IN THE SUPREME COURT OF FLORIDA

ALLEN'S CREEK PROPERTIES, INC., etc.,	
Petitioner,	
vs.	**Case No.: 86,123** **District Court of Appeal** **Second District No.: 94-01849**
CITY OF CLEARWATER, etc.,	
Respondent.	

INITIAL BRIEF ON MERITS

ON QUESTION CERTIFIED BY DISTRICT COURT OF APPEAL
TO BE OF GREAT PUBLIC IMPORTANCE

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STATEMENT OF THE CASE

The Petitioner, ALLEN'S CREEK PROPERTIES, INC., the original Plaintiff and Appellee, hereinafter referred to as "ALLEN'S CREEK', filed a five (5) Count Complaint against the Respondent, CITY OF CLEARWATER, hereinafter referred to as "CLEARWATER", the original Defendant and Appellant, seeking declaratory and other relief regarding CLEARWATER's refusal to provide sanitary sewer service to property owned by Petitioner. (R - 1-93). The case was tried non-jury before the Honorable Judge John Andrews on March 15, 1994, and resulted in the entry in favor of Petitioner on April 28, 1994. (R. - 952-955) (A. - 2).

The Respondent filed its Notice of Appeal with the Second District Court of Appeal on May 25, 1994, resulting in a decision reversing the trial court's decision filed on April 5, 1995. (A. - 3). The Petitioner subsequently filed a Motion for Rehearing and Certification and Motion for Rehearing En Banc, with the Second District Granting the Motion for Rehearing and Certification to the extent that the following question was certified to the Supreme Court as being of great public importance:

> MAY A MUNICIPALITY REFUSE TO PROVIDE SEWER SERVICE, OR CONDITION THE PROVISION OF SEWER SERVICE ON ANNEXATION, AS TO NONRESIDENTS LOCATED WITHIN ITS EXCLUSIVE SEWER SERVICE TERRITORY ESTABLISHED PURSUANT TO INTER-LOCAL AGREEMENTS WITH NEIGHBORING MUNICIPAL SERVICE PROVIDERS? (A. - 4).

The Second District Court denied the Petitioner's Motion for Rehearing En Banc.

The Petitioner filed its Notice to Invoke Discretionary Jurisdiction of Supreme Court on July 18, 1995, with the Supreme Court issuing an Order Postponing Decision on Jurisdiction and Briefing Schedule on July 25, 1995.

STATEMENT OF THE FACTS

The Petitioner, ALLEN'S CREEK PROPERTIES, "ALLEN'S CREEK", is the owner of a tract of undeveloped land comprised of approximately sixty (60) acres of land located in Pinellas County, Florida. The subject tract is located in an unincorporated area of Pinellas County, immediately adjacent to the Respondent's, "CLEARWATER", city limits and within a quarter mile of the City of Largo's city limits. In September of 1989, after the submittal to Pinellas County officials of a site plan for development of the site, ALLEN'S CREEK was advised by County officials that its property was located in Clearwater's exclusive sanitary sewer service area, with site plan approval conditioned upon CLEARWATER's provision of sewer services. Pursuant to this information, ALLEN'S CREEK wrote CLEARWATER on September 22, 1989, requesting sanitary sewer service for the property. (R. - 528). CLEARWATER responded to ALLEN'S CREEK's request on September 26, 1989, advising that, while the property was located outside of CLEARWATER's corporate city limits, is was within the City of Clearwater's sanitary sewer service area and that City Commission policy required that the property be annexed prior to receiving sanitary sewer service. (R. - 529). ALLEN'S CREEK refused to agree to the annexation of its property as required by CLEARWATER and subsequently elected to file suit in 1991.

CLEARWATER's policy of requiring annexation in return for sewer service to property located outside of its municipal city limits was codified by the Clearwater City Commission in Ordinance 68-97. (R. - 489). (A. - 6). Some ten (10) years after the adoption of this Ordinance, CLEARWATER, together with the City of Largo, the City of Safety Harbor, the Town of Belleair and Pinellas County, engaged in an area-wide planning process conducted pursuant to

and in compliance with the Federal Water Pollution Act, referred to as Public Law 92-500. Public Law 92-500 provided a mechanism by which municipalities and other governmental entities could obtain federal grant money for wastewater treatment uses, including the condition and/or modification of sewer treatment plans. (R. - 426-482). As a prerequisite to eligibility for Public Law 92-500 grants, however, petitioning governmental entities were required to adopt comprehensive plans for their geographic area documenting cost effective, efficient and reasonable methods for the management and operations of wastewater systems and facilities within the subject geographic area. These plans were known as 201 Plans, referring to section 201 of Public Law 92-500.

