THE SUPREME COURT OF FLORIDA

ALACHUA COUNTY, FLORIDA,

Appellant,

v.

CASE NO. 75,207

FLORIDA PETROLEUM MARKETERS ASSOCIATION, INC., ALSAX CORPORATION, UNITED FUELS CORPORATION, MILLER ENTERPRISES, INC., HUNTLEY'S JIFFY STORES, INC., MUNFORD, INC., CLARDY OIL COMPANY, MCB OIL COMPANY, DIXON OIL CORPORATION, THOMAS OIL COMPANY, INC., RALLY FOOD STORES, INC., RICHARDSON OIL COMPANY, INC., COTTON'S MIN-A-MART, LEWIS OIL COMPANY, INC., GATE PETROLEUM COMPANY, SUWANNEE SWIFTY STORES, INC., LIL' CHAMP FOOD STORES, INC., DIXIE OIL COMPANY, INC., and FLORIDA WELCOME STATION, INC.,

Appellees.

/

ANSWER BRIEF OF APPELLEES

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PRELIMINARY STATEMENT

For purposes of this Answer Brief, except where otherwise noted, Appellees, Florida Petroleum Marketers Association, Inc., et al., will be referred to as "FPMA." Appellant, Alachua County, Florida, will be referred to as "Alachua County" or as "the County."

References to the Record on Appeal will be designated by the use of the symbol (R.___) with the appropriate page number. Exhibits introduced at trial are identified by the party introducing the exhibit (with FPMA as Plaintiffs' and Alachua County as Defendant) and the appropriate exhibit number, e.g., Plaintiffs' Exhibit 4.

STATEMENT OF THE CASE AND FACTS

FPMA generally accepts Alachua County's Statement of the Case and Facts, with the exception of three issues. First, contrary to Alachua County's assertion, the First District Court of Appeal did not declare the entirety of Chapter 88-156, Laws of Florida, unconstitutional. To the contrary, the district court declared only Section 18 of Chapter 88-156, invalid. Specifically, the district court concluded as follows:

> Section 18 of Chapter 88-156 was properly found to be unconstitutional as it violates both Article III, Section 6 of the Florida Constitution and Article III, Section 10 of the Florida Constitution. The trial court's order is therefore affirmed.

Alachua County, Florida v. Florida Petroleum Marketers Ass'n, 14 FLW 2777, 2778 (Fla. 1st DCA Dec. 4, 1989), a copy of which is attached as Appendix A.

Second, FPMA's Amended Complaint filed in the Eighth Judicial Circuit (R. 48-81) sought a declaration that Section 18, Chapter 88-156, (not "Amendment 1 to Amendment 1 to CS/SB 155 (1988)") was unconstitutional.

Third, the County misinterprets the relationship between Chapter 88-331 and Chapter 88-156, Laws of Florida, insofar as these Acts affected Section 376.317, Florida Statutes (1987). To understand the nature of these Acts, some additional history is required.

The Department of Environmental Regulation ("DER") was initially given authority by the legislature to regulate petroleum storage systems[1] in the Water Quality

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[1] A "petroleum storage system" is generally defined as a storage tank, its integral piping, and associated dispensing equipment, which is intended to store petroleum products such as gasoline. § 376.301 (11), Fla. Stat. Generally, the parties are concerned with what are more commonly known as "underground storage tanks" such as those found at the corner gas station.

Assurance Act of 1983, Chapter 83-310, Laws of Florida, codified in part at Sections 376.30 -.90, Florida Statutes (Supp. 1984). The Water Quality Assurance Act of 1983 contained no restrictions against local governments desiring to enact their own ordinances regulating owners and operators of petroleum storage systems.

In May 1984, pursuant to its newly expanded authority, DER promulgated Chapter 17-61, Florida Administrative Code [Stationary Tanks]. (Plaintiffs' Exhibit 2). The Stationary Tanks Rule regulates owners and operators of petroleum storage systems in the construction, operation, and repair of systems storing motor vehicle fuels. Additionally, the Stationary Tanks Rule requires system owners and operators to register their systems with DER, to report discharges, to maintain inventory records, and to clean up contamination incidents.

Chapter 84-338, Laws of Florida, (Plaintiffs' Exhibit 3) amended the Water Quality Assurance Act of 1983. Section 13 of Chapter 84-338, created Section 376.317, Florida Statutes (1985),[2] a copy of which is attached as Appendix B. Section 376.317(2), Florida Statutes (1985), preempted local regulation of the prevention and removal of pollutant discharges[3] with two exceptions found in Section 376.317(3), Florida Statutes (1985):

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[2] Section 376.317, Florida Statutes, then remained unchanged through the 1987 Florida Statutes.

[3] The First District Court of Appeal considered this preemption in Lewis Oil Co., Inc. v. Alachua County, 496 So. 2d 184 (Fla. 1st DCA 1986) (Lewis I), and Alachua County v. Lewis Oil Co., Inc., 516 So. 2d 1033 (Fla. 1st DCA 1988). In Lewis I, the court found that the validity of an earlier version of the Alachua County Storage Tank Ordinance was dependent upon approval by DER. Recently, in Alachua County v. Lewis Oil Co., Inc., 15 FLW D148 (Fla. 1st DCA Dec. 29, 1989), the court declared unenforceable Alachua County Ordinances 86-10 and 87-2, which imposed a moratorium on the issuance of building permits for the installation of petroleum storage systems, on the ground that the Ordinances were not approved by DER pursuant to Section 376.317(3), Florida Statutes (1987).

(a) County ordinances that were in effect prior to September 1, 1984; and

(b) County ordinances enacted subsequent to September 1, 1984 that are thereafter approved by DER pursuant to the criteria in Section 376.317(3), Florida Statutes (1985), and Chapter 17-63, Florida Administrative Code. (Plaintiffs' Exhibit 4).

The former exception "grandfathered" Dade County's and Broward County's ordinances regulating owners and operators of petroleum storage systems from the preemption. These ordinances were enacted and in force in November 1983 and May 1984, respectively, i.e., prior to the effective date of the preemption. (Plaintiffs' Exhibit 5; Joint Exhibit 1).

On May 21, 1987, Alachua County filed its Petition for Approval of Revised Local Tank Ordinance with DER, pursuant to Section 376.317(3), Florida Statutes (1985), and Chapter 17-63, Florida Administrative Code. On June 22, 1987, Alachua County adopted the Alachua County Storage Tank Ordinance, Ordinance 87-10. (Plaintiffs' Exhibit 6). Ordinance 87-10 was filed with the Florida Secretary of State on June 24, 1987. (Joint Exhibit 1). Since Ordinance 87-10 included provisions which were more stringent and extensive than DER's Stationary Tank Rule, it was preempted under Section 376.317(2), Florida Statutes (1985), (Joint Exhibit 1), subject to DER's final approval under Section 376.317(3)(b), Florida Statutes (1985).

On July 8, 1987, DER issued its preliminary agency action, stating its intent to approve Ordinance 87-10. (Joint Exhibit 1). On July 28, 1987, FPMA[4] and other industry interests filed Petitions for Formal Administrative Hearing, pursuant to Section 120.57,

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[4] In this instance, FPMA means only the Florida Petroleum Marketers Association, Inc. Some, but not all of the other Appellees in this case were parties to the administrative proceeding.

Florida Statutes, challenging DER's intended agency action and preventing DER's preliminary approval from becoming final. (Id.). From July 28, 1987, through early June 1988, the parties engaged in discovery and other prehearing proceedings in anticipation of a two week final administrative hearing scheduled to begin on June 20, 1988. (Id.).

