IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA, and the Taxpayers, Property Owners and Citizens of Sarasota County, including nonresidents owning property or subject to taxation therein, et al.,

Defendant/Appellant,

v.

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

Plaintiff/Appellee.
_____/

Appeal Case #73,912

Appeal from
Case No. 88-5873

ON APPEAL FROM THE
CIRCUIT COURT
OF SARASOTA COUNTY

AMENDED REPLY BRIEF OF APPELLANT

EARL MORELAND, STATE ATTORNEY
TWELFTH JUDICIAL CIRCUIT

HENRY E. LEE, **296368**
Chief Assistant State Attorney
State Attorneys' Office
P.O. Box **880**
Sarasota, Florida **34230**
(813) 951-5403
ATTORNEY FOR DEFENDANT/APPELLANT

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REPLY TO THE COUNTY'S STATEMENT OF THE FACTS

The Appellee's Additional Statement of the Facts needs clarification. In 1984, the Sarasota County Charter Review Board (hereinafter CRB) placed two distinct charter amendments before the voters for their consideration. Both were approved. §4.3.E, at issue in this case, required referendum approval for every bond issue in excess of $10,000,000.00 which was payable out of the "tax revenues of the County". At the same time, 54.3.F was placed before the voters, as a completely separate referenda question, and was approved. 54.3.F required referendum approval before the county could increase ad valorem taxes more than ten (10%) percent over the preceding year.

The Board of County Commissioners objected to both referendum questions because it was placing tighter controls on the County's purse strings. The County Commissioners resented this. However, after being advised by their counsel that placing the referenda questions on the ballot was a purely ministerial act which they were compelled to do under §6.1 of the charter, they acquiesced.

The CRB's attorney, Daniel Joy, appeared before the Board of County Commissioners to explain the two proposed Charter Amendments and answer any questions. If the County had declined to place the referenda questions on the ballot as required by 56.1 of the Charter the CRB was prepared to file suit for mandamus compelling same. The Appellee's Statement of the Facts selectively incorporates certain excerpts from Mr. Joy's presentation which

should not be considered because it should not be part of the record on appeal.

Moreover, Appellee's Statement of the Facts refers to testimony by the County Clerk, the Finance Director, and the County Commissioners who testified that in their opinion the pledge of the County Gas Tax, the Voted Gas Tax, and the Local Option Gas Tax were State taxes. Appellee neglected to point out that neither the County Clerk, the Finance Director, nor any of the County Commissioners who testified were attorneys.

Finally, Appellee emphasizes that the County has validated five (5) bond issues since 54.3.E was added to the Charter in **1984,** and that no one contested those bond issues. It is important to note, that neither the CRB, nor the State Attorney's Office, nor any taxpayer of Sarasota County was aware the County was issuing bonds in excess of **$10,000,000.00** payable from the tax revenues of the County without referendum approval. The violation of the Charter was first discovered in November of **1988,** at which time an interested taxpayer, Michael Moran, intervened. After that intervention, Michael Moran, along with ten other interested taxpayers of Sarasota County petitioned the State Attorney, Earl Moreland, to intervene on their behalf in the case at bar.

'LY T(SUMMARY OF !

1. Appellee argues that the State Attorney has never intervened before. The State Attorney's Office was not aware that the County was violating the Charter in the past. Once discovered, the State Attorney's Office immediately intervened in the next bond issue.

2. The CRB's attorney never conceded that **54.3.E** was ambiguous. To the contrary, the drafter of **54.3.E** testified that it was intended to apply to **all** tax revenues of the County.

3. Appellee's argument that the revenues pledged for the instant bonds are State Tax revenues is untenable. Appellee's argument that the County Gas Tax, the Voted Gas Tax, and the Local Option Gas Tax are State taxes fails.

4. The County Charter is constitutional because it does not conflict with powers granted under general law. Charter counties have the option, not the duty, to levy a County Gas Tax, a Voted Gas Tax, and a Local Option Gas Tax if they so desire. **54.3.E** does not prohibit the County from levying any of the above taxes. Furthermore, §4.3.E does not prohibit the County from issuing bonds in excess of **$10,000,000.00**payable from the above tax revenues. However, **§4.3.E** does require voter approval before the County does so. General Law is silent on whether referendum approval is required to issue these bonds. Thus, there is no conflict with General Law, rather they complement and co-exist with each other.

