IN THE SUPREME COURT OF FLORIDA

THOMAS M. WOHL and
JOHN F. FARLEY,

Intervenors/Appellants,

vs.

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

Plaintiff/Appellee,

vs.

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

Defendants/Appellees.
_____/

Case No. 67,668

REPLY BRIEF OF APPELLANTS

Appeal From the Bond Validation Judgment
of the Circuit Court of the Tenth
Judicial Circuit, in and for
Highlands County, Florida,
Honorable J. Dale Durrance, Circuit Judge
Case No. 85-169-G

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PRELIMINARY STATEMENT

This brief is filed in reply to the answer brief filed by Appellee, the Sebring Utility Commission, hereinafter referred to as Sucom.

Intervenors/Appellants, Thomas M. Wohl and John F. Farley are referenced herein as Intervenors.

Reference to Appellee's Answer brief will be by (Suc. B.___), and reference to Appellant's Initial brief will be by (I.B.___).

References to portions of the record contained in Appellants' Appendix are by (A.__). References to those portions of the record contained in Appellee's Appendix will be, in order to avoid confusion, cited in the same manner in which it is referenced in Appellee's brief, that being by (C.A. ___).

References to documents received in evidence are Intervenors' Exhibits (Int. Ex. ___), and Sucom's Exhibits (Suc. Ex. __).

Reference to the transcript of the February 11, 1985, and July 29, 1985, proceedings which are the subject of this appeal will be by (T. ___/A.___).

REPLY TO APPELLEE'S STATEMENT OF THE FACTS

Although the Rules of Appellate Procedure do not expressly permit Appellant to respond in its reply brief to the Statement of the Facts contained in Appellee's brief, Appellant includes this brief rebuttal due to Sucom's assertions that Appellants' Statement of the Facts is replete with argumentative and irrelevant facts. (Suc.B.2).

While Rule 9.210(c), Fla.R.App.P. provides that an appellee may identify those facts contained in appellants' statement of the facts about which there is a dispute, and include those facts which appellee deems pertinent to the

appeal which were not included by appellant, nowhere in the rules or in the cases interpreting the rules can Sucom find support for its rejection of Appellants' facts on the basis that Sucom would have stated them "more succinctly." While Sucom asserts that Appellants' "statement is replete with argumentative positions" (Suc. B. 2), it does not dispute that the "argumentative positions" included in Appellants' Statement of the Facts are indeed based upon facts contained in the trial transcript and other documentary evidence. By its objection to Appellants' statement of the facts, Sucom attempts to gloss over or ignore many facts and documents which substantiate Appellants' claims.

Moreover, Appellant objects to Sucom's inclusion of certain impertinent statements which are unsubstantiated by record reference. For instance, Sucom includes a statement, unsupported by the record, that the proposed 1963 amendment to the Sucom CHARTER " . . . was the subject of full public inquiry, debate, and referendum." (Suc. B. 7). While there is no dispute that a referendum was held on December 10, 1963 to approve the amendment, the only evidence in the record to support a statement that the proposed amendment was the subject of debate, is the blanket statement of Joseph MacBeth to the effect that the amendment was the subject of debate and talk during Commission meetings in 1963." (T.64/A.379). Such does not imply that there was full public debate.

Appellee followed this statement with a footnote in which it discussed the notice requirement necessary to effect adoption of a special act. While Sucom correctly noted that Art. III, §21, Fla. Const. (1885) does not require published notice of the title and substance of a proposed special law where a referendum is utilized to effect the adoption of a special act, the remainder of Appellee's statements in footnote three are fallacious and confuse the issues in this case. At no time have Appellants challenged the pre-filing procedures

and notice effected in March of 1963 when the proposed law was introduced into the Legislature. Yet, Sucom asserts that, due to the fact that it complied with both requirements of Art. III, §21, to wit, published notice and submission of the proposed amendment to referendum election, it cannot be faulted for not properly notifying the electorate of the substance of the amendment (Suc. B. 7). Unfortunately, the opposite is true, since, although Sucom did attempt to comply with both constitutional notice requirements, its attempts were insufficient and failed to satisfy either constitutional requirement.

