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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APPELLANT'S INITIAL 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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STATEMENT OF THE CASE AND FACTS

On August 6, 1991, Orange County enacted Ordinance 91-17 (AP-1). Said ordinance, known as the Public Services Tax (hereinafter sometimes referred to as "utilities tax") establishes and enacts a 10% tax upon certain enumerated utilities to be paid by the purchaser of said utilities. Said tax is levied only against those individuals residing and purchasing the enumerated utilities within the unincorporated areas of Orange County.

Orange County is a charter county, and as a charter county Orange County claims authority to enact said utilities tax pursuant to Florida Statutes, § 166.231. Said statute is a general law which authorizes the imposition of such utilities tax by the municipalities within the state of Florida.

On November 10, 1992, Orange County adopted Ordinance 92-35 (AP-2) which authorized the financing of capital projects within Orange County by the issuance of Public Service Tax Revenue Bonds payable from the revenues generated by the utilities tax.

On November 10, 1992, Orange County passed Resolution 92-B-10 (AP-3) and Resolution 92-B-11 (AP-4), hereinafter sometimes referred to jointly as the "bond resolutions". Said bond resolutions authorized the proceeds from said bonds ($30,000,000.00) to be utilized for the provision of capital improvements and governmental services throughout Orange County, regardless of location. The revenues generated by the utilities tax are to be the sole revenue source for the retirement of said Series 1993 Bonds.

On February 25, 1993, Orange County filed its Complaint For Validation (AP-5) of said bonds. On March 24, 1993, the Honorable William C. Gridley issued the court's Order To Show Cause (AP-6) in the bond validation proceeding. Said Order To Show Cause was published twice in the Orlando Sentinel on April 29, 1993 and again on May 6, 1993.

A bond validation hearing was held below on June 4, 1993. As a result of said hearing, the Honorable William C. Gridley on June 23, 1993 entered the court's order validating said bonds (AP-7).

Johnie A. McLeod, as a resident and property owner in the unincorporated area of Orange County and being subject to and affected by the issuance of the subject bonds, timely filed a Motion For Rehearing or New Trial (AP-8). Subsequent to said filing, and before a judicial ruling thereon, Johnie A. McLeod filed his Addendum To Motion For New Trial Or Rehearing (AP-9).

Orange County filed an objection to said Addendum basing the objection on failure to follow the proper procedure for the filing of such an Addendum. Prior to any hearing on the objection of Orange County, Judge Gridley entered his Order (AP-10) denying Johnie A. McLeod's Motion For New Trial Or Rehearing.

From said order validating the subject bonds and the order denying the timely filed Motion For New Trial Or Rehearing, this appeal ensues. The nature of the Order appealed is a Final Judgment validating the subject bonds.

SUMMARY OF THE ARGUMENT

POINT I - ABSENT A GENERAL LAW SO EMPOWERING, ORANGE COUNTY AS A CHARTER COUNTY IS WITHOUT THE POWER OR AUTHORITY TO ENACT A PUBLIC SERVICE TAX PURSUANT TO FLORIDA STATUTES, §166.231

The power to tax is an inherent and plenary power of the sovereign. Municipalities and counties, both charter and non-charter, are political subdivisions of and created by the state. Said political subdivisions have no inherent power to tax. Any authority for said political subdivisions to exercise the taxing power must be found in the Constitution and general laws of the state of Florida. Absent a Constitutional or general statutory grant of such power and authority all taxing powers are preempted by the state sovereign.

Article VIII, § 1(g) and Part II and Part IV of Chapter 125, Florida Statutes are the grant of power and enabling acts which allow a county to change its form of government to become a charter county. Neither Article VIII nor Chapter 125, Florida Statutes operate to grant to a charter county the power or authority to enact a utilities tax pursuant to Florida Statutes, § 166.231. Said statutory section specifically authorizes only municipalities to enact such a utilities tax within the confines of the municipality.

Imposition of such a utilities tax pursuant to Florida Statutes, § 166.231 by Orange County is not authorized by Florida Constitution Article VIII, § 1(g) and is repugnant to Article VII, §§ 1(a), 9(a); Article III, § 10; Article III, § 6; Article I, §§ 2, 9, 11; and is in violation of the 5th and 14th Amendments to the

United States Constitution.

Absent a general law passed by the Legislature empowering charter counties to enact such a utilities tax and containing specified guidelines therein for the application of said utilities tax, charter counties are not authorized to enact such a utilities tax ordinance pursuant to Florida Statutes, § 166.231. Unless and until the Legislature so acts, this type of taxation by charter counties is preempted by the state.

POINT II - ORANGE COUNTY, ACTING AS A MUNICIPALITY OSTENSIBLY BY VIRTUE OF ITS BEING A CHARTER COUNTY, ENACTED ORDINANCE 91-17 ESTABLISHING A UTILITIES TAX PURSUANT TO FLORIDA STATUTES, § 166.231, HOWEVER, ORANGE COUNTY FAILED TO FOLLOW THE CORRECT PROCEDURE IN THE ENACTMENT OF ORDINANCE 91-17

The Legislature, having plenary power of taxation, is the branch of government that determines who, what, when, where, and how the taxing power of the sovereign may be applied by the various political subdivisions of the state. As said power is plenary, the Legislature through general law has the right and sole power to determine how said taxing power shall be enacted by the political subdivisions.

Florida Statutes, § 166.231 is a general law that authorizes municipalities to enact a utilities tax within the municipality. The Legislature has determined, via Florida Statutes, § 166.041, the procedure to be utilized by a municipality in enacting such a tax.

Orange County claims that it has the power and authority of a municipality to exercise the tax provided for by Florida Statutes, § 166.231. However, in its capacity as a municipality Orange

County failed to follow the dictates of Florida Statutes, § 166.041, therefore, Ordinance 91-17 (AP-1) was not validly enacted and must fall.

