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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.

-------------------------------------/

APPELLANT'S REPLY 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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ARGUMENT

I. ARTICLE VIII, §1(g) IS NOT AN AUTOMATIC CONSTITUTIONAL GRANT OF MUNICIPAL POWERS TO COUNTIES THAT ADOPT A CHARTER GOVERNMENT

The Answer Brief prepared by outside counsel on behalf of Appellee Orange County, hereinafter sometimes referred to as "County", speaks throughout of "constitutionally vested municipal powers" available to a charter county. The County relies solely upon words that do not exist in Article VIII, §1(g) of the Florida Constitution as a taxing power that has its "genesis" from the judiciary of the state, not the legislature. A most novel concept.

The county attempts to "bootstrap" itself to entitlement to powers that cannot be found in the plain language of Article VIII, §1(g), nor in Part IV of Florida Statutes, Chapter 125 under which the charter form of government for Orange County was established. The county must believe if one repeats something fanciful long enough and with ardent conviction, it must surely be true.

Article VIII, §1(g) of the Florida Constitution controls as to Orange County's charter. The so-termed "revolution" (Answer Brief pg. 8) allegedly brought about by the 1968 Constitutional Revision was not an omnibus that granted to any charter county new or omnipotent powers. See **CITY OF MIAMI BEACH v. FLEETWOOD HOTEL, INC.**, 261 So.2d 801 (Fla. 1972).

As political subdivisions of and created by the state, counties have no inherent governmental power. The "archaic relationship" (Answer Brief at pg. 8) and resultant time consuming process of seeking state legislative authorization to exercise governmental powers on the local level by the county is the dynamic

that was addressed and realigned by the 1968 revision. The only additional or new "power" that was granted to charter counties was the ability to allow the charter itself to determine whether a county ordinance would prevail over a conflicting municipal ordinance.

The county contends that "[A]bsent an inconsistent law or charter provision, a charter county has complete power of self-government to legislate by ordinance on any subject matter which constitutes a public purpose." (Answer Brief at pg. 9). If, as the County would contend, the 1968 Constitutional Revision unleashed a "revolution" and the county is correct in it's veiled claim to an omnipotent grant of power, said revolution would appear to be rooted in 1917 Russia or 1939 Germany, not 1968 Florida.

In a concurring opinion, Justice Glenn Terrell addressed an attempt by the Florida Legislature to circumvent the Constitutionally mandated method by which the Constitution of the State of Florida could be revised:

> To one whose feet have been consistently tangled in the grassroots of **Jeffersonian** democracy, such an order was not only impertinent but had the aroma of an exotic out of the Soviet Union or other totalitarian state. (emphasis in original)

RIVERA-CRUZ v. GRAY, 104 So.2d 501, at 506 (Fla. 1958)

Here, Orange County is attempting to circumvent both the Constitution and the Statutory law of the state of Florida when it lays claim to authority to enact the municipal utilities tax absent a specific statutory grant of said power to charter counties.

The language of Article VIII, §1(g) states that upon becoming

a charter county said county "shall have all powers of local self-government not inconsistent with general law, * * *". The Constitution of the State of Florida is not a general grant of power, the Constitution is a restriction of powers given to the government(s) by the people of the State of Florida. Each section of the Constitution must be read with equal dignity in relation to every other provision of the Constitution. Further, the Legislature and the Constitution Revision Committee are presumed to know and understand the plain meaning of the words utilized.

Had the framers and the people of the state intended that charter counties were to automatically be given all powers that are or may be granted to municipalities, that provision could or would have been placed in Article VIII, §1(g). No such language exists therein.

As will be shown below, the framers understood and intended the distinction as to charter counties between a grant of all powers of local self government and a grant of all powers conferred upon municipalities. See Article VIII, §6(f). It appears that there may exist in Florida charter counties an "equal among equals". Any perceived slight in such categorization or empowerment is left to the remedy of the legislature, not the courts.

