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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PEOPLE AGAINST TAX REVENUE MISMANAGEMENT, INC., DANNY MCDANIEL, JOEL DALAFAVE, and CHARLES SMITH,

Appellants,

vs.

COUNTY OF LEON, FLORIDA,

Appellee.

CASE NO. 77,572

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA.

INITIAL BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

PEOPLE AGAINST TAX REVENUE MISMANAGEMENT, INC., DANNY McDANIEL, JOEL DALAFAVE, and CHARLES SMITH, were the defendants below and are the appellants here. They will be referred to in this brief as the appellants. The COUNTY OF LEON, which was the plaintiff below, will be referred to as Leon County.

References to excerpts from the record below, which appear here in the form of an appendix, are by tab and document page number, as for example (D 17).

The appellants shall be filing a motion for ancillary relief and expect to do so within ten days of the filing of this brief.

STATEMENT OF THE CASE AND FACTS

The case below commenced with the January 9, 1991 filing in the Circuit Court of the Second Judicial Circuit of a complaint for validation of a 60 million dollar bond issue for the construction of a new Leon County jail and sheriff's offices. The plaintiff was the County of Leon, Florida. In addition to the standard language naming the State of Florida and the taxpayers, property owners, and citizens, as defendants, the complaint specifically named People Against Tax Revenue Mismanagement, Inc., Danny McDaniel, Joel Dalafave, and Charles Smith as defendants (A; exhibits omitted).

The case was assigned to Judge N. Sanders Sauls, who, on January 10, 1991, signed an order to show cause why the proposed bonds should not be issued (B).

The individually named defendants (the appellants here) were served, and on January 29, 1991, filed their answer to the complaint (C).

On February 1, 1991, Leon County filed a notice and affidavit of publication of the notice to the public (D; composite, with exhibits).

On February 8, 1991, at the hearing on the order to show cause, the appellants filed a motion for disqualification (E; exhibits omitted), a written response to the order to show cause (F), a provisional motion for continuance or stay (G), and a motion

for consolidation of the prior election challenge case with the bond validation (H). All were denied by the court at the outset of the hearing.

The court then heard the testimony of: Gayle Nelson, a Leon County Commissioner; Ion Sancho, the Leon County Supervisor of Elections; Raymond Samuel Hurst, the Leon County Finance Office; John Wilson, Leon County's bond advisor; Catherine A. Sportelli, a Leon County employee; and Charles F. Cuthbertson, an employee of the City of Tallahassee, all as Leon County's witnesses; and Danny McDaniel, as a witness for the appellants. The testimony of Ion Sancho and Charles Cuthbertson has been transcribed (I).

Among the various documents introduced into evidence were exhibits by Leon County (J; Leon County's list of exhibits) and exhibits by the defendants. Copies of the appellants' initial complaint in PATRM, et. al. v. Leon County Canvassing Board, Case No. 89-3673, (K; with attachments) (Leon County exhibits) and of the appellants' exhibits (L; composite) are provided here.

At the end of the February 8 hearing, the trial judge signed Leon County's final judgment in the form as proposed (M). On February 13, the trial judge executed an order denying disqualification and an affidavit of qualification under Section 38.02 (N; composite).

On February 18, the appellants filed a motion for reconsideration and renewed motion for disqualification (O; with exhibits) and an accompanying memorandum of law (P).

On February 18, the appellants filed a petition for writ of prohibition to this court, styled as People Against Tax Revenue Mismanagement, Inc., et. al. v. N. Sanders Sauls, et. al., Case No. 77,411.

On February 19, counsel for Leon County proposed to the trial judge that he enter an amended order denying disqualification and an amended affidavit (Q; composite). On February 21, the appellants' counsel responded by letter (R). The trial judge had, in the interim, already executed an amended order and affidavit (S).

On February 22 this court denied the appellants' petition for writ of prohibition.

Notice of appeal to this court was timely filed on March 7, 1991.

SUMMARY OF ARGUMENT

(I)

The show cause procedure in this case is defective on two grounds: first, it failed to afford the appellants due process in that the summary nature of show cause bond validation procedures does not allow effective development and presentation of substantial issues of fact; and second, the appellants' efforts to invoke the statutory election contest remedy were, in the unusual circumstances of this case, still timely and the Leon County Canvassing Board should have been joined as the proper party defendant and an election contest established.

(II)

Leon County lacks standing because it has no legitimate interest in the merits of the controversy over the validity of the sales tax election and is not the real party in interest. Only the public has standing to litigate the merits of the validity of the sales tax election.

(III)

Leon County did not provide a constitutionally adequate notice to the public. The notice failed to meet the requirements of due process in that it lacked any reference to the ongoing and live issue of the validity of the sales tax election.

