IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

Petitioner,

vs.

ROBERT N. WEBSTER,

Respondent.

Case No. 72,992

District Court of Appeal
5th District - Case No. 87-1448

PETITIONER'S BRIEF ON THE MERITS

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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]." Other references to the record are designated as "R.___." 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

By a vote of 69,361 to 52,732, 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 by Orange County subsequent to that time have been taken pursuant to that charter authority. On January 5, 1987, the respondent filed suit to invalidate the charter, asserting, inter alia, that the applicable statutory requirements for this charter election had not been complied with by the County. (R. 56).

Notices of the special charter election had been published by the County in accordance with Section 100.342, Fla. Stat. (1987), which prescribes the requirements for special elections "not otherwise provided for." (R. 500-502). Additionally, copies of the proposed charter had been mailed to all Orange County registered voters. (A. Tab 6, Ex. B). 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. (R. 527-528; 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. (1967), applied to this election and that its requirements were not satisfied by the County. Section 125.64(1) requires that, "[u]pon 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.

The District Court further held that the County's November 4 charter election did not comply with that 45 day notice requirement because, in the District Court's view, the charter was not "received" by the Board until it was approved by the Board in its final form on September 22. (A. Tab 1, p.3). Although the Board was presented with the proposed charter, which had been prepared by the County Attorney at the Board's direction, on September 12, certain technical amendments suggested by the League of Women Voters were subsequently adopted at the Board's September 22 public hearing. (A. Tab 6, Ex. B). Because there were only 43 -- rather than 45 -- days between that later date and the election, the District Court concluded 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, cured the purported technical deficiency upon which the District Court

had based its decision invalidating the Orange County charter. Id. Because this curative legislation had become law as of the time the County filed its motion for rehearing, the County asserted that this law should be applied to resolve the appeal.

By decision 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 decision 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 District 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." (A. Tab 1, p.2). The Court then reinstated and ratified its original decision of April 28, 1988. Id.

The County filed its Notice To Invoke Discretionary Jurisdiction on August 29, 1988. This Court accepted jurisdiction by order dated December 8, 1988.

SUMMARY OF ARGUMENT

The District Court incorrectly applied the requirements of Section 125.64(1), which expressly governs elections for charters proposed by autonomous charter commissions, to the Orange County election on a home rule charter proposed by the Board of County Commissioners. Both its explicit language and its statutory purpose make clear that Section 125.64(1) applies only to the specified type of charter election.

Furthermore, even if Section 125.64(1) did apply, the election was in fact held in actual, or at least substantial, compliance with the time requirements of that statute. If the term "receipt" means what it says, all of the required notice was given because the election was held within 45 to 90 days of the date the County Attorney delivered, and the Board received, the proposed charter. If "receipt" means "approval," as the Fifth District concluded, there was still substantial compliance with those time requirements since the election was held 43 days after the last minor changes to the proposed charter were approved by the Board. Under Florida law, substantial compliance with statutory election procedures is legally sufficient to overcome technical deficiencies. The Fifth District's decision flies in the face of that established principle.

Finally, the plain language of House Bill No. 1662, enacted to cure the technical deficiency upon which the District Court invalidated the County's home rule charter, demonstrates the Legislature's intent that the act be applied retroactively to ratify charters -- such as the Orange County Charter -- adopted pursuant to the procedures at issue here. The Fifth District held, however, that curative legislation enacted pending the appeal could not be considered by it 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." (A. Tab 1, p.2). Quite to the contrary, this Court has consistently held that legislation enacted during the pendency of a judicial proceeding must be applied in that proceeding. Under this long-standing precedent, the Fifth District was required to apply House Bill No. 1662 and give it due effect as the controlling law of Florida on this appeal.

The District Court's decision should accordingly be reversed with directions that the circuit court's judgment upholding the validity of the charter approved by the citizens of Orange County be reinstated. Indeed, unless that is done, the voters will have been deprived -- on the most technical of grounds -- of their franchise on this important matter of governance.

ARGUMENT

Point One

The Orange County charter election complied or substantially complied with the applicable statutory requirements.

