IN THE SUPREME COURT
OF THE STATE OF FLORIDA

ORANGE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Petitioner,

vs. Case No. 72,992

ROBERT N. WEBSTER,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

PRELIMINARY STATEMENT

Petitioner, Orange County, Florida, a political subdivision of the State of Florida, was defendant-appellee below; it will be referred to in this brief as "the County." Respondent Robert N. Webster was the plaintiff-appellant below and he will be referred to as "the Respondent."

Various record materials referenced in this brief are reproduced in the Appendix and cited as "A. [tab number]." A copy of the decision sought to be reviewed is included in the Appendix at Tab 1.

All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The voters of Orange County approved a new charter on November 4, 1986 in order to bring home rule government to the County. (R. 520-526). This charter became effective on January 1, 1987, and all actions taken by Orange County subsequent to that time have been pursuant to that charter authority. On January 5, 1987, the Respondent filed suit to invalidate the charter, asserting, inter alia, that the statutory requirements for this charter election had not been complied with by the County. (R. 56).

Notices of the special election to approve the proposed charter were published by the County in accordance with Florida Statutes Section 100.342, Fla. Stat. (1987) which prescribes the notice requirements for special elections "not otherwise provided for. . . ." (R. 500-502). Additionally, copies of the proposed charter were mailed to all Orange County registered voters. (Ex. B., p.2, Appellee's Supplemental Brief; A. Tab 8). The Circuit Court entered summary judgment for the County, holding, among other things, that the County had complied with the applicable statutory requirements for a charter referendum. (A. Tab 8).

The Fifth District Court of Appeal, by its decision of April 28, 1988, reversed the Circuit Court's judgment and invalidated the Orange County charter. (A. Tab 1). The District Court held that Section 125.64(1), Fla. Stat. (1987), applied to this election and that its requirements were not satisfied by the County. Section 125.64(1) requires that, "upon submission to the board of county commissioners of a charter by the charter

commission, the board of county commissioners shall call a special election to be held not more than 90 nor less than 45 days subsequent to its receipt of a proposed charter. . . ." The District Court held that this statute controlled even though the charter here had not been proposed by a charter commission but by ordinance of the Board of County Commissioners itself.

Furthermore, although the Board received the charter, which had been prepared by the County Attorney, on September 12, 1986, certain technical amendments suggested by the League of Women Voters were subsequently adopted at the September 22, 1986 public hearing. (Ex. B, p. 1 to Appellee's Supp. Brief). The District Court held that the charter was therefore not "received" by the Board until September 22. Id. at 2; A. Tab 1. Because there were only 43 -- rather than 45 -- days between that date and the election, the District Court held that Section 125.64(1) was not satisfied.

The County moved for rehearing, asserting, among other things, that the 45 day requirement of Section 125.64(1) does not apply to a board of county commissioners' initiated charter election and that, in any event, the charter should not have been invalidated since there had been substantial compliance with even that statutory requirement. (A. Tab 2). The County also urged that House Bill No. 1662, Chapter 88-38, Laws of Florida, had become law as of the time the County filed its motion for rehearing and that this legislation cured the suggested technical deficiency upon which the District Court had based its decision invalidating the Orange County charter. Id.

The Respondent moved to strike the reference to the curative legislation, urging that it was not relevant to the District Court's decision. (A. Tab 3). By order dated June 23, 1988, the District Court held that House Bill No. 1662 "is dispositive of the instant case." (A. Tab 4). The Court accordingly vacated its original opinion of April 28, 1988 and affirmed the trial court's judgment for the County. Id. However, on June 28, 1988, the Court ordered, sua sponte, that its June 23 opinion be "vacated and withdrawn for reconsideration of the cause." (A. Tab 5). The Court then directed the parties to file supplemental briefs concerning "the applicability, Vel non of the legislative enactment of House Bill number 162 (sic) to the instant case." Id. The parties did so. (A. Tabs 6 and 7).

By per curiam decision dated August 18, 1988, the Court held, on motion for rehearing, as follows: "(1) that the validity and the effect of House Bill 1662 as to the charter election in question is not a proper issue in this case; (2) that if those issues are to be judicially determined it should be done in a new and separate proceeding, properly raising and presenting them; and (3) that this controversy should be disposed of solely on the issues originally framed by the pleadings, considered by the trial court and reviewed in our original opinion." Decision at 2; A. Tab 1. The Court then reinstated and ratified its original decision of April 28, 1988. Id.

SUMMARY OF ARGUMENT

The Fifth District's decision explicitly holds that the effect and validity of curative legislation enacted pending an appeal cannot be considered by the appellate court but rather must be raised in a "new and separate proceeding" because the appeal "should be disposed of solely on the issues originally framed by the pleadings, considered by the trial court and reviewed in our original opinion." That holding expressly and directly conflicts with prior decisions of the Florida Supreme Court applying curative legislation in exactly the circumstances of this case.

Florida courts have long recognized that curative legislation enacted during the pendency of a judicial proceeding must be applied in that proceeding; indeed, it is the court's duty to take judicial notice of the validating act. The plain language of House Bill No. 1662 demonstrates the Legislature's intent to apply the Bill retroactively to ratify charters -- such as the Orange County Charter -- adopted pursuant to the notices and procedures specified in that Bill. Under long-standing precedent of this Court, the Fifth District was required to apply that curative legislation and give it due recognition and effect because it constituted the controlling law of Florida on this appeal.

