O/a 3-10-89

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

COUNTY OF ORANGE, ETC.,

Petitioner,

vs. CASE NO. 72,992

ROBERT N. WEBSTER,

Respondent.

----------/

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

In this Brief Respondent ROBERT N. WEBSTER will be referred to as "Webster." Petitioner COUNTY OF ORANGE will be referred to herein as "the County" or "Orange County." References to the record on appeal will be denoted as (R Vol. no. page no.).

STATEMENT OF THE CASE AND OF THE FACTS

Webster brought this suit for declaratory judgment, pursuant to Chapter 86, Florida Statutes (1985), and for injunctive relief, arising out of Orange County's adoption of a county charter. (RI 95-102) (First Amended Complaint). The parties were in basic agreement as to most of the factual issues involved in the lawsuit. (RII. 194).

Webster's Complaint alleged, and Orange County's Answer admitted, the following factual chronology leading up to the election: on or about March 10, 1986, the County, through its Board of County Commissioners (hereinafter referred to as "the Board or "the Commissioners"), undertook certain actions to establish a "Citizen's Charter Ad Hoc Committee" pursuant to Part IV, Chapter 125, Florida Statutes. (RI. 96, 133). Resolution No. 86-M-13, formally creating and establishing the "Orange County Citizens Charter Government Study Committee" (hereinafter the "Study Committee")." was approved by the Commissioners on or about April 14, 1986. (Id.).

The resolution was typed and prepared on April 10, 1986 and executed by the Board's chairman, Tom Dorman, on April 14, 1986.

(Id.). On or about July 11, 1986 the Study Committee reported its final recommendations to the Board. (Id.). On or about July 30, 1986 the Board published a legal notice in the Orlando Sentinel newspaper stating that the Commissioners would consider the Study Committee's recommendations on August 14, 1986. (Id.). The Board accepted the Study Committee's recommendation "in concept" at the August 14 meeting and authorized the County Attorney to draft a proposed charter. (RI. 96-97, 133).

The proposed charter ordinance draft was prepared on or about August 29, 1986. (RI. 97, 134). The County Attorney recommended passage of his proposed draft charter together with six amendments on September 12, 1986. (RI. 97, 134). The Commissioners passed a charter ordinance, No. 86-22, (RI 178-186), on September 22, 1986, which included at least eight (8) major amendments or changes in language in the Charter itself, including a provision regarding recall of elected Charter officers. Amendments proposed by League of Women Voters by letter submitted September 22, 1986, were approved on that day and were not part of the County Attorney's proposed draft of the charter ordinance.

Notices of the referendum on the proposed Charter were published on September 28 and October 12, 1986 (RI. 98, 134) for the election to be held November 4, 1986. (Id.). Webster alleged, inter alia, that the notices of the referendum election were deficient in that the charter ordinance to be voted upon in the referendum was broader than the notice indicated, and did not reflect that the referendum was in fact a special election called

for that purpose, as required by the Florida Constitution and Section 125.64(1) Florida Statutes (1985). (R. 99). Webster also alleged that the election was held sooner than 45 days from the Commissioners' receipt of the proposed charter ordinance, in violation of Chapter 125.64(1), Florida Statutes (1985). (Id.).

Webster also alleged that the County's charter did not comply with any of the three forms of governmental structure which may be adopted as prescribed by Section 125.84, Florida Statutes (1985). (RI 98).

Both Webster (RI. 157-163) and Orange County (RII, 230-231) moved for summary judgment pursuant to Rule 1.510, Florida Rules of Civil Procedure. However, Orange County's Motion for Summary Judgment did not allege that no genuine issue of material fact existed, nor that the County was entitled to summary judgment as a matter of law. (RII. 230). The County's motion also failed to state with particularity the grounds on which it was based or the substantial matters of law to be argued. (Id.).

Instead, Orange County's Motion for Summary Judgment contained a single "allegation," as follows:

> The grounds upon which this motion is based and the substantial matters of law to be argued are stated with particularity in the Memorandum of Law in Support of Defendant's Motion for Summary Judgment, which is filed herewith and incorporated into this motion by reference.

Extensive memoranda of law were filed with the trial court by each party. (RII. 232-278, 192-229). The County contended that all statutory and constitutional requirements raised by Webster had either been met or were inapplicable (RII. 193-194), and further that Webster was estopped to contest the election,

since he brought suit after the election had been held even though he "was on notice of a technical irregularity before the election." (RII. 194). Webster contended that the voters of Orange County had been misled and defrauded by the County's failure to comply with the previously-described statutory and constitutional mandates (RII. 232), thus rendering the election void ab initio.

The trial court granted Orange County's Motion for Summary Judgment, and denied Webster's. (RIII. 527-528). The trial court stated that it found "no genuine issue of material fact in," inter alia, "the following areas:"

> Orange County and the Supervisor of Elections properly held a special election on the Charter Referendum on Tuesday, November the 4th, 1986.
>
> That Orange County complied with the applicable statutory notice for requirements for noticing a Charter Referendum, and distribution by First Class Mail of approximately 233,000 copies of the Charter.
>
> That both the title to the ordinance proposing the Charter and the ballot language for the Charter Referendum conformed with State constitutional and statutory law.
>
> * * *
>
> That the Plaintiff herein waited until after the results of the referendum to complain of technical irregularities. It is, therefore, estopped to override the will of the electorate.

(Id.).

Webster timely moved for rehearing (RII. 279-286), not only responding to the County's contentions, but also contending that the affidavits in support of Orange County's Motion for Summary Judgment were insufficient as a matter of law, and that the County's motion itself was not in compliance with Rule 1.510(c), Florida Rules of Civil Procedure, for its failure to allege the nonexistence of a genuine issue of material fact and that Orange

County was entitled to judgment as a matter of law. Webster's motion also note (RII. 282) that the trial court's order in response to both parties motions for summary judgment similarly failed to comply with Rule 1.510, since, although the order recited that the trial court found no genuine issue with respect to several areas, the order nowhere stated that either of the parties was entitled to judgment as a matter of law. Webster's "Motion for Rehearing on Final Order Granting Summary Judgment" was denied (RIII. 529); Webster timely filed his Notice of Appeal (RIII. 530) and an appeal ensued.

SUMMARY OF THE ARGUMENTS

The County's Motion for Summary Judgment was clearly violative of the applicable rule of civil procedure for its failure to allege that no genuine issue of material fact existed and that the County was entitled to judgment as a matter of law. The trial court's order also failed to comply with the rule by failing to state that either of the movants was entitled to judgment as a matter of law, and was unresponsive to Webster's contention in his Motion for Summary Judgment that Webster was entitled to judgment as a matter of law. Even if the substantive issues of law raised by these motions should have ultimately been decided in the County's favor, the County clearly failed to meet

its burden of proof in that it proffered legally insufficient affidavits in support of its motion.