The District Court applied the procedural requirements of Section 125.64(1), Florida Statutes, to the Orange County charter election. That statute provides that a special election to consider a charter must be held not less than 45 or more than 90 days of a board of county commissioner's receipt of the proposed charter from an autonomous charter commission. By its explicit terms, however, this statute applies only to charters proposed by an autonomous charter commission, and it should not be construed, as the District Court did, to apply to an election on a proposed charter initiated by the Board's own ordinance rather than by a charter commission. In doing so, the District Court misapprehended the legislative intent underlying that statutory time requirement.

By requiring a board to schedule an election within a specified time after it receives a proposed charter from an autonomous charter commission, the Legislature sought to preclude the possibility that an unreceptive board of county commissioners could forestall a public referendum on a proposed charter by simply failing to call an election. But that concern does not exist in a situation such as this where there was no autonomous charter commission proposing a charter. Rather, since the Board

of County Commissioners had itself adopted an ordinance to propose its own charter, there would be no reason for the Board not to schedule an election on its own proposed charter.

Even if the time constraints of Section 125.64(1) were applicable to a proposed charter initiated by the Board rather than by a charter commission, they were in fact complied with here. The triggering event under that statute is the date the charter was received by the Board of County Commissioners. The record is undisputed that the Board was given -- and thus "received" -- the charter, which had been prepared by the County Attorney, on September 12, 1986. (R. 433-437). The District Court, however, erroneously equated "receipt" with "approval," holding that "[A]lthough the County Attorney forwarded his recommendations to the Board on September 12, 1986, [the League's proposed] changes were not approved, and, therefore, not received until September 22, 1986."

Contrary to the District Court's decision, the statutory language does not require that the board "approve" a charter proposed by a charter commission, only that it shall "call a special election to be held not more than 90 nor less than 45 days subsequent to its receipt of the proposed charter . . . ." There is, in short, no basis in the statute itself for equating "receipt" by the board with "approval."

In point of fact, when the statute is utilized as the Legislature intended -- to process a charter proposed by a charter commission -- no approval by the board is even contemplated or required. Accordingly, under interpretive gloss the District

Court placed upon Section 125.64(1), the 45 day period would never begin to run because the board does not grant its approval where an autonomous charter commission has prepared the proposed charter. More importantly, if the triggering event were such approval, then the very purpose of that time requirement could be defeated by a recalcitrant board which refused to "approve" an independent commission's proposed charter or kept making changes to it -- thereby enabling it to avoid calling an election on a charter it opposed. Patently, "receipt" alone, without the need for further action by the board, was intended to trigger the time requirements.

The District Court's strained construction of Section 125.64(1) graphically demonstrates the Court's error in applying that statute to this type of election. The reason offered by the District Court for interpreting "receipt of the proposed charter" as meaning "approval" is that "a contrary conclusion would allow the Board to subvert the Legislative dictates by allowing amendments to the proposed Charter up to the date of the election." But that is not the case at all. Quite to the contrary, the District Court overlooked both the 30 to 45 day notice requirement of Section 125.64(1) and the requirements for passing a county ordinance as prescribed by Section 125.66.

Under Section 125.64(1), there could be no amendments to the proposed charter after the thirtieth day prior to the referendum; the original notice would no longer be timely under the 30 to 45 day publication requirement, and any such amendments would require new notice to the electors of a new charter. Furthermore, Section

125.66 provides that an ordinance may not be enacted or amended unless "notice of intent to consider such ordinance is given at least 15 days prior to said meeting, excluding Sundays and legal holidays." As a result of these requirements, Orange County did not have the option of amending the charter up to the date of the election.

Finally, although the Fifth District emphasized the fact that two changes were submitted by the League of Women Voters at the September 22, 1986 public hearing, it overlooked the fact that both recommendations resulted in deletions from the proposed charter already received by the Board, neither of which altered the substance of the proposed charter in any way.[1/] Amendments to ordinances are clearly allowed at public hearings, so long as they fall within the scope of the subject matter advertised.

For all of these reasons, the District Court erred in invalidating the Orange County charter based on the requirements of Section 125.64(1). The Court should have instead affirmed the judgment of the trial court validating the charter as having been adopted in compliance with the election scheduling requirements applicable to counties proceeding under Part IV of Chapter 125.

