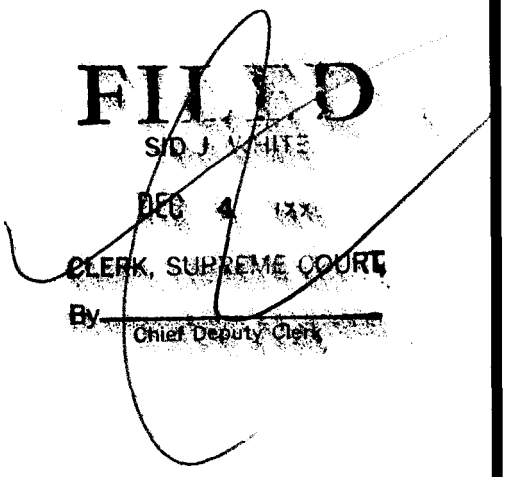
IN THE SUPREME COURT
OF THE STATE OF FLORIDA



PETER FORSYTHE and ALISABETHE
JERGENS FORSYTHE,

Appellants,

v.

Case No. 78,654

LONGBOAT KEY BEACH EROSION
CONTROL DISTRICT,

Appellees.

_____/

REPLY BRIEF OF APPELLANTS

Appeal from Final Order
of Manatee County
Circuit Court

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REPLY TO APPELLEE'S STATEMENT OF THE CASE AND FACTS

Appellee's exception to a photocopy of a newspaper page in Appellants' Appendix, at page 87, is misguided. The inclusion of the article was because it was a citation of authority for part of Appellants' argument and was supplied as part of the Appendix to the initial brief because it was believed to be unlikely that the Court would have access to the authority (a local weekly newspaper) cited. The inclusion of the article is no more improper than the inclusion of portions of the Florida Council on Intergovernmental Relations publications and Appellee correctly made no objection to those documents.

ARGUMENT

Appellants respond to the three points of Appellee's argument contained in its Answer Brief in the same order as they were presented in the Answer Brief.

I.

Appellee argues that the statutory language of Section 189.403, Fla. Stat. (1989) is ambiguous as "applied to the facts of the case," (AB-3) (References to the Appendix filed with the Appellants' Initial Brief will be "A- ", and references to the Appellee's Answer Brief will be "AB- ") It is, the Appellee District argues, "**obvious** that neither the Legislature nor the Florida Advisory Council on Intergovernmental Relations ("ACIR") ever considered the possibility that a single municipality could overlap county boundaries." (AB-3). Emphasis supplied.

Appellees' argument is baseless. No where in the almost 350 pages of ACIR documents on Ms. Falconer's law review article can support for this statement be found. Likewise, the statutory language is equally unsupportive of Appellee's argument. This is true even though the statute does contain a lengthy "statement of the legislative purpose and intent." Florida Advisory Council on Intergovernmental Relations, Special District Accountability in Florida (1987); Florida Advisory Council on Intergovernmental Relations, Special District Accountability Recommendations and Rationales (1987); §189.402, Fla. Stat. (1989).

Additionally, there was no testimony at the trial nor evidence submitted in this action that supports Appellee's argument. The argument is without substance or merit.

What actually is "obvious" is that when special district boundaries cross county lines the district inherently takes on a different status. The special district is then subject to different jurisdictions of various constitutional officers and the district inherently becomes more complex. Section 189.402(2)(c), Fla. Stat. (1989) may have contemplated this inherent complexity when it pointed out a need to

> [i]mprove communication and coordination between special districts and other local entities with respect to ad valorem taxation, non ad valorem assessment collection, special district elections and local governmental comprehensive planning.

The multi-jurisdictional cross boundary nature of this type of district can easily be seen to be just what the statute contemplated when it required independent districts to go through the more involved legislative process as opposed to simply enacting an ordinance. There is a higher public interest where county boundaries are crossed and the potential exists for intergovernmental conflicts and a plethora of other problems. Thus, what is "obvious" is that the subject district is exactly what the Legislature intended to limit and control.