(IV)

The appellants made a sufficient showing in response to the order to show cause. The appellants' claims against the sales tax election are well-supported by documentation, testimony, and a reading of the sales tax ballot language.

(V)

Judge Sauls improperly passed upon the facts of the appellants' motion for disqualification. The motion otherwise presents valid grounds for disqualification due to Judge Sauls' ties to county attorney Pennington and his firm, and Judge Sauls' commercial real estate holdings. Due to their official and administrative interest in the new jail, the judges of the Second Circuit are disqualified from presiding over the validation of bonds for that jail.

ARGUMENT

ISSUE I

WHETHER SUBSTANTIAL UNRESOLVED ISSUES OF FACT AS TO THE VALIDITY OF THE SEPTEMBER 1989 LEON COUNTY LOCAL OPTION SALES TAX REFERENDUM SHOULD HAVE BEEN DISPOSED OF THROUGH SUMMARY BOND VALIDATION PROCEDURES OR THROUGH THE ELECTION CONTEST MECHANISM WITH THE PARTICIPATION OF THE LEON COUNTY CANVASSING BOARD AS THE PROPER PARTY DEFENDANT.

This extraordinary case arrives before the court as an appeal from a bond validation. But the essence of the controversy is something quite different: a long-running and still-unresolved dispute over the validity of the September 19, 1989, Leon County local option sales tax election, the revenue source on which Leon County proposes to issue bonds for a new jail and sheriff's offices. The show cause procedure in this case fails on two grounds: it did not fairly accomodate the substantial issues of fact at stake, nor did it engage the Leon County Canvassing Board as the party defendant.

It may be--indeed, it ought to be--a source of puzzlement and concern to this court that there was an outstanding question over the validity of the sales tax election when Leon County filed its complaint for the bond validation in January of 1991, more than a year after the election had taken place. Yet Leon County cannot deny that there are serious questions over the validity of the

sales tax election. Otherwise, Leon County cannot justify singling out three private individuals and their civic organization as named defendants in this bond validation. Why was such an unprecedented and extraordinary undertaking necessary?

There is a simple and disturbing reason: Leon County and the courts which have so far had jurisdiction over this controversy have declined to follow the clear terms of Florida's election contest remedy, notwithstanding the appellants' persistent efforts to resort to it. In consequence, there was and is great doubt over the validity of the September 1989 sales tax election. In order to advance its bond issue, Leon County joined the appellants as defendants to the bond validation proceeding so as to acquire against their most dogged critics a judgment upholding a tainted election.

By way of motion for ancillary relief, the appellants will address and seek relief from the irregularities which have made this controversy into a thorough and much-litigated jumble. But the issue here is what procedure should have been followed in the bond validation in order to lay to rest the outstanding doubts over the validity of the sales tax election. Was it proper for Leon County and the trial court to hear and determine the election issues through summary bond validation procedures? Or, as the appellants contend, should the Leon County Canvassing Board have been joined to the bond validation as the indispensable and proper

party defendant and the election issues resolved through ordinary civil procedures and the statutory mechanism of election contests?

The two forms of proceeding--summary bond validations and election contests--are radically different in nature and designed for different purposes. Bond validations are statutorily authorized to proceed by the summary device of an order to show cause. Sec. 75.05, Fla. Stat. (1989). Although by statute (Sec. 75.07, Fla. Stat. (1989)), a bond validation show cause hearing is not necessarily the trial or final hearing in the matter, that is the common practice. In this case, even before any evidence was heard, the trial judge rejected the appellants' objections and announced at the outset of the hearing that it was to be the trial and final hearing in the matter, notwithstanding the lack of any prior notice or order by the court establishing the show cause hearing on that basis.

In most instances, there is no substantial reason for challenge to summary hearing of objections to a bond validation. The objections to a bond issue which the substantive law on the subject contemplates are almost exclusively in the nature of legal argument over the powers of the governing body to issue the bonds. Extensive disputed issues of material fact are rarely encountered or even cognizeable in bond validations. How are such issues to be treated when they do arise?

The summary nature of show cause procedure does not and cannot fairly accommodate extensive factual issues. Summary treatment of

complex and substantial issues of fact is offensive to due process and invites serious judicial errors and abuses. See, e. g., Martin v. Dugger, 686 F.Supp. 1523 (S.D.Fla. 1988) (Summary disposition by Florida circuit court of mental competency claims by death row inmate held to have violated due process).

