1985 bonds for the purpose of providing funds for paying all or part of the cost of refunding the Outstanding Bonds. (RESOLUTION §201; Id. at 77).

The subject 1985 bonds ($130 million) will not presently be utilized to refund the "Outstanding (1981, 1984) Bonds" or satisfy the April 1, 1985 debt. Section 209 of the RESOLUTION provides that the 1985 bonds shall be issued in an aggregate Original Principal Amount not exceeding $130 million "for the purpose of providing funds, together with other available funds, for (i) paying at their respective maturities or (ii) redeeming at a redemption date or dates or (iii) purchasing, pursuant to a program for the solicitation of tenders, all of the Outstanding Bonds." (RESOLUTION pp. 25-26; Id. at 80-81). In this regard, Mr. Albert Simmons, bond counsel for Sucom, testified during the July 29, 1985 hearing that, under the RESOLUTION, revenues from this 1985 bond issue would be deposited in a special fund and invested in obligations of the United States Government. As the prior obligations mature, or as call dates arrive in several years, earnings built up from investing the subject 1985 bonds would be utilized to redeem them. In the meantime, earnings in the fund, together with other available funds, would be utilized by Sucom to service the debt (approximately $10,532,000 per year) on the 1981 bonds. He testified that the 1981 bonds ($92,750,000) would be paid off in 1991 ("in all likelihood"), the 1984 bonds in 1994, and the 1985 notes on April 1, 1986 (T. 26; A. 341).

The subject 1985 MASTER BOND RESOLUTION does not otherwise include language which requires that Sucom utilize the proceeds from the validated 1985 bond issue in order to refund outstanding obligations at this time. Thus, in addition to the outstanding debt of approximately $96 million, Sucom anticipates having additional debt of $130 million, at least for a period of years prior to eventual pay off of the "Outstanding Bonds". As a matter of fact, Intervenors are troubled when suggesting that Sucom will pay off the

"Outstanding Bonds" at all. This is because its RESOLUTION does not explicitly so require.

The Rate Payers Pay the Cost of Sucom's Borrowings

Sucom owes approximately $92 million under the 1981 bond issue and the total pay out is approximately $320 million; it is unable to pay the annual debt service of approximately $10,532,000. (Moothart Testimony; T. 187-190; A. 193-195; Int. Ex. 4/A. 166-167). The pay back on the October 1, 1984 bonds in the amount of $1,800,000 is $5,675,000. (Id. at 191-194; A. 197-200). The pay out on the proposed $130 million issue will be almost $400 million. (Simmons Testimony; T. 39; A. 354).

Sucom has approximately 10,000 rate payers. (Moothart Testimony; T. 219-220; A. 225-226). Its rates are 20 to 30 percent higher than Florida Power Corporation which serves the adjacent area. (Moothart Testimony; T. 207-208; A. 213-214), (Wohl Testimony; T. 253; A. 258), (Keith Testimony; T. 277, 278; A. 282-283). The rate payers, including Intervenors, pay the obligations undertaken and proposed to be undertaken by Sucom. (Moothart Testimony; T. 194, 201, 226; A. 200, 207, 232).

Sucom is unable to pay its current obligations. In this regard, it is presently experiencing revenues of approximately $16 million and expenses of operation of $12 million. It has operating income of $2,238,000 from which it must pay interest expense of $10,400,000 (Moothart Testimony; T. 189, 204; A. 195, 210).

The 1981 bond issue ($92,750,000) was undertaken in order to construct a new power generating facility. With yearly bond debt service exceeding $10,500,000 (Int.Ex. 4/A. 166-167), Sucom never had the financial means with

which to pay for its undertaking.[3] For the fiscal year ended (FYE) September 30, 1979, earnings totalled $874,141; for FYE 9/30/80 $931,311; for FYE 9/30/81 $1,022,448. (Farley testimony T. 77/A. 392). Sucom now purchases power from other power companies because such is cheaper than what it can produce. (Moothart testimony T.73/A.388).

Costs for investment banker commission and bond insurance approximate $8,296,000. (Simmons testimony T.34-37/A.349-352). Whether such is an added debt of Sucom appears certain, but bond counsel, Mr. Simmons, testified "yes and no". He explained his equivocation by stating that the escrow generated by the proposed bond sale will earn interest. (Id. A.352). However, Sucom will not derive a "profit" by such investment because the federal arbitrage rules prohibit such. (Id.T. 26/A. 341).

Although Mr. Simmons testified that the validated bond issue is a refunding issue (T.18/A.333), it is clearly much more because the RESOLUTION clearly manifests Sucom's intention to utilize the bond proceeds for, inter alia, construction. (A.39-43). Thus, to that extent, the bond sale is designed for more than mere refunding. And, the CONSOLIDATED FINAL JUDGMENT reflects that more than refunding outstanding bonds is contemplated. (A. 482-483).

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[3]Mr. Dale Martin Keith is an engineer associated with Veatch & Associates, Engineers, consultant to Sucom. He testified that his firm is attempting to "restructure" Sucom's debt to follow natural growth of the system in order to take it out of a possible "death spiral." However, when he testified, he did not know the details of the restructuring. (T. 100-110). The proposed 1985 bond issue under consideration here is apparently the proposed "restructuring." Although Sucom did not proffer any details of the "restructuring," and although the details were not available to Intervenors at the time of trial, it is generally understood that the scheme involves the sale of revenue bonds on a "zero coupon basis" (heavily discounted) whereupon the proceeds of the bond issue will be invested, and pay back to the bond
(Footnote Continued)

ISSUE ON APPEAL

DID THE CIRCUIT COURT ERR IN VALIDATING THE 1985 BOND ISSUE ($130 MILLION) DESCRIBED IN THE MASTER BOND RESOLUTION?

Several sub-issues are stated in order to answer the question:

A. DOES THE 1985 BOND ISSUE QUALIFY AS A REFUNDING BOND ISSUE IN VIEW OF THE FACT THAT IT INCREASES SUCOM'S DEBT?

B. ASSUMING THAT THE 1985 BOND ISSUE DOES NOT QUALIFY AS A REFUNDING BOND ISSUE, IS IT NEVERTHELESS VALID DESPITE THE FACT THAT SUCOM HAS NOT OBTAINED VOTER APPROVAL AT A REFERENDUM ELECTION?

