IN THE SUPREME COURT OF FLORIDA

SEAN F. MURPHY

Appellant,

vs.

THE STATE OF FLORIDA, TAXPAYERS, PROPERTY OWNERS AND CITIZENS OF THE CITY OF PORT ST. LUCIE, FLORIDA, INCLUDING NONRESIDENTS 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 BY PLAINTIFF OF THE 1994A BONDS DESCRIBED HEREIN OR TO BE AFFECTED IN ANY WAY THEREBY,

Appellees.

CASE NO. 84,917

APPEAL FROM THE NINETEENTH JUDICIAL CIRCUIT COURT IN AND FOR ST. LUCIE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

In this Answer Brief, the Appellee, the City of Port St. Lucie, Florida, which was the plaintiff in the 1994A Bonds validation proceedings below, is referred to as the "City". The Appellant, Sean F. Murphy, who was a witness only and not one of the 23 intervenors in the proceedings below, is herein referred to as the "Appellant." The persons who formally intervened in the proceedings below are referred to as the "Intervenors." None of the Intervenors filed a notice of appeal from the final judgment validating the 1994A Bonds and the 1994A Assessments hereinafter described and defined.

The City's combined and consolidated water, sewer and gas utility system is sometimes referred to herein as the "System." The acquisition and construction of water and sewer line extensions within the area of the City designated as Special Assessment District No. 1, Phase I, is sometimes referred to as the "Project." The Special Assessment Bonds, Series 1994A (Assessment Area No. 1, Phase I) of the City proposed to be issued in the aggregate principal amount of not exceeding $17,600,000 to finance the Project are sometimes herein referred to as the "1994A Bonds". The special assessments proposed to be levied to finance the Project are sometimes referred to herein as the "1994A Assessments".

Pursuant to Rule 9.220, Florida Rules of Appellate Procedure, the City submits copies of certain documents considered by the trial court; also included is copy of the Final Judgment by the Trial Court in a prior bond validation proceeding. These documents are organized and presented in the form of a separately bound appendix with separate numbered tabs for each item. Parenthetical references to items in the City's appendix are presented throughout this Answer Brief in the following form: "(CA-[TAB#]; [PAGE#]."

Items included in Appellants' Appendix have not been included in the City's Appendix. Because the items in Appellant's appendix were not organized or bound, the City has prepared a separately bound appendix of these documents; references to these documents are in the form "(AA-[TAB#]; [PAGE#])."

STATEMENT OF THE CASE

The City presents its statement of the Case as follows.

On July 28, 1994, the City filed a complaint (A-1) in the Circuit Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida, for validation under chapter 75, Florida Statutes, of not exceeding $17,600,000 Special Assessment Bonds, Series 1994A (Assessment Area No. 1, Phase I). The court issued an Order to Show Cause why the proposed Bonds should not be validated. (A-2) The Order to Show Cause was duly published as required by section 75.06, Florida Statutes. (A-3)

At the time originally set for the validation hearing on September 12, 1994, the Court directed the City and the Intervenors to return to court on September 30, 1994, for a Pre-Trial Conference, which led to the Court's entry of a Pre-Trial Order. (AA-5)

The formal validation hearing commenced at 10:00 A.M., on October 14, 1994. The City closed its case in chief on the morning of the first day of the hearing. Thereafter, the trial court heard testimony of witnesses for the Intervenors and received extensive documentary evidence for the Intervenors, over repeated objections as to relevancy and other matters by counsel for the City. At the end of the first day, the matter was continued until October 21, 1994, for further testimony by various witnesses, including the Appellant, on behalf of the Intervenors. At the conclusion of the second full day of testimony, the matter was continued again until October 25, 1994, at which time closing arguments of counsel (A-5) were delivered. At the conclusion of the testimony on October 14, 1994, the City filed its Plaintiff's Trial Memorandum (A-6), summarizing its arguments with respect to the matters addressed in the Represented Intervenor's initial pleadings and in the evidence as presented.

At the conclusion of the closing arguments on October 25, 1994, the trial court took the case under advisement and requested the parties to file any supplemental memoranda or authorities. Certain of the Intervenors through their counsel filed their Memorandum of Law and Statement of Facts (A-7), and the City filed its Plaintiff's Response to Represented Intervenor's Memorandum of Law and Statement of Facts (A-8).

Thereafter, on November 23, 1994, the trial court rendered its judgment finding that all the requirements of law with regard to the issuance of the 1994A Bonds and the levy and collection of the 1994A Assessments had been satisfied and validating the 1994A Bonds and the 1994A Assessments. (A-9)

The Appellant filed his notice of appeal in the circuit court on December 27, 1994. Jurisdiction vests in this court pursuant to article V, section 3(b)(2), Florida Constitution, Rule 9.030(a)(1)(B)(i), Florida Rules of Appellate Procedure, and section 75.08, Florida Statutes.

STATEMENT OF THE FACTS

On July 25, 1994, the City enacted Ordinance No. 94-35 (AA-2), providing for the issuance from time to time of special assessment bonds (the "Master Bond Ordinance") and Ordinance No. 94-36 (AA-3), providing for the issuance of not exceeding $17,600,000 Special Assessment Bonds, to finance the expansion of water and sewer utility lines into the area of the City designated as Special Assessment District No. 1 (also referred to as Special Assessment Area No. 1), Phase I ("SAD 1, Phase I"). At this time, the City also enacted Ordinance No. 94-34 (the "Assessment Ordinance") (AA-1), providing an alternative source of authority to Chapter 170, Florida Statutes, for the levy and collection of special assessments.

On July 11, 1994, the City Council also adopted Resolution No. 94-R40 (CA-11), which provided for the levy and collection of special assessments against the properties within SAD 1, Phase I which would be specially benefitted by having central water and/or sewer service made available. Notice of a public hearing on the Project and the assessment roll was duly published and mailed to the affected residents, and an 8-hour public hearing was held on the night of on August 17 and morning of August 18, 1994. The hearing was continued until August 24, 1994, at which time the City Council adopted Resolution No. 94-R44, which approved the Project and equalized and approved the preliminary assessment roll. (CA-12)

A group of City residents who were opposed to the expansion project -- indeed, to the entire System, including the City's original acquisition of the System -- prior to and at the time of the public hearing on the assessment roll urged other residents to speak out in opposition to the project. (AA-6; 15-18)

Article VII of the City Charter provides a method by which citizens of the City may file a petition to have a City ordinance reconsidered. (CA-13; 2). The Charter was approved by vote of the electors on November 2, 1976, and the referendum procedure for reconsideration of

ordinances has been successfully invoked by the citizens, most recently in 1990, to force a reconsideration of an ordinance approving a bankruptcy settlement agreement between the City and General Development Corporation. (CA-14; 95-97)

