IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 84, 917
L.T. CASE NO. 94-882CA 02

SEAN F. MURPHY,

Appellant,

v.

CITY OF PORT ST. LUCIE, FLORIDA,
a municipal corporation of the State
of Florida,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

On appeal from the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida (Civil Division).

Sean F. Murphy
1956 S.E. Dranson Circle
Port St. Lucie, FL

Pro Se Appellant

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STATEMENT OF THE CASE AND FACTS

The City of Port St. Lucie implemented a program to provide modernized central water and sewer service to all property in the City over an eight to ten year period. Pursuant to this plan, the City acquired ownership of the water and sewer utility from St. Lucie County on October 1, 1994.

As Councilman Ankrom described it, the acquisition of the utility and the extension of lines to all property in the city are part of "our program of getting sewer and water throughout the city" and based on "a policy set in the beginning that Council wanted to see sewer and water lines in front of every home in this city within the next ten years." Intervenor's Exhibit # 12, p. 8. As the City Council has stated: "The city's operation of the system is the first step in creating a unified water and sewer system throughout the city." Intervenor's Exhibit # 21, page 5.

On May 4, 1994, the City hired Hartman & Associates, experts in the field of utility systems, to conduct a study of the County's utility system and prepare a report, titled "Partial Due Diligence Investigation." The due diligence report was not commissioned to determine whether the Council should proceed with the project, "but for the express purpose of determining the physical status of what [the City was] accepting responsibility for." Intervenor's Exhibit # 21, page 4, statements of Mayor Minsky.

At trial, the Due Diligence Report was admitted into evidence as Intervenor's Exhibit # 1. Also at trial, Howard Woodrum, P.E., an expert in Water and wastewater treatment systems, testified as to matters contained in the report as did Gerald Hartman, P.E., the principal engineer in charge of preparing the report.

The Consulting Engineer Gerald Hartman found a "General lack of Proper Maintenance on the plant" and found lacking a needed and customary program for preventive maintenance. Intervenor's Exhibit # 1, p. 11-3; Testimony of Gerald Hartman.

In regard to water supply system, Hartman disclosed that the majority of the facilities in the water system presently require general repair and maintenance. Intervenor's Exhibit # 1, p. 2-24. In particular, Water treatment Plant No. 2 "exhibited a lack of preventive maintenance program necessary to keep the facility in proper functioning order". Intervenor's Exhibit # 1, p. 2-31. Numerous components of the treatment plant also need replacing or refurbishing. Intervenor's Exhibit # 1, p. 2-31.

The well-sites also require general preventive maintenance which is not currently provided. Intervenor's Exhibit # 1, p. 2-31. Further, the pumping stations are in critical need of equipment repair and replacement and both stations are operating without any auxiliary generators. Exhibit # 1, p. 2-31.

The Due Diligence Report also revealed a general state of disrepair and lack of maintenance for the Wastewater treatment facilities. Repairs or replacements were called for in virtually

every aspect of the system. Exhibit # 1, p. 3-82-88. The Southport Wastewater treatment plant, the plant currently servicing the most customers, requires repairs and "major maintenance" and "is in dire need of being expanded." Exhibit # 1, p. 3-82-88.

At trial, Howard Woodrum, P.E., testified that the present pumping stations of the water system are in serious need of equipment repair or replacement. From his experience, a great deal of capital would be required to bring the present equipment up to proper standards for reliable operation. Further, much of the Plant equipment and the bulk of the existing pipelines have approached the end of their useful lifetime. In summary, Woodrum testified that the present system was a liability instead of an asset to the community.

Woodrum also testified that the sewage and runoff collection lines need immediate repair to prevent the current processing of a quantity of water/waste that far exceeds the quantity that is actually placed into the ground system via designed inlet sources. Hartman described this process as Infiltration and Inflow (I/I) problem. The gist of the problem stems from rainwater and groundwater leaking into the wastewater system from deteriorating or defective pipes, connections, etc. The customer gets charged for water never used. Hartman concluded that I/I is a significant problem for the utility. Intervenor's Exhibit # 1, page 9-10 -- 9-16; 3-24 -- 3-27.

Woodrum also noted that the present equipment does not have

installed spare capacity to cover breakdowns and that maintenance and repair may be difficult or impossible because manufacturer nameplates are missing.

The City officials have also expressed their alarm over the system's deterioration. Mayor Minsky stated that "the physical condition of the plant is almost catastrophic and getting worse." Intervenor's Exhibit # 21, page 4. Vice Mayor Christianson noted the "deplorable lack of maintenance". Intervenor's Exhibit # 21, page 4. Councilman Anderson was "appalled" at the condition of the utility and noted that "there has been virtually little or no maintenance on the plants", employee's safety is at risk with inadequate procedures and equipment, and the labor force is critically understaffed. Intervenor's Exhibit # 21, page 7.

Hartman identified several necessary maintenance programs, missing from the current system or presently inadequate, which immediately will immediately and significantly increase the operating costs of the utility. Exhibit # 1, p. ES-24. For wastewater, these maintenance programs and ensuing additional costs include: Sewer Cleaning/Sealing, Etc. ($105,000); Manhole Repair ($35,000); STEP Systems (125,000); Maintenance Collection/Transmission ($146,000); Maintenance Labor ($250,000); Maintenance General/Operations ($200,000). Exhibit # 1, p. ES-25. The total additional funds necessary for these wastewater programs is $861,000.00.

The Water System currently requires the following additional programs and funds: Meter replacement ($ 47,000); Leak Detection

($ 40,000); Valve/Hydrant ($ 30,000); Backflow Prevention ($ 15,000); Cross Connection ($ 10,000); Preventative Maintenance ($ 125,000 plus 125,000 for wastewater = 250,000); and Maintenance General ($200,000). The total additional funding for these identified water maintenance programs is $ 592,000.00. Exhibit # 1, p. ES-25.

The total additional funding needed annually for these identified maintenance programs is **$ 1,453,000.00.** The lacking maintenance programs may constitute as much as 20 percent (20%) of the existing operations budget. Exhibit # 1, p. ES-25. Hartman notes that the apparent positive operating results of the utility in the last three years are due in part to "the lack of investment in maintenance and the deferred payment of any principal portion of the debt." Exhibit # 1, p. 7-5.

The Hartman Report notes that a potential seller will, typically prior to acquisition, make efforts to improve cash flow position of the system by minimizing staff. Exhibit # 1, p. 7-5. In 1985, when General Development had half the present customers as today, the system had more than twice the maintenance force as it does today (16 in 1985; 7 Today). Intervenor's Exhibit # 1, p. ES-20, 6-5, 6-6 (Table), 11-3. While this dramatic decrease in maintenance staff occurred, the system and facilities had aged requiring more maintenance, the system was expanded requiring more maintenance, and new facilities were constructed requiring new maintenance. Intervenor's Exhibit # 1, p. 6-5.

County and GDU records also show that the number of total

staff is presently down to 49 compared to 54 in 1985 when the system serviced much fewer accounts. Intervenor's Exhibit # 1, p. 6-6. The NorthPort Water Treatment Plant staff is outnumbered two to one based on its production when compared to the staff and production of the Fort Pierce Utility. Intervenor's Exhibit # 13, page 6, Statement of Dan Sneed, North Port Facilities Operation Director. Considering the whole utility system, the present staffing with the addition of one more person is half the historically necessary levels of staff. Intervenor's Exhibit # 1, p.ES-19 and 6-6.

Interim Utilities Director and Chief Engineer Sam Amerson requested six (6) new maintenance positions and six (6) new operation positions for Fiscal Year 94/94. Budget funding for the added staff was never approved. Intervenor's Exhibit # 1, p. 6-6. Significantly, this minimum increase in staff, needed to approach 1985 customer staff ratio, "would result in an additional rate increase." Intervenor's Exhibit # 1, p. 6-6 (emphasis supplied).

The above discussion of necessary additional staff does not take into account further necessary staff and costs for planning, engineering, legal, billing, accounting, administrative, budget/purchasing, computer services, personnel services and regulatory coordination personnel. These historical functions were accomplished in Miami or later at the County or by County Consultants. Intervenor's Exhibit # 1, p. ES-20. It can be assumed that additional staff will be required to be employed by

the City to serve these additional functions.

