IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

APPEAL NO. 82,443
(L.T. CASE NO. CI93-1371)

JOHNIE A. McLEOD,

Appellant

IN THE MATTER OF:

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

Appellee/Plaintiff

vs.

THE STATE OF FLORIDA, and the Taxpayers, Property Owners and Citizens of Orange County, Florida, including non-residents owning property or subject to taxation therein, and all others having or claiming any right, title or interest in property to be affected by the issuance of the Bonds, herein described, or to be affected thereby,

Defendants.
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SID J. WHITE
DEC 1 1993
CLERK, SUPREME COURT
By_____
Chief Deputy Clerk

APPELLANT'S REPLY BRIEF TO AMICI CURIAE ANSWER BRIEF

Appeal of Final Judgment dated June 8th, 1993 and Order Denying Rehearing dated August 20th, 1993, from Circuit Court, Orange County

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The Amici Curiae Answer Brief filed by the Florida Association of Counties, Inc.; the Florida Association of County Attorneys, Inc.; Alachua County; Dade County; Palm Beach County; Seminole County; and Volusia County essentially addresses two main ideas. One being that the decision in **STATE EX REL. VOLUSIA COUNTY v. DICKINSON**, 269 So.2d 9 (Fla. 1972) has been unquestioned and unchallenged until the instant appeal, and two, that a reversal would cause "financial chaos" to the counties that have enacted such a utilities tax.

Amici posits that any decision other than affirmance of the Final Judgment below would amount to a "shocking repudiation of settled precedent." (Amici Answer Brief at pg. 4). It would be reasonable to assume that many felt that the decision of the United States Supreme Court in **BROWN v. BOARD OF EDUCATION** (citations omitted) holding the precedent of "separate but equal" established in **PLESSY v. FERGUSON** (citations omitted) did not apply to public schools was a "shocking repudiation of settled precedent" as well.

Judicial precedent is not sacrosanct, especially if said precedent causes harm. Further, the law of the case is only controlling in cases where the facts fit the four corners of the precedential case. The facts here do not so squarely fit with **VOLUSIA COUNTY v. DICKINSON** (supra).

Amici would also argue to this Honorable Court that the instant appeal and a reversal of the Final Judgment below would "raise serious doubt as to the scope of municipal powers of Dade County under its constitutional charter" (Amici Answer Brief at pg.

4). Such an argument simply is not tenable.

As pointed out in the Appellant's Reply Brief, Dade County may, by specific grant contained within the 1968 Florida Constitution, "* * * exercise all the powers conferred now or hereafter by general law upon municipalities". (emphasis supplied) See Article VIII, §6(f) Florida Constitution. The relief sought by the Appellant will in no way affect or alter the municipal powers of Dade County.

Amici follow the line advanced by the Appellee in stating that the municipal power provisions of the Orange County Charter are identical to those in the Volusia County Charter. A fair reading and comparison of both charter documents evidences that this is not the case. Please see and compare Volusia County Charter Article(s) II, §202; II, §202(1); II, §202.1; III, §307(2); and XI, §1104.2 (Answer Brief Appendix #5) with Orange County Charter Article(s) I, §101; I, §103; I, §104; and I, §105 (Answer Brief Appendix #4).

Additionally, and of no small distinction, Volusia County's charter was enacted pursuant to Article VIII, §1(c) of the Florida Constitution and was drafted by the Legislature of the State of Florida. Please see Laws of Florida c. 70-966. The state Legislature granted certain municipal powers to Volusia County.

Orange County's charter, on the other hand, was enacted pursuant to Article VIII, §1(g) of the Florida Constitution and Part IV of Florida Statutes Chapter 125.

The Legislature of the State of Florida did not draft the charter for Orange County. Article VIII, §1(g) and Part IV of

Chapter 125 are deafeningly silent as to a grant of any specified municipal powers.

As to Orange County's charter and Volusia County's charter, Amici urges "[N]o difference in the wording exists between the two charter powers or municipal tax options that could remotely yield a different constitutional result in this case." (Amici Answer Brief at pg. 5). Appellant respectfully suggests that there exist important differences in not only the municipal powers claimed by the cited charter documents and their respective manner of enactment, but that the two "municipal tax options" are very much different indeed. (Please see Appellant's Reply Brief).

At pages 6 through 7 of the Answer Brief, Amici sets forth the dates the listed counties have enacted the utilities tax, what they have realized for fiscal 1992/1993 and what is projected to be realized for fiscal 1993/1994. (Noticeably absent in the brief filed by the Florida Association of Counties, Inc., is a listing for Orange County). Appellant suggests that such a listing is an obvious attempt to bolster their "sky is falling" argument of "financial chaos" as a sufficient rationale to uphold the Final Judgment below.