Article VII of the Charter provides the procedure for (i) formation of a petitioner's committee, (ii) preparation of petitions, (iii) and form and content of petitions. Finally, the Charter provides that petitions shall be filed within 30 days of enactment of the ordinance whose repeal is sought. (CA-13:1,2)

The citizens in the instant case who sought to invoke the petition process filed First Amendment petitions, which were not intended to satisfy the requirements of Article VI of the City Charter. (CA-16; 12-14) Though they argue on appeal that their petitions satisfied the Charter requirements, in fact the petitioners (i) failed to begin the formal petition process until the 27th day of the 30-day period for filing petitions (CA-14; 99), (ii) were provided petition forms, but never returned to the Clerk's office to request her to have the petitions prepared (CA-14; 103), (iii) circulated four different forms of petition (AA-11)(CA-14-109), none of which complied with the Charter requirements for attachment of a copy of the ordinance proposed for reconsideration, (iv) filed photocopies of unverified signature pages (CA-14; 112) and (v) submitted signatures constituting less than the required 15% of the qualified voters. (CA-14;109)

The City Clerk accepted the papers presented by the citizens groups, but, on the advice of the City Attorney, took no further steps with respect thereto on the grounds that, since the papers presented failed to satisfy any of the requirements of the Charter for the petition process, they did not constitute a petition for purposes of the Charter. (CA-14;112)

SUMMARY OF ARGUMENT

POINT I

THE TRIAL COURT FOUND THAT THE REQUIREMENTS OF LAW WERE SATISFIED WITH RESPECT TO THE LEVY AND COLLECTION OF THE 1994A SPECIAL ASSESSMENTS AND THE ISSUANCE OF THE 1994A BONDS. APPELLANT HAS MADE NO SHOWING THAT THE RULING OF THE COURT IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

POINT II

THE CITY COUNCIL FOUND THAT THE EXTENSION OF WATER AND SEWER UTILITY SERVICE TO THE PARCELS IN THE CITY WHICH DO NOT CURRENTLY HAVE SUCH SERVICE CONFERS A SPECIAL BENEFIT ON SUCH PROPERTIES; THIS FINDING WAS PROPERLY UPHELD BY THE TRIAL COURT.

POINT III

THE PROCEEDINGS RELATIVE TO THE PURCHASE OF THE WATER AND SEWER UTILITY ARE NOT MATERIAL TO THE VALIDATION OF THE 1994A BONDS AND THE 1994A SPECIAL ASSESSMENTS IN THE INSTANT PROCEEDINGS; THESE PROCEEDINGS WERE VALIDATED BY AN EARLIER JUDGMENT OF THE CIRCUIT COURT FOR ST. LUCIE COUNTY AND WERE NOT PROPERLY BEFORE THE TRIAL COURT IN THIS PROCEEDING.

POINT IV

THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE BEFORE THE TRIAL COURT UPON WHICH IT COULD CONCLUDE THAT A REFERENDUM PETITION UNDER ARTICLE VII OF THE PORT ST. LUCIE CITY CHARTER WAS NEVER PRESENTED TO THE CITY CLERK AND THEREFORE, THAT SHE WAS NOT REQUIRED TO ISSUE A CERTIFICATE OF INSUFFICIENCY.

POINT V

THE REFERENDUM PROCEDURES SET FORTH IN ARTICLE VII OF THE PORT ST. LUCIE CITY CHARTER DO NOT VIOLATE THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION OR THE PROVISIONS OF ARTICLE I, SECTION V, OF THE FLORIDA CONSTITUTION, AND THE ATTEMPTS BY THE CITY CLERK TO ASSIST THE PETITIONERS' COMMITTEE LIKEWISE DID NOT VIOLATE THE PETITIONERS' RIGHTS UNDER THE FOREGOING PROVISIONS.

POINT VI

THERE WAS SUBSTANTIAL COMPETENT EVIDENCE BEFORE THE TRIAL COURT UPON WHICH IT COULD CONCLUDE THAT THE PROPOSED EXPANSION OF WATER AND SEWERLINES DOES NOT VIOLATE THE PROVISIONS OF THE CITY'S COMPREHENSIVE PLAN.

POINT VII

THE PROVISION IN THE MASTER BOND RESOLUTION ALLOWING THE CITY TO COVENANT TO BUDGET AND APPROPRIATE FUNDS SUPPLEMENTAL TO THE 1994A ASSESSMENTS FROM LEGALLY AVAILABLE SOURCES OF MONEY DERIVED FROM SOURCES OTHER THAN AD VALOREM TAXATION DOES NOT VIOLATE ARTICLE VII, SECTION 12, FLORIDA CONSTITUTION.

POINT I

THE TRIAL COURT'S FINDINGS THAT THE REQUIREMENTS OF LAW WERE SATISFIED WITH RESPECT TO THE LEVY AND COLLECTION OF THE 1994A SPECIAL ASSESSMENTS AND THE ISSUANCE OF THE 1994A BONDS SHOULD BE UPHELD BECAUSE APPELLANT HAS MADE NO SHOWING THAT THE RULING OF THE COURT IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The validation hearing in this case spanned three full days, which included opening statements, testimony of over a dozen witnesses, introduction of extensive documentary evidence, and closing arguments of counsel. Intervenors below were permitted to introduce virtually every item of evidence proffered, over repeated objections of counsel for the City as to relevance and/or authenticity. After the conclusion of the trial, both parties submitted memoranda of law to the trial court (CA-5, CA-6, CA-7), and the trial judge requested transcripts of closing arguments of counsel for his review (CA-4).

Approximately one month after the trial had concluded, the trial court rendered its final judgment validating the 1994A Special Assessments and the 1994A Bonds (CA-8). In that judgment the trial court stated:

> 13. Numerous taxpayers, citizens and other persons have intervened in these proceedings for the purpose of interposing objections to the granting of the prayers set forth in the complaint. This Court has made a review of the matters alleged and raised in such objections. This Court, however, finds no basis upon which to deny the petition of the plaintiff for validation of the 1994A Bonds and the 1994A Assessments. (CA-8; 4)
>
> * * *
>
> 15. This Court has found that all requirements of the Constitution and laws of the State of Florida pertaining to the proceedings in [this] matter have been strictly followed. (CA-8; 5)

The City submits that the findings and judgment of the Trial Court in this matter (1) come to this Court clothed with a presumption of correctness, *Delgado v. Strong*, 360 So.2d 73,

75 (Fla. 1978); (2) should be affirmed "if upon the pleadings and the evidence before the trial court, there was any theory or principle of law which would support the trial court's judgment," *Cohen v. Mohawk*, 137 So.2d 222, 225 (Fla. 1962) and (3) should not be overturned unless there is a showing that there was not substantial, competent evidence in the record to support its findings, *Strawgate v. Turner*, 339 So.2d 1112, 1113 (Fla. 1976); *Westerman v. Shell's City*, Inc., 265 So.2d 43, 45 (Fla. 1972); *Dory Auerbach Realty Company v. Waser*, 359 So.2d 902, 903 (Fla. 3rd DCA 1978).