The Constitution itself not only distinguishes between counties, charter counties, and municipalities, it also distinguishes among charter counties. Article VIII, §1(f) pertains to non-charter counties, Article VIII, §1(c) pertains to charter

counties established by act of the legislature (Volusia), and Article VIII, §1(g) pertains to charter counties which are enacted pursuant to Florida Statutes, Chapter 125, Part IV (Orange). Article VIII, §6(f) pertains to Dade County. Article VIII, §2 pertains to municipalities.

Had the 1968 Constitutional Revision intended to be the now claimed automatic grant of municipal authority to a charter county to exercise and enact any tax or power that a municipality may enact, the framers could no doubt have included language in Article VIII, §1(g) to the effect that "[C]ounties operating under county charters shall have all powers of local self-government, <u>including those powers conferred now or hereafter upon municipalities</u>, not inconsistent with general law, or with special law approved by vote of the electors." (underlined supplied). Those words and their grant of power are not included in Article VIII, §1(g), nor found in Florida Statutes, Chapter 125, Part IV, nor in Florida Statute, §166.231, however, said power only exists ethereally due to judicial fiat. The judiciary cannot act as a legislative body.

The county argues the judiciary has granted a power to a class of counties that is, by the very terms of the constitution, specifically preempted to the state. It is the legislature and the legislature alone that has the power to determine how and under what circumstances and by what agencies the power to tax shall be exercised.

The county places enormous weight upon the two page opinion

issued by this Honorable Court, only four years after the 1968 Constitutional Revision, in **STATE EX REL. VOLUSIA COUNTY v. DICKINSON**, 269 So.2d 9 (Fla. 1972). In arriving at it's decision in **VOLUSIA COUNTY** this Honorable Court relied on the decision in **STATE EX REL. DADE COUNTY v. BRAUTIGAM**, 224 So.2d 688 (Fla. 1969).

A distinction of no small import exists concerning the charter and charter powers of Dade County. The Dade County charter was specifically provided for by the Constitution of 1885 and carried through in Article VIII, §6(f) of the Constitution Revision of 1968. That distinction must be borne in mind when construing the intent and grant of power contained in Article VIII, §1(g).

Article VIII, §6(f) reads in it's entirety:

> "Dade county -- **powers conferred upon municipalities.** To the extent not inconsistent with the powers **of existing municipalities** or general law, the Metropolitan Government of Dade County **may exercise all the powers conferred now or hereafter by general law upon municipalities.**" (emphasis supplied)

The framers of the 1968 Constitution Revision specifically granted Dade County the authority to "exercise all powers conferred now or hereafter by general law upon municipalities"; the framers did not specifically grant to Dade County "all powers of local self-government as is provided by general law or special law."

There had to be a distinct and specific rationale for making a demarcation of such magnitude pertaining to Dade county as a charter county authorized to exercise "all the powers conferred * * * upon municipalities", and all other charter counties who subsequently adopt a charter under Article VIII, §1(g) which "shall have all powers of local self-government * * *". If no such

distinction exists in the language so utilized, then, given the construction of Article VIII, §1(g) urged by the county, the language utilized in §6(f) is meaningless surplusage.

The county's attempt to classify a distinction between non-charter counties and charter counties as being "the constitutional vesting of municipal powers in charter counties by the 1968 constitutional revision[.]" (Answer Brief at pg. 9) does not and cannot square with the demarcation between Article VIII, §1(g) (under which Orange County's charter was adopted) and Article VIII, §6(f) which specifically grants the exercise of municipal powers. Article VIII, §1(g) is devoid of any reference to municipal powers.

Further differentiation between the case sub judice and **VOLUSIA COUNTY** (supra) and **BRAUTIGAM** (supra) exists. Both **VOLUSIA COUNTY** and **BRAUTIGAM** concerned a municipal tax imposed by the county in it's unincorporated area. At that point the similarity to the case sub judice ceases.