In concert with the "financial chaos" rationale, Amici (Amici Answer Brief at pg. 5) states that "* * *, the Florida Association of Counties, and the Florida Association of County Attorneys, Inc., at educational seminars and through other vehicles, have published to their members and the public, since the Volusia County v. Dickinson decision, the settled concept that an essential and

unique attribute of charter county government is an 'unquestioned' constitutional vesting of municipal power to levy any tax provided to a municipality[.]" in an attempt to show perceived harm should this Honorable Court not uphold the Final Judgment below. This Lemmingesque engineering builds a house of cards.

Attorneys should recognize the importance of precedent. In educating others on the law, Attorneys should also recognize that precedent is not cast in stone.

> "It was 1858; Lincoln was challenging Stephen A. Douglas for a Senate seat--and challenging the Supreme Court's ruling on slavery.
> Douglas defended the decision in Dred Scott's case as the pronouncement of 'the highest tribunal on earth,' * * *. 'From that decision there is no appeal this side of Heaven,' * * *.
> One decision settles one case, retorted Lincoln; it does not even settle the law, still less the future of the country."

See EQUAL JUSTICE UNDER THE LAW, The Supreme Court In American Life; The Foundation Of The Federal Bar Association, 1965, at 47, 48.

As an aside, neither the Appellant nor the Amici has addressed the propriety, legality, or for that matter the ethics of using monies raised at the expense of only certain residents and businesses of a county to provide traditional governmental functions and services (through the issue of bonds) to the entirety of the county, including those situated within the municipalities located throughout the county.

"The older Sophists tended to be agnostics in religion, relativists in ethics, and power theorists in politics, * * *."

See Groliers Academic American Encyclopedia (1993) Re: Plato, Dialogues, translated by Benjamin Jowett (1937).

Amici does not indicate whether said counties have pledged the proceeds from the enacted utilities taxes as the "sole revenue source" from which bonds are to be retired. Orange County claims that it has the power and authority to sometimes act as a county and to sometimes act as a municipality and that it is entitled to wear the hat most convenient to the purpose to be served. This type of "hybrid" government poses interesting questions and dilemmas.

The Florida Constitution differentiates between Municipalities, Counties, and Charter Counties. Certain Chapters of the Florida Statutes also differentiate between Municipalities, Counties, and Charter Counties. Florida Statutes Chapter 75 does not mention Charter Counties. Does Orange County, as a charter county, even have the authority to issue bonds or are they really acting as a traditional county in this area?

Orange County enacted it's utilities tax on August 6, 1991 and has realized $30,035,058.00 in fiscal 1991/1992, and $32,561,323.00 in fiscal 1992/1993; thereby realizing a two year total of $62,596,381.00. The county's stated purpose of the "Initial Project" to be funded by the Bonds that were the subject of the validation proceedings below is to acquire "environmentally sensitive" lands. See Initial Brief Appendix Item #5.
More than sufficient monies for the purpose of acquiring "environmentally sensitive" lands had been raised by the utilities

tax. A bond issue for that purpose simply is not necessary.

A fair reading of the complaint filed below evidences that the county seeks to utilize the monies realized from the residents and businesses located in the unincorporated area of the county to provide traditional government functions and services on a county-wide basis (including within the 13 municipalities) that should be paid from ad valorem taxes.

Appellant suggests that the real purpose of the Bond validation proceeding was to insulate and perpetuate the constitutionally infirm utilities tax enacted by Orange County. See Florida Statutes, §75.09.

The county-wide millage rate for Orange County is 5.2889. The valuation of property situated within the unincorporated area of Orange County is $17,425,506,353.00. The 1992/1993 budget for Orange County derived from ad valorem taxes is $921,608,250.00.

In order to raise $32,561,323.00 (the amount raised by the utilities tax in fiscal 1992/1993) by ad valorem taxes the millage rate would have to have been raised by .98275 mills. The listed millage increase is an approximation.

To raise the millage rate .98275 for the provision of these traditional functions and services would have been at best uncomfortable and at worst damaging politically. In today's economic and political climates, it is politically more palatable for those in power to impose the utilities tax in unincorporated Orange County by edict (and then come through the side door with bond issues for the provision of governmental functions and

services) than to be required to justify to the Orange County electorate an almost 1 mill increase in the ad valorem tax rate.

Based upon the economic fact that each year the cost of providing utilities to customers will increase, the county stands to take in additional tax monies without ever having to publicly speak of a tax increase. Orange County, in the second year of the utilities tax, realized a tax increase in excess of $2,500,000.00. Impressive.