POINT III - THE NOTICE OF THE ORDER TO SHOW CAUSE IN THE BOND VALIDATION SUIT FAILED TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT OF 1990 AND FAILED TO COMPLY WITH THE ADMINISTRATIVE ORDER OF THE CHIEF JUDGE OF THE NINTH JUDICIAL CIRCUIT MANDATING THE NOTICE REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT OF 1990

On March 24, 1993, the Honorable William C. Gridley, trial judge below, issued the court's Order To Show Cause (AP-6) in the bond validation proceeding below. Said Order was to be published in a newspaper of general circulation within Orange County in accord with the provision of Florida Statutes, § 75.06.

On April 15, 1993, the Chief Judge of the Ninth Judicial Circuit, in and for Orange County, Florida, the Honorable Frederick Pfeiffer, entered his Administrative Order (AP-11) mandating that the notice requirements of the Americans With Disabilities Act be included with, inter alia, notices of all court proceedings.

The Order To Show Cause was published in The Orlando Sentinel on April 29, 1993 and on May 6, 1993. Said published notices did not contain the required notice language mandated by the Americans With Disabilities Act of 1990 and the Administrative Order entered on April 15, 1993.

As said published notices did not comply with the Administrative Order nor the Federal law, the Order below validating the subject bonds should be quashed.

POINT I

ABSENT A GENERAL LAW SO EMPOWERING, ORANGE COUNTY AS A CHARTER COUNTY IS WITHOUT THE POWER OR AUTHORITY TO ENACT A PUBLIC SERVICE TAX PURSUANT TO FLORIDA STATUTES, § 166.231

The power to tax is an essential, integral, and plenary power of the state sovereign. Counties and municipalities, being political subdivisions created by the state, have no inherent power to tax. As counties and municipalities have no inherent power to tax, said entities may impose taxes only as authorized by the Constitution and the general laws of the state. Merely adopting a charter by a county does not alter this fundamental relationship.

On June 23, 1993, the lower court entered its order validating the issuance of Public Service Tax Revenue Bonds, Series 1993, in the amount of $30,000,000.00. (AP-7). As set forth in the County's Complaint For Validation (AP-5) and the Bond Resolutions 92-B-10 (AP-3) and 92-B-11 (AP-4), the proceeds of these bonds are to be utilized for various and sundry purposes including, but not limited to, the purchase of environmentally sensitive lands, roads and other transportation facilities, stormwater facilities, jail facilities, courthouse facilities, other governmental buildings, water and wastewater facilities, solid waste disposal facilities, park and recreation facilities, convention centers, civic centers, auditoriums, and vehicles and equipment pertaining to the foregoing or other governmental operations. The funding source for the repayment of said bonds is the Public Service Tax (hereinafter sometimes referred to as the "utilities tax").

Orange County is a Charter County. Orange County became a charter county pursuant to provisions of Article VIII of the Florida Constitution and Part IV of Chapter 125, Florida Statutes. On August 6, 1991, the Orange County Board of County Commissioners enacted Ordinance 91-17 (AP-1). Said Ordinance established a utilities tax to be paid by the purchaser of certain enumerated utilities. Said utilities tax is to be paid only by residents of the unincorporated area of Orange County. The proceeds of the Series 1993 Bonds, subject of the hearing below, are to be utilized for any legitimate county purpose on a county wide basis, without regard to the location of the project within Orange County.

Orange County is without the power and authority to enact such a utilities tax. As the power to tax is reposed in the sovereign state, counties and municipalities may not impose a tax unless and until they are specifically authorized to do so either by Constitutional provision or general statutory authority.

In imposing the utilities tax, Orange County claimed authority pursuant to Florida Statutes § 166.231. Said statute specifically authorizes **municipalities** to enact such a tax. Said statute is defeaningly silent as to granting authority to a charter county to enact such a tax.

At the trial in the validation proceeding held below the State of Florida, through the state's attorney, indicated to the court that the state knew of no statutory authority, nor case in point, for Orange County to enact a utility tax pursuant to Florida Statute, § 166.231. (AP-12, p. 28, L. 9-25; p. 29, L. 1-3).

Orange County claims authority to enact a public service tax by ordinance pursuant to Florida Statutes, § 166.231 by virtue of being a charter county, and as such have all powers of a municipality.

Orange County, in advancing the hypothesis that a charter county can exercise municipal taxing powers, heavily relies on **VOLUSIA COUNTY v. DICKINSON**, 269 So.2d 9 (Fla. 1972); **STATE ex rel. DADE COUNTY v. BAUTIGAM**, 224 So.2d 688 (Fla. 1969); and **STATE v. BROWARD COUNTY**, 468 So.2d 965 (Fla. 1985). None of the cases cited as support by Orange County deal with a utilities tax imposed, by a charter county, pursuant to Florida Statute, § 166.231, let alone a utilities tax imposed by a charter county only in the unincorporated area of said county.

A very important distinction should be noted in that Dade County was established as a charter county pursuant to the 1885 Florida Constitution. The provisions for Dade County being a charter county were carried through in the 1968 Florida Constitution revision. Chief among those powers granted were that Dade County is specifically authorized to exercise the powers heretofore and hereafter granted municipalities by general law.