The Due Diligence Report sets forth the capital improvements required to correct present system deficiencies, regulatory requirements, and provide service to future customers that connect within the Five Year planning period. The majority of these improvements are required to continue current operations and to serve current customers and must be accomplished in the first two years of the five year planning period. Intervenor's Exhibit # 1, 9-1 to end.

Water System. The Five Year plan for improvements to the Water System (Intervenor's Exhibit # 1, 9-1 to 9-9) identifies a number of improvements required to maintain current operations and which are scheduled to occur in the first two years. Capacity analysis of the raw water supply "indicates that immediate improvements are necessary to meet not only the projected flows but also the current flows." Exhibit # 1, 9-2. Accordingly, nine new wells are scheduled for 1994/5 FY and four more in 1996. The Budgeted amounts are $1,920,000 in 1995 and $ 1,160,000 in 1996. Intervenor's Exhibit # 1, 9-2. Alternatively, 3 wells each are scheduled for 1998 and 1999 with a budgeted cost of $ 720,000 and $ 670,000 respectively.

Other capital improvements to the water system not currently budgeted include $40,000 annually beginning in FY 1995 for wellfield rehabilitation; a one time water resource study in the amount of $200,000 scheduled for FY 1995; a one time Safe Water Act study to identify potential violations is budgeted in FY 1995

in the amount of $100,000. Intervenor's Exhibit # 1, 9-2 - 9-3.

The Water Treatment Facilities require major improvements and modifications over the next two years. These improvements are necessary to maintain current operations at an acceptable level. Intervenor's Exhibit # 1, 9-2. These improvements are budgeted for FY 1996 and for the amount of $ 3,500,000. Intervenor's Exhibit # 1, 9-3 - 9-6.

The water pump stations also require renovations. A permanent building must be constructed at the Mid Port Pump station to house the chlorination and ammonia systems and prevent evident corrosion problems; the cost of this project will be $ 110,000 and is budgeted for 1995. Intervenor's Exhibit # 1, 9-6. Immediate improvements to the South Port Pump station consist of refurbishing the building, ground storage tank, pump system and replacing tanks in 1995 in the amount of $ 105,000. Intervenor's Exhibit # 1, 9-6. Another $ 735,000 is budgeted for 1997 for expansion and improvements to the pump stations.

Table 9-1 of the Due Diligence Report sets forth the Water Systems Capital Improvements Schedule. A total of $ 14,060,000 is budgeted for improvements to the water system over the next five years with 7.5 million spent in the first two years. As Lee Hammon, Facilities Operator of all the plants, stated: "These are all big ticket items; they are capital expenses." Intervenor's Exhibit # 6, page 4.

These improvements over five years are necessary for the system to continue to serve the present customers. For example,

expanding the operations building is required because the existing building "does not provide adequate room for the facilities" and "needs to be doubled in size." Intervenor's Exhibit # 1, 9-5; # 13, page 3. A unit that thickens the sludge must be completely replaced, the centrifuge unit needs to be replaced at a cost of $400,001/, expanding the Save All tank is "crucial", softening units must be replaced, etc. The reason that improvements are necessary is because the entire system is 34 years old and has not had maintenance done in the past. Intervenor's Exhibit # 1, 9-4 - 9-6; # 13, page 3-4.

Wastewater System. A number of major improvements are scheduled for the Wastewater system. The wastewater facilities presently provide wastewater service to 10,888 accounts. These accounts can be broken down to 2,271 accounts in the North Port WWTP service area, 7,308 in the South Port WWTP service area, and 922 accounts within the WestPort WWTP service area. Intervenor's Exhibit # 1, page 9-9. South Port is operating at approximately 80% of its design capacity and actually operating at nearly 100% of its operating capabilities (Intervenor's Exhibit # 1, page 9-21); West Port is operating at nearly 100% of its permitted capacity (Intervenor's Exhibit 9-24), and North Port is allegedly operating at 47% of its permitted capacity if it is staffed higher.

Because the wastewater facilities are operating at such high

1/ This item was not included in Hartman's list of necessary improvements; hence this figure can be added to the total cost of immediate improvements to the water system.

capacities, "improvements are required at all of the [Wastewater Treatment Plants] to meet current and future requirements. Intervenor's Exhibit # 1, page 9-18.

A "critical" and immediate improvement to the North Port WWTP is the design and construction of a sludge stabilization facility because the current level of sludge stabilization fails to meet Federal Regulations. Intervenor's Exhibit # 1, page 9-18. Construction of the sludge facilities must begin by October 1994 and the cost is approximately $502,700. Intervenor's Exhibit # 1, page 9-19. Also, the plant has been operating without a treatment plant permit and a deep well injection permit since 1993; therefore, permits need to be obtained immediately in the amount of $31,000. Also, in conjunction with construction of sludge facility, modifications of existing equipment must be accomplished in the amount of $276,000. Intervenor's Exhibit # 1, page 9-19. The total costs for immediate improvements to North Port over the next two years is $ 810,000. Intervenor's Exhibit # 1, page 9-19 and 9-20 and Table 9-2. Lastly, $3, 136,000 is needed over the next three years for North Port expansion.

Immediate improvements are required at South Port Waste Water Treatment Plant with an estimated cost of over 5.5 million dollars over the next three years; 5.1 million of the costs of these improvements are scheduled for FY 1995 and 1996. Intervenor's Exhibit # 1, page 9-21. South Port serves the largest sewer area of the city or 7,308 accounts out of 10,888.

Intervenor's Exhibit # 1, page 3-58; 9-21. Built in the 1960's, South Port was the original plant for the Port St. Lucie area. South Port is operating at 80% of its design capacity, however, "the facility is actually operating at nearly 100% of its operating capabilities."2/ Intervenor's Exhibit # 1, page 9-21. South Port is located in the South Eastern portion of the City "by Club Med." Intervenor's Exhibit # 1, page 3-58 and figure 2-2; # 11, page 5. South Port provides gray water. Intervenors Exhibit # 11, page 7.

The 5.5 million dollar expansion of South Port needs to be accomplished to meet current needs. Intervenor's Exhibit # 1, page 3-85, 9-21, 5-26; Intervenor's Exhibit # 11, p. 6-7. As described in the Due Diligence Report:

> In general, the South Port WWTP is in need of repairs, painting, and major maintenance. Much of which cannot be performed until additional capacity is provided so the units can be taken out of service. The plant is currently operating at 80 percent capacity. FDEP guidelines state that at this level of operation, construction of additional capacity should be under way. The 1.2 MGD portion of the WWTP cannot handle its permitted flows, and as a result the 1.0 MGD train is being operated at 150% of its permitted capacity to make up for problems associated with the 1.2 MGD train. Therefore, the facility is in dire need of being expanded.

Intervenor's Exhibit # 1, page 3-85 (emphasis added).3/

2/ Dan Sneed, Facilities Operation Director of South Port, said the plant " is at 100% of its capacity organically and hydraulically." Intervenor's Exhibit # 11, page 8.

3/ Numerous other improvements are needed to South Port, more fully discussed in the Due Diligence Report at pages 3-85 through 3-89. One example is that the sludge digester do not work properly, so the county has created a makeshift stabilization facility; however this facility must be replaced because the method

Bruce Sloan, Chief of Operations for South Port, has said:

> "This plant was built in the 1960's and has long seen its useful life. It is undersized, and we can't put much flow through because of the size of the clarifiers, it also needs major work."

Intervenor's Exhibit # 11, p. 6-7.

In reference to one of the two operating units at South Port, Sloan remarked: "It is undersized and basically useless for this plant. This plant processes 1.2 million gallons per day, 400,000 gallons is the unit's maximum capacity per day. We are over working the other plant to make up for this unit." Intervenor's Exhibit # 11, p. 6-7. Mayor Minsky acknowledged that the design was never realistic for its intended use. There is no backup system for the plant. "It can't handle much more; there is no room for error. We have no forgiveness if anything goes wrong."

Additional immediate Capital needs of South Port WWTP include $ 300,000 for a monitoring well in FY 1995 to satisfy current state regulations; $ 92,000 for an MIT test. Intervenor's Exhibit # 1, 9-2. Overall, $5,094,000 is needed in Capital improvements to South Port in the next two (2) years and another $409,000 in the FY 1997. Intervenor's Exhibit # 1, Table 9-2. In the last two years -- FY 1998 and 1999 -- $145,100 is budgeted for improvements to South Port. Intervenor's Exhibit # 1, Table 9-2.