During the 1988 Legislative Session, the Legislature passed Chapter 88-331, Laws of Florida. This Act did not affect the preemption provision of Section 376.317(2), Florida Statutes (1987). Nor did the Act affect the "grandfather" provision of Section 376.317(3)(a), Florida Statutes (1987), under which those ordinances enacted before preemption were "grandfathered" from preemption. Instead, Chapter 88-331, added an additional criteria for "non-grandfathered" counties to meet in order to obtain DER approval for a storage tank ordinance under Section 376.317(3)(b), Florida Statutes. This additional criteria was that a county would have to demonstrate to DER "that it has effectively administered the state law or rules for a period of two years prior to filing a petition for approval." However, in fairness to any counties which had already begun the DER approval process for a storage tank ordinance, these counties would not have to meet the additional requirement of administering the state tank program for two years.

Then, on May 31, 1988, less than three weeks before the start of the final hearing concerning DER's intent to approve Ordinance 87-10, the Florida Legislature began to tinker with Section 376.317 (2) and (3)(a), Florida Statutes (1987), the state preemption (and "grandfathering") of local petroleum storage system regulation.

On April 5, 1988, the Senate Committee on Economic, Community, and Consumer Affairs passed Committee Substitute for Senate Bill 155 ("CS/SB 155")(1988), which amended and readopted Chapter 489, Florida Statutes (1987). (Plaintiffs' Exhibit

8). Chapter 489, which contains statewide licensing, examination, and practice standards for contractors (including building contractors, petroleum storage system specialty contractors, swimming pool and spa contractors, and air conditioning contractors) was scheduled to "sunset" on October 1, 1988, pursuant to Section 11.061, Florida Statutes (1987). CS/SB 155 (1988) passed the Senate on April 19, 1988, and was certified to the House of Representatives. (Plaintiffs' Exhibit 8).

On May 31, 1988, the House of Representatives considered CS/SB 155 (1988), which at this stage, bore no mention of local ordinances which may regulate owners and operators of petroleum storage systems. (Plaintiffs' Exhibit 8). On the House floor, Representative Sidney Martin, representing Alachua County, offered House Amendment 1 to House Amendment 1 to CS/SB 155 (1988). (Id.). The Amendment was not considered by legislative committee. (Id.)

Representative Martin's Amendment to CS/SB 155 (1988) (published as Section 18 to Chapter 88-156) amended Section 376.317(3)(a), Florida Statutes (1987), by providing that county ordinances regulating petroleum storage facilities may be exempted from the State's preemption (and the DER approval process) if they are adopted and filed with the Secretary of State prior to July 1, 1987. (Plaintiffs' Exhibit 8). This legislation is codified at Section 376.317(3), Florida Statutes (Supp. 1988), a copy of which is attached as Appendix C. Other than Dade County and Broward County, whose ordinances were already "grandfathered" from preemption, the only county affected (and which could ever be affected) by Representative Martin's Amendment was Alachua County. (Plaintiffs' Exhibit 10).

On June 2, 1988, the Senate refused to accept Representative Martin's Amendment to CS/SB 155 (1988) and requested that the House recede. (Plaintiffs'

Exhibit 8). On June 3, 1988, the House refused to recede, again passed CS/SB 155 (1988) with Representative Martin's Amendment, and sent the bill back to the Senate. (Id.)

Finally, on June 7, 1988, as the Legislature reached its June 10, 1988 conclusion, and with regulation of contractors in danger of "sunsetting", the Senate passed CS/SB 155 (1988) with the Amendment which was published as Section 18, Chapter 88-156, the subject of FPMA's constitutional challenge. (Id.)

SUMMARY OF ARGUMENT

As the trial court found, and the district court agreed, Section 18 of Chapter 88-156, Laws of Florida, has as its subject the adoption of ordinances by counties seeking to regulate owners and operators of petroleum storage facilities, i.e., gas stations, bulk plants, and other locations storing petroleum products. The purpose of any such regulation is to protect the state's ground and surface waters. See Section 376.30, Florida Statutes (1987). The remainder of Chapter 88-156 has as its subject qualification, licensing, and practice standards for contractors. See Section 489.101, Florida Statutes (Supp. 1988). The purpose of these standards, found in Chapter 489, Florida Statutes, is to protect the public against dishonest and incompetent contractors. Consequently, Chapter 88-156 fails to "embrace but one subject and matter properly connected therewith," as required by Article III, Section 6 of the Florida Constitution.

The trial court also found, and the district court concurred, that Section 18 of Chapter 88-156, though not specifically naming Alachua County, creates a classification which only applies (and can only apply in the future) to Alachua County, and is a special or local law. This classification permits Alachua County to adopt ordinances regulating petroleum storage facilities. Other counties (except Dade and Broward whose ordinances were properly "grandfathered" in 1984) must have their ordinances approved by the DER, or the ordinances will be preempted by Section 376.317(2), Florida Statutes (1987 and Supp. 1988). Since adoption of Section 18 was not noticed in accordance with general law, it is unconstitutional under Article III, Section 10 of the Florida Constitution.

In addition, Alachua County had argued that Section 18 of Chapter 88-156, should be sustained as a general law under Article III, Section 11(b) of the Florida

Constitution. The trial court found that even assuming that the law is a general law, the law fails to classify counties on a basis reasonably related to the subject of the law. There is simply no record evidence showing why, from the point of view of the 1988 Legislature, Alachua County (or any county other than Dade and Broward enacting a petroleum storage system ordinance before July 1, 1987) should be classified differently from other counties.

ARGUMENT

I. SECTION 18, CHAPTER 88-156, LAWS OF FLORIDA, VIOLATES THE SINGLE SUBJECT REQUIREMENT OF ARTICLE III, SECTION 6 OF THE FLORIDA CONSTITUTION

In its Final Judgment, the trial court found as follows:

> 6. Section 18 of Chapter 88-156, Laws of Florida, pertains only to adoption of ordinances by county governments regulating owners and operators of underground storage tank systems, and in no way relates to the licensing of contractors.

(R. 134). In affirming the trial court's Final Judgment, the district court found as follows:

> . . . In this case the pending bill containing some 16 sections amending Chapter 489, relating to the regulation of the construction industry, was amended by adding Section 18 to amend Chapter 376, relating to pollutant discharge prevention and removal, a subject totally distinct and different from the subject matter of the act before the amendment. The provisions of Section 18 are not germane to the construction industry, the subject of the pending act it amended, nor are its provisions such as are necessary incidents to, or which tend to make effective or promote, the objects and purposes of the pending construction industry litigation. Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987).

Alachua County, Florida v. Florida Petroleum Marketers Ass'n, 14 FLW 2777, 2778 (Fla. 1st DCA Dec. 4, 1989).

The trial court and the district court thus held that Section 18, Chapter 88-156, Laws of Florida, violated the "single subject" requirement of Article III, Section 6 of the Florida Constitution. This Section provides, in relevant part, as follows:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.

The test for determining whether a law violates the single subject requirement is set forth in Smith v. Department of Insurance, 507 So. 2d 1080, 1087 (Fla. 1987):

> The test to determine whether legislation meets the single-subject requirement is based on common sense. It requires examining the act to determine if 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."

(Citation Omitted.)

As this Court stated in In Re Advisory Opinion to the Governor, 509 So. 2d 292, 313 (Fla. 1987):

> The single subject rule has a twofold purpose. First, it attempts to avoid surprise or fraud by ensuring that both the public and the legislators involved receive fair and reasonable notice of the contents of a proposed act. Secondly, the limitation prevents "hodgepodge, logrolling legislation."