Those cases are distinguishable from the case sub judice in very important regards. **VOLUSIA** was not a question of whether a charter county can enact a utilities tax pursuant to Florida Statutes, § 166.231. **VOLUSIA** concerned a question of dual taxation in the area of cigarette excise taxes. Additionally, the language contained in **VOLUSIA** to the effect "[T]hat upon a county becoming

a charter county it automatically becomes a metropolitan entity for self-government purposes", **VOLUSIA** at 10, 11; and "[R]ead together, Sections 9(a), Article VII and 1(g), Article VIII, clearly connote the principle that unless precluded by general or special law, a charter county may, **without more under authority of existing general law** may impose by ordinance any tax in the area of its tax jurisdiction a municipality may impose[.]" Id. at 11, is inapposite to Orange County having the authority to enact a utilities tax pursuant to Florida Statute § 166.231. This is so, as will be shown below, as such a broad grant and enlargement of charter county power in this area will run afoul of Article III, § 10 of the Constitution of the State of Florida.

Orange County relies upon judicial precedent in areas other than Florida Statutes § 166.231 taxation. As noted above, the cases cited by Orange County do not deal with this specific municipal tax. As the power to tax is plenary with the sovereign state it is improvident for the judiciary to enlarge the taxing authority of any of the political subdivisions of the state.

Since the 1971 opinion in **VOLUSIA**, the Legislature has amended Florida Statutes § 166.231 a total of fifteen (15) times. The most recent amendment being in 1993. It is of great import to note that in none of the amendments were charter counties, either expressly or by implication, authorized to enact such a utilities tax. It cannot be said that the Legislature has accepted the judicial interpretation that charter counties are authorized to enact such a tax.

> "Legislative silence does not communicate intent to leave the job to the courts; it merely means the Legislature has not finished the job."

STATE ex rel. DADE COUNTY v. DICKINSON, 230 So.2d 130, at 141 (Fla.1969).

Not only has the Legislature not adopted the judicial interpretations of the authority of charter counties to enact any municipal taxing ordinances, the Attorney General's Office is of the opinion that absent authority pursuant to general law political subdivisions may not operate in areas preempted to the state. See Atty. General's Opinion 74-379. Article VII, § 1(a) provides;

> "No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. **All other forms of taxation shall be preempted to the state except as provided by general law.**" (emphasis supplied)

Orange County as a charter county, in an attempt to exercise powers previously not available, rely on Article VIII, § 1(g) as being a broad grant of powers and as somehow justifying the exercise of municipal taxing powers by a charter county. Said language reads as follows:

> "Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances."

The change in the redistribution of power between the sovereign and the county operating under a charter is to determine, pursuant to the charter itself, whether the county ordinance will prevail over a conflicting municipal ordinance. See **D'ALEMBERTE,**

Commentary on Fla. Const. Art. VIII, § 1; 26A F.S.A. 268-270.

Orange County Ordinance 91-17 (AP-1) is violative of Article VII, § 1(a) and § 9(a).

The language "in pursuance of law" denotes that a tax must be enacted in accordance with general law. Absent a general law specifically authorizing such taxation (utilities tax) by a county, charter or noncharter, that taxation power and authority is pre-empted to the state and may not be exercised by the county.

> "The legislative power delegated by § 1(g), Article 8 to enact ordinances not inconsistent with general law does not carry with it the authority to enact ordinances **amending or repealing laws enacted by the state legislature or any part or parts thereof.**" (emphasis supplied)
> Attorney General's Opinion 90-27.

The authority for charter counties to enact tax measures is not found in Article VIII, § 1(g), rather, said authority is found in Article 7, § 1(a), 9(a) and such general and special laws as are enacted by the state Legislature. By way of analogy, please see Attorney General's Opinion 87-45.

Absent specified Constitutional or statutory authority for political subdivisions to enact a tax, all taxing power and forms of taxation are preempted to the State. See **CITY OF TAMPA, v. BIRDSONG MOTORS, INC.**, 261 So.2d 1 (Fla. 1972). As there has been no specific statutory or constitutional authorization for charter counties to enact a utilities tax, any attempt to do so by a charter county is ultra vires and therefore void.

What Orange County attempts to do by passing Ordinance 91-17 (AP 1) is to amend a general law of the State of Florida by a local

ordinance and attempt to raise revenues for the operation of county government other than by the prescribed method of ad valorem taxation. Orange County is without the power and authority to so amend Florida Statutes § 166.231.

Additionally, Article 8, § 1(h) provides:

> "Property situate within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas."

Ordinance 91-17 (AP-1) provides the revenue source for the Public Service Tax Revenue Bonds pursuant to Resolution 92-B-10, (AP-3) 92-B-11 (AP-4). The proceeds of said bonds can be utilized for, inter alia, any capital improvement project by Orange County and the location of the capital improvement projects can be located anywhere within Orange County including within the various municipalities (AP-2; 3; 4; 5). The end result is that individuals living within any of the thirteen municipalities within Orange County are receving substantial benefits by the expenditure of tax monies on capital improvements, etc., that is derived solely from individuals who reside in the unincorporated areas of the county.

Municipalities are specifically authorized to enact a utilities tax by Florida Statute §166.231. Once the municipality has enacted such a tax, that tax is uniform and applicable to all citizens and electors of the municipality that reside within the municipality and who purchase the specified utilities therein. The delegation of the power to tax from the state sovereign to the political subdivisions of the state does not carry with it the power to exempt from said tax. See Attorney General's Opinion 79-

26.

Florida Statutes, § 166.231 sets forth certain exemptions that a Municipality may put in place in enacting a Municipal Ordinance establishing a utilities tax pursuant to said section. Noticably absent in the way of exemption is a provision that the Municipality may enforce its utilities tax ordinance in only certain areas within the municipality. If a municipality enacts an ordinance establishing a utilities tax, that tax is applicable to all residents and electors within the corporate boundaries of the enacting municipality.

The Board of County Commissioners is the governing body for Orange County and all citizens, residents, and electors within the corporate boundaries of Orange County. All qualified electors, whether living in the unincorporated area of Orange County or within any of the thirteen incorporated municipalities within Orange County, were entitled to vote for passage of the charter form of county government and the individuals who were elected to the Board of County Commissioners. However, the Board of County Commissioners has determined that this utilities tax shall apply only in the unincorporated areas of the county and shall not apply to any resident of any of the incorporated Municipalities, whether or not said municipality has inacted such a tax on its own.