Even assuming, however, that the Section 125.64(1), Part II time requirements were applicable to the adoption of the Orange County Charter pursuant to Part IV of Chapter 125 and that Orange County failed to comply fully with its requirements, the

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1/ The changes are described in Defendant's Memorandum in Support of Summary Judgment at R. 216 and 217, as well as Orange County League of Women Voters' position paper on proposed charter government at R. 439 and 440.

inescapable fact remains that Orange County substantially complied with them. The election should therefore not have been invalidated by the District Court on the basis of the technicality seized upon by the respondent.

Florida law makes clear that technical irregularities in the election process should not be permitted to impair the will of the people when substantial compliance with the applicable statutory requirements has been achieved.2/ The citizens' right to vote is one of the most basic rights afforded by our democracy; indeed, it has been described by this Court as "the keystone in the arch of liberty." State v. Gates, 134 So.2d 497, 500 (Fla. 1961). It should not be negated on purely technical grounds, where no fraud is established, where no voter was prevented from expressing his choice, and where it is not shown that, but for the acts complained of, the result would have been different. Carn v. Moore, 74 Fla. 77, 76 So. 337, 340 (1917).

2/ This is the rule in other jurisdictions as well. See e.g., Richards v. Barone, 275 A.2d 771 (N.J. Super. Ct. Law Div. 1971) (despite failure to publish notice of the proposed public question at the general election as required by statute, in view of the mailing of sample ballots to all township residents showing such question thereon, and a vast amount of publicity concerning the issue it could not be said that the procedural omission had the effect of imposing so vital an influence on an election that the election should be vitiated); State of Tennessee v. Quarterly County Court, 351 S.W.2d 390 (Tenn. 1961) (eight days' legal notice of the election, coupled with general newspaper coverage of the public issues, constituted substantial compliance with the Tennessee statute that required ten days' notice); Wurst v. Lowery, 695 S.W.2d 378 (Ark. 1985); Stanley v. Southwestern Community College Merged Area (Merged Area XIV) in Counties of Adair, et al., 184 N.W.2d 29 (Iowa 1971); Minthorn v. Hale, 372 S.W.2d 752 (Tex. Civ. App. 1963); Gray v. Reorganized School District R-4 of Oregon County, 356 S.W.2d 55 (Mo. 1962).

The underlying rationale for this rule was exhaustively reviewed by the Florida Supreme Court in Boardman v. Esteva, 323 So.2d 259 (Fla. 1975), cert. denied, 425 U.S. 967, 96 S.Ct. 2162 (1976). Although the absentee ballots challenged there failed to meet a number of statutory requirements, the Court refused to void them on that technical ground. Instead, the Court quoted with approval the following language of the Nebraska Supreme Court in McMaster v. Wilkinson, 145 Neb. 39, 15 N.W. 2d 348, 353 (1944):

> It is the policy of the law to prevent as far as possible the disenfranchisement of electors who have cast their ballots in good faith, and while the technical requirements set forth in the absentee voting law are mandatory, yet in meeting these requirements laws are construed so that a substantial compliance therewith is all that is required.

The Court further cautioned against elevating form over substance in the regulation of elections, stating that:

> By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

323 So.2d at 263.

The Boardman decision and its progeny make clear that deviations from statutory election procedures, even mandatory procedures, are not, standing alone, a sufficient reason to invalidate the election. Rather, because "the primary consideration in an election contest is whether the will of the people has been effected," three factors are to be considered in that regard:

> (a) the presence or absence of fraud, gross negligence, or intentional wrongdoing;

> (b) whether there was been substantial compliance with the essential requirements of the absentee voting law; and
>
> (c) whether the irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election.

323 So.2d at 269.

Each of these considerations mandates the affirmance of the voters' approval of the Orange County Charter. There is no claim of fraud, gross negligence or intentional wrongdoing, and there was certainly substantial compliance with the time requirements for the election. The record establishes the many notices, advertisements, mailings, and meetings regarding this proposed charter government. (A. Tab 2, p. i-ii). Given the widespread publicity the proposed charter received in Orange County -- including the actual mailing of the proposed charter to all Orange County voters a month before the election -- the electorate was timely and fully informed as to the proposed charter. Certainly no one suggests that the election outcome would have been different had the election been held three days later. In these circumstances, the absence of strict compliance with all of the technical requirements of the election statutes should not be allowed to thwart the will of the electorate.