There is much about the procedures at the hearing below to criticize: the overbearing declaration of Leon County's counsel that the hearing would be on his terms, begining on Friday and continuing through the weekend if necessary for a decision (E 11); the lack of any notice of trial or final hearing from the court; the trial judge's determination against the appellants' objections and before even hearing any evidence that the show cause hearing was the final hearing on the matter; and the trial judge's ready embrace of Leon County's proposed final judgment at the close of hearing, a judgment which did not and could not properly take account of the evidence at hearing and the appellants' formal written response to the order to show cause (M).

But the most telling error was the use of a summary show cause hearing for disposition of wide-ranging factual issues without affording the appellants the opportunity for discovery and the winnowing-out, issue-defining, burden-shifting pre-trial devices which are rightly and necessarily available to litigants under the rules of civil procedure. As a result, the hearing on the bond validation fell outside the boundaries of due process.

What kind of case were the appellants expected to prepare and present at the show cause hearing? Call every possible witness, elicit all possible testimony, introduce every possible document, and litigate every possible fact and issue available to them? The appellants have acquired and analyzed literally hundreds of pages of internal City of Tallahassee and Leon County documents. Should those documents have all been introduced, explained by testimony, and argued by counsel? Should all of the dozens of individuals whose names appeared in the appellants' election contest complaint and its extensive attachments have been called to attend and testify?

And if the appellants--who were named as defendants by Leon County--had undertaken those extraordinary burdens and had brought everything possible forward at the show cause hearing, would it have produced a trial or a confusing filibuster? The integrity of an election is at issue, but through Leon County's manipulations, the appellants were afforded less due process than would have been available to them in a $200 security deposit dispute in county court.

Yet there is an even more serious irregularity which underlies the entire proceeding. The summary bond validation procedure compounded Leon County's prior deprivations of the appellants' fundamental voting rights in the sales tax election and their right of access to Florida's election contest remedy.

For Leon County, the purpose of the bond validation was to foreclose in summary fashion any possible future judicial inquiry into the validity of the September 1989 Leon County sales tax election. But the only proper course of action was to have afforded the appellants the election contest remedy which they have so long sought and which would provide the only procedurally correct method for determining the validity of the sales tax election.

Florida's election contest remedy appears at Sec. 102.168, Fla. Stat. (1989). Controlling decisions of this court have established that remedy as very broad in scope with the vital purpose of safeguarding the sanctity of the ballot and the integrity of the election process. Bolden v. Potter, 452 So.2d 564 (Fla. 1984); and Boardman v. Esteva, 323 So.2d 259 (Fla. 1975).

Ordinarily, when an election is held, the result certified, and the statutory time period of ten days passes without a contest to the election being filed, the election may be presumed valid against all but a few limited forms of attack. One exception appears to be that even after the period for an election contest has lapsed, referendum elections remain subject to scrutiny as to certain formal ballot language requirements under provisions of Florida law which are unique to that form of election. See Wadhams v. Board of County Commissioners of Sarasota County, 567 So.2d 414 (Fla. 1990). In addition, the remedy of quo warranto, however it may apply, is not abridged by the provision for election contests. Sec. 102.169, Fla. Stat. (1989). But neither referendum nor

candidate elections may be challenged on the broad grounds available under the election contest statute once its ten days' filing period has expired.

Under the election contest statute, the county canvassing board has an essential role. If the election is a candidate election, then the canvassing board and the opposing candidate or candidates must all be named as party defendants. If a referendum is contested, there are of course no opposing candidates and the canvassing board is, in the terms of the statute, "the proper party defendant." Sec. 102.168, Fla. Stat. (1989).

The canvassing board has the authority to concede an election as fraudulent or otherwise irregular, subject to judicial scrutiny against a bad faith or misinformed concession. State ex rel. Knott v. Crawford, 73 So. 584, 72 Fla. 232 (1916). Notably, the canvassing board is under an obligation to refrain from dilatory tactics. See Barber v. Moody, 229 So.2d 284 (Fla.1st DCA 1970).

Since the membership of the canvassing board is subject to disqualification under the supervision of the chief judge, there is a further guarantee of its neutrality and fairness in most election contests. Sec. 102.141, Fla. Stat. (1989). Under some circumstances, the three public officials whom the statute designates as the members of the canvassing board, the county supervisor of elections, the chairman of the board of county commissioners, and a county judge, can be disqualified and replaced by electors of the county.

In early October of 1989, the appellants timely filed an extensive and detailed contest of the sales tax election. The complaint was expressly stated to be pursuant to Sec. 102.168, Fla. Stat. (1989), the election contest statute. In accord with the terms of that statute, the appellants named the Leon County Canvassing Board as the sole party defendant.