Although Appellants have never raised the issue of the sufficiency of Sucom's Notice of Intention to Apply for a Special Act, Sucom, nevertheless raised the "fact" that it complied with constitutional notice provisions. Appellants disagree, yet refrain from a lengthy discussion of the issue since it is not germane to this appeal.[1]

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[1]Art. III, §21, Fla. Const. (1885), and §11.02 Fla. Stat. (1963), require publication of notice of intention to apply for a special law, to be published once at least 30 days prior to its introduction into the Legislature. Where the law requires referendum election, the only publication required is notice of special referendum election, §100.342, Fla. Stat. (1963), to be published once a week for four consecutive weeks prior to the election. With regard to the 1963 amendment (which required referendum approval), Sucom published notice for two consecutive weeks, neither of which was 30 days prior to the election. The record contains two affidavits of publication which affirm that a notice of special election for the 1963 amendment to the CHARTER was published in the Sebring News-Sun, Inc. on November 14, 1983 and November 21, 1983. Thus, Sucom failed to comply with the notice of special referendum election requirement on two counts: (1) it failed to publish a notice of special election at least 30 days prior to said election, and (2) it failed to publish said notice once a week for four consecutive weeks. The only other affidavit of publication contained in the record refers to an ad placed in the December 5, 1963 issue of the Sebring News-Sun, Inc., which is a paid political advertisement endorsing the amendment to the SUCOM CHARTER. This advertisement certainly cannot be considered either notice of adoption of a special law, or notice of a special referendum election, and should thus be disregarded by this court.

SUMMARY OF ARGUMENT

Sucom is not a municipality or governing body entitled to rely on Art. VIII, §2, Fla. Const. (1968), and the Municipal Home Rule Powers Act, Ch. 166, Fla. Stat., for authorization to sell revenue bonds without voter approval. Rather, Sucom is an unelected, appointed utilities commission, which answers to no one, and is limited in its actions and financial activities only by the provisions of its CHARTER.

Section 12.01 of the CHARTER clearly and unambiguously requires Sucom to hold a special referendum election and obtain voter approval prior to the issuance of revenue bonds in unlimited amounts. While §12.04 of the CHARTER permits Sucom to issue revenue bonds by resolution and without voter approval where said bonds are for the purpose of "refunding" outstanding bond issues, the 1985 MASTER BOND RESOLUTION does not provide for the issuance of true "refunding bonds"; therefore, any bonds proposed thereunder must be approved by the voters prior to issuance.

Refunding bonds may be issued without voter approval only if the bonds do not increase the debt created by the outstanding bonds and the concomitant burden placed on the ratepayers. In this case, the outstanding bond issues represent a debt of approximately $97 million, whereas the proposed "refunding issue" in the amount of $130 million clearly increases Sucom's debt by approximately $33 million. This increase in Sucom's outstanding obligation amounts to an "increased liability" and increased burden on the ratepayers. Thus, the bonds proposed under the 1985 MASTER BOND RESOLUTION cannot be deemed refunding bonds, and are therefore subject to approval by the voters at a special referendum election.

Sucom contends that the 1963 amendment to the CHARTER effectively eliminated the need for voter approval prior to issuance of revenue bonds.

(Suc. B. 7). Appellants disagree for the reasons that, (a) §12.01 clearly and unambiguously requires voter approval prior to issuance of revenue bonds in unlimited amounts. Section 12.01 has never been amended or repealed, thus, referendum election is a prerequisite to issuance of the 1985 proposed bond issue; (b) §3 (1963) is nothing more than a rule of construction and cannot be utilized to "construe" a clearly unambiguous referendum election requirement; (c) assuming arguendo, it is necessary to "construe" §12.01, the power to construe legislation is clearly within the province of the judiciary. The Legislature is without power to enact a law which construes its prior enactments, and any attempts to do so violate the constitutional mandate of separation of powers; (d) the Legislature acted unconstitutionally in creating two provisions - §§12.01 and 3, which give Sucom the discretion whether to conduct referendum elections. The Legislature may not delegate its power to determine what the law will be to an unelected, appointed entity such as Sucom, and any attempt to do so is an unconstitutional delegation of power.

The 1983 amendment procedures were the product of extrinsic fraud upon the ratepayers, and as such, the court has the inherent power to set aside the 1981 bond validation decree, and allow Appellants to pursue their independent action for fraud in connection with the 1983 amendment procedures.

Finally, since the October 1, 1984, and the April 1, 1985 borrowings do not qualify under §1.12 of the CHARTER, (the limited borrowing authority for specially stated purposes) and since such borrowings were not approved by vote of the electorate, such borrowings are illegal and void, and the "refunding" bond issue which would eventually replace them is likewise illegal and void.