This Court recently adhered to this important principle, declaring that "the electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election." State of Florida on the Relation of Bill Chappell, Jr. v. Bob Martinez, 13 F.L.W. 702 (Fla. December 8, 1988). Holding that "'there is no magic in the

statutory requirements,'" the Court refused to disenfranchise voters where there was substantial compliance with those statutory requirements.

In this case, as in the decisions cited above, there is no claim that any person entitled to vote was prevented from expressing his choice or that the election was anything other than a full, fair and free expression of the will of the people. Hence, the District Court's acceptance of the respondent's hypertechnical argument only serves to suppress the full, fair and free expression of the common will. Since the overriding concern in election proceedings is to effect the will of the people, the results of this election -- held in substantial compliance with the statutory time requirements -- should be affirmed.

Point Two

Any technical irregularities in the Orange County Charter election were cured by House Bill No. 1662.

The Florida Supreme Court has long held that curative legislation -- such as House Bill No. 1662 -- enacted during the pendency of a judicial proceeding must be applied in that proceeding, even if an opinion has already been issued. The District Court's explicit refusal to apply that curative legislation here is directly contrary to those controlling precedents.

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 requirements of that Bill. And, the legislative history conclusively demonstrates that the Legislature intended by this Bill to ratify the Orange County Charter and thereby supersede the District Court's decision voiding that charter.

For instance, the Senate Staff Analysis and Economic Impact Statement for Senate Bill 1406 (the identical companion bill of House Bill No. 1662) (A. Tab 6, Ex. B) contains a lengthy discussion of the Orange County case and states as follows:

> IB. Effect of Proposed Changes.
>
> The Orange County Charter ("any charter . . . which was adopted by vote of the electors at an election conducted and noticed in conformance with the provisions of §§ 101.161(1) and 100.342, Florida Statutes") is ratified.

Paragraph II(B) expressly declares: "This bill effectively overturns the Fifth District Court of Appeal decision, thereby ratifying the Orange County Charter." Finally, Paragraph III confirms: "This bill effectively ratifies the Orange County Charter, as a Charter proposed under § 125.82, Florida Statutes, and approved by the voters in conformance with §§ 101.161(1) and 100.342, Florida Statutes."

Three out of four major headings in the Senate Staff Analysis informed the Legislature that a major thrust of this Bill is to correct a problem caused by the District Court's application of Section 125.64(3), Florida Statutes, to charters -- such as the Orange County Charter -- adopted pursuant to Section 125.82, Florida Statutes. Likewise, the Bill Summary from Legislative Affairs, Office of the Governor (A. Tab 6, Ex. C), forwarded to the Governor along with the bill itself, informed the Governor that:

> The Orange County Charter ("any charter . . . which was adopted by vote of the electors at an election conducted and noticed in conformance with the provisions of §§ 101.161(1) and 100.342, Florida Statutes") is legally ratified.

Quite apart from these explicit statements of legislative intent, the statutory language demonstrates on its face that it applies to ratify the Orange County Charter, as well as the procedure by which the electorate approved this Charter, and thereby negate the District Court's contrary decision. House Bill No. 1662 (Chapter 88-38, Laws of Florida) (A. Tab 6, Ex. A) provides as follows:

> Any charter proposed under § 125.82, Fla. Stat., which was adopted by vote of the electors at an election conducted and noticed in conformance with the requirement of §§ 101.161(1) and 100.342, Fla. Stat., is hereby ratified.

The Orange County Charter was adopted pursuant to Part IV, Chapter 125, Florida Statutes. See Section 2 of Orange County Ordinance No. 86-22. (R. 457). Part IV of Chapter 125 consists of Sections 125.80 through 125.88. The Orange County Charter clearly meets the first test of Section 2 of the House Bill No. 1662, i.e., "Proposed under Section 125.82, Florida Statutes."