Remarkably, in April of 1990, the Leon County Canvassing Board filed a motion to dismiss on the grounds that it was not the proper party defendant. Even more remarkably, that motion was granted by the trial judge to whom the election contest had been assigned. An appeal from that decision was made to the First DCA. The appeal was denied, as was a petition for writ of prohibition to the First DCA for purposes of judicial disqualification.

Yet, notwithstanding the extensive litigation over the Leon County sales tax election and the passage of more than a years' time, when Leon County filed its bond validation in January of 1991, it could not at all be confident that the sales tax election could survive judicial scrutiny. Since Leon County and the Leon County Canvassing Board had adamantly refused to allow the appellants recourse to the statutory election contest remedy, its ten day limitation period could not be invoked as a time bar against them or other potential challengers. Moreover, despite the extensive litigation over the sales tax election, no judgment had been entered on the merits of the election dispute itself.

Due to the unique posture of the controversy, the grounds which the appellants had raised against the September 1989 sales tax election thus remained open, outstanding, and unresolved more than a year after the votes had been counted and the result certified. Therefore, in its complaint for validation of the bonds, Leon County placed into issue the appellants' grounds of the election contest and named the appellants as defendants. In that form of proceeding, Leon County was armed with an order to show cause and aided by the preclusive effects and summary frame of mind which such orders engender.

Nevertheless, on the appellants' appearance at hearing and their reassertion of their grounds of challenge to the sales tax election, the court should have recognized that complex and substantial issues of fact were before it which could not be disposed of on a summary basis. Moreover, the nature of those issues--a live election dispute--required that the Leon County Canvassing Board be joined to the action as the proper party defendant on those claims. How should the controversy have proceeded if the Canvassing Board had been joined?

Due to lack of standing, a point which the appellants argue separately here as Issue II, Leon County should have been but a bystander in the resolution of the appellants' claims against the validity of the sales tax election. Plausibly, the Canvassing Board itself could appraise the sales tax election as invalid. Granted, such an outcome would be unlikely with three Leon County public

officials as its members; but there is always the possibility that they could be disqualified in favor of three electors who might have the same view of the City of Tallahassee's and Leon County's conduct in the sales tax election as do the appellants.

Or, plausibly, the appellants could prevail on their claim that the Canvassing Board is estopped due to its dilatory tactics to even attempt a defense of the sales tax referendum. Surely, between the Canvassing Board--which for a year and a half has refused to even attempt a defense of the election notwithstanding its statutory obligations as the "proper party defendant"--and the appellants--who have long and tenaciously sought such a contest--it is the Canvassing Board which must bear the penalty for dilatory conduct.

In the event that a resolution of the merits of the appellants' challenge to the sales tax election is made, it should be--and as a matter of law must be--between them and the Canvassing Board under the substantive principles of Bolden v. Potter, supra, and Boardman V. Esteva, supra, and be litigated under the ordinary rules of civil procedure. Otherwise, under any other concept or procedure, the election contest remedy is subverted and the appellants and the public are deprived of that remedy as a vindication of fundamental rights of a free and self-governing people.

ISSUE II

WHETHER LEON COUNTY HAS STANDING TO AFFIRMATIVELY ESTABLISH THE VALIDITY OF A DISPUTED ELECTION.

Leon County's complaint in this action affirmatively sought and obtained a judicial declaration that the September 1989 sales tax election was valid against the appellants' grounds of challenge (A 9-10). But that complaint and judgment is fundamentally defective because Leon County does not have standing to litigate the merits of the appellants' challenge to the sales tax election. Only the Leon County Canvassing Board, the statutory "proper party defendant", has standing among all governmental entities to litigate the validity of the sales tax election.

Standing has two basic requirements. First, a legitimate and sufficiant stake in the outcome of the controversy. Thus it is said that "a party has standing when it has such a legitimate interest in a matter as to warrant asking a court to entertain it." Jamlynn Investments v. San Marco Residences of Marco Condominium Association, 544 So.2d 1080 (Fla. 2d DCA 1989) (citing Argonaut Insurance v. Commercial Standard Insurance, 380 So.2d 1066, 1067 (Fla, 2d DCA 1981) and General Development v. Kirk, 251 So.2d 284 (Fla. 2d DCA 1971), at 286).

There is also a second element required for standing:

> However, standing encompasses not only this "sufficient stake" definition, but the at least equally-important

> requirement that the claim be brought by or on behalf of one who is recognized in the law as a "real party in interest," that is, "the person in whom rests, by substantive law, the claim sought to be enforced,"
>
> . . .
>
> The basic purpose of rules requiring that every action be prosecuted by or on behalf of the real party in interest is merely "to protect a defendant from facing a subsequent similar action brought by one not a party to the present proceeding and to ensure that any action taken to judgment will have its proper effect as res judicata . . .