CLEARWATER, together with the Cities of Largo and Safety Harbor, the Town of Belleair and Pinellas County, adopted a 201 plan, with CLEARWATER taking the lead role in the 201 planning process and preparation of the 201 plan. As a result of its participation and adoption of the 201 plan, CLEARWATER obtained federal funds and utilized these funds to improve its wastewater treatment facilities.

One component of the 201 plan adopted by CLEARWATER, Largo and the other participants was the creation of sanitary sewer service areas. As set forth in Chapter 8 of the 201 plan, entitled "Management Agencies", the plan provided:

> Clearwater Service Area
>
> The City of Clearwater will provide service to an area bounded on the North and West by the extremities of the Central Pinellas 201 planning area, and on the South by Belleair Road, exclusive of any incorporated portions of Largo, Belleair or Dunedin. The area includes the municipal limits of Clearwater and Safety Harbor as well as a significant quantity of unincorporated land (emphases added).

Largo Service Area

> . . .Its northern boundary basically coincides with Belleair Road, but its southern and a part of its western boundary which borders on the Pinellas County Service Area are somewhat irregular. The service area encompasses the corporate limits of Largo as well as a portion of unincorporated territory. . . (emphasis added). (R. - 504-527).

These service areas were contemplated to be exclusive in nature and included not only geographic areas located within the service provider's municipal city limits, but also included areas of unincorporated Pinellas County.

The 201 plan, as adopted by CLEARWATER, was never approved by the Environmental Protection Agency, as the contemplated method of wastewater disposal set forth in the plan, known as deep well injection, fell into disfavor. Despite this fact, in 1983, CLEARWATER and Largo entered into an inter-local Sewer Service Area Agreement pursuant to Chapter 163 of the Florida Statutes. (R. - 483) (A. - 5). This agreement provided in part:

> 2. The sanitary sewer service area of the municipalities shall be as is further set forth and described on Exhibit "A" attached hereto and made a part hereof by reference.
>
> 3. The parties in providing sanitary sewer services shall be bound by the area designated in Exhibit "A". The parties shall have the exclusive right to provide wholesale and retail sanitary sewer service within the area allocated to such party and further agree not to compete with each other as to the provision of such sewer service outside their designated area as set forth in Exhibit "A".

The designated areas referred to in the inter-local agreement as Exhibit "A" were identical to those areas contemplated in the 201 plan previously adopted by CLEARWATER and Largo. Following the execution of the inter-local agreement, CLEARWATER and Largo have

provided sewer service exclusively in their respective areas, with the exception of a few variations approved by both parties.

Despite the language of Ordinance 68-97, CLEARWATER does provide sewer service outside of its municipal boundaries. (See CLEARWATER's initial brief on appeal, page 2). These circumstances include: (1) certain geographic areas which were provided sewer service in the early seventies pursuant to a special legislative act, (2) certain areas located within the City of Largo municipal city limits which Largo is unable to serve due to infrastructure deficiencies and (3) properties within its exclusive sewer service area but not contiguous to the city as defined in Chapter 171, Fla.Stat. (1993) and, therefore, not yet available for annexation. These properties comprising the third circumstance, however, are required to sign an agreement to annex, which becomes effective at such time as the provisions of Chapter 171, Fla.Stat. (1993) become applicable.

Finally, in the instant case, CLEARWATER maintains municipal sewer facilities within fifteen (15) feet of ALLEN'S CREEK's property line and has ample capacity in its sewer system to incorporate the Petitioner's proposed development. Further, CLEARWATER's rate schedule applicable to nonresidents who are provided sewer services includes a twenty-five (25%) percent surcharge as allowed per §181.191(b), Fla.Stat. (1993).

ISSUES

ISSUE 1:

A MUNICIPALITY MAY NOT REFUSE TO PROVIDE SEWER SERVICE TO NONRESIDENTS LOCATED WITHIN ITS EXCLUSIVE SEWER SERVICE TERRITORY ESTABLISHED PURSUANT TO INTER-LOCAL AGREEMENTS WITH NEIGHBORING MUNICIPAL SEWER SERVICE PROVIDERS.

