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 REPLY BRIEF ON THE MERITS

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Alan C. Sundberg
Sylvia H. Walbolt
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

and

Harry A. Stewart,
County Attorney
Joseph L. Passiatore,
Assistant County Attorney
ORANGE COUNTY LEGAL DEPARTMENT
Orange County Administration Center
Post Office Box 1393
Orlando, Florida 32802-1393
(407) 236-7320

Attorneys for Petitioner Orange County

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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 either the Supplemental Appendix accompanying this brief and cited as "S.A. [tab number]" or the Appendix to Petitioner's Initial Brief on the Merits and cited as "A. [tab number]." Other references to the record are designated as "R.___."

All emphasis is supplied unless otherwise noted.

ARGUMENT

Respondent raises six issues in its answer brief. Issues II, III, V and VI raise arguments that either were not raised below or were specifically rejected by both the trial and appellate courts. Issues I and IV are the issues raised in Orange County's petition for review and they are discussed in Points One and Two.

Point One

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

The 45-day scheduling requirement of Section 125.64(1), by both its explicit language and its statutory purpose, applies only to the type of charter election specified there -- elections for charters proposed by autonomous charter commissions. It does not apply to Orange County's election of a home rule charter proposed by the Board itself pursuant to Section 125.82.

Even if the scheduling requirements of Section 125.64(1) were applicable here, the election was held in actual, or at least substantial, compliance with the requirement that the election be held no less than 45 days from the Board's "receipt" of the proposed charter. Contrary to the District Court's decision, the statutory election schedule does not commence with the board's "approval" of the proposed charter -- rather, it is only required that the board 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 . . . ." Section 125.64(1). Since the Board received the proposed charter on September 12, 1986 (R-433; S.A.

Tab 1), the November 4, 1986 election met the 45 day requirement of section 125.64(1).

Respondent stresses the District Court's conclusion that "receipt of the proposed charter" should be interpreted to mean "approval" because, otherwise, "the Board can use up as much of the 45-day time period as it desires in the Amendment process . . . ."[1] (Respondent's Brief at p. 13). This is simply wrong. The District Court overlooked the requirement of section 125.64 that notice of the election be published at least 30 days before the scheduled election, the 15 day notice requirement prescribed by section 125.66(2) for passing a county ordinance, and the requirement of a 10 day advance delivery of the proposed charter to the clerk of the Board of County Commissioners,[2] all of which place a definite time constraint on the amendment process.

The fact of the matter is, there is absolutely no basis in the statute itself for equating "receipt" by the board with "approval." No approval by the board is even required to process a charter proposed by a charter commission. Consequently, under the District Court's interpretation, the 45 day period would never begin to run because the board does not even grant its approval in this particular situation. Furthermore, if "receipt" were

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[1] Respondent also asserts that "major" changes were made to the proposed charter after the Board received it. That is not the case at all, and none of the changes altered the substance of the proposed charter. See S. A. Tab 1 and Tab 2 attached hereto containing those amendments.

[2] Respondent incorrectly states at page 19 that the charter was not attached to the ordinance adopting the proposed charter. The record shows that it was. [R-429; S.A. Tab 3].

construed to mean "approval," the very purpose of the statutory 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.

There is, then, a very good reason why this statute -- which relates only to charters proposed by an independent commission rather than by the board itself -- ties the notice to receipt, thereby starting the scheduling requirements by an automatic act outside the control of the Board. In contrast, this concern is obviously not present when the Board itself proposes the charter and thus has no incentive to delay an election on it.

Even if the section 125.64(1) time requirements were applicable to this charter and even if the County failed to comply fully with those requirements, it is nevertheless clear that the County substantially complied with them. Under settled Florida law, technical irregularities in the election process will not be permitted to impair the will of the people when there has been substantial compliance with the statutory requirements.

Respondent makes no real effort to deny the existence of substantial compliance, noting simply that "[S]ince 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." (Respondent's Brief at 14). Respondent then cites several cases in which the election result was not upheld because there was no substantial compliance with the statutory election requirements.

Significantly, each of the cases relied upon by respondent predates the pronouncements of this Court in Boardman v. Esteva, 323 So.2d 259 (Fla. 1975), cert. denied, 425 U.S. 967, 96 S. Ct. 2162 (1976), with respect to the criteria to be applied in determining whether there has been sufficient compliance with election procedures to uphold the election result. Those principles were recently adhered to by this Court in State of Florida on the Relation of Bill Chappell, Jr. v. Bob Martinez, 13 F.L.W. 702 (Fla. December 8, 1988), where this Court refused to allow technical failures to meet statutory requirements to void the election results. Despite the patent applicability of Boardman and Chappell to the question on review, respondent does not even discuss those decisions, much less attempt to explain why they are not controlling here.