With respect to the substantive issues of law raised, the County clearly violated statutory and constitutional requirements regarding notice and timing of the election. These violations were not merely "technical," as Orange County contended below, but rendered the entire election void ab initio, since the election was required to be a special election. Because these violations were not merely technical, Webster was not estopped to bring suit even after the election was held. In such a case, a post-election challenge does not thwart the "will of the electorate," since it was never properly expressed in the first instance.

Additionally, the County clearly failed to comply with either of the two statutory procedures by which it might have adopted a charter, Part II, Sections 125.60-125-64, and Part IV, 125180-125-85, Florida Statutes (1985). Under both methods, the statutory requirements for notice and the timing of the referendum election in relation thereto are the same. See, § 125.82, Fla. Stat. (1985) [incorporating into Part IV of Chapter 125 the requirements of Section 125.64, but without regard to the time limitation placed on charter commissions found in Section 125.64(3).] Even if this Court accepts the County's contention that these requirements are inapplicable to the procedure allowed by Part IV of Chapter 125 (Sections 125.80-125.85), the County failed to comply with the requirement of Part IV that when the

procedure provided by Part IV is utilized, the County must adopt one of three types of government. § 125.84, Fla. Stat. (1985).

Attached to the County's memorandum in support of its Motion for Summary Judgment were comments entitled "Affidavit in Support of Defendant's Motion for Summary Judgment." (RIII. 414, 429, 432, 438, 441, 453, 455, 481, 483, 506, 507, 509, 518, 520). In the first paragraph of each affidavit it is stated that the affiant has been "apprised as to the nature of the above styled lawsuit." (Id.). No affiant addresses whether there was any genuine issue as to any material fact or addresses any substantial matter of law. Instead each affiant only attests to the truth and correctness of various documents attached thereto. (Id.). All these affidavits also fail to state that the assertions made therein respecting the documents are of the affiant's personal knowledge; that the documents attached to the affidavits would be admissible in evidence; and that the affiants were competent to testify to the matters stated therein. (Id.).

Chapter 125.66 requires that an ordinance must be filed with the Clerk of the Board of County Commissioners fifteen (15) days before considering an ordinance, excluding Sundays and holidays. The proposed ordinance was filed on September 2, 1986, and published in a newspaper on September 3, 1986, noticing a meeting to be held on September 22, 1986. The proposed ordinance was filed without the changes (amendments) made on September 22, 1986, and without the attached charter, so a person could not physically review Ordinance No. 86-22 until it was typed, as amended, on September 23, 1986. The charter and ordinance were

not accepted by the Board with amendments, until September 22, 1986. Florida Statutes Chapter 125.66 further provides that certified copies of the ordinance shall be filed with the Department of State within 10 days after enactment and shall take effect upon receipt of the official acknowledgment from that office that said ordinance has been filed. The ordinance was mailed September 25, 1986, filed by Department of State on September 29, 1986, and Notice of Filing received by County on October 2, 1986.

Publication for referendum was published September 28, 1986, and October 12, 1986, as a general election and not a special election. The ordinance was not effective until October 2, 1986, and the only publication after that date was October 12, 1986.

The County should have filed the ordinance as amended and approved on September 22, 1986, with the Clerk and new notice published for passage of Ordinance #86-22 pursuant to Florida Statute 125.66, then passed and mailed to the Department of State to comply with Florida Statute 125.66 before the vote could be held as a special election as required by Article VIII, Sec. 1(c) Florida Statutes.

ARGUMENT

I.

ORANGE COUNTY FAILED TO COMPLY WITH APPLICABLE CONSTITUTIONAL AND STATUTORY REQUIREMENTS THUS VOIDING THE CHARTER ELECTION, AND WEBSTER IS NOT ESTOPPED FROM RAISING THESE FAILURES AFTER THE ELECTION AND THE ORDER OF THE FIFTH DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED

The Constitution of the State of Florida requires that charters be adopted, amended or repealed "only upon vote of the electors of the county in a special election called for that purpose." Art. 8, § 1(c), Fla. Const. (1968) (emphasis supplied). The County did not call a special election for the purpose of adopting a charter in the instant case, as required by the constitution, despite belatedly denominating it as such on the ballot. See, (RI. 189).

Webster does not contend that the constitution was violated simply because the charter referendum was held the same day as a general election, as the County attempted to characterize in its argument below. (RII. 198). Webster conceded it was possible to hold a special election and a general election on the same day, but contended that when this was done the County would have to do more than retroactively denominate the referendum as a "special election" on the ballot in order to meet the constitutional requirement.

Clearly, the referendum below was not a special election called for the purpose of adopting or amending a charter. Professor Black defines the verb "call" as follows:

> To make a request or demand; to summon or demand by name; . . . to demand the presence and participation of a number of persons by calling aloud their names, either in a pre-arranged and systematic order or in a succession determined by chance.

H. Black, Black's Law Dictionary 185 (5th ed. 1979).

The above definitions encompass two factors: (1) a summons, request or demand; and (2) a denomination. The Florida constitution does not prescribe calling the electorate to a special

election, but "calling" the special election itself. Thus, the constitution requires not only that the electorate be notified of a referendum in which a charter is to be considered, but also that such notice shall inform the electorate that a special election is to be held for such purpose; the election must be so denominated in any notice to the electorate so that it fully understands the gravity of the measure being considered.

In the instant case, Orange County published two notices of the referendum, both of which stated that the County would hold a "general election." (RI 181)(emphasis supplied). The direct-mail notification of the charter referendum, the significance of which the County heavily emphasized below, similarly noted, both on its introductory page (RI. 182) and the outer envelope (RI. 188), that the referendum on the charter would take place at a "general election" (emphasis supplied). The enabling ordinance also stated the referendum would take place at a "general election." See, (RII. 233). Under these circumstances, the County failed to comply with the constitutional requirement that a special election be called for the purpose of adopting the charter.

The County also failed to comply with the statutory requirements for notice of election and the date of the referendum. Section 125.64(1), Florida Statutes (1985) states:

> (1) Upon submission to the board of county commissioners of a charter by the charter 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 the proposed charter, at which special election a referendum of the qualified electors within the county shall be held to determine whether the

> proposed charter shall be adopted. Notice of the election on the proposed charter shall be published in a newspaper of general circulation in the county not less than 30 nor more than 45 days before the election.

(Emphasis supplied.)

Orange County contended that the above statutory requirement did not apply because it utilized the "Optional County Charter Law," Part IV of Chapter 125, Florida Statutes. (RII. 200-201). This contention is without merit since Section 125.82 provides:

> 125.82 Charter adoption by ordinance.-- As a supplemental and alternative way to the provisions of ss. 125.60-125.64, inclusive, the board of county commissioners may propose by ordinance a charter consistent with the provisions of this part and provide for a special election pursuant to the procedures established in s. 125.64 without regard to the time limitation contained in subsection 125.64(3).