Kumar Corporation v. Nopal Lines, Inc., 462 So.2d 1178 (Fla. 2d DCA 1985), at 1183.

The principle of standing is applied to public entities and officers no less than it is to other parties, with their standing measured by their legitimate interest in the controversy and whether they are or represent a real party in interest. Florida case law provides an abundance of examples of these principles at work in a variety of contexts.

An abstract fight over land use at the Naples Municipal Airport was dismissed in City of Naples Airport Authority v. City of Naples, 360 So.2d 48 (Fla. 2d DCA 1978), due to lack of standing. Municipalities having operative franchise agreements were held to be entitled to intervene in a controversy over franchise revenues in City of Hialeah Gardens v. Dade County, 348 So.2d 1174 (Fla. 3d DCA 1977).

In Dickinson v. Segal, 219 So.2d 435 (Fla. 1969), the Florida Comptroller was found to lack standing to appeal a trial court's decision to hold a statute unconstitutional since he was not a

party before that court. Standing will often turn on the particulars of the language of a statute. Thus, in City of Miami v. Dade County, 190 So.2d 436 (Fla. 3d DCA 1966), the Florida Comptroller was found not to be an indispensable party to a millage level controversy, solely on a distinction as to which statutory tax provision was at issue in the case.

The case of Charlotte County Development Commission v. Lord, 180 So.2d 198 (Fla. 2d DCA 1965), was resolved with the court's conclusion that the commission had no interest in the controversy. Retail Liquor Dealers Association of Dade County v. Dade County, 100 So.2d 76 (Fla. 3d DCA 1958), concerned the efforts of Dade County to procure a declaratory decree against the Association, which won on appeal due to Dade County's lack of a legal interest in the issue, it being one solely between the Association and the State Beverage Department.

In Watson v. Claughton, 34 So.2d 243 (Fla. 1948), this court limited the Attorney General's participation to his proper lawful interest, the constitutionality of the statute at issue, denying him the right to participate as a full party. The court held that the Attorney General had the discretion to enter a case in order to defend a statute, but that power did not "permit the Attorney General to 'enter in a private litigation where a statute is assailed as unconstitutional'". Id, at 246.

This court's opinion in State v. Kerwin 279 So.2d 836 (Fla. 1973), stated the distinctions inherent in limited standing in modern procedural terms:

> . . . the State is a proper, but not necessary party to any determination of the constitutionality of any state statute . . . We hold that the State of Florida, through the Attorney General, is a proper party to any action in which the constitutionality of any general statute is raised, solely as to those papers, pleadings, or orders dealing directly with the constitutional issue.

Id., at 838.

How does standing apply in this controversy? The legal interest of Leon County and the City of Tallahassee in regard to the September 1989 sales tax referendum is the same as was stated in Palm Beach County v. Hudspeth, 540 So.2d 147 (Fla. 4th DCA 1989), in regard to a tax referendum campaign:

> It is never in the public interest, however, to pick up the gauntlet and enter the fray [as to the merits of a referendum]. The funds collected from taxpayers theoretically belong to proponents and opponents of county action alike. To favor one side of any such issue by expending funds obtained from those who do not favor that issue turns government on its head and is the antithesis of the democratic process.

Palm Beach County v. Hudspeth, at 154.

For fundamental, constitutional reasons, governments may not enter the fray on the merits of referendum questions; and by direct extension of that principle, neither may they litigate the merits of a post-election referendum contest. Only canvassing boards may do that, those being the governmental bodies which in Florida law are statutorily designated and constituted for that purpose. Palm

Beach County v. Hudspeth, supra, is the most recent but is by no means the only authority which directly supports that view.

In 1971, the Attorney General of the State of Florida opined in AGO 71-276 that a city had no interest in an election contest and thus could not expend funds to litigate in defending it. That was up to the candidates involved. A referendum contest is no different, except for the statutory provision that the canvassing board is the proper party defendant (see Sec. 102.168, Fla. Stat.(1989)).

The same conclusion also follows from the real party in interest aspect of standing. The real party in interest in all election contests is the people, not the government entities which may be affected by elections and election contest outcomes. Notwithstanding the desires and manipulations of incumbent public officials, it is the people who control the government, not the government which controls the people--or at least it is the promise of our state constitution that "All political power is inherent in the people." Art. I, Sec. 1, Florida Const.

This court, in its seminal election contest opinion, stated:

> We first take note that the real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration. . . . Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We

> must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice.

Boardman v. Esteva, 323 So.2d 259 (Fla. 1976).