The tax in question in **VOLUSIA COUNTY** and **BRAUTIGAM** was an excise tax on the sale of cigarettes, pursuant to Florida Statutes, Chapter 210, imposed by the state on a uniform statewide basis. Both Dade and Volusia counties sought to impose said tax in their unincorporated areas. The county's Answer Brief at page 15, asserts: "[F]urthermore, the taxing option on cigarette sales that was granted to municipalities in section 210.03, Florida Statutes (1971) and construed in Volusia County v. Dickinson, is substantially similar to the municipal taxing option provided in section 166.231, Florida Statutes, authorizing a municipal public

service tax." The Answer Brief contains parsed passages of both sections in an attempt to show the similarity. In reality, the two taxing measures are quite different in effect and impact.

The statute under review, Florida Statutes, 166.231, is markedly different from Florida Statutes, Chapter 210. The utility tax statute is not one that is enacted by the state on a uniform statewide basis. The state has authorized municipalities to exercise a taxing power that the state has not chosen to enact, namely a utilities tax.

Any municipality within the state of Florida can enact such a tax on the sale of the enumerated utilities only within the territorial boundaries of said municipality. The revenues raised by said tax are expendable only within the territorial limits of the enacting municipality.

Florida Statutes, Chapter 210 (1971) is an excise tax on the sale of cigarettes that was **imposed by the state** on a uniform statewide basis. Municipalities were given the option (F.S., 210.03) of imposing the excise tax up to the same amount as levied by the state for the sale of cigarettes within the municipality. Further, "[T]he taxpayer shall be entitled to a credit on the state tax imposed in this section to the extent of any tax imposed by any municipality as authorized in this section." See Florida Statutes, §210.03(7).

Florida Statutes, 210.03(5) specifically limited as to what services and functions the municipality may put "[A]ny funds received under and by virtue of this chapter by municipalities * *

*." See Florida Statutes, §210.03(5).

Of import is the fact that pursuant to Chapter 210, counties, whether charter or not, were already receiving a percentage of the tax collected and held by the state for the sale of cigarettes in the unincorporated area of each county.

A close reading of **VOLUSIA COUNTY** evidences that the section under review was Florida Statutes, 210.20(2)(c), not §210.03. See **VOLUSIA COUNTY** at 10.

As the state was already collecting the cigarette excise tax on a statewide uniform basis the question of Volusia county enacting such a tax, ostensibly authorized due to it's being a charter county established and empowered by the state legislature, was one of dual taxation.

A court is required to construe an ordinance in an attempt to keep same valid if possible. If the county could be construed to have municipal taxing powers then, pursuant to Florida Statute, §210.03, the question of dual taxation would be removed. The Court, relying on **BRAUTIGAM** and the language of the Dade County charter, found that Volusia county could enact such a municipal tax.

In light of the decision in **BRAUTIGAM** and the fact that Dade County by operation of Article VIII, §6(f) was specifically granted all powers of municipalities, it becomes necessary to investigate the manner in which Volusia County became a charter and the powers so granted to Volusia County. Volusia County was established as a charter county pursuant to Article VIII, §1(c).

Therefore, the legislature drafts the charter for a county which utilizes §1(c) as the vehicle by which said county is transformed into a charter county, and the legislature determines the powers to be granted by such charter. The Florida legislature drafted, by special act Laws of Florida c. 70-966, the charter under which Volusia County operates and from which the powers to be exercised thereunder are identified.

The county's Answer Brief, at page 14, attempts to classify the municipal powers provisions of the Volusia County Charter and the municipal powers provisions of the Orange County Charter as being identical. When bearing in mind that Volusia county's charter was promulgated by the legislature, a fair reading of both documents belies the Appellee's assertion.