REPLY ARGUMENT TO POINT ON APPEAL

I.

THE LOWER COURT ERRED BY ENTERING *AN* ORDER VALIDATING $37,000,000.00 GAS TAX REVENUE BONDS BECAUSE THE SARASOTA COUNTY CHARTER REQUIRES REFERENDUM APPROVAL FOR ALL BONDS IN EXCESS OF $10,000,000.00 PAYABLE FROM THE TAX REVENUES OF THE COUNTY.

A close reading of Appellee's argument on this point would lend a reader to believe that the CRB only placed one proposed charter amendment before the voters in **1984.** As discussed earlier, there were two. **54.3.E** limited the ability of Sarasota County to issue bonds in excess of **$10,000,000.00** payable out of the tax revenues without referenda approval. **54.3.F** limited Sarasota County from increasing ad valorem taxes more than ten **(10%)** percent from the preceding year without referenda approval. The two charter amendments were completely separate and distinct.

The CRB was well aware of the constitutional prohibition against issuing bonds payable from ad valorem taxes without referenda approval. This was discussed in depth before any referenda questions were placed on the ballot. Moreover, the CRB's attorney, Daniel Joy, was well aware that the County could not issue ad valorem backed bonds without referenda approval even if the bond issue was for an amount less than **$10,000,000.**

Next, Appellee argues that the County was not pleased with placing **§4.3.E** on the ballot. Whether the County Commission was satisfied or not is irrelevant. The County Commission, pursuant to §6.1 of the Charter, must place each and every proposed Charter

amendment recommended by the Charter Review Board on the ballot. This is not a right or privilege of the County Commission, it is a duty. §6.1 states in pertinent part:

ARTICLE VI
CHARTER REVISION

> Section 6.1 **Petition, Ordinance, Legislature, Charter Review Board.** Changes to this Charter may be proposed by
>
> * * *
>
> (iv) a recommendation by the Charter Review Board.
>
> * * *
>
> Changes proposed under subsection (iv) and filed with the Supervisor of Elections **shall** be submitted to the voters at a special election to be held concurrently with the next general or special election in the County, and such changes if approved at the election by a majority vote shall become a part of this Charter. (Emphasis added)

Consequently, the County Commission is compelled to place on the ballot whatever is proposed and recommended by the CRB. It is a ministerial act only which must be done under the Charter. In other words, the County Commission is not required to approve of what is going before the voters, but they have a duty to place it before the voters.

Appellee cites **Rinker Materials Corp. v. City of North Miami**, 286 So.2d 552 (Fla. 1973), **City of Opa Locka v. State**, 257 So.2d 100 (1972 Fla. 3d DCA), and **Jacksonville v. Ledwith**, 26 Fla. 163, 7 So. 885 (1890), in support of the proposition that the primary rule for interpretation and construction of charters and ordinances

is that the intention of the legislative body is to be ascertained and given effect. Appellee also argues, the legislative intent, which is the primary factor of importance in construing statutes, must be determined primarily from the language of the statute. **State v. Atlantic .L.R. Co.,** 56 Fla. 627, 47 So. 969 (1908); **Van Pelt v. Hilliard**, 75 Fla 792, 78 So. 693 (1918); **SRG Corp. v. Department of Revenue**, 365 So.2d 607 (Fla. 1978); **State v. Dalby**, 361 So.2d 215 (Fla. 1978); **Vocelle v. Knight Brothers Paper Co.,** 118 So.2d 664 (Fla. 3d DCA 1960). Finally, Appellee argues the Court is obligated to give effect to the legislative intent if that intent is clear and unmistakable.

The above argument made by Appellee is absolutely correct. The polestar of Florida law is that legislative intent is controlling. The legislative body in the instant case, the CRB, all testified as to what their intent was. The CRB members who were sponsors of §4.3.E, as well as the drafter of §4.3.E all testified at trial that it was never intended that §4.3.E would apply only to ad valorem tax revenues. If that was their intent they would have used "ad valorem tax revenues" as they did in §4.3.F which was added to the charter at the same time. Appellant's witnesses testified that 94.3.E was intended to apply to all tax revenues of the County, from one whatever source. There was only one exception: User Fees.