In examining the first concern, it is clear that persons such as owners and operators of service stations and petroleum marketing facilities would not be on fair notice that a bill regulating contractors affects the daily operation of their businesses. Turning to the second concern of the "single subject" requirement, the requirement was designed to prevent logrolling which results in hodgepodge or omnibus legislation.[5]

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[5] Senators Langley and Thurman both recognized the logrolling inherent in CS/SB 155 (1988) in their explanation of vote spread upon the pages of the June 7, 1988 Journal of the Senate. (Plaintiffs' Exhibit 8). Senator Langley stated "I voted against this bill even though it provided some necessary and major changes in the licensing acts." Senator Thurman stated:

> that my vote for Committee Substitute for Senate Bill 155 was made under protest. While I am supportive of maintaining the regulation of Florida's construction industry, I strongly oppose the amendment which would allow Alachua County to preempt the provisions of Chapter 17-61 of the Florida Administrative Code.

Williams v. State, 459 So. 2d 319, 320 (Fla. 5th DCA 1984). As Justice Brown wrote in Colonial Investments Co. v. Nolan, 100 Fla. 1349, 131 So. 178 (1930),

> It had become quite common for legislative bodies to embrace in the same bill incongruous matters having no relationship to each other. . . . And frequently such distinct subjects, affecting diverse interests, were combined in order to unite the members who favored either in support of all . . . .

In Fine v. Firestone, 448 So. 2d 984 (Fla. 1984), this Court noted its concern over subversion of the legislative process where bills were passed which have no majority support, but which were passed because legislators were voting to approve other portions of the bill. In the case of Chapter 88-156, it is clear that the inclusion of Section 18 caused concern among some legislators, particularly in the Senate, who wished to reenact Chapter 489, Florida Statutes. See footnote 5, infra; see also, Department of Education v. Lewis, 416 So. 2d 455, 459 (Fla. 1982). (A lawmaker must not be placed in the position of having to accept a repugnant provision in order to achieve adoption of a desired one.) Furthermore, as was also evident with CS/SB 155 (1988),

> [i]t could also impair the Governor's veto power if he or she were forced to accept an unwanted or undesirable provision in order to obtain the enactment of a desirable one.

Williams, 459 So. 2d at 320, citing Brown v. Firestone, 382 So. 2d 654, 663 (Fla. 1980).

Chapter 489 provides examination, licensing, and practice requirements for all types of contractors licensed statewide by the Department of Professional Regulation ("DPR"). These professionals include building contractors, air conditioning contractors, pool and spa contractors, and others engaged in various types of contracting activities. Pursuant to Section 11.61, Florida Statutes (1987), the Regulatory Sunset Act, Chapter

489, was to be automatically repealed on October 1, 1988 (or would "sunset"), absent reenactment during the 1988 Legislative Session. Thus, CS/SB 155 (1988) was introduced during the 1988 Legislative Session to reenact Chapter 489.

As discussed in the Statement of the Case and Facts, CS/SB 155 (1988), did not amend Section 376.317, Florida Statutes, until Representative Martin offered his Amendment to CS/SB 155 (1988) in the closing days of the Legislative Session. Unlike the rest of CS/SB 155 (1988), Representative Martin's Amendment did not concern the regulation of the practice of "contracting", or even the "construction industry," but instead amended Section 376.317(3)(a), Florida Statutes (1987), as follows:

> 376.317. Superseded laws; state preemption
>
> (3) A county government is authorized to adopt countywide ordinances that regulate underground storage tanks, as described herein, which ordinances are more stringent or extensive than any state law or rule regulating such tanks, provided:
>
> (a) The original ordinance was ~~legally~~ adopted by the county and filed with the Secretary of State before July 1, 1987 ~~and in force before September 1, 1984~~; or
>
> (b) The ordinance establishing the local program was approved by the department.
>
> The department is authorized to adopt rules that permit any county government to establish, in accordance with s. 403.182, a program regulating underground storage tanks, which program is more stringent or extensive than that established by any state law of rule regulating underground storage tanks. The department shall approve or deny a request by a county for approval of an ordinance establishing such a program according to the procedures and limits of s. 120.60. When adopting the rules, the department shall consider local conditions that warrant such more stringent or extensive regulation of underground storage tanks, including, but not limited to, the proximity of the county to a sole or single source aquifer, the potential threat to the public water supply because of the proximity of

> underground storage tanks to public wells or ground water, or the detection of petroleum products in public or private water supplies.

Alachua County argues that several provisions of Chapter 88-156, other than Section 18, pertain to petroleum storage systems, and therefore, that there is a logical connection between Section 18 and the rest of Chapter 88-156. The County's argument ignores the fact that the provisions of Chapter 88-156 (other than Section 18) which relate to petroleum storage systems do so only in so far as Chapter 88-156 regulates contractors who install, remove, or test petroleum storage systems. No other provision of Chapter 88-156 regulates owners and operators of petroleum storage system facilities.

In answer to Alachua County's section-by-section analysis, the County correctly notes that Section 1, Chapter 88-156, amends Section 489.101, Florida Statutes, by making a non-substantive, grammatical change to the statement of legislative purpose. However, Section 489.101, Florida Statutes, was not expanded to include regulation of the products and services which contractors use or provide. Rather, this "purpose" section merely recognizes that "incompetent or dishonest contractors" may provide unsafe products or services. But the Legislature recognized that the danger of unsafe products or services is inherent in the bad contractor, not in the bad product or in the daily operation of the business that hires the contractor. It is the contractor, not the product or the person hiring the contractor, being regulated.

Sections 3 and 16, Chapter 88-156, may be treated together. These Sections contain definitions for "pollutant storage system specialty contractors," "pollutant storage tanks" (and plumbing and mechanic contractors, who also may perform work relating to storage tanks) and "registered precision tank testers." These definitions are properly

incidental to Chapter 88-156 because they are necessary to identify who the legislature considers to be specialty contractors who install and test petroleum storage systems. Section 10, Chapter 88-156, which establishes licensing requirements for "petroleum storage system specialty contractors" is also necessary to meet the legislative purpose of providing specific licensing requirements for different contractors. Similarly, definitions of "Class C Air Conditioning Contractor" (Section 489.105(3)(h)) and "Swimming Pool Servicing Contractor" (Section 489.105(3)(l)) are necessary to regulate these contractors, but do not "open the door" to regulation of establishments with air conditioners or swimming pools under any fair reading of the "single subject" requirement. Sections 3, 10, and 16 of Chapter 88-156, do not lead to the conclusion that because it is necessary to define and to regulate contractors who install, and precision tank testers who test, petroleum storage systems, that wide-ranging regulation of businesses who maintain storage systems "tends to make effective or promote" the regulation of petroleum storage system contractors.

Section 7, Chapter 88-156, does no more than to allow any county or municipality to prevent <u>any</u> contractor, including petroleum storage system specialty contractors, from contracting without a license, in order to prevent dishonest or incompetent "contracting." Sections 13 and 15, Chapter 88-156, give counties and municipalities code enforcement and permitting authority to enforce these provisions. These Sections bear no relationship to Section 18, Chapter 88-156, which allows county regulation of owners and operators of petroleum storage system facilities.

Section 17, Chapter 88-156, readopts Section 376.303, Florida Statutes, which gives DER authority to adopt rules for local governments wishing to inspect the work performed by petroleum storage system specialty contractors. Incidental to the

regulation of contractors is government's ability to inspect a contractor's work to determine that the contractor is licensed and that the work is competently performed. Again, however, Section 17, Chapter 88-156, has no "natural and logical relationship" with Section 18, which allows for county regulation of how businesses, such as gasoline service stations, convenience stores, and petroleum marketers, operate long after the work of the contractor is done.