Appellee points out that the only circumstance in which the definitions contained in §189.403(2) and (3) "could be met is precisely this one. . . ." (AB-3). The implication is that the only place that such could occur is on Longboat Key. Such argument is an unsupported assertion on the part of the Appellee. There was no testimony at the trial which supports the allegation. Even in the deposition of Ms. Sonja Crockett, she

stated that she was not aware whether there were other districts in the same circumstance as Longboat Key or not. (A-33). Ms. Crockett did indicate that the reason she did not know if there were other districts in the same circumstances as the subject district was that she had to keep track of all the districts and that she had "a thousand of these . . ." to keep track of. (A-37).

Thus, the assertion that the Longboat Key situation is unique is mere supposition and totally unsubstantiated. Besides, we do know that there is at least one district that is similar, and that is the Rainbow Lakes District in Marion and Levy Counties. (A-33; A-68). The Rainbow Lakes District is an independent special district which was created in 1969. Even though the district was created before the enactment of Chapter 189, the district was created in a manner consistent for multi-county districts, that is, by legislative action which is precisely how the legislature obviously intends for independent special districts to be created. It is certainly not unreasonable to believe that there may be more such districts and perhaps even many such districts.

Appellee goes on to argue that §189.403(3) is ambiguous and therefore the Court should give the statute an interpretation consistent with the Appellee's wishes.

Even if the Court were to buy Appellee's argument that the statute is ambiguous, nothing in the a argument compels the conclusion proffered by Appellee. The conflict is in the

Appellee's mind and not in the facts of this case or the statutes in question.

No rule of statutory construction or case citation offered by Appellee requires the adoption of Appellee's argument. Just the contrary is true. Appellants' argument in their initial brief certainly points out that the statutory mandate of §189.403(3) is clear and unambiguous. However, Appellants went far beyond such a simple argument to point out how their conclusion was supported by the statute as a whole, how it was consistent with various other portions of Chapter 189 and how it made sense.

Even Ms. Sonja Crockett, the non-lawyer, state agency bureaucrat who is in charge of cataloging and listing special districts by type, could recognize the subject district for what it is, an independent special district. (A-33). Ms. Crockett immediately saw the dependent/independent issue with the District's forms when they were submitted stating that the district was a dependent district.

Lastly, no conflict or inconsistency is created by following the plain language of §189.403(3). It is totally logical and consistent for the Legislature to have specified that any district that crosses county boundaries be an independent district. Appellee is attempting to cloud the issue by creating ambiguity where none exists.

II.

In point II of its argument, Appellee essentially makes the case for the Appellants. The District first cites the "broad home rule powers" under the State Constitution and Chapter 166. Appellees then admit their case away by stating that "[m]unicipalities are **given** the power to create dependent special districts under Section 189.4041, Fla. Stat. (1989). . . ." Emphasis supplied. The Appellees are precisely correct. A municipality's ability to create a special district is a **specific legislative grant of authority.** A municipality has no broader authority than that which it has been granted by either the State Constitution or legislative act.

Here, the District specifically admits that **if** it is a valid district, it is such only by the grant of authority contained in §189.4041, Fla. Stat. (1989). Thus, if the power to create a special district was not authorized in §189.4041, then the prohibition in Chapter 189, and particularly §189.4031, Fla. Stat. (1989), would prevent municipalities from creating special districts. Chapter 189 preempts special district creation to the state. Subsequent to the enactment of Chapter 89-169, Laws of Florida, special districts dependent or independent, may **only** be created in accordance with the specific legislative grant of authority contained in Chapter 189.

The "broad home rule powers" relied on by the District have been preempted by the enactment of Chapter 189 which preemption

is specifically provided for in §166.021(3)(c), Fla. Stat. (1977).[1] Thus, the Town of Longboat Key could only create a special district in accordance with the legislative grant contained in Chapter 189. Section 189.4031, Fla. Stat. (1989) states that

> **All special districts . . . shall comply** with the **creation,** dissolution and reporting **requirements** set forth in this Chapter. Emphasis supplied.