To further complicate matters, Appellee attempts to confuse the issue in this case. The heart of their argument is that Article IV of the Sarasota County Charter when read in its entirety

relates only to ad valorem taxing power of the county. This is patently not the case. A crucial fact in this controversy is that two proposed charter amendments was placed before the voters in 1984. If approved, one limited the ability of Sarasota County to increase ad valorem taxes without referenda approval [§4.3.F]. Another limited the ability of Sarasota County to issue bonds in excess of $10,000,000.00 payable from the tax revenues of the County without referenda approval [§4.3.E].

The CRB was well aware of the Florida Constitution requirement for referenda approval on ad valorem backed bonds and had no desire to waste the time and money to duplicate what was already required by law. At no time, neither in 1984 nor in 1989, did the CRB intend for §4.3.E to be limited to ad valorem taxes. Conspicuously absent in Appellee's argument is the fact that Article IV of the Charter includes numerous items dealing with issues other than ad valorem taxes. Included in Article IV are special districts, municipal service taxing units, budget requirements, prohibitions against county employees receiving compensation on a fee basis, and audit requirements for the county.

In summary, the term "tax revenues of the county" as used in §4.3.E, when read in conjunction with the entire charter, plainly means all tax revenues of the County.

A.

THE LOWER COURT ERRED BY ADMITTING PAROL TESTIMONY TO VARY THE CLEAR AND UNAMBIGUOUS LANGUAGE OF §4.3.E OF THE SARASOTA COUNTY CHARTER.

Appellee's argument is internally inconsistent. On Point I.A on Appeal, they argue that **54.3.E** of the Sarasota County Charter is not ambiguous and that "the legislative intent, which is the primary factor of importance in construing statutes, must be determined primarily from the language of the statute". Moreover, "a statute is to be taken, construed and applied in the form enacted." Notwithstanding the above, Appellee argues that the charter provision is not clear and ambiguous, thereby requiring legislative interpretation.

If it is determined that **54.3.E** is unambiguous the intent that is controlling is the intent of the legislature body that drafted the Charter provision: The Charter Review Board.

B.

THE LOWER COURT ERRED IN HOLDING THE GAS TAX REVENUE BONDS WERE NOT PAYABLE FROM TAX REVENUES OF THE COUNTY.

C.

THE LOWER COURT ERRED IN HOLDING §4.3.E OF THE SARASOTA COUNTY CHARTER WAS ONLY APPLICABLE TO AD VALOREM TAXES.

Appellee's argument on points B. and C. on appeal are also internally inconsistent. Appellee first argues that the County Gas Tax, the Voted Gas Tax, and the Local Option Gas Tax are State taxes. Appellee does admit, however, that the County Gas Tax, the Voted Gas Tax, and the Local Option Gas Tax have been given to the County by the Florida Legislature.

Appellee next argues that the County Gas Tax is a state tax levied by the Department of Revenue. This argument is facetious. 5336.021 states:

> **"(1) Any county in the state, in the discretion of its governing body and subject to a referendum, may impose, in addition to all other taxes required or allowed by law, 1-cent voted gas tax upon every gallon of motor fuel and special fuel sold in such county ... " (Emphasis added)**

Additionally, 5336.025 allows the county to levy a

> **"1-cent, 2-cent, 3-cent, 4-cent, 5-cent, or 6-cent local option gas tax upon every gallon of motor fuel and special fuel sold in a county."**

Accordingly, it is beyond dispute that Appellee is incorrect in arguing the County Gas Tax is levied and assessed by the State. It is levied and assessed by the County.