Unlike the foregoing provisions, Section 18, Chapter 88-156, did not purport to regulate contractors on a statewide basis. Nor did the legislation relate to any fair, common sense appraisal of what constitutes the "construction industry." Instead, in a classic case of "logrolling," this portion of the bill allowed Alachua County to impose requirements on owners and operators of petroleum storage systems which are more stringent or extensive than state law or regulation. Looking at Chapter 17-61, Florida Administrative Code, we can see examples of the type of requirements that can be imposed by counties on petroleum storage system owners and operators under Section 18, Chapter 88-156:

--- System owners and operators must register their tanks with DER [Section 17-61.050(1)(a), Florida Administrative Code]

--- System owners and operators must notify DER when they convert their systems to motor fuel systems, when they abandon their systems, when they sell their systems, or when they retrofit (upgrade) their systems [Section 17-61.050(1)(b), Florida Administrative Code]

--- System owners and operators must report a discharge of motor fuels to DER [Section 17-61.050(1)(b.)4.-6., Florida Administrative Code]

--- Requirements are provided for the maintenance of out-of-service and abandoned systems by owners and operators [Section 17-61.050 (3)(b),(c), Florida Administrative Code]

--- Record keeping and contamination cleanup requirements are imposed on system owners and operators. The inventory requirements require that inventory measurements be made by the owner or operator for each day a system is used. [Section 17-61.050(4), Florida Administrative Code]

--- Requirements are imposed on system owners and operators relating to the type of leak detection system, overfill protection, tanks, integral piping, and monitoring equipment that they may use. [Sections 17-61.050(2),(4)(c)(5), and 17-61.060, Florida Administrative Code]

--- Requirements are imposed on system owners and operators regarding how and when they must retrofit their older systems. [Section 17-61.060(2)(c), Florida Administrative Code].

Turning to the Alachua County Tank Ordinance, Ordinance 87-10, additional provisions the County may enact under the challenged law which may impact system owners and operators include requirements that:

--- Alachua County officials may inspect records kept by system owners and operators relating to the operation of facilities. [Section 7 b.(1)(b), Ordinance 87-10]

--- Restrictions are placed on where an owner or operator may locate an underground storage system within Alachua County. [Section 8.c., Ordinance 87-10]

--- System owners and operators in Alachua County are required to obtain construction, operation, and closure permits and to pay a fee for same. [Section 9, Ordinance 87-10]

From a review of these aspects of the DER Stationary Tank Rule and from Alachua County's Ordinance which is authorized by Section 18, Chapter 88-156, it is clear that Section 18 does not relate to either the practice of contracting or the "construction industry." Rather, Section 18 relates to the extent which counties can regulate owners and operators of petroleum storage systems.

The County also argues that anything relating to construction is fair game for Chapter 88-156, because the word "construction" is in the title of the Act.[6] Initial Brief at 18. The County's next leap of faith is that regulation of "construction" under the Act includes not only the equipment which regulated contractors install, but also regulation of the members of the public who use the equipment. The County's argument conclusively illustrates how two distinct and separate subjects (contractors and the operation of petroleum storage system facilities) are contained in Chapter 88-156, rendering the law violative of Article III, Section 6 of the Florida Constitution. Taking the County's argument to its logical conclusion, it would presumably have no single subject concerns if Chapter 88-156 also did the following:

--- regulate where on his property a homeowner could locate a swimming pool installed by a residential pool/spa contractor

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[6] The County misconstrues the holding of Rouleau v. Avrach, 233 So. 2d 1 (Fla. 1970). This case merely restates the constitutional requirement that the subject of an act must be expressed in the title. The constitution does not allow the legislature to cure an act which is defective on single subject grounds by using a "catch all" title.

--- require that a hotel operator take regular chlorine samples of the hotel swimming pool, which was installed by a commercial pool/spa contractor

--- require that county buildings may not operate their air conditioners, installed by an air conditioning contractor, at a temperature below 72 degrees

Of course, the list of possible subjects under which Chapter 88-156 could have entertained under the County's argument is endless.

In several appellate decisions, the courts have relied on the "single subject" requirement to invalidate legislation. In Bunnell v. State, 453 So. 2d 808 (Fla. 1984), this Court considered the constitutionality of Chapter 82-150, Laws of Florida, against a single-subject challenge. Section 1 of Chapter 82-150 created the crime of obstruction by false information. Sections 2 and 3 of Chapter 82-150 related to the "sunset" of the Florida Council on Criminal Justice. This Court held "that the subject of section 1 has no cogent relationship with the subject of sections 2 and 3 and that the object of section 1 is separate and disassociated from the object of sections 2 and 3," and thus, that section 1 was unconstitutional. Id., at 809. Interestingly, the district court had accepted the State's argument that Chapter 82-150 dealt with one subject: the criminal justice system, State v. Bunnell, 447 So. 2d 228, 230-31 (Fla. 2nd DCA 1983), but this Court disagreed. See also, Williams v. State , 459 So. 2d at 319, 321 (Fla. 5th DCA 1984), app. dism., 458 So. 2d 274 (Fla. 1984) (general object of both subjects may be to improve criminal justice system, but law contains two different subjects or matters: a new crime and membership of Florida Criminal Justice Council).

Pilot Equipment Company, Inc., v. Miller, 470 So. 2d 40 (Fla. 1st DCA 1985), is also relevant. Pilot Equipment involved a single-subject challenge to the Water Quality Assurance Act of 1983 ("WQAA"), specifically Sections 57-59. The WQAA (which is also

the subject of Section 18, Chapter 88-156) provides a comprehensive plan for regulation of water quality. Sections 57-59 of the WQAA amended Chapter 212, Florida Statutes, the Florida Sales Tax Law, by providing for a "step up" procedure in the collection of sales tax.

On a Motion for Summary Judgment in the trial court, the State argued that Sections 57-59 were designed to raise revenue for the financing of trust funds established by the WQAA. In support, the state submitted a "Cash Flow Analysis" of the WQAA, which cited a "sales tax step-up" as a revenue source. The trial court held that the WQAA was a comprehensive act whose purpose was to preserve clean water. Trust funds were found to be a key ingredient in furthering the purpose of the WQAA, and Sections 57-59 were found to be a source of revenue for these funds. The trial court thus held Sections 57-59 constitutional.

On appeal, the district court found that the unsworn "Cash Flow Analysis" could not form the basis of a Summary Judgment and that the "Cash Flow Analysis" did not cite Sections 57-59 as a revenue source for funds established by the WQAA. The district court held as follows:

> Examining Chapter 83-310 [the WQAA] facially, we find there is no logical or factual connection between the regulation of water quality and amendment of the state's sales tax collection law. Sections 57-59 are not remotely germane to the purposes or objectives found in the remainder of Chapter 83-310. The amendments disclose no facial or intrinsic motive or purpose relating to funding of the state water pollution control trust funds. Furthermore, the remainder of the statute offers no explanation of the fiscal significance of these sections in relation to activities mandated by its other provisions. Cf., Rushton v. State, 75 Fla. 422, 78 So. 345 (Fla. 1918) (statute regulating militia included provision for militia's payment). The Act says absolutely nothing about how the revenue generated by amending Chapter 212 is to be spent. The subject dealt with in Sections 57-59 is entirely

> outside of the legitimate scope of Chapter 83-310. "There is nothing in common between the two." Colonial Investment Co. v. Nolan, 100 Fla. 1349, 131 So. 178, 181 (Fla. 1930).