The second test is conformity with Section 101.161(1), Florida Statutes, which provides as follows:

> (1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution, constitutional revision commission proposal, constitutional convention proposal, or enabling resolution or ordinance. The substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of.

The question presented to the Orange County voters on the November 4, 1986 ballot (R. 454), on its face, meets these requirements.

The third test is conformity with Section 100.342, Florida Statutes, which provides:

> Section 100.342. Notice of special election or referendum.
>
> In any special election or referendum not otherwise provided for there shall be at least 30 days' notice of the election or referendum by publication in a newspaper of general circulation in the county, district, or municipality, as the case may be. The publication shall be made at least twice, once in the fifth week and once in the third week prior to the week in which the election or referendum is to be held. If there is no newspaper of general circulation in the county, district, or municipality, the notice shall be posted in no less than five places within the territorial limits of the county, district, or municipality.

The election validating the Orange County Charter was held on November 4, 1986, with notices appearing in a newspaper of general circulation within Orange County on September 28, 1986, the fifth week before the election, and October 12, 1986 (R. 500), the third week before the election. Orange County held an election in clear conformance with the requirements of Section 100.342.

Having met all of the tests set out in the Bill, the Orange County Charter and the particular election procedure by which it was approved by the electorate have been ratified by the Legislature. Indeed, the Legislature knew when it passed this Bill, and the Governor knew when he signed the Bill, that passage of the Orange County Charter met its requirements. Accordingly, House Bill No. 1662 is controlling and must be applied to cure any technical deficiency in the Orange County charter election.

It has been established since 1900 that curative legislation must be applied to validate elections against legal attacks based on technical defects in the election procedures. In Middleton v. City of St. Augustine, 29 So. 421, 431 (Fla. 1900), the Supreme Court first addressed the legality of statutes "curing defects in legal proceedings, where they amount to mere irregularities, not extending to matters of jurisdiction, and in the absence of constitutional limitations," and held as follows:

> If the thing wanting, or which failed to be done, and which constitutes the defects in the proceeding, is something the necessity for which the Legislature might have . . . dispensed with . . . by prior statute, then it is dispensed with by subsequent statute. And if the irregularity consists of doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.

Middleton, 29 So. at 431 (citation omitted). The Court then applied the legislation curing the procedural challenges to the election alleged by the lawsuit:

> In so far as the alleged defects and irregularities in the election held and as to the qualification of the voters thereat are concerned, it is a complete answer to say that the legislature had the power to authorize the municipality to issue the bonds in question without any submission at all of the question to an election by the taxpayers of the city; and, consequently, under the rule stated, it had the power by the subsequent curative act to declare that such election as was in fact held was a sufficient predicate for the proper issuance thereof, even though such election may have been irregular and defective -- which fact we do not determine.

Id. at 432. Although the Court ultimately remanded the case, the legitimacy of using a curative act to sustain the results of an election was established.

Three years later, the Florida Supreme Court revisited the use of curative legislation in Givens v. Hillsborough County, 35 So. 88 (Fla. 1903). The case is noteworthy for two additions it made to the prior pronouncement on curative legislation. First, the curative act in question there was passed after the Court itself had declared Hillsborough County's proposed issue of bonds to be invalid. The Court rejected the argument that "the legislation is a usurpation of judicial power by the Legislature," and instead declared that:

> The authority of the county officials to make the issue was questioned, and the court held that under the then existing conditions they were without such power. The curative act of the Legislature did not question the correctness of this decision, nor attempt to adjudicate the regularity of the previous acts of the county commissioners, but, recognizing the binding force of the judgment of the court, undertook to confer authority where before there was none.

Id. at 90.

Secondly, the Court rejected the argument that the statute was violative of Article 3, Section 20 of the Florida Constitution because "it affects only Hillsborough county and these particular bonds; that Hillsborough County was the only county in the state attempting to issue bonds for the purposes mentioned, and that this was known to the Legislature in passing the act . . . ." The Court held that the classification was a reasonable one, even if

the act only applied to a single county. Accordingly, the curative legislation was applied by the Court, even after the county's bond issue had been judicially invalidated.