(Emphasis supplied.)

Similarly, Orange County also argued that the Study Committee was not a "charter commission" referred to in Section 125.64, so that the 45-day requirement did not apply, because the Board did not receive the proposed charter from a charter commission.

The legislature is presumed to know what statutes are in force when it enacts new legislation, so that new enactments of a fragmentary nature on a subject are to be construed as fitting into the existing system and carried into conformity therewith, see, 49 Fla. Jur. 2d Statutes § 175 (1984, supp. 1987), and in the case of Part IV of Chapter 125, the legislature specifically referred to the requirements of Section 125.64 and made them applicable (with the sole exception of the restriction on holding a second referendum within two years of a previous rejection by the electorate of a charter proposal). Under these

circumstances, the plain meaning of Section 126.82 requires that the 45-day requirement be applied to Part IV of Chapter 125. Statutes are to be construed according to the plain meaning of the words employed. See, e. g., Rinker Materials Corp. v. North Miami, 286 So. 2d 552 (Fla. 1973), 288 So. 2d 536 (Fla. 3d DCA 1974). To refuse to apply the 45-day limit to Part IV of Chapter 125 in light of Section 125.82 would render the latter provision meaningless and absurd, and such constructions are not favored and should not be adopted by this Court. See, e.g., State v. Webb, 398 So. 2d 820 (Fla. 1981).

Since the 45-day limit must be applied even if the County was proceeding pursuant to Part IV of Chapter 125, the next question to be answered is when the proposed charter was "received" by the Board. The County predictably contended that the proposed charter was "received" in a letter from the County attorney dated August 29 (RI. 134), which would place the election on November 4, more than 45 days but less than 90 days after receipt.

However, this argument fails because the proposed charter "received" via the County Attorney's letter was not "the" same charter proposal put to the county electorate. The proposed charter which was the subject of the November 4 referendum was not voted upon by County until the September 22 meeting, at which time several suggested amendments by the County Attorney and the League of Women Voters were considered and approved. Under the "charter commission" procedure set forth in Sections 125.60-125.64, Florida Statutes (1985), it is clear that this

amendment procedure would have been deemed complete when the commission finished its work and submitted its proposal to the Board. See, § 125.63, Fla. Stat. (1985). A similar rule should apply in this case as the ordinance was complete on 9/22/86, but not before.

Although the County here claimed it was proceeding under the alternate method provided by Part IV of Chapter 125 (Section 125.80, et seq.), this Court should affirm the Order of the Fifth District Court of Appeal by applying the Section 125.64(1) 45-day time limit by virtue of Section 125.82 as the Board does not "receive" the proposed charter until the amendment process applicable to charter proposals has reached its end. Such a holding would effectuate the clear intent of the legislature in enacting Section 125.64(1), i.e., to give the electorate at least 45 days to consider the wisdom of so drastic a step as adoption of a county charter. On the other hand, this legislative purpose would not be best served by holding that "receipt" of a proposed charter different than that which is ultimately submitted to the voters would satisfy the requirement of receipt so as to start the 45-day period running.

If the County's interpretation of the statutes' proper application is accepted, the legislative intent is thwarted, because the Board can use up as much of the 45-day time period as it desires in the amendment process, finally producing a proposed charter markedly different from the initial draft provided by its County Attorney. Of course, this time before the proposed charter which is to be submitted to the electorate is finally

voted upon it is unavailable for the electorate to begin consideration of the proposed charter, thus depriving the electorate of the full period for reflection, contemplation, and debate which the legislature intended them to have as required by Chapter 125.66, 125.82 and 125.64. For example, in this instance, if the County's interpretation is correct, the election could have been properly held as early as October 13, 1986 (45 days from August 29), but since the "final" charter proposed was not formulated until September 22, 1986, that would give the electorate only 43 days, not the 45 prescribed by the legislature. In short, the County failed to hold the election at least 45 days after receipt of the charter proposal, thus invalidating the election regardless of the procedure the County was purportedly following.

For example, Special Tax School District No. 1 of Duval County v. State, 123 So. 2d 316 (Fla. 1960) involved a bond validation referendum. In that case the supreme court opined:

> Concerning the question of whether there was a compliance with the provision of the law relating to the publication of the notice of reregistration, we have heretofore pointed out that such notice was published in the form of a legal advertisement in only one issue of the newspaper whereas the statute requires that said notice be published once each week for four consecutive weeks. Petitioners' argument that the wide-spread publicity appearing in the press and on television and radio during each day from prior to the date of the first publication of this notice to and including the date of the election constituted a substantial compliance with the requirement of the statute cannot be sustained. Nor do we believe that any extended discussion of such nebulous argument is necessary to justify this conclusion. Special elections, and particularly those which might result in requiring the exercise of the power of taxation, must be conducted in substantial compliance with constitutional and statutory requirements. Newspaper articles or comments or publicity by television or radio cannot lawfully substitute for the mandatory requirements of

the law. The power to prescribe what shall constitute reasonable notice of an election, reregistration or other procedures is a legislative one. When it does so in elections of this kind, the requirements must be substantially complied with. One publication of the notice cannot conceivably be construed to be a substantial compliance with a statute which requires such notice to be published once each week for four consecutive weeks. Such requirement, being a condition precedent to an effective election, clearly supports the conclusion of the trial judge that this fatality vitiated the entire election.

123 So. 2d at 322 (footnote omitted, emphasis supplied).

Similarly, in City of Miami v. Romfh, 66 Fla. 280, 63 So. 440 (1913), the court opined:

> The statute under which the bonds were authorized expressly requires that the notice of election to be held for the purpose of approving the issue of the bonds shall be published "once a week for a period of thirty days." By demurrer it is admitted that the proclamation giving notice of the election "was published once a week for the period of twenty-one days, instead of thirty days"; and "that said proclamation was published only once a week for the period of twenty-one days in the 'Miami Metropolis,' a newspaper published at Miami, Fla., the first insertion being on the 26th day of March, A.D. 1913, and the last insertion being April 16, 1913, as shown by the proof of publication attached to defendant's answer in the validating suit."
>
> This publication of notice of the election was insufficient under the statute requiring the notice to be published "once a week for a period of thirty days." The statute did not require merely "thirty days' notice," or a publication once a week for four weeks, but a publication "once a week for a period of thirty days."
>
> The statute makes the publication of the notice of the election a prerequisite to the issue of the bonds, therefore such publication is not merely formal and directory; and the required publication cannot be dispensed with upon the theory that it does not appear that the electors were misled by the failure to make the publication for the statutory period.