Stating for purposes of argument only that Orange County as a Charter county has the power and authority to enact a tax pursuant to § 166.231, Orange County does not have the power nor authority to in any way change the provisions of § 166.231 and levy said tax

against only a portion of the individuals residing within the confines of Orange County. Ordinance 91-17 (AP-1) has, in effect and intent, amended § 166.231 and Orange County is without the power to so amend. See Attorney General's Opinion 90-27.

The Board of County Commissioners has impermissibly discriminated against those individuals who reside and purchase specified utilities within the unincorporated areas of the county in favor of those individuals who reside and purchase specified utilities within any of the thirteen incorporated areas of Orange County as said municipal residents are not subject to said utilities tax imposed by Ordinance 91-17 (AP-1).

At present, six municipalities within the boundaries of Orange County have imposed a utilities tax pursuant to Florida Statutes § 166.231; seven municipalities within the boundaries of Orange County have not imposed such a tax. The proceeds from the utilities tax will be utilized to retire bonds whose purpose is to fund land acquisition and capital improvements anywhere within Orange County, including within the various municipalities.

If the legislature had intended to grant to charter counties the authority to impose a tax pursuant to Florida Statutes, §166.231 the legislature would have included, with appropriate guidelines to insure uniform application, charter counties within said section.

The fact remains that some twenty-two years, and fifteen (15) amendments to Florida Statutes, § 166.231, since the **VOLUSIA** decision, the legislature has not seen fit to statutorily grant

charter counties the authority to enact a utilities tax.

To hold that a county upon becoming a charter county is automatically authorized to enact any tax that the legislature has, through general law, authorized municipalities to enact would result in unequal and non-uniform taxation. Article VIII, § 1(g) provides in pertinent part;

> "The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances."

In counties whose charters hold that the county ordinance will prevail over conflicting municipal ordinances, such a utilities tax would result in a county taxing the sale and purchase of specified utilities within, as well as without, the corporate boundaries of the municipalities within the county. At the same time, counties whose charters provide that municipal ordinances will prevail over conflicting county ordinances would result in a county being restricted to taxing the sale and purchase of utilities only in the unincorporated areas of the county.

Therefore, unless and until the legislature specifically grants such utilities tax authority to charter counties and provides specific guidelines therein for its application, the expansion of Florida Statute, § 166.231 by judicial fiat to automatically include charter counties could well make said section repugnant to Article III, § 10 of the Florida Constitution and therby be invalid. The law, without specific guidelines pertaining to charter counties, would not operate uniformly as to all charter counties within the state of Florida.

> "...uniformity of operation does not require that law operate upon every person in state, but that every person brought within circumstances provided for is fairly and equally affected by law." **STATE v. LEAVINS**, 599 So.2d 1326, at 1327 (Fla.App.1 Dist. 1992).

As the county-wide government for the county of Orange, the Board of County Commissioners has impermissibly discriminated against certain of the citizens and residents of Orange County simply upon the basis of their residence location. It cannot be maintained that such a utilities tax levied only in the unincorporated areas of the county is somehow the equivalent of a Municipal Service Taxing Unit which would allow a county ad valorem tax levied against residents of the unincorporated areas comprising said MSTU to the exclusion of residents of any incorporated municipality. Said revenues realized pursuant to a MSTU must be utilized by the county for the provision of governmental services within said MSTU.

Article 3, § 6 of the Florida Constitution provides in pertinent part:

> "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only."

The title to Florida Statutes, §166.231 reads: **Municipalities; public service tax.** The judiciary has improperly acted as a "super-legislature" in determining that charter counties upon becoming such are automatically authorized to enact tax ordinances that have been Legislatively limited by terms of general law solely to municipalities. Again, the power to tax is plenary and rests solely in the sovereign. That power may only be

delegated to the various lower political subdivisions by a proper legislative enactment. Article VII, § § 1(a), 9(a).

> ". . . the obligation of a citizen to pay taxes being purely of statutory creation, taxes can be lawfully levied, assessed, and collected only in the express method pointed out by statute." **STATE EX REL. SEABOARD AIR LINE R. CO. V. GAY**, 35 So. 2d 403, at 409 (FLa. 1948).

A fair and thorough reading of Florida Statute, § 166.231 (and the entire Title XII as well) does not even hint of the inclusion of charter counties in the Legislative grant of authority to enact such a utilities tax.

> ". . .; our only proper function being to interpret the law as it has been written by the Legislature, not to recast it in the mold which we, perhaps, might like to have seen it written had we been responsible for its promulgation". Id.

If Orange County is without authority to enact the utilities tax, Ordinance 91-17 (AP-1) violates the 5th and 14th Amendments of the United States Constitution and Article I, § § 2 and 9 of the Florida Constitution as the forced contribution without authority is a taking of property without due process of law or just compensation.

In a four to three decision, this Honorable Court in **STATE** ex rel. **DADE COUNTY v. DICKINSON**, 230 So.2d 130 (Fla. 1969) had the opportunity to discuss taxation by counties (including "home rule" or charter counties) and municipalities in the area of ad valorem taxes in the face of unprecedented growth and demands for governmental services. It must be borne in mind that Dade County, by virtue of Constitutional provision is specifically authorized to exercise municipal powers and enact municipal ordinances.

In **DADE COUNTY** this Honorable Court posed the following:

> "The question then naturally arises, 'How does one distinguish between county purposes and services, municipal purposes and services, and municipal purposes and services susceptible to county-wide administration by the Metropolitan Commissioners?' We have not conclusively answered this question, save on a piecemeal basis as various situations have been presented." **DADE COUNTY** at 136.