ISSUE 2:

A MUNICIPALITY MAY NOT CONDITION THE PROVISION OF SEWER SERVICE ON ANNEXATION AS TO NONRESIDENTS LOCATED WITHIN ITS EXCLUSIVE SEWER SERVICE TERRITORY ESTABLISHED PURSUANT TO INTER-LOCAL AGREEMENTS WITH NEIGHBORING MUNICIPAL SEWER SERVICE PROVIDERS.

SUMMARY OF ARGUMENT

The Petitioner argues that the certified question should be answered in the negative. A municipality, by creating exclusive sewer service areas via inter-local agreement with other municipal sewer service providers, by knowingly and voluntarily including within its exclusive area certain unincorporated areas of the county and by providing sewer service to nonresidents located within its exclusive sewer service area, accedes to the status of a public utility and, as such, assumes a legal obligation to provide sewer service to the nonresidents located within its exclusive service area. Further, as a result of the duty imposed upon the municipality, a policy of the municipality requiring annexation as a requirement for the provision of sewer service to those nonresidents located within its exclusive sewer service area is unjust and constitutes an unlawful expansion of the statutorily prescribed methods of annexation set forth in Chapter 171 of the Florida Statutes.

ARGUMENT

ISSUE 1:

A MUNICIPALITY MAY NOT REFUSE TO PROVIDE SEWER SERVICE TO NONRESIDENTS LOCATED WITHIN ITS EXCLUSIVE SEWER SERVICE TERRITORY ESTABLISHED PURSUANT TO INTER-LOCAL AGREEMENTS WITH NEIGHBORING MUNICIPAL SEWER SERVICE PROVIDERS.

ALLEN'S CREEK urges the Court to find that a municipality may not refuse to provide sewer service to nonresidents located within its exclusive sewer service territory established pursuant to inter-local agreements with neighboring municipal sewer service providers. Central to such a determination is the recognition that a municipality, which has established an exclusive sewer service area including nonresidents, has a duty and obligation to provide sewer service to all residents located within its exclusive sewer service area. As a general rule, a municipality has no duty or responsibility to supply services to areas outside its municipal boundaries. Allstate Insurance Company v. City of Boca Raton, 387 So.2d 478 (Fla. 4th DCA 1980). However, an exception to this rule has been recognized where a municipality, in providing utility service, accedes to the status of a public utility and, therefore, becomes obligated to provide service to all within its service area, unless prevented from so doing by a utility related reason. This rule has been explicitly adopted in other states and, although Florida has not explicitly adopted a similar rule, several Florida cases suggest that this rule is followed in Florida.

In Robinson v. City of Boulder, 547 P.2d 228 (Colo. 1976), the Colorado Supreme Court, En Banc, explained the "public utility" rule as it applied to a municipality providing water and sewer service to an exclusive area which included nonresidents. In Robinson, landowners sought to develop property which lay outside Boulder's city limits, but within

Boulder's exclusive utility service area. The property owners applied for utility service, but Boulder objected to providing same on the basis that the proposed use of the property was inconsistent with the Boulder Valley Comprehensive Plan and other aspects of the city's growth policy. Robinson at 229. The Colorado Supreme Court noted that Boulder's objection to the provision of utility service was not based upon incapacity to supply the service or any other utility related problem, but instead motivated by the City's desire to accomplish regulatory goals within the area through its position as the exclusive provider of utility service to the area. Robinson at 229.

The Colorado Supreme Court held that Boulder, by entering into inter-local agreements with other local providers and municipalities, having the effect of precluding those entities from servicing the unincorporated area and by providing service to other users outside its city limits, had by its action acceded to the status of a public utility. By so doing, the City of Boulder was found to have an obligation to provide service to its exclusive service area unless a utility related reason prevented it from extending the service.

In determining that Boulder was a public utility, the Robinson court applied a test it had enunciated in City of Englewood v. Denver, 229 P.2d 667 (Colo. 1951). The Englewood test stated:

> To fall into the class of a public utility, a business or enterprise must be impressed with a public interest and that those engaged in the conduct thereof must hold themselves out as serving or ready to serve all members of the public, who may require it, to the extent of their capacity. The nature of the service must be such that all members of the public have an enforceable right to demand it. Englewood at 672-673.

The City of Boulder held itself out as ready and able to serve those within its exclusive service area who required service and, therefore, assumed a duty to provide service to that area. In the instant case, CLEARWATER has acceded to the status of a public utility as, like the City of Boulder, it provides service to others outside its city limits and it has created through inter-local agreements with neighboring sewer service providers an exclusive sewer service area which includes the area within CLEARWATER's municipal city limits and unincorporated areas of Pinellas County proximate to the city limits.