The language of Special Tax School District No. 1 in reference to "substantial compliance" with a mandatory rather than directory requirement should not be taken as a license for authorities to issue fewer notices of an election than are required by statute, or

to allow issuance at the wrong time. The First District Court of Appeal rejected such an argument in State v. Shields, 140 So. 2d 144 (Fla. 1st DCA), cert. denied, 146 So. 2d 745 (Fla. 1962) in which it explained Special Tax School District No. 1 as follows:

[T]he over-all import of that decision, as applied to the case on review, is to require four weekly publications of the notice and that anything less than that number will not constitute substantial compliance. Appellees' contention that the Supreme Court, in saying that "one publication of the notice cannot conceivably be construed to be a substantial compliance with a statute which requires such notice to be published once each week for four consecutive weeks," impliedly held that three publications constitutes substantial compliance, is untenable because (1) the Supreme Court was not confronted with a three-publication situation as we are, and (2) we construe the term "substantial compliance," as used in the quotation, as having reference to situations other than one where it is sought to have "three" amount substantially to "four". Even legal parlance will not permit that arithmetic mutation.

In Eberhardt Const. Co. v. Board of Com'rs of Sedgwick County, 100 Kan. 394, 164 P. 281, the Kansas Supreme Court in dealing with a similar problem under a Kansas statute said:

> "The statute requires that a notice of an election to vote upon the question of issuing bonds to cover the cost of a county building shall be published in the official paper 'for not less than thirty days preceding the day such special election is to be held.' * * * Here the election was held on August 1, 1916. The notice was published in the official paper (a weekly) in the issues of June 30th, July 7th, July 14th, and July 21st, but not in the issue of July 28th. The language of the statute requiring a publication to be made in a paper 'for' a given number of days before an event is held to mean that the publication must run during the entire period, be continuous from a time that far in advance until the date named, and therefore, although the first publication is made sufficiently early, the omission of the notice in the last issue of the paper before the event is to take place results in a failure to meet the legal requirement. * * *
>
> * * * * * *
>
> "The failure to publish the notice of a special election for the full time required by law is a fatal defect rendering the election void and presenting the lawful issuance of bonds which

depend upon it for their validity. State ex rel. v. Staley, 90 Kan. 624, 135 P. 602 * * * .

> "Formal defects in a published notice of an election which do not diminish its efficiency in giving information by which the action of voters may be affected are not necessarily fatal. * * But, as was pointed out in State ex rel. v. Staley, just cited, the omission of the notice from one issue of the paper in which the law required it to be inserted might possibly have deprived some voters of an opportunity to take part in the election, and thereby have influenced the result."

To the same effect see City of Miami v. Romfh, 66 Fla. 280, 63 So. 440; Davis v. Doughterty County, 116 Ga. 491, 42 S. E. 764; Shanks v. Winkler, 210 Ala. 101, 97 So. 142; State v. Hoyle, 211 Miss. 342, 51 So. 2d 730; City of Chanute v. Davis, 85 Kan. 188, 116 P. 367.

The situation here is clearly distinguishable from that where the time for election is prescribed by general law and an officer is charged with the duty of giving notice of such election. In that posture the law in itself is notice which all electors must heed, and it is generally held that failure to give notice will not invalidate the election because the provision for notice is primarily a reminder to electors of what the law has already provided and is therefore directory only and not mandatory. That rule also rests on the premise that the notice under such circumstances is unconnected with the electors' right of franchise. However, where the time for holding an election is not prescribed by general law or the constitution, and is fixed by a body vested with authority to call it (in the case at bar, the legislature), the voters cannot be expected to have or take notice thereof unless notice is given. Accordingly, a requirement for publication as here involved must be considered as mandatory and its performance essential to the validity of the election. The requirement under the statute in suit as to the length of time during which a notice must be given is quite as substantial as the requirement that notice must be given at all.

Having a fair conception of the population potential of the community known as St. Marks, we are not unmindful of the likelihood that the election result would not have been changed had the mandatory provision for publication of notice been complied with; and we may surmise that every person in the affected area who might have qualified to vote either did so or was acquainted with the need to register and was otherwise informed of the purpose of the election. But in so doing we would necessarily indulge in pure speculation

> for the legal proofs herein--the testimony presented before the trial court--do not support that premise. An election by which a municipal corporation may be created and invested with many specific and implied powers, including the power to tax, as here involved, is equally if not more important and a matter of concern to the citizen affected thereby as is an election upon the question of issuance of bonds the payment of which is to be made by levy of taxes and secured by a lien upon property of the citizen. Under our form of government the rights of the minority, even of one, are entitled to full protection under the law.

Shields shows that notices of special elections are not mandatory only when the taxing power is specifically involved, as had been the case in Romfh and Special Tax School District. See also, Town of Mangonia Park v.Homan, 118 So. 2d 585 (Fla. 2d DCA 1960) (involving annexation of land by town). Note also that in Shields the petitioner was allowed to overturn an election despite the fact that it was already a fait accompli.

In the instant case the County's electorate was considering adoption of a county charter, a measure at least as important as those considered in the above cited cases, and one which our constitution requires be decided at a special election called for that purpose. The County's failure to properly schedule and hold the referendum at least 45 days after its receipt of the proposed charter, and its failure to properly give notice of the election pursuant to statutory mandate, Chapter 125.82, 125.64 and 125.66 voided the election ab initio, a defect which can be raised at any time. See, 22 Fla. Jur. 2d Estoppel & Waiver § 6 (1980, supp. 1987). Accordingly, the judgment of the Fifth District Court of Appeal should be affirmed.

The County should have complied with the requirements of 125.66 as to filing the ordinance with the clerk and then with

the Department of State. The chronological procedure of the passage of Ordinance 86-22 is as follows:

8/29/86 - Ordinance typed without attachment (charter itself).

9/ 2/86 - Ordinance filed with Clerk for public to view - (no charter attached). See Chapter 125.66 F.S.

9/ 3/86 - Publication made for ordinance to be considered September 22, 1986. See Chapter 125.66 F.S.

9/12/86 - County attorney sent memo to County Commissioners of six amendments to be made to ordinance.

9/22/86 - Ordinance 86-22 with 6 amendments prepared by County Attorney on September 12, 1986, and two amendments by the League of Women Voters presented September 22, 1986, was approved on September 22, 1986.

9/23/86 - Ordinance 86-22 typed on September 23, 1986. Chapter 125.66 required this to be filed with Clerk for date for County to consider the ordinance.

9/25/86 - Ordinance mailed to Department of State.

9/28/86 - Notice of election first publication made. See Ch. 125.82 and 125.64 - 43 days before November 4, 1986, but 4 days before the effective date of the ordinance which is October 2, 1986.

10/2/86 - Notice received from Department of State. See Ch. 125.66 and Art. VIII, Sec. 1(i) ordinance effective date was October 2, 1986.

10/12/86 - Notice of election identified by County as second publication which was 23 days before 11/4/86--actually first publication after October 2,

1986.

Webster contends that the ordinance was not effective on September 22, 1986, because the procedure taken on September 2, 1986, and publication on September 3, 1986, had to start over again pursuant to the requirement of Chapter 125.66 after September 22, 1986.