C. IS THE OUTSTANDING 1981 BOND ISSUE VOID AND ILLEGAL FOR EXTRINSIC FRAUD IN VIEW OF THE 1963 PROCESS UTILIZED IN AMENDING THE CHARTER?

D. ARE THE OCTOBER 1, 1984 AND APRIL 1, 1985 BORROWINGS VOID AND ILLEGAL IN VIEW OF SUCOM'S FAILURE TO OBTAIN VOTER APPROVAL?

ARGUMENT

A. THE SUBJECT 1985 REVENUE BOND ISSUE IN THE AMOUNT OF $130 MILLION DOES NOT QUALIFY AS A REFUNDING BOND ISSUE BECAUSE IT INCREASES SUCOM'S DEBT AND DOES NOT IMMEDIATELY REFUND THE OUTSTANDING DEBT.

Candidly, we have found no Florida case law which deals with refunding outstanding revenue bonds. The Sucom borrowing has, with the exception of the April 1, 1985 undertaking, been secured by the sale of revenue bonds.

(Footnote Continued)
holders during the early years will be amounts within the net operating revenue experiences of the utility.

This court's prior decisions on the subject of refunding bonds have involved general obligation bonds which are guaranteed or secured by the tax base of a particular political entity.[4]

However, there is no basis for concluding that the concept of refunding general obligation bond issues would or should differ from that applicable to "refunding revenue bond issues." Section 12.04 of the CHARTER provides, in pertinent part:

> (Sucom) ... is hereby ... authorized and empowered, for the purpose of refunding any revenue bonds ... to issue refunding revenue bonds or certificates. The issuance of any such refunding bonds or certificates may be authorized by resolution which may be adopted at the same meeting at which it is introduced by a majority of all members of (Sucom) then in office and shall take effect immediately upon its adoption and need not be published or posted, nor shall the issuance of such refunding revenue bonds or certificates require the approval of freeholders owning real estate within said City of Sebring and who are also qualified to vote in any general election of said City to ratify and approve the same.

(CHARTER, p. 52; A. 20).

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[4]Sucom is an unelected commission and is not the governing agency of any political entity. The five members of the commission are appointed by the elected city council of the City of Sebring. (CHARTER, pp. 41-43; A. 9-11). Thus, Sucom is not subject to supervision through the electoral process.

The clear meaning of the quoted language is that the debt of Sucom shall not be increased by the issuance of a "refunding bond issue." However, the evidence at trial demonstrates that, in addition to the fact that there will now be several bond issues outstanding, including the 1981 and 1984 and the present bond issue of $130 million as well as the March 1985 note, Sucom must pay approximately $8 million to investment bankers, bond counsel and a bond insurance company.

And the RESOLUTION authorizes utilization of the Bond sale proceeds in order to undertake additional construction. The purpose of refunding of bonds by the issuance of new bonds is that outstanding bonds are due or about to become due and the issuer is without funds to pay them, or to obtain the advantage and savings of a reduced rate of interest payable on the refunding bonds. Folks v. Marion County, 121 Fla. 17, 163 So. 298 (1935); State v. Miami, 155 Fla. 180, 19 So.2d 790 (1944). The proposed "refunding bonds" go far beyond mere refunding in order to save interest or in order to defer payment of the original amount. Thus:

1. Approximately $8 million from the proceeds are to be utilized to pay expenses of investment bankers and bond insurance.

2. The terms of the RESOLUTION include the proposition that some of the funds will be utilized for new construction purposes.

3. The outstanding obligations from 1981, 1984 and April 1, 1985 will, in fact, not be refunded at this time. Thus, for a period of several years, Sucom will pay interest on all of the prior obligations as well as upon these "refunding bonds."

This court has stated on several occasions that refunding bonds that merely contain the obligation of the original bonds for reduced or extended payments are not required by law to be approved by the electorate. Such

approval if given does not afford additional legal effect to the refunding bonds or to the authority for issuing them. See, e.g. Boatright v. City of Jacksonville, 117 Fla. 477, 158 So. 42, 43, 44 (1934); State v. City of West Palm Beach, 141 Fla. 775, 193 So. 839, 842 (1940).

In Nolle v. Brevard County, 100 Fla. 1962, 131 So. 776 (1931), this court reversed the circuit court's order sustaining a demurrer to Mr. Nolle's complaint for an injunction to preclude the issuance of proposed refunding bonds. The citizen, resident and taxpayer had contended that the Florida Constitution, as amended in 1930, forbade the issuance of bonds without the required approving vote of the electorate - the bonds were general obligation or tax base secured bonds. He appealed the dismissal of his injunction suit. The court wrote at 131 So. 777:

> Chapter 11855, Acts 1927, authorizes a county to issue refunding bonds for the purpose of refunding any bonds for the payment of which the credit of said county is pledged; and amended section 6, article 9, Constitution, permits a county to issue refunding bonds without an approving vote of the electorate as therein required for the original issue of bonds; but such refunding bonds must be exclusively for the purpose of refunding bonds of the county, and bonds of a taxing district are not made bonds of a county by a statute which merely authorizes county bonds to be issued in lieu of district bonds and does not make the district bonds the bonds of the county. In such case the bonds to be issued by the county are as to the county, original and not refunding bonds, and under amended section 6, article 9, Constitution, the county has power to issue such bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such county shall participate.
>
> As the bonds in this case are not to be issued to refund bonds of the county, they can not under amended section 6, article 9, Constitution, be issued without the required approving vote at an election duly held for that purpose.
>
> Reversed.

In Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211, 218 (1931), the court wrote:

> . . . The theory of the cases so holding is that, since the bonds are not the debt itself, but the legal evidence of the existence of the debt, the issuance of refunding bonds for the purpose of discharging an existing legal indebtedness, originally incurred in accordance with the constitution requirement, does not create a new debt or impose any new liability against the taxpayers or their property within the meaning of such constitutional provision, but merely renews and continues in a changed form the original existing indebtedness which was originally created in conformity with the Constitution, and that such constitutional provision therefor does not prohibit the renewal, without a vote, of the previously existing valid debt, so long as no additional or increased liability is created. . . . (emphasis added).

See also, State v. Board of Public Instruction of Broward County, 164 So.2d 6, 11 (Fla. 1964).