It should be noted that both Robinson and Englewood were overruled by the Colorado Supreme Court in Board of County Commissioners of the County of Arapahoe v. Denver Board of Water Commissioners, 718 P.2d 235 (Colo. 1986); however, the basis for overturning Robinson and Englewood was the fact that the Colorado legislature established a new definition for public utility, with the duties which had been required of public utilities under the common law definition of Englewood and Robinson no longer applicable. Absent a legislative definition and/or delineation of the duties of a public utility, the common law enunciated by Englewood and Robinson is sound and is consistent with other state decisions.

The Delaware Supreme Court, in Mayor and Council of the City of Dover v. Delmarva Enterprises, Inc., 301 P.2d 276 (Del. 1973), held that the City of Dover, acting as a public utility, must provide service to all residents within its service area if it is providing service to some residents in the area. In Bair v. Mayor and Council of Westminster, 221 P.2d 642 (Mary. Ct. of Appeal 1966), the Maryland Court of Appeal found that when a municipality undertakes to perform duties of public service companies, it must, insofar as services are reasonably within its range of performance, furnish services to all applicants within the area supplied and cannot

unjustly discriminate between consumers therein. See also Mayor and City Council of Cumberland v. Powles, 258 P.2d 410 (Mary. Ct. of Appeal 1969) and City of Milwaukee v. Public Service Commission, 66 N.W.2d 716 (Wisc. 1954).

Several Florida cases suggest that a municipality may accede to the status of a public utility and, as such, assume an obligation to provide service outside its city limits where such a duty might not otherwise exist.

The Fifth District Court of Appeal, in two (2) separate decisions, recognized the obligation imposed upon a municipality serving as a public utility. In The City of Winter Park v. Southern States Utilities, Inc., 540 So.2d 178 (Fla. 5th DCA 1989), Winter Park created an exclusive sewer service zone which extended to property located outside its corporate city limits. The effect of this action was to require property owners located within this service area to connect to the City's sewer system when it became available. Winter Park, however, did not have the capacity necessary to serve all the areas within its exclusive service area and a private service provider, Southern States Utilities, Inc., provided service to such area. Winter Park sued Southern States, seeking a declaratory judgment to the effect that the property owners located within its exclusive service area would have to disconnect with Southern States and connect with the City when service became available. The trial court denied the City's request, holding that the City could compel the property owners to connect with its system only if city sewer capacity was available at the time it was needed and that the property owners utilizing another sewer service provider would not have to terminate that service and connect with Winter Park in the future. The City appealed, with the appellate court affirming the trial court's decision. In so doing, the Fifth District held that: "All corporations which voluntarily undertake to engage in

performing a service of a public nature whether a governmental agency such as a municipality, or a private corporation, assume an obligation implied by law, to render, for reasonable compensation and without discrimination and to all of the public in the area sought to be served, a service reasonably adequate to meet the just requirements of those sought to be served." Winter Park at 180. The Appellate Court went on to say that "The public is entitled to be served and served by the entity best able to serve it", and found that Winter Park, by so creating an exclusive sewer zone, assumed a duty to provide the service that it had undertaken to provide, to wit: the provision of sewer service. Winter Park at 180.

In the instant case, the trial court relied upon the Winter Park case in finding that CLEARWATER assumed an obligation, implied by law, to render to all of the public in its service area sanitary sewer service. (R. - 955). The Second District Court, in reversing the trial court, stated that Winter Park provided no authority since CLEARWATER did not enact an ordinance as did the City of Winter Park and that CLEARWATER seeks to refuse, not require, the furnishing of service. (A. - 3). The Second District, in its effort to distinguish Winter Park, misses the point of the case. The critical aspect of Winter Park, which is directly on point to the instant case, is that both Winter Park and CLEARWATER created exclusive sewer service areas and both voluntarily undertook to engage in performing a service of a public nature; the provision of sewer service. By virtue of these actions, the City of Winter Park was found to have an obligation, implied by law, to render to all of the public in its service area sanitary sewer service. CLEARWATER has the same obligation.