ARGUMENT

I.

THE CIRCUIT COURT ERRED IN ENTERING JUDGMENT VALIDATING THE $130 MILLION ORIGINAL PRINCIPAL AMOUNT UTILITIES SYSTEM REVENUE BONDS OF SUCOM BECAUSE:

A. THE SUBJECT 1985 REVENUE BOND ISSUE IN THE AMOUNT OF $130 MILLION DOES NOT QUALIFY AS A REFUNDING BOND ISSUE BECAUSE IT SUBSTANTIALLY INCREASES SUCOM'S OBLIGATIONS.

Sucom contends that despite the fact that its present debt approximates $97 million, the issuance of the proposed 1985 MASTER BOND RESOLUTION, in the amount of approximately $130 million, does not create a "new debt" or "new liability," but rather "merely renews and continues in a changed form the original existing indebtedness." (Suc.B. 13, citing, Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211, 218 (1931)). Sucom is flat wrong in contending that a bond issue which increases its debt by more than $33 million ($130,000,000 - ($92,750,000 + $1,800,000 + $2,350,000)), including costs exceeding $8 million in insurance premiums and investment banking commissions, does not create a new debt or new liability.

Sucom cites Sullivan for the proposition that some inducement in the form of an increase in the rate of interest is necessary to persuade the bondholders to exchange their bonds for refunding bonds. (Suc.B. 15). Appellees confuse the issues, since (a) Appellants have never asserted that the proposed 1985 bonds are not refunding bonds merely because they might be issued at a higher rate of interest (there simply is not record evidence of what interest rate the refunding would carry); (b) the mechanism of the bond market is such that it is not necessary for the outstanding bondholders to "surrender existing bonds" in order to effect the sale of the refunding issue; and (c) Appellees cannot escape the obvious fact that the $130 million in "refunding" bonds exceeds Sucom's existing debt by more than $33 million.

Sucom totally avoids discussing the implications of the $33 million increase in liability, choosing instead to refer to the added debt as a "changed form of the existing indebtedness." (Suc. B. 13). In its answer brief, Sucom discussed a case wherein the court reviewed refunding bonds issued at a higher interest rate[2], a case wherein the proceeds of the refunding bond issue were placed in escrow, the amount of which would be sufficient to cover principal and interest on the outstanding bonds when they mature[3] and a case in which the refunding bonds were not used to extinguish the underlying debt until several month thereafter.[4] (Suc. B. 14-17). However, Sucom cites no cases wherein a borrowing which increased the principal amount of the debt by approximately 40%, and called for a payoff of outstanding bonds several years thereafter, has been upheld as a proper "refunding" issue. This is because there is no constitutional, statutory of decisional authority which would in any way support Sucom's contention that the new liability is nothing more than a refunding or restructuring of the outstanding issues.

While simultaneous sale of the "refunding" bond issue and cancellation or satisfaction of outstanding obligations is not required by either the Sucom CHARTER or the decisions of this court, a bond issue cannot classify as a "refunding" bond issue if the debt created by the "refunding" issue is

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[2]Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211 (1931).

[3]Fleeman v. City of Jacksonville, 140 Fla. 478, 191 So. 840 (1939).

[4]State v. Board of Public Instruction of Broward County, 164 So. 2d 6 (Fla. 1964).

substantially greater than the debt which it replaces. State v. Board of Public Instruction of Lake County, 177 So.2d 214 (Fla. 1965).

In asserting that the proposed refunding bond issue creates an "increased liability," Appellants do not even consider the potential increase in the total payout which is attributable to higher interest rates, since, as noted by the Sullivan court,

> [T]he general rule is that the question of whether the limitation is exceeded by a particular issuance of bonds must be determined at the time of the actual issuance of the bonds, and that interest to accrue in the future will not be included in computing the amount of bonds which may be issued.

134 So. at 218.

Thus, the true test when determining the nature of an issue is whether, at the time of their issuance, the refunding bonds create additional or increased liability. Clearly, in the case of the 1985 "refunding" issue, the burden on the ratepayers will be increased by approximately $33 million from the moment the bonds are issued. Hence, the bonds cannot be classified as a refunding issue.