Similarly, Judge Donald Hartwell held in McLean v. Bellamy, et. al., Case No. 82-522 (2nd Cir., Leon Co. 1982):

> From Boardman and other relevant causes we distill the following general principles:
>
> (1) The candidates and election officials are minor characters in the drama of an election contest.
>
> (2) All the voters, whether machine or absentee, in the election under consideration are the real parties in interest.
>
> . . .

Id., p. 2. [Emphasis in original]

The City of Tallahassee and Leon County campaign for passage of the sales tax overwhelmed the normal democratic election process and resulted in a sham election. Leon County should not be allowed to compound and extend that misconduct by entering the fray of the ensuing election controversy and taking sides in defense of a sales tax referendum result obtained through gross irregularities of their own making. As a matter of constitutional and statutory law, Leon County has no standing to litigate the merits of appellants' challenge to the sales tax referendum.

ISSUE III

WHETHER THE PUBLISHED NOTICE TO THE PUBLIC OF LEON COUNTY WAS CONSTITUTIONALLY ADEQUATE NOTWITHSTANDING THE LACK OF ANY PUBLISHED NOTICE OF THE UNRESOLVED ELECTION ISSUES.

Due process requires that adequate notice of the pendency and nature of the bond validation be published to the public at large. But constitutionally adequate notice requires more than simply a notice that a bond validation is being sought. Where there are outstanding issues of consequence to the public, the notice must indicate as much.

The notice published for this bond validation gives no hint whatever that any issues over the validity of the sales tax election remained outstanding (D). Yet, as explained in the argument on Issue I, the extraordinary feature of this bond validation controversy is that the normal election contest time bar does not apply and the grounds of challenge to the sales tax election remained live more than a year and a half after the election was held. This led Leon County to sue three private citizens and a small civic organization in an irregular attempt to somehow, anyhow, get a judgment declaring a tainted election legal.

Does Leon County conceive this litigation to be a private controversy between itself and the appellants? Since in any event notice must be published to the public, the only cost to Leon

County of properly informing the public about the pendency of the sales tax election issue in the bond validation is embarrassment to Leon County and a potential accrual of public support to the appellants. But Leon county's desire to avoid either of those outcomes is not a justification for failing to inform the public at large of the unresolved election controversy so that they may make an intelligent choice as to whether they wish to participate in the proceeding.

In Tulsa Collection Services v. Pope, 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988), the U.S. Supreme Court reiterated a long line of due process notice cases and held that due process required that in any proceeding to be accorded finality, the notice to be provided was required to apprise interested parties of the pendency of the action and what was at stake. Manifestly, the notice published in this case is constitutionally inadequate because it did not properly alert the public that the validity of the sales tax election was still in doubt and at stake in the bond validation.

ISSUE IV

WHETHER THE APPELLANTS SHOWED SUFFICIENT CAUSE TO BAR THE PROPOSED BOND ISSUE OR TO REQUIRE FURTHER PROCEEDINGS INQUIRING INTO THE VALIDITY OF THE UNDERLYING SALES TAX ELECTION.

Notwithstanding the limitations of the hearing below, what quantum of facts and law did the appellants provide in support of their challenge to the September 1989 sales tax election?

The appellants' grounds of challenge to the proposed bond issue are essentially a challenge to the validity of the September 19, 1989, sales tax election. Those grounds of challenge were first raised in the appellants' election contest complaint, which was filed on October 2, 1989 (J), and were reasserted at the February 8, 1991, hearing below (C 3).

The appellants contend that the September 19, 1989, Leon County sales tax referendum is invalid because of numerous irregularities in the election due to the efforts of the City of Tallahassee and Leon County to promote passage of the sales tax: (1) intentional deception of the electorate by the City of Tallahassee and Leon County; (2) failure by the Supervisor of Elections to safeguard the integrity of the election process; (3) a promotional, one-sided, and false wording of the ballot question as part of that campaign by the City of Tallahassee and Leon County--including even having the ballot issue headed by the pro-tax campaign slogan; (4) the use of City and County employees and

facilities to plan, coordinate, and work on the campaign for passage of the sales tax; (5) the creation of a captive political action committee to raise and expend private contributions for the campaign; (6) the participation of a second illegal political committee as an ally of the City and County; (7) the expenditure of public funds in the campaign; (8) various specific constitutional and election law violations; (9) violations of Florida's Government in the Sunshine law which were integral to the sales tax campaign; and (10), private understandings with interests which supported the tax and expected to benefit from its passage (J).