In Williams v. The City of Mount Dora, 452 So.2d 1143 (Fla. 5th DCA 1984), the Fifth District set forth the applicable duty to provide service imposed upon a public utility. Within the

geographic territory a public utility has undertaken to serve and concerning which it has the exclusive legal right to provide necessary services, a public utility has a legal duty to provide services on an equal basis to all users who apply for service. . . The providing of utility services by a municipality is a private or proprietary function in the exercise of which the municipality is subject to the same legal rules applicable to private corporation. Williams at 1145-1146.

The Second District Court distinguished the Williams case, finding that Williams concerned an issue of requiring payment of a delinquent bill from a prior user as a condition of obtaining electrical service. While the factual distinction from the instant case is accurate, the appellate court again missed the point. Williams is applicable to the instant case as it, like Winter Park, sets forth the duty imposed upon a municipality acting as a public utility, a duty which should be imposed on the CITY OF CLEARWATER.

The Second District, in City of Clearwater v. Metco Development Corporation, 519 So.2d 23 (Fla. 2d DCA 1987), also recognizes the established law of public utilities. In affirming the trial court's entry of an injunction against the City of Clearwater enjoining it from requiring annexation of an unincorporated area as a condition to supplying water service, the Second District approved the trial court's determination that "the Court construes the contract and the intent of the parties to follow the established law required of public utilities and quasi-monopolies in providing water service to their customers in the water serve area at the lowest possible cost with the most efficiency". Metco at 24. Additionally, the Second District held in Edris v. Sebring Utilities Commission, 237 So.2d 585 (Fla. 2d DCA 1970) that when a municipality provides service beyond its corporate limits, it may not impose illegal conditions or unjustly discriminate in supplying service outside its corporate limits. Edris at 587. The

Second District revisited this issue in Sebring Utilities Commission v. Home Savings Association of Florida, 508 So.2d 26 (Fla. 2d DCA 1987). In Home Savings, the appellate court upheld Sebring's requirement that the provision of water service would require the customer to acquire its electricity from the Sebring utility. The court noted that Edris was not applicable because, in Home Savings, an economic justification for requiring a tie between water service and electrical service was shown where, in Edris, no economic justification was present. Both Edris and Home Savings, however, dealt with situations where other service providers were available to the nonresident and, until the instant case, the Second District's opinion as to a duty to provide service to nonresidents in a municipality's exclusive service area was unknown.

The case of Allstate Insurance Company v. The City of Boca Raton, 387 So.2d 478 (Fla. 4th DCA 1980) was relied upon heavily by the CITY OF CLEARWATER in its appellate brief and was found to be persuasive by the Second District in reversing the trial court. (A. - 3). At first blush, the Allstate case appears to address a factual scenario virtually identical to the instant case, with the decision that the plan in which Boca Raton participated did not place a duty upon Boca Raton to provide water and sewer apparently controlling. However, upon a closer review of Allstate, several major differences exist between the Allstate situation and the instant one. Primarily, the plan involved in Allstate did not provide for exclusive service areas. Rather, the Fourth District specifically stated: "under the stated options, Allstate is not precluded from obtaining water and sewage service merely because of its inability to presently obtain same from the City of Boca Raton. Allstate may seek the services from suppliers under the other two options (emphasis added)." Allstate at 480. Further, the Court provided:

> Generally, the Plan seems to be designed so that entities desiring water and sewer services will know which supplier to contact first

> in a specific service area. If the designated agent in a particular area cannot supply the services needed, then the entity seeking those services is free to obtain the services from a second or third option designated under the plan. The Plan thus ranks the suppliers within the service areas setting priorities. Allstate at 480 (emphasis added).

Thus, it is clear that in Allstate, the Court was not addressing a situation where the service provider involved had created an exclusive sewer service area unto itself. Rather, the plan provided several options for sewer service, with Boca Raton being the first of three available options. In the instant case, the fact that CLEARWATER, via inter-local agreement, has precluded any other sewer service provider from providing service to ALLEN'S CREEK, mandates an opposite result; the service provider must provide service to its exclusive area.

Finally, it should be noted that the Allstate court specifically limited its ruling to the circumstances of this case and reached its decision by looking exclusively at the Plan involved. Footnote four (4) of the opinion specifically provides that cases cited by the parties dealing with the extension of services beyond municipal boundaries were not relied upon. Allstate at 481.