As the City's arguments in Points II through VII demonstrate, there was substantial competent evidence before the Trial Court upon which it could base its findings referred to above. For this reason, the City submits that the judgment of the Trial Court validating the 1994A Bonds and the 1994A Assessments should be affirmed on this appeal.

POINT II

THE FINDING OF THE CITY COUNCIL THAT THE EXTENSION OF WATER AND SEWER UTILITY SERVICE TO THE PARCELS IN THE CITY WHICH DO NOT CURRENTLY HAVE SUCH SERVICE CONFERS A SPECIAL BENEFIT ON SUCH PROPERTIES WAS PROPERLY UPHELD BY THE TRIAL COURT; SUCH AN EXTENSION PLAN DOES NOT CONSTITUTE A "COMMUNITY-WIDE" PROGRAM WHERE ALL PROPERTIES RECEIVE A SIMILAR BENEFIT; THEREFORE, THE 1994A ASSESSMENTS WERE PROPERLY VALIDATED BY THE TRIAL COURT

The City of Port St. Lucie contains over 70,000 residents. (AA-6; 64). Fifteen thousand (15,000) parcels of land in the City are currently served by central water and sewer service (AA-6; 60).

The City Council determined to extend central water and sewer service to the parcels that do not currently have such service in order to prevent the proliferation of wells and septic tanks in the City and to provide a means of eventually eliminating the existing septic tanks. (CA-14; 26).

The City Council determined in Resolution No. 94-R44 that the expansion of water and sewer utility service to properties not currently served by central water and sewer service conferred a benefit on such properties in an amount not less than the amounts of assessments against such properties. (CA-12; 2). The City's Consulting Engineer, Alton Harvey, testified at trial that he had given his opinion to the City Council that the amount of the assessments did not exceed the benefits to the assessed properties. (AA-6; 72).

In Florida, assessments levied by municipalities are presumed valid, and the burden of proving their invalidity rests upon the one challenging the assessment. *South Trail Fire Control District v. State*, 273 So.2d 380, 384 (Fla. 1973).

The determination whether benefits are conferred by an improvement program so as to justify the levy of assessments to pay the cost of the improvements is a legislative function, and the determination of the legislative body is conclusive as to the fact of benefit unless the

challenger can show that the assessments were (a) palpably arbitrary, (b) grossly unfair and confiscatory, or (c) so devoid of a reasonable basis as to be arbitrary and to constitute an abuse of power. *South Trail Fire Control District*, supra, at 383; *Bodner v. City of Coral Gables*, 245 So.2d 250, 253 (Fla. 1971); *City of Hallandale v. Meekins*, 237 So.2d 318, 320-21 (Fla. 1970); *Rosche v. City of Hollywood*, 55 So.2d 909, 913 Fla. 1952). If reasonable men might differ on the question whether benefits flow from a particular improvement program, the courts will not interfere with the exercise of the legislative power to levy assessments. *City of Hallandale, supra,* at 321.

The Intervenors below totally failed to show by any competent evidence that the action of the City Council satisfied any of the foregoing tests of insufficiency. The Trial Court refused to disturb the findings of the City Council and found that the 1994A Assessments were validly levied. It is the City's position that the Trial Court's ruling should be upheld on this appeal.

The Intervenors maintained throughout the trial -- and the Appellant continues to argue on appeal in his POINT VI -- that the 1994A Special Assessments are really a tax and not an assessment and, therefore, that a referendum is required for their levy. They base their argument on the phrase, "city-wide," which was used by the court in *Hanna v. City of Palm Bay*, 570 So.2d 320, 322 (Fla. 5th DCA 1991).

Hanna involved a city program to resurface <u>all streets</u> in the City of Palm Bay and to assess <u>all properties</u> within the City for the benefit conferred thereby. The program was to be carried out in phases, but, eventually, <u>all streets</u> were to be resurfaced and <u>all properties</u> assessed, so that there was truly to be a similar benefit to all the properties in the City. The Fifth District Court of Appeal reasoned that a program to resurface all the streets in the City did not confer a special benefit on particular properties, but benefitted the community as a whole.

The flaw in the Intervenors'/Appellant's argument is in their attempt to apply the phrase "city-wide" to the instant case. Water and sewer utility service is ultimately planned to be extended only to properties in the City which do not currently have such service, i.e. excluding the 15,000 properties already served. The fact that there is a significant number of properties in the City already connected to the central water and sewer system, and that these properties are not being assessed for the extension of service, clearly takes this case out of the "city-wide" category which was before the Fifth District in *Hanna*.

As to the benefit issue, the rule in Florida with respect to special benefits from sanitary sewer system improvements was set forth by the Florida Supreme Court in *City of Hallandale v. Meekins, supra,* 321, where the Court said:

> When a particular improvement by its nature is designed essentially to afford special or peculiar benefits to abutting or other property within the protective proximity of the improvement, it is presumed that special or peculiar benefits may or will accrue to the property so situated, and thus special assessments are permitted without an express finding or determination by the city that the property will be benefitted. [Citations omitted].
>
> We think a sanitary sewer system is by its nature designed essentially to afford special or peculiar benefits to abutting or other property within the protective proximity of the improvement. It provides no benefit to the public generally as does the paving of a public street, nor does it confer any benefit upon property lying outside of the geographical boundaries by the improvement. Thus, *there was a presumption of special benefits to the abutting and other property within the protective proximity of the improvement thereby relieving the City of the necessity of making a specific finding of benefits as to each parcel.* (Emphasis supplied).

The program for extending water and sewer utility service to only those properties that do not currently have such service clearly falls within the ambit of the decided Supreme Court cases approving assessments for the expansion of utility service. The trial court's refusal to

disturb the City Council's findings of benefit with respect to the levy of the 1994A Special Assessments was supported by the record and should be upheld on this appeal.

POINT III

THE PROCEEDINGS RELATIVE TO THE PURCHASE OF THE WATER AND SEWER UTILITY SYSTEM, INCLUDING MATTERS ARISING UNDER CHAPTER 180, FLORIDA STATUTES, ARE NOT RELEVANT TO THE VALIDATION OF THE 1994A BONDS AND THE 1994A SPECIAL ASSESSMENTS IN THE INSTANT PROCEEDINGS; MOREOVER, THE PROCEEDINGS RELATIVE TO THE PURCHASE OF THE WATER AND SEWER UTILITY WERE PUT TO REST BY THE VALIDATION JUDGMENT VALIDATING THE TRANSFER BONDS WHICH WERE ISSUED IN SEPTEMBER 1994, TO ACQUIRE THE WATER AND SEWER UTILITY.