The charter drafted pursuant to Laws of Florida c. 70-966 for Volusia County differs in many important regards from the charter adopted by Orange County under Article VIII, §1(g) and Florida Statutes, Chapter 125, Part IV. Please see and compare Volusia Charter Article(s): II, §202; II, §202 (1); II, §202.1; III, §307(2); and XI, §1104.2 (Answer Brief Appendix #5) with Orange Charter Article(s): I, §101; I, §103; I, §104; and I, §105 (Answer Brief Appendix #4).

The Constitution of the state of Florida granted Dade County specific authority to exercise all municipal powers. The legislature of the state of Florida granted certain municipal powers to Volusia County. Nothing exists under Article VIII, §1(g) or Part IV or Florida Statutes, Chapter 125 which authorizes Orange

County to include the authority in it's charter to exercise municipal powers or municipal taxing authority as a county. See **CITY OF TAMPA v. BIRDSONG MOTORS, INC.**, 261 So.2d 1 (Fla. 1972).

Orange County has attempted to appropriate municipal powers, especially taxing powers, simply by force of the charter itself. Additionally, by force of the Orange County charter and Ordinance No. 91-17, the county attempts to amend Florida Statutes, §166.231. The county is without the power or authorization to amend a constitutional article or state statute. See **Attorney General's Opinion 85-41**, at page 117-119; and **Atty. General's Opinion 90-27.**

The important distinctions and hierarchy between the three charters (Dade, Volusia, and Orange) should not be overlooked by this Honorable Court.

The Appellant would contend that the utilities tax imposed by Orange County and the resulting purpose of the proposed bonds, to which the proceeds from said tax are pledged, is violative of the Orange County Charter itself. Article I, §106 of the Orange County charter reads in pertinent part:

> In order to secure to the citizens of the county protection against abuses and encroachments, the county shall use its powers to secure for all citizens, by ordinance or by civil or criminal action, whenever appropriate, the following:
>
> A. Just and equitable taxation.
>
> * * *

The entire electorate of Orange County were authorized to vote on whether to accept a charter form of government. The Orange County Government is now imposing a very substantial tax upon what

in today's society are necessaries, for the purpose of providing government services throughout the entire county, only upon residents (and businesses) located in the unincorporated area of the county. It is extremely unlikely that any of the voters, when asked whether to embrace the charter concept, were made aware by the ballot language that such a tax result would be possible under the terms of the proposed charter. See **WADHAMS v. BOARD OF COUNTY COMMISSIONERS OF SARASOTA COUNTY,** 567 So.2d 414 (Fla. 1990). Were the votes of municipal residents weighted? **STATE v. REINHART, 192 So. 819 (Fla. 1939).**

The Appellant respectfully suggests that in 1972 this Honorable Court erred in extrapolating the power and authority found in Dade County's charter, and utilized as a basis for the decision in **Volusia County,** to apply automatically to all counties upon their becoming a charter county. The Appellant respectfully suggests that such language is **obiter dicta** and should not form the basis upon which such a power is inferentially and automatically granted all charters under Article VIII, §1(g).

A grant of all powers of local self-government does not equate to a grant of all the powers conferred now or hereafter by general law upon municipalities.

While the taxing power is inherent in the sovereign, it is also penal in nature. It is difficult to imagine that the legislature would affirmatively give up control and authority to exercise such a power based upon implication. For the legislature to do so would of itself be violative of the Constitution.

Article VII, §1(a) reads as follows:

> "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 law.**" (emphasis supplied)

Article VII, §9(a) of the Florida Constitution reads in pertinent part:

> "Counties, school districts, and municipalities **shall**, * * *, be authorized by law to levy ad valorem taxes and **may be authorized by general law to levy other taxes, for their respective purposes**, except ad valorem taxes on intangible personal property and taxes **prohibited by this constitution.**" (emphasis supplied)

It is abundantly clear that the taxing power of the State of Florida has been preempted to the state. It is equally clear that the exercise of the taxing power by a municipality or by a county depends upon specific statutory grant of said power. "No tax shall be levied except in pursuance of law."