West Port will require $712,000 in the next two (2) years

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is hazardous and unsafe to employees. # 1, 3-87.

for effluent disposal; this is needed because West Port is operating at nearly 100% of its permitted capacity. Intervenor's Exhibit # 1, 9-24. In addition, $1,512,000 is needed in 1998 and 1999 for West Port expansion. Intervenor's Exhibit # 1, Table 9-2.

The three year Capital Improvement Plan for water calls for $12,870,000 in costs; the improvements for wastewater will cost $11,646,000. Intervenors Exhibit # 1, page 10-1 and 10-5. The grand total funds needed for improvements to the system in the next three years is $24,517,000. Including the costs for funds over the fourth and fifth years, the total Capital Improvement costs are $32,224,000.

The annual costs for maintenance programs which are not currently budgeted but which are required is 1,453,000 annually; over a five year period, $7,265,000 is required for maintenance programs.

Therefore, over the next five years, the city will spend, conservatively, 40 million dollars on improvements and maintenance to the system.

The forty million dollar figure exceeds the $36.7 million dollar value placed on the utility by the City. Testimony of Gerald Hartman; Testimony of Jim Anderson.

Financial Picture of the Utility and Source of Funds

The utility currently does not have sufficient funds for either the maintenance program or for critical capital

improvements.

For one, there is insufficient money in the operations budget to cover any maintenance or improvements. Even minor repairs, such as to stairwells at the South Port WWTP Plant, "have depleted every penny in the operations budget." Intervenor's Exhibit # 13, page 8. The utility would be actually losing substantial amounts of money if proper maintenance was provided and the debt was being paid. As the Due Diligence Report concluded, "Positive operating results are reflected due to the lack of investment in maintenance and the deferred payment of any principal portion of the debt." Intervenor's Exhibit # 1, page 7-5.

The utility's negative financial picture can be seen by including the cost of necessary maintenance, labor, and payment of the debt principal compared with gross revenue. For 1992/1993, the last year figures were available, the utility had gross revenue in the amount of $10,448,585. Intervenor's Exhibit # 1, page 7-1. Operating expenses (without maintenance or improvements or adequate labor) were $ 5,422,068. Thus, Net Revenue is $ 5,026,517. Hartman notes that debt service was "significantly reduced" due to principal deferment and refunding activities. Debt service is generally level on annual basis of 5.5 million dollars. Intervenor's Exhibit # 1, 8-2. Add to regular debt service mandatory annual maintenance programs of $1,453,000 equals $6,953,000. One can add to the net revenue of the utility extra revenue from interest and connection charges in

the amount of $ 2,046,535 which equals $7,073,052.

Subtracting the value of normal debt service and maintenance from available revenue leaves a balance $120,000 for mandatory improvements. 1996 alone calls for 10.1 million dollars in necessary improvements to the entire system to serve current customers. 1995 calls for over 5 million in required improvements. Additional operating employees have not been factored into these figures. Also note that the gross revenues include revenue from a substantial rate increase and surcharge.

The Mayor has stated that a tremendous amount of escrowed funds should have belonged to the utility with the transfer to the county; however, the county never went after the funds. In response to the Mayor, Lee Hammon, Director of all Utility Operations, stated "unfortunately that is history and now we have a utility and no money to fix it." Intervenor's Exhibit # 13, page 9.

The preacquisition debt service is $153,823,897.36 with over 75 million owed in principal. Intervenor's Exhibit # 1, 8-3 (Table 8-2). That debt was incurred by the County to cover acquisition costs and improvements. $45,000,000 was set aside in escrow for the purchase of the utility from GDU. However, a court judgement reversed the 36.7 million dollar price tag placed on the utility by the County indicating that the figure was not enough because it did not take into account developer contributions; the final price tag could be 138 million, including attorney fees and costs. Testimony of Gerald Hartman;

Testimony of Jim Anderson; Intervenor's Exhibit # 1, 11-5 ("Litigation Liability"); Unmarked Intervenor's Exhibit (Fourth District Court of Appeal Mandate and opinion). fn 140 million Significant exposure exists of a judgement in excess of 45 million dollars. Intervenor's Exhibit # 1, page 11-5.

Notwithstanding the 75 million dollar debt, there is no money left for the required $33 million dollars in improvements set forth in Hartman's report. The 33 million dollars needed in capital improvement funds are in addition to the funds and projects budgeted in the County's Capital improvement plan. Intervenor's Exhibit # 1, page 10-2 through 10-8.

Only $3,300,00 million remains for additional acquisition costs and the improvements identified in the County's Capital plans.4/ Intervenor's Exhibit # 1, page 8-19. However, in fact, there is not even enough money to cover the County's Capital improvement projects:

> In summary, the present capital funding plan appears to project a current shortfall of $ 3, 837,684 as of 3/31/94 which consist of combined shortfalls in funds 432,453, 438 and 439 and the $ 1,377,800 due to the reserve fund.

Intervenor's Exhibit # 1, page 8-18.

Over the past 4 years, the County spent 10.1 million dollars in finance and consultant costs or as much as they did for all

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4/ These funds are tied up in uncompleted county projects which are separate from the projects identified in Hartman's 3 and 5 year capital improvement plan. In fact, there is insufficient funds to even complete the County's projects -- "the present capital funding plan appears to project a current shortfall of $ 3,837,684 as of 3/31/94." Intervenor's Exhibit # 1, page 8-18.

debt funded construction. Intervenor's Exhibit # 1, page 8-19; ES-23.

A number of capital projects were budgeted with the 75 million dollar bond issue including a replacement and renewal program. Taking out finance and consultant costs, deposit for acquisition, and funds in the debts service reserve, $17,300,000 was available for Renewals and Replacements and Capital Costs. Intervenor's Exhibit # 1, page ES-23. As of March 31, 1994, 11 million was expended on projects and another 3 million was encumbered in projects of the available "Very Few" projects are complete; only two are substantially complete. Intervenor's Exhibit # 1, page 9-9, table 8-1, 8-2, 8-3. Records indicate an inordinately high variance between the 1990 bond estimate for the projects versus the costs to date and the new estimate. For the 2.0 MGD WTP expansion, the 1990 Bond estimate was $ 700,000; the amount expended as of March 1994 was $2,023,679 with a new project estimate of $2,559,640 for a 366% variance. The second project, the storage tank, was estimated at $600,000 and the new estimate is $1,265,000. Intervenor's Exhibit # 1, page 8-9.

Besides high consultant fees and costs and exorbitant project cost overruns, the shortfall in project funds is also due to expenditures on aborted projects such as $1,259,125 on the abandoned Bayshore project. Intervenor's Exhibit # 1, page 8-8. More importantly, over the last 4 years the vast majority of projects conducted were not originally identified in the capital improvement plan -- improvements were made on an as need and

emergency basis. Intervenor's Exhibit # 1, 11-3.

Also, 23 projects were identified in the 1990 Bond Revenue issue for specific renewal and replacement needs (sperate from capital improvements). Only five projects were completed; $2,560,000 of the project plus interest needs to be done. Intervenor's Exhibit # 1, page 11-2.

The County's capital program also experienced an "unusual transaction" in that $1,377,880 of the debt service reserve was transferred to the project fund to cover a shortfall in funding capital costs. Intervenor's Exhibit # 1, ES-23.

As a consequence of finance, consultant costs, inordinately high variance between budgeted projects and their costs, facility deterioration and lack of maintenance for 34 years, the failure to recoup escrowed funds from GDU, a "shortfall in current improvements funds" exists which will require another revenue bond issue backed by rates and user fees of the utility. Intervenor's Exhibit # 1, page 10-1.

The deferral of the maintenance programs, capital and operational costs, including payment of the principal debt service, will necessitate rate and charge revenue increases initially. Intervenor's Exhibit # 1, Table 11-22 No. 22. Even the addition of 6 maintenance employees and 6 operation employees -- which will still leave the utility understaffed according to historic levels and as compared to the Fort Pierce Utility -- will in and of itself result in an additional rate increase. Intervenor's Exhibit # 1, page 6-7.