Not only do the cases relied on by respondent precede the seminal decisions of this Court, none of those cases involved a situation like this where extensive notice was undeniably given to the electorate. In Special Tax School District No. 1 of Duval County v. State, 123 So.2d 316 (Fla. 1960), for example, the Court found that "[o]ne 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." Id. at 322. Similarly, in State v. Shields, 140 So.2d 144 (Fla. 1st DCA), cert. denied, 146 So.2d 754 (1962) and City of Miami v. Romfh, 63 So. 440 (Fla. 1913), three notices rather than four was legally insufficient. Finally, in Town of Mangonia Park v. Homan, 118 So.2d 585 (Fla. 2d DCA 1960), there

was no compliance at all with the jurisdictional requirement that three copies of the annexation ordinance be posted in the district to be annexed. Id. at 588.

In contrast to those cases, even using the criteria of "approval" rather than "receipt" of the proposed charter, here the election was simply scheduled 43 -- rather than 45 -- days after the last consideration of the proposed charter by the Board. Thus, there was a 1/22 difference in the actual time preceding the election with that purportedly required under section 125.64(1) -- far different from the 3/4 difference in Special Tax District, the 1/4 difference in Shields and Romfh, and the 100% difference in Homan!

Moreover, it is critical to recognize that the statutory notice requirement designed to protect the public's right to be adequately informed of an impending charter election is the 30 to 45 day advance publication of notice of the charter election. This notice requirement is specified in the last sentence of section 125.64(1); the very section that contains the 45 to 90 day scheduling requirement. By combining the notice requirements of section 100.342 with section 125.64(1), Orange County published two notices instead of just the one required by section 125.64(1).[3] In addition, it mailed copies of the proposed charter to all 233,021 registered voters (A. Tab 6, Ex. B.; R-441)

[3] The County published notices of election on September 28, 1986 and October 12, 1986 (R-80). Plaintiff, at its hypertechnical best, discounts the September 28, 1986 publication on the basis that the Secretary of State did not acknowledge receipt of the ordinance adopting the Charter until October 2, 1986.

during October 7, 1986 to October 14, 1986. The statutory purpose was clearly satisfied by these steps.

Under these circumstances, there was certainly "substantial compliance" with the statutory scheduling requirements and the voters' approval of the proposed home rule charter should not be voided on a perceived technical deficiency. The law in this regard has been confirmed as recently as Chappell, in which this Court refused to invalidate an election result, declaring that "the electorate's effecting its will through its balloting, not the hypertechnical compliance with statutes, is the object of holding an election." 13 F.L.W. at 702. Since "'[t]here is no magic in the statutory requirements,'" the Court refused to disenfranchise voters where there was substantial compliance with those statutory requirements. The same result should follow here.

Point Two

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

Respondent raises several "concerns" about House Bill No. 1662 (Ch. 88-38, Laws of Florida) (A. Tab 6, Ex. A), each of which are completely without merit. First, citing Anderson v. Board of Public Instruction for Hillsborough County, 136 So. 334 (Fla. 1931), respondent contends that this statute is only applicable to one county and is therefore "a Special Act passed in the guise of a General Act and was not enacted by the proper procedure." (Respondent's Brief at 29.) Respondent's reliance on Anderson is totally misplaced.

In reaching its conclusion in Anderson that the statute was a

special act pertaining only to Hillsborough County, the Court stressed that:

> [T]he act now applies to Hillsborough County alone and that it can never apply to any other county because it relates to the holding of one election which is required to be held not later than thirty days after the approval of the bill by the Governor, after which the entire function, scope, and purpose of the act will have been served . . . . House Bill No. 200XX is therefore neither actually nor potentially applicable to any county in the State of Florida other than Hillsborough County, and can never become so according to the plain meaning of its provisions.

136 So. at 337. Thus, the critical factor in Anderson was that the statute was intended to serve one particular election and it was "neither actually nor potentially applicable" to any other county. As such, that statute was a special law.

The curative statute enacted here is not so limited in its application. Although claiming that House Bill 1662 is a special act which pertains only to Orange County, respondent fails to point to any language which so limits the statute. While the immediate intent of the Legislature was to overturn the Fifth District's decision, this is not the only effect of the legislation. Rather, by its explicit terms, the statute applies to any county which has utilized the section 125.82 notice procedures to adopt its charter.