Appellant in this Court and the Intervenors below emphasize as a principal point of their case matters related to the water and sewer utility System which the City acquired from the County in September 1994. The gist of their argument is that the City is extending water and sewer lines to unserved properties primarily to finance capital improvements to the System and not for the benefit of the properties to which service from the System would be made available.

In support of their argument, the Intervenors below called and qualified as Intervenor's expert witness Gerald Hartman, the Consulting Engineer who had inspected the System on behalf of the City. Hartman testified, however, that the proposed capital improvement program for the System was planned to be financed from System revenues and the proceeds of the Transfer Bonds, issued at the time the City acquired the System, and not from revenues to be generated by the sewer expansion program. (CA-14; 150-51)

More fundamentally, however, it is the City's position on appeal, that matters relating to the decisions by the City (i) whether to acquire the System (involving considerations of the condition of the System and the other Chapter 180, Florida Statutes, requirements), (ii) whether to finance the transfer of the System from the County to the City through the issuance of revenue bonds (the Transfer Bonds), and (iii) whether to finance System improvements with the proceeds of the Transfer Bonds were: (A) not relevant to the question whether the City proceeded within its powers and according to law in authorizing the issuance of the 1994A Assessment Bonds and

the levy of the 1994A Assessments; (B) legislative decisions which have previously been subjected, without objection, to judicial scrutiny in the validation proceedings for the Transfer Bonds; (CA-9) and (C) moot because the City has issued the Transfer Bonds and owns the System. (CA-10)

The issues properly before the Trial Court in the instant validation proceeding were:

(i) the City's authority under the constitution and laws of Florida to issue the 1994A Bonds;

(ii) the City's authority to spend the proceeds of the 1994A Bonds to extend water and sewer lines to unserved properties;

(iii) the City's authority to pledge the 1994A Assessments and other security to secure repayment of the 1994A Bonds;

(iv) the City's authority to levy the 1994A Assessments to pay the costs of extending the System; and

(v) the legality of the City Council's proceedings with respect to the 1994A Bonds and the 1994 Assessments.

Warner Cable Communications, Inc. v. City of Niceville, 520 So.2d 245 (Fla. 1988); *Risher v. Town of Inglis*, 522 So.2d 355 (Fla. 1988); *Lodwick v. School District of Palm Beach County*, 506 So.2d 407 (Fla. 1987); *Taylor v. Lee County*, 498 So.2d 424 (Fla. 1986).

Legal or other matters which do not relate to (a) the City's authority to issue the 1994A Bonds, (b) the security therefor (the 1994A Assessments) or (c) the regularity of proceedings had in connection therewith are beyond the scope of validation (i.e., the court in a validation proceeding lacks subject matter jurisdiction over such collateral issues) and are not properly considered in a validation proceeding. *McCoy Restaurants, Inc. v. City of Orlando*, 392 So.2d 252, 254 (Fla. 1980).

Collateral issues include, but are not limited to, (1) the wisdom or expedience of undertaking a particular project and incurring debt as a means of its financing, (2) the financial and economic feasibility of the project proposed to be financed with bond proceeds, and (3) the financial feasibility of the proposed bond issue. Such questions are deemed by the courts to be legislative matters and may not properly be raised during such proceedings. *Partridge v. St. Lucie County*, 539 So.2d 6472 (Fla. 1989); *State v. Division of Bond Finance*, 530 So.2d 289 (Fla. 1988); *De Sha v. City of Waldo*, 444 So.2d 16 (Fla. 1984); *State v. Daytona Beach*, 431 So.2d 981 (Fla. 1983); *State v. City of Miami*, 103 So.2d 185 (Fla. 1958). The issue whether the City should acquire the System was clearly collateral to the proceedings regarding the 1994A Bonds and the 1994A Assessments and the finding of the trial court that the legal requirements with respect to the issuance of the 1994A Bonds and the levy of the 1994A Assessments were satisfied is supported by the record before the court and should be affirmed.

POINT IV

THERE WAS SUBSTANTIAL COMPETENT EVIDENCE BEFORE THE TRIAL COURT UPON WHICH IT COULD CONCLUDE THAT AN ARTICLE VII REFERENDUM PETITION UNDER THE CITY CHARTER WAS NEVER PRESENTED TO THE CITY CLERK AND, THEREFORE, THAT CLERK WAS NOT REQUIRED TO ISSUE A CERTIFICATE OF INSUFFICIENCY UNDER THE CHARTER.

Appellant argues that the City Clerk failed to issue a certificate of insufficiency with respect to the petitions presented by the citizens' committee evidencing their opposition to the proposed water and sewer utility system expansion project and, therefore, that the ordinances authorizing the levy of the 1994A Assessments and the issuance of the 1994A Bonds are not in effect.

The City's position is that the petitions submitted by the citizens' committee were never intended to be Article VII petitions under the City Charter for reconsideration of the foregoing ordinances, but, rather, were intended to be and prepared as First Amendment petitions expressing opposition to the proposed water and sewer system expansion project. Thus, the City Clerk of the City of Port St. Lucie was never presented with a referendum petition and therefore was not required to make a determination regarding its sufficiency. Even if the petitions were to be considered as Article VII petitions, there were insufficient signatures on the petitions to satisfy the Charter requirements for reconsideration of ordinances.

The ability of the people to petition their government for a redress of grievances is an inherent right emanating from both the federal and state constitutions. Amend. 1, U.S. Const.; Art. 1, § 5, Fla. Const. It reserves to the people the right to present complaints concerning government's conduct directly to the government. However, the First Amendment right to petition, standing alone, does not provide the people with a means by which they may compel a specific action or result from government. As such, the First Amendment right to petition is

distinguishable from the rights of initiative/referendum that have been crafted by state and local legislation.

Initiative "refers to the power reserved, in some jurisdictions, to the people to propose laws and amendments to the Constitution and to enact or reject the same at the polls, generally independent of the legislature." 12 Fla.Jur.2d. *Counties and Municipal Corporations*, 177. Referendum is "the power reserved to the people in some jurisdictions to approve or reject at the polls any act of the legislature." Id. The City of Port St. Lucie, in its Charter, reserves to the people the power of initiative and referendum. More importantly, the Charter provides the procedural requirements necessary in order to exercise the power of referendum and initiative.