"From the outset the Sophists believed that an opposition existed between nature and custom or convention. They treated legal codes, ethical ideals, and social systems as merely conventional. They argued, for example, that by nature the weak have no rights against the strong and that the gods were invented by rulers to intimidate their subjects." Groliers, supra. Please see Reply Brief Appendix #1.

The hierarchy and concomitant authority from the state constitution to state legislative enactment to county charter to local ordinance and resolution is an indispensable facet of our society. A county charter proclamation of powers does not equate to a state constitutional grant of powers, nor does said county proclamation equate with a state legislative delegation of powers. Amici and the Appellee would ask this Court to overlook the distinctions and the plain language utilized in Article VIII of the Florida Constitution.

The 1968 Constitution granted unto Dade County all the powers conferred now or hereafter by general law on municipalities (see

Article VIII, §6(f)), the state legislature granted certain municipal powers to Volusia County (see Article VIII, §1(c) and Laws of Florida c. 70-966), Orange County on the other hand adopted its charter under Article VIII, §1(g) and Part IV of Florida Statutes Chapter 125. Article VIII, §1(g) and Part IV of Florida Statutes Chapter 125 do not even speak of municipal powers let alone grant same.

It appears that the Appellee and Amici would argue that the difference between "all the powers conferred now or hereafter by general law upon municipalities" (Article VIII, §6(f)) and "all powers of local self-government" (Article VIII, §1(g)) is merely one of semantics and that it should be obvious that local self government and municipal powers are synonymous.

If that truly is the case, then the marked differentiation between Article VIII, §1(g) and Article VIII, §6(f) evidences either a lack of understanding of the English language or a purely mischievous and capricious bent on the part of the framers of the 1968 Constitution Revision. Words mean what they say and should be given their plain meaning in construction.

Absent a specific statutory grant of authority by the legislature of the state of Florida to charter counties enacted pursuant to Article VIII, §1(g) of the Florida Constitution and Part IV of Florida Statutes Chapter 125 to enact a utilities tax said counties are expressly forbidden to impose such a tax. See Florida Constitution Article VII, §1(a), §9(a); **CITY OF MIAMI BEACH v. FLEETWOOD HOTEL, INC.**, 261 So.2d 801 (Fla. 1972);

CITY OF TAMPA v. BIRDSONG MOTORS, INC., 261 So.2d 1 (Fla. 1972); 26A F.S.A. at pages 268-270, D'Alemberte, Commentary on Fla. Const. Article VIII, §1.

Respectfully Submitted,

JOHNIE A. McLEOD, ESQUIRE

JAMES S. CURRY, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U.S. Mail, postage pre-paid, this 30th day of November, 1993, to: ROBERT NABORS, ESQUIRE, 315 South Calhoun Street, Suite 800, Tallahassee, Florida 32301, Attorney for Appellee; KAYE COLLIE, ESQUIRE, Assistant Orange County Attorney, 201 South Rosalind Avenue, Fifth Floor, Orlando, Florida 32802; PAULA COFFMAN, ESQUIRE, Assistant State Attorney, State Attorney's Office, 250 North Orange Avenue, Fourteenth Floor, Orlando, Florida 32801; WILLIAM J. ROBERTS, ESQUIRE, Florida Association of Counties, Inc., Post Office Box 549, Tallahassee, Florida 32302.

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September 20, 1993

Mr. Johnnie A. McLeod
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Dear Mr. McLeod:

I am writing today to notify you of the consequences of actions you may or may not be about to undertake, and to appeal to you to refrain from single-handedly standing in the way of the County's purchase of as much as five thousand acres of environmentally sensitive lands.

We find ourselves standing at the threshold of purchasing and preserving forever lands that are rapidly disappearing. Interest rates are their lowest in many years, real estate prices are stable or declining, and the County is poised to take advantage of these conditions by purchasing the lands using bonds. However, we stand to lose our window of opportunity if your pending lawsuit needlessly delays the Public Service Tax bond validation. Given this scenario, I want to let you know that your actions as an individual acting alone have the potential to penalize hundreds of thousands of your fellow citizens, both today and for generations to come. You are not acting in the best interests of the people of this community by any stretch of the imagination, and I appeal to you to end this fruitless litigation.

It is my most fervent wish that you join me in my concern for protecting our valuable natural resources here in Orange County by assisting in our efforts to acquire these precious and scenic lands and by removing the roadblock that you alone have placed before us.

Sincerely,

Linda W. Chapin

Linda W. Chapin
Orange County Chairman

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