Pilot Equipment, 470 So. 2d at 42 (original in italics.)

Although the district court did not directly rule on the constitutionality of Sections 57-59 of the Act, it held that extrinsic evidence demonstrating that Sections 57-59 were a funding source for the WQAA would be required to demonstrate that Sections 57-59 were constitutional. Id., at 43. But for purposes of this case, it is important to note that the district court pointed out the duality of subjects between the WQAA and sales tax collection.

In Kass v. Lewin, 104 So.2d 572 (Fla. 1958), this Court held invalid a statute in which one section prohibited the recording of conveyances, leases, mortgages, or agreements relating to certain lands with unrecorded plats and another section required certain lands to be platted. The court, holding the statute unconstitutional, found as follows:

> While such instruments [conveyances, leases, mortgages and agreements] may as a practical matter utilize plats by referring to them in describing lands, the subject of recording of such instruments, their validity and use of a means of exercising the right to sell or sell real property is not either germane to or incidental to the subject of subdivision control, traffic planning or the other public purposes to be accomplished by requiring approval of plats by public bodies before they may be recorded.

104 So. 2d at 578.

In State ex rel. Flink v. Canova, 94 So. 2d 181 (Fla. 1957), this Court set limits on the permissible scope of a professional licensing statute under the "single subject" requirement. In this case, Flink challenged the Florida Pharmacy Act, Chapter 28150, Acts of Florida 1953, arguing that this law violated the "single subject" requirement.

Flink claimed that the Pharmacy Act dealt with two subjects: pharmacy and drug stores. This Court disagreed, finding that the Pharmacy Act only dealt with the regulation of drug store sales of medicines, but only to the extent these medicines were prepared by in-store pharmacists. This Court concluded that

> we do not see how the practice of pharmacy could be adequately regulated without regulation of the sales of the work product of pharmacists and regulation of the places where such work is performed and the work product is sold.

94 So.2d at 186.

Of critical importance is that this Court also found that had the Pharmacy Act attempted to regulate the sale of medicines not prepared by pharmacists in retail drug stores, "we believe the title and Act may well have been violative of the Constitution because of duplicity." 94 So. 2d at 185.

Putting Canova and the instant case side-by-side, two conclusions can be drawn. First, since the purpose of Chapter 489, Florida Statutes, is to protect the public against unqualified contractors, Representative Martin's Amendment to Section 376.317, Florida Statutes, in no way "make[s] effective or promote[s] the objects and purposes of the legislation," i.e., protecting the public against dishonest or incompetent contractors. Second, Representative Martin's Amendment far exceeds the boundaries set by Canova. It goes far beyond protecting petroleum storage system owners and the public against incompetent contractors; it allows Alachua County to intrude in many aspects of how a petroleum wholesale or retail business may be operated.

Cases cited by Alachua County and other cases which upheld statutes against a single-subject challenge are readily distinguishable from the instant case. In Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), this Court considered the Tort

Reform and Insurance Act. Challengers of the law argued that the Act contained multiple subjects: insurance regulation, tort reform, and broad reforms in civil damage litigation. Id., at 1085. This Court disagreed, adopting the trial court's finding that the tort system and liability insurance have grown together and that "[l]egal scholars have long commented on the relationship between the two."[7] Id., at 1086. See also, In re Advisory Opinion to the Governor, 509 So. 2d 292, 313 (Fla. 1987) (all provisions of services tax law have a logical and natural connection with taxation of services); Chenoweth v. Kemp, 396 So. 2d 1122, 1124 (Fla. 1981) (medical malpractice and insurance provisions relate to tort litigation and insurance reform which have a natural or logical connection.); and State v. Lee, 356 So. 2d 276, 282-83 (Fla. 1978) (Insurance and Tort Reform Act of 1977 encompasses single subject of automobile negligence and automobile insurance under umbrella of tort litigation relating to automobile accidents).

In other cases, this Court upheld acts where a common sense analysis indicated a direct relationship between the subject of the law and the challenged provisions. For example, in Santos v. State, 380 So. 2d 1284 (Fla. 1980), this Court found a direct relationship between a law regulating traffic control and the subject of driving under the influence. In Board of Public Instruction v. Doran, 224 So. 2d 693 (Fla. 1969), this Court found a direct relationship between a law providing for public meetings and provisions of the law providing for criminal sanctions and injunctive relief against

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[7] Smith, a 4-3 decision, represents the outer boundaries for laws which are permissible under the single subject requirement. In dissent, Justice Ehrlich found that the challenged act had one object, to increase the affordability and availability of liability insurance, but at least four subjects. 507 So. 2d at 1097. As Justice Adkins, also in dissent, asked "WHERE WILL IT END?" Id., at 1099. But even if one examines the objects of Chapter 88-156, there are at least two: protection of the public against incompetent and dishonest contractors and protection of the State's natural resources.

violators of the public meetings law. See also, State v. McDonald, 357 So. 2d 405 (Fla. 1978) (traffic infraction procedures statute may encompass penalties for failure to sign traffic citation).

Common sense indicates the almost self-evident finding of a single subject in Santos, Doran, and McDonald. There is an obvious and direct relationship between a substantive law and penalties for its violation. But, it is equally self-evident that a law regulating the licensing and disciplining of contractors is wholly unrelated to a law which allows certain counties to regulate the operation of petroleum storage system facilities.

As previously noted, FPMA does not dispute the fact that included with the provisions regulating of contractors in Chapter 88-156, Laws of Florida, were provisions relating to pollutant storage system specialty contractors, who are under the regulatory jurisdiction of DPR. These contractors install, remove and test petroleum storage systems. Nor does FPMA dispute that Chapter 88-156 allows DER (or local governments under contract with DER) to inspect the work done by these contractors. Clearly, these activities fall within the ambit of the state's regulation of all professional contractors, the subject of Chapter 489, Florida Statutes, and these aspects of the law may be permissible under Canova, as necessary to assure adequate regulation of contractors.

But to the extent the County attempts to argue that Chapter 88-156, encompasses "the regulation of the products" provided by contractors[8], Section 1 of Chapter 88-156, codified at Section 489.101, Florida Statutes, states that the purpose

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[8] Assuming arguendo that the products supplied by contractors are directly related to the regulation of contractors, the use of such products by the non-contracting public are typically not directly related to the practice of contracting.

of the Chapter 489 is to protect the public against "incompetent and dishonest contractors" and the goods and services which these incompetent, dishonest contractors may provide. Nowhere in Chapter 489 (other than Section 18, Chapter 88-156) has the legislature ever attempted to regulate the works (e.g., swimming pools) which contractors provide, nor the ultimate users of the works of contractors.

A comparison of the statutes upheld and stricken in a "single subject" challenge with Section 18, Chapter 88-156, leads to the common sense conclusion that Chapter 88-156 has at least two subjects: regulation of contractors and regulation of the operation of petroleum storage system facilities. Under the test set forth in Smith, the provisions concerning the latter do not "promote the objects and purposes" of protecting the public against dishonest or incompetent contractors. Section 18 of Chapter 88-156, therefore violates the "single subject" requirement of Article III, Section 6 of the Florida Constitution.

II. SECTION 18, CHAPTER 88-156, LAWS OF FLORIDA, IS A SPECIAL OR LOCAL LAW WHICH WAS PASSED WITHOUT REQUIRED NOTICE IN VIOLATION OF ARTICLE III, SECTION 10 OF THE FLORIDA CONSTITUTION.