Webster also contends that the ordinance was not effective, assuming the above paragraph is not sufficient, until it was received from the Department of State by the County Commissioners on October 2, 1986. The publication of September 28, 1986, was of no effect to start the time running as to requirement of Chapter 125.82 and 125.64 or Ch. 101.161(1) or 100.342--at best for Orange County the time to start counting days would be October 12, 1986--23 days before November 4, 1986.

Florida Constitution Article VIII. Section 1(i) County Ordinances. Each county ordinance shall be filed with the Secretary of State and shall become effective at such time thereafter as provided by general law.

Florida Statutes Chapter 125.66 F. S., Chapter 125.87 F. S. states (1) Following the organization of the first Board of County Commissioners elected pursuant to a charter, the Board of County Commissioners shall adopt an administrative code . . . There is no provision in the charter for election of the charter commissioners and Part IV cannot be effective. (Emphasis supplied.)

II.

THE ORANGE COUNTY CHARTER PASSED AT THE ELECTION ON NOVEMBER 4, 1986, IS ITSELF IN VIOLATION OF THE LAW AND THE ORDER OF THE FIFTH DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED.

Even if it is assumed arguendo that the election was not void ab initio, or that Webster is estopped to raise the County's failure to comply with constitutional and statutory requirements regarding notice of the election and when it must be held, Webster was nevertheless entitled to judgment below as a matter of law because the charter approved in the election is itself in violation of applicable statutory law.

The County contended below that it proceeded pursuant to the Optional County charter Law, but the charter itself violates the provisions of that law. One statute which is a part of the Optional County Charter Law provides:

> The county charter shall provide a schedule for the transfer of governmental functions into the charter form of government as adopted.

§ 125.83(5), Fla. Stat. (1985) (emphasis supplied).

The term "shall" normally has a mandatory connotation. Neal v. Bryant, 149 So. 2d 529, 532 (Fla. 1962). "Schedule" has been defined as follows:

> A sheet of paper annexed to a statute, deed, deposition, or other instrument, exhibiting in detail the matters mentioned or referred to in the principal document; e. g. schedule of assets and liabilities (debts) in bankruptcy proceeding.
>
> Any list of planned events to take place on a regular basis such as a train schedule or a schedule of work to be performed in a factory.

H. Black, Black's Law Dictionary 1203 (5th ed. 1979) (emphasis supplied).

The charter approved in the referendum contained no such list or detailed plan for the transfer of governmental functions into the charter form of government. The only provisions in the charter which even remotely resemble such a "schedule" state as follows:

> Section 105. Transfer of Powers.
>
> The County shall have the power and authority, pursuant to the Constitution and Laws of Florida, to assume and perform all functions and obligations now or hereinafter performed by any municipality, special district or agency, whenever such municipality, special district or agency shall request the performance or transfer of the function to the County.
>
> * * *
>
> Section 711. Home Rule Charter Transition.
>
> Unless otherwise expressly provided for in this Home Rule Charter, the adoption of this Home Rule Charter shall not affect any existing obligations of Orange County, the validity of any of its ordinances, or the term of office of any elected County Officer which term shall continue as if this Charter had not been passed.

(RI. 18, 187). Neither of the above provisions is detailed or could be considered a list, and thus the charter clearly violates the statutory requirement of a schedule for the transfer of functions.

The charter also fails to comply with Section 125.84, Florida Statutes (1985), which states:

> Any county desiring to adopt a county charter shall provide for one of the following optional forms of government:
>
> (1) County executive form. -- The county executive form shall provide for governance by an elected board of commissioners and an elected county executive and such other officers as may be duly elected or appointed pursuant to the charter. The elected county executive shall exercise the executive responsibilities

assigned by the charter and shall, in addition, approve each ordinance by signing it or allowing it to become approved without signature by failing to veto it or may veto any ordinance by returning it to the clerk of the board within ten days of passage with a written statement of his objections. If two-thirds of the members of the board present and voting and constituting a quorum shall, upon reconsideration, vote for the ordinance, the executive's veto shall be overridden and the ordinance shall become law in ten days or at such other time as may be provided in the ordinance or by resolution of the board, without the executive's signature.

(2) County manager form. -- The county manager form shall provide for governance by an elected board of commissioners and an appointed county manager and such other officers as may be duly elected or appointed pursuant to the charter. The county manager shall be appointed by, and serve at the pleasure of, the board and shall exercise the executive responsibilities assigned by the charter.

(3) County chairman-administrator plan. -- The county chairman-administrator plan shall provide for governance by an elected board of commissioners, presided over by an elected chairman who shall vote only in case of tie, and an appointed county administrator and such other officers as may be duly elected or appointed pursuant to the charter. The county administrator shall be appointed by, and serve at the pleasure of the chairman. The chairman shall exercise, in conjunction with the administrator, the executive responsibilities assigned by the charter.

(Emphasis supplied.)

Webster will not herein set out the text of the charter (RI. 183-187), nor engage in a section-by-section analysis thereof. However, it is obvious that the charter simply does not establish any of the above required forms of government which are required to be adopted when a charter is enacted pursuant to the Optional County Charter Law.

As Webster noted below (RII. 236-237), the Charter resembles the "county manager" form of government more than either of the other two statutorily-mandated governmental structures. But the

legislature's use of the mandatory "shall" requires that counties adopt the specific types of governments specified, and not be permitted to adopt alterations or mutations thereof. Orange County's failure to do so in the present case renders its charter invalid.

The attorney general has so opined, in 1981. The question put to the attorney general was as follows:

> Must the executive responsibilities and the legislative responsibilities as set out in ss. 125.85 and 125.86, F.S., be included in the proposed Hillsborough County charter verbatim, or may they be altered or adjusted to accommodate, amplify or facilitate the particular optional form of government chosen?

1981 Op. Att'y Gen. Fla. 081-7 (February 11, 1981). The attorney general's answer, stated in summary form, was as follows:

> The general executive and legislative responsibilities, functions, powers and duties prescribed by ss. 125.85 and 125.86, F.S., must be included in and defined by a county home rule charter adopted under part IV of ch. 125, F. S., and no alteration of or deviation from the same may be made in formulating and adopting such county home rule charter; no provision in the charter for either optional form of county government may be inconsistent with or contravene any provision for or limitations on optional county charters prescribed in part IV of ch. 125, F.S.

Id. (emphasis supplied). (The main body of the attorney general's opinion discussed this conclusion extensively, and cited numerous authorities supportive of the conclusion.)

In short, since the charter itself does not comply with the requirements of the Optional County Charter Law, even if it is assumed that the election was not void, the charter is itself illegal, and thus Webster was entitled to judgment below as a matter of law on this basis and the order of the Fifth District Court of Appeal should be affirmed.

(See Attorney General Opinions 85.41 and 85.93.)

III.