In a slightly different setting, the court, in State v. City of Lakeland, 154 Fla. 137, 16 So.2d 924 (1943), found that the "refunding bond issue" was not authorized unless approved by the electorate where the original contract between the taxpayers and the bondholders was materially enlarged. There, the City of Lakeland proposed to substantially add to the security of the bonds by pledging future unappropriated revenues from the utilities. The court relied upon State ex rel. Babson v. City of Sebring, 115 Fla. 176, 155 So. 669 (1934).

The proposed refunding bonds violate the concept of refunding bond issues for the reason that they would increase the existing debt. Accordingly, we respectfully submit that the subject bond issue which was validated by the circuit court does not qualify as a "refunding bond issue." The next logical question, therefore, is whether this proposed bond issue qualifies under another theory. Such is treated in the next section.

B. ASSUMING THAT THE 1985 BOND ISSUE DOES NOT QUALIFY AS A REFUNDING BOND ISSUE, NEITHER CAN IT QUALIFY AS A REVENUE BOND ISSUE BECAUSE SUCOM DID NOT OBTAIN VOTER APPROVAL.

Firstly, it is relevant to note that Sucom, as an unelected commission, is in a very tenuous position when making decisions to increase its capital base - purchasing and constructing electrical power plants - and selling revenue bonds in order to finance the same without obtaining approval of the electorate. The CHARTER, as it existed in 1951, manifests the voters' intention that they would maintain control and supervision over the spending habits of the Commission. It is not difficult to understand their concern, since they did not and do not have the opportunity to elect the five commissioners who govern Sucom. As stated in the FACTS, above, the CHARTER prescribes three very discrete methods of borrowing. The first two methods described above do not require voter approval and do not suggest that any borrowing would be substantial.[5] The voters, however, enacted §12.01, because they foresaw the need of Sucom to engage in unlimited borrowing for unlimited periods of time, and to utilize the sale of revenue bonds in order to secure said borrowing. This is the subject of borrowing about which the voters were concerned. As stated, such borrowing could be engaged in subject only to their approval.[6] To our

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[5]The evidence introduced during the two hearings conducted by the circuit court demonstrates that Sucom did not have prior year earnings which would have qualified or authorized it to borrow for these limited purposes.

[6]The §12.01 requirement that "approval of the freeholders" is required is not of concern here. The limiting concept of "freeholder" approval was overruled by the United States and Florida Supreme Courts. City of Phoenix, Arizona
(Footnote Continued)

knowledge, only one court has commented upon problems created by unelected commissions. In a setting where voter approval of borrowing was not the subject of decision, the Fifth District made the following observation about the Orlando Utilities Commission:

> The City/OUC Tandem is a unique and strange one. The City and its electors have no control over the OUC; but neither does the OUC have control over the City. The OUC is answerable to no taxpayer or voter group, although it is a public utility. This situation is created by state law and it can only be changed by state law."

Gaines v. City of Orlando, 450 So.2d 1174, 1182 (Fla. 5th DCA 1984).

It is against the foregoing backdrop that we present this argument about the meaning of the CHARTER after it was amended by §3 in 1963. The means by which Sucom undertook to "amend" the CHARTER is the subject of the next section. For purposes here, it is assumed for the sake of argument only that the amending process in 1963 was not flawed. We deal here with the question whether the Legislature's enactment of §3 constituted an unlawful delegation of power. That is, §12.01 was not repealed. And, §3, as distinguished from being a substantive provision of law, suggests a "rule of construction."

Rules of Construction: Rule of the Judiciary, Not of the Legislature

Section 3 (1963) provides:

> Construction of act. - This act shall be construed to authorize the issuance of revenue bonds or certificates subject to approval of the freeholders when required under the constitution of the state and shall not be

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(Footnote Continued)
v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970); State v. City of Miami, 260 So.2d 497 (Fla. 1972). The upshot of the decisions is that voters need not be freeholders in order to approve revenue bond issues under §12.01. However, it is particularly relevant to note that §3 (1963) is most logically read as addressing this very issue, i.e., "freeholder approval" is required only if the Florida Constitution requires such.

> construed to be in conflict with the general law of the state authorizing the issuance of revenue bonds or certificates payable solely from the municipal utilities revenues. Chapter 63-1926 was approved at referendum held Dec. 10, 1963.

The most obvious point is that §12.01 does not require judicial "construction." That voter approval of unlimited borrowing is required is clear and unambiguous. Moreover, the amendment was unnecessary in any event because there was no suggestion of prior illegal borrowing. And, see n. 6., supra.

An equally cogent point is that the powers of the state government are divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided in the constitution. Art. II, §3 Fla. Const. (1968); Art II, Fla. Const. (1885). The courts are law-interpreting and not lawmaking bodies. It is the court's duty to interpret laws rather than to make them. General Motors Acceptance Corporation v. State, 152 Fla. 297, 11 So.2d 482, 485 (1943). And, see generally, 10 Fla.Jur.2d, CONSTITUTIONAL LAW §170, p. 369, and cases cited therein. The Legislature has no power under the constitution to regulate the judicial discretion or judgment that is vested in the courts. See, Trustees of Internal Improvement Fund v. Bailey, 10 Fla. 238, 250 (1863):

> In a case where "the exercise of power by the Legislature properly belonging to the judicial department is clear and manifest, there is no doubt it would be incumbent upon this Court to declare it a violation of the Constitution.
>
> The Legislature, under this provision of the Constitution may pass an act which is ministerial and simply remedial of an existing right, which may not amount to the exercise of judicial power, which was the act of Legislature in Pennsylvania in the case of Lessee of Livingston vs. Moore and others.

> It is a great blessing to us as a people that we have a written Constitution, in which the powers of the Government are divided and a prohibition is put upon the exercise or usurpation of any of the powers properly belonging to either of the other. The framers of the Constitution of Florida doubtless, had in mind the omnipotent power often exercised by the British Parliament, the exercise of judicial power by the Legislature in those States where there are no written Constitutions restraining them , when they wisely prohibited the exercise of such powers in our State.
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> That Convention was composed of men of the best legal minds in the country-men of experience and skilled in the law-who had witnessed the breaking down by unrestrained legislation all the security of property derived from contract, the divesting of vested rights by doing away the force of the law as decided, the overturning of solemn decisions of the Courts of the last resort, by, under the pretense of remedial acts, enacting for one or the other party litigants such provisions as would dictate to the judiciary their decision, and leaving everything which should be expounded by the judiciary to the variable and ever-changing mind of the popular branch of the Government.
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> To prohibit the exercise of such power in this State, they provided that the judiciary department shall not exercise any power properly belonging to the legislative department, nor the Legislature any power properly belonging to the judicial department. (Court's emphasis).