The Port St. Lucie City Charter was adopted by referendum of the qualified electors in November 1976. Article VII of the Charter authorizes the process of referendum whereby "the qualified voters of the city shall have the power to require reconsideration by the council of any adopted ordinance and, if the council fails to repeal an ordinance so reconsidered, to approve or reject it at a city election...." The procedure for commencing a referendum petition is set out in Section 7.02 of the City Charter which allows any five qualified voters to commence the referendum proceedings by filing with the City Clerk

> ...an affidavit stating they will constitute the petitioners' committee and be responsible for circulating the petition and filing it in proper form, stating their names and addresses and specifying the address to which all notices to the committee are to be sent, and setting out in full the proposed initiative ordinance or citing the ordinance sought to be reconsidered.
>
> Promptly after the affidavit of the petitioners' committee is filed, the clerk shall issue the appropriate petition blanks to the petitioners' committee.

The form and content of the petition is specified in Section 7.03:

> (b) All papers of a petition shall be uniform in size and style and shall be assembled as one instrument for filing. Each signature shall be executed in ink or in indelible pencil and shall be followed by the address of the person signing. Petitions shall contain or

have attached thereto throughout their circulation the full text of the ordinance proposed or sought to be reconsidered.

(c) Each paper of a petition shall have attached to it when filed an affidavit executed by the circulator thereof stating that he personally circulated the paper, the number of signatures thereon, that all the signatures were affixed in his presence, that he believes them to be the genuine signatures of the persons whose names they purport to be and that each signer had an opportunity before signing to read the full text of the ordinance proposed or sought to be reconsidered.

Further, Section 7.03 states that the number of signatures required for a valid referendum petition must be equal in number to at least fifteen percent of the total number of qualified voters registered to vote at the last regular city election and that "referendum petitions must be filed within thirty (30) days after adoption by the council of the ordinance sought to be reconsidered."

Upon the filing of a referendum petition, the City Clerk is required by Section 7.04 to complete, within twenty days after the petition is filed, a certificate as to its sufficiency, specifying if it is insufficient, the particulars wherein it is defective, and to promptly send a copy of the certificate to the petitioners' committee by registered mail.

The Ordinances allegedly sought by the citizens' groups to be reconsidered were enacted on second reading at public hearings held before the City Council at its regular meeting on Monday, July 25, 1994. Under the provisions of Article VII of the City Charter, petitions for reconsideration of the ordinances were required to be filed no later than Wednesday, August 24, 1994.

Appellant testified at trial that he held a press conference on the requirements of the City Charter regarding referendum petitions at least three weeks prior to the deadline for submitting

petitions. (CA-15; 4-5) Appellant further testified: "[T]he [U.S.] Constitution to me and to the committee and to the people who signed the petition was quite clearly what we turned in[,] was the correct process under the United States Constitution and I could care less about the City's charter at that point." (CA-16; 12)(emphasis supplied)

Nonetheless, two days before the deadline for filing an Article VII petition, under the City Charter, on Monday, August 22, 1994, Appellant and others formally commenced the referendum process by the filing of an affidavit with the City Clerk creating a petitioners' committee, consistent with Section 7.02 of the City Charter. (AA-6; 19-20) The affidavit states it is "In Regard to: Ordinances 94-34; 94-35; 94-36; 94-37." (AA-11)

The City Clerk, Sandra Johnson, testified that upon receipt of the affidavit she immediately began preparing the petition blanks to be circulated. (CA-14; 99-101) The Clerk testified that she was concerned with the City's ability to print the required number of petition blanks because each ordinance required a separate petition blank with enough space for over 5,000 signatures. (CA-14; 102). As such, she contacted outside printers to accommodate the process. (CA-14; 102-103).

The City Clerk followed her practice of preparing a sample petition blank and submitted it to the petitioners' committee the next day, the morning of Tuesday, August 23, 1994, to make sure the wording was acceptable to them. (CA-14; 99-100, 115). The Clerk was told by a committee representative that they would let her know whether the wording was acceptable; in fact, no one from the citizens' committee ever contacted the Clerk regarding preparation of the petition blanks. (CA-14; 115-116).

On the afternoon of Wednesday, August 24, 1994, photocopies of papers allegedly containing over 5,000 signatures were presented to the City Clerk's office. (CA-14; 72-73). The

signatures were contained on four types of documents. The first was a document with the following heading:

> We, the TAXPAYERS, VOTERS and RESIDENTS, of Port St. Lucie, represent by our signatures below, that our CITY COUNCIL must send the 'WATER AND SEWER EXPANSION PROJECT' to a city wide vote, or by any, and all other means by which the residents of Port St. Lucie will decide this issue. WE further understand that if our city council ignores our wishes in this, we, as a community, will withdraw COMMUNITY SUPPORT for the bonding of said PROJECT."

(AA-11). There were then spaces for names, addresses and phone numbers.

> The next document containing signatures had a heading which said:
>
> TONIGHT "We, the TAXPAYERS, VOTERS and RESIDENTS, of Port St. Lucie, represent by our signatures below, that our CITY COUNCIL must send the 'WATER AND SEWER EXPANSION PROJECT' to a city wide vote, or by any, and all other means by which the residents of Port St. Lucie will decide this issue. We further understand that if our city council ignores our wishes in this, we, as a community, will withdraw COMMUNITY SUPPORT for the bonding of said PROJECT."
>
> BRING THIS TO CITY HALL TONIGHT AT 7:00 P.M. OR CONTACT HELEN BOUFFORD, TREASURER; 879-0999."

(AA-11). There was then provided room for the name, address and phone number of the signatories.

> The third document read as follows:
>
> TO THE PORT ST. LUCIE COUNCIL, ASSEMBLED AUGUST 17, 1994 IN THE BUSINESS OF PORT ST. LUCIE CITIZENS:
>
> As a voter and legal homeowner in Port St. Lucie, Florida, I ask that my elected representatives study much more carefully the options, and the costs of the proposed PORT ST. LUCIE WATER & SEWER PLAN. That they not burden the community at this time with an expensive and inappropriate Utility. Please remember that it's easy to buy, but hard to pay for extravagant luxuries. We ask that you treat our city budget the same as you would your own. Please think less about the commerce that may or may not "enrich City of Port St. Lucie" and more about those of us who already make it their home. The cancer of too quick growth can produce financial disaster for many, possible Flight and Blight! Vote No to the Water & Sewer Plan today.

(AA-11). There was then provided room for the name and address of citizens.

The last document was entitled "An Open Letter to Port St. Lucie Taxpayers." Its heading was:

"Pressing City Need"--or $1.5 Billion Boondoggle For Friends of City Hall?

(AA-11). This document spoke generally about the water and sewer project, stating there was a flood of unanswered questions and urging every citizen to come to City Hall on Wednesday, August 17, 1994, to petition and ask their council to defeat or at the very least table for further study this "appalling fiscal boondoggle."