Even if House Bill 1662 could be construed as being applicable only to Orange County, this Court has recognized that curative legislation will not be deprived of its character as general legislation simply because there is only a single entity coming within its terms. For example, in Givens v. Hillsborough

County, 35 So. 88 (Fla. 1903), a curative act was held to be a general statute even though it affected only Hillsborough County. In so holding, the Court specifically cited Ex Parte Wells, 21 Fla. 280 (1885) where the "city of Pensacola was the only municipality within the state which came within the terms of the acts in question." 35 So. at 90. The Court had upheld that act as general legislation, declaring that it is "clear that the mere fact that there is but one of a class does not render legislation covering such class special . . . ." 21 Fla. at 316.

In yet another effort to escape the controlling effect of this curative legislation, respondent contends that Section 2 of House Bill No. 1662 is too broad and therefore invalid under Certain Lots Upon Which Taxes Are Delinquent et al. v. Town of Monticello, 159 Fla. 134, 31 So.2d 905 (Fla. 1947). That statute was not at all like the statute enacted here, however.

In Monticello, the curative legislation sought to ratify all acts of a specific class of cities and towns "done under any law of the State of Florida," without specifying the specific nature of those acts. Id. at 907. The Court held that this was too broad:

> A curative Act contemplates that the legislature has been advised of the nature of the matters done and performed which it purports to validate, ratify or confirm and any law as general as the aforesaid section which attempts to validate any and all acts and doings of a class of officers or public corporations is too general to be effective as a valid exercise of legislative power.

31 So.2d at 913.

Unlike Monticello, the curative legislation which is the

subject of the instant case treats only one specific type of act -- ratification of county charters adopted in accordance with the prescribed notice and election requirements -- as opposed to "any and all acts and doings" of a class of officers or public corporations. Furthermore, 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) clearly reflects that the Legislature was "advised of the nature of the matters done and performed which it purports to validate" when it enacted House Bill No. 1662, including the ratification of this and other similarly approved charters.

Finally, respondent sets forth a pot-pourri of last-ditch attempts to escape this controlling legislation. For instance, respondent claims that citizens have a vested right to vote and that House Bill No. 1662 removes the citizens' right to vote informatively. In point of fact, as Chappell emphasized, it is the respondent who is attempting to disenfranchise the citizens of Orange County of their vote. Given the County's substantial compliance with all conceivable statutory requirements and the additional steps taken by the County to provide the voters with notice of the proposed charter, there can be no question but that the electorate was timely and fully informed as to the issue before it.

Respondent also argues that the title of House Bill No. 1662 "involved" two distinct subject matters in violation of the Florida Constitution because "(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." (Respondent's Brief at 32). In actuality, respondent is not complaining that two different matters are encompassed within the title but rather that two matters were omitted.[4] But that is plainly wrong.

First, the title specifically points out that the Act provides "time limitations for holding a special election with respect to a charter proposed by the charter commission method do not apply to a charter proposed by the alternative ordinance method . . . ." This gave adequate notice that section 125.64, providing election requirements for charters proposed by autonomous charter commissions, is not applicable to charters proposed by a board of county commissioners.

Respondent's second complaint about the title is equally meritless. On its face, the title specifies that the act "ratifies" charters adopted pursuant to certain procedures. By the plain meaning of "ratify," the act is necessarily intended to

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[4] This Court has taken a broad view of the "single subject" requirement for legislative acts. Smith v. Department of Insurance, 507 So.2d 1080, 1085 (Fla. 1987). The test for determining whether legislation meets the "single subject" requirement is "based on common sense" and requires a determination of whether "the provisions 'are fairly and naturally germane to the subject of the act, or are such as are necessary incidents to or tend to make effective or promote the objects and purposes of legislation included in the subject.'" Id. at 1087 (quoting State v. Canova, 94 So.2d 181, 184 (Fla. 1957)). Here, the curative legislation addresses only one subject -- ratification of county charters adopted in accordance with the notice and election requirements prescribed.

apply retroactively.

In any event, there was no need to specify anything in this regard in the title. The retroactive effect of a given statute is not a "subject" of that statute. As this Court noted in North Ridge General Hospital v. City of Oakland Park, 374 So.2d 461, 463-64 (Fla. 1979): "The subject [of proposed legislation] is the matter to which an act relates; the object, the purpose to be accomplished. The term 'subject' is broader than the word 'object,' as one subject may contain many objects." (citations omitted). As clearly seen from the title of House Bill No. 1662, one of the objects of this act is retroactive application. (A. Tab 6, Ex. A). However, such retroactive effect is certainly not a subject of the act and therefore need not be specified in the title itself.