Appellee next cites 5206.61 to support the proposition that Sarasota County is prohibited from levying or collecting any gas tax. Appellee improperly cites 5206.061 by cutting the first sentence in half. The first sentence of 5206.061, reads in its entirety as follows:

> **No municipality or other political subdivision shall levy or collect any gas tax or other tax measured or computed by the sale, purchase, storage, distribution, use, consumption, or other disposition of motor fuel except such municipalities as are now levying such a tax under authorization of special laws (emphasis supplied).**

The special laws to which 5206.061 refer are all being levied by Sarasota County presently. They are:

1. The County Gas Tax authorized by 5206.60. Appellee argues that notwithstanding the title to 5206.60, which

is "County Tax on Motor Fuel", it is not really a county tax. Appellee's argument simply fails.

2. Appellee correctly points out that the "Voted Gas Tax" authorized by 9336.021 is a Gas Tax levied by the County, and administered and collected by the County.

3. Appellee also correctly points out that the "Optional Gas Tax" authorized by 9336.025 authorizes the underlying county to approve a gas tax of up to six cents at their option.

Consequently, Appellee's argument that the County Gas Tax, the Voted Gas Tax, and the Local Option Gas Tax are State taxes, and not County taxes fails. These taxes are all imposed by the County, only one is collected by the State and remitted to the County. Accordingly, these taxes are "tax revenues of the County" and the referendum requirement of 94.3.E applies.

D.

THE TRIAL COURT ERRED BY FINDING THAT IF §4.3.E REQUIRES A REFERENDUM, IT IS INCONSISTENT WITH 9336.025 FLORIDA STATUTES.

Appellee argues that if §4.3.E of the Sarasota County Charter requires a referendum, it is inconsistent with §336.025(e), 206.60(b)(1)(4) and 9125.01, Florida Statutes.

Appellee's argument fails for several reasons. First, Appellee has never alleged they were operating under §336.025(e) nor have they used the Division of Bond Finance to issue any bonds. Accordingly, §336.025(e) has no applicability to the instant case. Second, §336.025(3), states in full:

(3) The tax shall be imposed using either of the following procedures:

(a) "The tax may be levied by an ordinance

adopted by a majority vote of the governing body or upon approval by referendum."

Accordingly, referenda approval to levy the Local Option Gas Tax and to pledge same to redeem bonds is a procedure allowed by General Law. There is no conflict between §336.025(e) and §4.3.E rather they complement each other.

Appellee next argues that 54.3.E is also inconsistent with §206.60(b)(1) and (4), F. S. Both arguments fail. §206.60(b)(1) allows the County to impose a 1 cent per gallon County Tax on motor fuel and if the County does levy such a tax the funds must be used for road acquisition, maintenance and repair. §4.3.E does not prohibit the County from imposing this tax or using the money for these purposes. In fact, 54.3.E has nothing to do with §206.60(b)(1). 54.3.E only comes into play when the County starts issuing bonds. Appellee then argues 54.3.E conflicts with §206.60(b)(4). This argument fails because §206.60(b)(4) prohibits the County from using public funds in such a manner as would violate any bond issue. Accordingly, §206.60(b)(4) has nothing to do with this case. Consequently, there is no conflict with either of the sections Appellee cites, nor does 54.3.E prohibit or restrict any action authorized by General Law.

Third, Appellee argues that 54.3.E is inconsistent with §125.01, Florida Statutes. 5125.01 spells out in great detail the powers and duties the governing body of a county shall be permitted to exercise. 5125.01 fully supports the constitutionality of §4.3.E because in this section broad powers are delegated to County

Governments and Charter Counties to operate as a sovereign. Under Sarasota's Charter the CRB is created and empowered to recommend changes to the Charter.

Appellee next cites Board of **County Commissioners of Dade County v. Wilson, 386** So.2d **556** (Fla. Sup. Ct. **1980)** in support of its position that a Charter provision which is inconsistent with General Law is invalid. Clearly, **Wilson**, supra, is the leading case in Florida on this issue. However, Appellee fails to point out that a local ordinance which co-exits with General Law is constitutional. The local ordinance in **Wilson** clearly conflicted with General Law. By contrast, **§4.3.E,** at issue here, co-exists with General Law. The language in **Wilson** is well worth quoting:

> "We agree that the constitutional provision does not, in itself, prescribe the method and means by which taxes are to be imposed. As a consequence, where there is no legislative directive relating to a specific method or means of taxation, that procedure may be controlled by ordinance.