Not one of the foregoing documents refers to, cites or speaks to any ordinance. Not one of the documents asks for any ordinance to be reconsidered by the City Council. As such, they are immediately distinguishable from an Article VII referendum petition, the purpose of which is to compel the reconsideration of a specific ordinance or ordinances.

The documents presented in this case are more properly characterized as First Amendment petitions, consisting of protests to the City Council about the proposed water and sewer project. The wording of the petitions themselves indicates that they were intended for presentation at the City Council meeting of August 17, 1994, which was the public hearing on the proposed special assessment roll.

Clearly, the Appellant's and the other petitioners' attempts to characterize their First Amendment petitions as Article VII petitions under the Charter were an afterthought, resulting from their failure to follow the requirements of the petition process under the City Charter. This failure was notwithstanding Appellant's self-proclaimed knowledge at a press conference of the existence of the Article VII process at least three weeks prior to the deadline for filing petitions. (CA-16; 4)

First Amendment petitions, such as the ones submitted in this case, which are intended to request a particular course of action from the government cannot be treated as an Article VII referendum petitions under the provisions of the City Charter, which actually compel the government to reconsider an ordinance already passed. The exercise of the referendum power under Article VII of the Charter is governed by specific procedures, designed to prevent fraud and deception being practiced on those asked to sign petitions and also to prevent interference with the normal process of city government.

The City's Charter, approved by referendum vote of the qualified electors of the City in 1976, makes clear that, as a prerequisite to circulation of any referendum petition, an affidavit creating a petitioners committee must be filed with the City Clerk and that the Clerk must issue the appropriate petition blanks to ensure that the full text of the ordinance sought to be reconsidered is attached to the petition. The First Amendment petition submitted here carries none of the indicia of a referendum petition. [1]

Based upon the foregoing, it is clear that there is an adequate basis in the record upon which the Trial Court could conclude that an Article VII referendum petition was not presented to the City Clerk for review as to its sufficiency in the instant case.

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[1] Although a referendum process was properly commenced by the filing of an affidavit creating of a petitioners committee, the First Amendment petition submitted was circulated and the signatures gathered before the filing of the affidavit. Further, not only did the First Amendment petition fail to have the full text of the ordinance sought to be reconsidered attached thereto, it did not even refer to any ordinance nor ask that any ordinance be reconsidered. Finally, it did not have attached to it an affidavit executed by the circulator thereof stating that he personally circulated the paper, the number of signatures thereon, that all the signatures were affixed in his presence, that he/she believes them to be genuine and that each signer had an opportunity before signing to read the full text of the ordinance sought to be reconsidered.

Even assuming *arguendo* that the First Amendment petition were to be considered as an attempted Article VII referendum petition, the Clerk's duty to review it for sufficiency was not triggered because it was so fundamentally defective as not to rise to the level requiring the issuance of a certificate of insufficiency.

The fundamental defects in the papers filed with the Clerk on August 24 included the following: (1) the petition was circulated and the signatures gathered before the appropriate affidavit had been filed creating the petitioners' committee; (2) the documents circulated were not on forms issued by the City Clerk and failed to refer to any ordinance or ask that any ordinance be reconsidered; (3) no copy of the ordinance sought to be reconsidered was attached to the petition; and (4) the papers were photocopies only and contained no original signatures.

In re the matter of initiative petition filed November 15, 1993, 718 P.2d 1353 (Oklahoma 1986), the Oklahoma Supreme Court addressed the effect of the failure to file a copy of the proposed initiative with the city clerk before its circulation, as required by charter (which provided that the laws of the state would govern the initiative process). Citing well-settled authority that statutory provisions regarding initiative petitions which are essential to guard against fraud are indispensable and the failure to comply with them fatal to the validity of the petition, the Oklahoma Supreme Court held that the failure to file a copy of the proposed measure prior to its circulation was a jurisdictional requirement, the failure to comply with which was fatal. On this basis, the Oklahoma Supreme Court held, it was without jurisdiction to hear any action by the proponents of the petition and affirmed the trial court's finding the petition invalid.

In *Shaw v. Lynch*, 580 N.E.2d 1068 (Ohio 1991), the Supreme Court of Ohio held that a city clerk was under no duty to certify a referendum petition and deliver it to the board of

elections where the citizens had failed to file a copy of the referendum with the city clerk prior to the petition's circulation, as required by charter.

Analogizing the foregoing cases to this one, it seems clear that the City Clerk was not required to review the petition for sufficiency since: (1) it was circulated and the signatures gathered prior to the proper commencement of the referendum process, (2) the documents circulated not only failed to have attached thereto a copy of the ordinance sought to be reconsidered but also failed to refer to an ordinance in any way or to ask for reconsideration of any ordinance, and (3) the papers submitted had no manual signatures but were merely photocopies of documents allegedly containing manual signatures.

The City asserts that these requirements are jurisdictional with respect to referendum petitions and that failure to comply, not only with one of them, but with all of them, is fatal to the Appellant's argument that the papers constituted a valid Article VII referendum petition. Any other result would enable virtually any papers delivered to the Clerk to furnish a basis for reconsideration of an ordinance and suspension of its effectiveness pending such reconsideration.

Additionally, assuming *arguendo* the First Amendment petition was intended to be an Article VII petition under the City Charter, the City Clerk testified that the petitions contained at most 4,128 valid signatures (CA-14; 109), whereas 5,312 signatures were needed to satisfy the Article VII requirements for reconsideration (CA-14; 102).

As a final note, the City submits that, again assuming arguendo the "First Amendment" petition is treated as an attempted Article VII referendum petition, the appropriate vehicle for challenging a City Clerk's refusal to act is by petition for writ of mandamus asking the trial court to direct the City Clerk to perform her duties. See e.g. *Bradley v. Gallaway*, 651.S.W.2d 445 (Ark. 1983); *Shaw v. Lynch*, 580 N.E.2d 1068 (Ohio 1991). Appellant did not seek a writ

of mandamus directing the City Clerk to pass upon the sufficiency of the petition and thus may not raise the issue now in a bond validation proceeding.

For the foregoing reasons, the City submits that there was substantial competent evidence in the record below upon which the Trial Court could conclude that no Article VII petition was intended to be circulated or signed, no Article VII petition was presented to the Clerk, and no issue existed with respect to the Clerk's not issuing a certificate of insufficiency with respect to the papers filed with her. For this reason, Appellant's argument regarding the petition process must fail.