The present system contains numerous problems that could result in enormous costs in fines, specified corrective action and/or a shutdown of operations by various regulatory agencies. Testimony of Howard Woodrum, P.E. A few of the problems exposing the system to environmental and regulatory liability include: the operation of non-permitted wells, the operation of wastewater treatment plants without permits or expired permits, plant configuration control, operating plants and equipment beyond capacity, lack of biological testing of discharge sludge and disposing of the sludge with no certificate of analysis, unsafe work areas, contamination of grounds and work sites with hazardous materials, etc. Testimony of Howard Woodrum, P.E.; Intervenor's Exhibit # 1, Table 4-1, 4-13, 4-11, 4-6, 11-4 (No. 17 & 18), 3-87, 3-68 and 3-79, 4-1, etc.

In addition, the city and the users face enormous potential litigation liability. On August 24, 1994, the Fourth District Court of Appeal decision overturned the $ 36.7 million dollar price tag of the utility because developer contributions were not taken into account in determining the price. Unmarked Intervenor Exhibit (Fourth District Mandate and Opinion); Testimony Jim Anderson; Gerald Hartman. The final judgment could be 138 million dollars, including attorney fees, costs, and interest.

Mayor Minsky has said:

> The maintenance and administration of the utility, as reported in the study, expressed beyond all doubt, the city must acquire the utility and implement urgent remedial action.

If this was simply a decision based on the bottom line,

there is no way anyone on this council would agree to go forward.

It is a decision that will be almost impossible to justify financially but would be absolutely irresponsible if we did not do it.

The best description I can think of to portray my dilemma is the situation Indiana Jones faced in the movie where he was searching for the Holy Grail. * * * He was standing at the edge of a sheer drop of thousands of feet. He had to get to the other side and the only way that he could do that is to step out onto as bridge that he could not see, but had to trust it would be there. * * * If there was ever a Blind Leap Of Faith, I believe Council is poised to do just that.

Intervenor's Exhibit # 21, page 4.

Vice Mayor Christianson states:

The deplorable lack of maintenance and expansion of the existing utility . . . is appalling. * * * The utility must be brought up to a standard that will ensure its ability to provide central water and sewer to our citizens for many years to come.

Councilman Ray Ankrom stated:
This utility is not going to go away. If the Council did nothing, the utility would still be there, and it could only get worse. * * * It is in bad shape, which is why we want it. We want to make the utility better for you -- our citizens.

We started out with the main objective being the expansion of water and sewer facilities throughout the City. Without this expansion there is no hope of attracting quality commercial or industrial development. * * * The City's operation of the systems is the first step in creating a unified water and sewer system throughout the city.

As of October 1, we are going to start our own utility. Unfortunately, we have to take an old one to do it, but I can't leave half our citizens out there holding the bag for that 74 million dollar debt incurred by the County and it is sickening, I admit it. These people are taxpayers too. We can't just sit back and do nothing to protect them

Councilman Jim Anderson has stated:

> An enormous debt looms over the Utility's head. A debt not owed by St. Lucie County, but by the users of the utility, of which approximately half the city's population is counted.
>
> Perhaps the easiest way to explain the situation is to liken the utility to any company on the stock exchange. The owners of these companies are the stockholders. The stockholders of St. Lucie County Utilities are its rate payers. Ratepayer are responsible for every penny of debt and when money isn't there to meet these debts, its back to the ratepayer they go for the money.
>
> It will be a minimum of five to seven years before this system will be a viable asset to the community.

Intervenor's Exhibit # 21, page 6.

Appellant was a non-represented intervenor in the bond validation proceedings and was a leader of a petition drive seeking a referendum on the ordinances authorizing the instant assessments and bonds. At the bond hearing, Appellant testified as to his involvement in the petition process and his views as a resident on the water and sewer program.

SUMMARY OF ARGUMENT

In acquiring the utility, the City was required to base its decision in part on the purchase price of the utility. The city failed to consider the purchase price or cost of the utility. This The City cannot authorize these assessments until it lawfully acquires and controls the utility system.

Further, the instant assessments are part of a citywide program which is intended to confer a community-wide benefit on the people of Port St. Lucie, but which provides the assessed homeowner with no special benefit. As such, the assessments are invalid and should be struck down. In addition, extension of utility services and lines into phase I directly conflicts with the city's comprehensive plan which renders the assessments illegal.

The ordinances upon which the instant assessments are based are suspended because there has not been a final determination of a referendum petition. The clerk has a duty to issue a certificate of insufficiency, if she wants to finalize and give legal effect to her assertion of invalidity. By failing to perform her duty, the clerk has deprived petitioners with rights of review and left the subject legislation suspended.

ARGUMENT

I. THE FINAL JUDGMENT VALIDATING THE SPECIAL ASSESSMENT BONDS MUST BE REVERSED BECAUSE THE CITY FAILED TO COMPLY WITH CHAPTER 180.301, F.S. IN ITS ACQUISITION OF THE UTILITY FROM ST. LUCIE COUNTY

Pursuant to Chapter 180, Florida Statutes, the City entered into an agreement for the ownership of the County's Utility system, effective October 1, 1994. Intervenor's Exhibit # 3, p. 12; Appendix p.115; Intervenor's Unmarked Exhibit , Port St. Lucie Ordinance 94-29, p. 11 and 14, (Bond Acquisiton Ordinance)(Judicially Noted Contents of Court File); Appendix p. 118. _The utility system was owned by General Development Corporation (Reorganized as Atlantic Gulf Communities) until 1990 when the County acquired the system in an unusual "quick take" condemnation proceeding. Intervenor's Exhibit # 1, 11-5; Appendix p. 101.

The acquisition purchase price of the utility between the County and GDC (Now AGC) has been the subject of extensive litigation which was not yet final at the time the City decided to acquire the utility. Intervenor's Exhibit # 1, 11-5; Appendix p.101. Nor was the utility purchase price final at the time the City formally acquired the utility on October 1, 1994 or tot he present day. On August 24, 1994, the Fourth District Court of Appeal reversed a Circuit Judge's order approving the City's 36.7 million dollar price tag placed on the Former GDU utility, citing authority that the judge failed to include developer contributions to the water and sewer system in formulating the

purchase price. Intervenor's Exhibit # 1, 11-5; Appendix p.101. On September 9, 1994, the Appeal court entered a mandate ordering the case back to trial. Intervenor's Exhibit # 1, 11-5; Appendix p.101.

As noted in the City's Due Diligence Report, the City, by agreeing to assume all the debts and liability from the utility, faces "significant cost exposure" for a purchase price in excess of the amount anticipated by the County and ordered by the trial judge. Intervenor's Exhibit # 1, 11-5; Appendix p.101. Also, attorney fees, interest over four years, and other costs incurred by the County in the litigation will be added to the final price of the utility. Intervenor's Exhibit # 1, 11-5; Appendix p.101. Because of the uncertain outcome, the City is not doing a rate study until the judgement is final. Intervenor's Exhibit # 2, P. 1; Appendix ___ . Intervenor's exhibit B for Identification, an August 24, 1994 Palm Beach Post Article, which Intervenor's proffered and asked the court to judicially notice, demonstrates that there is a significant disagreement on the purchase price between the parties and the figure a jury would decide. Intervenor's Exhibit B; Appendix p.193.

Section 180.301, Florida Statutes, (Appendix p.196) provides:

> No Municipality may purchase or sell a water, sewer, or Wastewater reuse utility that provides service to the public for compensation, until the governing body of the municipality has held a public hearing on the purchase or sale and made a determination that the purchase or sale is in the public interest. In determining that the purchase or sale is in the public interest, the municipality shall consider, at a

minimum, the following:

* * *

(5) The Reasonableness of the Purchase or sales price and terms; (emphasis added).