CLEARWATER, together with the City of Largo, the Town of Belleair and Pinellas County, comprise all of the sanitary sewer service providers available to provide sewer service to ALLEN'S CREEK. These municipal sewer service providers, via inter-local agreements, carved up the central Pinellas County area into exclusive sanitary sewer service areas, with each service provider allocated an exclusive service area. The inter-local agreements provided that the neighboring municipality would not compete to supply sewer services to an area located within another's sewer service area and, further, that any service to an area located within another's sewer service area could only occur with the express consent of the service provider

in whose area the property be served was located. Finally, the geographic areas comprising the exclusive sewer service areas established by these inter-local agreements included area within each municipality's municipal boundaries and areas of the unincorporated county which were contiguous or proximate to the municipality's city boundaries.

A review of the inter-local agreements between CLEARWATER and the City of Largo leaves no doubt as to the intent of the instrument. Each city has an exclusive sewer service area within which the other will not serve and each city will serve its exclusive area with sewer service (R. - 483). Property owners whose property lies within an unincorporated area of Pinellas County, but within one of these exclusive sewer service areas created by the providers themselves, finds himself with but one option if desirous of developing his property: acquire sewer service from the designated sewer service provider, regardless of the strings attached.

While it may be generally true that a municipality has no responsibility to supply sewer service to areas outside its municipal boundaries, an exception exists where a municipality, pursuant to an overall plan and pursuant to agreements with alternative sewer service providers, creates unto itself an exclusive sewer service area, said area including areas outside its municipal limits. By reserving to itself exclusively the provision of sewer service to an unincorporated area, the municipality takes on the obligation to in fact provide sewer service to that exclusive area. By virtue of including unincorporated areas within its exclusive sewer service area, CLEARWATER holds itself out as willing to provide service to that unincorporated area. This willingness, combined with the creation of an exclusive service area and with CLEARWATER's provision of sewer service to other unincorporated areas within its exclusive sewer service area (albeit after compelling agreements to annex in the future), evidences the fact that the

municipality is serving as a public utility and, therefore, subject to the obligation of service provision not imposed upon municipalities not deemed to be acting as a public utility.

Florida courts, while seeming to embrace the position that a municipality providing utility services may accede to the status of a public utility, have yet to expressly adopt such a proposition. This court, after analyzing the reasoning set forth in out-of-state cases such as Robinson and Englewood and the Florida appellate decisions such as Southern States, Mount Dora and Metco, should find that Florida does in fact recognize an exception to the general rule that a municipality has no duty to provide services outside its city limits, with that exception applying when a municipality acts as a public utility in holding itself out to provide service to an area where such service is to be exclusively provided by the municipality.

ISSUE 2:

A MUNICIPALITY MAY NOT CONDITION THE PROVISION OF SEWER SERVICE ON ANNEXATION AS TO NONRESIDENTS LOCATED WITHIN ITS EXCLUSIVE SEWER SERVICE TERRITORY ESTABLISHED PURSUANT TO INTER-LOCAL AGREEMENTS WITH NEIGHBORING MUNICIPAL SEWER SERVICE PROVIDERS.

ALLEN'S CREEK further argues that a municipality may not condition the provision of sewer service on annexation as to nonresidents located within its exclusive sewer service territory established pursuant to inter-local agreements with neighboring municipal sewer service providers. This argument again centers upon the Court determining that a municipality, when acting as a public utility, assumes a duty to provide service to the area it has held itself out to serve. However, this argument also relates to the provisions of Chapter 171, Fla. Stat. (1993) which sets forth the authority and procedures by which a municipality may annex unincorporated property and the right of a municipality to coerce owners of property located in an unincorporated area to annex in return for the provision of utility services.

The Florida Constitution provides, in Article VIII, §2(c), that "municipal annexation of unincorporated territory. . ., and exercise of extra-territorial powers by municipalities shall be as provided by general or special law". In 1974, the Florida legislature enacted the Municipal Annexation or Construction Act, certified in Chapter 171 of the Florida Statutes. Other than via a general or special law exacted by the state legislature, a municipality may annex unincorporated property only by complying with the provisions of Chapter 171 of the Florida Statutes.

Two (2) procedures are set forth in Chapter 171 by which a municipality may annex property: involuntary annexation and voluntary annexation. The annexation law is to be strictly construed and no annexation procedure, other than that which is provided by the legislature, may

be utilized to require annexation of territory by a municipality. Town of Magnolia Park v. Hoffman, 118 So.2d 585 (Fla. 2d DCA 1960). Nowhere in Chapter 171, nor in any other statute, does authority exist authorizing a municipality to achieve or induce annexation by refusing to grant utility service in its utility service area.