The Supreme Court continued;

> "These cases, when read in conjunction with the constitutional home-rule provisions and the Charter [referring to the Dade County Charter] adopted thereunder, offer uncertain guidelines for determining the exact status of interlocal governmental relations in Dade County. * * * (brackets added)
>
> We are of the view that the dispelling of the uncertainty which exists regarding interlocal governmental relations in Dade County is a **legislative** task of the most pressing urgency, the import of which transcends the boundaries of Dade, inasmuch as home-rule for several areas is preserved under Article VIII, § 6(e), and the opportunity for consolidation has been expanded state-wide under Article VII, § 3 of the current amended Constitution. This must be done, of course, by general law." (emphasis in original) Id. at 136, 137.

The Court concludes;

> "In summation, we have held today * * * that the demarcation between county purposes and municipal purposes is uncertain; and that the dispelling of this uncertainty is a most urgent and pressing legislative task." Id. at 137.

The dispelling of uncertainty as to the authority of a charter county to enact a municipal tax pursuant to a general law of the legislature that by its terms is purely municipal in application is no less an urgent and pressing legislative task.

In his dissent in **DADE COUNTY** Justice Adkins saw the wisdom of leaving such determinations to the legislature;

> "There is no question but that the 1968 Constitution

> contains millage limitations. It also contains provisions validating tax provisions otherwise invalid. Repeatedly, the phrase appears 'as authorized by law.' We are persuaded this can only mean, legislative law, not judicial legislation." (emphasis supplied) Id. at 140.

Justice Adkins further opined;

> "A demarcation line must be drawn, but this is a legislative task and should not be left to the piecemeal interpretation of the unguided courts. * * *. The legislature is presumed to know the case law established by this Court. It is inconceivable that the Legislature intended to leave the great questions of timing and policy to be hammered out in scattered trial courts in an endless wave of expensive litigation. Legislative silence does not communicate intent to leave the job to the courts; it merely means the Legislature has not finished the job." Id. at 141.

Chief Justice Ervin concurred in dissent and filed a separate dissenting opinion. Justice Thornal also filed a dissenting opinion wherein he states;

> "I would enter an order retaining jurisdiction until the Legislature has time to act, this being basically a Legislative problem. I feel that the Court today has moved into the Legislative field instead of exercising the appropriate restraint which prohibits such action." Id. at 143.

The same rationale applies to the case sub judice. Save for ad valorem taxes, it is a purely legislative function to authorize the political subdivisions of the state to enact local taxing ordinances.

The cases arising out of Dade County do not provide substantial guidance in that Dade County is specifically authorized to exercise municipal power and enact municipal ordinances pursuant to general law applicable to municipalities. Further, other cases cited by Orange County as support for its authority to enact a utilities tax pursuant to Florida Statutes, § 166.231 provide

little guidance as well. Most notably among these is **STATE v. BROWARD COUNTY**, 468 So.2d 965 (Fla. 1985).

The crux of said case was whether Broward County as a charter county could enact resource recovery revenue bonds to finance solid waste disposal plants. The court held that Broward, as a charter county, could issue said resource recovery revenue bonds pursuant to Florida Statutes, § 166.111. A very important point of distinction exists between resource recovery bonds issued pursuant to Florida Statutes, § 166.111 and a utilities tax enacted pursuant to Florida Statutes, § 166.231.

Resource recovery revenue bonds are to be retired from revenues generated by the very project for which the bonds were issued. As such, issuance of said bonds by any charter county within the state of Florida, regardless of whether it's charter provides for county supremecy over conflicting municipal ordinance or vice versa, would not be repugnant to Article III, § 10 of the Florida Constitution as the application of Florida Statutes, § 166.111 would be uniform among all charter counties throughout the state of Florida. The same cannot be said for a utilities tax, whose revenues are to be utilized to retire bonds issued for the construction of capital improvments and provision of governmental services, enacted by the various charter counties throughout the state of Florida.

The language of Article VII, § 1(a) and 9(a) of the Florida Constitution is clear. The imposition of a tax by a county requires general law authorization.

Legislative intent is the polestar of construction. If the intent of the legislature can be gleaned from the statute itself it becomes unnecessary to delve into the legislative history of the act. Florida Statute, § 166.231 evidences the intent of the legislature in its enactment. As noted in **DADE COUNTY**, supra, the Legislature is presumed to "know the case law established by this Court". Since the 1968 Constitutional revision there has been the opportunity for the various courts of the state to judicially interpret the distinction between municipalies and charter counties. However, the undersigned have been unable to discover a case of any court of this state which has interpreted the power and authority of a charter county to enact an ordinance pursuant to F.S., § 166.231 which is a grant of the sovereign taxing authority to municipalities.

The plenary power to tax that is reposed in the sovereign carries with it the concomitant plenary power to determine who, what, when, where, and how to tax. This is purely a Legislative function and prerogative, not judicial.

Since the Constitutional Revision of 1968, which made provision for the establishment of charter counties through Article 8, § 1(g) and providing for the establishment of "home-rule" powers, the Legislature has, in various and sundry manner, amended Florida Statutes, § 166.231 fifteen (15) times;

Laws 1973, c. 73-129, § 1; Laws 1974, c. 74-109, § 1,2;
Laws 1977, c. 77-174, § 1; Laws 1977, c. 77-251, § 1;
Laws 1978, c. 78-299, § 4; Laws 1978, c. 78-400, § 1;
Laws 1982, c. 82-230, § 1; Laws 1982, c. 82-399, § 1;
Laws 1984, c. 84-356, § 24; Laws 1985 c. 85-174, § 1;
Laws 1986, c. 86-155, § 1; Laws 1988, c. 88-140, § 1;

Laws 1988, c. 88-35, § 1; Laws 1990, c. 90-360, § 36; Laws 1993, c. 93-224, § 1.