See also, Thornley v. United States, 113 U. S. 310, 28 L.Ed. 999, 1000, 5 S. Ct. 491, (1885); State ex rel Payson v. Chillingworth, 122 Fla. 339, 165 So. 264 (1936).

In Marbury v. Madison, 5 U.S. 137, (1 Cranch), 2 L.Ed. 60, 73 (1803), the Court stated: "It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. . . ." And, see Ogden v. Blackledge, 6 U.S. 272 (2 Cranch), 2 L.Ed. 276 (1804), wherein the Court interrupted counsel, stating that it was unnecessary to argue the point that the judicial power extends to declaring what the law is, and that to declare what the law shall be is legislative; the legislature may not enact a

law to declare what the law was not.[7] Finally, see Straub v. Lyman Land & Investment Co., 30 S.D. 310, 138 N.W. 957, 959 (1912), where the court wrote: ". . . A legislative declaration as to the construction to be given a previous statute is not conclusive or binding on the courts . . ."

Indeed, the Legislature did not undertake to construe §12.01 of the CHARTER when enacting §3, above; it goes without saying that the Legislature is without authority to delegate to a commission the power to construe the Legislature's statutes.

The only point remaining for discussion is the question under what circumstances will the judiciary construe legislation. Where the language of the statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resort to the rules of statutory interpretation. Rules of statutory construction should be used only in case of doubt and should never be used to create doubt, only to remove it. If the language of the statute is clear and admits of only one meaning, the Legislature should be held to have intended what it has plainly expressed. There is no room for construction, and no necessity for interpretation. The proper function of the court is to effectuate the legislative intent. When the language of a statute is both clear and reasonable and logical in its operation, the court should not reach for excuses to give a different meaning to words used in the statute, nor should the court speculate as to what the Legislature intended. Thus, the court is without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its

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[7]By enacting §3 in 1963 and providing that the CHARTER shall be construed to require voter approval only when such is required by the Florida Constitution, the Legislature, in effect, stated that yesterday's §12.01 is not the law tomorrow.

reasonable and obvious implications. See Tropical Coach Line, Inc. v. Carter, 121 So.2d 779 (Fla. 1960):

> If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended.

Also, Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822, 825-826 (Fla. 1964). And, see generally, 49 Fla.Jur.2d, STATUTES, §11, pp. 147-150.

If the Legislature, in enacting §3 during the 1963 session, had intended to repeal the provision of §12.01 requiring a referendum on revenue bond issues, it should and would have done so. The court is thus left with (a) a plain and unambiguous statute requiring a referendum on revenue bond issues (§12.01), and (b) the Legislature's self-styled "rule of construction" to the effect that the CHARTER ". . . shall be construed to authorize the issuance of revenue bonds or certificates subject to approval of the freeholders when required under the constitution of the state. . . ." (§3). However, the circuit court "interpreted" or "construed" the plain and unambiguous meaning of §12.01, and thus placed itself squarely in the position of construing §12.01 as meaning something which it clearly does not provide. Moreover, the circuit was clearly in error in concluding that the §3 language dispensed with the requirement of a referendum; the language, in its proper and correct grammatical context, has meaning only for the requirement of freeholder approval. See n. 6, supra. It may well be that Sucom, in drafting §3, intended to evade the clear requirement of voter approval as stated in §12.01, but it clearly could not effectuate such by a rule of construction which would later place the judicial branch of government in the position of "construing" an unambiguous statute. On the other hand, Sucom could have met the issue head on by seeking repeal of the statute to the extent that voter approval is

required. It did not do so and cannot now contend that the judicial branch must construe §12.01.

Therefore, §12.01 of the CHARTER provides the only authority whereby Sucom is empowered to issue revenue bonds. And, that authority must be undertaken strictly in accordance with that section - there must be an approving vote by referendum. The judicial branch should not undertake to construe unambiguous language to mean that which it clearly does not.

Unconstitutional Delegation of Legislative Power

First, the concept that §12.01 shall not be construed to be in conflict with the general law of the state authorizing the issuance of revenue bonds is totally without meaning for the simple reason that the general law did not during 1963, and does not now, authorize a commission's sale of revenue bonds for any purpose. Article VIII, §2 of the Florida Constitution (1968) provides that municipalities shall have certain home rule powers. Authority to issue bonds is extended to municipalities by §166.111, Fla. Stat. By virtue of §166.101(8) the term "project" means a governmental undertaking approved by the governing body and includes all property rights, easements, and franchises relating thereto and deemed necessary or convenient for the construction, acquisition or operation thereof, and embraces any capital expenditure which the governing body of the municipality shall be deemed to be made for a public purpose including the refunding of any bonded indebtedness which may be outstanding on any existing project which is to be improved by means of a new project. Sucom is not a "municipality" and is not a "governing body." Accordingly, the Municipal Home Rule Powers Act, Ch. 166, Fla. Stat., is not applicable.

The only remaining general statute of which we have knowledge is the Revenue Bond Act of 1953, Fla. Stat., Ch. 159. The word "municipality" means any city, town, village or port authority in the state, and the term "governing body," as applied to a municipality shall mean the council, commission or other board or body in which the general legislative powers of the municipality shall be vested. §159.02 Fla. Stat. The word "project" means the various things enumerated, including waterworks systems, sewer systems, gas systems, etc. §159.02(4) Fla. Stat. Electrical power generating systems are not included within the definition of the word "project." Therefore, in addition to the fact that Sucom does not qualify as a municipality or "governing body," the Revenue Bond Act of 1953 was not enacted for the purpose of authorizing the sale of revenue bonds in order to acquire funds to construct electrical power generating systems.