In the present case, the City did not consider the reasonableness of the sales or purchase price when it agreed to purchase the utility from the County because the price has not yet been determined. If the purchase price is unknown -- subject to dispute between the parties and the contingencies of litigation and jury verdict -- then it cannot be "considered." Therefore, the City failed to comply with the statute; its actions in purchasing the utility were illegal. The utility acquisition agreement with St. Lucie County is illegal, and thus, void.5/

Consequently, the City is without authority to pledge the utility system revenues to secure payment of the Series 1994A Bonds, as set forth in Section 3.02 of Ordinance 94-35 (Master Assessment Bonds Ordinance). More importantly, the assessments

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5/ The City has ignored Chapter 180 in other respects. Section 180.301, Florida Statutes, provides that the City must also consider the physical condition of the utility in determining that the purchase is in its best interests. Accordingly, the City hired consultant Gerald Hartman to perform a Due Diligence investigation of the utility. In a brochure put out by the City to explain the acquisition, Mayor Minsky states:

> In anticipation of the city's acquiring control of St. Lucie County Utilities, we hired the firm of Hartman & Associates to conduct a due diligence study. This was not done to determine if we should proceed with the acquisition, it was done for the express purpose of determining the physical status of what we were accepting responsibility for.

Intervenor's Exhibit # 21, page 4; Appendix p. .

and benefits derived therefrom were based on the acquisition agreement with the County and the City cannot authorize these assessments until it lawfully acquires and controls the utility system.

II. THE FINAL JUDGMENT VALIDATING THE BONDS MUST BE REVERSED BECAUSE THE ORDINANCES UPON WHICH THE BOND AND ASSESSMENTS ARE BASED ARE SUSPENDED

Validation of the instant bonds is precluded because the ordinances authorizing the issuance of bonds and levying of assessments are suspended, pending a final determination of insufficiency of a referendum petition filed by a Petitioner's Committee. Pursuant to Section 7.02, Port St. Lucie City Charter, a petitioner's committee commenced a referendum proceeding by filing with the City Clerk a Petitioner's Committee Affidavit. Intervenor's Exhibit # 9; Appendix p. 201. As indicated in their affidavit, the measures sought to be referred were the ordinances authorizing the issuance of bonds and levying of special assessments or Port St. Lucie Ordinances 94-34, 94-35, 94-36, and 94-37.

The Ordinances to be referred were adopted on July 25, 1994. Ordinance 94-35 which authorizes the issuance of the Special Assessment and was subject of the petition is 38 pages in length. Petitioner's Exhibit # 6; Appendix p.220. Initially, the City sought to validate Bonds for Phase II of the project. However, the City postponed Phase II and entered a notice of voluntary dismissal of the complaint seeking to validate Phase II bonds

because the residents were not provided "proper" notice of the assessments. Intervenor's Exhibit # 18; Intervenor's Exhibit # 12 at p. 5, Appendix p. 5.

Members of the Petitioner's Committee began circulating Petitions to invalidate the bond ordinances in mid-August. Testimony of Intervenor's Witness Diane Souza; Appendix p. 19-23 Petitioner's gathered over 5300 signatures requesting that the bond and special assessment ordinances be placed on a referendum vote. testimony.

On August 23, 1994, at 7:45 a.m., Sandy Johnson, City Clerk, called Diane Souza, member of Petitioner's Committee and instructed her that she should resign from the Petitioner's committee and that further involvement with the committee or its members could subject her to a five year jail sentence and a five thousand dollar fine. Testimony of Diane Souza, Intervenor Witness # 7; Appendix at p. 28-29; testimony of Sandra Johnson, Petitioner Rebuttal witness. Sandra Johnson finally made contact with Helen Bouffard, Committee Treasurer, and told her that she was risking jail time and fine by continuing with the petition process.

On August 24, 1994, the last day that the petition could be filed for a referendum, Ms. Souza, on behalf of the Petitioner's Committee, filed with the City Clerk's Office a Petition containing over 5300 signatures. Testimony of Diane Souza, Intervenor Witness; Appendix at p. 28-29. The day after the Petition was filed, Sandra Johnson told the newspapers and

members of the petitioner's committee that the petition was invalid because each petition page did not have the full text of the ordinances attached. Testimony of Diane Souza; Appendix p. 41; Intervenor's Exhibit # 5; Appendix p. 274; Intervenor's Exhibit A, Marked for Identification.

Pursuant to Section 7.04 (a) of the Port St. Lucie City Charter, the City Clerk must complete a certificate as to a Petition's insufficiency and send it to the Petitioner's Committee.

> **Sec. 7.04**. PROCEDURE FOR FILING.
> (a) Certificate of Clerk; amendment. Within twenty (20) days after the petition is filed, the city clerk shall complete a certificate as to its sufficiency, specifying if it is insufficient, the particulars wherein it is defective and shall promptly send a copy of the certificate to the petitioner's committee by registered mail.

Petitioner's Exhibit # 9 ; Appendix p. 286.

After a Petition is certified as insufficient, the committee has a right, per Section 7.04 (b) of the Charter, within two days of receipt of the Clerk's certificate to request review by the Council of the Certificate of Insufficiency and allow City Council to make a final determination as to whether a referendum may proceed. Petitioner's Exhibit # 9 ; Appendix p.286. Upon request, the Council must review the Certificate at its next meeting and approve it or disapprove it, "and the Council's determination <u>shall</u> <u>then</u> be a final determination as to the sufficiency of the petition." Section 7.04 (b), Port St. Lucie City Charter Petitioner's Exhibit # 9; Appendix p.286.

The issuance of a Certificate of Insufficiency is an integral part of finalizing the referendum, and hence, the City Legislative process. Section 7.05. Referendum Petitions; Suspension of Effect of Ordinance, provides that "when a referendum petition is filed with the City clerk, the ordinance sought to be reconsidered shall be suspended." The suspension terminates only when there is a "final determination of sufficiency" or the petition is withdrawn, the ordinance is repealed or 30 days after a vote on the ordinance by the council. Section 7.05, Port St. Lucie City Charter; Petitioner's Exhibit # 9; Appendix p.286.

Based on the Clerk's comments, Petitioner's Committee on August 24, 1994, sent a letter to the City clerk indicating their intention to seek City Council review of the City Clerk's Certificate of Insufficiency. Intervenor's Exhibit # 8; Appendix p. 200. On August 31, 1994 -- 6 days after the clerk told the committee and the papers that the petition was defective because it did not have the required ordinances attached -- Sandra Johnson informed the committee that she would not perform her duties under the Charter and issue a certificate of insufficiency. Section 7.05, Port St. Lucie City Charter; Petitioner's Exhibit #9 ; Appendix p.286.

The purpose of a referendum is to suspend or annul laws in order to provide the people a means of expressing their desire regarding a piece of legislation. 82 C.J.S. Statutes § 115 (1953). The referendum process is designed to make the

lawmaking power of the government not final, but subject to the will of the people. Id. at § 116.

Referendum procedures like those found in Port St. Lucie's charter postpone and make the effectiveness of an ordinance dependent upon the carrying out of the procedures and rules proscribed therein. City of Coral Gables v. Carmichael, 256 So.2d 404, 408 (Fla. 3DCA 1972). Such a referendum charter procedure "constitutes a method of legislation, relating to enactment of an ordinance, which is cumulative and alternative to the legislative power with respect thereto that is conferred upon the City Commission, when such referendum actions is invoked." Id.

Charter provisions providing the power of referendum and initiative are to be liberally construed in order to meet the purposes for which it was adopted. Barnes v. City of Miami, 47 So.2d 3 (Fla. 1950); Bradley v. Galloway, 651 S.W.2d 445 (Ark. 1983). In bond validation cases, this Court has often stated that all doubts concerning the requirement of an election prior to an issue of indebtedness should be resolved in favor of allowing the people to decide it. See State v. City of Boca Raton, 172 So.2d 231, 233 (Fla. 1965). This principle recognizes that the people are the ultimate source of sovereign power and thust requiring a vote does not affect the power of the City to issue the bonds, but merely leaves the question of incurring the indebtedness to the people who must ultimately pay the bill. Id. The rule that referendum charter provisions should be strictly

construed against the government and liberally construed for the people is even more compelling in this case since when the petition concerns a vote on the questions of incurring a debt.