As previously stated, the general rule is that a municipality has no obligation to provide services outside its city limits. Allstate at 480. However, this general rule does not apply to the municipality which holds itself out as a provider of services to the public and creates unto itself an exclusive service area. In exploring a municipality's right to couple annexation with the provision of sewer service, the Court must consider the exclusivity factor in determining whether annexation may be compelled.

In the instant case, CLEARWATER, Largo and Pinellas County are the only sewer service providers with the capability of serving ALLEN'S CREEK. These entities, via inter-local agreements, created exclusive sewer service areas, reserving for each a geographic area where sewer service would be provided exclusively by one provider. ALLEN'S CREEK's exclusive source of sewer service per inter-local agreement was CLEARWATER, requiring ALLEN'S CREEK to go to CLEARWATER to obtain sewer service if it wished to develop its land. CLEARWATER, by requiring annexation as a condition to the provision of sewer services to an owner located within its exclusive sewer service area, puts the property owner in the position of capitulating to CLEARWATER's annexation demand, or choosing not to develop.

CLEARWATER argues that the property owner has an alternative to obtaining sewer service from CLEARWATER, that alternative being the construction of a self-contained private treatment facility. However, a review of Chapter 381 of the Florida Statutes, entitled Public

Health, General Provisions, shows that this alternative is not available. Section 381.0065, Fla.Stat. (1993) provides:

> (1) Legislature Intent - It is the intent of the Legislature that where a publicly owned or investor owned sewerage system is not available, the department shall issue permits for the construction, installation, modification, abandonment, or repair of onsite sewage treatment and disposal systems under conditions described in the section. . .
>
> (2) Definitions - As used in §§381.0065-381.0069, the term: "Available publicly owned or investor owned sewerage system" means a publicly owned or investor owned sewerage system that is capable of being connected to the plumbing of an establishment or residence so long as:
>
> > (2) The sewerage system had adequate permitted capacity to accept the sewage to be generated by the establishment. . .
> >
> > (4) For estimated sewage flows exceeding 1,000 gallons per day. . ., a sewer line, force main or lift station exists in a public easement or right of way that abuts the property of the establishment and is within 50 feet of the property line of the establishment as accessed via existing right-of-way or easements.

It was conclusively shown at trial that the CITY OF CLEARWATER maintained sewer facilities within fifteen (15) feet of ALLEN'S CREEK's property line and that CLEARWATER had no capacity problems in accepting the sewage anticipated from the ALLEN'S CREEK development. Therefore, per the provisions of §381.0065, ALLEN'S CREEK could not have obtained the necessary permits from the State of Florida to construct a private sewer plant. Further, §381.00655, entitled "Correction of existing onsite sewerage treatment and disposal systems to central sewerage system; requirements. - ", provides:

> (1)(a) The owner of a properly functioning onsite sewage treatment and disposal system, excluding an approved onsite graywater system, must connect the system or the building's plumbing to an available publicly owned or investor-owned sewerage system within 365 days after written notification by the owner of the publicly owned or investor-owned sewerage system that the system is available for connection. The publicly owned or investor-owned sewerage system must notify the owner of the onsite sewage treatment and disposal system of the availability of the central sewerage system.

Therefore, as CLEARWATER operated a publicly owned sewerage system available for connection, ALLEN'S CREEK, if the private sewer plant option was viable, would have to apply for permitting, construct a private plant, then turn around and abandon the plant and connect with CLEARWATER's sewerage system within 365 days, a ludicrous result.

The clear intent of the legislature, as set forth in Chapter 381 of the Florida Statutes, is to the greatest extent possible have sewerage disposal systems maintained by publicly owned or investor operated companies, in lieu of privately owned and operated sewage treatment facilities. By allowing a municipality the right to require annexation in return for the provision of sewer service, where the municipality has an "available" sewerage system, the municipality is able to require annexation where the legislature would otherwise require the municipality to provide the sewer service.