The trial court, in declaring Section 18, Chapter 88-156, Laws of Florida, a special or local law passed without the required notice found as follows:

> 7. Section 18 of Chapter 88-156, Laws of Florida, creates a classification applicable only to Alachua County. In addition, other counties cannot be affected in the future by the classification created by Section 18 of Chapter 88-156, Laws of Florida.

(R. 133).

* * *

> 9. Section 18 of Chapter 88-156, Laws of Florida, would allow Alachua County Ordinance 87-10 to become effective without approval by the Department of Environmental Regulation. No evidence was presented at trial nor can the Court determine any reasonable basis, as to why Alachua County should be classified differently from other counties for purposes of the classification scheme in Section 18, Chapter 88-156, Laws of FLorida.

(R. 134).

The district court affirmed, holding as follows:

> Section 18, Chapter 88-156 is clearly a special law because it affects only Alachua County and there is no possibility that it will ever affect or apply to any other county since no other county meets the statutory criteria nor can any other county meet it in the future. A special law passed under the guise of a general law remains a special law. Anderson v. Board of Public Instruction for Hillsborough County, 136 So. 334 (Fla. 1931). If it is not enacted in accordance with the constitutional requirements, it is unconstitutional. The trial court correctly found that Section 18 of Chapter 88-156 is a local law, notice of which was not published in accordance with the general law and is therefore in violation of Article III, Section 10.

Alachua County, Florida v. Florida Petroleum Marketers Ass'n, 14 FLW 2777 (Fla. 1st DCA Dec. 4, 1989).

Article III, Section 10, of the Florida Constitution provides as follows:

> Special Laws. - No special law shall be passed unless notice of intent to seek enactment thereof has been published in the manner provided by general law. . . .

A special law is defined by Article X, Section 12(g), of the Florida Constitution as a special or local law. The procedure for providing publication of notice of intent to seek enactment of special or local laws is found in Section 11.02, Florida Statutes (1987). Chapter 88-156, Laws of Florida, was not published in accordance with Section 11.02, Florida Statutes (1987). (Joint Exhibit 1)[9]. Therefore, if Chapter 88-156, is a special or local law, it is invalid.

Alachua County argues that the district court's determination "that Chapter 88-156 can never apply to any counties but Broward, Dade, and Alachua is not determinative" of whether the challenged law violates Article III, Section 10 of the Florida Constitution. See Initial Brief at 20. This argument misstates the district court's determination. The district court determined that Section 18, Chapter 88-156 can only apply to Alachua County. The question next arises as to whether this finding is determinative.

Alachua County, in its Amended Initial Brief filed with the district court, argued that Section 18, Chapter 88-156 was a general law because it created a classification "based upon proper distinctions and differences that inhere in or are peculiar or

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[9] Section 11.02, Florida Statutes (1987), requires that notice of special or local legislation be published in a newspaper in the affected county or counties at least 30 days prior to the introduction of the proposed law in the legislature.

appropriate to the class." Amended Initial Brief to First District Court of Appeal, at 21-29, citing Department of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So. 2d 879, 881 (Fla. 1983). The trial court specifically found that Section 18, Chapter 88-156 did not create a valid classification scheme. (R. 134). The County disagreed, and fully briefed this point to the district court. It must be therefore presumed that this point was considered by the district court in its holding that the Act was a special or local law. See Shayne v. Saunders, 129 Fla. 355, 176 So. 495 (1937). If Alachua County wanted further written explication of the district court's rationale, the appropriate remedy would have been for it to file a motion under Rule 9.330, Florida Rules of Appellate Procedure. The County filed no such motion.

Furthermore, there is ample support in this Court's decisions for the proposition that a classification which creates a conclusively closed class, as did Section 18, Chapter 88-156, violates Article III, Section 10 of the Florida Constitution. FPMA does not argue that because only Alachua County meets the created classification that the challenged law is unconstitutional. FPMA instead maintains that because only Alachua County can ever fall into the created classification that it is conclusively established that the classification is unreasonable and that the law is a special or local law. Moreover, as stated above, FPMA also argued before both courts below that the classification scheme established by the Legislature was unreasonable.

The instant case is analogous to Walker v. Pendarvis, 132 So. 2d 186 (Fla. 1961). In Walker, plaintiffs challenged Chapter 22604, Laws of Florida, 1945, and Chapter 28450, Laws of Florida, 1953, as laws which were purportedly enacted as general laws, but were actually special or local laws enacted without notice, in violation

of the Florida Constitution. The two challenged acts contained population restrictions as follows:

Chapter 22604, Laws of Florida, 1945:

> Section 1. That from and after the passage of this Act, it shall be lawful for each Constable in all the counties in this State which now have a population of not less than 260,000 according to the last Federal Census, to employ, appoint and deputize one deputy constable as a law enforcement officer to serve under the supervision, direction and control of the constable so making the appointment.

* * *

Chapter 28450, Laws of Florida, 1953:

> Section 1. That from and after the passage of this act, it shall be lawful for each constable in all the counties in this state which now have a population of not less than three hundred thousand (300,000) according to the last state or federal census, to employ, appoint and deputize not more than two deputy constables as law enforcement officers to serve under the supervision, direction and control of the constable so making the appointment.

(Emphasis supplied.) This Court held that the law is unconstitutional as a special act because the law created a classification applicable only to Duval County and that no other county could meet the classification (because of the use of the word "now" in the statutes).

Similarly, in Housing Authority of City of St. Petersburg v. City of St. Petersburg, 287 So. 2d 307 (Fla. 1973), this Court considered the constitutionality of Chapters 63-557 and 72-270, Laws of Florida. These acts amended prior laws which created municipal housing authorities authorized to transact business upon resolution by the respective municipality. The challenged laws, applicable only to Pinellas County, provided that housing authorities within Pinellas County could act only with majority

approval in a referendum. In holding the challenged laws unconstitutional under Article III, Section 10 of the Florida Constitution, this Court stated:

> [The laws] restrict, in Pinellas County only, the powers granted housing authorities through the entire state, thereby creating in Pinellas County housing authorities with powers different from all others. The people of Pinellas County were afforded no notice of the intent to enact these restrictions on housing authorities located within their county only.
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> * * *
>
> It makes no difference that said laws were purportedly enacted under the guise of being general laws.

287 So. 2d at 311. See also, Baldwin v. Coleman, 148 Fla. 155, 3 So. 2d 802 (1941) (court will look at purpose and effect of law to determine whether it is a local or special act, regardless of whether locality intended to be affected is specifically named or not).

Recently, this Court considered the issue of special/local laws in Department of Business Regulation v. Classic Mile, Inc., 14 FLW 183 (Fla. Apr. 6,1989). This Court reviewed Section 13, Chapter 87-38, Laws of Florida, which created Section 550.355(2), Florida Statutes (1987), to allow off-track betting, presumably, in certain counties. Although no county was specifically mentioned in the law, only counties meeting the following requirements could qualify for off-track betting:

--- As of January 1, 1987, the state must have issued two quarter horse racing permits in the county.

--- Neither permit may have been utilized for racing prior to January 1, 1987.

--- Only one jai-alai permit may have been issued in the county.

The First District Court held as follows:

> The wording of the statute does not facially create a special law. However, in their briefs and argument before the Court, the parties have conceded that the wording of the statute is the equivalent of a specification of Marion County alone by name since, due to the particular requirements and the temporal limitation imposed by the state, only Marion County will ever fall within its bounds. Use of that descriptive technique for the sole purpose of specifically identifying Marion County amounts to the creation of a completely "closed class" under the guise of creating a valid classification for the enactment of a general law.
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> * * *
>
> Therefore, under the circumstances as conceded by the parties, Section 550.355(2) is a special act. The fact that it was not enacted pursuant to the requirement of Article III, Section 10, that a special law not be passed without published notice or the provision for a referendum and approval by vote of the electors of the area affected, renders it unconstitutional.