The Legislature granted the Town of Longboat Key the authority to create dependent special districts in §189.4041, Fla. Stat. (1989). The Legislature did **not** grant the Town the broader authority to create an independent special district and in §189.404, Fla. Stat. (1989) the Legislature specifically reserved that authority to itself. It is essential, then, that the Town not exceed the legislative grant and tread into independent special district territory. To assist the Town in identifying the legislatively imposed limits, the Legislature created definitions of dependent and independent special districts.

The Legislature, in Section 189.403(2), Fla. Stat. (1989), set out a multi-part definition of a dependent special district. If a district met at least one of the listed criteria, then it

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[1]Appellees particular citation, to "Section 166.021, Fla. Stat. (1990)" sic, is actually a citation to the General Act, as adopted in 1973 and amended in 1977. The 1990 amendment to the statute merely added subsection (6) which deals with the disposal of solid waste and has nothing to do with this case. The citation as amended is §166.021, Fla. Stat. (Supp. 1990).

could be a dependent special district. The definition is not mandatory and in fact a caveat at the end of the subsection even points out that the "subsection is for purposes of definition only."

The dispositive language of the issue comes in the very next subsection. Section 189.403(3), Fla. Stat. (1989) limits the town's ability to create a district by stating that if the district does not meet one of the criteria of subsection (2), then the district is an independent district **and in all cases** if the district ". . . includes more than one county [it] is an independent special district." §189.403(3), Fla. Stat. (1989).

Thus, if a district "includes more than one county" subsection (2) of the statute is really irrelevant since the district, **by definition, cannot be a dependent district.**

Appellee's Answer Brief then artfully reviews a number of Florida cases as well as cases from other jurisdictions ranging from South Carolina to Alaska.

Appellee's lead case is Jackson v. Consolidated Government of the City of Jacksonville, 225 So.2d 497 (Fla. 1969). The District cites the Jackson case in support of the argument that the Appellants have a "heavy burden" to carry when challenging the validity of the District's ordinance. While it is true that the burden is on the Appellant in an appeal, here, it is the **Appellants who are attempting to have a statute upheld.**

It is the lower court's decision, and the position of the Appellee that a statute [§189.403(3)] should be interpreted in a

manner that is clearly inconsistent with its plain language. It is the Appellants who are appealing a decision that ignores the legislative "presumption of validity" that **must** accompany Section 189.403(3). Jackson, at 502.

The Rich v. Ryals, 212 So.2d 641 (Fla. 1968) case likewise is supportive of Appellants' argument in that it points out that it is "the policy of this Court in the interpretation of statutes where possible to make such an interpretation as would enable the Court to hold the statutes constitutional." Rich at 643. The interpretation of the lower court does nothing to uphold the sanctity of the legislative enactment but rather disregards the plain language of the statute and attempts to judicially amend or modify the statutory pronouncement to accommodate the enactment of an ordinance by a local governmental entity. Section 189.403(3) is entitled to the same presumption of correctness as is the ordinance.

Lastly in this section is the argument advanced by Appellee based on Hudson Pulp & Paper Corp. v. County of Volusia, 348 So.2d 45 (Fla. 1st DCA 1977), which is that home rule inherently gives the Town the power to create a special district and that the Town has done so and it is therefore improper to question the wisdom of that enactment.

This argument misses the point. It is not the wisdom of the establishment of the district that is the issue. Rather it is whether the Town had the authority to create a district that is, by definition, an independent district. The answer is NO. The

Town does not as the Appellee alleges have "power to create a special district." (AB-10). Rather, the Town has the **limited** power to create a dependent special district **if** the Town follows the requirements in the statutes. Here, the Town did not and its actions are illegal and void.

III.

The lower court's decision concerning the validity of the amendment to the original ordinance merely stated that

> [a]ny alleged confusion created by the map references in 90-21 was slight (if at all) and not sufficient to invalidate the ordinance or the election. (A-2)

The lower court failed to address an important issue that was presented at trial which was that the amendment to the original ordinance failed to meet the mandatory requirements of §166.041(2), Fla. Stat. (1989), not that there may have merely been some confusion about the map references in 90-21 and 91-06.