We note in passing that the circuit court, in its CONSOLIDATED FINAL JUDGMENT stated that Sucom is authorized to issue the subject bonds by virtue of the authority granted by the Constitution and laws of the State of Florida, including the "Act" (CHARTER). (JUDGMENT, finding of fact (g), p. 3; A. 481). It is a fact that no constitutional or statutory provision authorizes the sale of revenue bonds by a commission.[8] However, it is true that the CHARTER authorizes the sale of revenue bonds by §12.01, but, again, such is strictly subject to approval by the voters.

Assuming that §3, (1963) is not void by reason of the means of its enactment, it remains an unconstitutional delegation of power. The

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[8]Neither the 1885 nor the 1968 Constitution deals with the subject of revenue bonds. See Article IX, §6 (1885) and Article VII, §12 (1968). As is only logical, these provisions pertain only to the governmental sale of tax base secured bonds - such requires approval by the voters.

Legislature may not delegate power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law. The Legislature is limited to enacting laws which are complete in themselves, designed to accomplish a general public purpose, and it may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. State v. Atlantic Coast Line Railway Co., 56 Fla. 617, 47 So. 969, 976 (1908), cited by the court in Conner v. Joe Hatton, Inc., 216 So.2d 209, 211 (Fla. 1968). This court wrote in Conner:

> The fact that some authority, discretion or judgment is necessarily required to be exercised in carrying out a purely administrative or ministerial duty imposed by statute does not invalidate the statute. Such authority, discretion, or judgment is subject to judicial review and is not deemed to be a non-delegable legislative power. Bailey v. Van Pelt, 1919, 78 Fla. 337, 82 So. 789, 793. It has been said that the true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what the law shall be, and the conferring of authority or discretion in executing the law pursuant to and within the confines of the law itself. See Ex Parte Lewis, 1931, 101 Fla. 624, 135 So. 147, 151, quoting with approval Hampton, Jr. & Co. v. United States, 276 U.S. 394, 400, 48 S.Ct. 348, 351, 72 L.Ed. 624. (Court's emphasis).

When the statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the administrative body the power to say what the law shall be. See State ex rel. Davis v. Fowler, 94 Fla. 752, 114 So. 435, 437 (1927); Lewis v. Florida State Board of Health, 143 So.2d 867, 875, (Fla. 1st DCA 1962).

And, this court stated in Connor, 216 So.2d at 213:

> Similarly, the authorization to prohibit "unfair trade practices" is subject to the same infirmity. In Robbins v. Webb's Cut Rate Drug

> Co., 1944, 153 Fla. 822, 16 So.2d 121, in considering whether a similar authorization respecting "unfair or unreasonable economic practices among barbers or barber shops" was an unconstitutional delegation of legislative authority, this court pointed out that these terms
>
> "* * * have no set meaning in law or in common usage. To vest in a Commission the unbridled discretion to define such terms without any rule or standard whatever to guide them is a clear delegation to enact the law or define what it shall be; in other words, a delegation of straight legislative power which will not be permitted.
>
> It must be held, therefore, that the provisions of Subsection 3(c) of Section 573.17, relating to unfair trade practices, is too vague and uncertain, as presently framed, to support a delegation of administrative authority to the Commissioner.

In D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977), the appellant appealed to this court following a decision of the First District which declared that a certain statute was unconstitutional. The court addressed the subject of unlawful delegation of legislative authority, and wrote at 349 So.2d 166:

> An assault on the constitutionality of a statute vel non must necessarily succeed if the language does not convey sufficiently definite warnings of the proscribed conduct when measured by common understanding and practice. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); Newman v. Carson, 280 So.2d 426 (Fla. 1973); Zachary v. State, 269 So.2d 669 (Fla. 1972); Orlando Sports Stadium, Inc. v. State ex rel. Powell, 262 So.2d 881 (Fla. 1972); Smith v. State, 237 So.2d 139 (Fla. 1970); Hunter v. Allen, 422 F.2d 1158 (5th Cir. 1970). Due process of law will not tolerate a statute which "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning." Cline v. Frink Dairy Co., 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927); State v. Llopis, 257 So.2d 17 (Fla. 1971); Brock v. Hardie, 114 Fla. 670, 154 So. 690 (Fla. 1934).

And, at 349 So.2d 167-169:

". . . That law provided this Court with additional guidance to meet a constitutional challenge of vagueness. Conversely, in Conner v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968), this Court held in part that Sections 573.17(3)(b) and (c), Florida Statutes (1967), which statutory sections employed language similar to that challenged in Rogers, supra, were invalid as an unconstitutional delegation of legislative power. The question arose in a suit filed by the appellant, as Commissioner of Agriculture of the State of Florida, to collect an assessment made against the appellee under the authority of Section 573.21(1), Florida Statutes, to pay the cost of administering a Sweet Corn Marketing Order promulgated by the Commissioner pursuant to Section 573.17(3). Appellee defended on the basis that Section 573.17(3), Florida Statutes, was unconstitutional on various grounds, one of which was that the act constituted an unlawful delegation of legislative power. In holding that the authorization of programs "for the prevention, modification or removal of trade barriers which obstruct the free flow of celery or sweet corn to market" [§573.17(3)(b), Fla.State.] was unconstitutional, we stated:

> We are not directed to any decisions upholding such a delegation of authority; nor is it suggested what standards, either by common usage or by reference to the purposes of the Act, can be implied in limiting the Commissioner's authority in this respect. (Court's emphasis)

* * *

Whether a particular statute is valid and falls closer to that end of the spectrum illustrated by the rationale of Rogers or is invalid and falls closer to that end exemplified by Joe Hatton is contingent on how well-defined the controversial language has become through common law, trade usage, or perhaps federal law (if the intent of the Legislature is to bestow precision to the statute through reference to federal law).

The case sub judice falls closer to the Joe Hatton end of the spectrum. Unlike Rogers, we find no meaningful precedent exuding from federal law which interprets the ambiguous language, nor does the statute expressly request that we attempt to do so. Additionally, the indefinite language in the statute does not employ technical words which have acquired a pellucid connotation to those specific individuals governed by the statute. Here, the reasonably prudent man test is utilized. The inherent vagueness in the statutory language cannot be

> sanitized by resort to signification acquired through custom in the trade as in Rogers.
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> * * *
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> As the Legislature cannot shift its constitutional duties to someone else, neither can we. Consequently, we must exercise our duty and find Section 112.313(2)(a), Florida Statutes (1975), unconstitutional for the reasons stated herein. At the same time, we are not critical of the Legislature in its attempt to establish and implement standards to govern the ethical conduct of public officials in accepting gifts and favors which might affect performance of their official duties. Indeed, the people of this state have recognized the need for such ethical standards and have mandated the Legislature to act in this area by adopting the language of Article III, Section 18 of our Constitution.
>
> The decision and judgment of the District Court of Appeal, First District, is affirmed.