In the case of refunding bonds which are payable from ad valorem taxes, the prohibition on the creation of increased debt or new liability is based upon the constitutional proscription against increasing public debt without approval of the electors. Jacksonville Shipyards v. Jacksonville Electric Authority, 419 So.2d 1092 (Fla. 1982), and Art. VII, §12 (b), Fla. Const. (1968). Since, by its nature, a refunding bond issue is utilized primarily to take advantage of lower interest rates and to reduce carrying charges, and, since the issuing entity is, in essence, utilizing a refunding bond issue to save money rather then to increase liabilities, voter approval is unnecessary. State v. City of Miami, 155 Fla. 6, 19 So.2d 410 (1944).

Similarly, where a charter or corporate charter, such as governs Sucom, provides for electorate approval prior to issuance of revenue bonds, and further provides that refunding bonds may be issued without the need for a referendum election, it can reasonably be concluded that refunding bonds should be issued only to take advantage of a lower interest rate, reduce carrying charges, or if the issuing entity is unable to repay the original bonds when due. It would be illogical to denominate a bond issue as a "refunding bond issue" when the bond resolution provides for issuance of bonds in an amount which exceeds the outstanding obligations by over $33 million, and which does not provide for a refund of outstanding bonds within a reasonable period of time. To allow Sucom to ignore the CHARTER requirement of referendum approval by classifying this new debt as a "refunding bond issue" would allow Sucom unbridled discretion in its bond financing activities, and would violate §12.01.

Sucom also contends that "the underwriting costs, insurance premiums, and other expenses attributable to the issuance of the bonds will not be borne by the ratepayers, since the escrow arrangements under the MASTER BOND RESOLUTION will allow the Commission to recover those expenses, and will not increase the amount to be paid by ratepayers (Suc. B. 12). This statement is patently untrue, since federal arbitrage rules prohibit Sucom from investing the 1985 bond proceeds at an interest rate higher than the interest payable on the proposed 1985 bonds. See testimony of Sucom's bond counsel, Mr. Simmons. (T.26/A.341). Stated simply, in cases of "tax free municipals," federal arbitrage rules prohibit the issuer from making a profit by investing the bond proceeds at a higher interest rate - the United States does not allow issuers of tax free bonds to net a profit by investing the bond sales proceeds. Thus, the more than $8 million in underwriting fees and insurance premiums must be considered as an increase of the debt.

In sum, under no circumstances can the 1985 MASTER BOND RESOLUTION be considered a refunding issue not subject to voter approval. There is absolutely no support in the record for concluding that the 1985 proposed borrowing is a "refunding" bond issue, because (a) the total liability under the new bonds exceeds that of the outstanding bonds by $33 million, (b) as Sucom's bond counsel, Mr. Simmons, testified, the outstanding bond issues and will not be repaid until several years after the refunding bonds are issued, (c) the yearly debt service on both the outstanding bonds and the refunding bonds will significantly increase Sucom's debt, and (d) no provisions are included for repaying the $130 million debt. Validation of such a bond issue will only serve to substantially increase the ratepayer's burden, which is already 30% greater than that of their neighbors who purchase power from Florida Power Corporation. (I.B. 11).

B. SECTION 12.01 OF THE CHARTER PROHIBITS SUCOM FROM ISSUING REVENUE BONDS WITHOUT FIRST OBTAINING VOTER APPROVAL.

Since the Commission is made up of a group of appointed, rather than elected officials, the voters only ability to regulate, control, or supervise spending habits is contained in the CHARTER §12.01 (1951). The CHARTER provides for two methods of borrowing which do not require voter approval, such as limited borrowings for the purpose of construction, maintenance, and renovations (I.B. 5, C.A. 9-10). However, where Sucom decides to undertake unlimited borrowing for an unlimited period of time, §12.01 (1951) requires that it obtain approval by referendum election (C.A. 11).

In 1963, the members of the Commission attempted to circumvent the CHARTER requirement of referendum approval. As we have demonstrated, this exercise was fatally flawed for several reasons, discussed in our initial

brief and infra. However, should the court hold that (a) the 1985 proposed bond issue is not a "refunding issue" for the reason that it substantially increases Sucom's debt, and (b) §3 (1963) is nothing more than a rule of construction, which cannot be utilized to "construe" an unambiguous referendum requirement, the court need not reach the constitutional issues raised herein.