These allegations are supported in the record before this court by the extensive attachments to the appellants' complaint (J), by the testimony of Charles Cuthbertson and Ion Sancho (I), and by the appellants' exhibits at hearing (L). This is of course not the place for an extensive, point by point recapitulation or proof of the appellants' case. But some key points can and should be established so as to provide assurance to the court that the appellants' claims are not specious or fanciful.

(1) City-County campaign as promotional of a favorable vote on the sales tax.

The one-sided nature of the City-County "educational campaign" was admitted in testimony by Charles Cuthbertson, one of the planners of that campaign:

BY MR. MUSZYNSKI:

Q. Mr. Cuthbertson, did you receive a note from Dan Kleman in July, July the 30th I believe, of 1989 to the effect that, "I spoke to Jack McLean December 28th. He is anxious to get going on the sales tax issue"?

A. I received a memo so dated indicating that Mr. McLean was anxious to so move.

Q. Was the City responsible for running the election?

A. The City had an interest in running the election. No, that is not a City responsibility.

Q. What was the City's interest then in getting going on the sales tax issue?

A. It was something that we believed in. We believed it was an adequate way of funding a problem in this community. While we are not charged with the actual election and the operation of that election, we do believe we have a -- the majority of the citizens are City citizens, and they should know both the pros and the cons of the issue. And that could only be accomplished by starting the educational campaign.

Q. Can you show me anything in the City advertising or the County advertising that was directed as the cons of the sales tax issue?

A. I don't have anything with me.

Q. Do you know of any such advertising?

A. No, I am not familiar with any. That's not unusual. We believed it was a good item. We believed there was probably people in the community that if they disagreed should be given adequate time to point out the cons, and that was allowed.

Q. Where?

A. Simply by the provision of time between the determination of the -- that there would be a referendum and the referendum date. If you are asking me whether they took advantage of that, I can't answer that.

(Testimony of Charles Cuthbertson, February 8, 1991, pages 25-26.)

(2) Ballot language irregularity.

On Wadhams v. Sarasota, supra, this court struck a firm blow against a referendum ballot which was not neutral. Yet the ballot at issue there was far less offensive than the ballot in this case --which was headed by the pro-sales tax slogan no less: "Take Charge! It's Your Future". The City-County campaign plan candidly described the tactic:

> "The campaign theme and colors have already been established. 'Take Charge: It's Your Future' ..." (from page 7)
>
> . . .
>
> "The theme is also flexible enough to be used in city/county information materials without saying "vote for" and in the PAC materials with the "vote for" line giving this campaign an unified message." (from page 8)

(As quoted in appellants' election contest complaint; J; par. 13)

(C) Election law violations.

At hearing, Supervisor of Elections Ion Sancho testified in cross examination:

> Q. Do you monitor all of the campaign reports that are filed with your office for irregularities in form and substance?
>
> A. Essentially we do. We have a check-off form that we receive from the Division of Elections that we essentially look for timeliness and completeness.
>
> Q. Did you do that with the filings of the Take Charge PAC?
>
> A. Yes, we did.

Q. Did you find any deficiencies?

A. In terms of reports generally, no.

Q. You say generally, no. Was there some other deficiency you had in mind?

A. Well, we did notice that there was a contribution received from a group that we did not find any evidence of existing as a political action committee.

Q. Is it your understanding that that would have been a violation of law?

A. It could apparently be a violation of law. And I put it in those terms because I am not allowed to make any sort of conclusion and have received a memo from the Florida Elections Commission stating that my role as a supervisor of elections is ministerial and, therefore I can't make any investigations as to that area and can't make any conclusions as to whether somebody is violating the law or not.

And so since the actual Take Charge PAC had not been the violator, that essentially meant that I could not proceed further on that issue.

(I; Testimony of Ion Sancho, February 8, 1991, pages 14-15).

The group referred to by Mr. Sancho was the Council for Tallahassee's Future, Inc., who were named in the appellants' election contest complaint as having violated the election laws (J; par. 15(d)). Mr. Sancho's testimony confirms the appellants' strongest allegation of an election law violation in the sales tax campaign.

Even with the limited scope of the summary proceeding below, the appellants' met the burden of the show cause order. The proposed bond issue cannot be validated. At the very least, further proceedings are required.

ISSUE V

WHETHER JUDGE SAULS OR ANY JUDGE OF THE SECOND CIRCUIT IS QUALIFIED TO PRESIDE IN THIS CASE.

The appellants' unsuccessful petition for a writ of prohibition from this court ought not to be seen as a bar to relief on appeal on the same issues. A petition for an extraordinary remedy is not the equivalent of an interlocutory appeal which would establish law of the case. E. g., Thomas v. State, 422 So.2d 93 (Fla. 2d DCA 1982), and Obanion v. State, 496 So.2d 977 (Fla. 3d DCA 1986). In at least one instance, this court has denied a petition for writ of prohibition on procedural grounds and expressed its preference for the more orderly mechanism of appellate review of the question presented. State ex rel. Carter v. Wigginton, 221 So.2d 409 (Fla. 1969), at 410.