In the instant case, there is no legislative directiveon a specific method by which the County can impose a County Gas Tax, a Local Option Gas Tax, and a Voted Gas Tax. Consequently, **§4.3.E** co-exists with General Law and can control the method by which the County issue bonds, not taxes. Appellee argues that **§4.3.E** is prohibiting the County from levying and collecting taxes. That is patently not the case. **§4.3.E** is not limiting the taxing authority, nor is it limiting the ability of Sarasota County to issue bonds for less than **$10,000,000.** §4.3.E simply requires the

County to get referendum approval for all bonds in excess of $10,000,000.00 payable from the tax revenues of the County.

Finally, Appellee cites Board of County Commissioners of Marion County v. McKeever, 436 So.2d 299 (Fla. 5th DCA 1983) to support its position that (54.3.E is unconstitutional. It is readily apparent upon reading McKeever that it has no applicability to the case at bar. In McKeever, Marion County was a non-charter county and the facts were radically different from the instant case.

In sum, Appellee's argument that (54.3.E conflicts with (5336.025, §206.60(b)(1) and (4) and (5125.01, Florida Statutes has no merit.

CONCLUSION

The failure of Sarasota County to comply with §4.3.E of the Charter for Sarasota County is fatal to the bonds Sarasota County is attempting to issue. A fair reading of §4.3.E of the Charter leads to only one conclusion: Whenever the tax revenues of Sarasota County will be used to redeem a bond, the county must get referenda approval for all bonds in excess of $10,000,000.00. The fact that Sarasota County apparently ignored §4.3.E for four (4) years is irrelevant. Pursuant to Chapter 75, Florida Statutes, each bond issue must stand or fall on its own. Consequently, as much as the county would like the Court to believe there is some stare decisis value in the prior bond issues, this argument fails.

Assuming arguendo that (54.3.E is ambiguous, the only parol testimony that should have been permitted should have been that of

the sponsors of the section, the Charter Review Board. Furthermore, it should be remembered that the Charter Review Board placed two referenda questions on the ballot in 1984 dealing with taxation. 54.3.F limited the County's ability to increase ad valorem taxation greater than 10% over the preceding years. Simultaneously, the Charter Review Board proposed 54.3.E which limited the ability of Sarasota County to issue bonds in excess of $10,000,000.00, without referenda approval, whenever the bonds were payable out of the tax revenues of the County. One section specifically referred to ad valorem taxation and one did not.

By the same token, if Sarasota County was interpreting §4.3.E to apply only to ad valorem taxation, their interpretation should be given no weight. The Board of County Commissioners did not draft or sponsor 54.3.E as an amendment to the Charter and is thus not the Legislative body creating this law. This was done exclusively by the Charter Review Board who testified in depth as to what they intended 54.3.E to do.

Finally, 54.3.E is constitutional because there is no conflict with General Law. General Law does not prohibit referenda approval before bonds are issued by Charter Counties. 54.3.E does not prohibit the County from issuing bonds or levying Gas Taxes allowed under General Law, but does require referenda approval in certain instances. Thus 54.3.E does not conflict with General Law nor does it prohibit the County from issuing bonds which are expressly authorized by General Law.

In summary, the court should reverse the trial court ruling,

remanding the matter with instructions that the bond validation should be declared null and void until such time as Sarasota County obtain referenda approval for the bonds or alternatively, the County issues bonds for an amount less than $10,000,000.00.

Respectfully submitted,

Henry E. Lee
Chief Assistant State Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/~~hand~~ delivery to Richard Nelson, Esquire, Nelson, Hesse, Cyril, Smith, Widman & Herb, 2070 Ringling Boulevard, Post Office Box 2524, Sarasota, Florida 34236 this 22 day of May, 1989.

EARL MORELAND, STATE ATTORNEY
TWELFTH JUDICIAL CIRCUIT

Henry E. Lee, 296368
Chief Assistant State Attorney
State Attorney's Office
P.O. Box 880
Sarasota, Florida 34236
(813) 951-5403
ATTORNEY FOR DEFENDANTS/APPELLANTS

REPLY.BOND