Since those early decisions, the Florida Supreme Court has repeatedly sustained curative legislation under circumstances such as these. See, e.g., Cranor v. Board of Commissioners of Volusia County, 45 So. 455 (Fla. 1907); Dover Drainage Dist. v. Pancoast, 135 So. 518 (Fla. 1931). The use of curative legislation to validate irregularities in elections continues to be approved in Florida today. See, e.g., State v. County of Sarasota, 155 So.2d 543 (Fla. 1963); H.C. Coon v. Board of Public Instruction of Okaloosa County, 203 So.2d 497 (Fla. 1967); County of Palm Beach v. State, 342 So.2d 56 (Fla. 1976).

In Sarasota, for instance, the Florida Supreme Court held that the legislation "cured any and all such defects so as to make the bond election legal and valid in all respects." 155 So.2d at 546. Likewise, in Palm Beach, the Court held that "the failure to give statutory notice was cured by subsequent legislative validation." 342 So.2d at 58. Accordingly, the judgment of the circuit court which had invalidated the bond issue approved by the county voters was reversed.

The case of Okaloosa County is particularly relevant because this Court clearly recognized there that subsequently enacted curative legislation was controlling in a pending suit, even though the Supreme Court had already rendered its decision in the case. The Legislature enacted curative legislation while a petition for rehearing was pending before the Florida Supreme

Court, in order to cure a defect in a special election to approve school district bonds. The Supreme Court granted the rehearing and remanded to the trial court for reconsideration in light of the curative act. On appeal of the trial court's application of the curative bill, the Supreme Court held:

> Even when the Supreme Court has prepared an opinion holding an issue of bonds to 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.

Okaloosa County, 203 So.2d at 498-499 (citation omitted).

The Sarasota, Okaloosa County, and Palm Beach decisions are directly controlling here. By their plain holdings, the District Court was required to apply the curative legislation enacted during the appeal of this case.

In seeking to avoid the effect of those decisions, the respondent urged below that House Bill No. 1662 does not expressly state that it is to be applied retroactively and that it is therefore inapplicable to this appeal because statutes are presumed to be prospective in application unless the Legislature manifests an intention to the contrary. However, his contention lacks merit because the language of this act does in fact demonstrate a clear legislative intent that it be applied retroactively.

Section 2 of the Bill provides as follows:

> Any charter proposed under section 125.85, Florida Statutes, which was adopted by vote of the electors at an election conducted and noticed in conformance with the requirements of section 101.161(1) and 100.342, Florida Statutes, is hereby ratified.

By using the past tense, the Legislature confirmed that this bill applied retroactively to charters adopted pursuant to elections which were conducted and noticed in conformance with the specified notice requirements before passage of this legislation. In this way, the Legislature plainly provided that the statute should be given retroactive application.

Furthermore, the Legislature used the phrase "is hereby ratified" with respect to any charter previously adopted in accordance with this procedure. Obviously, legislative ratification of an act which has already occurred contemplates retroactive application of the curative statute. This interpretation is confirmed by the common usage of the word "ratify." According to the Oxford English Dictionary, "ratify" means:

> To confirm or make valid (an act, promise, compact, etc.) by giving consent, approval, or formal sanction (especially to what has been done or arranged for by another).

Oxford English Dictionary (Compact Edition Oxford University Press 1971).

Respondent argued below that the term "ratify" is insufficient to make the act retrospective. As supposed support for that argument he cited Chiapetta v. Jordan, 153 Fla. 788, 16 So.2d 641 (1943), Anderson v. Anderson, 468 So.2d 528 (Fla. 3d DCA 1985), and State v. Rinehart, 192 So. 819 (Fla. 1939). But, not one of those cases holds that the word "ratify" does not connote retroactivity. Chiapetta and Anderson simply restate the general presumption of prospective application of a statute in the absence

of legislative intent to the contrary, and Rinehart is bereft of any discussion at all of a statute's retroactivity, much less any discussion of the effect of the word "ratify."