A charter provision directing a clerk to issue a certificate of sufficiency or insufficiency imposes a duty that must be performed to finalize a legislative enactment. See City of Coral Gables v. Carmichael, 256 So.2d 404 (Fla. 3DCA 1972); Bradley v. Galloway, 651 S.W.2d 445 (Ark. 1983); State v. Garner, 128 S.E. 2d 186, 187 (W.Va. 1962). Further, when rights of review or amendment of the petition are dependent upon the issuance of a formal certificate of insufficient, a clerk's allegations of invalidity or deficiency of the petition cannot serve as a basis for inaction, non-recognition or refusal to certify the petition. Bradley, 651 S.W.2d at 446-47; Garner, 128 S.E.2d at 189. Failure to make a final determination of a petition's sufficiency has been held to force a city to concede the validity of the petition. Garner, 128 S.E.2d at 190.

In Bradley v. Galloway, the city clerk declared that the referendum petition to be insufficient and that it amounted to nothing and there was nothing to be done to validate the petition. Bradley, 561 S.W.2d at 446. The Charter provision allowed petitioner's ten days to amend or correct the petition after the City Clerk sent them the written notice of insufficient. Id. Although the clerk stated the petition was invalid on numerous occasions, he refused give the petitioner's the statutory written notice, thereby preventing them from

exercising their right to amend or correct. Id. In affirming the order of the lower court directing the city clerk to comply with the statute, the Supreme Court of Arkansas found that the clerk failed to perform the statutory duty, that this failure prevented petitioner's from exercising rights of amendment and review in chancery court, and that the issue presented was the clerk's failure to perform his administerial duty and not whether the petition was ultimately sufficient to require an election. Bradley, supra, at 446.

The Port St. Lucie City Charter is also clear and directs the clerk to prepare and send a certificate of sufficiency or insufficiency in regard to a referendum petition. It imposed a duty that the clerk must perform to finalize the enactment of the ordinances. See City of Coral Gables v. Carmichael, 256 So.2d 404 (Fla. 3DCA 1972)(Charter provision imposed duty upon clerk to prepare a certificate of sough or sufficiency of a referendum petition within ten days of filing; injunction filed on eighth day reversed, clerk given two days to perform duty); Bradley v. Galloway, 651 S.W.2d 445 (Ark. 1983)(Statute requiring clerk to provide written notice of insufficiency and ten to correct or amend should be liberally construed; clerk directed to comply with statutory duty); State v. Garner, 128 S.E. 2d 186, 187 (W.Va. 1962)(formal determination of the validity of the petition under charter must be made within the prescribed time).

In addition, the Port St. Lucie Clerk's refusal to perform her duty prevented the petitioner's from exercising their rights

of amendment and review, which, under Section 7.01 (b) of the City Charter, included the rights to have the elected officials of the City Council make a final determination as to the sufficiency of the petition, and then after that seek court review. Just as in Bradley, supra, the City clerk here unilaterally imposed a "gag rule" and took the position that the petition amounted to nothing in refusing to issue a certificate of insufficiency. Intervenor's Exhibit # 7; Appendix296. By so doing, the clerk had the final and only say on the validity of a petition when, upon request, the city council or the court's decision is final. Given the clear language of the charter, the city must be held to the legal effect of the clerk's failure to recognize the petition and issue a certificate of insufficiency: a continuing suspension of the bond and assessment ordinances until a final determination of the sufficiency is made.

III. THE REFERENDUM PROCEDURES SET FORTH IN THE PORT ST. LUCIE CITY CHARTER AND THE ACTS OF DECEPTION AND THREATS OF CRIMINAL AND CIVIL LIABILITY MADE BY THE CITY CLERK VIOLATE THE RIGHTS OF THE PETITIONERS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I., § 5 OF THE FLORIDA CONSTITUTION

Although a state or local government has no obligation to create a referendum or initiative procedure, it is obligated once it confers those rights to do so in a manner consistent with the federal Constitution. Meyer v. Grant, 486 U.S. 414 (1988). A referendum or initiative procedure violates the federal

Constitution if it unduly restricts the First Amendment rights of the Citizens in carrying out the petition process. Id. at 295.

Petitioner's sought change by referendum in the laws adopted by the city for water and sewer expansion; their right to freely engage in a public issue is protected by the First Amendment. Meyer, 486 U.S. at 421. The physical act of circulating a petition involves the expression of desire of political change and a discussion of that change. Id. Communication in the petition process involves "core political speech." Id.

The Port St. Lucie Charter referendum procedure requires that each petition page contain or have attached "throughout their circulation" the full text of the ordinance sought to be reconsidered. Section 7.03, Port St. Lucie City Charter; Appendix. The Clerk first based her claim that the petitions in this case were invalid because an ordinance was not attached to each page. Intervenor's exhibit # 5; Appendix at p.274. The Master Bond Ordinance, 94-35, contained 38 pages. Gathering 15% of the town's voter's signatures in a limited time necessities the use of many circulators with hundreds of petition pages. To meet the clerk's expectations every petition page will have the 40 pages of leglistlation attached to it. 6/

6/ Important political issues are contained in lengthy ordinances. For example, the 84 million dollar Utility Acquisition ordinance, 94-29, where the City incurred 84 million in debt to pay for the debt of the county's utility, validated on August 1, 1994, is 60 pages in length. If each petition signer were to read this ordinance before signing a petition and could somehow do so in 10 minutes, it would take over 22 forty hour work weeks in circulating the petition alone to gather the required 5300 signatures.

The charter requirement that the full ordinance be attached to each petition page unduly burdens the effort to place a referendum on the ballot and should be struck down as violative of the First Amendment. Meyer v. Grant, 486 U.S. 414 (1988). Further, these restrictions cannot be justified by the city as protecting the integrity of the referendum process. Meyer v. Grant, 486 U.S. 414 (1988). Purportedly, the object advanced by the city is that each signer read the full text of the ordinance sand thereby minimize improper conduct during the petition stage. However, pursuing this object makes it less likely to have successful referendum action, especially in regard to the more complex and lengthy legislation. When a charter restriction impairs and diminishes the referendum right, as here, it violates the constitution. The city must seek to place less onerous restrictions on the process to advance its interests of maintaining the referendum's integrity. Meyer v. Grant, 486 U.S. 414 (1988); Urevich v. Woodward, 667 P.2d 760 (Colo. 1983). This is all the more true since the risk of fraud or corruption is more remote at the petition stage than at the time of balloting. Meyer, 486 U.S. at 427.

Lastly, whether the City should incur indebtedness to proceed with a water and sewer expansion in undeveloped property is a matter of societal concern that citizens of Port St. Lucie have a right to discuss publicly without risking criminal sanctions. Meyer v. Grant, 486 U.S. at 421. "The freedom of speech and of the press guaranteed by the Constitution embraces

at the least the liberty to discuss publicly and truthfully all matters of public concern with previous restraint or fear of subsequent punishment." Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940). The City Clerk's threats of 5 years in jail and civil lawsuits, occurring at a critical stage in the petition campaign, also violated petitioner's free speech and association rights.

IV. THE FINAL JUDGEMENT VALIDATING THE BONDS MUST BE REVERSED BECAUSE THE ASSESSMENTS ARE INCONSISTENT WITH THE CITY'S COMPREHENSIVE PLAN

Pursuant to the Growth Management Act, a municipality must prepare a comprehensive plan for approval by the Department of Community Affairs. The adopted local plan must include 'Principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development" of the local government's jurisdictional area. Section 163.3177(1), Fla.Stat. (1991).

The local plan must include elements covering future land use; capital improvements generally; sanitary sewer, potable water and natural ground water aquifer specifically. Id., § 163.3177(6).

In particular, the future land use element must contain both a future land use map and goals, policies, and measurable objectives to guide future land use decisions. This plan element must designate the "proposed future general distribution,

location, and extent of the uses of land" for various purposes. Id. Also, the future land use element must contain standards for the control and distribution of densities and intensities of development. § 163.3177(6)(a).

All development must be consistent with the adopted local plan. Id., 163.3194(1)(a). Section 163.3194(3) provides that development is consistent if it is "compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government." The City of Port St. Lucie's current Comprehensive Plan was adopted in 1990 and was introduced into evidence as Intervenor's Exhibit # 28. (Portions attached Appendix p.298-307).