POINT V

THE REFERENDUM PROCEDURES SET FORTH IN ARTICLE VII OF THE PORT ST. LUCIE CITY CHARTER ARE CONSTITUTIONAL AND DO NOT VIOLATE THE PETITIONERS' RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION V, OF THE FLORIDA CONSTITUTION MOREOVER, THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE IN THE RECORD FROM WHICH THE TRIAL COURT COULD CONCLUDE THAT THE ACTIONS OF THE CITY CLERK IN RESPONDING TO THE CITIZENS' COMMITTEE DID NOT VIOLATE THE COMMITTEE MEMBERS' CONSTITUTIONAL RIGHTS.

Appellant argues in POINT III of his brief that one of the Charter provisions of the City of Port St. Lucie pertaining to the form and content of referendum petitions is unconstitutional and violative of the First Amendment because it unduly restricts the citizens' rights in carrying out the petition process.

Specifically, appellant challenges the requirement that "each [referendum] petition page contain or have attached thereto throughout its circulation the full text of the ordinance sought to be reconsidered." Appellant states that the object advanced by the foregoing requirement is that each signer read the full text of the ordinance before signing the petition. Appellant asserts that such a requirement is unduly burdensome.

The City would first point out that Appellant advances this argument for the first time on appeal in this case. The Intervenor's arguments on the petition issue in the Trial Court were directed solely to the question whether the City complied with the provisions of Article VII of the City Charter. The Intervenors made no argument as to any defect in the Charter provisions relating to reconsideration of ordinances in the Trial Court. (See CA-4; 15-61)

The rule is well-settled in Florida that appellate courts will not consider on appeal matters not presented to the Trial Court and not ruled on adversely to the Appellant. *State v. Barber*,

301 So.2d 7, 9 (Fla. 1974). The City submits, therefore, that the issue of the constitutionality of the referendum procedure set forth in the City Charter is not properly before this Court.

Assuming that the issue is properly before the Court, appellant is incorrect in asserting that the Charter requires the full text of the ordinance to be attached to each page of a petition. Rather, the Charter requires that the full text of the ordinance be attached to each petition. Petitions are generally circulated with multiple signature pages on each petition.

The City believes -- and obviously the residents of the City who approved the Charter at referendum believed -- the requirement, rather than being an undue burden, is critical to the integrity of the referendum process. The City cannot envision how a citizen can make an informed decision on whether or not to sign a petition for reconsideration of a duly enacted ordinance without having the full text of the ordinance sought to be reconsidered available for his reading.

In fact, the Florida courts have implicitly recognized the constitutionality of such a provision in several cases. In *City of Miami Beach v. Herman*, 346 So.2d 122 (3d DCA 1977), the Third District affirmed a trial court's grant of a permanent injunction enjoining the city from including an ordinance proposed by an initiative petition on the special election ballot. In so holding, the Third District reasoned that several procedural requirements of the city's charter had not been complied with; among them, a requirement that the petition circulated fully set forth the text of the proposed ordinance. The Third District held that the initiative petitions were invalid because they did not fully set forth the subject matter of the proposed ordinance as required by city charter.

Also in *Wadhams v. Board of County Commissioners*, 567 So.2d 414 (Fla. 1990), this Court, in reviewing referendum procedures sustained statutory requirements that ballots on

public measures must clearly state substance of the matter under consideration; failure to do so has ben held fatal under the provisions of Section 101.161(1), Florida Statutes (1993).

Herman and *Wadhams* implicitly support the conclusion that the requirement in the Port St. Lucie Charter that the full text of the ordinance sought to be reconsidered be attached to the petition is constitutional. Both of those cases address instances where the text of a proposed ordinance and proposed changes to a charter respectively were not included in the petition and ballot. Contrary to finding them an undue burden, the courts held they were mandatory to the initiative/referendum process.

The only case appellant cites in support of his argument is *Meyer v. Grant*, 486 U.S. 414 L.E.2d 425, 108 S.Ct. 1886 (1988), which does not even address the constitutionality of requiring the full text of the ordinance sought to be reconsidered to be attached to a referendum petition. Rather, the issue in *Meyer*, was whether a Colorado state law making it a felony to pay petition circulators involved in the initiative process was constitutional. That was the only provision of the initiative process which was challenged.

In holding the law unconstitutional, the Supreme Court reasoned that the circulation of an initiative petition involves core political speech which falls squarely within the protection of the First Amendment and the prohibition imposed an impermissible burden on political expression, thus violating the First and Fourteenth Amendments. In so holding, the court noted that the burden imposed by the prohibition was not justified by the state's interest in making sure that an initiative has sufficient grass roots support to be placed on the ballot and in protecting the integrity of the initiative process.

The court noted that other provisions of the Colorado statute sufficiently protect those interests. Specifically, it is a crime to forge a signature on a petition under Colorado state law, to make false or misleading statements relating to a petition or to pay someone to sign a petition.

Further, the top of each page of the petition was required to bear a statement printed in red ink warning potential signatories that it is a felony to forge a signature on a petition or to sign the petition when not qualified to vote and admonishing signatories not to sign the petition unless they have read and understand the proposed initiative.

The court concluded that the foregoing provisions are adequate to minimize the risk of improper conduct in the circulation of a petition. Thus, contrary to appellant's assertion, *Meyer* actually supports the City's argument that its Charter provision requiring the full text of the ordinance to be attached to the petition is constitutional because it noted that a similar admonition requiring a person to read and understand a proposed initiative was a guarantee against potential fraud and deception.

The City's requirement is not designed to interfere with the petition process but rather to provide citizens with a clear opportunity to understand the precise nature of the petition at the time it is submitted for their consideration. The Charter's referendum petition requirements are not violative of the U.S. Constitution for the foregoing reasons.

On the matter of the interchanges between the City Clerk and the citizens' committee, there was conflicting testimony. The Clerk testified that she was attempting to advise the citizens' committee of the requirements of the Charter with respect to referendum petitions (CA-14; 97-103). Diane Sousa testified that she perceived the Clerk's advice to the citizens' committee as threatening (AA-6; 19-21). The Clerk, however, testified that she had merely called to Ms. Sousa's attention to the existence of statutory provisions regarding the formation of political committees and citizens' committees. (CA-14; 62-66) Additionally, Ms. Sousa testified that the Clerk had called early in the morning before Ms. Sousa was awake or had had any coffee. (AA-6;20)

The City submits that the resolution of this conflict was within the province of the Trial Court as the trier of fact, that the Trial Court found no impermissible activity on the part of the City Clerk based on the testimony before him, and that his finding that there was no merit to the Intervenors' objections should be sustained on appeal.