None of the amendments, either expressly or by implication, brought charter counties within the ambit of § 166.231. The very body charged with the plenary power of taxation has not recognized the judicial determination/fiat that counties upon becoming charter counties automatically have the authority to enact municipal taxing ordinances pursuant to general law of municipal application.

Further review of the section itself reveals a Legislative limitation which operates to restrict the sections application to municipalities alone. As noted earlier, counties and municipalities are creatures of the state. They may be created or abolished by the state. Municipalities, however, carry and can exercise pursuant to general law a power of no small distinction that is forbidden a county.

Municipalities have the power of annexation and contraction. No action is required of the state for a municipality to exercise this power. The Municipality must only follow the guidelines as set forth in Chapter 171, Florida Statutes. Counties, on the other hand, are completely devoid of the power of annexation or contraction. A change in a county's boundaries can only be occasioned by an act of the Legislature.

Florida Statutes, § 166.231(7) reads as follows:

> "A municipality shall notify in writing any known seller of items taxable hereunder **of any change in the boundaries of the municipality** or in the rate of taxation." (emphasis supplied)

If charter counties are automatically (see **BROWARD**, supra,)

authorized to avail themselves of general laws applicable to municipalities, can Orange County pursuant to Chapter 171, Florida Statutes, then annex a portion of the unincorporated area of Seminole County should the residents in said unincorporated area of Seminole County determine they wish to become part of Orange County?

If the Legislature had intended that charter counties be authorized to exercise the power granted to municipalities via § 166.231 the Legislature surely would have incorporated such charter county authority. The Legislature has not seen fit to do so and it is improper to enlarge a grant of taxation authority by mere analogy and implication.

Absent a Legislative grant of authority with accompanying guidelines, merely holding that upon becoming a charter county said county is automatically authorized to avail themselves of all municipal powers and general laws will allow absurd positions to obtain.

Orange County Ordinance 91-17 (AP-1), which implements the utilities tax in the unincorporated area of the county ostensibly pursuant to § 166.231, is Constitutionally defective.

Article I, § 11 of the Constitution of the State of Florida guarantees that no person shall be imprisoned for debt, except in cases of fraud. Section 11 of Ordinance 91-17 (AP-1) provides in pertinent part:

> "Pursuant to Section 125.69 of Florida Statutes, any purchaser willfully failing or refusing to pay the tax hereby imposed, * * *, may, upon conviction, be punished by a fine not to exceed Five Hundred Dollars ($500.00) or

by imprisonment for a period not exceeding sixty (60) days, or by other such fines and imprisonment for each and every violation as may be lawfully imposed by a court with jurisdiction."

An individual can reside in the unincorporated area of Orange County and not be subject to the tax if said individual does not purchase any of the enumerated items or contract for the provision of utilities to his place of abode. If, however, the individual contracts for the provision of any of the enumerated utilities his contract automatically assumes and incorporates the laws in force and effect. The 10% tax is in the nature of a debt for which, pursuant to the above section of the Ordinance and F.S. § 125.69, the individual faces potential incarceration for non-payment of a debt. See **TURNER v. STATE ex rel. GRUVER**, 168 So.2d 192 (Fla.App.3 Dist. 1964).

As is evidenced by the complaint (AP-5) to validate the Series 1993 bonds, the proceeds from the bonds are to be utilized to provide various and sundry capital improvement projects, land acquisition and provide governmental services throughout the entirety of Orange County.

The revenue from the utilities tax is to be the revenue source utilized to retire the issued bonds. Therefore, the essential nature of the utilities tax revenues is changed and same becomes more than a mere excise or sales tax, which arguably are outside of the proscription of Article I, § 11, and become a charge (debt) for services rendered by the county and are within the full purview of Article I, § 11 of the Constitution of the State of Florida.

As section 11 of Ordinance 91-17 (AP-1) is unconstitutional in the face of Article I, § 11 of the Florida Constitution, it must be stricken from the ordinance. The Severability clause of the Ordinance, Section 12, cannot save the Ordinance. Once the penalty provision of Section 11 is removed, compliance with the Ordinance and payment thereunder becomes voluntary on the part of the purchaser. This provision applies as well to the seller of the taxable items should they willfully fail to collect and remit absent an assumption on the part of the seller to absorb and pay said tax on behalf of the affected consumer. Therefore, collection and remittance to the County becomes voluntary as well.

Stating for purposes of argument only that Orange County as a Charter county has the power and authority to enact a tax pursuant to § 166.231, Orange County as noted earlier, does not have the power nor authority to in any way change the provisions of § 166.231 and levy said tax against only a portion of the individuals residing within the confines of Orange County. Ordinance 91-17 (AP-1) has, in effect and intent, amended § 166.231 and Orange County is without the power to so amend. See Attorney General's Opinion 90-27.

By imposing the utilities tax on only the citizens, electors, and residents of unincorporated Orange County and establishing the revenues to be realized as the revenue source for retirement of the Series 1993 Bonds, revenue from said bonds to be utilized to provide governmental services, infrastructure, parks, etc., (AP-2; 3; 4; 5) Orange County has conferred benefits and services upon

individuals (e.g., those who reside within any of the thirteen municipalities within Orange County) who are not required to contribute toward payment of same.

This Honorable Court should defer to the Legislative Branch of government in determining how, when, where, and under what circumstances the political subdivisions of the state may utilize the delegated taxing power and authority of the sovereign. It is with a very broad brush the Court paints when determining that a county upon becoming a charter county automatically has the authority to exercise and enact Ordinances pursuant to general statutes of municipal application authorizing the exercise of certain powers by municipalities. It is the province of the Legislature to delegate such authority within stated paramaters and guidelines; a task for which the judiciary is not well suited.