First, the boundaries of the district were sufficiently unclear in ordinance 90-21 that the Town attempted to amend that ordinance by the passage of 91-06. Appellants obviously agree that the district boundaries were insufficient and unclear in 90-21.

Second, Appellees argue that the lower court was right because there was "sufficient reference to the original act" (AB-15) to make the amendment legally sufficient.

In order for the amendment to be valid

> [t]he amendatory ordinance must set out the revised or amended section, subsection or paragraph of a section or subsection **in full,** including all the language of the former section or subsection or paragraph thereof not being deleted or amended and the amendatory language. Enough of the ordinance being amended must be republished to make the meaning of the provision published complete and intelligent from its language. Op. Atty. Gen. 073-449, Nov. 29, 1973.

The Town did not follow these requirements and merely referenced the former ordinance by number. (A-11).

Third, Appellee argues that the references in 91-06 to the prior ordinance and to the "10 large scale maps. . ." (AB-16) were sufficient to make the amendment valid. What Appellees and the lower court miss is the fact that the attempt to incorporate by reference either the earlier ordinance or the maps is legally insufficient.

While it is well settled that a municipality may incorporate a state statute by reference, infra, Appellants are aware of no such authority for a municipality to incorporate other less authoritative matters such as map references. Jaramillo v. City of Homestead, 322 So.2d 496 (Fla. 1975).

Additionally, the attempt in 91-06 to incorporate the "10 large scale maps" is hopelessly confusing. The ordinance (91-06) states that

> [t]he boundaries of the . . . district shall be as set forth on the ten large scale maps of the Town of Longboat Key which were on display in the Town Hall prior to and during the enactment of Ordinance 90-21. . . . (A-11). Emphasis supplied

and the amending ordinance goes on to say that

> [r]educed copies of such maps solely for identification and administrative convenience, have been prepared and are attached hereto as Exhibit A. (A-11).

However, when 91-06 is reviewed (A-10 through A-17) there are only five (5) pages of maps plus an overview page. It is important to note that the lower court made its decision utilizing Exhibit A to Ordinance 91-06 which was submitted to the court as Plaintiff's Exhibit 6. **See**, A-10 through A-17. It is plainly written on the face of the maps in A-10-17 that the maps presented there are part of eleven pages of maps. There is no explanation of where the other five pages of maps (or six according to the actual legend on the maps themselves) are or why they are missing.

Thus, while the lower court may have viewed the confusion as "slight," such is obviously not the case. (A-2). The amending ordinance is, in fact, hopelessly confusing. If the Town wanted to rely on the "large scale maps" then it should have done so and not added to the confusion by attaching incomplete and clearly conflicting maps.

Ordinance 91-06 created the confusion by its own conflicting language, by its failure to comply with §166.041(2), Fla. Stat. (1989), and by its inherent repeal (superseding) of "any inconsistency or apparent inconsistency" in 90-21. (A-11). Thus, while the judge in the lower court may not have been confused, it is easy to see how anyone else could have been.

CONCLUSION

The Florida Supreme Court should find that the lower court erred in its decision to uphold the validity of the Longboat Key Beach Erosion Control District. The Court's decision would uphold the plain meaning of §189.403(3), Fla. Stat. (1989), and the intent of the Legislature.

The Town of Longboat Key should be made to comply with all the statutes relating to district creation and to follow procedures that do not result in obvious confusion and uncertainty as to the validity of the district. Both Manatee and Sarasota Counties as well as all other interested parties would have an opportunity to be heard concerning the impact of the creation of such a cross boundary district.

Fairness, equity and legislative intent would be served by a reversal of the lower court's decision.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that I have furnished a copy of the foregoing Reply Brief of Appellants to **DANIEL U. LIVERMORE, Esquire,** Livermore, Klein & Lott, P.A., 1750 Gulf Life Tower, Jacksonville, FL 32207, and **STEVEN J. CHASE, Esquire,** 240 S.

Pineapple Avenue, 9th Floor, P. O. Box 49948, Sarasota, Florida 34230-6948, by U. S. Mail, postage prepaid, this 3rd day of December, 1991.

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