Section 3 (1963) violates all of the rules laid down by this and other courts. Firstly, for some reason that is not at all apparent, when Sucom presented the proposed §3 amendment to the Secretary of State and the Legislature in 1963, it did not suggest that §12.01 should be repealed or changed in part so as to result in language which would give it the power and authority to borrow money by selling revenue bonds without first obtaining voter approval.[9] Secondly, in view of the fact that the requirement

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[9]It can be surmised that, in 1963, Sucom did not believe that the voters would approve a rewrite of §12.01 which would result in eliminating their overview of Sucom's spending habits. Sucom's counsel testified during the July 29, 1985 hearing that he had personally been of the view that §12.01 placed Sucom in an "untenable position" in that the general law did not require commissions to obtain voter approval. (MacBeth Testimony, A. 378). We view this as passing strange because (a) it is the citizens'/ratepayers' personal business and interest that they oversee spending habits which might result in raising their utility rates, and (b) the general law certainly did not authorize unelected commissions to borrow money by selling revenue bonds. As a matter of fact, §§169.01, 169.02, 169.03, and 169.04, repealed Laws,
(Footnote Continued)

for voter approval was not eliminated from §12.01, Sucom was left with an unbridled discretion to decide whether it would conduct a referendum election at any time when it decided to sell revenue bonds. Such is constitutionally impermissible.

Thirdly, the §3 language to the effect that §12.01 shall not be construed to be in conflict with the general law of the state authorizing the issuance of revenue bonds is totally without meaning for the simple reason that the general law does not authorize a commission's sale of revenue bonds for any purpose. Fourthly, it is impossible from a grammatical viewpoint to determine whether, by the words "... when required under the constitution of the state ..." the Legislature intended to modify the words "... issuance of revenue bonds ..." or "... subject to the approval of the freeholders ..." or both phrases. Again, the wording of §3 is unconstitutionally vague.

We believe that the court is thus left with the question whether the so-called "constitutional requirement" has meaning for purposes of §12.01. Thus, §3 provides that the act "shall be construed to authorize the issuance of revenue bonds or certificates subject to approval of the freeholders when required under the constitution of the state. ..." We respectfully submit that this point has already been disposed of, above, in our discussion involving the constitutional separation of powers. Only the judicial branch has authority to construe statutes, and then only when a statute is ambiguous. Assuming for the sake of argument only, that the Legislature has

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(Footnote Continued)
1973, (c), 73-129, §5, F.S.A. (Supp. p. 79) provided during 1963 that before a city or town council could borrow money for electric light plants, such must have been approved by an election. Ch. 169 was replaced by Ch. 166 which does not in any way authorize Sucom to issue bonds - it is not a "governing body" because it is not empowered with a "general legislative powers of the municipality." Section 166.01, Fla. Stat.

the constitutional authority to dictate to the judiciary about how to construe legislation which it has written - it clearly does not - the question yet remains what there is for the judiciary to "construe" when §12.01 is not ambiguous - it clearly requires voter approval of revenue bond issues.

The circuit court, in its CONSOLIDATED FINAL JUDGMENT, did not discuss this aspect of the case. We can only surmise that the court concluded that either (a) §3 constituted a repeal of §12.01, or (b) it was necessary to "construe" §12.01 for the reason that it is ambiguous. Obviously, there is no basis for concluding that §12.01 is ambiguous. It should be equally obvious that §3 (1963) does not constitute an amendment or repeal "by implication." Firstly, amendments by implication are not favored. Secondly,

> [b]efore the courts may declare that one statute amends or repeals another by implication it must appear that the statute later in point of time was intended as a revision of the subject matter of the former, or that there is such a positive and irreconcilable repugnancy between the (statutes) as to indicate clearly that the later statute was intended to prescribe the only rule which should govern the case provided for, and that there is no field in which the provisions of the statute first in point of time can operate lawfully without conflict.

Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194, 196 (1946). Accord, State v. J.R.M., 388 So. 2d 1227 (Fla. 1980) (court held no amendment by implication because there was not an irreconcilable repugnancy between the two statutes which created a situation whereby the earlier statute could operate without conflicting with the later statute); Richey v. Town of Indian River Shores, 337 So.2d 410 (Fla. 4th DCA 1976), aff'd. 348 So.2d 1 (Fla. 1977). Section 3 (1963) is not repugnant to §12.01 of the CHARTER and does not create a situation whereby §12.01 cannot operate lawfully without conflicting with §3. Moreover, §3 is not even

a statute in the sense that it creates rights or obligations. It purports to be a rule of construction only, which, under the separation of powers doctrine, supra, the Legislature did not have authority to promulgate.

C. THE OUTSTANDING 1981 BOND ISSUE IS ILLEGAL AND VOID FOR EXTRINSIC FRAUD ARISING FROM THE 1963 PROCESS UTILIZED IN AMENDING THE CHARTER. LIKEWISE, THE OCTOBER 1, 1984 AND APRIL 1, 1985 BOND OBLIGATIONS ARE ILLEGAL AND VOID.

Only the 1981 bond issue in the amount of $92,750,000 was validated by the circuit court. The latter two undertakings were not validated, and issues arising therefrom have been appealed in Case No. 84-284-G to the Second District Court of Appeal.