Finally, the Second District determined that, if the CITY OF CLEARWATER was forced to provide sewer service without annexation, the city would lose the revenue of impact and other fees and taxes charged to its residents which make up part of its overall plan to finance and provide municipal services. (A. - 3). The Court went on to say that there was nothing in the record to support the conclusion that this economic need on the part of the CITY does not provide a natural basis for the requirement of annexation. (A. - 3). In making this determination,

the Court ignored several issues. First, no evidence was introduced by CLEARWATER to support the statement that impact fees and taxes were necessary to finance sewer services. Second, and more important, the Second District ignored the provisions of Chapter 180, entitled Municipal Public Works, specifically §180.191(a) and (b), wherein a municipality operating a sewer utility outside of its corporate limits may charge a surcharge to nonresident users in an amount not to exceed twenty-five (25%) percent of the resident user charge. Additionally, the municipal sewer service provider may impose an impact fee for connection to the sewer system and require the user to pay any expenses related to increasing the sewerage system's ability to handle the user's projected sewage.

As a municipality which provides sewage service may collect higher fees, impose an impact fee and require the nonresident user to incur any cost incident to the sewer hookup, no economic basis exists to allow the requirement of annexation in return for providing sewer service to an exclusive sewer service area which the municipality has held itself out to serve.

The Second District, in Edris v. Sebring Utilities Commission, 237 So.2d 587, (Fla. 2d DCA 1970) held that although a municipality is under no obligation to service customers outside the city on the same basis as those within its corporate limits, a public utility corporation cannot refuse to render the service which it is authorized by its charter (or by law) to furnish, because of some collateral matter not related to that service. Edris at 587. The Court went on to find that water and electrical services are not complimentary or so interlocked that neither can be effective without the other and, on that basis, struck down Sebring's rule requiring non-resident water customers to purchase electricity from Sebring as a condition to obtaining water service. Annexation and the provision of sewer service are likewise not complimentary or so interlocked

and, therefore, a policy requiring annexation in return for sewer service should be stricken. In City of Clearwater v. Metco Development Corporation, 519 So.2d 23 (Fla. 2d DCA 1987), the Second District upheld the trial court's order restraining the CITY OF CLEARWATER from enforcing its policy of requiring annexation in return for providing water service to nonresidents located within the service area the City was obligated to serve. While it is true that in Metco, a contractual agreement existed between CLEARWATER and Pinellas County wherein CLEARWATER agreed to provide water service to an unincorporated area, in the instant case, where the municipality has undertaken to provide nonresidents which are located within its service area with sewer service and, where the service area is exclusive to the municipality, the municipality assumes a duty to provide the sewer service similar to the contractual duty found in Metco, the existence of said duty rendering the requirement of annexation unjust.

Chapter 171 of the Florida Statutes sets forth the legislature's mechanism for annexation by a municipality. Unless the annexation for utility service policy is stricken, municipalities and other governmental entities which provide utility services will divide geographic areas within their counties into exclusive service areas, with those areas essentially becoming annexation agreements between those entities. As private sewer facilities are discouraged and, in many cases, unavailable, property owners in unincorporated areas will be required to annex into adjacent municipalities should they wish to develop their property, accepting whatever zoning, land use and growth management regulations are imposed by the municipality and accepting whatever impact fees and tax rates the municipality imposes upon its residents. This policy of coercive annexation was not intended by the legislature and should not be condoned by this Court.

CONCLUSION

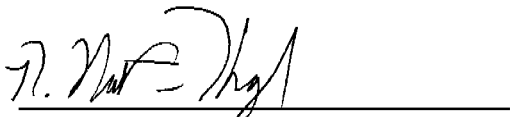
A municipality, by entering into inter-local agreement with other local utility providers, having the effect of precluding those providers from serving the public located within the area and by providing service to those located within the area, accedes to the status of a public utility. In acting as a public utility, the municipality assumes an obligation, implied by law, to render utility service to all of the public in its service area. When the service area includes areas not located within the municipality's service area, the duty assumed by the municipality extends to the unincorporated area and the municipality must provide service to the unincorporated area, absent any utility based reason for inability to provide the service.

Further, as a municipality acting as a public utility assumes a duty to provide nonresidents located within its exclusive sewer service area with utility service, it is unjust and improper for the municipality to require annexation as a condition to the provision of utility service. Any policy of a municipality requiring annexation in return for the provision of utility service is an unlawful expansion of Chapter 171 of the Florida Statutes and should be declared unenforceable.

The Petitioner requests that the Court take jurisdiction of this matter and answer the certified question in the negative, requiring the CITY OF CLEARWATER to provide sewer service to the Petitioner's property without the requirement of annexation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief On Merits has been sent by U.S. Mail to Paul Richard Hull, Esquire, Assistant City Attorney, at P.O. Box 4748, Clearwater, Florida 34718, this 21st day of August, 1995.



R. Nathan Hightower