Not only do the cases relied upon by the respondent fail to support his argument, that argument flies directly in the face of precedent squarely on point. As noted earlier, in Okaloosa County, County of Palm Beach, and Sarasota, the Florida Supreme Court applied statutes which used the word "ratify" to retroactively validate challenged elections.

The District Court refused to apply curative legislation here on the ground that legislation enacted during the pendency of 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." (A. Tab 1, p.2). Quite to the contrary, this curative legislation falls squarely within the time-honored exception to the general presumption of prospective application regarding remedial or procedural statutes, and it must accordingly be applied in this proceeding.

"[S]tatutes which do not alter contractual or vested rights but relate only to remedies or procedure are not within the general rule against retrospective operation and, absent a saving clause, all pending proceedings are affected." Rothermel v. Florida Parole and Probation Commission, 441 So.2d 663, 664 (Fla. 1st DCA 1983). See also, Fogg v. Southeast Bank, N.A., 473 So.2d 1352 (Fla. 4th DCA 1985); Batch v. State of Florida, 405 So.2d 302

(Fla. 4th DCA 1981); Harris v. State, 400 So.2d 819 (Fla. 5th DCA 1981). Accordingly, a procedural statute "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 [the] decision rather than that in effect when the cause of action arose or some earlier time." Fogg, 473 So.2d at 1353.

Since House Bill No. 1662 went into effect prior to the rendition of a final decision of this Court and was brought to the attention of the Court for rehearing, this case must be determined in accordance with the law in effect at the time the County's rehearing motion was filed in this case. State v. Castillo, 486 So.2d 565 (Fla. 1986) (appellant entitled to benefit of law at time of appellate disposition).3/ Indeed, this Court has expressly held that curative legislation enacted after the lower court rendered its final decision must be given effect by the appellate court:

> 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.

82 So. at 774. Thus, under circumstances like 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.

3/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).

One such decision of this Court is particularly instructive in demonstrating the incorrectness of the Fifth District's decision. In Okaloosa County, 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." 203 So.2d at 499. In that case, after the Supreme Court had actually filed its opinion invalidating the election proceeding, 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 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.

Notwithstanding this Court's decision in Okaloosa County, the respondent argued below that House Bill No. 1662 could not be applied by the District Court since it was enacted after the District Court had issued its decision. In support of that assertion, he cited Middleton v. City of St. Augustine, 29 So. 421 (Fla. 1900). But, far from providing support for his contention, the Florida Supreme Court stated there that the fact that the curative act was adopted after the institution of the suit but before judgment was entered did not affect the force of validity of the act. Id. at 433. Here, of course, the act was passed before the District Court issued its mandate;[4/] accordingly --

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4/ Indeed, the District Court had the power, sua sponte, to even recall its mandate, as long as it did so within the term during (footnote continued)

just as in Okaloosa County -- that statute constituted the effective law to be applied by the District Court during this appeal.

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 flies directly in the face of this Court's decision in Okaloosa County as well as the decisions cited above. Its holding that the applicability and validity of the curative legislation could only be determined in a new and separate lawsuit is equally contrary to settled Florida law.

This Court has on a number of occasions directly considered and passed upon the validity 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

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(footnote continued from previous page)
which the mandate was issued. State Farm Mutual Automobile Insurance Co. v. Judges of the District Court of Appeal, Fifth District, 405 So.2d 980 (Fla. 1981); Chapman v. St. Stephens Protestant Episcopal Church, 138 So. 630 (Fla. 1932); United Faculty of Florida, Local 1847 v. Board of Regents, State University System, 423 So.2d 429 (Fla. 1st DCA 1982); State of Florida v. In the Interest of D. I., 477 So.2d 71 (Fla. 4th DCA 1985); Orange Federal Savings & Loan Assoc. v. Dykes, 444 So.2d 1152 (Fla. 5th DCA 1984).

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 should have done that as well.

CONCLUSION

The District Court's decision below should be reversed. That decision would leave Orange County -- the State's seventh largest county -- without the charter which its voters had expressly approved, even though there was at least substantial, if not actual, compliance with the very 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. It is respectfully submitted that this Court should reverse the District Court's decision and direct it to remand the case to the trial court with directions to reinstate its judgment for the County.

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 30th day of December, 1988.

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