A CHARTER GOVERNMENT PURSUANT TO PART IV, FLORIDA STATUTES 125.80-88 CANNOT BE VALID ACCORDING TO PROVISIONS OF U. S. AND FLORIDA CONSTITUTIONS AND THE ORDER OF THE FIFTH DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED.

Art. II, Sec. 3, of the United States Constitution states:

> The powers of all state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided therein.

Art. III of the Florida Constitution sets out the power of the legislature; Art. IV, the executive and Art. V the judiciary.

Art. IV, Sec. 2, of the United States Constitution states in part:

> The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.

Art. IV, Sec. 4, of the United States Constitution states in part:

> The U. S. shall guarantee to every state in this union a republican form of government,

Art. VI, Sec. 2 of the United States Constitution states in the second paragraph as follows:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any thing in the Constitution or Laws of any State to the Contrary nothwithstanding.

The U. S. Constitution guarantees that any area that wants to become a state must have a republican form of government with

three branches of government elected by the people (1) legislative, (2) executive and (3) judicial.

Art. X, of the United States Constitution states:

> The power not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Art. II, Sec. 3, of the Florida Constitution states:

> Fla. Court - Branches of Government -- The powers of State Government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any power appertaining to either of the other branches unless expressly provided herein.

Art. III, Sec. 13 of Florida Constitution states:

> Terms of Office -- no term of office shall be created the term of which shall exceed four years except as provided herein.

Art. IV, Sec. 1(f) of the Florida Constitution states:

> When not otherwise provided for in this Constitution, the governor shall fill by appointment any vacancy in State or County office for the remainder of the term of an appointive office and for the remainder of the term of an elective office if less than twenty-eight months, otherwise until the first Tuesday after the first Monday following the next general election.

Art. VIII, Sec. 1(a), of the Florida Constitution states:

> Political Subdivisions -- The state shall be divided by law into political subdivisions called counties. Counties may be created, abolished or changed by law . . .
>
> (c) Government. Pursuant to general or special law, a county government may be established by charter which shall be adopted, amended or repealed only upon vote of electors of the <u>county in a special election called for that purpose</u>.

Art. X, Sec. 3, of the Florida Constitution states:

> Vacancy in Office -- Vacancies in office shall occur upon creation of an office, upon the death of the incumbent or his removal from office, resignation,

succession to another office, unexplained absence for sixty consecutive days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term.

125.84, Florida Statutes, identifies the manager of the county as one who is appointed by the county commissioners and that person shall have executive powers as set out in 125.85. Florida Statutes. The county commissioners by virtue of the charter and Florida Statute Chapter 125.85 becomes a legislative branch of government with power to hire and fire the county manager. The county manager (executive) does not have a veto power over the legislative branch (county commissioners). There is no separation of power and the county commissioners then become the executive and legislative branches of the county government. The county commission also controls zoning in the county and pursuant to Florida Statute 125.86(7) shall have control over any legislation in county affecting health, safety and general welfare.

In the Charter Article II, Sec. 206 the County Commissioners have authority to replace commissioners contrary to Article IV, Sec. 1(f) of the Florida Constitution which establishes by law for appointment by Governor of County officers and Article III, Sec. 13 of the Florida Constitution which limits tenure to only four years in office.

It is possible pursuant to Article II, Sec. 206 of the Charter for the Board of Commissioners of Orange County to be appointed by the Commission and not the Governor, whereby it is

conceivable that the complete board could be appointed and not elected.

A charter county has the power of a municipality and as such can levy taxes such as utility taxes that it cannot levy as a county which was not told to the electorate of Orange County.

The County by setting up zoning board pursuant to the charter and code enforcement boards pursuant to Chapter 162 is acting as a quasi judicial body and the third branch of a republic (the judiciary) should not allow this to occur.

There is no provision in the Charter as to the implementation of the charter as required by Florida Statutes 125.87 which states:

> Following the organization of the first Board of County Commissioners elected pursuant to the Charter. . .

The Charter cannot be effective until all commissioners have been elected pursuant to the charter but the charter makes no provision as to how and when the charter commissioners shall be elected.

The title of the ordinance does not refer to state law that must be considered in the implementation of certain provisions of the charter such as:

1) Appointment of commissioners for vacant seat or seats.

2) How commissioners are to be paid.

3) When commissioners are to be elected or when to take office.

4) Zoning regulations not mentioned in title.

5) Does not mention code enforcement boards created pursuant to Chapter 162.

6) Does not state the ordinance must be voted upon at a special election called for the purpose as required by Article VII, Sec. (c)(e), Florida Constitution.

IV.

THE PASSAGE OF HOUSE BILL NO. 1662 DID NOT CURE THE DEFECTS AS ALLEGED BY WEBSTER AND AFFIRMED BY THE FIFTH DISTRICT COURT OF APPEAL.

Webster has several concerns regarding the above referenced legislative act (Appendix 1 and 2) (hereinafter sometimes referred to as "recent legislation"), and will identify each area by major subjects:

1. Special Act: The recent legislation passed by the House and Senate and ultimately signed by Governor Martinez, is a Special Act passed in the guise of a General Act and was not enacted by the proper procedure as required by Article III, Section 10, Florida Constitution, and Chapters 11.02, 11.021 and 11.03, Florida Statutes. 10 Fla. Jur. 2d Sec. 330, page 500, Constitutional Law. Anderson v. Board of Public Instruction for Hillsborough County, 62 Fla. 695, 136 So. 334 (Sup. Ct. 1931).

Attached hereto, and made a part hereof within the Appendix 3 and 4 are the synopsis by the House and Senate committee staffs, which to Respondent clearly show that this was a special act for the sole purpose of overturning the Fifth D.C.A.'s decision entered the 28th day of April, 1988, which reversed the trial court's granting of Summary Judgment for Appellant.

Ellsworth v. Insurance Co. of North America, (1st DCA 1987) 508 So. 2d 395.

2. Legislation is Too Broad: The recent legislation is too broad as it is attempting in Section 2 to ratify any charter government approved since the adoption of Part IV of Chapter 125, Florida Statutes in 1974. Certain Lots et al. v. Town of Monticello, 31 So. 2d 905 (Sup. Ct. 1947). Even though other counties within the State of Florida have opted to form a charter form of government by referendum pursuant to Chapter 125, Florida Statutes and irrespective of whether they complied with the notices as required in 125.82 and 125.64 Florida Statutes, the recent legislation would ratify all charter governments, upon becoming law if publication was done pursuant to Florida Statutes Chapters 101.161(1) and 100.342 although the Fifth D.C.A. has ruled that Florida Statute 125.64 is applicable as to publication. See Appendix (5) as to counties that are affected.