As it happens, while the petition was pending before this court, a new grounds of disqualification developed. For the sake of brevity, the appellants will restrict their presentation of the issue here to that new ground and to the most significant of the grounds of disqualification which were first raised in the petition.

(1) Judge Sauls passed upon the facts of the motion.

It is fundamental to Florida law on judicial disqualification that the judge may not pass upon the facts of the motion. Bundy v.

Rudd, 366 So.2d 440 (Fla. 1978). Judge Sauls' amended affidavit does just that in stating that the appellants' motion for disqualification "falsely suggests that the undersigned circuit judge is interested in the result of this lawsuit." (E 2).

(2) Judge Sauls' ties to Carl Pennington.

As the attorneys for Leon County at the time, Carl Pennington and the Pennington firm had a key role in the sales tax campaign: contributions, fund-raising, and favorable legal advice in the form of approval of the disputed ballot language (I 12; E 9). Judge Sauls' ties to that firm include not only his years of practice with them but also, according to his financial disclosure, a $560,000 mortgage held by a company in which Mr. Pennington is a director (E 10).

No matter what gloss is put on the matter, the salient fact is that Judge Sauls has a very substantial debtor-creditor relationship with one of the sales tax's most active and important supporters.

(3) Judge Sauls' property interests.

Judge Sauls' interest in the Southgate Apartments has already been discussed in regard to the $560,000 mortgage. But that interest in real estate, valued by Judge Sauls at $750,000, also raises serious questions about his neutrality on the issue of the sales tax itself (E 12).

The Leon County local option sales tax was promoted as the alternative to property tax increases. Obviously, for an owner of commercial real estate of substantial value like Judge Sauls, that argument can have considerable sway. That is why local real estate interests were the sales tax's most prominent private supporters. It is not unreasonable to suppose that Judge Sauls' real estate interests could influence his decision, for the effect of declaring the sales tax invalid could be substantially higher taxes on his nonhomesteaded commercial property (E 12).

(4) Grounds of disqualification applicable to the judiciary of the entire circuit.

A circuit's judiciary cannot properly adjudicate a controversy over facilities extensively used and relied on by them. This was the apparent basis for blanket disqualification of an entire circuit's judiciary in Board of County Commissioners v. Judicial Space in the Bradford County Courthouse, 378 So.2d 1247 (Fla. 1st DCA 1980). After holding that the judiciary has the authority to command that necessary courthouse space be provided, the First DCA went on to say:

> . . . we deem it appropriate that the Chief Judge of the Eighth Circuit request the Chief Justice of the Supreme Court to temporarily assign a judge from outside of the circuit to preside over the evidence.

Id, at 1248-9.

On further review, this court specifically endorsed that position:

> We agree with the district court of appeal that the county, if it desires, is entitled to an evidentiary hearing before a judicial officer from outside the circuit, at which the county's burden of proof will be as expressed in this opinion.

Chief Judge of the Eighth Judicial Circuit v. Board of County Commissioners, 401 So.2d 1330 (Fla. 1981), at 1332.

The basis for those holdings was not stated in either opinion, but support for them is easily apparent in Canon 3 of the Code of Judicial Conduct, section C, subsection (1)(c). Disqualification is required by its provisions when a judge "individually or as a fiduciary" has a "financial interest in the subject matter or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

The definitions incorporated in Canon 3-C in regard to disqualification define the key terms. They state that "'fiduciary' includes such relationships as executor, administrator, trustee, and guardian", and that "'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party . . ." (Canon 3, section C, subsections (3)(b) and (c)).

The appellants' concerns in this regard are also founded on Leon County Commissioner Gayle Nelson's letter of stating that the

new jail plan was approved by a "meeting of the judge" (E 4). It is not at all unreasonable to suppose that when the judiciary of a circuit approve the plan for the new jail, they will also be inclined to favor the approval of the bond issue for that jail.

CONCLUSION

The judgment of the trial court should be reversed and remanded. The trial court should be instructed to: (a) establish the Leon County Canvassing Board as the proper party defendant in a Sec. 102.168, Fla. Stat., election contest with the appellants; (b) limit the standing of Leon County and the City of Tallahassee; and (c), provide for further resolution of the election controversy to be under the Florida Rules of Civil Procedure.

This court should directly designate a judge from outside the Second Circuit to preside over the case.