Classic Mile v. Department of Business Regulation, 536 So.2d 1048, 1049 (Fla. 1st DCA 1988).

On appeal, this Court affirmed, holding as follows:

> Section 550.355(2) is clearly a special law because it applies only to Marion County and there is no possibility that it will ever apply to any other count. See Anderson. A special law passed under the guise of a general law remains a special law. Article III, Section 10 Florida Constitution, prohibits the enactment of any special law unless the legislature publishes notice of its intent to enact the law or unless the law is conditioned to become effective only upon a vote of the electors of the area affected. Because Section 550.355(2) is a special law passed in contravention of the requirements of Article III, Section 10, we declare the statute unconstitutional.

Classic Mile, 14 FLW at 184. This Court then further found that Section 550.355(2) could not be a valid general law because it fails to create a reasonable classification scheme as required by Article III, Section 11(b), of the Florida Constitution.

The instant case is strikingly similar. Section 18, Chapter 88-156, Laws of Florida, creates a completely closed class limited to Alachua County. As the trial court found, and the district court concurred, only Alachua County (other than Dade and Broward County which had already been "grandfathered" from the preemption) enacted a local tank ordinance and filed it with the Secretary of State prior to January 1, 1987. No other county meets the statutory criteria, nor can any county meet it in the future.

Nonetheless, as the findings of the trial court indicate, Section 18, Chapter 88-156 also creates an unreasonable classification scheme, in addition to creating a closed class. To illustrate this point, a review of legislative history is helpful. Prior to the 1984 Legislative Session, counties could regulate petroleum storage systems in any reasonable manner. Dade County and Broward County each passed petroleum storage system ordinances, which were effective in November 1983 and May 1984, respectively. (Joint Exhibit 1). After Dade County's and Broward County's ordinances were effective, the Legislature, by passing Chapter 84-338, Laws of Florida, preempted local petroleum storage system ordinances. See Section 376.317(2), Florida Statutes (1985). The Legislature "grandfathered" the existing Dade and Broward County ordinances from the preemption. See Section 376.317(3)(a), Florida Statutes (1985). The Legislature also created a procedure by which the remaining 65 counties could by-pass the preemption.[10] See Section 376.317(3)(b), Florida Statutes (1985).

Section 18, Chapter 88-156, Laws of Florida, did not affect the criteria by which DER would review local ordinances. Instead, as found by the courts below, it

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[10] This procedure, whereby DER reviews county ordinances, was implicitly upheld in Alachua County, Florida v. Department of Environmental Regulation, 10 FALR 5258 (Final Order, October 2, 1987), aff'd, 528 So.2d 1184 (Fla. 1st DCA 1988).

attempted to exempt Alachua County alone from the state preemption, and no other county could ever be "grandfathered" from the preemption in the future.

The County, on pages 21-22 of its Initial Brief, claims that Section 18 of Chapter 88-156, creates a classification "based upon proper distinctions and differences that inhere in or are peculiar or appropriate to the class." In support of its argument, the County argues that Section 18 of Chapter 88-156, and Chapter 88-331, taken together, provide a reasonable three part classification of counties with respect to the adoption of ordinances regulating underground storage tanks.

The County's argument must fail for two reasons. First, FPMA has challenged the classification scheme of Section 18, Chapter 88-156, whose validity cannot depend on another Act of the legislature. Section 18, Chapter 88-156, standing alone, is a special or local law because it applies now and forever only to Alachua County, and this classification has no reasonable basis. Second, even if one examines Section 376.317, Florida Statutes, as it existed before the 1988 Legislative Session, and as amended by both Chapters 88-156 and 88-331, Florida Statutes, it is clear that Section 18, Chapter 88-156, violates both Article III, Section 10 and Article III, Section 11(b) of the Florida Constitution.

The alleged three-part classification of counties does not, as the County argues on page 22 of its Initial Brief, rest "on the fact that various counties are at different levels in the adoption process of local ordinances regulating underground storage tanks and that such pre-existing efforts must be recognized." The three categories of counties, according to Alachua County, are: (Category One) those counties which adopted ordinances and filed them with the Secretary of State prior to July 1, 1987; (Category Two) those counties which sought DER approval of their ordinances before

January 1, 1988; and (Category Three) those counties which had not yet filed an application with DER. These categories have no basis in fact or reason.

Category One would presumably include the counties of Dade, Broward, and Alachua.[11] Category Three would consist of the 64 other counties. However, Category Two would consist of only Alachua County. (Plaintiffs' Exhibit 10). In other words, Alachua County would fall into two mutually exclusive categories: its Ordinance would be both a) grandfathered from preemption, and therefore, not subject to review by DER and b) preempted, but subject to less stringent review criteria by DER than the 64 other counties who might pass an ordinance in the future.

Alachua County argues that there are two additional reasonable bases for the classification. First, Alachua County argues that Section 18 of Chapter 88-156, Laws of Florida, was "nothing more than a grandfather provision which expanded the prior grandfather provisions of the law to include Alachua County and any other county which may have adopted a local ordinance prior to July 1, 1987." Initial Brief at 31. The County further argues that "the district court's holding would effectively prohibit the Legislature from ever providing for the grandfathering of an existing ordinance, since such grandfathering provision would necessarily affect less than the whole."

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[11] Possibly as a result of the end-of-session rush to enact this legislation, Section 18, Chapter 88-156 had the (presumably) unintended result of eliminating the "grandfather" for Dade County's Ordinance and rendering Dade County's Ordinance preempted. This is because the statutory language was changed from ordinances which were "legally adopted" and "in force" to ordinances filed with the Secretary of State. However, Dade County does not file its ordinances with the Secretary of State. Charter of Metropolitan Dade County, § 1.02(f). See also, Article VIII, Section 6, Fla. Const.; State v. Metropolitan Dade County Water & Sewer Board, 343 So. 2d 699 (Fla. 3d DCA 1979), cert. denied, 355 So. 2d 880 (Fla. 1978). Therefore, the amended "grandfather" provision would not include Dade County. The Legislature cured this defect by the passage of House Bill 430 (1989).

To dispense of two points quickly, first, the "grandfather" expansion in Section 18, Chapter 88-156 affected only Alachua County and second, a "grandfather" provision will always affect less than the whole. But for the "grandfather" to be reasonably related to the subject of the law, something must occur to confer special rights on the class to be "grandfathered."[12] Otherwise, the "grandfather" clause is unreasonable.

Section 18 of Chapter 88-156, and Chapter 88-331, are not "grandfathers" of the same degree. As stated above, Chapter 84-338 preempted local storage system ordinances, but "grandfathered" the existing Dade County and Broward County Ordinances. All the other 65 counties, including Alachua, would have to submit their ordinances to DER for review, lest they be preempted.