First, it is important that we state that Intervenors have no direct evidence that would suggest that Sucom or its counsel, during 1963, undertook to intentionally utter misrepresentations of material fact with the intention that the voters rely thereon. Rather, we suggest, as we did in the circuit court, that we are dealing with "constructive fraud" which arises by virtue of "negligent misrepresentation" or representations made under circumstances wherein there is no factual basis for belief that the statements made were true.[10] In Watson v. Jones, supra. n. 11, this court wrote:

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[10]For example, the Florida law of actionable misrepresentation includes the following elements: (1) a misrepresentation of material fact; (2) [a] knowledge of the representator of the misrepresentation or [b] representations made by the representator without knowledge as to either truth or falsity, or [c] representations made under circumstances in which the representator ought to have known, if he did not know, of the falsity thereof; (3) an intention that the representation induce another to act on it; and (4) resulting in injury to the party acting in justifiable reliance on the representation. Joiner v. McCullers, 158 Fla. 562, 28 So.2d 823 (1947). See also, Kutner v. Kalish, 173 So.2d 763 (Fla. 3d D.C.A. 1965); Watson v. (Footnote Continued)

> [When] it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistible that he did know that which his duty required him to know.

(25 So. at 682).

Moreover, "constructive fraud" is premised upon the relationship of the parties and the making of statements under circumstances wherein the representator does not have reason to believe that the actual facts exist.[11] Constructive fraud is particularly relevant in instances where a fiduciary duty exists. We believe that such a duty has always existed between Sucom

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(Footnote Continued)
Jones, 41 Fla. 241, 25 So. 678 (1899). Thus, the Florida elements of fraud differ from most jurisdictions in that in Florida the representor does not have to have actual knowledge of the falsity of his statement to be held liable. Rather, negligent misrepresentation is sufficient. See, Watson v. Jones, 41 Fla. 241, 25 So. 678 (1899); Bobby Jones Garden Apartments, Inc. v. Suleski, 391 F.2d 172 (5th Cir. 1968); Emerson Electric Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970); Ostreyko v. B. C. Morton Organization, Inc., 310 So.2d 316 (Fla.3d D.C.A. 1975).

[11] See Robson Link & Co. v. Leedy Wheeler & Co., 154 Fla. 596, 18 So.2d 523 (1944); Douglas v. Ogle, 80 Fla. 42, 85 So. 243 (1920); Harrell v. Branson, 344 So.2d 604 (Fla. 1st DCA 1977). See Dale v. Jennings, 90 Fla. 234, 107 So. 175 (1925); Quinn v. Phipps, 93 Fla. 805, 113 So. 419 (1927); Harris v. Zeuch, 103 Fla. 183, 137 So. 135 (1931); Moss v. Sperry, 140 Fla. 301, 191 So. 531 (1939); Strickland v. Muir, 198 So.2d 49 (Fla. 4th DCA 1967); Prescott v. Kreher, 123 So.2d 721, 727 (Fla. 2d DCA 1960) ("... [C]ourts of equity have refrained from defining particular instances of fiduciary relations in such a manner that other instances might be excluded. Instead, the principle applies under the definition to every possible case wherein there exists as a fact a fiduciary relation through which, on the one side, a confidence is reposed and, on the other side, there is the resultant superiority and influence. . . . The relation need not be legal but may be moral, social, domestic, or purely personal. Thus, the term, "fiduciary" or "confidential" relation as defined is a very broad one."). Sucom, in its undertaking of indebtedness, has assumed a moral and social obligation to the ratepayers - who are then called upon to amortize that debt through payment of their utility bills. The relationship is further understood when it is realized that the taxpayers and notepayers have no voice at the polls. Like the faceless bureaucrats, it is impossible to "vote the scoundrels out of office."

and the ratepayers. This is particularly so because, on the one hand Sucom is selling revenue bonds whereby its only stated or written duty is to the bond holders, i.e. to repay them. On the other hand, the ratepayers, including the Intervenors, must pay the cost of said borrowing. In other words, it is not Sucom which must repay the bondholders; rather it is the ratepayers who have such a duty and that duty has been undertaken for them by Sucom. There is no other way to look at the relationship other than that of a fiduciary duty.

The record establishes that neither Sucom nor its "investment advisors" ever had any basis whatsoever for believing that the purchase of a power generating facility for $50,000,000 could be paid for from operating revenues. The evidence establishes convincingly that Sucom most certainly could not meet debt service requirements. The financial statements in evidence establish a "net earnings" record that does not even approach the financial means to meet the huge overall debt pay out obligation - now more than $325,000,000. Thus, the 10,000 ratepayers as voters had every reason to hear debate as to whether Sucom should embark upon its folly as the record demonstrates. It is a truism that, contrary to the CHARTER, particularly §12.01, the finances of Sucom are in the hands of the investment bankers rather than under the supervision of the ratepaying citizens/voters. This lawsuit is really between the bankers and Intervenors.

Rule 1.540(b), Fla.R.Civ.P., provides that the one year limitation period for the court's relieving a party from fraud does not limit the power of the court to entertain an independent action to relieve a party from a judgment, decree, order or proceeding, or to set aside a judgment or decree for fraud upon the court. The CONSOLIDATED FINAL JUDGMENT merely states in a short one sentence paragraph that the final bond validation judgments,

including the subject 1981 judgment involving $92,750,000 of revenue bonds, were not procured through fraud on the court and may not be set aside. (p. 9/A. 487). Such is in response to the Intervenors' EIGHTH AFFIRMATIVE DEFENSE whereby they pleaded fraud. (A. 156).

Extrinsic fraud is that which is committed outside the courtroom, i.e. that which is practiced upon a party under circumstances wherein he does not have the benefit of the adversarial process. By way of distinction, "intrinsic fraud" is that which may not be the subject of relief because the trial process is deemed to be sufficient in order to prevent it. However, extrinsic fraud does have meaning for the judicial process where, as here, the court, in validating the 1981 bond issue, was called upon to rule that that bond issue was valid because of the supposed meaning of §3 (1963). If extrinsic fraud was committed upon the voters in 1963, they are entitled to raise such by an independent action.

In Brown v. Brown, 432 So.2d 704 (Fla. 3d DCA 1983), the circuit court had dismissed the defendant's counterclaim against her former husband's suit to foreclose a mortgage which she had given as part of a judicially approved property settlement agreement. The former wife claimed that her former husband had fraudulently induced her to execute a settlement agreement which included the note and mortgage. The Third District reversed and remanded, holding that the former wife's allegations that her former husband had fraudulently induced her to give a note and mortgage to him alleged extrinsic fraud, thus entitling her to bring an independent action for relief from the final dissolution judgment approving the property settlement agreement, and that such could be accomplished by way of counterclaim to the former husband's complaint to foreclose a mortgage. The Third District framed the issue before it as being whether Rule 1.540(b) provides for

independent actions only for "fraud upon the court". The part of the rule pertinent to the issue, quoted by the court, is:

> This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, decree, order or proceeding or to set aside a judgment or decree for fraud upon the court.