Sucom argues that, because bond issues have been validated since the 1963 enactment of §3, the question whether §3 (1963) effectively eliminated the need for a referendum election prior to issuing revenue bonds has been laid to rest forever - conclusively determined. Additionally, Sucom argues that "Appellant John Farley participated in both the 1981 and 1983[5] validation proceedings, raising the referendum issue in each proceeding." (Suc.B. 19) Finally, Sucom contends that Chap. 75, Fla. Stat., applies to preclude any person from subsequently challenging the validity of bonds, or the authority to issue. (Suc.B. 19-21).

Chap. 75 was enacted to curtail collateral and direct challenges to the validity of bonds previously issued, and approved by the circuit court, to protect the bond holders from untimely attacks on the validity of the previously issued bonds, and to preserve the integrity of the securities market which had been dramatically weakened due to the 1929 stock market crash.

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[5]We refrain from a discussion of the purported res judicata effect of the 1983 bond validation decree since the bonds were never sold, and the 1985 MASTER BOND RESOLUTION expressly provides that "[A]ll provisions of the 1983 Resolution are hereby repealed and said 1983 Resolution is hereby declared void and of no further force or effect for any purpose whatever." (C.A. 128). Thus, issues relating to the 1983 bonds are moot.

Chap. 75 was not enacted to forever preclude constitutional attack upon the underlying enabling legislation. It is beyond the power of the legislature to enact a general law which conclusively and completely insulates a statute or special law from constitutional challenge. See, United States ex rel Horigan v. Heyward, 98 F.2d 433 (5th Cir. 1938), wherein the court held that a judicial decree of validation of a municipality's bonds estopped the town's taxpayers and citizens from ever attacking the validity of the bonds except on constitutional grounds. See also, Hillsborough County v. Keefe, 82 F.2d 127 (5th Cir. 1936), cert denied, 298 U.S. 679, (1936), wherein the court held that a judgment of the Florida Supreme Court validating county refunding bonds was not res judicata as to the unconstitutionality of the issuing authority's power to issue original bonds.

Appellants do not assert that there were any procedural improprieties or irregularities with regard to the issuance of the 1981 bonds, and Appellants do not seek to invalidate the bonds on this basis.[6] However, Appellants do challenge Sucom's authority to issue new bonds without approval of the electorate as required by §12.01 of the Sucom CHARTER.

> It is a matter of common knowledge in this state . . . and especially during the boom period marking the years 1924 to 1926, the counties, districts, and municipalities of the state had issued bonds, notes, and other obligations involving hundreds of millions of dollars; that the issuance of a large part of these obligations had been authorized without a vote of the people, or in many

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[6]Appellants realize that §75.09, Fla. Stat. operates to prevent a validation challenge on procedural grounds; but when extrinsic fraud is alleged in connection with the amendment procedures of the enabling legislation, Ch. 75 does not prevent the court from utilizing its inherent powers to set aside the validation judgment. As stated in our initial brief (I.B.32), Appellants have raised the issue of extrinsic fraud in connection with the 1963 amendment procedures in an independent action presently pending in the Second District Court of Appeals. Case No. 84-284-G. This court may wish to defer ruling on the extrinsic fraud issue to the Second District.

> cases, when a vote had been had a very small portion of the voters had actually participated in the election. After the collapse of the boom and the return to a more sane condition of the public mind, there arose a strong sentiment among our people that no further bonded indebtedness should be issued or incurred without first securing the approval of a majority of the votes of the people upon whom the burden would fall. But the existence of the large amount of outstanding obligations, many of which had matured, or were about to mature, rendered it necessary that some provision should be made which would authorize the refunding of these existing and maturing obligations without the expense and delay of a preliminary election, otherwise immediate defaults would in many cases have occurred before the machinery for holding an election could have been put in motion and its function completed. Such conditions must have been in the minds of the framers in proposing, and of the people in adopting, such amendment. (Emphasis added).

Sullivan, 134 So. at 217.

Section 12.01 was enacted for much the same reason as the amendment referred to in Sullivan - to prevent unlimited bond indebtedness without voter approval. The clear language of §12.01 requiring voter approval and the legislative intent in drafting the special law, should not be disregarded based upon a tortured reading of §3 (1963) which Sucom contends removes the requirement of voter approval.