Argument

The Florida Supreme Court has, in numerous cases, explicitly considered and applied curative legislation validating technical defects in elections. Middleton v. City of St. Augustine, 29 So. 421, 431-432 (Fla. 1900); Givens v. Hillsborough County, 35 So. 88 (Fla. 1903); Cranor v. Board of Commissioners of Volusia County, 45 So. 455 (Fla. 1907); Charlotte Harbor & N. Ry. Co. v. Welles, 82 So. 770 (Fla. 1919); Dover Drainage Dist. v. Pancoast, 135 So. 518 (Fla. 1931). This rule continues to be honored today. State v. County of Sarasota, 155 So.2d 543, 546 (Fla. 1963) (subsequently enacted legislation "cured any and all such defects so as to make the bond election legal and valid in all respects"); County of Palm Beach v. State, 342 So.2d 56, 58 (Fla. 1976) ("failure to give statutory notice was cured by subsequent legislative validation").

Furthermore, as the Florida Supreme Court has expressly recognized, curative legislation must be given effect by the appellate court even if it was enacted after the lower court rendered its final decision.[1/] The Court's holding in Charlotte

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1/ This is consistent with the well-established rule that the law to be applied in an appeal is the law in effect at the time the appeal is resolved. State v. Castillo, 486 So.2d 565 (Fla. 1986). See also, Tedder v. Video Electronics, 491 So.2d 533 (Fla. 1986); Dougan v. State of Florida, 470 So.2d 697 (Fla. 1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1499 (1986); Florida East Coast Railway Co. v. Rouse, 194 So.2d 260 (Fla. 1966). Since House Bill No. 1662 went into effect prior to the rendition of a final decision of the Fifth District and was brought to the attention of that Court on motion for rehearing, the appeal was required to be determined in accordance with the law in effect at the time the rehearing motion was resolved. As the Fourth District declared in Fogg v. Southeast Bank, N.A., 473 So.2d 1352, 1353 (Fla. 4th DCA
(footnote continued)

Harbor succinctly states this controlling principle of law:

> Both chapters 7750 and 8024 have been passed by the Legislature since this case has been pending in this court. It becomes the duty of the court to take judicial notice of the said validating act of the Legislature, and to give it due recognition and effect.

Id. at 774, citing Cranor. Thus, under circumstances such as those presented here, this Court has held that curative legislation which is in effect at the time of an appeal must be applied to validate election results.

One such decision of the Court is particularly instructive in demonstrating the conflict created by the Fifth District's decision. In H.C. Coon v. Board of Public Instruction of Okaloosa County, 203 So.2d 497 (Fla. 1967), the Court specifically adhered to its earlier decision in Charlotte Harbor, holding once again that it was "the duty of this Court to take judicial notice of a validating statute enacted pending an appeal." Id. at 499. In that case, as here, the Court had actually filed its opinion invalidating the election proceeding and curative legislation was enacted while the petition for rehearing was pending. The Court accordingly withdrew its opinion, holding that, "[e]ven when the Supreme Court has prepared an opinion holding an issue of bonds to

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(footnote continued from previous page)
1985), a procedural statute such as this "operate[s] retrospectively in the sense that all pending proceedings, including matters on appeal, are determined under the law in effect at the time of decision rather than that in effect when the cause of action arose or some earlier time." The Fifth District's stated refusal to apply a curative statute in effect at the time of its final decision is flatly contrary to those decisions.

be invalid, as here, a special act passed as a curative statute pending the appeal has been held to be controlling in sustaining the ultimate validity of the bonds." Id. at 498-99.

The Fifth District's decision that the curative legislation validating the Orange County Charter would not be considered or applied as the controlling law on this appeal directly and expressly conflicts with the Court's decision in Okaloosa County as well as the decisions of the Court cited above. Direct conflict is also created by the District Court's decision that the validity and constitutionality of the curative legislation could only be determined in a new and separate lawsuit rather than in this case.

The Florida Supreme Court has directly considered and passed upon the validity and constitutionality of curative legislation which was enacted pending appeal without requiring the filing of a new and separate lawsuit for the resolution of these issues. See, e.g., Givens (Court sustained curative legislation against attack under Article 3, Section 20 of the Florida Constitution and applied legislation even after the county's bond issue had been judicially invalidated); County of Palm Beach, 342 So.2d at 57 (Court placed "limiting construction" on language of curative legislation which allowed it to "fulfill the voters' expectations by validating the bonds...."); Okaloosa County (Court sustained constitutionality and validity of the curative legislation and applied the legislation to validate bond issuance which had been previously held invalid). The Fifth District's decision that the

constitutionality and validity of the curative legislation must be determined in a new, independent proceeding directly and expressly conflicts with those decisions.

The conflict created by the District Court's decision below should be resolved by this Court because of its great importance to the citizens of the State. That decision leaves Orange County -- the State's seventh largest county -- without the charter which its voters had approved even though there was substantial compliance with the notice requirements that were held by the District Court to be applicable. Moreover, it fails to effectuate the plain intent of the Florida Legislature to cure the technical deficiency upon which the District Court had invalidated the charter and to confirm the charter. This in turn also places in doubt a legal principle which has been settled since 1900 -- the ability of the Legislature to enact curative legislation and thereby eliminate technical challenges to an election.

CONCLUSION

For the foregoing reasons, the District Court's decision is in direct and express conflict with decisions of this Court and other district courts of appeal. This Court accordingly has jurisdiction under Article V, § 3(b)(3) of the Florida Constitution. Trustees of Internal Improvment Fund v. Lobean, 127 So.2d 98 (Fla. 1961); see also, The Florida Star v. B.J.F., 13 F.L.W. 518 (Fla. September 1, 1988). Because of the great public

interest in this question, it is respectfully submitted that this Court should assert its jurisdiction here and grant the petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished to Johnie A. McLeod, Esquire, McLeod & McLeod, P.A. 48 East Main Street, Post Office Drawer 550, Apopka, Florida 32704-0950, by Hand Delivery this 9th day of September, 1988.

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