The statutory grant of the power to tax the sale of certain enumerated utilities contained in Florida Statute, §166.231 is by it's very terms limited to and contemplates only municipalities. Orange County, by cloaking itself in a claim to municipal power not specifically granted to it, would like to modify Florida Statutes, §166.231 and take the authorization given by the legislature to municipalities to enact a utilities tax while at the same time ignore the remainder of said statute by virtue of its being a county. See **Attorney General's Opinion 85-41**, supra; **Attorney General's Opinion 90-27**, supra.

The enabling section of §166.231, (1)(a), contains an express limitation of the statute to municipalities only. Said subsection

reads in pertinent part:

> "A municipality may levy a tax on the purchase of electricity, metered or bottled gas (* * *), and water service. **The tax shall be levied only upon purchases within the municipality,** * * *". (emphasis supplied).

The statute sets out what is to be taxed, by whom the tax is to be enacted, and the territorial limits within which the tax is to operate.

Orange County urges that a form of tacit incorporation of this Court's decision in **VOLUSIA COUNTY** has been made by the legislature in the above statute. That argument cannot square with the language of **VOLUSIA COUNTY** nor the language of the statute in question. This Court stated in **VOLUSIA COUNTY** at 11;

> "* * *, a charter county may without more under authority of existing general law impose by ordinance any tax **in the area of its tax jurisdiction** a municipality may impose." (emphasis supplied)

Pursuant to Article VII, §9(a) a county's tax jurisdiction is the entire area encompassed by the corporate limits of the county (except when the county establishes a Municipal Services Taxing Unit in the unincorporated area, which is not the case at bar). The tax jurisdiction of a municipality is that area encompassed by the corporate limits of the municipality. Florida Statute, §166.231 contains no provision whereby the municipal taxing authority can impose the tax in only a portion of its tax jurisdiction, however, Orange County has chosen to discriminate in favor of those individuals (and businesses) who reside or are located within a municipality by only levying the tax against those individuals (and businesses) who reside or are located in the

unincorporated area of the county's tax jurisdiction. See **Attorney General's Opinion 85-41 and Atty. General's Opinion 90-27, supra.**

It is impermissible for the Board of County Commissioners, which is the county government for all citizens of the county, to discriminate against a class of its citizens based upon the location of their residence (or business) and call upon those so discriminated to bear the financial burden of the capital improvements to be provided by the county on a county-wide basis, and financed by the bonds at issue which are to be retired by a pledge of the funds raised by the utilities tax.

To judicially grant such power (said power being constitutionally reposed in the legislature) based upon inference and implication to an entity that cannot fall within the plain language and meaning of the statute compromises and weakens the tri-partite system of government currently guaranteed to and enjoyed by the citizens of Florida.

The Appellee's argument to this Honorable Court that "the failure of the Legislature to remove counties (sic) from section 166.231, after the Volusia County v. Dickinson decision, reflects an obvious and apparent acceptance of the Court's construction of the constitutional vesting of municipal powers in charter counties[.]" (Answer Brief at pg. 17) is at best an incredulous conclusion which begs the question as to how the legislature is to remove an entity from the operation of a statute when said entity has never been contemplated, incorporated, nor encompassed by the plain language and meaning of the statute. Expressio unius est

exclusio alterius.

The Appellee urges that "* * *the legislative record is clear that the municipal power of a charter county to levy the public service tax option granted under section 166.231 is recognized and assumed by the Legislature." Id. In support thereof the Appellee refers to the Bill Analysis and Economic Impact Statement of the House of Representatives Committee on Community Affairs to proposed bill, HB 105, and Senate Staff Analysis accompanying SB 84, the Senate Companion to HB 105.

Putting aside for the moment that the latter of the above documents was not before the lower tribunal, in reality those documents should carry very little weight, if any, with this Honorable Court. The analyses were prepared not by any legislative committee but by administrative staff apparently for the central Florida legislative delegation and it is not known whether the authors of said analyses are Florida licensed attorneys who may be qualified to give such an opinion.