Section 3 (1963) states that "this act shall be construed to authorize the issuance of revenue bonds . . . subject to approval of the freeholders when required under the constitution . . ." (I. B. 5-6, Suc. B. 6). This 1963 "amendment" is flawed in several respects, as we demonstrated in the initial brief:

1. The words "when required under the constitution" seemingly modify the word "freeholders" rather than the words "subject to approval of the freeholders." The United States and Florida Supreme Courts have rejected the requirement that only "freeholders" be allowed to vote. All persons

qualified to vote - even tenants - are entitled to vote on bond issue questions. (I.B. 18-19).

2. The legislature, under the separation of powers doctrine, is without authority to enact legislature that "construes" its prior enactments. (I.B. 30-31). Thus, the legislature did not have power in 1963 to enact §3 in order to "construe" §12.01 which was enacted during 1951. Accordingly, the court must ignore §3.

3. The legislature acted unconstitutionally when it created two provisions - §§12.01 and 3 - which give Sucom the discretion whether to conduct referendum elections. (I.B. 26).

An additional problem or flaw in §3 surfaces in a judicial setting:

4. When a court is requested to "construe" legislation, it will not do so if the wording is clear and unambiguous. (I.B. 30-3). Section 12.01 is unambiguous.

The aforementioned issues were not addressed during the 1981 bond validation proceeding; thus, the validation decree is not res judicata as to these issues. See, Municipal Bond & Mortgage Corp v. Bishop's Harbor Drainage District, 133 Fla. 430, 182 So. 794 (1938), holding that a judicial bond validation decree cannot confer authority to issue bonds, and cannot give validity to an unconstitutional, void or illegal issuing entity.

As to the issue of Appellant, John Farley's involvement in the 1981 bond validation proceeding, and the res judicata effect of the validation decree, Sucom again confuses the issues. Firstly, while Farley was, and is, a Sucom ratepayer, he did not individually intervene in the 1981 proceeding. He did attend certain court hearings, and may have voiced his objection to the validation of the 1981 bonds, but he was not represented by counsel, and did not seek to individually intervene.

Secondly, the doctrine of res judicata precludes relitigation of certain issues, only if four concurrent conditions are present: (1) identity in the thing sued upon; (2) identity of the causes of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the person for or against whom the claim is made.[7] Assuming arguendo, the court finds identity of the parties, since Farley is a Sucom ratepayer, and the State intervened in the 1981 proceeding on behalf of the taxpayers and ratepayers, there is, nevertheless, an absence of identity of the causes of action. The 1981 proceeding was a bond validation proceeding, in which the issues before the court were limited to determining whether Sucom followed proper procedures with regard to the issuance of the 1981 bonds, and whether Sucom acted pursuant to statutory or other authority. The constitutionality of the 1983 amendment procedures was never an issue in that proceeding.

Conversely, the issues in this action involve a request for declaratory and injunctive relief with regard to the effectiveness of the 1963 amendment, the procedures whereby said amendment was enacted, and the issue of whether the 1985 MASTER BOND RESOLUTION should have been validated by the circuit court. Clearly, there is no identity of issues or causes of action in this case and the 1981 proceeding. This case is an entirely different cause of action, thus, principles of res judicata do not apply to estop Appellants from litigating the issues presently before the court. Prall v. Prall, 48 Fla. 496, 50 So. 867 (1909); and Shearn v. Orlando Funeral Home,

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[7] Donahue v. Davis, 68 So.2d 163, 169 (Fla. 1953), and 32 Fla. Jur. 2d, Judgments and Decrees, §107 (1985), citing, Yulee v. Canova, 11 Fla. 9, 56 (1864-65), State v. Dubose, 152 Fla. 304, 11 So.2d 477 (1943), and a myriad of other cases cited therein.

88 So.2d 591 (Fla. 1956), holding that since all facts essential to the maintenance of the suits under consideration were not identical, nor was the same evidence necessary to sustain both causes of action, thus, principals of res judicata were inapplicable.

In addition to lack of identity of parties, and causes of action, there is also a lack of identity in the relief sought in both actions. In the 1981 proceeding, Sucom sought a decree validating the 1981 bond issue. In this, Sucom sought a decree validating its proposed 1985 refunding bond issue. Appellants, on the other hand, seek declaratory and injunctive relief on the ground that the 1963 amendment was effected by means of extrinsic fraud upon Sucom's ratepayers. Since there is no identity of the thing sued for, Yulee v. Canova, supra, there is an absence of at least three concurrent conditions necessary for application of the doctrine of res judicata. American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116, 47 So. 942 (1908). Finally, the doctrine of res judicata is never applied where it would be unjust to do so, and the doctrine may not be invoked to sustain fraud. Ferrall v. Bradford, 2 Fla. 508 (1849). It therefore should not be applied here to estop Appellants from attacking the fraudulent methods used to amend the CHARTER in 1963, and seeking declaratory relief regarding the requirement of voter approval prior to issuance of revenue bonds.