Ordinance 91-17 (AP-1) should be struck down. As the revenue source to be utilized to retire the Series 1993 bonds would come from said utilities tax, the Series 1993 bonds should not be validated and issued.

POINT II

ORANGE COUNTY, ACTING AS A MUNICIPALITY OSTENSIBLY BY VIRTUE OF ITS BEING A CHARTER COUNTY, ENACTED ORDINANCE 91-17 ESTABLISHING A UTILITIES TAX PURSUANT TO FLORIDA STATUTES, § 166.231, HOWEVER, ORANGE COUNTY FAILED TO FOLLOW THE CORRECT PROCEDURE IN THE ENACTMENT OF ORDINANCE 91-17

For purposes of Point II argument, it will be assumed without admitting and for purposes of argument only that upon becoming a charter county said county is automatically authorized to exercise municipal powers pursuant to general law applicable to municipalities.

As noted in Point I, supra, the power to tax is plenary and is an inherent power of the sovereign state. Political subdivisions of the state possess no inherent power to tax. What taxing authority and power that is possessed by the political subdivisions of the state are to be found in the Constitution and general law enacted by the legislature delegating such authority. Absent any constitutional authority or grant of authority by the Legislature, all power to tax is preempted by the state. See Article VII, § § 1(a), 9(a).

Orange County has enacted an Ordinance establishing a utilities tax upon those individuals who reside in the unincorporated area of Orange County and who purchase any of the enumerated items/services upon which said tax applies. Orange County claims authority to enact such an Ordinance under Florida Statutes, § 166.231 and the fact that Orange County is a charter county.

Chapter 166, Florida Statutes is entitled Municipalities. The

four parts of said chapter are:

Part I, General Provisions;
Part II, Municipal Borrowing;
Part III, Municipal Finance And Taxation;
Part IV, Eminent Domain

Florida Stautes, § 166.041 provides, in pertinent part:

> (1) As used in this section, the following words and terms shall have the following meanings unless some other meaning is plainly indicated:
>
> (a) "Ordinance" means an offical legislative action of a **governing body**, which action is a regulation of a general and permanent nature and enforceable as a local law. (emphasis supplied)
>
> (3)(a) Except as provided in paragraph (c), a proposed ordinance may be read by title, or in full, on at least 2 separate days and shall, at least 10 days prior to adoption, be noticed once in a newspaper of general circulation in the municipality. The notice of proposed enactment shall state the date, time, and place of the meeting; the title or titles of proposed ordinances; and the place or places within the municipality where such proposed ordinances may be inspected by the public. The notice shall also advise that interested parties may appear at the meeting and be heard with respect to the proposed ordinance."

Florida Statutes, Chapter 166, Part III, § 166.201 provides:

> "A municipality may raise, by taxation and licenses authorized by the constitution or general law, or by user charges or fees authorized by ordinance, amounts of money which are necessary for the conduct of municipal government and may enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law."

In its enactment of Ordinance 91-17 (AP-1), Orange County is assuming the role of a municipality. The county has claimed such authority to act as a municipality by virtue of Article VII, § 1(g), Part IV of Chapter 125 Florida Statutes, and the Orange County Charter.

Orange County, in enacting Ordinance 91-17 (AP-1), followed the procedure for enactment set forth in Florida Statutes, § 125.66.

Said section provides in pertinent part;

> (1) In exercising the ordinance-making powers conferred by s. 1, Art. VIII of the State Constitution, counties shall adhere to the procedures prescribed herein.
>
> (2)(a) The regular enactment procedure shall be as follows: The board of county commissioners at any regular or special meeting may enact or amend any ordinance, except as provided in subsecgtion (5), i f notice of intent to consider such ordinance is given at least 15 days prior to said meeting, excluding Sundays and legal holidays. A copy of such notice shall be kept available for public inspection during the regular business hours of the office of the board of county commsissioners.

Article VIII, § 1(g) provides in pertinent part;

> The governing body of a county operating under a charter may enact county ordinances **not inconsistent with general law.** (emphasis supplied).

In this area the county claims authority to act as a municipality to enact a utilities tax. As has been noted, the power to tax is plenary with the sovereign. The sovereign may delegate its power to tax along with identifiable and specific guidelines to be followed by the political subdivision to which said power has been delegated.

The county asserts that it must strictly adhere to the procedural requirements of Florida Statutes, § 125.66 when enacting a county ordinance, however, Orange County has not enacted a county ordinance consistent with general law as there is no provision in the Constitution nor general law for a county to enact a utilities tax.

The Legislative Branch of government is the sole branch holding the taxing power. It is the Legislative branch which determines when, under what circumstances and how it's political subdivisions shall be allowed to exercise said taxing power. The Legislature has spoken in regard to the exercise of levying a utilities tax by municipalities.

As the legislature has defined, by general law, the manner in which a municipality may enact an ordinance which imposes such a utilities tax, a municipality may not deviate from the prescribed enactment procedure.

As Orange County is operating as a municipality and exercising municipal power in establishing and levying the subject municipal utilities tax, Orange County cannot deviate from the prescribed enactment procedures set forth in Chapter 166, Florida Statutes. The County, in its Memorandum In Opposition To Motion For New Trial Or Rehearing (AP-13) at page four, states:

> "Orange County is relying on the holding of the Florida Supreme Court in **VOLUSIA COUNTY v. DICKINSON**, 269 So.2d 9 (Fla. 1972) and a related line of cases * * * as authority for Orange County to levy a public service tax. * * * . Volusia County followed the procedures set forth in Section 125.66, Florida Statutes, by holding <u>one</u> public hearing and noticing the hearing at least <u>15</u> days prior to the public hearing to adopt the ordinance." (emphasis in original)

The county continues, rhetorically;

> "Presumably the Supreme Court would have invalidated the Volusia ordinance for failure to meet the procedural requirements set forth in 166.041, Florida Statutes, if those were applicable to the County."