The future land use element of the Port St. Lucie plan sets policies and standards for future growth and the provision of services. The key components of the future land use element are the Future Land Use Map Series and the Urban Service Area Map. Id., Appendix p.300. "The Future Land Use Map Series outlines the future land use designations and the Urban Service Area Map delineates the areas where urban services (central water and sewer and other municipal services) will be provided." Id., Appendix p.301(emphasis added). Development and location of services in the Urban service area is provided in the plan to combat urban sprawl and random growth. The potential "continued" urban sprawl in the city is significant due to the extent of the city's land area that has been platted, sold and provided with

roads access. Id. at 15, Appendix p.301.

Objective 1.1.4 of the Future Land Use Element provides that "Future growth, development, and redevelopment shall be directed to appropriate areas as depicted on the Future Land Use Map, consistent with: . . . the goals, objectives, and policies contained within this comprehensive plan; . . . and minimizing urban sprawl." Id. at p. 18; Appendix p.308. Policy 1.1.7.3 sets forth the policies for where central water and sewer will be extended:

> "Central water and sewer facilities and other municipal services, requiring capital investment shall be extended and provided in the Urban Service Area to facilitate compact development in accordance with the Capital Improvement Element."

Id. at 27; Appendix p.304. Policy 1.1.7.3 further provides that the City will be required to amend the Urban Service Area as a prerequisite to the extension of infrastructure and community services." Id.

The Urban Service Area is set forth in the Urban Service Area Map contained in the Comprehensive Plan and uses crosshatches to signify those areas included in the urban service area. Id. at 14; Appendix p.300. The Urban Service Area Map correlates to the Map of the Special Assessment District, introduced into evidence as Intervenor's Exhibit # 24. Testimony of Alton Harvey p. 48;. Planning areas 1 and 2 on the Urban Service Area Map generally correspond to the area designated as Phase I on the Special Assessment District Map, though planning area 1 and 2 encompass an area slightly larger than Phase I.

Testimony of Alton Harvey p. 48.

The Special Assessment District Map shows that Phase I consists of 5 platted districts and a very large open area known as the Sharrat area. Intervenor's Exhibit # 24; Appendix p.314; Testimony of Alton Harvey p. 48. The Sharrat area is that area on the Special Assessment District Map that has the circled number one in it. Intervenor's Exhibit # 24; Appendix p.314. Testimony of Alton Harvey p. 45; The Sharrat area is not platted and does not have streets laid out in it. Id. The rest of Phase I consists of five platted Districts or sections, 43, 44, 45, 46, and 47. Intervenor's Exhibit # 24; Appendix p.310-313; Testimony of Alton Harvey p. 45.

The non-platted area, in the area with the circled 1 on the Special Assessment District Map, which includes the Sharrat area, consists of 1764 acres and comprises approximately 40% of Phase I. Testimony of Alton Harvey, p. 50; Intervenor's Exhibit # 23; Appendix p.310-313. The Phase I project includes all of the sharrat and non-platted area which is outside the urban service area located in planning sections 1 and 2 on the Urban Service Area Map. Testimony of Alton Harvey, p. 50; Intervenor's Exhibit # 23; Appendix p. 310-313; Intervenor's Exhibit # 28, p. 14; Appendix p.300. Thus, approximately 40% of Phase I is outside the Urban Service Area and that 40% has no streets or rights of way located in it.

Sharrat and the other non-platted property located in Phase I comprises the largest land area that is outside the urban

service area in all of Port St. Lucie. Testimony of Alton Harvey, p. 51-52; Intervenor's Exhibit # 23; Appendix p.310-313; Intervenor's Exhibit # 28, p. 14; Appendix p.300. The primary owner of the non-platted non-urban service area in Phase I (Sharrat, et. al.) is Atlantic Gulf Communities, formerly General Development Corporation before the Chapter 11 bankruptcy.

Pursuant to the assessment program, water and sewer is being made available to sharrat and the other non-urban service area in Phase I. Testimony of Alton Harvey, p. 46-47. Water and sewer lines are being laid throughout the non-urban service area in phase I. Testimony of Alton Harvey, p. 46-47, 67-69. Specifically, Sharrat and the remaining non-urban service area is receiving the "back-bone" of the system. Testimony of Alton Harvey, p. 46-47. The non-platted non-urban service area is being assessed at the same rate as the platted sections in phase I. Testimony of Alton Harvey, p. 75.

Not surprisingly, the master water and sewer plan7/ "was prepared irrespective of the urban service area or the non-urban service area locations in the city." Testimony of Alton Harvey, p. 75. The consulting engineers who developed the water and sewer master plan and the Phase I assessment program were not even aware, until trial of this matter, that Sharrat and the other area were outside the urban service area . Id.

Consequently, the assessment and attendant expansion of

7/ The master water and sewer plan governing the assessment program was developed from money in the general fund. Intervenor Exhibit # 21, p. 9-29;Appendix p. 307.

water and sewer into Phase I is wholly inconsistent with the City's policy of extending water and sewer services in the Urban service area so as to facilitate compact development. The city was required to amend its Urban Service Area before it decided to extend the lines in Phase I and the non-urban service area; having failed to do so, the extension of infrastructure services into sharrat and other non-urban service areas clearly violates the clear language and intent of the plan. City of Port St. Lucie Comprehensive Plan, Future Land Use Element, Policy 1.1.7.3; Appendix at p. 304.

Moreover, Policy 4.A.1.2.1, provides the criteria for which platted areas shall be sewered. Intervenor's Exhibit # 28, p. 4A-24; Appendix p. 305. The criteria include existing septic tank density per acre; platted areas with septic tanks and wells; percentage of septic tank failures. Id. The intent behind this policy is to avoid areas with high septic tank concentrations from containing the raw water wells, and eventually, the Indian River Lagoon. Testimony of Alton Harvey, p. 66.

In total derogation of the above policy and rationale, Four of the five platted sections in Phase I are vacant; only section 43 has any homes in it and that number is 329 or 28% of that plat section. Alton Harvey, p. 75. Overall, ninety-plus percent of phase I is vacant land. Testimony of Alton Harvey, p. 64. Accordingly, there are virtually no septic tanks in Phase I compared to all other areas of the City. Just as important, there are no raw water wells in Phase I. There are, however, 37

of the City's 40 raw water wells in Phase II which also has a very dense septic tank ratio per acre. Id., Intervenor's Exhibit # 2, Page 11 (Map); Appendix p. 187.8/

Therefore, the instant assessments, being in direct conflict with the pertinent policies of its plan Plan, must be invalidated, and the City's actions in authorizing the assessments declared Ultra Vires.

V. THE COVENANT TO BUDGET AND APPROPRIATE IN THE MASTER BOND ORDINANCE VIOLATES ARTICLE VII, SECTION 12 OF THE FLORIDA CONSTITUTION

Whether the City has the authority to issue the instant bond depends on the legality of the financing agreement upon which the bond is secured. State v. City of Port Orange, 19 Fla. L. Weekly S239 (Fla. Nov. 3, 1994). In this case the financing agreement provides that the "City may covenant to budget and appropriate in any Bond Year or Fiscal Year . . . such funds as may be necessary to supplement the pledged revenues to the extent necessary to pay the Debt Service Requirement of the bonds of such series." 94-35; Section 3.01; Master Bond Ordinance. This provision authorizes the City to obligate all non ad valorem funds of the city to pay the Debt Service requirement on the bonds. If the City were to enter into such an agreement, it would in effect be a promise to levy ad valorem taxes without a

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8/ Extension of water and sewer into Phase I also contravenes Various other provisions of the Comprehensive plan, more fully set forth in the complete record.

referendum in contravention of Article VII, Section 12 of the Florida Constitution. See County of Volusia v. State, 417 So.2d 968 (Fla. 1982).

VI. THE FINAL JUDGMENT VALIDATING THE BONDS SHOULD BE REVERSED BECAUSE THE SPECIAL ASSESSMENTS DO NOT CONFER A SPECIAL BENEFIT, BUT RATHER ATTEMPT TO PROVIDE BENEFITS TO THE COMMUNITY AS A WHOLE BY PROMOTING COMMERCIAL AND INDUSTRIAL DEVELOPMENT AND BY SPREADING THE LIABILITY AND COSTS OF A FAILED SYSTEM TO THE PUBLIC AS A WHOLE

To be valid, a special assessment must confer a special benefit upon the assessed parties, beyond that benefit conferred upon the public generally. St. Lucie County v. Higgs, 141 So.2d 744 (Fla. 1962).