Sucom ignores the constitutional and legal issues raised in Appellants' initial brief, and instead argues around the points, suggesting the doctrine of implied repeal. We anticipated this argument because Sucom raised it in the circuit court (I.B. 31). Section 12.01 of the CHARTER clearly and expressly states that a referendum election is required prior to issuance of revenue bonds. It cannot be said that enactment of §3 in 1963 conferred upon the legislature of the power to "construe" a previously enacted referendum

requirement so as to totally emasculate it. Secondly, the 1963 amendment stated that the proposed legislation was an amendment of §3 of the CHARTER, and not of §12.01. Sucom's attempt to avoid this fatal flaw in its argument by contending that §3 (1963) "impliedly repealed" the referendum requirement of §12.010, is without merit.

The doctrine of implied repeal is not favored in the law, and operates only when two statutes create an irreconcilable repugnancy, whereby the earlier statute cannot operate without conflicting with the latter. Richey v. Town of Indian River Shores, 337 So.2d 410 (Fla. 4th DCA 1976), and, ARGUMENT (I.B 31). As stated previously, §3 (1963) did not create an irreversible repugnancy as to §12.01, since §3 is not substantive legislation - it is a "rule of construction," and §12.01 can operate without conflicting with §3.

Additionally, Sucom ignores the fact that the CHARTER itself contains a saving clause provision which precludes an implied repeal of a CHARTER provision. Section 4 (1951) provides, ". . . this Act shall not be construed as repealing any . . . charter provisions. . . ."[8] Thus, by the terms of the CHARTER itself, §3 (1963) cannot impliedly repeal §12.01.

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[8]Ch. 27893, Laws of Fla.(1951).

> Section 4. Act Additional and Complete Authority. That the powers conferred by this Act shall be in addition and supplemental to the existing powers of the commission, and this Act shall not be construed as repealing any of the provisions of any other law, general or local, or charter provision, but to provide an alternative and complete method for the exercise of the powers granted in this Act. The existing municipal utilities may be repaired, extended or improved, and revenue bonds, certificates or other obligations issued pursuant to this Act without regard to or necessity for

(Footnote Continued)

Assuming arguendo §3 is found to be unconstitutional and of no effect, the remainder of the CHARTER, and in particular §12.01, is nevertheless alive and well since §5 (1951) provides,

> Section 5. Separability of Provisions.
> That if any section, clause, sentence or provision of this Act, or the application of such section, clause, sentence or provision to any persons, bodies or circumstances, shall be held to be inoperative, invalid or unconstitutional, the invalidity of such a section, clause, sentence or provision shall not be held, deemed or taken to affect the application of any of the provisions of this Act to persons, bodies or circumstances other than those as to which it, or any parts thereof, shall have been held inoperative, invalid or unconstitutional.

Ch. 27893, Laws of Fla.(1951).

Therefore, the referendum requirement in §12.01, which has never been amended or repealed or held to be unconstitutional, remains an integral part of the CHARTER, and a legal prerequisite for issuance of unlimited funding revenue bonds.

In addition to the unconstitutional delegation to Sucom of the discretion to construe legislation, §3 (1963) is unconstitutional by reason of the fact that the law is couched and vague in uncertain terms such that no one can say with certainty, from the terms of the law itself, what would be deemed and infringement of the law. Therefore, §3 (1963) should be of no effect, leaving the remainder of the Sucom CHARTER intact. Due process of law

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(Footnote Continued)
compliance with the limitations or restrictions contained in any other general, special or local law.

would not tolerate a statute which is so vague or broad that men of common intelligence must necessarily guess at its meaning. Cline v. Frink Dairy Co, 274 U.S. 445 (1927).