3. Time of Publication. County begins with reviewing the sequence that Orange County's Ordinance No. 86-22 was enacted by County. It is the position of Webster that Ordinance 86-22 could not have been advertised to be presented to county commissioners, pursuant to Florida Statute 125.66 for a referendum until on or after the 23rd day of September, 1986, which is the date the final ordinance was typed and executed with amendments as it could not be filed with the Clerk of Court until September 23, 1986. Due to the dates, neither advertisement published by Petitioner complied with Florida Statutes 125.83, 125.64, 125.66, 101.161.(1), 100.342, Florida Statutes, as to the time

requirements. County has agreed that the advertisement was two days short of the minimum 45 days required by Florida Statutes 125.82 and 125.64, Florida Statutes.

4. Vested Right: The citizens of Orange County have a "vested right" to vote (see 49 Fla. Jur. 2d Sec. 137, page 141, Statutes); Article I, Section 10, Florida Constitution and Walker v. LaBerge, Inc. v. Halegan, 344 So. 2d 239 (1987 Fla.); Fleeman v. Case, 342 So. 2d 815 (1976, Fla.)

It is the position of Webster that Section 2 of the recent legislation removed the vested constitutional right of the citizens of Orange County to be "informed" pursuant to law applicable at the time the vote occurred on November 4, 1986, and any amendment to the ordinance or change by the legislature should have required a referendum or been advertised and proposed as a local law.

As discussed in State v. Rinehart (Sup. Ct. 1939), 192 So. 819, Justice Terrell stated that

> ". . . one cannot read Article VI [Florida Constitution] and not be impressed with the importance of the ballot and the safeguards that the makers of the Constitution felt impelled to throw around its purity. Registration of voting are sovereign duties imposed on every citizen of a democracy. We hear a lot of loose talk about the right to vote, but as distinguished from a duty, there is no such thing as a right to vote. Voting is the most responsible duty the citizen of a democracy is called on to perform. It is a duty not to be exercised flippantly for in its performance, our social and economic status, our ideals, and general well being are determined. Hence, the mandate of the Constitution for a pure ballot and pure elections.
>
> No democracy can long endure if the electorate is corrupted and enticed to depart from the constitutional pattern on election day. Without reference to any party hereto, it is not amiss to say that the most abject traitor to democratic institutions is the one

> who buys or intimidates the electorate for personal gain and next to him is the voter who habitually goes into the open market and pawns his vote to anyone who will purchase it. They are the termites and screw worms of democracy and if not exterminated, they will as surely wreck the ship of state as the latter will destroy the house or the dumb creature on which they feed. It is a strange paradox that they parade as human beings and are protected by the law against homicide. Such enemies of the cotton crop, the tobacco crop, or the citrus crop would be relentlessly chased and destroyed. If democracy is as precious as we profess it to be, why not pursue its enemies as relentlessly as we do the boll weevil, the tobacco bug, the Mediterranean fruit fly or the bean beetle?

It is the position of Webster that the laws in force and in effect at the time of the contract or when the election occurred (i. e. November 4, 1986) forms a basis of the bargain and an integral element of the contract between the electorate and the elected officials calling for such an election (See State v. City of Pensacola, 40 So. 2d 569 (Sup. Ct. 1949), and accordingly, ordinances must be enacted according to the law in effect at the time of their passing. If ordinances are not enacted in the proper procedure, the ordinances are invalid where proper notice was not properly filed pursuant to Chapter 125.66(2) (See Linville v. Escambia County, 436 So. 2d 292 (1st DCA 1983).

5. Improper Notice: Webster is of the belief that the title of the recent legislation involved two distinct subject matters which is contrary to Florida Constitution, Art. III, Section 6, in that: (1) the title of the recent legislation did not properly inform the public and the electorate of Orange County that Section 125.64, Florida Statutes no longer would be applicable as to time of advertisement and (2) the act would be retrospective.

The result of the recent legislation, has failed to address the issues of the applicability of Florida Statutes 101.161(1) and 100.342, 125.64 and 125.66 to the instant case, as they are being directly affected as to whether it is retrospective in its application.

The County did not comply with the advertisement time requirement of Florida Statute 101.161(1) or Chapter 100.34 of Florida Statutes as the date of Ordinance 86-22 was October 2, 1986, and first publication after that date was October 12, 1986.

6. Moral Right: Webster states that it is not "morally right" for Orange County to be successful in declaring that Orange County is a valid Charter for government when Orange County:

a. Failed to follow the law in having the issue voted on in the proper statutory and constitutional procedures by ignoring time requirements.

b. Did not seek relief from the Legislature in 1987, when the mistake was made obvious to Petitioner when it was served with the cause of action sub judice if the Legislature could have cured the defects.

c. Waited until 1988, to seek relief from the Legislature, after the Fifth District Court of Appeal had made its determination that Petitioner had failed to comply with Florida Statutes 125.82 and 125.64, Florida Statutes, in presenting the issue of Charter Government to the electors of Orange County.

d. Exercised its "pure raw power" by requesting the

Florida Legislature to pass an act attempting to cure an obvious error made by Orange County, without complying with the law because it is a local bill as discussed earlier. (See Article III, Section 10, Florida Constitution and Florida Statutes 11.02; 11.021 and 11.03 Florida Statutes).

When Webster filed the lawsuit on the 5th day of January, 1987, Petitioner had a moral and legal obligation to not litigate when there was an obvious error violating the Florida Statutes and Constitution. With hindsight Orange County could have attempted to mediate and correct the problem by: 1) invalidating Ordinance 86-22; 2) passing a new ordinance according to Florida Law; 3) properly advertising the new ordinance; and, 4) calling for a special election so that the electors of Orange County could exercise their vested right to make an informed decision. All of the before stated hindsight observations could have been completed within 90 to 120 days after the 5th day of January, 1987, alleviating all the expenses, not only of Webster who is acting in the guise of a private attorney general, but also saving the taxpayers and electors of Orange County the resources of time and money. Board of Com'rs of Everglades Drainage Dist. v. Forbes Pioneer Boat Line, 86 So. 199 (Sup. Ct. 1920).

(Also attached as Appendix 6 and 7 are two newspaper articles about the legislature in regard to House Bill 1662.)

V.

ORANGE COUNTY'S MOTION FOR SUMMARY JUDGMENT AND THE TRIAL COURT'S ORDER WHICH GRANTED IT FAILED TO COMPLY WITH THE APPLICABLE RULES OF CIVIL PROCEDURE AND THE ORDER OF THE 5TH D.C.A SHOULD BE AFFIRMED.

Rule 1.510, Florida Rules of Civil Procedure entitled "Summary Judgment" provides in pertinent part as follows:

> (c) Motion and Proceedings Thereon. The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least twenty days before the time fixed for the hearing. The adverse party may serve opposing affidavits prior to the day of hearing. the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fla. R. Civ. P. 1.510(c) (emphasis supplied).

Failure of a movant to comply with the requirements of the above rule by including the prescribed grounds and matters in the motion requires reversal of the summary judgment granted thereon. See, City of Brooksville v. Hernando County, 424 So. 2d 846 (Fla. 5th DCA 1982) (reversing summary judgment for failure of movant to include in motion substantial matters of law to be argued).