All that is constitutionally required is that the title of the act be "broad enough so that an average person can reasonably foresee that his interests might be affected by the proposed legislation . . . ." Id. at 464. The title of this curative legislation clearly meets this test.

Lastly, respondent claims that "it is not morally right" for Orange County to be successful in obtaining a judgment that it has a valid charter government. That is absurd. The whole point of curative legislation is to validate elections against legal attacks based on technical defects in the election procedure. In Middleton v. City of St. Augustine, 29 So. 221, 431 (Fla. 1900), the Supreme Court explained the rationale for this rule:

> 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 not beyond the power of the legislature to dispense with it 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.

Id. at 431 (citation omitted). In short, if the Legislature can impose an election requirement in the first place, it has the right to later change it and thereby cure any technical deficiencies which might otherwise thwart the voters' will.

Point Three

The remaining issues raised by respondent are without merit.

Respondent contends in Issue II that the Orange County Charter is in violation of the Optional County Charter Law because it allegedly does not contain a schedulefor the transfer of functions as required by section 125.83(5) and was not one of the three forms prescribed in section 125.84.

Contrary to respondent's argument, the Charter does contain a transfer of functions, including Section 105 Transfer of Powers, Section 711 Home Rule Charter Transition and the Effective Date of January 1, 1987 in Section 712. Furthermore, although the Charter uses the term "County Administrator" instead of "County Manager," it clearly adheres to the County Manager Form provided by section 125.84(2).[5] That statute provides that

[5] A copy of the charter approved by the voters is included in the Supplemental Appendix, S.A. Tab 4, attached hereto.

a county manager shall be appointed by and serve at the pleasure of the Board of County Commissioners and shall exercise the executive responsibilities assigned by the Charter. Section 302 of the Charter provides that the Administrator shall serve at the pleasure of the Commission and direct and supervise the administration and functions of the County.

Respondent's Issue III represents a conglomeration of constitutional challenges that were rejected by the trial court and then abandoned on appeal. Having failed to raise those issues below, they cannot be raised before this Court. Carillon Hotel v. Rodriguez, 124 So.2d 3 (Fla. 1960).

Respondent contends in Issue V that Orange County's motion for summary judgment is defective because it did not contain the statement that "there were no genuine issues of material fact" and that the movant "was entitled to judgment as a matter of law." To begin with, respondent never raised this issue at the June 23, 1987 hearing for summary judgment (R-1 to 55) and he thereby waived it.[6] Furthermore, Orange County's motion incorporated the memorandum of law which was attached to the motion and which stated on page 3 (R-194) that there is "NO GENUINE ISSUE AS TO MATERIAL FACTS" and on page 7 (R-198) that "DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW."

It is difficult to perceive what prejudice could have been

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[6] A copy of the transcript of the June 23, 1987 hearing for summary judgment is included in the Supplemental Appendix, S.A. Tab 5, attached hereto.

possibly sustained by respondent due to Orange County's use of a Motion and a Memorandum to identify the issues. None was argued at the hearing and none is described in respondent's brief.

Respondent's final issue concerns the adequacy of the affidavits attached to Orange County's motion for summary judgment. The affidavits were filed and served simultaneously with the Motion and Memorandum on May 18, 1987 (R-290). No objection was made to them at the hearing on June 23, 1987. (R-1 to 55). Once again, it is clear that "no error may be predicated on such admission absent timely objection or motion to strike." O'Quinn v. Seibels, Bruce and Company, 447 So.2d 369, 370, n.2 (Fla. 1st DCA 1984).

Conclusion

For all of the foregoing reasons, the decision of the Fifth District Court of Appeal invalidating the Orange County charter should be reversed and remanded with directions to affirm the judgment of the circuit court.

Respectfully submitted,

Harry A. Stewart,
County Attorney
Joseph L. Passiatore,
Assistant County Attorney
ORANGE COUNTY LEGAL DEPARTMENT
Orange County Admin. Ctr.
Post Office Box 1393
Orlando, Florida 32802-1393
(407) 236-7320

and

Alan C. Sundberg
Sylvia H. Walbolt
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
First Florida Bank Bldg., Suite 410
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

By: Alan C. Sundberg
Alan C. Sundberg
Florida Bar No.: 079381

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 950, Apopka, Florida 32704-0950, by U.S. Mail this 13th day of February, 1989.

Alan C Sundberg
Attorney