POINT VI

THERE WAS SUBSTANTIAL COMPETENT EVIDENCE IN THE PROCEEDINGS BELOW TO SUPPORT A CONCLUSION BY THE TRIAL COURT THAT OF THE PROPOSED EXPANSION OF LINES FOR THE CITY UTILITY INTO AREAS THAT ARE CURRENTLY UNDEVELOPABLE BECAUSE OF LACK OF CENTRAL WATER AND SEWER SERVICE DOES NOT VIOLATE THE PROVISIONS OF THE CITY'S COMPREHENSIVE PLAN

Appellant argues that the City's proposed expansion of water and sewer utility service into SAD1, Phase I, violates the provisions of the City's Comprehensive Plan, and, therefore, that the 1994A Assessments cannot legally be levied or the 1994A Bonds legally issued. Appellant ignores the uncontroverted testimony of John Sickler, Assistant Director of Planning and Zoning for the City (A-14; 3-4).

Appellant's argument rests on his incorrect assumptions that (1) the Comprehensive Plan permits water and sewer utility service to be extended only into the Urban Service Area, and (2) the Comprehensive Plan does not provide for the extension of water and sewer lines funded by special assessments in any area of the City, whether designated an Urban Service Area or not.

Mr. Sickler testified that special assessments could be considered to finance urban services for properties outside the Urban Service Areas (A-14; 7-8). Mr. Sickler also testified that an overriding goal of the Comprehensive Plan was to take such actions as were necessary to adequately provide necessary public facilities for future residents in a manner that will promote orderly growth. (A-14; 10).

Appellant cites no authority for his proposition and his factual basis is not supported by the testimony in the record. Appellant's citations to the City's Comprehensive Plan were demonstrated by Mr. Sickler's testimony to be misguided. The City submits that Appellant's Comprehensive Plan argument is without merit.

POINT VII

PROVISION FOR THE CITY TO COVENANT TO BUDGET AND APPROPRIATE FROM LEGALLY AVAILABLE SOURCES OF MONEY DERIVED FROM SOURCES OTHER THAN AD VALOREM TAXATION DOES NOT VIOLATE ARTICLE VII, SECTION 12, FLORIDA CONSTITUTION

In the instant case, the City has authorized bonds secured by special assessments. (AA-2; 19 and 24) In the Master Resolution authorizing the issuance of special assessments bonds generally, the City has provided authority for additionally covenanting to budget and appropriate sufficient moneys derived from sources other than ad valorem taxation to the extent necessary to supplement the special assessments in order to pay debt service on any bonds issued under the authority of the Master Resolution. (AA-2; 27)

It is not certain whether the City will actually use such a covenant with respect to the 1994A Bonds; it has merely validated its authority to do so in the event such an additional covenant is necessary in order to secure a lower interest rate on a given issue of bonds.

Appellant suggests that the existence of this covenant contravenes the holding of this Court in *County of Volusia v. State*, 417 So.2d 968 (Fla. 1982). The City submits that the holding of this Court in *County of Volusia* is limited to situations where there is both a covenant to budget and appropriate and a covenant to continue services, so that the pledgor has no alternative to raising ad valorem taxes in the event that additional moneys are needed to pay debt service on bonds.

In *County of Volusia*, the sole source of revenue with which to pay debt service was the County's covenant to budget and appropriate from non-ad valorem revenue sources. In addition to making this covenant, the County also covenanted to continue existing County services in effect to the extent necessary to derive the needed non-ad valorem revenues. Based on the

combination of these two factors, this Court concluded that there would be more than an incidental effect on ad valorem taxes, and affirmed the Circuit Court's refusal to validate the 1994A Bonds. *Id.* at 971

In subsequent decisions, this Court has made clear that it was the presence of the pledge of all non-ad valorem revenue sources together with the covenant to continue services that produced the pernicious effect of requiring an increase in ad valorem taxes; where the covenant to maintain services has not been present, the Court has not found a constitutional problem. *State v. City of Daytona Beach*, 431 So.2d 981, 983 (Fla.1983)("only when the record clearly reflects that all legally available non-ad valorem revenue sources have been pledged and the governmental body has agreed to do everything necessary to receive such revenue"); *City of Palatka v. State*, 440 So.2d 1271, 1273 (Fla. 1983)("This situation does not fall within the purview of the *County of Volusia*, in which this Court reasoned that the only way Volusia County would be able to uphold its covenant to maintain the programs which generated all of its non-ad valorem revenues would be to raise ad valorem taxes to operate such programs); *State v. Brevard County*, 539 So.2d 461, 463 (Fla. 1989)("We find the proposed bond issue in the instant case easily distinguished from that in County of Volusia. Not only is there no covenant to maintain revenue-generating services, . . ."); *State v. School Board of Sarasota County*, 561 So.2d 549, 553 (Fla. 1990)("We held that referendum approval was required [in *County of Volusia*] because the interrelated promises [pledge of all non-ad valorem revenues and covenant to maintain services] 'in effect constitute a promise to levy ad valorem taxes'").

In the instant case, non-ad valorem revenues are being considered only as a supplemental source of revenues to the extent that the collection of special assessments in any year are insufficient to pay debt service. Moreover, and more importantly, there is no covenant to

maintain any particular City services in effect. Finally, the Master Bond Resolution makes clear that any use of non-ad valorem revenues would merely constitute an advance of those moneys until such time as the proceeds of assessments could be collected through the normal assessment billing process, through the sale of tax certificates, or through foreclosure; at this point, the City would be reimbursed with interest for any moneys advanced. (AA-2; §3.04(A)(3), p.25).

For the foregoing reasons, the City submits that this case is clearly distinguishable from *County of Volusia* on the basis of the facts, and that the holding of this Court in *County of Volusia* does not furnish a basis for invalidating the 1994A Bonds in the instant case.

CONCLUSION

The Trial Court fully considered the Intervenors' objections to the proposed water and sewer expansion project, the City's decision to finance the project by the issuance of the 1994A Bonds, secured by the 1994A Assessments, and the proceedings relative thereto. The Trial Court heard and considered testimony and other evidence relative to the citizens' committees' petitions in opposition to the project, the City's compliance with the provisions of its Comprehensive Plan, and, the City's decision to acquire the water and sewer utility, which had previously been validated by judgment of the Trial Court in a separate proceeding.

There is substantial competent evidence in the record to support the Trial Court's conclusion that all requirements of law with respect to the 1994A Bonds and the 1994A Assessments were satisfied and that the Intervenors' objections were without merit.

The Appellant has failed to demonstrate any error on the part of the Trial Court in the proceedings below. The City submits, therefore, that this Court should affirm the judgment of the Trial Court.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Answer Brief of Appellee together with the Appendix has been furnished to Sean F. Murphy, 1956 S.E. Dranson Circle, Port St. Lucie, Florida, 34952, by U.S. Mail this 24th day of February, 1995.

Robert O. Freeman