Orange County's motion purports to include the necessary allegations, grounds, and matters of law therein by reference to its memorandum, but this is not permitted by the applicable rule of civil procedure, either.

The applicable rule states:

> (a) Instruments Attached. All bonds, notes, bills of exchange, contracts, accounts or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading. No papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts or other instruments.

> (b) Part for all Purposes. Any exhibit attached to a pleading shall be considered a part thereof for all purposes. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.

Fla. R. Civ. P. 1.130 (emphasis supplied).

The only reference above to incorporating statements made elsewhere into motions (as here) is that statements in pleadings may be incorporated in motions [second sentence of subsection (b)]. Subsection (a) and the first sentence of subsection (b) speak only of incorporation of other papers or exhibits into pleadings. As will be seen, neither a motion nor a memorandum is a "pleading" under the rules. The statements incorporated into the County's motion are from a memorandum, which is not a "pleading" under the rules. The applicable rule states in part:

> (a) Pleadings. There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a cross-claim if the answer contains a cross-claim; a third party complaint if a person who was not an original party is summoned as a third party defendant and a third party answer if a third party complaint is served. If an answer or third party answer contains an affirmative defense and the opposing party seeks to avoid it, he shall file a reply containing the avoidance. No other pleadings shall be allowed.
>
> (b) Motions. An application to the court for an order shall be by motion which shall be made in writing unless made during a hearing or trial, shall state with particularity the grounds therefor and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Fla. R. Civ. P. 1.100(a), (b) (emphasis supplied).

Since Orange County's motion was not a "pleading," [see, Glisson v. North Fla. Tel. Co., 210 So. 2d 25 (Fla. 1st DCA 1968)], subsection (a) and the first sentence of subsection (b)

of Rule 1.130 do not apply. Although the second sentence of subsection (b) of Rule 1.130 allows motions to incorporate by reference other pleadings (or portions thereof), the memorandum purportedly incorporated into the motion is not a "pleading," so none of Rule 1.130 allows such incorporation. [The memorandum, being neither a "motion" nor a "pleading," appears to be simply an "other paper" filed with the court. See, Fla. R. Civ. P. 1.100(c) (requiring that such other papers, along with pleadings, motions, order and judgments, be property captioned).]

Since the County did not comply with Rule 1.510, the summary judgment must be reversed and the case allowed to proceed to trial. However, even if this were not so, the trial court's order would have to be reversed because it fails to adjudicate the matter set before it by Webster's proper Motion for Summary Judgment, i.e., whether Webster was entitled to judgment as a matter of law. Had the order affirmatively stated that Orange County was so entitled, Webster would concede that the rule was complied with, since there are but two parties to this suit. But the trial Court failed to rule that either party was entitled to judgment as a matter of law, and for that reason alone its judgment must be reversed.

VI.

ORANGE COUNTY'S AFFIDAVITS IN SUPPORT OF ITS MOTION WERE INSUFFICIENT AS A MATTER OF LAW, SUCH THAT ORANGE COUNTY DID NOT MEET ITS BURDEN OF PROOF IN MOVING FOR SUMMARY JUDGMENT AND THE ORDER OF THE FIFTH DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED.

The rule of civil procedure applicable to affidavits in support of or opposition to motions for summary judgment states:

> (e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or by further affidavits.

Fla. R. Civ. P. 1.510(e) (emphasis supplied).

Orange County appended numerous affidavits to its Motion for Summary Judgment and memorandum of law in support thereof. In each case, these affidavits recited that the affiants "had been apprised" of the suit, but did not state that the affidavits were made on the affiant's personal knowledge, as required by the rule. Where affidavits in support of a motion for summary judgment do not show they are made on personal knowledge, set forth evidentiary facts as would be admissible in evidence, or affirmatively show the affiant competent to testify to matters therein, summary judgment is improper. Hurricane Boats, Inc. v. Certified Indus. Fabricators, Inc., 246 So. 2d 174 (Fla. 3d DCA 1968). Affidavits reciting that the affiant "has been apprised" of a lawsuit, but which do not state they are made on the personal knowledge of the affiant simply do not comply with the rule. See, e.g., Montejo Investments, N.V. v. Green Companies, Inc. of Fla., 471 So. 2d 158 (Fla. 3d DCA 1985). Numerous cases have held affidavits based on "information and belief" to be insufficient under the rule, and not properly considered by the trial court in ruling on a motion for summary judgment. See, e.g., Campbell v. Salman, 384 So. 2d 1331 (Fla. 3d DCA 1980). In such

cases an order of summary judgment is improper. See, Thompson v. Citizen's Nat'l Bank of Leesburg, 443 So. 2d 32 (Fla. 5th DCA 1983).

Webster recognizes that a defendant is entitled to move for summary judgment with or without affidavits. See, Fla. R. Civ. P. 1.510(b). However, if an affidavit is used, a defendant must comply with the rule. Stringfellow v. State Farm Fire & Casualty Co., 295 So. 2d 686 (Fla. 2d DCA 1974). Since the burden is on the movant for summary judgment to establish entitlement thereto, and all doubts are to be resolved against that party, Davis v. 7-Eleven Food Stores, Inc., 294 So. 2d 111 (Fla. 1st DCA 1974), the County's Motion for Summary Judgment, based on insufficient affidavits, should have been denied.

CONCLUSION

Webster in volunteering to take the role as a private Attorney General, and by calling Orange County to task for the violations of Florida Statutes and the Florida Constitution, (as determined by the Fifth District Court of Appeal) Webster has taken on an onerous burden in fighting "County Hall" and "Big Government."

Florida Statutes 125.82 and 125.64 were applicable as to time of publication for referendum on County Ordinance 86-22 and 43 days is not 45 days.

House Bill 1662 did not cure the defects as to time of publication in newspaper as to Ordinance 86-22 as the Ordinance as completed on September 22, 1986, should have followed the course as prescribed by Florida Statutes Chapter 126.66. Orange County did not comply with Florida Statutes Chapter 101.161(1) or 100.42.

The recent legislation is local in nature passed improperly without appropriate publication or a provision for a referendum and did not cure the defects of County by not publishing for the election within the time specified by law.

For the foregoing reasons, this Court should affirm the judgment of the Fifth District Court of Appeal and remand with directions to enter summary judgment in favor of Webster.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail, postage prepaid, this 23rd day of January, 1989, to Harry A. Stewart, Esq., County Attorney, Orange County Legal Dept. and Joseph L. Passiatore, Esq., of Orange County Legal Department, Orange County Administration Center, 201 S. Rosalind Avenue, P. O. Box 1393, Orlando, FL 32802-1393, and Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P. A., Alan C. Sundberg, Sylvia H. Walbolt, P. O. Drawer 190, Tallahassee, FL 32302.

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