By the passage of Chapter 88-331, the Legislature did not change the preemption of local storage system ordinances. Instead, the Legislature added an additional criterium for any of the 65 counties seeking to avoid preemption through the DER ordinance review process. This criterium was that a county would have to demonstrate to DER that it had effectively administered the DER Stationary Tank Rule for two years. Section 376.317(3), Florida Statutes (Supp. 1988). Nonetheless, the Legislature did grant a "grandfather" to Alachua County from the additional review criterium in Chapter 88-331 because the County had its Ordinance pending before DER at the time the new criterium was added. This was a reasonable basis for this

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[12] A "grandfather" provision is essentially a recognition of vested rights. In a land use context, it has been stated that "vested rights [depend] upon whether the owner acquired real property rights which cannot be taken away by governmental regulation." Heeter, Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes, 1971 Urb. L. Ann. 63, 64-5. The doctrine has its roots in the Fourteenth Amendment to the federal constitution, which protects against property deprivations. See Church v. Church, 296 N.Y.S. 2d 716 (1968).

"grandfather." But, contrary to the County's argument, Section 18, Chapter 88-156 did not extend the "grandfather" from the more stringent DER review criteria found in Chapter 88-331. Instead, the "grandfather" in Section 18 related to the "grandfather" from preemption of local storage tank ordinances.

Nor can Section 18, Chapter 88-156 be considered an extension of the "grandfather" in Chapter 84-338 (Section 376.317(3)(a), Florida Statutes (1985)). The "grandfather" in Chapter 84-338 had a reasonable basis: Dade County and Broward County had pre-existing ordinances (analogous to a property right) which, presumably out of fairness, were appropriately vested from preemption. But there was no reasonable basis for the Legislature to create a "grandfather" for Alachua County in Section 18, Chapter 88-156 (nor for any other County that might have fit the "Category Two" classification). Nothing had occurred which would have given rise to special or vested rights for Alachua County in relation to the preemption in Section 376.317(2), Florida Statutes (1987). So while Alachua County acquired special rights as to how DER would review its Ordinance (by submitting its Ordinance to DER before the Legislature imposed a new, more stringent criterium for DER review), it acquired no special rights justifying absolute "grandfathering" from the preemption/DER review process. Since Alachua County has no special rights as to the State's preemption of local storage tank regulation, there is no reasonable basis for the classification scheme in Section 18, Chapter 88-156.

In searching for the reasonable basis behind the so-called expansion of the "grandfather," the County next argues that Section 18, Chapter 88-156, is the Legislature's recognition of the County's "pre-existing efforts" to enact a storage tank ordinance. In other words, the County argues that because its Ordinance was enacted

and was being reviewed by DER, there is a reasonable basis for the Legislature to "grandfather" the Ordinance from preemption. Of course, if this were the case, the Legislature would be obligated to exempt from the preemption any county with an application before DER or any county that adopts a storage system ordinance. In this circumstance, any county filing a petition for approval of a storage tank ordinance would be "grandfathered" from DER review and the ordinance would immediately become effective. This would render the preemption meaningless and would divest DER of its authority to review and approve local storage tank ordinances. Yet, it is clear that the Legislature intended to keep the preemption and DER review process alive.

Another presumably reasonable basis for the classification scheme is found in an argument raised here for the first time by the County. This argument concerns the enactment of Section 5 of Chapter 87-374, Laws of Florida. This Section clarified Section 376.317(3)(b), Florida Statutes (1987) by providing that DER's review of petitions for approval of county storage system ordinances would be governed by Section 120.60, Florida Statutes. Previously, Section 376.317(3)(b), Florida Statutes, was silent as to DER's time limit to review a petition by a county seeking approval of a storage system ordinance. Section 120.60, Florida Statutes, requires administrative agencies to act within certain timeframes in processing applications and in requesting additional information from applicants. The essence of the County's argument, found on pages 22-23 of its Initial Brief, is that because this "significant change" became effective July 1, 1987, that it would be reasonable to exclude from the DER approval process any county which had adopted a storage tank ordinance prior to July 1, 1987.

The County's argument makes no sense. In Section 5 of Chapter 87-374, the Legislature directed DER to process county storage tank petitions in a timely fashion,

i.e., within 90 days of a complete petition, and to request additional information from counties within 30 days of receipt of a petition.[13] These directives inure to the benefit of a county seeking DER's review of its storage tank ordinance. This change in the law does not create any reasonable basis which would cause the Legislature in 1988 to "grandfather" counties completely from the DER review process. Any county in the DER review process could only benefit from Chapter 87-374, by having its application reviewed more quickly.

There is no record evidence of a reasonable basis for clarifying Alachua County differently from other counties. If the Legislature had a good reason in mind for classifying Alachua County differently from other counties for purposes of regulation, then a permissible classification should have been designated on the face of the statute. See, Classic Mile, 14 FLW at 184; Metropolitan Dade County v. Golden Nuggett Group, 448 So. 2d 575 (Fla. 3d DCA 1984), aff'd, 464 So. 2d 535 (Fla. 1985). Assuming a permissible classification, the legislation would also have to allow counties similarly situated to Alachua County to become subject to the classification. But no such reasonable, permissible classification exists in this case.

As the record reveals no reasonable basis for the classification of Alachua County differently from the 64 other counties subject to the preemption in Section 376.317(2), Florida Statutes (1987), Classic Mile, again proves illustrative. After finding that the statute was an invalid special or local law, the district court in Classic Mile

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[13] The amendment to Section 376.317(3), Florida Statutes, provided as follows:

> The department shall approve or deny a request by a county for approval of an ordinance establishing such a program according to the procedures and time limits of s. 120.60.

further held that Section 550.355(2), Florida Statutes, was also not constitutionally sound as a general law under Article III, Section 11(b) of the Florida Constitution. 536 So.2d at 1049-50. The district court specifically found that "the parties have not shown any reasonable relationship between the express class characteristics enumerated in the statute and the purpose of the legislation. 536 So.2d at 1049 (emphasis supplied).

On appeal, this Court agreed, finding that the classification scheme in the statute distinguished between counties on the basis of whether a county had been issued two quarter horse racing permits by January 1, 1987, neither of which had been used as of January 1, 1987, and only one jai-alai permit. The court found no reasonable relationship in the record between the classification scheme and the subject of the statute, off-track betting. 14 FLW at 184.

In this case, there was simply no reason for the Legislature, in 1988, to add Alachua County to Dade and Broward Counties as counties grandfathered from the State's preemption of local storage tank ordinances[14]. The statutory scheme in Section 18, Chapter 88-156, Laws of Florida, is meant only to describe Alachua County, not to set up a meaningful classification scheme.

CONCLUSION

This Court should affirm the decision of the First District Court of Appeal, which declared Section 18, Chapter 88-156, Laws of Florida, unconstitutional.

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[14] Since there is no reasonable basis for the classification chosen by the Legislature in Section 18, Chapter 88-156, the court may also consider extrinsic evidence of legislative intent to determine whether the Legislature attempted to create a special or local act by bypassing notice and referendum requirements. Department of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So. 2d 879, 882 (Fla. 1983). In this case, the Court should find that the sole basis for Section 18, Chapter 88-156, was Representative Martin's desire to "grandfather" Alachua County's Ordinance and to avoid Alachua County's imminent administrative proceeding with FPMA.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been provided to ARTHUR C. WALLBERG, ESQUIRE, ASSISTANT ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL, Suite 1501, The Capitol, Tallahassee, Florida 32399-1050; GREGORY T. STEWART, ESQ., and ARTHUR R. WIEDINGER, ESQ., NABORS, GIBLIN, & NICKERSON, P.A., 315 South Calhoun Street, Barnett Bank Building, Suite 800, Tallahassee, Florida 32301; and THOMAS BUSTIN, ESQUIRE, ALACHUA COUNTY ATTORNEY, Post Office Drawer CC, Gainesville, Florida 32602, by United States Mail, this 12th day of February, 1990.

J. Michael Huey

FPMA.AB2.rdf.ksm