The question of a special benefit presents an issue of fact. City of Fort Meyers v. State, 95 Fla. 704, 117 So. 97 (Fla.1928); The term "special benefit" refers to a peculiar and added benefit to the particular parcel of property that is being assessed. Meyer, 219 So.2d at 420.

If the benefit from the assessment is the same or similar to that conferred on the community at large or if the individual benefit is only incidental to the community benefit, the individual homeowners cannot be made to bear the burden of the cost of the benefit. Fisher v. Board of County Commissioners, 84 So.2d 572, 577 (Fla. 1956); Hanna v. City of Palm Bay, 570 So.2d 320 (Fla. 5th DCA 1991). As the Florida Supreme has stated:

> The fair and just foundation on which special assessments for local improvements rest is special benefits accruing to the property benefited; that is to say, benefits received by it in addition to those

received by the community at large.

City of Fort Meyers v. State, 117 So. 97 (Fla. 1928).

The requirement that the benefit conferred on the property owner be greater than the benefit conferred to the public at large is based on two important policy considerations. First, the Florida Constitution sets forth an exception to the homestead exemption for improvements that specially benefit property. Therefore, the requirements of a special benefit must be strictly followed to avoid circumventing the constitutional exemption from forced sale of the homestead. Hanna, 570 So.2d at 322. A second policy consideration is that a valid special assessment with commensurate special benefits allows a public entity to issue bonds for improvements without a vote of the electors pursuant to Article VII, section 12 of the Florida Constitution. In such a situation, the cost of the improvement is not spread among all of those who use the service of the city by use of ad valorem tax revenues, fees, and other revenue sources; rather, the individual homeowners are held responsible for the full cost of the improvement. It is imperative, therefore, that only improvements that provide a special and peculiar benefit to affected property owners are funded through such a revenue vehicle. Id.

Using these principles, the Courts have stricken down as invalid special assessments where the benefits conferred upon the individual homeowners were similar to or the same as the benefits provided to the community at large, or when the individual benefit was only incidental to the community benefit. See St.

Lucie County v. Higgs, 141 So.2d 744 (Fla. 1962) (Assessment throughout district based on overall plan for maintenance and operation of fire district); Hanna v. City of Palm Bay, 579 So.2d 320 (Fla. 5th DCA 1991) (Special assessments imposed upon abutting property owners for project pursuant to a citywide program to eventually rehabilitate all roads in city invalid where benefit was to public at large by diminishing burden of upkeep imposed on general funds of the city); Stockman v. City of Trenton, 181 So. 383 (Fla. 1938) (assessments on abutting property owners for road widening and drainage improvements were detriments to individual owners and benefit public generally); Fisher v. Board of Count Commissioners, 84 So.2d 572 (Fla. 1956) (Assessment in rural area of Dade County to pave and repair streets and provide street lighting); Rafkin v. City of Miami Beach, 38 So.2d 836 (Fla. 1949) (assessment which confers general commercial advantage invalid).

In the case at bar, there is no special benefit conferred on the assessed homeowners, rather, the primary benefits from the expansion program flow to the public generally with incidental or, more likely, no added benefits going to the affected homeowners. The evidence at trial is clear that the system is a detriment to the community and to current users. It is this same detriment that is being made available to the assessed homeowners: the "catastrophic condition" of the plants and equipment; the lack of maintenance for 34 years; the 40 million dollars in improvement and maintenance needed to continue

operations over the next five years; the 75 million dollar principal debt from the county; etc.. As Councilman Ankrom noted, it is not the taxpayers who are responsible for the debts, but the utility users. This responsibility and use and reliance on an inferior system are detriments that the handful of selected homeowners should not be made to pay for and bear under the guise of a special assessment.

The lack of benefit provided by the system is evidenced by the plight of the current users: Council could not leave them alone on the system "holding the bag" for the utility's labilities; current ratepayer are likened to stockholders of a horrible company with enormous debt who must be "protected". Further, the city must implement urgent remedial action to keep the utility running and to prevent environmental disaster.

Given the condition of the utility and the plight of the current users, the manifest intention of council is to expand water and sewer to spread out the system's liability by increasing ratepayers. Further, given the lack of capital and he enormous need for immediate improvements, it is obvious that the City's expansion of the failing system stems from the necessity to increase revenue from the only available sources of a larger ratepayer base, user charges, and most importantly, connection charges ($5000 - $7000).

Also, a primary intention is to confer a community wide benefit by luring Industrial and commercial development into the City so as to expand the city's tax base. As stated by Council

Ankrom in a publication put out by the City:

> We started out with the main objective being the expansion of water and sewer facilities throughout the city. Without this expansion there is no hope of attracting quality commercial or industrial development.

Intervenor's Exhibit # 21, page 5. In the same publication, Councilman Anderson summed up Council's position: "We will not broaden our tax base without water and sewer."

Expansion into phase I itself demonstrates that the city's program is designed to primarily benefit the community at large by increasing the tax base and not the homeowners. Phase I is 95% undeveloped; there are only 300 homes out of 4600 hundred acres. Informational material put out by the city provides that possible locations for industrial or commercial development are throughout the city "with several large parcels in SAD 1, Phase 1." Intervenor's Exhibit # 2, page 6. Intervenor's Exhibit # 2, page 6.

While expanding into Phase I serves developers and industry and the community by increasing the tax base, it does not promote the city's purported rationale to stop increasing septic tank failures and contamination of the wells and eventually the aquifer. There are no wells in Phase I9/, and there are virtually no septic tanks. 10/ Also, expanding water and

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9/ Intervenor's Exhibit # 2, page 11.

10/ Many parts of Port St. Lucie have an extremely dense concentration of septic tanks. Phase II, for example, has 5600 homes with septic tanks and 37 of the 40 wells serving the public utility system are in Phase II. Intervenor's Exhibit # 11, page 3

sewer into Phase I completely conflicts with the City's Comprehensive Plan because approximately Forty percent of Phase I is outside the urban service area and because there is a low density of septic tanks and failures in that area. Intervenor's Exhibit # 29, page 15 and page 27 (Policy 1.1.7.2) and page 4A-24 (Policy 4.A.1.2.1) and page 9-15. Moreover, promoting commercial and industrial development does not confer a special benefit to the assessed homeowners, beyond that conferred to the community in general by increasing the tax base.

The challenged special assessments here are undeniably part of a long range program under which the city will attempt to modernize and rehabilitate water and sewer facilities throughout the City, thereby allowing the City to seek commerce and industry and expand the tax base and general fund of the city, and also at the same time relieve the burden of a portion of the population connected to a detrimental system who otherwise left responsible for enormous debt as ratepayers and for the impossible costs presently needed for capital improvements. The instant assessments, therefore, are part of a program intended to benefit the taxpayers and the community <u>at large</u> by reconditioning and modernizing an inferior system so as to broaden the taxbase and by diminish the horrendous burden on current users.

Under the guise of special assessments, therefore, the City of Port St. Lucie is attempting to shift the responsibility for

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and 4. If septic tanks have a nine year useful life, then it would seem advisable to expand first into those areas with high density of septic tanks approaching the end of their useful lifetime.

the promotion of industry and commercial development and the rehabilitation of a failed system unto 300 homeowners rather than spreading the costs over the community at large by use of ad valorem revenues, fees from occupational licenses, franchise fees, utility tax revenues, and other sources of the general fund of the city. By doing so, the city has ignored the express limitation on special assessments that the benefit conferred not be less than or incidental to the benefits conferred to the community as a whole. City of Fort Meyers v. State, 117 So. 97 (Fla. 1928); Hanna v. City of Palm Bay, 579 So.2d 320 (Fla. 5th DCA 1991).

In conclusion, the instant assessments are part of a citywide program which is intended to confer a community-wide benefit on the people of Port St. Lucie, but which provides the assessed homeowner with no special benefit. As such, the assessments are invalid and must be struck down.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully request this honorable court to reverse the lower court's Final Judgement validating the Special Assessments and the Series 1994A Bonds.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy hereof has been

furnished to the following attorneys: Roger G. Orr, Esquire, City Attorney, 121 S.W. Port St. Lucie Boulevard, Port St. Lucie, Florida, by U.S. Mail on the 30th day of January, 1995.

By: _____

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