Appellant can only suggest that perhaps that very question was not before the Court in **VOLUSIA**.

The Orange County charter itself is silent as to what procedure shall be followed when the county deigns to act as a municipality and to enact an ordinance exercising municipal power.

General law(s) authorizing the delegation of the exercise of the sovereign taxing power are to be strictly construed. A delegation of authority from the sovereign to a political subdivision along with stated procedures as to how that authority is to be enacted permits of no other procedure. No general law applicable to counties, charter or otherwise, in the area of utilities taxes exists.

The legislature has spoken as to how such ordinances exercising the taxing power are to be enacted. If Orange County is operating as a municipality in enacting Ordinance 91-17 (AP-) then Orange County as a municipality must follow the enactment procedure codified at Florida Statutes, § 166.041.

As the Ordinance in question was not enacted with the procedural requirements established by the Legislature said Ordinance is void and of no force and effect. As the revenue source to be utilized to retire the Series 1993 Bonds is derived from a void Ordinance, said bond validation Order should be quashed.

POINT III

THE NOTICE OF THE RULE TO SHOW CAUSE IN THE BOND VALIDATION SUIT FAILED TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT OF 1990 AND FAILED TO COMPLY WITH THE ADMINISTRATIVE ORDER OF THE CHIEF JUDGE OF THE NINTH JUDICIAL CIRCUIT MANDATING THE NOTICE REQUIREMENTS OF THE AMERICANS WITH DISABILITIES ACT OF 1990

On March 24, 1993, the Honorable William C. Gridley, trial judge below, issued the court's Order To Show Cause (AP-6) in the bond validation proceeding against all named defendants in the cause. Pursuant to said Order, the Order was to be published in the manner required by Florida Statutes, § 75.06 in a newspaper of general circulation in Orange County, Florida. By the terms of the Order, publication of same made all property owners, taxpayers and citizens of the State of Florida and of Orange County, Florida, including non-residents owning property or subject to taxation therein, and all others having or claiming any right, title or intetrest in property to be affected by the issuance of said Bonds or to be affected in any way thereby, are made parties defendant.

On April 15, 1993, the Chief Judge of the Ninth Judicial Circuit, in and for Orange County, Florida, the Honorable Frederick Pfeiffer, entered his Administrative Order (AP-11) which required;

> "IT IS ORDERED that all communications noticing court proceedings including, but not limited to, subpoenas for trial, jury summons, notice of hearings, notice for depositions and all other court related proceedings **shall** provide that persons with a disability who need a special accommodation, shall contact the individual or agency sending the notice not later than seven days prior to the proceeding to insure that reasonable accommodations are available. Such communications noticing court proceedings **shall** include the following substantive language:
>
> In accordance with the Americans With Disabilities Act, persons with disabilities needing a special accommodation

> to participate in this proceeding should contact the individual or agency sending the notice at (address), Telephone: (area code and number) not later than seven days prior to the proceeding. If hearing impaired, (TDD) 1-800-955-8771, or Voice (V) 1-800-955-8770, via Florida Relay Service." (emphasis supplied).

Said Order To Show Cause (AP-6) was published in The Orlando Sentinel on April 29, 1993 and May 6, 1993. Said publications failed to include the mandatory language pursuant to the Americans With Disabilities Act of 1990 and the Administrative Order of Judge Pfeiffer (AP-11). By failing to include the mandatory language the Administrative Order (AP-11) of April 15, 1993 and the Americans With Disabilities Act of 1990 have been violated.

As a result of failing to comply with the local Administrative Order (AP-11) and the Federal Law as enunciated in the Americans With Disabilities Act, the Order validating the issue of Series 1993 Public Service Tax Revenue Bonds should be quashed.

CONCLUSION

Article VIII, § 1(g) of the Florida Constitution does not automatically grant the authority to a charter county to enact municipal taxes pursuant to Florida Statutes, § 166.231. The power to tax is an inherent and plenary power of the sovereign. Political subdivisions of the sovereign have no inherent power to tax, and any such authority must be found in Constitutional provisions or by general law of the sovereign. The sovereign has not seen fit to authorize counties, charter or otherwise, to exercise the power granted by Florida Statutes, § 166.231. There exists no general law so authorizing charter counties. Based upon the provision of Article VIII, § 1(g) of the Florida Constitution each charter county is entitled to determine whether county ordinances will prevail over municipal ordinances and vice versa. As all charter counties in this regard are not similarly structured, to hold that a charter county is automatically vested with the authority to enact a utilities tax pursuant to Florida Statutes, § 166.231 will result in non-uniform taxation in violation of Article III, § 10. As the Legislature has not moved by general law to empower charter counties to enact such a utilities tax that power is preempted to the state and Orange County is without the power and authority to enact such a tax. Therefore, said tax enacted without the authority therefore is a nullity and void. For the reasons contained in this Initial Brief Ordinance 91-17 should be struck down, and as the revenues generated by said tax are pledged as the sole revenue source to

retire the Series 1993 bonds said bond validation should be quashed.

Respectfully submitted,

JOHNIE A. MCLEOD, ESQUIRE

JAMES S. CURRY, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by U. S. Mail, postage prepaid, this 7th day of October 1993, to Robert Nabors, Esquire, 315 South Calhoun Street, Suite 800, Tallahassee, Florida 32301; Kaye Collie, Esquire, Assistant County Attorney, 201 South Rosalind Avenue, Fifth Floor, Orlando, FL 32802; and Paula Coffman, Esquire, Assistant State Attorney, State Attorney's Office, 250 North Orange Avenue, Fourteenth Floor, Orlando, FL 32801.

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