Finally, in a last ditch effort to defend the indefensible, the County claims that should this Court recede from the holding in **VOLUSIA COUNTY** financial crisis would result to the counties that have enacted such a utilities tax. Any claimed financial crisis, which is doubtful, that may occur is the fault of the politicians of the enacting counties and theirs alone. The enacting counties, other than Dade and Volusia, have attempted a power grab of authority to which they are not entitled by law. To utilize perceived or threatened financial crisis as the foundation upon

which to uphold an invalid revenue (tax) act does more than just allow the camel's nose under the tent, it gives incentive to make such enactments.

Given the case load facing today's judiciary and the length of time it takes to prosecute a case to completion, such a basis would be encouragement and incentive for county governments, in an effort to raise revenue in a "politically painless manner", to enact an innovative but constitutionally suspect or invalid ordinance to raise substantial revenues knowing full well that the enactment, though possibly invalid, will be upheld because of claimed financial crisis. Further, when the funds from such an enactment are pledged as the sole revenue source for repayment of issued Bonds that enactment may not be repealed during the life of the issued Bonds.

The county defends with sophistry.

The cry of financial crisis posited by the Appellee herein is not the first such cry raised in Florida. The learned and esteemed Justice Terrell recognized the falaciousness of such a plea:

> A municipality's power to tax for benefits is not bounded by its cosmic ambition or the superlative inducements of its chamber of commerce but by its present capacity to replace the taxes exacted with a commensurate benefit.

SMITH v. CITY OF WINTER HAVEN, 18 So.2d 4, 6 (Fla. 1944), and demanded that the governments recognize their duties owed and stand accountable for their improprieties:

> * * *it matters not whether the taxing government is Federal, State or local, it must assume full responsibility for the wrongful acts of its officers and employees. It should never be forgotten by these officers and employees that the first essential of good government or good trusteeship is justice to

the citizen.
'The government always wins when the citizen gets justice, it always loses when he is wronged'.

DUNDEE CORPORATION v. LEE, 24 So.2d 234, at 235, 236 (Fla. 1945).

II. THE LEGISLATURE HAS GRANTED THE POWER TO MUNICIPALITIES TO TAX THE SALE OF SPECIFIED UTILITIES AND THE LEGISLATURE HAS SET THE PROCEDURE TO BE UTILIZED WHEN ENACTING SAID GRANT OF POWER.

The Appellant stands on the Point Two argument set forth in the Initial Brief.

III. THE ORDER TO SHOW CAUSE ISSUED BELOW WAS ISSUED IN VIOLATION OF THE AMERICANS WITH DISABILITIES ACT AND THE ADMINISTRATIVE ORDER OF THE CHIEF JUDGE OF THE NINTH JUDICIAL CIRCUIT.

The Americans With Disabilities Act ("ADA") is a Federal Law. Said Federal Law was implemented in the Ninth Judicial Circuit by an Administrative Order of the Chief Judge of the Ninth Judicial Circuit prior to the issuing of the Order To Show Cause below. The Appellant can only assume that both the ADA and the Administrative Order mean what they say.

The Complaint and the Order To Show Cause below were directed at 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.**

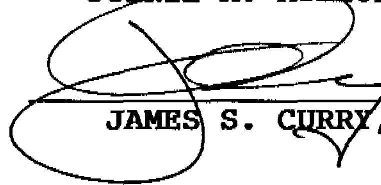
> A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination

assured them by the Act and this part. 28 C.F.R. §35.106.

The Appellant cannot claim to be able to determine and state that failure to include the mandated ADA language contained within the Administrative Order was not harmful error. See Title II, 28 C.F.R. Part 35.

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 22nd day of November 1993, to Robert L. Nabors, Esquire, Post Office Box 11008, Tallahassee, Florida 32302; Thomas J. Wilkes, Post Office Box 1393, 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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