432 So.2d at 710.

After reviewing other district court opinions, the Third District concluded:

> We hold that the appellant's counterclaim alleges facts which show that the judicially-approved property settlement agreement, including the note and mortgage which appellee seeks to foreclose, were procured by fraud; that such alleged facts constitute an extrinsic fraud which, therefore, support an independent action for relief from the judgment of dissolution under Rule 1.540(b). We recede from the dicta in August v. August, 350 So.2d 794 (Fla. 3d DCA 1977), and Sottile v. Gaines, 281 So.2d 558 (Fla. 3d DCA 1973), that suggests that fraud upon the court is the exclusive ground upon which an independent action under Rule 1.540(b) may be based. To the extent that Alexander v. First National Bank of Titusville, 275 So.2d 272; Truitt v. Truitt, 383 So.2d 276; Erhardt v. Erhardt, 362 So.2d 70, and Kimbrough v. McCranie, 325 So.2d 70, may be viewed as precedent for limiting the right to maintain an independent action under Rule 1.540(b) to only such actions which allege "fraud upon the court," we acknowledge our disagreement with these cases. Accordingly, the order dismissing appellant's counterclaim is reversed and the cause remanded to the trial court for further proceedings.

432 So.2d at 715.

We respectfully submit that the circuit court's conclusion in this case:

> 12. The final judgments referred to in paragraph 11 above were not procured through fraud on the Court and may not be set aside. (A. 487)

manifests a basic misunderstanding of Rule 1.540(b). Firstly, the court concluded that there was no "fraud on the court," but, secondly, seemed to be unaware of the concept of "extrinsic fraud" which authorizes an independent action for relief from judgment. The Third District expressly receded from dicta in other cases that suggested that fraud upon the court is

the exclusive ground upon which an independent action under Rule 1.540(b) may be based. We are not here arguing about fraud upon the court.[12] Intervenors view Sucom's 1963 actions in obtaining voter approval of §3 as "extrinsic fraud." And, for that reason, we respectfully submit that the circuit court erred.

Moreover, such constitutes a clearly erroneous view of the evidence, requiring reversal as a matter of law. Certainly, after Sucom had pre-filed the §3 bill with the Secretary of State, it should have advised the referendum voters that it provided that the issuance of revenue bonds would be tied to the question whether the constitution required voter approval of revenue bond issues. As advertised in the newspaper and as stated on the ballot, the voters were not apprised of the "constitutional formula" in any way, shape or form. Secondly, the advertising and the ballot description tells the voters that "The amendment provides the issuance of revenue bonds or certificates pursuant to said Act shall not be construed to be in conflict with the general law of the State of Florida authorizing the issuance of revenue bonds or certificates payable solely from the municipal utility revenues." Although the language is tortured, the one "fact statement" which comes out of this and which suggested what the amendment provides is that the "general law" of Florida authorizes the issuance of revenue bonds by commissions. Such constitutes a blatant misstatement of fact. The circuit court was thus not faced with a "fact finding issue" which may not be disturbed on appeal. It is unrefuted that the statement is a misstatement of fact.

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[12]However, it should not be overlooked that Sucom, having a fiduciary duty to the ratepayers, certainly should not have suggested to the court in prior bond validation proceedings that the enactment of §3 in 1963 effectively
(Footnote Continued)

Finally, the court, in Hill v. Milander, 72 So.2d 796 (Fla. 1954) was not concerned whether the voters were actually misled, i.e., it was not necessary that testimony be taken from voters in order to ask them whether they understood what had occurred or what the true facts were underlying an election. This court wrote at 72 So.2d 798:

> . . . In numerous instances we have held that the only requirements in a[n] election of this kind are that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote. . . . All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide. . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot. . . .

Thus, the circuit court was not faced with the task of taking testimony from voters who participated in the December 1963 referendum.

The 1981 bond validation judgment approving the sale of revenue bonds in the amount of $92,750,000 (without voter approval) is based upon only one provision of the CHARTER, i.e. §3 (1963). Without it, it is clear that a referendum election was required under §12.01. If §3 was obtained by extrinsic fraud upon the voters, the 1981 bond validation judgment is premised upon fraud. Because a refunding bond issue merely takes the place of the original bond issue, a refunding bond validation judgment cannot stand if the original validation is based upon extrinsic fraud. Accordingly, the judgment of the lower court should be reversed.

(Footnote Continued)
repealed the §12.01 requirement of voter approval. To that extent, a case could be made for "fraud upon the court," but we do not make that case here.

D. THE OCTOBER 1, 1984 AND APRIL 1, 1985 BORROWINGS ARE ILLEGAL AND VOID IN VIEW OF SUBCOM'S FAILURE TO OBTAIN VOTER APPROVAL.

Nothing more remains to be stated at this juncture because the subject borrowings were not approved by the electorate. They do not qualify under §1.12 of the CHARTER, the limited borrowing authority for specifically stated purposes. Such borrowings being illegal and void, the refunding bond issue which would eventually replace them is likewise illegal and void.

CONCLUSION

For the reasons stated, Intervenors seek this court's decision reversing the circuit court's CONSOLIDATED FINAL JUDGMENT with regard to its validation of the subject "refunding bonds."

For the court's information, Intervenors as Plaintiffs in the declaratory judgment action, case number 84-284-G, have appealed the judgment to the Second District. The issues there concern whether the prior borrowings should be declared illegal and void and of no effect whatsoever. Of course, this court's opinion in this matter will have important implications for that case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by hand delivery to Mr. William S. Dufoe, Holland & Knight, P. O. Drawer BW, 94 Lake Wire Drive, Lakeland, FL 33802 (by delivery to Mr. Ferguson), and by U.S. Mail to Mr. Andrew B. Jackson, general counsel for Plaintiff, at P. O. Box 591, Sebring, FL 33807; and to Assistant State's Attorney, Mr. Alfred C. Thullberry, Jr., P.O. Box 1309, 250 N. Wilson, Bartow, FL 33830, this 9th day of October 1985.

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