Sucom attempts to legitimize to §3 (1963) by calling upon "the cardinal rule of statutory construction" which is to give effect to legislative purpose, and to avoid any conclusion of unconstitutionality. (Suc. B. 22). Sucom cites several different rules of statutory construction, and cases in support thereof, none of which are relevant, since the judiciary, and certainly a commission such as Sucom, is without authority to "construe" a law or infer legislative intent, when the law itself is clear and unambiguous. "Fundamental rules" regarding irreconcilable inconsistencies and the last expression of legislative intent (Suc. B. 23) have no application here, since §12.01 clearly and unequivocably states that Sucom has authority to issue revenue bonds in unlimited amounts subject to the approval of the free holders owning real estate in the City of Sebring. Ch. 27893, Laws of Fla. (1951). Section 12.02 further states that no resolution authorizing the issuance of revenue bonds shall be effective unless and until the borrowing has been approved by the freeholders owning real estate in Sebring. Id. This special act needs no construction, as it unambiguously requires a referendum election before issuance of any unlimited revenue bond financing.

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.

In the circuit court below and in their initial brief, Appellants raised the issue of extrinsic fraud in connection with the 1963 amendment process.

Appellants requested, and continue to request, that the 1981 bond validation be set aside on the basis of extrinsic fraud.

Sucom contends that the power of the court to set aside a judgment on the basis of extrinsic fraud is limited to fraud pertaining to matters not in issue in the original action. (Suc.B.28). Appellee reasons that since any alleged fraud relating to the amendment process could have been asserted during the 1981 bond validation proceeding, "[T]he Plaintiffs are not entitled to reopen a final judgment of bond validation . . . by merely labeling the amendment process . . . fraudulent." (Suc.B.29). This rationale ignores the express language of Rule 1.540(b), Fla.R.Civ.P.:

> . . . This rule does not limit the power of a 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.

This language is further explained in the Author's Comment - 1967 to Rule 1.540, Fla.R.Civ.P.,

> Finally, it should be carefully noted that there is an express saving clause in Rule 1.540(b) which does not limit the power of the court to set aside a judgment or decree for fraud upon the court. There is no time limit on the exercise of this power, nor on the right to bring an independent action under this rule.

31 Fla. Stat. Ann. 121 (1983).

Appellants again note that they have filed an "independent action" alleging fraud in connection with the 1963 amendment process. That action is presently on appeal to the Second District (Case number 84-284-G).

Should the court decide to entertain the issue at this time, rather than defer the issue to the Second District, it has the inherent power to set aside the 1981 bond validation, since Rule 1.540(b) authorizes the court to set aside a judgment based upon <u>any</u> type of fraud, not merely a fraud upon the court. The Third District noted this distinction in <u>Brown v. Brown</u>, 432

So.2d 704 (Fla. 3d DCA 1983), wherein it reviewed a decision by the circuit court setting aside a final decree on the ground that a fraud had been committed upon the defendant. The Brown court distinguished those decisions which limit application of Rule 1.540(b) to cases where a fraud upon the court has occurred. Rather, the Brown court extended application of the rule to any case wherein the party is prevented from fully prosecuting its case based on extrinsic fraud. Therefore, this court has the power to set aside the 1981 bond validation judgment based upon the underlying fraudulent practices of Sucom with regard to the amendment process and the misleading nature of the notice of election published to the electorate.

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

Since the borrowings, which do not qualify under the limited borrowing authority found in §1.12 of the CHARTER, were not presented to the voters at a referendum election as required by §12.01, they are unauthorized financings which are illegal and void.

CONCLUSION

The 1985 MASTER BOND RESOLUTION provides for the issuance of bonds in an amount which exceeds the debt created by the underlying obligation by approximately $33 million, and significantly increases the burden to be borne by the ratepayers. Thus, the proposed bond issue is not a "refunding issue" and is therefore subject to voter approval at a referendum election pursuant to §12.01.

Furthermore, the 1963 amendment process was tainted with fraud, and any bond validation decrees entered in reliance upon the effectiveness of the

1963 amendment should be set aside. Section 3 (1963), even if constitutional, is nothing more than a rule of construction which cannot be utilized to "construe" or repeal §12.01, which unambiguously requires voter approval prior to issuance of revenue bonds.

Therefore, Appellants respectfully urge this court's decision reversing the circuit court's CONSOLIDATED FINAL JUDGMENT validating the "refunding bonds."

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, Florida 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, Florida 33807; and to Assistant State's Attorney, Mr. Alfred C. Thullberry, Jr., P. O. Box 1309, 250 North Wilson, Bartow, Florida 33830, this 18th day of November 1985.

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